ECLIC 5

EU AND COMPARATIVE LAW
ISSUES AND CHALLENGES SERIES

International Scientific
Conference

EU 2021 – The future of the EU in and after the pandemic

EDITORS:
Dunja Duić
Tunjica Petrašević

EXECUTIVE EDITORS:
Ante Novokmet
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PRAVOS
JOSIP JURAJ STROSSMAYER UNIVERSITY OF OSIJEK
Hanns Seidel Stiftung
Europska komisija

EU AND COMPARATIVE LAW ISSUES AND CHALLENGES SERIES (ECLIC) – ISSUE 5
ISSN 2459-9425

Publishers:
Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek

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Conference book of proceedings

In Osijek, 20-21 May 2021

Publishers
University Josip Juraj Strossmayer of Osijek
Faculty of Law Osijek

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ISBN 978-953-8109-39-3

International Scientific Conference

EU 2021 – The future of the EU in and after the pandemic

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FOREWORD

We are in the second year of pandemic which has changed the way we live, the way we work and the way we communicate. Last year, the globe, let alone the European Union, focused on the reaction to the pandemic, that is, reacting to the ever-changing events around us. This year, our sights are beginning to shift forward. As we slowly emerge from the health crisis, we are starting to contemplate what lies ahead, and more importantly, what needs to be done to provide a better future for the next generations of Europeans.

Democracy, rule of law and fundamental rights are the three pillars forming the bedrock of the European Union. They cannot exist without one another, even less used against one another. They are the basis for everything else in the EU and they are projected to all other policies, be it green, digital or beyond. This is largely what makes the EU unique.

It goes without saying that science has shown its value over the past year. Science to innovate and find solutions to the challenges of our age have been perhaps taken for granted previously, but we are now more than aware of the life changing potential of science on our daily lives. Indeed, stable democratic systems are not a given. Democracy needs to be nurtured and defended. Trust of citizens in democratic processes and personal responsibility of citizens, are key to this. Here, researchers can play an important role in the design of evidence-based policy. Researchers can help develop and experiment with innovative solutions and innovative policy approaches. Horizon Europe will continue the Horizon 2020 support for such research and experimentation.

As an institution, European Commission is of course, very much interested in the future. Science will provide the backbone of our policies which lie ahead, but our job is to gauge ongoing trends and steer towards a better future for us all. Currently, this means things like the digital and green transitions. This year's conference embodies the new trend. "The future of the EU in and after the pandemic" encompasses efforts across Europe to look forward. One thing which has emerged is that there is an impression that a number of people got disappointed with democracy and democratic forces. In times of crisis, quick solutions are sought. In today's world of fast changes and transitions, like digital or green, feelings of instability and uncertainty arise. We need to therefore foster communication, to further enrich representative democracy and trust. One of the novelties this year is the launch of the Conference on the Future of Europe with that goal in mind - to give citizens a greater say in shaping future EU policies. As current and future

leaders in your scientific field, or simply as interested professionals, you will find a place to make your voice heard. This year's conference is evidence of that.

Ognian Zlatev
Head of Representation of
European Commission in the Republic of Croatia

Topic 1

EU legal issues

UDK 341.43(4-67EU):614.4
Original scientific paper

EU ASYLUM SYSTEM IN AND AFTER THE COVID-19 PANDEMIC: DISCLOSING THE WEAKNESSES OF THE CURRENT RULES AND ASSESSING THE PROSPECTS OF THE NEW PACT ON MIGRATION AND ASYLUM*

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ABSTRACT

The paper analyses the influence that the Covid-19 pandemic has had on the functioning of the European asylum system. The analysis is divided into three parts and addresses problematic issues associated with different stages of the pandemic. In the first part of the paper, the author outlines the asylum practices of EU Member States in the initial stage of the Covid-19 pandemic during which the pandemic was perceived as a state of emergency. By exploring the legal possibilities to derogate both from the EU asylum rules and international human rights standards, the author offers conclusions as regards limits of derogations and the legality of Member States' practices, especially their failure to differentiate between rules that are susceptive of being derogated in emergency situations and those that are not. The second part of the paper analyses the current phase of the pandemic in which it is perceived as a 'new normal' and focuses on making the EU asylum system immune to Covid-19 influence to the greatest extent possible and in line with relevant EU and human rights rules. The author insists on the vulnerability as an inherent feature of persons in need of international protection and researches upon the relationship between the two competing interests involved – protection of asylum seekers and ensuring public health as a legitimate reason for restricting certain asylum seekers' rights. The final part of the paper analyses the prospects of the future EU asylum system, as announced by the New Pact on Migration and Asylum in September 2020, to adapt to the exigencies of both the current Covid-19 crisis and pandemics that are yet to come. With an exclusive focus on referral to Covid-19 and provisions relevant for the current and future pandemics, the author criticizes several solutions included in the instruments that make up the Pact. It is concluded that the Pact failed to offer solutions for problems experienced during the Covid-19 pandemic

* This paper is the result of research conducted within the scientific project "*Pandemic. Law. Society.*", supported by the University of Belgrade Faculty of Law.

and that, under the pretext of public health, it prioritizes the interests of Member States over the interests of applicants for international protection.

***Keywords**: Asylum, Covid-19, Pandemic, EU, New Pact on Migration and Asylum*

1. INTRODUCTION

The year 2020 has left the European Union (EU) with two significant legacies that have serious repercussions on its asylum system – the Covid-19 pandemic and the New Pact on Migration and Asylum.[1]

The outbreak of the Covid-19 pandemic put the Common European Asylum System (CEAS) to a difficult test and challenged the already fragile Dublin rules. Under the pretext of emergency measures, Member States introduced a number of changes in the functioning of their asylum systems, thus seriously endangering the rights of the most vulnerable group of persons – those in need of international protection. According to numerous reports of international and European organizations, Member States' responses to Covid-19 varied significantly, both as regards the nature of the measures taken and their temporal scope. However, their common feature seems to have consisted in some sort of suspension of asylum procedures and Dublin transfers, temporary deferral of the right to seek asylum and even, in certain cases, denial of access to the territory. Also, reception conditions in asylum centres were often considered as not in line with measures recommended for the suppression of the pandemic spread, such as over-crowdedness and the consequential impossibility of social distancing.

The paper will analyse the influence of the Covid-19 pandemic on the EU asylum system through three different stages – the initial stage in which Covid-19 was qualified as a state of emergency, the current one which treats Covid-19 pandemic as a 'new normal' and the future stage for which new rules are emerging within the New Pact on Migration and Asylum. As it appears, the documents that make up the Pact take into account the influence of the pandemic both within and beyond the concept of force majeure.

The first part of the paper will focus on the initial stage and the very outbreak of the pandemic during which the pandemic was perceived by the Member States as a state of emergency (2.). A brief overview of various Member States' practices will be provided, followed by an analysis of their legality (2.1.). Legal possibilities to derogate from EU asylum rules will be explored, as well as the limits of deroga-

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, Brussels, 23 September 2020, COM/2020/609 final.

tion (2.2.). Being an integral part of a multi-layer system of protection, the CEAS and its functioning during the state of emergency cannot be thoroughly analysed without referring to human rights as a corrective and limiting mechanism. The main claim will consist of Member States' obvious failure to differentiate between those rules that are susceptive of being derogated and those that are not, the principle of non-refoulement and the prohibition of ill-treatment being examples of the latter (2.3.).

The second part of the paper will focus on the functioning of the CEAS in the aftermath of the state of emergency, i.e. the current situation in which the pandemic is no longer perceived as an emergency but rather a 'new normal' (3.). In this context, the application of CEAS rules and standards will be examined in a two-fold manner. Firstly, by balancing between two different aims – the necessity to offer international protection to those in need and the legitimate aim to ensure public health (3.1.). Secondly, by insisting on the vulnerability of persons in need of international protection as the crucial criterion that, instead of allowing for lower standards in the pandemic context, actually requires higher standards to be implemented by the EU Member States in the course of applying the CEAS rules (3.2.).

The third part of the paper will analyse the pandemic in the context of a novelty introduced by the European Commission in September 2020 – the New Pact on Migration and Asylum. Announced as a "fresh start" by the new Commission and its President Ursula von der Leyen,[2] the Pact was intended to overcome the difficulties encountered by the earlier proposal to reform the Dublin system. Although initially envisaged as a means to respond to the 2015 migrant crisis, it is questionable whether the Pact appropriately acknowledges the current crisis – the Covid-19 pandemic (4.). This part of the paper will therefore focus on the pandemic in the future EU asylum system, both within and beyond the concept of force majeure introduced by the Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum,[3] and analyse scarce referral to Covid-19 in the documents that make up the Pact (4.1.). The subject matter of a profound analysis will primarily be the practical consequences of an obvious differentiation introduced by Article 1 of the Proposal for a Regula-

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2 Press statement by President von der Leyen on the New Pact on Migration and Asylum, Brussels, 23 September 2020, [https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1727], Accessed 5 January 2021.

3 Proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum, Brussels, 23 September 2020, COM(2020) 613 final, 2020/0277(COD) (Proposal for a Regulation on crisis and force majeure).

tion introducing a screening of third-country nationals at the external borders[4] between persons who are "vulnerable and in the need of health care" and those "posing a threat to public health". This part of the paper will thus explore whether such a solution, although officially proclaimed to be in the interest of persons in need of international protection, may become yet another basis for protecting the interests of individual Member States (4.2.).

2. EARLY STAGE – CONSIDERING COVID-19 AS A STATE OF EMERGENCY

The introduction of the state of emergency, either a formal or a factual one, and consequently the closure of state borders, was the first response to the outbreak of a pandemic caused by the so far unknown virus. This appears to have been a global reaction.[5] States rather instinctively perceived the virus as an external threat, closed themselves for the rest of the world and turned to internal methods of dealing with the situation.[6] A nationally oriented response in the area of asylum, however, requires two further observations of a genuinely limiting character. Firstly, though this may be understood as regards the rest of the members of the international community, such a self-centred approach is, to say the least, a surprise when it comes to an integrated group of states that proclaim the principle of solidarity as one of their guiding principles and share common rules and values, Common European Asylum System that consists of a number of legal acts serving as an example. Secondly, asylum seekers and persons in need of international protection become, in times of crisis, even more vulnerable than they already are, which is not properly addressed by states. States primarily focus on the benefit of their nationals whereas the welfare of displaced persons is not perceived as

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4 Proposal for a Regulation introducing a screening of third country nationals at the external borders, and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, Brussels, 23 September 2020, COM/2020/612 final, 2020/0278(COD) (Proposal for a Regulation on screening).

5 According to a report prepared by the Danish Refugee Council, 167 countries in the world decided to close their borders, whereas 57 states made no exceptions as regards persons seeking international protection. Danish Refugee Council, *A Restriction of Responsibility-Sharing: Exploring the Impact of Covid-19 on the Global Compact on Refugees*, Copenhagen, October 2020, p. 11.

6 Russack, S., *EU Crisis Response in Tackling Covid-19 – Views from the Member States*, European Policy Institutes Network Report, 20 April 2020, p. 1, [https://www.clingendael.org/sites/default/files/2020-04/Report_EU_crisis_response_April_2020.pdf], Accessed 25 March 2021. Carlucci shares the view and adds that the Union was hesitant to overrule individual EU Member States policies in the field of asylum, which resulted in the ambiguous asylum practices at national levels. Carlucci, M., *Europe, Migration and Covid-19: Turning Point or Consolidation of the Status Quo?*, International Development Research Network, 2020, pp. 1-11 [https://static1.squarespace.com/static/5e8ce9ff-629cbb272fd0406f/t/5ed54e91bd306477f6ca4739/1591037588073/Europe%2C+Migration+and+-Covid-19.pdf], Accessed 14 January 2021.

a priority,[7] even recognizing them as "a threat to the national well-being" thus paradoxically "seeking refuge in national sovereignty"[8] from those that are in fact in need of refuge themselves. Emergency measures applied in the area of asylum differed from one EU Member State to another (2.1.). However, there are serious concerns regarding the legality of these measures, both from the perspective of EU asylum law and EU law in general (2.2.), as well as their compatibility with recognized international human rights standards (2.3.).

2.1. EU Member States' practices regarding asylum after the outbreak of the Covid-19 pandemic – a brief overview of emergency measures

Although the need for a common approach was recognized and stressed by the European Council on 10 March 2020,[9] whereas the European Commission adopted a Communication providing for temporary restriction of non-essential travel to the EU due to Covid-19, which explicitly excluded "persons in need of international protection or for other humanitarian reasons",[10] the practices of EU Member States were quite different, certifying that in emergency times examples of bad practices outweigh the good ones. According to available information, Portugal was among rare states to grant citizenship rights to all asylum seekers whose applications were still under consideration at the time, with the main aim to allow this category of persons access to social security and health care.[11] Spain decided not to require asylum seekers to have valid documents to receive aid and health care and released migrants from administrative detention due to the impossibility

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7 Jauhiainen, J., *Biogeopolitics of Covid-19: Asylum-Related Migrants at the European Union Borderlands*, Tijdschrift voor Economische en Sociale Geografie, Vol. 111, No. 3, 2020, p. 261.

8 Triandafyllidou, A., *Commentary: Spaces of Solidarity and Spaces of Exception at the Times of Covid-19*, International Migration, Vol. 58, No. 3, 2020, p. 261.

9 Conclusions by the President of the European Council following the video conference on COVID-19. 10 March 2020, [https://www.consilium.europa.eu/en/press/press-releases/2020/03/10/statement-by-the-president-of-the-european-council-following-the-video-conference-on-covid-19/], Accessed 6 March 2021.

10 Communication from the Commission to the European Parliament, the European Council and the Council, Covid-19: Temporary Restriction on Non-Essential Travel to the EU, Brussels, 16 March 2020, COM/2020/115 final. One month later, the Commission adopted another relevant Communication relating to implementation of EU asylum rules in the context of Covid-19. Communication from the Commission COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement 2020/C 126/02, C/2020/2516, OJ C 126, 17.4.2020, pp. 12–27.

11 Dimitriadi, A., *The Future of European Migration and Asylum Policy post Covid-19*, FEPS Covid Response Papers, Issue No. 7, July 2020, p. 4 [https://www.feps-europe.eu/attachments/publications/feps%20covid%20response%20migration%20asylum.pdf], Accessed 12 January 2021.

to fully implement epidemiological measures in detention institutions.[12] Luxembourg automatically extended the status of persons whose asylum applications were underway, while Germany and Sweden allowed persons in need of international protection to both enter their territories and submit asylum applications.[13] Contrary to examples of good practices, measures taken in the other EU Member States were problematic and proved that covid-19 emergency measures "have affected the way states implement European law provisions and related administrative procedures on asylum, return and resettlement".[14] Hungary and Greece denied entry to persons seeking asylum[15] and suspended the right to apply for asylum, Italy and Malta declared their ports to be unsafe for disembarkation thus denying access to both territory and asylum procedures to newly arrived migrants, whereas Belgium and the Netherlands closed their arrival centres.[16] Pushbacks, a flagrant violation of the non-refoulement principle, were reported both on seas in Cyprus and Greece[17] and on land in Croatia.[18] The closure of internal borders seriously influenced one of the basic Dublin mechanisms – the so-called Dublin transfers which were suspended in the Netherlands, Germany and some other EU Member States.[19] The situation in Greece, besides problems regarding unsanitary conditions in overcrowded asylum centres on Greek islands,[20] also serves as a failed example of EU solidarity concerning the most vulnerable category of persons in need of international protection – the unaccompanied minors. Although the European Commission proposed a scheme for relocation of unaccompanied minors

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12 *Ibid*. However, in another aspect, measures adopted by Spain are problematic. Since it officially declared the state of emergency, Spain suspended the right to apply for asylum. Marin. L., *The Covid-19 Crisis and the Closure of External Borders: Another Stress-test for the Challenging Construction of Solidarity Within the EU?*, European Papers, Vol. 5, No. 2, 2020, p. 1077.

13 International Commission of Jurists, *The Impact of Covid-19 related measures on human rights of migrants and refugees in the EU*, Briefing paper, 26 June 2020, p. 3, [https://www.icj.org/wp-content/uploads/2020/06/Covid19-impact-migrans-Europe-Brief-2020-ENG.pdf], Accessed 14 January 2021.

14 Marin, *op. cit.*, note 12, pp. 1075-1076.

15 International Commission of Jurists, *op. cit.*, note 13, p. 2.

16 Marin, *op. cit.*, note 12, pp. 1077-1078.

17 International Commission of Jurists, *op. cit.*, note 13, p. 2.

18 Danish Refugee Council, *op. cit.*, note 5, pp. 25-26.

19 International Commission of Jurists, *op. cit.*, note 13, p. 6.

20 Veizis, A., *Commentary: "Leave No One Behind" and Access to Protection in the Greek Islands in the Covid-19 Era*, International Migration, Vol. 58, No. 3, 2020, p. 265. Problems regarding reception conditions, lack of respect for basic epidemiological measures and restrictions on movement were reported in other EU countries: International Commission of Jurists, *op. cit.*, note 13, pp. 12-13, 17; European Council on Refugees and Exiles, *Covid-19 Measures related to Asylum and Migration across Europe*, Information Sheet No. 8, April 2020, pp. 4-5. For a situation in France's Calais settlements, see: Danish Refugee Council, *op. cit.*, note 5, p. 11.

from Greece to the other EU Member States,[21] only ten states announced to take their share in the relocation.[22]

This brief overview of EU Member States' responses to Covid-19 in the area of asylum leads to a conclusion of an obvious lack of any coordination at the EU level that, as noted by Kelly, "seriously undermined the legitimacy of seeking asylum within the EU".[23] It is questionable whether such diversity in applying CEAS in the context of Covid-19 pandemic may be understood as an adaptation to the exigencies of the pandemic within the EU system or they instead prove that the CEAS does not offer an appropriate legal framework for taking coherent measures at the Union level in pandemic times. Covid-19, despite the mentioned Communication of the European Commission on non-essential travel that explicitly excluded persons in need of international protection, obviously served the EU Member States as an excuse for either entirely or partly suspending the CEAS rules and standards. However, although such emergency measures may be explained by factual reasons, it remains to be seen whether there was a legal basis for their introduction and whether there was a red line that was not supposed to be crossed even in times of emergency.

2.2. DEROGATING FROM CEAS – LEGAL POSSIBILITIES

Potential grounds for derogation from CEAS rules may be located both in primary EU law and relevant sources of secondary EU law.

The area of freedom, security and justice of which asylum forms an integral part, is regulated by rules contained in the Title V of the Treaty on the Functioning of the European Union (TFEU).[24] Article 72 TFEU has already been invoked by the Member States as a legal basis not to apply EU asylum law in emergency situations.[25] In joined cases C-715/17, C-718/17 and C-719/17, Poland and Hungary claimed that "they were entitled under Article 72 TFEU, (…) to disapply their

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21 Migration: Commission takes action to find solutions for unaccompanied migrant children on Greek islands, European Commission, Press release, Brussels, 6 March 2020 [https://ec.europa.eu/commission/presscorner/detail/en/ip_20_406], Accessed 10 February 2021.

22 Dimitriadi, *op. cit.*., note 11, p. 5.

23 Kelly, S.B., *The European Union Obligation: Member States must not Neglect the Consequences of Covid-19 to the Disadvantaged Asylum Seekers and Refugees*, HAPSc Policy Briefs Series, Vol. 1, No. 1, 2020, p. 215.

24 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, pp. 47–390 (TFEU).

25 Article 72 TFEU provides that title V "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security".

secondary, and therefore lower-ranking, legal obligations".[26] However, the Court of Justice of the European Union (CJEU) clearly stated that it cannot be inferred "that the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law" since "the recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of European Union law and its uniform application".[27] Instead, the Court suggests that Member States cannot rely on Article 72 as a basis for derogation in case "provisions contained in secondary law are sufficient to address State security interests, and are most appropriate to ensure that the objectives of the acquis are met".[28]

Two questions are raised in the specific context of Covid-19. Firstly, can Covid-19 situation be qualified as a threat for "the maintenance of law and order and the safeguarding of internal security" as required by Article 72 and, secondly, whether CEAS rules, as relevant secondary legislation, ensure in an appropriate manner EU Member States' interests threatened by Covid-19 pandemic in the context of asylum?

Public health, although not expressly mentioned in Article 72, may be considered to be encompassed by Article 72 using two arguments. On the one hand, the CJEU itself adopted a rather extensive reading of the term security and considered that it included situations of "fundamental importance for a country's existence, not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants".[29] On the other hand, specific secondary legislation in the area of freedom, security and justice, such as the Schengen Borders Code, recognizes public health among grounds for not allowing entry to third-country nationals.[30] However, and this is of crucial importance for considering the legality of asylum-related emergency measures taken by the EU Member States in the state of the emergency phase of the pandemic, security reasons cannot

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26 Joined Cases C715/17, C718/17 and C719/17 *Commission v. Poland, Hungary and Czech Republic*, [2020] ECLI:EU:C:2020:257, par. 134.

27 *Ibid*., par. 143.

28 European Council on Refugees and Exiles, *Derogating from EU Asylum Law in the Name of "Emergencies": The Legal Limits Under EU Law*, Legal Note No. 6, 2020, pp. 2-3. Such a conclusion can be drawn from paras. 150-156 of CJEU judgment in the already mentioned joined cases C715/17, C718/17 and C719/17.

29 Case 72/83 *Campus Oil Limited and others v Minister for Industry and Energy and others* [1984] *ECR 1984 -02727,* par. 34.

30 Article 6 (1, e) of the Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L 77, pp. 1–52.

be invoked by the Member States on their own and in a unilateral manner. They thus cannot be taken "without any control by the institutions of the European Union".[31]

The answer to the second question is not clear. It may be inferred from the position taken by the Commission in its Communication relating to Covid-19 which provided EU Member States with guidance on the implementation of relevant EU provisions in the area of asylum.[32] To prevent and contain the spread of Covid-19, the Commission recognizes general "public health measures such as medical screening, social distancing, quarantine and isolation" as applicable for applicants for international protection, "provided that these measures are reasonable, proportionate and non-discriminatory".[33] In other words, although aware that the pandemic has a disruptive effect on the way EU asylum rules are implemented by the Member States, the Commission stresses that such a situation is capable of being overcome through public health measures and that Covid-19 cannot in itself be considered a security reason that would require to derogate from CEAS. However, a counter-argument may also be offered. Namely, the Commission stresses in its Communication that "only the European Court of Justice may give authoritative interpretations of Union law".[34] It also notices that "a situation such as the one resulting from the Covid-19 pandemic has not been foreseen" in legal acts that comprise the CEAS.[35] It may thus be argued that the specificities of a pandemic as a unique security threat have not been properly taken into account within the secondary legislation and that therefore Article 72 TFEU may be used as a basis for derogating from CEAS since it does not sufficiently address Member States' interests. Although the author tends to consider the first option as more in line with the very nature, structure and aims of the CEAS, the further interpretation of Article 72 TFEU will hopefully be given by the Court in its future judgments.

The potential legal basis for derogation at the level of EU secondary legislation is easier to consider. The Commission seems to place on equal footing the 2015 crisis concerning a large number of simultaneous applications and the one caused by the Covid-19 pandemic and it considers that the same derogatory rules would apply to both situations.[36] In other words, the Covid-19 pandemic did not require the suspension and derogation of CEAS in general, but a degree of flexibility

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31 *Commission v. Poland, Hungary and Czech Republic*, par. 146.

32 Communication Covid-19, note 10.

33 *Ibid*., p. 12.

34 *Ibid*.

35 *Ibid*., p. 13.

36 Communication Covid-19, note 10, p. 13.

that needed to stay within CEAS standards and only to the extent allowed by the derogatory and discretionary clauses contained therein. To be more precise, flexibility is allowed concerning time limits set by the Asylum Procedures Directive,[37] the conditions to apply the so-called sovereignty or discretionary clause contained in the Dublin III Regulation[38] or options offered by the Reception Conditions Directive regarding material reception conditions.[39] Also, provisions of the Reception Conditions Directive concerning health care are to be interpreted as encompassing Covid-19 related care.

It may be concluded that it is highly questionable whether Covid-19, qualified as a threat to the maintenance of law and order and the safeguarding of internal security, met the requirements for applying Article 72 TFEU as a legal basis for emergency measures in the area of asylum. Therefore, derogatory provisions already contained in the CEAS instruments offered in the emergency phase the only possible ground for adapting the national asylum systems to the circumstances caused by the Covid-19 pandemic.

2.3. CEAS as an integral part of a multi-layer system of protection – human rights as a limiting and corrective mechanism

Since all EU Member States are at the same time contracting parties to the European Convention on Human Rights and Fundamental Freedoms (ECHR), the measures taken during the state of an emergency stage of the pandemic must also be examined with regard to the obligations and standards that exist within the ECHR system of protection.[40] ECHR, through its Article 15, as well as the European Court of Human Rights (ECtHR) through its case-law on the matter, actually offer clear guidance as to which line should not be crossed even in cases when the pandemic

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37 Articles 6(5) and 31(3) of the Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection [2013] OJ L 180, pp. 60–95.

38 Article 17 of Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180, pp. 31-59.

39 Article 18 of the Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180, pp. 96-116.

40 Such an overlap of different legal system in the area of asylum that include also the EU Charter on Fundamental Rights is considered as "multi-dimensionality of constitutional protection of human rights". Ippolito, F.; Velluti, S., *The Relationship between the CJEU and the ECtHR: the Case of Asylum*, in: Dzehtsiarou, K.; Konstadinides, T.; O'Marea, N. (eds), Human Rights Law in Europe – The Influence, Overlaps and Contradictions of the EU and the ECHR, Routledge, 2014, p. 156.

reaches the level that can be qualified as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed".[41] Authors that have so far dealt with the issue tend to consider Covid-19 as meeting the requirements of an emergency and that therefore, ECtHR's case law, although so far concerned with terrorist activities, armed conflicts and military coups, can be applied to the Covid-19 situation.[42] However, and in line with the ECtHR's position in its 2020 Judgment in the case *Baş v Turkey*, the Covid-19 pandemic may be considered to have fulfilled the conditions of a state of emergency only in the initial stage of the pandemic analyzed in this section of the paper, whereas with time its characteristics evolved thus making the public emergency considerations less obvious and of a declined intensity, requiring the exigency criterion to be applied "more stringently".[43]

Difficulties faced by the EU Member States in fulfilling their duties towards asylum seekers due to Covid-19 may have led to certain modalities and adaptations. However, to be considered compatible with ECHR standards, national emergency measures in the field of asylum couldn't have impacted the enjoyment of absolute rights, such as the prohibition of ill-treatment provided by Article 3 ECHR and non-refoulement. It may therefore be concluded that no measures limiting access to the territory for persons in need of international protection can be considered as legal and required by the exigencies of the situation, whereas the same would apply to reported cases of push-backs and detention and reception conditions that may be qualified as meeting the minimum level of severity required by Article 3 ECHR.[44] In other words, human rights of absolute nature represent an ultimate limit that cannot be crossed under any circumstances, no matter how extraordinary they are. Such a conclusion carries a dual meaning – general and individual. From the perspective of the (mal)functioning of the entire system, Covid-19 couldn't serve the purpose of derogating from both national and EU rules in the area of asylum, due to difficulties in meeting EU Member States' obligations. Among many rules that may be adapted to the exigencies of the situation, duties of absolute nature such as non-refoulement and prohibition of ill-treatment in its

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41 Judgment *Lawless v Ireland* No. 3 (1961) 1 EHRR 15, par. 28.

42 Jovičić, S., *Covid-19 Restrictions on Human Rights in the Light of the Case-law of the European Court of Human Rights*, ERA Forum, Vol. 21, 2021, p. 550; Spadaro, A., *Covid-19: Testing the Limits of Human Rights, European Journal of Risk Regulation*, Vol. 11, No. 2, 2020, p. 321.

43 Judgment *Baş v Turkey* (2020), par. 224.

44 Both European Asylum Office and the Fundamental Rights Agency pointed to concerns that EU Member States' practices in the field of asylum can be considered as incompatible with non-derogable human rights. European Asylum Support Office, *Covid-19 Emergency Measures in Asylum and Reception Systems*, Issue No. 2, 15 July 2020, pp. 7-8; Fundamental Rights Agency, *Coronavirus Pandemic in the EU – Fundamental Rights Implications*, Bulletin No. 1, April 2020, pp. 24-25, 29.

various appearances, cannot be either derogated from or adapted no matter how difficult the situation faced by the State in question may be.[45] From an individual asylum seeker's point of view, his or her state of health cannot serve as an excuse for not offering him/her access to territory and adequate protection, again in case there is a risk of refoulement or ill-treatment. Even though EC Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services allows the Member States "to refuse entry to non-resident third-country nationals where they present relevant symptoms or have been particularly exposed to risk of infection and are considered to be a threat to public health", it is also suggested that alternative measures "such as isolation or quarantine may be applied".[46] In any case, when persons in need of international protection are concerned, and in line with both the Schengen Borders Code and the Communication on non-essential travel, international obligations have precedence and exceptions are not applicable. This means that when denial of access to territory may be qualified as amounting to refoulement, Member States have duties towards persons facing the risk of persecution or serious harm, and to assess the existence of an individualized risk, access to both the territory and procedures must be guaranteed regardless of any considerations concerning public health.[47] The same dual approach applies to other EU Member States practices that might have been qualified as violations of absolute rights, reception and living conditions as well as immigration detention serving as examples. Neither general difficulties the Member State is facing due to Covid-19, nor the fact that the person represents a risk for public health may serve as valid excuses for not complying with the standards set by the ECtHR in its Article 3 jurisprudence.[48]

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45 The Commission itself does not question such an interpretation of the EU asylum rules in the context of Covid-19 pandemic. It stresses that "any restrictions in the field of asylum, return and resettlement must (…) take into account the principle of non-refoulement and obligations under international law". Communication Covid-19, note 10, p. 12.

46 European Commission, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services (2020) OJ C 86/I, p. 3.

47 Crawley, H., *The Politics of Refugee Protection in a (Post)Covid-19 World*, Social Sciences, Vol. 10, 2021, p. 5.

48 In addition to abundant ECtHR case-law through which clear standards have been established regarding the conditions in asylum and migrant centres that States need to meet in order not to qualify them as violation of the prohibition of torture, inhuman and degrading treatment, the latest Rule 39 provisional measure indicated by the ECtHR with regard to Greece proves that same standards are applicable in the pandemic context. Namely, on 16 April 2020 ECtHR ordered provisional measures in the case *E.I. and others v Greece* consisting in immediate transfer of vulnerable people from Moria camp where they faced serious health risks due to poor conditions. Tsourdi, E., *Covid-19, Asylum in the EU, and the Great Expectations of Solidarity*, International Journal of Refugee Law, Vol. 32, No. 2, 2020, p. 377. For ECtHR case-law that concerns reception conditions of asylum seekers in the context of Article 3, see: *N. v the United Kingdom* (2008), *Tabesh v Greece* (2009), *Louled Massoud v Malta* (2010), *M.S.S. v Belgium and Greece* (2011), *Sharifi and others v Italy and Greece* (2014), *Tarakhel v Switzerland* (2014).

3. CURRENT SITUATION – CEAS AND COVID-19 AS A 'NEW NORMAL'

With the continuous presence of Covid-19 and the impossibility of still perceiving it as an 'imminent' threat, the situation has emerged into a 'new normal' or 'new reality'.[49] This phase may be considered to have commenced in June 2020 when the initial strict lock-downs in numerous EU countries started to soften and the emergency phase was considered to be over. However, the situation did not imply the return to the one that existed before the outbreak of the pandemic. It instead indicated that the EU asylum system needed to continue to function in the newly emerging circumstances where the virus was still present and exerted a strong influence. However, instead of derogations of both EU rules and human rights obligations, only certain limitations due to public health reasons seem to be an option in the second phase. This part of the paper will therefore focus on making the asylum system "Covid-19 proofed"[50] to the greatest extent possible and in line with relevant EU and human rights rules. To avoid using Covid-19 as an excuse for evading States' "responsibilities towards refugees under international law and for introducing even more restrictive policies that may well become (semi)permanent once the pandemic is over",[51] two issues are of relevance. Firstly, it is important to explore the relationship between the two competing interests involved – protection of asylum seekers and ensuring public health, since public health does represent a legitimate reason for restricting certain asylum seekers' rights (3.1.). Secondly, the focus should be on the consequences that vulnerability as the main feature of asylum seekers as a group may have on standards that apply in the present stage of the pandemic (3.2.).

3.1. Weighing between public health and international protection

In the current phase, the pandemic seems not to fulfil one of the four criteria required by the ECtHR to be qualified as an emergency.[52] Namely, it does not appear to be "exceptional, in that the normal measures or restrictions, permitted

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49 Danish Refugee Council, *op. cit.*, note 5, p. 6. Arnoux-Bellavitis, M., *The Influence of Covid-19 on the European Asylum and Migration Policy – Making Health a Priority while Ensuring the Respect for Fundamental Rights*, Institute of European Democrats, 2020, p. 5, [https://www.iedonline.eu/download/geopolitics-values/26-Arnoux-Bellavitis_-_The_influence_of_covid_19_on_the_EU_asylum_and_migration_policy-FINAL.pdf], Accessed 1 April 2021.

50 Rasche, L., *Four Implications of the Covid-19 Pandemic for the EU's Asylum and Migration Policy*, Policy Brief, 24 July 2020, p. 5, [https://www.hertie-school.org/fileadmin/2_Research/1_About_our_research/2_Research_centres/6_Jacques_Delors_Centre/Publications/20200724_Covid-19_Migration-Rasche.pdf], Accessed 25 March 2021.

51 Crawley, *op. cit.*, note 47, p. 7

52 *Denmark, Norway, Sweden and the Netherlands v. Greece* (1968), par. 113.

by the Convention for the maintenance of public safety, health and order, were plainly inadequate".[53] Under such circumstances, the derogable rights of asylum seekers can be interfered with by a public authority, provided that the interference is in accordance with the law, necessary in a democratic society and in the interest, *inter alia*, of protecting public health. Public health can thus be considered as a legitimate aim in pursuance of which rights of asylum seekers can be restricted. However, and this is of crucial importance, a fair balance would need to be struck between an individual's interest to have his rights protected and general interest to ensure public health. This weighing between the two competing interests appears to be the most difficult aspect in the current phase of the pandemic. Both states and judicial bodies, national and international, will face the difficulty of assessing "whether the extraordinary measures taken during the Covid-19 period have been adequate and proportionate response to the situation",[54] or whether it was possible to achieve the same aim through less stringent measures. The lawfulness and proportionality tests will thus become the most relevant standards for assessing the compatibility of EU Member States' asylum practices and measures in the current stage of the pandemic. The proportionality test allows for certain adaptation to the particular circumstances of each Member State,[55] while at the same time precluding it from adopting approaches of general character since the assessment needs to be carried out in each particular case by taking into account the individual situation of a person in question. In other words, any restrictive measure needs to be assessed from the perspective of its necessity in the pandemic context and the need to protect public health. However, this should by no means be disproportionate to the standards that apply to persons in need of international protection established by both CEAS and international law. These considerations once again prove the inseparability of the CEAS from international human rights standards and suggest that "the human rights dimension needs to be at the heart of the European policy on migration and asylum, particularly in a post-Covid-19 world".[56] Although the Covid-19 pandemic is perceived as a 'new normal', the same should be avoided when human rights restrictions are concerned. As correctly noted by Spadaro, to

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53 *Ibid*.

54 Jovičić, *op. cit.*, note 42, p. 559. Tzevelekos and Dzehtsiarou expect the ECtHR to offer relevant criteria in its future jurisprudence: Tzevelekos, V.; Dzehtsiarou, K., *Normal as Usual? Human Rights in Times of Covid-19*, European Convention on Human Rights Law Review, Vol. 1, 2020, pp. 145-146.

55 Rasche considers that protection of public health may be achieved through adaptation of certain CEAS procedural rules, such as introducing online registration, remote management of applications or video interviewing, as well as preparing reception centers in a way to ensure sanitary and epidemiological requirements. Rasche, *op. cit.*, note 50, p. 5. Proportionate restrictions may also be introduced with regard to provisions that concern the freedom of movement or family unity of persons in need of international protection. International Commission of Jurists, *op. cit.*, note 13, pp. 7-8, 17-19.

56 Dimitriadi, *op. cit.*, note 11, p. 8.

prevent that "the curtailment of human rights" becomes "the new normal, States should strive to adopt a long-term strategy for the management of the pandemic that does not rely on the continued restriction" of fundamental rights.[57]

3.2. Vulnerability of asylum seekers as a criterion requiring higher instead of lower standards of protection in times of pandemic

Vulnerability as an inherent characteristic of persons in need of international protection has a three-fold influence on CEAS rules in the current phase of the Covid-19 pandemic.[58] Firstly, it serves as a limiting factor in the context of introducing potential restrictive measures for the protection of public health. Secondly, it is an emerging factor to be taken into consideration while applying existing rules. Thirdly, vulnerability requires the rising of existing standards, especially as regards health care and protection of the health of persons in need of international protection.

Restrictive measures affect persons in need of international protection to a greater extent than other groups that are not inherently vulnerable.[59] Namely, as noted by the Danish Refugee Council, European Asylum Support Office, as well as other organizations and institutions, lockdowns and restrictions on freedom of movement might lead to "risk of starvation", "lack of regular deliveries of food and water", "limited assistance" and "increased insecurity",[60] as well as an "increased risk of contracting diseases, including Covid-19".[61] The same applies as regards restrictions to other derogable rights. Due to their vulnerability, asylum seekers are impacted by such restrictions in a more striking and consequential manner than the rest of the population. Such a discrepancy in the Covid-19 restrictive measures' influence must therefore be taken into account as a decisive factor when adopting

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57 Spadaro, *op. cit.*, note 42, p. 323.

58 In addition to the well-established case-law of the ECtHR which consistently qualifies persons in need of international protection as a vulnerable group (*MSS v Belgium and Greece* [GC] (2011) 53 EHRR 2, par. 251), in the specific context of the Covid-19 pandemic the World Health Organization identified the refugees as one of the most adversely affected populations. Alemi, Q., Stempel, C., Siddiq H. & Kim, E., Refugees and COVID-19: achieving a comprehensive public health response, Bulletin of the World Health Organization, Vol. 98, 2020, 510.

59 Lanzarone, A.; Tullio, V.; Argo, A.; Zerbo, S., *When a Virus (Covid-19) Attacks Human Rights: The Situation of Asylum Seekers in the Medico-Legal Setting*, Medico-Legal Journal, Vol. 89, No. 1, 2021, p. 29.

60 Danish Refugee Council, *op. cit.*, note 5, p. 11; European Asylum Support Office, *op. cit.*, note 44, p. 7.

61 Kluge, H. H.; Jakab, Z.; Bartovic, J.; D'Anna, V.; Severoni, S., *Refugee and Migrant Health in the Covid-19 Response*, The Lancet, Vol. 395, 2020, p. 1238.

them,[62] whereas they should be tailored according to the specific characteristics of persons in need of international protection in order to avoid that Covid-19 vulnerabilities turn into "an extrapolation of already existing vulnerabilities".[63] In other words, the vulnerability of asylum seekers requires Covid-19 restrictive measures to be specific, not too invasive and, to the extent needed, to differ from general measures applied to the rest of the population.

Certain specific issues may emerge in the context of applying the CEAS in the current pandemic context. Namely, Covid-19 might also emerge as a factor to be taken into account concerning assessing the safety of a country to which the person is to be returned, either in the context of Dublin transfers, or the return of a failed asylum seeker to his/her country of origin or a third safe country. In other words, should the difficult epidemiological situation in the country to which the person is supposed to be returned in accordance with CEAS rules, be considered the reason not to return the person in question? Judging by the existing case-law of both the ECtHR[64] and the CJEU,[65] malfunctioning of the asylum system and poor reception conditions in the country to which the person is to be returned indeed should be considered as decisive.[66] Although established in the context of a massive influx of asylum seekers, there is no reason why the same standards should not apply in case the asylum system is not functioning properly because of the pandemic or the reception conditions in the country to which the person is to be returned to may be qualified as meeting the minimum level of severity required by the prohibition of inhuman or degrading treatment. It thus appears that Covid-19

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62 Guadagno correctly remarks that "crisis response measures cannot effectively include migrants unless they proactively address underlying conditions of vulnerability linked with migratory status". Guadagno, L., *Migrants and the Covid-19 Pandemic: An Initial Analysis*, Migration Research Series No. 60, International Organization for Migration, Geneva, 2020, p. 13. The same argument applies to asylum seekers and persons in need of international protection, the most vulnerable category of migrants.

63 Mukumbang, F., *Are Asylum Seekers, Refugees and Foreign Migrants Considered in the Covid-19 Vaccine Discourse?*, BMJ Global Health, 2020, p. 2.

64 *MSS v Belgium and Greece* [GC] (2011) 53 EHRR 2, paras. 344-359.

65 Case C-411/10 *N. S. v Secretary of State for the Home Department* and Case C-493/10 *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905, par. 106.

66 For a detailed analysis of the jurisprudence of CJEU and ECtHR in this context see: Lukić-Radović, M.; Čučković, B., *Dublin IV Regulation, the Solidarity Principle and Protection of Human Rights – Step(s) Forward or Backward?*, in: Duić, D.; Petrašević, T., (eds), EU Law in Context – Adjustment to Membership and Challenges of the Enlargement, EU and Comparative Law Issues and Challenges Series, University Josip Juraj Strossmayer, Osijek, 2018, pp. 15-22; Rizcallah, C., *Facing the Refugee Challenge in Europe: A Litmus Test for the European Union – A Critical Appraisal of the Common European Asylum System Through the Lens of Solidarity and Human Rights*, European Journal of Migration and Law, Vol. 21, No. 2, pp. 251-254

will influence the CEAS in an additional manner – by introducing a novel factor to be considered when adopting transfer and return decisions.

Finally, the Covid-19 pandemic may also be expected to raise standards, particularly those that relate to reception and detention conditions, as well as health care of asylum seekers. As noted earlier, reception conditions will have to be altered as a consequence of the pandemic, especially as regards density of the population in asylum and immigration detention centres, sanitary conditions, the necessity to relocate persons from the centres in cases of over crowdedness and health screenings, both upon arrival and on regular basis. Furthermore, it has already been confirmed by the European Commission that relevant provisions contained in the Receptions Conditions Directive concerning health care should be interpreted as including treatment for Covid-19.[67] Finally, within asylum seekers as a vulnerable group, enhanced protection should be accorded to vulnerable subgroups.[68] In addition to well-established vulnerable subgroups of asylum seekers such as unaccompanied minors, pregnant women and elderly people, the Covid-19 pandemic may result in including on this list also persons with health issues that have been proven to represent an additional risk in case of Covid-19 infection. In this context, health screenings upon reception in asylum centres should become more thorough and include not only screening for Covid-19 but also other chronic health conditions considered as potential comorbidities.[69] The tendency to raise standards of protection in order to mitigate the adverse consequences of the pandemic can also be recognized in the European Centre for Disease Prevention and Control Guidance on migrant and refugee reception and detention centres,[70] whereas it is to be expected that further raising of standards will ensue with future applications before the relevant international judicial and quasi-judicial institutions.

4. FUTURE OF THE EU ASYLUM SYSTEM –PANDEMIC AS A CRISIS, FORCE MAJEURE OR A HEALTH ISSUE?

The final section of the paper will analyse the prospects of the future EU asylum system, as announced by the New Pact on Migration and Asylum, to adapt to the exigencies of both the current Covid-19 crisis and pandemics that are yet to

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67 Communication from the Commission COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, *op. cit.*, note 10, p. 10.

68 *Human Mobility and Human Rights in the Covid-19 Pandemic: Principles of Protection for Migrants, Refugees and Other Displaced Persons*, International Journal of Refugee Law, Vol. 20, No. 20, p. 8.

69 Alemi *et al.*, *op. cit.*, note 58, p. 510.

70 European Centre for Disease Prevention and Control, *Guidance on infection prevention and control of coronavirus disease (COVID-19) in migrant and refugee reception and detention centres in the EU/EEA and the United Kingdom*, June 2020, Stockholm, 2020, pp. 5-17.

come. Leaving aside the current debates on the general effectiveness of the new solutions and whether the Pact represents compromises that "may come at the cost of an ambitious and humane migration and asylum policy",[71] the focus will be exclusively on Covid-19 and provisions relevant for future pandemics. In that regard, the first part of the section will offer an overview of Covid-19 reference in the documents that comprise the Pact and an assessment of whether the challenges and experiences faced throughout the two preceding phases of the pandemic have been properly taken into account (4.1.). An analysis will follow of the most relevant provisions of the Proposal for a Regulation on screening and the Proposal for a Regulation on crisis and force majeure, with a view to exploring the potential pitfalls and consequences for persons in need of international protection (4.2.).

4.1. Taking Covid-19 seriously or for granted - referral to Covid-19 in instruments that make up the Pact

Contrary to the position of certain authors who claim that Covid-19 not only "delayed publication of the New Pact" but also "proved a game changer" for future EU asylum policy,[72] such an influence cannot be inferred from the Pact's scarce referral to Covid-19. Instead, it appears that learnings of the Covid-19 experiences have been integrated in an insufficient manner and with the focus on the interests of the Member States, not those of persons seeking international protection.[73] Referral to the Covid-19 pandemic is present in the introductory parts of the instruments that the Pact consists of.

Proposal for a Regulation on asylum and migration management, which is supposed to replace the Dublin III Regulation, only acknowledges "the challenges for Member States' authorities in ensuring the safety of applicants and their staff

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71 Neidhart, A.-H., Sundberg Diez, O., *The Upcoming New Pact on Migration and Asylum: Will it be up to the Challenge?*, European Migration and Diversity Programme, Discussion Paper, April 2020, p. 4-7, [https://www.epc.eu/en/Publications/The-upcoming-New-Pact-on-Migration-and-Asylum-Will-it-be-up-to-the-ch~327210], Accessed 14 April 2021. Carrera questions whether the EU actually needed a pact at such an advanced stage of European integration. Carrera, S., *Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum*, CEPS Policy Insights, No. 2020-22, p. 1, [https://www.ceps.eu/wp-content/uploads/2020/09/PI2020-22-New-EU-Pact-on-Migration-and-Asylum.pdf], Accessed 15 April 2021. Görentas criticizes the Pact for trying to keep people out of the EU zone, for aiming at accelerating the procedures and making the return process easier, as well as for focusing on the external dimension of the problem by focusing on the cooperation with third states. Görentas, A., *From EU-Turkey Statement to New Pact on Migration and Asylum: EU's Response to 21st Century's Humanitarian Crisis*, International Journal of Afro-Eurasian Research, December 2020, pp. 29-31.

72 Crawley, *op. cit.*, note 47, p. 8.

73 Arnoux-Bellavitis, *op. cit.*, note 49, p. 10.

when facing the Covid-19 crisis", and the emerging necessity, "in the context of the coronavirus pandemic" to "avoid humanitarian crises" through "a system of compulsory solidarity that includes relocation and the need for long-term solutions and strong solidarity on asylum measures".[74] However, such proclamations do not appear to be of much significance for two main reasons. Firstly, they are rather abstract, of programmatic character and with no practical meaning. Secondly, they seem to have been inserted subsequently, with a simple and declaratory purpose of linking the adopted solutions to the exigencies of the pandemic, although mechanisms provided therein, such as a system of compulsory solidarity, were not initially designed based on experiences gained in the context of Covid-19 pandemic.

Covid-19 experiences have been considered to a greater extent in the Proposal for a Regulation on screening. In its introductory part, the Proposal states that the Schengen Borders Code provides for no specific obligation concerning medical checks on third-country nationals, that it is "important to identify at the earliest stage possible all those in need of immediate care" and that "the recent outbreak of Covid-19 also shows the need for health checks in order to identify persons requiring isolation on public health grounds".[75] It thus may be concluded that due to the Covid-19 crisis, health screenings were introduced in addition to the screenings that were initially supposed to encompass identity identification and safety reasons only.

The Pact seems to comprise the pandemic to the greatest extent in the Proposal for a Regulation on crisis and force majeure.[76] Differentiating between two possibilities that may unable the regular functioning of the EU asylum system – situations of crisis and force majeure – the Proposal qualifies the situation experienced due to the Covid-19 pandemic as force majeure. However, if one considers various emergency and restrictive measures taken by the EU Member States during the first two stages of the pandemic, it is highly questionable whether the solutions provided in the Proposal will be adequate and sufficient. Namely, the only alteration allowed by the Proposal in times of force majeure consists in the extension

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74 Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], Brussels, 23 September 2020, COM/2020/610 final. Similar referral to Covid-19 is contained in the Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, Brussels, 23 September 2020, COM/2020/611 final.

75 Proposal for a Regulation on screening, note 4.

76 Proposal for a Regulation on crisis and force majeure, note 3.

of time limits concerning registration,[77] transfers[78] and timeframes for solidarity measures[79]. Although the adopted solutions may serve as a strong and valid argument that derogations based on general EU law are not possible in times of pandemics since public health reasons are now properly taken into account and addressed by the relevant secondary EU legislation, it remains to be seen whether the proposed amendments to the EU asylum system will be capable of ensuring that the legislative framework deals with future situations of force majeure, or whether the practice of EU Member States will once again depart from the normative framework.

4.2. Pandemic as a health issue – which consequences for the rights of persons in need of international protection?

Beyond the concept of the pandemic as a force majeure, instruments that make up the Pact have adopted several solutions that, due to the experiences learned during the Covid-19 pandemic, depart from the ones contained in the current CEAS. Such changes appear to have been introduced at the back door, through addressing health issues in various contexts and with the intention to make them unnoticed. The focus is shifted from the protection of the health of an individual to the protection of public health. For example, Article 32 of the currently applicable Dublin III Regulation, dealing with the exchange of health data before a transfer is carried out, provides that the transferring Member State shall only transmit the information "after having obtained the explicit consent of the applicant and/or of his or her representative or, if the applicant is physically or legally incapable of giving his or her consent, when such transmission is necessary to protect the vital interests of the applicant or of another person".[80] The Proposal for a Regulation on asylum and migration management in its Article 39, which will replace Article 32 of the Dublin III Regulation, inserts another ground for exchanging health data before a transfer is carried out – the protection of public health. Namely, Article 39 does not require the explicit consent of the applicant when "such transmission is necessary to protect public health and public security".[81] The shift to public health protection as a priority, instead of a so far intended protection of the health of an applicant is even more visible in the Proposal for a Regulation on screening. Article 1 of the Proposal provides that "the screening shall also entail health checks, where appropriate, to identify persons vulnerable and in the need

77 Article 7 of the Proposal for a Regulation on crisis and force majeure.

78 Article 8 of the Proposal for a Regulation on crisis and force majeure.

79 Article 9 of the Proposal for a Regulation on crisis and force majeure.

80 Article 32 (2) of the Dublin III Regulation, note 38.

81 Article 39 (2) of the Proposal for a Regulation on asylum and migration management, note 74.

of health care as well as the ones posing a threat to public health".[82] Although the provision of Article 1 appears to consider an applicant's need for healthcare and threat to public health as equally relevant aims of the newly introduced screening procedure, a number of arguments may be advanced to challenge its main purpose and potential consequences. First of all, the introductory part of the Proposal that outlines the objectives of the screening procedure offers clear guidance as to the aims intended to be achieved through screening. Its focus is not on offering relevant health care to applicants but to ensure that "any health and security risks are quickly established". What is more, the Proposal explicitly notes that submitting applicants "to the health and security checks at the external borders" contributes to "increasing the security within the Schengen area". Secondly, if one takes into account that the screening procedure has a three-fold aim – identification, health and security check – whereas health checks are associated with security checks and not identity checks throughout the explanatory part of the Proposal, this observation may serve as another argument to identify health checks as aiming at the protection of public health, not ensuring individual health care. Thirdly, Article 1 stipulates that "those checks shall contribute to referring such persons to the appropriate procedure". However, it is not clear what may qualify as an appropriate procedure in case a person is recognized as a threat to public health. The fact that the Proposal fails to regulate this issue leaves space for different practices among the Member States and potential abuses. Finally, these considerations should also be placed in the wider context of screening as a procedure that is supposed to be carried at the border, before access to the territory of a Member State and as a pre-entry and pre-asylum procedure phase. It is difficult to imagine that adequate health care is provided and medical equipment and staff present at the border, especially in times of a pandemic.[83]

On the other hand, the instruments that make up the Pact failed to acknowledge many issues that the Covid-19 experience revealed. Firstly, they do not properly reflect the enhanced vulnerability of persons in need of international protection in the pandemic context. Article 39 of the Proposal for a Regulation on asylum and migration management may again serve as an example since it contains the same categories of vulnerable persons as its Dublin III Regulation counterpart and does not seem to recognize new subcategories of vulnerable applicants. The same

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82 Article 1 of the Proposal for a Regulation on screening, note 4.

83 *Jakulevičienė*, L., Re-decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders, EU Immigration and Asylum Law and Policy Blog, 27 October 2020, [https://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/], Accessed 19 March 2021.

remark relates to the Proposal for a Regulation on screening.[84] Secondly, it is not clear why the Proposal for a Regulation on crisis and force majeure differentiates between the two as regards granting immediate protection status. Namely, Article 10 of the Proposal allows the Member State to suspend the examination of applications for international protection "in respect of displaced persons from third countries who are facing a high degree of being subject to indiscriminate violence, in exceptional situations of armed conflict, and who are unable to return to their country of origin" and to grant them "immediate protection status".[85] However, Article 10 applies to situations of crisis only, not to force majeure. The Proposal should be criticized for not offering a similar temporary solution in cases of force majeure as well, especially considering the fact that the Covid-19 situation led to a suspension of asylum procedures. Thirdly, they do not offer guidance for solving difficult situations that will surely arise in the future, such as the relevance of the epidemiological situation in the country to which the person is to be returned or transferred for its qualification as a safe country.[86] The instruments that the Pact consists of are silent on the matter.

5. CONCLUDING REMARKS

The current Covid-19 crisis has once again revealed the weaknesses of the EU asylum system. Without enough time to adapt to the situation caused by the 2015 migrant crisis and a large influx of persons seeking international protection, the system was put to another difficult test. However, a threat that Covid-19 exerts on public health cannot serve as a justification for the violation of EU asylum law and well-established international and European human rights standards. Although there is room for adaptation to the so-far unexperienced health crisis, modifications of EU and national asylum practices need to stay within the applicable normative frameworks. Instead of taking the lead in coordinating the action of Member States in the field of asylum, the European Union, as straightforwardly remarked by one of its officials, opted for soft tools that were not intended to make real pressure on the Member States to enforce EU law and to control its enforcement in the context of a global pandemic.[87] As to the prospects of the future rules to handle the pandemics that are yet to come or the Covid-19 situation should the virus continue to be present after the entry into force of the instruments that com-

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84 Recital 26 of the Proposal for a Regulation on screening.

85 Article 10 of the Proposal for a Regulation on crisis and force majeure, note 3.

86 Certain authors draw a parallel with the outbreak of Ebola when the UNHCR made a recommendation to take into account the current situation in the countries affected by Ebola before returning persons. Arnoux-Bellavitis, *op. cit.*, note 49, pp. 14-15.

87 *Ibid.*, p. 10.

prise the New Pact on Migration and Asylum, it is doubtful whether the problems experienced during the Covid-19 crisis will be adequately addressed. Instead, the old problems seem to still be unresolved, whereas the newly emerged ones have not acquired the proper treatment. The EU asylum law and policy appear to constantly be lagging behind the real-life scenarios. As correctly remarked by Tsourdi, "until there is a permanent redesign of the CEAS, it will arguably be impossible to realize the legally binding principle of solidarity and to ensure human health and dignity, in the time of coronavirus and beyond".[88]

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UDK 342.737(4-67EU):614.4
Review article

THE IMPACT OF COVID-19 ON THE FREE MOVEMENT OF PERSONS IN THE EU*

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ABSTRACT

The impact of the COVID-19 outbreak is being endured throughout the world, and the European Union (EU) is no exception. The rapid spreading of the virus effected, among other things, restriction on the freedom of movement. The EU member states introduced national response measures to contain the pandemic and protect public health. While broadly similar, the measures differ with regard to strictness and the manner of introduction, reflecting the political legitimacy of the respective country. With the 'Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak' – its first COVID-19-related Communication – the European Commission (EC) attempted to curb differing practices of the EU member states and ensure a coordinated approach. Ultimately, this action was aimed at upholding of fundamental rights as guaranteed to EU citizens, one such being the freedom of movement. Thus, from the very start of the pandemic, the coordinated actions of EU institutions sought to contain the spread of COVID-19 infections with the support and cooperation of EU member states. This is confirmed by the most recent Council of the EU (Council) recommendation on a coordinated approach to restrictions to freedom of movement within the EU of October 2020. While they did prevent the spread of infection and save countless lives, the movement restriction measures and the resulting uncertainty have greatly affected the people, the society, and the economy, thereby demonstrating that they cannot remain in force for an extended period. This paper examines the measures introduced by EU member states and analyses the legal basis for introducing therewith limitations on human rights and market freedoms. To what extent are

* This paper is a product of work that has been fully supported by the Faculty of Law Osijek Josip Juraj Strossmayer University of Osijek under the project nr. IP-PRAVOS-6 ''Project title: Implementation of EU law in Croatian legal system".

the EU and member states authorized to introduce restrictions on the freedom of movement in the interest of public health? Have the EU and member states breached their obligations regarding market freedoms and fundamental rights under the Treaty? And most importantly: have they endangered the fundamental rights of the citizens of the EU?

Keywords: *COVID-19, European Union, free movement of persons, human rights, travel ban*

1. INTRODUCTION

Comprising one of the four fundamental freedoms upon which EU law rests – as laid down by the Treaty on the Functioning of the European Union (TFEU) – is the freedom of movement of persons. As the root of its protection and guarantee, the TFEU establishes the freedom of movement as a fundamental pillar of European Union (EU) law. Another aspect at the center of the EU's interest, in addition to freedom of movement, is EU citizenship. Being that the cornerstone of citizenship is precisely the right of citizens to move freely within the EU creates between the two an inextricable link. The years 2020 and nearly half of 2021, as marked by the COVID-19 pandemic, saw the EU posed with a new and difficult challenge, forced to balance between the protection of EU citizens' health and the foundations of its very existence – fundamental freedoms, especially freedom of movement. The results of actions taken to strike a balance between the two interests, are manifested in the employed soft law mechanisms. Despite the EU's guaranteed high level of security and multitude of social rights, the EU's response to the challenge suffered under its bureaucracy that continually hampers vital decisions, thereby creating distrust on the part of its citizens to whom it is to serve. The EU's actions in response to the pandemic have brought to light the need for flexibility in decision-making at EU level. But – given its member states' (MSs) mutual distinctiveness and differing interests and, by contrast, the EU's one-size-fits-all approach toward them – can the EU survive on exclusive unanimity and (requisite) solidarity? As focused on the freedom of movement of persons, the first part of the paper examines the regulations governing it, along with the relevant the case law of the Court of Justice of the EU (CJEU). The section also discusses the possibilities of restricting the freedom of movement of persons and presents the legal basis for such treatment. The central part of the paper analyzes the cardinal documents adopted and actions undertaken by the EU in response to the COVID-19 pandemic. The penultimate chapter reviews the Proposal for a Regulation of the European Parliament and of the Council on the digital green certificate with which the EU moved away from soft law mechanisms of action, which moving away is examined herein.

2. FREEDOM OF AND RESTRICTION ON MOVEMENT OF PERSONS

The freedom of movement of persons is both one of the four fundamental freedoms upon which EU law rests and the center of EU's raison d'être.[1] Initially defined by the 1992 Maastricht Treaty,[2] today freedom of movement is prescribed by Articles 45 to 49 to the TFEU.[3] The Maastricht Treaty supplemented the originally purely economic motive for the integration with a politically oriented one, which integration is most prominent in the establishment of EU citizenship.[4] The Treaty of Amsterdam, which amended Article 8 of the Maastricht Treaty, defined EU citizenship.[5] The keystone of EU citizenship is the citizens' right to move and reside freely on any MSs' territory, irrespective of their economic activities.[6] This right is also prescribed by Article 45 of the Charter of Fundamental Rights of the European Union.[7] Under the TFEU, a citizen of the EU is any person holding the nationality of an MS, whereby the EU citizenship does not replace national citizenship, but rather supplements it.[8] In confirming the effect of Article 21 of the TFEU in *Baumbast* (C-413/99), the CJEU noted that the right to EU citizenship is granted directly to every EU citizen.[9] In *Lasal* (C-162/09), the CJEU

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9 Storey, T., *Freedom of Movement for Persons - Baumbast & R v. Secretary of State for the Home Department (Case C-413/99), Carpenter v. Secretary of the Statefor the Home Department (Case C-60/00) - Court of*

emphasized that EU citizenship grants every EU citizen the primary and personal right to free movement and residence in the state territory of an MS.[10] In *Bosman* (C-415/93), the CJEU also confirmed that the right to free movement includes the right to leave the permanent or temporary residence.[11] Accordingly, as confirmed by the case law of the CJEU, the freedom of movement and residence in the territory of an MS, as well as leaving the place of permanent or temporary residence, and the right to equal treatment are guaranteed to EU citizens under the TFEU – all being the fundamental rights of EU citizens regardless of their economic activity.[12]

The step to have strengthened the freedom of movement was made on 14 June 1985, by the signing of the Schengen Agreement.[13] Its principal achievement was the abolishing of control of persons at internal borders and transplanting thereof to external borders.[14] Complementing it was the Convention implementing the Schengen Agreement, which laid down regulations and guarantees for the establishment of areas free of internal border controls. Since the entry into force of the Treaty of Amsterdam, the Convention, as effective since 1995, has been subsumed under primary EU law as a Protocol.[15] The EU's internal borders are governed by the Schengen Borders Code.[16] The Schengen acquis has been integrated into the legal framework of the Union by Protocol (No 19) to the TFEU.[17] The right of

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11 Case C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman, ECLI:EU:C:1995:463, paras. 95-96).

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citizens and their families to free movement within the EU is guaranteed by the Citizens' Rights Directive.[18]

The above documents also provide for restrictions on the freedom of movement in certain circumstances. Such restrictions are regulated in more detail in the TFEU and may be justified by Article 21, which states that the right to free movement and residence within the MSs' territories is subject to the limitations and conditions set out in the Treaties, as well as the measures put in place to give them effect. Where the Treaties do not provide the necessary powers, the Council may, in accordance with the ordinary legislative procedure, adopt provisions that facilitate the exercise of the said rights. The Council may also adopt measures relating to social security or social protection.[19] The protection and improvement of human health deriving from the TFEU fall under the supporting competences where the EU has no power to act, but rather only support the actions of MSs. Under Article 45 (3) to the TFEU, freedom of movement for workers may be restricted on grounds of protection of public policy, public security, or public health.[20] On the example of health matters, which are entirely within the competence of the MSs, even if the EU does not have authority to regulate issues relating to health protection, it has the authority to activate the restriction on the freedom of movement of workers under Article 45 (3) of the TFEU, invoking preservation of public health. Article 29 (1) to the Schengen Borders Code provides for the reintroduction of border control at internal borders – commensurate with the circumstances – where public policy or internal security so require.[21]

The MSs derive the greatest power for restriction on the right of entry and right of residence from the Citizens' Rights Directive. Under its Article 27, MSs may

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18 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC; Marković, T., *Prava državljana članica EGO-a i članova njihovih obitelji u okviru slobode kretanja vs. mobilnost,* Pravni vjesnik, Vol. 30, No 2, 2014, pp. 285-305; Valcke, A., *EU Citizens' Rights in Practice: Exploring the Implementation Gap in Free Movement Law*, European Journal of Migration and Law, Vol. 21, No. 3, 2019, pp. 289–312, pp. 290.

19 Article 21 TEU (Lisbon).

20 Article 45 (3) TEU (Lisbon); Pacces, M. A.; Weimer, M., *From Diversity to Coordination: A European Approach to COVID-19,* European Journal of Risk Regulation, Vol.11, Issue 2, 2020, pp. 283-296, pp. 286.

21 Montaldo, S., *The COVID-19 Emergency and the Reintroductionof Internal Border Controlsin the Schengen Area:Never Let a Serious Crisis Go to Waste*, European Papers, Vol. 5, No 1, 2020, pp. 523-531, pp. 525; Ramji-Nogales, J.; Goldner Lang, I., *Freedom of movement, migration, and borders*, Journal of Human Rights, Vol. 19, Issue 5, 2020, pp. 593-602, pp. 596; Regulation (EU) 2016/399*, op.cit.*, Article 29 (1).

restrict the freedom of movement and residence of EU citizens and their families on grounds of public policy, public security, or public health. The measures taken on grounds of public policy or public security must be in line with the principle of proportionality. Neither of the grounds may be invoked to serve economic ends. However, the Directive does condition that the measures taken on grounds of public policy or public security be based exclusively on the personal conduct of the individual concerned, and under no circumstance rely on general prevention or be automatic or systematic[22] The CJEU has repeatedly emphasized that the condition for taking measures to preserve public policy and public security is a case-by-case assessment.[23] However, neither the Citizens' Rights Directive nor the CJEU have determined that such condition applies to measures taken to preserve public health.[24] Of even more weight is Article 29 to the Directive, prescribing that the only diseases justifying measures restricting freedom of movement are the diseases with epidemic potential as defined by the relevant instruments of the World Health Organization (WHO) and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host MS. The disease caused by the COVID-19 virus undoubtedly fulfils said criteria.[25]

3. ACTIONS UNDERTAKEN BY THE EU AMID THE COVID-19 PANDEMIC

Following the COVID-19 outbreak in Europe and the rapid increase in the number of infections, European countries closed their borders, i.e., introduced restrictions on all entries to their respective state territories. The measures were adopted at the national level, absent of coordination between MSs,[26] hindering, inter alia, free movement of workers employed in MSs different from their country of ori-

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22 Directive 2004/38/EC, *op.cit.,* Article 27.

23 Case 67/74 *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln*, ECLI:EU:C:1975:34, para. 7., Case C-348/96 *Criminal proceedings against Donatella Calfa*, ECLI:EU:C:1999:6, paras. 25-27; Case C-408/03 *Commission v Belgium*, ECLI:EU:C:2006:192, paras. 68-72., Case C-331/16 *K. v Staatssecretaris van Veiligheid en Justitie and H.F. v Belgische Staat*, ECLI:EU:C:2018:296, para. 52; Case C-371/08 *Nural Ziebell v Land Baden-Württemberg*, ECLI:EU:2011:809, para. 82.

24 Goldner Lang, I., *„Laws of Fear" in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19,* European Journal of Risk Regulation, Cambridge University Press, 2021, pp. 1-24, pp. 7.

25 Goldner Lang, I., *Obveze Republike Hrvatske temeljem europskog prava pri donošenju zaštitnih mjera protiv bolesti COVID-19*, in: Barbić, J. (ed.), Primjena prava za vrijeme pandemije COVID-19, HAZU, 2021, pp. 4.

26 *Ibid.,* pp. 2; Pacces; Weimer, *op.cit.*, note 20; Bornemann, T.; Daniel J., *Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics*, European Papers, Vol. 5, 2020, No 3, 2021, pp. 1143-1170, pp. 1146.

gin. To prevent the spread of the disease and in response to the requests from the Members of the European Council (EUCO) to facilitate the transit of citizens returning to their countries of origin, the European Commission (EC) presented practical instructions for introducing a temporary restriction on non-essential travel to the EU, along with guidelines for ensuring the free movement of key workers.[27] With the Communication to the European Parliament, the European Council and the Council of 16 March 2020, the EC called for a temporary restriction on non-essential travel to the EU on grounds of the COVID-19 pandemic. The EC's aim was to ensure that the measures taken at external borders of the EU be consistent and commensurate.[28] With the Communication, the EC recommended to the EUCO to act with a view to the rapid adoption, by the Heads of State or Government of the Schengen MSs together with their counterparts of the Schengen Associated States, of a coordinated decision to apply a temporary restriction of non-essential travel from third countries into the EU area. The temporary restriction excluded nationals of the aforementioned groups of MSs.[29]

The primary task of the EU's policies was to maintain the functioning of the single market to prevent shortages and avoid exacerbating the social and economic difficulties faced by all European countries. The key principle therefor is solidarity. With a view to preventing the MSs from taking measures that would jeopardize the integrity of the single market for goods (in particular supply chains), the EU promptly adopted the Guidelines for border management measures to protect health and ensure the availability of goods and essential services.[30] The Guidelines formulate the principles underpinning an integrated approach to effective border management, as well as require that the MSs allow without exception entry to their own citizens and residents and facilitate the transit of other EU citizens and residents returning to their countries of origin or residence. At any rate, vital to any measure pertaining to EU border management is coordination at EU level.[31] Section V of the Guidelines that concerns internal borders, provides for MSs to

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27 Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (2020/C 102 I/03); Communication from the Commission COVID-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy (2020/C 102 I/02).

28 Communication from the Commission COVID-19: Temporary Restriction on Non-Essential Travel to the EU, COM(2020) 115 final.

29 *Ibid.;* Marcus Scott, J. *et al., The impact of COVID-19 on the Internal Market*, Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, PE 658.219, 2021.

30 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, (2020/C 86 I/01).

31 *Ibid.*

reintroduce temporary border controls at internal borders on grounds of public policy or internal security, of which reintroduction they must notify in accordance with the Schengen Borders Code. Such reintroduced controls should, of course, be applied in a proportionate manner, and EU citizens must be guaranteed the safeguards laid down in Directive 2004/32, i.e., MSs must not discriminate between their own nationals and resident EU citizens. However, MSs may take appropriate measures, such as impose self-isolation upon return from a COVID-19-affected area, insofar as they apply to their own nationals as well.[32]

To safeguard free movement of workers, in March 2020 the EC issued the Communication concerning the exercise of the free movement of workers,[33] building on the preceding Guidelines for border management measures to protect health and ensure the availability of goods and essential services.[34] Under paragraph 23 of the Guidelines, MSs should ensure the continued professional activity of frontier workers, primarily those in the health care and food sector and similar essential services (e.g. child and elderly care, critical staff for utilities) by permitting and facilitating their border-crossing.[35] The Communication of the EC concerning the exercise of the free movement of worker invites MSs to take specific measures to achieve a coordinated approach at EU level, pertaining primarily to critical workers in essential services whose place of work requires border crossing. The EC lists 17 critical occupations, including health professionals, staff of public institutions, firefighters, police officers etc. The Communication also requires that health screening of workers be carried out in a non-discriminating manner, as well as limits border controls of such workers. A separate section is dedicated to seasonal workers.[36] With the above documents, the EC strived to establish a common approach to addressing the crisis.[37]

The EC proceeded to adopt two further communications (on 8 April 2020 and 8 May 2020), recommending a one-month extension of the restrictions on optional travel, which extension all Schengen Area MSs and the four countries associated

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32 *Ibid.*

33 Communication from the Commission, Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak, (2020/C 102 I/03), *op.cit,* note 27.

34 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, (2020/C 86 I/01).

35 *Ibid.*

36 Communication from the Commission, Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak, (2020/C 102 I/03), *op.cit*., note 27; Guild, E., *Covid-19 Using Border Controls to Fight a Pandemic? Reflections From the European Union*, Original Research Article, Front. Hum. Dyn., 2020.

37 Robin-Olivier, S., *Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis: From Restrictive Selection to Selective Mobility*, Insight, European Papers, Vol. 5, No 1, 2020, pp. 613-619, pp. 616.

to the Schengen Area implemented, as last amended by 15 June 2020.[38] As part of the guidelines and recommendations package aimed at assisting MSs in a gradual lifting of restrictions on free movement, on 13 May 2020 the EC adopted the Communication towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls, and on flexibility in the reintroduction of certain measures where the epidemiological situation were to worsen and so require. [39] Its aim is to gradually unwind contingency and emergency measures for combatting the pandemic and restore free movement in the EU. The EC listed three criteria therefor: (1) epidemiological criteria; (2) health system capacity and (3) appropriate monitoring capacity.[40]

The EC's Communication of 11 June 2020 and the subsequent Recommendation of the Council of 30 June 2020 set out the lifting of the said restrictions on a country-to-country basis. Coordination of restrictions at external borders was a key factor in the lifting of restrictions at internal borders.[41] The EC called for adherence to principles of non-discrimination, flexibility and, as mentioned previously, coordination.

Given that the number of COVID-19 cases in the EU decreased between June and July 2020, many MSs lifted the free movement restrictions introduced in the pandemic's first wave. As the number of COVID-19 cases began to increase across the EU in August 2020, some MSs reintroduced such restrictions. With a view to facilitating free movement despite reintroduced restrictions, the Council adopted in September 2020 the Proposal for a Recommendation on a coordinated approach to restrictions on free movement in response to the COVID-19 pandemic,[42] once again putting the emphasis on adherence to principles of proportionality and non-

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38 Marcus Scott *et al., op.cit.*, note 29; Communication from the Commission to the European Parliament, the European Council and the Council on the assessment of the application of the temporary restriction on non-essential travel to the EU COM(2020) 148 final; Communication from the Commission to the European Parliament, the European Council and the Council on the second assessment of the application of the temporary restriction on non-essential travel to the EU, COM(2020) 222 final.

39 Communication from the Commission Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls — COVID-19, (2020/C 169/03).

40 Guild, *op.cit.*, note 36.

41 Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction, LI 208/1; Communication from the Commission to the European Parliament, the European Council and the Council On the third assessment of the application of the temporary restriction on non-essential travel to the EU, COM(2020) 399 final; De Bruycker, P., *The COVID Virus Crisis Resurrects the Public Health Exception in EU Migration Law,* Frontiers in Political Science.

42 Proposal for a Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, COM/2020/499 final.

discrimination in the introduction of restrictions. The EC then followed with the Communication on additional COVID-19 response measures, which set out next steps in key areas to reinforce the EU's response,[43] chiefly the effective and rapid testing, full use of contact tracing applications, facilitating of safe travel, securing of essential supplies, and effective vaccination. The development and procurement of an effective vaccine were determined as essential to bringing an end to the crisis. Acting toward this goal, the Commission is negotiating and concluding Advance Purchase Agreements (APAs) with vaccine producers to secure access to promising vaccine candidates.[44]

Early in 2021, the Council adopted the Proposal for a Council Recommendation amending Council Recommendation of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic.[45] With its Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, the Council coordinated the approach to the following key aspects: employing common criteria and thresholds in decisions on the introduction of free movement restrictions; color-code mapping the COVID-19 transmission risk as prepared by the European Centre for Disease Prevention and Control (ECDC); harmonizing measures that may apply to persons moving between areas, depending on the transmission risk level prevalent in those areas.[46] The Proposal for a Council Recommendation amending Council Recommendation (EU) 2020/1475 tasked the Commission, supported by the ECDC, to continue to regularly evaluate the criteria, data needs and thresholds defined therein – inter alia, the need to consider other criteria or adjust thresholds. Under the Proposal, any restrictions on the free movement of persons should continue to be implemented in line with the general EU law principles, primarily proportionality and non-discrimination, including non-discrimination on the basis of nationality. Any measures taken should be limited to the extent strictly necessary to safeguard public health. Restrictions should be adequately enforced, and any sanctions effective and proportionate.[47]

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43 Communication from the Commission on additional COVID-19 response measures COM(2020) 687 final.

44 *Ibid*., 2.4.

45 Proposal for a Council Recommendation amending Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic COM/2021/38 final.

46 Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic.

47 *Ibid.,* 14-16.

It follows from the above that the EC's actions changed between March 2020 and March 2021. Depending on the number of COVID-19 cases, the EC issued more or less strict recommendations on actions to be taken by MSs. A comparison of the recommendations and guidelines adopted by the EC in March 2020 and the latest recommendations from 2021 reveals progress and improvement in certainty in action. At the outset, the EC took a reserved stance that soon faltered under the pressure and reality of EU-wide unilateral national restrictions introduced. To coordinate national measures and emphasize the importance of non-discrimination and proportionality, the EC adopted a string of soft law measures. The single exception thereto was the closing of external borders with third countries, which closing was first adopted by the EUCO, and then implemented individually by the MSs.[48] The Schengen Borders Code does not explicitly mention the threat to public health as valid grounds for reintroducing internal border controls. In this context, the EC's action is crucial seeing as how it demonstrates that, in crises, the risks of a contagious disease can be considered equivalent to a threat to public policy or internal security.[49] That public health is used as grounds for restricting free movement of EU citizens points to its double-edged role in this pandemic. Namely, that the precautionary principle is considered in regard to COVID-19 policies in certain EU documents translates to public health being both a national and an EU value which, according to the EC, has become a top EU priority. However, public health is concurrently employed as grounds for limiting on a national level of another cardinal EU value – the free movement of persons.[50] That public health is accepted as justification for national measures restricting freedom of movement confirms that it is recognized as an EU value. Protect both public health and free movement interests as the EU may, the two are, in fact, mutually exclusive: more public health protection by way of national restrictions and travel bans effects less free movement there. By analogy, opting for national precautionary measures that restrict free movement of persons indicates that, in the MSs' view, more lenience in free movement effects more endangering of public health. While the EU documents relating to COVID-19 mention precautionary principles only sporadically, EU institutions have undoubtedly supported the precautionary approach through

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48 Goldner Lang, *"Laws of Fear […]" op. cit.*, note 24, pp 3; Pacces, M. A.; Weimer, M., *op. cit.*, note 20, pp. 291-294; Renda, A.; Catro, R., *Towards Stronger EU Governance of Health Threats after the COVID-19 Pandemic*, European Journal of Risk Regulation, Vol. 11, No. 2, 2020, pp. 273-282; Alemanno, A., *The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?* European Journal of Risk Regulation, Vol. 11, No. 2, 2020, pp. 307-316.

49 Goldner Lang, *"Laws of Fear […]", Ibid.,* pp.5.; Korkea-aho, E.; Scheinin, M., *„Could You, Would You, Should You?" Regulating Cross-Border Travel Through COVID-19 Soft Law in Finland*, European Journal of Risk Regulation, 2021, pp. 1-18, pp. 15.

50 Goldner Lang, "Laws of Fear […]", *Ibid.*

allowing national restrictions on free movement of persons, including throughout Schengen, as well as through the implicit acknowledging thereof.[51]

However, in doing so, the EU institutions did not intend to question the introduction of national travel bans or the closing of internal borders. Instead, to protect the economy to then the extent possible, the EC endeavored to ensure the mobility of essential workers within the EU. However, the EU's firm stance on the importance of ensuring the mobility of EU workers in critical occupations in light of the implications of a total stalemate in the internal market did not correspond to the EU's persuasive attempts to ensure that these workers are not neglected, exploited, or discriminated against.[52]

While restrictions on workers' freedom of movement may be justified on the basis of public policy, public protection, or public health, they first need to be necessary, proportionate, and based on objective and non-discriminatory criteria, i.e., are permissible only if the principles of proportionality and non-discrimination are followed. The principle of proportionality requires that the restrictive measure be appropriate to the achieving of the objective pursued, which – in the context of the pandemic – is the protection of public health (suitability test); that the set goal not be achievable as effectively with a less restrictive measure (necessity test); and that the measure be reasonable, taking into account other competing social interests and the degree of impediment to people's freedom of movement.[53] The principle of non-discrimination, on the other hand, requires that restrictions not be conditioned upon the nationality of a given EU citizen, and that nationals of other MSs not be placed at a disadvantage compared to nationals in identical or similar circumstances.[54]

Particularly emphasized is the precautionary principle. Never before had EU policies aimed at curbing the spread of COVID-19 sought recourse in the application of the precautionary principle to such an extent and with such urgency. In brief, the precautionary principle allows decision-makers to adopt restrictive measures in the face of an occurrence, product or process identified as a threat to the environment, human, animal, or plant health, for the risk of which threat the scientific evidence is insufficient, unconscientious or uncertain. Factors such as scientific evaluation, scientific uncertainty and adverse effects on human health precondition the invok-

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51 *Ibid.;* Renda; Catro, *op.cit.,* note 48, pp. 276.

52 Mantu, S., *EU Citizenship, Free Movement, and Covid-19 in Romania*, Front. Hum. Dyn. 2:594987, 2020 pp. 5.

53 Goldner Lang, *Obveze Republike Hrvatske…op.cit*., note 25, pp.4

54 *Ibid.;* Alison L. Y.; De Búrca, G., *Proportionality*, in: General Principles of Law: European and Comparative Perspectives, Hart Publishing, 2017.

ing of the precautionary principle, all of which – in the case of the COVID-19 pandemic – have been met.[55] A number of EU documents concerning restrictions on movement, as referred to below, contain terminology associated with the proportionality test and the precautionary approach, including: *preventive measures*, *protection*, *risk assessment*, *risk management science*, and *WHO*. In addition, the documents emphasize the balance of different criteria, including the epidemiological situation, in decision-making concerning the COVID-19 policy.[56]

The actions of the EC in the subsequent documents are directed at very specific conduct. Once the vaccine had been made available, the EC undertook to procure and finance it, instructing the MSs to take further action. Initially, the MSs introduced border closures and restrictions on entry to non-citizens, thereby violating the principles of proportionality and non-discrimination, which action the EC then sought to correct and prevent in its recommendations. The recommendations adopted between end of 2020 and in 2021 are aimed at inoculation in the MSs and facilitating movement within the EU. The EC's action is aimed at the future and the changes that are crucial to restoring a normal functioning and the freedoms that were restricted.[57] In particular terms, with the above actions, the EU in fact extended its powers, using the protection of public health as grounds for restrictions that is not envisaged as a basis for border closures under the Schengen Borders Code. Precisely such action is key to containing the pandemic as it allows for greater coordination of national responses that – through differing and often divergent – are necessary.[58]

From the analysis of the Council's recommendations and the EC's guidelines it follows that the EU did not exceed its powers with its actions, but rather only employed soft law instruments in the pandemic's first year. Formally, the EU fo-

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55 Communication from the Commission on the precautionary principle (COM(2000) 1 final, para. 4; Goldner Lang, „Laws of Fear […]", *op.cit.*, note 24, p. 9.; Alemanno, A., *The Shaping of the Precautionary Principle by European Courts: From Scientific Uncertainty to Legal Certainty*, in: Cuocolo, L.; Luparia, L. (eds.),Valori Costituzionali E Nuove Politiche Del Diritto, Cahiers Europèens, Halley, 2007; Bocconi Legal Studies Research Paper No. 1007404; Feintuck, M., *Precautionary Maybe, But What's the Principle? The Precautionary Principle, The Regulation of Risk, and The Public Domain*', 32 Journal of Law and Society, 2005, pp. 371-398; Majone, G., *The Precautionary Principle and its Policy Implications,* JCMS: Journal of Common Market Studies, Vol. 40, Issue 1, 2002, pp. 89–109.

56 Goldner Lang, "Laws of Fear […]", *Ibid*., pp. 11.

57 Kostakopoulou, D., *The Configuration of Citizenship in (post-)Covid-19 EU: Thoughts on the EU Citizenship Report 2020,* European Law Blog, 2021, [https://europeanlawblog.eu/2021/02/01/the-configuration-of-citizenship-in-post-covid-19-eu-thoughts-on-the-eu-citizenship-report-2020/], Accessed 10 April 2021.

58 Bouckaert, G., *et. al., European Coronationalism? A Hot Spot Governing a Pandemic Crisis*, Public Administration Review, by The American Society for Public Administration, Vol. 80, Issue 5, 2020, pp. 765–773, pp. 772.

cused on the coordination of the restrictive measures already put in place by the MSs. More precisely, the single document with which the EU sought to prevent MSs' decision-making, i.e., to direct it to joint action, is the Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy. The Guidance, as based on national measures, were put in place to ensure coordinated action at the EU's external borders, devised as assistance in actions at the EU's external borders.[59] Nonetheless, the power of EU soft law is not to be underestimated: while not law in itself, it creates rules, by which MSs abide.

4. DIGITAL GREEN CERTIFICATE

Finally, in March 2021, the EC proposed two regulations introducing the digital green certificate (DGC) – an interoperable certificate on vaccination, testing and recovery – aimed at facilitating free movement during the COVID-19 pandemic. Both DGC Regulation Proposals shape the framework for the DGC, with the first one applying to EU citizens,[60] and the second to third-country nationals residing in MSs during the COVID-19 pandemic.[61] The legal basis for the first DGC Regulation Proposal is Article 21 (2) of the TFEU,[62] and the legal basis for the second is Article 77 (2) (c) TFEU.[63] In fact, the second DGC Regulation Proposal follows the Council Recommendation of 30 October 2020, providing for MSs to apply the same rules to both EU and third-country nationals residing in EU territory

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59 Communication from the Commission COVID-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy (2020/C 102 I/02).

60 Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate), COM(2021) 130 final 2021/0068(COD).

61 Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to third-country nationals legally staying or legally residing in the territories of Member States during the COVID-19 pandemic (Digital Green Certificate) 2021/0071 (COD).

62 Article 21 (2) TFEU: "If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1."

63 Article 77 (2) (c) TFEU: "For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: […] (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period […]."

and/or having the right to travel to other MSs.[64] While the first DGC Regulation Proposal concerns EU citizenship issues, the second builds on EU policies relating to border control, asylum and immigration.[65] At the time of this writing, the two DGC Regulation Proposals are undergoing the first reading at the European Parliament (EP), more precisely, the first hearing at the EP's Subcommittee on Human Rights. Further two hearings were held before the Council, however, the Council's findings have not been made publicly available.[66] While announced by Commissioner Didier Reynders to likely be adopted in June 2021, a respective decision of the EP is still pending.[67]

The model of treatment provided for in the two Regulation Proposals should facilitate the movement of individuals and allow for a return to regular functioning and reinstatement of freedoms suspended by restrictions,[68] serving as a sort of *soft* reversal of the above-mentioned many measures involving different, lengthy checks on persons arriving from risk areas in another MS. To exemplify, under point 17 of the Council Recommendation (EU) 2020/1475, MSs could condition quarantine/self-isolation and/or test for SARS-CoV-2 infection prior to and/or after arrival to persons travelling from higher-risk areas in another MS. Further, persons travelling from "dark red" areas could have been subject to more rigid public health measures, and required to provide various proof, such as medical certificates, test results, or statements, which – due to a lack of standardized and safe formats – were often unaccepted. The EC therefore proposed the introduction of a framework established at EU level that would allow the issuing, verifying and accepting of vaccination certificates across the EU as part of the digital green certificate. The framework would also include other COVID-19-related certificates

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64 Gkotsopoulou, O.; Galatova, D., *Op-Ed*: *"The EU Digital Green Certificate proposed framework: how does it interact with data protection law?",* EU Law Live, 2021., [https://eulawlive.com/op-ed-the-eu-digital-green-certificate-proposed-framework-how-does-it-interact-with-data-protection-law-by-olga-gkotsopoulou-and-daniela-galatova/], Accessed 07 April 2021.

65 Procedure 2021/0068/COD COM (2021) 130: Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate),

66 General Secretariat of the Council, [https://www.consilium.europa.eu/en/documents-publications/public-register/public-register-search/results/?WordsInSubject=covid-19+vaccination&WordsInText=&DocumentNumber=&InterinstitutionalFiles=&DocumentDateFrom=&DocumentDateTo=&MeetingDateFrom=&MeetingDateTo=&DocumentLanguage=EN&OrderBy=DOCUMENT_DATE+DESC&ctl00%24ctl00%24cpMain%24cpMain%24btnSubmit=], Accessed 15 April 2021.

67 Sánchez Nicolás, E., *MEPs raise concerns on vaccine 'travel certificates'*, Euobserver, 2021, [https://euobserver.com/coronavirus/151529], Accessed 03 April 2021.

68 Brown, C. H., R.; Savulescu, J.; Williams, B.; Wilkinson, D., *Passport to freedom? Immunity passports for COVID-19*, J Med Ethics, 46, 2020, pp. 652–659.

issued during the pandemic (specifically, documents confirming a negative SARS-CoV-2 test result and documents confirming a past SARS-CoV-2 infection). Such interoperable framework would allow facilitating of free movement of persons who have not been vaccinated (either by choice or by circumstance).[69] With two adopted regulations establishing a framework for interoperability between EU information systems in the field of justice and interior, interoperability is hardly a novelty in EU legislation. The two regulations are aimed at improving security in the EU, allowing for more efficient checks at external borders, improving detection of multiple identities and helping prevent and combat illegal migration, all while safeguarding fundamental rights.[70] The interoperability of information systems allows their mutual complementing, facilitates the correct identification of persons, and contributes to the combatting of identity fraud. The certificates included in the DGC are to facilitate the exercise of the right to free movement. As stated by the EC in the DGC Regulation Proposals, the possession of a digital green certificate, especially a vaccination certificate, should not be a criterion for exercising one's right to free movement. Unvaccinated persons (not having been vaccinated for medical reasons, or due to not belonging to a vaccine target group, such as children, or by choice or circumstance) must be allowed to exercise their fundamental right to free movement, subject to restrictions such as obligatory testing and quarantine/self-isolation when required . As it is, the DGC Regulation Proposals cannot be construed as establishing a vaccination obligation or right.[71]

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69 COM(2021) 130 final 2021/0068(COD); "Interoperability may be defined as a characteristic of a product or system, whose interfaces are completely understood, to work with other products or systems, at present or in the future, in either implementation or access, without any restrictions. While the term was initially defined for information technology or systems engineering services to allow for information exchange, a broader definition takes into account social, political, and organizational factors that impact system to system performance. The concept of interoperability differs from neighboring concepts like integration, compatibilization or portability. Integration happens when two or more functions or components of the same system interact. Compatibility when two or more applications work in the same environment. Portability happens when an application can be transported from one environment to a different one without losing capabilities.", Oliveira, A. A.-Y., Recent developments of interoperability in the EU Area of Freedom, Security and Justice: Regulations (EU) 2019/817 and 2019/818. UNIO – EU Law Journal, 5(2), 2019, p. 128-135., p. 129.

70 Council of the EU*, Interoperability between EU information systems: Council adopts regulations* [https://www.consilium.europa.eu/hr/press/press-releases/2019/05/14/interoperability-between-eu-information-systems-council-adopts-regulations/] Accessed 03 April 2021; Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA.

71 COM(2021) 130 final 2021/0068(COD).

In theory, compared to vaccination certificates that would only allow inter-EU travel, digital green certificates would have a broader reach and could address the shortcomings of vaccination certificates. Vaccination certificates would allow unrestricted cross-border travel for vaccinated persons only, enabling each MS to set its own conditions for the entry of unvaccinated people to its territory. In effect, a host MS could impose for the unvaccinated even more stringent entry criteria, such as quarantine or even a total entry ban. The digital green certificate would curtail such an approach, instead – as stated in the Regulation Proposals – regulating and enabling free cross-border movement not only to vaccinated persons, but also to those holding a negative PCR test and those with antibodies developed post-COVID-19 recovery.[72]

From the comment of Manfred Weber, the German Member of the European Parliament – "Now that vaccination in Europe is increasing, we must have a perspective to returning to the fundamental right of free movement and travel in Europe." – it follows that the EU's larger aim may be the rollback to previous conditions and the recovery of the right to free movement.[73] Digital green certificates would ensure to southern states, such as Spain, Greece and Portugal, as well as Croatia, whose economies are most reliant on tourism, more or less favorable conditions, and facilitate the upcoming season.[74] The WHO's International Certificate of Vaccination or Prophylaxis (Yellow Card) – a well-known medical passport, certifying inoculation against cholera, plague, and typhus fever – shows that the digital green certificate would hardly be a novelty.[75]

The efficacy of the vaccine remains an open point. Currently, no scientific data confirm that vaccination prevents or minimizes chances of coronavirus transmission from vaccinated to non-vaccinated persons. In its interim position paper, the WHO was against requiring proof of COVID-19 vaccination as a condition of leaving or entering a country, "given that there are still unknowns regarding the efficacy of vaccination in reducing transmission", recommending that "people who are vaccinated not be exempt from complying with other travel risk-reduction

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72 Goldner Lang, I., *Vaccination for Vacation: Should the EU Have a "Digital Green Pass", "Vaccination Certificate" or Better Nothing?,* VerfBlog, 2021/3/16, [https://verfassungsblog.de/vaccination-for-vacation/], Accessed 05 April 2021.

73 Banks, Martin*, Commission's 'Digital Green Certificate' to help boost travel during the ongoing crisis,* The Parliament Magazine, 2021/3/15, [https://www.theparliamentmagazine.eu/news/article/commissions-digital-green-certificate-to-help-boost-travel-during-the-ongoing-crisis], Accessed 05 April 2021.

74 Henley, J., *Covid: EU unveils 'digital green certificate' to allow citizens to travel, The Guardian,* 2021/3/17, [https://www.theguardian.com/world/2021/mar/17/covid-eu-unveils-digital-green-certificate-to-allow-citizens-to-travel] Accessed 03 April 2021; Goldner Lang, *Vaccination for Vacation…, op.cit.,* note 72.

75 *Ibid.*

measures".[76] Precisely this raises the question of whether relying on proof of vaccination to permit secure cross-border travel without any additional precautions is sufficient. Vaccination can therefore be considered a reliable and appropriate proof of prevention or reduction of transmission only after reliable scientific data have emerged. Until then, the suitability test – the Achilles' heel of digital green certificates – will have to suffice.[77] Furthermore, vaccines have yet to be confirmed to be meeting the minimum requirements for the prevention of infection and disease; the specific difference in their effectiveness, too, has yet to be determined. This could prove especially difficult in regard to the vaccines not approved by the European Medicines Agency (EMA), such as in the case of the Russian and Chinese vaccines. Ultimately, the duration of immunity and protection of a vaccinated person against transmission will have to be determined.[78]

Once vaccines become widely available, digital green certificates will only be accepted if they are proportionate. The suitability test, as applied to determine proportionality, which would ensure that vaccination protects public health not only by providing protection only to those who have been vaccinated, but also by eliminating or substantially decreasing virus transmission to those who have not been vaccinated. This is in line with public health's main mission of protecting and improving the health of the whole population (rather than focusing on individuals only, which is the role of medicine).[79]

Despite all of the above, there is growing concern about potential discrimination. Although both DGC Regulation Proposals emphasize that vaccine cannot be the sole basis for freedom of movement, even such action could lead to discrimination. Persons who still cannot be vaccinated (whether by choice or by circumstance) must hold a negative PCR test if they have not recovered from COVID-19. In practice, such persons must be tested when entering or returning to another MS. By and large, such testing is still not free but rather expensive and out of reach to a large number of people. Such circumstances amount to inequality between those vaccinated free of charge and those unvaccinated (whether by choice or by circumstance) who cannot afford to get tested. A solution might be the offering of free tests to the unvaccinated.

Another issue relates to the digital form of digital green certificate. In the wrong hands, such a document could fall prey to hacker attacks and reveal more per-

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76 Goldner Lang, *Vaccination for Vacation […], op.cit.*, note 72

77 *Ibid.*

78 *Ibid.*; Dye, C.; Mills C. M., *COVID-19 vaccination passports*, Science, Vol 371, Issue 6535, 19 March 2021, [https://science.sciencemag.org/content/371/6535/1184.full], Accessed 05 April 2021.

79 Goldner Lang, *Vaccination for Vacation […], op.cit.*, note 72.

sonal information than designed. This was also pointed out by the Members of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), who called for a better technical and organizational framework of the certificates themselves, which would prevent potential abuse. Members of the LIBE also pointed out the issue of data management and data availability, referring to the General Data Protection Regulation (GDPR),[80] and offering as solution the application of the principle of minimization of personal data and time-limiting the use of such collected data to the end of pandemic to be declared by the WHO. In this regard, the European Data Protection Supervisor (EDPS) Wojciech Wiewiórowski presented to the LIBE the joint opinion of the EDPS and the European Data Protection Board (EDPB) on the EC's DGC Regulation Proposals. In the opinion, the EDPB and the EDPS highlighted that it is essential that the Proposal be coherent and not interfere with the GDPR's application in any way. Such opinion is not aimed only at legal certainty, but also at avoiding that the Proposals jeopardize, either directly or indirectly, the fundamental right to the protection of personal data, as established under Article 16 of the TEFU and Article 8 of the Charter of Fundamental Rights of the European Union.[81]

In turn, in his answers to MEP's requests for clarifications, European Commissioner for Justice Didier Reynders emphasized the EC's readiness to complete the required technical infrastructure work by the end of June, and that the certificate would not result in the creation of a central database at the EU level.[82] A further issue of such a document is that it would marginalize undocumented migrants, asylum seekers and refugees. Moreover, many asylum seekers simply do not possess the technology that could cater to the demands of such digitalization.[83]

In parallel with the EU action, in April 2021, the Council of Europe (CoE) issued to its member states guidance to safeguarding human rights. The document outlines the applicable human rights requirements for addressing the issuing of

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80 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

81 EDPB-EDPS Joint Opinion 04/2021 on the Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic (Digital Green Certificate) 31 March 2021.

82 Digital Green Certificate: MEPs seek clarifications regarding the travel facilitation tool [https://www.europarl.europa.eu/news/hr/press-room/20210407IPR01517/digital-green-certificate-clarifications-needed-on-travel-facilitation-tool], Accessed 15 April 2021.

83 Williams, O., *Vaccine passports and the threat to undocumented migrants ,Left Foot Forward,* [https://leftfootforward.org/2021/04/vaccine-passports-and-the-threat-to-undocumented-migrants/], Accessed 13 April 2021.

digital green certificates. In addition, it underlines the importance of intensifying efforts in producing and administering vaccines in an equitable manner, in accordance with the Convention on Human Rights and Biomedicine (Oviedo Convention), so that restrictions on individual freedoms can be progressively removed as broader immunity is achieved. Additionally, in the context of traveling, the CoE underscored the importance of taking any steps to facilitate the certifying of individuals' health status relating to COVID-19 (vaccinated, immune or infection-free) – provided that personal data are secured and anti-counterfeiting steps taken. The document invites MSs to act in line with the Convention for the protection of individuals with regard to automatic processing of personal data, the Convention on cybercrime (Budapest Convention), and the Convention on the counterfeiting of medical products and similar crimes involving threats to public health (MEDICRIME Convention).[84]

Between March 2020 and March 2021, or – more precisely – up to the adoption of the DGC Regulation Proposals, the EU had taken action by way of soft law instruments.[85] Such modus allowed MSs a wider array of actions and adoption of national decisions, independent from the EU. It could be argued that the simplicity of the soft law adaptation procedure is the primary advantage of soft law in times of crisis, where its flexibility in addressing situations where quick action is of great importance.[86] Nevertheless, soft law mechanisms and their impact on MSs' actions should not be underestimated. The DGC Regulation Proposals were a step further, and such treatment good from standpoint of urgency and the need for a harmonized approach to the overall situation with the aim of restoring freedom of movement. However, from the standpoint of the MSs, it might not be the optimum solution. While the DGC Regulation Proposals are focused on the matter of facilitating freedom of movement – one of the fundamental rights of the EU, the mechanisms for exercising that very right may prove to be a bone of contention in regard to the protection of personal data and the protection of fundamental rights.

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84 Vaccine passports: Council of Europe issues guidance to governments to safeguard human rights, [https://www.coe.int/en/web/human-rights-rule-of-law/-/vaccine-passports-council-of-europe-issues-guidance-to-governments-to-safeguard-human-rights?fbclid=IwAR1Bb4dSIl0EO1alJ-9mg-SM7ARg7q9VbNxfcvguHDcAwTP4GhLOtO3pUaiI], Accessed 15 April 2021.

85 Eliantonio, M.; Korkea-Aho, E.; Vaughan, S., *EJRR Special Issue Editorial: COVID-19 and Soft Law: Is Soft Law Pandemic-Proof?,* European Journal of Risk Regulation, Cambridge University Press, Vol. 12, Issue 1, 2021, pp.1-6; Eliantonio, M.; Ştefan, O.; *The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU*, European Journal of Risk Regulation, Cambridge University Press, Vol. 12, Issue 1, 2021, pp. 159-175.

86 Tsourdi, E.; Vavoula, N., *Killing me Softly? Scrutinising the Role of Soft Law in Greece's Response to COVID-19*, European Journal of Risk Regulation, Vol. 12, Issue 1, 2021, pp. 59-76.

5. CONCLUSION

The paper analyzed the two stages in the EU's and the MSs' fight against the COVID-19 pandemic. In the first stage, the MSs, acting independently, restricted the freedom of movement of persons, and the EU acted with soft law instruments. While the Council recommendations and EC guidelines, as analyzed herein, demonstrate that the EU had not exceeded its powers by acting through soft law instruments, their importance for the actions of the MSs should not be underestimated.

Under primary and secondary EU law, MSs may restrict the free movement of persons on three basic grounds: public safety, public order, and public health. However, the Schengen Borders Code – the legal basis for the closure of internal borders – provides only for public order and public safety as grounds for closing borders, and not public health. Directive 2004/38/EC, on the other hand, provides for restrictions on the free movement of persons (and residence of EU citizens and members of their families) on all three grounds, but its primary goal is not the mass restriction of freedom of movement, as caused by the COVID-19 pandemic, but an individual restriction of freedom, as has been confirmed by the CJEU. The COVID-19 pandemic found the EU unprepared, i.e., lacking legal regulation of restrictions on the free movement of people on grounds of protection of public health. Border closures and restrictions on the freedom of movement of workers can – unless interpreting it as the EU and the MSs having exceeded their powers – be justified solely by the precautionary principle, i.e., by the preservation of public safety in order to save human lives. In any event, the present situation has certainly revealed the need for amending secondary EU legislation, primarily the Schengen Borders Code.

The second phase in the fight against the COVID-19 pandemic started with the DGC Regulation Proposals. With the Proposals, the EU moved away from soft law instruments of action, instead proposing unified action regulated by regulations. Although the EC has repeatedly stated that neither vaccination nor testing can be a precondition for free movement, formalizing its position with a regulation is still pending. The period following a greater anti-COVID-19 vaccination coverage rate carries with it many a challenge. Would the limiting of free movement to digital green certificate holders only be legally justifiable? To what extent would such limiting violate fundamental human rights? Would the introduction of a digital green certificate be discriminatory if free testing were not provided to people who are unable or unwilling to receive the vaccine? Further challenges include the protection of personal data (currently being discussed in the EP's Subcommittee on Human Rights), as well as concerns related to the recognition of vaccines. Or, to illustrate in practical terms: should the digital green certificate

recognize only EMA-approved vaccines, what would it mean for the freedom of movement of, e.g., Hungarian citizens who have been vaccinated with, e.g., the non-EMA-approved Russian Sputnik vaccine?

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11. Vaccine passports: Council of Europe issues guidance to governments to safeguard human rights, [https://www.coe.int/en/web/human-rights-rule-of-law/-/vaccine-passports-council-of-europe-issues-guidance-to-governments-to-safeguard-human-rights?fbclid=IwAR1Bb4dSIl0EO1alJ-9mgSM7ARg7q9VbNxfcvguHDcAwTP4GhLOtO3pUaiI], Accessed 15 April 2021
12. Williams, O., *Vaccine passports and the threat to undocumented migrants ,Left Foot Forward,* [https://leftfootforward.org/2021/04/vaccine-passports-and-the-threat-to-undocumented-migrants/], Accessed 13 April 2021

UDK 364-646.2(4-67EU):614.4
Review article

HOW FIRM ARE THE BONDS THAT TIE THE EU TOGETHER? EU RULE OF LAW CONDITIONALITY MECHANISM AND THE NEXT GENERATION EU RECOVERY FUND*

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ABSTRACT

The Covid-19 pandemic has generated a one-in-a-generation challenge upon the EU, consisting of immediate danger for life and health, savings and jobs of its citizens, as well as for the stability and proper functioning of political and legal systems of its Member States. The manner in which the EU as a whole reacted to such sudden and grave challenge is by no means indicative of its political and legal-constitutional substance, and, consequently, of its capacity to subsist in its present form or to develop further.

The centrepiece of the Next Generation EU (NGEU) is the Recovery and Resilience Facility, which should help Member States address the economic and social impact of the COVID-19 pandemic. The establishment of the pandemic recovery fund may be regarded not only as an ad hoc measure, but also as a crucial milestone in the path to overcoming the disbalance between Union solidarity and national interests. However, the whole EU budget deal depended on the acceptance of the Rule of Law Mechanism by all Member States.

In the first part, this paper will analyse the COVID-19 recovery fund compromise solution as it has been finally agreed. Firstly, we will try to determine the effectiveness of the conditionality mechanism, in the light of European Council Conclusions on the "interpretative declaration on the new Rule of Law Mechanism" and its legal effects. Secondly, we will tackle the issue of the enforcement of the Rule of Law protection mechanism, having in mind the causal link

* This paper is the result of research conducted within the scientific project "Epidemija. Pravo. Društvo." [Pandemic. Law. Society] supported by the Faculty of Law, University of Belgrade.

that should be detected, between the protection of the financial interests of the EU, with the non-respect of the EU values enshrined in the Article 2 TEU, by particular Member State(s). Consequently, we will try to envisage the impact of the implementation of this conditionality mechanism, taking into consideration which Member States, and EU citizens, would be "hit" hardest by it.

In the second part of the paper an attempt shall be made to perceive the conditionality mechanism, tied to the recovery fund, from the perspective of the principle of solidarity.

Ultimately, this paper will try to answer the following question: in view of the necessary shift of priorities and the need for urgent reaction to the COVID-19 crisis, is the common European answer, in view of the core values of the EU and the principle of solidarity, optimal, and above all, will it be effective?

***Keywords**: Next Generation EU, Solidarity, Rule of Law, Conditionality Mechanism, COVID-19 pandemic*

1. INTRODUCTION

Jean-Claude Juncker, in capacity of the President of the European Commission, coined the term *polycrisis* for the purpose of denoting the multitude of challenges that the EU was faced with as the second decade of the 21st century progressed, in the wake of the 2008 global financial crisis: the sovereign debt crisis, also referred to as the Eurocrisis, external and internal security threats, the refugee crisis, the rise of populism which coincided with the Brexit and the rule of law backsliding in certain Member States.[1] These crises were mutually positively interrelated, i.e. fed each other. The EU articulated and applied various mechanisms and policies to address these challenges. As shall be seen, the plan to introduce the rule of law conditionality to the EU long-term budget (Multiannual Financial Framework – MFF) for the period 2021-2027 had predated the Covid-19 pandemic.

The *polycrisis* that exposed multiple vulnerabilities of the EU in the past decade has come to a completely different light during 2020. The Covid-19 pandemic struck, generating the worst crisis of the 21st century, at least so far, which has threatened to bring the economies of the EU and its Member States, along with the rest of the world, to their knees.

However, there are indications that in the midst of the social and economic crisis of such historic proportions, a transformation of constitutional, economic and political structures of the EU of commensurately historic significance has been taking place. Faced with the pandemic, the EU could not have confined itself to tackling

[1] *Speech by President Jean-Claude Juncker at the Annual General Meeting of the Hellenic Federation of Enterprises (SEV)* (2016) [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_2293], Accessed on 21 March 2021.

the consequences of Covid-19, the rule of law backsliding, Brexit or any other crisis independently of one another, as they transpired. The EU seems to have been forced to provide a common answer to these crises, one that should be based on core EU law principles of mutual trust and solidarity, in order to enable itself to move forward. In other words, the EU was suddenly hard-pressed to overcome its structural deficiencies.[2] In July 2020 a political agreement was reached by the European Council over a package comprising the 7-year EU budget and a recovery fund, totalling 1.8 billion Euro.[3] Differences between the stakeholders over the agreed-upon rule of law conditionality halted enactment of actual legislation implementing the package until December 2020, when a compromise on that issue was agreed upon by the European Council.[4] For the first time in the history of the EU, EU funding was conditioned upon respect of one of core values of the EU – the rule of law.

At first glance, the idea of linking, in relation to all Member States, the benefits of receiving proceeds from the EU budget and recovery funds with the respect of rule of law seems reasonable. It should, however, be analysed from several important perspectives. Is such conditionality necessary and may it be effective, in view of all the other tools on the disposal of EU bodies? Does it give excessive discretionary powers to the institution that is responsible for its implementation? Finally, does it create asymmetries that can negatively impact the relations between Member States, even though it is theoretically applicable to all Member States?

In this article we shall attempt to conceptualize the aforementioned issues from the perspective of EU constitutional law, to the extent possible in view of the chronological proximity and the open-endedness of subject events. We shall also try to understand whether such solution is sustainable in an environment of shifting policy and existential priorities, as well as whether it stands in accordance with, or is opposed to the core basis of the EU legal system, formed by certain values and principles, in particular by the principle of solidarity.

The application of the principle of solidarity to the Covid-19 recovery package has vastly remained in the shadow of the rule of law conditionality tied to that package, as well as by the overall gravity of consequences of the Covid-19 pandemic. We shall attempt to delineate the significance of the adopted mechanism for financing of the Covid-19 recovery fund for the overall constitutional structure of the EU, including the European Monetary Union (the EMU).

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2 For a comprehensive presentation of EU law, see Ćapeta, Tamara; Rodin, Siniša, *Osnove prava Evropske unije*, Narodne novine, Zagreb, 2018.

3 Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, Brusels, 21 July 2020, EUCO 10/20.

4 European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20, CO EUR 17 Concl. 8.

Both aforementioned aspects of the Covid-19 recovery package – the solidarity-based mechanism of financing assistance and the conditionality attached to said assistance – shall be compared to the instruments applied by the EU in response to the 2008 global financial crisis and the ensuing sovereign debt crisis that hit the EMU.

Finally, we shall explore the conflict between the principle of solidarity and the rule of law conditionality mechanism that became apparent in December 2020, when the two countries that were the likely targets of such conditionality threatened to block the entire recovery package. Was this antithesis coincidental, resulting from the idiosyncratic circumstances of the pandemic, political circumstances in certain Member States etc., or was it a symptom of a structural deficiency of the EU constitutional set-up?

Since true strength of a political community may only be assessed under stress, we shall attempt to assess whether a conclusion on the nature and quality of legal and political bonds tying the EU together may be formed on the basis of the analysis of two prominent features of the Covid-19 recovery package – solidarity-based debt-sharing and the rule of law conditionality.

2. RECOVERY FUND CONDITIONALITY: RULE OF LAW REPLACES FISCAL DISCIPLINE

2.1. Brief background on conditionality as tool of EU policies

According to Baraggia, conditionality can be defined as a tool for "building consent via the control of resources",[5] and is predicated upon asymmetry of the subjects involved.[6] It is undisputed that conditionality is not a new tool in EU policies. It has been implemented within the Enlargement and Neighbourhood policy,[7] as the defining element of the EU enlargement process,[8] in conjunction with the Copenhagen Criteria imposed upon candidate countries. In the EU external policy, conditionality is the most prominent feature of the pre-accession process. It is utilized for

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5 Baraggia, A., *The New Regulation on the Rule of Law Conditionality: a Controversial Tool with Some Potential*, 2020, [https://blog-iacl-aidc.org/2020-posts/2020/12/22/the-new-regulation-on-the-rule-of-law-conditionality-a-controversial-tool-with-some-potential], Accessed on 20 February 2021.

6 "Conditionality implies a relational but not equal position: the subject who poses the conditions exercises power over the recipient." Baraggia, *op. cit.*, note 5.

7 Kochenov, D., *Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law*, European Integration Online Papers (EIoP), Vol. 8, No. 10, 2004, [http://eiop.or.at/eiop/texte/2004-010a.htm], Accessed on 1 April 2021.

8 Heinemann, F., *Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework*, Intereconomics, Vol. 53, No. 6, 2018, pp. 297 - 301, [https://www.intereconomics.eu/contents/year/2018/number/6/article/going-for-the-wallet-rule-of-law-conditionality-in-the-next-eu-multiannual-financial-framework.html], Accessed on 1 April 2021.

bringing about positive judicial, administrative and economic developments in the accession candidate country.[9] As much as it generates political encouragement and enables financial support, it is also perceived as sometimes being both excessively vague and formal, permitting certain candidate countries to mask the actual state of affairs by "window dressing," i.e. by a purely technical fulfilment of the required conditions.[10] Conditionality has also been used for internal policy purposes, in cases involving a common EU interest.[11] In the area of agriculture, a Member State should grant additional financial incentives to farmers complying with the practices beneficial for the climate and the environment.[12] The Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania involved post-accession conditionality for the purpose of promoting judicial reform and anti-corruption measures.[13] The CVM was supposed to establish a bridge between the respect of rule of law during the pre-accession phase with post-accession fulfilment of certain benchmarks. From a broader perspective, however, it should be noted that room for carrying forward conditionality from the pre-accession to the post-accession period is limited by the principle of mutual solidarity, which governs relations between Member States.

Major EU spending programmes have been conditioned in a way to ensure sound administrative and financial management by the beneficiary of such funding.[14] All mechanisms of financial assistance which were implemented within the EU following the financial crisis of 2008 and the ensuing sovereign debt crisis involved conditionality.[15] It was in that period that conditionality became "the new topos of EU economic governance," according to Ioannidis, who pointed out that all

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9 See more in Szarek-Mason, P., *Conditionality in the EU accession process*, in: Szarek-Mason, P. (ed.), The European Union's Fight Against Corruption, The Evolving Policy Towards Member States and Candidate Countries, 2010, pp. 135-156.

10 See more in De Ridder, E.; Kochenov, D., *Democratic Conditionality in the Eastern Enlargement: Ambitious Window Dressing*, European Foreign Affairs Review, Vol. 16, No. 5, 2011, pp. 589–605.

11 For example, in case of the Cohesion Fund and its Conditionality Policy.

12 Regulation (EU) No 1307/2013 of the European Parliament and the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 [2013] OJ L 347/608.

13 Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, notified under document number C (2006) 6570 final [2006] OJ L 354/56.

14 Heinemann, *op. cit.*, note 8, p. 298.

15 On the constitutional significance of EU responses to the Eurocrisis see more in: Lukić, M., *Transformation Through Rescue - A Legal Perspective on the Response of the European Monetary Union to the Sovereign Debt Crisis,* Annals of the Faculty of Law in Belgrade - Belgrade Law Review, No. 3, 2013, pp. 187-198; Lukić, M., *Evro kao trojanski konj evropskog ujedinjenja - nadvladavanje suvereniteta država članica u ime štednje i solidarnosti* [The Euro as Trojan Horse of European Unification - Subduing Member State Sovereignty in the name of austerity], Pravo i privreda, Nos. 4-5, 2013, pp. 555-572.

financial assistance schemes to Member States included conditionality tied to fulfilling macroeconomic and budgetary conditions, assessing that "never before had European institutions been engaged in so close surveillance and micromanagement of such a wide spectrum of policies."[16]

In the interest of its wide-spread application to instruments for combatting the Eurocrisis, negative conditionality made its way into the Treaties. A new paragraph 3 was added to Article 136 of the Treaty on the Functioning of the European Union (TFEU) whereby Eurozone members were permitted to establish a stability mechanism "to be activated if indispensable to safeguard the stability of the euro area as a whole", under the condition that "the granting of any required financial assistance under the mechanism will be made subject to strict conditionality."[17] The amendment was challenged before the Court of Justice of the European Union (the CJEU) in the *Pringle* case. In its seminal judgment, the CJEU affirmed compatibility of the amendment with the EU law, stressing the importance of the strict conditionality requirement for the compliance of the subject mechanism with EU law.[18] According to a more recent analysis by Jacoby and Hopkin, however, the conditionality approach to imposing macroeconomic discipline in the Eurozone ultimately failed, so that monetary measures took center stage, for which conditionality had minor significance.[19]

The EU has been thus gradually introducing more and more conditionality mechanisms for the purpose of enhancing better governance in certain Member States, predominantly, but not exclusively, in relation to economic matters.

2.2. New mechanism for continuous rule of law monitoring and protection

Prior to undertaking the analysis of the Rule of Law Conditionality Mechanism attached to the MFF 2021-2027 and the NGEU, as the newest, and for now, the most discussed addition to the EU rule of law "toolbox", it is important to note

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16 Ioannidis, M., *EU Financial Assistance Conditionality after "Two Pack"*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law, Vol. 74, 2014, pp. 62-63, 103.

17 European Council Decision 2011/199/EU amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ 2011 L 91/1.

18 Case 370/12 *Thomas Pringle v Government of Ireland and Others* [2012] EU:C:2012:756, paras. 72, 111, 136, 143; for an in-depth analysis of the judgment see Lukić, M., *Presuda u slučaju Pringl (2012): pravno sredstvo nadmoći političke nad ekonomskom prirodom Unije,* in Vasić, R.; Čučković, B. (eds.) Identitetski preobražaj Srbije, Prilozi projektu 2017, Beograd 2018, pp. 63-78.

19 Jacoby, W.; Hopkin, J., *From lever to club? Conditionality in the European Union during the financial crisis*, Journal of European Public Policy, Vol. 27, 2020, pp. 1157-1177.

that in the same year in which that conditionality mechanism was enacted, the first Rule of Law Report was also published, setting forth the European Rule of Law Mechanism as a "as a yearly cycle to promote the rule of law and to prevent problems from emerging or deepening."[20] The report was issued in accordance with the Commission's Blueprint for action for the purpose of strengthening the rule of law, which had been published in 2019,[21] and in line with a number of resolutions of the European Parliament.[22] Both in the 2019 Blueprint for action and in the 2020 Rule of law report, the Commission provided rather detailed descriptions of the scope and elements of the rule of law principle. The structure of the 2019 Blueprint for action involved a differentiation of perspectives on rule of law that seems instructive on how the approach of the EU to tackling rule of law issues shall evolve in the future: treating rule of law, on one hand, as a "shared value for Europeans," and, on the other, as a "shared responsibility for all Member States and EU institutions."[23] The European Rule of Law Mechanism was envisaged as an *ex-ante* tool that should be based on inter-institutional dialogue through political and technical cooperation. The 2020 Rule of law report encompassed 27 country chapters, comprising assessments of the state of affairs with respect to rule of law in the Member States. Aside from being the first annual report issued under the new mechanism, it was also the first rule of law assessment done in the EU during the Covid-19 pandemic. The authors of the report deemed the pandemic a "stress-test for the rule of law resilience".[24] Four aspects, envisaged as the "pillars" of rule of law, were analysed: the level of trust in the checks and balances in the Member States, the functioning of the media and the civil society, as well as the resilience of the justice system during the pandemic.[25] The impact that the Covid-19 pandemic had on every aspect of governance seems to confirm the need for continuous monitoring of rule of law in the EU and the Member States.

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20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report, The rule of law situation in the European Union, Brussels, 30.9.2020, COM/2020/580 final.

21 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Strengthening the rule of law within the Union, a blueprint for action, COM/2019/343 final.

22 European Parliament Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, 2015/2254(INL); European Parliament Resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights, 2018/2886(RSP).

23 Strengthening the rule of law within the Union, a blueprint for action, *op. cit.*, note 21, pp. 2-3.

24 2020 Rule of Law Report, *op.cit.*, note 21, p. 6.

25 *Ibid.,* pp. 6-7.

From a static perspective, which does not take into account the growing role of EU citizens in the constitutional system of the EU, one could raise several objections to the potential effectiveness of this mechanism. First, aside from shedding light on pertinent issues and challenges and encouraging and enabling inter-institutional dialogue, it does not provide an answer on how to enable dialogue with States which intentionally choose not to respect rule of law. Second, having in mind that this kind of reporting is very similar to pre-accession reporting, it does not offer a new element to the already existing system that would enable linking "financial strings at the Union' disposal" with the respect of rule of law and other values in Member States.[26] This leads us to the analysis of the centrepiece of the heated compromise that was reached over the Covid-19 recovery instrument, which is supposed to protect rule of law by imposing conditionality of receiving financial assistance.

2.3. Linking rule of law with financial benefits

Precise understanding of the rule of law principle, as a meta-value, is a complex undertaking.[27] In addition, the attitudes towards various mechanisms for dealing with the rule of law crisis differed between EU institutions and Member States.[28] In this part of our contribution will attempt to provide more clarity on the newly introduced mechanism by understanding the *rationale* and the context in which that mechanism was enacted.

Prior to the regulation which is the subject of this article, instruments for addressing deficiencies of rule of law in Member States that were available to the Commission comprised the procedure under Article 7 of the Treaty on the European Union (TEU), which is supposed to address "a clear risk of a serious breach by a Member State" of values stipulated in Article 2 TEU and is primarily conducted before the Council, and the infringement procedure under Articles 258-260 TFEU, which is applicable "if a Member State fails to fulfil an obligation under the Treaties" and entails reference to the CJEU.[29] Blauberger and van Hüllen have

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[26] Kochenov, D., *Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law*, Hague Journal on the Rule of Law, Vol. 11, 2019, p. 425.

[27] See: Vlajković, M., *Rule of Law -EU's Common Constitutional Denominator and a Crucial Membership Condition*, ECLIC, EU 2020 – lessons from the past and solutions for the future, Vol. 4, 2020, pp. 235-257.

[28] See: Peirone, F., *The Rule of Law in the EU: Between Union and Unity*, Croatian Yearbook of European Law and Policy, Vol. 15, No. 1, 2019, pp. 57-98; Kochenov, D.; Pech, L., *Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation*, Journal of Common Market Studies, Vol. 54, Nstr.Nonih pitanja koje je proiziof Law, marijastr.Nonih pitanja koje je proiziof Law, marijano. 5, 2016, pp. 1063-1074.

[29] About the infringement procedure see: Petrašević, T.; Dadić, M., *Infringement procedures before the Court of Justice of the EU*, Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta

summarised the shortcomings of both mechanisms: while the application of Article 7, in terms of suspension of membership rights, is not always credible due to the requirement of unanimity in the Council, and is surely ineffective when more than one Member State is infringing upon Article 2 TEU values, infringement proceedings "typically target specific violations of EU law and cannot grasp the systemic nature of many small reforms adding up to significant democratic backsliding."[30] Other authors, however, point out to the fact that the CJEU has settled that "the attempted purge of Poland's Supreme Court was a violation of the rule of law under Article 2 TEU, concretized by Article 19 TEU," i.e. that "Article 2 TEU... can clearly be the subject of an infringement action."[31] In the same vein of thought lies the claim that, based on the experience gained until 2020, judicial mechanisms are more effective than political ones in relation to addressing rule of law violations, so that the infringement procedures from Articles 258 and 259 TEU should be applied in the form of "systemic infringement actions", based on the assumption that "the sum of numerous violations... is thus more important and qualitatively different than the individual violations that are more customarily alleged in infringements."[32]

So, where does the connection between the rule of law protection and the Covid-19 recovery response come to light? Firstly, the Covid-19 pandemic raised numerous important rule of law issues that are challenging not only for the Member States, but for the EU as a whole. This was underlined in the first Rule of Law Report, published in September 2020, in which it was highlighted that the "first reflection is on the rule of law culture and on the level of trust in the checks and balances in Member States."[33] Secondly, and perhaps more importantly, the rule of law conditionality that had been proposed in 2018 by the EU Commission[34] was

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Sveučilišta JJ Strossmayera u Osijeku, Vol. 29, Issue No. 1, 2013, pp. 77-98.

30 Blauberger, M.; van Hüllen, V., *Conditionality of EU funds: an instrument to enforce EU fundamental values?*, Journal of European Integration, Vol. 43, No. 1, 2021, p. 3.

31 Scheppele, K. L.; Pech, L.; Platon, S., Compromising the Rule of Law while Compromising on the Rule of Law, 2020, [https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/], Accessed on 21 March 2021, referring to Case 619/18, *European Commission v. Republic of Poland,* 2019, EU:C:2019:531.

32 A systemic infringement action would involve, according to this view, "making the pattern of Member State conduct the subject of a single infringement action and demonstrating to the ECJ that the pattern constitutes a systemic violation of EU values." Scheppele, K. L.; Kochenov, D. V.; Grabowska-Moroz, B., *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, Yearbook of European Law, Vol. 39, No. 1, 2020, p. 11, 119-120.

33 2020 Rule of Law Report, *op.cit.,* note 21, pp. 6-7.

34 Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States,

eventually implemented in 2020, as the mechanism to which implementation of the NGEU was supposed to be subordinated.

2.3.1. *Regulation proposal of 2018*

Approximately from the middle of the second decade of the 21st century, EU bodies have been faced with a pronounced backsliding of rule of law in certain Member States, namely Hungary and Poland. According to European officials, the issue was not only whether rule of law should have been protected in the EU legal and political system, but rather what was the most efficient way to do that. It seemed that in the cases of Hungary and Poland the institutions of the EU failed to do protect rule of law, or that they seemed to lack appropriate mechanisms. It was undisputed that EU values had to be preserved at all costs. According to Commissioner Reding, the rule of law is "in many ways a prerequisite for the protection of all other fundamental rights listed in Article 2 TEU and for upholding all rights and obligations deriving from the Treaties."[35] The imperative of preserving rule of law was the rationale of every "tool" that had been envisaged and/or implemented, starting from the activation of article 7 para. 1 TEU against Poland, the infringement procedures led before the Court of Justice of the EU (CJEU) against Hungary and Poland and numerous Commissions' communications.[36]

In 2018, the European Commission presented its Proposal for a Regulation on the protection of the Union's budget in cases of generalised deficiencies as regards the rule of law in the Member States (the 2018 Regulation proposal),[37] with the intention to thus provide a strong and efficient instrument for responding to the rule of law backsliding in certain EU Member States. The 2018 Regulation proposal purported to allow the Commission to suspend or cut funding under existing financial commitments, as well as prohibit the Commission to conclude new such commitments, in case of a finding of generalized deficiencies as regards rule of law in a Member State.[38]

COM/2018/324 final - 2018/0136 (COD).

35 Reding, V., European Commission, Speech, 4 September 2013, *The EU and the Rule of Law—What Next?*, 2013, [http://europa.eu/rapid /press-release_SPEECH-13-677_en.htm], Accessed on 18 April 2021.

36 Some of the key documents issued by the Commission in this respect are the Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM/2014/0158, and the Strengthening the rule of law within the Union, a blueprint for action, *op. cit.*, note 22.

37 Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final - 2018/0136 (COD).

38 For a detailed analysis of the strengths and weaknesses of the rule of law conditionality contained in the 2018 Regulation proposal, see Goldner Lang, I., *The Rule of Law, the Force of Law and the Power of*

The proposed procedure entailed the power of the Commission to submit an implementing act of appropriate measures to the Council, whereby such an act would have been adopted unless the Council rejected it with qualified majority.[39] The threshold for the Council to reject the implementing act was thus raised significantly by the proposal of so-called *reverse majority* voting. This mechanism was apparently taken over from the EMU regulation enacted in response to the Eurocrisis (the so-called *Six-pack, Two-pack*, as well as the *Common Provisions Regulation* of 2013[40] etc), which also featured, as has been already noted, prominent conditionality tied to macroeconomic and budgetary discipline. The fact stressed by Fisicaro, however, should be noted: "neither EMU sanctions nor macro-economic conditionality have ever been effectively applied."[41]

The 2018 Regulation Proposal left ample room for political manoeuvring by the EU Commission. First, the Commission had considerable leeway in determining what should be considered as a general deficiency, whether, in each particular case, there was one and to what extent it affected sound implementation of the EU budget or the financial interests of the Union. Second, the Commission was granted significant discretion in relation to establishing the measures which should be "proportionate to the nature, gravity and scope of the generalised deficiency as regards the rule of law."[42] Described provisions seemed to give rather wide discretionary powers to the EU Commission, which could have been perceived as a challenge to rule of law on the EU level, and in particular, as noted by Fisicaro, to the principles of legal certainty, transparency and non-arbitrariness.[43] Additionally, it seems that the existence and the substance of the rule of law deficiencies should not be determined merely on the basis of collecting "relevant information,"[44] with-

Money in the EU, Croatian Yearbook of European Law and Policy, Vol. 15, 2019, pp. 1-26.

39 *Ibid.*, Art. 5, paras. 7 and 8.

40 Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L 347/ 320.

41 Fisicaro, M., *Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values*, European Papers, Vol. 4, No. 3, 2019, p. 709.

42 Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final - 2018/0136 (COD), Art. 4, par. 3.

43 Fisicaro, *op. cit.*, note 41, p. 714.

44 Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final - 2018/0136 (COD), Art. 5, par. 2.

out specifying more precisely from which sources and in which manner the said information should be collected. *Argumentum a contrario* for this critical narrative may be the fact that this Proposal was brought up in 2018, before other mechanisms, such as the Rule of Law Report, which are also relevant for assessing the "deficiencies" and possibly a lack of respect of rule of law, were adopted.

The 2018 Regulation proposal faced significant criticism by the Legal Service of the Council. In its opinion,[45] the said service raised several important issues, emphasizing primarily the exact legal basis for enacting such a regulation: protecting sound implementation of the EU budget. The Council Legal Service concluded that the reference to rule of law in the Proposal was "neither necessary nor sufficient to establish a link with the sound implementation of the EU budget, which is required for a genuine spending conditionality," as well as that "a genuine conditionality mechanism cannot be based on the presumption that a risk for the EU budget necessarily exists once certain deficiencies are qualified as generalised."[46] On the basis of these general findings, the Council Legal Service proceeded to conclude that "the conditionality regime envisaged in the proposal as it currently stands, cannot be regarded as independent or autonomous from the procedure laid down in Article 7 TEU, as the respective aims and consequences of both procedures are not properly distinguished and risk overlapping with each other."[47] The Council Legal Service allowed the possibility that generalized malfunctioning of State authorities could justify activating a regime of conditionality aimed at protecting sound implementation of the EU budget, but spelled out specific conditions for such activation, insisting on the establishment of a concrete and direct link between malfunctioning of State authorities and the risk for sound financial management in the implementation of EU funds or the protection of the financial interests of the Union.[48] Finally, the Council Legal Service found that the reverse majority voting in the Council was not adequately justified in the proposal.[49]

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45 Opinion of Legal Service, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, Compatibility with the EU Treaties, Brussels, Interinstitutional File: 2018/0136(COD).

46 *Ibid.*, par. 51.

47 *Ibid.*

48 "(i) the cases of malfunctioning are identified with a clear and sufficiently precise definition; (ii) the malfunctioning affects or risks affecting *in concreto* the duty of sound financial management in the implementation of EU funds or the protection of the financial interests of the Union; (iii) the existence of a sufficient direct link between the malfunctioning and the use of the budget is established through verifiable evidence and (iv) the measures adopted are proportionate in volume to the negative effects of the malfunctioning on the use of the Union budget;" *Ibid.*

49 *Ibid.*

2.3.2. *Political agreement of July 2020*

The political agreement on the EU long-term funding and the Covid-19 recovery package was reached by the European Council on 21 July 2020. The negotiations lasted four days and nights, making that the second longest lasting European summit in history, only few minutes shorter than the Nice Summit in 2000.[50] It was agreed that the package would include, in addition to the 7-year EU budget amounting to approximately 1.1 trillion Euro, a recovery instrument, named "Next Generation EU" (NGEU), worth 750 billion Euro in 2018 prices.[51] The package that was agreed in July 2020 conformed mostly to the Commission's proposal, issued in May 2020.[52] The most contentious aspect of the entire package, due to which intense negotiations lasted for several days, was the overall size of grants under the NGEU, as well as the source of funding thereof.[53] It was finally agreed that the Commission would be authorized to borrow on the capital markets the entire amount of 750 billion Euro "on behalf of the Union."[54] The borrowing would need to stop by the end of 2026, and the repayments would need to be completed by the end of 2058.[55] The empowerment to borrow would take the form of the Own Resources Decision, which would include specific powers of the Commission to temporarily increase contributions by certain Member States in order that liquidity necessary for orderly repayment of borrowed funds be preserved.[56] Out of the total 750 billion Euro, 360 billion Euro could be loaned to Member States in need, whereas 390 billion Euro could be provided in the form of grants.[57] Most of the NGEU funds would be committed to the Recovery and Resilience Facility (RRF), encompassing the entire amount destined for loans (360

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50 *Four days, four nights: A look back on the special meeting of the European Council in July 2020*, 2020, [https://www.eu2020.de/eu2020-en/news/article/-/2370576], Accessed on 21 March 2021.

51 Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, Brussels, 21 July 2020, EUCO 10/20.

52 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions –Europe's moment: Repair and Prepare for the Next Generation, Brussels, 27.05.2020, COM/2020/456 final.

53 Sullivan, A., *Unmasking the EU's coronavirus recovery fund — the fine print*, 2020, [https://www.dw.com/en/unmasking-the-eus-coronavirus-recovery-fund-the-fine-print/a-54255523], Accessed on 1 March 2021.

54 Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, Brussels, 21 July 2020, EUCO 10/20, p. 2.

55 *Ibid.*, p. 3.

56 *Ibid.*, pp. 3-4.

57 The original proposal by France and Germany comprised granting the Commission authority to borrow 500 billion Euro, which would then be disbursed entirely in the form of grants. The reduction of the amount of grants was a compromise with the so-called "Frugal Four" group of countries, made up by Austria, Denmark, the Netherlands and Sweden. Sullivan, *op. cit.*, note 53.

million Euro) and 80% of the amount of grants (312,5 billion Euro).[58] It was left to the Commission to propose the set of allocation criteria for RRF commitments for years 2021 and 2022. For 2023, it was agreed that the unemployment criterion would be replaced by the loss in real GDP observed in 2020-2021, i.e. resulting from the Covid-19 pandemic. All grants under the RRF would have to be fully committed by the end of 2023.[59] The allocation of funds under the RRF was also made conditional upon the assessment of recovery and resilience plans which each Member State would have to prepare. In addition to previously established criteria for such plans, a requirement was added that "effective contribution to the green and digital transition shall also be a prerequisite for positive assessment."[60] The European Council statement included clear indications of the limited purpose of the NGEU: "given that NGEU is an exceptional response to those temporary but extreme circumstances, the powers granted to the Commission to borrow are clearly limited in size, duration and scope", as well as that "the Union shall use the funds borrowed on the capital markets for the sole purpose of addressing the consequences of the Covid-19 crisis."[61] The European Council Statement laid out a plan for increasing own resources of the Union, which was clearly related to the increased financial obligations of the EU in the coming decades due to the NGEU. The plan provided for, *inter alia,* a levy on non-recycled plastic waste.[62]

A rather interesting wording was included in the European Council statement in relation to the agreement: "The Union's financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU."[63] In other words, the values of Article 2 TEU would not be enforced for their absolute binding effect, but because it was necessary to protect the Union's financial interests in accordance with, *inter alia*, the said values. The subsequent paragraph included the stipulation that "a regime of conditionality to protect the budget and Next Generation EU will be introduced. In this context, the Commission will propose measures in case of breaches for adoption by the Council by qualified majority."[64] It seems that this was the point at which the Commission was forced to abandon its push for voting by reverse qualified majority, made in the 2018 Regulation proposal.

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58 Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, Brussels, 21 July 2020, EUCO 10/20, p. 5.

59 *Ibid.*, pp. 4-5.

60 *Ibid.*, p. 6.

61 *Ibid.,* p. 3.

62 *Ibid.*, p. 8.

63 *Ibid.*, p. 15.

64 *Ibid.*, p. 16.

2.3.3. *Regulation on rule of law conditionality*

The transposition of the substance of the political agreement of July 2020 into a package of legislation involving EU long-term budget and Covid-19 recovery funding was hindered, during the Fall of 2020, by the opposition of Poland and Hungary to the linking of the respect of rule of law with the EU budget and the recovery fund. The texts of the key parts of the package were largely agreed upon by the Parliament and the Council on 5 and 10 November 2020.[65] Following intense negotiations to break the political impasse, a compromise was reached by the European Council on 11 December 2020,[66] enabling the enactment of the entire legislative package in the days that followed, comprising the Multi-annual Financial Framework Regulation for years 2021-2027 (MFF 2021-2027),[67] i.e. the EU's 7-year budget, the Regulation on the EU Recovery Instrument,[68] which represented the legislative articulation of the NGEU fund stipulations made by the European Council in July 2020, and therefore the centrepiece of the EU response to the Covid-19 pandemic, the new Own Resources Decision enabling the borrowing of the NGEU funds and joint repayment thereof,[69] and the Rule of law conditionality regulation (the Regulation).[70] The package included also the Proposal for a Regulation establishing a Recovery and Resilience Facility (the RRF Regulation), which was enacted in February 2021,[71] and the Interinstitutional

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65 Council of the EU Press Release 5 November 2020*, Budget conditionality: Council presidency and Parliament's negotiators reach provisional agreement*, 2020, [https://www.consilium.europa.eu/en/press/press-releases/2020/11/05/budget-conditionality-council-presidency-and-parliament-s-negotiators-reach-provisional-agreement/], Accessed on 21 March 2021; Council of the EU Press Release 10 November 2020, *Next multiannual financial framework and recovery package: Council presidency reaches political agreement with the European Parliament*, 2020, [https://www.consilium.europa.eu/en/press/press-releases/2020/11/10/next-multiannual-financial-framework-and-recovery-package-council-presidency-reaches-political-agreement-with-the-european-parliament/], Accessed on 21 March 2021.

66 European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20, CO EUR 17 Concl 8.

67 Council Regulation (EU, Euratom) 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L 433 I/11.

68 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020], OJ L 433I/23.

69 Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020], OJ L 424/1.

70 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433 I/1.

71 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57/17.

Agreement between the Commission and the legislative bodies of the EU on budgetary discipline, sound financial management and new own resources.[72]

The enactment of the package was clearly a result of a series of compromises along several lines of disagreement. The so-called Frugal Four group of Member States opposed involvement of grants, which was being advocated by the countries whose economies were most affected by the pandemic, primarily Spain and Italy. The negative rule of law conditionality was supported by the Frugal Four, together with Germany and France, but it was fiercely opposed by Poland and Hungary, the most likely targets of such mechanism. According to de la Porte and Jensen, the compromise on the rule of law negative conditionality was made possible by the fact that details and procedures for application of that mechanism were not specified, as well as that the NGEU had been negotiated in parallel with the MFF, which had made possible incentives in the form of side payments and rebates.[73] While the compromise between the Frugal Four and Germany, on one hand, and France, Spain and Italy on the other, comprising rule of law conditionality as counterbalance to grants and an *ad hoc* and limited debt mutualization, seems to have been agreed at arm's length, the explanation offered by the said authors as the reason why Poland and Hungary abandoned their opposition to the negative rule of law conditionality does not seem plausible. The significance of the said conditionality, as well as its potential impact upon the political structures in Poland and Hungary far outweighed the prospect that opposing such mechanism by those two countries on the basis of ambiguous and incomplete legislation could be successful, as well as possible significance of side payments and rebates from the EU budget for the same two countries.

The changes undertaken in the Regulation with respect to the 2018 Regulation proposal resulted from a series of compromises between the Council and the European Parliament.[74] The difference between the title of the 2018 Regulation proposal and the title of the Regulation is conspicuous. The title of the Regulation

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72 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources, OJ L 433 I/28.

73 De la Porte, C.; Jensen, M. D., *The Next generation EU: An analysis of the dimensions of conflict behind the deal*, Social Policy & Administration, Vol. 55, 2021, pp. 1-15.

74 According to Dimitrovs and Droste, the difference between the approaches of the two institutions may be summarized as follows: for the Parliament, "the aim of the regulation was to protect the rule of law principle through the protection of the EU budget," whereas for the Council it was "to protect the EU budget through the protection of the rule of law." Dimitrovs, A.; Droste, H., *Conditionality Mechanism: What's In It?,* 2020, [https://verfassungsblog.de/conditionality-mechanism-whats-in-it/], Accessed on 16 March 2021.

lacks the wording "in case generalised deficiencies as regards the rule of law." The abbreviated title clearly shows the focus of the conditionality instrument which has been stipulated in the Regulation: the protection of the EU budget. The subject matter of the Regulation is defined as the establishment of "rules necessary for the protection of the Union's budget in case of breaches of the principles of the rule of law in the Member States,"[75] instead of "generalised deficiencies as regards the rule of law in the Member States."[76] The general condition for application of punitive measures against a Member State from the 2018 Regulation proposal, which required that a generalised deficiency as regards the rule of law "affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union"[77] has been somewhat narrowed in the Regulation by the requirement that that the said risk must be "serious", as well as that the subject influence must transpire "in a sufficiently direct way."[78] The use of the term "breaches," as well as the other two described changes, seem to have been devised to satisfy the objections to the 2018 Regulation proposal raised in the Council Legal Service opinion, the bottom line of which was that the causality between perceived breaches of rule of law and the negative consequences upon the EU budget and financial interests had to be concretized in order that the new mechanism could be sufficiently differentiated from the Article 7 TEU mechanism.

The set of measures which the EU bodies may implement against a Member State remained essentially the same in the Regulation as it has been envisaged in the 2018 Regulation proposal, comprising primarily suspension or reduction of payments from the Union budget, suspension or reduction of economic advantages under instruments guaranteed by the Union budget, or prohibition of undertaking new such instruments.[79] As has been already noted in relation to the July 2020 agreement, the voting requirement in the Council was significantly modified – reverse majority that had been provided for in the 2018 Regulation proposal did not remain in the Regulation.[80]

Another novelty in the Regulation was the so-called "emergency brake," which was stipulated in Recital 26 of the Regulation. The mechanism authorizes the Member State which is the subject of the proceedings under the Regulation, in case that it

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75 Regulation 2020/2092, Art. 3.

76 Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final - 2018/0136 (COD), Art. 3.

77 2018 Regulation proposal, Art. 3 para. 1.

78 Regulation 2020/2092, Art. 4 para. 1.

79 2018 Regulation proposal, Art. 4: Regulation 2020/2092, Art 5.

80 2018 Regulation proposal, Art. 5 para. 7: Regulation 2020/2092, Art 5.

"considers" that there were serious breaches of the principles of objectivity, non-discrimination and equal treatment in relation to imposing or lifting the measures based on the Regulation, to request that the President of the European Council refer the matter to the next meeting of the European Council, so that voting in the Council on the measures proposed by the Commission may not take place before the matter is discussed by the European Council. The "break" may not, however, stop the process for longer than 3 months.[81] It has been already explained by several authors that this mechanism has been placed in recitals because the European Council is not a legislative body, and cannot stop the adoption of measures.[82] It seems that the purpose of the mechanism is to secure additional time for high-level political consultations, but only in situations in which the affected Member State may reasonably claim that the procedure before the Commission violated due process principles.

2.3.4. *Political or legal compromise?*

As has been previously noted, the enactment of the entire financing package with the Regulation as its integral part was made possible by a compromise at the EUCO, following a political impasse, which had been created by Poland and Hungary, which threatened to block the adoption of the MFF 2021-2027 and NGEU due to the Regulation.[83] An important aspect of the compromise was articulated in the form of a declaration by EUCO, which was included in the EUCO statement on conclusions from the meeting (the EUCO Conclusions). It comprised two assertions about future actions of the Commission: that "the Commission intends to develop and adopt guidelines on the way it will apply the Regulation, including a methodology for carrying out its assessment... in close consultation with the Member States", as well as that "should an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment... Until such guidelines are finalised, the Commission will not propose measures under the Regulation."[84] Another assertion, included in the EUCO Conclusions, which in effect represents an instruction to the Commission on how the Regulation should be applied, was the following: "the application of the mechanism will respect its subsidiary character."[85]

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81 Regulation 2020/2092, Recital (26).

82 Dimitrovs; Droste, *op. cit.*, note 74.

83 Alemanno, A.; Chamon, M., *To Save the Rule of Law You Must Apparently Break It*, 2020, [https://verfassungsblog.de/tosave-the-rule-of-law-you-must-apparently-break-it/], Accessed on 21 March 2021.

84 European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20, CO EUR 17 Concl 8, I.2.c).

85 *Ibid.*

The European Parliament enacted a resolution on 17 December 2020 whereby it welcomed the political agreement on the package, recalled the historic importance of the package, but also expressed strong regret "that, due to the unanimity rule in the Council, the adoption of the entire package, ... , cause unduly delay for the entire process", and, in relation to the abovementioned declaration by the EUCO on the manner in which the Commission should proceed to apply the Regulation, it recalled that "the content of the European Council conclusions on the Regulation on a general regime of conditionality for the protection of the Union budget is superfluous;,,, the applicability, purpose and scope of the Rule of Law Regulation is clearly defined in the legal text of the said Regulation."[86]

The EUCO Conclusions were met with harsh criticism by legal scholars. According to Alemanno and Chamon, the issuance of the interpretative declaration by the EUCO "despite its political nature", represents, first, an *ultra vires* exercise of legislative function by the European Council, due to the requirement that the Commission adopts the guidelines and to the "conditioning the application of the mechanism to the finalisation of such guidelines," and, second, a violation of the principle of institutional balance, because it effectively gives suspensive effect to an action for annulment, contrary to Art. 278 TFEU, and because it comprises instructions to the Commission, contrary to Art. 17(3) TEU.[87] Scheppele, Pech and Platon claim that the adoption of the package, including the Regulation, "is not a victory for the rule of law", because "the Conditionality Regulation was once designed primarily for that purpose but now appears primarily designed to protect the budget because it can only be triggered when funds have already been misspent."[88] These authors claim that the EUCO Conclusions "systemically undermine" the Regulation. The principal basis for such finding is the view that the EUCO Conclusions substantially delay enforcement of the Regulation, by adding additional stages of application of the Regulation, including additional "layers of dialogue" (in points I.2.c) and I.2.g)), and making the duration of some of these stages dependent on the completion of proceedings before the CJEU. In view of the fact that NGEU funds should be spent by 2023, the warning of these authors, that the subject delay may very well mean that the Commission will be able to proceed with enforcing the application only after NGEU funds have been spent,[89] seems well-founded. A major departure from the language and meaning of the

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86 European Parliament resolution on the Multiannual Financial Framework 2021-2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation 2020/2923(RSP), Art. 4.

87 Alemanno, A.; Chamon, M., *To Save the Rule of Law You Must Apparently Break It*, 2020, [https://verfassungsblog.de/tosave-the-rule-of-law-you-must-apparently-break-it/], Accessed on 21 March 2021.

88 Scheppele; Pech; Platon, *op. cit.*, note 31.

89 *Ibid.*

Regulation is included in point I.2.f) of the EUCO Conclusions, which reads, *inter alia*: "The triggering factors set out in the Regulation are to be read and applied as a closed list of homogenous elements and not be open to factors or events of a different nature."[90] As Scheppele, Pech and Platon rightly note,[91] the cited phrase directly contradicts the wording of Art. 4(2)(h) of the Regulation, which makes the list of possible breaches of the rule of law principle, included in Art. 4(2), open-ended.

In accordance with what had been already expected at the time of the EUCO meeting in December 2020, in March 2021 Hungary and Poland challenged the rule of law conditionality mechanism entailed in the Regulation before the CJEU.[92] If the EU Commission follows the instruction entailed in the EUCO Conclusions, the application of the Regulation will thus be suspended until the CJEU decides upon the subject challenge.

2.4. Possible implications of adopted solutions

The contentiousness of the rule of law conditionality originated from pragmatic interests of the Member State governments and political structures which that conditionality had been designed to affect. It has generated the conceptual dilemma of whether the primary of aim of that mechanism is to protect the rule of law *per se*, or the financial interests of the Union. The paramount significance of the rule of law principle makes it harder to conceive the conceptual ambiguity that has burdened the introduction of that mechanism from the outset.

Having regard to the political impasse, that was overcome in midst of December 2020, with respect to the introduction of the rule of law conditionality, however, it may be proper to conceive that the introduction of that mechanism became subordinated to the need of adoption of the EU budget and the NGEU facility. After the compromise has been reached, new issues arise what should be the effects and legal implications of the European Council Conclusions,[93] that served as the basis for the compromise, and, consequently, what shall be the practical impact of the conditionality mechanism envisaged in the Regulation. Having regard to how that

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90 European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20, CO EUR 17 Concl 8, I.2.f).

91 Scheppele; Pech; Platon, *op. cit.*, note 31.

92 *Poland and Hungary file complaint over EU budget mechanism*, 2021, [https://www.dw.com/en/poland-and-hungary-file-complaint-over-eu-budget-mechanism/a-56835979], 2021, Accessed on 1 April 2021.

93 European Council meeting (10 and 11 December 2020) – Conclusions, Brussels, 11 December 2020, EUCO 22/20, CO EUR 17 Concl 8.

situation unfolded, one may wonder, in the context of the Covid-19 crisis, as well as of the readiness of certain Member State governments to condition adoption of the entire Covid-19 recovery instrument upon protection of their patently illegitimate particular interests, is it even possible to uniformly and effectively protect rule of law through such a mechanism? Having in mind the fact that Hungary and Poland managed to substantially delay the enforcement of the Regulation, the effects of the mechanism are put in doubt. It is probable that by the time the Court decides on the challenges to the Regulation initiated by Hungary and Poland, and by the time the Commission guidelines are adopted, the NGEU funds will have already been delivered and spent. A definitive EU-wide answer to such challenges is yet to be articulated, both by the CJEU in relation to the proceedings initiated by the Commission on one side and Poland and Hungary on the other, and by the Commission, in the form of either the guidelines for implementing the mechanism, or of actual enforcement of the Regulation.

Another consequence of the contentiousness of the mechanism was the need for compromises related to its enactment. The large extent to which the adoption of the recovery package has been burdened with compromises is well illustrated by the statement of the French President Mr. Macron, describing the July 2020 agreement as "not a perfect mechanism, but a mechanism that is able to change something fundamental."[94] Another illustration of the high level of controversiality of the rule of law conditionality, as one of the central features of the entire package, is the statement of the former president of the EU Commission, Jean-Claude Juncker, about the plan to link entitlement to receive EU funds with observation of the rule of principle, at the time when the plan was *in statu nascendi*, circulating in the form of a position paper presented and proposed by the German Government: "That would be the poison for the continent."[95] Juncker added that linking financial threat and some sort of the "punishment" for the lack of respect of rule of law would even divide the EU, and would also present a threat to the mutual trust and solidarity.

The fear that the conditionality mechanism may prove counterproductive in practice therefore seems natural. Notwithstanding certain provisions of the Regulation which aim to protect end-beneficiaries of EU funding from negative effects of the measures, eventually the citizens of a Member State against which measures under the Regulation are enforced shall become the hostages and victims of their

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[94] *How Europe reacted to the new EU budget and coronavirus recovery fund deal?*, 2020, [https://www.politico.eu/article/madness-and-historic-day-europe-reacts-to-the-budget-deal], Accessed on 21 March 2021.

[95] *Juncker: German Plan to link funds and rules would be "poison*", 2017, [https https://www.politico.eu/article/juncker-german-plan-to-link-funds-and-rules-would-be-poison/], Accessed on 18 March 2021.

government's actions. A similar criticism of the mechanism was proposed by Gros, Droste and Corti, who feared, *inter alia,* that "linking the budget to rule of law conditionality risks creating a paradox whereby a national government's infringement of the rule of law comes at the expense of the well-being of its citizens, especially the most disadvantaged among them."[96] The measures may also foster EU pessimism and negative feelings towards the EU among such citizens. The issues related to the breaches of the rule of law principle have so far been concentrated in the East, in former communist countries, so that application of the measures may strengthen the East-West divide.

Relying on the experience gained through application of the EU accession conditionality, as well as of economic sanctions, Blauberger and van Hüllen proposed a set of criteria for assessing the chances of success of the Commission's 2018 Regulation proposal: likelihood of application, size and speed of measures, determinacy of conditions for imposing the measures, context of application, perceived legitimacy of the measures.[97] The context of application relates to the "nature of the target regime and of the sender's relations with it." Some of the problems they identified were not sufficiently determined conditions for application of measures, as well as the *de facto* unequal vulnerability of Member States and lack of systemic monitoring procedures, affecting perceived legitimacy.[98] The changes made in the Regulation in comparison with the 2018 Regulation proposal, as well as the introduction of the EU Rule of law mechanism, that transpired in the meantime, seem to contribute to an improved score of the Regulation in terms of perceived legitimacy. In our view, the issues related to the "context of application", which concern the constitutional nexus between the EU, Member States and their citizens, remain to be pronounced, because the EU is able to tackle the rule of law deficiencies in one or more Member States only to a limited extent. For that reason, the assessment by Gros, who pointed out that it would not have been realistic to expect that a mechanism for protecting the rule of law *per se* could have been adopted, seems true.[99]

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96 Gros, D.; Blockmans, S.; Corti, F., *Rule of law and the Next Generation EU recovery*, 2020 [https://www.ceps.eu/rule-of-law-and-the-next-generation-eu-recovery/], Accessed on 16 January 2021.

97 Blauberger; van Huellen, *op. cit.*, note 38, pp. 3-13.

98 *Ibid.*, pp. 12-13.

99 "... the Regulation ... represents the utmost of what can be done within the existing legal order of the Union", since "the mechanism had to be limited to the 'defence of the financial interests' of the Union." Gros, D., *The European Council's compromise on the Rule of Law Regulation, Capitulation to illiberal states or misplaced expectations?*, 2020, [https://www.ceps.eu/the-european-councils-compromise-on-the-rule-of-law-regulation-capitulation-to-the-forces-of-evil-or-misplaced-expectations/], Accessed on 21 March 2021.

3. NEXT GENERATION EU AND SOLIDARITY

Solidarity as an ethical value transverses the domains of law, politics and ethics, but as a legal principle, it lies in the very foundation of EU law.[100] As has been already noted in the introductory part of this paper, the EU has been facing several crises throughout the past decades, some of which transpired simultaneously. Solidarity was the principal basis of the EU response to the sovereign debt crisis, which put the Euro in danger. On that occasion, however, solidarity did not cause a widespread use of grants for helping heavily-indebted countries, and rescue mechanisms in the form cheap loans, tied to macroeconomic austerity, were used instead. The crisis, however, was not overcome until the ECB President Mr. Draghi pledged "to do whatever it takes", referring to buying of bonds of the troubled Member-States by the ECB, which kept borrowing costs of such Member States sufficiently low.[101] Solidarity was at the very core of the migration crisis that ensued. The EU did not even consider closing its borders for migrants altogether, *inter alia* due to its commitment to solidarity as an ethical value. It was solidarity as the principle of EU law that motivated the EU bodies to require that Member States share with Italy and Greece the burden of accommodating migrants, since the borders of those two countries were the primary entry points for the waves of migrants.

Whenever an assistance mechanism is analysed from the perspective of solidarity, one should assess whether there were other reasons at play, other than solidarity, that motivated the creation of such mechanism, e.g. pragmatic self-interest. In relation to the Eurocrisis, it is conceivable that the benefits of preserving the Euro outweighed the risks associated with extending loans to Greece, Italy, Spain and Portugal, as well as of not objecting to bond-buying by the ECB. By the same token, did certain countries of the EU, faced with the impending workforce shortages, impose the *de facto* opening of EU borders to waves of migrants in 2015-2017? In respect of the NGEU, the following assessment of Darvas is worth noting: "even if NGEU has only a modest effect on growth, all EU countries are net beneficiaries."[102]

The fact that the EMU is asymmetric is widely known: it is a monetary union lacking a corresponding fiscal union. A fiscal union would entail full mutual-

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100 Lukić Radović, M., *Solidarnost u pravu Evropske unije*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2018.

101 Dullien, S.; Theobald, T.; Tober, S.; Watt, A., *Why Current EU Proposals for Corona-Related Financial Aid Cannot Replace Coronabonds*, Intereconomics – Review of European Economic Policy, Vol. 55, No. 3, 2020, pp. 152-153.

102 Darvas, Z., *The nonsense of Next Generation EU net balance calculations*, Policy Contribution, Issue no. 03, 2021, p. 15.

ization of debt. One may argue that the Member States with low debt-to-GDP ratios have reasonable and legitimate reasons not to mutualize debt with heavily-indebted States, but it may be argued as well that unwillingness to mutualize debt raised for the purpose of absorbing shocks, which hurt indebted countries disproportionately more than those which are not so much indebted, is a symptom of a lack of solidarity. The optimal balance lies in between such extremes, remaining largely dependent on the level of political integration within the EU at any given point in time.

The shock-absorbing function of the common budget is important in federations,[103] and is an embodiment of the principle of solidarity among constituent members of a federated entity.[104] Alcidi and Gros rightly point to the fact that "the bulk of Next Generation EU is not expected to have a shock-absorbing function, ... its purpose resembles the traditional EU budget where common financial resources are pre-allocated at the beginning of programming period."[105] Such assessment is in stark contrast with black letter law of the Council Decision on the system of own resources of the EU, authorizing the Commission to borrow EUR 750 billion on behalf of the EU "for the sole purpose of addressing the consequences of the COVID-19 crisis through the Council Regulation establishing a European Union Recovery Instrument and the sectoral legislation referred to therein..."[106] It seems as though it was important to nominally promote the shock-absorbing function of the NGEU, and, consequently, the perception of solidarity in the EU.

In this respect, and for the purpose of putting the NGEU into a wider historic perspective of EU and EMU constitutional dynamics, it may be worth reminding of the roadmap for ensuring resilience of the EMU, comprised in the report by Mr. Van Rompuy, the president of EUCO, of December 2012. The roadmap comprised three stages: first, ensuring fiscal sustainability and breaking the link between the sovereigns and the financial sector, second, completing the integrated financial framework and promoting sound structural policies, and third, planned for realization after 2014, improving the resilience of the EMU through the creation of a shock-absorption function at the central level. The third stage was more closely described as „establishing a well-defined and limited fiscal capacity to improve the absorption of country-specific economic shocks, through an insurance

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103 Alcidi, C.; Gros, D., *Next Generation EU: A Large Common Response to the COVID-19 Crisis*, Intereconomics – Review of European Economic Policy, Vol. 55, No. 4, 2020, p. 203.

104 Gros, D., *Next Generation EU*, 2020, [https://www.ceps.eu/next-generation-eu-2/], Accessed on 21 March 2021.

105 Alcidi; Gros, *op. cit.*, note 103, p. 203.

106 Council Decision 2020/2053, Art. 5(3).

system set up at the central level."[107] The mechanism of funding of the NGEU, as well as the planned purpose of NGEU funds, certainly make the NGEU a step in the direction indicated in the cited report.

Although NGEU is both a temporary and an *ad hoc* mechanism, not entailing a full-fledged debt mutualization comprising joint and several liability of Member States for each other's debts, it is nevertheless of undisputedly historic significance, since it entails joint debt issuance by the Member States, as well as sharing of the burden of a very large recovery fund.

4. NET EFFECT OF NGEU – A STRONGER OR A WEAKER EU?

While the Covid-19 pandemic has attained historic proportions, the response of the EU to its negative economic consequences, in the form of the NGEU, seems to be on the path to gaining a commensurately historic significance for further EU legal, economic and political integration. The view that the pertinent legislative package represents one of the most ambitious EU integration projects so far[108] seems well justified for several reasons besides the sheer scale of the fund. From the perspective of its immediate effects, the package was a timely and adequate response to fears of the global markets in relation to the ability of certain EU Member States to withstand consequences of the Covid-19 pandemic. From a structural-constitutional perspective, the package entailed large-scale bond-issuance by the EU Commission and the mutualization of the debt thus created at the EU level. The recovery funds shall be to a large extent granted to to those in need, whereas the repayment of bonds shall be shared equally, according to a *pro rata* allocation based on gross national incomes of Member States at the time of repayment. As concisely pointed out by Tridimas, the package "interlaces response to the pandemic with policy priorities," and entails a substantial difference in comparison to the rescue mechanisms devised in response to the Eurocrisis, consisting in the fact that it had not been based on intergovernmental agreements outside of the Treaties, but was instead enacted within the realm of EU law.[109] The latter claim however seems excessively formalistic. It has been shown in the analytical parts of this paper that intergovernmental compromises in fact played a decisive role in the creation of the package. At this point in time it is difficult to predict which of the two facets of the package shall have a more pronounced

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[107] Towards a genuine economic and monetary union, Report by the President of the European Council Herman Van Rompuy, 5 December 2012.

[108] Gros, D.; Blockmans, S.; Corti F., *Rule of law and the Next Generation EU recovery*, 2020 [https://www.ceps.eu/rule-of-law-and-the-next-generation-eu-recovery/], Accessed on 16 January 2021.

[109] Tridimas, T., *Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?,* Croatian Yearbook of European Law and Policy, Vol. 16, 2020, p. 11.

long-term influence: the intergovernmental bargaining over particular interests of Member States, or the core substance of the package – the joint action required by solidarity, involving debt mutualization to certain extent, as well as the rule that every action of the Union, including an urgent response to a crisis with harsh economic consequences, must involve safeguards for respecting the core principles of the EU, rule of law in particular. It seems that from a future perspective, the latter shall be more prominent.

In view of the attempt by Hungary and Poland to blackmail the Council not to adopt the conditionality at the moment of dire need, of both the entire EU and certain of its less economically successful members in particular, for the recovery package to be adopted at the end of 2020, many voices in politics, law and academia have been asking whether a price tag was being attached to the commitment to rule of law. The question seems to have been misplaced for several reasons. First, mere linking, in the form of negative conditionality, of financial entitlements to the respect of rule of law does not necessarily mean that rule of law is supposed to be either sold or bought at a price. The second reason concerns the democratic legitimacy of the mechanism. Citizens of Member States which did not need the recovery package at all had the right to demand that their contributions to the recovery fund managed by the Union, and to grants in particular, be spent in line with the core values of that very Union; the citizens of Member States whose governments violate rule of law, on the other hand, should not benefit from EU funds if they continue to tolerate such governments.

In the multi-dimensional bargaining over the terms of the package, the inclusion of the rule of law conditionality was surely an important motive for the Frugal Four and Germany to accept grants and large-scale joint debt issuance. The reasons why Hungary and Poland accepted the conditionality, however, are less clear, since these two countries did not need recovery funds. Their acceptance probably may be only understood outside of purely legal/institutional framework. It is reasonable to assume that one of the reasons may have been the fear of the governments of those two Member States that they would face a strong negative backlash in domestic politics had they been perceived as the direct culprits for the failure of the EU to adopt the recovery mechanism, or forcing other Member States to circumvent the Treaties and adopt the new mechanism on an intergovernmental basis.

One should never overlook the fact that the legal basis on which the Regulation has been adopted defines its ultimate aim: protection of sound implementation of the EU budget, and not of the rule of law principle *per se.* Being aware of that fact, first, facilitates proper understanding of the Regulation and its potential ef-

fects, and second, puts an emphasis on the necessity of increasing direct political relations between EU bodies and EU citizens, since only increasing democratic accountability and legitimacy of EU bodies may successfully and sustainably counterbalance deficiencies of democratic governance at the level of Member States.

The fear, expressed by some authors,[110] that the package has somehow diminished the importance of solidarity in the EU constitutional framework, by coupling solidarity with conditionality, does not seem justified. First, as has been already noted, the large-scale joint debt-issuance, for the purpose of securing limited fiscal capacity with a shock-absorbing function at the central level, is a strong expression of solidarity. Second, the package seems to be the result of a considerable level of solidarity among Member States, in view of the fact that a substantial portion of the package comprises grants, as well as that there was no systemic risk for "frugal" Member States, which would make their participation in the recovery fund pragmatic. Both of these reasons represent marked differences in comparison with the circumstances and the EMU response to the Eurocrisis. Third, the manner in which the negotiations from July to December 2020 developed makes it obvious that in the present constitutional set-up of the EU the adoption of the package represents an outstanding achievement, opening the possibility of subsequent steps along the same normative path in the future. Although the NGEU is not a permanent mechanism, it clearly sets a precedent on the basis of which a more lasting solution may be devised in the future.

The Regulation by no means represents a valuable addition to the set of tools at the disposal of the EU Commission for safeguarding rule of law at the Member State level, complementary to the existing mechanisms. The controversies over the terms of its application should not cloud the broader view, which should take into account that adherence to the principle of solidarity enabled the EU to generate a globally competitive response to the Covid-19 crisis, and, at the same time, that the severity of that crisis could not have been exploited by certain Member States to prevent the EU from including the rule of law conditionality in the Regulation altogether. The attempt by such Member States to profit from the urgency of the recovery package, and the limited success these states realized in relation to delaying the application and limiting the scope of the Regulation, clearly shows that the constitutional set-up of the EU has reached the limits of intergovernmentalism, as well as that the core values of the EU may only be adhered to if political responsibility and political powers at the EU level are increased. The reason

[110] Fisicaro proposed the view that the Regulation marks a departure from the long-held paradigm of the decoupling of solidarity and conditionality in EU constitutional matters, paraphrasing the famous collocation by Schuman "*de facto* solidarity" as "*de facto* conditional solidarity." Fisicaro, *op. cit.*, note 41, p. 718.

is pretty straightforward – EU citizens, as individuals, are much more prone to pursuing values, such as rule of law and solidarity, than Member States, whose responsibilities may be distorted by self-serving interests of their governing political structures. Relying on the dichotomy from the Commission's 2019 Blueprint for action, it may be concluded that the extent to which the Europeans may promote rule of law as their shared value seems to be far greater than the extent to which rule of law may be upheld by the Member States as their shared responsibility.

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UDK 327(4-67EU):341.123:616-036.22
Review article

TRIGGERING EMERGENCY PROCEDURES: A CRITICAL OVERVIEW OF THE EU'S AND UN'S RESPONSE TO THE COVID-19 PANDEMIC AND BEYOND

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ABSTRACT

The large-scale COVID-19 pandemic is a severe public health emergency which poses distressing social and economic challenges to the international community as a whole. In order to provide immediate and effective support to affected welfare and healthcare systems as well as to build their lasting, inclusive and sustainable recovery, both the European Union and the United Nations have introduced a number of urgent measures aiming to help and protect citizens and economies.

This paper looks into the specificities of urgent procedures launched and carried out by the two most influential international organisations with a view to rapidly respond to the unprecedented COVID-19 crisis. More specifically, it focuses on the involved institutions and steps of urgent procedures as well as on their most remarkable outcomes. In the case of the European Union, the emphasis is put primarily on two Coronavirus Response Investment Initiatives (CRIIs), adopted during the Croatian Presidency of the Council in one of the fastest legal procedures in the history of the European Union, and the Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU) as an extension of the CRIIs' crisis repair measures. The overarching United Nations' response is assessed through an analysis of its urgent policy agenda developed on the premise that the COVID-19 pandemic is not only a health and socio-economic emergency but also a global humanitarian, security and human rights crisis. This particularly includes procedures foreseen by the Global Humanitarian Response Plan (GHRP) and the Strategic Preparedness and Response Plan (SPRP).

In addition, the aim of the paper is to provide a critical overview of the subject by highlighting three pivotal elements. First, the paper sheds light on the financial aspects of the urgent fight against the COVID-19 pandemic, necessary for turning words into action. Notably, this refers to funds secured by the Multiannual Financial Frameworks 2014-2020 and 2021-2027, and the Next Generation EU recovery instrument, on the one hand, and the UN COVID-19 Response and Recovery Fund, the UN Central Emergency Response Fund and the Solidarity Response Fund, on the other hand. Second, it offers a comparative evaluation of the end results of the European and global emergency procedures in mitigating the impacts of the COVID-19 pandemic. Finally, it summarises the underlying elements of measures governing the aftermath of the ongoing crisis, i.e. those promoting a human-centred, green, sustainable, inclusive and digital approach to future life.

***Keywords**: COVID-19 pandemic, emergency funding, European Union, United Nations, urgent procedures*

1. INTRODUCTION

Since the onset of coronavirus disease 2019 (COVID-19) in December 2019,[1] more than 2,800,000 people have died and 130,000,000 got infected worldwide.[2] Apart from tragic human losses and enormous pressure on the healthcare and public health sector,[3] the COVID-19 pandemic has rapidly led to a severe economic, social, humanitarian, human rights and environmental crisis.[4] In consequence, the global health emergency has triggered introduction of a series of immediate response and recovery measures at local, national, regional and international level. They all underscore the long-standing precept that "crisis situations call for special measures",[5]

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3 What Will be the Impact of the COVID-19 Pandemic on Healthcare Systems?, Deloitte, Paris, June 2020.

4 Impact of the COVID-19 Pandemic on Trade and Development: Transitioning to a New Normal, UNCTAD/OSG/2020/1, 19 November 2020; The Impact of the COVID-19 Pandemic on Jobs and Incomes in G20 Economies, ILO-OECD paper prepared at the request of G20 Leaders Saudi Arabia's G20 Presidency 2020, ILO-OECD, 2020; Alawa, J. *et al.*, *Addressing COVID-19 in Humanitarian Settings: A Call to Action*, Conflict and Health, Vol. 14, No. 1, 2020, pp. 1-4; Impact of the Coronavirus Disease (COVID-19) Pandemic on the Enjoyment of Human Rights Around the World, Including Good Practices and Areas of Concern, A/HRC/46/19, 18 January 2021; Prata, J. C. *et al.*, *COVID-19 Pandemic Repercussions on the Use and Management of Plastics*, Environmental Science & Technology, Vol. 54, No. 13, 2020, pp. 7760-7765.

5 Debates of the European Parliament (Mulder – ELDR, NL), Official Journal of the European Communities, No. 525-527, 9 October 1998, p. 298.

which in the current state of affairs inevitably include the element of urgency. The character of special measures differs greatly from those aiming to flatten the curve[6] to the ones defined to build long-term socioeconomic resilience.[7]

There is a growing body of legal literature examining and contextualising the effects of the COVID-19 pandemic and their countermeasures – from broader analyses of the preparedness rules codified in universal instruments[8] to more focused assessments of particular regional[9] and national[10] approaches to the ongoing crisis. This paper provides a fresh comparative outlook on the latest emergency responses to the COVID-19 crisis at European and global level. Although earlier scholarly writings explore certain common aspects of the universal and European perspective on the pandemic, such as the precautionary principle,[11] this research gives an original overarching insight into the most recent universal and European COVID-19 legislation and actions characterised by elements of urgency and financial upholding.

Thus, the following chapters examine the incidence and nature of urgency as a critical factor in recent procedures, tools, measures, action plans and funding schemes deployed by the two most influential international organisations – the European Union and the United Nations in addressing and mitigating the nega-

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6 Santos, J.; Pagsuyoin, Sh., *The Impact of "Flatten the Curve" on Interdependent Economic Sectors*, in: Linkov, I.; Keenan, J. M.; Trump, B. D. (eds.), COVID-19: Systemic Risk and Resilience, Springer, Cham, 2021, pp. 163-181.

7 Trump, B. D.; Keenan, J. M.; Linkov, I., *Multi-disciplinary Perspectives on Systemic Risk and Resilience in the Time of COVID-19*, in: Linkov, I.; Keenan, J. M.; Trump, B. D. (eds.), COVID-19: Systemic Risk and Resilience, Springer, Cham, 2021, pp. 1-11; Siders, A. R.; Gerber-Chavez, L., *Resilience for Whom? Insights for COVID-19 for Social Equity in Resilience*, in: Linkov, I.; Keenan, J. M.; Trump, B. D. (eds.), COVID-19: Systemic Risk and Resilience, Springer, Cham, 2021, pp. 373-389; Wells, E. M. *et al.*, *Real-time Anticipatory Response to COVID-19, A Novel Methodological Approach*, in: Linkov, I.; Keenan, J. M.; Trump, B. D. (eds.), COVID-19: Systemic Risk and Resilience, Springer, Cham, 2021, pp. 35-61.

8 De Guttry, A., *Is the International Community Ready for the Next Pandemic Wave? A Legal Analysis of the Preparedness Rules Codified in Universal Instruments and of their Impact in the Light of the Covid-19 Experience*, Global Iurist, Vol. 20, No. 3, 2020, pp. 1-41.

9 *E.g.* Van Schaik, L.; Jørgensen, K. E.; van de Pas, R., *Loyal at Once? The EU's Global Health Awakening in the COVID-19 Pandemic*, Journal of European Integration, Vol. 49, No. 8, 2020, pp. 1145-1160; Panebianco, S., *Towards a Human and Humane Approach? The EU Discourse on Migration Amidst the COVID-19 Crisis*, Italian Journal of International Affairs, Vol. 56, No. 2, 2021, pp. 19-37.

10 *E.g.* Bouhon, F. *et al.*, *L'État belge face à la pandémie de Covid-19: esquisse d'un régime d'exception*, Courrier hebdomadaire, No. 2446, 2020, pp. 5-40; Menoni, S., *Enhancing Current Practice from the Natural and Manmade Hazards Domain to Pandemic: Insights from the Italian Case*, in: Linkov, I.; Keenan, J. M.; Trump, B. D. (eds.), COVID-19: Systemic Risk and Resilience, Springer, Cham, 2021, pp. 75-103.

11 The precautionary principle is a recognised legal principle in both International and European Law. It promotes the "better safe than sorry" approach and allows for the application of preventive measures even before a scientific consensus is reached. See: Meßerschmidt, K., *COVID-19 Legislation in the Light of the Precautionary Principle*, The Theory and Practice of Legislation, Vol. 8, No. 3, 2020, pp. 267-292.

tive effects of the COVID-19 pandemic. With a view to providing immediate and effective support to affected welfare and healthcare systems as well as to building their lasting, inclusive and sustainable recovery, both the European Union and the United Nations have introduced a number of urgent measures aiming to help and protect citizens and economies. Given their numerousness and heterogeneity, the analysis is limited to the principal and systematic mechanisms that form the backbone of the international response to the COVID-19 pandemic.

The inquiry into the European Union's countermeasures puts emphasis on two Coronavirus Response Investment Initiatives (CRIIs), adopted during the Croatian Presidency of the Council of the European Union in one of the fastest legal procedures in the history of the European Union, and the Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU) as an extension of the CRIIs' crisis response and repair measures. The comprehensive United Nations' response is assessed through examination of its urgent policy agenda developed on the premise that the COVID-19 pandemic is not only a health and socio-economic emergency but also a global humanitarian, security and human rights crisis. This particularly includes procedures foreseen by the Global Humanitarian Response Plan (GHRP) and the Strategic Preparedness and Response Plan (SPRP).

Introduction of adequate measures requires adequate funding, so the following chapters carefully link urgent actions with targeted sources of financing. In the event of the European Union, this refers to funds secured by the Multiannual Financial Frameworks 2014-2020 and 2021-2027, and the *Next Generation EU* recovery instrument 2021-2023, while the United Nation's financial response encompasses the UN COVID-19 Response and Recovery Fund, the UN Central Emergency Response Fund and the Solidarity Response Fund.

The closing remarks of the analysis provide a consolidated assessment of the success of the measures introduced by the European Union and the United Nations and compare their scope, with a view to the anticipated uncertain process of socio-economic recovery. Historically, both the European Union and the United Nations arose from crises and were significantly shaped thereby. As Ladi and Tsarouhas argue with respect to the European Union, "previous crises have led to incremental changes", which included the strengthening of current and introduction of new tools capable to respond to contemporary challenges.[12] The same viewpoint is also

[12] Ladi, S.; Tsarouhas, D., *EU Economic Governance and COVID-19: Policy Learning and Windows of Opportunity*, Journal of European Integration, Vol. 42, No. 8, 2020, pp. 1043-1044. On adaptation to crises and building resilience see also: Haldon, J. *et al.*, *Between Resilience and Adaptation: A Historical Framework for Understanding Stability and Transformation of Societies to Shocks and Stress*, in: Linkov, I.; Keenan, J. M.; Trump, B. D. (eds.), COVID-19: Systemic Risk and Resilience, Springer, Cham, 2021,

applicable to the United Nations. Our research confirms that, drawing on past experiences, the introduction of the COVID-19 crisis response and crisis repair measures by the European Union and the United Nations could be seen as, what Ladi and Tsarouhas call, "windows of opportunity" for future (socio) economic governance.[13]

2. EUROPEAN UNION AND ITS URGENT RESPONSE TO THE COVID-19 PANDEMIC

2.1. In a Nutshell

If at a specific moment circumstances, particular interests or needs in the European Union so require, the European Union's co-legislators may resort to a special procedure to bring legislation into force instead of employing the ordinary legislative procedure (OLP).[14] The main characteristic of the OLP is adoption of legislation jointly and on an equal footing by the European Parliament and the Council of the European Union.[15] In general, a legislative proposal – a regulation, a directive or a decision is presented by the European Commission and then debated in up to three readings whereat the two co-legislators may agree upon the joint text thereof. If they reach agreement, the procedure is thereby closed, at any reading.[16] The internal legal acts of the co-legislators define possibilities on how to proceed with the urgent procedure. More specifically, the European Council, the Council of the European Union and the European Parliament define the possibility of using urgent procedures in their rules of procedure. The respective rules do not define how long the urgent procedure should last, but they determine steps that lead to a faster legislative procedure and entry into force of a legal act. In some

pp. 235-268.; Hynes, W. *et al.*, *Complexity, Interconnectedness and Resilience: Why a Paradigm Shift in Economics is Needed to Deal with COVID-19 and Future Shocks*, in: Linkov, I.; Keenan, J. M.; Trump, B. D. (eds.), COVID-19: Systemic Risk and Resilience, Springer, Cham, 2021, pp. 61-75.

13 Ladi; Tsarouhas, *ibid.*, p. 1041-1056.

14 The co-decision procedure for adopting EU legislation was first introduced in 1992. When the Treaty of Lisbon entered into force in 2009, the term 'co-decision procedure' was replaced by 'ordinary legislative procedure'. In the ordinary legislative procedure, the two co-legislators are equal, which means that they both have a deciding vote or may amend a proposal in the legislative process. Loewenthal, P.-J., *Articles 289-292*, in: Kellerbauer, M.; Klamert, M.; Tomkin, J. (eds.), The EU Treaties and the Charter of Fundamental Rights – A Commentary, Oxford University Press, Oxford, 2019, p. 1912.

15 Consolidated Version of the Treaty on the Functioning of the European Union, *OJ C 202, 7 June 2016, Article 289*; Craig, P.; de Búrca, G., *EU Law – Text, Cases, and Materials*, Oxford University Press, Oxford, 2020, pp. 164-172; Schütze, R., *An Introduction to European Law*, Oxford University Press, Oxford, 2020, pp. 37-45.

16 Leino, P., *The Politics of Efficient Compromise in the Adoption of EU Legal Acts*, in: Cremona, M.; Kilpatrick, C., (eds.), EU Legal Acts: Challenges and Transformations, Oxford University Press, Oxford, 2018, pp. 30-70.

circumstances, such as the COVID-19 pandemic, time can be crucial and special procedures are of particular importance.

The COVID-19 crisis was first recognised as a health crisis. Given the limited competence and legislative powers of the European Union in the field of health, there was an omnipresent fear that the common European response to a new health emergency would not be adequate.[17] In addition, the EU Member States were rather uncoordinated in supporting and funding their own global health priorities before the COVID-19 pandemic.[18] However, the following chapters on specific cases of the EU's urgent actions demonstrate the ability of the European Union to flexibly respond to an unprecedented health situation with a set of effective measures which successfully combine urgent interventions in the health sector with those in economy and labour rights. This conclusion is in line with what Wolff and Ladi described as a proven "degree of (the EU's) adaptability to a 'permanent' emergency mode".[19]

Before thoroughly examining the latest urgent measures introduced by the European Union amidst the ongoing COVID-19 crisis, the following chapter offers a brief overview of the rules of procedure regulating possible urgent steps of three EU instances: the European Council, the Council of the European Union and the European Parliament.

2.2. Rules of Procedure

2.2.1. *European Council*

According to Article 7 of the Rules of Procedure of the European Council, "Decisions of the European Council on an urgent matter may be adopted by a written vote where the President of the European Council proposes to use that procedure. Written votes may be used where all members of the European Council having the right to vote agree to that procedure."[20] In other words, the respective rule allows the co-legislator to opt for an emergency procedure when consent can be effectively obtained in writing. The General Secretariat of the Council regularly

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17 See more: Delhomme, V., *Emancipating Health from the Internal Market: For a Stronger EU (Legislative) Competence in Public Health*, European Journal of Risk Regulation, Vol. 11, No. 4, 2020, pp. 747-756.

18 Van Schaik; Jørgensen; van de Pas, *op. cit.*, note 9, pp. 1146; Beaussier, A.-L.; Cabane, L., *Strengthening the EU's Response Capacity to Health Emergiencies: Insights from EU Crisis Management Mechanisms*, European Journal of Risk Regulation, Vol. 11, No. 4, 2020, p. 808.

19 Wolff, S.; Ladi, S., *European Union Responses to the COVID-19 Pandemic: Adaptability in Times of Permanent Emergency*, Journal of European Integration, Vol. 42, No. 8, 2020, pp. 1025-1040.

20 European Council Decision of 1 December 2009 adopting its Rules of Procedure, *OJ L 315, 2 December 2009.*

prepares a summary of acts adopted within the written procedure.[21] The European Council, as the highest instance of political decision-making, does not take part in every urgent legislative process and acts only on issues of the highest political importance.

2.2.2. *Council of the European Union*

The urgent steps of the Council of the European Union are regulated by Article 12 of the Rules of Procedure of the Council of the European Union on ordinary written procedure and silence procedure. Its paragraph 1 stipulates that "Acts of the Council on an urgent matter may be adopted by a written vote where the Council or Coreper unanimously decides to use that procedure. In special circumstances, the President may also propose the use of that procedure; in such a case, written votes may be used where all members of the Council agree to that procedure."[22] Furthermore, paragraph 1 also specifies that "Agreement by the Commission to the use of the written procedure shall be required where the written vote is on a matter which the Commission has brought before the Council".[23] In accordance with paragraph 2 of the same Article, "On the initiative of the Presidency, the Council may act by means of a simplified written procedure called 'silence procedure'", whereby the provision lists the cases in which the Council may resort to the silence procedure.[24]

2.2.3. *European Parliament*

The 9th parliamentary term of the European Parliament is underway (2019-2024), and its Rules of Procedure were updated accordingly in December 2019.[25] The relevant provision of the Rules of Procedure regulating the urgent procedure is Rule 163, which explains in detail who can launch the procedure and how it is handled. Paragraph 1 thereof stipulates that "A request to treat a debate on a proposal submitted to Parliament pursuant to Rule 48(1)[26] as urgent may be made to Parliament by the President, a committee, a political group, Members reaching at least the low threshold, the Commission or the Council. Such requests shall be

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21 *Ibid*.

22 Council Decision of 1 December 2009 adopting the Council's Rules of Procedure, OJ L 325, 11 December 2009.

23 *Ibid*.

24 *Ibid*.

25 Rules of Procedures, European Parliament 2019-2024 – 9th Parliamentary Term, European Parliament, January 2021, pp. 93-94.

26 *Ibid*., p. 36. Rule 48 relates to 'Consideration of legally binding acts'.

made in writing and supported by reasons."[27] Furthermore, paragraph 2 of the same Rule states that "As soon as the President has received a request for urgent debate this shall be announced in Parliament. The vote on the request shall be taken at the beginning of the sitting following that during which the announcement was made, provided that the proposal to which the request relates has been distributed to Members in the official languages. Where there are several requests for urgent debate on the same subject, the approval or rejection of the request for urgent debate shall apply to all such requests that are on the same subject."[28] In addition, Rule 163 clarifies who can speak during a hearing under the accelerated procedure and under what conditions. According to paragraph 3 thereof, "Before the vote, only the mover, and one speaker against may be heard, along with the Chair or rapporteur of the committee responsible, or both. None of those speakers may speak for more than three minutes".[29] In its paragraph 4, Rule 163 specifies that "Questions to be dealt with by urgent procedure shall be given priority over other items on the agenda". Finally, paragraph 5 accentuates that "An urgent procedure may be held without a report or, exceptionally, on the basis of an oral report by the committee responsible."[30]

2.3. Specific Cases of Urgent Procedures Triggered by the COVID-19 Pandemic with Special Emphasis on Cohesion Policy

2.3.1. *Coronavirus Response Investment Initiative (CRII)*

In order to contribute to the introduction of suppression measures related to the COVID-19 pandemic and limit its negative socio-economic impact on the European Union as a whole, the European Commission published the Communication 'Coordinated Economic Response to the COVID-19 Outbreak' on 13 March 2020.[31] Accompanied by three Annexes, the Communication launched a special investment initiative – Coronavirus Response Investment Initiative (CRII), to respond to COVID-19 with a particular package of measures which mobilises the existing liquidity of 8 billion euros under the Structural Funds of the European Union. This amount should trigger additional 29 billion euros of EU's co-financing from structural funding across the Member States, which would result in up to 37 billion euros directed into public investment to fight the COVID-19

27 *Ibid*., p. 93.

28 *Ibid*.

29 *Ibid*., pp. 93-94.

30 *Ibid*., p. 94.

31 Communication from the Commission 'Coordinated Economic Response to the COVID-19 Outbreak', COM(2020) 112 final, Brussels, 13 March 2020.

pandemic.[32] The package of measures is specifically defined in two new legislative proposals: (1) Proposal for a Regulation amending the following Regulations of the current financial period (2014-2020) – the Common Provisions Regulation (CPR), the European Regional Development Fund (ERDF) Regulation and the European Maritime and Fisheries Fund (EMFF) Regulation, for the purpose of introducing specific measures to mobilise investments in the health care systems of the Member States and in other sectors of their economies in response to the COVID-19 outbreak,[33] and (2) Proposal for a Regulation amending the Regulation on the EU Solidarity Fund, for the purpose of providing financial assistance to the Member States and countries negotiating their accession to the Union seriously affected by a major public health emergency.[34] Both Proposals were urgently presented and discussed within the Council of the European Union just four days after their publishing, *i.e.* at the meeting of the Working Party on Structural Measures (SMWP), held on 17 March 2020. The legislative package was adopted by the European Parliament already on 26 March 2020 and by the Council on 30 March 2020, and entered into force on 1 April 2020. This means that only 19 days passed from the day of the CRII's presentation to the entry into force of the package.[35]

In particular, the European Commission proposed to waive the obligation to request reimbursement of unused pre-financing for the European Structural and Investment Funds (ESIF) in 2020. This refers to the above-mentioned amount of 8 billion euros from the EU budget, which is additionally supplemented by up to 29 billion euros of unallocated Structural Funds from existing national envelopes to combat the crisis caused by the COVID-19 pandemic. The key element of the CRII is the rule that all potential expenditure to combat COVID-19 shall be eligible for funding from the Structural Funds from 1 February 2020. In addition, the European Commission also proposed the possibility of a significant transfer of funds within a programme in a simplified way. These measures allow the Member States to channel funds into support of their health systems, liquidity of

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32 *Ibid*., p. 7.

33 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013, Regulation (EU) No 1301/2013 and Regulation (EU) No 508/2014 as regards specific measures to mobilise investments in the health care systems of the Member States and in other sectors of their economies in response to the COVID-19 outbreak, COM (2020) 113 final, Brussels, 12 March 2020.

34 Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2012/2002 in order to provide financial assistance to Member States and countries negotiating their accession to the Union seriously affected by a major public health emergency, COM2020 114 final, Brussels, 12 March 2020.

35 This is the internal information of the Structural Measures Working Party (SMWP) of which the co-authors are members.

companies, and flexible working schemes as well as of upskilling and reskilling of workers. As part of the CRII, the European Commission also proposed to extend the scope of the EU Solidarity Fund (EUSF) to include the public health crisis. Around 800 million euros was made available for this purpose in 2020. Finally, the European Globalization Adjustment Fund (EGAF) was mobilized to support dissmissed workers and the self-employed with the allocation of around 179 million euros in 2020.[36]

2.3.2. *Coronavirus Response Investment Initiative Plus (CRII+)*

Since the negative socio-economic effects of the COVID-19 pandemic became more prominent after the adoption of the CRII's legislative package, the European Commission published, as soon as of 2 April 2020, a new Communication titled 'Responding to the Coronavirus – Using Every Available Euro in Every Way Possible to Protect Lives and Livelihoods'.[37] The legislative package, known as 'Coronavirus Response Investment Initiative Plus' (CRII+), proposed a set of measures in the area of Cohesion Policy to provide additional flexibility for the use of the European Investment and Structural Funds in response to the COVID-19 pandemic. Thus, a new legal basis for the regulation of this issue has become the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) no. 1303/2013 and Regulation (EU) no. 1301/2013 with regard to special measures to ensure exceptional flexibility for the use of the European Investment and Structural Funds in response to the outbreak of COVID-19.[38]

The CRII+ was designed to ensure support to citizens and liquidity of the financial sector, with particular emphasis on supporting small and medium-sized enterprises (SMEs). It was assumed that the GDP growth of the European Union would fall to zero or even below zero in 2020 due to the pandemic, so a coordinated economic response of the European Union's institutions and Member States was crucial to save lives and provide funds for the protection of the worst-affected workers and SMEs. A new, temporary instrument named 'Support to mitigate **U**nemployment **R**isks in an **E**mergency' (SURE) and worth 100 billion euros was proposed in the form of loans to the hardest hit countries mostly to help workers retain wages and help employers retain workers. In addition, the Euro-

36 Communication from the Commission, *op. cit.*, note 31, pp. 7-8.

37 Communication from the Commission 'Coronavirus Response – Using Every Available Euro in Every Way Possible to Protect Lives and Livelihoods', COM (2020) 143 final, Brussels, 2 April 2020.

38 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013 and Regulation (EU) No 1301/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak, COM/2020/138 final, Brussels, 2 April 2020.

pean Commission proposed some modifications related to the Fund for European Aid to the Most Deprived (FEAD) in terms of introduction of new delivery methods, such as electronic vouchers and purchase of protective equipment, in order to protect volunteers who deliver aid from getting infected by COVID-19. As farmers and the fisheries sector, who are severely affected by the health crisis, are central to food security across the EU, the European Commission also proposed flexible measures within the European Maritime and Fisheries Fund (EMFF) and the Common Agricultural Policy (CAP) to help them overcome the crisis. The CRII Plus enables mobilising all the unused funds of Cohesion Policy 2014-2020 (which includes the European Regional Development Fund – ERDF, the European Social Fund – ESF and the Cohesion Fund – CF) and maximum flexibility in their transfers. A great novelty introduced by the CRII+ is that no national co-financing will be requested for any of the funds. What was also proposed is that there are no restrictions when it comes to thematic concentration. With the aim of easing the administrative burden, the Member States will be exempted from the requirement to amend Partnership Agreements, the deadline for the submission of annual reports will be postponed and some flexibility was introduced when closing the programme.[39]

Soon after its introduction on 2 April 2020, the CRII+ was adopted by the European Parliament on 17 April and the Council of the European Union on 24 April 2020. The initiative came into force soon afterwards, on 24 April 2020, which was only 23 days after its presentation. This means that it took less than a month for both the CRII and the CRII+ to enter into force, which is considered as one of the fastest legal procedures in the history of the European Union.[40]

2.3.3. *Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU)*

The Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU) was introduced on 28 May 2020 as an extension of the CRIIs' crisis response and repair measures in the domain of Cohesion Policy.[41] Cohesion Policy is the European Union's main investment policy, which plays a major role in ensuring "a

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39 Communication from the Commission, *op. cit.*, note 37, pp. 2-6.

40 This is the internal information of the Structural Measures Working Party (SMWP) of which the co-authors are members.

41 Regulation (EU) 2020/2221 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU) No 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (REACT-EU), OJ L 437, 28 December 2020.

balanced recovery, fostering convergence and making sure no one is left behind" during and after the COVID-19 pandemic.[42] The global health emergency has led to the closure of companies and introduction of numerous restrictions in the Member States, which in turn has led to a significant decline in economic activity and severe social degradation. In order to prevent further widening of disparities and avoid uneven recovery, the European Commission proposed, with the introduction of the REACT-EU, to provide additional funding to the European Structural and Investment Funds (ESIF) for 2020, 2021 and 2022 in the amount of more than 58 million euros in current prices. This funding is completely fresh, it is a top up to 2014-2020 programmes and additional to the Cohesion Policy allocations 2021-2027.[43]

The REACT-EU complements the previously adopted CRIIs' amendments, which introduce special measures to mobilise investment in health care and economic systems in order to respond to the COVID-19 pandemic. The initiatives also offer appertaining special measures to provide exceptional flexibility for the use of the European Structural and Investment Funds. In this context, the European Commission has proposed to use the full potential of the EU budget to mobilise investment and financial support in the first years of recovery. Successful implementation of the REACT-EU is highly dependent on three building blocks – "its strength (financial allocation), speed (by using the existing programmes until 2023) and full flexibility of the implementation rules".[44] The financial scheme is based on two pillars – the European Recovery Instrument worth 750 billion euros (of which the REACT-EU is part) and the strengthened Multiannual Financial Framework (MFF) 2021-2027. Additional funding will also be distributed to the Member States from the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Fund for European Aid to the Most Deprived (FEAD) in 2021 and 2022. The distribution should support crisis management operations in the context of the COVID-19 pandemic in regions whose economies are severely hit thereby and are thus undergoing the process of preparing a green, digital and resilient recovery.[45]

The REACT-EU Regulation was adopted on 23 December 2020 and came into force on 1 January 2021.[46] Although the REACT-EU had all the preconditions to be adopted by a fast-track, urgent procedure, the co-legislators decided to make

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42 REACT-EU, [https://ec.europa.eu/regional_policy/en/newsroom/coronavirus-response/react-eu], Accessed 8 March 2021.

43 *Ibid*.

44 *Ibid*.

45 *Ibid*.

46 Regulation (EU) 2020/2221, *loc. cit.* note 41.

changes to the European Commission's proposal, which made the legislative process longer. Nevertheless, the adoption of the REACT-EU was much faster than the adoption of other legislative acts of the Cohesion Policy legislative package 2021-2027, the adoption of which required nearly three-year negotiations. It is important to note that the REACT-EU has enabled allocation of separate funding for the measures first envisaged by the CRIIs and then by the REACT-EU as a guarantee of an effective fight against the consequences of the COVID-19 pandemic.

3. UNITED NATIONS AND ITS URGENT RESPONSE TO THE COVID-19 PANDEMIC

3.1. In a Nutshell

On 25 June 2020, the UN released the first comprehensive overview of its urgent response to COVID-19,[47] soon followed by the second edition in September 2020,[48] highlighting the main pillars, actors, priorities, policies and funding sources of its overarching approach to the global health emergency. The two reports of utmost relevance for understanding the UN's approach to the COVID-19 crisis shed light on the fragility and inequality of our societies, accentuated by the pandemic and call for "a whole-of-society, whole-of-government and whole-of-the-world approach driven by compassion and solidarity".[49]

The United Nations response to the COVID-19 pandemic is structured around four principal objectives, similar to those of the EU: delivering an all-inclusive global response that leaves no one behind; reducing the level of vulnerability to future pandemics; building resilience to future shocks (esp. climate change); and overcoming severe and systemic inequalities revealed and potentiated by the pandemic. These objectives are achieved through three types of operations, depending on whether the response addresses health aspects; socioeconomic, humanitarian and human rights aspects; or recovery aspects of the crisis.[50]

The following chapters outline three distinctive modes of intervention employed by the United Nations to effectively deal with the consequences of the unprecedented COVID-19 pandemic and to set up a legal and socio-economic framework for post-

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47 United Nations Comprehensive Response to COVID-19: Saving Lives, Protecting Societies, Recovering Better, United Nations, New York, June 2020.

48 United Nations Comprehensive Response to COVID-19: Saving Lives, Protecting Societies, Recovering Better, United Nations, New York, September 2020.

49 *Ibid*., p. 6.

50 United Nations Comprehensive Response to COVID-19, *op. cit.*, note 47, pp. 5-6, 12-14.

pandemic resilience. First, the nature and role of the Special Procedures of the Human Rights Council in addressing the impact of the COVID-19 on human rights are thoroughly explained. Second, the features of two response plans – the Global Humanitarian Response Plan (GHRP) and the Strategic Preparedness and Response Plan (SPRP) are summarised. Finally, the last chapter looks into the financial aspects necessary to turn the United Nations' words into action, bringing attention to three funding sources – the UN COVID-19 Response and Recovery Fund, the UN Central Emergency Response Fund and the Solidarity Response Fund.

The nature of this paper limits the examination of the United Nations' actions to those with a high urgency factor only. Yet, it is essential to underline that the United Nation's activities related to the pandemic have been much more numerous, diverse and varied. Some fine examples of scholarly discourses elaborating these UN's interventions include de Guttry's broad investigation into the specificities pertinent to UN documents on major health issues and managing related disasters[51] and Cormacain's brief overview of some UN documents falling under the category of emergency legislation (as distinct from ordinary legislation).[52]

3.2. Modalities of the United Nations Urgent Interventions in Response to COVID-19

3.2.1. *Special Procedures of the Human Rights Council*

a) General Overview

The 2008 Manual of Operations of the Special Procedures broadly describes the system of the Special Procedures of the Human Rights Council as "a diverse range of procedures established to promote and protect human rights and to prevent violations in relation to specific themes or issues, or to examine the situation in specific countries".[53] It is considered as the central element of the United Nations

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51 De Guttry, *op. cit.*, note 8, pp. 8-14, 19.

52 Cormacain, R., *Keeping COVID-19 Emergency Legislation Socially Distant from Ordinary Legislation: Principles for the Structure of Emergency Legislation*, The Theory and Practice of Legislation, Vol. 8, No. 3, 2020, pp. 249-251.

53 Manual of Operations of the Specific Procedures of the Human Rights Council, Human Rights Council, New York, August 2008, p. 4. The system is primarily derived from the practice of the Commission of Human Rights, the establishment of which dates back to 1967. The current mechanism reflects the change in the UN human rights machinery, made in 2006 when the Human Rights Council replaced the Commission of Human Rights. Its legal basis was set out in 2007 by the Resolution 5/1 of the Human Rights Council on Institution-building of the United Nations Human Rights Council and Resolution 5/2 of the Human Rights Council on the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council. See: Report to the General Assembly on the Fifth Session of the Council, A/HRC/5/21, 7 August 2007; Mazur-Kumrić, N.; Komanovics, A., *The Human Rights*

human rights scheme[54] and as "the eyes and ears of the Human Rights Council".[55] During the COVID-19 pandemic, the Special Procedures have proved to be one of the backbones of the United Nations system for an urgent response to the crisis.

The Special Procedures is a term which specifically denotes independent UN human rights experts accountable to the Human Rights Council and mandated to carry out investigations on the allegations of human rights violations in all parts of the world[56]. Apart from investigating, their mandate also includes issuing recommendations on a particular thematic issue (thematic mandates) or country situation (country-specific mandates), which take full account of all human rights: civil, political, economic, social and cultural[57]. In addition, in their effort to adequately protect the victims or potential victims of human rights violations, their activities may include communicating information through letters of allegations or urgent appeals, issuing related recommendations and conclusions, country visits, thematic studies etc.[58] The interventions of the Special Procedures directed to Governments and other stakeholders (non-state actors) in the form of letters (urgent appeals, allegation letters, and other communications) may touch upon three types of human rights violations: one that has already taken place, one that is ongoing, and one with a high risk of taking place. Their subject may range from individual cases concerning one individual/one particular group to general examples of human rights abuses.[59]

The Special Procedures are also called mandate-holders and may be either an individual ("Special Rapporteur" or "Independent Expert") or a Working Group of five members representing the five UN regional groups (Africa, Asia and the Pacific, Eastern Europe, Latin America and the Caribbean, and the Western Europe and Others), "Special Representative of the Secretary General" and "Representative of the Secretary-General".[60] Regardless of their different titles, their responsibilities and methods of work are the

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Council and the Universal Periodic Review: A Novel Method of Promoting Compliance with Human Righs, in: Drinóczi, T. *et al.* (eds.), Contemporary Legal Challenges: EU – Hungary – Croatia, Faculty of Law, University of Pécs/Faculty of Law, J. J. Strossmayer University of Osijek, 2012, pp. 641-671.

54 Directory of Special Procedures Mandate Holders, HRC/NONE/2017/74/Rev.3/iPub, July 2020.

55 Subedi, S. P., *Protection of Human Rights through the Mechanism of UN Special Rapporteurs*, Human Rights Quarterly, Vol. 33, No. 1, 2011, p. 204.

56 Manual of Operations of the Specific Procedures of the Human Rights Council, *op. cit.*, note 53, p. 5.

57 *Ibid*.

58 *Ibid*., pp.14-26.

59 Mandates of the Special Rapporteur on the human rights of migrants *et al.*, UA OTH 87/2020, 15 January 2021, p.1.

60 Manual of Operations of the Specific Procedures of the Human Rights Council, *op. cit.*, note 53, pp. 5-7.

same or very similar.[61] It is important to note that they neither represent quasi-judicial mechanisms nor affect national judicial procedures[62]. As of 1 November 2020, there were 44 thematic and 11 country mandates with 79 mandate holders.[63]

b) Urgent Appeals

In exercising their functions at the time of the COVID-19 pandemic, the Special Procedures resort to a particular type of urgent procedures – urgent appeals. Pursuant to Article 10 of the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, "mandate-holders may resort to urgent appeals in cases where alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of a very grave nature to victims that cannot be addressed in a timely manner by the procedure of Article 9 of the present Code".[64] For example, the Special Rapporteur on the negative impact of unilateral coercive measures transmitted an urgent appeal to the Government of the United States of America for their trade embargo against Cuba, due to which the medical equipment donated by a Chinese entrepreneur for the purpose of fighting the pandemic could not be transferred to Cuba.[65] Another urgent appeal to the United States of America, prepared jointly by eight mandate-holders, threw light on the grave conditions of 819 migrant women confined at the Irwin County Detention Centre. It concerns the lack of appropriate protection measures during the COVID-19 pandemic since March 2020 onwards, but also a number of other alleged human rights abuses, additionally aggravated by the pandemic, such as the lack of access to healthcare, ill-treatment and medical-abuses (*e.g.* unwarranted gynaecological surgeries). [66] In both

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61 Manual of Operations of the Specific Procedures of the Human Rights Council, *ibid*., p. 6, note 5; Review of the Work and Functioning of the Human Rights Council, A/HRC/RES/16/21, 12 April 2011, points 23-30.

62 Manual of Operations of the Specific Procedures of the Human Rights Council, *ibid.*, p. 14.

63 Current and Former Mandate-Holders for Existing Mandates Valid as of 1 November 2020, [https://www.ohchr.org/EN/HRBodies/SP/Pages/Currentmandateholders.aspx], Accessed 8 February 2021.

64 Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, A/HRC/5/21, 7 August 2007. Article 9 of the respective Code regulates Letters of Allegation, which are regarded as standard communication tools used by the Special Procedures in their usual interaction with Governments, intergovernmental organisations, businesses, security or military companies etc. when it is alleged that human rights violations have already occurred and or in other cases when urgent procedures are not applicable. See: Manual of Operations of the Specific Procedures of the Human Rights Council, *op. cit.*, note 53, p. 15.

65 Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights – Negative impact of unilateral coercive measures on the enjoyment of human rights in the coronavirus disease pandemic, A/75/209, 21 July 2020, p. 7.

66 Mandates of the Special Rapporteur *et al.*, *loc. cit.*, note 59.

cases, the American Government was asked to provide additional information on the allegations, indicate specific measures, actions and steps taken to adequately protect violated human rights, and urgently take all necessary interim measures "to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person responsible of the alleged violations".[67]

c) Other Communicating Tools with Urgent Elements - Thematic Reports in Focus

The Special Procedures have been greatly employed in the United Nations' efforts to effectively respond to the pandemic. The modes of employment have been varied, spanning from recommendations to States and other stakeholders to reports to the Human Rights Council and the General Assembly. Their main feature is application of a human rights approach in addressing the consequences of the COVID-19 crisis.[68] More specifically, in March 2020, over 60 mandate-holders launched a general call pointing out that "everyone has the right to life-saving interventions" and that the crisis cannot be approached solely from the public health and emergency perspective but from the human rights one as well. They also called for application of "the principles of non-discrimination, participation, empowerment and accountability" in all health-related policies.[69] In addition, mandate-holders issued 14 guidance tools as well as sent 287 communications to State and non-State actors in less than a year (*i.e.* from the beginning of the pandemic until late January 2021).[70] In the same short period, they presented 15 reports to Human Rights Council and/or the General Assembly while three more are expected in 2021.[71] Those reports are another crucial tool for the United Nation's urgent response to the COVID-19 as they regularly and repeatedly call for urgent actions to ensure that all human rights are protected during the pandemic. For example, the Special Rapporteur on violence against women called in her report for urgent action to protect women from gender-based violence and domestic violence during the pandemic.[72]

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67 *Ibid*., p. 14.

68 Special Procedures and Covid-19, United Nations Human Rights Special Procedures, New York, 22 January 2021.

69 Pūras, D. *et al.*, *The Right to Health Must Guide Responses to COVID-19*, The Lancet, Vol. 395, No. 10241, 2020, p. 1890, note 12.

70 Special Procedures and Covid-19, *loc. cit.*, note. 68.

71 *Ibid*.

72 Report of the Special Rapporteur on violence against women, its causes and consequences – Intersection between the coronavirus disease (COVID-19) pandemic and the pandemic of gender-based

To underline the importance and variety of the topics covered in COVID-19 thematic reports as a critical pillar of today's human rights protection, some of their central messages are summarised below. The reports provide guidance and recommendations with regard to diverse human rights seriously affected by the pandemic. Specifically, the Special Rapporteur on extreme poverty shed light on the severely disadvantaged position of persons in extreme poverty and the need for their adequate social protection in the post-COVID-19 economic recovery in line with human rights standards. This especially concerns vulnerable people employed in the informal sector and in precarious forms of employment, such as migrants, indigenous peoples and women.[73] The Special Rapporteur on the negative impact of unilateral coercive measures presented the repercussions of unilateral sanctions (such as trade and arms embargoes and travel restrictions) imposed by the United States, the European Union and the United Kingdom on the ability of sanctioned countries to deal with the pandemic, especially in terms of the enjoyment of human rights and delivery of humanitarian aid. She recommended assessment of unilateral sanctions imposed without authorisation of the Security Council and humanitarian exemptions for trade in essential humanitarian goods and commodities.[74] The Independent Expert on foreign debt and human rights addressed the interrelation between the financial obligations of low-income and developing countries at the time of the pandemic and the right of their citizens to fully enjoy their economic, social, cultural and other rights. Since debt undermines a country's emergency response efforts and potentiates the rapid rise of inequality, poverty and marginalisation, she recommended emergency financing, fiscal stimulus packages, temporary debt standstill or debt restructuring and cancellation.[75] Particularly important is the report of the Special Rapporteur on the right to education, which stresses that more than 1.5 billion learners all around the world were negatively affected by the closure of educational institutions, calling for, *inter alia*, in-depth assessments of these restrictions and introduction of the "4As" system of

violence against women, with a focus on domestic violence and the "peace in the home" initiative, A/75/144, 24 July 2020, p. 7.

73 Looking Back to Look Ahead: A Rights-based Approach to Social Protection in the Post-COVID-19 Economic Recovery, Special Rapporteur on extreme poverty and human rights, United Nations Human Rights Special Procedures, New York, 11 September 2020, pp. 1-2, 4, 10-14, 20-25.

74 Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, *op. cit.*, note. 65.

75 Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights – Addressing the COVID-19 Debt related Problems of Developing Countries from a Human Rights perspective, A/75/164, 31 July 2020, p. 2.

education at all levels (Availability, Accessibility, Acceptability and Adaptability).[76] The most anticipated report was certainly the one prepared by the Special Rapporteur on the right to health, which analyses the interrelatedness between the right to health and other human rights, particularly civil and political ones.[77] The report of the Special Rapporteur on the right to privacy also received much attention due to privacy-intrusive anti-COVID-19 measures such as surveillance and contact tracing. Although extraordinary situations require extraordinary measures, the Special Rapporteur concluded that every State is obliged to pay particular attention to the principles of necessity and proportionality.[78] One of the most sensitive reports was the one prepared by the Special Rapporteur on Freedom of Opinion and Expression. It points out five challenges that a society may encounter during pandemics: access to information held by public authorities, access to the Internet, protection and promotion of independent media, public health disinformation and public health surveillance.[79] The COVID-19 pandemic has brought the culture sector to a dangerous standstill, which the Special Rapporteur on cultural rights described as "a cataclysm for cultural rights". In her conclusions and recommendations, she called for urgent action to guarantee these rights as they are "central to human well-being, resilience and development".[80] Lockdowns, teleworking and online schooling have put the Special Rapporteur on adequate housing in the spotlight. In his report, he advocated for the right to adequate housing in line with the principle of non-discrimination, enforcement of a moratorium on evictions and foreclosures, improvement of social protection measures and many other actions.[81] The Special Rapporteur on hazardous substances and waste put the duty of every State to prevent exposure to the COVID-19 virus in the focus of his report, summing up zoonotic viruses under hazardous substances.[82]

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76 Report of the Special Rapporteur on the right to education – Right to education: impact of the COVID-19 crisis on the right to education; concerns, challenges and opportunities, A/HRC/44/39, 15 June 2020, p. 4.

77 Final report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/75/163, 16 July 2020, p. 15-22.

78 Report of the Special Rapporteur on the right to privacy, A/75/147, 27 July 2020, pp. 2, 17-18.

79 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression – Disease pandemics and the freedom of opinion and expression, A/HRC/44/49, 23 April 2020, pp. 2.

80 Report of the Special Rapporteur in the field of cultural rights – COVID-19, culture and cultural rights, A/HRC/46/34, 17 February 2021, pp. 4-10, 19-21.

81 Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context – COVID-19 and the right to adequate housing: impacts and the way forward, A/75/148, 27 July 2020, pp. 21-22.

82 Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes - Duty to prevent exposure to the COVID-19 virus, A/HRC/45/12, 13 October 2020, p. 21.

Various examples of the adverse impact of the COVID-19 pandemic on particular groups of people or entities were also addressed by the Special Rapporteur on violence against women,[83] the Independent Expert on Sexual Orientation and Gender Identity,[84] the Independent Expert on older persons,[85] the Working Group on the Peoples of African Descent,[86] the Special Rapporteur on the Sale and sexual exploitation of children,[87] the Special Rapporteur on the Rights of Indigenous Peoples,[88] the Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members[89] and the Special Rapporteur on Contemporary Forms of Slavery.[90]

3.2.2. *Urgent Response Plans of the United Nations*

a) Global Humanitarian Response Plan (GHRP)

At the very outset of the COVID-19 pandemic, the United Nations launched a comprehensive 10.3-billion-dollar worth Global Humanitarian Response Plan to help 63 low-income countries deal with direct and indirect impacts of COVID-19[91]. That coordinated operation, targeting around 250 million most vulnerable people, was introduced in March 2020 for the purpose of covering expenses related to essential health services and many other immediate multi-sectoral

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83 Report of the Special Rapporteur on violence against women, its causes and consequences, *op. cit.*, note 72.

84 Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity – Violence and discrimination based on sexual orientation and gender identity during the coronavirus disease (COVID-19) pandemic, A/75/258, 28 July 2020.

85 Report of the Independent Expert on the enjoyment of all human rights by older persons - Impact of the coronavirus disease (COVID-19) on the enjoyment of all human rights by older persons, A/75/205, 21 July 2020.

86 Report of the Working Group of Experts on People of African Descent – COVID-19, systemic racism and global protests, A/HRC/45/44, 21 August 2020.

87 Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material – Impact of coronavirus disease on different manifestations of sale and sexual exploitation of children, A/HRC/46/31, 22 January 2021.

88 Report of the Special Rapporteur on the rights of indigenous peoples, A/75/185, 20 July 2020.

89 Report of the Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members, A/HRC/44/46, 27 April 2020.

90 Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences – Impact of the coronavirus disease pandemic on contemporary forms of slavery and slavery-like practices, A/HRC/45/8, 4 August 2020.

91 The respective amount is just a fraction of the estimated 90 billion dollars needed to protect 10 per cent of the world's poorest population from the negative consequences of the COVID-19 pandemic. See: Global Humanitarian Response Plan – COVID-19, United Nations Coordinated Appeal – April-December 2020, July 2020, pp. 4, 16-19.

needs, such as those related to famine prevention, NGOs, protection of vulnerable people etc. Founded at the initiative of the Inter-Agency Standing Committee (IASC),[92] it encompasses and combines appeals from an impressive number of United Nations agencies, programmes and funds, primarily the Food and Agriculture Organization (FAO), the International Organisation for Migrations (IOM), the United Nations Development Programme (UNDP), the United Nations Population Fund (UNFPA), the UN-Habitat, the United Nations Refugee Agency (UNHCR), the United Nations International Children's Emergency Fund (UNICEF), the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and the United Nations World Food Programme (WFP). It was also complementary to similar plans, such as the Strategic Preparedness and Response Plan, as well as those of the International Red Cross and Red Crescent Movement.[93]

The Global Humanitarian Response Plan is an overarching and future-oriented endeavour, which integrates the urgent humanitarian response to COVID-19 with the responses to other existing or emerging humanitarian crises (*e.g.* wars and natural disasters), all that with a view to creating a more sustainable humanitarian system. All the actions performed within the Plan's ambit contribute to at least one of the three strategic priorities: "1. containing the spread of COVID-19 and decreasing morbidity and mortality; 2. decreasing the deterioration of human assets and rights, social cohesion and livelihoods; and 3. protecting, assisting and advocating for refugees, internally displaced persons, migrants and host communities particularly vulnerable to the pandemic." [94] The Plan carefully considers both the public health impact and the socio-economic impact of COVID-19. Along the way, particularly vulnerable people – women and girls, persons with disabilities, older persons, children, adolescents and youth, refugees, asylum-seekers, IDPs and migrants, food-insecure people and informal urban settlement dwellers – were regularly in the Plan's spotlight.

Substantial humanitarian measures require substantial funding.[95] The main funding sources of the Global Humanitarian Response Plan have been Governments' budgets and the European Commission. Namely, in 2020, the top five donors

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92 The Inter-Agency Standing Committee (IASC) was established by the United Nations General Assembly resolution 46/182 in 1991 as a body responsible for contributing to the humanitarian emergency assistance provided by the United Nations. Nowadays, the IASC is "the longest-standing and highest-level humanitarian coordination forum of the UN system". See: Strengthening of the coordination of humanitarian emergency assistance of the United Nations, A/RES/46/182, 19 December 1991.

93 Global Humanitarian Response Plan – COVID-19, *op. cit.*, note 91, pp. 4, 12.

94 *Ibid.*, pp. 12, 23-63.

95 A graphic overview of the array of universal COVID-19 Response Plans see in: *Ibid.*, p. 97.

were the USA, Germany, the European Commission, the United Kingdom and Japan while the most supported individual countries were Syrian Arab Republic, Yemen, Lebanon and South Sudan.[96] However, regardless of all the efforts to secure adequate funding, the gap between urgent humanitarian needs and funding received remains wide.[97]

b) Strategic Preparedness and Response Plan (SPRP)

Initiated by the World Health Organisation (WHO) and partners in February 2020, the Strategic Preparedness and Response Plan is a global health response designed to address urgent health needs around the globe. It represents one of the most urgent United Nations initiatives given the fact that it was adopted only four days after the WHO's Director-General declared COVID-19 "a public health emergency of international concern (PHEIC)", *i.e.* the WHO's highest level of alarm under international law.[98]

Since the thematic focus of the Strategic Preparedness and Response Plan is much more limited than the focus of the Global Humanitarian Response Plan, so is its funding. The overall financial envelope is estimated at 1.74 billion dollars and those funds are directed to the implementation of public health measures necessary to respond effectively to the COVID-19 pandemic. The main funders of the Plan are Governments' budgets, the UN Central Emergency Response Fund (CERF) and WHO's Solidarity Response Fund.[99] Unlike the thematic focus, the geographical scope of the Plan is wider than the one of the Global Humanitarian Response Plan and it encompasses all the countries in the world. The strength of the Plan also lies in the fact that it was launched by, as van Schaik *et al.* put it, "the only international organisation with a universal mandate for norm-setting on how to handle infectious diseases of global concern".[100]

In 2020, the main goal of this response strategy was to prevent further transmission of COVID-19 and to mitigate a variety of its negative impacts. The urgent measures included three types of mutually interwoven activities – rapid establishment of international cooperation and operational support; increasing country

96 Total Reported Funding 2020, [https://fts.unocha.org/global-funding/overview/2020], Accessed 2 March 2021.

97 For example, only 4.4% of the funding demanded for urgent humanitarian needs has been donated in 2021. See: Humanitarian Aid Contributions, [https://fts.unocha.org/], Accessed 2 March 2021.

98 COVID-19 Strategic Preparedness and Response Plan, 1 February 2021 – 31 January 2022, World Health Organization, Geneva, 2021, p. viii.

99 United Nations Comprehensive Response to COVID-19, *op. cit.*, note 47, p. 9.

100 Van Schaik ; Jørgensen ; van de Pas, *op. cit.*, note 9, p. 1145.

preparedness and response operations; and acceleration of priority research and innovation related to COVID-19. The Plan foresees a very precise monitoring framework with exact key performance indicators divided into several categories, such as epidemiology situation, country readiness and capacity, global response in terms of programme management, supply and R&D etc.[101] Built on the respective monitoring framework and experiences on the ground, the WHO has issued the updated Strategic Preparedness and Response Plan 2021, which translates the knowledge accumulated in 2020 into strategic actions. In that respect, it defines six key strategic public health objectives to fully concentrate on in 2021: suppression of transmission, reduction of exposure, countering misinformation, protecting the vulnerable, reducing mortality and morbidity from all causes, and accelerating equitable access to new COVID-19 tools (*e.g.* vaccines, diagnostics and therapeutics).[102]

3.3. United Nations Emergency Financing at the Time of COVID-19

Given the fact that funding is a building block of the United Nations urgent response to COVID-19, it is useful to wrap this analysis up with a brief overview of the three principal funding mechanisms, *i.e.* the UN COVID-19 Response and Recovery Fund, the UN Central Emergency Response Fund and the Solidarity Response Fund.

The UN COVID-19 Response and Recovery Fund was launched by the UN Secretary-General to help low- and middle-income countries recover economically and socially sooner and more effectively with the United Nations' stimulus. It was established for the period of two years (April 2020 – April 2022) with the initial financial requirement of 2 billion dollars.[103] It should be perceived in the light of the UN Secretary- General's Call for Solidarity, which requests global action to stop the COVID-19 pandemic and mitigate its serious consequences. Namely, the Fund should be in line with Call's three objectives: tackling the health emergency; focusing on the social and economic response and recovery; and helping countries recover better.[104] The funding sources are contributions from donors (Governments, organisations and individuals), investment income from the Fund as well as interest from the Fund and participating organisations. The money is currently directed into more than 200 various investments (protecting people, economic response, social co-

[101] Novel Coronavirus (2019-nCoV), World Health Organization, Geneva, 4 February 2020, pp. 1, 5-20.

[102] COVID-19 Strategic Preparedness and Response Plan, *op. cit.*, note 98, pp. 10, 13-17.

[103] The Secretary-General's UN COVID-19 Response and Recovery Fund, United Nations, New York, April 2020, p. 2.

[104] *Ibid*.

hesion, health etc.) while respecting the principles of immediate action, leaving no one behind and inclusion.[105] The Fund is complementary to the Strategic Preparedness and Response Plan and the Global Humanitarian Response Plan.[106]

The UN Central Emergency Response Fund (CERF) is a UN's funding mechanism with an over 15-year-long tradition of financing urgent humanitarian assistance to people in crisis. Since its establishment by the UN General Assembly in 2005, the Fund has enabled 7 billion dollars of life-saving assistance to over 100 countries. Similar to the UN COVID-19 Response and Recovery Fund, the main donors encompass Governments, corporations, foundations and individuals. The rapid and agile nature of the Fund makes it a perfect complementary tool for responding to the impacts of the pandemic.[107] With the total allocation of 241 million dollars for the COVID-19 response, the Fund has contributed greatly to covering the expenses of supporting logistics and common services (*e.g.* transportation of supplies), the health and sanitation response (*e.g.* providing vulnerable communities with health care and protective equipment) and dealing with the secondary impacts of the pandemic (*e.g.* distribution of food and cash transfers). This involves providing 58 million dollars to NGOs, the Red Cross and Red Crescent National Societies and other local partners.[108]

The Solidarity Response Fund was set by the World Health Organization (WHO) for the purpose of supporting the work of the WHO and its partners to help countries "prevent, detect and respond to the COVID-19 pandemic" in a speedy, effective and flexible way.[109] Its allocation is disbursed in line with the priorities and principles of the Strategic Preparedness and Response Plan. As of March 2021, the Fund's budget amounted to almost 243 million dollars, raised from over 663,000 donors (corporations, foundations, individuals, organizations etc). The funds have been invested in some focal COVID-19-related activities – distributing essential supplies, coordinating global vaccine R&D, protecting internally displaced people and refugees, supporting vulnerable people in low-income communities and alleviating negative consequences of the pandemic on youth development.[110]

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105 For the catalogue of the projects funded by the UN Response and Recovery Fund, funded areas, donors and key priorities see: Global Interim Report of the UN COVID-19 Response and Recovery Fund, UN Multi-Partner Trust Fund Office, New York, 2020.

106 The Secretary-General's UN COVID-19 Response and Recovery Fund, *loc. cit.*, note. 103.

107 See: CERF Annual Results Report 2020, United Nations Office for the Coordination of Humanitarian Affairs (OCHA), New York, 2020, pp. 2-10.

108 More on the UN Central Emergency Response Fund investments see: OCHA Humanitarian Pooled Funds – COVID-19 Response, OCHA, 2 March 2021.

109 COVID-19 Solidarity Response Fund for the World Health Organisation, Impact Report, 1 January – 31 March 2021, WHO, 2021, p. 4.

110 *Ibid*., pp. 2-3.

4. CONCLUSION

The COVID-19 pandemic has radically reshaped our lives and, in consequence, prompted the United Nations and the European Union to flexibly respond to new challenges and refocus their priorities. At the time of the global health emergency, flexibility usually implies urgency. Both the United Nations and the European Union have triggered their urgent mechanisms and inventively resorted either to creating new or using current protection schemes which have enabled them to appropriately cope with the immense human and economic toll.

In order to alleviate the negative socio-economic impact of the COVID-19 pandemic, the European Union has secured cash injections worth billions of euros, which are aimed at the satisfaction of the most pressing health, economic and social needs. Thus, the financial assistance is directed to the most exposed domains such as healthcare, *SMEs*, labour markets, the most deprived, fishermen and farmers etc. Additionally, the European Union has simplified the use of EU funds to the greatest possible extent in an attempt to speedily mobilise Cohesion Policy resources and boost socio-economic recovery. The emphasis is hence put on both the crisis response and crisis repair measures. The introduced and foreseen standards have been longsighted in a sense that they give due diligence to the usual, pre-COVID-19 priorities of the European Union, such as investments in twin green and digital transitions. Like the European Union, the United Nations has also addressed health, socio-economic and recovery aspects of the crisis; however, its prime focus of concern have become humanitarian and human rights conditions. The United Nations has asserted that public health emergencies, such as the COVID-19 pandemic, pose an extreme threat not only to physical, mental and social well-being but also to all human rights – civil, political, economic, social and cultural. Moreover, the United Nations have been much more vocal in warning about the grave consequences of the COVID-19-driven economic downturn for further widening of the gap between the rich and the poor, which may possibly lead to turmoil or outbreaks of civil and world wars.

The United Nations' and the European Union's urgent actions on the ground are fully dependant on adequate sources of financing. Both international organisations have secured those sources through various funding schemes such as targeted funds and initiatives. Nevertheless, the United Nations' numbers are currently more modest and not fully in line with real needs. Since the COVID-19 pandemic is still in full swing, despite all the lockdowns and vaccination efforts, the United Nations and the European Union need to look further for innovative and sustainable urgent responses based on the principles of solidarity, global cooperation, good governance, transparency and equality. The burden is great, yet with the vast experience of these two organisations in emergency responses achievable.

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UDK 341.43(4-67EU):342.7](439)
341.215.4-054.72
Original scientific article

DETENTION OF ASYLUM SEEKERS THROUGH THE PRACTICE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON THE EXAMPLE OF THE REPUBLIC OF HUNGARY AND THE PERSPECTIVES OF THE NEW PACT ON MIGRATION AND ASYLUM

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ABSTRACT

Restrictions on freedom of movement, in particular the detention of asylum seekers as the most severe form of such restrictions, constitute an interference with fundamental human rights and must be approached with particular care. In view of the migration and refugee crisis, the Republic of Hungary has begun to amend its asylum legislation, thus tightening the conditions for the detention of asylum seekers. The introduction of the provision establishing that asylum may be sought only in transit zones has also led to the gradual detention of asylum seekers in transit zones, which Hungary did not consider as detention. This issue was brought before the Court of Justice of the European Union (hereinafter: CJEU), which drastically changed the path taken by the Hungarian government when it comes to detaining asylum seekers. What the CJEU has found is that leaving people in transit zones without the right to free movement is to be considered detention, even though they are not specialized detention facilities. The CJEU ordered that such a practice must cease immediately. Therefore, this paper will examine the Hungarian practice following the judgment of the CJEU. The CJEU has taken a major step towards protecting the rights of asylum seekers as regards detention, and the EU recently adopted amendments as part of the new Pact on Migration and Asylum aimed at improving the existing asylum system. The second part of the paper analyzes the provisions of the new Pact on Migration and Asylum related to detention in order to determine whether the proposed amendments contribute to the Common European Asylum System and the protection of the human rights of asylum seekers or represent a step backwards.

Keywords: *asylum, detention, Hungary, CJEU, New Pact on Migration and Asylum*

1. INTRODUCTION

The detention of asylum seekers in the European Union (hereinafter: the EU) is one of the issues very often associated with human rights violations. The actions of Member States following the migration and refugee crisis in the EU, as well as changes in national legislation, have led to violations of the rights of asylum seekers under international and European refugee law, in particular the freedom of movement within the state in which they have applied for asylum. At the very beginning of the paper, the provisions of European law regulating the freedom of movement of asylum seekers and its restriction with regard to the application of the detention measure will be analyzed. The paper will further discuss the application of the detention measure in the Republic of Hungary (hereinafter: Hungary), a state that, following the refugee and migration crisis in the EU, raised a physical barrier at the state border and amended its asylum legislation in a manner inconsistent with international and European law. The CJEU analyzed the actions of Hungary when it comes to conducting asylum procedures in transit zones and the application of detention measures, thus determining the most significant deviations from international and European law. With this ruling, the CJEU took a major step towards protecting the rights of asylum seekers as regards freedom of movement within the state in which they applied for asylum. Shortly after the Court ruling, the EU proposed a number of amendments presented in the new Pact on Migration and Asylum (hereinafter: PMA) with a view to improving the existing asylum and migration management system. The proposed measures significantly change the existing system and bring a completely new approach to the asylum system in the EU. Therefore, the second part of the paper analyzes the provisions of the PMA related to the detention of asylum seekers in the border procedure in order to determine whether the proposed amendments contribute to the Common European Asylum System (hereinafter: CEAS) and the protection of the human rights of asylum seekers or represent a step backwards. At the very end of the paper, certain guidelines are given in relation to the detention of asylum seekers under European legislation, which could have a positive impact on the creation of the CEAS and the protection of the human rights of asylum seekers, in particular the right to freedom of movement. Therefore, the hypothesis of this paper is that Hungary's actions after the migration and refugee crisis and its changes in legislation related to the rights of asylum seekers are in complete contradiction with European and international legal norms when it comes to restricting the freedom of movement of asylum seekers and applying detention measures. Moreover, the paper will try to prove that the PMA provisions related to the detention of asylum seekers in the border procedure do not contribute to the CEAS and the protection of the human rights of asylum seekers, but represent a step backwards. The question is whether the provisions on the implementation of the asylum pro-

cedure at the EU border, as well as the automatic detention of an asylum seeker during that time, are in line with recent CJEU case law.

2. FREEDOM OF MOVEMENT OF ASYLUM SEEKERS IN THE STATE IN WHICH THEY APPLIED FOR ASYLUM AND GROUNDS FOR RESTRICTIONS IN EUROPEAN LAW – *DE LEGE LATA*

The EU Charter of Fundamental Rights (hereinafter: the EU Charter) guarantees in Article 6 everyone the right to liberty and security of person. Despite the efforts made by the EU legislator to define the concept of detention and the efforts of the CJEU to interpret the set legal framework, a lack of results has been observed. The EU legal framework, unlike the European Court of Human Rights (hereinafter: ECtHR), links the concept of detention to the deprivation or restriction of freedom of movement, and not to the deprivation of the right to physical freedom of every human being. The Dublin system is the oldest cornerstone of the CEAS, established to harmonize Member States' asylum policies and procedural issues when it comes to asylum.[1] The Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (hereinafter: Dublin III Regulation) does not define the freedom of movement of asylum seekers but proclaims that the detention of applicants should be applied following the fundamental principle that a person should not be detained simply because he or she seeks international protection.[2] Detention should be as short as possible and in accordance with the principle of proportionality, in particular Article 31 of the Convention Relating to the Status of Refugees[3] (hereinafter: 1951 Convention).[4] As regards general safeguards concerning detention and conditions for detention, reference is made to the application of the Directive on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons

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1 For more details on the Dublin system see: Maiani, F., *The Dublin III Regulation: A New Legal Framework for a More Humane System?*, in: Chetail,V.; De Bruycker, P.; Maiani, F. (eds.), Reforming the Common European Asylum System - The New European Refugee Law, Brill Nijhoff, Leiden, Boston, 2016.

2 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180 (Regulation Dublin III) Preamble, Recital 20.

3 Convention relating to the Status of Refugees, adopted on 28 July 1951 by General Assembly Resolution 429 (V) of 14 October 1950, entered into force on 22 April 1954.

4 Costello, C., *Human Rights of Migrants and Refugees in European Law*, Oxford University Press, 2016.

who otherwise need international protection and the content of the protection granted[5] (hereinafter: Directive on minimum standards) and to detention procedures under the Dublin III Regulation.[6] Article 28 of the Dublin III Regulation provides for an exception to freedom of movement for asylum seekers, i.e. detention for transfer when there is a high risk of absconding. Detention, in this case, must be as short as possible and last only as long as is reasonably necessary.[7] All EU institutions apply the principle of proportionality following the Protocol on the application of the principles of subsidiarity and proportionality.[8]The principle of proportionality is the cornerstone of the individualized procedure on which the detention decision is based, and a detention measure that is not necessary in an individual case is not accepted as such.[9]

The perception of the legislator that is necessary to define the rules for issuing a detention order is paradoxical. In a system that assigns responsibility for asylum applications and which should in principle also protect the rights of asylum seekers, detention or the use of other measures restricting liberty would not be necessary if the system is based on correct assumptions, provides equal conditions, outcomes and comparable rights for persons who exercise the right to international protection.[10] Therefore, according to Hruschka and Maiani, the provision of Article 28 in itself shows the imperfection of the system and the introduction of detention can only be considered a "transitional measure" into a system that can function without the use of coercion.[11]

The Directive laying down standards for the reception of applicants for international protection[12] (hereinafter: Reception Directive) is also relevant in determin-

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5 Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 2004, OJ L 304 (Qualification Directive).

6 Regulation Dublin III, Preamble, Recital 20.

7 Regulation Dublin III, Art. 28(2)(3).

8 Consolidated versions of the Treaty on the Functioning of the European Union Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, OJ C 202.

9 Wilsher, D., *Immigration Detention: Law, History, Politics*, Cambridge University Press, 2012, p. 336.

10 See: Filzwieser, C.; Sprung, A., *Dublin III-Verordnung, Das Europäische Asylzuständigkeitssystem - Stand: 1. February 2014*, BWV Berliner-Wissenschaft, 2014.

11 Hruscha, B.; Maiani, F., *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, in: Hailbronner, K.; Thym, D., (eds.), EU Immigration and Asylum Law, A Commentary, 2nd edition, C.H.Beck/Hart/Nomos, 2016, pp. 1478; Bender, D.; Hocks, S., *Eilrechtsschutz und Selbsteintrittspflicht im Dublin-Verfahren*, Asylmagazin, 2010, p. 223.

12 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180 (Reception

ing the conditions of detention and treatment in situations where it is necessary to restrict the freedom of movement of asylum seekers and to order their detention, and in the procedures provided for by the Member States. Thus, Article 7(1) of the Reception Directive guarantees freedom of movement for applicants "within the territory of the host Member State or within an area assigned to them by that Member State". It is this provision that creates ambiguity about the freedom of movement of asylum seekers because it is provided for in the first part of the sentence, whereas in the second part of the sentence it is limited to the area designated by the state. Article 7 of the Reception Directive regulates two areas that are closely linked but not identical. The first concerns freedom of movement and the circumstances under which that freedom may be restricted, while the second area concerns the place of residence of asylum seekers. These two areas and the difference in their interpretations are not clearly stated in the provision of Article 7 and it is necessary to amend the provision in terms of a clearer definition of freedom of movement, restriction of freedom of movement, and place of residence of asylum seekers. Article 7 of the 2003 Reception Directive was also highly debated during the pre-adoption procedure.[13] The article was criticized for giving the Member States an open path to the complete annulment of the right to liberty. It is precisely this kind of discretion given to the Member States that also raises the question of the compatibility of Article 7(1) of the Reception Directive with Article 31(2) of the 1951 Convention.[14] This type of restriction of the movement of asylum seekers to a specific territorial part of a Member State may consequently have an impact on access to education, health care, and employment. Therefore, such territorial restrictions on movement should be used rarely; however, they should not depend on the size of the area restricting the freedom of movement of asylum seekers, but on the infrastructure of such an area and the availability of all necessary services and address the needs of asylum seekers. The vast majority of asylum seekers are accommodated in reception centers located in the Member States and funded by the state. As these capacities are limited and often insufficient, it is clear that there is a need to relocate asylum seekers to other parts of the Member State where there are spare capacities, and in that case, such a decision is considered justified. What Peek and Tsourdi see as a problem, however, is the determination of residence by the state in situations where asylum seekers can afford private accommodation and finance it themselves or have family and friends with whom they can stay. In that case, the limited capacities in the reception

Directive).

13 FRA and Council of Europe, Handbook on European Law relating to asylum, borders and immigration, 2013, p. 138.

14 See: Marx, R., *Article 26*, in: Zimmermann, A. (ed.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, Oxford University Press, 2011, p. 1163-1164.

centers cannot justify the determination of the asylum seekers' place of residence and likewise these decisions cannot be based on the public interest.[15] Moreover, although the system of reception of asylum seekers depends on the capacities available in the reception centers, this does not mean that the general transfer of all asylum seekers who are unable to secure accommodation and living conditions is justified. Therefore, the Member States which do not provide for exceptions to the determination of residence in individual cases, including those asylum seekers who can secure accommodation on their own, are considered to be in breach of the Reception Directive.[16] Article 8(3) of the Reception Directive prescribes specific grounds for detention: to verify identity or nationality, to determine those elements of an asylum application which cannot be obtained in the absence of detention, to decide on the right of an asylum seeker to enter the state territory, due to the implementation of the return procedure and for reasons of national security and public order. The Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter: Return Directive) provides that, if less coercive measures cannot be applied in a particular case, Member States may detain a third-country national to ensure the return procedure, especially when there is a risk of absconding or a particular third-country national avoids or obstructs preparations for the return.[17] In the El Dridi case, the CJEU emphasized that detention should be used as a last resort.[18] Any detention may last only as long as is necessary to fulfill the purpose of such detention. The possibility of detaining a person for reasons of public order and public security cannot be based on the Return Directive. Given that Article 7(1) of the proposal to amend the Return Directive gives a certain discretion to the Member States to restrict the freedom of movement of asylum seekers and the resulting practice, the

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15 Peek, M.; Tsourdi, L., *Asylum Reception Conditions Directive 2012/33/EU, Article 7*, in: Hailbronner, K.; Thym D., (eds.), EU Immigration and Asylum Law, A Commentary, 2nd edition, C. H. Beck/ Hart/Nomos, 2016, p. 1409.

16 Meyer, T., *Mindestaufnahmebedingungen für Asylbewerber: Nivelierung auf niedrigem Niveau oder Fortschritt für eine gemeinsame Asylpolitik in Europa?*, in: Neue Zeitschrift für Verwaltungsrecht, 2004, p. 549.

17 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348 (Return Directive) Art. 15(1).

18 Case C-61/11 Hassen El Dridi, alias Soufi Karim [2011], Reference for a preliminary ruling: Corte d'appello di Trento - Italy, paragraph 39: "...Member States must carry out the removal using the least coercive measures possible. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him", as well as paragraph 41: "…in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility".

question arises as to whether that provision complies with Article 26 of the 1951 Convention, which prescribes only the restriction of freedom of movement applicable to aliens in the same situation.[19] What De Bruycker et. al. see as a problem is compliance with international sources of law, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms[20] (hereinafter: ECHR), the International Covenant on Civil and Political Rights[21] and the 1951 Convention, as well as the lack of proportionality provisions that must be taken into account when determining measures restricting the freedom of movement of asylum seekers. Restricting freedom of movement to ensure a faster and more efficient examination of asylum applications is not in line with international regulations and these circumstances should be taken into account when deciding on the proposal to amend the Return Directive.[22]

The Directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted[23] (hereinafter: Qualifications Directive) guarantees freedom of movement for beneficiaries of international protection "within their territory under the same conditions and with the same restrictions as those provided for other third-country nationals legally resident in their territories."[24] What follows from that provision is a reference to the national rules of the Member States as regards restrictions on the freedom of movement of beneficiaries of international protection and those in the process of obtaining international protection. The question arises as to where and under what conditions asylum seekers will stay while their status is being decided, and how to proceed when it comes to a family with minor children. Another question that arises is the situation when the asylum seeker is an unaccompanied minor. Will his or her freedom of movement be restricted because the minor is without the supervision of a responsible adult, and where will he or she normally be accommodated while waiting a decision on his or her application?

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19 Marx, *op. cit.,* note 14.

20 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

21 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999.

22 De Bruycker, P.; Bloomfield, A.; Tsourdi, E. L.; Pétin, J., *Alternatives to Immigration and Asylum Detention in the EU - Time for Implementation*, Odysseus - Academic Network for Legal Studies on Immigration, 2015, p. 35.

23 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337 (Qualifications Directive).

24 Qualifications Directive, Art. 33.

Article 26 of the Directive on common procedures for granting and withdrawing international protection[25] (hereinafter: Common Procedures Directive) stipulates that "Member States shall not hold a person in detention simply because he or she is an applicant" and that if the applicant is detained, "Member States shall ensure that there is a possibility of speedy judicial review in accordance with Directive 2013/33/EU." It is clear that the Common Procedures Directive calls for the application of the Reception Directive when it comes to determining the measure of detention of asylum seekers but reiterates the importance of the fact that no one may be detained or deprived of freedom of movement simply because he or she is an asylum seeker. The purpose of the Common Procedures Directive is to ensure that all asylum seekers have access to the asylum procedure and, in part, to enable interpreters to ensure that the authorities in charge of the procedure are sure that the third-country national wishes to apply for asylum. This also applies to asylum seekers in detention institutions.[26]

Several problems exist in the current EU asylum system when it comes to restricting the freedom of movement of asylum seekers and enforcing detention measures. The biggest problem is the different interpretations of the provisions by the Member States and the use of national security as a pretext for many detention decisions. It is precisely because of the perceived shortcomings of the asylum system that the EU has embarked on the reform and adoption of the PMA, which will be discussed later in this paper.

3. DETENTION OF ASYLUM SEEKERS IN THE REPUBLIC OF HUNGARY

Article 27 of the Hungarian Constitution states that everyone legally residing in Hungary has the right to choose their place of residence as well as freedom of movement.[27] Thus, the Hungarian legislator implemented the provisions of the 1951 Convention and Article 26 on freedom of movement. For the purpose of conducting the asylum procedure and ensuring transfers under the Dublin pro-

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25 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180 (Common Procedures Directive).

26 "In order to facilitate access to the examination procedure at border crossing points and in detention facilities, information should be made available on the possibility to apply for international protection. Basic communication necessary to enable the competent authorities to understand if persons declare their wish to apply for international protection should be ensured through interpretation arrangements." Common Procedures Directive, Recital 28.

27 Magyarország Alaptörvénye from April 25, 2011, available at: [https://nemzetikonyvtar.kormany.hu/download/8/00/50000/horv%C3%A1t-magyar_nyomdai.pdf], Accessed 2 February 2021.

cedure, the Administration may detain the asylum seeker to establish his or her identity, if expulsion proceedings have been initiated or if there are reasonable grounds for believing that the asylum seeker is seeking international protection solely in order to delay or impede the enforcement of the expulsion decision, in order to establish the facts and circumstances on which the asylum application is based if those facts and circumstances cannot be established without detention, in particular where there is a risk of absconding. It is also possible to impose this measure when detention is necessary to protect national security or public order if the application is lodged at an airport, when detention is necessary to secure surrender procedures under the Dublin III Regulation and when there is a serious risk of absconding. Detention may be determined on a case-by-case basis, and only if its purpose cannot be ensured by the application of an availability measure. Before imposing a detention measure, the Administration shall consider whether the purpose can be achieved by applying a less restrictive measure.[28]An unaccompanied minor cannot be detained under Hungarian law. The detention of a family with a minor can only be determined as a final measure, taking into account primarily the best interests of the child.[29]

As regards the effectiveness and oversight of the national judiciary over the legality of detention decisions, the Hungarian Helsinki Committee (hereinafter: HHC) concludes in an analysis of sixty-four court decisions conducted in 2014 that such oversight is completely ineffective.[30] The HHC has systematically criticized the shortcomings of detaining asylum seekers.[31]The decision of the District Court of Nyírbátor is an extreme example showing the lack of individualization of each case precisely because it contained incorrect personal data such as the name, date of birth, or nationality of an asylum seeker.[32] Moreover, four national court decisions contained a date of birth indicating an age below 18 years. However, no decision

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28 2007 évi LXXX törvény a menedékjogról (Asylum Act), Art. 31 (A) (1) (2) (3).

29 2007 évi LXXX törvény a menedékjogról (Asylum Act), Art.31 (B) (1) (2).

30 See: Hungarian Helsinki Committee, Information Note on asylum-seekers in detention and in Dublin procedures in Hungary, 2014.

31 See: Hungarian Helsinki Committee, Briefing paper for the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on the occasion of the CPT's periodic visit to Hungary, 2013, Chapter 5.1, available at: [http://helsinki.hu/wp-content/uploads/HHC_briefing-paper_CPT_periodic_ visit_28March2013_FINAL.pdf], Accessed 27 January 2021; Hungarian Helsinki Committee, Access to Protection Jeopardized – Information note on the treatment of Dublin returnees in Hungary, 2011, Chapter 4-5, available at: [http://helsinki.hu/en/access-to-protection-jeopardised-2], Accessed 27 January 2021; Hungarian Helsinki Committee, Stuck in Jail – Immigration detention in Hungary in 2010/2011, available at: [http://helsinki.hu/wp-content/uploads/HHC-immigration-detention_ENG_final.pdf], Accessed 27 January 2021.

32 According to: Nyírbátor District Court, Decisionsno. 1.Ir.214/2014/3., 9.Ir.350/2014/3., 1.Ir.728/2013/5. and 9.Ir.335/2014/3.

called into question the legality of detaining an asylum seeker under the age of 18, nor did it involve an age assessment procedure or proof of the legal age of a particular asylum seeker.[33] According to an analysis conducted by the Hungarian Supreme Court, out of approximately 5,000 decisions made in 2011 and 2012, only in three cases was a particular detention measure overturned, while the rest simply extended such a measure without any particular justification.[34] It is precisely because of such inconsistencies and legal shortcomings in the decisions of national courts that the ECtHR has examined 7 cases related to the arbitrary detention of asylum seekers in 2019 alone.[35] These cases of omission were suspended pending a decision by the CJEU on whether holding asylum seekers in a transit zone was equated with deprivation of liberty and detention. Now that the CJEU has ruled that such detention is tantamount to deprivation of liberty, it remains to be seen how the Hungarian authorities will act on that decision. In 2018, the Administrative and Labor Court in Szeged annulled several decisions on the placement of asylum seekers in transit zones, although such a practice did not last longer than the beginning of 2019.[36] There are three detention facilities: Debrecen, Békéscsaba and Nyírbátor, with a total capacity of 472 places.[37]As of March 28, 2017, all asylum seekers entering the transit zones of Röszke and Tompa remain de facto detained, although the Hungarian authorities refuse to acknowledge that this is a form of detention. The fact that asylum seekers within transit zones have been deprived of their freedom of movement is also confirmed by the UN Working Group on Arbitrary Detention (UNWGAD),[38] the European Committee for the Prevention of Torture (CPT),[39] the UN High Commissioner for Refugees

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33 According to: Nyírbátor District Court, Decisionno. 1.Ir.46/2014/3., Debrecen District Court, Decisionsno. 68. Beü.94/2014/4-I., 68.Beü.108/2014/4, 68.Beü.104/2014/4. and 68.Beü.1087/2014/4.

34 Supreme Court, Advisory Opinion of the Hungarian Supreme Court, adopted on 30 May 2013 and approved on 23 September 2013.

35 Supreme Court, Advisory Opinion of the Hungarian Supreme Court, adopted on 30 May 2013 and approved on 23 September 2013. Ahmed AYAD v. Hungary and four joint applications [2015] Application no. 7077/15, 26250/15, 26819/15, 32038/15, 48139/16; S.B. v. Hungary [2017] Application no. 15977/17; Dragon DSHIJRI v. Hungary [2016] Application no. 21325/16

36 According to: District Court of Szeged, Decision no. 6.K.27.060/2018/8; District Court of Szeged, Decision no. 44.K.33.689/2018/11.

37 Asylum Information Database, Country Report 2015.: Hungary, European Council of Refugees and Exiles, available at: [https://www.asylumineurope.org/sites/default/files/report-download/aida_hu_update.iv_0.pdf], Accessed 1 March 2021.

38 UNWGAD, 'UN human rights experts suspend Hungary visit after access denied', 15 November 2018, available at: [https://bit.ly/2B7X5Pu], Accessed 12 April 2021.

39 CPT, Report on the visit to Hungary from 20 to 26 October 2017, CPT/Inf (2018) 42, 18 September 2018, available: [https://bit.ly/2TTgsTq.], Accessed 1 March 2021.

(UNHCR),[40] the UN Human Rights Committee (UNHCR),[41] the UN High Commissioner for Human Rights,[42] the UN Special Rapporteur on the Human Rights of Migrants,[43] the European Commission [44] and the Council of Europe Commissioner for Human Rights.[45]

The following is an analysis and statistical presentation of the decisions on restricting the freedom of movement of asylum seekers and imposing a detention measure in Hungary in the period from 2015 to 2019.

Table no. 1. Restrictions on the freedom of movement of asylum seekers and detention measures in Hungary in the period from 2015 to 2019

	2015	**2016**	**2017**	**2018**	**2019**
Restrictions on the freedom of movement of asylum seekers	13,202 (100 %)	57,517 (100 %)	1,567 (100 %)	14 (100 %)	40 (100 %)
Detention	1,829 (13.85 %)	2,621 (4.55 %)	391 (24.95 %)	7 (50 %)	0 (0 %)
Alternative measures	11,373 (86.14 %)	54,615 (94.78 %)	1,176 (75.04 %)	7 (50 %)	40 (100 %)

Source [46]

From Table no. 1 it follows that, in 2015, the measure of restriction of freedom of movement was imposed in 13,202 (7.50%) cases out of a total of 175,960 applications filed that year, of which in 1,829 (1.03%) cases the measure of detention of asylum seekers was imposed, while in 11,373 (6.47%) cases an alternative measure of detention was imposed. What is particularly interesting in the Hungarian system, and what has certainly influenced the changes in the national asylum system, is the fact that in 2016 there were 29,432 asylum applications in Hungary,

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40 UNHCR, 'UNHCR Chief visits Hungary, calls for greater access to asylum, end to detention and more solidarity with refugees".2017, available at: [http://bit.ly/2y2BnsC.], Accessed 1 March 2021.

41 Human Rights Committee, Concluding observations on the sixth periodic report of Hungary, CCPR/C/HUN/CO/6, 2018., available at: [https://bit.ly/2TWDzwu.], Accessed 1 March 2021.

42 UN Office of the High Commissioner for Human Rights, Press briefing notes on Iran and Hungary, 2019., available at: [http://bit.ly/38h8pXr.], Accessed 1 March 2021.

43 OHCHR, End of visit statement of the UN Special Rapporteur on the human rights of migrants, Felipe González Morales, 2019., available at: [http://bit.ly/2tqOHcX.], Accessed 1 March 2021.

44 European Commission, Migration and Asylum: Commission takes further steps in infringement procedures against Hungary, 2018., available at: [https://bit.ly/2uMEJ2c], Accessed 1 March 2021.

45 Commissioner for Human Rights Of The Council Of Europe, Report following visit to Hungary from 4 to 8 February 2019, 2019., available at: [http://bit.ly/30upiLp], Accessed 1 March 2021.

46 Analysis made based on the processing of data contained in the reports from 2015 to 2019 in Asylum Information Database, Country Report: Hungary, European Council of Refugees and Exiles, available at: [https://www.asylumineurope.org/reports/country/hungary], Accessed 1 March 2021.

and the number of measures restricting freedom of movement imposed that year was 57,517, of which in 2,621 (4.55%) cases a detention measure was imposed, while in 54,615 (94.78%) cases an alternative detention measure was imposed. The existence of such illogicalities in the Hungarian system can only presuppose the fact that third-country nationals, refugees, and migrants have already been detained even before applying for asylum. Such detentions are not in line with international and European standards for the protection of human rights and refugees. After the amendment of the asylum legislation, the number of applications decreased significantly, so that in 2017 there were 3,397 asylum applications, and the measure restricting freedom of movement was imposed in 1,567 (46.12%) cases, of which in 391 (11.51%) cases a detention measure was imposed, while in 1,176 (34.61%) cases an alternative detention measure was imposed.

The trend of declining asylum applications decreased in 2018 as well, with only 670 applications submitted that year, and in 14 (2.08%) cases a measure restricting freedom of movement was imposed, of which in 7 (1.04%) cases a detention measure was imposed and in 7 (1.04%) cases alternative detention measures were imposed. In 2019, 468 asylum applications were filed, and in 40 (8.54%) cases a measure restricting freedom of movement was imposed, with an alternative measure of detention being imposed in all 40 (8.54%) cases, whereas the measure of detention was not imposed in any case.

It can be concluded that Hungary experienced a large influx of refugees and migrants to its territory after 2015 and reacted completely unprepared in 2016 when it imposed a measure restricting freedom of movement in 57,517 cases, but not only for asylum seekers – as the number of applications was 29,432, which does not correspond to the possible actual situation. This would mean that in 28,085 (48.82%) cases a measure restricting freedom of movement was imposed on third-country nationals who did not apply for asylum or the Hungarian authorities did not credibly register asylum seekers, which ultimately led to data discrepancies. After 2017, the number of asylum applications started to decrease, following the new asylum legislation, which has been criticized by the European courts and other EU bodies as unlawful. As the number of asylum applications decreased, so did the number of cases in which a measure restricting freedom of movement was imposed. It is evident that not a single asylum seeker was detained in 2019, but these are certainly not real indicators of the situation, as Hungary does not consider the placement of asylum seekers in transit zones as a form of deprivation of liberty, and therefore such detention is not included in the statistics of detention measures, which will have to change following the latest CJEU judgment.

Both the ECtHR and the CJEU have ruled on the lawfulness of detaining asylum seekers in Hungary in several cases. In each of them, they found the basis for the unlawfulness of such deprivation of liberty, especially after changes in legislation caused by the refugee and migration crisis in the EU. In that regard, in Lokpo and Touré v. Hungary, the ECtHR found that the absence of a detailed explanation of the deprivation of liberty of an asylum seeker rendered that measure incompatible with the legality requirement inherent in Article 5 of the ECHR. Therefore, in the Court's view, the detention of the asylum seeker cannot be considered "lawful" within the meaning of Article 5 § 1 (f) of the ECHR.[47] Shortly after that judgment, the ECtHR found in the cases of Al-Tayyar Abdelhakim v. Hungary and Hendrin Ali Said and Aras Ali Said v. Hungary that there had been a violation of Article 5 § 1 (f) of the ECHR because asylum seekers had been deprived of their liberty for a longer period. After all, the refugee authorities did not initiate their release. The ECtHR concluded that the procedure followed by the Hungarian authorities had the same shortcomings as the case of Lokpo and Touré.[48]As Szuhai and Tálas state, the authorities in Hungary, as in the other Member States, do not know how to address the issues arising from the migration and refugee crisis, and the governments of those countries are unable to solve structural problems. To change this, the states must have economically functioning institutions with stable governance to cope with pressures such as mass influx.[49]Vajkai believes that the issue of migration should be discussed as a matter of security policy in every Member State.[50]

It can be concluded that the decisions imposing the detention measure are molded and that their imposition lacks individual reasoning as to the lawfulness and proportionality of the detention and does not take into account the individual circumstances of each case, including the vulnerability of the individual. Necessity tests and proportionality analyses were not used in all cases and alternatives to detention were sometimes not even considered. Such claims are confirmed by the CJEU in the judgment of O.M. v. Hungary[51] where it was found that the measure

47 ECtHR - Lokpo and Touré v. Hungary, Application No. 10816/10.

48 ECtHR - Al-Tayyar Abdelhakim v. Hungary, Application No. 13058/11; ECtHR - Hendrin Ali Said and Aras Ali Said v. Hungary, Application No. 13457/11.

49 See: Szuhai, I., Tálas, P., *A 2015-ös európai migrációs és menekültválság okairól és hátteréről*, in: Talas, P. (ed.), Magyarország és a 2015-ös európai migrációs válság, Dialóg Campus Kiadó Budapest, 2017, p. 9-35.

50 See: Vajkai, E. I., *A migrációs válság biztonságpolitikai aspektusai*, in: Talas, P. (ed.), Magyarország és a 2015-ös európai migrációs válság, Dialóg Campus Kiadó Budapest, 2017, p. 35-49.

51 O.M. v. Hungary [2016] Application No. 9912/15.

of detention of vulnerable asylum seekers is not sufficiently individualized.[52] The latest judgment of the CJEU is related to the imposition of a detention measure and its duration in the case of FMS and others v. Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionalális Igazgatóság and Országos Idegenrendeszeti Főigazgatóság. [53]

3.1. Judgment of the CJEU – FMS and others v. Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionalális Igazgatóság and Országos Idegenrendeszeti Főigazgatóság

Afghan nationals (C-924/19 PPU) and Iranian nationals (C-925/19 PPU) who entered Hungary via Serbia applied for asylum at the Röszke transit center located on the Serbian-Hungarian border. Under Hungarian law relating to a safe third country, these applications were rejected as inadmissible, and decisions were taken requiring the applicants to return to Serbia. However, Serbia refused to readmit the applicants to its territory, arguing that the conditions set out in the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorization were not met.[54] Following that decision, the Hungarian authorities did not examine the substance of the application, but the countries of destination listed in the initial return decision were also amended to include the asylum seekers' country of origin. After that, the asylum seekers filed complaints in relation to these changes, and brought a lawsuit before the Hungarian court requesting the annulment of the return decisions. They also covered the issue of their long-term detention in the transit zone as well as the material reception conditions. According to the judgment of the CJEU, "by administrative decision of 25 April 2019, the asylum authority rejected the application for asylum made by FMS and FNZ, without examining its substance, as inadmissible on the basis of Article 51(2)(f) of the Law on the right of asylum, on the ground that the applicants had arrived in Hungary via a third country on whose territory

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52 The Court has found that Article 5 (1) (b) of the ECHR cannot serve as a legal basis for detaining asylum seekers. The Court therefore unanimously ruled that the detention of the asylum seekers was arbitrary and unjustified, in breach of Article 5 (1) of the ECHR. In particular, the Court found that the Hungarian authorities had not made an individualized assessment and had taken into account the applicant's vulnerability in detention on the basis of his sexual orientation. The Court emphasized the special care that the authorities should take when deciding on deprivation of liberty in order to avoid situations that could create a bad environment due to which asylum seekers are forced to flee.

53 Case Szegedi Közigazgatási és Munkaügyi Bíróság – Mađarska – FMS, FNZ (C-924/19 PPU), SA and SA junior (C-925/19 PPU) v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság [2020] SL C 161.

54 Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, annexed to the Council Decision, 2007, OJ 2007 L 334.

they were not exposed to persecution justifying recognition of refugee status or to a risk of serious harm justifying the grant of subsidiary protection and that they were guaranteed sufficient protection in the countries through which they had travelled before arriving in Hungary. By that same decision, the asylum authority asserted that the principle of non-refoulement did not apply in the case of those applicants in connection with Afghanistan and ordered that they be removed to Serbia".[55]As further stated, "FMS and FNZ brought an action before the referring court, requesting it to annul those orders and to order the asylum authority to conduct a fresh procedure, claiming, first of all, that those orders constitute return decisions which must be amenable to a judicial action and, next, that those return decisions are illegal. FMS and FNZ claim that the asylum authority ought to have examined the substance of their application for asylum since they had not been readmitted to the territory of Serbia and since Article 51(2)(f) of the Law on the right of asylum introduces a new concept of 'safe country of transit', which is contrary to EU law. In addition, FMS and FNZ brought an administration action for failure to act before the referring court against the aliens policing authority at first instance, seeking a declaration that that authority failed to fulfil its obligations by not assigning them accommodation outside the Röszke transit zone."[56] Such treatment is contrary to Article 27 of the Hungarian Constitution as well as Article 14 § 4, which guarantees the right to asylum. Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labor Court in Szeged, Hungary) decided to stay the proceedings and to refer the following preliminary questions to the CJEU for a finding of irregularities in the actions of the Hungarian authorities and the administrative court in the areas of asylum, detention in transit zones and freedom of movement.

The CJEU has primarily examined the situation of persons in the Röszke transit center, in the light of the rules governing the detention of asylum seekers and the rules of the Return Directive relating to the illegal stay of third-country nationals. In this connection, the CJEU first found that the detention of an asylum seeker in a transit zone must be considered as a measure restricting freedom of movement, i.e. deprivation of freedom of movement equivalent to imposing a measure of detention. Coming to this conclusion, the CJEU argued that the notion of "detention" in a transit zone means a coercive measure that presupposes deprivation of liberty rather than mere restriction of the person's freedom of movement and isolation of that person from the rest of the population, requiring the person concerned to remain within a confined and closed area.[57] According to the CJEU, the

[55] Case C-924/19 PPU and C-925/19 PPU, *op. cit.* note 53., par. 51.

[56] *Ibid.*,par. 59-60.

[57] *Ibid.*,par. 231.

conditions prevailing in the Röszke transit zone constitute deprivation of liberty, inter alia because the asylum seekers cannot leave the zone legally and of their own free will.[58] The Court also considered whether such detention complied with the requirements of European law and found that, under Article 8 of the Reception Conditions Directive and Article 15 of the Return Directive, neither an asylum seeker nor a third-country national in return could be detained solely because they cannot provide for their own needs as they do not have sufficient means to cover the cost of living on their own.[59]

The CJEU has ruled that Article 33 of the Procedures Directive should be interpreted as precluding any national rule allowing the rejection of an application for international protection as inadmissible, merely because the applicant came to the territory of a Member State through a country where he or she was not exposed to persecution or a risk of serious harm within the meaning of a national provision transposing Article 15 of Directive 2011/95, or in which a sufficient level of protection is guaranteed.[60] Importantly, the CJEU has pointed out that the principle of the supremacy of EU law, as well as the right to effective judicial protection guaranteed by Article 47 of the EU Charter, must be interpreted as requiring the national court, in the absence of a national provision providing for judicial review of the lawfulness of an administrative decision ordering the detention of an asylum seeker or third-country national whose applications for asylum have been rejected, to declare that it has jurisdiction to decide on the lawfulness of such detention and authorize that court to release the person concerned immediately if it considers that the detention is contrary to EU law. The same rule was set in the absence of a national provision providing for judicial review of the right to accommodation within the meaning of Article 17 of the Reception Directive, i.e. the CJEU orders the national court to declare itself competent to rule on a remedy intended to guarantee such a right.[61]

It therefore follows from this judgment that detention in a transit zone is no longer lawful after four weeks and that the conditions prevailing in transit zones indisputably lead to them fulfilling all the conditions of detention and deprivation of liberty, which is contrary to positive EU legislation. With this judgment, the CJEU has given great powers to national courts. It is also very important that the CJEU states that it is not lawful to reject an asylum application because the applicant entered the territory of a certain Member State through the territory of

58 *Ibid.*, par. 229.

59 *Ibid.*, par. 266.

60 *Ibid.*, par. 165.

61 *Ibid.*, par. 301.

a Member State where his or her life was not endangered, i.e. safe third countries. It is very clear that the CJEU states that the application of the institution of a safe third country, as introduced in Hungarian legislation, is illegal when used as a pretext for taking responsibility for refugees.

With this ruling, the EU has taken a major step for the Member States whose laws have not given administrative courts the power to overturn a decision to detain an asylum seeker, but only to return it to a review body with a more advisory role. One of these countries is Croatia, whose legal framework stipulates that decisions based on the discretion of administrative bodies, such as the issue of asylum and detention, cannot be overturned by administrative courts. Such a decision of the CJEU will certainly have an impact on the amendment of certain procedural issues and legislative provisions of national laws. This decision was preceded by the ECtHR judgment in Ilias and Ahmed v. Hungary, which found that Hungary had breached its human rights obligations by returning an asylum seeker to Serbia without considering the risk that he might be subjected to inhuman and degrading treatment upon arrival.[62] The CJEU goes beyond the ECtHR and finds that detention in the Röszke transit zone without a formal decision and appropriate safeguards constitutes arbitrary detention.[63] Notwithstanding court decisions, the Hungarian Migration and Asylum Office ignored court rulings and continued to designate a transit zone as a place to detain asylum seekers under the same conditions as before the ECtHR and CJEU decisions.[64]

4. DETENTION UNDER THE NEW PACT ON MIGRATION AND ASYLUM

Three key pieces of European legislation relating to the detention of asylum seekers are subject to the reform proposed by the new PMA, namely the Reception Conditions Directive, the Return Directive, and the Dublin III Regulation. All three of these changes tend to make detention conditions more severe. Three main trends can be observed. The first is the increased use of detention measures on a wider range of grounds, the second is the expansion of other measures that restrict the freedom of movement of asylum seekers, other than detention, and the third is certainly related to problematic conditions in detention facilities. These trends lead to a large gap between the development of the CEAS and the protection of human rights, as the greatest human rights violations occur precisely in connec-

62 Case Ilias and Ahmed v. Hungary [2019] Application No. 47287/15.

63 Case C-924/19 PPU and C-925/19 PPU, *op. cit.* note 53., par. 248.

64 See: Hungarian Helsinki Committee, The Immigration and asylum office continues to ignore court decisions and interim measures, 2018.

tion with the detention of asylum seekers.[65]The Return Directive introduced an additional basis for detention if a third-country national poses a risk to public policy, public security, or national security. Furthermore, Member States are required to set a maximum detention period at three months, a change which the Commission justifies by referring to the ineffectiveness of return policies. The proposed changes to the risk of absconding and the mandatory denial of the period of voluntary return also have implications for the right to liberty. Further changes to the legal framework governing the detention and accommodation of applicants for international protection are provided for in the proposal for a Regulation on Asylum and Migration Management, which replaces the Dublin III Regulation. The deadlines applicable to relocation procedures are also changed if a detention measure is used, which in most cases means stricter deadlines.[66]

The Commission's proposal for a revised Reception Conditions Directive introduces changes to the legal framework governing freedom of movement and detention during the asylum procedure, as in the current Reception Conditions Directive, the general rule of freedom of movement in the territory of a Member State or within the territory assigned to the applicants in that Member State. However, the proposed recast of the Directive provides that the Member States shall grant to asylum seekers a specific place of residence, if necessary for reasons of public interest or public order, for rapid processing and effective monitoring of applications, for rapid processing and effective monitoring of transfer procedures or for the prevention of absconding. The proposal explicitly states that all decisions restricting the freedom of movement of asylum seekers must be based on an individual approach, taking into account any special needs for the reception of applicants and the principle of proportionality. The importance which the Commission attaches to measures restricting freedom of movement is reflected in the fact that Article 8 adds a further ground for detention: where an asylum seeker has been granted a particular place of residence but has not fulfilled his or her obligation to reside in that country, and there is a real risk of absconding, the asylum seeker may be detained to ensure that the obligation to stay in an assigned place is fulfilled. All legal detention requirements and applicable guarantees set out in the current Reception Conditions Directive remain unchanged. This means that the duration of the detention measure must be proportionate and that detention is no longer allowed if there are no longer indications that an asylum seeker will not fulfill the

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65 REMAP Study First Edition, Chapter 2 – Ensuring Liberty and Freedom of Movement, 2020, p. 41.

66 Caritas Europa's analysis and recommendations on the EU Pact on Migration and Asylum, Position Paper, Caritas Europa, available at: [https://www.caritas.eu/wordpress/wpcontent/uploads/2021/02/210212_position_Paper_EU_Pact_migration_Caritas_Europa_Final.pdf], Accessed 12 January 2021.

obligation to stay in an assigned place. Cornelisse, therefore, considers that measures to detain and restrict freedom of movement, if decided by an administrative body, should also be subject to swift judicial review, and the scope of such review should be such as to enable the judicial authority to substitute its own decision for the administrative authority's decision. Also, he believes that it is necessary to amend the Commission's proposal for a new PMA if real protection, promised security, and decent conditions are to be achieved because this proposal does not contribute to the protection of asylum seekers.[67]

In their recent joint commentary on the new PMA proposal, Greece, Spain, Malta, and Italy warn that, although the Commission's proposal does not explicitly include this possibility, we must be sure that the final regulation of border procedures does not pave the way to undesirable effects. According to their comments, the establishment of large closed centers at the external borders is not acceptable and they note that the proposed asylum and migration management must fully respect human rights and the rights of asylum seekers.[68]

The new PMA does not define or explicitly mention detention, but that does not mean that it excludes it from the application. On the contrary, it tacitly tightens the rules of detention and leads to the fact that detention is no longer used as a last resort, but as a necessary measure in the procedure that takes place at the border. According to Wessels, this proposal seems to run counter to the ECtHR's position on the interpretation of Article 5 of the ECHR. Wessels considers that a closer examination of the text of those provisions which could serve as a basis for detention and the asylum procedure (Article 8(3)(d) of the Commission proposal to amend the Reception Conditions Directive) and for the border return procedure (Article 41(a)(5) of the proposal to amend the Common Procedures Directive) largely reflects the wording of Article 5 (1) (f) of the ECHR concerning the prevention of unauthorized entry. The proposal appears to have been shaped by that standard. In this context, if the detention is possible during border proceedings under Article 5(1)(f), it is important that entry has not yet been declared authorized.[69] However, as the REMAP study shows, Article 5 of the ECHR is not in

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67 See: Carrera, S., *The Pact and Detantion: An Empty Promise of "certainty, clarity and decent conditions"*, Special series of post on the New Migration Pact, coordinated by Prof. Daniel Thym, EU Immigration and Asylum Law and Policy, 2020.

68 New Pact on Migration and Asylum: comments by Greece, Italy, Malta and Spain, available at: [http://www.astrid-online.it/static/upload/2511/251120-non-paper-pacto-migratorio.pdf], Accessed 12 January 2021.

69 Wessels, J., *The New Pact on Migration and Asylum: Human Rights challenges to border procedures.*, Online publication or Website, RLI Blog on Refugee Law and Forced Migration, available at: [https://rli.blogs.sas.ac.uk/2021/01/05/the-new-pact-on-migration-and-asylum-human-rights-challenges-to-border-procedures/], Accessed 14 January 2021.

line with international human rights law. The prohibition of arbitrary detention is a well-established rule of customary international law and is codified in a wide range of treaties, such as Article 9 of the International Covenant on Civil Rights. Also, based on case law and General Comments, the Human Rights Committee explained that the detention of asylum seekers is only allowed for a short period to document their entry, record their claims and establish their identity.[70] It has been proposed to detain asylum seekers in the screening or rapid verification process for a maximum of 5 days, but if, for example, the identity could not be established for months, it remains unclear how much the procedure is expected to be shortened and what happens when these deadlines are exceeded. According to Carrera, one of the problems is that this period can be extended to 12 weeks in cases where individuals appeal against a decision rejecting an application for international protection and can be further extended, depending on the time required to prepare the return procedure or implement expulsion proceedings.[71] Besides, the detention of asylum seekers at the EU border during the international protection processing according to all international standards should be considered arbitrary, unless there are specific reasons identified in each case, after which it is considered necessary to impose a detention measure. The whole proposal is based on the fact of illegal entry and prevention of illegal entry, but the illegal entry should not be the basis and justification for detaining asylum seekers. It can be concluded that, with this proposal, the objective of asylum policy, instead of a common way of creating uniform rules and harmonizing procedures, has become the fight against illegal entry into the EU. Such an objective cannot lead to a quality and harmonized asylum policy. The EU is legally bound to follow the rules of customary international law, which are an integral part of the EU legal order and binding on its legislators. However, the new PMA would allow the detention of third-country nationals in order to assess their claims, such as those coming from a country of origin with a recognition rate of less than 20%, without specific individual reasons.[72]

It can therefore be concluded that the Commission's proposal provides for detention in the event of illegal entry or during the processing of asylum applications, which is not in line with international law and the obligations that the EU must fulfill. It is therefore necessary to amend such a proposal and to derogate from keeping the asylum seekers at the borders only on the grounds of attempted illegal entry and for the purpose of the asylum procedure. The proposal for a Regulation

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70 REMAP Study First Edition, Chapter 2 – Ensuring Liberty and Freedom of Movement, 2020.

71 Carrera, S., *Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum*, CEPS Policy Insights, No. 2020-22, 2020, p. 4, available at: [https://www.ceps.eu/wp-content/uploads/2020/09/PI2020-22-New-EU-Pact-on-Migration-and-Asylum.pdf], Accessed 14 April 2021.

72 Wessels, *op. cit.,* note 67.

addressing situations of crisis and force majeure in the field of migration and asylum refers to provisions on the adaptation of new tools for managing migration at the border in exceptional situations, some of which have consequences for the right to liberty. In the event that a mass influx of irregular arrivals floods the Member State's asylum, reception, or return systems and thus jeopardizes the functioning of the CEAS, derogations from the proposed Asylum Procedures Regulation are allowed, meaning that the asylum and return procedures may be extended for an additional period of 8 weeks. The preamble to the Regulation clarifies that detention should also be possible during this period, following Article 41(a) of the proposed Asylum Procedures Regulation concerning the border return procedure. Moreover, the proposed Regulation addressing situations of crisis and force majeure in the field of migration and asylum introduces two additional cases in which the risk of absconding can be presumed in individual cases unless proven otherwise. Such a presumption may subsequently provide a basis for the use of detention under Article 18 of the proposed recast of the Return Directive. Two additional grounds are an explicit expression of intent not to comply with return-related measures or a gross failure to comply with the obligation to cooperate in the proceedings.[73]

When it comes to respecting the right to personal liberty, perhaps the most striking feature of the PMA is the implicit blurring of the line between detention and restriction of freedom of movement, a tendency that is undoubtedly typical of modern migration management. The most important question raised by such practices is how well our current framework of fundamental rights can respond to the challenges that arise from it. Checks and border procedures are characterized by refusal of entry. At the same time, applicants for international protection have the right to remain under EU law and cannot return before their application is assessed. Moreover, Article 18 of the EU Charter provides for the right to asylum. This special construction of detention at the border inevitably affects the freedom of asylum seekers at the border or in the transit zone. In fact, in these proceedings, entry is refused precisely to prevent free movement within the territory of a Member State, as well as potential secondary movements within the EU.

The policy of non-entry into the EU, as provided for in the control and border asylum and return procedures, interferes with the right to personal liberty and also raises complex factual and legal questions. Such solutions will certainly harm the human rights of asylum seekers, noting that in 2013 the European Commission delivered an opinion stating that border procedures can only be used in exceptional circumstances because they involve keeping asylum seekers and unaccom-

[73] See: Carrera, *op. cit.,* note 65.

panied minors. It can therefore be concluded that the detention of asylum seekers at the EU external borders will constitute a deprivation of liberty and not a mere restriction on freedom of movement, and the measure of detention will no longer be the exception but the rule. It is therefore necessary to address the amendments to the PMA with a view to finding a solution for developing and strengthening the CEAS that protects the human rights of asylum seekers

5. CONCLUSION

After the migration and refugee crisis, Hungary was a state that changed its legislation regarding the granting of international protection and began the practice of conducting asylum procedures exclusively in transit zones, thus automatically detaining asylum seekers, although Hungary did not consider this a deprivation of liberty. This paper therefore analyzes Hungary's treatment of asylum seekers, and then proceeds to examine the case law of the CJEU in the case of FMS and others v. Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionalális Igazgatóság and Országos Idegenrendesgat Fő. What the CJEU has found is that leaving people in transit zones without the right to free movement is to be considered detention, even though they are not specialized detention facilities. It can be concluded that the research has shown that Hungary's actions following the migration and refugee crisis and the changes in legislation related to the rights of asylum seekers are in complete contradiction with European and international legal norms when it comes to restricting the freedom of movement of asylum seekers and applying detention measures. To date, Hungary has not changed its treatment of asylum seekers in transit zones, although the CJEU has made it clear that such detention of asylum seekers must be stopped immediately. With this ruling, the CJEU has taken a major step towards protecting the rights of asylum seekers when it comes to freedom of movement within the country in which they have sought asylum. Shortly after the Court ruling, the EU proposed a number of changes that it introduced into the new PMA to improve the existing asylum and migration management system. After analyzing the provisions of the PMA related to the detention of asylum seekers in the border procedure, it was found that they do not contribute to the CEAS and the protection of the human rights of asylum seekers, but represent a step backwards.The provisions on the implementation of the asylum procedure at the EU border, as well as the automatic detention of an asylum seeker during that time, are in line with the recent case law of the CJEU. With the adoption of the new PMA, the EU will not compromise the protection of the rights of refugees and asylum seekers in any way when it comes to restricting freedom of movement and detention, and detention will no longer be used as an "ultima ratio" but as a "prima ratio" necessary to carry out border asylum

procedures. The provisions of the new PMA regarding detention violate the human rights of refugees and asylum seekers. Efforts must be made to amend such a pact, especially when it comes to vulnerable groups of asylum seekers such as children and unaccompanied minors, in order to protect the human rights of refugees and asylum seekers at the highest level. Preventing illegal migration cannot be the main objective of the new PMA, but the focus must be on protecting human rights and the rights of refugees, because that is the primary goal of the institution of asylum and should be the primary goal of the EU.

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UDK 342.8(497.5)
Original scientific paper

PARLIAMENTARY ELECTORAL LEGISLATION – LAW *vis á vis* JUSTNESS OF ELECTORAL LEGISLATION IN THE REPUBLIC OF CROATIA IN THE PAST 20 YEARS

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ABSTRACT

In the last twenty years, through the democratic development of the Republic of Croatia, the problem of modernizing parliamentary electoral legislation and the need and desire to create a better and fairer electoral system as a whole, which will bring the Republic of Croatia into European integration and the map of Western democracies comes "to the surface". In order for the implementation of the political desire to join Western democracies and bring the Republic of Croatia closer to the European Union realize its full potential, the electoral system was changed in 1999, and since then seven elections have been held for the Croatian Parliament, and the Republic of Croatia has in the meantime become a full member of the European Union. On this democratic path and democratic-parliamentary progress of the Republic of Croatia, a constant and unchanged circumstance (parliamentary anomaly) was noticed, which the Constitutional Court warned about back in 2010, and that is the need to create a fairer electoral system, since these existing ones call into question legality and constitutionality of the election results (the warning which the Croatian Parliament still ignores). Therefore, in this paper, the authors, by analyzing the existing electoral system and comparing the 2000 and 2020 elections, identify its shortcomings, inconsistencies between the Act on Election of Representatives to the Croatian Parliament and the Act on Constituencies. Further analysis in this paper refers to the fact of imbalance in the number of voters in different constituencies in which an identical number of representatives is elected (malapportionment), and the lack of "justness" that allows issues of political engineering and forming post-election coalitions, as well as the possibility of representatives "entering" the Croatian Parliament with a minimum number of votes obtained. Also, the authors try to confirm the thesis that the existing electoral system of electing representatives to the Croatian Parliament as a legislative body of the Republic of Croatia

needs to be made more just in order to completely fulfill its purpose of creating parliamentary democracy in accordance with the rule of law and the will of the people. In light of the above, the paper will compare and analyze the results of the aforementioned parliamentary elections and their shortcomings, and will provide an overview of the necessary changes and the creation of a future more just electoral system, which the Republic of Croatia certainly needs and which will reduce to a minimum the difference between law and justice in the procedures for the election of representatives to the Croatian Parliament.

***Keywords**: electoral system, justness, election of representatives, parliamentary elections*

No political topic has been discussed so intensively in the Croatian public in the past thirty years as electoral systems. Much of what is said and written is hard to call rational[1]

1. INTRODUCTORY CONSIDERATIONS

If Plato's politics can be interpreted as the interconnectedness of man, polis and universe, the contemporary legal-political vision of the ideal state should therefore be viewed through the prism of the true will of the people, which would be articulated by the electoral system and the election of people's representatives to public authorities. Precisely such articulation of the true will of the people through elected representatives in governing bodies, and in a concrete sense the legislative body, should be permeated not only by law – of the electoral legislation as such, but also by the principle/elements of justness that complements the true will and reflection of the voters. Therefore, Law and Justness, as two synonyms on which rests every desire of the people of a state to have a state that will be able to combine these two concepts, and we could in an utopian manner say two state-building ideals, in the modern understanding of Plato's ideal state[2] should be *condicio sine qua non* of any parliamentary electoral legislation, and only then it could be said that there is a just and law-based electoral system that articulates the will of the people in the legislative body. The desire for the Ideal State will result in the fact that the Republic of Croatia, as a country with almost 30 years of democratic tradition of electing

[1] Kasapović, M., *Jesu li izborni sustavi sredstva dramatična utjecaja na sudbine zemalja?* Političke analize, No. 32, 2017, pp. 17.

[2] For more on the Ideal State, see Posavec, Z., *Idealna država i mogućnost njena ozbiljenja- Studija o Platonovoj Državi i Kritiji*, Politička misao, 1, Zagreb, 1978, Zagreb.

people's representatives to the legislative authority[3], should, given the nature of the democratic process and Western European democratic values, overcome and outgrow "childhood diseases", and with help of the parliamentary electoral system translate the true will of the voters through the representatives of the people into the legislative authority, i.e. into the mandates of the representatives in the Croatian Parliament.[4] The desire to create and strengthen a modern democratic legal order in the postwar period in the Republic of Croatia, and to approach the true values of Western democracies, and thus the European Union, will include the process of modernizing electoral legislation, all with the aim of approximation and equalization of rights and justice. The modernization of electoral legislation, and perhaps the desire for a more just electoral system, will result in the adoption of a new Act on the Election of Representatives to the Croatian Parliament, which will be adopted by the House of Representatives at its session on October 29, 1999. [5]

Although two decades have passed since the adoption of the aforementioned act and seven parliamentary elections have been held for the election of members of the Croatian Parliament, the passage of time will raise the question of whether it has led to the development of justness of the electoral system in relation to the electoral system itself, which arises from positive legal provisions. Law and justness as syntagms of every electoral system, including the democratic electoral system in the Republic of Croatia, in the past two decades will undoubtedly be diametrically opposed poles that will detect both electoral anomalies and anomalies of direct election of people's representatives to the legislative body. Observed and detected electoral anomalies, in addition to the question of the justness of the electoral system, will raise the question of electoral democracy, the real purpose of the elec-

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3 The thirty-year democratic tradition of electing people's representatives to the legislative body in the Republic of Croatia refers to the fact that the first multi-party elections for the Parliament of the then FR Croatia within the former SFR Yugoslavia were held in the first round on April 22, 1990 and in the second round on May 6, 1990, pursuant to the Decision on calling general elections at all levels in Croatia, which was adopted by the Presidency of the Central Committee-SKH on December 10, 1989. For more on the first multi-party elections, see Vukas, B., Jr., *Hrvatska državnost – Pravnopovijesne prosudbe* – uz 25. godišnjicu prijama Republike Hrvatske u Ujedinjene narode, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2018, pp. 142 and 143.

4 That there was a genuine will and desire to move closer to Western democratic values and traditions, including through the provisions of the new Constitution, the "Christmas Constitution" of the Republic of Croatia from 1990, can be seen in the statements of Vladimir Šeks in which he claims: "Another characteristic of the new Constitution is that it has all the characteristics of modern democratic acquis with all the consequences that follow from it. In this way, we have normatively and legally obtained a ticket for the European Community, and whether it will actually happen, that is another matter. However, we have legislatively adapted to joining the European Community." For more on this, see Šeks, V., *Temelji hrvatske državnosti*, Golden marketing/Tehnička knjiga, Zagreb, 2005, pp. 93 and 94.

5 Act on Election of Representatives to the Croatian Parliament, Official Gazette, No. 116/99.

toral law as such, as well as the implementation of certain measures/warnings by the Constitutional Court, which again raises the question of law and justness of the parliamentary electoral legislation. Perhaps the best in this regard and following the introductory considerations of the author of this paper is the thought of Joseph LaPalombara, who states that "the Constitution provides a framework for democracy, but political parties and elections are its heart and soul."[6] Precisely the elections as the "heart and soul" of any democracy should be based on justness, which will include, in addition to creating more just constituencies, the fact that the post-election coalition of parties is a fraud or a real reflection of the true will of voters. Although some authors believe that "there is no ideal electoral system, a system that will perfectly reflect the will of citizens and cover all the required factors, such as justness, regional representation, minority representation, etc.", as well as that the existing electoral system is the *status quo* which the main political actors avoid dealing with".[7] Precisely because of this fact, the authors of this paper will, instead of political actors, deal with the true detection of the gap between law and justness in the process of electing members of the Croatian Parliament, and through a comparative method and method of analysis of election results and content analysis try to detect and identify weaknesses of the Croatian parliamentary electoral legislation, which is possibly despite the *lege artis* of the electoral process against the justness and Plato's Ideal State.

2. ELECTORAL LAW AND PRINCIPLES OF ELECTORAL LAW

In the early 1990s, the Republic of Croatia "experienced" its long-desired constitutional change that would enable it to gain independence, sovereignty and the ability to create a democratic and independent state in which power would come from the people and belong to the people as a community of free and equal citizens.[8] One of the highest values of the constitutional order of the Republic of Croatia is a democratic multi-party system that is realized through national sovereignty and free elections.[9] Thus, the political leadership of a country derives from

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6 LaPalombara, J., and according to Deren-Antoljak, Š., *Izbori i izborni sustavi, Društvena istraživanja*, Zagreb, Vol. 1, No. 2 (2), 1992, pp. 215.

7 Pervan, M., *Mehanički učinci izbornog sustava: slučaj izbornih jedinica u Hrvatskoj*, Političke analize 9, No. 33-34, 2018, pp. 26-32, [https://hrcak.srce.hr/205958], Accessed 10 March 2021.

8 Article 1, paragraph 2 of the Constitution of the Republic of Croatia Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14, hereinafter the Constitution.

9 The original foundations of the Constitution: "Respecting the free will of the Croatian people and all citizens in free elections, the Republic of Croatia is being shaped and developed as a sovereign and democratic state…"
Article 1, paragraph 3 of the Constitution states that the people exercise power through the election of their representatives and direct decision-making.

free elections in which the voter exercises his or her active or passive suffrage. [10] A competitive electoral system is a part of every democratic state that rests on the rule of law, whose foundation is characterized by the most important principles and values, among which stand out: universal suffrage, its equality, immediacy, secrecy and freedom of choice. Freedom of choice forms the very basis of democratic competitive elections, while immediacy means that the people are allowed to participate personally in the election of their representatives. Universal suffrage means that all voters have it, regardless of possible differences between them. [11] The principle of secrecy means that the decision made by the voter on his or her vote must remain unknown to others. Last and most important in the context of this paper - the principle of equality of suffrage means that the legislator through the electoral system must ensure that the vote of each voter has equal value, i.e., that the weight of suffrage and the right to vote is equal. [12] Consequently, every democratic society will seek to regulate and create an electoral system based on these fundamental principles, which will guarantee the conduct of competitive elections. This is because the real freedom of choice depends on the character and model of the electoral system through which citizens exercise state governance and through which representative democracy is achieved.[13] Perhaps the best presentation of the relationship between the elections themselves and the effects they should have is also noticed by Deren-Antoljak in her article, who states; "Elections are not only the generally accepted (and only) legal basis for political power and the constitution of democratic political representation, but they provide more or less free communication between those in power and those governed, managers and followers, leaders and followers, representatives and the represented."[14]

These principles and preconditions are just some of the elements of Plato's Just State, because through them we repeatedly come to the essence, and that is whether the law and justness of elections and the electoral system are the true will of

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10 The right to participate in elections as a candidate and to be elected as a representative of citizens in government is called passive suffrage. While active suffrage provides an answer to the question of who can elect government representatives, i.e., who has the right to vote.

11 Thus, in the Republic of Croatia, everyone has rights and freedoms, regardless of race, colour, sex, language, religion, political or other beliefs, national or social origin, property, birth, education, social status or other characteristics, Article 14, paragraph 1 of the Constitution.

12 As well, the *Code of Good Practice in Electoral Matters of the Commission for Democracy and Law of the Council of Europe* (hereinafter: the Venice Commission), adopted at the 51st session on 5 and 6 July 2002, together with the reasoning adopted by the Commission at its 52nd plenary session on 18 and 19 October 2002, in particular points 2, 2.1. and 2.2.

13 "Representative democracy is a system in which the government is formed by representatives of the majority, expressed in free and competitive elections…" Smerdel, B., *Ustavno uređenje europske Hrvatske*, Zagreb, 2013, pp. 5.

14 Deren-Antoljak, *op. cit.*, note 6, pp. 220 and 221.

the people, and if that does not happen or "the principle of justness is not implemented, then the state falls into a dangerous path of disorder that threatens its existence...." [15] Therefore, with an analytical and comparative approach, the authors will through this paper and research try to find out "what is the path of the Republic of Croatia?"

3. PROPORTIONAL ELECTORAL SYSTEM AND ITS CHARACTERISTICS

In the first ten years of Croatian electoral history or Croatian democracy, the main models of electoral systems changed: majority (1990), mixed (1992 and 1995) and proportional (2000). In 2000, the legislator in the Republic of Croatia opted for the introduction of a proportional electoral system[16], which he considered to be the best guarantee of free and competitive elections. The basic proposal for the drafting of the new Act on the Election of Representatives to the Croatian National Parliament[17] was the proposal of the Working Group for drafting the framework proposal and basic institutes of the Croatian election legislation from March 1999.[18] In its proposal, the working group emphasized two basic principles: the principle of "fair political representation of all parts of the electorate, which includes fair parliamentary representation of political parties that express their interests and values", and the principle of effective political power, which should "prevent the creation of an atomized and polarized multi-party system in parliament, which jeopardizes political decision-making and implementation, encourages strong ideological polarizations and fundamentalizes conflicts in both parliament and society, and destabilizes the overall political order."[19] With the enactment of the Act on the Election of Representatives to the Croatian Parliament in Croatia, a proportional electoral system was fully introduced in Croatia, electing 140 deputies in 10 constituencies. [20] This act for the first time in the applica-

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15 Posavec, *op. cit.*, note 2, pp. 34.

16 "In majority of the existing democracies, proportional elections are applied." Nohlen, Dieter: *Electoral Law and the Party System*, Biblioteka alternative, Školska knjiga, Zagreb, 1992, pp. 32.

17 Act on Election of Representatives to the Croatian Parliament, Official Gazette, No. 116/99.

18 The members of that working group were professors Smiljko Sokol, Branko Smerdel, Mirjana Kasapović, Ivan Grdešić and Mario Jelušić.

19 Working group for drafting the framework proposal and basic institutes of the electoral legislation of the Republic of Croatia, *Basic Principles and Institutes of the Act on the Election of Representatives to the Croatian National Parliament* - Proposal, Zagreb, 1999.

20 With the reform of the electoral legislation after the adoption of the Act on the Election of Representatives to the Croatian National Parliament from 1999, Official Gazette, No. 116/99, the proportional electoral system was fully introduced in Croatia. The name Croatian National Parliament was introduced by the enactment of the Constitutional Act on Amendments to the Constitution, Official Gazette, No. 135/97.

tion of the proportional electoral system divided the state territory into constituencies using the D'Hondt method in the election of all representatives, apart from the representatives of national minorities, and introduced an electoral threshold of 5%. The same act also provided one constituency for all Croatian citizens residing outside Croatia in which up to 14 deputies are elected (11th constituency) and the 12th constituency consisting of the entire territory of Croatia for members of national minorities. The primary goal of dividing the territory into 10 constituencies was the regionalization of politics, namely, the goal was to elect local politicians who would represent the interests of their region. Since political parties highlighted candidates on their lists who did not come from the constituency in which they were elected, this goal was not fully met, and therefore in such an example we clearly notice differences in the implementation of the content of the right to justice and fairness of the electoral system. By opting for a proportional electoral system for the election of representatives to the Croatian Parliament, the legislator was guided by the fact that the Constitution prescribes that the system of representative government is a fundamental form of exercising people's sovereignty in which the Republic of Croatia is a multi-party parliamentary democratic state. The people, as a community of citizens, exercise power by electing their representatives on the basis of universal and equal suffrage. Therefore, the elected representative of the people is considered to be the representative of all citizens of the Republic of Croatia, not just the voters who elected him."[21] "He also applied the concept of so-called pre-reserved seats in such a way as to ensure that members of minorities have special representation in the national parliament, because minorities usually cannot elect their representatives in regular elections, and their election must be separated from the general electoral system. This is necessary in order to enable minorities, regardless of their number, to protect their minority interests in political decision-making processes and to participate in political power through their special representatives with the so-called *positive discrimination*." [22] The electoral system for the election of representatives to the Croatian Parliament is regulated by norms of a constitutional and legal nature, as well as norms of international law. We should also mention the norms that prescribe ethical rules of conduct and mutual relations of all participants in the election process. The mentioned electoral system as it was introduced in 2000 has remained in force today with minor changes, which occurred in 2014 and 2015 and are related to the mandatory introduction of the so-called women's quotas, (although it applies to both sexes). [23] These changes also introduced the possibility of expressing one

[21] Order of the Constitutional Court No. U-I-1203/1999 of 3 February 2000

[22] *Ibid*. 18

[23] The introduction of the women's quota did not have concrete results, i.e., the list can go to the elections regardless of the gender ratio, but if there are less than 40% of members of one sex, a fine is paid.

preferential vote (closed unblocked lists), abolished the institute of list holders, banned the candidacy of persons who committed crimes, changed the regulation of election campaigns on public services and introduced the democratic use of more attention. in election observation. It can be concluded that these were only "cosmetic" changes, changes that approached European parliamentary/democratic values. These changes in their basis and content did not significantly affect the creation of an electoral system tailored to the needs of a modern democracy, which would be a real reflection of the true will of electors, voters and each individual, which would undoubtedly lead to full implementation of justice in articulating the will of voters and thereby the creation of a Just State.

4. ACTUAL EFFECTS OF THE VALID ELECTORAL SYSTEM

Electoral systems operate in complex political, economic, social and cultural environments, so their impact on political reality is not always easy to assess. However, in every society, they certainly have a great influence on democracy, the political and party system, but also on the notion of moral values. Perhaps in the wake of this we can cite the maxim or thinking of Denis F. Thompson by which he best depicts the meanings of the effects of the electoral system and the elections themselves; Elections can happen without democracy, but democracy cannot exist without elections". [24] The very fact that democracy cannot exist without elections hides a great uncertainty between the border of law and the fairness of the same elections. When we talk about the influence of the electoral system on the political system, its two elements have the greatest influence on it: determining the results of elections and the constituency[25]. The system of determining the results of elections is a way of converting the votes of voters into the final result of the election, which includes the choice between the majority and proportional electoral system, the method of converting votes into seats and the election threshold.[26] The Venice Commission, in its Code of Good Practice in Electoral Matters, emphasizes that the stability of the electoral law is crucial for the credibility of the electoral process, which in itself is essential in consolidating democracy. The Venice Commission points out that, in practice, the fundamental principles of the right to vote are not so much endangered as the stability of certain rules of the electoral law that

[24] Thompson, F., D., *Elections – creating a fair electoral process in the United States*, The University of Chicago Press, 2002, pp. 1.

[25] The basic elements of the electoral system are voting, running, constituencies and determining the results of elections.

[26] Lijphart, A., points out that the choice between a majority and a proportional electoral system is one of two fundamental constitutional choices. The second choice is between the presidential and parliamentary system of government, Lijphart, A., *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1*945-1990. Oxford, Oxford University Press, 1994, pp. 23.

regulate the electoral system itself, including the determination of constituencies. Twenty years have passed since the beginning of the elections for the Croatian Parliament according to the proportional electoral system and ten years since the Constitutional Court of the Republic of Croatia (hereinafter: the Constitutional Court) in the Report[27] on Unequal Voter Weight in Constituencies defined by Articles 2 to 11 of the Act on Constituencies for the Election of Representatives to the Croatian Parliament ("Official Gazette" No. 116/99) established that the constitutionality and legality of the division of territories into constituencies as in force could be called into question and called on the Croatian Parliament to "immediately" start the procedure of amending the boundaries of constituencies. The Constitutional Court thus pointed out that the division into constituencies introduced by the Act on Constituencies for the Election of Representatives to the Croatian Parliament ("Official Gazette" No. 169/99; hereinafter: the Constituency Act) produced an outcome in the number of voters per constituency which in all constituencies does not fit into the requirement of the Act on Election of Representatives to the Croatian Parliament[28], according to whose provision from Article 39, paragraph 1, the number of voters in constituencies may not differ from +-5%. In addition to finding excessive discrepancies in the number of voters per constituency in the previous elections, the Constitutional Court found that this called into question the real equality of the right to vote, a principle expressed in Article 45 paragraph 1 of the Constitution[29]. Furthermore, he warned that another legal standard should be ensured, and that is maximum respect for the area of administrative-territorial units when determining the boundaries of constituencies. In conclusion, the Constitutional Court pointed out the necessity of immediate amendments to the Law on Constituencies, but also the need to determine the competent bodies in that law and prescribe the rules of the so-called the procedure of delimitation, i.e., the procedure of harmonization of areas and borders of constituencies. The Constitutional Court states that once certain constituencies are by nature subject to change. "It is especially important that the division into constituencies cannot be regulated once and for all. Migration processes require constant adjustment of constituencies to changed relations, by geographically changing the boundaries of constituencies, or by changing the number of

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27 Order of the Constitutional Court No. U-X-6472/2010 of 8 December 2010, Official Gazette No. 142/10.

28 Official Gazette No. 116/99, 109/00, 53/03, 167/03, 44/06, 19/07, 20/09, 145/10, 24/11, 93/11, 19/15, 104/15, 48/18 and 98/19.

29 Croatian citizens over the age of 18 (voters) have universal and equal suffrage in parliamentary, presidential and the European Parliament elections, and in the decision-making process in a state referendum, in accordance with the law.

seats in a constituency."[30] Changes in the number of voters in general constituencies, determined by the Act on Constituencies for the Election of Representatives, must therefore be constantly monitored. If necessary, their areas and borders must be periodically, in due time before the next parliamentary elections, adjusted to the actual situation of voters in them." One of the most important conclusions of the Constitutional Court is the following one:" Both the legality and the general democratic character of the overall elections depend on equal distribution of voters by general election units (on which distribution the equality of the weight of the electorate directly depends). Moreover, the assessment of the constitutionality of the entire election may depend on it: they would be unconstitutional if the excessive deviation in the number of voters in individual general constituencies would directly and indirectly affect the election result, i.e., if it would lead to different election results in a situation where all other elements of the electoral system would be or remain the same." Nevertheless, elections for the representatives of the Croatian Parliament are still conducted according to unchanged legal provisions, and the general democratic character of all elections may or may not remain a utopian expectation of the justness of the electoral system and possibly a just state.

5. (IN)EQUALITY IN SUFFRAGE

When dividing the territory of the Republic of Croatia into 10 constituencies, the problem is a very pronounced imbalance in the number of voters in different constituencies in which an identical number of deputies is elected, also known as *malapportionment*, which represents a "modern and refined way of violating the equality of suffrage as a constitutionalized principle that has found its place in a number of different international documents"[31]. Such "tailored" constituencies represent a shortcoming of the Croatian electoral system (unacceptable for democracy) when we talk about the negative effect - inequality in the strength of the right to vote, or a state in which one's vote is worth more than another. The basic aspiration in the organization of constituencies should be the equal influence of each vote with a more orderly division of the geographical space of the state. This is an issue that touches on the fundamental political rights of citizens guaranteed by the Constitution and their political equality, the changes of which are equally in the interest of both citizens and political parties. "It is considered to be a characteristic of a fair proportional electoral system that no one has significantly more mandates than they deserve according to what the citizens gave them in the

[30] Nohlen, *op. cit.,* note 16, pp. 48.

[31] Palić, M., *Učinci primjene razmjernog izbornog sustava u Republici Hrvatskoj,* Zbornik radova Pravnog fakulteta u Splitu, 2012, Vol. 49, No. 1, pp. 49-58.

elections."[32] Citizens have the right to vote in elections for "competing" candidates, but they also have the right (with a minimum of legitimate expectations) to fair and equitable representation from those to whom they have given (whom they felt they have given) their confidence.

Overview of the deviation of the number of voters from the allowed legal range of + -5% in the parliamentary elections in 2000 and the last ones in 2020.[33]

constituencies	**elections 2000**	**elections 2020**
I.	-1,41	-6,20
II.	4.49	6,45
III.	-0,96	-4,65
IV.	-9,47	-14,21
V.	3,39	-7,43
VI.	-6,17	-9,85
VII.	1,03	12,05
VIII.	1,76	2,25
IX.	1,01	12,49
X.	6,33	9,09
average	3,60	8,47
range	15,80	26,70

From the attached table, and in terms of proving the thesis in this paper and the research, it is evident that in the 2000 elections there were units that "jumped" outside the legally allowed range +/- 5% - 2000 three, and in 2020 it is as many as eight out of ten constituencies. Also, over time, the average deviation of other units increases, from 3.6% in 2000 to 8.47 in 2020. At the same time, the difference between the smallest and the largest constituency is growing, calculated at the level of one mandate, which means, for example, that in 2020 in the IV. constituency 22 328 voters elected one representative, while in IX the electoral unit of one representative was elected by 29,277 voters. One constituency, VII remained within the legal framework, and three constituencies (IV, VI and X) were outside

[32] prof. Podolnjak, 10 December 2018 at the Citizen's Initiative forum The People Decide: *Does power belong to the people and who steals our referendum?*

[33] Shaded - constituencies that deviate outside the legal framework of +/- 5%, average - average percentage deviation (absolute values) of all constituencies range - range between the maximum negative and maximum positive deviation in each year (or the difference between the least numerous and most numerous constituencies units expressed as a percentage of the average constituency). Čular, G., *Hoće li sljedeći parlamentarni izbori biti neustavni?* Fakultet političkih znanosti u Zagrebu, September, 2020, pp. 5, 6 and 7 [https://www.gong.hr/media/uploads/20200914_izborne_jedinice.pdf], Accessed 10 March 2021.

the legal range. It is noticeable that the deviations usually increased over time, so that the small number of constituencies became smaller in number of voters, and the overnumbered ones received more and more voters. This fact supports the thesis that the main cause of inequality of constituencies with regard to the number of voters is most likely demographic trends. However, this fact has an impact on the inequality in the weight of the vote, where voters of the same units are always "overrepresented" and others are always "underrepresented", which turns individual inequality of suffrage into regional inequality. The aforementioned speaks in favor of the thesis about the eternal "conflict" of law and justness of the electoral system and legislation in the Republic of Croatia.

Furthermore, in terms of further proving and reviewing the relationship between the law and justness of the electoral system and legislation in the Republic of Croatia, in support of proving Jelušić's allegations should be cited in which he states, "although when creating this electoral system in 1999, some members of the commission for drafting the basic principles of then a new electoral system in Croatia thought that due to the the stability of the executive power of the Croatian Parliament thus formed, it would be good if a dozen deputies were still elected by a relative majority system. Such a model is simpler and, with the current electoral threshold rate of 5%, ensures satisfactory stability of the government resulting from the Croatian Parliament. Although the majority systems institutionally generate a stable executive power with less pronounced representativeness and democracy, this proportional electoral model has so far become established in our country, becoming an important part of the Croatian political system and political culture and generally accepted by most key political parties and the public. In addition to a possible increase in the number of possible preferential votes, the only urgent change in the electoral system is the correction of the territories of individual constituencies so that due to demographic changes in the past two decades they are all reduced to the proportions prescribed by the Croatian Parliament in the number of voters in some of them in the amount of +/- 0.5%."[34]

6. FREE AND JUST (FAIR) ELECTIONS

Almost 30 years ago, in the beginnings of independence, when the process of democratization in the Republic of Croatia was starting, we pointed out the following: "Political parties and movements guarantee with their own position that no one should fear democracy or to live in democracy in fear; no one has reason to fear free democratic elections. Democracy is freedom - the rights and fundamental

[34] Jelušić, M., judge of the Constitutional Court of the Republic of Croatia, Interview of the author, February 2021.

victory of every man and of all people. All parties and movements, together and individually, must be a support to every man and all people in the exercise of their political and social rights, in the preservation of their freedom and human rights. Therefore, it is the duty of all parties and movements to protect every person, regardless of which party or movement he or she belongs to.[35] Subsequently, the Declaration on Criteria for Free and Fair Elections[36] was adopted, stating that elections are a necessary and unavoidable element of sustainable efforts to protect the rights and interests of those governed and that everyone has the right to participate in them as a key factor, all with the aim of exercising human rights and freedoms. The fundamental principle is "free and fair election", which means that in any state the authority of the government can only come from the will of the people, which is expressed in fair, free and fair elections held at regular intervals, on the basis of universal, equal and secret voting right. Each voter has the right to exercise his right to vote as well as others, and his vote must have the same weight as the votes of all others. In the context of the law and responsibilities of the states, it is emphasized that the states should take the necessary legislative and other measures in accordance with their constitutional procedure, in order to guarantee the rights and institutional framework for regular, fair, free and fair elections. Taking into account the last 20 years of our electoral system and the statements mentioned in points 4 and 5, we cannot escape the impression that these principles and postulates have been somehow neglected, anachronized due to the political interests of certain groups, thus repeatedly and unequivocally the question of justness in relation to the law of the electoral system.

7. AUTHORITY WITHIN THE LIMITS OF LAW AND ITS JUSTNESS

As early as the 12th century in England it was believed that a ruler must obey God and the laws he had enacted at the time. This obligation of the ruler was confirmed by the Grand Charter of Liberties (Magna Charta Libertatum) of 1215, which established the ruler's obligations to the earthly barons and recognized their right to rebel if these obligations were violated. If we start from the fact that the goal of politicians and politics is the common good, then it should be said that the precondition for the common good is justness as the highest virtue of the individual which ultimately leads to a just community[37] (state) of all. Authorities are expected to pass laws that will ensure the justice of democracy. The idea underlying

[35] Declaration of the Principle of Conduct for Election Participants, Official Gazette No. 13/90 od 30 March 1990.

[36] Unanimously adopted by the Interparliamentary Council, 154th session, Paris, 26 March 1994.

[37] Plato defines justness as the virtue of the individual. Aristotle interpreted justness as equality.

proportional representation is that each party in the representative body should be represented in proportion to the part of the electorate that supported it in the elections. In legal theory, one of the characteristics of proportional representation is most often its justness.[38] "The definition of the law is: the law is a normative act of the state, a regulation of the highest legal force after the Constitution. The law formulates the people's representation or the people directly. The law is aimed at implementation. All regulations and all actions must be in accordance with the Constitution, legislation and law, as prescribed by Article 5 of the Constitution." [39] According to Smerdel, new categories of legislation have been created in our country, and one of them consists of the laws that are applied, although in some way declared unconstitutional, but still continue to be applied until some point in the future. As a result, legal uncertainty arises, [40] and any reflection outside the literal grammatical interpretation of regulations becomes dangerous, especially if it has to do with politics, which is inevitable in constitutional matters (which includes the electoral system). Such a fact creates political chaos, legal inequality and destabilization of society itself as a body of every state. In this sense, we should also mention Fuller's reflections, which state that certain moral standards – "principles of legality" are built into the very concept of law, so that nothing is valid if the law does not meet those standards. Based on these principles of legality,[41] there is an internal morality according to the law that imposes a minimum morality of justice. The principles of legality together guarantee that each law will embody certain moral standards of respect, fairness and predictability that represent important aspects of the rule of law. Democracy has a chance to develop only with the help and joint action of an enlightened leadership and an active people, which is not possible without confidence in the justice of the system. Therefore, the above definitions and assumptions of democracy and justice according to Fuller in

[38] However, from the point of view of voters (citizens), the connection between the given votes and the election results is not very transparent. The elections are dominated by political parties, i.e., the lists of candidates they determine. Therefore, voters do not know the proposed candidates at all, so they vote in the elections according to the preferences of a particular political party. Changes to the electoral system have tried to circumvent this by introducing preferential voting, which "gives importance" to the will of the voters themselves.

[39] Branko Smerdel's book *Ustavno uređenje europske Hrvatske, II. izmijenjeno i dopunjeno izdanje*, 2020 was published by Narodne novine d.d.

[40] According to the former President of the Constitutional Court, Dr. sc. Jasna Omejec, the legal system has been turned into a "patch" of unclear and contradictory solutions and new institutions foreign to the Croatian tradition." *Ibid*. 38, p. 552.

[41] "Legal rules must meet 8 minimum requirements in order to be counted as a real law. The rules must be: 1. sufficiently general, 2. publicly announced, 3. applicable to future conduct, 4. minimally clear and comprehensible, 5. non-contradictory, 6. relatively constant, 7. must be obedient and 8. must be applied in a way that does not differ from the obvious meaning", Fuller, L., *The Morality fo Law,* Yale University Press, New Haven and London, 1964.

the Croatian context remain in contradiction with the existing electoral legislation and electoral system.

7.1. Representative mandate, pre and (post)election coalitions as a result of injust representation

The "recipe" for overcoming chaos and hopelessness is to create civilized communities from local, national to supranational. The realization of the above is not possible without professional, intelligent and ethical interpretations of the existing legislative framework which will both shape the rules of conduct and persist in their just and reasonable application. "In other words, the current institutions[42] need to be "reset",[43] especially through the filter of morality,[44] legitimacy[45] and legality."[46] We are facing a situation of deep democratic crisis marked by declining citizen engagement caused by a deficit of values, faith in procedure, law and the Constitution. According to Lauc, legitimacy should be thought of as a bridge between morality and legality. Its *raison d'etre* is the expression of belief in certain types of government by citizens. However, the lack of politically responsible behaviour, morals, honesty (justice), led to the fact that this model of political relations was spent.[47] The future of political life should begin to be created outside the framework of general politicization, populism and anti-intellectual atmosphere with the right measure and optimal model that will ensure moral defensibility (good-evil), legal effectiveness and political feasibility of any regulation. State activities must not be arbitrary, but based on predetermined rules of the game, le-

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42 "It should always be borne in mind that institutions are concrete people. Therefore, their motivation, morality and ethics, training (knowledge and skills), teamwork, social sensitivity are essential for fulfilling the content and procedures of decision-making and action. The resilience of democracy is inherently linked to the healing of its institutions - vital components that protect the rights of those in the minority and contribute to resolving political disagreements in a peaceful, orderly manner. This is a prerequisite for the realization of economic efficiency, political freedom and social security". Lauc, Z., *MORALITET – LEGITIMITET – LEGALITET = Trojstvo konstitucionalnog inženjeringa, HAZU 30-godišnjica Ustava RH (1990-2020); Ustavne promjene i političke nagodbe - Republika Hrvatska između ustavne demokracije i populizma,* HAZU, Zagreb, 2020 pp. 36.

43 One should unlearn what has been learned, unlearn the fact that "vocation" is valued instead of knowledge.

44 "This is because morality (honesty) is the most important category for economic and political prosperity". *Ibid*. 38, pp. 10.

45 The notion of legitimacy implies the dignity of a political order to be recognized, Habermas, J., *Problemi legitimacije u modernoj državi*, Gledište, 1979, pp. 135.

46 *Ibid*. 38, pp. 4.

47 Josipović, I., "The Croatian electoral system is unfair and undemocratic. There is no democracy in the parties. The electoral system supports the selection of cats from the political sacks." [https://www.jutarnji.hr/vijesti/hrvatska/josipovic-se-obratio-hrvatskoj-javnosti-zelim-vam-odgovoriti-na-dva-vazna-pitanja-462136], Accessed 15 March 2021.

gitimized by the people invited to participate in the adoption of these rules[48] in a specific case, by the people called to decide who will represent them as a justly elected representative in parliament.[49] Following this thinking, we can take the research conducted by Guy S. Goodwin-Gill, who states:... electoral obligations and the goal of representative democracy have a program dimension, predicting progress in building a democratic institution, strengthening people's confidence in the democratic process and leading to better and more democratic governments."[50]

However, contrary to the above, the parliamentary elections held in 2020 show all the "luxury and political colour" of the representation of the people by (unwanted) representatives. The most common situation is that the representatives who received the mandate is replaced by another representative, i.e., his mandate is "handed over" to another representative. Such true and conscious cheating of voters and manipulation of the electoral system is the modus operandi of all political options, especially the current ruling nomenclature, because the lists include "strong and resounding" candidates who cannot enter the Croatian Parliament by Law[51] (e.g., ministers, state secretaries, prefects, members of the management board of companies, etc.)[52] or who are expected to be ministers in case of victory of a certain political option. Furthermore, as an electoral anomaly in Croatian political everyday life, which refers to the deliberate manipulation of justice and the will of voters, and in connection with the election procedure in Croatia, we have the case of positions of Marko Milanović Litre, who entered the Parliament as a replacement for MEP Ruža Tomašić. The mentioned representative of the Croatian Conservative Party was on the list of the Homeland Movement in the 10th constituency, but as she remains in the European Parliament, Milanović Litre entered the

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48 Rule of law.

49 European Court of Human Rights, in the case of Yumak and Sadak against Turkey, Judgment no. 10226/03 of 8 July 2008 stated that: "States Parties to the Convention are obliged to hold elections that ensure the expression of the will of the people, while respecting the right of the individual citizen to vote and to stand for election. Any restrictions imposed by electoral legislation must not impede the free expression of the will of the people in the election of the legislature - in other words they must reflect... the effort to maintain the integrity and effectiveness of the electoral process aimed at recognizing the will of the people through universal suffrage.", point 109, Order of the Constitutional Court No.: U-I-4780/14 of 24 September 2015.

50 Goodwin-Gill, Guy S., *Free and Fair Elections,* Inter-Parliamentary Union, Geneva, 2006, pp. 71, [http://archive.ipu.org/PDF/publications/Free&Fair06-e.pdf], Accessed 15 March 2021.

51 Article 9 paragraph 1 of the Act on the Election of Representatives to the Croatian Parliament.

52 Thus, instead of those to whom they gave a preferential vote such as: Andrej Plenković, Nina Obuljen Koržinek, Zvonko Milas, Gordan Grlić Radman, Darko Horvat, Ivan Anušić, Josip Škorić, Zoran Đuroković, Zdravko Marić, Mario Banožić, Josip Aladrović, Danijel Marušić, Davor Božinović, Tomo Medved, Tomislav Ćorić, Oleg Butković, Ivan Malenica, Nediljko Dujić, Luka Brčić, Božidar Kalmeta, Marijan Kustić, Vili Beroš, Blaženko Boban, Andro Krstulović Opara, Ante Mihanović, Predrag Fred Matića Zlatko Komadina, Damir Bajs, Željko Kolar and Matija Posavac – the voters will be represented by "second-league players" they did not elect.

Parliament instead of her, thus "expelling" Robert Pauletić, although he won only 19 preferential votes (0.09 percent of the total number of votes achieved by that list). At the same time, Pauletić, as the candidate of the Homeland Movement, won 3,907 votes, or 19.79% of the total number of votes achieved by the entire list. If Tomašić, Milanović Litre and Pauletić were candidates on the candidate list of one party, then Pauletić would enter the Parliament. The law[53] says that on the list of one party the elected representative is replaced by an unelected candidate, in which case he is elected according to the preferential votes won, and if there is no candidate on the list to replace the representative, then he is determined by the party proposing the list. A candidate who enters by preferential votes should win at least 10 percent of the preferential votes in relation to the number of votes won by the list on which he is running. In the case of candidate lists of two or more parties, as is the case here, the elected representative shall be replaced by an unelected candidate "from the same party to which the representative whose term of office ended or stands belonged at the time of the election". In that case, too, preferential votes are seen first, and if on the list "there is no candidate to replace the representative, then the deputy is appointed by the political party to which, at the time of the election, the representative whose mandate ended belonged". According to the legal provisions, Milanović Litre, as the only remaining representative of the Croatian Conservative Party on the list, would have replaced Ruža Tomašić even if he had not won a single preferential vote. In this way, people who do not represent the true voting will of the voters and who received a minority of votes enter the Parliament, which can repeatedly lead to the conclusion that this is voter fraud and a legal anomaly, which, despite the fact that everything is in accordance with existing regulations is not in accordance with the principle of justness. Pauletić defended his rights with a constitutional complaint, but unsuccessfully, it was rejected with the explanation that: "in a situation when a candidate from the same list and a member of the same political party as the elected candidate is appointed as a deputy, the number of preferential votes of the applicant, who is a member of another political party, is not decisive."[54] Therefore, one could talk about the partial composition of the Parliament without being based on the real will of the voters,[55] which was certainly not the intention of the legislator when he introduced preferential voting in our electoral system. On the contrary, it was then defended by the fact that the voters choose the candidates of their choice

[53] Article 42 of the Act on the Election of Representatives.

[54] Decision of the Constitutional Court No. U-III-3786/2020 of 23 February 2021.

[55] "The elected representative of the people is considered to be the representative of all citizens of the Republic of Croatia and not only the voters who elected him. Such representative rule is expressed through a representative mandate derived from the theory of indivisible people's sovereignty.", Decision of the Constitutional Court No. U-I-3789/2003 of 8 December 2010.

over other candidates on the same list, while political influence is largely transferred from political parties to the benefit of citizens. The intention was to give citizens the opportunity to influence the composition of the representative body, by choosing those who managed to motivate them with their work or program and gain their trust. The legislator believed that in this way the will of those who compiled the lists would not be decisive and that the political scene would be enriched by people who would actively and responsibly approach the role of candidates, and then representatives. However, we can conclude that this intention of the legislator, due to the "acrobatics" of politicians and the desire for "power" of the newly elected representatives deprived of any sense of legitimacy and justness of this "power", failed to fully materialize. In this example (which is not the only one of this kind) we can speak in its entirety about falling on the test of democracy and justness of all intentions of the legislator related to the "democratization" of the electoral system and "playing" the role of voters in it, and we can say that with the accession of the Republic of Croatia to the European Union such a practice has not changed. Thus, the division of territories into constituencies was aimed at electing local politicians who will represent the interests of the voters of their region in the Parliament, however, this goal was not fully met either. An example of this is the previously mentioned case of Milanović Litre who, as a citizen of Zagreb, will represent voters from the 10th constituency, while it will not be the actual "representative of those voters, Pauletić.[56] Furthermore, if we recall that the idea on which proportional representation rests is that each party in the representative body is represented in proportion to that part of the electorate which supported it in the elections, and that the principle of justice is thus achieved, we cannot fail to notice implementation of that content with representatives entering Parliament in the manner set out above. All this represents a "violation" of the essential postulates on which the election of members of Parliament is based, and at the same time fully confirms Smerdel's claim that any reflection outside the literal grammatical interpretation of regulations becomes dangerous (the authors would say in vain) is fully realized, until the beginnings of efforts to achieve more just voter representation are seen.

In the further presentation of the Croatian electoral system and the presentation of the lack or absence of justness in respecting the will of the voters, we can observe the example of pre-election and post-election coalitions. "In political relations, the

[56] Ruža Tomašić does not see anything disputable in the fact that now the citizen of Zagreb will represent the south of Croatia in the Parliament, [https://www.jutarnji.hr/izbori/vijesti/umjesto-ruze-tomasic-u-sabor-ide-njezin-asistent-koji-je-dobio-19 preferencijalnih-glasova-15006885], Accessed 15 March 2021.

term coalition refers to an alliance[57] of political parties formed before or after the parliamentary elections, usually in parliamentary democratic systems, usually with the aim of making it easier for the coalition members to exercise power in order to create political preconditions for increasing political profits and jointly achieving certain political goals".[58] In Croatian legal and political history, it was the Government of Democratic Unity aimed at preserving national interests caused by the state of war. [59] That coalition would pass the so-called proportionality test, it was necessary in a democratic society and its work (existence) justified its formation. However, in recent legal and political history, we have witnessed how some political parties go to the polls on their own, although they are aware that after the end of the elections, and in accordance with the mandates won, they will not be able to participate in government. Therefore, they very skillfully form post-election coalitions and offer "their services" to the winning majority. These are post-election coalitions that are not banned, moreover, they are legitimate, especially if such "small" parties within the government succeed in realizing the promised programs useful for society and the state. The political scene in Croatia was shaken for the first time in history because a political party elected on the list of opposition political parties moved into a coalition with the ideologically opposed ruling party (we are talking about the Croatian People's Party and its coalition with the Croatian Democratic Union and its entry to the Government).[60] According to Kasapović, when creating coalitions, "it is recommended to respect the principle of electoral responsiveness, according to which parties that have suffered a drop in voter support compared to the previous elections should not participate in the new coalition government." The aforementioned coalition is also specific because the leadership of the Croatian People's Party based its election campaign, among other things, on the fact that it would never enter into agreements or a coalition with the

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57 Pre-election alliances are formed between political parties that believe that, as a coalition, they will synergistically achieve greater political gain (more votes) among voters than they would achieve in the elections alone, for their programs and candidates who are elected. The post-election coalition is aimed at creating a parliamentary majority that forms a joint coalition government in order to achieve the common interests and goals of the parties that joined the coalition. Arlović, M., *Vlada demokratskog jedinstva koalicijski odgovor na velikosrpsku agresiju,* Zbornik radova Pravnog fakulteta u Splitu, Vol. 57, No. 2, 2020, pp. 454.

58 *Ibid*.

59 Or as the public likes to say war government.

60 Examples: Both the mighty Christian Democratic and Christian Social Union of Germany entered into coalitions with ideologically completely opposite Social Democrats (and did not announce this before the election!) because there was no other choice. It was similar in Austria when the liberal 'Freelancers' once formed a coalition with the People, which greatly excited the EU. Greek left-wing Syriza is in a coalition with the far-right 'Independent Greeks', although they are ideologically on completely opposite sides, [https://croexpress.eu/pogled-iz-iseljenistva-koalicija-hdz-a-i-hns-a-nije-prevara-glasaca/], Accessed 15 March 2021.

Croatian Democratic Union, however, this eventually happened. In addition, the Croatian People's Party, as the opposition, initiated a no-confidence vote in some ministers, called the government the "Titanic government" and called new elections, and then in June 2020 supported the unstable government of the Croatian Democratic Union and gained "power" over the two ministries. That the Croatian People's Party, as one of the longest-running political parties, has lost its credibility is shown by only one mandate won in the 2020 parliamentary elections. Thus, the Croatian People's Party somehow became a "Titanic party", on the verge of slipping off the national political scene. There were debates in the general public about whether this type of coalition could be considered a "fraud" of voters, or was such a coalition of national interest in the sense that there would be no new elections and political instability in the country? We have already concluded that such coalitions are allowed and that they are common in other countries as well. However, an ordinary voter (citizen) who has given his vote to a certain political option, and it then inclines to a possibly undesirable option (combination) can lead to a weakening of the trust and legitimacy of the elected, as well as to the political system of a country.

8. CONCLUDING REMARKS

Precisely on the trail of modern constitutionalism based on the idea of a sovereign people that has the ultimate power to institutionalize power in elections and parliament and other constitutional forms, we question whether all of the above is just[61] in relation to voters-citizens (people)? John Rawls states that "every person possesses inviolability based on a sense of justness which society, even if it is called a welfare or liberal society, cannot overcome through its institutions."[62] If justness is understood as the crown of all virtues, then it is not and cannot be the subject political bargaining or calculations of social institutions due to some social interest. "Understanding justness as the first virtue of social institutions reveals to us the importance of modern institutions of the basic structure of liberal constitutional democracy as the most important generators and distributors of justice."[63] In a political community where there is no practical agreement on the (political) conception of justness,[64] lacks the necessary basis for the community as a whole.

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61 The HDZ election program in the 2016 parliamentary elections was entitled "Economic Growth, New Jobs and *Social Justice* Program." [http://moj.hdz.hr/sites/default/files/hdz_program_gospodarski_rast_nova_radna_mjesta_i_drustvena_pravednost.pdf], Accessed 15 March 2021.

62 Rawls, J., *A Theory of Justice*, Revised Edition, 1971, pp. 105.

63 Berdica, J., *Pravednost kao prva vrlina društvenih institucija,* Pravni fakultet u Osijeku, 2013, pp. 1.

64 "The political conception of justness is independent, but it is not self-sufficient, it is the citizens who are called to complete it." *Ibid*. 62, pp. 674.

The political conception of justice is independent, but it is not self-sufficient, it is the citizens who are called to complete it. Taking into account the way our politicians act, we come to the conclusion that this action certainly lacks justness-political justness, but also political values. Justness and political values, on which modern parliamentary democracy rests, have largely remained within the same framework as twenty years ago in the Republic of Croatia, and with the entry and gaining full membership in the European Union, such values have not been set as primary and decisive in the context of parliamentary election legislation. It is precisely the lack of the above that will affect the lack of moral identity and loyalty to the people who face the failure of great pre-election and post-election promises almost every day. Therefore, perhaps it is time for justness to remain in our political life as a fundamental virtue, as a starting point from which we can develop political relations and society in general, and thus try to create in some elements Plato's Just State.

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UDK 364-646.2(4-67EU:497.7)
340.114(4-67EU:497.7)
Original scientific article

SOLIDARITY CHECK IN TIMES OF COVID-19. ANALYSIS OF THE EU APPROACH TOWARDS ITS CLOSEST NEIGHBOURS WITH A SPECIAL FOCUS ON MONTENEGRO

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ABSTRACT

Solidarity as one of the cornerstone values of the European Union has been once again seated on the red chair and intensively discussed within the European Union and broader. After the economic recession and migrant crisis that marked the last two decades, the outbreak of the COVID-19 pandemic has once again harshly tested the fundamental objectives and values of the European Union and the responsiveness and effectiveness of its governance system on many fronts. In April, 2020 several EU Member States were among the worst affected countries worldwide and this situation soon became similar in their closest neighbourhood. It put a huge pressure on the EU to act faster, while at the same time placing this sui generis community to the test that led to revealing its strengths and weaknesses. As it happened in the previous crises, the Union launched policies and various programmes that were meant to lessen the burden of the Member States and aspiring countries caused by the crises. The objectives of the mentioned soft law instruments that the EU adopted during the COVID-19 crisis has been not only to show that EU law is equipped to react to health and economic crises rapidly but to deliver its support in terms of solidarity to its Member States and its closest neighbours facing the unprecedented health and economic crisis.

This article will explore the value and implication of the solidarity principle in times of Covid-19 in its various manifestations. A special focus will be on the financial and material aspects of the EU instruments created to combat the negative consequences of the pandemic and their further impact on shaping the solidarity principle within the EU system. While examin-

ing the character and types of these mechanisms a special focus will be placed on those available to Western Balkan countries, whereas Montenegro as the "fast runner" in the EU integration process will be taken as a case study for the purpose of more detailed analyses.

One of the major conclusions of the paper will be that although the speed of the EU reactions due to highly complex structure of decision making was not always satisfying for all the actors concerned, the EU once again has shown that it is reliable and that it treats the Western Balkan countries as privileged partners all for the sake of ending pandemic and launching the socio-economic recovery of the Western Balkans.

Analytical and comparative methods will be dominantly relied upon throughout the paper. This will allow the authors to draw the main conclusions of the paper and assess the degree of solidarity as well as the effectiveness of the existing EU instruments that are available to Montenegro and aimed at diminishing negative consequences of the crisis.

Keywords: *COVID-19; Solidarity; European Union, Western Balkans, Montenegro*

1. INTRODUCTION

This article will analyse the solidarity principle that lies at the very heart of the project of the European Union, being one of the cornerstone values upon which this supranational entity is based. The need for a closer insight into the topic stems from the increasing reference to this principle and its ever-growing relevance in times of pandemic. Therefore, relying on conceptual analysis the authors will draw conclusions about both legal and political aspects of this principle. Moreover, they will analyse the concept of solidarity, as well as its interconnectedness with the phenomenon of globalization and the Covid-19 pandemic, leading them to the conclusion that the European Union will have to improve solidarity mechanisms in order to be able to adequately and efficiently respond to all the challenges that lie ahead. In light of the pandemic, these challenges are primarily related to resolving the health crisis, as well as to tackling its pervasive social and economic consequences. The authors will also critically examine the concept of solidarity in times of crisis, especially the format and speed of the reaction, putting a special focus on the reforms that were introduced in order to allow the EU as a supranational entity with limited competencies in the field of health, to act in a satisfactory manner and bring tangible results also in its closest neighbourhood.

The analysis of the principle of solidarity has its theoretical and practical relevance. From a theoretical point of view, there are many conflicting observations about its nature. One group of theorists ascribe to the principle of solidarity only political nature, while the other group holds that it presents a legal principle. In other words, while the first group claims that the principle of solidarity has only an abstract or political relevance, the second one refers to it as a legal obligation. Anyhow, the answer to this topic has not yet crystallized in theory, so neither this

paper seeks to provide an answer to the above question, but it rather seeks to provide a modest contribution towards enlightening the importance of this principle by relying upon both theories. In other words, it will point out the practical reflections of the principle of solidarity during the pandemic and based on this argue in favour of the importance of such a concept.

Looking from the short term perspective the principle of solidarity might seem as not that profitable. From the long term perspective and taking into account the benefit of a peaceful and cooperative continent, we can conclude that perseverance of the concept of solidarity significantly overrides all the expenses the member states have incurred during the pandemic or will incur in future crises the EU might face. The paper will point out the available assistance mechanisms, their development through a short historical overview, and the rationale behind them - to the extent that is necessary for this work, given its scope and wide range of available mechanisms the EU offers. One of the authors' goals is also to re-contextualize European solidarity and to examine the potential of the emergence of genuine measures to promote solidarity which are the "ones that go beyond the mere coordination of 'solidarity' among different national systems."[1] This goal could be achieved through a more detailed analysis of the current (procurement) procedures and available mechanisms that have the potential of becoming a genuine EU led "solidarity in action" means and that can generate more coordinated and effective future EU responses to crises.

After that, based on the available information, we will show the assistance provided to the EU closest neighbourhood, during the pandemic, with a special focus on Montenegro. This assistance presents a strong reflection of the genuine devotion of the EU to the Western Balkans. Since the signing of the Accession and Stabilization Agreement, the European Union besides setting conditions for democratization and strengthening the rule of law, human rights, etc. has also been generously assisting the region and Montenegro`s development through providing various pre-accession funds. Certainly, among the key aspects of this assistance is the financial and administrative support, with the aim to help candidate states to achieve economic growth and approximation to European standards. During the pandemic, the European Union once again proved to be a reliable partner for the Western Balkans. Based on the information obtained from the European Union Delegation in Montenegro, European External Action service, and other available sources, the paper will present the assistance provided by the EU to Montenegro

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since the beginning of the pandemic. That help is reflected in necessary medicines, medical equipment, various financial assistance mechanisms that will be further elaborated in the following chapters.

Bearing in mind the above mentioned aspects of the EU available mechanisms for combating the immediate consequences of the health and socio economic crises, the authors argue that the approach of the European Union towards its closest neighbours indicates the importance of the principle of solidarity, and that even facing the severe crisis itself, the European Union showed that it does not leave the Western Balkans behind. This was not taken for granted by the Montenegrin citizens, and the recent polls have shown a significant increase in the support towards Montenegrin membership to the EU - that has once again proven to be a major partner for the Western Balkans countries that they can always rely on.

2. THE CONCEPT OF SOLIDARITY

In order to consider solidarity in a legal and political sense, we must first point out its moral and human character. In this vein, cooperation with others has been the main precondition to survival and development from the very beginning of humanity. In that regard, things have not changed much up until today, as each association, organization or group, must contain a seed of solidarity in order to survive. Otherwise, sooner or later it won't exist. Thus, solidarity did not emerge as a legal principle as "by its origin and nature, solidarity is a moral principle and a universal human value"[2]. Keith Banting and Will Kymlicka maintain that solidarity among members of a political community is a precondition to the realization of human rights, to the functioning of "just institutions", as well as to the existence of a "just society – one that seeks to protect the vulnerable, ensure equal opportunities and mitigate undeserved inequalities".[3]

Cooperation between people implies mutual compromises, and solidarity as the basis of such a relation.[4] Although at first glance it might seem that solidarity is the good will shown by those who are stronger and richer, practice challenges this belief and offers different proofs. This is particularly relevant in the crises such as

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2 Lukić Radović, M., *Solidarnost u pravu Evropske unije- uloga i perspektive*, Pravni fakultet Univerziteta u Beogradu, 2018, p. 13.

3 Hostovsky Brandes, T., *Solidarity as a Constitutional Value*, Buffalo Human Rights Law Review, August 29, 2020, [http://dx.doi.org/10.2139/ssrn.3682992], p. 4.

4 Saraceno, F.; Fitoussi, J., *Inequality, Growth, and Regional Disparities. Rethinking European Priorities*, in Altomonte, C.: Villafranca, A. (eds.), Europe in Identity Crisis. The Future of the EU in the Age of Nationalism, 2019, 70-93, pp. 73.

the one that we are currently facing due to Covid-19, which sets clear rules of the game - "nobody wins this race until everyone wins".

The concept of EU solidarity was evoked as "a guiding idea by the inspired political leaders who forged the very idea of a united Europe".[5] Solidarity as a key value in the EU founding treaties is mentioned both as a general principle and as a norm which stipulates obligation on mutual support among member states and peoples during specific circumstances such as natural or man-made calamities.[6] Habermas perceives solidarity[7] as the very foundation for which concrete duties can be derived. Esin Küçük also argues that solidarity is to be defined as a legal principle that can have "binding legal implications" and therefore "normative effect".[8]

The duties upon Member states are likely to change over time and place, for instance, the COVID-19 pandemic gave birth to an entirely new set of duties upon individuals, such as the duty to maintain social distance and the duty to wear masks. The concept of solidarity could be perceived also as a litmus paper showing the richness of life over the norms, but also a proof of how well-prescribed norms, that in a way embrace the vividity of life, can positively affect a wide range of life aspects. The question is whether the European Union's responses to the crises would have been of similar quality and what implications they might have had in case there was no principle of solidarity? The principle of solidarity, in fact, was a key basis and essence of numerous decisions that rescued both some Member States and the sole EU as a supranational community in these challenging times - awaking nationalistic behaviours and tensions all over the EU.

What distinguishes the Covid-19 crisis, is the fact that it does not present a threat for the national economies alone. In fact, due to its nature and scope it provided a strong impulse for the joint action. In case of the previous crises that hit the Union, "political and legal debates were basically structured around the idea of national responsibility", while in the situation of the Covid-19 pandemic "the structuring role is now claimed by the principle of solidarity"[9]. The European Union over years has created a solid legal basis for solving the crises which essence is embodied precisely in the principle of solidarity. It is now up to political elites leading the countries within

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5 Di Napoli; Russo, *op. cit.*, note 1, p. 211.

6 *Ibid.*

7 Habermas, J., *The Postnational Constellation*, Wiley Kindle Edition, Oxford, 1998, 1406.

8 Kucuk, E., *Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?,* Maastricht Journal of European and Comparative Law, Vol. 23, No. 6, 2016, 965-983, pp. 975.

9 Ioannidis, M., *Between Responsibility and Solidarity: COVID-19 and the Future of the European Economic Order,* Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper Vol. 4, No. 80, Heidelberg Journal of International Law/Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 2020, p. 1-11.

this supranational entity and leading the sole EU to make the best use of these instruments and existing possibilities and to combat the challenges that lie ahead.

3. THE EU SOLIDARITY CLAUSE

Solidarity has been one of the fundamental values since the inception of the EU integration project. Over years, solidarity went through a metamorphosis and along the way became a crucial value to be supported by the EU as a supranational entity that also aspires to play a more significant role at the international scene. There are quite a few arguments that support this thesis. The first one is related to the development of a common market. In other words, solidarity has played a major role in "mitigating the potentially divisive effects of the common market, and its associated freedom of movement of persons, goods, services and capital"[10]. Secondly, it was a key factor in the establishment of European integration as a stepwise process that has been built on an *ad hoc* established system of norms and mutual obligations. Solidarity was a key prerequisite for the long term success among all the participants involved. And thirdly, in times of crisis solidarity proved to be the key cohesive factor predetermining the success of such a value-based community in managing the crises.

The solidarity clause of the EU stipulated by Article 122 TFEU assumed a central role during the COVID-19 crisis, clearly indicating the re-balancing between national responsibility and Union solidarity from what was the case during the Eurozone crisis. At the time Article 122 TFEU was a sideliner, "superseded by the new principle expressed in Article 136(1) TFEU- setting out the rule that assistance could only be possible under strict conditionality"[11]. Corona-times brought different status for the Article 122 TFEU, which served as the legal basis for many programmes, among others, Support to mitigate Unemployment Risks in an Emergency (hereinafter: SURE) and the NextGenerationEU. President of the Commission, Ursula von der Leyen, during the Eurogroup statement of 9 April 2020 called SURE "real European solidarity in action".[12] Article 122 TFEU in the context of the NextGenerationEU, serves as the legal basis of its basic component which allows for targeted derogations from standard budget and financing of the Union rules in exceptional crisis situations.[13]

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10 Di Napoli; Russo, *op. cit.*, note 1, p. 202.

11 Case C-370/12, Pringle, para. 116.

12 Ursula von der Leyen, *This is how the EU's €100 billion corona-fund will work*, Euractiv, [https://www.euractiv.com/section/economy-jobs/news/this-is-how-the-eus-e100-billion-corona-fund-will-work/], Accessed 11 March 2021.

13 Ioannidis, *op. cit.*, note 10, p. 5-6.

The Union budget spending must be rational. By spending rationally, the EU is able to spend in a solidar manner, and that's the way on how funds can be determined for those in need. In line with that Armin von Bogdany and Justyina Lacny states that "the CJEU holds that the principle of sound financial management (applied in the area of EU funds) corresponds to the principle of sincere cooperation (as applied more generally in EU law)."[14]

Solidarity in access to health and medicines has been recognized as a cornerstone value to be guaranteed in EU policy and law. Another important document is the Patient's Rights Directive that was adopted in 2006,[15] which stipulates that solidarity through universal access should be adhered to by the Union and in the Member States. Still, these provisions do not have the status of the primary law in the EU, although they do represent a European baseline for health law that is common to the Member States.[16]

One of the recent decisions brought by the General Court in the case of the Republic of Poland *vs* European Commission annulling the European Commission's decision[17] indicates the fact that this issue of the legal nature of the principle of solidarity is highly complex and important for the EU. The General Court upheld Poland's plea, by recognizing the binding nature of the principle of energy solidarity, which imposes a general obligation on both the EU and the Member States to take into account each other's interests and avoid measures that can affect the energy security interests of the other stakeholders.[18]

This judgment is not only limited to energy solidarity, but it declares that solidarity must always be taken into account. Confirmation of this judgment by the Court of Justice as the second instance would be of great importance for the whole Union, not only in the energy sector but in all other fields where solidarity is applied. By confirming the normative power of the principle of solidarity, decision-

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14 Von Bogdandy A.; Lacny J., *Suspension of EU Funds for Member States Breaching the Rule of Law – A Dose of Tough Love Needed,* Swedish Institute for European Policy Studies, pp. 7.

15 Directive 2011/24/EU, 'Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the Application of Patients' Rights in Cross-Border Healthcare (O.J. L88/45, 4-4-2011).

16 De Ruijter, A.; Beetsma, R.; *et al*, *EU Solidarity and Policy in Fighting Infectious Diseases: State of Play, Obstacles, Citizen Preferences and Ways Forward*, Amsterdam Centre for European Studies Research Paper No. 06, Amsterdam Law School Research Paper No. 17, 2020, pp. 6.

17 The principle of solidarity and the geopolitics of energy: Poland v. Commission (OPAL pipeline), p. 890, [https://curia.europa.eu/juris/document/document.jsf;jsessionid=6A868C3F9717BC39B5EA554FD-5FE520D?text=&docid=217543&pageIndex=0&doclang=EN&mode=req&dir=&occ=-first&part=1&cid=109512], Accessed 07 March 2021.

18 The principle of solidarity and the geopolitics of energy: Poland v. Commission (OPAL pipeline), p. 898.

makers would have an undoubtful basis for providing assistance, as well as the legal obligation to act in this manner.

4. *DIFFERENTIA SPECIFICA* OF THE COVID-19 SOLIDARITY TRIGGER AND THE EU ABSTENTION FROM THE "CONDITIONALITY TACTIC"

The Covid-19 pandemic in comparison to the previous crises is a hazard that provoked substantially different reactions from the side of the EU, while solidarity became an omnipresent concept and basis of the EU strategy and instruments designed for combating the pandemic. According to Herman Van Rompuy this crisis has awakened "a kind of togetherness between people, grown out of the feeling that we are all in the same boat"[19]. In this endeavour of combating the negative consequences of the crisis an important move was disassociating the existing COVID-19 EU mechanisms from the legacy of conditionality - being important subtract present in the previous responses to the crises.

Conditionality as an EU policy tool has been applied since the late 1980s in the EU's external relations, more precisely, in the field of humanitarian aid to third countries. The rationale behind this approach is that states are "prompted to comply with requirements established under EU law in return for certain advantages". The same strategy has been applied in the process of establishment of the European Monetary Union in which the access of the less developed EU members to the Cohesion Fund was conditioned upon their compliance with the EU budget deficit rules.[20]

The reason for such different EU reactions in the environment of the Covid-19 pandemic lies in its character, the fate-like nature, and in the fact that this crisis was not the result of "fiscal profligacy, corruption, or broken institutions". In other words, there is no "national responsibility" argument as it was in the case with the Eurozone crisis. Here, as some authors imply "the moral hazard argument had a much clearer basis and stronger political clout".[21] Therefore, the shock caused by the Covid-19 "made audiences and decision-makers across Europe much more receptive to arguments framed in terms of solidarity", which had recently shaped the historic responses from the side of the EU.[22]

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19 Herman Van Rompuy, *COVID-19: A turning point for the EU?*, Discussion paper, European politics and institutions programme, 16 April 2020, p. 1.

20 Von Bogdandy; Lacny, *op. cit.,* note 15, p. 5.

21 Ioannidis, *op. cit.*, note 10, p. 3.

22 *Ibid.*

There are plenty of examples of such a "conditionality free" EU approach, and some of them are Eurogroup agreement on the strategy to combat the crisis brought on 9 April 2020, and the European Stability Mechanism (ESM), the role of which is envisaged through its Pandemic Crisis Support component- "a virtually conditionality-free credit line available to euro area countries through a very expedient procedure". Support to mitigate Unemployment Risks in an Emergency (SURE) is another instrument introduced to provide favourable loans to the EU Member States in order to support their short-time working schemes.

Another historic decision was brought in May 2020, with a Franco-German compromise that led to the 'NextGenerationEU' recovery instrument.[23] The European Council for the first time agreed to the basic contours of the programme that essentially mirrors the possibility of collective borrowing for the purpose of financing the expenditures, as part of EU's 2021-2027 multiannual financial framework (MFF).[24] The NextGenerationEU instrument sets certain conditions that countries need to fulfil in order to receive the financial support under its main component called the Recovery and Resilience Facility (RRF).[25] Their key obligation is to submit to the Commission national Recovery and Resilience Plans (RRPs) that need to be aligned with the Union standards. According to Pisani-Ferry, "this arrangement is (yet) neither typical conditionality ('first reform your pensions, then we can talk') nor rubber-stamping ('here's the money, please tell us what you do with it')".[26]

The special value of this approach reflects the sole nature of the available mechanisms as "intrusive rules of Regulation 472/2013 have been deactivated"[27]. This is particularly important, as if the solidarity mechanisms are tight with strict conditions, then conditional transfers present not an expression of solidarity but rather a surrogate of bureaucratic control. The age of Covid-19 is marked by the reduc-

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23 Darvas, Z., *"The nonsense of Next Generation EU net balance calculations'*, Policy Contribution, No. 03, Bruegel, 2021, 15.
The total maximum financial envelope of NGEU comprises grants and guarantees amounting to €420 billion, and loans amounting to €375 billion. These amounts will be disbursed via the seven facilities of NGEU: the Recovery and Resilience Facility (RRF, €312.5 billion in grants and €360 billion in loans); Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU, €47.5 billion in grants); the Just Transition Funds (JTF, €10 billion in grants); Rural Development (€7.5 billion in grants); Horizon Europe (€5 billion in grants), civil protection (RescEU, €1.9 billion in grants); and InvestEU (€5.6 billion of guarantees).

24 Ioannidis, *op. cit.*, note 10, p. 2. It allows the EU to borrow 750 billion EUR in order to finance 390 billion EUR in non-repayable financial support (grants) and 360 billion EUR in loans for the EU member states.

25 Toniolo, G., *Next Generation EU: Una condizionalità virtuosa,* Luiss School of European Political Economy, Policy Brief, No. 33, 2020, p. 2.

26 Ioannidis, *op. cit.*, note 10, p. 5.

27 Regulation 472/2013.

tion of conditionality in this regard although it did not get everywhere the same sympathy.[28]

No matter how generous the help seems to be, we must not confuse solidarity with the gift. First of all, quality control mechanisms must be established for the purpose of transparency over the spending of funds. In addition, solidarity goes hand in hand with reciprocity – implying that states want to rely on the premise of equal treatment shown by the other actors involved, if they find themselves in a similar situation. In other words, as Peter Hilpold mentioned "solidarity expects solidarity."[29] In regards to solidarity, there is always at least a small share of personal interest and therefore "solidarity has to be conceptually separated from altruism that is based on selflessness, while solidarity is always partly driven by self-interest."[30] Esin Kucuk states, "the pursuit of self-interest, however, is not necessarily the reverse of solidarity, in fact, self-interest is the only driver of solidarity in the absence of altruistic or moral underpinnings."[31] The fact that during the Covid-19 we are all on the same boat perfectly fits with the rationale explained, as due to the nature of this hazard no one will be safe until everyone is safe.

As Yuval Noah Harari[32] rightly pointed out, in such a state of play, global cooperation isn't altruism. In fact, it becomes essential for ensuring the national interest.

5. "NEED FOR SPEED". A COVID-19 (QUEST FOR A SPEED ADAPTATION AND REACTION)

A system`s responses to crises are changing according to the needs imposed by circumstances. Sometimes the circumstances are so grave that they render the existing mechanisms/responses useless almost overnight. Some systems are able to provide a quicker response and to adapt more swiftly, while some others due to highly complex internal structures of decision making are in a way slower, and this vacuum between the outbreak of the hazard and system`s response - can become a strong weapon in the hands of the opponents. That can result in the growth of

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28 Giuseppe Conte, during the July 2020 summit, and Heiko Maas, Olaf Scholz in their article entitled "A response to the corona crisis in Europe based on solidarity", made a strong point for saying no to "unnecessary conditions". On the other hand, Finland case could depict the alternative approach to this matter.

29 Hilpold, P., *Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with Particular Regard to Monetary Union*, Yearbook of European Law, No. 34. 257–285, 2015, pp. 262.

30 Bouza da Costa, *op. cit.*, note 7, p. 9.

31 Kucuk, *op. cit.,* note 9, p. 967.

32 Harari, Y., *Lessons from a year of Covid*, 26 February 2021, [https://www.ft.com/content/f1b30f2c-84aa-4595-84f2-7816796d684], Accessed 01 March 2021.

the opponents` relative power of questioning the credibility and reliability of these systems in general.

The SARS pandemic, for example, was one of the stepping stone moments that have brought new international rules, which led to revising the International Health Regulation that was approved during the 58th World Health Assembly, and since then, it has become the core instrument for regulating disease outbreaks with an international dimension.[33]

Covid-19 pandemic due to its character and outreach certainly provided another great impulse for such ground-breaking moves and could become a milestone in international relations and the functioning of international organizations. Nonetheless, not the WHO nor the EU were able to provide an instant and adequate response to such a hazard embodied in the Covid-19. On the contrary, the WHO went under great criticism that was primarily related to the inability to timely recognize the seriousness of the pandemic after its outbreak in China, slow response, politicization within the organization especially reflected in the behaviour of the major players within the WHO.

Although the EU's response at the beginning of the pandemic was not at a satisfactory pace, especially not for countries most severely hit, at the later stages of the pandemic, the EU managed to act in a consolidated way and to play a pivotal role in the continent and wider. Here we are especially referring to the generous assistance that the EU provided to its closest neighbours. One of the lessons learned is certainly that speed also matters. In this regard, better legal regulation of the principle of solidarity, would greatly help the Union to react faster and better, having a clear legal basis for doing so.

6. THE EU ROLE IN ORGANIZING SOLIDARITY FOR HEALTH. RESOURCE ALLOCATION AND RATIONALIZATION OF PUBLIC GOODS

Since the 1970s, with the development and use of European (disease) networks, the EU as a supranational entity has assumed powers in the field of surveillance and early warning of public health threats. Although "all this did not carve out a strong role for the EU in organizing solidarity for health, involving redistribution

[33] Von Bogdandy, A.; Villarreal, P., *International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 07, 2020, p. 6.

or rationing", it certainly influenced the creation of some mechanisms aiming at creating more efficient "health" responses at the EU level in times of crises.[34]

There are large differences among the EU Member states health systems, that can be distinguished by the quality of the health care, available resources, culture, organization, etc.[35] This state of play strongly advocates in favour of cherishing the Member States` prerogatives in this field and the application of the so-called subsidiarity principle "as deviations from this principle could carry a danger of major inefficiencies or exacerbate inequalities" around Europe and have potentially detrimental effects on the Member States' healthcare systems.

On the other hand, in the case of infectious diseases such as Covid-19, the situation is quite the opposite from what has been previously said. Namely, decisions that aim to tackle spread of such diseases may have large cross-border spillovers, and the precedence of the 'national prerogatives', especially if the decisions are populist/inward oriented "may create a problem of collective action that could yield, in the end, bad outcomes for everyone."[36]

Nonetheless, imagining the EU as the key actor in this field requires trustworthiness "that it can also support the Member States in a tangible way, and that this supranational entity is capable of setting up real cooperation in order to keep citizens safer"[37]. Therefore, this explains why the recently adopted initiatives such as Joint Procurement initiative and the "rescEU" are so important. The first one, within the EU health regime, is able to ensure the size and volume of necessary procurement of medicines and medical equipment, while the second one creates a central allocation authority for the European Commission.[38]

Moreover, free movement and the integrity of the Single Market is another vehicle for strengthening the EU role in managing the crisis. In this vein, the Commission Communication has recently announced the free movement of goods as one of the instruments for coordinating Member States' actions, this is particularly important in the case of medicines and medical equipment due to their central

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34 De Ruijter; Beetsma, *et al., op. cit.*, note 17, p. 8.

35 Hackenbroich, J.; Shapiro, J.; Varma, T., *Health sovereignty: How to build a resilient European response to pandemics, European Council on Foreign Relations*, Policy brief, 2020, p. 10.

36 De Ruijter; Beetsma, R. *et al., op. cit.*, note 17, p. 21.

37 Communication from the Commission, A Modern Budget for a Union that Protects, Empowers and Defends. The Multiannual Financial Framework for 2021-2027, Brussels,2.5.2018, COM(2018) 321 final.

38 De Ruijter; Beetsma, *et al., op. cit.*, note 17, p. 21.

importance in combating COVID-19 pandemic.[39] In the case, a member state breaches the obligations and hinders flow of goods that are deemed essential for fighting COVID-19 the Commission establishes a task force to respond to this.[40]

Recognizing the current moment the EU Commission made another important step and has adopted the temporary state aid framework from 19 March, the basic goal of which was to insure that national governments can act swiftly and know what state aid measures do not constitute prohibited measures in order to tackle exceptional occurrence caused by the COVID-19 outbreak.[41] On 4 April and 8 May the Commission extended the scope of the Temporary Framework"[42], and by the fourth amendment of 13 October 2020, the Commission prolonged the Temporary Framework until 30 June 2021.[43]

However, one particular aspect of the story should not be neglected. In times of crisis, people's major concern is safety, so politicians led by the wish to save for themselves political points for handling the health emergencies are often showing reluctance to transfer the redistributive power to the EU level. These lessons learned imply that national political elites rather opt for a "domestic-centred equilibrium"[44] and are, therefore, turning to isolationist politics, as they are at least looking from the short-term perspective, a way more profitable.

6.1. EU Public procurement procedures: only voluntary, not mandatory

The EU can play an important role for COVID-19 in organising health solidarity through a European Public Procurement process. Nevertheless, the previous health crises were not that bright examples of EU solidarity, showing how fragile was the EU countries` system of obtaining vaccines and medications, as well as their low level of purchasing power. The main reason for that was the system cre-

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39 Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank (March 13, 2020), the European Investment Bank and the Eurogroup, Coordinated economic response to the COVID-19 Outbreak, COM(2020) 112 final, Brussels, pp. 3.

40 De Ruijter; Beetsma, *et al., op. cit.*, note 17, p.14.

41 From 12 March to 26 October 2020, the Commission had adopted 435 decisions on COVID-19 related State aid measures, i.e. support for coronavirus-related research and development (vaccines and medicines); support for the construction and upscaling of testing facilities; support for the production of vaccines and medicines; support in the form of wage subsidies for employees, liquidity support for businesses that does not exceed EUR 800,000, etc.

42 Busch, D., *Is the European Union Going to Help Us Overcome the COVID-19 Crisis?,* European Banking Institute Working Paper Series, No. 64, 2020, pp. 7-8.

43 Bouchagiar, A., *State aid in the context of the COVID-19 outbreak, including the Temporary Framework 2020, Robert Schuman Centre for Advanced Studies Florence School of Regulation*, EUI Working Paper RSC. No. 03, 2021, pp. 2.

44 Busch, *op. cit.,* note 53, p. 21-22.

ated in 2011 and 2013 that envisaged "the voluntary public procurement medical countermeasure in case of a health emergency, that is either declared and identified by the WHO or by the European Commission".[45]

In June 2014 the Joint Procurement Agreement entered into force. It applies to joint procurement of medicines, further implementing Article 5.[46] This joint procurement refers to different sorts of medicines, among which "antivirals, treatments or vaccines, also, medical devices (infusion pumps, needles) and 'other services and goods' needed to mitigate or treat cross-border threats to health, such as laboratory tests, diagnostic tools, decontamination products, masks or personal protective equipment, eye protection and respirators, and ventilators".[47] The JPA has been signed by 37 countries, "including all EU and EEA countries, the UK, and the Western Balkans".[48] The key goal of this voluntary mechanism is to support "fair and equitable access to, and distribution of, pandemic influenza vaccines, antivirals and other treatments for the future", to achieve in that way the greater level of security of supply and more balanced prices for the countries involved.

One more important achievement for public health and serious cross-border threat preparedness is the signature of framework contracts for the production and supply of pandemic Influenza vaccines.[49] Article 5 of the Decision 1082/2013/EU on serious cross-border threats to health presents the legal basis of this joint mechanism. This mechanism sets the common rules for the practical organisation of joint procurement procedures for the purpose of obtaining the medical countermeasures for different categories of "cross-border health threats"[50]. The key aspects of this mechanism are threefold. The first one is the determination of the

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45 Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC [2013] OJ L 293/1.

46 European Commission, Public health: Joint purchasing of vaccines and medicines becomes a reality in the EU, 10 April 2014, [https://ec.europa.eu/commission/presscorner/detail/en/IP_14_418], Accessed 10 February 2021.

47 De Ruijter; Beetsma, *et al., op. cit.*, note 17, p. 11.

48 European Commission, Public health: Joint purchasing of vaccines and medicines becomes a reality in the EU, 10 April 2014, [https://ec.europa.eu/commission/presscorner/detail/en/IP_14_418], accessed: 10 February 2021.

49 European Commission, *Preparedness and response planning*, [https://ec.europa.eu/health/security/preparedness_response_en], Accessed 20 March 2021.

50 MEMO 28/03/2019, Framework contracts for pandemic influenza vaccines, "A serious, cross-border threat to health is a life-threatening or otherwise serious hazard to health from a biological, chemical, environmental or unknown origin. Such threats spread or entail a significant risk of spreading across the national borders of Member States, and may require coordination at EU level in order to ensure a high level of human health protection", [https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/ev_20190328_memo_en.pdf], Accessed 21 March 2021.

practical arrangements governing the mechanism. The second aspect is focusing on the decision-making process determining the choice of the procedures. Lastly, the third aspects are related to setting criteria for the assessment of the tenders and the award of the contract.[51]

In the case of urgency, that is declared by the Commission and the Member States participating in the Joint Procurement Agreement Steering Committee, a Member State is allowed to request derogation from the generally applicable criteria on the allocation of the medical countermeasures and to therefore receive them at a faster rate than other participating states.[52] Member States can also donate medical countermeasures acquired under the joint procurement procedure.[53] Each procedure sets its own conditions and distributive regulations.[54]

6.2. The EU Civil Protection Mechanism and "rescEU". (De)centralized procurement

The EU Civil protection mechanism was created in 2013, as a successor of the Civil Protection Mechanism that was set up back in 2001 under Euratom. It is based on Art. 196 TFEU, according to which the Union has both internal and external competences in the field of civil protection. As stipulated by the Article 6(f) of the TFEU, the EU in the field of civil protection, has limited competences that are of the supporting, coordinating, or supplementing nature to the respective competencies of the Member States.[55]

Nonetheless, the experience with different crises has shown that reliance on voluntary offers of mutual assistance, coordinated and facilitated by the Union Mechanism, does not ensure satisfactory results, which particularly applies to the situations in which a number of countries are simultaneously affected by the crises.

Therefore, from 2019, the EU Civil Protection Mechanism was further complemented by the creation of rescEU - the key goal of which is to contribute to centralizing the EU capacities.[56] RescEU is designed "to provide assistance in overwhelming situations where overall existing capacities at a national level and those

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51 MEMO 28/03/2019, *Ibid*.

52 Art. 17(2) JPA.

53 Art. 31 JPA.

54 Art. 17 JPA.

55 Article 169: "The Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters".

56 Decision (EU) 2019/420 of the European Parliament and of the Council of 13 March 2019 amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism (OJ L 77I , 20.3.2019, p. 1–15).

precommitted by the Member States to the European Civil Protection Pool are not, in the circumstances, able to ensure an effective response to the various kinds of disasters"[57]. The key aspects of this endeavour are mirrored in the Article 12 of this Decision that "provides for the EU to use its internal funds, precommitted national funds and EU co-financed Member States capacities at the disposal of EU efforts, to respond to a major emergency"[58]. RescEU also envisages the possibility for joint procurement, existing in parallel to the Joint Procurement Agreement under the health infrastructure (Art. 20) with a more central role to be given to the Commission.

The actual capacity of rescEU is predetermined by the Member States' willingness to contribute to the EU internal funding in this regard. The Member states have recently shown to be generally more interested in the national level initiatives or actions through the JPA in the EU health context. There are quite a few factors that could fit in the above statement. The first one are the diverse realities of the purchasing powers of the Member States. Furthermore, the absence of the EU budget is also another unfavourable objective circumstance. Last but not the least, the inability of this intergovernmental and bureaucratic structure to generate the necessary speed that an urgent procurement process would need is yet another factor that acts as a delusion for those advocating for the more EU centralised approach in this field.

On the other hand, there are a number of advantages of having centralized procurement at the EU level. One of the key benefits is related to the ability of the EU to negotiate a better position with pharmaceutical companies, diminishing in that way their relative power over the relation between different member states and especially over certain member states that could try to negotiate a better price. The second aspect is directly related to solving inefficiency of stockpiles managed by the individual member states, by creating a common stockpile of medical countermeasures managed at the EU level. That would solve the issue of excess demand in some countries and excess supply in other countries. Lastly, the risk-sharing for the purpose of combating the pandemic consequences with the common stockpile is much more effective than in the case when each member is responsible for its own stock of medicines and equipment. The common stockpile is at the same time a larger stockpile with much greater firepower to target outbreaks of infectious diseases.[59] This would require a larger role for the European Commission,

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57 Decision (EU) 2019/420 of 20 March 2019 of the European Parliament and of the Council of 13 March 2019 amending Decision 1313/2013/EU on a Union Civil Protection Mechanism, Art. 12 replaced.

58 *Ibid.*

59 De Ruijter; Beetsma, *et al., op. cit.*, note 17, p. 24.

securing a more efficient response than the current structure is able to achieve because all contracting parties have to instantly agree on the deployment of medical counter-measures in accordance with urgency and need.[60]

After the COVID-19 outbreak, the Western Balkans have activated the Union Civil Protection Mechanism (UCPM) and have already started to receive assistance from it. Three Western Balkan countries, namely, Serbia, North Macedonia and Montenegro are participating States in the Mechanism, able to contribute but also to request support of rescEU.

7. BETWEEN SOLIDARITY AND NATIONALISM, TRUST BUILDING AS A BRIDGE TOWARDS MORE SOLIDARITY

The crisis, severe as the Covid-19 one, that brought many changes to everyday life is expected to have far-reaching social effects on globalization. In line with this statement, the UN Secretary General says that: "[w]ith the right actions, the COVID-19 pandemic can mark the beginning of a new type of global and societal cooperation."[61] Many debates have been activated since the outbreak of the crisis, and one that seems pretty relevant in this context is about the path that the EU member states are going to choose, namely: greater reliance on international institutions or nationalism. The first one goes hand in hand with the tendency of empowering the supranational/international institutions to be able to act in a more efficient way in times of crisis and in general. The second one is a tendency towards nationalism and populism, which seems to be gaining momentum in recent years, and it is not something unexpected as crises tend to strengthen national sentiments, "with people falling back on their nation-state, which has the financial, organisational and emotional strengths that global institutions lack."[62]

The authors who claim that we are witnessing the second scenario are relying upon the argument of the absence of the notion of community and sense of identity/belonging to the international level. In addition, the EU as one of the most integrated communities has been a subject of great criticism by the Member states for failing to deliver on its promise of solidarity that further creates a negative sentiment that at the same time "strengthens the sense of nationalism and gives

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60 *Ibid,* p. 13-14.

61 UN news, *UN launches COVID-19 plan that could 'defeat the virus and build a better world,* 31 March 2020, [https://news.un.org/en/story/2020/03/1060702], Accessed 20 March 2021.

62 Rachman, G., *Nationalism is a side effect of coronavirus, The pushback against globalisation will come from protectionists, national-security hawks and greens*, Financial Times, [https://www.ft.com/content/644fd920-6cea-11ea-9bca-bf503995cd6f], Accessed 10 April 2021.

a louder voice to protectionists and populists".[63] It can be also argued that the politicians have partially contributed to this sense of feeling threatened. Although the enemy is invisible, the "war talks" nevertheless creates the spectre of an enemy. War is associated with the "other/otherness", and the atmosphere that has been created by different narratives has the tendency to create and build on ethno-nationalist sentiment.[64]

Although it seems that the trend of relying on protective nationalism as a reaction to the pandemic prevails, we also witness a growing atmosphere of solidarity among nations. This thesis can be substantiated by a number of examples, embodied in isolated or structured actions that are aimed to support those in need.

Here we should mention the cooperation between the physicians and medical researchers around the globe that struggled to invent a vaccination for COVID-19. The support was provided by China, Britain, Germany, France, etc. which had sent doctors and offered a financial package and medical material to Italy and other countries severely affected by the crises at the beginning of the pandemic. The support was also provided by the EU to its closest neighbours, the Western Balkans countries. Those are all examples proving that cooperation is extremely necessary especially for highly affected and developing countries, which due to their limited financial and human capabilities or poor economies, are not able to cope with the deep and far reaching consequences of the crises alone.[65] Although it seems to be overlooked thus far, this aspect that highlights the benefits of cooperation and solidarity is growingly important - implying that in the long term, there could be more tendency towards globalization and unification as the Covid-19 may not be the only situation placing as all on the same boat.

In order to move in that direction, trust-building between the participating states and the democratic scrutiny of "assistance" transfers are certainly important preconditions to developing a more consolidated and solidar approach in times of crises. The aspect of trust building is particularly important as the concept opposite to the system of control, which is able to generate the presumption of agreement with the EU's actions.

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63 Yacoub, A.; El-Zomor, M., *Would COVID-19 Be the Turning Point in History for the Globalization Era? The Short-Term and Long-Term Impact of COVID-19 on Globalization*, 2020, pp. 12.

64 We don't need a 'war' against coronavirus. We need solidarity, [https://coronavirusnews.psmghana.com/index.php/2020/04/06/we-dont-need-a-war-against-coronavirus-we-need-solidarity/], Accessed 07 April 2021.

65 Yacoub; El-Zomor, *op. cit.,* note 74, p. 10.

Another aspect is the transfer of *democratic* scrutiny at a *European* level over the use of European funds by the Member States,[66] in order to establish transparency and effective monitoring on how national governments spend the funds. The decision to tie the NextGenerationEU to the European Semester and the insistence on rule-of-law conditionality are justified also from that, so-called solidarity-reinforcing perspective.

8. SOLIDARITY IN ACTION. THE EU APPROACH TOWARDS ITS CLOSEST NEIGHBOURS.

Since the beginning of the Covid-19 pandemic, although heavily affected by the pandemic, the EU has taken a proactive role towards its closest neighbours, and has included them in the strategies and various programmes aimed at tackling the health and socio-economic consequences of the crises. This approach once again explicitly showed that the EU leaves no one behind, especially not its partners in need, the Western Balkans.

As indicated in the Commission Communication on the "Support to the Western Balkans in tackling COVID-19 and the post-pandemic recovery" of 29 April 2020[67] the total bilateral and regional EU assistance package for the Western Balkans in response to COVID-19 currently exceeds 3.3 billion EUR. The aim of this generous support that the EU has provided to the Western Balkans is to address the immediate health crisis and resulting humanitarian needs, as well as contribute to longer term and structural impact on their societies and economies.

More precisely, the mentioned support consists of various instruments, and those are as follows:

a) reallocations from the Instrument for Pre-accession Assistance amounting to 38 million EUR of immediate support for the health sector;
b) 389 million EUR to respond to social and economic recovery needs;
c) 455 million EUR economic reactivation package for the region in close cooperation with the International Financial Institutions;

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66 Wolff, *Without good governance, the EU borrowing mechanism to boost the recovery could fail,* [https://www.bruegel.org/2020/09/without-good-governance-the-eu-borrowing- mechanism-to-boost-the-recovery-could-fail/], Accessed 03 February 2021.

67 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Support to the Western Balkans in tackling COVID-19 and the post-pandemic recovery, Commission contribution ahead of the EU-Western Balkans leaders meeting on 6 May 2020, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/com_2020_315_en.pdf], Brussels, 29.4.2020, COM(2020) 315 final.

d) a proposal[68] for EUR 750 million of Macro Financial Assistance
s) 1.7 billion EUR[69] package of assistance from the European Investment Bank.[70]

Other than mentioned assistance, the EU also envisages help via the EU Solidarity Fund to the states that have started negotiation talks, support to the private sector in cooperation with International Financial Institutions, as well as the immediate humanitarian assistance to vulnerable refugees and migrants amounting to 4.5 million EUR and 8 million EUR of emergency support to migrants and refugees stranded in the Western Balkans from the Instrument contributing to Stability and Peace.[71]

The EC has also adopted a measure of 70 million EUR under the Instrument for Pre-Accession (IPA II) to help fund the access of Western Balkans to vaccines and necessary vaccination equipment procured by the EU Member States. In addition, the EU in cooperation with the World Health Organisation (WHO) has launched a new regional project amounting to over 7 million EUR aimed at supporting safe and effective vaccination of the people across the region.[72]

Besides the measures aimed at tackling the immediate consequences of the Covid-19 crisis, the EU has developed an Economic and Investment 2021-2027 plan for the region in which the Green transition and the Digital transformation will play a central role. The total envelope for the Pre-Accession Instrument III is 14.5 billion EUR. The Commission foresees a doubling in the provision of grants through the Western Balkans Investment Framework to support private sector development, connectivity, digitalisation, green agenda and social investments.[73]

Challenges faced by young people, in terms of job prospects, inequality and retaining young talent in the region to tackle the brain drain are also within the scope of EU attention. Via Erasmus+ programme it has doubled its funding since

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68 2020/0065 (COD) Proposal for a Decision of the European Parliament and of the Council on providing MacroFinancial Assistance to enlargement and neighborhood partners in the context of the COVID-19 pandemic crisis. 22 April 2020.

69 Montenegro: EIB and IDF sign €50 million loan to support faster post-COVID recovery of SMEs and mid-caps, [https://www.eib.org/en/press/all/2020-238-eib-and-idf-sign-eur50-million-loan-to-support-faster-post-covid-recovery-of-smes-and-mid-caps-in-montenegro], Accessed 08 April 2021.

70 *Op. cit*, COM(2020) 315 final.

71 *Ibid.*

72 European Commission, New EU project to support readiness for vaccination efforts and resilient health systems in the Western Balkans, [https://ec.europa.eu/commission/presscorner/detail/en/ip_21_683], Accessed 10 April 2021.

73 *Ibid.*

2018 to over 65 million EUR to address the key challenges faced by youth and to better prepare them for the labour market.

These figures present essential and unparalleled support provided to the Western Balkans aimed at fostering the stability and prosperity of this region. They arose as a result of the so-called 'Team Europe' approach[74] - that envisages quick and targeted support which entails resources pooled from the EU institutions, the Member States and financial institutions, in particular the European Investment Bank and the European Bank for Reconstruction and Development. In addition to this, Member States can also decide to provide assistance on a bilateral basis.

9. THE EU SUPPORT TO MONTENEGRO

Montenegro is one of the smallest European countries that declared outbreak of infectious coronavirus disease on 26 March 2020. Recently Montenegro has been facing alarming percentages in the number of infected people and unfortunately high mortality rate as well, in European, but also in the global context.

Additional aspect that should not be neglected is the low level of diversification of Montenegrin economy and high level of dependence on tourism (which share in Montenegrin GDP amounts to approximately 25 percent), that made Montenegro particularly fragile in terms of handling the economic and financial repercussions of the crisis. That has left deep consequences on the country, leading it to severe recession trends.

Recognizing these alarming circumstances, the European Union acted very quickly and from the start of the pandemic and have mobilised a substantial package of 53 million EUR of non-repayable financial aid and 60 million EUR of favourable loans as part of macro-financial assistance for Montenegro.

From the 3 million EUR for immediate responses (part of non-repayable financial aid), the EU has funded the delivery of a range of personal protection equipment, ventilators and x-ray machines. The 40.5 million EUR Resilience Contract Budget Support is aimed to reduce the negative effects of the crisis on the economy, particularly focusing on protecting vulnerable social groups. Finally, the 9.5 million EUR Health programme will help to upgrade health infrastructure - build two new hospital wings in Podgorica and refurbish a dozen laboratories, and improve capacities to deal with future epidemiological threats. Additional hundreds

[74] Communication on the Global EU response to COVID-19 (JOIN(2020)11 final) of 8.4.2020.

of thousands of pieces of personal protective equipment have been donated by the EU Member States and the EU, through the Civil Protection Mechanism.[75]

Montenegro has also received 2.4 million EUR as part of the Pre-Accession (IPA II) package that will allow it to get the access to COVID-19 vaccines procured by the EU Member States.[76] In addition, since October 2020, Montenegro has become a part of the COVAX initiative, which presents a global scheme that brings together governments and manufacturers to ensure eventual COVID-19 vaccines reach those in greatest need. Based on this agreement Montenegro will receive 248.800 doses of vaccines. Last month Montenegro received the delivery of 84,000 doses of the AstraZeneca vaccine.[77]

Furthermore, the European Commission has allocated around 200,000 EUR of additional support to Montenegro, in order to contribute to the fight against Covid-19. The donation is part of the package proposed by the European Commission of almost 530 million EUR in additional support under the EU Solidarity Fund to safeguard public health in fighting the coronavirus.

In cooperation with the Montenegrin Investment Development Fund and commercial banks, the EIB provided 100 million EUR in favourable loans to support tourism and other sectors severely affected by COVID-19 and help companies sustain liquidity and jobs.

Closer insight into the data about the assistance provided to Montenegro from the side of international institutions on one hand and the EU, on the other hand, leads us to the conclusion that the EU provided more aid to Montenegro than the World Bank and the MMF did jointly. In addition to financial assistance, as it has been described above, the EU has provided Montenegro with the necessary medical equipment, vaccines, etc.

This approach and care shown by the EU once again proved that this supranational entity is the most important and reliable international partner of Montenegro and that European integration is the only safe path that our country should take. Although the Union was criticised because of the speed of reaction at the

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75 Delegation of the European Union to Montenegro, Signing a Financing Agreement on EU assistance to the health sector in the fight against Covid-19, [https://eeas.europa.eu/delegations/montenegro/92162/signing-financing-agreement-eu-assistance-health-sector-fight-against-covid-19_en], Accessed 05 April 2021.

76 European Commission, Commission adopts €70 million package for early access to EU COVID-19 vaccines in the Western Balkans, [https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2539], Accessed 07 April 2021.

77 *Ibid.*

beginning of the crisis, after the internal consolidation, it managed to react effectively and selflessly to help all countries involved. What made the position of the EU particularly difficult were the competencies the EU has in this area, in which Member states are actually playing the key role causing the slow response. Therefore, one of the key lessons learned from this process should be that the pandemic is not to be taken as an exceptional case, but the EU should rather get prepared for the future shocks it might face in order to be able to act efficiently in the manner of a credible international actor from the very beginning.

10. CONCLUSION

Solidarity constitutes the essence of the EU integration processes. From the very beginning of the idea on joint market and peaceful coexistence there is a present mantra of solidarity that is explicitly expressed through the Schuman declaration, that says: "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity"[78]. Although it builds upon the existing international heritage, the UN General Assembly's resolutions from 2001 and 2002,[79] the idea of solidarity within the EU presents a bright example, as it went quite a few steps ahead - by the EU`s continuous work on growing the status and factual importance of the principle of solidarity.

The joint feature of all the crises that have recently hit the EU was that they required a great effort and solidarity from the side of the EU institutions and member states in both economic/financial and infrastructural terms. Despite its various forms (economic, financial, migrant, health crisis, etc.) these crises have heavily affected the Union, questioning its capacity to effectively address the issues, unleashing political tensions and discourse of nationalism within and among member states. At the same time these crises also taught us many important lectures, and one of the key implies that if we want a strong and resilient Union, solidarity must be cherished as a key principle by decision-makers and citizens, as a legal and moral obligation to help those in need, all for the sake of long term benefit of all.

Therefore, recognition of solidarity as a legal obligation would be an essential move that would help the EU to be able to act efficiently and timely address future crises. In this vein, the mentioned judgment of the European Court of Justice

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78 Schuman. Robert, Declaration of 9th of May 1950, [https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf], Accessed 07 March 2021.

79 UN General Assembly, Promotion of a democratic and equitable international order: Resolution adopted by the General Assembly, 25 February 2003, A/RES/57/213, [https://www.refworld.org/docid/3f49d46a4.html], Accessed 10 March 2021.

regarding Germany's appeal against the first-instance decision is eagerly awaited. If the Court confirms the first-instance judgment, that will give rise to a completely new Union, empowered with one important mechanism - able to save millions, both lives and euros.

Since one important aspect of solidarity is financial assistance, special attention must be devoted to establishing a transparent and continuous control over spending of the funds, accompanied with harsh penalties for those who commit violations. Only in this way, the misuse of funds can be prevented and thus the legitimacy of the generous assistance provided (to the countries in need) secured. The principle of control must be applied also in case of the aspiring member states, such as Montenegro in order to ensure that the funds allocated by the EU are spent for a specific designated purpose. This particularly applies to the funds intended for the construction of hospitals and the refurbishment of the existing ones. To what extent this is important indicates the fact that the last general hospital in Montenegro was built in 1946, the special hospital in 1953 and the Clinical Center of Montenegro in 1974. Proper investments in this health infrastructure is essential to creating better living conditions for all citizens, that in turn has a great potential of strengthening the public support/legitimacy of the European Union. Letting the citizens feel the firsthand benefits, and *de facto* solidarity means letting them feel the authenticity of the value based community such as the EU.

As the famous quote says "in the middle of difficulty lies opportunity" and the Covid-19 pandemic should also be viewed from a positive side. Turning out mirrors into windows in the context of Covid-19, would mean finding inspiration for cooperation and solidarity, so that 2020 "would not be a wasted year" but a serious milestone for the development of the EU/all mankind. It is up to all of us to contribute to the realization of positive predictions. Crisis such as the Covid-19 one could have a strong potential to act as katalizators bringing to the surface quality decisions and speeding up processes, so it's up to Member states and institutions to channel them in a proper direction. The Covid pandemic is a chance. This chance was given to us in order to understand the importance of mutual help and to develop new knowledge and skills. Just as the International Health Regulation was amended after the SARS pandemic, Covid-19 could provide for another great impulse to amend the existing EU and international agreements in order to secure better protection to the most vulnerable ones. Also, the crisis is a warning that if certain changes do not happen, there is a justified fear that other "fate-like" environmental and information crises, which are likely to happen in the future, could be even more detrimental. Let us only imagine what confusion and collapse would the Internet and other digital forms of international communication cause if they stop functioning, or what would be the consequences of increase

in the greenhouse gas levels? Unfortunately, the level of consciousness about the seriousness of these threats is in general not high enough to allow us to predict their consequences, which can be more fatal to the economy and people than a Covid-19 pandemic.

Lastly, the Covid-19 crisis had taught us an indispensable lesson on how it feels to be on the same boat, or in other words, about our common fate. It has a strong potential of inspiring more cooperation and solidarity among nations. That is exactly what happened in the European continent. Although the speed of the EU reaction was criticised at the beginning of the pandemic, the EU managed to consolidate efforts and to take an active and notable role in managing the crisis on the continent and wider. The EU acting towards its closest neighbours and treating them as privileged partners in these uncertain times provides for additional proof that the European path is plausible and a firm path, and the only one that Montenegro and the Western Balkans should take.

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UDK 342.565.2(497.5):341.231.145(4)
Review article

THE CROATIAN CONSTITUTIONAL COURT AND THE EU CHARTER OF FUNDAMENTAL RIGHTS - A LIMBO BETWEN THE CHARTER, THE ECHR AND NATIONAL CONSTITUTION*

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ABSTRACT

The Charter of Fundamental Rights of the European Union has been applied directly by the Croatian Constitutional Court since the decision No. U-I-1397/2015 (Act on Elections of the Representatives to the Croatian Parliament) rendered in 2015. Ever since it can be observed that the Charter has been consistently applied both in the proceedings of constitutional review in abstracto and in the proceedings initiated by a constitutional complaint (constitutional review in concreto), however, in a limited number of cases mostly concerning migrations or asylum. Therefore, this paper analyses the application of the Charter in the case law of the Croatian Constitutional Court and the method of interpretation pursued, with special reference to both its shortcomings and benefits. The paper also investigates the reasons for limited application of the Charter, even in those cases which would normally fall under the scope of application of EU law. The analysis indicates two distinct methodological approaches adopted by the Constitutional Court. The first one, where the Charter has been regarded as an interpretative tool only; and the second one, where the Charter has been found to be directly applicable vis-à-vis individual rights inferred from the EU law. The latter approach, first followed in an asylum case No. U-III-424/2019 (X. Y.), had raised new questions on interpretation of the Charter (with respect to the Croatian constitutional framework) in the cases where the Charter's applicability ratione materiae overlaps with the Croatian Constitution and the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, which to the day, in contrast to the Charter, has been consistently followed and therefore legally internalised by the Croatian Constitutional Court. Therefore, the paper also elaborates a new methodological approach adopted by the Croatian Constitutional Court in finding a way out of „limbo" between the Charter, the ECHR, and the Croatian Constitution.

Key words: *Croatian Constitutional Court, EU Charter of Fundamental Rights, ECHR, Croatian Constitution, migrations, asylum*

* The views expressed in this paper are those of the author and do not represent, nor do they reflect the views of the Constitutional Court.

1. INTRODUCTION: THE CROATIAN CONSTITUTIONAL COURT AND A DUAL CHARACTER OF THE EUROPEAN HUMAN RIGHTS SYSTEM

Ever since the Republic of Croatia (hereinafter: RoC) had become a candidate for membership to the European Union (hereinafter: EU), a significant body of scholarly work and papers has been produced on the topic of a relationship between the Constitution of the RoC[1] (hereinafter: Croatian Constitution) and the EU law.[2] On the other side, there is only a limited body of research work on the topic of interpretative methods of the Croatian Constitutional Court (hereinafter: CCC) as a European court obliged to apply both the EU law and the (European) Convention for the Protection of Human Rights and Fundamental Freedoms[3] (hereinafter: ECHR).[4] Furthermore, some scholars have already tackled opened questions on the position of the Charter of Fundamental Rights of the EU[5] (hereinafter: the Charter) in the Croatian legal order.[6] However, the interpretative methods pursued by the CCC in the application of the Charter remain unexplored to this day, especially in the context of the CCC's duty to interpret and apply the ECHR which, in its scope of application, overlaps with the application of the Charter.

The principal goal of this paper is to give an overview of the CCC's case law on application of the Charter, with a special focus on the CCC's interpretative methods, all in the context of the CCC's role in a dual European system of human rights governed by both the Charter and the ECHR (with special reference to asylum cases).[7] The research is divided in four parts: in the first one the paper provides

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1 The Constitution of the Republic of Croatia, Official Gazette No. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

2 See, among the latest papers: Smerdel, B., *In Quest of a Doctrine: Croatian Constitutional Identity in the European Union*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 64 No. 4, 2014, pp. 513 - 554; Horvat Vuković, A., *The Constitutional Court of the Republic of Croatia as a 'European' Court and the Preservation of National Standards of Fundamental Rights Protection*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 69, No. 2, 2019, pp. 249 – 276.

3 Official Gazette, International agreements, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010

4 See, for example, Barić, S. *The Transformative Role of the Constitutional Court of the Republic of Croatia - From the ex-Yu to the EU*, Working paper no. 6 for Analitika Center of Social Research, Sarajevo, 2016, pp. 13 - 39, [https://bib.irb.hr/datoteka/971606.constitutional_court_croatia_1.pdf], Accessed 3 February 2021.

5 2012, OJ C 326/391.

6 See, for example, Selanec, G., *The Role of the Charter in the Croatian Legal Order*, in Palmisano G. (ed.), Making the Charter of Fundamental Rights a Living Instrument, Brill Nijhoff, Leiden, 2015, pp. 361–381.

7 For various aspects of interrelation between the ECHR and the EU's legal order, see Dzehtsiarou, K. *et al.*, *Human Rights Law in Europe*: *The Influence, Overlaps and Contradictions of the EU and the ECHR*, Routledge, New York, 2014.

for an overview and analysis of the application of the Charter in the cases of constitutional review *in abstracto*; then in the second part follows the same analysis of the constitutional review *in concreto* cases; in the third part the paper describes the interpretative methods pursued by the CCC in applying both the Charter and the ECHR; and in the final part the research ends with concluding remarks and recommendations on further development of the CCC's interpretative methods.

2. THE CHARTER AND THE CONSTITUTIONAL REVIEW *IN ABSTRACTO*

The decision in which the CCC had referred to the Charter's text for the first time was rendered in 2012 in the case no. U-I-448/2009 where the CCC was called to review Art. 10 of the Criminal Procedure Act[8] regulating inadmissibility of the evidence obtained in violation of the right to human dignity. The CCC pointed out that human dignity, protected by Art. 1 of the Charter, „is the first indivisable and universal value" of the EU.[9] The CCC had referred further to the ECHR and the case law of the European Court of Human Rights (hereinafter: ECtHR), as well as the case law of the German Constitutional Court. However, the assessment of the merits was not brought into a relation with the cited Art. 1 of the Charter. Taking into account several circumstances, e.g.; that the Charter was mentioned for the first time in a case of constitutional review in *abstracto*; the fact that decision in question predates the accession of the RoC to the EU, which was at that time relevant to the applicability of the EU law *ratione temporis*; and especially the fact that, to this day, the EU law does not lay any rules on admissibility of the evidence in criminal proceedings[10]; it remains unclear why the CCC had decided to refer to the Charter in this specific case.

If the Charter was not applicable (at least) *ratione materiae*, it could be speculated, as the CCC had indirectly indicated, that Art. 1 of the Charter was mentioned in the context of common European values or even general principles of law common to many other constitutional traditions. However, the CCC's simple reference to the Charter in the latter case cannot be taken as an answer to the question whether the CCC had actually implied that the Charter's provision could be applied, and therefore intepreted as general principles guiding the court's method of interpretation, in the cases falling out of the scope of application of the EU law. A

8 Official Gazette, No. 152/2008, 76/2009, 80/2011.

9 U-I-448/2009 *et al.* (Criminal Procedure Act), 19.7.2012., see par. 44.4.

10 In this regard see the critical review of the EU law on admissibility of evidence in criminal proceedings, in Ligeti, K. *et al.*, *Admissibility of Evidence in Criminal Proceedings in the EU*, The European Criminal Law Association's Forum, No. 3, publication by Max Planck Society for the Advancement of Science, Freiburg, 2020, pp. 201 – 208.

proof *du contraire* can be found in the CCC's order no. U-I-5600/2012, rendered a year later and only a few months prior to the accession, in the proceedings for review of the constitutionality of the Enforcement Act.[11] The CCC elaborated that the alleged inconsistency of the Enforcement Act with Art. 53 – 54 of the Charter cannot be examined in the merits because at the relevant time the Charter had not entered into force in the RoC.[12] This conclusion was reached in spite of the applicants' complaint that, by enacting the new Enforcement Act, the RoC had violated the obligations assumed by the pre-accession agreements which, under certain conditions, can be binding and therefore applicable *ratione temporis* to the continuing situations created prior to the accession.[13] Furthermore, the doors opened to the broader scope of application of the Charter in constitutional review *in abstracto* had been closed by the CCC's first post-accession order no. U-I-3861/2013 instituting proceedings for review of the Value Added Tax Act[14]. The CCC had concluded that the Charter is applicable only to the situations where „the member states implement the EU law".[15] In this regard, it is interesting to notice that the Charter was applied directly for the first time in the CCC's decision on the Act Ammending the Act on Elections of the Representatives to the Croatian Parliament (hereinafter: the Elections Act)[16], in particular Art. 30 (22) regulating promotion and fair treatment by the electronic media of the candidates standing for elections. The CCC confirmed (most likely unintentionally) that the Elections Act implements Art. 11 of the Charter (freedom of expression), by simply citing in the court's assessment, and therefore accepting, the Government's preparatory proposal of the impugned law citing the Charter.[17] However, it was obvious from the court's further assessment (referring to the relevant case law of the ECtHR) that no sources were available to it on the applicability of the EU law or the Charter to the national elections falling under the exclusive competence of the Member States (hereinafter: MS's). Even when the Government or the legislator fails to discern whether the Charter or the EU law has been implemented by national legislation, it is still advisable for the CCC to take over that task because

11 Official Gazzete, No. 112/2012.

12 U-I-5600/2012 (Enforcement Act), 23.4.2013., see par. 9.

13 The interpretation on inapplicability of the EU law or the Charter to the pre-accession situations was, to some extent, dubious. In this regard, see more in Martines, F., *Direct Effect of International Agreements of the European Union*, The European Journal of International Law, Vol. 25 no. 1, 2014, p. 139 and further; in respect of the RoC's pre-accession agreements, see in particular the CJEU's case C-277/19 (*R. D. and A. D.*), 26.9.2019., par. 29., and the case law cited thereto.

14 Official Gazette, No. 73/2013.

15 U-I-3861/2013, 16.7.2013., par. 6.

16 The Act Ammending the Act on Elections of the Representatives to the Croatian Parliament, Official Gazette, No. 19/2015.

17 U-I-1397/2015, 24.9.2015., par. 135.

the CCC had previosuly limited the applicability of the Charter only to the situations where „the MS's implement the EU law". By accepting the Government's argument that the Elections Act implements Art. 11 of the Charter, in spite of the fact that the situation in question was not governed by the EU law, the CCC had prejudiced the applicability of the Charter for the following decisions rendered in comparable situations.

Regardless of the obvious inconsistencies in applying the Charter in the situations that are not governed by the EU law, to this day the CCC has not explicitly stated that the Charter (and the supporting case law of the Court of Justice of the EU; hereinafter: CJEU) shall be applied or interpreted, at least as a general principle of law or a common constitutional tradition, in the situations falling out of the scope of application of EU law. However, the possibility of the latter, less formal approach to the application of the Charter as an interpretative legal tool and source, has not been ruled out, thankfully to the dissenting opinions of several judges of the CCC, indicating that the consensus on the latter issue has not been reached.[18]

Contrary to the decision on the Elections Act, in other cases the CCC had disregarded either the Government's or the applicants' arguments that the impugned law implements either secondary law of the EU or the Charter, even where the EU law was manifestly applicable. In the decision on the The Act Ammending and Supplementing the Consumer Protection Act (hereinafter: the Consumer Protection Act)[19] the CCC cited the applicants in so far as they had complained that the Government, by enacting the impugned law on the consumers' right to conversion of Swiss franc loans, had violated Art. 63 of the Treaty on the Functioning of the European Union.[20] The CCC cited as well the applicants' complaints as to the method of implementation of the EU directives, that was, in their view, manifestly erroneus and disproportionate, *inter alia*, due to the retrospective effect of

[18] See, for example, the dissenting opinions of the judges advocating for reception of the general principles of EU law or the Charter as a legal transplant in various situations where the EU law was not neccessarily directly applicable, in the following cases: U-III-1267/2015 (GONG – the right of access to classified informations), 21.11.2017., a dissenting opinion of the judges Abramović, Kušan and Selanec; U-I-60/1991 *et al*. (Termination of pregnancy), 21.2.2017., a dissenting opinion of judge Šumanović on the interpretation of Art. 1 of the Charter and the CJEU's ruling in the case C-34/10 (*Brüstle*), GC, 18.11.2011., par. 11.3.; U-I-1092/2017 (Act on Direct Payments for Employment), 10.7.2018., a dissenting opinion of the judges Kušan and Selanec on the application of the principle of non-discrimination in similar situations governed by the EU's non-discrimination rules in the area of employment.

[19] Official Gazette No. 102/2015.

[20] 2012, OJ C 326.

the impugned law.[21] In its assessment[22], the CCC had not advanced further the Government's argument that the contested law implements Art. 38 of the Charter (consumer protection), but had only accepted the Government's observation that the impugned provisions on the conversion of Swiss franc loans do not implement directly the Directive on credit agreements for consumers relating to residential immovable property[23]. The CCC recognized that the situation in question possibly falls under the scope of application of the Directive on unfair terms in consumer contracts[24], but nevertheless the CCC neglected a possibility to review the impugned law from the perspective of a consumer's right to an effective legal remedy as guaranteed by Art. 47 of the Charter.[25] If Art. 47 of the Charter was applied, the latter approach would have been verified by the CJEU only a year later in the case *Sziber*[26], concerning the conversion of loans, where the CJEU decided to interpret the Directive on unfair terms in consumer contracts in connection to Art. 47 of the Charter, by pointing out that „it is therefore appropriate, having regard to the subject matter …, to interpret that directive, read in the light of the relevant provisions of the Charter, in particular Article 47 thereof, which enshrines the right to effective judicial protection".[27] The CJEU went even further, by using the language of „positive obligations of the MS's" that is more inherent the ECtHR's case law, therefore concluding that „it is apparent from Article 7(1) of Directive 93/13, …, that the MS's must ensure that judicial and administrative bodies have adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers".[28]

In view of the *Sziber* case, it appears that the constitutional review of the Consumer Protection Act was a missed opportunity for implementing the Charter as an intepretative tool in the test of proportionality of the impugned provisions, as it was obvious that the measure taken by the Government had a legitimate aim in providing an effective legal remedy for eliminating the consequences of unfair

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21 U-I-3685/2015 (Consumer Protection Act), 4.4.2017.; see in particular par. 11.-11.1., 11.3.-11.4., 11.7.-11.8., 11.11.

22 *Ibid*., see par. 26. – 42.

23 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, 2014, OJ L 60 /34.

24 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts , 1993, OJ L 95/29.

25 U-I-3685/2015, *op. cit.*, see par. 18.1. and 30.

26 C-483/16 (*Sziber*), 31.5.2018.

27 *Ibid.*, see par. 29.

28 *Ibid*., see par. 33.; For a thorough analysis of the *Sziber* case, see Gomboš, K., *Europeanisation effects in the court jurisprudence,* International and Comparative Law Review, Vol. 19, No 1., 2019, pp. 265–266.

terms in consumer credit agreements. Furthermore, the fact that the CJEU had ruled on the "right to conversion" only a year after the CCC's decision, indicates that the CCC could have and should have reconsidered a potential applicability of the Charter in specific circumstances of the latter case.

However, a novel approach to applying the Charter *proprio motu* in constitutional review *in abstracto* has been developed in the case no. U-I-2911/2017 where the applicants contested Art. 434 of the Public Procurement Act[29] regulating judicial control of the procedures conducted by the State Commission for Supervision of Public Procurement Procedures (hereinafter: SCSPPP). The applicants complained that the impugned provisions, setting up a single-instance court mechanism for the judicial review of the SCSPPP (that being the High Adminstrative Court as both the court of first instance and the court of last resort), do not comply with Art. 18 of the Croatian Constitution (right of appeal) and Art. 29 of the Croatian Constitution (right to a fair trial and of access to a court). They argued that the administrative courts of first instance were left out of the scheme, thus depriving the applicants of a possibilty to have their appeal decided by the High Administrative Court as a court of second instance. The CCC acknowledged that the case falls under the scope of application of the Directive on improving the effectiveness of review procedures concerning the award of public contracts[30] and therefore examined the complaints by applying Art. 47 of the Charter. Starting from the interpretation provided by the CJEU in the case *Combinatie Spijker Infrabouw-De Jonge Konstruktie*[31] , the CCC pointed out that Art. 47 of the Charter compels the MS's to set up effective legal remedies in the area of public procurement, but at the same time the MS's enjoy a certain margin of appreciation in the choice of the procedural guarantees. From the text of the Directive and the CJEU's judgment rendered in the case *Diouf*[32], the CCC concluded that Art. 47 of the Charter affords an individual a right of access to a court, but not to a number of levels of jurisdiction.[33] The *Diouf* judgment was a preliminary ruling interpreting the Asylum Procedures Directive 2005[34] and therefore had no connection whatsoever to the Directive on improving the effectiveness of review procedures concerning the

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29 Official Gazette, No. 120/2016.

30 Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, 2007, OJ L 335/31.

31 C-568/08 (*Combinatie Spijker Infrabouw-De Jonge Konstruktie*), 9.12.2010.

32 C-69/10 (*Diouf*), 28.7.2011.

33 U-I-2911/2017 (Public Procurement Act), 5.2.2019., par. 19.1. - 19.2.

34 Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, 2005, OJ L 326/13.

award of public contracts.[35] However, it must noticed that, to this day, the CJEU has not dealt with comparable issues of single-instance court mechanisms in the area of public procurement. Therefore, no other choice was left to the CCC but to resort to transplanting the case law developed in the area of asylum procedures. On the other side, a due regard could have been given to the case *Star Storage*[36] where the CJEU had established the general criteria limitation of the right to an effective remedy before a court (within the meaning of Art. 47 of the Charter) in public procurement procedures.[37]

A similar situation where the Charter was interpreted by the CCC on its own motion emerged again in the order on constitutionality of Art. 62 of the Penal Code[38] regulating extension of the limitation periods for the offences, that was challenged by the applicants complaining of its incosistency with the *nullum crimen sine lege principle*. As the impugned provision is generally applicable to all offences, this case falls under the scope of application of the EU law as it has been argued by the Advocate General Bot in his opinion delivered in the case *Taricco II*[39] (that is confronting the requirement of effectiveness of the EU law with the principles of legality and proportionality of criminal offences and penalties protected by Art. 49 of the Charter). In contrast to the case *Taricco II* where the Italian Constitutional Court had decided to seek a preliminary ruling from the CJEU, that would further clarify the CJEU's interpretation of the earlier case *Taricco I*[40], the CCC did not seek a preliminary ruling from the CJEU, but rather decided to interpret Art. 49 of the Charter and the *Tarrico I* judgment on its own motion.[41] However, in the first few days following the CCC's decision, the CJEU rendered a judgment in the case *Taricco II* in which it opted for a novel approach to the intepretation of Art. 49 of the Charter in connection to Art. 7 ECHR and has thus, in part, departed from the position taken in *Taricco I* judgment.[42]

Therefore, by taking into account the earlier decision on the Consumer Protection Act, and now the fact that the Italian Constitutional Court sought a preliminary

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35 As to the relevance of the latter case in the context of asylum procedures, see Zalar, B., *Comments on the Court of Justice of the EU's Developing Case Law on Asylum*, International Journal of Refugee Law, Vol. 25, No.2, 2013, pp. 377–381.

36 C-439/14 and C-488/14 (*Star Storage*), 15.9.2016.

37 *Ibid*., see par. 49.

38 Official Gazette, No. 25/2011, 144/2012, 56/2015, 61/2015, 101/2017.

39 C-42/17 (*Taricco II*), AG's opinion, 18.7.2017.

40 C-105/14 (*Taricco I*), GC, 8.9.2015.

41 U-I-3826/2013 *et al*., 28.11.2017., see par. 16.1., 18., 23.

42 For a detailed interpretation and analysis of the *Taricco II* case, see Materljan, G.; Materljan, I., *Predmet Taricco II i pitanja na vagi: ustavno načelo zakonitosti u kaznenom pravu i djelotvornost prava Europske unije*, Hrvatski ljetopis za kaznene znanosti i praksu (Zagreb), Vol. 26, No 2, pp. 503 -528.

ruling in a situation comparable to that of the CCC in the Penal Code case, it can be observed that the CCC is not activating the preliminary reference procedure nor engaging in the judicial dialogue with the CJEU, even where it is appropriate and there is no dispute over the applicability of the EU law, nor the Charter. In the context of the Penal Code case, a preliminary ruling of the CJEU could have shed a new light on the application of the *nullum crimen sine lege principle*, as it has eventually happened in the *Taricco II* case. [43] Finally, in the joined cases U-I-2854/2018 and U-I-2855/2018, concerning the compatibility of the Croatian Qualifications Framework with the European Qualifications Framework, where the applicants complained that awarding different qualifications to the students in comparable situations was not reasonable nor proportionate, several judges dissented from the majority by arguing that the CCC had to refer the questions brought before it to the CJEU for a preliminary ruling.[44]

3. THE CHARTER AND THE CONSTITUTIONAL REVIEW *IN CONCRETO*

The CCC referred to the Charter for the first time in the proceedings instituted by an individual complaint of an applicant complaining that he was unlawfully deprived of liberty in the proceedings for execution of the European arrest warrant. By its decision no. U-III- 351/2014 (*Perković*) the CCC accepted, according to the CJEU's ruling rendered in the case *Radu*[45], that all domestic proceedings for execution of the European arrest warrant must comply with the requirement of respect for personal liberty protected by Art. 6 of the Charter.[46] Even though this was the very first case of constitutonal review *in concreto* where the Charter was directly applicable, it has gone unnoticed that the CJEU had actually examined the *Radu* case by referring to Art. 47 (right to a fair trial) and Art. 48 of the Charter (right of defence), therefore excluding a potential applicability of Art. 6 of the Charter taken alone.[47] In its own decision, the CCC did not further apply the Charter or the CJEU's case law to the assessment of the alleged violation of human rights. However, the principal reason thereto is disclosed by the fact that the applicant's complaint was not substantiated in respect of the application of the Charter. Therefore, the comparable situations where, on one side the CCC accepts the applicability of the Charter, but on the other side does not give any interpreta-

43 See *C-42/17 (Taricco II)*, GC, 5.12.2017., par. 54. – 55., 60. – 62.

44 U-I-2854/2018, U-I-2855/2018 (Croatian Qualifications Framework), 10.3.2020., see a dissenting opinion of the judges Abramović, Kušan and Selanec.

45 C-396/11 (*Radu*), GC, 29.1.2013.

46 U-III- 351/2014 (*Perković*), 24.1.2014., par. 13.1.

47 See C-396/11 (*Radu*), GC, 29.1.2013., par. 30. – 32.

tions of the Charter's provision in the assessment of the alleged violation of human rights due to the applicants' failure to refer to the relevant provisions of the Charter or the case law of the CJEU, have repeated again in the CCC's case law.[48]

Therefore, it does not appear that the CCC will pursue a detailed approach to the application of the Charter or the CJEU's case law thereto if the applicant does not substantiate his or her complaint thereof.

The latter method of limiting the scope of the constitutional review *in concreto* was confirmed once again in respect of the Charter by the decision no. U-III-6958/2014 (*S. A. K.*) where the applicant, an asylum seeker, complained of inability to access free legal assistance and to have the costs of a legal representation reimbursed. The applicant referred to Art. 47 of the Charter, but omitted to point out any of the CJEU's ruling thereto.[49] Taking into account the relevant provisions of Art. 9 of the Reception Conditions Directive[50], the CCC briefly concluded, without referring to the CJEU's case law, that the applicant's case had not raised any relevant questions as to the potential inconsistencies with the requirements of Art. 47 of the Charter.[51] Furthermore, the CCC had not conducted an inquiry into availability of free legal assisstance or legal representation to the asylum seekers in the RoC. This approach may appear as a restrictive one, especially if confronted with the principle of *iura novit curia* and a very specific nature of an asylum seeker's complaint of violation of human rights. However, pursuant to Art. 65 of the Constitutional Act on the Constitutional Court of the RoC[52], the applicant bears a duty of substantiating an alleged violation of human rights. Therefore, the unsubstantiated claims shall not be examined in the merits, but shall be declared inadmissible instead.[53] In this respect the examination method of the CCC is mirroring the settled case law of the ECtHR on manifestly ill-founded complaints.[54] On the other side, if the same method was pursued in each case consistently, by disregarding the nature of different violations of human rights that can be brought

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48 See, for example, case no. U-III-3468/2018 (*ORCA*), 18.11.2018., par. 14.5., where a reference was made to the right to strike as a general principle of the EU law and a fundamental right according to the CJEU's interpretation in the case C-438/05 (*Viking*), GC, 11.9.2007.

49 U-III-6958/2014 (*S. A. K.*), 27.2.2018., see par. 1.2. in connection to par. 4.

50 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 2013, OJ L 180/96.

51 *S. A. K.*, *op. cit.*, see par. 6.1.2. and 8.

52 Official Gazette, No. 99/1999, 29/2002 i 49/2002.

53 See in that regard decision no. U-III-4150/2019 (*Raiffeisenbank and Others*), 3.2.2021. par. 60.1. and 60.3.

54 See more in the ECtHR's Practical Guide on Admissibility Criteria, Council of Europe, Strasbourg, 2021, par. 74.; [https://www.echr.coe.int/documents/admissibility_guide_eng.pdf], Accessed 1 April 2021.

before the court, it would hardly meet the requirements of the ECtHR's case law on the distribution of proof between an asylum seeker and the Government or the ECtHR's position on collecting the evidence *proprio motu* in the asylum cases.[55] In this regard, the shortcomings of the CCC's assessment method in the *S. A. K.* case have become particularly noticeable after the case no. U-IIIBi-1385/2018 (*Hussainkhel I*) where the applicants detained in the reception centre complained of having been denied access to a lawyer and the conditions in the reception center that had not met the requirements of respect for human dignity (Art. 3 ECHR).[56] In contrast to the *S. A. K.* case, in the *Hussainkhel I* case the CCC had verified relevant evaluation reports on the access to the reception centre and the conditions of reception.[57] But on the other side, the CCC did not observe that the situation before it was governed by Art. 9 (guarantees for detained applicants) and Art. 10 (conditions of detention) of the Reception Conditions Directive, in connection to Art. 4 (prohibition of inhuman or degrading treatment) and Art. 47 of the Charter (right to a fair trial and effective legal remedy), but had only referred to the text of Art. 18 (right to asylum) and Art. 19 of the Charter (*non-refoulement*).[58]

However, the follow-up cases of in the area of asylum or migrations demonstrated a gradual shift towards a different approach where the CCC, on its own motion, applies the Charter directly.

In the case no. U-III-208/2018 (*Oral I*), the applicant, a Turkish citizen who had already been granted an asylum in the Swiss Confederation, was detained in the RoC on the arrest warrant of the Turkish Republic. He complained that the Supreme Court's decision upholding an order of extradition to the Turkish Republic had violated Art. 31 of the Croatian Constitution prohibiting extradition of individuals who are residing lawfully in the RoC or the EU, as he was already granted an asylum in the Swiss Conferedation. Furthermore, he argued that the extradition would contravene the principle of *non-refoulement* in connection to Art. 2 (right to life) and Art. 3 (prohibiton of torture and degrading treatment) ECHR. In his complaints the applicant did not refer to the Charter in any way.[59] However, the CCC had applied on its own motion the principle of mutual confidence and Art. 4 of the Charter (prohibition of inhuman or degrading treatment), as interpreted by the CJEU in the case of *N. S. and Others*[60]. Starting from the Council Deci-

55 See *F.G. v Sweden*, 43611/11, GC, 23.3.2016., par. 127; and *J. K. and Others v. Sweden*, 59166/12, GC, 23.8.2016., par. 91 – 98.

56 U-IIIBi-1385/2018 (*Hussainkhel I*), 18.12.2018., par. 15.1. – 15.2.

57 *Ibid*. par. 23., 34.

58 *Ibid*., par. 20.3.

59 U-III-208/2018 (*Oral I*), 10.7.2018., see par. 15. – 15.6.

60 C-411/10 and C-493/10 (*N. S. and Others*), GC, 21.12.2011.

sion 2008/147/EC of 28 January 2008[61] and the Council Decision 2009/487/EC of 24 October 2008[62] integrating the Swiss Confederation into the Dublin system, the CCC found that the fact of having been granted an asylum in the Swiss Confederation prevents the applicant's extradition to the Turkish Republic.[63] The CCC further noticed that the Supreme Court had attached a decisive weight to the fact that the Swiss Confederation is not a MS of the EU, without investigating the position held by the Swiss Confederation in the Dublin system according to the decisions adopted by the Council. For that reason, the CCC found further a violation of Art. 141.c of the Croatian Constitution regulating the duty of all public authorites to implement directly the EU law and the legal acts adopted by the institutions of the EU.[64]

4. THE CROATIAN CONSTITUTIONAL COURT IN A LIMBO BETWEEN THE CHARTER AND THE ECHR

Following the developments in applying the Charter *proprio motu*, the CCC got confronted with a dilemma on how to approach the cases where both the ECHR and the Charter were applicable, especially in the context of a complex interrelation between the ECHR system and the legal order of the EU. The so called *Bosphorus* doctrine on the rebuttable presumption of equivalent protection had enabled the ECtHR to rebut the presumption of equivalence, leading that court to review in the merits the conformity of the EU law with the ECHR (as the standards of protection afforded to an individual by the EU law do not have to be necessarily the same as those of the ECHR.)[65] On the other side, the CJEU has

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61 2008/147/EC: Council Decision of 28 January 2008 on the conclusion on behalf of the European Community of the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, 2008, OJ L 53/3.

62 2009/487/EC: Council Decision of 24 October 2008 on the conclusion of a Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, 2009, OJ L 161/6.

63 U-III-208/2018 (*Oral I*), 10.7.2018., see par. 23.1. – 24., 26.

64 *Ibid*., see p. 27. – 28.

65 See more on the Bosphorus doctrine and its development in Gragl, P., *An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to Opinion 2/13 in the Avotiņš Case: ECtHR 23 May 2016, Case No. 17502/07, Avotiņš v Latvia*, European Constitutional Law Review, Vol. 3, No. 3, pp. 551-567; and Kuhnert, K., *Bosphorus – Double standards in European human rights protection?*, Utrecth Law Review, Vol. 2, No. 2, 2006, pp. 177-189; For the cases where where the presumption was rebutted, see for example *Michaud v. France*, 12323/11, 6.12.2012., par. 113 - 115; In the asylum cases, it should be borne in mind that the presumption of equivalent protection has been "diluted" and it is not applicable, even where the public authorities of

been interpreting the ECHR as well; in the pre-Charter period in the context of the general principles of the EU law; and in the post-Charter period in accordance to Art. 52.3 of the Charter laying down an equivalent protection principle in the EU law by proclaiming that the meaning and scope of the fundamental rights guaranteed by the Charter shall be the same as those laid down by the ECHR. From there on the creators of the Charter went further by pointing out that this provision shall not prevent the EU law providing more extensive protection.

In the middle of a limbo described above is the CCC who, pursuant to Art. 134 of the Croatian Constitution and the settled case law, finds the ECHR to be directly applicable in the proceedings before all domestic courts, and especially the CCC.[66] At the same time, the landmark decision rendered in the case *Oral I*, finding a violation of Art. 141.c of the Croatian Constitution if a domestic court fails to implement the EU law (the Charter) directly, had also created a duty of applying the Charter directly where applicable. Therefore, the post-accession CCC is now in a triangle between the ECtHR and the CJEU - obliged to observe the standards afforded to the protection of human rights by both European courts.

The CCC decided to verify *proprio motu* the equivalence of the standards of protection afforded by the ECHR and the Charter in a landmark decision rendered in the joined cases no. U-III-424/2019 and U-III-1411/2019 (*X. Y.*), concerning an Iraqi national whose application for asylum was rejected as unfounded (unsubstantiated), and a subsuquent application was rejected as inadmissible. The aplicant complained, *inter alia*, that under Croatian law he had been deprived of the right to an effective legal remedy capable of suspending the execution of a deporation order that was issued following the dissmissal of his subsequent application for asylum, whereas the appelate proceedings before the High Administrative Court, as a court of second instance, were still pending. Furthermore, the applicant argued that he would be deported to Iraq without having his appeal finally determined by the High Administrative Court. The CCC first examined whether the ECHR guarantees the right to a legal remedy with an automatic suspensory effect in the second instance of judicial proceedings. It was established, according to the judgments rendered in the cases *De Souza v. France*[67] and *A. M. v. Nether-*

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the Dublin system act within the authority provided to them by the Dublin regulations, if the ECtHR succeeds at establishing that the EU law had afforded them a margin of appreciation which enables them to exercise a public authority in compliance with the ECHR. In that respect see in particular the landmark judgment in *M.S.S. v. Belgium and Greece*, 30696/09, GC, 21.1.2011., par. 339 – 340.

66 See in particular *Habulinec and Filipović v. Croatia*, 51166/10, 4.6.2013., par. 11; and the CCC's case no. U-III-2864/2016 (Đomlija), 23.5.2019., par. 18.

67 *De Souza v. France*, GC, 22689/07, 13.12.2012.

lands[68], that Art. 13 ECHR does not compel the signatories to the ECHR to set up a second level of appeal before administrative courts.[69] In so far, the applicant's complaints as described above could have been rejeceted as manifestly ill-founded (inadmissible), if the CJEU had not established, on the basis of Art. 47 of the Charter, a higher level protection in respect of an automatic suspensory effect of the appelate proceedings. In the case *Staatssecretaris van Veiligheid en Justitie (suspensory effect of the appeal)*[70] the CJEU had determined, in line with the case law of the ECtHR, that the appeal submitted with the court of second instance does not need to have an automatic suspensory effect. However, according to the principle of eqivalence stemming from Art. 47 of the Charter, the CJEU imposed onto the domestic courts an additional duty to verify whether the legal remedies, provided by domestic law in other comparable procedures, have an automatic suspensory effect. Thus because the principle of equivalence requires an equal treatment of claims based on a breach of a national law and of similar claims based on a breach of the EU law.[71] Therefore, the CCC had conducted a test of equivalence according to the criteria established by the CJEU. By comparing the legal remedies available to the foreigners pursuant to the Act on Foreigners[72] and the Act on International and Temporary Protection[73], the CCC had reached a conclusion that the Act on International and Temporary Protection, by implementing directly the Asylum Procedures Directive 2013[74], provides for a higher degree of legal protection to the asylum seekers when compared to the foreigners residing (un)lawfully in the RoC pursuant to the Act on Foreigners. Thus because the complaint submitted with an administrative court of first instance by an asylum seeker has an automatic suspensory effect enabling them to reside lawfully in the RoC until the complaint has been determined by that court, whereas the complaint submitted with an administrative court of first instance by a foreigner who had not applied for asylum does not have the same effect.[75]

Furthermore, in the *X. Y.* case the CCC had examined and determined (though not explicitly, but on the methodological level) the equivalence between the ECHR and the EU law in respect of the principle of *ex nunc* evaluation of an asylum ap-

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68 *A. M. v. Netherlands*, 29094/09, 5.7.2016.

69 U-III-424/2019 and U-III-1411/2019 (*X. Y. - deporation to Iraq*), 17.12.2019., see in detail pp. 123 – 127.

70 C-180/17 (*Staatssecretaris van Veiligheid en Justitie - suspensory effect of the appeal*), 26.9.2018.

71 *X. Y. - expulsion to Iraq*, *op. cit.*, see in detail par. 128. - 137.

72 Official Gazette, No. 130/2011, 74/2013, 69/2017, 46/2018.

73 Official Gazette, No. 70/2015, 127/2017.

74 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, 2013, OJ L 180/60.

75 *X. Y. - expulsion to Iraq*, *op. cit.,* see in detail pp. 138 – 146.

plication protected by Art. 46 of the Asylum Procedures Directive 2013 and Art. 47 of the Charter. The applicant had also complained that his return to Iraq would contravene the *non-refoulement* principle (Art. 2 and 3 ECHR), whereas the administrative courts failed to examine the general risks in Iraq and the applicant related specific risk - an alleged persecution by a Shia militia. In that regard the CCC accepted that the assessment of the Ministry of Interior and administrative courts, as to the specific risks the applicant would face if he was deported to Iraq, was somewhat erroneus.[76] Furthermore, the CCC took into account the passage of time between the first application for asylum and the date of the CCC's decision, as well as the subsuquent evidence produced by the applicant.[77] According to Art. 46 of the Asylum Procedures Directive 2013 and Art. 47 of the Charter as intepreted by the *Diouf* judgment mentioned above, the MS's are obliged to secure a judicial review of the asylum cases based on the *ex nunc* principle, but this requirement applies consistently to the courts of first instance only. Therefore, the Asylum Procedures Directive 2013 does not impose any specific procedural requirements on the proceedings before a constitutional court. In that regard, and due to the erroneous assessment given by the lower courts, the CCC could have decided to remit the case to an administrative court of first instance for a new trial, as it had already done in the case no. U-III-557/2019 (*A. B.*)[78], therefore prolonging the uncertainty of the applicant's situation. However, following the methodological approach of the ECtHR in the cases *F. G. v. Sweden* and *J. K. v. Sweden*[79], the CCC applied the principle of *ex nunc* evaluation as it is interpreted by the ECtHR[80], consulted the relevant country reports and therefore examined *proprio motu* the general situation in Iraq, the applicant allegations as to the specific risks he would face if deported, and in the end the possibility of removal of the risks by internal relocation.[81] Even though the applicant's complaints were rejected as unfounded, the CCC had nevertheless decided on the applicant's asylum application in the merits by applying the principle of *ex nunc* evaluation, providing him with a fully effective legal remedy within the meaning of Art. 13 ECHR and Art. 47 of the Charter. On the other side, if the CCC finds, by applying the *ex nunc* principle, that the complaints of an asylum seeker are founded, the decision in the

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76 *Ibid.*, see in detail par. 73. - 74.

77 *Ibid.*, see in detail par. 66., 86.

78 U-III-557/2019 (*A. B. - expulsion to Iraq*)., 11.9.2019., see par. 5.14. as to the CCC's order to the lower court to examine general situation in Iraq and applicant related specific riks.

79 As to the general principles on *ex nunc* evaluation of the complaints raised under Art. 2 and 3 ECHR, see in detail *ibid.*, par. 56.3. - 56.7.

80 For a detailed review of the factors relevant for *ex nunc* assessment, as interpreted by the ECtHR, see Blöndal, E. K.; Arnardóttir, O. M, *Non-Refoulement in Strasbourg: Making Sense of the Assessment of Individual Circumstances*, Oslo Law Review, Vol. 5, No. 3, 2018, pp. 147-174.

81 *Ibid.*, see in detail par. 60. - 108.

X. Y. case has enabled the CCC to determine the applicant's claim finally. When the CCC remits the case to a lower administrative court, an application for asylum must be decided according to the CCC's final and binding interpretation. Therefore, the methodological approach adopted by the ECtHR provides the asylum seekers with a higher standard of protection in the proceedings before the CCC, than the standard of protection they would be afforded by applying the formalistic approach of the CJEU in applying Art. 47 of the Charter. For that reason, in the latter part of the decision rendered in the *X. Y.* case, the CCC had not referred to the Charter nor the CJEU's case law thereto.

However, a comparative method in applying both the Charter and the ECHR has not become a consistent method of interpretation. A year after the *X. Y.* case, the CCC rendered a decision in the case of constitutional review *in abstracto*, elaborating in details the requirements imposed by the Charter as to the deportation of the foreigners, but on the other side, without examining the standard of protection afforded by the ECHR in comparable situations. In the case no. U-I-1007/2012 *et al*. where the CCC was called to examine Art. 5 of the Act on Foreigners[82] in so far as it provides that the deportation order on the grounds of national security shall not be reasoned. The applicant claimed that the impugned provision contravenes the principle of effective judicial protection, thus because a foreigner may be deported without knowing the reasons thereto. In spite of the extensive assessment of the CJEU's case law developed on the basis of Art. 47 of the Charter, and a thorough examination of procedural safeguards provided by domestic law[83], the CCC had not verified whether the impugned provisions satisfy the requirements first established by the ECtHR in the case *Al-Nashif v. Bulgaria*[84] as to the right to a reasoned decision of the foreigners deported for national security reasons, nor the general principles as to the effectivenes of judicial control in such cases that had been summarized in the case *X. v. Sweden*[85].[86]

Attention must be brought to the fact that all signatory parties to the ECHR can fulfil their positive (procedural) obligations based on Art. 2 and 3 ECHR in connection to Art. 1 ECHR, only if domestic laws are of a certain quality capable of satisfying the procedural requirements imposed by the latter provisions of the ECHR, that may be different (more or less stringent) than the procedural re-

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82 Act on Foreigners, No. 130/2011, 74/2013, 69/2017, 46/2018.

83 U-I-1007/2012 *et al*. (Act on Foreigners), 24.6.2020., see in particular par. 13. - 25.

84 *Al-Nashif v. Bulgaria*, 50963/99, 20.6.2002., see in particular par. 137. - 138.

85 *X. v. Sweden*, 36417/16, 9.1.2018., see in particular par. 46 - 51.

86 For an overview of national security related immigration cases in the European context, see more in Chlebny, J., *Public Order, National Security and the Rights of Third-Country Nationals in Immigration Cases*, European Journal of Migration and Law, Vol. 20, No. 2, 2018, pp. 115 – 134.

quirements imposed by the EU law or the Charter.[87] In this regard, the decisions of the Committee of Ministers rendered in the proceedings for execution of the ECtHR's judgments, may also serve as a valuable source of law on both the compatibility and approximation of domestic laws to the standards guaranteed by the ECHR. Therefore, in spite of a noticeable progress in interpretation and direct application of the Charter in the area of migrations and asylum, the CCC should not lose sight of the comparative method of interpretation implemented in *X. Y.* case.

5. CONCLUDING REMARKS

From the analysis of the CCC's case law, several conclusions can be reached as to the interpretative methods in application of the Charter:

1. The CCC's pre-accession and early post-accession methodology usually disregarded to answer whether the Charter (the EU law) is applicable in a specific situation *ratione temporis* or *ratione materiae*, and on several occasions the CCC had even erred in the assessment of applicability. Furthermore, the CCC has never dealt with issues of vertical and horizontal effect of the Charter's provisions. These observations may appear formalistic, as the Charter or the case law of the CJEU could be consulted as an interpretative tool or a source of law even where the EU law is not applicable. However, establishing the real scope of application of the EU law, and thus the Charter, is a foremost step in honouring the obligation to activate the preliminary reference mechanism pursuant to Art. 267 TFEU.;

2. Regardless of the formalistic approach to the scope of application, the Charter may be applied in every case as a comparative source of law or an interpretative tool. There is, in fact, no need for declaring one's application for constitutional review inadmissible, solely because the applicant had referred to the Charter where the EU law is not applicable.;

3. If the applicant's complaint, as to the compatibility with the requirements stemming from the Charter, is not substantiated, the CCC should not declare it inadmissible where, according to the case law of the ECtHR, is obliged to conduct an examination *proprio motu*. In other cases, the doctrine on inadmissiblity should be applied consistently, as in the case law of the ECtHR.;

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[87] As to the limited scope of application of the concept of positive obligation in the EU law, especially in migration related cases, see Beijer, M., *The Limited Scope For Accepting Positive Obligations Under EU Law: The Case of Humanitarian Visas For Refugees Review of European Administrative Law*, Vol. 11, No. 1, 2018, par. 37 – 48.

4. When interpreting the Charter in a situation where there is no clear case law of the CJEU (the *CILFIT* criteria) or where the applicant's arguments are posing complex questions on interpretation of the EU law, and the situation obviously falls under the scope of application of the EU law (as in the Consumer Protection Act case), it is advisable to activate the preliminary reference mechanism.;

5. The progress of the CCC in applying the Charter and the EU law in the cases of migrations or asylum is praiseworthy. However, the CCC should verify consistently, by a comparative method, the standards of protection afforded by the ECHR and the Charter, as in the *X. Y.* case. Thus especially in the cases of constitutional review *in abstracto*, even where the contested law is in compliance with the Charter (the EU law), the positive obligations created under Art. 1 ECHR should be honoured and the ECtHR's case law consulted.

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Topic 2

EU criminal law and procedure

UDK 614.4:342.7](497.11)
Review article

UNFORESEEABILITY AND ABUSE OF CRIMINAL LAW DURING THE COVID-19 PANDEMIC IN SERBIA

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ABSTRACT

The author deals with the problem of criminal measures and sanctions in the legislation of the Republic of Serbia during the Covid-19 pandemic. The executive branch of the government declared a state of emergency in the Republic of Serbia in March 2020. At the same time the so-called Crisis Headquarter was established with the authority to impose measures of criminal-legal nature. During the two-month state of emergency, through the Crisis Headquarter, the executive branch of the government was changing criminal laws and sanctions at an almost daily basis. It is debatable whether such laws meet the rule of law and the European Court of Human Rights standards. Many citizens failed to adapt their behavior to the imposed measures. On the one hand, the courts have fallen into the trap of double punishment, both for a crime and for a misdemeanor. On the other hand, justifications of the courts' decisions are also questionable, especially those containing references to statements made by members of the crisis team through the media. Furthermore, the Constitutional Court didn't rule on any of the numerous requests for constitutional review, but in September it came out with the view that since the state of emergency was over, its decision was unnecessary.

The paper is comprised of several units. In the first place, the author explains the process of legal changes by analyzing all the laws and rules that were passed by the end of 2020, as well as data related to the punishment of residents whose behavior was not in accordance with existing legal solutions. Bearing in mind the standards of the rule of law and the European Court of Human Rights, the author then explains that the measures implemented by the Serbian authorities do not meet the basic required criteria, primarily the foreseeability of the law, as well as that the laws were abused for the purpose of the election campaign. The special attention is paid to curfews and the complete ban on leaving homes for senior citizens well as ban of contacting with the family members, and then the lockdown of the rest of the population. The actions taken by the authorities during the epidemic resulted in violation of human rights of their citizens, and experience shows that the only court that citizens will be able to turn to will be the European Court of Human Rights. The author believes that with this understanding of the law and respect for its own citizens, the European Union can only be a distant idea.

Keywords*: curfews, double jeopardy, failing to act pursuant to regulations, human rights, foreseeability of the law*

1. INTRODUCTORY REMARKS

Coronavirus (COVID-19) is the newest dangerous contagious disease in the world, emerged at the end of 2019 and the beginning of 2020[1] and it is certainly challenge for democratic societies.[2] As Ben Stickle and Marcus Felson emphasize, "the COVID-19 pandemic of 2020 is unquestionably one of the most significant worldwide events in recent history, impacting culture, government operations, crime, economics, politics, and social interactions for the foreseeable future. One unique aspect of this crisis is the governmental response of issuing legal stay-at-home orders to attempt to slow the spread of the virus. While these orders varied, both in degree and timing, between countries and states, they generally began with strong encouragement for persons to isolate themselves voluntarily."[3] However, Republic of Serbia adopted an opposite solution – a mandatory isolation for entire population, with some exceptions.

Due to the pandemic caused by the coronavirus, the President of the Republic of Serbia, the President of the National Assembly and the Prime Minister passed the Decision on declaring a state of emergency on March 15, 2020, which lasted until May 6, 2020. The Assembly passed a Decision to abolish the state of emergency. The day after the declaration of the state of emergency, the Government, with the co-signature of the President of the Republic, passed the Regulation on measures during the state of emergency, which prescribes measures derogating from the constitutionally guaranteed human and minority rights.

This article is divided into several parts. In the first part, the author explains the process of legal changes by analyzing all the laws and rules that were passed by the end of 2020, as well as data related to the punishment of residents whose behavior was not in accordance with existing legal solutions. In the second part we

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1 Turanjanin, V.; Radulović, D., *Coronavirus (Covid-19) and Possibilities for Criminal Law Reaction in Europe: A Review*, Iranian Journal of Public Health, Vol. 49, Suppl. 1, 2020, p. 4; Chan, H.Y., *Hospitals' Liabilities in Times of Pandemic: Recalibrating the Legal Obligation to Provide Personal Protective Equipment to Healthcare Workers*, Liverpool Law Rev, 2020, [https://doi.org/10.1007/s10991-020-09270-z].

2 In the field of criminal procedure law, one of the issues is use of the technical means at the main trial. See Turanjanin, V., *Video Surveillance of the Employees Between the Rights to Privacy and Rights to Property after Lopez Ribalda and Others v. Spain*, University of Bologna Law Review, Vol. 5, No. 2, 2020, p. 269. For example, if the presence of the defendant is difficult at the main trial due to the danger of spreading a contagious disease, the court may decide to ensure the participation of the defendant by technical means, if it is technically possible.

3 Stickle, B.; Felson, M., *Crime Rates in a Pandemic: the Largest Criminological Experiment in History*, American Journal of Criminal Justice, Vol. 45, 2020, p. 525. See further: Lundgren, M.; Klamberg, M.; Sundström, K.; Dahlqvist, J., *Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness*, Nordic Journal of Human Rights, Vol. 38, No. 4, 2020, pp. 305-318; M. Klatt, *What COVID-19 does to our Universities*, University of Bologna Law Review, Vol. 6, No. 1, 2021, p. 1.

will explain decision of the Serbian Constitutional Court on issues raised during the state of emergency. The third part is devoted to the curfews and the complete ban on leaving homes for senior citizens well as ban of contacting with the family members, and then the lockdown of the rest of the population. The author then, in the part IV, explains that the measures implemented by the Serbian authorities do not meet the basic required criteria, primarily the foreseeability of the law, as well as that the laws were abused for the purpose of the election campaign.

2. CRIMINAL AND MISDEMEANOR PROVISIONS AND STATE OF EMERGENCY

In the first place, it is necessary to start from the Criminal Code of the Republic of Serbia, which in Article 248 prescribes the criminal offense *Failure to act in accordance with health regulations during epidemic*:

Whoever during an epidemic of a dangerous contagious disease fails to act pursuant to regulations, decisions or orders setting forth measures for suppression or prevention thereof, shall be punished by fine or imprisonment up to three years.

This is a blanket criminal offence, which means that the content depends on other legal regulations that were passed during the epidemic. However, Serbia did not pass any laws, but regulations, as bylaws, which criminalized certain behaviors, and the most problematic was the Order of the Minister of Internal Affairs on the prohibition of movement (curfew), which will be discussed in more detail in the text below.

During the state of emergency, the Government of the Republic of Serbia passed a number of bylaws, which deeply encroached on the rights and freedoms of citizens guaranteed by the Constitution. In the first place, we are referring to the Regulation on measures during the state of emergency, which has been changed several times (hereinafter: the Regulation).[4] At the very beginning of Regulation, in Article 1, it is stated that the Regulation deviates from the constitutionally guaranteed

[4] Official Gazette of Republic of Serbia No. 31/20 (16/03/2020), Official Gazette of Republic of Serbia No. 36/20 (19/03/2020), Official Gazette of Republic of Serbia No. 38/20 (20/03/2020), Official Gazette of Republic of Serbia No. 39/20 (21/03/2020), Official Gazette of Republic of Serbia No. 43/20 (27/03/2020), Official Gazette of Republic of Serbia No. 47/20 (28/03/2020), Official Gazette of Republic of Serbia No. 49/20 (01/04/2020), Official Gazette of Republic of Serbia No. 53/20 (09/04/2020), Official Gazette of Republic of Serbia No. 56/20 (15/04/2020), Official Gazette of Republic of Serbia No. 57/20 (16/04/2020), Official Gazette of Republic of Serbia No. 58/20 (20/04/2020), Official Gazette of Republic of Serbia No. 60/20 (24/04/2020), Official Gazette of Republic of Serbia No. 65/20 (06/05/2020) and Official Gazette of Republic of Serbia No. 126/20 (23/10/2020).

human and minority rights during a state of emergency.[5] Finally, on May 6, 2020, the National Assembly adopted the Law on the application of regulations passed by the Government with the co-signature of the President of the Republic during the state of emergency[6] and which were confirmed by the National Assembly. In the text that follows, we will analyze the most important and most controversial provisions of these acts. Emphasis will be placed on banning the movement of the population, as well as on violating the principle of double criminality. It is important to note that the legal regulations entered into force on the day of their publication in the Official Gazette.

Restrictions on the rights and freedoms of citizens were already announced in Article 1 of the Regulation. Article 2 of the Regulation allows ministries to impose certain measures which would restrict citizen's rights and freedoms. Based on this article, the Minister of the Interior issued an Order on restriction and prohibition of movement of persons on the territory of the Republic of Serbia. The order prohibits the movement of persons over 65 years of age in populated areas with more than 5,000 inhabitants and persons over 70 years of age in populated areas with up to 5,000 inhabitants. The ban did not refer only to Saturday, for the period from 04:00 to 07:00 in the morning. All other persons are prohibited from leaving apartments, rooms and facilities in residential buildings and houses from 5 pm to 5 am on working days, as well as from 1 pm on Saturdays until 5 am on Mondays. After that, the mantra about *the importance of the next two weeks* was repeated, and the ban on movement was extended until the beginning of May, when the government abolished it under the public pressure – just before the elections.

The Regulation on Amendments of the Regulation on Measures during the State of Emergency of 9 April 2020 transferred the quarantine of citizens to the Regulation, by adding Articles 1a and 1b. Namely, in order to suppress and prevent the spread of the infectious disease COVID-19 and protect the population from that disease, during the state of emergency it was forbidden to move in public places, i.e. outside apartments, rooms and other residential objects in residential buildings, as well as outside the household: for persons from 70 years of age in populated areas up to 5000 inhabitants, and persons over 65 years of age in populated areas over 5000 inhabitants, except on Fridays from 04 to 07 o'clock in the morning. Persons under the age of 65 were initially banned from leaving the houses from 5 pm to 5 am on working days, as well as from 5 pm on Friday until 5 am

5 Official Gazette of Republic of Serbia No. 34/2020, 39/2020, 40/2020, 46/2020 and 50/2020.

6 Official Gazette of Republic of Serbia No. 65/20 (06/05/2020).

on Monday.[7] As a result of a public pressure, provisions on taking pets for a walk were added to the Regulation. For this purpose, the movement was, exceptionally, at the time of the ban, allowed to persons under 65 years of age, in the period from 11 pm to 1 am the next day, as well as on Saturdays and Sundays from 8 am to 10 am, for 20 minutes, up to a maximum of 200 m distance from the place of residence or stay. During this time, it was forbidden for more than two persons to move together or stay in a public place in the open. The ban did not apply to minors and their parents, i.e. guardians and foster parents.

At the same time, Article 1b of the Regulation prohibited movement in all parks and public areas intended for recreation and sports. Funerals could be held, but only with the presence of a maximum of ten people and with a mandatory distance of two meters. Particularly interesting is the provision of paragraph 1 of Article 4d of the Regulation, which prescribed extremely high fines for violating the provisions of Articles 1a and 1b - a fine in the range of 50.000,00 RSD (approximately 425,00 EUR or 520,00 USD) to 150,000.00 RSD (approximately 1.270,00 EUR or 1.550,00 USD). It is really theoretically problematic here how to determine the fine that will be imposed due to the violation of the movement ban. An even more problematic provision is the provision of paragraph 2, which explicitly stipulates that a misdemeanor procedure will be initiated and completed due to the committed misdemeanor, even if criminal proceedings have been initiated against the perpetrator for a criminal offense that includes the characteristics of that misdemeanor, regardless of prohibition from Article 8, paragraph 3 of the Law on Misdemeanors. This provision clearly stipulates that against a perpetrator of a misdemeanor proceedings for the misdemeanor cannot be initiated, or if already initiated cannot be continued if a person has already been found guilty of a criminal offense which includes characteristics of the misdemeanor.

In the following amendments to the Regulation, the permission to move during the ban was extended to persons with developmental disabilities and autism, but only if accompanied by one adult, up to a maximum of 200 meters from the place of residence or stay. Only three days later, a new amendment to the Regulation was passed, which extended the ban on movement during the Easter holidays as follows: during the Easter holidays, persons under the age of 65 are prohibited from moving from 5 pm on Friday, April 17, until 05 am on Tuesday, April 21, but during this period, in addition to the already prescribed time for taking pets

[7] Exceptions were licensed health workers, members of the Ministry of the Interior, the Ministry of Defense, the Serbian Army and security services, who are on duty, persons licensed by the Ministry of the Interior, crew members of cargo motor vehicles, cargo ships, railway staff vehicles, crews and cabin crew of aircraft, which perform international transport in road, rail, water and air transport; as well as persons who urgently needed medical assistance, with a maximum of two accompanying persons.

for a walk, it is also allowed to take them out on Monday, April 20 from 08 to 10 am.

A few days later, restrictions on leaving homes for people older than 65 were even more tightened. Namely, in addition to the provision which allows them to go out on Fridays from 04 to 07 in the morning, it was decided that this was allowed only for the purpose of buying groceries. However, this category of persons was allowed to go out on Tuesdays, Fridays and Sundays in the period from 6 pm to 1 am, for a period of 30 minutes and in a diameter of 600 meters from the place of residence or stay. For persons under the age of 65, the timespan during which it was not allowed to leave the residence was extended from 5 pm to 6 pm. Then, the ban was lifted for the construction workers hired on properly registered building construction and civil engineering construction sites. Also, blind, deaf or persons with hearing difficulties, as well as persons who, due to the existence of similar impairments, cannot move independently, could move accompanied by one companion, in the period when movement was allowed. The ban did not apply to persons who were elected, appointed or employed in a state body, autonomous province body or local self-government body if their presence was necessary for the functioning of competent state bodies, autonomous province bodies or local self-government bodies with the provision that all preventive measures related to preventing the spread of infectious diseases (keeping social distance, disinfection and use of protective equipment, i.e., masks and gloves) were applied. At the request of the competent state body, the body of the autonomous province or the body of the local self-government unit, the Ministry of the Interior issued a special permit for these persons to move.

The new amendment to the Regulation of April 24 allowed persons over 65 years of age to go out every day for 60 minutes, but the period in which they were previously allowed to go out has not changed. The ban on going out has also been extended during the Labor Day holidays, from 6 pm on Thursday, April 30, until 5 am on Monday, May 4. Taking out the pets allowed from 8 am to 10 am on Friday, May 1. On May 6, 2020, the Law on the Validity of regulations passed by the Government with the co-signature of the President of the Republic during the state of emergency was enacted and then confirmed by the National Assembly. In this way, a set of different regulations with criminal provisions gained the force of law quite illegally. This legal text repealed the regulations, which stipulates that the provisions of those ordinances are applied to the offenders for criminal offences committed during the state of emergency even after the state of emergency has ceased (Article 2).

3. REACTION OF THE CONSTITUTIONAL COURT OF SERBIA

The reaction of the Constitutional Court of the Republic of Serbia was, we can freely say, mild and it came too late. Decision No. Iuo-45/2020 on several issues related to restrictions on the rights and freedoms of citizens during the state of emergency was issued by the Constitutional Court only on September 17, 2020, more than five months after the end of the state of emergency, and more than seven months after the filing of the constitutional appeals. The decision is mostly declaratory, and it states: first, that the provisions of the Regulation and Order regarding the violation of the *ne bis in idem* principle at the time of application were not in accordance with the Constitution and the ratified international treaty; second, that the proceedings for establishing the unconstitutionality and illegality of the provisions of Articles 1a, 2 and 3 of the Regulation are being suspended; third, that the procedure for determining the unconstitutionality of the Order on Restriction and Prohibition of Movement of Persons on the Territory of the Republic of Serbia is suspended; fourth, the requests for suspension of the execution of individual acts and actions undertaken on the basis of the disputed provisions of the said acts are rejected.

At this point, attention should be drawn to the disputed Article 2 of the Regulation, which enabled the issuance of the Order. Namely, the Constitutional Court pointed out that this provision of the Regulation determined as possible measures of deviation from human and minority rights during the state of emergency, in order to suppress and prevent the spread of a contagious disease. The Constitutional Court has taken the position that in this case it is not a matter of delegating competencies to state administration bodies, but leaving the activation of measures and their operational implementation on the ground to the competent bodies in charge of enforcing laws and other regulations in the field of protection against infectious diseases for the purpose of expediency. According to the Constitutional Court, this approach of the Government enabled, depending on the development of the factual situation on the ground, which no one could have predicted with certainty, that concrete measures be implemented only where it was necessary and, in the extent, it was necessary, which is one from the basic constitutional preconditions for the introduction of measures derogating human and minority rights. Furthermore, according to the same position, each measure adopted by the Minister of the Interior was in fact adopted with the prior consent of the Government, because all proposals for adequate measures were considered at Government sessions and adopted only after obtaining consent. The Constitutional Court considers that this leads to the conclusion that the Government together with the President of the Republic retained the right to absolute control over the use of the given authority to concretize measures, which means that at any time it

could have deprived the competent body of the right to decide on measures if this right had been exercised contrary to the Constitution and decisions of all relevant state institutions and bodies.

Due to the above, the Constitutional Court considers that the disputed Order of the Minister of the Interior is an appropriate implementing act, which in itself does not represent a kind of original and independent decision-making of the Minister of the Interior, but the implementation and concretization of the Government's Regulation, part of which is the aforementioned Minister. Therefore, the Order does not represent a decision in the substantive sense, but is only derived from the Government Regulation which determines the measures that deviate from the constitutionally guaranteed human and minority rights during the state of emergency. Moreover, the Constitutional Court draws attention to the provisions of the Law on State Administration, which stipulates that for the protection of life and health, state administration bodies may prescribe measures that substantially restrict or prohibit the movement of persons and their gathering at public places. Then, according to the Law on Police, the Minister of the Interior may order the police, in order to ensure public order and peace or protect the health and lives of people, to temporarily restrict or prohibit movement in certain facilities, certain areas or workplaces. The Law on Health Protection envisages the possibility that the Minister of Health, under certain conditions, may prohibit the movement of the population in the area affected by a certain infectious disease, i.e., epidemic of that infectious disease, as well as prohibit or restrict travel and prohibit gathering in public places. Based on the above, the Constitutional Court took the position that the stated measures had to be taken. However, after the given analysis, the Constitutional Court suspended the proceedings.

The issue on which the Constitutional Court also suspended the proceedings is the issue of banning the movement of the population. The Constitutional Court pointed out here that in addition to measures restricting human rights, there is also a legal regime of derogation of human rights, i.e., deviations from human rights. This legal regime exists in extraordinary circumstances and is characterized by a temporary character. With regard to the restriction of freedom of movement, the Constitutional Court took the view that the measures applied were necessary and did not constitute deprivation of liberty measures. The purpose of the measures was not to deprive persons of their liberty for a certain period of time, but to protect them from the possibility of becoming infected by a dangerous infectious disease in specific circumstances. The Constitutional Court compared the ban on freedom of movement to patients who are effectively suffering from certain diseases, which require hospital treatment, which in some situations implies a longer stay in one hospital room. Since this is not considered deprivation of liberty, the

ban on leaving apartments and houses is not deprivation of liberty. Then, neither from the content of the prescribed measures of restraint of movement does it follow that it is a matter of deprivation of liberty. According to the Constitutional Court, the content of these measures is essentially reduced to creating the necessary conditions for effective protection against dangerous infectious diseases, and the population, especially the elderly, is directly related to some chronic diseases. Therefore, the goal of the measures is their protection, not deprivation of liberty. Consequently, the Constitutional Court did not find that the article of the Constitution guaranteeing a legal remedy was violated, because since it is not a matter of deprivation of liberty, there is no place for a legal remedy. Finally, the Constitutional Court found that there were no procedural preconditions for the continuation of the proceedings, and suspended them.

4. IS MANDATORY ISOLATION OF THE POPULATION DEPRIVATION OF LIBERTY WITHIN THE MEANING OF ARTICLE 5 OF THE CONVENTION?

In its decision, the Constitutional Court clearly took the position that the ban on the movement of the population does not constitute deprivation of liberty.[8] However, this is rather questionable given the ECtHR's views on forced isolation. It is not disputed that Article 5 of the European Convention guarantees the right to liberty and security of person and no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.

Dr. Korhecz Tamás did not agree with this position of the Constitutional Court, and in his dissenting opinion he gave strong reasons for his position. Namely, he claimed that Article 2 of the Regulation only determined human rights that may be limited in order to combat a pandemic, and the establishment and introduction of specific measures, their duration, categories of persons to whom they apply, as well as the territory of the country to which they apply, was left to state administration bodies. The disputed authorizing norms of the Regulation are formulated extremely generally, to the extent that the determination of the contents of the restrictions, the imposition of the obligation is left to the general acts of the state administration. Moreover, the decision-making on the ban and restriction of

[8] It is worthy to emphasize the fact that according to the research, police officers were not sufficiently prepared and trained to respond in these specific circumstances. See more in: Janković, B.; Cvetković, V., *Public Perception of Police Behaviors in the Disaster COVID-19 – The Case of Serbia*, Policing: An International Journal, Vol. 43, Issue 6, 2020, pp. 979-992.

movement is left to the competent ministries. Norms such as: "The Ministry of the Interior, in agreement with the Ministry of Health, may temporarily restrict or prohibit the movement of persons in public places"… or the state administration body "may order the closure of all accesses to an open space or facility and prevent leaving that space or facility without a special permit…" do not determine the parts of the territory of the Republic of Serbia in which restrictive measures may be applied, except for "public places" and "open spaces", nor the categories of persons to whom restrictions may apply, nor the duration of measures on a daily, weekly bases, etc., except that the measures are of a temporary nature arising from the Constitution itself, so stating the temporality of the restrictions does not represent any specific duration of the measures.

Further, in a dissenting opinion, Dr. Korhecz Tamás clearly emphasizes that the Government has not determined the range of entities to which the measures are to be applied, has not determined specific measures of derogation, has not done so "substantially" or otherwise, nor has it "only set a specific operational task" to ministries. In the response of the Government and the competent ministry to the Constitutional Court, it is stated that the order of the ministry that prescribed specific measures was passed after consideration and after the consent of the Government and with the control of the Government and the President of the Republic. When assessing the constitutionality of the Regulation, as well as the Order, this information is not legally relevant, since such a procedure of adoption (with consideration and approval by the Government) is not prescribed by procedural norms, and cannot affect the constitutionality of disputed norms. From the same response of the Government and the competent ministry it follows that the Government had the opportunity to sit, and to consider the measures of the Ministry at the time of enactment of the administrative regulation, which means that there were no special reasons that due to impediment of the Government ministry itself imposes derogation measures and adjust them to epidemiological situation. After all, on April 9, less than a month after its adoption, the Government amended the Regulation in such a way that it itself prescribed measures of derogation and prescribed the termination of the validity of the disputed Order. This fact is an additional reason to conclude that specific measures to derogate from human rights could have been prescribed in the Regulation from the beginning. The dissenting opinion concludes that if the Constitutional Court confirms legal shortcomings of regulations, even formal ones, it will relativize the importance of respecting the procedure, the competence of various bodies and the constitutionally established relationship between branches of government and relations in the same branch of government, paraphrasing a Supreme Court judge of the United States of America

Robert Jackson in the case of *Toyosaburo Korematsu v. United States*[9] that the court must not confirm the constitutionality of the order of a state body, even if it represents a justified exercise of power in extraordinary circumstances, because the courts exercise legal power and must abide by the constitution and laws, otherwise they become an instrument of certain policy.[10]

First of all, we need to examine three steps: whether the applicant was "deprived of his liberty", whether the deprivation of liberty was justified under any of subparagraphs (a) to (f) of Article 5 § 1 and whether the detention in issue was "lawful" and free from arbitrariness. The ECtHR took a stand that the compulsory isolation orders and the citizens' involuntary placement in the hospital amounted to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention. Furthermore, Article 5 § 1 of the Convention contains an exhaustive list of permissible grounds of deprivation of liberty. However, the applicability of one ground does not necessarily preclude that of another; a detention may, depending on the circumstances, be justified under more than one subparagraph.[11]

The expressions "lawful" and "in accordance with a procedure prescribed by law" ("*selon les voies légales*" in French) in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. Where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently accessible and precise to allow the person – if necessary, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences a given action may entail.[12] Moreover, an essential element of the "lawfulness" of a detention within the meaning of Article 5 § 1 (e) is the absence

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9 *Toyosaburo Korematsu v. United States*, Supreme Court. 323 U.S. 214. 65 S.Ct. 193. 89 L.Ed. 194., 1944.

10 *Decision No. Iuo-45/2020*.

11 *Enhorn v. Sweden* (2005), *Eriksen v. Norway* (1997) 1997-III 861; *Brand v. the Netherlands* (2004). See: Mowbray, A., *Compulsory Detention to Prevent Spreading of Infectious Diseases*, Human Rights Law Review, Vol. 5, Issue 2, 2005, pp. 387-391; Martin, R., *The exercise of public health powers in cases of infectious disease: human rights implications. Enhorn v. Sweden*, Med Law Rev, Vol. 14, No. 1, pp. 132-143.

12 *Varbanov v. Bulgaria* (2000) ECHR 2000-X; *Amann v. Switzerland* (2000) ECHR 2000-II; *Steel and Others v. the United Kingdom* (1998) 1998-VII 2735; *Amuur v. France* (1996) 1996-III 850-51; *Hilda Hafsteinsdóttir v. Iceland* (2004).

of arbitrariness.[13] The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it must also be necessary in the circumstances[14] and in accordance with the principle of proportionality.[15]

When we speak about the detention of citizens for preventing the spread of the infection, it should be noted that the ECtHR has so far encountered several forms of this deprivation of liberty. Article 5 § 1 (e) of the Convention refers to several categories of individuals, namely persons spreading infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds. It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in paragraph 1 (e) of Article 5 to be deprived of their liberty is not only that they are a danger to public safety but also that their own interests may necessitate their detention.[16] Taking these principles into account, the ECtHR states that the essential criteria when assessing the "lawfulness" of the detention of a person "for the prevention of the spreading of infectious diseases" are:

1. whether the spreading of the infectious disease is dangerous to public health or safety
2. whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest.

When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist.[17] As judge Costa in *Enhorn* emphasizes, Article 5 § 1 (e), which provides for the possibility of depriving a person of his liberty "in accordance with a procedure prescribed by law" where the purpose is "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants", has not given rise to

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13 *Chahal v. the United Kingdom* (1996) 1996-V 1864; *Witold Litwa v. Poland* (2000) ECHR 2000-III; *K.-F. v. Germany* (1997) 1997-VII 2674.

14 *Witold Litwa v. Poland*, note 13.

15 *Vasileva v. Denmark* (2003).

16 *Guzzardi v. Italy*, (1980) 39 36-37, *Witold Litwa v. Poland*, note 13.

17 *Enhorn v. Sweden*, note 11.

a very extensive body of case-law and there are virtually no precedents concerning "the prevention of the spreading of infectious diseases". Additionally, we can agree with his statement in *Enhorn*, which can be very copied to some degree on the present, that illustrate both the difficulty of striking a balance between liberty (which should ultimately prevail) and the "protection of society", because a disproportionate deprivation of liberty is not necessary and that, if it is not necessary, it borders on arbitrary. Some clarification would be desirable, particularly with a view to ensuring legal certainty and this would be especially helpful as developments in epidemiology. Furthermore, as judge Cabral Bareto emphasizes in *Enhorn*, today situation also relates to "a deprivation of liberty in the context of the measures which States are called upon to take in order to protect society from the potential acts of individuals who have contracted an infectious disease. The obvious aim of such measures is to prevent the spread of a disease whose consequences are exceptionally serious. The problem is that where such measures entail deprivation of liberty within the meaning of Article 5 § 1 of the Convention, they must be consistent with the Court's settled case-law, which is rightly stringent."

We believe that the forcible detention of the population in their homes constitutes deprivation of liberty within the meaning of Article 5 of the Convention. If we start from the three-level test (whether the applicant was "deprived of his liberty", whether the deprivation of liberty was justified under any of sub-paragraphs (a) to (f) of Article 5 § 1 and whether the detention in issue was "lawful" and free from arbitrariness), we can state that all conditions are not met. First, it is clear that the forced detention of the population, threated by imposing high fines and imprisonment, in their own homes, is deprivation of liberty. Secondly, it is true that this was done to prevent the spread of infectious diseases. However, according to the legal rules, the restriction of movement can be imposed only in a certain area, while in the Republic of Serbia, an absolute ban on movement is imposed on the entire territory, to all residents, regardless of their health condition. At the same time, if we look at the number of changes and changes in the regime of movement, we can conclude that the detention was not free of arbitrariness.

It is important to emphasize one more fact here. Namely, the Constitutional Court described in detail why it found that the provisions regarding the principle of *ne bis in idem* were not in accordance with the Constitution. In the reasoning of the decision, the Constitutional Court definitely took a position on that issue, referring both to the European Convention on Human Rights and to a number of decisions of the European Court of Human Rights. On the contrary, when deciding on the ban on movement, the Constitutional Court very laconically took the position that it was not a matter of deprivation of liberty, without engaging in any form of argumentation for such a position.

5. HAS THE REPUBLIC OF SERBIA VIOLATED THE PRINCIPLE OF LEGALITY?

The principle of legality, as a basic principle of criminal law, is deeply connected with the rule of law[18] and the legal state and it is known as one of the most fundamental defenses to a criminal prosecution is that of *nullum crimen sine lege, nulla poena sine lege* ("no crime without law, no punishment without law".[19] Today, *nullum crimen sine lege and nulla poena sine lege* serve as the bedrock of the principle of legality.[20] A comparative analysis of the criminal codes reveals that the this principle enjoys universal recognition, while only two member States of the United Nations (Bhutan and Brunei) do not contain provisions on *nullum crimen nulla poena sine lege* in their domestic legal orders.[21] As Enric Fossas Espadaler emphasizes, following the path of the Inter-American Court of Human Rights, the ECtHR has contemplated a duty to protect rights through criminal law.[22] The principle of legality is part of the concept of the rule of law[23] and it is prescribed by numerous international and domestic legal texts.

As is well known, Article 7 of the ECHR stipulates that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. At the same time, this article does not affect the trial and punishment of a person for an act or omission which at the time of execution was considered a criminal offense under the general principles of law recognized by civilized nations. Thus, this article prescribes the principle

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18 The rule of law, as protection against the arbitrary and excessive use of state power, is certainly one of the most attractive items Western liberal democracies. Letnar Černič, J., *Impact of the European Court of Human Rights on the Rule of Law in Central and Eastern Europe*, Hague Journal of Human Rights, Vol. 10, 2018. p. 113.

19 Van Schaack, B., *Crimen sine lege: Judicial lawmaking at the intersection of law and morals*, Georgetown Law Journal, Vol. 97, No. 1, 2008, p. 121; see more: Olasolo, H., *A Note on the Evolution of the Principle of Legality in International Criminal Law, Criminal Law Forum*, Vol. 18, 2007, pp. 301-319.

20 Dana, S., *Beyond retroactivity to realizing justice: theory on the principle of legality in international criminal law sentencing*, Journal of Criminal Law and Criminology, Vol. 99, No. 4, 2009, p. 861.

21 Rauter, T., *Judicial Practice, International Criminal Law and Nullum Crimen sine Lege*, Springer, Cham, 2017, 20. See more in: Hallevy, G., *A Modern Treatise on the Principle of Legality in Criminal Law*, Springer, Heidelberg, 2010.

22 Fossas Espadaler, E., *Material Limits on the Criminal Legislator: Their Interpretation by the Spanish Constitutional Court and the European Court of Human Rights*, in: Pérez Manzano, M.; Antonio Lascuraín Sánchez, J.; Mínguez Rosique, M. (eds.), Multilevel Protection of the Principle of the Legality in Criminal Law, Springer, Cham, 2018, p. 17.

23 Manusama, K., *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality*, Martinus Nijhoff Publishers, Leiden-Boston, 2006, p. 6.

of legality, which originates from the principle of the rule of law,[24] and there is an opinion that the public may be more understandable and acceptable to the name of the principle of illegality.[25] It applies only when a conviction which determines the sentence has been pronounced, and if the criminal proceedings are terminated in any other way, this article will not be applied, and its scope does not include sanctions imposed during the execution of the sentence.[26] Due to the scope of work here, we will not deal with the definition and explanation of the principle of legality according to the legislation of the Republic of Serbia.[27] Finally, what is particularly important in the case of this Article of the ECHR is that no derogation from it is allowed under Article 15 of the ECHR, which has been emphasized in a number of judgments.[28]

Despite the fact that the principle of legality is prescribed as one of the basic principles of criminal law in numerous national and international legal documents, the ECtHR has dealt with this issue on many occasions. Through its rich jurisprudence it has defined what is really meant by the principle of legality. Thus, although the principle of *nullum crimen nulla poena sine lege* seems clear at first sight, the ECtHR has, in a series of its judgments, identified situations in which this principle may be applied and in which it may not. At the same time, the ECtHR's views on the principle of legality, and especially on its segments do not coincide with national legislations, which is understandable given that the ECtHR seeks to reconcile different legal traditions. In the majority of cases, the ECtHR found a violation of the prohibition of retroactive application of criminal law. As we can conclude from the provision prescribing the principle of legality, the ECHR does not openly guarantee the application of a more lenient law, so the ECtHR initially denied the guarantee of this right, but during later practice there was a turnaround on this issue. The ECtHR has given special importance to the

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24 Greer, S., *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, p. 239.

25 Gallant, K., *The principle of legality in international and comparative criminal law*, Cambridge, Cambridge University Press, 2009, pp. 14-15.

26 Jaksić, A., *European Convention on Human Rights: A Commentary*, Belgrade, Faculty of Law, 2006, p. 235.

27 Škulić, M., *The Principle of Legality and the Principle of Guilt in Criminal Law as Segments of Legal State*, in: Nogo, S. (ed.), The Principles of Rule of Law, Tara, 2017, pp. 78-109; Stojanović, Z., *Criminal Law – General Part*, Belgrade, 2012, pp. 22- 23; Čejović, B., *The Principles of Criminal Law*, Belgrade, Dosije, 2008, pp. 59-140.

28 See more: Jovičić, S., *COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights*, ERA Forum, Vol. 21, 2021, pp. 545-560.

practice of national courts, especially due to the issue of foreseeability of criminal law,[29] which, together with accessibility, is an integral part of the principle.[30]

Today, legal rules must be laid down in a clear and precise statute in order to enable the citizens to foresee legal consequences of an action.[31] For these considerations, the most important segment of the principle of legality is reflected in the foreseeability of criminal law. In this paper, we will emphasize the regulations passed by the Republic of Serbia during the state of emergency, which, from the author's point of view, did not meet the requirement of foreseeability, which resulted in numerous negative consequences for alleged violators of the measures imposed by the regulations.[32]

In the first place, it is necessary to start with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.[33] Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage.[34] It also embodies, more generally, the principle that only the law can define a crime and prescribe a pen-

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29 Stojanović, A, *The Prohibition of Retroactivity in the ECtHR Jurisprudence*, Godišnjak Pravnog fakulteta u Istočnom Sarajevu, Vol. 2, No. 1, 2011, p. 54.

30 Schabas, W., *European Convention on Human Rights: A Commentary*, Oxford, Oxford University Press, 2015, p. 335.

31 Gless, S., *A New Test for Mens Rea: Safeguarding Legal Certainty in a European Area of Freedom, Security and Justice*, European Criminal Law Review, Vol. 1, No. 2, 2011, p. 115; Faure, M.; Goodwin, M.; Weber, F., *The regulator's dilemma: Caught between the need for flexibility & the demands for foreseeability reassessing the lex certa principle*, Albany Law Journal of Science & Technology, Vol. 24, No. 2, 2014, p. 285; Pinto Soares, P., *Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism*, Criminal Law Forum, Vol. 23, 2012, p. 164; Manes, V., *'Common Law-ization of criminal law'? The Evolution of nullum crimen sine lege and the forthcoming challenges*, New Journal of European Criminal Law, Vol. 8, No. 3, 2017, p. 335.

32 See further Turanjanin, V., *Life Imprisonment Without Parole: The Compatibility of Serbia's Approach with the European Convention on Human Rights*, Liverpool Law Review, 2021, [https://doi.org/10.1007/s10991-020-09269-6].

33 *S.W. v. the United Kingdom* (1995) 21 ECHR 363; *C.R. v. the United Kingdom* (1995) 21 ECHR 32; *Kafkaris v. Cyprus* (2008) 49 EHRR 877.

34 *Welch v. the United Kingdom* (1995) 20 EHRR 247; *Jamil v. France* (1995); *Ecer and Zeyrek v. Turkey*, (2001) ECHR 2001II; *Mihai Toma v. Romania* (2012).

alty.[35] While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.[36] It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account.[37]

The ECtHR states that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability.[38] These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[39] However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.[40] The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain.[41] The progressive development of criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States.[42] Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case,

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35 *Kokkinakis v. Greece* (1993) 17 EHRR 397.

36 *Coëme and Others v. Belgium* (2000) ECHR -VII; for an example of the application of a penalty by analogy, see *Başkaya and Okçuoğlu v. Turkey* (1999) ECHR 1999IV.

37 *Cantoni v. France* (1996) 1996V; *Kafkaris v. Cyprus*, note 33.

38 *Kokkinakis v. Greece*, note 35; *Cantoni v. France*, note 37; *Coëme and Others v. Belgium*, note 36; E.K. v. Turkey (2002)

39 *Ibid*.

40 *Kafkaris v. Cyprus*, note 33.

41 *Ibid*.

42 *Kruslin v. France* (1990) 12 EHRR 547.

provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[43] The lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused's Article 7 rights.[44] Were that not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated. The European Court of Human Rights puts emphasis on the question of whether the rule prohibiting the offence is knowable to the offender, by requiring that the provision is both foreseeable and accessible and the underlying idea is that human beings can only adapt their behaviour in order to prevent criminal responsibility, by refraining from engaging in offences, if they are privy to the consequences.[45] Furthermore, the ECtHR assessed the foreseeability using the subjective ability for the applicant to recognize the criminal liability.[46]

Juan Antonio García Amado remands us that according to the Dictionary of the Spanish Royal Academy, foreseeable is "What may be foreseen or comes within normal foresight", so, to foresee is to see in anticipation or to know, to conjecture by some signs or indications what has to happen or to have or to prepare resources against future contingencies.[47] Precisely in the field of accessibility and foreseeability of norms, close to the prohibition of retroactivity,[48] and court interpretation, we believe that the provisions of the regulations were not in accordance with the requirements of the principle of legality. In the first place, we believe that the European Court of Human Rights did not encounter a situation before the coronavirus epidemic that the provisions on which the application of the criminal law depends change on a weekly basis.

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43 *Del Rio Prada v. Spain* (2013) 1004; S.*W. v. the United Kingdom*, note 33; *C.R. v. the United Kingdom*, note 33; *Streletz, Kessler and Krenz* (2001) ECHR 2001-II; K.-H.W. v. Germany (2001), *Korbely v. Hungary* (2008) ECHR 847; *Kononov v. Latvia* (2010) ECHR 667.

44 *Pessino v. France* (2006); *Dragotoniu and Militaru-Pidhorni v. Romania* (2007); *Alimuçaj v. Albania* (2012). Unfortunately, this term has not been consistently applied. See more: Zdravković, A., *Few Questions Yet to Be Answered in Regard to the Article 7 of the European Convention on Human Rights*, ECLIC, Vol. 4, 2020, pp. 670-700.

45 van der Wilt, H., *Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test*, Nordic Journal of International Law, Vol. 84, 2015, p. 518.

46 Mariniello, T., *The Nuremberg clause and beyond: Legality principle and sources of international criminal law in the European court's jurisprudence*. Nordic Journal of International Law, Vol. 82, No. 2, 2013, p. 244.

47 Antonio García Amado, J., *On the Foreseeability of Legal Consequences: Which Normative Provisions Are and Which Are Not Protected?*, in: Pérez Manzano, M.; Antonio Lascuraín Sánchez, J.; Mínguez Rosique, M. (eds.), Multilevel Protection of the Principle of the Legality in Criminal Law, Springer, Cham, 2018, 177.

48 Krstulović Dragićević, A., *The Principle of Legality in the Case Law of the European Convention of Human Rights*, Hrvatski ljetopis za kaznene znanosti i praksu, Vol. 23, No. 2, 2016, p. 431.

ay that „in criminal matters, the relationship between the principle of legality and foreseeability is indisputable and is, therefore, delimited as follows: the punishment handed down for the offence cannot be harsher than what an average citizen may reasonably foresee, making use, as appropriate, of expert advice on the subject. On the other hand, there is no violation of a basic right associated with the principle of legality in criminal matters, when the penalty handed down is less severe than what could reasonably have been foreseen by this subject at the time of his action."[49] For these considerations very important is a judgment in a case *Öcalan v. Turkey (no. 2)*. The ECtHR states that "the isolation in question was not imposed under any decision taken by the authorities to confine the applicant in a cell in an ordinary prison, but rather resulted from a concrete situation, namely the fact that the applicant was the only inmate in the prison. The highly exceptional measure, which consisted in earmarking an entire prison for a single prisoner, did not for part of a detention regime geared to punishing the applicant more severely. It was motivated solely by the concern to protect the applicant's life and to prevent risk of escape linked to the conditions prevailing in ordinary prisons, including high-security establishments. The Court takes the view that this was such an extraordinary measure that a State could not be reasonably expected to provide details in its legislation on the regime to be applied in such cases. Moreover, the applicant, who had been wanted for serious offences carrying the death penalty, did not contend before the Court that he could not have foreseen that he would be incarcerated under exceptional conditions should be arrested."[50]

Therefore, we believe that foreseeability, as an element of the principle of legality, should be viewed in two directions. First, as the European Court of Human Rights has repeatedly emphasized, the law must be such that any person can reasonably foresee the sanction that will follow in the event of a breach of the norms. Secondly, however, we believe that the law itself must be foreseeable, so that each person can adjust their behavior to legal norms. Although the ECtHR finds that when the punishment is accessible and foreseeable, then the principle cannot be breached, in the light of the multiple changes of the laws nor the punishment nor the offence are not foreseeable.[51] In other words, the principle of legality was held not to have been violated when offenders could have foreseen the criminal consequences of their con- duct, despite no specific law criminalising such action at the time when it was carried out.[52]

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49 Antonio García Amado, *op. cit.*, note 47, p. 180.

50 *Öcalan v. Turkey (no. 2)* (2014).

51 *S.W. v. the United Kingdom*, note 33; *C.R. v. the United Kingdom*, note 33; Dana, *op. cit.*, note 20, p. 905.

52 Vanacore, G., *Legal Culpability and Dogmatik: A Dialogue between the ECtHR, Comparative and International Criminal Law*, International Criminal Law Review, Vol. 15, 2015, p. 830.

It is not disputed that the provisions of the regulations were clear. However, the question arises as to how citizens could monitor the changes in these bylaws in general. On the one hand, in some court verdicts, justifications of convictions were based on the requirement that citizens are obliged to follow the speeches of the President of the Serbia, and that in that way the standard of accessibility of the law was met. In other words, citizens were required to follow the president's speeches to know which legal rules would apply to them. On the other hand, through numerous verdicts we recognize the objectification of guilt. This view deserves a closer interpretation.

The Criminal Code of the Republic of Serbia adopts an objective-subjective theory of the concept of a criminal offense. According to the Article 14, a criminal offence is an offence set forth by the law as criminal offence, which is unlawful and committed with guilty mind/*mens rea*. Therefore, in this definition, both objective and subjective elements of the notion of a criminal offense stand out. The misdemeanor law, on the other hand, contains an objective conception of a misdemeanor, according to which a misdemeanor is an illegal act which is determined as a misdemeanor by law or other regulation of the competent authority and for which a misdemeanor sanction is prescribed.

The analysis of verdicts points to the fact that the courts, both criminal and misdemeanor, did not take into account both the subjective component and the circumstances that in this case could have influenced the fact that the defendants were not guilty of misdemeanor. For example, in several cases, persons were convicted because they were on the way home during the period covered by the ban, but did not arrive on time due to vehicle breakdowns. According to the court, they had enough time to reach the house in another way, and that they did not act in an emergency, acting intentionally during the commission of the offense.[53]

Thus, the population has been put in a position to adjust all its activities by bylaws, which have been changed on a weekly basis. At the same time, there were no exculpatory circumstances on the basis of which the person violated the prohibitive measures. It is true that in criminal law criminal offences can be prescribed only by law. However, here we have a case of a blanket bylaw that changes very quickly, and we have a criminal penalty based on bylaws. In doing so, we should take into account the views of the European Court of Human Rights on the concept of law and criminal punishment. Therefore, we believe that this approach of the legislator essentially objectifies the guilt of the offender.

[53] Verdicts of the Čačak Misdemeanor Court no. 12 Pr 1333/20 (29/04/20) and 13 Pr 1326/20 (23/04/20).

6. CONCLUSION

The coronavirus epidemic has caused many problems around the world. The sphere of criminal law could not be excluded. The states found themselves facing situations that they had not faced for years, and as a result, the reactions were more than different. However, the analysis of comparative legislation can also show different degrees of respect for human rights.

In this paper, we have tried to answer the question of whether the behavior of state bodies in the Republic of Serbia was in accordance with human rights standards. On the one hand, we have tried to answer the question of whether the forcible isolation of the population constituted deprivation of liberty within the meaning of Article 5 of the Convention. On the other hand, the question is whether the legal regulations adopted by the state met the requirements of the principle of legality within the meaning of Article 7 of the Convention. Although the European Court of Human Rights may take the view that such measures, such as compulsory vaccination, were and are necessary in a democratic society, we believe that, at this point, there has been a violation of human rights protected by Articles 5 and 7 of the Convention.

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LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. *Toyosaburo Korematsu v. United States*, Supreme Court. 323 U.S. 214. 65 S.Ct. 193. 89 L.Ed. 194., 1944
2. Verdicts of the Čačak Misdemeanor Court no. 12 Pr 1333/20 (29/04/20) and 13 Pr 1326/20 (23/04/20)

UDK 343.272(497.7)
Professional paper

DATABASES TO SUPPORT ASSET MANAGEMENT AND SOCIAL REUSE: THE CASE STUDY OF THE REPUBLIC OF NORTH MACEDONIA

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ABSTRACT

Over the past decades, many EU and non EU countries have amended their legislative and institutional framework on proceeds of crime confiscation to deprive criminals of their assets more effectively and to better manage and dispose of them. There are still, however, some under-researched issues that could greatly enhance the effectiveness and efficiency of confiscation policies. A first topic is the contribution that databases can give to asset management and disposal; the second one deals with a particular asset disposal option which involves giving criminal proceeds back to the communities affected by crime and promoting their use in line with communal needs: social reuse. This article responds to this question: what is the current situation regarding these two key issues in the Republic of North Macedonia?

Keywords: *databases on seized and confiscated assets, disposal of confiscated assets, social reuse, EU, Republic of North Macedonia.*

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1. INTRODUCTION

Over the past decades, supranational standards[3] have been developed on seizure and confiscation, with a view to increase the efficiency of asset management and disposal.[4] Many countries have set up Asset Management Offices (AMOs), to ensure the adequate management of seized and provisionally confiscated assets pending judicial proceedings. However, there has been so far little discussion about two key mechanisms in this respect, namely:

1) *how ICT (Information and Communication Technology) tools can support asset management and disposal:* the better one knows the assets, the better they can be managed. Still, very little attention has been paid so far to how the structured and regular collection of data on seized and confiscated assets in a database can boost confiscation policies;

2) *how the benefits from confiscation policies can be made visible to citizens and shares with the communities affected by crime*: different forms of reuse of confiscated assets are possible. In addition to the traditional transfer of ill-gotten gains into the State budget, some Member States envisage an innovative form of disposal that is attracting increasing attention at the EU level: the reuse of confiscated assets for social purposes.

This article answers the following question: what is the current situation regarding these two key issues in the Republic of North Macedonia?

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3 See, for example, the 2010 Justice and Home Affairs Council Conclusions on confiscation and asset recovery and the 2010 Commission Communication on an EU Internal Security Strategy (COM(2010) 673 final). Also Directive 2014/42/EU deals with the topic. Article 7 requires Member States to take "the necessary measures to enable the freezing of property with a view to possible subsequent confiscation. Those measures [...] shall include urgent action to be taken when necessary in order to preserve property". Article 10 invites Member States to take the measures necessary to ensure the adequate management of property frozen with a view to possible subsequent confiscation, including the establishment of centralised offices/a set of specialised offices/equivalent mechanisms, as well as the possibility to sell or transfer property where necessary. Also the Financial Action Task Force (FATF) recommended countries to implement a program for efficiently managing frozen property and, where necessary, disposing of it. See FATF, *Best Practices Paper. Best practices on confiscation (recommendations 4 and 38) and a framework for ongoing work on asset recovery*, FATF/OECD, Paris, October 2012, pp. 9-10.

4 At the end of any judicial procedure aimed at removing the proceeds from crime, the issue of what to do with them arises. These issues are dealt with in the disposal phase, which is the phase in which a final confiscation order is enforced and confiscated assets are disposed of.

2. DATABASES TO SUPPORT ASSET MANAGEMENT: THE DEBATE AT THE INTERNATIONAL LEVEL

Notwithstanding the establishment of AMOs in many EU and non EU countries,[5] "there have been few instructions on how they should collect and manage data".[6]

The first institution taking a position on this issue was, in 2005, the Criminal Legal Affairs working group of the G8, that suggested that: "States should consider the use of information technology (IT) systems for the administration of seized property. Appropriate financial and property administration IT systems can, for example, be extremely useful for tracking and managing inventory or for meeting expenses associated with seized property as well as for maintaining a transparent and accountable system. States may also wish to use such IT systems for the administration of confiscated property".[7]

The Camden Asset Recovery Inter-agency Network (CARIN), which is an informal network of law enforcement and judicial practitioners in the field of asset tracing, freezing, seizure and confiscation, also regards databases as a key tool. The recommendations of the 2008 CARIN General Assembly on "Promoting the Creation of National Asset Recovery Offices and the Effective Management of Seized and Confiscated Assets" stressed, in respect to AMOs, the importance of establishing a centralized database to track all assets seized or restrained for confiscation.

In 2011 the Organización de los Estados Americanos (OAS) also dealt with registries of seized and forfeited property and stated that "States should consider using software to maintain a registry of seized and forfeited assets, sometimes called Asset Management Systems (AMS). This technological tool will be used to record income, transfers, judicial proceedings, legal situation, identification of objects, and the location of each asset in custody, in order to permit quick verification of its current status. An AMS also will permit the generation of reports on the amount

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5 According to a recent report by the European Commission, "13 Member States (Belgium, Bulgaria, Czechia, Ireland, Greece, Spain, France, Croatia, Italy, Luxembourg, Netherlands, Portugal, Romania) have set up, or are in the process of setting up, Asset Management Offices (AMOs) to ensure the management of frozen property in order to preserve its economic value". See European Commission, *Report from the Commission to the European Parliament and the Council - Asset recovery and confiscation: Ensuring that crime does not pay*, Brussels, 2 June 2020, p. 12, COM(2020) 217 final, available at [https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/european-agenda-security/20200602_com-2020-217-commission-report_en.pdf], Accessed 10 June 2021.

6 Organización de los Estados Americanos, *Analysis of Systems for the Collection of Data on Seized and Forfeited Assets of Illicit Origin in the Member States of the OAS*, 2014, p. 8, available at [http://cicad.oas.org/apps/document.aspx?id=2978], Accessed 10 June 2021.

7 G8 Lyon/Roma Group Criminal Legal Affairs Subgroup, *G8 Best Practices for the Administration of Seized Assets*, 27 April 2005, p. 3.

of real estate and personal property, as well as the preparation of statistics on assets seized and forfeited, accountability, management costs, and financial statements. It also seeks to promote transparency and good governance in management of seized and forfeited assets, because the data recorded in the system will be subject to public scrutiny".[8] OAS clearly identified the three different types of benefits brought about by these systems, i.e. support to asset management activities, statistical production and promotion of transparency/accountability of the whole management process. In 2014, OAS developed some detailed recommendations in this field, that are herein summed up:

- information should be collected by a centralized agency and in a centralized, customized, structured database;
- all agencies involved in confiscation proceedings (from investigation to disposal) should input data;
- information shall be updated by specialized personnel, and the ability to change information in the database should be granted only to authorized personnel;
- for each asset a description should be available, as well as information on its physical location, owner, condition and value at the time of seizure; also, a serial number should be attributed to each asset when taken into custody;
- the updated total number of assets, total number of assets by description and by category should be publicly available.[9]

The setting up of dedicated databases is also recommended, at the EU level, in the report of the ARO (Asset Recovery Offices) Sub-group on Asset Management, set up in 2013 within the ARO Platform.

The topic has more recently been dealt with by UNODC, that in 2017 recognised that "in the early stages of developing asset management capacity, countries have developed fairly rudimentary data-capturing and data-storage mechanisms. As the system matures, it becomes harder to maintain accurate record of all property subject to seizure and confiscation orders. The need to improve or develop ever-more sophisticated capacity to maintain, access and keep the data reliable and secure

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8 Organización de los Estados Americanos, *Asset Management Systems in Latin America and Best Practices Document on Management of Seized and Forfeited Assets*, 2011, p. 127, available at [http://www.cicad.oas.org/lavado_activos/grupoExpertos/Decomiso%20y%20ED/Manual%20Bienes%20Decomisados%20-%20BIDAL.pdf], Accessed 10 June 2021.

9 Organización de los Estados Americanos, Analysis of Systems for the Collection of Data on Seized and Forfeited Assets of Illicit Origin in the Member States of the OAS, 2014, pp. 38-40.

increases".[10] As a result, UNODC suggested to promote further discussion on the topic of electronic databases to improve information management on restrained and confiscated property, with a special focus on good practices in this field.[11]

3. SOCIAL REUSE: DEFINITION AND KEY EXPERIENCES WITHIN THE EU

The second key topic addressed by the article is social reuse of confiscated assets. Social reuse involves giving the criminal proceeds back to the communities affected by (organised) crime and promoting their use in line with communal needs. Its attractiveness is the visibility of confiscated assets among citizens.

According to the findings of the EU-funded Study RECAST, sale is the main disposal option in practically all Member States.[12] However, about two-thirds of Member States envisage, though almost never as first choice, different forms of reuse of the assets/proceeds, via their transfer to state/local institutions ('institutional reuse', via incentivisation schemes) or to society/non-government organisations (NGOs) ('social reuse').

The key social reuse experiences within the EU are in Belgium, France, Hungary, Italy, Luxembourg, Scotland and Spain. These experiences fit one of two models: direct and indirect social reuse. Direct reuse operates in Italy, Belgium (Flemish region), and Hungary. Assets are reassigned for the public benefit through a change in their intended use (e.g. conversion of the house formerly belonging to a criminal boss into a playgroup). Indirect social reuse is where the proceeds of crime (or from the sale of confiscated assets) are distributed via specialised funds that use them either a) in crime prevention projects or b) in incentivisation schemes for law enforcement agencies, so that these entities may have a further incentive to

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10 UNODC, *Effective management and disposal of seized and confiscated assets*, UNODC, Vienna, 2017, p. 59, available at [https://www.unodc.org/documents/corruption/Publications/2017/17-07000_ebook_sr.pdf], Accessed 10 June 2021.

11 UNODC, Effective management and disposal of seized and confiscated assets, UNODC, Vienna, 2017, p. 67.

12 The Study was awarded to the Department of European Studies and International Integration at the University of Palermo by the European Commission, DG HOME under the 2010 ISEC Programme. It was carried out in the period November 2011–November 2014 in co-operation with the Center for the Study of Democracy and the FLARE Network, and with the support of Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata and UNICRI. Its aim was to promote the development of common European standards on the reuse of confiscated assets for social purposes. See Vettori, B., *"The disposal of confiscated assets in the EU Member States: what works, what does not work and what is promising"*, in King, C.; Walker, C.; Gurulé, J. (eds.), The Palgrave handbook of criminal and terrorism financing law, volume 1, Palgrave Macmillan, Basingstoke, 2018, pp. 705-733.

keep on fighting crime - always, even if indirectly, in the interest of society. Under this mechanism confiscated assets are not straightforwardly passed on to society, rather the proceeds from their sale are. In addition, the proceeds may not always be reused for the immediate, but rather mediate (via incentivisation schemes) interest of society. This model is in place in France, Spain,[13] Luxembourg and Scotland.

4. DATABASES TO SUPPORT ASSET MANAGEMENT IN THE REPUBLIC OF NORTH MACEDONIA

As part of several multinational networks for managing confiscated assets, such as BAMIN network,[14] the Republic of North Macedonia is taking direct steps to introduce the novelties that are present in this field into its national jurisdiction. This means that the Macedonian system is eagerly trying to update its legal framework to the latest EU trends, in particular by establishing the Asset Recovery Office and a database registry supporting asset management. At the moment, these trends have been followed through the drafting of a Law on Asset Recovery Office and the introduction of elaborate reforms into the Law on Management of Confiscated Assets,[15] where one particular amendment is the setting up of a database for tracking confiscated assets as a tool for their effective and efficient management by the Macedonian Asset Management Office.

5. POTENTIAL FOR ADOPTION OF SOCIAL REUSE IN THE REPUBLIC OF NORTH MACEDONIA

5.1. Disposing of the proceeds from crime in Macedonia: law in the books, law in action

Current legal framework. The Law on Management of Forfeited Property, Proceeds and Seized Items in Criminal and Misdemeanour Proceedings (further in the text Law on Management of Confiscated Assets) regulates the disposal of assets confiscated within criminal proceedings in the Republic of North Macedonia. This

[13] The Spanish model envisages both direct and indirect social reuse. In practice the second option is predominantly used.

[14] See [http://www.bamin-network.org/], Accessed 10 June 2021.

[15] Currently, the two working groups established by the Ministry of Justice have provided a Draft Law on Asset Recovery Office and amendments to the Law on Assets Management where establishing of a database is envisioned. Considering the State's Strategy for Reform of the National Legislation, these two laws should be enacted by the Parliament by the end of 2021.

Law on Management of Confiscated Assets was enacted in 2008 and has been amended several times since then.[16]

The Law on Management of Confiscated Assets regulates the establishment, operation and status of the Agency for the Management of Seized and Confiscated Property (further in the text Agency), together with the procedure for management and disposal of seized and confiscated assets. This law establishes three disposal options for confiscated assets. Furthermore, the Law on Management of Confiscated Assets regulates the activities of the Agency in regard to the management of the frozen assets, providing opportunities for early sale of such assets in order to protect such frozen assets during the course of the criminal proceedings.

In regard to the disposal of the confiscated assets it seems that the Macedonian Law on Management of Confiscated Assets does not recognize the possibility for direct social reuse of the confiscated assets. Explained in a nut shell, the first, and most commonly used, possibility for disposal of the confiscated assets is sale. This procedure is regulated within the articles 33 to 50 of the Law on Management of Confiscated Assets.[17] Hence, confiscated assets are sold on public bids organized by the Agency, except for gold which is transferred to the National Bank. The money gathered from the assets sold on public bids is considered as income to the State budget and the Law on Management of Confiscated Assets does not contain any provisions for possible structural and specific allocation of this income to specific state agencies. Unfortunately, the Law on Management of Confiscated Assets does not recognize possibility for other types of disposal of such assets besides the public bid. Hence forward, the Law on Management of Confiscated Assets does not provide sufficient legal basis for effective legitimation for the biding procedure. This means that it does not contain detailed provisions in regard to the effective limitation of the persons connected to the defendant's from whom the assets has been confiscated. In addition, the Law on Management of Confiscated Assets does not contains provisions for limiting the possibility from excessive or non-realistic biddings which later would significantly increase the value of the bidding assets, that will finally leads to the situation where the winner of the bidding procedure would not pay the bidding price and by such action would undermine the opportunity for selling of the confiscated assets.

The second possibility for disposal of the confiscated assets is the direct transfer of confiscated assets to the Government or to state bodies and agencies, as regulated

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16 Official Gazette of the Republic of Macedonia No. 98/2008, 145/2010, 104/2013, 187/2013, 43/2014, 160/2014, 97/2015, 148/2015 and 64/2018.

17 Ibid.

in articles 51 and 52 of the Law on Management of Confiscated Assets.[18] Within these provisions of the Law on Management of Confiscated Assets it is regulated that confiscated assets can be transferred to the Government and/or its bodies, local municipalities, state institutions, state agencies, and other agencies, funds and directorates established by the State[19], without any financial contribution. This means that in such cases the confiscated asset is simply transferred to the state institutions without any purchase. In both of such options for disposal the decision for disposal is performed by the Agency upon prior approval from the Government of the Republic of North Macedonia.

Finally, confiscated assets may be rented to third parties, as regulated in the article 38-a[20] of this Law, limiting this possibility for renting it to the defendants from whom the asset has been confiscated. The rent will be also considered as an income to the State budget and transferred to the State budget.

Bearing on mind these provisions it is apparent that the most common or even dominant way of disposal of confiscated assets in Republic of North Macedonia is selling trough public bid. Henceforward, despite the fact that there is possibility for transfer of confiscated assets to the state bodies and institutions, it is not clearly stated that this transfer is purposed for social reuse of the confiscated assets. Furthermore, the Law on Management of Confiscated Assets does not provide provisions stating the purpose of the further use of the confiscated assets when they are transferred to the state bodies. Unfortunately, the Law on Management of Confiscated Assets does not allow the possibility for transfer of these goods to NGO's or other non-profit organizations as part of its social use opportunity.

As addition to the legal imperfection, we can state the absence of the provisions in the Law on Management of Confiscated Assets which would regulate the possibility for transfer of part of the money received from the selling of the confiscated assets to the Agency as direct benefit from its activities in regard to the management of the confiscated assets.

Law in practice. When analysing the practical implementation of the confiscation and freezing of the property, proceeds and instrumentalities which have derived from crimes in the Republic of North Macedonia one must state that confiscation appears relatively rare in the practice by the Macedonian courts[21]. Such small num-

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18 Ibid.

19 As regulated in the Article 52 of the Law on Management of Confiscated Assets.

20 Ibid.

21 See the annual reports from these State bodies available at [www.stat.gov.mk] and [www.odzemenimot.gov.mk] See the annual report of the biggest Criminal Court in the Republic of Macedonia,

ber of confiscations performed by the national courts may be based upon several factors, where one of the most influential might be the poor financial investigation of the assets during the pre-trial phase. This means that in most of the cases the financial investigations are absent or rarely simultaneously led during the criminal investigation as an initial phase of the criminal procedure.[22] Due to these reasons, in most of the cases judges do not have sufficient information regarding the defendant's assets, and do not have proper evidence in regard of the real owners of the assets that should be confiscated.[23] Such environment produces the low number of confiscated assets and generates the court practice where the judges, in most cases, stick only to forfeiture of the instrumentalities of the crime (*corpora delicti)* as one of the most undisputed assets that can be forfeited from the defendants.

In regard to the tracking of the number of the actual assets that were confiscated by the Macedonian courts, it seems that there are several problematic areas which mask the real number and the worth of the assets. Difficulties of the determining of the real number and types of assets that are confiscated are due to the fact that there are discrepancies between the publicly available reports depending on the issuing agency. This means that the numbers of the actual confiscations do not correlate between each other, considering the numbers gathered from the courts, state statistical bureau, or the Agency for managing of the confiscated assets.[24]

Additional reason for such differences of the data rests upon the fact that data gathered from the courts in most of the cases consists data of the confiscated assets mixed with the data for forfeited instrumentalities of the crime (*corpora delicti)*.[25]

Basic Criminal Court in Skopje, available at [http://www.vsrm.mk/wps/portal/osskopje1/], Accessed 10 June 2021.

22 Understaffing has been constantly reported as important challenge in the functioning of the Public Prosecution Offices. See Yearly Reports of the Public Prosecution, available at: Годишен извештај за работата на јавните обвинителства во Република Северна Македонија за 2019 година – ЈАВНО ОБВИНИТЕЛСТВО НА РЕПУБЛИКА СЕВЕРНА МАКЕДОНИЈА, [jorm.gov.mk]. Also see: Conclusions from the round table regarding the Practical implementation of Confiscation, 08.06.2018, conducted by Network 23+, available at [http://www.merc.org.mk/aktivnost/48/dijalog-za-politika-konfiskacija-na-imot-i-nelegalno-steknata-imotna-korist], Accessed 10 June 2021.

23 See: Misoski, B.; Petrovska, N.; Avramovski D., Analysis of Data Obtained from Monitoring Court Proceedings within the Field of Organized Crime and Corruption in 2019, "Coalition All for Fair Trials", OSCE Mission to Skopje, 2020.

24 See: Misoski B., The Impact of the EU Directive 2014/42/EU on Freezing and Confiscation of Instrumentalities and Proceeds of Crime to the Macedonian Criminal Justice System, in: Petrašević, T.; Duić, D. (eds.), EU Law in Context – Adjustment to Membership and Challenges of the Enlargement, Vol. 2, Faculty of Law Osijek, Croatia, 2018, also see the annual reports from these State bodies available at [www.stat.gov.mk] and [www.odzemenimot.gov.mk], Accessed 10 June 2021.

25 See: Avramovski D.; Petrovska N., *Confiscation of Assets in the Corruption Cases*, CAFT, 2019 (in Macedonian), available at: [PB-CAFT-MKD-2019.pdf], [all4fairtrials.org.mk], Accessed 10 June 2021.

Disregarding the fact that there are methodological discrepancies between the data gathering and data reporting regarding the number of the court cases where the assets have been confiscated, it is interesting to understand what the epilogue of such confiscated assets is. Furthermore, despite the fact that the number of such cases is relatively low, it is still and intriguing question what does Macedonian authorities do with such assets.

For answering of this issue, the most accurate data in regard to the future resolution of the confiscated assets can be considered the data gathered from the Agency. However, unfortunately the Agency does not provide detailed yearly report that is available on their official web site. Hence, it is not easy to correlate the court performance in regards to the confiscation and the epilogue of the confiscated assets, since the court proceedings are rather lengthy, and on top of this the procedure itself in front of the Agency is also complicated, resulting in situation where the gathered data for Agency's work performance is connected to older court cases.

However, in order to understand the trail of the confiscated assets and in more to understand the possibility of future social reuse of the confiscated assets it is not necessarily important to evaluate the court's performance in the implementation of the confiscation. Instead of this it is more important to analyse the practice of the Agency for Management of the confiscated assets in order to evaluate whether the confiscated assets can be used for future legally acceptable purposes. Instead, our data was gathered through the official request for information submitted to the Agency.

Due to these reasons, for the purpose of the writing of this article we have contacted the Agency for Management of the Confiscated Assets in order to receive formal information in regard to the epilogue of the confiscated assets as performed by the Agency.

TOTAL INCOME FROM THE SALE OF CONFISCATED AND SEIZED ASSETS				
2016	2017	2018	2019	2020
1.982.686 EUR	630.281 EUR	1.813.590 EUR	9.289.672 EUR	807.720 EUR

Table: Data from Agency for Management of the Confiscated Assets – Total Income from selling of the assets

The Agency for Management of the Confiscated Assets have generously provided an answer to our request and provided us a data for the total income received from selling of the confiscated assets, together with the data for possible transfer of the confiscated assets and forfeited goods to other state institutions and data

for transferred confiscated vehicles.[26] Unfortunately, from the data gathered from the Agency, we have learned that the Agency does not have further tracking of the transferred assets and is not aware whether and to whom (legal entity or natural persons) these assets are transferred. On the other hand, the Agency have records of the state institutions and state bodies that have received the transferred confiscated motor vehicles.

From the data gathered from the Agency we can conclude that other than these amounts that were gained as an income from the selling of the confiscated and seized assets, the Agency has also transferred assets predominantly to the Ministry of Labour and Social Welfare. These transfers due to the limitations of the Law are not considered as a social reuse, despite the fact that in most of the cases these transfers could be annotated as such social reuse. Hence, usually confiscated vehicles are generally transferred to state bodies and institutions that can be considered in some hand as a social reuse.

From the available data we can learn that the Agency has donated various confiscated and seized goods to the Ministry in amount of 183.000,00 euros in 2019, while in 2020 these donated goods were in value of 148.500,00 euros. Regarding the transferred vehicles, from the data gathered from the Agency we can understand that in the period of 2017 till 2020 approximately 135[27] vehicles per year were transferred to the state bodies and institutions in estimated value of approximately 480.000,00 euros per year.

Connecting these numbers with the data from the courts in regard to the number of court cases where these measures were imposed, we can conclude that despite the relatively small number of cases where the courts have imposed such measures, these measures provide substantial income to the Macedonian state budget.

However, in regard to the social reuse of the confiscation, we can conclude that there are several obvious gaps in order to improve its implementation. First and the most important reason lays upon the legal imperfection, since the Law on Management of Confiscated Assets does not provide any legal grounds for actual

[26] The data was gathered trough official request submitted to the Agency in order to use publicly shared information from the Agency on the International online workshop "*Addressing Organized Crime and Corruption through the Re-use of Confiscated Criminal Assets*" Organized by OSCE, on 10-th of December, 2020 presented, by the Senior Advisor in the Agency for Management of the Confiscated Assets in Republic of North Macedonia.

[27] From the data gathered from the Agency for Management of Confiscated Assets we can learn that in 2020 a 150 vehicles were transferred in value of 510.569,00 euros; in 2019 the number of transferred vehicles is 141 in value of 438.019,00 euros; in 2018, a 138 vehicles were transferred in value of 530.349,00 euros, while in 2017 the number of transferred vehicles is 107 in value of 410.746,00 euros.

transfer of such assets to a NGO's or social vulnerable groups as a direct transfer for immediate social reuse of such goods. Hence, despite the fact that there is probably transfer of these goods to such groups through the Ministry of Labour and Social Welfare, we cannot have clear tracking, nor we can discuss the proper social reuse doctrine of the confiscated assets.

Proper addressing into the media and professional public is another thing that seems to be missing in order to elaborate the necessity of confiscation of assets and its social benefit. Through such initiatives the general public can become aware upon the activities of the Agency, which should pave the road into the increase of the level of trust of the functioning of the criminal justice system. Due to these limitations, the general public usually has the impression that the Criminal Justice system in North Macedonia has poor performance record in the "battle" with the criminals in regard to the confiscation of their criminal gain.

Contrary to this general perception, we are witnessing that, although severely understaffed, the Agency produces substantial income to the Macedonian economy and successfully cope with the challenges connected with the management of the confiscated assets. However, the above numbers, should not be considered as a satisfactory answer towards the fight and suppression of the crime in Republic of North Macedonia, but instead, the above mentioned numbers and figures should serve to as only a tool for motivation. Since with such low number of imposed measures for confiscation of assets or measures for forfeiture of the instrumentalities of the crime (*corpora delicti*), the state can gain substantial economic wealth. We should work upon finding further possibilities for expanding such activities by the courts and all others members from the law enforcement authorities.

5.2. Potential for adoption of social reuse by the Republic of North Macedonia

Despite the fact that there are limited number of ongoing academic and professional debates regarding the possibility of introduction of social reuse of the confiscated assets in Republic of North Macedonia, we deem that the Agency for Management of the Confiscated Assets has already paved the road towards its proper implementation. Hence, from the above mentioned data gathered from the Agency, we can witness that the culture of sharing and giving of the confiscated assets from the state organs to the institutions appears to be acceptable practice.

In order to improve such practise there are at least two or even more possible fronts that should simultaneously develop. First one is the reform and upgrading of the Law on Management of Confiscated Assets; second one is changes of the stakeholders' mentality trough public campaigns for raising awareness of social

reuse of confiscated assets; the third one is further support to the Agency trough financial and manpower aid; while other front is strengthening the legal culture and reform of the law enforcement agencies where these agencies would be focused not only upon the crime stopping, but also towards the investigation of the illegal financial flows.

Initially and obviously the Law on Management of Confiscated Assets, needs to be reform into the sense where it will allow the Agency to develop social reuse strategies for the confiscated assets. This front seems to be the easiest task, since it requires only legislative amendments that can be drafted and implemented into the Law. Considering the Law on Management of Confiscated Assets there are obvious further needs for improvement, since the law in many cases is unclear, has several legal lacunas and do not answer the modern needs of the Agency. The most problematic and urgent issues in this Law are: obsolete or limited types of disposal of the assets; need for introduction of registry of the confiscated and forfeited assets; necessity for improvement of the provisions for procedure for selling of these assets and improvement of the possibilities for direct transfer of part of the profits gain from the disposal of the confiscated assets to the Agency as necessity for its proper function and future development.

In regard to the raising of the public awareness, towards the social reuse of the confiscated assets, we deem that is necessary initially to establish good practice of regularly inform the public of the activities of the Agency. This should be done by updating of the Agency web site on regular basis, and together with raising media campaigns where the general public would be informed of the "successful stories" from the social reuse of the confiscated assets. State bodies should change the climate where the judges and prosecutors would not have any further insight whether the confiscated asset is sold, destroyed, mixed or reused in any other way[28], as a result of their daily activities at a courtroom. Knowing these particular information regarding the criminally gained assets, the judges and prosecutors might double their efforts into the search and confiscation of such assets within their practice.

Finally, increased implementation of confiscation or improvement of this tool via the introduction of several models for the social reuse of these assets will increase the efficiency of the criminal justice system. It could in fact provide criminal justice actors, particularly judges, with a clear vision of where confiscated assets where used for, as well as with a better understanding of the societal benefit from

[28] See: Vettori B.; Misoski B., *"Social Reuse of Confiscated Assets in the EU: Current Experiences and Potential for its Adoption by Other EU and non-EU Countries"*, Collection of Papers in Honour of Akad. Vlado Kambovski, Macedonian Academy of Arts and Sciences (MASA), 2019.

their work. This fact should endow judges and other law enforcement agencies to put additional effort in investigating the proceeds from crime and ultimately to use confiscation more frequently. A second benefit would be through the fact that the message will be sent to the criminals that in most of the cases crime will not pay, which might be detrimental for undertaking future criminal activities.[29]

Hence, legal amendments to the Law on Criminal Procedure and Law on Public Prosecution in a way of fostering the establishment of the Investigative Centres and further support and strengthening of the Financial Police and Public Prosecution Offices with financial aids together with the adequately staffing with prosecutors and investigators. Such improvements of these state bodies would result into frequent commencement of thorough financial investigations as essential part of the criminal investigations and would increase the coordination between the abovementioned state agencies. Only through such improvements of these state bodies we could expect increase of the number of confiscated and forfeited assets, which would finally lead towards the increased implementation of the social reuse of such assets.

Last, but not less important is the further support to the Agency with financial and manpower aid. This means that if the employees of the Agency has sufficient financial assets and well trained staff, than, by all means, we should expect increase of its effectiveness and efficiency into the management of the confiscated and forfeited assets.

6. CONCLUSION

Social reuse of the confiscated assets seems to be the future "big deal" of the management of confiscated assets. This is based upon the fact that trough such management the direct message is sent to the public that convicted criminals does not gain from the crime and that their criminal gain is feasibly and transparently transferred to the members of the community. However, in order to have effective social reuse of the confiscated assets several preconditions need to be met, such as efficient Agency for Management of the confiscated assets based upon proper legal basis for implementation of the social reuse procedures. Hence forward, in order to have proper management of the confiscated assets we need operational Agency that takes proper care of such assets that can be further either transferred to the community or sold on public auctions. One of the most important tools

[29] See: Misoski B., The Impact of the EU Directive 2014/42/EU on Freezing and Confiscation of Instrumentalities and Proceeds of Crime to the Macedonian Criminal Justice System, in: Petrašević, T.; Duić, D. (eds.), EU Law in Context – Adjustment to Membership and Challenges of the Enlargement, Vol. 2, Faculty of Law Osijek, Croatia, 2018, p. 371.

for proper management of such assets seems to be the organization of databases for the confiscated assets where every confiscated and seized item will be properly marked and tracked by the Agency in order to determine the most suitable type of management of such assets. Functional databases will provide proper ground for reduction of depreciation of the value of the confiscated assets. These novelties already present on several EU member states' soil, although recognized by the Macedonian legislator, seems to be routed on the waiting list for their enactment by the Parliament and operationalized in practice by the Agency for management of the confiscated assets.

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UDK 342.722:343.19]:614.4
Review article

IMPACT OF COVID-19 PANDEMIC ON CRIMINAL JUSTICE SYSTEMS ACCROSS EUROPE

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ABSTRACT

Last year the Europe and world were facing with COVID-19 outbreak that put at the risk lives of the people and capability of healthcare systems to provide their services. To prevent spread of the COVID-19 governments have imposed restrictive measures, while some of them declared state of emergency. The response to the pandemic influenced on the functioning of the criminal justice system and daily operation of courts, but also on the substantive criminal law since some states are applying criminal law to violation of restrictive measures or to criminalizing disinformation on COVID-19 outbreak.

Outbreak of COVID-19 revealed new trends in criminal law like accelerated introduction of new crimes during pandemic, extremely flexible interpretation and rapid changes of criminal laws, which tend to be threat for legal stability and human rights protection. In addition, populist governments tend to use that new trend as a tool in suppression of political dissidents.

COVID-19 pandemic has posed unprecedent challenges to the functioning of judiciaries. Courts and prosecution services were working with limited capacities to ensure social distancing. Some countries introduced ICT tools and fast-track procedures to organize hearings, which raised question of procedural rights and protection of rights of defendant.

In the article authors assessed whether derogation of fair trial rights was in the line with standards of international human rights law and if introduction of state of emergency and restrictions were proportionate, time limited and needed and whether they changed understanding of the fundamental rights protection, especially right to a fair trial. Furthermore, authors explore whether COVID 19 changed perception of criminal law and legal certainty. Authors assessed how restrictions in the organization of judiciary work influenced on human rights protection and citizens trust in judiciary. Consequently, authors assesses whether some of

introduces changes, especially use of ICT tools made permanent changes in operation of courts and understanding of access to justice. Finally, authors are assessing whether these changes tend to erode judiciaries or put into the risk access to justice in the EU members states and candidate countries or whether they jeopardized EU principle of mutual trust.

***Keywords**: access to justice, independence of judiciary, rule of law, right to a fair trial, criminal justice*

1. STATE OF EMERGENCY IN RESPONSE TO THE COVID-19 CRISIS

Since last year the Europe and world are facing with COVID-19 outbreak that put at the risk lives of the people and capability of healthcare systems to provide their services. To combat COVID-19 pandemic as effectively as possible, states have largely opted for a preventive approach by applying the precautionary principle[1], which implies the obligation to anticipate relevant hazards and a proactive approach.[2] At the same time, the effective fight against the pandemic implies the restriction of numerous human rights and most often restriction of the right to move freely.[3] The legal basis for precautionary principle and the restriction and deviation from guaranteed human rights was the introduction of a state of emergency as a legal response to an emergency situation that poses a substantial danger to a country.[4] Introduction of state of emergency raised questions of their legitimacy, duration and level of oversight.[5]

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1 About precautionary principle in fight against pandemia, see more: Goldner Lang I., *"Laws of Fear" in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19*, European Journal of Risk Regulation, 2021, p. 1-24.

2 Venice Commission, *Report - Respect for Democracy Human Rights and Rule of Law during State of Emergency - Reflection*, CDL-PI(2020)005rev, 26 May 2020, Introduction, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)005rev-e], Accessed 15 March 2021.

3 About restrictions of human rights in combating COVID-19 pandemia in Serbia see report: YUCOM, *Ljudska prava i COVID-19, Analiza izmene pravnog okvira tokom vanrednog stanja i uticaj na uživanje ljudskih prava,* 2020. For Croatia see more: Roksandić, S.; Grđan, K., *COVID-19 i razumijevanje pravnih propisa vezanih za suzbijanje zaraznih bolesti u Republici Hrvatskoj – osvrt na bitna pravna pitanja od početka pandemije do listopada 2020*, Pravni vjesnik, 2020, Vol. 36, No. 3-4, 327-343, also: Roksandić, S.; Mamić, K., Širenje *zaraznih bolesti kao prijetnja ostvarivanju ljudske sigurnosti i kaznenopravni mehanizmi u sprječavanju* širenja *bolesti COVID-19*, Hrvatski ljetopis za kaznene znanosti i praksu, 2020, Vol. 27, No. 2, 681-713.

4 Venice Commission*, Compilation of Venice Commission opinions and reports on states of emergency*, CDL-PI(2020)003, 16 April 2020, par. 244, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)003-e], Accessed 15 March 2021.

5 European Parliament, State of emergency in the Response to the coronavirus crisis: Situation in the certain Member States, PE. 649.408, June 2020.

The rule of law approach to state of emergency, implies that the state of emergency must be a subject of legal regulation[6] and that relevant procedures should be followed.[7] All relevant documents of international human rights law are based on the rule of law state of emergency approach and therefore they include derogative clauses to regulate which human rights and under what conditions could be derogated in state of emergency.[8] Practice has shown that a state of emergency can be an ideal opportunity for various types of abuse and violation of rights by the executive and from that reason the Human Rights Committee issued two General Comments stipulating that a state of emergency must be exceptional, temporary in nature and proportionate.[9] The Council of Europe has repeatedly taken the view that a state of emergency must be legally limited in duration, circumstance and scope, while the emergency powers may be exercised only for the purposes for which they were granted.[10] Venice Commission has defined several basic principles governing the state of emergency – necessity, proportionality, temporariness, effective (parliamentary and judicial) scrutiny, predictability of emergency legislation and loyal co-operation among state institutions.[11]

State of emergency necessarily implies a disturbance of the balance between the three branches of government, in favour of the executive. The state of emergency during COVID-19 pandemic is characterized by an additional power reduction of the legislature and the judiciary, given that due to the pandemic, many parliaments restricted their sessions, and the courts limited their work. An example of the above is Hungarian parliament that, due to the pandemic, passed a law authorizing the government to govern by decree without parliamentary approval.[12]

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6 There are two ways of understanding State of emergency, see more in: Venice Commission, *Report - Respect for Democracy Human Rights and Rule of Law during State of Emergency - Reflection*, *op. cit.*, par. 8.

7 Grdašević, Dj., *Pandemija i Ustav Republike Hrvatske*, Informator 6623, 2020 [https://informator.hr/strucni-clanci/pandemija-i-ustav-republike-hrvatske], Accessed 05 May 2021.

8 Issue of human rights derogation in case of State of Emergency is regulated in article 14 International Covenant on Civil and Political Rights and article 15 European Convention on Human Rights.

9 UN Human Rights Committee (HRC), *CCPR General Comment No. 5: Article 4 (Derogations)*, 31 July 1981 [https://www.refworld.org/docid/453883ff1b.html], Accessed 7 March 2021; UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Derogations during a State of Emergency*, 31 August 2001, [https://www.refworld.org/docid/453883fd1f.html], Accessed 7 March 2021.

10 Council of Europe, Parliamentary Assembly, Resolution 2209 (2018) State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights, par. 4, [https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24680&lang=en], Accessed 7 March 2021.

11 Venice Commission, *Report - Respect for Democracy Human Rights and Rule of Law during State of Emergency - Reflection*, *op. cit.*, par. 7-16.

12 See more: Picheta, R.; Halasz, S., *Hungarian parliament votes to let prime minister rule by decree*, Constitutionnet, 30 March 2020, [http://constitutionnet.org/news/hungarian-parliament-votes-let-prime-min-

Therefore, the pandemic created a risk that the executive would strive to preserve the imbalance between the three state powers even after the end of the pandemic.[13]

Introduction of state of emergency had multiple effects on criminal justice. Thus, question arises whether the growing criminal repression is an adequate and proportional response to the threat of a pandemic. Also, whether weakening of the judiciary branch in favour to executive could decrease the existing standards of judicial independence, especially having in mind that during the pandemic judicial supervision over the executive is inefficient. Question can be raised about derogability of fair trial rights in state of emergency. The fair trial right is not marked as jus cogens in international law,[14] but development of human rights determines this right as not derogabile right.[15]

Introduced measures influenced on the independence of judiciary. In France, for example some measures raised significant discussion, specifically automatic prolongation of the length of pre-trial detention without decision of judge.[16] Based on the legal action contesting the legality of prolongation, the Court of Cassation ruled that the court that would normally have decided on the prolongation should rapidly review the validity of the prolongation decision.[17] In Serbia, Governmental decree was used to give instruction to judiciary to used videoconference trials. Although the Serbian Criminal Procedure Code did not envisage trial by video conference, except in specific circumstances,[18] the Serbian Government adopted a decree by which during the state of emergency, judge could decide that defendant's participation can be ensured through a video link.[19]

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ister-rule-decree], Accessed 7 March 2021.

13 OSCE, ODIHR, *The Functioning of Courts in the COVID19 Pandemic*, October 2020, [https://www.osce.org/odihr/469170], Accessed 7 March 2021, p. 9.

14 Article 4.1. International Covenant on Civil and Political Rights stipulates that fair trial right is derogabile.

15 For example: UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Derogations during a State of Emergency*, *op.cit.* stipulates that states are not allowed, under any circumstances, to invoke a derogation to justify non-compliance with fundamental principles of a fair trial.
UN Human Rights Committee (HRC), *CCPR General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, August 2007, [https://www.refworld.org/docid/478b2b2f2.html], Accessed 7 March 2021 stipulates that guarantees of a fair trial must not be subject to derogation, as this could pose a risk to all peremptory norms protected by a fair trial.

16 Art. 16, Ordinance 2020-303 of 25 March 2020.

17 Judgment no. 974 of the Court of Cassation of 26 May 2020 (20-81.910).

18 Article 104 of the Criminal Procedure Code.

19 Uredba o načinu učešća optuženog na glavnom pretresu u krivičnom postupku koji se održava za vreme vanrednog stanja proglašenog 15 March 2020, Official Gazette RS, No. 49/2020.

2. CRIMINAL JUSTICE IN PANDEMIC – HOW COVID 19 AFFECTED CRIMINAL JUSTICE?

In the fight against the pandemic, governments have resorted to various methods. Complex public health issues are often politicized, and pandemic crisis is presented in simplified way with a dose of spectacularism[20]. This wave of medical populism,[21] which mean creating panic and dramatizing the crisis go hand in hand with populist demand for the most severe punishment known as penal populism. In this regard, governments have recognized criminal law as the most effective means of fighting pandemic. The criminal law, as an expression of the sovereign right of the state to punish, has become the most commonly used legal method in the fight against the pandemic, primarily because of its efficiency[22]. COVID 19 expand opportunities for various types of crime while presenting unprecedented challenges for the criminal justice system[23], this situation has created an ideal ground for multiple transformations of criminal law, which are reflected in: use of criminal law to implement restrictive measures; prescribing new crimes to combating pandemic, which may result in overcriminalization; endangering the procedural rights of defendants; extremely rapid changes in regulations and overlapping penal provisions; growing flexibility in interpreting the law; abuse of criminal law to supress freedom of speech and political dissidents; partial suspension of the *work* of *courts* and the risks of using ICT in criminal justice. All these issues are capable to create different criminal justice approach in EU member states which may disturb principles of mutual trust and mutual recognition.

2.1. Use of criminal law to implement restrictive measures

Use of criminal law in the context of public health is well known. For example, it has been used in suppression of HIV infection[24]. COVID 19 pandemic created tremendous risk for public health all over the world and to supress the pandemic states resort to limitations of freedom of movement and communication through introduction of measures such as isolation, quarantine, social distancing, and lock

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20 Lasco G., *Medical populism and the COVID-19 pandemic*, Glob Public Healt, Vol. 15, Issue 10, 2020, p. 1417-1429.

21 Lasco, G.; Curato, N, *Medical populism*, Social science and medicine, No. 221, 2019, p. 1-8.

22 For general overview of using criminal law, as ultima ratio law, in fight against virus see more: Drumbl M.; Roksandić S., *Virus and Terrorism*, JUSTICE – 360 blog, 13 April 2020, [https://justice-360.com/virus-terrorism/], Accessed 28 April 2021.

23 Miller, J.M.; Blumstein, A., *Crime, Justice & the COVID-19 Pandemic: Toward a National Research Agenda*, American Journal of Criminal Justice, Vol. 45, Issue 4, **2020,** p. 515.

24 About criminalization of HIV transmition see UNAIDS review, [https://www.unaids.org/sites/default/files/media_asset/jc1601_policy_brief_criminalization_long_en.pdf], Accessed 28 April 2021.

down. Criminal law was used in some states to ensure the effective implementation of these measures. Criminal law is the most coercive state tool and therefore its usage should be carefully weighed, especially in relation to human rights and scientific evidence. It is noted that despite the evolving scientific knowledge, criminalisation has been written and implemented across the world faster than the development of the general understanding of the virus itself. [25] This fact create risk that coercive state measures might not be efficient enough in pandemic suppression, while it could create citizen dissatisfaction and resistance. Excessive reliance on criminal law threatens to create the impression of controlling the pandemic and led to neglect of use of non-coercive measures. The conclusion that sanctions were the wrong strategy for stopping the spread of the disease came from HIV experience.[26] Therefore, overuse and misuse of criminal law in public health issues can be non-productive or even counterproductive. For example, Italy has reportedly charged more than 40,000 individuals for violating its quarantine rules and it is questionable whether this measure created any significant anti-pandemic effect.[27] In Spain, over 7,000 people were arrested or detained between 15 March and 15 May 2020 for allegedly breaching the state of confinement or rules created to COVID-19. [28]Additional challenge is the fact that many countries introduced draconic sanctions for breaching restrictive measures that are not proportionate to the threat posed by offences. Thus, Albanian Government propose amendments to the Criminal Code to impose prison sentences up to 15 years on citizens found guilty for violation of Government orders taken to prevent the spread of COVID-19.[29] It is well known that deterrence is generally found to have a small influence

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25 *When considering the criminalisation of COVID-19, lessons from HIV should be retained,* HIV Justice Network, 17 June 2020, [https://www.hivjustice.net/news-from-other-sources/when-considering-the-criminalisation-of-covid-19-lessons-from-hiv-should-be-retained/], Accessed 8 March 2021.

26 Witt, J.F., *American Contagions Epidemic and the Law from Smallpox to Covid 19*, Yale University Press, 2020, p. 96.

27 Sun, N.; Zilli, L., *COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Enforcement of Public Health Measures, Part II, 2020.,* [http://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-enforcement-of-public-health-measures-part-ii/], Accessed 10 March 2021.

28 Short update: 7,556 arrests and 869,537 fines proposals since the start of emergency in Spain, Fair Trails, May 2020, see: [https://www.fairtrials.org/news/short-update-7556-arrests-and-869537-fines-proposals-start-emergency-spain], Accessed 28 April 2021.

29 See: Civil Right Defenders, *Albania's Government Unconstitutionally Pushes Draconian Sentences in Fight Against COVID-19,* 16 April 2020. [https://crd.org/2020/04/16/albanias-government-unconstitutionally-pushes-draconian-sentences-in-fight-against-covid-19/], Accessed 10 March 2021.
Milder sanctions were approved in comparison to the initial draft proposed by the government. Changes of Criminal Code include prison sentences of 3-8 years in cases of violation of COVID 19 preventative measures, when they had serious consequences for the health and life of the population. See more: Civil Right Defenders, *Impact of Covid-19 Measures on Human Rights and Criminal Justice*

on most people's behaviour,[30] so these draconic sanctions will probably appear to have no effect on pandemic, but it is possible to show some effect on legitimacy of law and legitimacy of state's actions in pandemic suppression.

Overuse and the misuse of criminal law in public health emergencies set a concerning precedent on the future use of penal law.[31] It raised a concern whether the patterns of criminal law from the time of pandemic become permanent.

2.2. Prescribing new crimes at combating pandemic and risk of overcriminalization

To suppress the pandemic, many countries have resorted to the criminalization of exposure and transmission of the COVID-19 virus. Criminalization was carried out in two ways. First is through general criminal provisions such as the criminal offence of failure to comply with health regulations during an epidemic or criminal offence spreading of infectious diseases,[32] and the second is through the introduction of new criminal offences relating exclusively to COVID-19.

Criminalization of COVID-19 exposure and transmission is legal and social challenge. As COVID-19 is not the first epidemic against which criminal law has been used, it is important to recall the experiences from criminalizing HIV exposure and transmission. The criminalization of these actions proved to be insufficiently effective from the point of view of virus spreading, but it created other risks, such as increasing stigmatisation.[33] A similar threat is posed by criminalization of COVID-19, which can lead to patient's stigmatisation, or stigmatisation of those people who may have symptoms similar to COVID illness, but also to discrimination of entire groups that are presumed to be virus carriers, such as people of Asian descent.[34]

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in Western Balkans and Turkey, 26 May 2020, [https://crd.org/2020/05/26/impact-of-covid-19-measures-on-human-rights-and-criminal-justice-in-western-balkans-and-turkey/], Accessed 28 April 2021.

30 Tyler, T.; Jackson, J. *Future Challenges in the Study of Legitimacy and Criminal Justice,* Yale Law School, Public Law Working Paper No. 264, 2013, p. 2, [https://ssrn.com/abstract=2141322or http://dx.doi.org/10.2139/ssrn.2141322], Accessed 10 March 2021.

31 Sun; Zilli, *op.cit.* note 27, *Part II.*

32 For example, in Serbia articles 248 and 249 Criminal Code, and in Croatia article 180 Criminal Code.

33 Sun; Zilli, *op.cit.* note 27, *Part I.*

34 About discrimination against people of Asian descent see more: Witt, *op.cit.,* note 26, p. 133 and Yun Liew, J.C., *Spread of Anti-Asian Racism: Prevention and Critical Race Analysis in Pandemic Planning*, in: Flood et al (eds.), Vulnerable. The Law, Policy and Ethics of COVID 19, University of Ottawa, 2020 p. 393-407.

Parallel with the criminalization of exposure and transmission of COVID-19, many governments have resorted to criminalization of various types of behaviour that, in their opinion, makes the fight against the virus more difficult.

World Health Organisation announced that pandemic was accompanied by an infodemic of mis- and disinformation and that constituted a serious risk to public health and public action.[35] States recognised that information considered fake news or misinformation could lead to potential spread of panic among the population.[36] Thus, criminalisation of spreading false news about the pandemic was not rare. In Hungary this crime was introduced jointly with the crime of violating epidemic measures.[37] Russia took similar action and amended Criminal Code with provision that those who found deliberately spread false information about serious matters of public safety such as COVID-19 will face fines and up to five years of imprisonment.[38] Albania also introduced new criminalization prescribing that diffusion of fake information or announcements in any form aimed at creating a state insecurity and panic among the people is the crime.[39]

Spreading false information as a crime was introduced with rationale that panic makes fight against the virus more difficult. However, the criminalization of spreading false information could challenge freedom of expression and press freedom. Thus, crime of spreading false information might be able to discourage critical opinions and produce chilling effect on journalist and academia.[40] This crime could be used as a political tool for censoring critical report and creating atmosphere that prevents criticism of any government action regarding pandemic, since the criticism could be interpretate as spreading false information. Use of vaguely legal definitions is ideal base for censorship because it can be unclear whether an information is false or true or weather some matter is serious enough. From the

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35 WHO Situation Report No. 13, 2 February 2020, [https://www.who.int/docs/default-source/coronaviruse/situationreports/20200202-sitrep-13-ncov-v3.pdf.], Accessed 10 March 2021.

36 Noorlander, P., *COVID and free speech. The impact of COVID-19 and ensuing measures on freedom of expression in Council of Europe member states*, Council of Europe, 2020, p. 7, [https://rm.coe.int/covid-and-free-speech-en/1680a03f3a], Accessed 10 March 2021.

37 Drinoczi, T.; Bien – Kacala, A., *COVID – 19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism*, The Theory and Practice of Legislation, Vol. 8, No. 1-2, 2020, pp. 171-192, p. 186.

38 International Press Institute, *New fake news law stifles independent reporting in Russia on Covid 19*, 8 May 2020, [https://ipi.media/new-fake-news-law-stifles-independent-reporting-in-russia-on-covid-19/], Accessed 10 March 2021.

39 Erebara, G., *Albania Prosecutors to Probe Panic-Mongering About Coronavirus,* 24 February 2020, [https://balkaninsight.com/2020/02/24/albania-prosecutors-open-investigation-over-corona-virus-panic-spreading-information/], Accessed 10 March 2021.

40 Drinoczi; Bien – Kacala, *op. cit.,* note 37, p. 186.

sociological and politicological point of view introducing spreading false information as a crime is caused by the fact that governments have been facing with loss of trust in anti-pandemic actions. Unable to create citizens trust, governments compensate this lack by threat of sanction. This could lead to intimidation of citizens and strengthening the belief that governments are hiding something.

These trends are fully in the line with the thesis that modern society suffers from overcriminalization because there is an explosive growth in the size and scope of criminal law. The pressing problem of modern criminal law lies in the fact that we have too much of it.[41]

2.3. Extremely rapid changes in regulations and overlapping penal provisions

Pandemic has shown two important features of modern criminal law: overcriminalization, and high frequency of amendments. Frequent changes in anti-virus strategies, as well as uncertainties about the manner and intensity of virus spreading have caused frequent and bustling changes of penal provisions. In the absence of a unified anti-virus strategy and in a situation where information of the nature of the virus has changed day by day, legislators have resorted to adaptation tactics, which has resulted in extremely rapid changes in legislation and accelerated procedure for laws approval. This was further contributed by the need to adapt the economy to the new situation to prevent economic losses.

Thus, in the Republic of Serbia the misdemeanour provisions regarding the prevention of the spread of the infection were changed several dozen times within three months.[42] It was similar in Hungary where 70 decrees were issued during the emergency. Some of them regulate the same matters, some have an omnibus nature legislation and others amend the previously issued emergency decrees.[43] Poland also have had massive and chaotic legislative activities.[44] In Italy restrictions and sanctions were hectic because they were prescribed on a day by day basis and came from different institutions – government, ministers, regions, city majors or civil protection department.[45]

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41 Husak, D. *Overcriminalization, The Limits of the Criminal Law,* Oxford University Press, 2008, p. 3.

42 Golubović, K. *et al*, *Ograničenje kretanja i suđenja za vreme vanrednog stanja*, 2020, p. 19, [https://www.yucom.org.rs/analiza-ogranicenje-kretanja-i-sudenja-za-vreme-trajanja-vanrednog-stanja/], Accessed 10 March 2021.

43 Drinoczi; Bien – Kacala, *op. cit.,* note 37, p. 186.

44 Drinoczi; Bien – Kacala, *op. cit.,* note 37, p. 189.

45 Canestrini, N., *Covid 19 Italian emergency legislation and infection of the rule of law*, New Journal of European Criminal Law, Vol 11, No. 2, 2020, p. 118.

The practice of the Serbian NGO YUCOM speaks about the problem of overcriminalization and excessively frequent amendments to the law during the pandemic. A large number of citizens addressed this organization with claim that they were ordered into custody for violating measures of home self-isolation, without receiving any previous notification of self-isolation obligation. Therefore, they did not even be aware of mandatory self-isolation. This happened due to the fact the Government's decision prescribing the obligation of self-isolation was changed as many as ten times in one month in different directions: conditions for self-isolation, methods of self-isolation and self-isolation deadlines. This decision was almost impossible to track even for legal professionals. YUCOM pointed out that the purpose of criminal punishment of citizens cannot be achieved if citizens are punished for obligations that they did not even know they had.[46]

Legislative chaos led to a massive overlap of criminal and administrative penal provisions and sanctions, which has created a risk of violating the defendant's right against double jeopardy. Poland faced this problem.[47] In Serbia overlapping has been even encouraged by Government who prescribed the possibility of conducting the misdemeanour procedure against defendant who is in the process of the criminal offence for the same conduct.[48] This decision abolished the *ne bis in idem* principle in Serbian legal system which was previously successfully established in the field of criminal and misdemeanour law.

Overcriminalization, high frequency of law changes and overlapping have led to situation in which proper following the law became almost impossible. Citizens were not able to follow the law, because very often they were not aware of penal provisions, or they were confused by the content of the provisions. When citizens misunderstood or if they are ignorant of the law, they are in a mistake of law. Widespread mistake of law could jeopardise rule of law and lead to lowering standards of legal certainty in criminal justice. Also, it is opposing to the article 7 of the European Convention on Human Rights which prescribe no punishment without law. Caselaw of ECtHR advocates that relevant penalties must be clearly defined by the law[49] and that penal law has to have qualitative requirements such as accessibility and foreseeability.[50]

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46 Golubović *et al*, *op.cit.*, note 42, p. 19-20.

47 Drinoczi; Bien – Kacala, *op.cit.,* note 37, p. 191.

48 Article 2. Uredba o prekršaju za kršenje Naredbe ministra unutrašnjih poslova o razgraničenju i zabrani kretanja lica na teritoriji Republike Srbije, Official Gazette, No. 398/2020.

49 *Parmak and Bakir v. Turkey*, ECtHR, App. nos. 22429/07 *and* 25195/07, 3 December 2019, par. 58.

50 *Kasymakhunov and Saybatalov v.Russia*, ECtHR, App. nos. 26261/05 and 26377/06, 14 March 2013, par. 77.

2.4. Growing flexibility in interpreting the law

The principle that analogy is forbidden in criminal law, as well as the principle that penal provisions should be interpreted restrictively, have shown as superfluous from the point of view of the criminal law in the field of pandemic protection. The executive requires the robust action of criminal law and show no interest in theoretical principles of criminal law. As a consequence, a request for a flexible interpretation of criminal law have been created.

An example of executive request is recommendation of the Ministry of Justice Republic of Serbia to the public prosecutors. In the recommendation Ministry is requiring from the public prosecutors to propose detention for any person accused of breaching self-isolation measures. At the same time, prosecutors should take care for medical quarantine time limitations. In a case that public prosecutor does not propose detention, Ministry recommended to the Republic public prosecutor to submit a disciplinary charge against public prosecutor.[51]Although this recommendation does not have legal binding force, it undoubtedly influenced prosecutors and courts to interpret detention provisions more flexibly and broadly. The fact that executive recommends proposing detention beyond legal grounds is worrying.

Similar situation happened in France and Italy. In France some measures included the early release of certain categories of detainees, but an automatic prolongation of the length of pre-trial detention was also introduced.[52] In Italy, police has interpret extensively limitations which should be restrictively applied.[53] Flexibility in interpretation can produce different consequences, so it is correct to conclude that criminal law in pandemic creates a risk that courts will expand the scope of crimes such as assault and aggravated assault for conduct such as coughing.[54]

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51 See Ministry of Justice Recommendations, [https://www.mpravde.gov.rs/sr/obavestenje/29543/poostravanje-sankcija-za-lica-koja-prekrse-mere-samoizolacije-.php], Accessed 11 March 2021.

52 European Commission, SWD(2020) 309 Commission staff working document 2020 Rule of Law Report Country Chapter on the rule of law situation in France Accompanying the document communication from the Commission to the European parliament, the Council, The European Economic and Social Committee and the Committee of the Regions 2020 Rule of Law Report, The rule of law situation in the European Union, Brussels, 30.9.2020, p. 4, [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0309&from=EN], Accessed 15 March 2021.

53 Canestrini, *op.cit.*, note 45, p. 122.

54 Skolnik, T., *Criminal Law During (and After) COVID-19,* Manitoba Law Journal, Vol. 43, No. 4, 2020, p. 145.

2.5. Endangering the procedural rights of defendants

The COVID-19 outbreak also has an impact on the exercise of procedural rights of suspects and accused persons. Direct communication with a lawyer, interpreter or with third person, especially while the suspects or accused persons are deprived of liberty was reduced.[55] In addition to access to a lawyer, the suspects and accused had limited access to the case files due to restricted access to the courts and police stations. Access to a lawyer, access to an interpreter and access to the case files are aspects of the right to a fair trial and limitation or violation of these rights during criminal procedure represent violation of the European Convention of Human Rights and relevant EU Directives on rights of suspects and accused.[56] Countries were struggling to find solutions that will protect health and prevent spread of virus and to fulfil human rights standards. Some of the introduced measures were not function properly at the beginning of pandemic, especially those depending on technology and IT equipment.

In Spain, authorities introduced measure that prevented detained persons from attending court hearings and thus unable them to communicate with their lawyer before and after their appearance.[57] Lawyers reported challenges in accessing remote hearings due to lack of videoconferencing equipment and/or bad internet connections. In the Netherlands, the Netherlands Committee of Jurists for Human Rights reported that confidential lawyer-client communication was not possible during videoconference hearings.[58] Same problem was notified in Spain, where remote hearings were introduced as anti-pandemic measure in April 2020.[59] However, the physical presence of the accused is required for crimes which are punishable with at least five years of imprisonments, but only during the trial. That solution had as a consequence that in the phases of the criminal procedure before trial defendant was placed in the police station while lawyer was in the

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55 Beyond Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe, Fair Trials, June 2020, p. 24, [https://www.fairtrials.org/sites/default/files/publication_pdf/Beyond%20the%20emergency%20of%20the%20COVID-19%20pandemic.pdf], Accessed 11 April 2021.

56 Jimeno-Bulnes, M., *Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU*?, CEPS, 2010, p. 171.

57 See: Fair Trials, Short Update: Assistance ALA request appropriate Legal Assistance to Detainees in a letter addressed to the Superior Court of Justice in Madrid, [https://www.fairtrials.org/news/short-update-association-ala-requests-appropriate-legal-assistance-detainees-letter-addressed], Accessed 11April 2021.

58 Netherlands Committee of Jurists for Human Rights Report, 10.06.2020, [https://www.rijksoverheid.nl/documenten/rapporten/2020/06/19/tk-bijlage-njcm-brief-over-zorgen-om-corona-maatregelen-in-de-strafrechtspleging], Accessed 11April 2021.

59 Royal Decree – Law 16/2020, April 28, 2020.

court room with the judge, which prevented any confidential counseling.[60] In addition, not all courts across the EU countries have adequate videoconferencing equipment, which specifically was reported by lawyers in France.[61]

Limitations and bans on access to a lawyer for people in prison were introduced in some countries. In Portugal lawyers were reported that they could visit clients in prison in duly justified urgent matters and situations, which impeded preparation of the proceedings.[62]

The right to access to a lawyer is enshrined in the EU Directive on the right of access to a lawyer in criminal proceedings,[63] which sets minimum standards for EU member states to ensure that suspects and accused persons have the right of access to a lawyer in such time and in such manner so as to allow them to exercise their rights of defence practically and effectively.[64] The right of access to a lawyer has been subject of the Court of Justice interpretation and Court of Justice referred to the jurisprudence of the European Court of Human Rights.[65]

According to the jurisprudence of the European Court of Human Rights, telephone and video conference as alternative for hearings and other procedural actions, may be used if there are based in law, time-limited and demonstrably necessary and proportionate in the local circumstance and do not prevent confidential communication of a person with their lawyer. In the criminal cases participation in the proceedings by videoconference is acceptable to the European Court of Human Rights when it is explicitly provided in the national legislation (*Marcello Viola v Italy,*[66] para 65) and if technical conditions enable smooth transmission

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60 Bulnes, M. J., Commentary: iProcess - Judicial Emergency in Spain during the COVID-19 crises, [https://www.fairtrials.org/news/commentary-iprocess-–-judicial-emergency-spain-during-covid-19-crisis], Accessed 11 April 2021.

61 Beyond Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe, Fair Trials, June 2020, [https://www.fairtrials.org/sites/default/files/publication_pdf/Beyond%20the%20emergency%20of%20the%20COVID-19%20pandemic.pdf], Accessed 11 April 2021.

62 Ramos, V.C, Pereira, D.S., Commentary: COVID-19 - What does all this mean for your ability to defend your clients' right to a fair trial – the Portuguese case, April 7, 2020 [https://www.fairtrials.org/news/commentary-covid-19-what-does-all-mean-your-ability-defend-your-clients'-right-fair-trial-], Accessed 11 April 2021.

63 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294.

64 Klimek, L., *Mutual Recognition of Judicial Decisions in European Criminal Law,* Springer International Publishing, 2017, p. 632.

65 Case 612/15 *Kolev and others*, ECLI:EU:C:2018:392, par. 106.

66 Application no. 45106/04, judgement 5 October 2006.

of the voice and images (para 74). It is important that use of videoconference do not prevent confidential communication with the defense counsel. The European Court of Human Rights pointed out this condition in case *Marcello Viola v Italy* (para 75), which was ensured through direct contact with lawyer. Use of videoconference in judiciary is not a new technology and prior to COVID-19 it was used in specific procedures, especially in cross border or for hearing vulnerable victims.[67] The specifics of videoconferencing during COVID-19 is to replace all or majority of hearings, not to be used for limited number of specific cases. Since face to face meetings with lawyers were limited during pandemic the Fair Trials developed detail recommendations[68] on access to a lawyer, especially access to legal assistance for defendants in detention to ensure confidentiality. Recommendations were focused on secure and unlimited use for telephones, so that calls cannot be intercepted or recorded.

Introduced measures and solutions to combat COVID-19 resulted in limitation of access to a lawyer, since suspects and accused had restricted lawyers' assistance prior to police questioning as well as during police questioning.[69] The EU right acquis on right to access a lawyer includes right to receive legal assistance at the early stages of criminal proceedings, including prior to any questioning of police, which helps a person to understand their situation and consequences of their choices. In addition, the right to access to a lawyer includes the physical presence and effective participation of their lawyer during questioning by police to enable to intervene during the questioning.

In the Netherlands, stakeholders have raised concerns about the effective safeguarding of the right to a fair trial and quality of justice during pandemic,[70] since the prosecution service has announced plans to make increased use of its power to

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67 Gori, P., Pahladsingh, A. *Fundamental rights under Covid-19: an European perspective on videoconferencing in court*, ERA Forum, Vol. 21, 2021, p. 575.

68 Safeguarding the right to a fair trial during coronavirus pandemic: remote criminal justice proceedings, 2020 Fair Trials, [https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf], Accessed 11 April 2021.

69 Justice Under Lockdown in Europe – A survey on the impact of COVID-19 on defence rights in Europe, 2020, Fair Trials, [https://www.fairtrials.org/sites/default/files/publication_pdf/COVID-19%20Europe%20Survey_Justice%20under%20lockdown%20paper_Sept%202020_0.pdf], Accessed 11 April 2021.

70 The Netherlands Committee of Jurists for Human Rights, 2020, Letter on concerns about corona measures in criminal justice.

decide itself on certain criminal cases.[71] This could have an impact on the right to a fair trial, if citizens are not adequately informed.[72]

Similar situation occurred in the USA where has been an increase in plea bargains during the COVID-19 pandemic.[73] Council on Criminal Justice raised concern that defendants may feel pressured to plead guilty to stay out of prison.[74]

When it comes to the right to access case files as an aspect of a right to a fair trial, it is enshrined in the EU Directive on the right to information in criminal proceedings which gives suspect and accused persons the tight to access all documents in the possession of the competent authorities.[75] To allow effective exercise of the right to access to the materials of the cases the access should be granted in due time.

In Belgium, lawyers reported that they were provided access to the case file for only 48 hours with no option of receiving copy of the file for clients in pre-trial detention.[76] Only later, the lawyers were allowed to scan documents. In Portugal, the lawyers could access to case files after submitting a special application and scheduling a specific time and date from relevant authority.[77] Some EU member states made electronic access to the case files, but it depends on availability of equipment.[78]

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71 Such decisions by the prosecution service cannot impose a prison sentence and can be contested in court. See the Letter from the Minister for Justice and Security and the Minister for Legal Protection to the House of Representatives of 25 June 2020: 'Contours of the Approach to Address Backlogs in Criminal Justice'.

72 See in that regard: National Ombudsman, Proper Provision of Information is the Basis of Access to Justice – Bottlenecks in the Provision of Information about Penalties and Dismissal Decisions.

73 Baldwin, J.M., Eassey, J.M., Brooke, E.J., *Court Operations during the COVID-19 Pandemic*, American Journal of Criminal Justice, Vol. 45, Issue 4, 2020, pp. 743-758.

74 Council on Criminal Justice, April 17, 2020, Facing COVID-19 in the Courts (Webinar), [https://justiceroundtable.org/event/council-on-criminal-justice-facing-covid-19-in-the-courts], Accessed 11 April 2021.

75 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142.

76 See: [https://www.lecho.be/dossiers/coronavirus/la-justice-penale-au-rabais-bienvenue-chez-kafka-2-0/10225297.html], Accessed 11 April 2021.

77 Ramos; Pereira, *op.cit.*, note 62, note 9.

78 Some courts in France granted online access to specific documents. See: Dreu, C.A., Commentary: Silver lining to a very dark cloud: what could we learn from the COVID-19 crisis? A French perspective, [https://www.fairtrials.org/news/commentary-silver-lining-very-dark-cloud-what-could-we-learn-covid-19-crisis-french-perspective], Accessed 11 April 2021.

In addition to legislative actions, safety measures should be adopted, such as glass protections at police stations or in detention facilities, in order to enable the exercise of the right of access to lawyer or the right to an interpreter.

In times of COVID-19, the procedural rights of suspects and accused persons need to be respected to ensure fair proceedings. Limited derogations, which are provided for by the decrees, should be interpreted restrictively by the competent authorities and not be employed on a large scale.

2.6. Abuse of criminal law in order to supress freedom of speech and political dissidents

The state of emergency strengthened the executive branch at the expense of the legislative and judicial. Authoritarian governments are therefore happy to resort to a state of emergency to use broader powers of state authorities in accordance with "imposing opposition and restricting human rights".[79] Although "governments should counter COVID-19 by encouraging people to mask up, not shut up",[80] according to some reports, at least 83 governments around the world have abused the pandemic to justify violating the freedom of speech and peaceful assembly.[81] For example, charges were brought by Polish authorities against two activists for a poster campaign. They were detained after they put up posters in Warsaw accusing the government of manipulating COVID-19 statistics. Activist were charged with theft and burglary for removing the glass covering of advertisements on bus shelters to replace them with their own posters and they faced possible prison sentences of up to 10 years. Amnesty International warned that charges might create additional barriers to the work of human rights defenders.[82]

Abuse of the state of emergency to settle accounts with political opponents is not uncommon. The European Court for Human Rights also ruled on this, warning on several occasions that "public emergency threatening the life of the nation must

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79 Venice Commission, *Compilation of Venice Commission opinions and reports on states of emergency*, CDL-PI(2020)003, *op.cit.*, para 51.

80 Gerry Simpson associate crisis and conflict director at Human Rights Watch in Human Rights Watch. See: Human Rights Watch, *Covid -19 Triggers Wave of Frees Speech Abuse, Scores of Countries Target Media, Activist, Medics, Political Opponents*, 11 February 2021, [https://www.hrw.org/news/2021/02/11/covid-19-triggers-wave-free-speech-abuse], Accessed 12 March 2021.

81 Ibid.

82 See: Amnesty International, *Poland: Activists at risk of 10-year jail term for COVID-19 poster campaign challenging government statistics*, 11 June 2020, [https://www.amnesty.org/en/latest/news/2020/06/poland-activists-at-risk-of-10-year-jail-term-for-covid-19-poster-campaign-challenging-government-statistics/], Accessed 12 March 2021.

not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society".[83]

2.7. Partial suspension of the *work* of *courts*

The courts have been unable to simultaneously meet general safety guidelines while maintaining full operations and usual caseloads. Subsequently, the primary response among many courts has been to either reduce or eliminate their in-person practice by halting all such operations, even closing their physical locations.[84] The reduced activities in courts and lockdown measures have impact on court operations. Majority of countries were looking for solutions that would limit interaction with courts and suspension of non-urgent cases was one of the applied measures.

In Hungary, the Government ordered by Decree that the functioning of Hungarian courts be suspended, apart from certain urgent cases, for an undefined period of time.[85] Two weeks later, the Government introduced changes to the procedural laws, aimed at facilitating the operation of the justice system during the state of danger.[86] In Bulgaria, following a decision of the Judges' chamber of the Supreme Judicial Council,[87] the processing of court cases was temporarily suspended for one month during the state of emergency, except for urgent cases.[88] In Austria, most activity of courts was temporarily suspended from 16 March to 13 April 2020 due to the COVID-19 pandemic, with specific measures adopted to postpone procedural deadlines, which could lead to increased backlogs in the justice system.[89]

Although suspension or limitation of courts' operations were necessary measure at the beginning of pandemic, it was not sustainable solution and Governments and judiciary were obliged to find more suitable solutions, either through use of information technologies, or amendments to procedural legislation and incentives for

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83 *Mehmet Hasan Altan v. Turkey*, ECHR, Appl.no.13237/2017, 20 March 2018, par. 210; as well as Şahin *Alpay v. Turkey,* ECtHR, Appl.no.16538/17, 20 June 2018, par. 180.

84 Miller, C., How COVID-19 is Impacting California Courts: Roundup of Services, 2020, [https://www.law.com/therecorder/2020/06/16/how-covid-19-is-impacting-california-courts-roundup-of-services/?slreturn=20200528125509], Accessed 11 April 2021.

85 Government Decree 45/2020 of 14 March 2020.

86 Government Decree 74/2020 of 31 March 2020. That Decree became ineffective on 18 June 2020, in accordance with Article 53(4) of the Fundamental Law.

87 Extraordinary Session, Short Protocol No. 9, 10 March 2020.

88 Such as those on reviewing pre-trial detention or undertaking victim protection measures and child protection measures.

89 *1. und 2. COVID-Justizbegleitgesetz.*

court settlements.[90] Such approach was taken in Italy, where Government adopted organizational measures in cooperation with the Heads of Judicial Offices and the High Council for Judiciary, allowing for remote civil and procedural hearings.[91]

Spain declared state of alarm on 14 March 2020[92] and during period of three months the activities of the courts were limited, procedural deadlines being suspended, and procedural acts being maintained only in urgent procedures. The second nationwide state of alarm has been in place since 25 October 2020 till 9 May 2021,[93] and limitation to rights approved in the context of the second state of alarm are much less restrictive than those imposed between March and June 2020. Concerns was raised that these measures may have impact on the justice system to deal with the backlogs generated during state of alarm.[94] Efforts are undertaken to minimize the impact of the COVID-19 pandemic on the justice system through adoption of new legislation foreseeing special procedural and organizational measures.[95] The measures envisaged also include a wider use of digital technologies for procedural acts and trial for crimes punishable with up to five years of imprisonment.

In Portugal, several measures were adopted related to teleworking and possibilities to hold hearings and conduct other procedures remotely.[96] Deadlines in non-urgent cases were suspended, and non-urgent cases were adjourned. Portugal foresees a set of measures to address challenges after initial lockdown. Special focus of the measures is to address increased demand for justice and need to reduce backlog. One of the envisaged measures is a temporary regime of reduction of court fees to facilitate reaching of court agreements.

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90 Kostić, J.; Matić Bošković, M., *How COVID-19 Pandemic Influences Rule of Law Backsliding in Europe*, Regional Law Review, Institute of Comparative Law, 2020, pp. 77-90.

91 Art. 83 of the Decree-law of 17 March 2020 n. 18.

92 Royal Decree 463/2020, declaring the state of alarm as a result of the health crisis caused by COVID-19.

93 Royal Decree 926/2020.

94 The Commission has also addressed this issue in the context of the European Semester. Recital 28, Council Recommendation on the 2020 National Reform Programme of Spain and delivering a Council opinion on the 2020 Stability Programme of Spain, p. 8 [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0509&from=EN], Accessed 11 April 2021.

95 For example, 11 to 31 August were declared working days for procedural purposes.

96 2020 Rule of Law Report – Country Chapter on rule of law situation in Portugal, SWD(2020) 321 final, p. 5.

2.8. Risks of using ICT in criminal justice

To enable functioning of the courts, countries where level of information technology development allowed introduced modalities of online hearings and/or other use of modern technologies during proceedings like electronic filing.

The COVID-19 pandemic enhanced the process of digitalization of the justice system. A number of initiatives are being taken ranging from allowing court users to monitor on-line the stages of proceedings to organize on-line hearings. The crisis led to an acceleration of digitalization in criminal trials, where the Prosecution service was granted the possibility to hear witnesses and examine suspect through video conference and appoint experts.[97]

Countries in which e-justice systems are well advanced, like in Estonia and Latvia, showed a high degree of accessibility to court users and functioning of the courts continued without significant disruption during COVID-19 pandemic.[98]

However, one has to be careful with conclusions. The access to justice is definitely improved by virtual courts, with the major exception of digitally excluded people who does not have access to internet, computers on technology in general. The Eurostat numbers show some alarming data regarding the member states disparities. According to 2020 data, in the Netherlands almost all households have broadband access (97 percent), compared to 79 percent of households in Bulgaria and 73 percent in Bosnia and Herzegovina.[99]

Additionally, the uneven use of information and communication technologies tools in the EU member states judicial system put additional challenge for access to justice across the Europe.[100] The European Commission carried out comprehensive analysis and mapping of the digitalisation of justice in all member states, which reveals different level of progress amongst the member states.[101] Specifically,

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97 2020 Rule of Law Report – Country chapter on rule of law situation in Italy, SWD(2020) 311 final, p. 5. Information received in the context of the country visit and of the consultation process for the preparation of the report, e.g. Ministry of Justice contribution (an increase of 89% in videoconferences has been registered in May 2020 with respect to May 2019).

98 2020 Rule of Law Report – The Rule of Law situation in the European Union, SWD(2020) 580 final, p. 11.

99 Eurostat, Households with broadband access, 2020, [https://ec.europa.eu/eurostat/databrowser/view/tin00073/default/table?lang=en}], Accessed 5 May 2021.

100 Wahl, T., Commission Plans to Speed Up Digitalisation of Justice Systems, January 2021, Eucrim.

101 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Digitalisation of justice in the European Union – A toolbox of opportunities, {SWD(2020) 540 final} Brussels, 2.12.2020 COM(2020) 710 final.

in the context of criminal law, victims can access an electronic file in seven member states and defendants in nine, evidence can be submitted to a court exclusively in digital format in the context of all types of criminal proceedings in 13 member states. To overcome this inequality and to ensure protection of human rights the European Commission developed plan to support advancement of national justice system digitalisation and improving digitalisation of cross-border judicial cooperation at the EU level.

3. PANDEMIC AND MUTUAL TRUST IN THE EU

The high level of trust between EU member states on which the mutual recognition instruments are based on strict respect of high standards of individual rights protection in each member state.[102] In addition, the mutual recognition instruments are based on the premiss that the criminal courts meet the standards of effective judicial protection, which include in particular independence and impartiality of these courts.[103]

The existence of a real risk that person to whom mutual recognition instrument relates to would suffer a violation of his fundamental rights, can present reason for member state judicial authority to refuse to act according to the request from the instrument.[104] Belgium and the Netherlands have specifically included a human rights clause in their national legislation for implementation of European arrest warrant,[105] allowing a judge to refuse extradition in case of a potential breach of human rights.[106]

The relevance of organization of judiciary is confirmed in the EU Court of Justice decision from June 2019 in the case Commission against Poland.[107] Court of Justice conclude that Poland took obligation to follow "common values from article 2 of the EU Treaty", including the rule of law. Court of Justice also stated that "although the organization of judiciary is within the member states jurisdiction", that does not mean that member states can violate EU acquis. In September 2020, the Inter-

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102 Willems, A., *The Principle of Mutual Trust in EU Criminal Law*, 2021, Hart Publishing, p. 26.

103 Suominen, A., *The Principle of Mutual Recognition in Cooperation in Criminal Matters*, Intersentia, 2011. p. 51.

104 According to article 1 (3) of the Framework Decision 2002/584 mentioned decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

105 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190/1.

106 Willems, *op.cit*, note 102, p. 65.

107 *Commission v Poland*, Case C-619/18, ECLI:EU:C:2019:531.

national Legal Assistance Chamber of the Amsterdam District court announced that it would temporarily stop extraditing people who are suspected or convicted of a crime to Poland due to concerns related to the independence of the Polish judiciary. This is the first time that a domestic court has issued a blanket ban on extradition to another EU member state. The Amsterdam Court's announcement present opportunity for the Court of Justice of the EU to revise its approach. In addition, the Amsterdam court would lead to the projection of fundamental rights, including the right to a fair trial.

Overcriminalisation during COVID-19 outbreak and partial double criminality check potentially could raise challenges for application of mutual recognition instruments, especially European Arrest Warrant.[108] Although, according to the Framework Decision 2002/584/JHA the double criminality check is not required where the offence that the warrants refer to is included in the list of 32 categories of offences, the overcriminalisation during COVID-19 could create problems in assessing the law of issuing state that is not included in the list. The list linked to the European Arrest Warrant refers rather to criminological categories than to the judicial definition of infringements, which leaves a wide margin for interpretation on the part of national judicial authorities. Some countries criminalised and prosecuted behaviour that in other countries has been purposely excluded.[109]

It has to be seen how the measures introduced during COVID-19 pandemic will influence on the mutual trust and mutual recognition instruments in the EU and member states. Limitation to ensure procedural rights of suspect and accused persons might have impact on individual decisions. Although each country proposed anti-pandemic measures based on the specific situation in their country, the EU and member states should bear in mind that these measures have cross-border impact.

4. CONCLUSION

The COVID-19 crisis caused unprecedent challenges for criminal justice system across Europe. When the crisis began in March 2020, all governments and judiciaries in Europe imposed strict measures to contain the spread of the virus. Court operations were reduced to a minimum, home based work was organised, and only emergency personnel attended the courts to process urgent cases. In many countries, the lockdown eased, and courts resumed operations during the summer

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108 Janssens, C., *The Principle of Mutual Recognition in EU Law*, Oxford University Press, 2013, p. 176.

109 See: Amnesty International, *Poland: Activists at risk of 10-year jail term for COVID-19 poster campaign challenging government statistics*, 11 June 2020.

2020. However, due to the second and third wave of COVID-19 spread during winter 2020/2021 the courts operations were again limited, depending on situation in each country.[110]

In parallel to the measures introduced by judiciaries, the Governments opted for use of criminal law as an instrument for ensuring implementation of anti-pandemic measures. Modalities of use of criminal law vary across Europe, some countries introduced new crimes and severe sanctions. Frequent changes in the law and overcriminalisation caused challenges for legal certainty, both for citizens and judiciary. There are examples of Governments' interventions that jeopardise independence of judiciary, such as automatic prolongation of detention in France, or instruction for conducting misdemeanour procedure in parallel to the criminal procedure in Serbia.

Possible violations of human rights, especially rights of defendant, as well as over-criminalisation could have implication on mutual recognition instruments and cause challenges for their application.

The crisis created an opportunity for judiciaries to make better use of remote and e-tools for case processing and made decision makers, court staff and court users more apt to change. Responding to the challenges faced by EU's judicial systems during COVID-19 crisis, the European Commission has initiated legislation as part of the Roadmap on Digitalisation of justice in the EU.[111] However, the used of ICT tools in the judiciary raises questions of protection of procedural rights of defendants, which required additional protection measures to ensure smooth application of e-tools. Also, the level of ICT equipment development and internet connection caused challenges in implementation and provide additional obstacles for exercise of procedural rights.

Countries and judiciaries across the EU should be prepared for crisis situations in the future. Lessons learned from COVID-19 outbreak should be used and applied in the future to prevent introduction of any measures and rules that could jeop-

[110] In the Ireland the remote work has been continued during spring 2021, and priority has been given to urgent matters such as domestic violence and trials with single accused person [https://www.courts.ie/covid-19-response-updates], Accessed 5 May 2021. In Croatia the president of the Supreme Court adopted Instruction for court presidents to organize court's work in line with predefined models of operations to limit circulation of parties and citizens in the courts [http://www.vsrh.hr/CustomPages/Static/HRV/Files/2020dok/Priopcenja/Upute%20o%20mjerama%20za%20sprječavanje%20širenja%20epidemije%20bolesti%20COVID-19%20od%202.11.pdf], Accessed 5 May 2021.

[111] Roadmap on Digitalisation of justice in the EU, [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12547-Digitalisation-of-justice-in-the-EU], Accessed 12 April 2021.

ardise independence of judiciary, rights of defendants in the criminal procedure, legal certainty and stability and overuse of criminal law.

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Topic 3

EU civil law and procedure

UDK 656.7:614.4
347.824:614.4
Preliminary communication

AIR TRANSPORT AND PASSENGER RIGHTS PROTECTION DURING AND AFTER THE CORONAVIRUS (COVID-19) PANDEMIC*

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ABSTRACT

A pandemic caused by the COVID-19 has caused disorders and enormous damage in all modes of transport. Carriers as well as transport users have faced great challenges of maintaining traffic. Measures and requirements imposed on them were often obscure, imprecise, and the journey itself was uncertain. Passengers were in fear of whether they would be able to reach their destination, but also whether they will succeed in preserving their health. Carriers, on the other hand, have also sought to adapt and provide passengers with safe transport. Nevertheless, the pandemic caused financial collapse of many carriers, landed the world fleet and closed many airports.

Various legal instruments related to the protection of public health are applied in air transport, and they have been adopted within the framework of the World Health Organisation (WHO), the International Civil Aviation Organisation (ICAO) and the European Aviation Safety Agency (EASA), which will be presented in the paper.

* This paper is a product of work that has been fully supported by the Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, under the project No. IP-PRAVOS-5 "Challenges and threats of modern transport and new legal solutions".

Various epidemiological measures related to the COVID-19 coronavirus pandemic have been prescribed in air transport, applicable during the journey, which have certain specifics in relation to other modes of transport. The paper will present epidemiological measures as well as the procedure applied when there is a passenger on the flight who shows symptoms of an infectious disease, and new procedures related to transport of goods. It will also address the obligation to complete certain forms and provide various information as well as the obligation to compensate costs for cancelled flights.

There is no doubt that the COVID-19 pandemic has a significant economic impact on air transport, and efforts will be made to present measures and provide forecasts for the recovery of air traffic in the period that follows. The paper will also address the question as to whether existing legislation and measures are appropriate, whether relevant international organisations have taken prompt measures to protect and ensure air transport during the pandemic, and whether sufficient measures have been taken to protect the health of passengers on the flight.

***Keywords**: air transport, COVID-19 pandemic, passenger rights, epidemiological measures, health safety*

1. INTRODUCTION

Air transport is one of the most COVID-19 pandemic affected transport modes. World media reported on cancelled flights, closed airports, fleet landing and the complete airline collapse. According to available data, the decline in air transport in 2020 amounted to more than 60%[1] compared to 2019, and such data is also applicable to the Republic of Croatia, i.e. 60%.[2]

In order to prevent the spread of SARS-Cov-2, flights were cancelled and states made various decisions and adopted numerous measures. The cancelled flights had a detrimental effect not only on the transport of passengers but also on the transport of cargo, and problems also arose with the transport of essential medical supplies. All this required urgent measures at European Union level, but also globally, with international organisations such as the World Health Organisation (hereinafter: WHO) and the International Civil Aviation Organisation (hereinafter: ICAO) that played an important role. WHO, ICAO and the European Aviation Safety Agency (hereinafter: EASA) have issued a series of health and safety guidance documents for airlines, crew members, and airports, aimed at preventing coronavirus infection and spread. However, all stakeholders are faced with a difficult task - to ensure a normal course of flights in 'abnormal' conditions.

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1 ICAO, *Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis*, [https://www.icao.int/sustainability/Documents/COVID-19/ICAO_Coronavirus_Econ_Impact.pdf], Accessed 28 March 2021.

2 Hrvatska kontrola zračne plovidbe, *Financijski plan HKZP-a za 2021.,* [https://www.crocontrol.hr/app/uploads/2021/02/HKZP-FIN-PLN-2021.pdf], Accessed 28 March 2021, p. 5.

We have been witnessing the difficult flow of traffic, especially passenger traffic, and a large number of dissatisfied passengers, especially on international flights. Uncertainty as to whether and under what conditions it will be possible to reach the destination while maintaining good health has resulted in numerous travel postponements.

The paper presents various legal instruments related to the protection of public health that are applied in air transport, which are adopted within the framework of WHO, ICAO and EASA. Various epidemiological measures related to the COVID-19 coronavirus pandemic that have been prescribed in air transport will also be presented. The paper will also address the obligation to complete certain forms and provide various information as well as the obligation to compensate costs for cancelled flights.

There is no doubt that the COVID-19 virus pandemic has had a significant economic impact on air transport, and efforts will be made to present measures and provide forecasts for the recovery of air traffic in the period that follows. Finally, the authors will try to answer the question as to whether existing legislation and measures are appropriate.

2. AIR TRANSPORT AND PUBLIC HEALTH PROTECTION

2.1. A historical overview of the development of the infectious disease protection and control system

Infectious diseases have taken many lives throughout history. The need for international cooperation in the field of health care resulted in the organisation of the first International Sanitary Conference in Paris in 1851, which aimed to harmonise the implementation of mandatory quarantine measures in maritime transport in Europe.[3] After the cholera epidemic of 1892, the first International Sanitary Convention on the systematic infectious disease control and prevention was adopted. Conferences in Dresden in 1893 and Paris in 1894 resulted in two additional conventions relating to cholera, while the conference in Venice in 1897 resulted in an international convention dealing with prevention of the spread of plague. These four conventions were consolidated into a single International Sanitary Convention in 1903,[4] which was changed again at the conference held in Paris in 1912.[5]

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3 World Health Organisation, *Global Health Histories, Origin and development of health cooperation*, [https://www.who.int/global_health_histories/background/en/], Accessed 21 January 2021.

4 *Ibid*.

5 Stock, P. G., *The International Sanitary Convention of 1944,* Proceedings of the Royal Society of Medicine, Vol. XXXVIII, Issue 7, 1945, p. 310.

The idea of forming a permanent body to manage this system was developed in this period. Thus, in Europe, the Office International d'Hygiène Publique was established in 1909, which managed the infectious disease control and prevention system until the beginning of World War I, while in America, there was the International Sanitary Bureau, which was later renamed the Pan American Sanitary Bureau.[6]

In the period between World War I and World War II, there were various changes in the institutions themselves, but it can generally be considered that the joint initiative in the field of infectious disease prevention in that period was in the background. In 1943, the United Nations Relief and Rehabilitation Administration (UNRRA)[7] was established in Washington D.C. as an institution whose task was, *inter alia*, to monitor and prevent infectious diseases, and the Health Committee was established as an advisory body. The European Regional UNRRA Office was set up in London. This institution ceased to function in 1946 with the initiative to establish a special organisation within the United Nations. Based on this initiative, the World Health Organisation (WHO) was founded in 1948 as a specialised agency of the United Nations. Its main purpose is to achieve the highest possible level of health for all peoples, and the health of all peoples has been established as a prerequisite for achieving international peace and security.[8]

2.2. Infectious diseases and air transport

The increase in air transport in the early 1930s allows for increasing connectivity between different countries, but also raises the question of an increased risk of the spread of infectious diseases. In order to create common procedures and measures for the prevention of infection among both passengers and crew members, the International Sanitary Convention for Aerial Navigation[9] was adopted in 1933. This convention, although not widely accepted, represents a turning point in air

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See also: International Sanitary Convention, League of Nations Treaty Series - LNTS, Vol. 4, No. 112, 1912. p. 28. The International Sanitary Convention of 1912 was amended in 1926, 1933, 1938 and 1944.

6 World Health Organisation, *op. cit.*, note 3.

7 Stock, P. G., *The International Sanitary Convention of 1944,* Proceedings of the Royal Society of Medicine, Vol. XXXVIII, Issue 7, 1945, pp. 309-316.

8 For more details, see: Lapaš, D., *Pravo međunarodnih organizacija*, Narodne novine, Zagreb, 2008, p. 204.

9 Stock, *op. cit.*, note 5, p. 311.
This convention was later amended in 1944. The Republic of Croatia is not a party to the Convention. United Nations Treaty Series Online, *International Sanitary Convention for Aerial Navigation, 1944*, [https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280163 91a&clang=_en], Accessed 20 March 2021.

transport in terms of international cooperation in the field of the prevention and control of infectious diseases. The document contains binding procedures for five infectious diseases, i.e. plague, cholera, yellow fever, typhus and smallpox. Also, the obligation to fill in the Personal Declaration of Origin and Health document has been introduced, which the commander of an arriving aircraft must present to the health officer together with all necessary certificates of additional hygiene measures.[10]

At the time when the UNRRA was established, an initiative was launched in Washington D.C., the United States, to create common international civil air traffic regulation and coordination. Under this initiative, the Convention on International Civil Aviation[11] (also known as the Chicago Convention) was signed in Chicago in 1944 and it entered into force in 1947. The Chicago Convention established the International Civil Aviation Organisation (ICAO) as a specialised organisation whose task is to coordinate the establishment of various new rules, standards and procedures necessary to conduct international air transport. ICAO works to develop international Standards and Recommended Practices (SARPs) used by states when enacting national civil aviation regulations.[12] In 1947, ICAO became a specialised agency of the United Nations.[13]

In its Article 14, the Convention on International Civil Aviation provides for measures to prevent the spread of infectious diseases (cholera, typhus (epidemic), smallpox, yellow fever, plague, and other diseases) by air and obliges Contracting States to cooperate with organisations dealing with international regulations on sanitary measures applicable to aircraft in terms of the implementation of measures to combat infectious diseases and prevent their spread.[14]

In 1951, WHO issued the International Sanitary Regulations, a document that regulates the prevention and control of specific infectious diseases. In 1969, this document was revised and renamed the International Health Regulations (IHR) and is legally binding upon the signatories. Over time, the IHR have undergone revisions, primarily to regulate procedures for infectious diseases not listed in the

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10 Stock, *op. cit.*, note 5, p. 311.

11 Convention on International Civil Aviation, Official Gazette, International Agreements, No. 1/1996.

12 Vasilj, A.; Činčurak Erceg, B., *Prometno pravo i osiguranje*, Sveučilište Josipa Jurja Strossmayera u Osijeku, Pravni fakultet Osijek, Osijek, 2016, p. 49.

13 ICAO, *ICAO and the United Nations*, [https://www.icao.int/about-icao/History/Pages/icao-and-the-united-nations.aspx], Accessed 21 January 2021.

14 Convention on International Civil Aviation [https://www.icao.int/publications/Documents/7300_cons.pdf], Accessed 30 January 2021.

document, and a particularly significant revision of 2005[15] followed the outbreak of the Severe Acute Respiratory Syndrome (SARS). As it is necessary to prescribe guidelines and procedures related to air transport, as two specialised UN agencies, ICAO and WHO work closely together, and following the amendment to the International Health Regulations in 2005, ICAO revised the Standards and Recommended Practices (SARPs).[16]

The SARPs represent the standards embedded by virtue of the annexes in the Chicago Convention under Article 37.[17] Annex 9 to the Chicago Convention (2005) imposes an obligation on all operators to report any suspected case of infectious disease on aircraft and to comply with all the provisions of the Convention related to infectious diseases.[18]

In the same year, in cooperation with WHO, the International Air Transport Association (IATA) and the Airports Council International (ACI), ICAO published Guidelines for states concerning the management of communicable disease posing a serious public health risk.[19] Based on the new guidelines, the parties to the Chicago Convention are required to develop their national aviation safety plans[20] and procedures related to the protection and prevention of infectious diseases, and these guidelines were issued to assist in the development of these plans.

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15 International Health Regulations (2005) (Odluka o objavi Međunarodnih zdravstvenih propisa (2005)), Official Gazette, International Agreements, No. 9/2013.

16 ICAO, *Managing Communicable Disease in Aviation*, [https://www.icao.int/safety/aviation-medicine/pages/healthrisks.aspx], Accessed 30 January 2021.

17 Pursuant to Article 37(1) of the Chicago Convention, all Contracting States undertake to cooperate to ensure uniformity in regulations, standards, procedures, and organisation relating to aircraft, personnel, airways and auxiliary services in all areas where such uniformity would facilitate and improve air navigation.
All Contracting States to the Chicago Convention undertake to accept all prescribed standards, which enables unified procedures and gives the right to overfly another country's airspace.

18 ICAO, *International Standards and Recommended Practices, Annex 9 to the Convention on International Civil Aviation*, [https://www.ifrc.org/docs/IDRL/Chicago%20Convention%20Annex%209.pdf], Accessed 3 February 2021.
At the same time, Member States undertake to take all necessary measures to prevent the spread of infectious diseases such as cholera, typhus, smallpox, yellow fever, plague and other infectious diseases, as assessed at a specific moment by the Member State.

19 ICAO, *Guidelines for states concerning the management of communicable disease posing a serious public health risk* [https://www.icao.int/safety/aviation-medicine/guidelines/avinfluenza_guidelines.pdf], Accessed 3 February 2021.

20 The 2015 National Aviation Safety Programme is in force in the Republic of Croatia, and the Safety Plan is defined in Annex 4 to the aforementioned National Programme. (Decision on the adoption of the National Aviation Safety Programme (Odluka o donošenju Nacionalnog programa sigurnosti u zračnom prometu), Official Gazette, No. 141/2015).

In 2006, the Collaborative Arrangement for the Prevention and Management of Public Health Events in Civil Aviation (CAPSCA)[21] was concluded. With this agreement, in addition to WHO, ICAO calls for various international, national and local organisations to prepare joint plans and programmes aimed at the protection of public health in the field of air transport.[22] The three most important areas covered by this programme relate to:

1. Population - implementation of a measure to control the risk of a pandemic;
2. Passengers and aircraft crew - measures to reduce the risk of the spread of infectious diseases on board the aircraft;
3. Economic measures - the prevention of a financial impact on air transport due to a pandemic.[23]

CAPSCA also provides assistance in relation to the implementation of ICAO Standards and Regulations (SARPs) and International Health Regulations (IHR), assesses readiness of states to respond to events in air transport that pose a risk to public health, and supports and assists the states in developing their national aviation safety programmes in the field of public health protection.[24]

The revised Annex 9, which has been in force since 2007, has introduced changes and regulatory obligations related to airlines, flight and cabin crew, the procedure to be carried out in case there is a suspected case of infectious disease on board the aircraft, aircraft cleaning and disinfection, biohazardous waste disposal and the like. In cooperation with WHO and IATA, the Passenger Locator Card (PLC) form was introduced. The PLC is intended for rapid data collection for the purpose of providing the information needed by public health authorities. A Health Declaration has been added to the existing General Declaration form, which lists the infectious disease symptoms as guidelines for assessment and where data will be entered subsequently on passengers who develop such symptoms on board the aircraft, as well as the circumstances that may have led to the spread of the disease and information on disinfection done. The pilot-in-command is obliged to inform air traffic control (ATC) on the presence of symptoms of an infectious disease on board the aircraft. The list of symptoms has been agreed upon and ac-

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21 ICAO, *Collaborative Arrangement for the Prevention and Management of Public Health Events in Civil Aviation – CAPSCA*, [https://www.icao.int/safety/CAPSCA/Pages/About-CAPSCA.aspx], Accessed 6 February 2021.

22 *Ibid.*

23 Evans A., *ICAO and prevention of spread of disease*, [https://www.icao.int/SAM/Documents/2009/MEDSEM/AVMED-%20prevention%20of%20spread%20of%20disease.pdf], Accessed 6 February 2021.

24 ICAO, *op. cit.*, note 21.

cepted by all public health and aviation organisations: fever (38°C or greater) + one of the following: "appearing obviously unwell; persistent coughing; impaired breathing; persistent diarrhoea; persistent vomiting; skin rash; bruising or bleeding without previous injury; or, confusion of recent onset".[25]

Annex 6 of 2009 introduced additional standards (SARPs) providing for the quantities of necessary on-board medical supplies and equipment and the introduction of the Universal Precaution Kit (UPK) "for the use of cabin crew members in managing incidents of ill health associated with a case of suspected communicable disease, or in the case of illness involving contact with body fluids".[26]

We will also mention here Suspected Communicable Disease Guidelines for cabin crew, i.e. guidelines for procedures of cabin crew in the event of a case of suspected communicable disease on board an aircraft, published in 2017 by IATA in cooperation with WHO and ICAO.[27]

Let us just mention that at European Union level, the European Union Aviation Safety Agency (EASA) has been operating since 2002, working closely with ICAO and supporting the implementation of common standards in Member States.[28] EASA also cooperates with IATA, in particular in the field of security and other areas of common interest.

3. COVID-19 PANDEMIC AND AIR TRANSPORT

On 31 December 2019, in the city of Wuhan, Hubei province in China, several cases of non-specific pneumonia were reported,[29] for which the causal agent, a novel coronavirus (later named SARS-Cov-2) was identified in January 2020, and a new disease caused by this virus is called coronavirus disease COVID-19.[30] At the meeting of the Emergency Committee convened by WHO on 30 January

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25 ICAO, *ICAO health-related documents*, p. 6 [https://www.icao.int/MID/Documents/2013/capsca-mid3/ICAOHealthRelatedSARPsandguidelines.pdf], Accessed 7 February 2021.

26 *Ibid*., p. 2.

27 IATA, *Suspected Communicable Disease, Guidelines for cabin crew*, [https://www.iata.org/contentassets/f1163430bba94512a583eb6d6b24aa56/health-guidelines-cabin-crew.pdf], Accessed 7 February 2021.

28 EASA, *Cooperation with the International Civil Aviation Organisation (ICAO)*, [https://www.easa.europa.eu/domains/international-cooperation/cooperation-with-ICAO], Accessed 7 February 2021.

29 Croatian National Institute of Public Health, *Epidemija pneumonije/akutne respiratorne bolesti uzrokovane novim koronavirusom, Kina*, [https://www.hzjz.hr/sluzba-epidemiologija-zarazne-bolesti/epidemija-pneumonije-povezana-s-novim-koronavirusom-kina/], Accessed 7 February 2021.

30 Croatian National Institute of Public Health, *Pitanja i odgovori o bolesti uzrokovanom novim koronavirusom COVID-19*, [https://www.hzjz.hr/sluzba-epidemiologija-zarazne-bolesti/pitanja-i-odgovori-o-novom-koronavirusu-2019-ncov/], Accessed 7 February 2021.

2020, it was decided to declare this disease a Public Health Emergency of International Concern – PHEIC,[31] and on 11 March 2020, WHO declared COVID-19 a pandemic.[32]

The deteriorating epidemiological situation around the world has significantly affected air transport, especially because of fear of increased risk and SARS-CoV-2 transmission due to large passenger flow, and time spent at an airport and on the aircraft. Air transport has faced new circumstances and the need for effective measures in unforeseen situations. Measures to prevent the spread of the epidemic prescribed and implemented by states pursuant to their national regulations, together with regulations and standards by WHO, ICAO, IATA, FAA, EASA and other partners, were aimed at reducing the possibility of disease transmission, providing passenger and staff protection and restoring passenger confidence in air travel, which will consequently affect the recovery of air transport as the industry most affected by the economic consequences of the pandemic.

Given the rapid spread of the virus and the danger of in-flight COVID-19 transmission, on 6 March 2020, ICAO and WHO published a Joint statement[33] containing aviation-related instructions placing emphasis on the importance of complying with prescribed standards (SARPs) relating to preventive measures for infectious diseases. At the same time, ICAO has taken a leading role in providing guidance and information to CAPSCA Member States and organisations, and together with IATA, the Airports Council International (ACI) and other partners, it has joined forces to develop joint measures and procedures to "provide guidance to aviation authorities, airlines and airports, on appropriate measures aimed to protect the health of the travelling public and reduce the risk of transmission."[34]

Based on the ICAO guidelines, EASA and the United States Federal Aviation Administration in collaboration with IATA published guidelines with COVID-19 prevention and control procedures for aircraft operators and personnel, and various procedures to enable safe air travel. Due to a need to deliver medical supplies

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31 Croatian National Institute of Public Health, *op. cit.,* note 29.

32 WHO, *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, [https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020], Accessed 7 February 2021.

33 ICAO, *ICAO and WHO Joint Statement on COVID-19*, [https://www.icao.int/Security/COVID-19/PublishingImages/Pages/Statements/Joint%20ICAO-WHO%20Statement%20on%20COVID-19.pdf], Accessed 7 February 2021.

34 ICAO, *ICAO-WHO publish joint statement on COVID-19*, [https://www.icao.int/Newsroom/Pages/ICAO-WHO-publish-joint-statement-on-COVID-19.aspx], Accessed 8 February 2021.

and other important goods, EASA has issued a temporary permit for transport of cargo in the passenger cabin.[35]

3.1. COVID-19 Aviation Health Safety Protocol and other procedures and measures

At EU level, the European Commission, in cooperation with the European Council, has issued the European Roadmap towards lifting COVID-19 containment measures[36] containing recommendations to Member States in terms of the preservation of public health.[37] Based on this document, EASA, in cooperation with the European Centre for Disease Prevention and Control (hereinafter: ECDC), has issued the COVID-19 Aviation Health Safety Protocol – Operational guidelines for the management of air passengers and aviation personnel in relation to COVID-19 pandemic (hereinafter: the COVID-19 Aviation Health Safety Protocol),[38] a document that provides guidelines and is a source of best practice for all air transport stakeholders with the aim of protecting public health and preventing the spread of SARS-Cov-2. It is based on the Plan-Do-Check-Act (PDCA) principle aimed at protecting air passengers and aviation personnel, and providing confidence in air travel. Measures and restrictions contained therein are the result of the current situation and their lifting depends on regular assessment of the situation and the current pandemic phase.

The COVID-19 Aviation Health Safety Protocol can generally be divided into two thematic units:

1. management of passengers, and
2. management of aviation personnel.

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35 EASA, *Airworthiness aspects for transport of cargo in the passenger cabin of Large Aeroplanes*, [https://www.easa.europa.eu/newsroom-and-events/news/airworthiness-aspects-transport-cargo-passenger-cabin-large-aeroplanes], Accessed 10 February 2021. See also: EASA (European Union Aviation Safety Agency), *Guidelines transport of cargo in passenger compartment - exemptions under article 71(1) of Regulation 2018/1139 (The Basic Regulation),* [https://www.easa.europa.eu/sites/default/files/dfu/Guidelines%20for%20the%20transport%20of%20cargo%20in%20passenger%20aircraft_EASA_issue3_final.pdf], Accessed 10 February 2021.

36 Joint European Roadmap towards lifting COVID-19 containment measures [2020] OJ C 126/01.

37 European Commission, *A European roadmap to lifting coronavirus containment measures*, [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/european-roadmap-lifting-coronavirus-containment-measures_en], Accessed 11 February 2021.

38 EASA and ECDC, COVID-19 Aviation Health Safety Protocol Operational guidelines for the management of air passengers and aviation personnel in relation to the COVID-19 pandemic, Issue No. 02, Issue date: 30 June 2020, [https://www.easa.europa.eu/sites/default/files/dfu/EASA-ECDC_COVID-19_Operational%20guidelines%20for%20management%20of%20passengers_v2.pdf], Accessed 11 February 2021.

3.1.1. *Management of passengers*

Since transport has been associated with health risks related to COVID-19, Gutiérrez, Miravet and Domènech rightly state that "public transport operators must minimise the risk of contagion both on-board and during passenger waiting time."[39]

Management of air passengers provides for guidelines and measures for passengers before their trip, i.e. before arriving at the airport, those implemented at the airport and protective measures implemented on board the aircraft. Although these measures were aimed at restoring passenger confidence in air travel, a large number of guidelines combined with an uneven approach depending on national regulations leads to confusion and resistance of passengers to comply with what has been prescribed.

Aircraft operators and airport operators are obliged to inform passengers of the travel restrictions referring to those passengers who may have COVID-19-compatible symptoms, or of a travel ban imposed on a passenger diagnosed with elevated skin temperature at the airport where such thermal screening is conducted. Then, before the journey, all passengers must be informed that they are obliged to wear face masks and mouth-nose covers, with the exemption of children under 6 years of age and persons who cannot wear a face mask due to medical reasons, and reminded that the physical distance must be maintained.[40]

The COVID-19 Aviation Health Safety Protocol provides for guidelines in such cases and passengers who do not comply with the prescribed measures shall be denied entry to the airport and the aircraft. Also, if a passenger refuses to comply with the prescribed protection measures in-flight, crew members shall apply the procedures related to handling cases of unruly or disruptive passengers.[41]

Although the COVID-19 Aviation Health Safety Protocol provides for the possibility of an exemption to wearing a face mask or a face covering,[42] it does not specify how this shall be implemented. Due to situations when passengers may refuse to wear a protective mask on a flight for a medical reason, airline operators have started to request passengers exempt from wearing face masks to present medical certificates.[43]

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39 Gutiérrez, A.; Miravet, D.; Domènech, A., *COVID-19 and urban public transport services: emerging challenges and research agenda*, Cities & Health, 2020, p. 1.

40 EASA and ECDC, *op. cit.*, note 38.

41 *Ibid.* p. 9.

42 *Ibid.* p. 7.

43 Lufthansa, *Medical certificate: Wearing of a medical protective mask*, [https://www.lufthansa.com/content/dam/lh/documents/book-and-manage/travel-information/we-care/faq-mouth-nose-cover/certifi-

On board an aircraft or while purchasing an airline ticket, passengers are required to fill in a Passenger Locator form[44] and a Passenger Health Declaration. Based on these forms, passenger health status data is collected, i.e. data on possible exposure to COVID-19 and the appearance of symptoms, as well as passenger data used by public health authorities for contact tracing purposes.[45]

A Passenger Health Declaration is a statement passengers are required to have on air travel along with other documents for verification purposes during travel and on arrival. A passenger must present this declaration when boarding the aircraft, or when asked to do so by airport staff or by the designated airport medical authority.[46]

It is important that the symptoms listed on the Health Declaration form are identical to the symptoms of other diseases that are not contraindications to air travel. Given that not all airports and airlines have an elaborate procedure and rapid tests, the question arises as to whether denied travel in the event of symptoms is justified or not.

Pursuant to Article 6 of Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, airlines are obliged to collect passenger related data when they purchase a ticket or enter a check-in process that is to be communicated by the airlines to law enforcement and immigration authorities. [47] These data are also used for preventing the spread of infectious diseases in accordance with the Schengen Borders Code.[48]

Given that the data obtained are not sufficient to monitor passenger contacts in the case of a COVID-19 pandemic and their retrieval from the database is a slow process, ECDC has prescribed the minimum data necessary for the tracing process to be effective:

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cate-mask-exemption-20210125-en.pdf], Accessed 12 February 2021.

44 EASA and ECDC, *op. cit.*, note 38, pp. 21-22; ICAO, *Public Health Passenger Locator Form*, [https://www.icao.int/safety/aviation-medicine/guidelines/AvInfluenza_guidelines_app.pdf],], Accessed 12 February 2021.

45 EASA and ECDC, *op. cit.*, note 38, p. 31.

46 European Centre for Disease Prevention and Control, *Considerations relating to passenger locator data, entry and exit screening and health declarations in the context of COVID-19 in the EU/EEA and the UK*, [https://www.ecdc.europa.eu/sites/default/files/documents/ECDC-one-page_EntryScreening_Passenger-Locator-and-Health-Declarations.pdf], Accessed 12 February 2021.

47 Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data [2004] OJ L 261/24.

48 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L 77/1.

- Flight number and seat number,
- Full name,
- Date of birth (optional, but may be useful to differentiate between people with common names),
- Telephone number: a functional mobile,
- Email address.[49]

A passenger locator card contains all this information and passengers are required to fill out this form before or during their flight. The PLC data collection and processing method depends on national regulations, which creates additional pressure on both air passengers and aviation personnel. Another challenge in this data collection is the implementation of Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation – GDPR).[50] Airlines are expected to collect and submit these forms to public health authorities and it is up to the Member States "to assess whether the transfer of passenger location data from airlines to public health authorities complies with the requirements under the General Data Protection Legislation (GDPR), taking into account the legal requirements under their national law."[51]

Unlike other means of public transport, physical distancing is not mandatory in air transport, because it has been proved that the possibility of in-flight infectious disease transmission is extremely small, and the use of personal protective equipment reduces this risk even further. For this reason, airlines will ensure a physical distance between passengers if it is operationally feasible, and when it is allowed by passenger load, cabin configuration, and aircraft mass and balance requirements.[52] If it is not possible to maintain the distance between passengers, airlines are obliged to prescribe and apply risk-mitigation measures. One such measure relates to cabin air recirculation and the use of high-efficiency particulate air (HEPA) filters that do not let SARS-CoV-2. According to the IATA website, "The risk of transmission in the modern cabin environment is low for a number

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49 ECDC, *op. cit.*, note 46, p. 3.

50 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

51 ECDC, *op. cit.*, note 46, p. 3.

52 EASA and ECDC, *op. cit.*, note 38, p. 30.

of reasons: passengers face the same direction, seatbacks act as barriers, air flow is from the top to bottom, and the air is also very clean."[53]

In addition to the above measures, IATA proposes additional measures for the safety of air passengers:

- "Temperature screening of passengers, airport workers and travellers,
- Boarding and deplaning processes that reduce contact with other passengers or crew,
- Limiting movement within the cabin during flight,
- More frequent and deeper cabin cleaning, and
- Simplified catering procedures that lower crew movement and interaction with passengers."[54]

Aircraft and airport premises need to be additionally disinfected. ECDC has published guidelines[55] regarding cleaning and disinfection of the premises. These guidelines also apply to airport premises, and are contained in the guidelines published by EASA in the document Guidance on Aircraft Cleaning and Disinfection in relation to the COVID-19 pandemic.[56]

3.1.2. *Management of aviation personnel*

Management of aviation personnel focuses on personnel protection measures aimed at reducing the risk of infectious disease transmission between passengers and aviation personnel. The procedures related to physical distancing, hand hygiene and respiratory etiquette are identical to those prescribed for passengers. The aircraft operator is obliged to have a crew health monitoring programme, and aircrew members and airport staff are exempt from airport screening procedures.[57]

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53 IATA, *Cabin Air Quality* [https://www.iata.org/en/youandiata/travelers/health/cabin-air/], Accessed 12 February 2021.

54 IATA, *IATA Calls for Passenger Face Covering and Crew Masks*, [https://www.iata.org/en/pressroom/pr/2020-05-05-01/], Accessed 12 February 2021.

55 European Centre for Disease Prevention and Control, *Disinfection of environments in healthcare and non-healthcare settings potentially contaminated with SARS-CoV-2*, [https://www.ecdc.europa.eu/en/publications-data/disinfection-environments-covid-19], [https://www.ecdc.europa.eu/sites/default/files/documents/Environmental-persistence-of-SARS_CoV_2-virus-Options-for-cleaning2020-03-26_0.pdf], Accessed 12 February 2021.

56 EASA, *Guidance on Aircraft Cleaning and Disinfection in relation to the COVID-19 pandemic*, [https://www.easa.europa.eu/sites/default/files/dfu/EASA%20Guidance%20on%20aircraft%20cleaning%20and%20disinfection-issue%202.pdf], Accessed 12 February 2021.

57 EASA and ECDC, *op. cit.*, note 38, p. 24.

EASA has published Guidance Management of Crew Members in relation to the COVID-19 pandemic.[58] According to these guidelines, when creating the crew schedule, aircraft operators should maintain the same teams in order to avoid cross-contamination.[59] This document also prescribes health self-monitoring procedures and the procedure when an in-flight passenger or crew member shows symptoms that are compatible with COVID-19.

Given the large number of procedures that differed from regulators and operators, and with the aim of enforcing the prescribed standards in a quality manner, IATA has published the Health Safety Checklist for Airline Operators.[60] This document is used as a list of procedures by operators when conducting self-assessment or as a list of guidelines by those operators that want to structure their health operations management in this way.

3.2. Cargo in the passenger cabin

A large number of aircraft have been grounded and the number of cargo flights has decreased since the emergence of the SARS-CoV-2 virus as about 40% of annual global air cargo is typically transported in the bellyhold of passenger aircraft.[61] There are a number of problems that arise in freight transport including various regulations that are dynamic and unharmonised regarding testing and quarantine. A serious problem was a 14-day quarantine at the destination not only for the entire crew, but also for cargo, which implied 14-day delay. Due to this unacceptable situation, "airlines are lobbying for governments to respond with practical exemptions to these regulations such as exempting flight crew who do not interact with public from the quarantine regulations."[62]

At the same time, due to the reduced number of flights, the delivery of humanitarian aid and medical supplies has become a challenge for airlines. Due to the need to transport this type of cargo, airlines have started to consider the possibility of transporting cargo in the passenger cabin. Since passenger cabins are not designed

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58 EASA, *Guidance on the management of crew members in relation to the COVID-19 pandemic*, [https://www.easa.europa.eu/sites/default/files/dfu/EASA-COVID-19_Guidance%20on%20Management%20of%20Crew%20Members_issue%202.pdf], Accessed 14 February 2021.

59 *Ibid*., p. 7.

60 IATA, *IATA Health Safety Standards Checklist for Airline Operators*, [https://www.icao.int/safety/CAPSCA/PublishingImages/Pages/Coronavirus/IATA%20Health%20Safety%20Standards%20Checklist%20for%20Airline%20Operators.pdf], Accessed 15 February 2021.

61 World Economic Forum, *Coronavirus and aviation: Why is air cargo grounded when the world needs it most?*, [https://www.weforum.org/agenda/2020/04/coronavirus-aviation-why-is-air-cargo-grounded-when-the-world-needs-it-most/], Accessed 15 February 2021.

62 *Ibid.*

for the transport of cargo, it was necessary to prescribe the conditions under which such transport is possible.

ICAO has produced general guidelines related to aircraft modifications and the transport of dangerous goods[63] in accordance with Annex 18 stipulating standards for the Safe Transport of Dangerous Goods by Air.[64] The potential risks of such operations are the risk of smoke/fire in the passenger compartment as well as the risk of unlabelled or not correctly labelled dangerous goods.

IATA has issued Guidance for the transport of cargo and mail on aircraft configured for the carriage of passengers[65] with detailed instructions for airlines and a prescribed risk assessment procedure: "Before considering such operation, a comprehensive safety risk assessment shall be performed involving all the relevant operational departments (i.e. ground, cargo, cabin, flight, engineering)."[66] Air transport regulations and aircraft manufacturers approve the transport of cargo in the passenger cabin, and in the case of special types of goods, operators must obtain approval from the regulator. The transport of dangerous goods in the passenger cabin is not allowed.

Based on an initiative by IATA and support from ICAO, EASA has issued Guidelines for the Transport of Cargo in Passenger Compartment[67], as a special exemption in terms of Regulation (EU) 2018/1139 of the European Parliament and of the Council, pursuant to which operators are required to request time-limited airworthiness approval for an aircraft whose configuration does not meet the clas-

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63 See ICAO, *Airworthiness of Aircraft, Repurposing aircraft passenger cabin for transport of cargo*, [https://www.icao.int/safety/COVID-19OPS/Pages/Airworthiness.aspx]; ICAO, *Safety transport of COVID-19 vaccines on commercial aircraft*, [https://www.icao.int/safety/OPS/OPS-Normal/Pages/Safety-transport-vaccines.aspx]; ICAO, *Addendum No. 1 to the Technical Instructions* for the safe transport of dangerous goods by air (2021/2022 Edition), [https://www.icao.int/safety/DangerousGoods/AddendumCorrigendum%20to%20the%20Technical%20Instructions/Doc%209284-2021-2022.AddendumNo1.en.pdf]; ICAO, *Addendum No. 2 to the Technical Instructions Instructions for the safe transport of dangerous goods by air* (2021/2022 Edition) [https://www.icao.int/safety/DangerousGoods/AddendumCorrigendum%20to%20the%20Technical%20Instructions/Doc%209284-2021-2022.AddendumNo2.en.pdf], Accessed 28 February 2021.

64 ICAO, Technical Instructions for the Safe Transport of Dangerous Goods by Air (Doc 9284), [https://www.icao.int/safety/dangerousgoods/pages/technical-instructions.aspx], Accessed 21 February 2021.

65 IATA, *Guidance for the transport of cargo and mail on aircraft configured for the carriage of passengers Ed 3 04 May 2020,* [https://www.iata.org/contentassets/094560b4bd9844fda520e9058a0fbe2e/guidance-safe-transportation-cargo-passenger-cabin.pdf], Accessed 15 February 2021.

66 *Ibid*., p. 4.

67 EASA, *European Union Aviation Safety Agency Guidelines Transport of Cargo in Passenger Compartment - Exemptions under Article 71(1) of Regulation (EU) 2018/1139 (The Basic Regulation),* [https://www.easa.europa.eu/sites/default/files/dfu/Guidelines%20for%20the%20transport%20of%20cargo%20in%20passenger%20aircraft_EASA_Issue-5.pdf], Accessed 17 February 2021, p. 2.

sifications prescribed for cargo transport. EASA has also prescribed what modifications in the passenger cabin must be made in order for the aircraft to receive such approval, and exceptionally, national regulators may also grant approval for aircraft that do not have the necessary modifications to enable the transportation of supplies essential for COVID-19 response.[68] Soon, the American FAA also gave a one-year approval for the transport of goods in the passenger cabin.[69]

4. THE ECONOMIC IMPACT OF THE PANDEMIC ON AIR TRANSPORT AND RELIEF MEASURES

The crisis caused by the COVID-19 pandemic has had an unprecedented impact on air transport and the aviation industry. Since the beginning of international air transport, this is the biggest strategic challenge and disruption on a global scale.

As stated in the Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, the transport and mobility sector is essential to ensure economic continuity and "control measures should not undermine the continuity of economic activity and should preserve the operation of supply chains."[70]

At the beginning of the epidemic, when it was thought that the virus would remain only in China, the expected drop in revenue was 29.3 billion dollars.[71] Given the rapid spread of the virus, according to IATA analyses, a loss in global passenger revenues of about USD 113 billion is estimated.[72] The latest data shows that this amount could be much higher, i.e. that a decline in total revenue could amount to 44% of 2019 revenue, or USD 252 billion.[73]

Although, globally speaking, air transport continues to function, major changes are visible: the number of flights has declined (see Figure 1), aircraft fleets have been grounded and thousands of employees have lost their jobs.

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68 *Ibid*. See also Annex 1 of the Guidelines Transport of Cargo in Passenger Compartment.

69 FAA (U.S. Department of Transportation Federal Aviation Administration), *Novel Coronavirus (COVID-19) Update*, [https://www.faa.gov/news/updates/?newsId=94991], Accessed 17 February 2021.

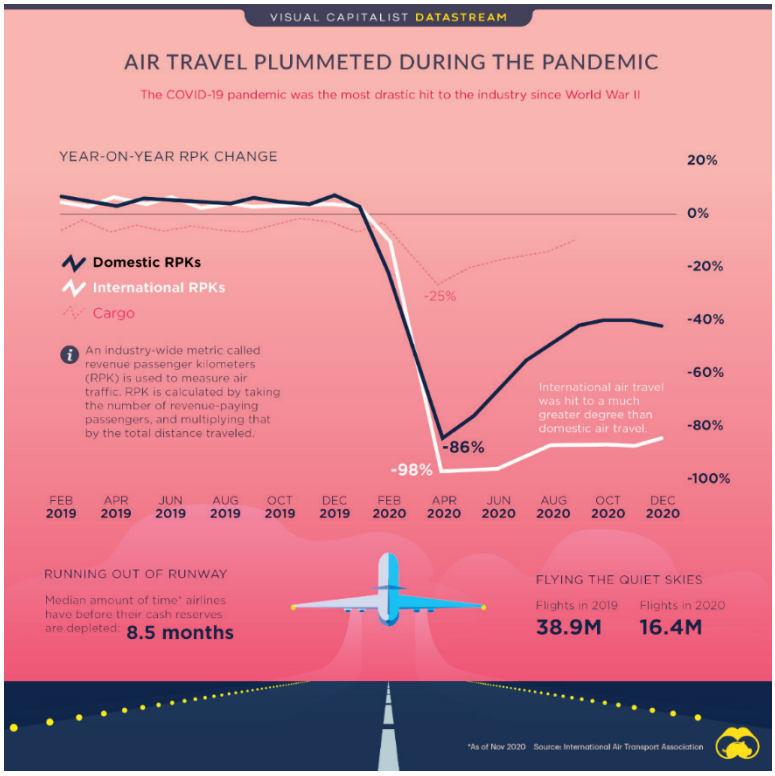
70 European Commission, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services 2020/C 86 I/01 [2020] OJ C 861, p. 1.

71 IATA, IATA Updates COVID-19 Financial Impacts - Relief Measures Needed -, [https://www.iata.org/en/pressroom/pr/2020-03-05-01/], Accessed 20 February 2021.

72 *Ibid.*

73 Flight Safety Foundation, Pandemic, Non-medical operational safety aspects; Supplemental materials, [https://flightsafety.org/wp-content/uploads/2020/05/COVID-19-Roadmap-V2.pdf], Accessed 20 February 2021, p. 2.

Figure 1.



Source: Ang, C., Visual Capitalist, *One Year In: Air Travel Plummeted During the COVID-19 Pandemic*, [https://www.visualcapitalist.com/air-travel-plummeted-during-covid-19-pandemic/], Accessed 22 March 2021.

The impact of the aviation industry on the global economy is extremely large. The 2019 Aviation Benefits Report said that this impact is approximately equivalent to the overall GDP of the United Kingdom.[74] At European level, according to the 2016 results, that is 3.3% of all employment and 4.1% of all GDP in European countries.[75]

The data referring to the Republic of Croatia shows that after good results achieved in 2019, when air transport generated revenue of about HRK 4.9 billion, in 2020, due to the COVID-19 pandemic, according to the Air Transport Association of

[74] Industry High Level Group (IHLG), Aviation Benefits Report 2019, [https://www.icao.int/sustainability/Documents/AVIATION-BENEFITS-2019-web.pdf], Accessed 20 February 2021, p. 17.

[75] Air Transport Action Group (ATAG), Aviation benefits beyond borders, [https://aviationbenefits.org/media/166711/abbb18_full-report_web.pdf], Accessed 20 February 2021, p. 44.

the Croatian Chamber of Commerce, it recorded a decline of as much as 90%[76], or according to Croatia Control Ltd. (the Croatian air navigation service provider), a 60% fall.[77]

Aviation affects all branches of the economy, especially tourism, because it directly provides significant revenue for all stakeholders involved in the chain, such as travel agencies, hotels, restaurants, etc., and the economic impact on air transport will affect both tourism and the global economy. According to estimates that include the best outcome, in terms of revenue and operations, air transport is expected to return to 2019 levels in 2024 at the earliest,[78] and states must give their support for the aviation industry in the form of clear and consistent measures to enable it to survive and to make passengers regain confidence and feel safe.

IATA highlights four key segments where government assistance is needed:

1. Extending the waiver from the 80-20 use-it-or-lose-it rule in the Worldwide Airport Slot Guidelines offering more flexibility to airline operators to plan schedules,
2. Continued financial assistance,
3. Extensions to wage subsidies and corporate taxation relief measures,
4. Avoiding increases in charges and fees.[79]

At EU level, one of the significant financial instruments is the Economic Stimulus Programme worth EUR 750 billion and offered by the European Central Bank to navigate the economic downturn across the eurozone. Also, EASA has adopted

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76 Udruženje zračnog prometa HGK, *Udruženje zračnog prometa: Nakon pada od 90%, oporavak moguć tek 2024*., [https://hgk.hr/odrzan-sastanak-udruzenja-zracnog-prometa], Accessed 20 February 2021.

77 Hrvatska kontrola zračne plovidbe, *op. cit*., note 2, p. 8.

78 *Ibid*.
EUROCONTROL has published three recovery scenarios to return to 2019 levels, which are related to the vaccination rate, as follows:
Scenario 1 – Vaccine made widely available for travellers (or end of pandemic) by Summer 2021 - by 2024.
Scenario 2 – Vaccine made widely available for travellers (or end of pandemic) by Summer 2022 - by 2026.
Scenario 3 – Vaccine not effective - returning to 2019 levels by 2029.
EUROCONTROL, *EUROCONTROL Five-Year Forecast 2020-2024, Traffic not expected to reach 2019 levels until 2024 at earliest*, [https://www.eurocontrol.int/publication/eurocontrol-five-year-forecast-2020-2024], Accessed 20 February 2021.

79 IATA, *Continued Government Relief Measures Needed to get Airlines through the Winter*, [https://www.iata.org/en/pressroom/pr/2020-06-16-01/], Accessed 20 February 2021.

a number of regulations since the beginning of the pandemic, which enable safe operations in the time of the COVID crisis.[80]

4.1. Air passenger rights and COVID-19

It is well known that "a modern passenger requires punctuality, regularity, comfort, speed, economy, and above all safety while traveling."[81] Developed passenger transport also includes issues referring to the protection of passenger rights. Passenger rights have gained importance in recent years, especially within the European Union, and ensuring a high level of protection of passenger rights is a significant part of transport policy.

Due to the large number of cancelled flights that generate high costs in terms of passenger compensation, and due to numerous rules and restrictions, and at the same time to protect passenger rights, the European Commission has published Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19[82] (hereinafter: Interpretative Guidelines), which facilitate the interpretation and application of the protection of passenger rights during the COVID-19 pandemic. These Interpretative Guidelines also apply to Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights[83].

Regulation (EC) No 261/2004[84] establishes minimum rights for passengers when: a) they are denied boarding against their will; b) their flight is cancelled; c) their

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80 IATA, *Relief measures*, [https://www.iata.org/globalassets/iata/programs/covid/relief-measures-update.pdf], Accessed 20 February 2021.

81 Činčurak Erceg, B.; Vasilj, A.; *Current Affairs in Passengers Rights Protection in the European Union*, International Scientific Conference "EU Law in Context – Adjustment to Membership and Challenges of the Enlargement (ECLIC)", Vol. 2 (2018), Osijek, p. 217.

82 Commission Notice Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19 C/2020/1830, [2020] OJ C 89I/01.

83 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004], OJ L 46/1.

84 For more information about Regulation (EC) No 261/2004, its solutions, application and implementation problems, see: Fox, S. J.; Martin-Domingo, L., EU Air Passengers' Rights Past, Present, and Future: In an Uncertain World (Regulation (EC) 261/2004: Evaluation and Case Study), Journal of Air Law and Commerce Vol. 85, Issue 2, 2020; Drake, S., *Delays, cancellations and compensation: Why are air passengers still finding it difficult to enforce their EU rights under Regulation 261/2004?*, Maastricht Journal of European and Comparative Law, Vol. 27, No. 2, 2020, pp. 230–249.; Okeke, G.; Kokpan, B., *Evaluation of the EU Regulation 261/2004 on Rights of Air Passengers in the Event of Delayed and Cancelled Flights*, International Review of Law and Jurisprudence, Vol. 3, No. 2, 2021;

flight is delayed (Article 1(1)). Specific provisions apply to passenger rights in the event of flight cancellation. According to Article 5 of Regulation (EC) No 261/2004, in case of flight cancellation, the passengers concerned shall have the right to: a) reimbursement or re-routing (Article 8),[85] b) care (Article 9), and c) compensation (Article 7). As stated in the Interpretative Guidelines, given the unpredictability of the situation in the case of COVID-19, passengers cannot be provided with re-routing "at the earliest opportunity", as provided for in Article 8(1) (a) of Regulation (EC) No 261/2004, so in that case reimbursement of the ticket price or rerouting at a later stage might be preferable for the passenger.[86] A large number of passengers cancelled their travel due to the pandemic, and in order to keep their passengers, the airlines offered a voucher with a new travel date. In contrast to this situation, if an airline cancels the flight and offers only a voucher, the passenger still has the right to choose between the voucher, reimbursement of the ticket price and re-routing. Under this provision, airlines generate high costs and in April 2020, twelve[87] European countries asked the European Commission to "suspend the law requiring airlines to offer a full refund for cancelled flights

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Steer; European Commission, *Study on the current level of protection of air passenger rights in the EU, Final report*, 2020, [https://op.europa.eu/en/publication-detail/-/publication/f03df002-335c-11ea-ba6e-01aa75ed71a1], Accessed 1 February 2021.; Činčurak Erceg, B.; Vasilj, A., *Current Affairs in Passengers Rights Protection in the European Union*, International Scientific Conference "EU Law in Context – Adjustment to Membership and Challenges of the Enlargement (ECLIC)", Vol. 2 (2018), Osijek; Vasilj, A., *Jačanje pravnog položaja putnika - potreba usklađivanja nacionalnih propisa s međunarodnim konvencijama i propisima Europske unije*, Pravni vjesnik, Vol. 27, No. 1, 2011; Radionov, N., Ćapeta, T., Marin. J., Bulum, B., Kumpan, A., Popović, N., Savić, I., *Europsko prometno pravo*, Zagreb, Sveučilište u Zagrebu, Pravni fakultet, 2011.; Proposal for a regulation of the European Parliament and of the council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, COM (2013) 130 final - 2013/0072 (COD); Commission Notice - Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council [2016] OJ C 214.; Steer Davies Gleave, *Exploratory study on the application and possible revision of Regulation 261/2004, Final report*, 2012, [https://ec.europa.eu/transport/sites/default/files/themes/passengers/studies/doc/2012-07-exploratory-study-on-the-application-and-possible-revision-of-regulation-261-2004.pdf], Accessed 1 February 2021.

85 According to Article 8, passengers are offered the choice between: a) reimbursement (refund); b) re-routing at the earliest opportunity, or c) re-routing at a later date at the passenger's convenience.

86 Commission Notice Interpretative Guidelines, *op. cit.*, note 82, p. 2.

87 Belgium, Bulgaria, Cyprus, Czech Republic, France, Greece, Ireland, Latvia, Malta, the Netherlands, Poland and Portugal. Morgan, S., *Twelve countries demand passenger rights suspension*, [https://www.euractiv.com/section/aviation/news/twelve-countries-demand-passenger-rights-suspension/], Accessed 2 June 2021.

and allow airlines to choose the means by which passengers are reimbursed".[88] It is precisely for this reason that rules have been adopted at national level according to which airlines are allowed to offer passengers vouchers instead of refunds, such as the Italian "Cura Italia Decree", which allows that pursuant to the Guidelines: "such national measures do not fall under the scope of the EU passenger rights regulations."[89] Nevertheless, on 13 May 2020, the European Commission adopted Recommendation (EU) 2020/648 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic,[90] in which it emphasises that passengers have the choice between cash reimbursement and reimbursement in the form of a voucher. However, the Commission's main recommendation for airlines is to make vouchers more attractive, so that consumers will more easily accept them instead of the reimbursement.

Regulation (EC) No 261/2004 prescribes that under certain conditions passengers are also entitled to flight cancellation compensation; but, Article 5(3) also stipulates that "an operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken". However, Regulation (EC) No 261/2004 itself does not provide a definition of extraordinary circumstances. According to the aforementioned Interpretative Guidelines, the European Commission reckons that travel restrictions in the case of COVID-19 can be considered as such circumstances.[91] As to the right to care, it still remains the obligation of the carrier.[92]

A large number of measures aimed at protecting public health have been adopted in the Member States at national levels, which restrict free movement and thus undermine the foundations of European integration. Measures aimed at restricting

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88 Lexology, *Coronavirus and cancelled flights: refund or vouchers?,* [https://www.lexology.com/library/detail.aspx?g=e82dc998-9496-4f35-8dd5-d8eeaae3b9da], Accessed 21 February 2021.

89 Commission Notice Interpretative Guidelines, *op. cit.*, note 82, p. 3.

90 Commission Recommendation (EU) 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic, C/2020/3125, [2020], OJ L 151/10.

91 It is also stated that "where the airline decides to cancel a flight and shows that this decision was justified on grounds of protecting the health of the crew, such cancellation should also be considered as "caused" by extraordinary circumstances." Commission Notice Interpretative Guidelines, *op. cit*., note 82, p. 5.

92 The right to care according to Article 9 of Regulation (EC) No 261/2004 consists of meals and refreshments in a reasonable relation to the waiting time, hotel accommodation if necessary, and transport to the place of accommodation.

the spread of the virus have affected passenger rights and their free movement.[93] There was no coordinated approach at Member State level and the Council called on Member States to cooperate.

Since March 2020, the Commission and the Council have adopted guidelines and recommendations in response to the crisis. The Council issued Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic[94] aimed at ensuring the coordination and timely communication at EU level of measures taken by Member States that restrict free movement due to the COVID-19 (coronavirus) pandemic. The Council Recommendation contains specific recommendations that should be adopted by Member States in order to limit restrictions on free movement to only what is strictly necessary to protect public health, given that a unilateral approach has a significant impact on the European economy. It is especially important to ensure uniform regulations for categories of persons travelling for business reasons.

In the Communication from the Commission on additional COVID-19 response measures,[95] the Commission concluded that "unilateral and uncoordinated action undermines the impact of the EU's response and the confidence of citizens,"[96] and launched an initiative to create a joint response to the crisis with a set of new measures to be applied at EU level. One of the measures is to enable safe travel and free movement within the EU and the Schengen Area. Although the majority of states still prescribe certain restrictions,[97] according to this Communication, "such restrictions can be justified in the interests of public health, they must be proportionate and must not discriminate between citizens of different Member States."[98]

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93 E.g. "Pursuant to Council Regulation (EC) No. 1008/2008, on March 11, 2020, Spain announced flight suspensions of all direct flights between Italy and Spain, with the exception of stopovers for non-traffic purposes, state flights, cargo-only, humanitarian, medical, and urgency flights." Fox, S. J.; Martin-Domingo, L., *EU Air Passengers' Rights Past, Present, and Future: In an Uncertain World (Regulation (EC) 261/2004: Evaluation and Case Study)*, Journal of Air Law and Commerce, Vol. 85, Issue 2, 2020, p. 300.

94 Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic [2020] OJ L 337/3.

95 Communication from the Commission to the European Parliament, the European Council and the Council on additional COVID-19 response measures, [2020] COM/2020/687 final.

96 *Ibid.*, p. 1.

97 We witnessed that at the beginning of the pandemic many national governments and local authorities applied travel restrictions and reintroduced internal border controls inside the EU, with only essential travel permitted. Also, many Member States require persons from other Member States to undergo quarantine or a test before or upon entry into their territory, with requirements modelled according to the epidemiological situation.

98 *Ibid.*, p. 8.

In order to enable safe travel, a joint response of Member States is aimed at better passenger information, cooperation with ECDC, establishing passenger testing protocols, a consistent application of quarantine rules, establishing a digital European passenger locator form and launching a Re-open EU application that would provide rapid access to up-to-date information on measures implemented at national levels.[99]

In response to the transport situation, the European Union has adopted a number of documents. Since the analysis of other legislation would exceed the scope of this paper, we note that the following documents have been adopted in the European Union: Commission Delegated Regulation (EU) 2020/2115 of 16 December 2020 amending Regulation (EC) No 1008/2008 of the European Parliament and of the Council as regards the temporary extension of exceptional measures to address the consequences of the COVID-19 pandemic with regard to operating licences,[100] Regulation (EU) 2020/459 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports,[101] European Commission, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services,[102] Consolidated text: Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak, Communication from the Commission European Commission Guidelines: Facilitating Air Cargo Operations during COVID-19 outbreak [2020], *OJ C 100I,* Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak,[103] Communication from the Commission European Commission Guidelines: Facilitating Air Cargo

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99 Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic [2020] OJ L 337/3.

100 Commission Delegated Regulation (EU) 2020/2115 of 16 December 2020 amending Regulation (EC) No 1008/2008 of the European Parliament and of the Council as regards the temporary extension of exceptional measures to address the consequences of the COVID-19 pandemic with regard to operating licences, [2020], OJ L 426.

101 Regulation (EU) 2020/459 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, [2020], OJ L 99.

102 European Commission, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services 2020/C 86 I/01 [2020] OJ C 861.

103 Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak [2020], *OJ C 102I.*

Operations during COVID-19 outbreak,[104] Consolidated text: Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic,[105] European Commission, Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services,[106] etc. Their content and more detailed analysis are valuable material for future research and some other paper.

5. CONCLUDING REMARKS

On 30 January 2020, due to the global epidemic of a novel coronavirus, the Director General of the World Health Organisation (WHO) declared a Public Health Emergency of International Concern, and on 11 March 2020, WHO declared a global pandemic.

In order to limit the spread of the virus, EU Member States have adopted various measures, some of which have affected the right of European Union citizens to move and reside freely within the territory of the Member States, such as travel bans, entry requirements and various conditions related to border crossing and transit to another country, cross-border travellers required to remain in quarantine, etc., which has led to a considerable number of cancellations and the inability to travel. Health protection before, during and after air travel is imperative on the part of both the passenger and the carrier.

The COVID-19 pandemic took our society by surprise, the foundations of the European Union such as solidarity and freedom of movement have been shaken, and the fundamental rights and trust of citizens have been violated. The aviation industry is recording the biggest losses ever, which inevitably affects the global economy.

As the epidemiological situation worsens, planning and making a trip is becoming more complex so passengers need clear information to minimise risks and costs. Measures to reduce the chance of virus transmission include more frequent clean-

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104 Communication from the Commission European Commission Guidelines: Facilitating Air Cargo Operations during COVID-19 outbreak [2020], OJ C 100I.

105 Consolidated text: Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02020H1475-20210202].

106 European Commission, Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services, [2020], *OJ C 96I.*

ing, temperature checks for staff members and passengers, improving ventilation, physical distancing, use of face masks, etc. However, it seems that the provisions to quarantine after travel and the quarantine period had the greatest impact on travel planning or cancellation.

International organisations have adopted a number of rules, recommendations and guidelines for air transport during the COVID-19 pandemic. The highest priority of aviation is safety, and over the past year, various procedures and measures have been established to achieve this goal and thus enable safe travel. On the other hand, regulations on travel restrictions, quarantine, mandatory testing and the like are enacted at national level, which puts additional pressure on passengers and airlines. Although an initiative has been launched at EU level to create joint measures in terms of a coordinated approach to facilitate travel at least within the Schengen Area, this has not produced any desired results so far.

The spread of the pandemic has not only caused problems related to the reduction of available staff both on planes and at airports, but also opened issues related to the vaccination of priority groups like persons working in transport and tourism. Apart from facing a large drop in the number of passengers carried, air carriers also face a number of other difficulties before and during a flight (from collecting various data, disinfection, additional checks on passengers and their health), which puts additional pressure on staff. Although it has been proved that the risk of infectious disease transmission in the aircraft cabin is extremely low, passengers are still reluctant to travel due to uncertain and changing regulations, test costs and the like. In this regard, passengers should be further educated on the safety of air travel. Due to the reduced number of passengers, flights are cancelled, and airlines accumulate losses. The world's most important organisations - WHO, ICAO and the EU EASA, responded to the pandemic by adjusting the existing rules, but in practice this did not lead to an increase in the number of passengers carried. New measures and government assistance in terms of cooperation with the transport and tourism sectors are needed to enable a return of passengers in these new circumstances. What is necessary is better coordination and cooperation not only between the states, but also within individual states and between states and carriers. A balanced approach that takes into account verified health and scientific results will contribute most to an increase in the number of trips and the recovery of the transport sector.

Due to the re-emergence of the pandemic in early 2021, as well as the emergence of new virus strains, it is difficult to predict air traffic recovery, and statements coming from the aviation industry are not optimistic either.

If joint measures and assistance are lacking and if passengers are not able to travel more easily with simpler procedures such as cheaper rapid tests and a unified digital way of data collection, if the vaccine is not easily accessible to everyone, "aviation's recovery from the COVID-19 crisis will be a long-haul flight."[107]

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UDK 331.5.021-057.117:631]:614.4(4-67EU)
331.526-054.6:614.4(4-67-EU)
Original scientific article

THE ABUSE AND EXPLOITATION OF FOREIGN SEASONAL WORKERS: DID THE CORONAVIRUS EMERGENCY WORSEN ALREADY PRECARIOUS WORKING CONDITIONS IN THE AGRICULTURAL SECTOR?*

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ABSTRACT

Seasonal workers are increasingly important in some Member States as a means to fill the labour market needs. Preferred due to their lower salaries, greater docility and the evasion of administrative and social security obligations, migrant workers are often treated less favourably than domestic workers in terms of employment rights, benefits and access to adequate housing. The agricultural sector of employment is particularly at risk of labour exploitation during harvest seasons and thus associated with atypical or informal forms of employment and precarious working conditions. The COVID-19 pandemic gave visibility to the new risks the seasonal workers are exposed to. In addition, it showed that in some cases such problems can lead to the further spreading of infectious diseases and increase the risk of COVID-19 clusters. The consequences of of the pandemic can be observed in Croatia too. This paper primarily covers the position of third-country nationals who enter and reside in Croatia for the purpose of agricultural seasonal work within the framework of the Seasonal Workers Directive (Directive 2014/36/EU). Significant challenges facing the Croatian labour market have been addressed

* This paper is written under support of the University of Rijeka Research Project "Legal Aspects of Companies Restructuring and Transition Towards New Corporate Governance Culture" (uni-ri-drustv-18-43) and under support of Project "MI - jučer, danas, sutra", UP.04.2.1.06.0018.

by means of a comparative approach in order to present the current situation on the EU labour market and suggest potential legal solutions applicable in regard to the national circumstances.

Keywords: *seasonal work, third country nationals, Seasonal Workers Directive, agriculture, precariousness, Croatia, COVID-19*

1. SEASONAL EMPLOYMENT IN AGRICULTURAL SECTOR AS PRECARIOUS

In the early 1960s, the Italian economist Sylos Labini articulated a basic definition of the concept of precarious employment by reference to agricultural work as a type of employment performed by workers with no guarantee of stability either of their job or of their income, and hence no definite prospect of improvement.[1] The dominant understanding of neoliberal ideas and policies in the world of work aiming to restore the profitable growth has upheld these conditions.[2]

Mass media have reported various forms of discrimination related to the employment and exploitation of seasonal migrant workers with fatal outcomes in the areas of intensive agriculture within the EU, particularly in the Mediterranean countries that have begun to receive increasing attention.[3] The failure of employers and governments to protect fundamental human rights has resulted in thousands of migrant workers and their families living in make-shift settlements; in housing made out of wooden pallets, cardboard and plastic from the local greenhouses with no legal protection and access to medical health.[4]

In general, workers in the agricultural sector are often victims of discrimination and disadvantaged in many aspects. Work deficits occur through job insecurity, low level of income, poor health, safety and environmental conditions, limited professional opportunities, high level of workplace accidents including pesticide poisoning[5] and lack of access to the social security system.

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1 Labini, S., *Precarious Employment in Sicily*, International Labor Review, Vol. 89, 1964, p. 268.

2 Harvey, D., *A Brief History of Neoliberalism*, Oxford, Oxford University Press, 2010.

3 Report on the situation at Manolada, 2020. [https://g2red.org/report-on-the-situation-at-manolada-july-2020], Accessed 2 February 2021. The message coming from Andalucia's strawberry fields was clear: *You complain, you get fired. You're forced out of the EU*. More: European Coordination Via Campesina, *Sowing Injustice, Harvesting Despair*, Spain, 2019, p. 2 (hereinafter: Sowing Injustice), [https://www.eurovia.org/wp-content/uploads/2019/11/EN2.1_lowres.pdf], Accessed 3 March 2021.

4 Covid19: Food & vital supplies for migrant workers, [https://www.crowdfunder.co.uk/supportworkers], Accessed 5 February 2021.

5 For international standards protecting workers from exposure to agrochemicals see: ILO, The Safety and Health in Agriculture Convention (No. 184), 2001.

Despite being the very heart of the food production system, agricultural workers experience the highest incidence of the working poor.[6] Nonetheless, the agricultural sector has the lowest level of organization into trade union with an estimated less than 10 per cent of the world's waged agricultural workers represented in trade unions.[7] The reduction of small agricultural businesses, intensification of production and monopoly of mass distribution make for a combined effect on the radical transformation of the agriculture areas.[8] Regulated labour markets play the key role in determining employment and working conditions in rural areas.[9] Producers are forced to search for flexible and low-cost labour often composed of foreign seasonal agricultural workers employed in extremely precarious conditions and exposed to high risk of exploitation.[10] Therefore, agriculture has in many countries been transformed into an export-oriented sector heavily dependent on migrant labour.

As in other EU Member States, a shortage of seasonal workers is one of the key challenges of the Croatian agriculture. Domestic seasonal workers are employed based on the special employment contract, voucher, but it does not cover the actual demand for workers. In 2019 14190 seasonal workers performed work based on a voucher for 1530 employers in Croatia, with the average of 21.6 days of temporary work in agriculture.[11] We should bear in mind that these numbers are even (4 or 5 times) bigger, because, alongside workers who perform work based on a voucher, are permanent seasonal workers employed on a fixed-term contract, as well as illegaly employed workers. Taking all this into account it is estimated that more than 50000 seasonal workers work in Croatian agriculture.[12] The new

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6 FAO, Sustainable Development Goals, 2015, [http://www.fao.org/sustainable-development-goals/overview/fao-and-the-post-2015-development-agenda/sustainable-agriculture/en/], Accessed 2 February 2021.

7 ILO (2019), *Decent and Productive Work in Agriculture*, International Labour Office, Geneva, 2019, p. 3.

8 *The Transformation of Agri-Food Systems, Globalization, Supply Chains and Small Holder Farmers*, McCullough, E. B. *et al.* (eds.), The Food and Agriculture Organization of the United Nations and Earthscan, London, 2008, p. 28.

9 Martin, P. L., *Migrant Labor in Agriculture: An International Comparison*, International Migration Review, Vol. 19, No. 1, 1985, p. p. 137.

10 This so-called *Californisation* agricultural production system has become a structural feature in different EU Member States. The Californication model is based on four main elements: available workers, specific programs for the introduction of seasonal foreign workers, the spatial and social segregation of workers and the presence of labour intermediaries. See: *Sowing injustice*, *op. cit.*, note 3, p. 3.

11 Smarter, *Nezaposlene potrebno motivirati za sezonski rad u poljoprivredi*, [https://smarter.hr/nezaposlene-potrebno-motivirati-za-sezonski-rad-u-poljoprivredi/], accessed 7 March 2021.

12 Smarter, *op. cit.*, note 11.

Aliens Act,[13] in force as of January 2021, has introduced the labour market test as a requirement for the employment of third-country nationals in seasonal work, replacing the quota system of employment.

The paper first analyses the elements of precariousness of seasonal agricultural work. In the following sections focus is placed on different regulatory approaches to seasonal migrant work, especially the Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.[14] After a brief review of the Directive *ratione materiae*, the authors analyse the regulation of the employment of seasonal workers, working conditions, workers' rights and enforcement mechanisms, referring to the Directive. The authors address potential *protective gaps*, including the principle of equal treatment, with a critical overview of the extent to which the national regulatory framework is harmonized with the Directive. Finally, the paper deals with the pandemic COVID-19 and its impact on seasonal work in the agricultural sector.

2. THE MANIFESTATION OF PRECARIOUSNESS OF SEASONAL (MIGRANT) WORK IN AGRICULTURE

The contemporary concept of precariousness is identified in terms of high levels of labour insecurity and instability with broad implication on workers including their physical, mental and social well-being and the way in which they integrate paid work into other domains of social life.[15] Just how important it is to recognize and combat precarious work in agriculture is evident from the statistics. Although its share in total employment has fallen from 40.2 per cent to 26.8 per cent over the past two decades, the agriculture sector provides livelihoods to more than one billion people worldwide accounting for 60.4 per cent of employment.[16]

Migrants, especially seasonal workers, face serious problem if hired through services of labour contractors specialized in recruitment, transport and management of waged agricultural workers creating a grey area around employers' responsibilities leading to general authority abuse.[17]

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13 Zakon o strancima (Official Gazette No. 133/20).

14 Hereinafter: Seasonal Workers Directive, SWD.

15 Campbell, I.; Price, R. *Precarious work and precarious workers: Towards an improved conceptualisation*, The Economic and Labour Relations Review, Vol. 27, No. 3, 2016, p. 316.

16 ILOSTAT, *Employment by sex and economic activity – ILO modelled estimates*, November 2019.

17 For example: asking for commissions, overcharging for transport, housing and food, holding back wages etc. Seasonal workers are often employed through three main forms of labour intermediation schemes: government schemes for introducing foreign labour, private intermediation schemes (e.g.

Wage agricultural workers[18] performing seasonal activity are temporary workers employed for a limited period of time to perform a specific task; therefore, subjected to a high degree of insecurity.[19] In practice, the temporary nature of seasonal worker permits/stay presents an obstacle to reaching the minimum threshold and minimum contribution periods required to access certain rights.[20] Studies show the rise of casual forms of employment in agriculture.[21] Considering the *atypical* nature of work and forms of employment in agriculture, including a surplus of seasonal workers in relation to the aggregated EU demand, the seasonal employment relationship makes the sector less accessible to regulate. In consequence, the European Commission expressed concerns regarding seasonal workers experiencing exploitation and substandard working conditions especially in the agriculture sector.[22]

With the proclamation of the European Pillar of Social Rights in 2017 (EPSR),[23] the institutional awareness concerning workers' equal treatment *regardless of type and duration of their employment relationship* was raised. EPSR presupposes fair working conditions and access to social protection for *all workers* emphasizing that employment relationships that lead to *precarious working conditions* must be prevented, including by prohibiting abuse of atypical contracts. It also notes that workers have the right to decent work and standard of living and transparent and predictable working conditions in keeping with the national practice. Finally, it highlights the right of workers to be informed in writing at the start of employment about all aspects of the employment relationship. However, growing evidence of migrants involved in highly insecure work experiences in agriculture

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temporary employment agencies) and informal intermediation schemes. Mésini, M., *Seasonal workers in Mediterranean agriculture Flexibility and insecurity in a sector under pressure*, in: Thornley, C. *et al.* (eds.), Globalisation and precarious forms of production and employment: challenges for workers and union, Edward Elgar, Cheltenam UK, 2010, p. 60. Polish legislation does not allow a job intermediation agency to seek direct financial payment for a potential seasonal worker. However, it is allowed to seek payment for indirect services, like translation of the CV, the arranging of transportation or medical examination. Koroutchev, R., *Seasonal Workers Before the Covid-19 Era: Analysis of the Legislation within the Context of Eastern Europe*, Journal of Liberty and International Affairs, Vol. 6, No. 1, 2020, p. 107.

18 For categorisation see more: ILO (2007), *Agricultural Workers and Their Contribution to Sustainable Agriculture and Rural Development*, International Labour Office, Switzerland, 2007, p. 24-25.

19 ILO (2007), *op. cit.*, note 18, p. 39.

20 ILO (2016), *Non-standard forms of employment around the world*, International Labour Office, Geneva, 2016, p. 298.

21 ILO (2019), *op. cit.*, note 7, p. 4.

22 European Commission (hereinafter: EC), Migration and Home Affairs, [https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/work_en], Accessed 23April 2021.

23 EPSR, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017C1213%2801%29], Accessed 12 January 2021.

sets out a number of categories of risk factors that monitoring bodies took into account during interventions.[24] The majority of EPSR principles tackling precarious employment in agriculture are being systematically violated.[25]

The question of precariousness can be observed in several segments including worker's personal situation (language and communication barriers for foreign worker); employers' behaviour (workers not being given a written contract and not being transparently and comprehensively informed of their rights, over-charging for transport, housing and food, holding back wages and imposing debt slavery);[26] workplace organization and integration of worker in mostly rural economies they live in.[27] Agricultural migrant workers are poorly protected due to the exclusion or limited application of the national labour legislation, ineffective investigations and low risk of prosecution for offenders.[28]

Using key legal determinants and indicators of precariousness, a vulnerable social position can be furthermore understood by means of a multidimensional approach which encompasses all manifestations of insecurity integrated in the employment and migration status of seasonal workers.[29] Scholars conceive of an *insecurity continuum* presenting precariousness through: 1. pre-migration or work-divided precarity including individual circumstances of worker (poverty, family obligation, low education) and recruitment agency conditions; 2. migration (illegal traveling procedures deducting travel expenses from workers remuneration) and 3. destination country legal restrictions phase regarding rights and entitlements and

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24 FRA, Protecting migrant workers from exploitation in the EU: boosting workplace inspections, 2018, p. 12-13.

25 La Via Campesina, Agricultural regions in Europe becoming no-rights zones for migrant workers, 2019; Agricultural workers' rights abuses in Spain, [https://www.ethicalconsumer.org/food-drink/agricultural-workers-rights-abuses-spain], Accessed 15 January 2021.

26 O'Connell Davidson, J., *Troubling freedom: Migration, debt, and modern slavery*, Migration Studies, Vol. 1, No. 2, 2013, p. 176–195. See also: Lewis, H. *et al.*, *Hyper-precarious lives: Migrants, work and forced labour in the Global North*, Progress in Human Geography, Vol. 39, No. 5, 2015, p. 593.

27 There are multiple advantages for recruitment agency regarding secondary functions such as dormitory labour regimes. Dispositional workers in dormitory facilitates and just in-time production makes it easier to organize on-call work. However, how these advantages could be turned into abusive practices making possible for agencies to keep the workers under permanent and discreet control. See: ILO, *Fair migration: Setting an ILO agenda*, International Labour Office, Geneva, 2014, p. 15.

28 EC (2014), Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally-staying third country nationals, COM (2014) 286 final, 22 May 2014.

29 Kountouris, N.*, The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective*, Comparative Labour Law & Policy Journal, Vol. 34, No. 1, 2012, p. 23. See also: Zawojska, A., *Exploitation of migrant labour force in the EU agriculture*, Scientific Journals of the Warsaw University of Life Sciences, Economics and Organization of Food Economy, No. 116, 2016, p. 39.

ocupational safety and health (OSH) standards, which can activate precariousness through insufficient or incorrect use of protective personal equipment,[30] and lack of access to information resulting in the agricultural sector being the most affected by workplace accidents and illness, social isolation and workers multiple dependence on the employer (recruiter).[31] Lack of the required language skills and social and professional networks in the host country usually prevents migrant worker from having full information about labour market opportunities and about their rights, and considerably lowers their bargaining power, thus activating administrative and socio-economic precariousness of workers. Besides trade unions, NGOs present an important actor in the dissemination of information on the rights of workers and complaint mechanisms available, field visits to workers, as well as counselling services.[32] However, the premises of the employer in the agricultural sector are often located in rural area, making it difficult for the worker to leave, and for the NGOs and trade unions to inspect the premises.[33]

This needles to say calls for a holistic approach tackling **wage precariousness** in the agricultural sector in general, with income generally tending to be low (and sometimes not in the legal tender), not proportional to the number of hours worked and not periodically adjusted. As a result, many workers live below the poverty line.[34] The income determinants for waged seasonal agricultural worker depend on the number of days worked and the wage level. The income gap between full-time wage earners and seasonal workers is even wider in countries where unemployment benefits, education and health care are not provided. Foreign workers are discriminated as they are frequently employed in lower and less attractive positions.[35]

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30 According to Agricultural and Country Workers Union of Andalusia (SOC-SAT) workers are expected to perform work without proper protection whilst dangerous agrichemicals are being sprayed in the greenhouses. *COVID-19 clusters and outbreaks in occupational settings in the EU/EEA and the UK*, 2020, p. 6.

31 Lewis, *op. cit.*, note 26, p. 589.

32 European Migration Network, *Attracting and protecting the rights of seasonal workers in the EU and the United Kingdom – Synthesis Report*, Brussels, EMN, 2020, p. 28.

33 Rijken, C., *Legal Approaches to Combating the Exploitation of Third-Country National Seasonal Workers*, The International Journal of Comparative Labour Law and Industrial Relations, Vol. 31, No. 4, 2015, p. 443.

34 FRA, Protecting migrant workers from exploitation in the EU: workers' perspectives, 2019, p. 16-36.

35 Foreign workers' earnings on average are lower than Italians': generally, the gap is higher for non-EU (-25%) than for EU citizens (-20%). Interestingly, in agriculture the difference is deeper for EU citizens (-12%) than for non-EU citizens (-7%). Italian Ministry of Labour and Social Policies, *7th Report on Foreign workers on Italian market of labour*, 2017.

As collective bargaining is weak in agriculture, the national minimum wage is an important means to protect the seasonal workers as the lowest paid workers. It should be emphasized that workers in non-standard forms of employment, like seasonal, tend to be less well reached by minimum wage policies, and thus at risk of income precariousness.[36] Essential workers in the agriculture sector make the highest share of minimum wage earners.[37] The national minimum wage for employees in general largely corresponds to the minimum wages of seasonal workers meaning no minimum gross salary is *per se* defined in regard to the seasonal worker.[38] For countries without statutory minimum wages, minimum wages are implemented via collective bargaining agreements. The number of the latter agreements covering a given job category varies significantly from country to country. While some only have one agreement covering the whole sector, other countries, in particularly Italy, have up to 60 with regard to agricultural work.[39]

3. APPROACHES TO ATTRACT AND REGULATE THE SEASONAL WORK OF MIGRANTS IN AGRICULTURE

Seasonal agricultural work is a highly labour-intensive activity with peak season, often low-paid and physically demanding that therefore tends to be unappealing to the domestic population.[40] The unattractiveness of agricultural work faces the EU with a structural need for seasonal workers, especially low-skilled and low-qualified.[41] The European Commission estimates that more than 100 000 seasonal workers from outside the EU come to the EU every year. [42]

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36 Eurofound (2020), *Minimum wages in 2020: Annual review, Minimum wages in the EU series*, Publications Office of the European Union, Luxembourg, p. 1.

37 Eurofound (2020a), *Minimum wages in 2020: Will COVID-19 derail the quest for fair pay?*, 2020, [https://www.eurofound.europa.eu/hr/publications/blog/minimum-wages-in-2020-will-covid-19-derail-the-quest-for-fair-pay], Accessed 1 March 2021.

38 EMN, (2020), *Attracting and protecting, op.cit.,* note 32, p. 8.

39 Eurofound, *Living and Working in Italy*, 2021, [https://www.eurofound.europa.eu/hr/country/italy], Accessed 11 January 2021; Coderoni, S. *et al.*, *Farms Employing Foreign Workers in Italy: An Anaysis with Census Micro Data*, The German Journal of Agricultural Economics, Vol. 67, No. 3, 2018, p. 189.

40 Seasonal migrant workers are typically involved in the so-called "three D" jobs (dirty, dull, dangerous). Mendez, G., Caviedes, A., *Labour Migration in Europe*, Palgrave Macmillan, UK, 2010, p. 33.

41 In EU seasonal workers are generally engaged in non- or low-skilled sectors, such as in agriculture or tourism. EC, *Commission Staff Working Document: Summary of Impact Assessment accompanying the proposal for a Directive of the European Parliament and of the Council on the conditions and entry of third-country nationals for the purpose of seasonal employment*. COM (2010) 379 final, SEC (2010) 887', Brussels, p. 2, 8.

42 EC, *Migration and Home Affairs*, *op. cit.*, note 22.

3.1. Residence and stay permits, labour market tests, quotas and temporary migration programs

Most EU Member States consider seasonal workers from third countries as part of the overall migration policy.[43] In line with admitting authorization, they use short-stay visas, work permits, long-stay visas and residence permits.[44] Work permits and residence permits do not necessarily overlap in so far as residence permits for seasonal workers are issued for several years, whereas work permits are issued for the duration of the employment contract.

In **Croatian law**, a residence and work permit is a combined approval of temporary stay and work. It can be issued for a period of 90 days to up to six months. According to Eurostat data, in 2019 Croatia issued most permits for a validity of seven to nine months.[45] A permit can be issued only if the Croatian Employment Service[46] gives a positive opinion about the employment of the third-country national, based on the results of the labour market test, an important legislative novelty, replacing the employment quotas. In many Member States, a labour market test is applied to seasonal workers. Its purpose is to determine whether the labour market situation justifies the employment of third-country nationals or whether job vacancies can be filled by domestic citizens, EU/EEA citizens or foreign citizens already available in the domestic labour market.[47]

The employer's conditions requested in the labour market test to be fulfilled concern: the educational level, the educational qualification, work experience and all other conditions requested by the employer (Art. 97 (3) of the AA).[48] There is an important exception concerning seasonal workers in so far as in case of employment of seasonal workers in agriculture, forestry, catering industry and tourism in

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43 EMN (2020), *Attracting and protecting, op. cit.,* note 32, p. 8.

44 EMN (2020), *Attracting and protecting, op. cit.*, note 32, p. 5.

45 Ibid., p. 6.

46 Its regional service or office; hereinafter: CES.

47 OECD, *The Employment of Foreigners: Outlook and Issues in OECD Countries*, 2001, p. 189.

48 The employer's obligation is to request a labour market test before submitting the application for a residence and work permit. The test is carried out by the CES office that has to check the unemployed records and implement the intermediation procedure with the aim of recruiting workers from the national labour market. The employment intermediation should be carried out if there are persons in the unemployed records who fulfil the employer's conditions. The CES office has to inform the employer about the labour market test results within 15 days from the request made by the employer. The employer may apply for the residence and work permit within 90 days from being notified about the positive labour market test results. The CES office should give its positive opinion needed for the issuing of residence and work permit if the prescribed conditions are met. It is important to note that the positive opinion should not be given if the employer has less than ¼ of the employed that have citizenship of the Republic of Croatia, EEA or Swiss Confederation (Arts. 97, 98 and 99).

Croatia, the residence and work permit may be issued without the labour market test and the opinion of the CES for a period of up to 90 days during a calendar year.

Particular Member States link attraction of foreign workers in the agricultural sector through bilateral labour agreements signed with the issuing countries. Such strategies can include the elimination of employment quotas for non-EU country nationals.[49] **Quotas** are usually established periodically once a year through an estimation based on trends in employment and unemployment rates and needs of the labour market.[50]

By responding to labour market needs and attracting seasonal workers, the Member States can facilitate the allowing of re-entry of seasonal workers from third countries who were previously admitted to the same Member State to encourage the circular movement of seasonal workers and to combat illegal migration.[51] The advantage for these workers arising therefrom is the preferential treatment providing third-country nationals with benefits from this simplified and accelerated application procedure.[52] As part of the migration policy, Member States collect information on the required experience, skills and language levels of non-EU seasonal workers when applying for a work permit.[53]

To fill shortages, the EU Member States have developed measures to attract migrant workers which include shorter and simplified procedures and cooperation with third countries. In recent years there has been an expansion of temporary migration programs (TMP) as an instrument and a lawful alternative to illegal migrations,[54] enabling communication and transaction between the country of origin (domestic labour market) offering potential agricultural workers and the destination country demanding labour supply, respectively.[55] For example, Ger-

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49 EMN (2020), *Attracting and protecting op. cit.*, note 32, p. 15.

50 Coderoni *et al.*, *op. cit.*, note 39, p. 189.

51 Rijken, *op. cit.*, note 33, p. 444.

52 Afsar, N.; Antoons, J., *Seasonal workers in Belgium*, EMN, 2021, p. 19, [https://emnbelgium.be/sites/default/files/publications/Seasonal_workers_standalone.pdf], Accessed 24 February 2021.

53 EMN, Attracting and protecting, Czech Republic, 2020, p. 16. [https://ec.europa.eu/home-affairs/sites/default/files/06_czechrep_seasonal_workers_2020_en.pdf], Accessed 21 March 2021.

54 Undeclared work is more prevalent in the agricultural than in any other sectors of the economy. Higher levels of undeclared work are a result of intense cost pressure from the food processing industry and food retailers to whom agricultural producers supply most of their output. For more generic drivers of undeclared work see: Williams, C.; Horodnic, A., *Tackling undeclared work in the agricultural sector*, European Platform Undeclared Work, 2018.

55 For regulatory questions and dilemmas regarding TMP and good practice see: Bregiannis, F., *The European Seasonal Workers Directive and Lessons from Outside Europe*, Master Thesis, Tilburg University Law School, Tilburg, 2017, p. 4.

many has concluded the first **bilateral cooperation agreement** with Georgia in 2020.[56]

Indeed, several Member States have adopted *simplified* work arrangements. For example, in 2011 Romania introduced a regulation of day labour for the performance of "*unskilled working activities of an occasional nature*". Hungary regulates the so-called "*simplified employment*" for seasonal work in agriculture which eventually led to abuses and under-reporting of working activities.[57] In order to combat informality, some European countries have adopted *voucher-based* work which presupposes performing a specific task or fixed-term assignment. With voucher-based work, an employer "*acquires a voucher from a third party (generally a governmental authority) to be used as a payment for a service from a worker, rather than cash*". [58] The national regulation of voucher-based work also differs significantly with regard to the sectors in which their use is allowed. For example, the liberalized regulation of voucher-based work in Italy led to an expansion in their use, thereby questioning its effectiveness in combating undeclared work. [59]

In Croatia only domestic workers can perform seasonal work based on a special employment contract for performance of temporary, resp. casual seasonal work in agriculture (voucher).[60] It should be concluded before the beginning of work, for every working day, by delivery and receipt of the voucher. The content and form of the contract is regulated by LMA and a special By-law.[61] The worker should keep the contract with him/her. The price of voucher for 2021 amounts to 24.48 kuna (3.3 EUR per hour).

The employer is not required to keep evidence about workers in agriculture, or to deliver a record on wages to workers, as opposed to employers according to the La-

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56 Lechner, C., *Attracting and Protecting Seasonal Workers from Third Countries*, German National Contact Point for the European Migration Network (EMN) Working Paper 89, Federal Office for Migration and Refugees, 2020, p. 5.

57 Also for tourism or casual work in other sectors. See: *Labour Law and Employment in Hungary – 2021 Guide*, [https://accace.com/labour-law-and-employment-in-hungary/], Accessed 2 February 2021.

58 ILO (2016a), *Non-standard employment around the world: Understanding challenges, shaping prospects*, International Labour Office, Geneva, 2016, p. 25-26; Eurofound (2015), *New forms of employment*, Eurofound, Dublin, 2015, p. 82.

59 Zilli, A., *L'inclusione sociale attraverso i voucher per prestazioni di lavoro accessorio*, in Brollo, M.;Cester, C.; Menghini, L. (eds.), Legalità e rapporti di lavoro: Incentivi e sanzioni, Trieste, EUT, 2016. See also: Eurofound, Italy: New voucher-based work scheme provokes debate, 2017. [https://www.eurofound.europa.eu/publications/article/2017/italy-new-voucher-based-work-scheme-provokes-debate], Accessed 23 March 2021.

60 Zakon o tržištu rada (Labour Market Act; Official Gazette No. 118/18, 32/20; hereinafter: LMA).

61 Pravilnik o sadržaju i obliku ugovora o sezonskom radu u poljoprivredi (Official Gazette No. 28/2019), Art. 2 (1).

bour Act (Art. 7, By-law). The work of a seasonal worker in agriculture is limited to 90 days per calendar year and need not be continuous (LMA, Art. 79 (2-4)). The worker enjoys protection of rights in line with the LA. With the purpose of determining the insurance period in regard to seasonal work according to a special regulation, seasonal worker is obliged after the period of work in agriculture, and no later than the end of the calender year, to provide information about the work performed in agriculture in that calendar year to the body in charge of pension insurance.

The Croatian Employers Association made several proposals for more flexible use of vouchers, most notably that the worker who works based on a voucher can perform work for several years, until the maximum of 90 days is aggregated.[62] Moreover, one of the options is to enable work on voucher also for workers who had an employment contract and persons in early retirement, which is at present not allowed.

3.2. Seasonal Workers Directive

An important regulatory mechanism at the EU level is the Seasonal Workers Directive. The adoption of this Directive was subject to a long and difficult process including the proposition of equal treatment for all migrant workers with the domicile workers, when approaching the issue of non-EU workforce sector by sector.[63] The current version of the Seasonal Workers Directive represents an important development aiming to contribute to the proper management of migration flows as to the specific category of seasonal temporary[64] immigration and to ensure decent working and living conditions for seasonal workers, by establishing fair and transparent rules on admission and residence (Preamble, under 7).[65] In other words, the Seasonal Workers Directive combines immigration law, which

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62 Smarter, *op. cit.*, note 11.

63 Zoeteweij, M. H., *The Seasonal Workers Directive Another Vicious Circle?* in: Rijken, C.; de Lange, T. (eds.), Towards a Decent Labour Market for Waged Migrants Workers, Amsterdam University Press, Amsterdam, 2018.

64 It should be noted that temporary work is out of the scope of this article as temporary agency works respect. workers are permanently employed by a temporary agency and sent to a second country or even to the same country to be utilised by the user enterprise. The same applies to posted workers. These categories are subject to specific EU legislation. See: Coderoni *et al.*, *op. cit.*, note 39, p. 192.

65 EU SWD was a first attempt to harmonise temporary labour migration among a number of states with divergent migration policy and proved a source of disagreement among Member States. Hooper, K.; Le Coz, C., *Seasonal Worker Programmes in Europe - Promising practices and ongoing challenges*, Migration Policy Institute, Brussels, 2020.

regulates entry and stay for third-country national seasonal workers in the EU territory, with labour law, which governs the rights of workers.[66]

By virtue of Chapters II and III the Directive regulates the conditions for the admission and procedure and authorisations for the purpose of seasonal work. Furthermore, the Directive promotes temporary and circular migration, thus ensuring genuinely seasonal nature of work by limiting the maximum duration of the stay of seasonal workers to nine months in any 12-month period with some exceptions through possible extension of stay or renewal (Arts. 14 and 15).

Various preferences and policies related to specific economic circumstances of the Member States led to the emergance of a different personal status of third-country nationals within the Member States.[67] The Directive demonstrates non-EU seasonal workers have a deficit of rights and more obligations in regard to the right to access and remain in different EU territories and socio-economic rights during their stay (Art. 22). Therefore, the Directive provides for **equal treatment of seasonal workers** and EU/EEA nationals in the nine categories listed in Article 23 (1) of the Directive (*infra 4.1.)*.

Moreover, SWD provides standards relating to safe and **adequate living conditions** for the worker according to the national law and practice for the duration of his or her stay.

The Directive takes under consideration *especially* vulnerable situation of third-country national seasonal workers and the temporary nature of their assignment. Accordingly, its provisions recognize the need to provide **effective protection of their rights**, including the matter of social security and monitoring compliance in respect for the principle of equal treatment with domicile workers (Preamble 43). In order to prevent abuse and violation of the workers' rights, SWD requires Member States to introduce complaints procedures and effective, proportionate and dissuasive sanctions against employers who breach their obligations under the Directive (Art. 17).

Employers are more likely to use national schemes including the abovementioned bilateral cooperation agreements. However, the latter should be based on the SWD. All aspects of the placement of agreements should comply with the protection of the rights of seasonal workers.

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66 Fudge, J.; Herzfeld Olsson, P., *The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights*, European Journal of Migration and Law, Vol. 16, 2014, p. 440.

67 Medland, L., *Misconceiving 'seasons' in global food systems: The case of the EU Seasonal Workers Directive*, Euopean Law Journal, Vol. 23, No. 3-4, 2017, p. 160.
EMN (2020), *Attracting and protecting*, *op. cit.*, note 32, p. 7.

The final version of the Directive provided a broad flexibility to Member States concerning the admission structures; the duration of the worker's stay, and imposing or not the labour market test. The substantive provisions are designed so to ensure the equal treatment of seasonal migrant workers and national workers. Some aspects of the SWD concerning the rights of seasonal workers fall into the Member States' prerogative with individual adjustment leading to uneven practice on the national level.[68] Nevertheless, the enforcement mechanisms provided by the Directive are discretional rather than mandatory. Therefore, its efficiency is questionable.[69]

4. THE RIGHTS OF SEASONAL MIGRANT WORKERS IN AGRICULTURE

4.1. Right to equal treatment

The aim of the Directive is to harmonize the entry of third-country nationals seeking temporary, seasonal employment in the EU and prevent their exploitation by granting them a secure legal status, equal working conditions and access to appropriate accommodation.[70] Article 23 that regulates the right of equal treatment of the seasonal workers with the nationals of the host Member State in relation to specific issues is considered to be the core of the rights-based protection approach of the Directive.[71]

These categories are terms of employment and working conditions, the right to strike and take industrial action (in accordance with the host Member State's national law and practice), and freedom of association and affiliation and membership, the right to back payment of outstanding remuneration, the right to branches of social security as per Article 3 of Regulation 883/2004 (including sickness benefits, maternity benefits, invalidity benefits, survivors' benefits and family benefits), access to public goods and services, advice services on seasonal work offered by employment offices, education and vocational training, recognition of professional qualifications, and tax benefits (Art. 23).

Because of the temporary nature of the stay of seasonal workers, Member States will not be obliged to apply equal treatment on unemployment and family benefits, and may limit equal treatment on tax benefits and on education and vocational training (Art. 23 (2)). Member State's discretion right to set out optional

68 *Ibid.*, p. 7.

69 Fudge; Herzfeld Olsson, *op. cit.*, note 66, p. 463ff.

70 Rijken, *op. cit.*, note 33, p. 444, 446.

71 Fudge; Herzfeld Olsson, *op. cit.*, note 66, p. 452.

restrictions differs from no restrictions reported to explicit exclusion regarding access to family benefits with a similar legal approach considering seasonal workers entitlement to the unemployment benefits.[72]

Having regard to Art. 23 (1 and 2) of the SDW, the **Croatian** AA prescribes that seasonal workers have the same rights as Croatian citizens concerning the enumerated categories of rights (Art. 108 (1)). The level of rights depends on "the basis on which the conditions of seasonal workers will be equalized with those of national workers."[73] The Croatian legislator has made the Croatian regulations and collective bargaining agreements binding for the employer as a basis to equalize conditions.

Croatia has not used the possibility given by the Directive to restrict equal treatment of seasonal workers regarding certain rights, namely family benefits, unemployment benefits,[74] education and vocational training, study and maintenance grants and loans, and tax benefits. Nevertheless, the question is whether a seasonal worker can fulfil the conditions needed for such rights/benefits. For instance, an unemployed person in Croatia can obtain the unemployment benefit if he/she was employed for nine months in the total period of 24 months prior to applying for such a benefit. On the other hand, the (equal) right of seasonal workers to education and vocational training is questionable, not only because of their temporary employment, but also because of the current inefficient regulation of the employer's duty to educate a worker.[75]

4.2. Adequate accommodation

In order to be admitted to work in the EU under the Directive, workers must accompany their application with evidence of adequate accommodation (Art. 5 (1) (c)). The benchmark of adequate living standards and most used indicators to

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72 For right-based criticism towards the Council and the Member States for not extending the principle of equal treatment completely in case of third-country nationals see: Töttős, A., *The Past, the Present and the Future of the Seasonal Workers Directive*, Pécs Journal of International and European Law, Vol. 45, No. 1, 2014, p. 55-56.

73 Fudge; Herzfeld Olsson, *op. cit.*, note 66, p. 457. Cf. Preamble, point 43.

74 However, they are entitled to receive statutory pensions under the conditions provided for by Art. 23.1 (2) of the Directive.

75 Laleta, S., *Innovations and Growth of Skills: Challenges to the Croatian Legislature*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, No. 4 (Posebni broj), 2018, pp. 1860ff. There are examples of specific employment activity with employer that participate in continuing vocational training of its workers through specific contribution payment channel financing the training activities, whereby the seasonal worker benefits from an aggregation of hours for the completion of a training course. France and German Study, 2020, p. 25-26, p. 12.

define minimum standards may vary among Member States. Most used criteria are sanitation, living space and safety.[76] Where the accommodation is arranged by or through the employer, the Directive aims to protect seasonal workers and prohibits excessive rent that should not be automatically deducted from his or her wage (Art. 20). In some Member States, seasonal workers are being paid less than the minimum wage, as in-kind meals and accommodation is included.[77]

Pursuant to the Croatian Aliens Act, the ensured adequate accommodation should be "in accordance with the Croatian regulation and collective bargaining agreement that is binding for the employer". Under the AA, it is defined as "the accommodation enabling a seasonal worker adequate standard of living during the entire stay". In line with Art. 20 of SWD, the AA prescribes duties of the employer who has ensured the accommodation or who acts as an intermediator in ensuring the accommodation. He/she should not demand that the seasonal worker pays a rent that is too high compared with his/her net remuneration and with the quality of the accommodation. Such rent should not be automatically deducted from the wage of the seasonal worker. Likewise, the employer should submit the rental contract or an equivalent document in which the rental conditions for the accommodation are clearly stated, ensuring that the accommodation fulfils the general health and security norms in force in Croatia (Art. 104 (10) AA).[78] Seasonal worker and the employer should inform the police authority about any change of the accommodation within 8 days from the change.

Technical conditions for the adequate accommodation, the modus of rent payment and documentation are prescribed in the above mention By-law. Rental contract or an equivalent document are considered valid proofs of adequate accommodation.[79] They should include the information on the rent amount, surface

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76 EMN (2020), *Attracting and protecting*, *op. cit.*, note 38, p. 23.

77 If the employer or landlord offers seasonal worker accommodation and meals it must be clearly regulated in the initial or in a separate contract. Provisions include the terms and conditions for the provision of the accommodation and deduction of a reasonable amount (*Pfändungsfreigrenze)* for the rent and meals from wages that does not expose seasonal worker at risk of being left without enough money left over each month to live on. *Germany – important information for seasonal worker*, 2020, [https://www.arbeitsagentur.de/datei/important-information-for-seasonal-workers_ba146928.pdf], Accessed 11 January 2021.

78 The aim of the provisions is to protect workers from the employer's exploitation. Nevertheless, the Member States have the possibility to determine whether workers are free to arrange accommodation or if it is the employer's responsibility. See more: Fudge; Herzfeld Olsson, *op. cit.*, note 66, p. 452.

79 The accommodation expenses should be appropriate to the amount of wage of the seasonal worker and should not exceed 30% of the net wage. If the employer ensures the accommodation to the seasonal worker without charge, he/she has to issue a document in which the conditions of the accommodation are clearly specified (Art. 28 (e)).

and number of persons using the premises (Art. 28 (b)). The premises must satisfy certain conditions in order to be considered adequate.[80]

5. THE PROTECTION OF INFRINGED RIGHTS OF THE SEASONAL WORKER

The Directive prescribes the obligation of the Member States to ensure effective mechanisms through which the seasonal workers can protect their rights: a) directly, or b) through third party; or c) through a competent authority of the Member State (Art. 25).[81] As already mentioned, third-country seasonal workers are particularly vulnerable. To be effective, a protective enforcement mechanism has to address all the aspects of the seasonal migrant workers' vulnerability. Therefore, a multi-faceted approach to enforcement is needed. First, in order to minimize the risks to which the workers who claim their rights are exposed, they should have the right to change employers, to claim obligations they would have been entitled to had the work authorisation not been withdrawn. Second, they should have the right of recourse against the principal contractor, what is especially important in the agricultural sector, where the labour supply chains are used. Third, the effective complaint mechanisms should be available to seasonal migrant workers, as well as the possibility that they engage a third party (e.g. a trade union representative or labour inspector) to submit a complaint on their behalf. Finally, an external monitoring mechanism should be available to ensure that the employers fulfil their duties under the Directive.[82] The enforcement mechanisms are essential as a guarantee that migrant workers may enjoy labour standards provided for by the Directive.[83]

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80 It should be: a space in a fixed structure, with sanitary facilities that are physically separated from the living and sleeping premises; where running water, heating (except in an object where workers stay in summer) and electricity have been provided; which meets other health and hygienic living conditions, in line with special regulations (Art. 28.c). In the premises intended for living, sleeping and food preparation may be occupied by a maximum of six workers. The equipment and appliances at the premises may not be worn-out and damaged and they should be functional. The height of the rooms (from the floor to the ceiling) must enable free and safe movement of workers. Sleeping rooms for men and women should be physically separated, unless the seasonal workers are family members. Premises for the food preparation have to be positioned in such a way to allow individual food preparation. The minimum space for accommodation of a single seasonal worker has to be 14 m² per person (including sleeping room, premises for food preparation and sanitary facilities); for 2 persons 20 m², 3 persons 26 m², 4 persons 32 m², 5 persons 38 m² and 6 persons 44 m² (Art. 28 (d)).

81 Therefore, mechanisms through which seasonal workers may lodge complaints against their employers are under the Member States' powers, making their effectiveness dependant on national procedures (Art. 25).

82 Fudge; Herzfeld Olsson, *op. cit.*, note 66, p. 459-460.

83 Fudge; Herzfeld Olsson, *op. cit.*, note 66, p. 460.

A seasonal worker who deems that some of his/her rights guaranteed by the Croatian Aliens Act have been infringed may, in order to protect and claim that right, initiate proceedings against the employer before the competent court, government authorities or legal entities with public authorities, in line with the Croatian legislation. The mentioned proceedings may be initiated even after the termination of his/her employment with the mentioned employer (Art. 109 (1-2)). Pursuant to the Labour Act, the procedure for the protection of worker's rights for non-financial claims consists of two phases; the first internal procedure run by the employer, and the second comprising judicial protection (Art. 133 (4) LA). The LA prescribes that a worker who has failed to duly initiate the proceedings with the employer may not seek judicial protection before the competent court, except in the case of worker's financial claim pertaining to the employment (Art. 133 (1-3)). Moreover, different rules of the LA apply to the protection of the worker's dignity. [84]

It is doubtful whether the described general protection of the worker's rights can actually be an effective mechanism for the protection of rights of seasonal migrant workers. Their work and stay in Croatia is of a temporary nature and seeking protection according to general labour law rules may become impossible due to the complexity and duration of the procedure, as well as its expenses. We should bear in mind that this is especially true for seasonal workers in agriculture who often perform work for very short periods, of up to 90 days in a calendar year. Therefore, it would be appropriate to provide special rules (*de lege ferenda*) introducing shorter procedures (and deadlines for claims) both with the employer and before the court, or to enable direct judicial protection without prior procedure run by the employer. Establishing a special body of public authority that would be in charge of workers' complaints would be more efficient.

The Croatian AA prescribes that in addition to persons entitled to the representation, other persons, associations and other authorized organizations entitled to give legal assistance, may take part in the procedure for the protection of worker's rights, based on the authorization given by a worker (Art. 109 (3 and 4) AA).

Trade unions are authorized to represent workers as their members. Furthermore, pursuant to Art. 434 (a) of the Civil Procedure Act,[85] in labour-law court proceed-

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[84] See: Gović Penić, I. *et al.* (eds.), *Priručnik o diskriminaciji i mobingu na radnom mjestu*, Sindikat naftnog gospodarstva i Udruga za pomoć i edukaciju žrtava mobbing, Zagreb, 2018; Laleta, S.; Kotulovski, K., *Mobbing and the protection of dignity in the Croatian legislation and practice: lex specialis as sine qua non?*, in: Liber Memorialis Prof. Dr. Nada Bodiroga-Vukobrat, Hamburg, Verlag Dr. Kovač, 2021, p. 99-110.

[85] Civil Procedure Act (Official Gazette No. 148/1, 25/13, 89/14, 70/19).

ings a worker can be represented by a trade union's representative who is in an employment relationship with the respective trade union, of which the worker is a member, or in an employment relationship with the trade union association to which the respective trade union belongs. Since seasonal workers as temporary workers often perform work for up to three months, it is unlikely that they can easily join trade unions. The same is true if they stay in Croatia for up to six months (as a maximum). Therefore, it seems that third-country national seasonal workers will not seek the assistance of trade unions either in lodging complaints against the employer, or in a labour-law dispute before the court. In contrast, Austria has several contact points for seasonal workers that offer avenues for lodging complaints against their employers, including legislation specifically designating the Chambers of Agricultural Labour in this role and other institutions, such as trade unions and the Public Employment Service.[86] What's more, in Austria organizations meeting the minimum treshold of employees can create representation bodies, i.e. work councils, which support employees in all work-related matters.[87] As seasonal migrant workers become part of the employer's staff, their interests and rights should accordingly be protected by the work councils as the workers' participation body in Croatia.

In keeping with the Directive, the AA prohibits that a seasonal worker who has initiated the proceedings to protect his/her rights be put in an unfavourable position in relation to other workers employed by the employer, nor should this circumstance have an adverse effect on his/her rights arising from employment. As provided in Art. 117 of the LA, "an appeal or civil action, or participation in proceedings against the employer due to violation of laws, regulations or administrative provisions, collective bargaining agreement or working regulations, or the worker's approach to the competent state authorities shall not constitute a just cause for terminating the employment contract." The Labour Act prohibits any direct or indirect discrimination in the area of labour and working conditions, including the selection criteria and requirements for employment, advance in employment, professional guidance, education, training and retraining, in accordance with LA and special laws and regulations (anti-discrimination legislation).

One of the challenges connected with the protection of seasonal workers' rights is how to make **information** about such general protection rules (including the protection of worker's dignity and protection from being put in an unfavourable

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86 *Seasonal Workers from Third Countries in Austria*, UN Migration, 2020, p. 26, [https://www.emn.at/wp-content/uploads/2020/11/emn-national-report-2020-seasonal-workers-in-at.pdf], Accessed 17 April 2021.

87 EMN (2020), *Attracting and protecting*, *op. cit.*, note 38, p. 27.

situation) available to seasonal workers. They often do not speak the Croatian language, do not integrate easily in the working community by the employer, and, especially in agriculture, stay in rural areas where it is more difficult to get informed. In that respect, help could be provided by trade unions or other organizations (e.g. NGOs).[88] The latter can also represent seasonal workers in the afore mentioned proceedings, in case they are authorized to provide legal assistance (Art. 109 (3 and 4) AA).

It is important to emphasize that, by virtue of the Directive, the application for the permit has to be accompanied by a valid **work contract** (or a binding job offer; Art 6 (1(a))[89] and, what's more, the Directive prescribes the content of that contract. According to C. Rijken, such issues represent "objectified and standardized criteria that provide protection against exploitative practice".[90] It is important that a document which should accompany the application is legally enforceable. Together with the essential conditions that such a document should provide, it should guarantee the seasonal workers basic information about "what to expect and should give them a way to prove the conditions of employment in the event of a dispute."[91]

6. SANCTIONS AGAINST EMPLOYERS

6.1. Liability to pay compensation

Sanctions against employers who breach their obligations under the Directive should include liability of the employer to pay compensation to seasonal worker if the work authorisation is withdrawn for the following reasons: undeclared work and/or illegal employment, insolvency and breach of the obligations under the Directive,[92] cancelling a full-time position in order to create vacancy that the employer is trying to fill with the migrant worker (within 12 months immediately

88 During field visits, an association of trade unions and NGOs in Germany that deals with seasonal work in the agricultural sector informs and advises seasonal workers of their rights and provides support in the event of labour law difficulties. Initiative Faire Landarbeit (2020) Saisonsarbeit in der Landwirtschaft NP. [https://www.pecoev.de/docs/InitiativeFaireLandarbeit_Bericht2020_IGBAU-neu.pdf], accessed on 13 January 2021

89 Cf. the Aliens Act: it is a "valid employment contract", that should be "in accordance with the Croatian regulation and collective bargaining agreement that is binding for the employer".

90 Rijken, *op. cit.*, note 33, p. 446.

91 Fudge; Herzfeld Olsson, *op. cit.*, note 66 p. 452.

92 Art. 9.2. of the Directive providing that Member State *shall, if appropriate*, withdraw the authorization. The meaning of terms "shall, if appropriate" is not clear, but it seems that a Member State has a discretion to determine the appropriateness of the certain grounds as a ground for the rejection of application or withdrawing of the work permit. Cf. Fudge; Herzfeld Olsson, *op. cit.*, note 66, p. 455.

preceding the date of the application), or violation of "labour law and working conditions".[93] (Art. 17 (2), Directive). The employer's liability to pay compensation should be determined in accordance with the procedures under national law, and is hence not an automatic consequence of the imposed sanction.[94]

The Croatian AA under Art. 107 (6) prescribes the liability of the employer to pay compensation and all outstanding obligations in accordance with the provisions that regulate employment relations, if the residence and work permit was withdrawn. This sanction is prescribed for two instances when the permit may be withdrawn. First, if the employer does not fulfil the obligations regarding social security, worker's rights, working and employment conditions and tax duties, in line with the Croatian provisions and collective bargaining agreement binding for the employer.[95] Second, when the bankruptcy or liquidation proceedings have been opened or the employer was under such proceedings, or when the employer does not perform an economic activity (Art. 107 (2)).

The Aliens Act refers to all outstanding obligations "in accordance with the provisions that regulate employment relations". It should be emphasized that according to the Directive, liability covers "any outstanding obligation which the employer would have to respect if the authorization for the purpose of seasonal work had not been withdrawn", i.e. legitimate expectations of seasonal migrants.[96] A novelty of the AA is that the sanctions for and liability of the main contractor and any intermediate subcontractor is regulated as provided for by the Directive (Art. 107 (8 and 9) AA).

6.2. Serious breach of employers' obligations

Another novelty under Croatian law concerns the prohibition to issue the residence and work permit to an employer who, in the last one-year period, (at least)

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93 Art. 9.3. (a), (b), (c) of the Directive providing that Member States *may* withdraw the authorization. See also: Fudge; Herzfeld Olsson, *op. cit.*, note 66, p. 462.

94 Such a solution is criticized because seeking the compensation can be extremely difficult for victims of trafficking and in cases of labour exploitation. Rijken, *op. cit.*, note 33, p. 449. These sanctioning provisions represent a mix of obligatory and optional clauses. Fudge; Herzfeld Olsson, *op. cit.*, note 66, p. 462.

95 In Directive this is prescribed also as a possible ground for rejection of the application for authorization for the purpose of seasonal work (Art. 8 (4) point a). This measure seems to be effective and dissuasive. It seems that for the Croatian legislator this reason was not important enough to be prescribed as a reason to reject the permit. On the contrary, respecting equal treatment principle German Residence Act deals with less favourable terms for foreigners in relation to comparable German worker stating that approval can be revoked and seasonal work permit withdrawn in case same conditions have not been met. Residence Act (*Aufenthaltsgesetz, AufenthG*), s. 40.

96 Fudge; Herzfeld Olsson, *op. cit.*, note 66, p. 463.

twice failed to fulfil his obligations concerning social security, working conditions, etc. (Art.107 (7) AA). It seems that this sanction is not as effective and proportionate, as required by the Directive. To prevent such unlawful practice, the stand-down period should be longer *de lege ferenda* and a blacklist of employers in breach should be published.

7. EXTERNAL MONITORING MECHANISM

The actors in place to ensure the protection of seasonal workers' rights include the Labour Inspectorate, state departments, regional and migration authorities including police and border guard services. Under specific circumstances, these actors are authorized to enter business premises and workplaces, request information and inspect documents. The SWD relies on national legislation regarding labour inspectorate's legal activity without additional enforcement policy obligations for the Member States, thus creating a protective gap (Art. 24). In countries with coordinated systems of social dialogue, minimum standards are regulated through collective bargaining agreements, with responsibility for monitoring and investigating breaches shared between employers and unions and labour inspectorates.[97]

According to the SWD, seasonal workers shall be entitled to equal treatment also with regard to health and safety requirements at the workplace which notionally protects workers against unsafe working conditions without mention of sanctions for employers who do not comply (Art. 23 (2)). In other words, Member States have to establish norms clearly defining the role of the executive agency as competent authority monitoring and enforcing compliance with OHS standards set to protect seasonal workers. For example, in Spain labour inspectors have a broad remit to monitor the physical working environment, including correct payment of wage rates set down in either law or collective agreements, along with employers' social contributions.[98] Furthermore, the Labour Inspectorate in Spain on the indoor and outdoor workplaces advises public actors in the implementation of OHS measures regarding seasonal work.[99]

In Croatia, the Sector of Labour Inspection of the State Inspectorate is in charge of the monitoring of employment relations and OHS. Statistical data are rather scarce and not detailed, but according to available datasets, agriculture traditionaly belongs to sectors with high presence of illegal work. Illegal work is manifested

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97 Grimshaw, D. *et al.*, *Reducing Precarious Work Protective gaps and the role of social dialogue in Europe*, European Work and Employment Research Centre, University of Manchester, UK, 2017, p. 135.

98 EC, Muñoz de Bustillo Llorente, R.; Pinto Hernández, L. F., *Reducing Precarious Work in Europe Through Social Dialogue: The Case of Spain*, University of Salamanca, 2017, p. 35-38.

99 EMN (2020), *Attracting and protecting*, *op. cit.*, note 38, p. 51.

as employment or work of aliens in Croatia contrary to the law or without the mandatory application to the competent pension or health authorities. In 2017 a total of 321 foreign workers (24 women) performed a job contrary to the Aliens Act's provision of the duty to obtain a work permit (compared to 140 aliens in 2016 and 97 in 2015).[100]

In 2020 inspectors established reasonable doubt that 232 aliens worked for employer contrary to the Aliens Act. Accordingly, they issued 50 decisions on the prohibition of performance of activity. The Ombudswoman received complaints of several aliens who claimed to had performed work without the permit and employment contract and/or the employer had not paid off their salary, while some of them, after having been dismissed, had no possibility to return to their home country (country of origin) because of the closed borders.[101]

8. ASSESSING THE IMPACT OF THE COVID-19 ON AGRICULTURAL SECTOR – CONTINUED PRECARIOUS POSITION OF WORKERS IN THE POST-PANDEMIC PERIOD

Seasonal workers in agricultural sector are already in precarious conditions in terms of employment, housing and social services, and discrimination owing to their status as migrants. Early research on the labour market consequences of COVID-19 indicates that the professions to be hurt the most are primarily the low-skilled and less-educated ones.[102] In the context of Covid-19, Member States were called to ensure equal treatment regarding adequate protection from the coronavirus, and that health and safety of seasonal workers are safeguarded in transit and at the place of employment.[103]

However, the ongoing pandemic has aggravated the risk seasonal workers are exposed to and increased the possibility of Covid-19 infection. Many migrant seasonal workers in the agricultural sector have become stranded and unable to update their legal status, consequently facing situations of loss of employment and access to social benefits, including risk of being excluded from national vac-

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100 Republika Hrvatska, Ministarstvo rada i mirovinskoga sustava, Inspektorat rada, Izvješće o radu Inspektorata rada u 2017. godini, Zagreb, ožujak 2018, p. 17.

101 Izvješće pučke pravobraniteljice za 2020., p. 47, [https://www.ombudsman.hr/hr/download/izvjesce-pucke-pravobraniteljice-za-2020-godinu/?wpdmdl=10845&refresh=608e7e957ab3e1619951253], Accessed 24 April 2021.

102 Adams-Prassl, A. *et al.*, *Inequality in the Impact of theCoronavirus Shock: Evidence from Real Time Surveys*, IZA DP, No. 13183, 2020, p. 32-35.

103 European Parliament Resolution of 19 June 2020 on European protection of cross-border and seasonal workers in the context of the COVID-19 crisis, [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0176_EN.html], Accessed 1 March 2021.

cination schemes.[104] Workers in quarantined camps with no income, no social security and facing sanctions from the local government if they broke quarantine rules were afraid to report themselves sick and visit healthcare facilities.[105] Several reports of Covid-19 outbreaks identified risk factors linked to essential workers while performing work including extreme long working days imposed,[106] confined or close spaces with a lack of social distancing, sharing over-crowded transport and accommodation with poor hygiene conditions.[107] Further analysis of following effect for the seasonal workers health and safety identifies sub-standard housing,[108] additional financial costs and slowdown in production due to inexperienced labor force that needs to be adequately trained to work in agriculture incurred for the employers by the pandemic as a major challenge.[109]

Suggestions on activities to be undertaken at national or EU level to prevent reduction in job quality were concrete calling on Member States to assure adequate preventive and protective measures are in place and strengthen field inspections to ensure the proper application of OSH rules to seasonal workers.[110] However, there are examples of practices for which supervision is unequipped to intervene.[111] In addition, interviews with farm workers and trade unions confirmed that language barrier continues to be a persisting challenge of migration in agricultural sector with labour contractors not providing clear information to seasonal workers on their rights and the legal recourse available to them.[112]

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104 ILO (2020a), *Seasonal Migrant Workers' Schemes: Rethinking Fundamental Principles and Mechanisms in light of COVID-19*, International Labour Office, Geneva, 2020.

105 Neef, A., *Legal and social protection for migrant farm workers: lessons from Covid19*, Agriculture and Human Values, Vol. 37, No. 3, 2020, p. 641-642.

106 GüelL, B.; Garcés-Mascareñas, B., *Agricultural seasonal workers in times of Covid-19 in Spain*, ADMIGOV, 2020, p. 32.

107 Reports about performing work in slaughterhouses, meatpacking and distribution centers showed cramped working conditions resulting in high infection rates. *Germany: 1,500 workers test positive for COVID-19 at meat-processing plant; company criticised for "failure" to protect workers*, Business & Human Rights Resource Centre, [https://www.business-humanrights.org/en/latest-news/germany-1500-workers-test-positive-for-covid-19-at-meat-processing-plant-company-criticised-for-failure-to-protect-workers/], Accessed 1 March 2021.

108 Doomernik, J. *et al.*, *How (seasonal) agricultural demands for labour are met by immigrant workers in the Netherlands and Germany*, ADMIGOV, 2020, p. 12-13.

109 EC, Kalantaryan, S. *et al.*, *Meeting labour demand in agriculture in times of COVID 19 pandemic*, 2020, p. 6.

110 European Labour Authority, *Safeguarding seasonal workers' rights: European Labour Authority takes action*, 2019, [https://www.ela.europa.eu/news/safeguarding-seasonal-workers-rights-european-labour-authority-takes-action], Accessed 6 December 2020.

111 Doomernik *et al.*, *op. cit.*, note 143, p. 16.

112 Purkayastha *et al.*, *Work, health and Covid19: a literature review*, ETUI, Brussels, 2020, p. 25-26.

In Croatia, as a major food importer, the Covid-19 pandemic has triggered a desirable self-sufficiency model regarding the agricultural sector.[113] As mentioned above, Croatia relies on foreign seasonal workers. The proposal of the simplification of the employment of (seasonal) workers in agriculture and the procedure of issuing permits is one of the goals of the Croatian agriculture strategy 2030.[114]

In the context of labour relations, the employer and the employee are obliged to adhere to the normative framework and to perform their contractual obligations as in regular circumstances.[115] The coronavirus pandemic has made it much more difficult to pursue transparent and inclusive labor policies.[116] Transparency was sometimes mixed with confusion concerning the legal procedures on how measures should be enforced. Specific health protection and OSH measures that were introduced regarding Covid-19 must apply to seasonal migrant workers, [117] who should enjoy the same rights as the national workers.[118]

Given that the COVID-19 infection poses a direct risk to the safety and health of persons, it is worth mentioning the provisions of the OHS Act, under which both parties to the employment relationship are obliged to inform each other about potential health and life hazards.[119] In this sense, the employer is obliged to inform the employee about changes that could affect his safety and health (Article 32 (1)) and the obligation of the employee is to inform the employer about the circum-

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113 Croatian Chamber of Commerce. [https://www.hgk.hr/vanjskotrgovinski-deficit-poljoprivrednih-i-prehrambenih-proizvoda-smanjen-za-315-posto], Accessed 18 October 2020.

114 *Nacrt prijedloga Strategije poljoprivrede do 2030.*, [https://poljoprivreda.gov.hr/UserDocsImages/dokumenti/Strategija_poljoprivrede_2020_2030/Strategija_poljoprivrede_do_2030..pdf], Accessed 2 May 2021.

115 Vidas, I., *Pravni aspekt ograničenja prava radnika u slučaju pandemije s posebnim naglaskom na prava i obveze poslodavaca i radnika*, IUS-INFO, 86/2020, [https://www.iusinfo.hr/aktualno/u-sredistu/41010], Accessed 3 May 2021.

116 For examples see: EU Agency for Fundamental Rights, *Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications*, 2020, p. 5,[https://fra.europa.eu/sites/default/files/fra_uploads/malta-report-covid-19-april-2020_en.pdf], Accessed 11 July 2020.

117 The Croatian Compulsory Health Insurance Act prescribes compensation for temporary incapacity for work or incapacity for persons (insured persons) who have received a medically indicated measure of compulsory self-isolation at home or ordered quarantine by the competent health institution. Art. 39 (3). Zakon o obveznom zdravstvenom osiguranju (Official Gazette No. 80/13, 137/13 i 89/19); Hrvatski zavod za zdravstveno osiguranje, *Prava osiguranika na privremenu nesposobnost za rad zbog pojave koronavirusa*, [https://www.hzzo.hr/en/prava-osiguranika-na-privremenu-nesposobnost-za-rad-zbog-pojave-koronavirusa-2019ncov/], Accessed 11 April 2021.

118 It must be underlined that in Croatia, the population takes their constitutional right to health care seriously (Constitution, Article 59) and deems it as a fundamental right. Denial of health care could also be deemed as a criminal offence as prescribed in the Croatian Criminal Code.

119 Zakona o zaštiti na radu (Official Gazette No. 71/14, 118/14, 154/14 , 94/18, 96/18).

stances of the possibility of spreading the COVID-19 virus, which corresponds to Art. 68 (2).[120]

Extraordinary circumstances can disrupt or burden the business of the employer who in that case may (justifiably) terminate the employee's employment contract (Art. 122 LA). Considering termination of employment relationship as *ultima ratio,* the employer has at his disposal the legal institution of dismissal with the offer of alternative employment (Art. 123 LA) that prohibits the employer to make unilateral changes to the working conditions. In order to preserve jobs and implement measures to protect people against the spread of the virus, the employer may introduce alternative solutions including redistribution of working time (Art. 67 LA), shift work (Art. 71. LA), change the patterns of working time (Art. 66) or contract part-time work. Likewise, employers have the option to send workers on annual or paid leave. It is important to emphasize that in these situations, workers are entitled to a salary compensation.[121]

Concerning the active labour market policy measures, so far there have been no special measures for the employers utilizing the work of seasonal migrant workers. However, in the category *Particularly Vulnerable Workers*, the right to financial assistance for the so-called permanent seasonal workers was introduced.[122] In addition, the Government's *Job preservation subsidy* applies to the agricultural sector.[123] The subsidy amount is determined by a decline in revenue of at least 60% to qualify for the maximum subsidy of HRK 4,000.00 per employee which corresponds to the Croatian employer association requirements proposing compensation for seasonal workers in the agriculture sector under the same conditions as for other activities.[124] The employer is obliged to retain all employees, meaning that dismissal is not permitted. However, if the employment contract is terminated, the employer is entitled to the subsidy payment for the days on which the employee worked until the employment contract was terminated.

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120 Grgurev, I., *COVID-19 and Labour Law: Croatia*, Italian Labour Law e-Journal Special Issue 1, Vol. 13.

121 Vidas, *op. cit.*, note 154.

122 Vlada Republike Hrvatske, *Službena stranica Vlade za pravodobne i točne informacije o koronavirusu*, [https://www.koronavirus.hr/rezultatipretrazivanja/20?q=vladine+mjere#gsc.tab=0&gsc.q=vladine%20mjere&gsc.page=1], Accessed 25 April 2021.

123 New measures to preserve jobs in Croatia COVID, [https://www.cms-lawnow.com/ealerts/2020/10/new-measures-to-preserve-jobs-in-croatia?cc_lang=en], Accessed 25 April 2021.

124 *Info za članove HUP-a: Isplate potpore HZZ-a za travanj i svibanj*, [https://www.hup.hr/info-za-clanove-hup-a-isplate-potpore-hzz-a-za-travanj-i-svibanj.aspx], Accessed 28 April 2021.

9. CONCLUSION

Seasonal third country workers represent an especially vulnerable category of waged agricultural workers due to the presence of all the dimensions of precariousness. The Seasonal Workers Directive combines immigration law with labour law, that governs the rights of migrant workers. It embodies the approach of equal treatment of the seasonal migrant workers and domestic workers of the host Member State. Since the extent of the protection they actually enjoy depends on the terms and conditions that are guaranteed to national workers and the enforcement mechanisms available to seasonal workers, its efficiency is doubtful.

The New Croatian Aliens Act has brought an important novelty, namely the shift from the quotas to the labour market test system. Seasonal migrant workers are provided the same rights as the Croatian citizens concerning terms of employment and working conditions, and the protection of rights arising from the employment relationship. Croatian regulations and collective bargaining agreements that are binding for the employer are used as the basis to equalize conditions. On the flip side of the equal-treatment-coin, the general rules on protection in case of infringed rights do not represent effective and protective enforcement mechanism that is requested by the Directive. An appropriate, protective mechanism, tailored to fit the specific, temporary and precarious position of seasonal migrant workers, is needed *de lege ferenda* to bridge the present legislative gaps. The role of the labour inspection in this regard is crucial.

The Covid-19 pandemic has worsened working and living conditions in general. Seasonal migrant workers are facing new risks concerning the substandard accommodation with poor hygiene conditions and exacerbated free movement. In order to improve protection for migrant agricultural workers, they should be provided avenues for increased proactive inspections, anonymous reporting, alternative housing/employment and adequate workplace injury assessments in the healthcare system. For this reason, it is necessary to ensure effective and comprehensive regulatory framework with a policy promoting decent working conditions, productivity and income of waged agricultural workers.

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UDK 368.91:638.252
Original scientific paper

COVID - 19 AS A "SIGNIFICANT CIRCUMSTANCE" FOR RISK ASSESSMENT IN LIFE INSURANCE (IN AND AFTER THE PANDEMIC)

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ABSTRACT

The data on the health status of a policyholder represent a significant circumstance for risk assessment and concluding a life insurance contract, and are also legally relevant circumstances for exercising the rights from that contract. The author starts from a theoretical analysis of the perception of data on the health status of policyholders as personal data, comparing the right to confidentiality of such data with the duty to report them (before concluding a life insurance contract) in terms of reporting all circumstances relevant to the insurance risk assessment. In order to properly fulfil the obligation of pre-contractual nature, the paper analyses the legal norms governing this issue and also provides a comparative overview of the Croatian and German insurance legislation with special emphasis on the scope of health data that the insurer is authorised to require, the clarity of legal standards and legal insurance norms contained in the insurance questionnaires and the life insurance offer. Presenting the importance of COVID-19 infection and possible chronic consequences for human health, the author indicates the extent to which COVID-19 infection (mild or severe form of disease, possible need for hospital treatment) will have an impact on the design of new insurance questionnaires and the relevance of genetic testing results in the context of concluding future life insurance contracts.

Keywords: *COVID-19, life insurance,"significant circumstance"*

1. INTRODUCTION

On 30 January 2020, the World Health Organization (WHO) declared the COVID-19 outbreak a "public health emergency of international concern"[1] and, on 11 March 2020, declared it as a pandemic.[2] The coronavirus disease (COVID-19)

[1] See more Lee, A., *Public health actions against COVID-19 to protect our rights to health*, Medicine and Law, World Association for Medical Law, Vol. 39, No. 2, 2020, pp. 205 - 221.

[2] World Health Organization, *COVID-19 Public Health Emergency of International Concern (PHEIC)*, [https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-con-

may result in a milder clinical picture for some individuals. This is confirmed by the WTO data that around 95% of people who have been sick with COVID-19 to date have recovered or are recovering.[3] According to the Croatian Institute of Public Health data from March 2020, the COVID-19 infection in about 80% of cases caused a mild illness (no pneumonia or mild preumonia) and most sufferers recover, while 14% have a more severe illness and 6% have a severe form of the illness.[4] Thus, for a number of people, COVID-19 can cause a more severe clinical condition that may have a fatal outcome. According to European Commission data, every 17 seconds a person dies in the EU due to COVID-19.[5] Moreover, the data from the European Centre for Disease Prevention and Control shows that in 2020, the largest number of COVID-19 reported cases and death cases were in the USA (35 072 089 cases, 848 838 deaths) and then in Europe (24 842 295 cases, 552 404 deaths).[6] These data indicate the severity of the COVID-19 disease, but also the need to amend the insurer's questionnaires *de lege ferenda*. Namely, reporting of all significant circumstances for risk assessment (in life insurance one of the significant circumstances is also the reporting of illness by the policyholder/insured) is an obligation of pre-contractual nature, and its fulfilment has an effect on the exercise of rights from the insurance contract. The aim of this paper is to point out the importance of data on the health status of the policyholder/insured, the right to privacy of such data, the right to their collection and transmission, but also the duty to report them since these are important circumstances for risk assessment and the conclusion of life insurance contracts.

2. DATA ON HEALTH STATUS – COLLECTION AND ACCESS

The effectiveness of the health system depends on the exchange of data on health status. The conditions for the purposeful and efficient use of data and information on health status in the Republic of Croatia are regulated by the Act on Health

cern-(pheic)-global-research-and-innovation-forum], Accessed 13 January 2021.

3 World Health Organization, *COVID-19 severity*, [https://www.who.int/westernpacific/emergencies/covid-19/information/severity], Accessed 1 February 2021.

4 Croatian Institute of Public Health, *Pitanja i odgovori o bolesti uzrokovanoj novim koronavirusom*, [https://www.hzjz.hr/priopcenja-mediji/pitanja-i-odgovori-o-bolesti-uzrokovanoj-novim-koronavirusom/], Accessed 18 December 2020.

5 European Commission, *Communication from the Commission to the European Parliament and the Council, Staying safe from COVID-19 during winter*, COM(2020) 786 final, 2.12.2020., p. 2, [https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-786-F1-EN-MAIN-PART-1.PDF], Accessed 17 December 2020.

6 European Centre for Disease Prevention and Control, *COVID-19 situation update worldwide, as of week 52 2020*, [https://www.ecdc.europa.eu/en/geographical-distribution-2019-ncov-cases], Accessed 10 January 2021.

Data and Information.[7] The data on the the insured person's health status are health data since, according to the provision of Art. 3(1)(1) of the Act on Health Data, the data on a person, on his physical or mental health, including the health services provided to him in the health system of the Republic of Croatia are considered to be health data. Health records include medical documentation[8] - medical, nursing and other documentation (i.e. any record that contains information about the patient's health, treatment instructions, as well as how to exercise the patient's rights to health care)[9] and all other documentation that is created or recorded in health care (administrative, financial and other non-medical documentation).[10] In addition to the content of health data and medical documentation, the author points out the legal basis for the exchange of data on the patient's health status.[11] More specifically, according to the provisions of Art. 25, the Patients' Rights Act prescribes the patient's right to confidentiality[12] of health data,[13] i.e. the right to access medical records is regulated.[14] These provisions prescribe the following patient rights: a) the right to access all medical documentation related to the diag-

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7 Act on Health Data and Information, Official Gazette No. 14/2019 (Act on Health Data) - entered into force on 15 February 2019.

8 Medical documentation is a set of medical records and documents created in the process of providing health care by authorised health care providers that contain data on the health status and course of treatment of patients (Act on Health Data, Art. 3(1) point 8). These are the following documentation: discharge letter, medical certificate, medical history, laboratory test results, X-rays, CT findings, etc.

9 Matijević, B., *Osiguranje, Management, Ekonomija, Pravo*, Naklada, Zadar, 2010, p. 614.

10 Act on Health Data, Art. 3(1) point 9.

11 A patient is considered to be any person, sick or healthy, who requests or is provided with a certain measure or service for the purpose of preserving and improving health, preventing disease, treatment or health care and rehabilitation (Art. 1(2) Patients' Rights Act, Official Gazette No. 169/2004, 37/2008).

12 The principle of protection of patient privacy includes the right to confidentiality and privacy of information on health status, medical status, family circumstances, course of treatment and prognosis, and all relevant data. (Dulčić; K.; Bodiroga-Vukobrat, N., *Zaštita osobnih podataka pacijenata u europskom i hrvatskom pravu*, Zbornik Pravnog fakulteta u Rijeci, Vol. 29, No. 1, 2008, p. 2).

13 These are data that we consider a special category of personal data, the processing of which is in principle prohibited according to the provisions of Art. 9(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] *OJ L119/1–88 (Regulation (EU) 2016/679).* Exceptions to the application of the decision of Art. 9(1) of Regulation (EU) 2016/679, i.e. cases when the processing of personal data will be allowed (including data related to health) are prescribed by the provision of Art. 9(2) *Regulation (EU) 2016/679.* More on health data processing see *Act on Health Data,* Arts. *4 – 12.*

14 The doctor is obliged to keep accurate, comprehensive and dated medical documentation that can at any time provide sufficient information about the patient's health and treatment (Art. 23(1) Act on Medical Practice, Official Gazette No. 121/2003, 117/2008). In addition to the doctor's obligation to keep medical records of the patient's health and treatment, he is also obliged to keep these medical records while respecting the patient's privacy.

nosis and treatment of their disease;[15] and b) the right to request a copy of the medical documentation, at the expense of the patient.

The right to protection of personal data concerning health is the individuals' right to protection of their (legitimate, moral and economic) interests which relates to the effective protection of their personal health data from the risk of misuse, as well as from all unconstitutional, illegal, unjustified access and use, and to the sanctioning of illegal use and misuse of information.[16] The confidentiality of personal data is a personal right whereby every natural person's personal data is protected in order to exercise the right to privacy, which is one of the personality rights, and other human rights and fundamental freedoms.[17] Although the risk of disclosing personal data related to persons' health status makes all individuals (patients) a vulnerable category of persons[18] - by analysing Art. 23(1) of the Act on Medical Practice, we can see that the doctor is obliged to present the medical documentation to the Ministry of Health, State Administration Bodies in accordance with special regulations and the Croatian Medical Chamber or the judiciary[19] (exclusively at their request). In these cases, the prior consent of the patient to submit the data in question to the said authorities is not required. Upon the analysis of Articles 23 and 30 of the Act on Medical Practice, we can see that insurance companies do not have the right to access health data. However, insurance companies will be able to inspect medical records if the patient voluntarily provides them. In view of the fact that it is forbidden to discriminate or put at a disadvantage any person with regard to their state of health,[20] the author draws attention the importance of providing access to policyholder's medical records in connection with the importance of policyholder's health data when concluding a life insurance contract. More precisely, when concluding a life insurance contract, the insurer considers policyholder's state of health as a significant circumstance for the risk assessment.

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15 One of the patients' rights is the right to access and protection of health data, and the doctor is obliged, at the patient's request, to provide the patient with all medical documentation relating to the diagnosis and treatment of his disease (Act on Medical Practice, Art. 23 (3)).

16 Bevanda, M.; Čolaković, M., *Pravni okvir za zaštitu osobnih podataka (u vezi sa zdravljem) u pravu Europske unije*, Zbornik Pravnog fakulteta u Rijeci, Vol. 37, No. 1, 2016, p.151.

17 *Pravni leksikon*, Leksikografski zavod Miroslav Krleža, 2007, p. 1596.

18 Grozdanić, V.; Škorić, M.; Rittosa, D., *Liječnička tajna u finkciji zaštite privatnosti osoba s duševnim smetnjama*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 64, No. 5 - 6, 2014, p. 127.

19 In that case, the access to the documentation in question will most often come on the basis of a court order, and in connection with the conduct of court proceedings. More on medical documentation as the most important and credible evidence of crucial importance in civil and criminal court proceedings see Golubić, M., *Značaj medicinske dokumentacije u sudskom postupku*, 2017, p. 2, [https://www.iusinfo.hr/strucni-clanci/CLN20V01D2017B1005*], Accessed 27 December 2020.*

20 See Art. 1 of Anti-discrimination Act, Official Gazette No. 85/2008, 112/2012.

3. OBLIGATION OF THE POLICYHOLDER TO REPORT DATA ON HEALTH STATUS - SIGNIFICANT CIRCUMSTANCES FOR RISK ASSESSMENT IN CONCLUDING A LIFE INSURANCE CONTRACT

Life insurance contract is a contract of good faith[21] (*bona fides).* Good faith is a legal standard based on which it is required that the contracting parties, when establishing and exercising the rights from the insurance contract, are guided by the principle of good faith.[22] The principle of good faith implies openness, honesty and reliability in the mutual relations of the parties at the time of conclusion of the contract and after, until its realisation.[23] During the negotiations leading to a contract, good faith might require the parties to: a) keep every promise which is made; b) negotiate in such a way as to avoid taking advantage of another or the counterpart suffering prejudice; c) do one's best to complete the negotiations; d) act fairly and honestly; e) co-operate; f) inform the other party of all that he needs to know; g) avoid lies and misleading conduct; h) abstain from fraud.[24]

The principle of integrity and fairness, trust in the legal order, is one of the central principles of the law of obligations, which means a fair, loyal and just conduct of the contracting parties in establishing and performing contractual obligations.[25] This is an extralegal criterion for assessing the mutual relationship of the parties to obligations, and goes beyond what is explicitly provided or prescribed by the contract.[26] From the nature of the insurance relationship it follows that the policyholder must bear the burden of fully and truthfully informing the insurer of the facts relevant to its decision on concluding the contract and assessing the severity of the risk[27] and it is not permitted for the policyholder to conceal the facts known to him for his own benefit and to the detriment of the other contracting

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21 Clarke, M. A., *The Law of Insurance Contracts*, Sixth Edition, Informa, London, 2009, p. 119: Life insurance is valid if it is *bona fide*.

22 See more Wham, H. K., „*If They Wanted to Know, Why Didn't They Ask*?" A Review of the Insured' Duty of Disclosure, Auckland University Law Review, Vol. 20, 2014, p. 74; Baretić, M., *Načelo savjesnosti i poštenja u obveznom pravu*, Zbornik radova Pravnog fakulteta u Rijeci, Rijeka, Vol. 24, No. 1, 2003, pp. 571 – 615; Pavić, D., *Primjena načela dobre vjere u osiguranju*, Hrvatska pravna revija, Zagreb, No. 4, 2003, pp. 25 – 36; Galev, G., *Načelo savjesnosti i poštenja*, Zbornik Pravnog fakulteta u Rijeci, Supplement No. 3, 2003, pp. 223 – 236.

23 Andrijašević, S.; Račić-Žlibar, T., *Rječnik osiguranja*, Masmedia, Zagreb, 1997, p. 232.

24 Eggers, P. M.; Picken, S.; Foss, P., *Good Faith and Insurance Contract*, Lloyd's List, London, 2010, p. 6.

25 *Pravni leksikon*, *op. cit*., note 17, p. 233.

26 Pavić, D., *Načelo dobre vjere u poredbenom pravu pomorskog osiguranja*, Zbornik Pravnog Fakulteta u Rijeci, No. 2, 2002, p. 275.

27 The policyholder must accurately and fully report all circumstances relevant to the risk assessment, i.e. he must describe the risk he wants to insure accurately and completely (see Donati, A.; Volpe Putzolu, G., *Manuale di diritto delle assicurazioni*, Giuffre, Milano, 1995, p. 113).

party when taking out insurance.[28] This obligation is standardised in Art. 931 of the Croatian Civil Obligations Act[29] according to which the policyholder shall report to the insurer all the circumstances that are material for assessing the risk,[30] of which he is aware or of which he should have been aware.[31]

Precisely on the basis of fully and accurately reported circumstances relevant to the risk assessment, the insurer decides whether to conclude the insurance contract in question and assesses the severity of the risk.[32] This obligation of the policyholder exists before the conclusion of the contract or "on the conclusion of the contract". The pre-contractual duty of disclosure[33] is the most significant part of the duty of utmost good faith as applied in respect of insurance contracts.[34] This is an active reporting obligation that exists on the part of the policyholder. In other words, the policyholder knows best all significant circumstances that can be subjective and objective in nature.[35] The circumstances that are significant for the risk assessment are determined by the insurer and can only be determined on a case-by-case basis.[36] Generally speaking, significant circumstances are certainly the circumstances that are important for the insurer in deciding whether to conclude an insurance contract, i.e. under what conditions it will conclude it.[37] Although the Croatian legislator has nowhere explicitly prescribed the circumstances in question, the passive obligation to report exists on the part of the insurer who is obliged to define

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28 Pavić, D., *Ugovorno pravo osiguranja*, Tectus, Zagreb, 2009, p. 198.

29 Civil Obligations Act, Official Gazette No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018 (COA).

30 "Circumstances that are significant for the risk assessment" can be defined as information with which the insured approaches the insurer and on the basis of which he requests the conclusion of a contract in order to insure against the possible occurrence of a future risk (Keglević, A., *Ugovorno pravo osiguranja*, Školska knjiga, Zagreb, 2016, p. 346).

31 This obligation is prescribed within the German, Austrian, French, Italian and other EU Member States legislature - see Džidić, M.; Ćurković, M., *Pravo osiguranja*, Pravni fakultet Sveučilišta u Mostaru, Mostar, 2017, p. 173. More on the legal standardisation of this obligation in Slovenian legislation see Ivanjko, Š., *Uvod u zavarovalno pravo*, Univerza v Mariboru Pravna fakulteta, Maribor, 1999, pp. 145 – 146; Pavliha, M., *Zavarovalno pravo*, Gospodarski vestnik, Ljubljana, 2000., p. 168.

32 More on the obligation of policyholders to report significant risk assessment circumstances see Pavić, D., *Primjena načela dobre vjere u osiguranju*, Hrvatska pravna revija, br. 4, 2003, p. 26.; Ćurković, M., *Ugovor o osiguranju - obveza informiranja o značajnim okolnostima*, Osiguranje, Zagreb, No. 11, 2002, pp. 13 – 14.

33 See more Van Niekerk, J. P., *The Insured's Duties of Disclosure: Delictual and Contractual; Before the Conclusion and during the Currency of the Insurance Contract: Bruwer v Nova Risk Partners Ltd.*, South African Mercantile Law Journal, Vol. 23, No. 1, 2011, p. 135.

34 Eggers, P. M., *The Past and Future of English Insurance Law: Good Faith and Warranties*, UCL Journal of Law and Jurisprudence, Vol. 1, No. 2, 2012, p. 218.

35 Ćurković, M., *Obveze stranaka iz ugovora o osiguranju*, in: Kuzmić, M. (eds.), Ugovor o osiguranju prema novom ZOO, Inženjerski biro, Zagreb, 2005, p. 32.

36 Ćurković, *Ugovor o osiguranju - obveza*…, *op. cit.*, note 31, p. 13.

37 Ćurković, M., *Ugovor o osiguranju života*, Inženjerski biro, Zagreb, 2005. p. 80.

what information he considers significant[38] since the policyholder in many cases is unfamiliar with what information represent significant circumstances for the insurer.

Europen insurance contract law is not harmonised,[39] so there are no unified provisions that uniformly regulate the obligation of the policyholder to report significant circumstances for risk assessment, which in turn contributes to legal uncertainty. These rules vary significantly from one EU Member State to another, the practise of using questionnaires[40] to obtain the necessary disclosure from applicants is not mandatory in all EU Member States and the rules relating to allowed questions vary significantly.[41] Insurers are required to ask questions in order to learn about points relevant for their decision whether to accept the risk so, if they do not put questions in respect of some point - that point will be deemed "not relevant".[42] The fulfilment of the obligation to report significant circumstances for risk assessment refers to complete and accurate answering of all questions contained in the insurance offer,[43] reporting of circumstances covered by the insurer's questionnaire,[44] reporting of circumstances not covered by the insurer's questionnaire but stated in general and special policy conditions, as well as reporting those

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38 Pavić, *Ugovorno…, op. cit.,* note 28, p. 198. According to Ćurković, it is about giving answers to questions related to: illness; hospital stay, health resort, rehabilitation; data on the existing diseases of the heart, lungs, stomach, liver, kidneys, bile, nerves, mental illness, cancer, blood pressure, etc. (Ćurković, M., *Ugovor o osiguranju – Komentar odredaba Zakona o obveznim odnosima*, Inženjerski biro, Zagreb, 2017, p. 77).

39 See more Belanić, L., *Harmonizacija prava osiguranja u Europskoj uniji s osvrtom na ugovorno pravo osiguranja*, Zbornik Pravnog fakulteta u Zagrebu, Zagreb, Vol. 60, No. 3, 2010, pp. 1352 – 1353.

40 See more Cousy, H., *The Principles of European Insurance Contract Law: the Duty of Disclosure and the Aggravation of Risk*, ERA Forum, Vol. 9, 2008, p. 120.

41 European Commission, *Final Report of the Commission Expert Group on European Insurance Contract Law*, 2014, p. 43, [https://ec.europa.eu/info/sites/info/files/final_report_en.pdf], Accessed 28. December 2020. See more European Commission, *Disclosure duties of the customer*, [https://ec.europa.eu/justice/contract/files/expert_groups/disclosure_duties_of_the_customer_en.pdf], Accessed 27. December 2020.

42 Unan, S., *Some issues related to the content of the policyholder's pre-contractual duty of disclosure – general view*, European Insurance Law Review, No.1, 2016, p. 26.

43 Markov, M., *Posljedice neispunjenja obveza prijavljivanja okolnosti značajnih za ocjenu rizika u osiguranju života*, Osiguranje, Zagreb, No. 9, 1998, p. 3: As a rule, the policyholder is not obliged to inform the insurer about those circumstances for which no questions have been asked, but if the policyholder knew that a certain circumstance was significant for the risk assessment, he was obliged to inform the insurer even if no questions were asked.

44 By creating and handing in the questionnaire, the insurer did not, in terms of information, limit itself to the information contained in the questionnaire, nor did it release the policyholder from the obligation of informing him about the relevant facts that were not requested in the questionnaire (Jakaša, B., *Pravo osiguranja*, Pravni fakultet u Zagrebu, Zagreb, 1984, p. 220). For more on the usefulness of the insurer's questionnaire in terms of referring the policyholder to a list of circumstances that the insurer considers relevant to the risk assessment see Pavliha, *op. cit*., note 30, p. 168.

circumstances for which the insurer is requesting[45] additional information from the policyholder.[46] In life insurance, by means of the questionnaire the policyholder is instructed on the significant circumstances for risk assessment, and this can also be incorporated in a written insurance offer filled in by the policyholder or the insured.[47] Therefore, the insured should only have to answer the insurer's questions honestly and reasonably to fulfil his or her duty.[48]

Here it is important to note that according to the Croatian legislator (COA, Art. 931), the future policyholder must spontaneously report all significant circumstances, and which circumstances are significant - as a rule, only the insurer knows![49] Futhermore, the COA says nothing about the importance of insurer questionnaires.[50] We recognise that this is not a legal norm that provides protection of the weaker party's rights. It is therefore important to point out the valid provisions of the German legislator who saw the shortcomings of the provisions of Art. 16. of the German Insurance Contract Act (Versicherungsvertragsgesetzt – VVG of 1908) which corresponded to the provisions of Art. 931 of the COA. The provisions in question prescribed that the risk arising from any failure to recognise which facts and circumstances not requested by the insurer were of relevance to him therefore lay with the policyholder.[51] Amendments to the aforementioned provisions from 2008 shifted the risk of poor assessment of the importance of a circumstance to the insurer (so-called objective principle of assessment of circumstances).[52] There are clear criteria in German insurance law on the basis of which the policyholder will assess which circumstance is considered significant. Within Chapter I, Section 2 of the VVG of 2008,[53] Art. 19(1) prescribes that,

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45 Šulejić, P., *Pravo osiguranja*, Novinsko izdavačka ustanova, Beograd, 1980, p. 198: There is no obligation on the part of the insurer to request from the insured to complement and explain the answers given in the insurance offer.

46 The court's conclusion that due to the fact that the plaintiff as an insurer asks the policyholder to fill out a form with specific information relating to health problems or illnesses, taking medication, surgery or hospital treatment, disability, etc., all contained in 25 questions of the insurance offer, is correct, it follows that these data are relevant to the plaintiff in deciding whether to conclude such a contract with the policyholder at all, so these are important facts when concluding a contract, which is why the plaintiff's decision to conclude a contract depends on the answers to these questions (judgement of the County Court in Rijeka, Gž-2212/2017 of April 4, 2018).

47 Ćurković, *Ugovor o osiguranju života*, *op. cit.*, note 37, p. 81.

48 Wham, *op. cit.*, note 22, p. 100.

49 Ćurković, *Ugovor o osiguranju – Komentar…, op. cit.,* note 38, p. 75.

50 Ćurković, *Ugovor o osiguranju života*, *op. cit.*, note 37, p. 82.

51 Koch, R., *German Reform of Insurance Contract Law*, European Journal of Commercial Contract Law, Vol. 2, No. 3, 2010, p. 164.

52 Gorenc, V. et al., *Komentar Zakona o obveznim odnosima*, Narodne novine, Zagreb, 2014, p. 1502.

53 Versicherungsvertragsgesetz – VVG (BGBI. I S. p. 2631) from 23 November 2007, entered into force on 1 January 2008). English version [https://www.gesetze-im-internet.de/englisch_vvg/], Accessed 5

before the insurance contract is concluded, the insured is obliged to report to the insurer all circumstances that are important to the insurer for risk assessment and concluding insurance contracts, and about which the insurer has asked a question in writing.[54] Therefore, the VVG of 2008 abolishes the pre-contractual duty of the insured and reduces it to a duty to answer questions asked by the insurer in writing, that is, a duty not to misrepresent.[55] The written questions must be specific enough, clear and concise (non-ambiguous) so that there is only one right answer and the question must refer to present or past facts, not to future ones since this can provide no certainty, only presumption.[56] Thus, we can conclude that there is no obligation to present general risk forecasts or to assess the obligation to provide information, but the duty to answer questions about the circumstances of the risk which are put in writing by the insurer,[57] which means that a significant circumstance is considered to be the circumstance asked about by the insurer, in writing.[58] Thereby, the obligation of spontaneous notification was replaced with the insurer's questionnaire,[59] i.e. the principle of spontaneous reporting of important circumstances was abandoned and obliges the policyholder/insured to report only those circumstances that are known to him and for which the insurer asks questions in a written questionnaire.[60]

3.1. COVID-19 as a "significant circumstance"

Without going into the health circumstances that may contribute to the development of a more severe form of the disease and a more severe clinical picture of patients (such as old age, health problems, such as high blood pressure, obesity, heart and lung problems, asthma, diabetes, cancer, etc.), and consequently higher mortality - from the insurance standpoint it is important to indicate under what

January 2021. More on new VVG from 2008 see Heiss, H., *Proportionality in the New German Insurance Contract Act 2008*, Erasmus Law Review, Vol. 5, No. 2, 2012, pp. 105 - 114.

54 Sec. 19 VVG 2008 constitutes the key provision on the policyholder pre-contractual duty not to misrepresent and the revision of the rules on pre-contractual information duties (sec. 16 VVG 1908) was one of the core elements of the reform by the VVG from 2008 – Wandt, M.; Bork, K., *Disclosure duties in German insurance contract law*, Zeitschrift für die gesamte Versicherungswissenschaft, Springer, No. 1, 2020, p. 86.

55 Lowry, J., *Pre-contractual information duties: the insured's pre-contractual duty of disclosure - convergence across the jurisdictional divide*, in: Burling, J.; Lazarus, K. (eds.), Research Handbook on International Insurance Law and Regulation, Edward Elgar Publishing, UK-USA, 2012, p. 59.

56 Koch, *op. cit.*, note 50, p. 168.

57 Đorđević, S.; Samardžić, D., *Nemačko ugovorno pravo osiguranja sa prevodom zakona (VVG)*, Deutsche Stiftung für internationale rechtliche Zusammenarbeit, Beograd, 2014, p. 59.

58 See Wandt, M.; Bork, K., *op. cit.,* note 54, p. 82.

59 Keglević, *op. cit.*, note 30, p. 254.

60 Ćurković, *Ugovor o osiguranju – Komentar…, op. cit.,* note 38, p. 78.

conditions COVID-19, as a disease, will represent a significant circumstance for risk assessment in terms of concluding life insurance contracts not only in relation to persons over 60 and the elderly who have certain medical conditions, but also in relation to younger people who previously did not have significant health problems, and yet COVID-19 has led to a moderate to severe clinical picture that could possibly result in a chronic condition. When considering the existing dangers of COVID-19 disease, and the so far unexplored and unconfirmed effects of this disease on the development of another serious illness or the contribution to the creation of a more severe clinical picture for people with underlying health conditions - we can see problems that will soon begin to appear in practice and for which we do not yet have an answer in the scientific community because this requires many years of scientific research in order for certain hypotheses to be scientifically confirmed.

The data on the recovery from COVID-19 by policyholders/insured are not relevant to insurers regarding existing (already concluded) life insurance contracts because the conclusion of these contracts was based on the reporting of those significant circumstances that existed before the conclusion of such a contract (therefore, before or after occurrence of the disease if the insurer's questionnaire does not cover the question regarding the existence of COVID-19 infection in a person wishing to conclude a life insurance contract).[61] For that reason, life insurer cannot change the terms of coverage for active policies, so anyone who was covered remains covered.[62] However, in relation to future life insurance policies, the situation is different since data on the recovery from COVID-19 will be important for concluding life insurance contracts regarding changes in the life insurance application process and the change of questionnaires as guidelines for concluding this type of contract. For instance, some people who have had COVID-19, whether they have needed hospitalisation or not, continue to experience symptoms, including fatigue, respiratory and neurological symptoms[63] so many organs are affected by COVID-19 and there are many ways the infection can affect someone's health.[64] Although not much is known about this disease, numerous analytical studies point to chronic consequences for the health of people

[61] In relation to the existing life insurance policies, in the event of the death of the insured (caused by COVID-19), the insurer will be obliged to fulfil his contractual obligation.

[62] Moon, C., *How Is the Coronavirus (COVID-19) Affecting Life Insurance? An FAQ,* [https://www.valuepenguin.com/life-insurance-coronavirus-faq#cover], Accessed 29 January 2021.

[63] World Health Organization, *Coronavirus disease (COVID-19)*, 12 October 2020, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19], Accessed 20 December 2020.

[64] Centres for Disease Control and Prevention, *Long-Term Effects of COVID-19*, [https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html], Accessed 19 January 2021.

who have suffered from COVID-19. The analysis of the existing data shows that 12% of all infected people have some degree of heart muscle damage, and as for severe forms of the disease – in 61% of cases patients develop severe lung damage (so-called acute respiratory distress syndrome - ARDS), as many as 44% of these patients develop arrhythmias or other cardiac disorders which have so far been difficult to explain.[65] Precisely these possible consequences for the health of the policyholder will be of interest to the insurer (who will require the insurance applicant to give answers on specific questions on COVID-19 desease before concluding the life insurance contract) as certain diseases can pose a higher risk for the insurer which will, of course, also mean taking out a life insurance policy on less favorable terms for the policyholder, i.e. concluding the contract in question with the obligation to pay a larger amount of insurance premium.

Here it is important to assess the importance of genetic tests. A diagnostic genetic test aims to diagnose a specific genetic disease in a person who has symptoms while a positive predictive genetic test suggests that we have been in contact with a virus or that we have overcome a viral infection, and the test is conducted to find out if this viral infection caused a genetic change that can affect the development of the disease over a lifetime. Given that there are more than 1,000 different genetic tests in the world which are conducted on a voluntary basis (at the initiative of a potentially infected person), the question arises as to the possible significance of the results of these tests on the conclusion of a life insurance contract. In the Republic of Croatia, the issues on genetic examinations and analyses are not regulated in insurance legal acts. However, the provisions on the (im)possibility of using genetic tests for insurance purposes are contained within the already mentioned regulations: Anti-discrimination Act,[66] Patients' Rights Act[67] and Act

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65 Plazonić, Ž., *COVID-19 – srce u središtu*, Hrvatski liječnički zbor, [https://www.hlz.hr/strucna-drustva/covid-19-srce-u-sredistu/], Accessed 10 January 2021.

66 According to the provision of Art. 1(1) of the Anti-discrimination Act, the protection and promotion of equality as the highest value of the constitutional order of the Republic of Croatia means also protection against discrimination on the grounds of genetic heritage. Consequently, discrimination on the grounds of genetic heritage is prohibited, i.e. placing of a person in a less favourable position based on his or her genetic heritage.

67 The provision of Art. 22(2) of the Patients' Rights Act clearly stipulates that genetic testing or testing for genetic diseases or to identify patients as carriers of a gene responsible for the disease or to detect a genetic predisposition or susceptibility to the disease, may only be for health purposes or for scientific research related to health purposes and with appropriate genetic counselling. It is a provision that regulates the issue of intervention on the human genome by prescribing that these tests can be performed exclusively for health purposes (or for scientific research related to health purposes), and not for other purposes such as insurance.

on the Implementation of General Data Protection Regulation.[68] In the Republic of Croatia, there is an explicit prohibition on the processing of genetic data for the calculation of disease risk and other health aspects of data subjects within the activities taken for the conclusion or execution of life insurance contracts and contracts with survival clauses. This prohibition is regulated by Art. 20(1) of the Act on GDPR. The prohibition on the processing of genetic data applies to data subjects who conclude life insurance contracts and contracts with survival clauses in the Republic of Croatia (if the processing is carried out by a controller established in the Republic of Croatia or providing services in the Republic of Croatia) and the prohibition may not be lifted by the consent of the data subjects.[69] We can also point to the provisions of German legislation. The German Genetic Diagnostic Act (Gendiagnostikgesetzt – GenDG)[70] of 2009, which prevents discriminations against persons with crucial diseases,[71] in section 4 "Genetic Examinations in the Insurance Sector", regulates issues of the genetic examinations and analyses in conjunction with the conclusion of an insurance contract. These provisions prescribe that the insurer cannot demand from the insured (before or after the conclusion of an insurance contract): a) any genetic examinations or analyses to be conducted; or b) any results or data from any previously conducted genetic examinations or analyses, or use or receive the results of any genetic examinations or analyses.[72] So, the insurer cannot request from the policyholder to undergo a predictive genetic test nor demand to disclose to the insurer the results of genetic tests which he has already done.[73] Insurers do not have the right to ask questions to the insured regarding the results of genetic tests (if such questions were asked, in any form, the insured is not obliged to answer them), and in case the insured voluntarily submits the results of genetic tests – they must not be taken into account by the insurer.[74] By analysing the provision of Art. 18 of GenDG, we realise that there must be no initiative by the insurer on conducting genetic testing on the policyholder, nor on submitting the results of genetic tests previously performed by the policyholder. However, in the second sentence of Art. 18 (1) of GenDG

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68 Act on the Implementation of General Data Protection Regulation, Offcial Gazette No. 42/2018 (Act on GDPR).

69 Act on GDPR, Art. 20 (2-3).

70 German Genetic Diagnostic Act (Gendiagnostikgesetzt – GenDG), BGBI I. pp. 2529 - 2538. GenDG je donesen on 31 July 2009 and according to the par. 27. it entered into force on 1 February 2010. Text available on: [https://theprivacyreport.com/wp-content/uploads/2010/11/German-Act-Translation.pdf], Accessed 1 February 2021.

71 Wandt; Bork, *op. cit.*, note 54, p. 84.

72 GenDG, Art. 18(1).

73 See more Unan, *op. cit.*, note 42, p. 30.

74 Bodiroga-Vukobrat, N., Belanić, L., *Osigurani rizik u zdravstvenom osiguranju u svjetlu novih otkrića genetike*, Zbornik Pravnog fakulteta u Rijeci, Rijeka, Vol. 39, No. 1, p. 362.

the provision clearly stipulates that the prohibition to require the policyholder to submit the results of already performed genetic tests does not apply to life insurance if the agreed insured sum exceeds the amount of EUR 300,000. Therefore, with regard to concluding a life insurance contract, the insurer is prohibited from requesting from the insured to undergo any genetic examinations or analyses, but has the right to request information from the policyholder about the results of already performed genetic testing if the above conditions are met.

3.2. Intentional Misrepresentation or Concealment of the circumstances on health status of the policyholder/insured – theory and case law

The principle of good faith prevents both parties from concealing what they know privately in order to persuade the other party, to whom these facts are not known and believes otherwise, to enter into a contract.[75] According to Jakaša, the policyholder is also required to state whether he or she suffers from a disease that is not listed in the questionnaire, if that disease can have an impact on the assessment of the extent of the risk.[76] However, it is accepted that the policyholder, who correctly and fully answered all the questions from the questionnaire, after which another significant circumstance was determined that the policyholder had not reported (in relation to which the insurer did not even ask a question!) - cannot be held accountable for his oversight,[77] which is very important for assessing the effects of an incorrect or incomplete application.[78]

Violation of the principles of integrity and fairness is intentional misrepresentation[79] or concealment[80] of circumstances on health status of the policyholder/insured. According to Art. 932(1) of the COA, if a policyholder has intentionally[81] misrepresented or has intentionally concealed a circumstance the nature of which is such that the insurer would not have concluded the contract had he been aware

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75 Pavić, *Ugovorno…, op. cit.*, note 28, p. 198.

76 Jakaša, *op. cit.*, note 44, p. 401.

77 Nikolić, N., *Ugovor o osiguranju*, Državni osiguravajući zavod, Beograd, 1957, p. 129.

78 Ćurković, *Ugovor o osiguranju – Komentar…, op. cit.*, note 38, p. 77.

79 We will consider as misrepresentation a positive statement of fact, which is made or adopted by a party to the contract and which is untrue (Clarke, *op. cit.*, note 21, p. 678) or reporting circumstances that are untrue compared to the actual situation (Scalfi, G., *Manuale delle assicurazioni private*, Egea, Milano, 1994, p. 98).

80 Concealment of a circumstance or failure to provide information about a circumstance can be considered an incomplete application– Ćurković, M., *Ugovor o osiguranju – Komentar…, op. cit.*, note 38, p. 75.

81 There are two preconditions for the existence of an intentional violation of the reporting obligation: a) the policyholder is aware of this fact; b) the policyholder is aware that this fact is relevant to the risk assessment (Gorenc, V. et al., *Komentar Zakona o obveznim odnosima*, RRIF, Zagreb, 2005, p. 1404).

of the true state of affairs, the insurer may ask for annulment of the contract.[82] This is the right of the insurer, not his obligation. Accordingly, the insurer has the right to request the annulment of the contract, and if it does not submit a request for the annulment of the contract - that contract will remain in force (will remain valid).

The annulment of the insurance contract (due to intentional misrepresentation or concealment) requires a cumulative fulfilment of these conditions: a) the insurer must prove the intention of the policyholder; b) the insurer must prove that the intentional misrepresentation or concealment is so significant that the insurer would not have concluded the contract if he had known about it;[83] c) the insurer must request the annulment of the insurance contract (the contract is voidable[84] and by bringing an action the insurer may request the annulment of the contract); d) the request for cancellation of the insurance contract must be submitted within the preclusive period of 3 months following the day of becoming aware[85] of the misrepresentation or concealment.[86] The insurer bears the burden of proving that the said conditions have been met. The insurer's right to demand the annulment of the insurance contract shall expire if he has failed to communicate to the policyholder, within three months following the day he has become aware of misrepresentation or concealment that he intends to exercise this right (COA, Art. 932(2)).

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82 Intentional misrepresentation of a serious illness (cirrhosis of the liver) of the policyholder that caused his death after the conclusion of the contract, and of which if the insurer had known, it would not have agreed to conclude a life insurance contract, is the reason for voidability of the concluded contract so, if the insurer did not request and obtain (in court proceedings) its annulment, he is not released from the obligation to pay the agreed fee - judgement of the County Court in Bjelovar, Gž-1987/11-2 of November 17, 2011.

83 Whether the evidence was successful, is judged by the court' in its free assessment (Jakaša, *op. cit.*, note 44, p. 216.). As the defendant's predecesor presented himself as completely healthy when concluding the life insurance contract, this justifies the court's conclusion that the deceased A.Š. (who died from a heart attack and in respect of whom an expert medical report established that he had suffered from a serious chronic heart disease since 1991, when he suffered a major heart attack at the age of 40 and went through a cardiac arrest, that is, resuscitation twice) made an intentional misrepresentation or concealment of some circumstances that were relevant to the insurer when concluding the contract and that the insurer, had he known about the real situation, would not have concluded such a contract (judgement of the County Court in Rijeka, Gž-2212/2017 of April 4, 2018).

84 The insurer cannot request the determination of the nullity of the contract, because the COA explicitly states in Art. 932(1), that the consequences of intentional misrepresentation or concealment by the policyholder are of such a nature that they do not cause the nullity of the contract but voidability.

85 Suspicion (not knowledge) of a particular circumstance that the insurer considers significant is not sufficient– see more Ramljak, B., *Pravo osiguranja*, Mate, Zagreb, 2018, p. 143).

86 Pavić, *Ugovorno…, op. cit.*, note 28, p. 202. See more Ćurković, M., *Obveze…, op. cit.,* note 35, pp. 33 – 35.

The Croatian legislator has prescribed cases when the insurer cannot invoke misrepresentation or incomplete representation. The first case concerns the inability of the insurer to invoke misrepresentation or concealment in the application if at the time of concluding the contract he was aware or could not have been unaware[87] of the circumstances relevant for the risk assessment, which the policyholder has misrepresented or concealed. (COA, Art. 935(1)). This is a case that violates the principles of integrity and fairness,[88] i.e. the case when the insurer at the time of concluding the contract knows the actual facts, concludes a contract with the policyholder and subsequently calls for misrepresentation and/or concealment in the application. The second case refers to the inability of the insurer to invoke misrepresentation or concealment in the application if he has become aware of these circumstances during the insurance period, but has failed to exercise his legal powers (COA, Art. 935(2)). In this case, the insurer learned about the circumstances that were significant for the risk assessment after the conclusion of the contract (during the duration of the insurance contract) and did not submit a request for the annulment of the contract.

4. CONCLUSION

Having taken as a starting point the protection of a patient's right to privacy regarding the data on health status and the inability of the insurer to access this data (if the patient does not provide it voluntarily), this paper has drawn special attention to the importance of this data from the aspect of the insurance law. To be more precise, the paper analyses the theoretical and practical implications of the pre-contractual duty of the policyholder to diclose to the insurer all circumstances, e.g. all risk relevant facts which he/she is aware of (including the data on his/her health status), if he/she wants to conclude a life insurance contract. It is an obligation to accurately and fully inform the insurer about significant circumstances for risk assessment, and this pre-contractual obligation exists on the part of the policyholder immediately before or during the conclusion of a life insurance contract. Based on the reported circumstances significant for the risk assessment, the insurer makes a decision whether to conclude/not conclude a life insurance contract, that is, a decision whether to assume/not assume a future contractual

[87] Having in mind the finding and opinion of the expert, from which it clearly follows that it could have been clear to the medical layman that the policyholder was not healthy due to the existence of jaundice, the court correctly applied Art. 935(1) of COA, from which it follows that the plaintiff (insurer) at the time of concluding the contract could not have been unaware of the circumstances relevant to the risk assessment, and the plaintiff did not provide evidence on the basis of which he could have excluded the said possibility - judgement of the County Court in Zadar, Gž-162/19-2 of August 29, 2019.

[88] See Džidić; Ćurković, *op. cit.*, note 31, pp.179 – 180.

obligation, i.e. the payment of insurance if the insured event occurs. The policyholder is not aware of the significance of these circumstances, and the fact that there are no appropriate criteria that would assist the policyholder with assessing whether a circumstance is significant or not is of no help, and it is in relation to those circumstances that the insurer carries out the insurance risk assessment. As there are no uniform provisions at European level governing the obligation to report all circumstances relevant to the risk assessment, this has contributed to the creation of legal uncertainty. For this reason, this paper puts a special focus on the analysis of the effects of violation of principles of integrity and fairness in insurance contracts in case of policyholder's intentional misrepresentation or concealment of the circumstances significant for risk assessment and legal effects of this violation on the validity of life insurance contracts, i.e. a possible annulment of the contract in question.

The data on the health status of policyholders, in the future, will most certainly include the data on the recovery from the COVID-19 disease, which, due to the right to protection of patient privacy, the insurers will not have the right to inspect. Due to the possible chronic consequences to human health, the fact that someone has had COVID-19 and recovered may be relevant to concluding a life insurance contract because of the possible long-term effects of COVID-19. Therefore, the insurers will undoubtedly require introducing specific questions on the COVID-19 desease in the existing insurance questionnaires (offers to conclude a life insurance contract). Their importance is emphasised in this paper because they indicate to the policyholder those circumstances which are important for risk assessment, and their completion also requires answering questions on the policyholder's health status. In the Croatian legal system, the risk of poor assessment of significant circumstances for risk assessment, as a rule, exists on the part of the policyholder. The author provides a comparative review of the provisions of the German VVG of 2008 which transferred this risk to the insurer given that the policyholder is required to report only those circumstances that are significant for the risk assessment, and in relation to which the insurer required a written statement from the policyholder. I consider these provisions as a positive step towards the protection of the rights of policyholders and I suggest their appropriate transposition to the Croatian legal system.

The author indicates and analyses appropriate Croatian provisions on using genetic testing results in insurance, e.g. prohibition of the discrimination on the grounds of genetic heritage (Anti-discrimination Act), performing genetic tests exclusively for health purposes, e.g. not for insurance (Patients' Rights Act) and explicit prohibition on the processing of genetic data for the calculation of disease risk and other health aspects of data subjects within the activities taken for the conclusion

or execution of life insurance contracts and contracts with survival clauses (Act on GDPR). Pointing to the Croatian regulatory prohibition requesting from the insured to submit their genetic testing results and prohibition to process the genetic data for the purpose of conclusion or execution of life insurance contracts and contracts with survival clauses, the author points to the provisions of the German GenDG of 2009 which states (as an exception) the right of the insurer to require genetic results from the insured in life insurance if the agreed insured sum exceeds the amount of EUR 300,000. Different provisions that regulate the use of genetic tests for the purpose of concluding life insurance contracts within the legal systems of EU Member States (from an absolute prohibition to a relative prohibition on the use of genetic test results) indicate the need to unify provisions at European level, i.e. prescribing an explicit prohibition on conducting genetic testing and processing genetic data for insurance purposes. This would enable a uniform legal protection for future insured persons, i.e. protection against discrimination on the basis of genetic heritage.

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UDK 316.72: 347.78]:614.4
Review article

CULTURAL HERITAGE INSTITUTIONS DURING AND AFTER THE PANDEMIC– THE COPYRIGHT PERSPECTIVE

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ABSTRACT

The COVID-19 pandemic has imploded the traditional ways in which creative, cultural and artistic content are presented and consumed. Museums, libraries, archives, and other cultural institutions have been closed in lockdowns all around the European Union, and their content presented and consumed online. This paper will analyse how copyright rules affect cultural heritage institutions (publicly accessible libraries or museums, archives or film or audio heritage institutions) in the digital age. Four recent legal documents at the European level refer to the digitalisation of their collections and the digitised content's exposure to the public in the Digital Single Market. These are Directive 2001/29/EC, Directive 2012/28/EU, Directive (EU) 2019/790 and Directive (EU) 2019/1024.

This paper willfirst analyse how exclusive rights are regulated for authors, other creators, publishers, and producers in the digital age. Those rights need to be respected and exercised effectively by their owners. On the other hand, there is also a public interest, in that digitisation and access to digitised content should be free in cultural heritage institutions. To resolve the tension inherent in this relationship is not easy. The recent rapid change in consumption of creative, cultural and artistic content in the Single Digital Market (due to the pandemic

caused by the COVID-19 virus) has triggered the need for swifter digitisation of cultural heritage institutions' collections. The European legal framework offers some solutions to this need, which will be presented here. It does not resolve the situation generally, but refers to particular issues, such as orphan works, out-of-commerce works, text and data mining and the re-use of public sector information. In general, copyright protection prevails. Nevertheless, the tendencies towards free access grow stronger every day. This paper will analyse how these four directives interact with each other in the effort to resolve the tension between copyright, digitisation and free access to digitised content in cultural heritage institutions. At the end, two ideas for a new balance are presented.

***Keywords**: copyright, cultural heritage institutions, orphan works, out-of-commerce works, text and data mining, re-use of public sector information*

1. INTRODUCTION

The Digital Single Market's functioning is made complex and layered by a multitude of conflicting and interacting interests. This paper will analyse the protection of copyright and related rights with respect to cultural heritage institutions in the European Union, during and after the pandemic. The protection of copyright and related rights may conflict with those institutions' basic mission: preserving their collections and making them accessible to the public.

The transition from traditional to digital is particularly challenging for cultural heritage institutions.[1] They usually keep material specimens of copyright works in their collections, such as books, photographs, phonograms, videograms, paintings and sculptures. In traditional circumstances, the tension between the public functions of cultural heritage institutions and copyright and related rights has always been resolved by the exclusive right of distribution, and public lending right[2] as its component. Public lending right - either as an exclusive right or as a right to remuneration[3] exercised collectively, usually with extended effect - is the

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1 See for example Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation (2006/585/EC).

2 The Court of Justice of the European Union ruled that "lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user." See: Case C-174/15 *Vereniging Openbare Bibliotheken* [2016] ECLI:EU:C:2016:856. Nevertheless, it is emphasised by some authors that e-lending includes a making available to the public right and not a distribution and public lending right. See in detail: Dusollier, S., *A manifesto for an e-lending limitation in copyright*, JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law, Vol. 5, No. 3, 2014, pp. 1-23.

3 According to Art. 3 para 1 of European Parliament and Council Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28 (hereinafter: Directive 2006/115/EC) authors, performers, phonogram producers

balanced way to ensure the right owners remain compensated and the mission of cultural heritage institutions accomplished. Concerning exhibitions in museums and similar institutions, the authors usually enjoy the exclusive right of exhibition or public presentation as a special way of communication to the public. In some national legislations, this right is particularly regulated.[4] Nevertheless, in a sales contract or lending contract with a museum or similar institution, it is implied that licence for the exhibition of the work of visual art is given. For reasons of legal certainty, some national laws regulate that the author of an undisclosed work of visual art, applied art, industrial design, or photographic work implicitly licences public exhibition of the respective work in the sales contract unless agreed otherwise in writing. However, if the work is sold to the museum, gallery or other similar public institution, reservation of the exhibition right is not allowed.[5]

The process of digitisation brings to light new tensions in relations between copyright and related rights owners and cultural heritage institutions. Digitisation includes the exclusive right of reproduction. If digitised content is made available to the public on demand, the exclusive right of communication to the public shall also be involved, particularly the exclusive right of making available to the public. The employment of all these exclusive rights opposes the interests of the copyright and related rights owners, particularly publishers. In traditional circumstances, the usual business models of distributing material copies of protected copyright works and other subject matter were not particularly undermined by cultural heritage institutions' activity. In the digital world, the possibility of accessing the digitised collections of cultural heritage institutions from any place and at any time in most circumstances undermines to a greater extent both copyright and related rights owners' legal interests. This challenging conflicting situation is constantly under discussion. The European Union is trying to offer a new balance for its resolution through several directives that partly refer to this matter.

The COVID-19 pandemic has aggrevated the situation by imploding traditional ways in which creative, cultural and artistic content is presented and consumed.

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and film producers are given exclusive rights to authorise or prohibit rental and lending. In Art. 6 of the same directive it is envisaged that Member States will have the option to derogate from the exclusive right for public lending and transform it into a right to remuneration.

4 For example, according to Art. 18 of the German Copyright and Related Rights Act (*Urheberrechtsgesetz* vom 9. September 1965 (BGBl. I S. 1273), das zuletzt durch Artikel 4 des Gesetzes vom 26. November 2020 (BGBl. I S. 2568) geändert worden ist (Zuletzt geändert durch Art. 4 G v. 26.11.2020 I 2568), [https://www.gesetze-im-internet.de/urhg/index.html#BJNR012730965BJNE022614360], Accessed 02 April 2021, the exhibition right right to publicly show the original or copies of an unpublished work of the visual arts or the photographic work.

5 For example, see Art. 40 of the Croatian Copyright and Related Rights Act, Official Gazette No. 167/03, 79/07, 80/11, 125/11, 141/13, 127/14, 62/17, 96/18.

Museums, libraries, archives, and other cultural heritage institutions have been closed in lockdowns or under restricted access all around the European Union (and the whole world), and their content presented and consumed online.[6] The challenge to copyright and related rights has grown more rapidly than might have been envisaged. The technology that enables the presentation of cultural heritage online is quickly developing. The European Union's approach has been to gradually and progressively resolve the relationship between cultural heritage institutions' public mission and copyright and related rights by relaxing the existing legal framework to facilitate the mass digitisation and online presentation of collections belonging to cultural heritage institutions. Now, it seems that the process of digitalisation needs to develop more swiftly.

This paper will first analyse how exclusive rights are regulated for authors and other right owners in the digital age. Those rights need to be respected and exercised effectively. On the other hand, there is also a public interest, in that that the collections of cultural heritage institutions are digitised and made widely available to the public. In this respect, the European legal framework will be analysed from the perspective of exemptions and limitations to copyright and related rights. Nevertheless, the European legal framework does not resolve the situation generally. It refers to particular issues, such as orphan works, out-of-commerce works, the preservation of cultural heritage, text and data mining and the re-use of public sector information. In general, copyright protection prevails. The impetus towards free access grow stronger every day. It is to be expected that there will be further relaxation of the copyright and related rights legal framework concerning cultural heritage institutions. However, there is still no such concrete and formal legal initiative. Meanwhile, the public's demands and interests are growing, particularly concerning extreme situations such as the threat to public health in the pandemic situation. Therefore, some new ideas will be presented here.

2. EXCLUSIVE COPYRIGHT AND RELATED RIGHTS

Copyright and related rights are exclusive rights. This means that the author or other right owner is entitled to allow or to forbid the use of the work or other subject matter and decide under which circumstances he shall issue a licence. The absolute nature of copyright and related rights obliges all other individuals

[6] For the influence of the COVID-19 crisis on cultural heritage institutions in numbers see: Europa Nostra: *COVID-19 & BEYOND, Challenges and Opportunities for Cultural Heritage*, October 2020 [https://www.europanostra.org/wp-content/uploads/2020/10/20201014_COVID19_Consultation-Paper_EN.pdf], Accessed: 31 March 2021; UNESCO: Culture & Covid-19, Impact and Response Tracker – special issue, 3 July 2020 [https://en.unesco.org/sites/default/files/special_issue_en_culture_covid-19_tracker.pdf], Accessed 31 March 2021.

to refrain from using copyright work or other subject matter in ways defined by the content of the exclusive right. This content is regulated at international and European level, particularly concerning the digital environment. The adaptation of copyright and related rights protection to the digital age began with the WIPO Internet treaties of 1996.[7] It spread to the European level with Directive 2001/29/EZ[8] and was recently modernised through Directive (EU) 2019/790[9]. For the digital environment, particularly interesting are the exclusive right of reproduction, communication to the public, and making available to the public.

Reproduction right was developed so that any reproduction, whatsoever, on any media, in any way, by any technology, direct or indirect, temporary or permanent, is covered by the exclusive right for authors, performers, phonogram producers, film producers and broadcasting organisations.[10] Communication to the public is not defined in detail. It is regulated so that the authors enjoy the exclusive right of communication to the public "in any way". Simultaneously, there is no definition of what is meant by "communication" except for stating that the communication may appear by wired or wireless means.[11] Also, there is no definition of what exactly "public" means.[12] "Any" communication to the public is usually not regulated

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7 These are the WIPO Copyright Treaty (WCT) (1996) [https://www.wipo.int/treaties/en/ip/wct] (Accessed: 31 March 2021) and WIPO Performances and Phonograms Treaty (WPPT) (1996) [https://www.wipo.int/treaties/en/ip/wppt/], Accessed 31 March 2021.

8 Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 (hereinafter: Directive 2001/29/EZ).

9 European Parliament and Council Directive 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92 (hereinafter:-Directive (EU) 2019/790).

10 The definition of reproduction right is regulated in Art. 2 of Directive 2001/29/EC as the exclusive right for authors, performers, phonogram producers, film producers and broadcasting organisations with respect to the objects of their rights. It is also regulated as an exclusive right in Art. 7 of WPPT for performers and in Art. 11 of WPPT for phonogram producers. Art. 1 of WCT regulates that the contracting parties shall comply with Arts. 1 to 21 of the Berne Convention where exclusive reproduction right is regulated in Art. 9.

11 The provision that "communication" may appear either by wired or wireless means is regulated in Art. 8 of WCT and in Art. 3 para 1 of Directive 2001/29, for authors. Communication to the public has been interpreted in many cases by the Court of Justice of the European Union. See for example: Leistner, M., *Copyright at the interface between EU law and national law: definition of "work" and "right of communication to the public*, Journal of Intellectual Property Law & Practice, Vol. 10, No. 8, 2015, pp. 630-635; Quintais, J. P., *Untangling the hyperlinking web: In search of the online right of communication to the public*, The Journal of World Intellectual Property, Vol. 21, Issue 5-6, 2018, pp. 385-420.

12 Therefore, the Court of Justice of the European Union, with respect to several individual cases, interpreted what "public" means in the internet. This extensive jurisprudence triggered appreciations and criticism at the same time. See: Xalabarder, R., *The Role of the CJEU in Harmonizing EU Copyright Law*, IIC - International Review of Intellectual Property and Competition Law volume 47, 2016, pp. 635–639.

as an exclusive right for performers and phonogram producers but only as a right to remuneration with respect to commercial phonograms.[13]

A new exclusive right was developed for interactive uses on the internet through the WIPO Internet Treaties and Directive 2001/29/EC. It is called the right of making available to the public and is considered a special way of communication to the public. The owners of copyright and related rights may authorise or prohibit members of the public from accessing protected content from a place and at a time individually chosen by them.[14]

The right of communication to the public was regulated in more detail in Directive (EU) 2019/790.[15] An online content-sharing provider performs an act of communication to the public or making available to the public when it gives the public access to works and other subject matter uploaded by its users who are not acting on a commercial basis. This explains, in particular, situations where online content-sharing providers have invoked the so-called "safe harbour provisions" from Directive 2000/31/EC[16] to avoid liability for using copyright works and other subject matter. Directive (EU) 2019/790 particularly regulates that this shall not be possible any more.[17] The described activity of online content-sharing platforms shall be allowed only if they make best efforts to obtain licences from the right owners or remove or disable the access to the content for which they did not obtain a licence.

The rights of reproduction, communication to the public or making available to the public are engaged in all activities in which cultural heritage institutions make digital copies of works and other subject matter contained in their collections and present them to the public via the internet. So, cultural heritage institutions may not act freely and digitalise their collections' content and enable access to their collections if they have not previously acquired a licence to do so. Acquiring licences

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13 Art. 15 of WPPT regulates the right to remuneration for commercial phonograms. The agreed statement concerning this article makes it possible to provide for more extensive protection based on exclusive right. For example, the Croatian Copyright and Related Rights Act gives performers exclusive rights in all performances fixed in commercial and non-commercial phonograms.

14 It is regulated in Art. 3 para 1 of Directive 2001/29/EZ for authors and in para 2 for performers, phonogram producers, film producers and broadcasters. These provisions were drafted by taking into consideration previously internationally-accepted definitions from Art. 8 of WCT for authors and Arts. 10 and 14 for performers and phonogram producers, respectively.

15 See Art. 17 of Directive (EU) 2019/790.

16 See Art. 14 of European Parliament and Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1 (hereinafter: Directive 2000/31/EC).

17 See Art.17 para 3 of Directive (EU) 2019/790.

is costly and practically impossible for all situations since many right owners are unwilling to issue licences to cultural heritage institutions to present the protected content online. Therefore, because of their public mission and the public interest involved, there are situations where the legal framework allows cultural heritage institutions to do this even without acquiring a licence. These are called exceptions and limitations to copyright and related rights. These situations are well balanced and relate only to certain special cases, which will not be unreasonably detrimental to the right owners' legitimate interests.[18] It will be analysed *supra* which exceptions and limitations already exist in the European *acquis* that are directed to simplify the digitalisation of cultural heritage and provide access to digitised content.

The COVID-19 pandemic situation has pushed cultural heritage institutions towards presenting the content of their collection online more than before since they were or still are closed in lockdowns. Even when they are not in lockdown, physical access to libraries, museums, archives and other cultural heritage institutions is still restricted. So, digital presentation of their content online seems to be a much more important method of communication tothe public and enabling consumption of the content from their collections than before the pandemic. Nevertheless, such a health threat situation is not regulated as the cause for applying any of the existing exceptions and limitations of copyright.

3. EXCEPTIONS AND LIMITATIONS FOR CULTURAL HERITAGE INSTITUTIONS

Cultural heritage institutions' relationship to copyright and related rights is regulated in Directive 2001/29/EC, Directive 2012/28/EZ and Directive (EU) 2019/790 through several exceptions and limitations. Their initial, and primary, design was to enable the preservation of works and other protected subject matter contained in cultural heritage institutions' collections. At the same time that users' habits in the digital market have changed, cultural heritage institutions' public mission has also changed and transformed into enabling access to their digitised collections online. Following thisdevelopment of users' habits and the expansion of the digital market, the cultural heritage institutions' public mission has been, over time, supported by more exceptions and limitations to copyright and related rights.

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[18] See Art. 5. para 5 of Directive 2001/29/EC. This is called the three-step-test. There has been discussion on whether this text is binding only for the legislator or also for the courts. For analysis of this question see: van Eechoud, M. et.al., *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, Information Law Series 19, Kluwer Law International, Alphen aan den Rijn, 2009, pp. 113, 114.

3.1. Directive 2001/29/EC

The first exception, regulated in Directive 2001/29/EC, enables publicly accessible libraries, museums and archives to make "specific acts of reproduction" which are not for direct or indirect economic or commercial advantage.[19] By applying this exception, cultural heritage institutions could digitise protected works and other subject matter without making them available on the internet. Simultaneously, another exception was regulated, which gave the same institutions the ability to enable individual users to use digitised content on specially-dedicated terminals on their premises. This is possible for research and private study purposes, as a limitation to the right of reproduction and communication to the public, including making available to the public.[20] Directive 2001/29/EC provides one more exception for cultural heritage institutions: broadcasting organisations' official archives. The ephemeral recordings made by such institutions may be preserved if they have exceptional documentary character, even if the broadcasting organisation has only acquired a licence for broadcasting and not for reproduction.[21] Use in order to advertise the public exhibition or sale of artistic work, to the extent necessary to promote the respective event and excluding any other commercial use, is also regulated as an exception to copyright.[22]

Directive 2001/29/EC was designed, among other things, to regulate the right of making available to the public as an exclusive right for on-demand uses on the in-

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19 Art. 5 para 2 c) of Directive 2001/29/EC. A specific act of reproduction, for example for preservation, excludes the possibility of wide-range digitalisation. See also: Axhamn, J., Guibault, L., *Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage? Final report prepared for EuropeanaConnect*, Universiteit van Amsterdam, 2011, [https://www.ivir.nl/publicaties/download/ECL_Europeana_final_report092011.pdf], Accessed 03 April 2021, pp. 15-17. This exception was not mandatory for the Member States and therefore its implementation was not consistent. Dusollier, S., *The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition*, Common Market Law Review, Vol. 57, No. 4, 2020, p. 993.

20 Art. 5 para 2 n) of Directive 2001/29/EC. This exemption should equate to use "on the spot" and is not designed for gathering a new public online. See: Axhamn, J., Guibault, L., *op. cit*., pp. 17-19. Nevertheless, this exception was not consistently implemented throughout the European Union and was too narrow. Dusollier *ibid.,* p. 991. The Court of Justice of the European Union ruled that libraries have "the right to digitise" and to give access to this digitised content on the terminals in their premises. Nevertheless, it ruled that members of the public may not store the digitised copies on their USB devices or to print them out, unless private copy exception is regulated in the legislation of the respective Member States. This means that the exceptions in Art. 5 paras 2 c) and 2 n) of Directive 2001/29/EC do not encompass private copying, which is regulated in Art. 5. paras 2 a) and b) of the same directive. See also Panezi, A., *The Role of Judges in Deciding the Future of Digital Libraries*, Global Jurist, Volume 17, Issue 1, 20150025, 2017, pp. x-xi; Case 117/13, *Eugen Ulmer* [2014] ECLI:EU:C:2014:2196.

21 Art. 5 para 2 d) of Directive 2001/29/EC. Some claim that this might be a basis for a limitation on non-interactive streaming services. See Online music distributions - study 126, 127.

22 Art. 5 para 2 j) of Directive 2001/29/EC.

ternet, within the concept of communication to the public. It was popularly called the "Info-Society Directive". Its principal aim was to regulate the content of copyright and related rights for new digital uses and exceptions and limitations thereto. Nevertheless, it soon became apparent that this directive had not envisaged all the challenges of the new ways of consuming the protected content. This particularly applied to cultural heritage institutions' public mission in the digital world. It was recognised that authors and other right owners, such as publishers and producers, have interests in excercising exclusive rights acquired by legal transactions or directly by the law. But at the same time, providing access to knowledge, particularly for non-commercial and private uses, for research and individual education, through cultural heritage institutions' digitised collections represents a constant public interest. The Europeana project,[23] in particular, pushed the idea of providing more exceptions and limitations to copyright and related rights to benefit the cultural heritage institutions' mission toprovide access to digitalised European cultural heritage.

3.2. Directive 2012/28/EU

The European Union is constantly trying to find the balancing point where the protection of exclusive copyright and related rights should stop, and free reproduction and making available to the public should start, in order that the cultural heritage institutions' public mission may be fulfilled.[24] An important window was found in the specific position of so-called "orphan works", to which Directive 2012/28/EU[25] is dedicated.[26] Orphan works are works and phonograms that are still under protection,[27] but whose authors or other right owners (i.e. author's heirs, performers, publishers or producers or their successors in title) are not

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23 [https://www.europeana.eu/en/], accessed 08 April 2021. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; Europeana - next steps, Brussels, 28.8.2009 COM(2009) 440 final.

24 There are many policy documents and initiatives issued at the European level which "…all insist on the need to foster long-term digital preservation of cultural material, in full respect of international and European copyright laws"; Dusollier, *op. cit.*, note 19, p. 992.

25 European Parliament and Council Directive 2012/28/EU on certain permitted uses of orphan works [2012] OJ L 299/5 (hereinafter: Directive 2012/28/EU).

26 For example, there are estimates that orphan works constitute about 40% of the collection of the British Library and 22% of the Carnegie Mellon University Libraries. Bingbin L., *The Orphan Works Copyright Issue: Suggestions for International Response*, Journal of the Copyright Society of the USA, Vol. 60, No. 3, pp. 256, 257.

27 In particular, published books, magazines, newspapers, journals and other writings, cinematographic or audiovisual works and phonograms and works or other protected subject matter embedded or incorporated in them. For details see Art. 1 paras 2 to 4 of Directive 2012/28/EU.

known or are known but cannot be found despite diligent search.[28] Because their authors and other right owners cannot be identified or located, such works are called orphan works.[29] Diligent search is the standard that needs to be established by cultural heritage institutions based on the provisions of Directive 2012/28/EU.[30] It should not require more effort in time and costs than would be reasonable for this purpose. Orphan works are subject to special exceptions regulated in Directive 2012/28/EU[31] if they are contained in the collections of public heritage institutions.[32]

Within the scope of the application of orphan works' exception, cultural heritage institutions include publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions, and public-service broadcasting organisations.[33] They may reproduce orphan works from their collections, that is digitise them, without the copyright owner's authorisation. The reproduction exception may also be used for cataloguing, indexing, preservation and restoration. Moreover, cultural heritage institutions may offer orphan works in a

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28 Diligent search is defined in Art. 3 of Directive 2012/28/EU and sources that should be included in a diligent search are listed in the annexe to this directive. For detailed analysis of diligent search as a standard see in: Schroff, S.; Favale, M.; Bertoni, A., *The Impossible Quest – Problems with Diligent Search for Orphan Works*, IIC - International Review of Intellectual Property and Competition Law volume 48, 2017, pp. 286–304. Diligent search may incur high costs, therefore the full potential of orphan works' exception may not be achieved. Some authors suggest a crowdsourcing platform as a solution to this challenge. See: Borghi, M.; Erickson, K.; Favale, M., *With Enough Eyeballs All Searches Are Diligent: Mobilizing the Crowd in Copyright Clearance for Mass Digitization*, Chicago-Kent – Journal of Intellectual Property, Vol. 16, Issue 1, 2016, pp. 161-165.

29 A definition of orphan works is given in Art. 2. of Directive 2012/28/EU.

30 For an overview of the development of orphan works regulation, which culminated in Directive 2012/28/EU and its implementation in France and the Netherlands, see Copyright, and the Regulation of Orphan Works: A comparative review of seven jurisdictions and a rights clearance simulation pp.24-31.

31 Some emphasise that Directive 2012/28/EU is not a full solution for orphan works since it covers only public interest solutions and does not address the authorised uses of orphan works by other persons and entities, for purposes other than public interests. Bingbin, *op. cit.*, note 26, p. 273.

32 The European Union's approach to orphan works is concentrated on cultural heritage institutions. Nevertheless, orphan works are involved in uses in the private sector, outside the public interest. There are different legal solutions for the resolution of this problem worldwide. See: Bzhar, A.; Al-Salihi, K. H., *Analysis of the proposed solutions for the use of orphan works across the world*, The Journal of World Intellectual Property, Vol. 23, Issue 3-4, pp. 350-374. In the Member States of the European Union, extended collective licences partly resolve the problem of representation of right owners who cannot be located or are not known. The issue of unclaimed royalties is regulated in rec. 29 of the Preamble and in Art. 8 para 5 subparas b) and e) and in Art. 13 paras 2 to 6 of European Parliament and Council Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L 84/72.

33 Art. 1 para 1 of Directive 2012/28/EC. The exceptions of orphan works from the archives of broadcasting organisations are limited to the ones produced by the 31 December 2002.

digitised form to the public for interactive access. Therefore, the law shall permit cultural heritage institutions to use the exception to the right of making available to the public. Preservation, restoration, and provision of access to the public of orphan works from their collections are qualified as cultural heritage institutions' public mission activities.[34]

3.3. Directive (EU) 2019/790

Cultural heritage institutions were regualted for the first time under this expression in Directive (EU) 2019/790. They comprise publicly accessible libraries or museums, archives, and film or audio heritage institutions. This definition also includes national libraries and archives, and - as far as their archives and publicly accessible libraries are concerned - educational establishments, research organisations and public sector broadcasting organisations.[35] Their permanent collections contain diverse content protected by copyright and related rights. Comparison of the definition of cultural heritage institutions from Directive (EU) 2019/790 with Directive 2012/28/EU and Directive 2001/29/EC suggests that they overlap.

The orphan works' exception to copyright and related rights paved the way for the next legislative initiative with the same purpose, brought into existence in Directive (EU) 2019/790. There, cultural heritage institutions are supplied with additional opportunities to ensure wider access to their collections on the internet. This was achieved through a special regime applicable to out-of-commerce works and other subject matter.[36] This regime puts in first place the extended collective management of out-of-commerce works and other subject matter. Collective management organisation, which is sufficiently representative for the respective type of works or other subject matter and guarantees the same treatment for all respective right owners, shall be entitled to issue licences for out-of-commerce works and other subject matter, even if not all respective right owners have mandated it to do so. This licence may cover exclusive rights of reproduction, distribu-

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[34] Exceptions to the right of reproduction and right of making available as defined in Arts. 2 and 3 of Directive 2001/29/EC are regulated in Art. 6 of Directive 2012/28/EU. See in detail: Stamatoudi, I.; Torremans, P., *EU Copyright Law – A Commentary*, Edward Elgar, Cheltenham, UK + Northampton, MA, USA, 2014, pp. 684-686.

[35] Art. 2 subpara 3 and Rec. 13 of the preamble of Directive (EU) 2019/790.

[36] Out-of-commerce works and other protected subject matter are not available through customary channels of commerce after a reasonable effort to try to determine their availability to the public. A definition is given in Art. 8 para 5 of Directive (EU) 2019/790. It seems that the "reasonable effort" which is given as the standard for out-of-commerce works is more flexible and less stringent that the "diligent search" posed by Directive 2012/28/EU for orphan works. Therefore, when there is the possibility of a choice between the status of orphan work and out-of-commerce work, it seems more convenient to rely on the out-of-commerce scheme. See also: Dusollier, *op. cit.*, note 19, p. 994.

tion and communication to the public or making available to the public. It shall be non-exclusive for non-commercial purposes and shall be issued only to cultural heritage institutions. Where there is no collective management organisation for specific types of work and other subject matter, Directive (EU) 2019/790 envisages a specific exception to the exclusive right of reproduction and communication to the public or making available to the public, for cultural heritage institutions.[37] Considering that this exception relates to all types of works and subject matter of related rights, it is expected that out-of-commerce exceptions shall apply in situations where it is not usual to administer rights collectively. Collective management organisations usually exist in the music and audiovisual field and, in some countries, for visual arts. Data on out-of-commerce works shall be distributed to the European Union Intellectual Property Office, which is obliged to publish it through its web portal dedicated to out-of-commerce works and other subject matter.[38] And finally, all right owners shall have the right to exclude their works or other subject matter from the out-of-commerce regime, either in general or in specific cases, at any time, easily and effectively, including after the conclusion of a licence or after the beginning of the use.

It was emphasised in the preamble of Directive (EU) 2019/790 that the exceptions and limitations regulated in Directive 2001/29/EZ are not sufficient for current developments of the Digital Single Market. In particular, the exceptions and limitations need to be widened concerning cross-border digital uses and cultural heritage preservation.[39] Therefore, another mandatory exception to the exclusive right of reproduction for all types of works and subject matter protected by related rights permanently contained in the collections of cultural heritage institutions is provided, with the purpose of their preservation. They are allowed to make copies thereof, in any format or medium, for such a purpose.[40] This is an important step forward for cultural heritage institutions, since in Directive 2001/29/EC, the exception for "some acts of reproduction" was not mandatory.

Finally, Directive (EU) 2019/790 regulates another exception to the exclusive right of reproduction and extraction of the reproduced parts for all works and subject matter of related rights, including computer programs and original and *sui generis* databases. Reproductions and extractions are allowed for text and data mining for scientific research, from works and other subject matter to which cul-

37 Detailed regulation for out-of-commerce works is provided in Art. 8 of Directive (EU) 2019/790.

38 Detailed regulation see in Art. 10 of Directive (EU) 2019/790.

39 Rec. 5 of the Preamble of Directive (EU) 2019/790.

40 Art. 6 of Directive (EU) 2019/790.

tural heritage institutions have lawful access.[41] No contractual arrangement may override this exception.[42] Text and data mining results may be stored with the appropriate security level and retained for scientific research.

4. RE-USE OF PUBLIC SECTOR INFORMATION FROM CULTURAL HERITAGE INSTITUTIONS

Directive (EU) 2019/1024[43] regulates open data and the re-use of public sector information. The idea of this directive is to affirm the re-use (for mostly economic purposes)[44] of data produced in the public sector, to encourage innovation, create new values, new digital products, new applications, and to create an incentivising environment for the development of start-up companies and small and medium enterprises which should be able to re-use public sector data within new technologies in the production of their new digital products. The aim is also to adapt the legal environment to further develop machine learning, artificial intelligence,[45] and the internet of things.[46] Re-use of data is also connected with big data, which is defined as "the collection and aggregation of large masses of available data from a wide variety of different sources and its analysis, largely in the form of correlation, pattern-recognition, and predictive analysis."[47] Big data initiatives are usually linked to the openness of public sector data.[48]

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41 This exception also relates to research organisations such as universities and scientific institutions. See Art. 3 of Directive (EU) 2019/790. Lawful access means that there is some contractual arrangement between right owners and cultural heritage institutions, such as subscriptions, or that access is based on an open licence or that the content is freely available on the internet. See rec. 14 from the preamble of Directive (EU) 2019/790.

42 Some examples of this exception might be "…newspapers' archives by linguists to identify the evolution of some language patterns, or to all scientific articles published in one field to analyse gender distribution in authorship or quotations"; Dusollier, *op. cit.*, note 19, p. 985.

43 European Parliament and Council Directive 2019/1024 on open data and the re-use of public sector information [2019] OJ L 172/56 (hereinafter: Directive (EU) 2019/1024).

44 Dalla Core, L., *Towards Open Data Across the Pond*, in: van Loenen, B.; Vancauwenberghe, G.; Crompvoets, J. (eds.) Open Data Exposed – Information Technology and Law Series, IT&LAW 30, Springer, 2018, pp. 11-32, pp. 16, 22.

45 G Spindler, G., *Copyright Law and Artificial Intelligence*, IIC - International Review of Intellectual Property and Competition Law, Vol. 50, 2019, p. 1050.

46 Otero, B. G., *Evaluating the EC Private Data Sharing Principles - Setting a Mantra for Artificial Intelligence Nirvana?*, JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law, Vol. 10, No. 1, 2019, p. 68.

47 de Hert, P.; Sajfert, J., *Regulating Big Data In and Out of the Data Protection Policy Field: Two Scenarios of Post-GDPR Law-Making and the Actor Perspective*, European Data Protection Law Review, Vol. 3, No. 5, 2019, p. 338; Forgo, N.; Hinold, S.; Schutze, B., *The Principle of Purpose Limitation and Big Data*, New Technology, Big Data and the Law, Perspectives in Law, Business and Innovation, Springer Nature Singapore, 2017, pp. 17-42.

48 de Hert; Sajfert, *op. cit.*, note 44, p. 347.

Re-use means use that differs from the initial purposes for which the data were created. The idea is to ensure that information once created for some public purpose or in providing services in the general interest, whereby this creation or collection was funded from public resources, is eligible for any other commercial or non-commercial purpose, subject to some necessary restrictions. Data - documents which might be under copyright or related rights protection in the collections of cultural heritage institutions (public libraries, archives, and museums) - also fall within the scope of "public sector information" or "documents" to which the re-use obligation applies.[49] Cultural heritage collections and related metadata are recognised to have huge potential for innovative re-use, particularly in learning and tourism.[50] Therefore, cultural heritage institutions should also provide their data for re-use, but not automatically; they can decide whether to give some sets of data for re-use if they hold the copyright or related rights on such data. On the other hand, in order to preserve their public mission and make their activities sustainable, when providing data for re-use, cultural heritage institutions have the right to charge above marginal costs and require, within the price charged, a reasonable return on investment. Market prices should be taken into account when calculating the latter.[51]

Documents on which third parties hold the copyright or related rights are generally not subject to the obligation of re-use.[52] This means that the documents and metadata under copyright and related rights protection of third parties shall not be subject to re-use through cultural heritage institutions. Therefore, Directive (EU) 2019/1024 should not be considered as the legal source for exceptions and limitations to copyright and related rights. It only regulates how public sector bodies, including cultural heritage institutions, should exercise their own copyright and related rights. Within this context, it seems that the content that cultural heritage institutions may use under exceptions and limitations from Directive 2001/29/EC, Directive 2012/28/EU and Directive (EU) 2019/790 should still be considered as third party copyright. If some exception or limitation is provided only for non-commercial purposes or only for cultural heritage institutions, re-use obligation should not indirectly result in re-use for other purposes.

On the other hand, Directive (EU) 2019/1024 encourages cultural heritage institutions to digitise the content from their collections that is not protected by third party copyright and related rights and to provide it for re-use. It also encourages

49 It comes from Art. 1, para 2 (i) of Directive (EU) 2019/1024.

50 Rec 65 of Preamble of Directive (EU) 2019/1024.

51 See Rec 38 of Preamble of Directive (EU) 2019/1024.

52 Rec. 54, 55 of Preamble of Directive (EU) 2019/1024.

cultural heritage institutions to make contractual arrangements with private sector partners, which may invest in the digitalisation of their collections in the public domain and, consequently, have the exclusive right to re-use this content. Nevertheless, this exclusive right of re-use should not exceed ten years: given as the milestone for recouping investments made in digitalisation. After this exclusivity period expires, the data should be given back to the cultural heritage institution for further exploitation.[53]

So, it is clear that Directive (EU) 2019/1024 does not interfere with third party copyright and related rights in works and other subject matter contained in the collections of cultural heritage institutions. They remain untouched by this directive. It does not regulate any new exception or limitation towards third party copyright and related rights. On the other hand, it encourages cultural heritage institutions to give up their copyright and related rights (if existing) on their digitised collections and provide them for re-use.[54] Particularly, Directive (EU) 2019/1024 regulates that cultural heritage institutions, as all other public sector bodies, shall not exercise their *sui generis* database right on their digitised collections to prevent re-use.[55] At the same time, should they provide their documents (data in digitised form), with metadata, for re-use for commercial or non-commercial purposes, they can charge above marginal costs and claim a reasonable return of investments under market prices. This gives them the necessary resources to ensure their sustainability, while still serving the public mission.

5. POSSIBLE IDEAS FOR FUTURE DEVELOPMENTS

It has been shown here how exclusive copyright and related rights interfere with cultural heritage institutions' public mission. The COVID-19 pandemic situation has triggered some new developments in thinking about this relationship because the cultural heritage institutions' public mission has been even more emphasised. The demand for accessibility of the digitised content of their collections has grown rapidly. Moreover, some eminent authorities predict that similar situations in which some new pandemics threaten public health will occur in the future.[56] Due to the COVID-19 pandemic situation, the demand for digitalisation and online accessibility of cultural heritage institutions' collections will certainly grow

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53 Rec. 49 of Preamble of Diretive (EU) 2019/1024.

54 See also: Keller, P.; Margoni, T.; Rybicka, K.; Tarkowski, A., *Re-Use of Public Sector Information in Cultural Heritage Institutions*, The Journal of Open Law, Technology & Society, Vol. 6, No. 1, 2014, p. 8.

55 Art. 1 para 6 of Directive (EU) 2019/1024.

56 Gates, B., *Wir sind auf die nächste Pandemie nicht vorbereitet*, [https://www.sueddeutsche.de/politik/coronavirus-pandemie-bill-gates-impfstoff-interview-1.5187121?reduced=true], Accessed 11 April 2021.

more quickly than previously envisaged. The new circumstances and new habits will persist after the pandemic is over. Therefore, maybe a new balance between copyright and related rights and cultural heritage institutions should be designed.

This requires thinking in two directions. The first is related to the general issue of mass digitisation, and the second relates to digitalisation and making available online in extreme situations. The first direction might lead to compulsory licences. In situations where there is a prevailing public interest in mass digitisation of cultural heritage collections and providing online access to digitised content, the compulsory licence might be the solution. States, through their ministries of culture, might issue compulsory licences, at the request of cultural heritage institutions. A compulsory licence should be issued on the payment of a licencing fee covered from the state budget. This model should refer only to non-commercial uses for reproduction and making available to the public of digitised content.

The second direction might go towards a new exemption to copyright and related rights that would benefit cultural heritage institutions where the possibility of physical access is denied or restricted for some prevailing public interest, such as preservation of public health. This exemption would enable cultural heritage institutions to digitalise and provide access to digitised content despite the third parties' copyright and related rights. This exemption should be conditional and limited in time. Digitisation and making available to the public might be allowed without the right owner's permission but subject to payment of equitable remuneration.

Both models should refer only to non-commercial uses and should be regulated at the European level to ensure the consistency of the offer on the Digital Single Market.

6. CONCLUSION

The COVID-19 pandemic has made a tremendous change in consumers' habits worldwide and influenced patterns of perception and consumption of cultural heritage. During lockdowns and restricted access to cultural heritage institutions, many consumers reached for the digitised content of their collections. The institutions demonstrated their ability to adapt swiftly. and offered their collections digitally where possible, taking into consideration third party copyright and related rights. As a matter of course, they are obliged to respect copyright and related rights in works and other subject matter permanently contained in their collections. At the same time, there are exemptions and limitations for preserving cultural heritage, digitisation and access to orphan and out-of-commerce works

and other subject matter, and text and data mining for research purposes. Cultural heritage institutions are also encouraged to make available content on which they hold copyright and related rights for re-use and are not allowed to exercise their *sui generis* database rights in their digitised collections.

Still, it seems that the existing legal framework which regulates the conflict between the interest of protecting copyright and related rights and providing the public mission of cultural heritage institutions regulated in Directive 2001/29/EC, Directive 2012/28/EU, Directive (EU) 2019/790 and Directive (EU) 2019/1024 is not enough for them to fulfil their public mission and for extreme situations such as the COVID-19 pandemic. Therefore, copyright and its related rights legal framework need more flexibility.

Two options are offered here to start rethinking the balance. The first option would go towards compulsory licences, which may contribute to mass digitisation. The second goes towards new exceptions and limitations to copyright and related rights for extreme situations. Both options are adapted to the prevailing public interest over the interest of copyright and related rights owners. This refers only to the authorisation for digitisation and online access. The right to equitable remuneration for authors and other right owners should not be endangered.

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UDK 366.5:004.087
Professional paper

DIGITAL CONTENT CONTRACTS AND CONSUMER PROTECTION: STATUS QUO AND WAYS FURTHER

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ABSTRACT

One of the effects of the COVID-19 crisis is the significant acceleration of e-commerce. The number of companies and the varieties of products in the online markets increased, as well as the numbers of consumers and consumers' segments diversification. The e-commerce in pandemic times offered clear benefits and opportunities for the consumers. It also created situations where the lack of confidence in e-commerce may intensify. This comes from the consumers' uncertainty on their key contractual rights and it is particularly a case when it comes to the contracts for supply of digital content and digital services.

The European Union considered that legal certainty for consumers (and businesses) will increase by full harmonisation of key regulatory issues and that this would lead to growth of the potentials the e-commerce has on the common market. Aiming to achieve a genuine digital single market the Council of the European Union and the European Parliament in May 2019 have adopted the Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (the "Digital Content Directive") and the Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (the "Sales of Goods Directive") that regulate the supply of digital content and digital services and sale of goods with digital elements, respectively. Both directives lay down specific rules on the conformity of digital content or a digital service i.e., goods with digital elements with the contract, remedies in the cases of a lack of conformity or a failure to supply, as well as the modalities for the exercise of those remedies.

The paper analyses the mechanisms for regulation of the contracts for the supply of digital content and digital services and the specific rights and obligations of the parties to these contracts. The main objective of the research is to assess to which extent these mechanisms are novelty in the European Consumer Law and to examine the obstacles that the application of consumer law to digital content contracts may encounter.

***Keywords**: digital content, digital service, digital content contract, consumer protection*

1. INTRODUCTION

Eurostat estimates that at least 65% of the citizens of the European Union member states[1] made at least one online purchase in the last 12 months, while at least 53% of them made at least one purchase in the last 3 months of 2020.[2] The numbers show steady rise of the use of the Internet as a mean for purchase in the past 10 years. For example, in 2010 only 40% of the citizens made at least one online purchase in the last 12 months, which rose to 60% in 2019, and 27% of the citizens made at least one purchase in the last 3 months in 2010, which rose to 49% in 2019.[3] Off all online purchases (in the last 3 months) it is estimated that 37% were clothes (including sport clothing), shoes or accessories, 16% of the online purchases were furniture, home accessories or gardening products, and the same percentage were printed books, magazines or newspapers. Total of 17% of the purchases were deliveries from restaurants, fast-food chains, catering services. Approximately one third of all purchases were related to digital content and digital services - 15% of purchases were music as a streaming service or downloads and 18% were films or series as a streaming service or downloads.[4] Most of the online pucrases (37%) were of cost of 100 euro or more.[5] In 2020 the online sales to consumers (B2C) were made available by 20% of all enterprises established in the EU that have more than 10 employees (without the financial sector).[6] The OECD position is that the COVID-19 crisis accelerated an expansion of e-commerce towards new firms, customer segments and types of products.[7] It is considered that consumer trust is essential to the proper functioning of markets. This is particularly true in e-commerce, where consumers are unable to inspect products at a distance.[8]

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1 Data on the current 27 member states of the European Union.

2 Internet purchases by individuals (2020 onwards), Eurostat, [https://ec.europa.eu/eurostat/databrowser/view/isoc_ec_ib20/default/table?lang=en], Accessed 15 March 2021.

3 Internet purchases by individuals (until 2019), Eurostat, [https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do], Accessed 15 March 2021.

4 Internet purchases - goods or services (2020 onwards), Eurostat, [https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=isoc_ec_ibgs&lang=en], Accessed 15 March 2021.

5 Internet purchases - money spent (2020 onwards), Eurostat, [https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do], Accessed 15 March 2021.

6 E-commerce sales, Eurostat, [https://ec.europa.eu/eurostat/databrowser/view/isoc_ec_eseln2/default/table?lang=en] Accessed 15 March 2021.

7 E-commerce in the times of COVID-19, OECD, [https://www.oecd.org/coronavirus/policy-responses/e-commerce-in-the-time-of-covid-19-3a2b78e8/], Accessed 15 March 2021.

8 Protecting online consumers during the COVID-19 crisis, OECD, [https://www.oecd.org/coronavirus/policy-responses/protecting-online-consumers-during-the-covid-19-crisis-2ce7353c/], Accessed 15 March 2021.

The need for increasing consumers' trust in the e-commerce was one of the key factors in developing harmonised rules aimed to enable the potentials of the digital single market in the EU to be realized to full extent. In 2015 the European Commission proposed a directive on contracts for the supply of digital content and digital services[9] and a directive concerning certain aspects on online and other distance sales contracts for the sale of goods[10]. The proposals were part of the Commission's Digital Single Market Strategy, aiming to "reduce barriers and offer more opportunities for consumers and businesses to contract across European Union borders in a legal, safe, secure and affordable way."[11] One can argue that this approach (re)emphasises the role of the consumer law on facilitating trade[12] and is reflected in the policy that aims at totally harmonising consumer law at the EU level so as to establish one set of rules applicable in all Member State.[13] The proposals were also consistent with the Commission's 2018 New Deal for Consumers strategy[14], where the importance of these proposals "to provide consumers with clear and effective rights when accessing digital content and to ensure that both consumers and businesses can rely on uniform and effective rules across Europe" was emphasised and both proposals were expressly acknowledged as "a central element of the Digital Single Market strategy aiming to modernise consumer contract rules". Both of the proposals, aiming for maximum harmonisation, sought to ensure that traders in the Internal Market are not deterred from cross-border trading by differences in mandatory national contract laws, while

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9 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content; COM/2015/0634 final - 2015/0287 (COD); hereinafter: proposal Digital Content Directive).

10 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods; COM/2015/0635 final - 2015/0288 (COD); hereinafter: proposal Directive on Online Sale of Goods.

11 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, COM (2015) 192 final.

12 The ECJ treated national consumer laws as potential obstacle to movement within the Community, justified only when necessary, to *inter alia* protect the consumers (Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, [1979] ECR 00649, para. 8), thus the following consumer protection directives aimed to remedy any disparity between legislation that may directly affect the functioning of the common market (see for example Recitals 2 of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372).

13 Rott, P., *The EU Legal Framework for the Enforcement of Consumer Law* in: Micklitz, H-W.; Saumier, G., Enforcement and Effectiveness of Consumer Law, Ius Comparatum – Global Studies in Comparative Law, Volume 27, Springer, 2018, p. 252.

14 Communication from the Commission to the European Parliament, the Council, and the European Economic and Social Committee: A New Deal for Consumers, Brussels, 11.4.2018 COM (2018) 183 final.

providing consumers with a higher level of protection. The fact that 'rules on the supply of digital content are generally absent in European private law systems"[15] as are 'remedies for non-conformity of digital content'[16] are seen the reasons for urgency in the matter. There are, however, substantiated lines of reasoning that the main motivation behind the proposals is not the lack of consumer protection provisions at the national level, but rather "the stimulation of the EU economy, while the creation of consumer trust in the internal market is being used as a means to achieve growth."[17]

It took almost four years the directives to be adopted. While the proposal Digital Content Directive was introducing novelties in the consumer contract law, the proposal Directive on Online Sale of Goods involved intervention in a field that was already regulated in the consumer contract law of the EU and the member states.[18] Reflecting on the debates on these proposals, one may conclude that they arose, *inter alia,* from the fact that the proposals aimed to maximum harmonisation while the national legislation had existing rules that went beyond and may (potentially) reduce the consumer protection[19]. At the time, there were five co-exiting regimes that may be applicable to sales contracts and a new one was being introduced by the proposal Digital Content Directive. The fact that the scope of the proposal Directive on Online Sale of Goods included only on the distance sales contracts made the whole system seem unworkable, so it was argued that "the Member States will only agree to adopt the proposal Directive on Online Sale of Goods if its scope is enlarged to include also on- and off-premises contracts".[20]

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15 Giliker, P., *Adopting a Smart Approach to EU Legislation: Why Has It Proven So Difficult to Introduce a Directive on Contracts for the Supply of Digital Content?,* in: Synodinou, T-E.; Jougleux, P.; Markou, C.; Prastitou, T. (eds.), EU Internet Law in the Digital Era Regulation and Enforcement, Springer, 2020, p.300.

16 Oprysk, L., *"Digital" Exhaustion and the EU (Digital) Single Market*, in. Synodinou, T-E.; Jougleux, P.; Markou, C.; Prastitou, T. (eds.), EU Internet Law in the Digital Era Regulation and Enforcement, Springer, 2020, p.172.

17 Lehmann, M., *A Question of Coherence: The Proposals on EU Contract Law Rules on Digital Content and Online Sales*, Maastricht Journal of European and Comparative Law, vol. 23, no. 5, 2016, p. 755-756.

18 The rules established by the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, [1999] OJ L 171/12. (hereinafter: Consumer Sales Directive or Directive 1999/44/EC).

19 See further Beale, H., *Scope of application and general approach of the new rules for contracts in the digital environment,* European Parliament; Directorate General for Internal Policies; Policy Department C: Citizens' Rights and Constitutional Affairs, PE 536.493, p. 5.

20 Loos, M., *European Harmonisation of Online and Distance Selling of Goods and the Supply of Digital Content*, Amsterdam Law School Research Paper No. 2016-27, Centre for the Study of European Contract Law Working Paper Series No. 2016-08, p. 2 Available at SSRN: https://ssrn.com/abstract=2789398 or http://dx.doi.org/10.2139/ssrn.2789398.

Finally, in January 2019, the Council and the Parliament agreed on "an ambitious yet balanced compromise between guaranteeing rights for European consumers while creating new business opportunities for EU companies. Consumers will now be better protected when they buy a shirt in a shop, a smart fridge online or download music. Companies will be able to cut red tape when they want to expand and start selling across the Union.".[21] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services[22] and Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC[23] were published in the Official Journal of the European Union on 22 May 2019.

2. SCOPE OF THE DIGITAL CONTENT DIRECTIVE

The Digital Content Directive regulates the contracts between traders and consumers for the supply of digital content or digital services, and specifies the rules on conformity of digital content or a digital service with the contract, remedies in the event of a lack of conformity or a failure to supply, and the modalities for their exercise, and the modification of digital content or a digital service.[24] The Sale of Goods Directive lays down rules on certain requirements concerning contracts for the sale of goods, where the goods with digital elements are included, as well as rules about the conformity of goods, remedies for lack of conformity or failure to supply and modalities for their exercise, as well as the commercial guarantees[25]. The rules of both directives are complimentary to each other[26]. On the obligations

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21 Tudorel Toader, Minister of Justice of Romania, Press Release of the Council of the EU, 'Council and Parliament agree on new rules for contracts for the sale of goods and digital content' 29 January 2019, [https://www.consilium.europa.eu/en/press/press-releases/2019/01/29/council-and-parliament-agree-on-new-rules-for-contracts-for-the-sales-of-goods-and-digital-content/] Accessed 1 April 2021.

22 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136 (hereinafter: Digital Content Directive or Directive (EU) 2019/770 or DCD).

23 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, *OJ L 136* (hereinafter: Sale of Goods Directive or Directive (EU) 2019/771 or SGD).

24 Art. 1 of DCD.

25 Art. 1 of SGD.

26 Recitals 21 of DCD and Recitals 13 of SGD.

related to the delivery of goods and remedies in the event of the failure to deliver, the provisions of Directive 2011/83/EU[27] are applicable[28].

2.1. Definition of the contract - Objective scope of the Digital Content Directive

Regulating the application of Directive (EU) 2019/770, the legislator provides a definition of the digital content/digital service contract as "any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price"[29].

As per DGD, 'digital content' means data which are produced and supplied in digital form, while 'digital service' means: (a) a service that allows the consumer to create, process, store or access data in digital form; or (b) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service[30].

When it comes to the price[31] to be paid, the Directive, beside payments in money, foresees as a method of payment the digital representations of value (electronic vouchers or e-coupons) to be considered as well. The 'digital representations of value' also include virtual currencies, to the extent that they are recognised by national law.[32] Beside these novelties related to the price payment, the Directive introduces one more very important novelty in the consumer law - the personal data of the consumer is considered as 'currency' for payment of the price. Namely, the DCD provides that for the supply or undertaking to supply digital content or a digital service by the trader, the consumer to provide or undertake to provide

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27 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJ L 304* (hereinafter: Directive 2011/83/EU or Consumer Rights Directive) as amended by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, *OJ L 328* (hereinafter: Directive 2019/2161).

28 Directive 2011/83/EU is applied for the right of withdrawal and the nature of the contract under which those goods are supplied. DCD is also without prejudice to the distribution right applicable to these goods under copyright law. See Recital 20 of DCD.

29 Article 3(1) of DCD.

30 Art. 2(1)(2) and (3) of DCD.

31 Price in terms of the Directive means money or a digital representation of value that is due in exchange for the supply of digital content or a digital service (Art. 2(1/7) of DCD).

32 Recital 23 of DCD.

personal data to the trader[33]. By the introduction of this payment mode, the DCD makes the digital content not only the object of the contractual performance, but also a counter-performance.[34] Considering the fact that such business models - provision of digital service for personal data - are used in different forms in a considerable part of the market, the DCD ensures that consumers are, in the context of such business models, entitled to contractual remedies, while fully recognising that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity.[35] This novelty of the DCD does not go without criticisms, that are based on the fundamental right nature of the personal data and their protection. It is argued that the compatibility of this regime with the General Data Protection Regulation[36] is questionable and that it provides legitimisation of a business model hostile to data protection principles.[37] It is to be noted in this regard, that DCD allows the Member States to determine whether the requirements for the formation, existence and validity of a contract where personal data is used as a commodity, under national law are fulfilled.[38]

2.2. Parties to the Contract - Subjective Scope of the Digital Content Directive

In defining the trader[39] as the party who supplies or undertakes to supply digital content or digital service to the consumer, the Directive (EU) 2019/770 does not introduce new developments in the exiting EU consumer law. However, the Directive introduces the possibility the digital platform providers to be considered traders if they act for purposes relating to their own business and as the direct contractual partner of the consumer for the supply of digital content or a digital service, stipulating that "Member States should remain free to extend the applica-

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33 Article 3(1) of DCD .

34 See further Grundmann, S.; Hacker, P., *Digital Technology as a Challenge to European Contract Law – From the Existing to the Future Architecture* (July 17, 2017). 13 European Review of Contract Law 255-293, Available at SSRN: https://ssrn.com/abstract=3003885.

35 Recital 24 of DCD.

36 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119 (hereinafter: GDPR).

37 Drechsler, L., *Data As Counter-Performance: A New Way Forward Or A Step Back For The Fundamental Right Of Data Protection?*, in: Datenschutz & LegalTech/ Data Protection & LegalTech: Digitale Ausgabe zum Tagungsband des 21. Internationalen Rechtsinformatik Symposions IRIS2018 (February ed.), pp. 35-43.

38 Recital 24 of DCD.

39 'trader' means any natural or legal person, irrespective of whether privately or publicly owned, that is acting, including through any other person acting in that natural or legal person's name or on that person's behalf, for purposes relating to that person's trade, business, craft, or profession, in relation to contracts covered by this Directive, Art. 2(1/5) of DCD; Defined as seller in Art. 2(1/3) SGD.

tion of this Directive to platform providers that do not fulfil the requirements for being considered a trader".[40]

The notion of consumer in the Directive (EU) 2019/770 does not differ from the exiting definitions of 'consumer' in the EU Law and includes "any natural person who, in relation to contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession".[41] The Member States may extend the protection afforded by this directive to other persons who are not qualified as consumers according to the definition, such as non-governmental organisations, start-ups or SMEs.[42] This can be done in three ways: (i) extension of the concept of consumer, including legal persons and/or persons acting for professional purposes; (ii) general application of the legal regime(s) irrespective of the nature of the buyer of goods, digital content or digital services; (iii) extension of the protection to other categories of persons, such as micro-enterprises.[43] A challenge may arise, however, when it comes to dual-purpose contacts and the established criterion on predominant use.[44] The DCD provides that "Member States ….[are] free to determine,…… where the contract is concluded for purposes that are partly within and partly outside the person's trade, and where the trade purpose is so limited as not to be predominant in the overall context of the contract, whether and under which conditions that person should also be considered a consumer"[45]. Compared to this, Directive 2011/83 always considers these persons as consumers[46]. This position of the DCD regarding the dual-purpose contracts, opens the possibility to different approaches and cases where a same person has different position in different Members States.

3. SUPPLY OF THE DIGITAL CONTENT OR DIGITAL SERVICE AND THEIR CONFORMITY WITH THE CONTRACT

3.1. Supply of the digital content or digital service

The Digital Content Directive provides (Art. 5(1)) that 'the trader shall supply the digital content or digital service to the consumer, unless otherwise agreed,

40 Recital 18 of DCD; See also Recital 23 of SGD.

41 Art. 2(6) of DCD; See also Art. 2(2) of SGD.

42 Recital 16 of DCD.

43 Morais Carvalho, J., *Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771* (July 18, 2019)., p. 6; Available at SSRN: https://ssrn.com/abstract=3428550 or http://dx.doi.org/10.2139/ssrn.3428550.

44 Case C-464/01 Johann Gruber v Bay Wa AG [2005] ECR I-00439, para. 39.

45 Recital 17 of DCD.

46 Recital 17 of Directive 2011/83/EU.

without undue delay after the conclusion of the contract'. Hence, different modes of supply of digital content or provision of digital service are foreseen: single act or series of single acts of supply[47] and continuous supply over a period of time.[48] It is considered that the trader complied with the obligation to supply when: "(a) the digital content or any means suitable for accessing or downloading the digital content is made available or accessible to the consumer, or to a physical or virtual facility chosen by the consumer for that purpose; or (b) the digital service is made accessible to the consumer or to a physical or virtual facility chosen by the consumer for that purpose."[49] The digital content or the digital service should be supplied in the most recent version available at the time of the conclusion of the contract, unless otherwise agreed between the parties.[50]

3.2. Conformity of the digital content or digital service

Setting clear rules on conformity requirements is one of the cornerstones of the consumer protection. As conformity requirements for tangible goods exist in the EU consumer law since 1999,[51] setting rules on conformity of the digital content or a digital service was long overdue. Beside introduction conformity rules as such, a distinctive characteristic of Directive (EU) 2019/770 is that explicitly separates the conformity assessment criteria in subjective and objective. This is also case with the conformity criteria set in Directive (EU) 2019/771. The conformity assessment criteria themselves are not particular novelty, but both directives add to the existing ones the functionality, compatibility and interoperability requirements for digital content and services and for goods with digital elements.

While the subjective conformity requirements refer to elements resulting directly from the specific relationship between the consumer and the trader, the objective

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47 The distinctive element of this category of supply od digital content or digital service is the fact that consumers thereafter have the possibility to access and use the digital content or digital service indefinitely; Recital 56 of DCD.

48 The distinctive element of this category is the fact that the digital content or digital service is available or accessible to consumers only for the fixed duration of the contract or for as long as the indefinite contract is in force. This includes, for example, a two-year cloud storage contract or an indefinite social media platform membership. The element of continuous supply does not necessarily require a long-term supply. For example, cases such as web-streaming of a video clip should be considered continuous supply over a period of time, regardless of the actual duration of the audio-visual file. Cases where specific elements of the digital content or digital service are made available periodically or on several instances during the fixed duration of the contract, or for as long as the indefinite contract is in force, should also be considered a continuous supply over a period of time. Recital 57 of DCD.

49 Article 5(2) of DCD.

50 Article 8(6) of DCD.

51 Introduced by Consumer Sales Directive.

conformity requirements refer to what could normally be expected for the type of digital content or digital service.

3.2.1. *Subjective requirements for conformity*

The directive sets four subjective conformity requirements[52] to be used as assessment criteria where applicable. Thus, the digital content or digital service is in conformity with the contract when: (a) it is of the description, quantity and quality, and possess the functionality, compatibility, interoperability and other features, as required by the contract; or (b) it is fit for any particular purpose for which the consumer requires it and which the consumer made known to the trader and the trader accepted it (at the latest at the time of the conclusion of the contract); or (c) it is supplied with all accessories, instructions, including on installation, and customer assistance as required by the contract; or (d) it is updated as stipulated by the contract.[53]

3.2.2. *Objective requirements for conformity*

The objective requirements for conformity[54] are in addition to complying with any of the subjective requirements. As per DCD[55], it will be considered that the objective assessment criteria are met when the digital content or digital service is: (a) fit for the purposes for which digital content or digital services of the same type would normally be used[56]; (b) of the quantity and possess the qualities and performance features the consumer may reasonably expect[57]; (c) supplied along with any accessories and instructions which the consumer may reasonably expect to receive, where applicable; and (d) in comply with any trial version or preview of the digital

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52 Art. 7 of DCD.

53 Same subjective conformity requirements exist for the goods with digital elements as per Art. 6 of DCD.

54 Art. 8(1) of the DCD.

55 Similarly, the objective conformity requirements for goods with digital elements as per Art. 7 of SGD.

56 In the assessment of this any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct, where applicable, should be taken into account.

57 This includes the qualities and performance features in relation to functionality, compatibility, accessibility, continuity and security, normal for digital content or digital services of the same type and which, given the nature of the digital content or digital service and the public statements made by or on behalf of the trader, or other persons in the chain of transactions, particularly in advertising or on labelling. Exceptions exist when the trader shows that it was not, and could not reasonably have been, aware of the public statement in question; or that the public statement had been corrected in the same or a comparable way by the time of conclusion of the contract; or the decision of the consumer to acquire the digital content or digital service could not have been influenced by the public statement.

content or digital service, made available by the trader before the conclusion of the contract. In the cases when the supply of digital content or digital service is continuous over a period of time, they are to be in conformity throughout the duration of that period.[58]

Having in mind that the digital content and the digital service change very fast and very often, the DCD provides that the trader is obliged to ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep the digital content or digital service in conformity in course of the performance of the contract (in the cases of continuous supply). When it comes to contracts where the digital content/digital service is provided in a single act of supply or a series of individual acts of supply, the trader is obliged to provide updates that the consumer may reasonably expect (given the type and purpose of the digital content/service and taking into account the circumstances and nature of the contract).[59] Lack of conformity may exist as a result of incorrect integration of the digital content or digital service into the consumer's digital environment. In this case, the trader is liable for lack of conformity if: (a) the integration of the digital content or digital service in the consumer's digital environment was carried out by the trader or under the trader's responsibility; or (b) the integration made by the consumer was incorrect due to shortcomings in the integration instructions provided by the trader[60].

The failure of the trader to ensure that the digital content or digital service meets the conformity requirements will, in principle, lead to its liability for lack of conformity. Exceptions exist when the reason for the lack of conformity lies with the consumer. Thus, when it comes to updates, the trader will not be liable for any lack of conformity if the consumer failed to install, within a reasonable time, the updates supplied by the trader, provided that the consumer was properly informed by the trader that: (a) updates are available and what are the consequences of the failure to install it; and (b) how the update should be to installed.[61] In addition, where the consumer was informed before the conclusion of the contract and agreed, expressly and separately, accepted that a particular characteristic of the digital content or digital service deviates from the objective requirements for conformity, the trader will not be liable for that lack of conformity. [62]

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58 Art. 8(4) of DCD.

59 Art. 8(2) of DCD.

60 Art. 9 of DCD.

61 Art. 8(3) of DCD.

62 Art. 8(5) of DCD.

3.2.3. *Legal defects as lack of conformity*

The DCD includes the legal defects in the concept of lack of conformity. Thus, as per Art. 10, the consumer is entitled to the remedies for lack of conformity where the use of the digital content or digital service is restricted (limited or prevented) because rights of a third party, in particular intellectual property rights, have been violated by the digital content/service. The rational of this provision lies in the fact that the digital content and digital services are subject to intellectual property rights. When these rights are violated the third party may invoke a set of protection mechanisms that will result in the consumer being prevented or limited to use the digital content or digital service. When this is the case, in accordance with the subjective and objective requirements for conformity, the consumer is entitled to the remedies for the lack of conformity. Liability for lack of conformity will be the consequence unless the national law provides for nullity or rescission of the contract for the supply of the digital content or digital service with legal defects. [63]

4. LIABILITY OF THE TRADER FOR BREACH OF CONTRACT

The trader is liable to the consumer for failure to supply the digital content or digital service and in the event of a lack of conformity of the digital content or digital service.

4.1. Establishment of the time of breach

The supply of the digital content or digital service to the consumer, unless otherwise agreed, should be without undue delay after the conclusion of the contract.[64] The trader would be in a breach of contract if the digital content or the digital service is not provided at time for act of supply, being single or one in series, or does not start the continuous supply of content or service.

When it comes to the lack of conformity of the digital content or digital service, it is necessary to determine the relevant time when the lack is established, having in mind the modalities of the supply. Thus, where a contract provides for a single act of supply or a series of individual acts of supply, the conformity of the digital content or digital service to the requirements is assessed at the time of supply. Therefore the trader is liable only for lack of conformity which exists at the time when the single act of supply or each individual act of supply takes place.[65] If, under national law, the trader is only liable for a lack of conformity that becomes

63 See also Recital 54 of DCD.

64 Art. 5(1) of DCD.

65 Art. 11 (2) of DCD; Same period is foreseen in Art. 10 (1) of SGD.

apparent within a period of time after supply, the Directive in Art. 11(2) provides that this period shall not be less than two years from the time of supply.[66] In the cases of continuous supply over a period of time, the trader is liable for a lack of conformity, that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the contract.[67]

4.2. Time limits for liability for lack of conformity

In order to ensure legal certainty, Recital 56 of the Directive provides that traders and consumers should be able to rely on a harmonised minimum period during which the trader should be held liable for a lack of conformity. In relation to contracts which provide for a single act of supply or a series of individual acts of supply of the digital content or digital service, as per Article 11(2), traders should be liable for not less than two years from the time of supply, provided that under the national law, the trader is liable for any lack of conformity that becomes apparent within a period of time after supply. If the exercise of the rights the consumer has in cases of lack of conformity, under the national law, is subject to limitation period, the national law should ensure that the limitation period allows the consumer to exercise the remedies for any lack of conformity that occurs or becomes apparent during the period of supply. [68]

4.3. Burden of proof

The burden of proof with regard to whether the digital content or digital service meets the conformity requirements, in principle is on the trader. The DCD recognizes the fact that digital content and digital services have a specific nature and are highly complex, as require specific know-how, technical information and high-tech assistance, so the position of the trader is better than the consumer's when it comes to assessing if and why the digital content or digital service is not supplied or is not in conformity.[69] Therefore, in the event of a dispute between the trader and the consumer on the (lack of) conformity, the consumer is to provide

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66 This is without prejudice to point (b) of Article 8(2) of DCD.

67 Art. 11 (3) of DCD.

68 Article 11(2), 3rd sentence and Recital 58 of DCD; The Directive provides that Member States remain free to regulate national limitation periods, however, such limitation periods should not prevent consumers from exercising their rights throughout the period of time during which the trader is liable for a lack of conformity. Although, the DCD does not harmonise the starting point of national limitation periods, it ensure that such periods still allow consumers to exercise their remedies for any lack of conformity that becomes apparent at least during the period during which the trader is liable for a lack of conformity.

69 Recital 59 of DCD.

evidence that the digital content or digital service is not in conformity, but should not have to prove that the lack of conformity existed at the time of supply of the digital content or digital service or, in the event of continuous supply, during the duration of the contract. The burden of proof with regard to whether the supplied digital content or digital service was in conformity at the time of supply, for single or consecutive supplies, is on the trader, for a lack of conformity which becomes apparent within a period of one year from the time of supply. In the cases of continuous supply of digital content or digital services, the burden of proof on conformity within the period of time during which the digital content or digital service was supplied under the contract, is on the trader for a lack of conformity which becomes apparent within that period.[70] However, this will not be a case where the trader demonstrates that the digital environment of the consumer is not compatible with the technical requirements of the digital content or digital service and where the trader informed the consumer of such requirements in a clear and comprehensible manner before the conclusion of the contract.[71]

The consumer is expected to cooperate in the establishment whether the cause of the lack of conformity lies in the consumer's digital environment. This obligation is limited to the technically available means which are least intrusive for the consumer, especially having in mind their privacy. However, if the consumer fails to cooperate while the trader informed the consumer of such requirement in a clear and comprehensible manner before the conclusion of the contract, the burden of proof is on the consumer.[72]

5. REMEDIES

The DCD provides for remedies for the failure to supply[73] as well as remedies for the lack of conformity.[74] In both cases, the remedies available reinforce the *favor contractus* principle as priority is given to the supply of the digital content or digital service i.e., bringing them to conformity.[75] In principle, the consumer seeks the remedies from the trader. However, in the cases of chain of transactions there might be an act or omission by a person in previous links of that chain that may lead to failure to supply the digital content or digital service, or lack of conformity.

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70 Art. 12 (1) and (2) of DCD.

71 Art. 12 (3) of DCD.

72 Art. 12 (5) and Recital 60 of DCD.

73 Art. 13 of DCD.

74 Art. 14 of DCD.

75 The hierarchy of remedies giving priority to bringing the goods in conformity existed in Directive 1999/44/EEC (see Art. 3 (2) and (3)).

In this case the trader has a right of redress - is entitled pursue remedies against the person or persons liable in the chain of commercial transactions.[76,77]

5.1. Remedies for failure to supply

If and when the trader fails to supply the digital content or digital service, the trader shall be liable to the consumer. The consumer is, in that case, entitled: (1) to call upon the trader to supply the digital content or digital service, and (2) to terminate the contract.

The right the consumer to terminate the contract is limited. It may be invoked only if the trader fails to supply the digital content or digital service without undue delay, or within an additional period of time, as expressly agreed to by the parties.[78] The possibility provided the parties to extend the time of performance confirms the *favour contractus* principle. Still, the consumer may terminate the contract immediately, only if (a) trader will not supply the digital content or digital service, when this was declared or it is equally clear from the circumstances; and (b) when the specific time for the supply is essential for the consumer, and this was agreed between the parties or it is clear from the circumstances attending the conclusion of the contract.[79]

5.2. Remedies for lack of conformity

In the case of a lack of conformity, the consumer is entitled:

1. to have the digital content or digital service brought into conformity,
2. to receive a proportionate reduction in the price, or
3. to terminate the contract, under defined conditions.[80]

The foreseen remedies are not novelty in the EU consumer law. The rules that (currently) exist provide for the same remedies (the 'goods' to be brought into conformity, reduction of price and termination of the contract)[81] and give priority to bringing the goods in conformity, while the price reduction and termination are on the same level of, so to say, in the hierarchy of the remedies, having

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76 Art. 20 of DCD.

77 The person against whom the trader may pursue remedies, and the relevant actions and conditions of exercise, are to be determined by national law.

78 Art. 13(1) of DCD.

79 Art. 13 of DCD.

80 Art. 14 (1) of DCD.

81 Art. 3 (2) of Directive 1999/44.

in mind that in the European contract law general hierarchy of remedies in fact does not exist.[82] It is to be noted, however, that the two-stage hierarchy that exists in the current EU legislation was not mandatory for the Member States, as the Directive 1999/44/EEC was a minimum harmonization directive and there are national legislations where the consumers may choose between remedies is different manner than the one provided in the Consumer Sales Directive. The new legislation, namely this directive and Directive (EU) 2019/770 that repeals the Directive 1999/44/EEC, change this position and require such hierarchy, which is in line with the intention to ensure performance of the trader's/seller's contractual obligation. This, in practice could mean reduction of rights in the jurisdictions where free choice of remedies exists.[83]

5.2.1. *Bringing in to conformity*

The right to have the digital content or digital service brought into conformity[84], maybe exercised unless this would be impossible or would impose costs on the trader that would be disproportionate. In the assessment of the possibility/the costs all the circumstances of the case are to be taken into account. This includes (a) the value the digital content or digital service would have if there were no lack of conformity; and (b) the significance of the lack of conformity.

The trader is obliged to bring the digital content or digital service into conformity within a reasonable time from the time of receiving the information from the consumer, free of charge and without any significant inconvenience to the consumer[85]. When assessing in practice what a reasonable time would be, one should take into account of the nature of the digital content or digital service and the purpose for which, the consumer required the digital content or digital service.

5.2.2. *Price reduction or termination of the contract*

The consumer may have the price paid for the digital content or digital service, when they supplied in exchange for a payment of a price, reduced or have the

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82 See further Schmidt-Kessel, M., *Remedies for Breach of Contract in European Private Law,* in: Schulze, R. (ed.), New Features in Contract Law, Sellier European Law Publishers, 2007, p. 193.

83 For the specificities of transposition of Art. 3 in the Member States see further Schulte-Nölke, H.; Twigg-Flesner, C.; Ebers, M. (Eds.), *EC Consumer Law Compendium, The Consumer Acquis and its transposition in the Member States,* Sellier, 2008, p. 427.

84 Art. 14(2) of DCD.

85 Art. 14(3) of DCD.

contract terminated[86], in any of the following cases[87]: (1) when to bring the digital content or digital service into conformity would be impossible or disproportionate; (2) if the trader has not brought the digital content or digital service into conformity; (3) if, despite the trader's attempt to bring the digital content or digital service into conformity, a lack of conformity (still) appears; (4) the nature of the lack of conformity is such as to justify an immediate price reduction or termination of the contract; or (5) if the trader has declared, or it is clear from the circumstances, that the digital content or digital service will not be brought into conformity within a reasonable time, or without significant inconvenience for the consumer.

As to the method for calculation of the reduction, the directive foresees to be proportionate to the decrease in the value of the digital content or digital service supplied, compared to value that it would have had have if it were in conformity. For the digital content or digital service that is supplied over a period of time, the reduction in price applies to the period of time during which the digital content or digital service was not in conformity[88].

5.3. Specific rules on termination of the contract as remedy

The Directive (EU) 2019/770 provides that the contract for supply of digital content or digital service in exchange for the payment of a price, may be terminated only if the lack of conformity is not minor. The burden of proof with regard to whether the lack of conformity is minor is on the trader[89]. The consumer terminates the contract by providing a statement to the trader.[90]

DCD defines the specific rights and obligations of the parties in case of termination of the contract.

5.3.1. *Obligations of the trader*

When it comes to the obligations of the trader in the event of termination the Digital Content Directive provides for specific rules when the supply of the digital content or digital service was in exchange for payment of price and in exchange for personal data.

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86 Art. 14(4) of DCD.

87 Art. 14(2) of DCD.

88 Art. 14(5) of DCD.

89 Art. 14(6) of DCD.

90 Art. 15 of DCD; Rules as to the form of the statement are not provided by DCD.

In the cases of termination of contract where price was paid, the trader is obliged to reimburse the consumer for all sums paid under the contract. When the terminated contract was one that provided continuous supply, the trader reimburses the consumer only for the proportionate part of the price paid corresponding to the period of time during which there was lack of conformity, and any part of the price paid by the consumer in advance for the period that would have remained had the contract not been terminated.[91] The trader is obliged to make the reimbursement in without undue delay and, in any event, within 14 days of the date of the termination statement.[92] The reimbursement is to be carried out by using the same means of payment as the consumer used to pay for the digital content or digital service, unless the consumer expressly agrees otherwise, and provided that the consumer does not incur any fees as a result of such reimbursement. In any case, the trader may not impose any fee on the consumer in respect of the reimbursement.[93]

In respect contracts where the supply was in exchange for personal data of the consumer, the trader, as general rule set by the directive, must comply with the obligations stipulated in GDPR.[94] Digital Content Directive, provides for specific obligations of the trader. Thus, the trader must refrain from using any content other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader. Exception exists where such content: "(a) has no utility outside the context of the digital content or digital service supplied by the trader; (b) only relates to the consumer's activity when using the digital content or digital service supplied by the trader; (c) has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts; or (d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content."[95] In the cases of content generated jointly with other consumers when using the digital content or digital service supplied by the trader, the trader, at the request of the consumer, is obliged to make available to the consumer any content other than personal data, which was provided or created by the consumer. This retrieval will be free of charge, without hindrance from the trader, within a reasonable time and in a commonly used and machine-readable format.[96] The trader may prevent any further use of the digital content or digital service by the consumer, in particular

91 Art. 16(1) of DCD.

92 Art. 18(1) of DCD.

93 Art. 18(1) and (2) of DCD.

94 Art. 16(2) of DCD.

95 Art. 16(3) of DCD.

96 Art. 16(3) and (4) of DCD.

by making the digital content or digital service inaccessible or disabling the user account of the consumer.[97]

5.3.2. *Obligations of the consumer*

After the termination of the contract, the consumer is no longer permitted to use the digital content or digital service and to make it available to third parties. In the cases, where the digital content was supplied on a tangible medium, the consumer is obliged, at the request and at the expense of the trader, to return the tangible medium to the trader without undue delay. The consumer will have the obligation to return the tangible medium if trader makes the request within 14 days of the day on which the trader is informed of the consumer's decision to terminate the contract.[98] If the consumer made use of the digital content or digital service which was not in conformity, prior to the termination of the contract, they are not liable to pay for such use.[99]

5.3.3. *Termination due to modification of the digital content or digital service*

Recognising the fact that digital content and digital services have fast-evolving character the DCD address modifications (such as updates and upgrades), carried out by traders on the digital content or digital service which is supplied or made accessible to the consumer over a period of time. In this regard the Directive makes a distinction between modifications that are necessary for (continuous) fulfilment of the objective requirements for conformity and those where the features of the digital content or digital service are modified by decision of the trader beyond what is necessary to maintain the digital content or digital service in conformity.[100] The first would not only be permitted but also welcomed, but the later would be permitted under specific conditions. Thus, the modifications that are not necessary for conformity will be permitted[101] if (a) the contract allows, and provides a valid reason for them; (b) they are made without additional cost to the consumer; (c) the consumer is informed in a clear and comprehensible manner of the modification; and (d) if the modification negatively impacts the consumer's access to or use of the digital content or digital service, the consumer is adequately

97 Art. 16(5) od DCD.
98 Art. 18(2) of DCD.
99 Art. 18(2) of DCD.
100 Recitals (74) and (75) of DCD.
101 Art. 19(1) of DCD.

informed on such modification.[102] In the case of negative impact of the modification, the contract may be terminated provided (a) such negative impact is not only minor[103] and (b) the trader has enabled the consumer to maintain without additional cost the digital content or digital service without the modification, and the digital content or digital service remains in conformity.[104] The consumer is entitled to terminate the contract free of charge, in a period of 30 days of the receipt of the information on the modification when the modification occurs, whichever is later.[105] In case of termination due to modification the trader and the consumer have the same rights and obligations as termination due to failure to supply or lack of conformity.[106]

6. CONCLUDING REMARKS

The Digital Content Directive was long overdue having in mind the technological development. In determining to which extend it will contribute to regulating the (new) relations between consumers and traders when it comes to supply of digital content and digital services, will largely depend on transposition in the national law of the Member States, by 1 July 2021, and the application of its rules in practice, starting from 1 January 2022.[107] Having in mind the mandatory nature of the provisions of the directive[108] as well as its aim to achieve maximum harmonisation[109] one can expect that the national legislation will not impose obstacles in achieving single digital market in the European Union. However, the success of achieving maximum harmonization of the consumer law by the new directive(s) is questioned and running into difficulties is seen inevitable.[110] The transposition into the national legislation, as it seems, is not an easy task for the legislators. Although almost 2 years passed since its adoption and only 2 months remain for transposition, so far this was done only in France[111]

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102 The consumer should be informed reasonably in advance on a durable medium of the features and time of the modification and of the right to terminate the contract, or of the possibility to maintain the digital content or digital service without such a modification.

103 Art. 19(2) of DCD. This follows the line of reasoning as for the minor lack of conformity (Art.14(6)).

104 Art. 19(4) of DCD.

105 Art. 19(2) of DCD.

106 Art. 19(4) of DCD.

107 Art. 24 of DCD.

108 Art. 22 of DCD.

109 Art. 4 of DCD.

110 Twigg-Flesner, C., *Introduction: EU consumer and contract law at a crossroads?,* in Twigg-Flesner C. (ed.), Research Handbook on EU Consumer and Contract Law, Edward Elgar Publishing, 2016, p. 9.

111 As provided on EUR-Lex; The transposition in France is made with LOI no 2020-1508 du 3 décembre 2020 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière économi-

Still, differences in consumer protection on national level will exist, as the DCD does not affect the national law in regards to:

1. formation, validity, nullity or effects of contracts or the legality of the digital content or the digital service; [112]
2. determining the legal nature of contracts for the supply of digital content or a digital service;
3. specific remedies for hidden defects;
4. non-contractual remedies for the consumer, in the event of lack of conformity, against persons in previous links of the chain of transactions, or other persons that fulfil the obligations of such persons;[113]
5. conditions a contract for the supply of digital content or digital services to be considered linked with or ancillary to another contract, the remedies to be exercised under each contract or the effect that the termination of one contract would have on the other contract; [114]
6. consequences for the digital content and digital services contracts in the event that the consumer withdraws the consent for the processing of the consumer's personal data;[115] and
7. lability of the trader for damages.[116]

Not interfering with the core rules of the contract law is understandable as they are (still) outside of the scope of functions of the European Union. The national rules on liability for damage fall in this category as well, however the differences that exist in the Member States may provide for different level of protection when damages are to be a remedy for a failure to supply digital content and digital service or for lack of conformity. The DCD recognizes that principle of the liability of the trader for damages is an essential element of contracts for the supply of digital content or digital services, as well as entitlement of the consumer[117] but does not provide any specific rules. It relies on the existing national rules regulating the right to damages for breach of contract. Still, due to the fact that there are "quite significant variations in the way the Member States deal with the availabil-

que et financière, Journal Officiel de la République Française (JORF) [last access 15.04.2021].

112 Art. 3(10) and Recitals (12) DCD.

113 For (1) to (4) as provided in Recitals (12) of DCD.

114 Recital (34) of DCD.

115 Recital (40) of DCD.

116 Art. 3(10) and Recital (40) of DCD.

117 Recital (73) of DCD.

ity of damages as a remedy"[118] differences in consumer protection in this regard are could be expected. In regard to the remedies, it is also to be noted that the introduction of two-stage hierarchy of remedies may mean reduction of rights of the consumers in the jurisdictions where free choice of remedies exists as it was available under Directive 1999/44/EC.

Differences also may occur in regards to the concept of consumer, as the Members States may (or may not) opt the protection to be extended not only co natural persons in the cases of dual-purpose contracts.

The Digital Content Directive and the Sale of Goods Directive confirm the tendency for harmonization, to the maximum effect, of the consumer contract law. How will this affect the 'traditional' understanding of borders (not to be crossed) of the national private law is yet to be seen.

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UDK 343.143:616-036.21
Review article

TESTAMENTARY FORMALITIES IN THE TIME OF PANDEMIC

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ABSTRACT

The formalism in testamentary law is a result of the need to protect the freedom of testamentary disposition and the authenticity of the last will of the testator. Proposed formalities are supposed to serve multiple purposes in testamentary law: evidentiary, cautionary and protective. Having in mind the level of modern society development and technologies, as well as the new challenges we face with today (such as pandemics, natural disasters, etc.), the question arises: whether the prescribed formalities in testamentary disposition are justified in terms of purposes they are suposed to serve?

Modern testamentary law is characterized by the trend of liberalization of testamentary forms, mitigation of formalities, abolition of certain obsolete forms of testament, but also introduction of new forms dictated by new social and economic, political circumstances and new requirements of legal trade mortis causa. The experience with the Covid pandemic confirmed the importance of these issues. The state of the pandemic indisputably restricts the freedom of testation in several directions: limited contacts prevent the presence of notaries or judges as representatives of public authorities as a mandatory element of form in public testamentary forms, and the possibility of their composition; it is impossible or difficult to ensure the presence of testamentary witnesses in allographic testament and thus difficult to implement the principle of unitu actu as a key feature of the testamentary form; finally, illiterate people and people with disabilities remain deprived of the opportunity to exercise their constitutionally guaranteed freedom of testing due to being unable to make an holographic legacy, as their sole option available within the extraordinary circumstances of a pandemic, due to above mentioned restrictions.

As the basic purpose of the testamentary right is to enable a testamentarily capable person to manifest his last will in whatever circumstances he finds himself, extraordinary circumstances during a pandemic indisputably restrict the freedom of testing. The new pandemic circumstances have prompted the legal public to think in the following directions: whether there is a need to introduce new forms of testament during a pandemic (as was done in Spain, which regulated testament during a pandemic); should certain elements of the form of the will be modernized (e.g. allow the possibility of the participation of the witness of the will in the pro-

cess of making the will online via audio-video link) ?; and finally, should the door be opened to the digitalization of the will and the possibility of compiling an electronic will and mark the beginning of a new era of testamentary law?

These and related issues are the subject of analysis in this paper, and will be viewed through the prism of comparative legislation, with special emphasis on the legislation of the countries of the Roman legal tradition that precedes the form of bequest during a pandemic. In order to determine the guidelines for further development of testamentary law and its rationalization, the situation in common law countries will be pointed out, and some examples from their case law will be analyzed, considering that a significant step towards digitalization of testamentary law has already been made in these legal systems. Based on this comparative analysis, which implies the application of primarily comparative law and dogmatic methods, as well as axiological through a new approach to the testamentary form, we try to determine whether testamentary forms and formalities are harmonized with the needs of modern society, especially in pandemics.

Finally, at the end of the paper, the author tries to give proposed solutions in the direction of reforming the testamentary formalities de lege ferenda, trying to establish a balance between legal certainty and freedom of testing.

***Keywords**: Succession law, last will, testamentary formalities, pandemic, digitization*

1. INTRODUCTION

Outbreak of COVID-19 pandemics has influenced the law in many various aspects. Pandemic has highlighted many challenges the law is facing with nowadays, one of which appears to be also the purposefulness of testamentary formalities in the law of inheritance. The requirement of formality in testamentary disposition lies on a deep-rooted legal tradition, with the form of testament having the constitutive meaning (*forma legalis, forma essentialis*). From the moment of death, it becomes effectively possible for a testator to confirm the authenticity of the last will, or to solve any other dispute relating to the will content. Hence, these formalities, ensuring its authenticity, are necessary in order for the testator's last will to be executed after his death. Although being provided for the purpose of the execution of the last will, the formalities also limit the freedom of testamentary disposition, which is justified as long as there is proportionality between the provided formal limitation and the purpose for which the limitation has been prescribed. This proportionality has been brought into the question particular in the time of pandemic crises, since many obstacles regarding compliance with testamentary formalities and their practical implementation have been set, thus bringing into the question accomplishment of the freedom of testation.

The problem that arises relating to prescription of formal requirements for valid will is that all conditions relevant for will making process haven't been taken into

consideration (practical needs of the testator who acts in certain place, with certain abilities, in the specific circumstances.), in the context of specific social, economic, technologic, environmental circumstances, on the global level. These weak points of the law of testament have been emphasized by COVID-19 in the most significant way. Namely, the exercise of testamentary freedom has been jeopardized in numerous aspects, due to the restrictive social measures and stay-at-home orders. In these specific circumstances the fulfillment of some testamentary formalities has become increasingly difficult, or even impossible for certain categories of people (elder persons, persons with disabilities, or those who live alone). This brings into question not only formal effectiveness of a traditional testament, but also purposefulness of testamentary formalities due to difficulties in implementation. Peculiarly, concern should be taken about risks from possible discrimination of those testamentary capable persons being not able to exercise testamentary freedom, due to formal and social boundaries, which further raises the question of possible infringement of constitutionally guaranteed right on testamentary disposition. Therefore, traditional testamentary formalities and their legal purposes need to be thoroughly explored.

2. FORMALISM IN TESTAMENTARY LAW

Freedom of testamentary disposition has been based on the constitutional guarantees of the right to property and the right to inherit.[1] Law of wills derives from the premise that an owner is entitled to dispose of his property in contemplation of death (as it is the case for a life) [2], being limited in this disposition in various ways.[3]This rule is in accordance with European standards of inheritance law where equal legal protection has been granted to the right of disposal, as well as to the right to bequest.[4]

As a main instrument of estate planning, a testament can be defined as unilateral, personal, revocable disposition *mortis causa*, that has to be exercised in *ad solemnitatem* form.[5] In comparison to the contract law where principle of consensualism

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1 See art. 58 (1) and 59 (1) of Constitution of the Republic of Serbia („Offical Gazette RS", no. 98/2006).

2 Langbein, J. H., *Substantial Compliance with the Wills Act*, Harvard Law Review, Vol. 8, No 3. 1975, p. 496.

3 For limitations of freedom of testation see Đurđić-Milošević, T., *Ograničenje slobode zaveštajnih raspolaganja*, doctoral dissertation defended at the Faculty of Law of the University of Kragujevac, 2018, p.50-348.

4 Art. 17 (1) of Charter of Fundamental Rights of the European Union (2010/C 83/02); [https://www.europarl.europa.eu/charter/pdf/text_en.pdf], Accessed 15 March 2020.

5 Đurđević, D., *Institucije naslednog prava*, Beograd, 2017, p. 120; Stojanović, N., *Nasledno pravo*, Niš, 2011, pp. 193-195.

is a rule, in testamentary law formalism prevails.[6] Testamentary formalities are at the core of what makes a last will valid and trace back centuries.[7] They reflect a legal tradition of a society, and as social, economic, political circumstances have been changing through history, so did the formal requirements for valid testament.[8] Freedom of testamentary disposition (bequest) stem from one of property rights - the authority of the owner to dispose of his or her own property in contemplation of death (i.e. *mortis causa).*[9]

The compliance with will formalities are suposed to garantee the authenticity of the last will, its provability and certainty, as well as seriousness and finality of the will making process.[10] Testamentary formalities are supposed to serve their purposes prescribed by the law: (a) evidentiary (enable a court to decide, without the benefit of live testimony from the testator, whether a purported will is authentic); (b) cautionary (warning upon the testator with regard to the significance of making a will and that his/her actions cause legal effects; (c) channeling (providing a "tool" to permit the parties to give legal effect to their intentions), and protective funct+ion (protect the testator from manipulative imposition).[11]

3. TESTAMENTARY FORMS AND FORMALITIES IN INTERNATIONAL COMPARATIVE PERSPECTIVE

Forms of testaments available in continental legal systems of EU countries are numerous, and can be classified on the basis of different criteria into following categories: public and private testaments; ordinary and privileged testaments (*testamentum solemne* and *testamentum minus solemne*); handwritten and oral teastaments (i.e. nuncupative will)[12]. As far as private testamentary forms are concerned, holografic will is prevailing in continental legal systems (with the exception of Netherlands

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6 About the form of contract and other legal bequests see Perović, S., *Formalni ugovori u građanskom pravu*, Beograd, 1964, p. 26.

7 Langbein, *op. cit.*, note 2, p. 490.

8 Đurđić-Milošević, *op. cit.* note 3, p.111.

9 Đurđević, D., *Sloboda testiranja i formalizam olografskog testamenta,* Pravni život, no. 11, 2009, p. 849.

10 Lange, H., Kuchinke, K., *Erbrecht - Ein Lehrbuch,* C.H.Beck, München, 2001, p. 333.

11 Crawford, B. J., *Wills Formalities in the Twenty-First Century*, Wisconsin Law Review, 2019, p. 287. [https://ssrn.com/abstract=3264683], Accessed 10 March 2021; Critchley, P., *Privileged Wills and Testamentary Formalities,: A Time to Die?*, Cambridge Law Journal, Vol 58, Issue l, 1999, p. 51; Langbein, *op.cit.*, note 2, pp. 492-497; *Developments in the law - What is an electronic Will?* (chapter four), Harward Law Review, vol. 131, No. 6, 2018, p.1793. [https://harvardlawreview.org/wp-content/uploads/2018/04/1790-1811_Online.pdf], Accessed 28 Februar 2021; Lange; Kuchinke, *op.cit*, note 9, p. 332.

12 Marković, S., *Nasledno pravo*, Beograd, 1981, pp. 268, 269.

where it is notprescribed)[13], while the prevailing public form of the last will is notarial testament. Concerning privileged testamentary forms, there are various represented in continental legal systems, such as: military testament, last will made during a journey (whether on the ship or aircraft), privileged will made during natural disasters, or in isolated geographical areas (as a result of, crises, operations of war, calamities, contagious diseases or other extraordinary circumstances and accidents), etc.[14] Privileged forms of will could be used in extraordinary circumstances when the ordinary forms of will are not available. These are usually of public legal nature and should be made before a notary, or other representative of public authority (the local reconciliator, the mayor or a person authorized by the mayor, or a clergyman), in the presence of two witnesses.[15] In comparison to an ordinary public will, the formal requirements are to some extent decreased,[16] which should extend the availability of this testamentary form. On other hand, there are some legal systems that recognize an oral will as the only type of extraordinary will that is of private legal nature, and should be performed before at least two witnesses.[17]

The formal procedure for execution of the will in the time of epidemic has been even more simplified in Spanish law, where this type of will has been qualified as an open will[18] (not special will, as it is the case in other roman countries.)[19]. It should be executed in front of three witnesses, being over the age of sixteen. The presence of notary public is not required (or other public representative), as it is the case in other roman countries.[20] Nevertheless, it is necessary for this type of will in order to take effect to be raised the public deed within three month after testator's death.[21]

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13 See Pintens, W., *Testamentary Formalities in France and Belgium*, in: Reid, K.G.C, *et al.* (eds.), Comparative Succession Law, Volume I, Testamentary Formalities, Oxford, 2011, p. 57; Wekas, L., *Testamentary Formalities in Hungary*, in: Reid, K.G.C, *et al.* (eds.), *Comparative Succession Law, Volume I, Testamentary Formalities,* Oxford, 2011, p. 261; Braun, A., *Testamentary Formalities in Italy,* in: Reid K. G. C. *et al.* (eds.), *Comparative Succession Law, Volume I, Testamentary Formalities,* Oxford, 2011, pp. 125, 140.

14 Arts. 609-616 Italian Civil Code, [https://www.trans-lex.org/601300/italian-codice-civile/], Accessed 03 March 2021; Art. 701 (Section five on the open will) of Spanish Civil Code [http://derecho-civil-ugr.es/attachments/article/45/spanish-civil-code.pdf], Accessed 03 March 2021; Art. 985 of French Civil Code [https://www.legifrance.gouv.fr/liste/code?etatTexte=VIGUEUR¬&etatTexte=-VIGUEUR_DIFF], Accessed 01 March 2021.

15 Art. 609(1) Italian Civil Code.

16 It has been qualified as "simplify version of public will" (Braun, *op. cit.,* note 13, p. 134).

17 Art. 37 of the Inheritance Act of the Republic of Croatia, National Gazette, no. 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, 14/2019;: Art. 506 of Swiss Civil Code. [https://lawbrary.ch/law/210/ZGB/v3/de/schweizerisches-zivilgesetzbuch/], Accessed 07 May 2021.

18 Art. 701 (Section five on the open will) of Spanish Civil code.

19 See Braun, *op. cit.,* note 13 p. 134.

20 See art. 609 of Italian Civil Code; art. 985 of French Civil Code.

21 Art. 703 (1) of Spanish Civil Code.

At a first glance, it seems that these relaxed formalities of "pandemic will" in terms of possibility of execution only before three witnesses (and without presence of a public authority representative required), make this testamentary form more accessible in the specific pandemic circumstances. Some authors are taking a view that simplified testamentary formalities could jeopardise legal certainty creating more risks of misuse. [22] This may be the case with the agreed articulation of the contents of the last will between the witnesses who are attesting particular process of will making.[23] On the other hand, the required number of three witnesses for the testament to be valid provides a kind of guarantee of the authenticity of testator's will and legal certainty when it comes to determining the content of the last will of the testator.[24] The question is, whether it serves enough the protective testamentary function?

Another problem that arises regarding testamentary formalities is the difficulty of securing simultaneous presence of testamentary witnesses, in the limited pandemic circumstances, due to social distance measures and other restrictions on human contacts. The whole range of statutory limitations regarding persons allowed to attest the last will, additionally aggravates the problem. According to the Spanish law, "in an open testament, heirs and legatees named therein, their spouses or the relatives of the former within the fourth degree of consanguinity or the second degree of affinity, may not be witnesses".[25] This means that during social restrictions the fulfillment of these formal requirements is even harder to provide, due to a narrowed circle of persons that could take a role of testamentary witnesses.

Serbian legislation does not recognize specific testamentary form provided for pandemic or similar situations (calamity, accident, crises). There are just two specific forms of wills reserved for extraordinary circumstances: military testament (reserved for war time or mobilization)[26] and testament made on the ship (during a voyage)[27]. The only testament available in emergency situations is an *oral testament*. An oral testament has to be performed before three witnesses, but only under exceptional circumstances: when there is a sudden and imminent danger for the testator to lose his life, or testamentary capacity. [28]

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22 Antić. O., Balinovac. Z., *Komentar Zakona o nasleđivanju,* Beograd, 1996, p. 358.

23 *Ibid.*

24 Đurđić-Milošević, *op. cit.,* note 3, p. 158.

25 Art. 682 (1) Spanich Civil Code.

26 Art. 109 (2) Inheritance Act of Republic of Serbia (Official Gazette of the Republic of Serbia No. 46/95 and 101/2003 – decision of the Constitutional Court of the Republic of Serbia).

27 Art. 108 Inheritance Act of Republic of Serbia.

28 Đurđević, *op. cit.*, note 5, p. 145.

However, in a term of last will accessibility, a useful analogy could be made between an oral testament in Serbian legislation and a fore mentioned pandemic will in Spanish law, concerning the witnesses. Namely, for all testamentary forms in Serbian law for which validity the presence of testamentary witnesses is required, the similar limitation concerning the cycle of testamentary witnesses has been prescribed, as it is the case in Spanish law (even broader).[29] However, taking into consideration specific circumstances in which oral will is allowed to be created, a kind of relaxation regarding testamentary witnesses has been made in Serbian law, in a way that this limitation does not apply on oral testament (because of its extraordinary legal nature).[30] This actually means that broader cycle of persons could be found in the role of testamentary witness in case of oral will: the testator's spouse, descendants and other of his close relatives (that are not allowed by ordinary testamentary forms).[31] This relaxation regarding testamentary witnesses could apply on the last will in pandemic, resulting in its greater accessibility.

Another question regarding a will in pandemic arises concerning the circle of the persons to be allowed to take advantage from the testamentary disposition. To those who take the role of testamentary witnesses, should not be allowed to benefit from these testamentary dispositions. For example, there are a huge number of persons close to the testator that are deprived of this possibility, as far as oral will in Serbian law is concerned. [32] Thus, execution of the last will during a pandemic raises a lot of doubts that are finally resulting with the confrontation between testamentary formalities and legal certainty.

4. LOOSENING FORMAL REQUIREMENTS IN PANDEMIC

Continental legal systems are more rigid when it comes to the testamentary formalities, than common law. Non-compliance with the formal prerequisites results in invalidity of the last will (nullity or voidness), even if there is an evidence that it expresses the legally relevant will of the testator.[33] There is no possibility in continental law for court to intervene in the case of minor formal testamentary

[29] Art 13 (1) Inheritance Act of Republic of Serbia: „A testamentary witness cannot be a person who is a blood relative in the direct line to the testator, a collateral relative up to the fourth degree of kinship, an in-law relative up to the second degree of kinship, a relative by adoption, a spouse, ex-spouse, extramarital partner, ex-extramarital partner, guardian, ex-guardian, ward or former ward."

[30] Art 13 (2) Inheritance Act of Republic of Serbia: „This does not apply to oral bequests."

[31] Đurđević, *op. cit.*, note 5, p. 150.

[32] "The provisions of oral testament relating to some benefits for testamentary witnesses, their spouses, ancestors, descendants and relatives in the collateral line up to the fourth degree of kinship, as well as to the spouses of all those persons, are null and void." Art. 160 Inheritance Act of Republic of Serbia.

[33] Đurđić-Milošević, *op.cit.,* note 3, p. 146.

deficiencies, in order to keep the last will in force.[34] On the other hand, due to the more flexible approach towards formalities in common law, some steps towards de formalization of the law of testament have been taken, that could be helpful in time of pandemic. The possible emerging solutions could be as follows: providing holographic will in legislation (where it has not been acknowledged), adoption of the harmless-error doctrine (or doctrine on substantial compliance); enacting electronic will legislation, or temporarily suspending certain elements of the Inheritance Act during public health emergencies.[35]

The holographic testament could be considered as a good formal instrument for executing the last will during pandemic. This testamentary form is allowed in half of the states of USA, as well as in several Canadian provinces, while England and the Australian states do not recognize holographs[36]. In comparison to attested (i.e. formal or witnessed) will,[37] the advantage of this form is relaxed formalism, since handwriting substitutes attestation [38] (therefore it also called "unwitnessed" will).[39] The problem might arise regarding illiterate persons or the persons with some disabilities who are unable to make holographic will, as their sole option available within the extraordinary circumstances of a pandemic. The presence of public authority representative is also difficult to secure due to the social restrictions, thus the process of making a public will is aggravated. Since there is no other specific testamentary form available in pandemic situation, the following question arises: are these formal prerequisites for the last will execution unjustified and discriminatory in relation to a fore mentioned category of people, who are, over all, deprived of the right of testamentary disposition in certain extraordinary circumstances?

As far as Anglo-American jurisdiction is concerned, writing, a signature and attestation are the essential formal elements of a last will (with some variations regarding further formal requirements).[40] A significant step towards streamlining the testamen-

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34 See Wedenshorts, C.C., *Testamentary Formalities in Austria, Testamentary Formalities in Italy*, in: Reid, K. G. C. *et al.* (eds.), Comparative Succession Law, Volume I, Testamentary Formalities, Oxford, 2011, p. 250.

35 Horton. D., Weisbord, R. K., *COVID-19 and Formal Wills,* Standford Law Review, Vol.73, No. 18, 2020, p.19.

36 Langbein, J. H., *Excusing Harmless Errors in The Execution of Wills*: A Report on Australia's Tranquil Revolution in Probate Law, Columbi a Law Review, Vol. 87, No. 1, 1987, pp. 2, 3.

37 *Ibid.*

38 "The testator may execute his will without witnesses, but it must be "materially" (or in some states "entirely") in his handwriting." Langbein, *op. cit.,* note 36, p. 3.

39 Crawford, *op.cit.,* note 11, p. 280.

40 For example: annulment of the signature already in place; requirement for the signature to be in specific place in document etc., Langbein, *op. cit.*, note 36, p. 2.

tary formalities has been made within Uniform Probate Code,[41] through more liberal provision in favor of holographic testaments:" If a will that does not comply with subsection § 2-502((a) UCP is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.".[42]

It is undisputed that each of the formal elements of holographic will serve certain formal purposes. Until the moment of making a will, the signature has a warning purpose because it warns the testator on the seriousness of the act of making.[43] It is also evidence of finality of testator's intention (separating draft from final will),[44] and the evidence of will's authenticity, as well.[45] If there is no signature on testament, suspicious arises about the genuineness of the testament.[46] Concerning handwriting, it serves evidentiary purpose, securing reliable evidence of testator's intent to make the last will, proving its authenticity. In common law it is considered that handwriting and signature are "indispensable formal elements "of the last will and that abolishing the attestation requirement for formal wills would even "modernize" wills formalities.[47]

As far as attestation as a formal element of a last will is concerned, its protective function is undisputable, since it protects the testator against undue influence at the time of the will execution.[48] It's cautionary and the evidentiary function is also very important, and there is a doubt in legal doctrine whether these functions

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41 The Uniform Probate Code was promulgated by the National Conference of Commissioners on Uniform State Laws in 1969. It underwent substantial revisions in 1975, 1982, 1987, 1989, 1990, 1991, 1997, 1998, 2002, 2003, 2010. The Uniform Probate Code and its revisions have been adopted in Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, Utah, and Wisconsin. It was introduced for adoption in Massachusetts in 2008.

42 § 2-502(b) Uniform Probate Code; Langbein, *op. cit.,* note 36, p. 491.

43 Reid, K.G.C. *et al.*, *Testamentary Formalities in Historical and Comparative Perspective*, in: Reid K.G.C. *et al.* (eds.), Comparative Succession Law, Volume I, Testamentary Formalities, Oxford, 2011, p. 455.

44 Langbein J. H., *Absorbing South Australia's Wills Act Dispensing Power in the United States*, Adelaide Law Review, Vol. 38, No. 1, 2017, p. 4.

45 Reid *et al*, *op. cit.,* note 43, p. 455; Langbein, *op. cit.,* note 36, p. 3; "There may be rare cases where it would be appropriate to admit to probate an unsigned will, except in some unique cases" - Langbein, *op. cit.,* note 2, p. 518.

46 Langbein, *op. cit.,* note 44, p. 4.

47 Lindgren, J., *Abolishing the Attestation Requirement*, North Carolina Law Review, Vol. 68. No. 3, 1990, pp. 541, 542.

48 Scalise, R.J., *Testamentary Formalities in the United States of America,* in: Reid K.G.C. *et al.* (eds.), Comparative Succession Law, Volume I, Testamentary Formalities, Oxford, 2011, p.362; Langbein, *op. cit*., note 33, p. 3.

could be substituted by other formal means.[49] On the other hand, there are some authors that express certain doubts as to this element of testamentary form, considering that the attestation requirement "sets the level of caution and the evidence functions unreasonably high".[50] The competency of witnesses is also disputable in theory, and it is questionable whether their presence may or may not have served a prevention of malfeasance by others.[51]

It can certainly be debated whether the attestation is justified or not from the point of view of the function of the testamentary form, but this formal element also has to be considered from the point of view of the possibility for its realization. It is considered that social distancing measures make it difficult or even impossible for some persons to find the requisite witnesses (especially for the persons who are living alone), and to realize last will using this testamentary form.[52] At the same time, public testamentary forms are even less possible to exercise since the presence of the public authority representatives is hard to provide due to social distance measures.[53] It seems that before the question of whether a certain testamentary formality fulfills its purposes, the question should be posed whether these formalities are achievable in specific circumstances (such as pandemic), and therefore, whether different approach toward testamentary formalities has to be taken?[54]

Due to the difficulties with testamentary formalities implementation, in common law compliance requirement had been rather criticized and substantial compliance doctrine arose as a criticism to this strict formal compliance.[55] It was debated that a substantial compliance doctrine could be acceptable solution for execution of the last will in pandemic time[56], and that this "old pattern" could even help to legiti-

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49 Langbein, *op. cit.,* note 2, p. 521.

50 "The legislature which refuses to permit holographic wills forecloses the substantial compliance doctrine in cases of total failure of attestation. On the other hand, partial failure of attestation ought to be remediable under the substantial compliance doctrine. Attestation by two witnesses where the statute calls for three, or by one where it asks for two, is a less serious defect, because the execution of the will was witnessed and the omission goes to the quantity rather than the quality of the evidence. Other evidence of finality of intention and deliberate execution might then suffice to show that the missing witness was harmless to the statutory purpose". Langbein, *op. cit*., note 2, pp. 489, 490.

51 Crawford, *op. cit.*, note 11, p. 288.

52 Horton; Weisbord, *op. cit.*, note 35, p. 22.

53 Załucki, M., *Preparation of Wills in Times of COVID-19 Pandemic – selected observations,* The Journal of Modern Science, vol. 22, issue 2, p. 5.

54 „The formalities do not in fact provide adequate evidence that some theoretical purposes of wills formalities have been served." Crawford, *op. cit.*, note 11, p. 271.

55 *Developments in the law - What is an electronic Will?* (chapter four), Harward Law Review, vol. 131, No. 6, 2018, p. 1793. [https://harvardlawreview.org/wp-content/uploads/2018/04/1790-1811_Online.pdf], Accessed 07 May 2021.

56 Załucki, *op. cit.,* note 53, p. 5.

mate an electronic will[57]. Substantial compliance doctrine means that a testator's last will could be enforced if it is in substantial compliance with the US Wills Act formalities, and if there is a clear evidence that testator had intention for certain document to represent his last will.[58] In comparison to the doctrine of substantial compliance, the harmless error doctrine is more focused on the decedent's intention, and not on Wills Act formalities. It is important that testator intended his last will to be effective, and on this ground and under statutory dispensing power, the court could validate the last will that does not meet necessary requirements pertaining to their form (i.e. not formally comply Wills Act).[59] The harmless error rule has been incorporated into Uniform Probate Code: a "document or writing is treated as (compliant with formalities] if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute [a new will or an adjustment to a previous will).[60]The absence of formal compliance is justified as long as formal purposes of the will are satisfied. [61] The same was the case in Australian law, where courts had excused noncompliance with testamentary formalities, in the cases where it was determined with the certainty that the testator 'intended the document to constitute his or her will' (when there was clear and convincing evidence of the testator's intent to have the document in question serve as her will).[62] There are lots of cases in Australian judicial practice where a number of electronic wills had been sustained under the dispensing power of courts (last will recorded on DVD medium[63], last will typed and stored on a lap top[64]or tablet device[65], even those created and stored on mobile phone[66]).

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57 *Ibid.*

58 Under the substantial compliance doctrine, the court deems the defective instrument to be in compliance. Under a statutory dispensing power, the court validates the will even while acknowledging that the will did not comply., Langbein, *op.cit,* note 36, p.6; On the other hand, harmless error allows a judge to enforce a writing that does not comply with the Wills Act if there is clear and convincing evidence that the testator intended it to be effective", Horton; Weisbord, *op. cit.*, note 35, pp. 24-25.

59 *Ibid.*

60 § 2-503 of Uniform Probate Code.

61 "The substantial compliance doctrine permits the proponent of the defective change of beneficiary designation to prove that in the circumstances of the particular case these formal purposes were served without formal compliance". Langbein, *op. cit.,* note 2, p. 528.

62 Langbein *op. cit.,* note 44, p. 3.

63 Mellino v Wnuk & Ors [2013] QSC 336; [https://archive.sclqld.org.au/qjudgment/2013/QSC13-336.pdf], Accessed 15 February 2021.

64 Alan Yazbek v Ghosn Yazbek & Anor [2012] NSWSC 594; [https://www.caselaw.nsw.gov.au/decision/54a637ad3004de94513d9a45], Accessed 19 February 2021.

65 Re Estate of Javier Castro (Ohio Ct Com Pl, No 2013ES00140, 19 June 2013).

66 JASON YU & KARTER YU;Re: Yu [2013] QSC 322; : [https://www.sclqld.org.au/caselaw/QSC/2013/322], Accessed 18 February 2021.

On the other hand, in some jurisdictions some statutory changes regarding testamentary formalities have been made, providing testamentary disposition to be more accessible through loosening formal requirements for last will preparation. This was the case with Australia[67], New Zeeland,[68] Canada[69], where it was allowed during pandemic the testament to be sign and witnessed via audiovisual links, or as it is case in Canada concerning notarial will (and other notarial acts), where a notaries are authorized to act remotely. This has already been the case in some USA-a states (Arizona, Florida, Indiana, and Nevada), that had brought the electronic –will legislation before outbreak of Covid pandemic.[70]

5. DIGITIZATION OF A LAW OF TESTAMENT

5.1. Digitized Testamentary Formalities and Holographic Testament in Continental Law

As mentioned above,[71] the holographic testament is the most common private testamentary form in continental law. It has to be handwritten and signed declaration of a testator (in several legal systems date of making a will is of mandatory nature).[72]These formal prerequisite for making a valid holographic will are based on the individual characteristics of the testator's handwriting that should confirm the authenticity of the last will. For these reasons, some authors are taking a view that holographic will as handwritten one, may not be created (written) by electronic means (computer, tablet etc.).[73]

For example, in German legal doctrine it has been debated whether the last will written by stylus on tablet, meets the requirements of Section 2247 (1) of German Civil code in a term to be considered as handwritten and signed declaration

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67 COVID-19 Emergency Response Act 2020, Queensland (Current as at 4 December 2020), COVID-19 Emergency Response Act 2020 (legislation.qld.gov.au).

68 Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020 (from 16th of April 2020); This order modifies requirements imposed by the Wills Act 2007; [https://www.legislation.govt.nz/regulation/public/2020/0065/latest/whole.html], Accessed 25 February 2021.

69 Order 2020-010 of the Minister of Health and Social Services, as of 1 April 2020, [https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/AM_numero_2020-010-anglais.pdf?1585487531], Accessed 10 March 2021.

70 Horton;Weisbord, *op. cit.*, note 35, fn. 8.

71 See *infra* 3.

72 Art. 688 (2) of Spanish Civil code.

73 H. Brox, Grundprinzipen, Erbrecht, Köln-Berlin-München, 2004, p. 106.

of testator's last will?[74] Baumann believes that due to the numerous possibilities of technical misuse, a testament made on a computer should not be allowed, as long as the digital drawing up of a will does not meet security standards for determining authorship that fulfills a holographic will.[75] In order for these type of formal requirements to be subsumed under the Art. 2213, para. 1, subpara. 2 of German Civil code, certain changes of the existing regulation shall be made in order to prevent forgery of a last will, while accompanying rules relating to the storage of digital wills shall be provided.

The opposite view has been taken by Hergenröder[76] who considers that it is possible to make a holographic will using a stylus and tablet, if there has been an assurance that any subsequent fraudulent abuse of manifested last will has been excluded. The most open to this form of testation is Grziwotz who considers as follows: "If there is no doubt about the handwritten recording of the last will and if the flat-screen computer is considered as 'material' available for writing, it is therefore questionable whether, with regard to the constitutionally protected testamentary freedom and the further development of the technical possibilities of the creation of written documents, an analogy to handwriting can still be denied" [77]

According to Serbian Inheritance Act, holographic testament can be created by a literate person, who has to write and sign the last will with his own hand.[78] Such a legal formulation is imprecise and introduces vagueness in terms of technical means that can be used to make a holographic will. A literal interpretation of this legal provision leads to a conclusion that the testator must write the will in his own hand, but that he remains free to choose the technique and means of writing, because they are irrelevant from the point of view of testamentary form.[79] For a last will to be valid, it is only important that it is written by the testator person-

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74 "In previous literature, this is largely understood as a question, the answer to which is decided according to whether a certain degree of technical protection against forgery can be guaranteed and thus the formal purposes of Section 2247 BGB can be preserved (sub I). This understanding, however, ignores the system of legal formal requirements, which - particularly due to the recent history of legislation - generally forbids to understand digital documents as handwritten", Scholz, P., *Digitales Testieren. Zur Verwendung digitaler Technologien beim eigenhändigen und Nottestament de lege lata et ferenda*. Archiv für die civilistische Praxis, 219, 2019, p. 104.

75 See Art. 26 of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, pp. 73-114), [https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32014R0910&from=HR], Accessed 3 April 2020.

76 Baumn, W., in: J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, 2018, § 2247, Rn. 35.

77 Scholz, *op.cit,* note 74, p. 104.

78 Art. 84 Inheritance Act of Republic of Serbia.

79 Đurđić-Milošević, *op. cit.,* note 3, p. 151.

ally, in such a way that the authenticity of the manuscript can be established. It hasn't been explicitly stated in the text of the law weather written letters have to be shaped by testator's own hands and whether pre-printed letters are forbidden. Hence arises that the possibility of writing a will using various digital means of writing (computer, tablet, etc.) is not excluded by law, and that any way of composing text of the last will is allowed, as long as the testator personally composes the text, using his hands.[80] Since interpretation of this provision leads to a vagueness it should be rephrased *de lege ferenda*, and clarify that electronic means can be used for will creation. In this particular form of testament, handwritten signature serves the function of authentication of the last will.[81] This form of will would be a kind of transition between a traditional holographic will, on one side, and electronic testament, on the other, and could be considered as an introduction into a "new era" of testamentary law.

As far as alographic (witnessed) will is concerned, the main formal elements are: written declaration of testator's last will; document recognition; and presence of testamentary witnesses.[82] Alographic testament could be written either by hand, or by any electronic means (computer, tablet etc), by the testator himself, or a third person (usually a lawyer). [83] In some legal systems, such as Hungarian, this type of will has been considered as a substitute for notarial will, since the procedure of execution is simplier, more economic, and the content of the testament is not revealed to testamentary witnesses (regarding its private nature). [84] The formal flexibility of this testamentary form speaks in favor of extended testamentary freedom, and recognition of the remote witnessing would definitly contribute to the easear accessibility, with beneficial effect in pandemic time.

5.2. Concepts of Electronic Will

An interesting classification of electronic will has been made in American electronic will related legal doctrine, although probate courts are still reluctant as to the recognition of "electronic wills". There are three types of electronic wills: offline electronic will; online electronic will; qualified custodian electronic will. Each of this form of electronic will could be observed through the prism of the formal function they are able to serve, in order to justify or not each of electronic wills.

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80 *Ibid.*

81 See Reid *et al.*, *op. cit.,* note 43*,* pp. 443, 444.

82 The number of required witneses vires in legal systems: in Serbian law two testamentary witnesses are required (art. 85 of Inheritance Act of Serbia) , as it is tha case in Hungarian law (see R. Wékás, *op. cit.*263 ; in Austrian law, three testamentary witneses are requested(see Par.595 of Austrian Civil Code).

83 See Judgement of Supreme Court of Serbia, Rev. 2413/2004, 20th october, 2004.

84 Wékás, *op. cit.,* note 13, p. 264.

Offline electronic will is considered to be „the modern version of holographic wills"[85]. It is a will typed on the electronic device and signed by testator by typing her/his name and saved on the hard drive. The main functional difficulties with this form is possible fraudulent actions that might be taken, with regard to the possibility that someone else with access to the testator's computer could simply create and hide a document purporting to be a last will and testament.[86] Another problem that arises with this offline testament relates to the possibility of its permanent storage in electronic format since, through the decades after creation of the testament and its storage on the CD (or other medium), the CD could become obsolete and out of use, and the content lost. Taking into consideration all of these specifics, it is under a doubt weather this offline electronic will could satisfy the evidentiary, cautionary, protective and channeling function it is supposed to serve. For these purposes "metadata" protection (i.e. data about data) associated with an electronic document could be useful, since they could offer information on when testament was created, whether it has been altered and who can access it. However, it is disputable which level of security in the sense of last will authenticity could be provided, due to the insufficient technological protection, but it cannot be denied that it is though still some evidence on will making process, in comparison to holographic will.[87]

As far as online electronic will is concerned, it is a will that testator type into some storage of communication medium, likely expecting the will to be available when she later needs it.[88] The problem that might occur with this type of electronic will is of evidentiary nature: how to provide availability of the evidence relating to the wills authenticity, considering regulation on the personal data management and storage of this information on internet, as well as the terms and conditions of the agreement between testator and service provider?[89] Taking into consideration all specifics of on-line electronic testament, it is obvious that cautionary and protective purposes of testamentary form, as well as channeling function are less fulfilled by online electronic will, than by offline one.[90]

Qualified custodian electronic wills are those wills created by a company which act as a "qualified custodian" of a testator entitled to create, execute and store the

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85 Developments in the law- What is an Electronic Will?, *op. cit.,* note 11, p. 1796.

86 *Ibid.*

87 There are some decisions where on the basis of meta-data evidence, the court admitted offline testament to probate. Developments in the law- What is an electronic Will?, *op.cit.*, note 11, pp. 1800-1805.

88 *Ibid.* p. 1802.

89 *Ibid.*

90 *Ibid.* p. 1805.

testators will in more simplyfied way. The company would streamline will creation and execution (by providing witnesses or notary services via webcam) and also guarantee to store the testator's will in an accessible format for a certain period into the future.[91]

The conclusion that arises from these considerations is that the question of ensuring the testament authenticity by electronic will is closely related to data protection policy, and should be considered only in interdependence with the data protection regulation.[92] Therefore, the issue of the digitization of testamentary law opens a broader topic of digital inheritance ("successione digitale") and *post mortem* data protection.[93] Finally, it is important not only to guaranty testamentary freedom, but also to extend through new testamentary forms, and new tools for estate planning, as well.[94]

5.3. Statutory Electronic Will

Statutory electronic will is defined a last will "written, created and stored in electronic record that contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator."[95] It is interesting to consider the meaning of a term "authentication characteristic". This is characteristic unique to that person that is capable of measurement as a biological aspect of a physical act performed by that person (fingerprint, a retinal scan, voice recognition, facial recognition, video recording, a digitized signature or other commercially reasonable authentication using a unique characteristic of the person.). [96]

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91 *Ibid.*

92 See Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002L0058&from=EN], Accessed 03 April 2021.

93 According to the case law of European Court of Human Rights, Article 8 grants protection only to the living, see judgments: Jäggi v. Switzerland, no. 58757/00, ECHR 2006-X; Estate of Kresten Filtenborg Mortensen v. Denmark (dec.), no. 1338/03, ECHR 2006-V; Koch v. Germany no. 497/09, ECHR 19/07/2012.

94 Patti F.P.; Bartolini, F., *Digital Inheritance and Post Mortem Data Protection: The Italian Reform,* European Review of Private Law , No 5, 2019, Kluwer Law International BV, The Netherlands, pp. 1185,1186.

95 Nevada revised Statue (2017)-Chapter 133 –Wills NRS 133.085-Electronic Will- [https://www.leg.state.nv.us/NRS/NRS-133.html#NRS133Sec085], Accessed 22 March 2021.

96 For the statutory regulation of electronic will in six common law jurisdiction, see Anand, N.; Arora. D., *Where there is will, there is no way: COVID-19 and a case for the recognition of E-wills in India and other Common Law jurisdictions,* ILSA Journal of International & Comparative Law ,Vol. 27., 2020, pp. 78-94.

There are also some special rules proscribed concerning the will making process. The last will is supposed to be created and stored in such a manner that only one authoritative copy exists, and other precautionary measures must be taken to prevent the misuse of the will.[97] Therefore the argument that e-will disadvantage would be the lack of safeguard against future alteration by another person who is not a testator,[98] are by these statutory provisions refuted. Since electronic will imply new formal categories such as "digitized signature", "authoritative copy", "authentication characteristic", this means that a new approach towards testamentary formalities and their comprehension has to be taken. New terminology also arises from remote witnessing, such as a term "electronic presence". This means "the relationship of two or more individuals in different locations communicating by means of audio-video communications (as if the individuals were physically present in the same location). The digitization of testamentary formalities would undoubtedly facilitate the realization of testamentary freedom, in so many levels. It would definitly make it easier for the testator to exercise the last will during pandemic or other isolations.

6. CONCLUSION

The purpose of freedom of testation is to enable each testamentary capable person to manifest his last will in whatever circumstances he finds himself, and plurality of testamentary forms should serve this purpose. However, Covid -19 pandemic broth into question achievability of testamentary freedom in the specific pandemic circumstances, thus traditional comprehension of formalism and formalities in testamentary law.

Formalism in testamentary law arose as a result of the need to protect the free will of the testator, but at the same time it sets some boundaries, when it comes to exercising of subjective (personal) civil rights, such as the right of disposition of property *mortis causa.* [99] On these grounds, formal restrictions of testamentary freedom are determined by the basic legal and political goals for which fulfillment they were established, and these are protective, evidentiary and cautionary functions of the form. Only within this framework, it is possible to find justification for limitation of testamentary freedom. At the same time, one should have in

[97] "The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will; Any attempted alteration of the authoritative copy is readily identifiable and each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy. Nevada revised Statute (2017)-Chapter 133 –Wills NRS 133.085-Electronic Will.

[98] Horton, D, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, Boston Collage Law Review, Vol. 58, Issue 2, 2017, pp. 539, 573.

[99] Stojanović, D. ,*Uvod u građansko pravo*, Beograd, 2004, p. 10.

mind that the scope of testamentary freedom has been determined affirmatively, by the plurality of testamentary forms available for its manifestation. Therefore, the scope of freedom of testation should be observed from the perspective of this ambivalent effect of testamentary formalities.

In the light of new challenges of modern society, more comprehensive and flexible approach towards testamentary formalities has to be taken. For that purpose, some jurisdictions, mostly of common law tradition, took some steps towards loosening formalities in the law of testament, on the ground of harmless theory and dispensing power; in some legal systems, temporary looseness of the formalities had been taken, that only apply during pandemic (for example, permititon to use electronic will for estate plans only under emergency conditions); in some other legal systems have taken a concrete measures through statutory reform of law of testament.

In comparison to common law, which is more flexible and adaptable, continental legal systems are more rigid, sticking firmly to a traditional notion of testamentary form and its elements. Regardless of that fact, ongoing tendency in continental testamentary law is mitigation (relaxing) of testamentary formalities, as a result of social, economic, technological development. This pandemic situation has shown all weak points of testamentary formalities, emphasizing the importance of their accessibility (since it is often difficult to comply with traditional testamentary formalities), in order to provide all formal functions they are supposed to serve. From this perspective, some of the testamentary formalities in order to be more assessable in the specific circumstances (such a pandemic), might be loosened at some levels. On the other hand, liberalization of testamentary formalities should not jeopardize the legal certainty regarding testament formation. Therefore, the main assignment of a legal doctrine and practitioners is to find (establish) a balance between these important legal principles.

The relevance of some traditional formal elements is undisputable. Testator's signature is of crucial importance for proving testament's authenticity. Relating to the question of digitization of testamentary law, there are concerns weather electronic signature would be adequate substitute for handwritten signature, in the term of functionality? Generally speaking, it should be assumed that the signature fulfills its purpose if, based on its characteristics, the testator can be identified and the authenticity of the testament itself can be confirmed. Electronic signing seems justifiable from the point of view of the basic characteristics of a signature and its purposefulness. Taking into consideration the technology of creating an electronic signature, its authentication function is indisputable. Even with much greater reliability, the authenticity of a written text can be confirmed than a handwritten signature on paper, and its affiliation with a signed person can be confirmed with

a high degree of certainty.[100] Thus, we are of the opinion that the same legal effect should be recognized to a qualified electronic signature, as it is the case with hand-written signature in testamentary law. It is up to the testator to choose which of the testamentary forms is the most suitable concerning his interests and the ability of comply with certain testamentary formalities.

As far as attestation is concerned, the presence of testamentary witnesses, as a formal element of testament, is justifiably from the prism of formal purposes, and its relevance should not be diminished, as it is a tendency in common law. Finally, there is no doubt that digitization of testamentary forms is ongoing process, and that the "remote witnessing" "electronic presence" "electronic signing ", as well as usage of a real-time audiovisual platform such as Zoom, Skype or Viber for the execution of last will, are about to become a „new normal"[101], i.e. new formal.

For the persons with some disabilities who are incapable of making a private form of wills, notarial and other ordinary public testamentary forms are supposed to be available. In order to provide accessibility and compliance with will formalities, some changes have to be made, due to social restrictions and home stay orders. For the purpose, a remote witnessing has to be allowed by these forms, and even remote acting of notaries (or other public officers), in order to enable everyone to exercise the constitutionally guaranteed right of testation.

As far as privileged testamentary forms are concerned, it is undisputable that urgent legal reform has to be made. Some of the existing privileged testamentary forms have been overcome (for example, a military will), some other has to be introduced where needed (for example, the will in time of pandemic). This should be considered in the respect of certain specifics of each legal system. The most acceptable in pandemic and other extraordinary circumstances would be a privileged will with high level of flexibility, that could be adapted to the specific circumstances (for example, that a testator may opt for an oral form or the form of an allograph testament, that should be exercised before two testamentary witnesses).

Finally, solemnization of the last will has been provided for the purpose of strengthening the freedom of testation. However, legal solutions in terms of testamentary forms should correspond to the realities and practical needs of a human; otherwise, the freedom of testation has only a formal significance. It is up to the

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[100] Art. 25 (2) of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, pp. 73-114), [https://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32014R0910&from=HR], Accessed 3 April 2021.

[101] Purser, K, *et al.*, *Wills Formalities Beyond Covid 19: An Australian-United States Perspective*; UNSW Law Journal Forum., No 5, 2020, p. 2.

legislator to establish a system of testamentary forms, which will correspond to these modern needs of society, and enable every person in the testamentary capacity to achieve (exercise) guaranteed freedom of testation on every occasion, even exceptional ones, such as a pandemic. Only with this attitude, formalism in law of testament would justify its purpose, and the freedom of testation would be fully realized.

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UDK 347.736:347.99]614.4
Review article

REDEFINING THE CLASSIC CONCEPT OF THE COURT? -RESPONSES TO THE CORPORATE SOLVENCY PROBLEM IN THE ONGOING COVID-19 CRISIS*

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ABSTRACT

The coronavirus pandemic is pushing large number of firms towards insolvency by dramatically changing consumption patterns and business operations. The first wave of liquidity-focused policy responses (Act on Intervention Measures in Enforcement and Insolvency Proceedings for Duration of Special Circumstances) prevented or delayed more severe consequences for the corporate sector. While some liquidity support is still needed, the crucial issue that must be tackled now is that of corporate solvency. This paper addresses the role of the Financial Agency (hereinafter: FINA), which, as a legal entity with public authority, has (in)appropriate legal authority in bankruptcy proceedings over the rights of entities. As in the previous paper, a multidisciplinary scientific approach is advocated, which should contribute to the consideration of various aspects of the relationship between FINA, the state, the judiciary and the current tendency of Dejudicijalization.

Keywords: *judiciary, court, the role of FINA, reforms, informal bankruptcy*

1. DEFINING LEGAL TERMS

Having in mind the complexity and topicality of the problem we are analysing, we consider it important to make a terminological distinction *ab intio* in order to make it clear what is meant by the term's - "court", "dejudicialization" and "FINA".

* This paper was funded under the project line ZIP UNIRI of the University of Rijeka, for the project ZIP-UNIRI-130-7-20".

Pursuant to the provisions of the Law on Courts,[1] a court is defined as a body of state power that exercises judicial power independently within the scope and jurisdiction determined by law (Art. 2). However, taking into account the fact that the principle of precedent and thus jurisprudence as a formal source of law is affirmed through the jurisprudence of the ECHR, the term "court" in Art. 6. par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols[2] shouldn't necessarily be understood as a court "in the classical sense", which is integrated into the standard judicial apparatus of a country (Art. 2 LC), but also the body that has jurisdiction on the basis of legal rules and has a possibility to conduct the procedure in the manner prescribed by law. Of course, such a body must also meet a number of criteria, primarily the criteria of independence and impartiality, the manner of appointment and the duration of the mandate, the existence of guarantees against external pressure and the question of whether that body gives the impression of independence.[3]

In this context, where are talking of dejudicialization for the protection of civil rights and obligations. Namely, there is no doubt that the legal systems of modern countries are exposed to reform processes, and one of them is dejudicialization. For the purposes of this paper, we can define dejudicialization as the process of transferring certain tasks of the judiciary to non-judges, in this case to Financial Agency (hereinafter: FINA).

FINA has been operating under this name since 2002, as the successor of the Payment Operations Bureau and the Social Accounting Service. According to its legal form, FINA is a legal entity with public authorities for which registration is prescribed by a special law, and the sole founder is the Republic of Croatia. The special law according to which it was established is the Law on Financial Agency,[4] and the main activity is financial intermediation through market activities. Within these activities, FINA is a State partner in a number of projects. When it comes to bankruptcy proceedings, more significant role was given to FINA through the provisions of ZFPPN.[5] However, in practice, although the adoption of the ZFPPN significantly changed the bankruptcy procedure in the Republic of Croatia, in its three-year practical application a number of problems were observed in the interpretation and effects of certain provisions and institutes, which was eliminate

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1 Official Gazette No. 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20. hereinafter: LC.

2 Official Gazette No. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10, hereinafter: Convention.

3 Bodul, D., Grbić, S., *O međusobnoj komplementarnosti pojmova „sud" i „javni bilježnik" u praksi Europskog suda za ljudska prava*, Javni bilježnik, 2014, No. 40, p. 35 *et seq.*

4 Official Gazette No. 117/01, 60/04, 42/05.

5 Law on Financial Operations and Pre-Bankruptcy Settlement, Official Gazette No. 108/12, 144/12, 81/13, 112/13, 71/15, 78/15, hereinafter: ZFPPN.

by the new BA[6] in 2015. Nevertheless, from doctrinal point of view the objection remains. Namely, FINA should be either a public service, taking care of the public good and the interests of all, or a private organization that takes care of its own profit. If FINA wants to operate in the market, then we should open that market to everyone on equal terms. On the other hand, if FINA is a public service, then the pricing policy of its activities should be shaped by a public debate on how to optimize costs for everyone's benefit. Instead, internal meetings discuss how FINA, as an enforcement monopolist, can make the biggest profit just for itself.[7]

2. METHODOLOGY OF WORK, WORK GOAL AND REVIEW OF RELEVANT LITERATURE

The subject of the analysis are the current norms related to the position of FINA in bankruptcy proceedings, having in mind the possible consequences of incomplete and inadequate regulation on the rights and interests of the participants. Therefore, in addition to the legal analysis of FINA's position in bankruptcy proceedings, as it is under the existing (valid) legal framework (*de lege lata*), this paper also includes the question of what that position should be with regard to the requirements of practice (*de lege ferenda*). This provides a picture of the relationship between legal regulations and practice, and shows the shortcomings of the current legal standardization of FINA's position in bankruptcy proceedings. Methodologically, for the purposes of the analysis, telephone interviews were conducted among representatives of the bodies responsible for the implementation of bankruptcy proceedings. Conducted interviews of targeted respondents serve to further verify the credibility of the results of this analysis. The collected data indicate practical problems in the implementation of certain legal solutions in the first period of application of the new BA legislation. The perspective of individual interviewees is based on knowledge and experience gained in the practice of applying previously applicable legislation, which is certainly an important factor in assessing the improvement, but also the degree of optimization of the existing legal framework of legal protection in bankruptcy proceedings.

The aim of this analysis is to find an answer to the question of whether the existing legal framework governing FINA's position in bankruptcy proceedings meets the requirement of effective legal protection. Therefore, the analysis is based not only

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6 Bankruptcy Act, Official Gazette No. 71/15, 104/17, hereinafter: BA.

7 Blanchard, O.; Philippon, T.; Pisani-Ferry, J., *A New Policy Toolkit Is Needed as Countries Exit COVID-19 Lockdowns*, Peterson Institute for International Economics (PIIE) 20-8, June, 2020; Hodbod, A.; Hommes, C.; Hube, S. J.; Salle, I., *Avoiding zombification after the COVID-19 consumption game-changer,* VoxEU.org, 21 December, 2020.; Boggs, P., *Impact of COVID-19 on Insolvency Laws: How Countries Are Revamping Their Insolvency and Restructuring Laws to Combat COVID-19,* 2020.

on practical problems but on detecting possible problems that could complicate bankruptcy proceedings.

In the Republic of Croatia, there are, perhaps, hundreds of scientific texts that deal with extensive and complex issues of bankruptcy regulations (Dika, M., Garašić, J., Bodul, D., Eraković, A. and Čuveljak, J.) It is a relatively modest number of monographs in the field of bankruptcy,[8] as opposed to capital works, scientific articles that exist in German bankruptcy law, or U.S. law.[9] Yet in recent years, an increasing number of studies have analysed the economic and legal effects of liquidation and reorganization bankruptcy proceedings. However, the benefits of participation of FINA in (pre-)bankruptcy proceedings remain unclear in the existing literature. From what has been said, we notice that the existing literature does not provide an answer, as well as useful explanations and appropriate approaches. Therefore, this research will present systematic and scientifically based analysis of role of the FINA in (pre-)bankruptcy proceedings.

3. ANALYSIS OF THE ROLE OF FINA IN THE BANKRUPTCY LAW

Pressure for the reform of pre-bankruptcy settlements from the ZFPPN, i.e. for a stronger role of the court, was also exerted by the application of Art. 6. of the Conventions.[10] Namely, the practice of the ECHR indicates that Art. 6, par. 1 applies to bankruptcy proceedings,[11] so the first dilemma regarding the very legitimacy of the dejudicialisation process through the pre-bankruptcy settlement model is the fact that bankruptcy legal protection must be within the jurisdiction of the body referred to by the Convention as a tribunal, and today only a court has those properties in positive law. This resulted in the "deletion" of legislative decisions according to which FINA *de facto* and *de jure* decided in pre-bankruptcy settle-

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8 Dika, M., *Insolvencijsko pravo,* Pravni fakultet, Zagreb, 1998; Eraković, A., *Stečajni zakon s komentarom i primjerima,* Računovodstvo, revizija i financije Plus, Zagreb, 1997.

9 Group of Thirty, *Reviving and Restructuring the Corporate Sector Post-Covid: Designing Public Policy Interventions*, Group of Thirty, Washington D.C. Marsh, 2020; Ministry of Law Singapore, Simplified Insolvency Programme, October 5, 2020; Wyman, O., *Building up immunity of the financial sector: Policy actions to address rising credit risk and preserve financial stability,* August, 2020; UK Government, *Corporate Insolvency and Governance Bill 2020: factsheets,* UK Government Department for Business, Energy and Industrial Strategy (BEIS) and The Insolvency Service, June 1, 2020.

10 For more, Omejec, J., *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava, strasbourški acquis,* Zagreb, Novi informator, 2013, p. 1297 *et seq.*

11 Arg., *S.p.r.l. ANCA and Others v. Belgium, decision, 10 December 1984, Decisions and Reports 40, Interfina and Christian della Faille d'Huysse v. Belgium, decision, 4 May 1987, no. 11101/84, Ceteroni v. Italy, judgment, 15 November 1996, Reports of Judgments and Decisions 1996-V, Bassani v. Italy, judgment, 11 December 2003, no. 47778/99, Capital Bank AD v. Bulgaria, Judgment, 24 November 2005, no. 49429/99 and Sukobljević v. Croatia, Judgment, 2 November 2006, no. 5129/03.*

ment proceedings in ZFPPN. The new solution indicates the independence of the court, which means that the Court is a special type of state authority to which special trial rules apply, and FINA serves as its "assistance" in the proceedings.

3.1. The role of FINA in pre-bankruptcy proceedings

One of the major changes in the BA is the implementation of Chapter II, i.e. the provisions on pre-bankruptcy settlement, which were transferred from the ZFPPN to the BA as a pre-bankruptcy procedure. The pre-bankruptcy procedure (hereinafter: PP) itself is designed for those entities that are essentially financially sound and have a business perspective, but their main obstacle to further progress is an unfavourable balance sheet, with the possibility of economically realistic negotiations with their largest creditors to ensure the inflow of capital that is a necessary precondition for their development.

3.1.1. *General provisions*

The bodies of the PP are the single judge and the commissioner/bankruptcy manager (Art. 21 of the BA), and FINA is the technical and administrative service of the court (Art. 44 of the BA), whose work is constantly monitored by the court (Art. 45 of the BA). The body conciliation council no longer exists in the new BA but only FINA, and apart from such a linguistic form the difference is much deeper. Namely, in the PP there is only real and territorial jurisdiction of the commercial court in whose territory the debtor's registered office is located, so the proposal for opening the PP is submitted to the court (Art. 16 of the BA), no longer to the FINA (there is no longer an administrative court, so now everything is decided by the competent commercial court, i.e. on appeal by the High Commercial Court of the Republic of Croatia). In accordance with the above, the logical novelty is that the rules of civil procedure (Art. 10 of the BA) are appropriately applied in the PP before the Commercial Court, in accordance with the Civil Procedure Act,[12] as opposed to the previous appropriate application of the General administrative proceedings under pre-bankruptcy settlement proceedings before FINA. Moreover, the court in PP, as we pointed out, supervises the work of FINA and is authorized to give instructions and request notifications or reports on actions taken in the proceedings.[13]

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[12] Official Gazette No. 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19.

[13] See, Ordinance on the list of Financial Agency units and areas of their competence, Official Gazette No. 106/15.

3.1.2. *Powers and duties of FINA in pre-bankruptcy proceedings*

In the PP, FINA has certain powers and duties that are broader than in bankruptcy proceedings. It issues certificates on the existence of pre-bankruptcy reasons, receives claims, receives statements from debtors and commissioners on reported claims, compiles a table of reported claims and a table of disputed claims, and receives disputed claims. A particularly important role of FINA is to deal with the bases for payment after the opening of the PP, then after the suspension of the PP and finally after the decision on the confirmation of the pre-bankruptcy agreement becomes final (legal consequences of opening the PP) (Art. 34, 36, 38, 40,41, 42, 43, 44, 45, 61, 64, 69, 70 and 71. of the BA). The question arises, however, whether the legislator had to delegate to FINA tasks related to filed claims instead of keeping then in the hands of the bankruptcy judges and the bankruptcy trustees? These tasks could certainly have been performed by the commissioner instead of FINA, but then several questions arise. First, the appointment of a commissioner in each PP is not mandatory, but depends on the court's assessment of the need for his appointment (Art. 33, par. 2 of the BA) and, second, the sufficiency of the advance of HRK 5,000.00 to cover all costs of this procedure (Art. 28 of the BA). Namely, the Decree on Criteria and Manner of Calculating and Paying Remuneration to Bankruptcy Trustees[14] stipulates that the PP Commissioner is entitled to a one-time award for work performed in the PP in the amount of HRK 3,000.00 to 20,000.00 HRK gross (Art. 3 of the BA). It is questionable whether the court will force the debtor to bear higher costs than the upper limit of HRK 5,000.00 only because of the costs of the Commissioner. Furthermore, the trustee cannot count on covering the costs from the Bankruptcy Proceedings Fund, which is strictly intended to cover the costs of the bankruptcy proceedings (Art. 111. of the BA). This means, given the quantity and quality of processing that the legislator has opted for FINA, which undoubtedly has the capacity to meet all PP requirements with a reasonable price of service fee of HRK 760.00 plus value added tax.

3.1.3. *The role of FINA in submitting proposals for opening pre-bankruptcy proceedings*

The proposal to open a PP is authorized to be submitted by the debtor or the creditor, if the debtor agrees with the proposal (consent must be submitted with the proposal) (Art. 25 of the BA). Bearing in mind that initiating this procedure is a right not a duty, the reason for initiating is threatening insolvency, therefore, if the court acquires the belief that the debtor will not be able to fulfil his forthcoming

[14] Official Gazette No. 105/15.

obligations upon their maturity. One of the three presumptions is that the debtor has one or more recorded unexecuted payment bases in the Register of Order of Payment Bases kept by FINA, which should have been collected from any of his accounts on the basis of valid payment bases without further consent (Art. 4, par. 2 of the BA). The existence of this circumstance is proved by a certificate from FINA, which is obliged to issue such a certificate without delay at the request of the debtor or the creditor. Otherwise, FINA is liable for the damage that the applicant might suffer as a result (Art. 4, par. 3 of the BA).

3.1.4. *The role of FINA in opening pre-bankruptcy proceedings*

In case the court finds that the preconditions for opening the PP have been met, it will issue a decision on opening this procedure in which it will appoint a commissioner, if it deems it necessary, and will publish it on the courts' *e*-bulletin board website (Art. 33. of the BA). The decision on the opening of the PP will be submitted by the court to FINA (Art. 34, par. 5 of the BA). The decision must contain precisely specified data (Art. 34 of the BA). The creditors then report their claim to the competent FINA unit on the prescribed form and enclose in the transcript the documents from which the claim arises, i.e. which proves it. The 2017 amendment extended the deadlines set by the court in the decision on opening PP, so now the deadline for filing a claim in PP settlement proceedings is 21 days from the delivery of that decision on opening proceedings, and creditors can within 15 days submit statements on the reported claims of the debtor and the trustee, if appointed, to challenge the reported claims that they consider non-existent, with the obligatory indication of the amount for which the claim is disputed and the reasons for the dispute. The deadline for filing claims has been extended, so it is now determined that the decision to open PP proceedings contains an invitation to the debtor and the trustee, if appointed, to submit a written statement to the competent FINA unit within 30 days of delivery of the table of claims, a statement of whether the claim is acknowledged or disputed, with an indication of the amount for which the claim is contested and the reasons for the dispute. In doing so, FINA is entitled to reimbursement of actual costs, the type and amount of which are prescribed by the Ordinance on the type and amount of reimbursement of costs of the FINA in pre-bankruptcy proceedings and on the amount of reimbursement of costs of the FINA.[15] Reimbursement of actual costs will be paid from the advance funds that the applicant is obliged to pay for the costs of PP in the amount of HRK 5,000 (Art. 28 of the BA). Ultimately, the indicative method of fact-finding indicates that FINA costs are likely to lead to a

[15] Official Gazette No. 106/15.

more expensive process. The legal consequences of opening a PP occur when the opening decision is published on the court's *e*-bulletin board and affect all creditors' claims arising before the opening of the proceedings, except for the rights of separate and exclusive creditors and claims of workers and former debtors and security measures from criminal proceedings and tax proceedings for determining the abuse of rights (Art. 65 of the BA). The Novelty from 2017 amendment the rules concerning separate and exclusive creditors and states that they are obliged to notify the competent FINA unit within the deadline for filing a claim of their rights, legal basis and part of the debtor's property relating to their separate right and give a statement as to whether or not they waive the right to separate settlement. This statement may be revoked by separate and exclusive creditors no later than the beginning of the hearing on the restructuring plan if the restructuring plan reduces their rights or the exercise of their rights is changed after the given statement. The relevant notices and statements are submitted on the form for filing a creditor's claim in pre-bankruptcy proceedings. One of the consequences is that FINA ceases to execute all bases for payment recorded in the Register, except for the calculation of unpaid salary, salary compensation and severance pay and the basis for payment related to security measures in criminal proceedings (Art. 69 of the BA). The debtor and the trustee (if appointed) are required to recognize or not claims within eight days from the expiration of the deadline for applications for reported creditors' claims, and creditors may contest the reported claims of another creditor. On the basis of these disputes, FINA compiles a table of reported and a table of disputed claims, which publishes and submits all documentation electronically to the court (Art. 41-43 of the BA).

3.1.5. *FINA's role in the procedure for confirming the pre-bankruptcy agreement or in the procedure for denying and suspending the pre-bankruptcy agreement*

After the hearing to examine the claim and the hearing where the restructuring plan is discussed and voted on, the Court issues a decision confirming the pre-bankruptcy agreement or the certificate is denied and the PP proceedings are suspended. In the event that the decision confirming the PP agreement becomes final, the court will also submit it to FINA. From the date of receipt of the final decision confirming the pre-bankruptcy agreement, FINA will not continue to enforce the funds on the debtor's account on the basis of payment grounds which it has ceased to execute since receiving the decision to open PP proceedings (Art. 71, par. 1 of the BA). However, from the date of receipt of the final decision to suspend the PP proceedings, FINA will continue to enforce the funds on the debtor 's account on the basis of the payment basis which it ceased to receive from

the receipt of the PP decision (Art. 71, par. 1 of the BA). In cases of suspension of PP proceedings, the court will *ex officio* continue the proceedings as if a proposal for opening bankruptcy proceedings had been submitted, unless it finds that the debtor is fit to pay and has fulfilled all obligations to creditors (Art. 64. par. 2 of the BA).

3.2. The role of FINA in bankruptcy proceedings

The bodies of bankruptcy proceedings are the court, the bankruptcy trustee, the creditors 'assembly and the creditors' committee (Art. 75 of the BA). There were no significant changes regarding the court's authority, except that instead of the court, the creditors' committee approves the estimate of the costs of the bankruptcy proceedings (Art. 98, par. 2 of the BA), and the court approves the payment (Art. 76 of the BA). Thus, FINA is not a body of procedure but only and exclusively a participant as in the case of PP, but with narrowed powers and duties.

3.2.1. *The role of FINA in submitting proposals for opening bankruptcy proceedings of a legal entity and securing funds to cover the costs of bankruptcy proceedings*

In addition to the rules on the authorization of debtors and creditors to file for bankruptcy, one of the most important in this context is the obligation of FINA to file for bankruptcy, if the legal entity has unfulfilled bases for uninterrupted payment in the Register of Basis of Payment Order in period of 120 days (Art. 110, par. 1 of the BA). In this case, the court may issue a decision on the opening of bankruptcy proceedings without conducting preliminary proceedings (Art. 116, par. 1, of the BA). In accordance with the provisions of the aforementioned Ordinance on the type and amount of reimbursement of FINA's costs, it is entitled to reimbursement of costs in the amount of HRK 140.00 plus value added tax. This cost has the status of a creditor of the bankruptcy estate since it represents the cost of bankruptcy proceedings (Art. 110, par. 5 and 6 of the BA). It is also important to mention that FINA is not subject to the rule that the applicant for the opening of bankruptcy proceedings is obliged to pay an advance of HRK 1,000.00 to the Bankruptcy Fund and that by court order within eight days the additional amount of advance that cannot be higher than HRK 20,000.00 (Art. 114 par. 3 of the BA). Furthermore, as the settlement of the costs of bankruptcy proceedings is a special problem, it was determined that the Fund for the settlement of costs of bankruptcy proceedings is established in each court, and that the funds are provided on the basis of the rules of the BA. The procedure for securing funds to cover the costs of the bankruptcy procedure has been elaborated in detail in BA.

It is stipulated that FINA, after determining the impossibility of execution of the basis for payment due to lack of funds in the accounts of the debtor of the legal entity, will order the bank to seize funds from the debtor's account, in the amount of HRK 5,000.00 for advance payment of bankruptcy proceedings (Art. 112. par. 1 of the BA). The order to confiscate funds is executed before other orders, except for the order for execution of the basis for payment of the employer's calculation of non-payment of the due amount of salary and salary compensation (Art. 112, par. 2 of the BA). If FINA seizes an amount sufficient to settle all outstanding payment bases entered in the Register of Order of Payment Bases, it will suspend further seizures for the amount of the advance for settling the costs of bankruptcy proceedings, release the seized funds and issue an order to banks to execute payment bases in Register of the order of the basis for payment, unless FINA is on the basis of the provision of Art. 110, par. 1 of this Act submitted a proposal for the opening of bankruptcy proceedings (Art. 112, par. 3 of the BA). After the execution of all unexecuted bases for payment, FINA will issue an order for the release of seized funds and allow the debtor to dispose of it (Art. 112, par. 4 of the BA). Immediately after receiving the proposal to open bankruptcy proceedings, the court will request from FINA a notice on securing funds to cover the costs of the bankruptcy proceedings (Art. 112, par. 5 of the BA). By deciding to open bankruptcy proceedings against the debtor legal entity, the court will order FINA to order the bank to transfer the seized advance amount to the court account and suspend further seizure if the advance amount has not been seized in full (Art. 112, par. 6 of the BA). If the court rejects or deny the proposal to open bankruptcy proceedings, the decision on rejection or denial will order FINA to release the seized funds (Art. 112, par. 7 of the BA).

3.2.2. *The role of FINA in abbreviated bankruptcy proceedings*

From the mentioned regular bankruptcy, one should distinguish the, so-called, abbreviated bankruptcy proceedings (Art. 428-436 of the BA). These rules stipulate that FINA will submit a proposal to open an abbreviated bankruptcy procedure if certain conditions are cumulatively met. Therefore, the obligation of the proposer to check the existence of the property has been abolished, which the previous proposer, the Ministry of Finance - Tax Administration, has been checking so far. Based on FINA's request, the court will publish an advertisement on the *e*-bulletin board after inspecting the court register, inviting persons authorized to represent the debtor to submit a notarized list of assets and liabilities to the court within 15 days of the announcement. Within 45 days from the publication of the announcement, creditor can also propose the opening of bankruptcy proceedings. If no one responds within these deadlines and no one advances the funds to

cover the costs of the proceedings, the debtor will be considered insolvent and the court will issue a decision on opening and concluding an abbreviated bankruptcy proceeding. Otherwise, the court will suspend the shortened bankruptcy proceedings and, by appropriate application of the general provisions of the bankruptcy proceedings, issue a decision on initiating the preliminary proceedings, i.e. open the bankruptcy proceedings. The practice warns that due to the stated formalistic approach, a large number of entities that have property will be deleted, and it will not be controlled whether the debtors have ceded their property to rebuttal legal actions with the aim of damaging creditors. To avoid this problem, comparative experiences indicate a step-by-step approach due to the limited ability of courts to absorb a significant number of new bankruptcy proceedings.[16]

3.2.3. *The role of FINA in the process of liquidation of the bankruptcy estate*

The further role of FINA is highlighted in the rules on liquidation of the bankruptcy estate. Namely, the bankruptcy trustee is obliged, with appropriate application of the rules of enforcement proceedings, to submit to FINA without delay data on all real estate sold in bankruptcy proceedings, and on movables if their estimated value exceeds HRK 50,000.00 for entry in the Register of Real Estate and Movable Property, with an indication that they are being sold in bankruptcy proceedings (Art. 229, par. 3 of the BA). Therefore, the person who keeps the register of real estate and movables has changed because the same data were previously submitted to the Croatian Chamber of Commerce (HGK).

With regard to the rules on the sale of the debtor's property as a whole, it is stipulated that all announcements go through the *e*-bulletin board and that if the sale decision determines the sale by electronic public auction, the sale will be carried out with appropriate application of the enforcement rules (Art. 235, par. 2 and 3 of the BA). The court will confirm the decision on the sale with a decision if it finds that the sale does not put the creditors in a less favourable position for settlement than they would be if the debtor's property were liquidated in certain parts (Art. 235, par. 6 of the BA). Based on the decision on the sale and the final court decision confirming the decision on the sale, an advertisement will be published on the *e*-bulletin board website and on the FINAe website, indicating the conditions and manner of sale. The advertisement will indicate the place, time and manner of insight into the inventory of the bankruptcy debtor's property, the list of separate rights, evidence that the property belongs to the debtor, business books and documentation of the bankruptcy debtor and examination of the property (Art. 236, par. 1 of the BA).

[16] Čuveljak, J., *Komentar Stečajnog zakona,* Narodne novine, Zagreb, 2018, p. 1166 *et seq.*

Finally, there are new rules regarding the realization of cases on which there is a right of separation (Art. 247-256 of the BA). Namely, after the opening of bankruptcy proceedings, separate creditors are not authorized to initiate enforcement or insurance proceedings, and the terminated enforcement and insurance proceedings initiated by these creditors before the opening of bankruptcy proceedings will continue and be conducted by the court conducting bankruptcy proceedings. Therefore, this provision prescribes new procedural rules according to which separate creditors lose the right to initiate enforcement or insurance proceedings after the opening of bankruptcy proceedings, and prescribes the jurisdiction of the bankruptcy court to continue the terminated proceedings. This change in procedural rules is necessary in order to concentrate and speed up bankruptcy proceedings. The sale of real estate is carried out by FINA through an electronic public auction.

Unless the bankruptcy creditors have otherwise determined the manner and conditions of the sale at the reporting hearing, the debtor's property shall be sold by appropriate application of the provisions of Art. 247 and 249 of the BA (realization of objects on which there is a right of separation).

In all cases, the bankruptcy court and the bankruptcy trustee were given additional obligations, which objectively relieved the enforcement court in a large number of cases.

3.2.3.1. *The role of FINA in the process of selling real estate in bankruptcy*

Until the implementation of the new BA, the sale of real estate was usually done in two ways - by oral public auction or by direct agreement. Therefore, perhaps the biggest novelty is the rules for the sale of real estate in bankruptcy where the rules on the enforcement of real estate apply. It follows from the basic rules on the sale of real estate in bankruptcy that it is regularly sold according to the rules on liquidation of real estate in enforcement proceedings, which is why understanding the sale of real estate in enforcement proceedings is necessary to understand its sale in bankruptcy. Namely, when we talk about real estate as a subject of enforcement or part of the bankruptcy estate, then it can only be real estate which as a whole is determined by the rules governing ownership and other real rights, therefore, the principle of unity of real estate is accepted (Art. 9. of the ZOV).[17]

[17] Law on Property and Other Real Rights, Official Gazette No. 91/96, 68/98, 137/99, 22/00, 73/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14., hereinafter: ZOV.

The sale and realization of real estate is carried out by sale at an electronic public auction (Art. 97, par. 1 of the EA),[18] with the proviso that the rules on electronic public auction through FINA have been significantly changed. Therefore, the *lex specialis* regulation that was supposed to regulate the sale of real estate and movables in enforcement proceedings was abandoned, so what was supposed to be regulated by this regulation was included in the Enforcement Act, especially in its part entitled: Procedure for selling real estate in the Agency (Art. 132a-132i of the EA). Fr the subject at hand, quite important is the Ordinance on the manner and procedure of sale of real estate and movables in enforcement proceedings,[19] which regulates all issues relevant to the implementation of the sale of movables and real estate at and by FINA.

FINA sells real estate on the basis of a court request for sale as a special type of document by which the court orders FINA to initiate the sale procedure and with the request submits a decision on enforcement, an excerpt from the land register and a conclusion on sale (Art. 95a, par. 2 of the EA). FINA has the same position as the bailiff (Art. 95a, par. 3 of the EA). In Art. 5. the Ordinance stipulates that the request for the sale of real estate in enforcement proceedings must contain a number of elements, and if it does not contain them, it is not complete. Consequently, there are cases when FINA will not act upon the request due to the impossibility of acting. Here, at least according to the doctrine, is the power of FINA to determine that it cannot act on a request for sale, in which case FINA is obliged to inform the competent authority and state the reasons why it considers it impossible to act. However, we consider it questionable whether FINA is allowed to do so. We hold, as analogies come out, similar situations in the notary's actions, that FINA should submit such a request to the court for a decision. Moreover, the jurisprudence raises the question of a situation in which FINA considers one thing and the competent court another, but due to the vagueness, the question arises as to how the foreclosure on the property will be carried out at all, whether the bailiff will have the opportunity to appeal and to whom.[20]

As the sale of real estate is now entrusted to FINA, this has significantly increased the costs of the sale itself, so creditors must be aware of the costs in question if they do not instruct the bankruptcy trustee on another method of sale (see Art. 229, par. 1 of the EA). In any case, FINA has the right to collect the costs that it will

[18] Enforcement Act, Official Gazette No. 112/12, 25/13, 93/14, 55/16, 73/17, 131/20., hereinafter: EA.

[19] Ordinance on the manner and procedure of sale of real estate and movables in enforcement proceedings, Official Gazette No. 156/14, 1/19., hereinafter: Ordinance.

[20] Bodul, D., Vuković, A., *(Još jedna) reforma stečajnog zakonodavstva funkcionalizacija stečajno pravne zaštite ili placebo efekt,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 36, No. 1, 2015, p. 181.-213.

have in connection with the sale of real estate from the advance to cover the costs to be paid by the creditor. Persons who have previously given a guarantee (Art. 99, par. 1 of the EA) and submitted an application for participation in an electronic public auction (Art. 132e, par. 1 EA) may participate as buyers in the auction. The guarantee can be expressed only in HRK and in accordance with the terms of sale. The bidder may access the electronic public auction system in person, but also through a proxy or legal representative. In practice so far, the question has been asked how to react to the actions of persons who, exempt from prior bail, join the sale process, offer the highest price and get their property awarded, but do not pay on time and thus prevent the sale of real estate without sanctions. Therefore, in the latest amendments, the legislator abolished the possibility of exemption from bail for the Republic of Croatia, municipalities, cities and counties and state bodies if they participate in the proceedings as a party (Art. 99 in conjunction with Art. 15, par. 2 of the EA). If the bidder would participate in the sale procedure through a proxy, then the power of attorney is stored in FINA (Art. 14 of the Ordinance). The jurisprudence indicates that this will require that one power of attorney exist for the court and the other power of attorney exist for FINA. In any case, after the payment of the guarantee, and when applying for participation in the auction, FINA assigns and delivers to the future bidder the, so-called, identifier under which he anonymously participates in the auction - submits his bid (Art. 132e, par. 3 of the EA). This means that for each auction the bidder must have a different identifier. If the bidder is represented by a proxy or legal representative, then the identifier is submitted to the proxy or legal representative (Art. 15 of the Ordinance). After the bidder pays the guarantee, the bidder will have visibility in the electronic public auction system the auctions for which he has paid the guarantee and for which he can fill in the application for participation in the electronic public auction. The return of the guarantee can only take place if FINA receives an order from the competent authority to return the guarantee, otherwise the guarantee will be on the account. After FINA receives the decision of the competent authority on the return of the guarantee, FINA is obliged to return the guarantee within 8 days to the account indicated in the application for participation (Art. 13 of the Ordinance). It is certainly important to mention the obligation of FINA to open special accounts with a commercial bank to which only: 1) purchase funds are paid in the execution of enforcement, 2) guarantee funds paid in the implementation of enforcement, will be deposited. Data on these accounts should be made public, provided that the commercial bank does not charge a fee for opening, maintaining and closing these special accounts. Nevertheless, anecdotal evidence, as well as the relevant provisions of the Payment Transactions Act,[21] call

[21] Official Gazette No. 133/09, 136/12, 66/18.

this provision into question. It is also the duty of FINA to transfer funds from these special accounts without delay on the basis of a court order, and if FINA finds it impossible to execute a court order, it must immediately inform the court from which it received the money transfer order. Funds on these special accounts are exempt from enforcement (Art. 132c of the EA). It is important to mention the deadlines within which FINA must act. It is thus stipulated that FINA may take action in the proceedings only on the basis of a court order and that the time elapsed before the delivery of the order to FINA is not counted within the statutory time limit for its taking. It was also determined that if the day for taking action in the procedure is determined by law as a holiday, i.e. a non-working day, the first working day will be taken as the day for taking action (Art. 132f, of the EA). In Art. 3 and 4 Ordinance regulates in more detail the issue of delivery of documents between FINA, the court and other competent bodies.

Now the sales hearings are structured as an electronic auction which, each, lasts ten working days during which time bids are collected (Art. 102, par. 3 of the EA). Bids for participation in the electronic auction are submitted under the identifier and contain the bid price (Art. 132g, par. 4 OZ), and are collected electronically (Art. 132g, par. 1 of the EA). No more identical bid prices may be given at the electronic public auction (Art. 132g, par. 5 of the EA). The bids themselves are collected electronically, on working and non-working days between 0-24 hours, provided that the date and time of the beginning of the bidding and the date and time of the end of the bidding are determined by FINA in the invitation to participate, and cannot be changed later (Art. 17 of the Ordinance). It is also possible for bids to be submitted in the FINA business unit, provided that this is possible only during its working hours, i.e. during the working hours of the branch office (Art. 18 of the Ordinance). In order to avoid a symbolic increase, it was decided to specify the step of price increase (so-called auction step) for which the bidder may submit a bid in relation to the amount of the minimum price for which the item can be sold or the amount of the last valid bid (Art. 19 of the Ordinance). In any case, the submission of bids in the electronic public auction is regulated in more detail, with the initial sale price determined by the court, and the increase of the last valid bid is possible only for a predetermined auction step (Art. 21 of the Ordinance).

BA prescribes the possibility of four hearings (Art. 247, par. 3, item 5 and par. 4 of the BA). If the first auction fails, when FINA does not receive any valid bid, the second one is approached and so on. If even the fourth auction fails, FINA informs the court in order to suspend the enforcement (Art. 102, par. 4 of the EA). The electronic auction will also be conducted if only one bidder participates in it (Art. 100 of the EA). In these actions, the bidder can choose between the pre-

offered amounts offered by the electronic public auction system, so if no valid bid is recorded in the system, then the same can choose between the bid amount corresponding to the starting price of the subject of sale, auction step or an amount corresponding to a starting price increased by three initial steps. If a valid bid is recorded in the system, then the bidder can choose between the bid amount corresponding to the amount of the highest recorded valid bid increased by the auction step and the bid amount corresponding to the amount of the highest recorded valid bid increased by three auction steps. Each selection must be confirmed by the bidder with an advanced electronic signature (Art. 21 of the Ordinance). Invalid bids will not be shown at a later bid.

The Ordinance also regulates in more detail the issue of interruption, postponement and continuation of the sale of real estate and movables in enforcement proceedings (Art. 24). Thus, FINA will terminate the procedure for the sale of real estate and movables if it receives a decision from the competent authority to terminate the procedure, and it will continue such a procedure when it receives a decision from the competent authority to continue the procedure. The effect of the interruption is that all deadlines set for the sale implementation process cease to run, and with the continuation of the procedure, the deadlines start running again. As this is an electronic public auction, it is possible that due to technical reasons, the procedure will be interrupted. Therefore, the Ordinance determines the conduct of FINA after a break due to technical difficulties. Namely, if the bidding is to be suspended due to technical difficulties, FINA will then continue bidding after the difficulties have been resolved. In the event that difficulties arise and therefore the last day of the tender or the difficulties would last longer than 12 hours in one day of the tender, then the tender shall be extended by one day. FINA will put a notice on its website (Art.29). In the event that a decision on the postponement of enforcement is received from the competent authority, the procedure will continue when a decision on the continuation of the procedure is received from the competent authority. Unlike the termination of the proceedings, no action will be taken in the enforcement proceedings in the event of a stay. Both in case of suspension and in case of postponement of enforcement, after FINA receives the decision of the competent body to continue the procedure, it will re-publish the invitation to participate in the electronic public auction (Art. 24 of the Ordinance).

The electronic public auction shall end at a time specified in advance in the invitation to participate. After the completion of the electronic public auction, FINA informs the court about the conducted auction, collected bids and other necessary information (Art. 103, par. 2 of the EA). In doing so, a detailed report is submitted to the court stating all the information relevant to the decision on the

sale. Upon receipt of the notice, the court determines which buyer offered the highest price and whether the preconditions for awarding him real estate have been met (Art. 103, par. 3 of the EA). The decision on the award is made in writing, published on the court's *e*-notice board and on the FINA website and it is considered that the decision is delivered to all persons to whom the conclusion of the sale is sent and to all participants in the auction on the third day after its display on the notice board. The decision on the award should contain a clause of finality (provided that in Art. 28, par. 2 of the Ordinance prescribes in detail what information must be contained in the settlement decision submitted to FINA), and if that decision does not have such a clause it will be returned to a competent authority. The decision on the award will specify the deadline within which the buyer is obliged to pay the purchase price to the FINA account, by informing the court of the payment (or the fact that the payment has not been made) within 8 days of the payment deadline. The purchase price is paid into a special account in FINA, with FINA transferring the funds at the moment when it receives an order from the court (Art. 106, par. 1 and 3 of the EA). FINA will return the guarantee on the basis of a court order for the transfer of funds to the bidders whose bid was not accepted (Art. 99, par. 4 of the EA).[22]

3.2.4. *The role of FINA in the so-called "Automatic bankruptcy"*

Finally, FINA based on the legal powers under Art. 444 of the BA, initiates "automatic bankruptcy" for 27,106 legal entities that on September 1, 2015 (the date of entry into force of the BA) in the Register of the order of payment had unfulfilled bases for payment in an uninterrupted period of 120 days (so-called "legally dead societies"). FINA submits to the court: a) a request for the implementation of abbreviated bankruptcy proceedings and b) a proposal for the opening of bankruptcy proceedings. These are "dead companies" that do not perform any activity for a long time, and for which the legislator assessed that it is most rational to permanently eliminate them from entrepreneurship. For submitting a request for the implementation of abbreviated bankruptcy proceedings and a proposal for opening bankruptcy proceedings for legal entities referred to in Art. 444 of the BA, FINA is not entitled to compensation (Art. 4 of the Ordinance).

Namely, exceptionally from the deadline from Art. 429, par. 1 of the BA, for legal entities that have unregistered bases for payment in an uninterrupted period of 120 days recorded in the Register of the order of payment bases, and who do not

[22] For more, Kontrec, D., *Ovrha na nekretnini,* Hrvatska gospodarska komora - sektor za trgovinu, 23. forum poslovanja nekretninama, 2015; Mihelčić, G., u suradnji s Kontrec, D., *Komentar Ovršnog zakona*, Organizator, Zagreb, 2015, pp. 15-1150.

have employees and the conditions for deletion from the court register *ex officio* are not met, FINA will submit a request to the competent court for the implementation of abbreviated bankruptcy proceedings within 8 days from the expiration of the period in which the conditions for initiating proceedings for the legal entity are met, by submitting a written submission to the competent commercial court. On the other hand, exceptionally from the deadline from Art. 110, par. 1 of the BA, for legal entities that have in the Register of payment orders recorded unexecuted bases for payment in an uninterrupted period of 120 days, FINA will submit to the competent court a proposal to open bankruptcy proceedings within 8 days the period in which the conditions for initiating proceedings have been met for the legal person, by submitting a written submission to the competent commercial court according to the seat of the legal person.

4. INSTEAD OF A CONCLUSION (OR PERCEIVED POTENTIAL PROBLEMS OF FINA'S OPERATION IN (PRE)BANKRUPTCY PROCEEDINGS)

The international spread of the coronavirus is not only generating dramatic consequences from a social perspective but it is also heavily affecting the global economy. Bankruptcy and bankruptcy regulations could be said to be one of the basic parts of modern market systems today.[23] For this reason, governments, financial regulators and international organizations are responding to the coronavirus with a package of legal, economic and financial measures. Among the legal responses included in these packages, many countries, such as Australia, Belgium, Colombia, Czech Republic, France, Germany, Luxembourg, India, Italy, New Zealand, Peru, Poland, Portugal, Russia, Singapore, Spain, the United Kingdom, and the United States, have proposed or implemented temporary changes to their insolvency frameworks.[24]

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[23] Edward R.; Morrison E. R.; Saavedra, A. C., Bankruptcy's Role in the COVID-19 Crisis, Columbia Law School, 2020, 6-7, available at [https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=3567127], Accessed 01 May 2021.

[24] Gurrea-Martínez, A., *Insolvency Law in Times of COVID-19*, The Company Lawyer, Vol. 41, No. 7, 2020, p. 191-198. For an overview of the policy responses adopted by national legislators, see more on [https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19] and [https://som.yale.edu/faculty-research-centers/centers-initiatives/program-on-financial-stability/covid-19- crisis], Accessed 02 May 2021. For an analysis of the responses implemented by financial regulators and supervisors, see [https://www.iif.com/covid-19] and Remolina, N., Financial Regulators' Responses to COVID/19, IBEROAMERICAN INSTITUTE FOR LAW AND FINANCE, WORKING PAPER 1/2020 (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554557] Accessed 03 May 2021.

However, it must be pointed out that the issue of bankruptcy proceedings in countries with a long market tradition is a dynamic area in which new solutions are sought that will follow the trend of change in the international economy. The World Bank Principles and the UNCITRAL Legislative Guide[25] have highlighted the importance of informal arrangements for restructuring. Both texts treat informal debt restructuring as an integral part of an efficient creditor-debtor regulatory system. Therefore, there are many questions and doubts that arise in world practice and expert considerations regarding the construction and application of bankruptcy legislation.

One of the questions is, should the Law favour out-of-court (informal) arrangements or formal reorganization processes under the auspices of the court? An out-of-court restructuring or workout is a contract between the debtor and its creditors, which binds the debtor *vis-à-vis* the creditors and also binds the creditors There are a variety of explanations for the widespread use of informal contractual workouts, but the need for flexibility, as opposed to the relative rigidity of the formal insolvency proceedings, is probably the most important one. Also, it would be incorrect to assume that informal workouts are always superior to formal insolvency proceedings. The disadvantages of workouts *vis-à-vis* formal procedures are connected with the effects that characterize these procedures. If the debtor situation requires certain specific effects, such as a stay on creditor actions that provides some breathing space from collection efforts, or the repeal of executory contracts, a formal insolvency procedure may be the only viable option.[26] Moreover, comparative research shows that there are different understandings in procedural doctrine and legislation about the legal nature of bankruptcy proceedings. Different treatment, as judicial or as an administrative method of legal protection, has led to the fact that modern legal systems today are offering different conceptions of bankruptcy that oscillate between a concept similar to court decision-making, on the one hand, and purely administrative methods, on the other and there are several different transitional or combined models.[27] The experience from both the 2008 global financial crisis and also Asian financial crisis

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[25] World Bank Symposium, *Building effective insolvency system - transcript,* Washington, D.C., 2016., available on: [www.wordlbank.org] Accessed 10 March 2021 and UNCITRAL, *Legislative Guide on Insolvency Law,* 2016., available on: [www.uncitral.org] Accessed 10 March 2021.

[26] Gurrea-Martínez, A., *The Future of Reorganization Procedures in the Era of Pre-Insolvency Law,* European Business Organization Law Review, Vol. 21, No. 4, 2020, p. 829-854.

[27] Bodul, D., *Bankruptcy Policy, State Attitude towards Bankruptcy and State Interventionism, Economic and Social Development - 16th International Scientific Conference on Economic and Social Development* –"The Legal Challenges of Modern World", Varazdin Development and Entrepreneurship Agency in cooperation with Faculty of Law, University of Split and University North, Book of Proceedings, 2016, pp. 273-282.

illustrates the importance of having informal workout frameworks setting out the core obligations for informal debt negotiations with financial institutions, such as a standstill agreement preventing debt enforcement.[28] As they are informal tools, these frameworks can be put in place relatively quickly, ideally spear-headed by the country's central bank and bankers' association, and they typically avoid the procedural complexities and timelines of court proceedings. Creditors should be incentivized to restructure debts (for instance, through tax incentives) and use all restructuring tools available in order to save viable businesses while also maximizing their recovery. As a medium-term measure, countries should aim to put preventive restructuring or pre-insolvency frameworks in place to facilitate debt restructuring as early as possible.[29]

From the Croatian perspective, it is evident that the problem of payment of due financial obligations in the economy has not been completely eliminated, which means that (bankruptcy) courts will continue to fight with a large number of cases, so the idea of restructuring outside and before bankruptcy, which would make the debt sustainable and adjust the business to new circumstances, is gaining special importance in the Republic of Croatia as well. For now, the indicative method of establishing the facts indicates that these processes of dejudicialization of the protection of civil rights and obligations in Croatia are more a reflection of opportunistic, potentially unconstitutional solutions, and less thoughtful systemic legalist interventions. Namely, in the ZFPPN, in the part related to the pre-bankruptcy settlement procedure, FINA conducted the first part of the procedure according to the rules of administrative procedure through the settlement council, while the commercial court verified in the court procedure who voted for the pre-bankruptcy settlement proposal. However, in Croatian law, bankruptcy proceedings are traditionally court proceedings in the actual jurisdiction of commercial courts. Moreover, from a doctrinal perspective, it can be stated that the objective needed for specialization of courts is a necessary result of the requirement for effective judicial protection. Thus, judicial jurisdiction in this proceeding is the result of the aspiration to achieve fairness in terms of equal settlement of creditors from the debtor's property. Therefore, in the new BA, which entered into force on September 1, 2015, FINA "lost" all functions of conducting proceedings and is now acting as a service for pre-bankruptcy and bankruptcy proceedings. Moreover, analysing the legislative history of the adoption of the ZFPPN, it is shown that there was no consensus of the profession on not only the adoption,

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[28] Ricardo Caballero, J., R., *et al., Zombie Lending and Depressed Restructuring in Japan,* American Economic Review, Vol. 98, No. 5, 2008, p. 1943-1977.

[29] For a detailed discussion of crisis response see, World Bank Group FCI Unit, *Accessing the impact and policy response in support of private sector firms in the context of the COVID-19 pandemic*, 2020.

but also the implementation of these regulations. At one practical and empirical level, problems are still present, and we will give two examples. The first is the sale of real estate in bankruptcy, which occupies a very important place in the reform of the BA, which is in line with the general property and economic significance of real estate (as a rule that the most valuable parts of the debtor's property whose ownership can be relatively easily determined and proven). Unless the bankruptcy creditors have otherwise determined the manner and conditions of the sale at the reporting hearing, the debtor's assets are sold by FINA through an electronic public auction, with appropriate application of the rules of enforcement proceedings. For now, part of the doctrine and practice, believes that the process of selling real estate is complex and formalized, and even burdened with a series of unnecessary steps or decisions that must be made by the competent authorities during the procedure.[30] Therefore, they are sceptical, even of expectations that the reforms will be counterproductive, believing that, instead of relieving the burden, the courts could have a lot of work to do in bankruptcy cases. To this they add the fact that the text of the old BA was not significantly criticized in terms of real estate sales, so they also raise the question of the expediency of more comprehensive changes in this part of the BA. Furthermore, another example shows that in practice often the bankruptcy estate is not enough to pay the costs of the proceedings, so the legislator decided to provide funds in advance to cover them, by prescribing that the FINA after determining the inability to execute the basis for payment due to lack of cash funds on the accounts of the debtor of the legal entity, order the bank to seize the funds from the account of the debtor, in the amount of HRK 5,000.00 for an advance to cover the costs of the bankruptcy proceedings. In the provisions of Art. 112, par. 2-7. of the BA, the procedure in these cases is further elaborated. But here the fundamental question arises, how is it possible to seize funds to ensure the costs of bankruptcy proceedings in a case where the existence of some bankruptcy reason has not yet been established by court? In any case, the outbreak of COVID-19 triggered an economic contraction of unprecedented depth and synchronization. Economic activity and trade fell sharply in the first half of 2020 as countries across the globe introduced measures to contain the pandemic. Special, temporary out-of-court restructuring mechanisms can facilitate the restructuring of viable enterprises without overwhelming the court system. However, court-led insolvency procedures are also necessary to allow for the reorganization of viable enterprises that require more extensive restructuring. But the question remains - does the role of FINA in informal restructuring mechanism increasing or decreasing the capacity of insolvency systems?

[30] Kontrec, *op. cit.,* note 22.

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UDK 004.773.5:347.93]:614.4
Preliminary communication

VIDEOCONFERENCE HEARINGS AFTER THE TIMES OF PANDEMIC

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ABSTRACT

The sanitary crisis of the Covid-19 pandemic resulted in several changes in the way courts communicate, can be reached and handle cases. The so-called videoconferencing became one of the accepted ways of the hearings. This kind of videoconferencing took place on online videoconference solutions, which differ a lot from the conventional videoconference systems. After the exceptional situation, it remained a question whether the digital revolution of court proceedings had arrived or the use of videoconferencing should remain an exceptional instrument.

The application of a videoconference system is the subject of the right to a fair trial, in this regard it has been contested by the European Court of Human Rights in several cases. This case law stated several expectations and reveals many aspects, which have to be applied to the online videoconference solutions. On the other hand, the wider use of legal tech instruments is the subject of the political will. The political support is crystallizing within the EU, whose right to act is limited. The interim measures which were introduced under the emergency law regimes on national level show a number of experiences on how the continuous and legally founded functioning of the justice system can be ensured, for example by the use of online video hearings.

The balance between the effectivity and the legality is a crucial question. Upon the above-mentioned sources, the paper introduces the differences of the two methods of videoconferencing. It examines the legal requirements, details the experiences and shows the opportunities of the use of videoconference systems and online videoconference solutions in civil cases.

The use of videoconference in civil hearings can be an instrument conforming to procedural right. The general application of videoconference, especially the online solution lowers the threshold to access the justice, accelerates the procedures, ensures social distancing, but requires both legal and technical preparedness.

Keywords*: Covid-19, legal tech, litigation, online hearing, pandemic, videoconference*

1. THE EFFECTS OF THE PANDEMIC

The judicial branch's key roles, as guardian of civil liberties and protector of the rule of law, can be acutely relevant during public health emergencies, when courts need to function in a manner consistent with their institutional role and their essential characteristic. Courts may also need to issue orders authorizing actions to protect public health or restraining public health actions that are determined to unduly interfere with civil rights[1]. The continuous functioning of the courts in these times is essential; to do that within the framework of the full respect for human rights, and the principles of democracy and the rule of law is crucial.

The first wave of the COVID-19 pandemic in the spring of 2020 hit Europe, and influenced, *inter alia*, the functioning of the courts and justice systems. The intensity and the seriousness of the sanitary crisis were different among the European countries, but its influence, the fear of the unknown threat was the same and the answers were similar. In these months, from the middle of March till the summer many interim measures were introduced to ensure the social distancing, the universally accepted easiest way to protect ourselves against the virus[2]. Restrictions were also applied in justice systems. The main and typical restrictions were the suspension or postponement of cases, the delay of deadlines, the limitation of the access to courts, the adaptation of online and remote procedures and written proceedings[3].

The above-mentioned measures were temporary and usually adopted on the basis of the emergency law regime. As the president of the Consultative Council of European Judges (CCJE) pointed out some measures intended short-term may become permanent (e.g. online hearings, etc.)[4]. The expectations show[5] it is likely that the Covid-19 pandemic will enhance the digitalization of court proceedings and courts. There are many obstacles on this way, both legal and non-legal, such us the 'technical' issues and the cultural attitude.

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1 Stier, D.; Nicks, D.; Cowan, G, *The courts, public health, and legal preparedness*, American Journal of Public Health Vol. 97, 2007., pp. 69-73.

2 Communication of WHO, 2020, [https://www.who.int/westernpacific/emergencies/covid-19/information/physical-distancing], Accessed 13 April 2021.

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In a wider view, the pandemic is accelerates several "tectonic shifts" in the functioning of justice. The technology-enabled future of courts arrived earlier, by the forced adaptation of the use of the existing IT solutions. The wider use of online tools may erode the gatekeeper role of lawyers.[6]

The ongoing restrictions of the "new normal" effects significant challenges to the civil, political and economic rights of everyone. The paper introduces the measures that have been taken in Hungary in this field and also examines the legal obstacles on the way of further digitalization of court proceedings on the basis of the ECtHR's case-law on hearings held via video link.

2. THE EFFECTS OF DIGITALIZATION ON THE PROCEDURAL RIGHTS

The digitalization of court proceedings and in a wider scope the legal tech is a new, enormous hot topic. During the first wave, many countries turned to remote hearings as an alternative to in-person hearings. The so-called videoconferencing became part of our daily life and it does not require special investments and developments, like other possible tools of court digitalization.

With the introduction of a new instrument, the question arises: how does it fit into the legal environment? This question is much more adequate in connection with the application of brand new IT technologies, like the online videoconference platforms.

2.1. Legal frameworks of videoconference systems in the EU

The Treaties do not contain any special provisions for information and communication technologies. The EU took relevant actions within the framework of sectoral and horizontal policies. Theses actions' peek can be found in the Digital Single Market Strategy[7] and in the achievements of the European area of justice[8], especially in the field of judicial cooperation.

The use of videoconference systems was not an unknown instrument in the field of the judicial cooperation in civil matters in the EU. The European e-Justice action

6 Engstrom, D.F., *Post-Covid Courts*, U.C.L.A. Law Review, Vol. 46, 2020., pp. 246-267.

7 European Commission, *A Digital Single Market Strategy for Europe*, 2020, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192], Accessed 13 April 2021.

8 Barrot, J., *The EU's Area of Freedom, Security and Justice: Successes of the last ten years and the challenges ahead,* in: Guild, E.; Carrera, S.; Eggenschwiler, A. (eds.), The Area of Freedom, Security and Justice ten years on Successes and future challenges under the Stockholm Programme, Brussels, 2010., pp. 13-18.

plan approved by the Council in November 2008[9] emphasized the importance of the simplification and encouraging communication between the Member States' judicial authorities and found videoconferencing or secure electronic networks a proper instrument for that.

The European e-Justice action plan lists "Better use of videoconferencing" as one of the projects on which work should continue in 2009-2013. In cross-border cases, communication between judicial authorities of different Member States is crucial. In the framework of European e-Justice, the Member States of the EU have agreed to work together to promote the use of videoconferencing and to exchange experience and best practices. The legislative framework is different in criminal[10] and civil[11] matters, but the technical and practical issues, and also the aim is similar: to provide an effective tool and a greater flexibility for when and how witnesses or experts are required to give evidence or to ensure the presence of a party who is unable to be presented in person.

Within the EU in civil and commercial cases, the use of videoconference systems is most applied on the basis of the 1206/2001/EC regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters[12]. The regulation does not define 'videoconference' and does not mention any other type of technologies. In this way it offers flexibility to ensure the efficient taking of evidence regardless of the means[13]. In this way it leaves in the Member States' hand to choose the proper (existing) method of videoconference, which can easily result in technical compatibility problems. The lack of exchange of technical parameters is an identified problem of the regulation[14], and causes extra work for the coordinating central authorities or the failure of evidence

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9 Notice of the Council on Multi-annaul European E-Justice action plan 2009-2013*, OJ C 75, 31.3.2009, p. 1–12.*

10 the related regulations are the following: Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Article 10), Council Directive relating to compensation to crime victims (Article 9(1))., Council Framework Decision on the standing of victims in criminal proceedings (Article 11(1)).

11 the related regulations are the following: Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (Article 10(4) and Article 17(4)), Regulation EC No. 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure (Articles 8 and 9(1)), Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.

12 1.4. point of the Final Report of the Informal Working Group on Cross-border Videoconferencing, 2014, [https://e-justice.europa.eu/fileDownload.do?id=dd1801f0-6a44-43a9-b84b-7859bbe094b2], Accessed 13 April 2021.

13 Miguel, T., *Cross-Border Litigation: 'Videotaking' of Evidence within EU Member States*, Dispute Resolution International Vol. 12, 2018, pp. 71–95.

14 Final Report, *op. cit.*, note 12, 3.3 point.

taking. The scope of the regulation is the evidence taking, and it is not applicable for hearing the parties or to hold e-hearings.

With the introduction of the European small claim procedure, the EU found a special European civil procedure and reached the goal set in the Tampere Program, and detailed in the Hague Program[15] in this field. The new procedure steps forward with the scope of application of videoconferencing. Besides defining it as a tool of taking evidence, it also creates the option to hold an oral hearing through videoconference or other communication technology if the technical means are available[16].

The EU does not have the competence to act on the unification of the Member States' rules on the use of videoconference systems or other types of communication systems, especially at national level. There is an ongoing pilot program for the exchange of case-related data in cross-border legal procedures, the European e-Justice Digital Service Infrastructure (e-CODEX). It has been developed to interlink existing national and European ICT systems in the eJustice domain. The system has been initially tested between piloting countries starting with the European Order for Payment and EU Small Claim procedures.[17]

The existing rules and experiences of the taking evidence and the small claim procedure with the mixing of the facilitative effect of the pandemic in this field, may result in more ambitious cooperation at EU level. The ambition to facilitate the cooperation between the Members States can be seen in the ongoing legislative procedure about the computerised system for communication in cross-border civil and criminal proceedings[18].

2.2. Case law of the ECtHR concerning hearings via video link

From the legal point of view, the application of a videoconference system ensures the accessibility of the procedure, the presence of the party, the equality of arms,

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15 3.4.1 point of the Information of the Council on The Hague Programme: strengthening freedom, security and justice in the European Union, [2005], *OJ 2005/C 053/1*, pp 1-15.

16 Article 8 of the Regulation of the European Parliament and of the Council 861/2007/EC on establishing a European Small Claims Procedure, [2007], *OJ L 199, 31.7.2007, pp. 1–22.*

17 Velicogna, M., Cross-border Civil Litigation in the EU: What can we learn from COVID-19 emergency National e-Justice experiences?, *'e' Meets Justice webcast*, 2020, [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3737648_code835984.pdf?abstractid=3737648&mirid=1], Accessed 13 April 2021.

18 Legislative proposal of the European Commission on A computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726, 2020, [https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2020/0712/COM_COM(2020)0712_EN.pdf], Accessed 13 April 2021.

and the publicity of the hearings. These topics fall within the scope of the right to a fair trial.

The right to a fair trial is granted by Article 6 of European Convention on Human Rights (the Convention). In a different way it is applicable both in civil and criminal procedures. The content of the right and its differences based on the type of the procedure are interpreted in several judgements of the European Court of Human Rights (ECtHR). Also, the use of a videoconference system has been contested, and adjudged in several cases of the ECtHR.

The first time when the ECtHR examined the compatibility of the use of a video link with the right to a fair trial was in 2006, in the case of Marcello Viola v. Italy[19]. This case became the origo of the cases, where the question involves the use of a videoconference system, therefore the detailed exploration of the case is reasonable.

The above-mentioned case is based on a criminal procedure. The applicant was accused of serious crimes, and was subject to restricted prison regime. The alleged violation was that he was forced to use videoconference on his hearing, which created difficulties for his defence.

The general finding of the ECtHR was that the defendant's participation in the proceedings by videoconference as such is not contrary to the Convention, if it serves a legitimate aim and if the arrangements for the giving of evidence are compatible with the requirements of respect for due process. The requirement of respect for due process was examined from two angles: the necessity of the restriction of in person presence and the rights of the defence.

Within the framework of the reasons behind the restriction of in person presence, the ECtHR examined the following circumstances: prevention of disorder, prevention of crime, protection of witnesses and victims of offences in respect of their rights to life, freedom and security, and compliance with the "reasonable time" requirement in judicial proceedings.

Within the framework of the rights of the defence, the ECtHR examined the following: the effective presence of the applicant, and the right to legal counsel. In connection with the right to effective presence, the ECtHR examined, if the video link allowed the applicant to see the persons present and hear what was being said; if he could also be seen and heard by the other parties, the judge and the witnesses, and had an opportunity to make statements to the court from his place of deten-

[19] [2006], ECHR 2006-XI 123.

tion. Also, it took into account technical problems, for example if there were any difficulties in the transmission of the voice or images.

In connection with the right to legal counsel, the ECtHR examined, if the defence counsel had the right to be present where his client was situated and to confer with him confidentially.

In the certain case, the ECtHR found that the use of videoconference was compatible with the right to a fair trial, because the use of a special hearing method was reasonable, *inter alia*, because of safety measures and to be in compliance with the "reasonable time" requirement. The use of video link was applied only in the appeal hearings, which did not put the defence at a substantial disadvantage as compared with the other parties to the proceedings, and that the applicant had an opportunity to exercise the rights and entitlements. Furthermore, it pointed out there were no technical issues involved, because there were no times when the defence sought to bring to the attention of the court difficulties in hearing or seeing.

The ECtHR in the case of Sakhnovskiy v. Russia[20] cited the above-mentioned findings of the Marcello Viola v. Italy case in connection with the effective presence on an appellate hearing via videoconference. The subject of the case concerned the accused applicant's right to communicate with his lawyer, in this aspect the case introduced new findings.

In connection with the right to communicate with a lawyer, the ECtHR emphasized that the Convention is intended to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and if a lawyer were unable to confer with his client and receive confidential instructions from him without the risk of surveillance, his assistance would lose much of its usefulness. In the certain case the applicant was able to communicate with the newly appointed lawyer for fifteen minutes, immediately before the start of the hearing, which was considered not efficient, therefore found not compatible with the right to a fair trial. In connection with the video link, which was installed and operated by the state, the ECtHR found questionable the sufficient privacy of the communication and accepted that the applicant might legitimately have felt ill at ease when he had a discussion with his lawyer.

As we saw in the above-mentioned cases, the ECtHR in connection with the presence via video link handles the hearings differently based on whether it is a first instance hearing or an appellate one. In the case of Trepashkin v. Russia (No. 2)[21]

[20] [2010], Application no. 21272/03.

[21] [2010], Application no. 14248/05.

the ECtHR notes that the Convention case-law under Article 6 does not require the same level of guarantees in the court of appeal as at the trial stage. Thus, provided that a public hearing has been held at first instance, a less strict standard applies to the appellate level, at which the absence of such a hearing may be justified by the special features of the proceedings at issue. In the certain case, the ECtHR reiterates the reasoning of an admissibility decision[22] which says that the physical presence of an accused in the courtroom is highly desirable, but it is not an end in itself: it rather serves the greater goal of securing the fairness of the proceedings, taken as a whole. In this case, the ECtHR found no violation of Article 6 in a case where the applicant's presence on the appellate hearing was ensured by a video link, under circumstances where no malfunction of the IT system was found, and the right to effective defence was ensured.

The first case, where the use of videoconference was examined in connection with a civil case, was the case of Vladimir Vasilyev v. Russia[23]. In connection with the question of the in person presence on the hearings, the ECtHR pointed out the difference between the criminal and civil cases. It reiterated its case law about the interpretation of Article 6 of the Convention, which does not guarantee the right to be heard in person at a civil court, but rather a more general right to present one's case effectively before the court and to enjoy equality of arms with the opposing side.

In the certain case, the applicant - while he was serving his prison sentence - brought a civil case, in which his claim was rejected. The applicant kept in contact with the court in writing, and never was present or represented at the hearings. The subject of the case was personal so it would require the in person hearing of the applicant. The ECtHR found that the national court did not consider how to ensure effective participation for the applicant, despite the fact that there were options to do so. In the ECtHR's view, to hold a session by way of a video link would have been an appropriate option.

In the case of Yevdokimov and Others v. Russia[24], the ECtHR reiterated its finding, that the use of a video link could be an obvious solution to conduct civil proceedings, where the personal hearing of a party is required. The personal hearing of a party may be required if the claim involves the party's personal experience and, accordingly, whether the court needs to take oral evidence directly from the party. The ECtHR cited its findings taken in the above-mentioned criminal based

22 Case of Golubev v. Russia, [2002], Application no. 26260/02.

23 [2012], Application no. 28370/05.

24 [2016], Application no. 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 76438/11, 14919/12 , 19929/12, 42389/12, 57043/12 and 67481/12.

cases and expressed that the use of videoconference can be compatible with Article 6 if the party is able to follow the proceedings, see the persons present and hear what is being said, but is also able to be seen and heard by the other parties, the judge and witnesses, without technical impediment.

In the case of Gorbunov and Gorbachev v. Russia[25], the ECtHR reiterated the described findings. The poor connection of videoconference prevents the party to follow the proceedings in an adequate way if the only way of communication between the applicant and his lawyer carried out on a videoconference system installed and operated by the state results in the lack of confidential communication between them. These circumstances on the basis of the lack of effective presence and the lack of right to communicate with the lawyer result in the infringement of the right to a fair trial.

In the case of Sakhnovskiy v. Russia (No. 2)[26], which is based on the alleged lack of confidential communication between the applicant and his lawyer, the ECtHR pointed out, that it took into consideration the fact, that the state did not provide any evidence that the video link was secured against any attempt at interception, or offer any explanation why it was not possible to organize at least a telephone conversation between the applicant and the lawyer or to appoint a local lawyer who could have visited the applicant in the remand prison. These circumstances may be a good compass, to ensure the right to communicate with the lawyer.

On the basis of the cited case law of the ECtHR, it seems the use of a videoconference system is an "appropriate option" and "obvious solution" to conduct civil proceedings. As the cited cases also show, the use of a videoconference system always comes together with some restrictions of rights and opportunities of the parties. The interference of the restrictions with Article 6 of the Convention depends on the question of the proportionality. A restriction due to the special way of the hearing can conform with the right of a fair trial if within the circumstances of the exact case the restriction is proportional regarding the influenced right.

Although the question is complex, the legal aim and the compatibility with the requirements of respect for due process are the universal measures of the proportionality.

The legitimate aim can be varied, as the examined cases show the safety measures and the compliance with the reasonable time requirement can be a legitimate aim.

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25 [2016], Application no. 43183/06 and 27412/07.

26 [2018], Application no. 39159/12.

The party's right to an effective presence, as a part of respect of due process is handled differently in criminal and civil cases, and also in the different stages of the procedure. In civil cases, the in person hearing of the party is not essential; if his side is presented effectively in another way. The guarantees of Article 6 at the different procedural levels of the remedy do not require the same level as at the first instance.

The mentioned specialties of the civil cases and the different stages of the procedure lower the threshold of what can be deemed as a legitimate aim to found the use of videoconference systems. In civil cases, the parties' request based on their financial reason or time saving may also constitute a legitimate aim to hold a hearing via videoconference.

The examined case law in connection with the equipment of videoconference is technology-neutral. Based on the presented cases, if there are no technical malfunctions and difficulties in hearing or seeing, the videoconference system can be any kind. The security of the connection is a question only if confidential communication takes place. In civil cases, the confidential communication arises only in a few situations, in case of a closed hearing, confidential communication between the party and the legal counsel and if the identities of the witnesses are hidden. The confidential communication between the party and the legal counsel – based on the ECtHR findings in the case of Sakhnovskiy v. Russia (No. 2) - could take place on the telephone or mutatis mutandis by direct messaging, in a civil case maybe simultaneously with the hearing and hidden from the other participants.

In the author's view, upon the above presented ECtHR case law there is no general legal obstacle in the Convention to use online video platforms at civil case hearings. The cases where confidential communication should take place could be an exception from it. With the fulfillment of the described conditions, holding a hearing via online video connection can be applied for a wide range of reasons, especially upon the parties' request in civil cases.

3. NEWLY INTRODUCED RULES OF THE USE OF THE VIDEOCONFERENCE SYSTEMS IN HUNGARY, THE E-HEARINGS

As many other Member States of the EU, Hungary on 11th March, 2020 also declared the state of danger for the elimination of the consequences of the human epidemic[27]. The declaration of the state of danger was followed by two weeks of

[27] Hungary, Government Decree no. 40/2020 (11 March) on the declaration of state of danger, Official Gazette of HungaryNo. 39/2020.

total lockdown in almost every part of life, also in the operation of the judicial system, where extraordinary court vacation was ordered[28].

Because of the lack of legal preparedness, these weeks of the lockdown introduced days full of uncertainty and resulted in the freeze of procedures. Only the urgent cases were handled, sometimes in procedural manner that deemed practical but not legally founded. The extraordinary manner of the situation and the above-mentioned circumstances were similar to the situation experienced by other MSs' lawyers in their countries[29].

The legal bases of the continuous functioning of the courts were introduced on 31st March, 2020[30], among these the new rules of the application of the electronic communications network were introduced, which legally widened the applicability of the existing infrastructure.

3.1. The basis of electronic communication in the civil procedural law of Hungary

The Code of Civil Procedure of Hungary has had rules on ways of electronic communications for a long time and defines two types of it: the electronic communication and – in its first, and miraculous name - the closed-circuit telecommunications network. The electronic communication is the instrument that ensures the electronic identification of the clients and enables document transfer between the court and the identified client. The closed-circuit telecommunications network was the instrument that ensured the hearing of the party and other litigants, and experts, and the examination of witnesses via a videoconference system, the new code changed its name to 'conduct interview on electronic communications network'.

The use of electronic communication was introduced in 2010 and was optional in certain cases, and it gradually became available in a wider range of procedures, then became mandatory in some procedures. The end of this gradual development was achieved by the new Code of Civil Procedure, which entered into force on 1st January, 2018[31]. The new Code made the obligation to use electronic means gen-

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28 Section 1 of Hungary, Government Decree no. 45/2020 (14 March) on the measures to be taken during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, for the elimination of its consequences, and for the protection of the health and lives of Hungarian citizens (II), Official Gazette No. 42/2020.

29 Krans, B. *et al.*, *Civil Justice and Covid-19*, Septentrio Reports Vol. 5., 2020., pp. 4-57.

30 Hungary, Government Decree 74/2020 (31 March) on certain procedural measures applicable during the period of state of danger, Official Gazette No. 59/2020.

31 Szalai, P., *Elektronikus kommunikáció a polgári perben*, in: G. Karácsony, G. (ed.), Az elektronikus eljárások joga, Budapest, 2018., pp. 7-36.

eral for economic operators, organs of the State and the legal counsels of clients and optional for others in every type of cases[32].

The option to conduct an interview on electronic communications network was introduced in 2015 in civil cases, but is has earlier roots in the criminal procedure, where it has been available since 2003. The main rules of the use earlier and the present Code of Civil Procedure, the rules of the 'closed-circuit telecommunications network' and 'the conduct interview on electronic communications network' are mostly the same. The main rules are the following.

The court shall order to conduct the hearing through electronic communications networks based on a request of a party or ex officio. It can be ordered if it has a legitimate aim: if it is reasonable, particularly if it is likely to expedite the process, or the personal presence would entail considerable hardship or unreasonably higher costs, or if it is necessary to ensure the safety of a witness.

The law does not determine the type of the videoconference system or the equipment that has-to be used for this procedure. The equipment of this kind of hearing must be capable of simultaneous transmission of video and audio signals in real-time. This requirement is technology-neutral. The rules also determine the legal requirements of the hearings, which results in the fact that the hearing can be carried out only by a special videoconference system which is installed and operated by the state.

Among the legal requirements, the interview has to take place in a court, or any other body with required facilities and lead by a judge or by an assistant judge. In the second place, the equipment has to meet strict rules of visibility. It has to ensure that the person interviewed, and all other persons present together with the person heard can be seen by the persons attending the hearing. Furthermore, all areas of the premises designated for hearings via electronic communications network must be kept visible for the presiding judge. The person questioned in the premises specifically designed for hearings via electronic communications network shall also be able to monitor the hearing. At last, the equipment has to be capable of ensuring the holding of a confidential interview, where the identities of the witnesses are hidden from the attending persons, except the presiding judge, by the distortion of the video or sound signal or both signals during transmission.

On the basis of the described rules, the required videoconference system was installed in the courts. By the end of the year 2019, 184 courtrooms were fully equipped[33],

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32 Art. 609. (1) of Act CXXX of 2016 on the Code of Civil Procedure, Official Gazette of Hungary No. 190/2016.

33 Court news, *Courts of Hungary*, [2019], [https://birosag.hu/en/news/category/about-courts/soon-184-courtrooms-will-be-available-remote-hearings], Accessed 13 April 2021.

which resulted, that every court building in Hungary has been equipped with the electronic communication system called ViaVideo system. The system is capable of the simultaneous transmission of video and audio signals in real-time, ensures the above-mentioned visibility requirements and confidential interview, and also has a special inspection camera to carry out inspection of subject-matter or documents.

The above-mentioned rules of the use of electronic communications network also determine that the use of these procedures requires more court area, at least two courtrooms or a courtroom and one more official room and more officials. These requirements cannot be fulfilled in the times of pandemic, when the availability of the officials is tight and the restrictions on the right to free movement and the use of court buildings are applied. It also has to be noted, that the mentioned infrastructure, its bandwidth and the number of endpoints were designed to be operated in case of special needs, not for a general use.

3.2. Temporary rules of videoconferencing due to the pandemic in Hungary

Within the framework of the existing rules, there was no option to hold hearings via videoconference system or to conduct hearing in this way without the presence of the interviewed person in a court building or in another designated official place. There was no option to use electronic communications network without the involvement of additional court staff beside the presiding judge. Therefore, the applied restrictions of the lockdown, like social distancing, quarantine, restricted entry to court buildings could not have been handled by the existing rules of interviewing on an electronic communications network. These rules were designed to hear remotely one person in special need, but not to hold remote hearings in a high number. The introduced exceptional procedural measures[34] applicable during the period of state of danger handled this problem.

The new measure widened the option to use an electronic communications network in two ways. Firstly, the wording and the aim of the ruling changed, the electronic communications network can be used not only to conduct an interview, but also to hold hearings. Secondly, the new rules enabled the courts to hold hearings remotely by way of an electronic communications network or other means suitable for electronic image and sound transmission, if doing so is necessitated by epidemiological measures. [35]

This exceptional way of electronic communication is not regulated in a detailed way. The term 'suitable' means the acceptance of a method depends on the deci-

[34] Hungary, Government Decree 74/2020 (31 March).

[35] Section 21. (2) of Hungary, Government Decree 74/2020 (31 March).

sion of the presiding judge. The strict part of this new option comes from its name, it has to be able to maintain simultaneous audio and video connection. It results that the telephone conference is not a suitable way, but the use of online video platforms is an option.

The new option to hold e-hearings is a great facilitation of the use of electronic communications network methods, because it solves some of the revealed tight points of the system, by enabling the courts to use online videoconference systems.

The opinion of the Civil Chamber of the Curia of Hungary[36] filled the gap due to the lack of detailed rules of e-hearings. The opinion declared the related regulation as the rules of the e-hearing. The e-hearing is a new phenomenon in the Hungarian civil procedure despite the fact that it partly stands on the rules of the use of electronic communications network. The Curia emphasizes that the rules of e-hearing are based on emergency law regime and the part, where there is no special rule declared, shall be applied with the Code of Civil Procedure.

Upon the opinion, in cases, where it was required to hold a hearing, it was obligatory to hold it as an e-hearing. It meant the court had to examine if the participant (parties, counsels, witness etc.) are able to take part in an e-hearing, if they have the required technical resources or not. The e-hearing could be avoided only if the participants do not have the required technical resources or a special contribution needed, that could not be acted on at an e-hearing.

The e-hearing generally is a public hearing, its publicity is ensured in the court. In the case when a closed hearing is ordered, the presiding judge has to reveal if the places of the participants fulfilling the requirements of a closed hearing is ensured or not. When the issue is capable of being adjudged, the e-hearing shall be closed, the court shall adopt a judgment outside the hearing.

The Hungarian courts uniformly used Skype for business to hold e-hearings.

By the end of the state of danger in Hungary, the so-called state of epidemiological preparedness began[37] and due to the continuous threat of the pandemic, the legislator kept the option of e-hearings in cases when it is necessary because of the applied defensive measures due to the pandemic[38]. The legitimate aim to hold an e-hearing changed and ensures wider discretion for the presiding judge. At the same time, the regulation remained short, no detailed rules of the e-hearing pro-

36 Opinion 2/2020 of 30 April 2020 of the Civil Chamber of the Curia of Hungary.

37 Act. LVIII of 2020 on Temporary rules in connection with the termination of state of emergency and rules of the state of epidemiological preparedness, Official Gazette of Hungary No. 144/2020.

38 Art. 138. (1) of Act. LVIII of 2020.

cedure were acted, and the above-mentioned opinion of the Civil Chamber of the Curia of Hungary is not applicable anymore. The opinion was applicable within the framework of the law regime of state of danger, but not in the law regime of state of epidemiological preparedness.

4. THE FUTURE OF THE USE OF ONLINE VIDEO PLATFORMS IN CIVIL JUSTICE

The two types of the attitude in connection with the use of new technologies cannot be allowed to influence the legislator in the decision making process about the further use of e-hearings. Neither the avoidance, nor the excessively optimistic attitude can be taken into account in this question; the decision has to stand only on a legal base. The legal requirements both in the case law of the ECtHR and in the EU legislation are technology neutral. The strict procedural rules tighten the range of possible infrastructure of e-hearings. The necessity to ease these procedural rules and the way of it shall be a subject of consideration. The experiences of using videoconference systems, and the experiences of the times of pandemic about the use of online video platforms have to be taken into account.

Videoconference technology supports the quality of justice, *inter alia*, because videoconference, especially via online video platforms effortlessly bridges locations that are separated by great distances. In this aspect, it enhances the access to justice and reduces the procedural costs and delays.[39] The wider accessibility supports equality and legal certainty and stresses that videoconference is more than a cost-effective tool. [40] The online videoconference systems are more easily available for everyone and require less human or material resources of courts than the use of the state operated videoconference systems would.

On the other hand, the preparation for the court system to use online video conference systems has resource requirements. It requires both infrastructural investment and additional human resources, to operate the system on a daily basis and serve a support[41]. It also requires some financial resources, because the business use of this platform and the functions, which are required in a business use, have a price or fee. In certain cases, additional infrastructure development is required, if the copies of the conference should be saved or the encryption of the stream has to be ensured by own equipment.

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[39] Sourdin, T., *et al.*, *COVID-19, Technology and Family Dispute Resolution*, 2020, [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3672995], Accessed 13 April 2021.

[40] Final Report, *op. cit.*, note 12, 1.4 point.

[41] Final Report, *op. cit.*, note 12, 3.3 point.

In addition to the legal requirements detailed on the ECtHR case law, the experiences also show the negative side if a hearing takes place in a videoconference system. Because of the lack of the "atmosphere of the officiality", parties do not fully appreciate the seriousness or finality of proceedings. The technical issues with technology can make the effective presence more difficult. The lack of the opportunity to observe the non-verbal behaviors makes it harder for the parties to follow procedure, and for the presiding judge to adjudge the credibility of the participants or to identify vulnerability and give support.[42] [43]

5. CONCLUSION

The expectation arisen from the restrictions of the pandemic was to see how the continuous and legally founded functioning of the justice system can be ensured and how to balance between effectivity and legality. The courts were forced to focus more on the digital solutions. As the introduced example of Hungary shows, the technical preparedness of courts can swiftly serve these expectations.

The question of the use of modern technology in court procedures is not a new one, in some aspects, for example, the use of videoconference solutions has already been dealt with in several cases by the ECtHR and has become part of EU legislation.

The development of information technology has created challenges for the justice systems in at least two aspects. On the one hand, the new types of legal relations created within the online sphere cannot be handled within the legislative framework of the traditional civil procedure. On the other hand, the expectations have been changed.[44] Modern society demands that justice be delivered swiftly and effectively, even in "real time".[45] The new features of electronic civil procedure,

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42 Denault, V.; Patterson, M.L., *Justice and Nonverbal Communication in a Post-pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges*, Journal of Nonverbal Behavior, Vol. 45, 2021, pp. 1 – 10.

43 Ryan, M.; Harker, L.; Rothera S. *Remote hearings in the family justice system: reflections and experiences*, Nuffield Family Justice Observatory/The Legal Education Foundation, 2020, [https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/remote_hearings_sept_2020.pdf], Accessed 13 April 2021.

44 Osztovits, A., *Online bíróságok és az igazságszolgáltatáshoz való jog – esély vagy veszély?*, Magyar Jog, Vol. 67, No. 11, 2020, pp. 625 – 632.

45 Lord Chief Justice of England And Wales, First International Forum on Online Courts: the Cutting Edge of Digital Reform, 2018, [https://www.judiciary.uk/wp-content/uploads/2018/12/speech-lcj-online-court.pdf], Accessed 13 April 2021.

namely immateriality, connection, intermediality, interaction, hyper-reality, instantaneousness and deterritorialization are identified.[46]

The challenge has been changed; modern technology should not only be used, but should be implemented in court procedures.

The use of online video platforms serves the effectivity of court operations and increases the accessibility of justice, but interferes with the fairness of trial. Within the framework of the implementation of new technologies, in connection with the use of online video platforms, the paper examined how the temporary rules should be kept and implemented as a general rule.

The case law of the ECtHR set up the general requirements of how to use videoconference systems in a way that fulfills the requirements of the right to a fair trial. The EU has taken several steps in the use of electronic communication technologies and set a new goal to enhance the digitalization of the European economy and courts.

Based on the above and on the experiences of the pandemic, the digital transformation of the civil procedures is the most important question of the civil procedural law and it will be one of the biggest changes in this field of law.

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UDK 339.137:004.7(4-67EU)
Review article

PROPOSALS FOR THE DIGITAL MARKETS ACT AND DIGITAL SERVICES ACT – BROADER CONSIDERATIONS IN CONTEXT OF ONLINE PLATFORMS*

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ABSTRACT

Proposals for a Regulation on a Single Market For Digital Services (Digital Services Act) and Regulation on contestable and fair markets in the digital sector (Digital Markets Atc) of 15th of December, 2020 were long-avaited tools, through which, in the field of digital services, a higher degree of legal certainty for the consumer should be ensured and the functional responsibility regime of online platforms should be secured, in direct proportion. Submitted proposals preceded open public consultation of interested stakeholders, including the general public, academics, digital companies and other businesses, associations, civil society public authorities, and trade unions. The need to adopt adequate legislation in line with rapid technological development also stemmed from the fact that the E-commerce Directive was adopted in 2000 and has so far been considered as the main legal framework governing the issue of digital platforms, but it is also necessary to add that the regulation of online platforms has been mainly left to the Member States. As much of the activity has shifted to the online enviroment, digital platforms are playing an increasingly important role in our lives. The purpose of this paper is to analyze the relevant provisions of the proposal in the context of competition rules and also in view of the increased use of online platforms due to the global crisis. The content of the article will also contain a brief comparison with the current legal situation with reference to the practical implications that await us with the adoption of the new legislation.

Keywords: *Digital Services Act, Digital Markets Act, competition law, online platforms*

* This work was supported by the Slovak Research and Development Agency uder the Contract no. APVV-19-0424 and APVV-17-0561 Human-legal and ethical aspects of cyber security.

1. INTRODUCTION

Digital technologies are now an integral part of our lives. Their use on a daily basis has been exacerbated by the current global pandemic situation, caused by the spread of COVID-19 virus. Practically, from day to day we have moved most of our activities to the online space, not excluding work duties, purchasing essential needs, communicating with close persons or handling administrative matters. With regard to the mentioned transfer of our activities to the online environment, as it showed up, there are many barriers and opened legal issues that are undoubtedly related to acting in the online space. Unambiguously, one of the legal issues related to operating in the online space is question conjoint with protection of personal data, protection of the consumer, blocking of acces to certain content (whether for commercial or legal reasons), liability regime for content posted online, but also a wide range of aspects related to the operation of digital online platforms.

When it comes to the category of digital, online or collaborative platforms – as they tend to be synonymously referred to, these are the subject of expert discussions in terms of several aspects. Above all, it is necessary to emphasize the responsibility of the platforms, in relation to the provision of these services, their market position, their relation to the standard service providers, as well as the position of the individual platforms to each other.

Equally resonant is unfair competition of digital platforms in relation to business conditions or platform practices, or even their anti-competitive behavior. One of the matter discussed in this regard is the general consideration of which entities are actually online platforms. Following this question, another one arises as what parameters must these subject meet in order to perceive them as online platforms and what consequences follow from these position.

In relation to online platforms and the institute of competition, both public and private aspects resonate. When we mean private law aspects, in particular, these will be related to the business conditions of individual platforms, on the one hand, in relation to customers, but also on the other hand, business in relation to persons who provide these services through these platforms.

The question also remains whether the platform itself provides the service, or is merely the sole intermediary between the direct service provider and the customer as the final recipient of the service. Online platforms are generally defined as exclusive intermediaries, who stand between the direct service provider and the customer as the addressee of the service.[1] Finally, in the European Agenda for the

[1] De Franceschi, A., *Uber Spain and the "Identity Crisis" of Online Platforms*, Journal of European Consumer and Market Law, 2018, Vol. 7, Issue 1, pp. 1-4, [https://kluwerlawonline.com/journalarticle/Jour-

Collaborative Economy, the European Commission stated that whether the service is provided by the platform or is merely an intermediary needs to be examined on a case-by-case basis (2016).[2]

In assessing the above-mentioned points and finding alternatives from the basis for their regulation, we consider two aspects to be key –thus which entities can be considered as online digital platforms and what is the current situation of regulation of digital platforms in the context of competition. In particular, the two proposals for the regulations published at the end of last year are of considerable importance in this regard – proposal for the regulation of Digital Services Act and proposal for the regulation of Digital Markets Act.

The aim of this paper will be not to answer all the questions raised in connection with digital platforms and collaborative economy, but just to analyze the legislation de lege lata in the context of digital platforms and competition. We will also try to point out to the subject-matter of legislation which is currently in the process of being adopted, especially with regard to the European legislators.

2. PLATFORMS - CONSIDERATIONS FOR LEGAL DEFINITIONS

We use the terms such as online platform, digital platform or collaborative platform regularly, in various meanings. However in standard conversation, we usually attribute them a different signifacance as when we use these terms in a legal context. In these intentions, we also meet with a conceptual definition, more clearly, with differentiation of the platforms as bilateral platforms, possibly multilateral platforms. It will therefore be important to differentiate for what purpose the term needs to be defined, resp. what specific question we are looking for an answer to.

With respect to the mentioned, we point out to the division of online platforms, which is presented by prof. Bejček, while noting, that it is more accurate to use the term platform, as the notion market, as it makes it possible to distinguish between goods and services according to the way in which they are offered and subsequently traded with them.[3] As bilateral platforms are marked that onest hat connect the seller and the consumer, trilateral platforms as those, which restrain consumers, con-

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2 A European agenda for the collaborative economy, COM(2016) 356 final, p. 8, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0356&from=EN], Accessed 11 January 2021.

3 Bejček, J., *On the Impact of Digitalization of Economy and Competition Law – a Storm in a Teacup*?, in: Suchoža, J.; Husár, J.; Hučková, R. (eds.), Právo, obchod, ekonomika VII., Košice: Univerzita P.J.Šafárika v Košiciach, 2017, p. 27.

tent providers and advertisers and multilateral platforms (cites credit cards as an example).

According to the criterion of target persons, referring to OECD sources, prof. Bejček divides platforms into connecting peers (P2P), traders with traders (B2B), or consumer with traders (B2C). According to the functionality, we can divide platforms to the so-called search engines (GoogleSearch, TripAdvisor), electronic online markets (Amazon, Booking.com, eBay), common economic networks in a shared or interconnecting economy (Uber, Airbnb), social networks (LinedIn, Instagram, Facebook), or app stores (Apple ´s App Store, Google Play).[4] In view of the above mentioned, we can state that the platforms can be divided from different perspectives.

In this regard, we draw attention to the characteristics of the collaborative platform, as part of a shared economy, which is just one of the different types of platforms used online. The European Commission has made a clearer definition of the terms collaborative economy and collaborative platform in the European Agenda for the Collaborative Economy. European Commission characterizes the collaborative economy as well as the collaborative platforms as follows :

„The collaborative economy involves three categories of actors:

(i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis ('peers') or service providers acting in their professional capacity ("professional services providers");
(ii) users of these; and
(iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them ('collaborative platforms'). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit."[5]

In these intentions we also point out the idea presented by doc. Kalesná and dr. Patakyová, that even in the absence of a universal definition of online platforms, it is necessary to distinguish between the right shared economy, offering exchanges at the local level, from profit-oriented global trade, the so-called uberization of the economy.[6] The

4 *Ibid*.

5 A European agenda for the collaborative economy {SWD(2016) 184 final}, COM(2016) 356 final, p. 3.

6 Kálesná. K.; Patakyová T., *Digitálne platformy: súťažné právo verzus regulácia ex ante*, Právny obzor, Vol. 104, No. 1, 2021, p. 26-38.

notion –uberization or uberification[7] - can be characterized as a process or the act of changing the market for a service by introducing a different way of buying or using it, especially using mobile technology.[8]

In the context of online platforms is also frequently mentioned notion- information society services defined as „any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.“[9] Therein the well known in this regard is the judgment of the Court of Justice of the European Union in the case Asociación Profesional Élite Taxi against Uber Systems Spain SL, C-434/15, establishing that the services provided by Uber are not information society services, but they are inextricably linked to transport services. [10]

So far, the regulation of collaborative platforms has been left largely to individual Member States and documents issued by the European Union in the field in this question were rather non-binding or recommendatory in nature.[11] Finally, the Court of Justice of the European Union also reflects to this fact in cited judgment. That classification is indeed confirmed by the case-law of the Court, according to which the concept of 'services in the field of transport' includes not only transport services in themselves but also any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport.[12]

Lastly, the fact that the regulation of the conditions under which platforms may provides their services is left to the Member States is also emphasized by the Court of Justice. „It follows that, as EU law currently stands, it is for the Member States to regulate the conditions under which intermediation services such as that at issue in the main proceedings are to be provided in conformity with the general rules of the FEU Treaty.[13] The Court of Justice uses the term „services such as

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7 As it is used to be synonymously referred to, see for example Daidj, N., *"Uberization (or uberification) of the economy,"* Post-Print hal-02374117, HAL., 2017, DOI: 10.4018/978-1-5225-2255-3.ch204.

8 Cambridge dictionary, available at: [https://dictionary.cambridge.org/dictionary/english/uberization], Accessed 08 April 2021.

9 Directive (eu) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), Art. 1 (1), b.

10 Judgment of 20 December 2017, Asociación Profesional Elite Taxi, C-434/15, ECLI:EU:C:2017:981.

11 For example De Franceschi, *op. cit.,* note 1, p. 4; Busch, C.; Schulte-Nölke, H.; Wiewiórowska-Domagalska, S.; Zoll, F., *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?*, Journal of European Consumer and Market Law Vol. 3, Issue 1, 2016, p. 4.

12 Judgment of 20 December 2017, Asociación Profesional Elite Taxi, C-434/15, ECLI:EU:C:2017:981, point 41.

13 Judgment of 20 December 2017, Asociación Profesional Elite Taxi, C-434/15, ECLI:EU:C:2017:981, point 47.

that", which seems to mean, in particular, collaborative platforms in the field of transport. Subsuming a platform under definition means its exclusion from the concept of information society services, and all the benefits flowing from them.

3. THE CURRENT STATE OF REGULATION OF DIGITAL PLATFORMS

As it is stated several times in this paper, regulation of online platforms has been generally left to the Member States. In relation to online platforms and online services, the 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) has been referred as the basic regulatory legal framework. With reference to fact, that the E- commerce directive was adopted in 2000, it is evident that the current era of digitization, brings necessity for new legal regulation to sufficiently reflect the dynamics and development in this area.

When we focus on the questions of competition associated with the platforms, we run into a problem. With reference to Article 1 para. 5 letter b) E-commerce Directive which stipulates that „This Directive shall not apply to questions relating to agreements or practices governed by cartel law", the wording of the E-commerce directive itself precludes its application or effect on competition rules. Until now, therefore, legislation following platforms and competition issues has been governed by primary law starting with Article 101 of the Treaty on the Functioning of the EU, and the relevant secondary law. Secondary law completing the legal framework of competition legislation is made up primarily of regulations.

It is also important to note that currently in relation to online platforms and intermediary services, we also have regulation Regulation 2019/1150 of the European parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. This Regulation is, in essence, the first legal act to regulate specific aspects related to online platforms. This regulation can be referred to as business to business regulation (B2B), as its role is to adjust fair and transparent terms and conditions for business user, as they are defined in the Article 2 para. 1 of this Regulation. With the regard to subject matter of the regulation we can state that this legislative act is predominantly of a private law nature. Other key question, which is closely related to adjustment of digital platforms is ranking, whereas Article 5 of this Regulation sets up conditions under which main parameters determining ranking should be managed.

Despite the fact that the area of online markets has certain specifics compared to standard markets, anti-competitive practices were standardly sanctioned by the application of the provisions of the Treaty of Functioning of the European Union.

Application of the „case by case" principle to collaborative platforms (mentioned by the Commission) has to some extent been demonstrated in the case law of the Court of Justice. We point to the case Star Taxi App, C-62/19, while at first glance it might seem, that the services provided by Star Taxi App SRL will be assessed in the same way as services provided by Uber, but in this case the Court of Justice decided that an „intermediary service consisting of connecting, for a fee, a smartphone application to persons wishing to travel within the city and drivers of authorized taxi services, the provider of which has entered into service contracts with those drivers for consideration of a monthly fee. subscription, but does not send them orders, does not set fares or ensure payment from these persons, who pay it directly to the taxi driver, and, in addition, does not control the quality of the vehicles and their drivers or the behavior of these drivers, is a "information society service" .[14] [15]

4. OBJECTIVES AND INTENTS OF THE SUBMITTED PROPOSALS OF DIGITAL SERVICES ACT AND DIGITAL MARKETS ACT

4.1. In general to both proposals

The prediction of new legislation in the digital field was indicated by the second priority of the current composition of the European Commission - Europe fit for the digital age. As it is stated in the introduction of this priority „Europe must now strengthen its digital sovereignty and set standards, rather than following those of others – with a clear focus on data, technology, and infrastructure."[16] From initiate wording is clear, as well as from many other documents of the European Union, that the European Union wants to be as legally prepared as possible for the digital age which has already begun, but its real contours will not be fully apparent until the coming years.

Online space contains certain specifics, which we do not recognize in the offline environment. These specifics of the online environment can create legal uncer-

[14] Unofficial translation by the authors.

[15] Judgment of 3 December 2020, Star Taxi App, C-62/19, ECLI:EU:C:2020:980.

[16] A Europe fit for the digital age. Empowering people with a new generation of technologies, [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en], Accessed 05 April 2021.

tainty in many ways, especially with regard to the fact that when concluding virtual contracts we do not have the possibility of sufficient verification of the person standing on the other side. The issues of online security and, consequently, the security of online shopping have often been questioned, as unfortunately various fraudulent practices are still taking place today. However, the matter of online shopping security, as well as, for example, securing payments for goods purchased online, is extremely extensive and with the reagrd of the intentions of this article, we will not address it in more detail.

Following the above mentioned, it is necessary to draw attention to those practices which customers do not even need to be aware of at first and will only result from the observation of the relevant markets in which unfair practices apply. As set out in the explanatory memorandum of the Proposal of Digital Markets Act, from examination of the competent authorities at European Union level, several conflicting practices have been observed with unsatisfactory results in relation to the consumer or to the market itself: „unfair practices and lack of contestability lead to inefficient outcomes in the digital sector in terms of higher prices, lower quality, as well as less choice and innovation to the detriment of European consumers. Addressing these problems is of utmost importance in view of the size of the digital economy (estimated at between 4.5% to 15.5% of global GDP in 2019 with a growing trend) and the important role of online platforms in digital markets with its societal and economic implications."[17]

The European Union has an interest in business and trade, in particular in securing a high degree of harmonization of Member States' legislation. This is undoubtedly related to the institute of the internal market. The legal basis of the internal market is to be found in primary law, namely in Article 4 para. 2 letter (a) and Articles 26, 27, 114 and 115 of the Treaty on the Functioning of the European Union. The aim of the common market created by the Treaty of Rome in 1958 was to remove barriers to trade between Member States in order to increase economic prosperity and contribute to the "ever closer unification of the peoples of Europe".[18] This intention is also reflected in the current priorities of the European Commission, but at present the main obstacles are the obstacles appearing in the online environment. Mentioning online content, barriers or obstacles, it is necessary to point out, for example, to the European Union's initiatives in the field of

[17] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final 2020/0374 (COD), p. 1.

[18] Vnútorný trh, Všeobecné zásady, available at: [https://www.europarl.europa.eu/factsheets/sk/sheet/33/vnutorny-trh-vseobecne-zasady], Accessed 07 April 2021.

removing geographical blocking (thus geoblocking), in order to maintain equal access to online services and goods for all citizens of the European Union.

The current state and the latest changes in the field of restructuring and cross-border conversion were processed in an interesting way by the author's team Dolný and Mrázová in contribution Recent Developments in European Company Law: Harmonisation of Restructuring and Cross-border Conversion.[19] Efforts for a high degree of harmonization therefore do not exclude the area of online platforms either. Following the initial publication of the current Commission's priorities, it was clear that it was planning significant legislative changes in relation to online platforms. The term Digital Services Act was first used, and subsequently did the contours of the Digital Markets Act see the light of day.

The main objective of the presented legislative initiatives is to create a safer digital space in which the fundamental rights of all users of digital services are protected and to establish a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally.[20] In the following two subchapters, we will try to specify the main intentions of the proposals.

4.2. Proposal of Digital Services Act

In general the main aims of the proposal of regulation Digital Services Act are presented as to better protect consumers and their fundamental rights online, to create a framework for high transparency and clear accountability of online platforms and to foster innovation, growth and competitiveness in the single market.[21]

If we look directly at the wording of the proposal of the regulation DSA, in Article 1 (the subject matter and scope) is defined that „This Regulation lays down harmonised rules on the provision of intermediary services in the internal market. In particular, it establishes:

(a) a framework for the conditional exemption from liability of providers of intermediary services;

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19 Dolný, J.; Mrázová, Ž., *Recent Developments in European Company Law: Harmonisation... of Restructuring and Cross-border Conversion,* in: EVOLUTION OF PRIVATE LAW – NEW CHALLENGES , Publisher Instytut Prawa Gospodarczego Sp. z o.o., 2020, p. 63-71

20 Shaping Europe's digital future, POLICY, The Digital Services Act package, available at: [https://ec.europa.eu/digital-single-market/en/digital-services-act-package], Accessed 05 April 2021.

21 The Digital Services Act: ensuring a safe and accountable online, available at: [environmenthttps://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_sk], Accessed 30 April 2021.

(b) rules on specific due diligence obligations tailored to certain specific categories of providers of intermediary services;

(c) rules on the implementation and enforcement of this Regulation, including as regards the cooperation of and coordination between the competent authorities."

The regulation itself sets its aim in Article 1 para. 2, as to:

„(a)contribute to the proper functioning of the internal market for intermediary services;

(b) set out uniform rules for a safe, predictable and trusted online environment, where fundamental rights enshrined in the Charter are effectively protected."

In relation to legislation which has hitherto been perceived as the basic regulatory framework, its scope is defined in the proposal of the regulation in Article 1 (5) (a). a) „This Regulation is without prejudice to the rules laid down by the Directive 2000/31/EC." However, final provisions of proposal for a regulation DSA (Article 71 para. 1) declare that „Articles 12 to 15 of Directive 2000/31/EC shall be deleted." Mentioned articles of E-commerce Directive formed the basis of the legal framework for the liability of online platforms. Liability regim is comprehensively elaborated in the wording of the submitted preposol for a regulation DSA.

Aspects related to illegal content and liability for such content were considerably discussed. Liability regime of online platforms in conditions of the existing regulation was valuable processed in contribution by Rózenfeldová and Sokol.[22] Answer to the question of the liability of platforms for the content that is published by them is due to the wording of the proposal for regulation DSA governed in Article 3, 4, 5 and 7 of the Proposal of DSA Regulation. In this connection, it is important to emphasis wording of the Article 7, which provides that: „No general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers."

The proposal of the DSA regulation addresses, in particular, the liability issues of intermediary platforms and sets out a number of new obligations arising from their position. The proposal for a regulation also introduces new institutes and mechanisms concerning online platforms. The adjusted scope of obligations is relatively wide and goes beyond the scope of this contribution. Meredith Broadbent in contribution The Digital Services Act, the Digital Markets Act, and the New

[22] Rózenfeldová, L.; Sokol, P. *Liability regime of online platforms new approaches and perspectives*, in: Petrašević, T.; Duić, D.; Novokmet, A. (eds.), EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 3, 2019, p. 871.

Competition Tool, mentiones that „companies and stakeholders have commented extensively on both Inception Impact Assessments. Regarding the DSA section, supporters note its potential to create legal certainty and deepen the European internal market while making liability and consumer-protection requirements more robust. Other voices have raised concerns over where the burden of liability and safety will fall and worry that illegal content would migrate to smaller, less regulated platforms."[23]

4.3. Proposal of Digital Markets Act

Some large online platforms act as "gatekeepers" in digital markets. The Digital Markets Act aims to ensure that these platforms behave in a fair way online. Together with the Digital Services Act, the Digital Markets Act is one of the centrepieces of the European digital strategy.[24] Concept of Digital Markets Act is relatively different from the concept of Digital Services Act. The mentioned determinant of difference is primarily the introduction of the new notion - „gatekeeper" - in the field of online enviroment for the purposes of applying the Regulation. This term has not yet been legally defined, whereas the submitted proposal for a regulation DMA clarified its contours. For a category of gatekeepers (characterized by both qualitative and quantitative criteria) are set completely new rules, which has not yet been contained in any legislation.

In contrast with proposal for a regulation DSA, proposal for a regulation DMA determine its subject-matter and scope in Article 1 as follow: „This Regulation lays down harmonised rules ensuring contestable and fair markets in the digital sector across the Union where gatekeepers are present." With regard to this demarcation, we can state that the legislation in question will regulate primarily the public law aspects of online platforms.

DMA regulation is frequently reffered to as new competition tool. As we mentioned above, the digital environment carries with it certain specifics that we do not recognize in the offline space. In present we distinguish several platforms that have a really significant market position. Until now, the practices of these platforms have been penalized by standard competition law institutes although when

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[23] Broadbent M., The Digital Services Act, the Digital Markets Act, and the New Competition Tool, Center for strategic and internarional studies, November 20 2021,p. 8, available at: [https://www.csis.org/analysis/digital-services-act-digital-markets-act-and-new-competition-tool], Accessed 30 April 2021.

[24] The Digital Markets Act: ensuring fair and open digital markets, [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en], Accessed 05 April 2021.

the case showed certain digital specifics (such as use of personal data). This fundamental legal framework was, of course, Articles 101 and 102 of the Treaty on the Functioning of the European Union.

Obligations for gatekeepers are summarized in Article 5 and 6. As their content is relatively extensive, we point out, for example to the requirement resulting from the dual role of gatekeeper. It is the case when gatekeeper is the core platform services provider but also provides the services by this core platform just like a commercial user. This position is mainly related to the obligations set out in Article 6 para. 1 d.) (among others).

5. CONCLUSION

Submitted proposals for Digital Sevices Act and Digital Markets Act can be considered as desirable. Given the significant position of digital platforms in the market and an exponential increase in their market power, it can be expected that in the coming period their position will only be strengthened. In view of these facts it is necessary to guarantee consumers a high degree of legal certainty, but also to ensure a clear catalog of rules for online platforms to follow. Despite the fragmentation of opinion whether there is a real need to regulate digital platforms, for example in competition matters beyond the current legislation, we insist on the idea, that if the legislation as DSA and DMA has not been adopted at European Union level, it could cause that Member States would gradually adopt national legislation on their own initiative which could ultimately result in different approaches to online platforms. For this reason, it is necessary to adapt the legislation to the business models of the 21st century and enable them to act on the market for the benefit of the consumer, however, with a guarantee of a high degree of protection of its interests. Nor can the protection of competitors be overlooked, for example in the light of the context of competition.

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UDK 347.672:614.4
Original scientific paper

TESTAMENTARY DISPOSITIONS IN THE CONTEXT OF GLOBAL PANDEMIC

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ABSTRACT

The outbreak and the rapid spread of global COVID-19 pandemic have put significant strains on the institutions. The need to adapt to "new normal" and contain the rapid spread of disease, while maintaining a functional society, resulted with introduction of numerous new legal mechanisms and adaptation of the existing ones. However, it seems that one area of law remains on the fringes: the regulation of wills.

Even before the start of the pandemic many authors often pointed to the fact that the current legal framework does not follow modern technological developments, but no significant attempts were made to overhaul the inheritance law. Also, once the pandemic started in its full, there were no references to introduction of extraordinary mechanisms or new legal solutions to overcome the potential difficulties in forming wills. Comparative analysis yielded no better results: although some countries (such as Austria) recently completely overhauled their regulation of inheritance law, it seems that no attempts were made to introduce new types of wills or new methods of drafting wills into their regulations.

Furthermore, following the spread of the pandemic, increasing number of potential testators find themselves unable to use traditional methods of drafting wills as they, or the authorized persons tasked with assistance and creation of wills, remain isolated from one another due to various reasons (lock-downs, isolation in case of experiencing symptoms, etc.).

Having in mind these circumstances, it is necessary to ascertain whether there is a genuine need to introduce new types of wills into existing legal framework, or to adapt the current legal framework by facilitating the communication between citizens and the institutions. Also, it is necessary to analyze whether the interpretation of the existing legal framework enables the introduction of certain facilitating mechanisms. In order to reach these goals and clarify the possibilities within the current legal framework, interpretative and comparative method are used.

Keywords: *will, extraordinary will, digital will, electronic will, COVID-19 pandemic*

1. INTRODUCTION

The sudden appearance and rapid spread of global COVID-19 pandemic has certainly caught governments off-guard and while many quickly adapted and overcame the initial shock, gradually introducing measures in the private law[1,2] aimed (primarily) at dealing with (and mitigating) the economic consequences of the pandemics, inheritance law and regulation of wills remained on fringes.

This is not surprising, however, as the inheritance law is one of the areas of private law in which changes are incremental[3] and the regulation of will traces its roots in the Roman law[4]. Therefore, even after more than a year has passed since the start of the pandemic, intervention in inheritance law still occurs rarely[5].

At the start of the pandemic, it was predicted that some issues related to the inheritance law would arise, whether they were caused by increased mortality rate of citizens, unavailability of public services (primarily related to the restricted access to public notaries and courts), or inability of citizens to move freely[6]. So far, it seems that catastrophic predictions related to economic consequences of the pandemics, which prompted the introduction of the most significant measures in the private law, were not fulfilled[7]. Likewise, significant issues in functioning

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1 For a good overview of *ad hoc* legislation introduced by European states and the consequences of the pandemic – see: [https://www.intersentiaonline.com/bundle/coronavirus-and-the], Accessed 12 April 2021.

2 For example, implementation of stay on enforcement proceedings over accounts of physical persons (Act on Amendment of Act on Enforcement over Monetary Assets – Official Gazette No. 47/20) – For an overview of measures introduced in Croatian law – see Josipović, T., *Restrictions of Fundamental Rights in Private Law Relations in the Special Legal Order, with Exceptional Regard to the Specific Circumstances Caused by the Epidemic*, Central European Journal of Comparative Law, Vol. 1, No. 2, 2020, pp. 59 – 86.

3 For the development of Croatian inheritance law, see: Gavella, N.; Belaj, V., *Nasljedno pravo*, Narodne novine, Zagreb, 2008, pp. 14 – 16. It is interesting that the most significant systematic reform of the Austrian inheritance law since the introduction of ABGB occurred in 2015, two centuries after its entry into force (although there were several smaller changes in the meantime) – see: Rabl, C.; Zöchling-Jud, B. (eds): *Das neue Erbrecht,* MANZ'sche Verlag, Wien, 2015. See also: Sasso, I., *Will formalities in the digital age: Some Comparative Remarks*, Italian Law Journal, Vol. 4, No. 1, 2018, p. 169, 170.

4 Załucki, M., *About the Need to Adjust the Regulations regarding the Form of Will to the Modern Requirements*, European Journal of Economics, Law and Politics, Vol. 6, No. 2, 2019, p. 1, 11; Klasiček, D., *21st century wills*, Pravni Vjesnik, Vol. 35, No. 2, 2019, p. 31.

5 A notable of example of intervention is the example of the UK – see *infra.* 4.2.1.

6 *Cf.* Krätzschel, W., *Die Errichtung letztwilliger Verfügungen in Corona-Zeiten*, Zeitschrift für Erbrecht und Vermögensnachfolge, Heft 5, 2020, pp. 268 – 272.

7 It was expected that there will be a huge increase in the number of enforcement proceedings initiated against physical persons who will not be able to meet their due obligations, as the lockdown would cause a significant decrease in the economic activity – however, analyzing Croatian Financial Agency's (FINA) statistics, after the stay on enforcement proceedings ended (18. October 2020) at the end of

of the procedures, which fall under the scope of inheritance law, were not identified. However, it seems that these circumstances represent a good springboard to initiate a public debate on necessity of the introduction of certain mechanisms to prevent negative consequences in the future (e.g. in the context of new similar situations – such as the appearance of a new, more dangerous corona strain) or simply to modernise the existing legal framework. Apart from that, this also seems as a good opportunity to discuss whether such new solutions could be unified on the EU level, leading to further expansion of the EU inheritance law.

This paper contains an analysis of current legal framework, on Croatian, as well as the EU level, followed by an overview of potential problematic points caused by the epidemics and the analysis of the legal solutions for these issues. Finally, it is discussed, whether there is a genuine need to introduce new types of wills or new mechanisms into the Croatian inheritance law.

2. WILLS – CURRENT LEGAL FRAMEWORK

2.1. Regulation of wills in Croatia

Currently, the legal framework for wills in Croatia is provided in the Inheritance Act[8]. A significant part of the legal framework closely follows the tradition of the older Inheritance Act dating back to 1955[9]. Traditionally, as in other legal systems, wills are considered formal and strictly personal legal acts. In order for the will to produce its legal effects, the testator must observe strict set of formalities. Therefore, laws regulating wills are often considered rigid and incapable of adapting to continuous and sudden social, economic and cultural changes[10] - bereft of their

October, there were 247,270 persons whose bank accounts were blocked in the enforcement, which represents an increase of only 3.8% in comparison to March 2020, or 1.5% in comparison to October 2019. See – FINA, *Broj ovršenika koji nemaju dovoljno sredstava na računima za otplatu duga i ukupni dug na dan 31.10.2020. i 18.11.2020.*, available at: [https://www.fina.hr/-/broj-ovrsenika-koji-nemaju-dovoljno-sredstava-na-racunima-za-otplatu-duga-i-ukupni-dug], Accessed 14. April 2021. Also, see Maganić, A., *Građanskopravno pravosuđe za vrijeme pandemije bolesti COVID-19*, unpublished, Zagreb, 2021. – lecture held at Croatian Academy of Sciences and Arts, 22. January 2021.

8 Official Gazette No. 48/03, 163/03, 35/05, 127/13, 33/15, 14/19.

9 Inheritance Act, Official Gazette of the Federative People's Republic of Yugoslavia No. 20/55. After the Yugoslav Constitutional changes, inheritance laws were placed in the competence of the Federal Republics. As the Inheritance Act '55 was deemed quite successful, it was simply adopted again into the legal system of Croatia in 1971 – *see* Gavella; Belaj, *op. cit.*, note 3, p. 15, 16.
One the most significant difference between the current Inheritance Act and Inheritance Act '55 regulation of wills is that there are fewer types of extraordinary wills in the current Inheritance Act (military and maritime wills are not regulated anymore as they were deemed outdated). Gavella; Belaj, *op. cit.*, note 3, p. 137.

10 Sasso, *op. cit.*, note 3, p. 169.

traditional context, wills often seem archaic – however, such formalities are indeed justified – they ensure the expression of testator's true intentions and reduce the possibility of will's forgery. After all, when the will comes into effect, unlike in case of most other legal acts, it is impossible to check with the testator what was his or her true intention. One further consequence of this is that if a testator expressed his or her last will in a form not prescribed in the Inheritance Act (i.e. will is in an invalid form), it shall still produce all the legal effects as long as it is not voided in a court procedure (i.e. it is not null and void)[11]. This provides an opportunity for any potential heirs to evaluate if they shall exercise their right and invalidate the will or, in case they believe will indeed represents testator's true intent, they shall leave the will to produce its legal effects[12].

Unsurprisingly, Inheritance Act regulates types of will which can be found in other jurisdictions as well: there are two types of private written wills (holographic and allographic will), two types of public written wills (public will *stricto sensu* and international will) and one type of oral will[13]. Wills can be divided in different categories, but within the context of this paper, the most significant distinction of wills is whether they are formed in regular or extraordinary circumstances.

2.1.1. *Wills in regular circumstances*

In regular circumstances, testators can only draft a will in a written form. The simplest way to draft a will is to make a *handwritten* (holographic) will[14]. The only requirement for the validity of such will is that the will was written by the hand of the testator and signed. Therefore, a will written on a computer, printed and then signed would not be valid as a handwritten will. The signature on the will must leave no doubt as to who is the author of the will – therefore, it is recommended that a full name and surname are included in it – however, this is not strictly observed[15].

Another type of private written will prescribed by the Inheritance Act is an *allographic* will (or written will in the presence of the witnesses)[16]. This will is valid, regardless of how its content was written down (i.e. if it was printed, handwritten by the testator, or someone else), as long as the testator declared that a document

11 Art. 29, par. 3. of the Inheritance Act.

12 This rule, actually, resembles the US *harmless error* doctrine – see *infra,* note 57.

13 Gavella; Belaj, *op. cit.*, note 3, pp. 135 – 137. *See* also Šarčević, P.; Josipović, T.; Gliha, I.; Hlača, N.; Kunda, I., *Family and Succession Law in Croatia* in: Pintens, W. (ed.): *International Encyclopaedia of Laws, Family and Succession Law, supplement 55*, Wolters Kluwer, The Hague, 2011., p. 232.

14 Art. 30 of the Inheritance Act.

15 Gavella; Belaj, *op. cit.*, note 3, p. 145.

16 Art. 31 of the Inheritance Act.

contains his or her will in front of two simultaneously present witnesses and then signed the document.

Public will is a will expressed before an authorized person (public notary, municipal judge, or judge trainee and a consular/diplomatic-consular officer)[17]. Testator's last will is expressed in a strict procedure intended to determine the true identity of the testator, his or her last wishes (which should be followed closely but formulated in accordance with the Inheritance Act) and the testator's mental capacity. At the end of procedure, testator signs the will and the authorized person certifies the will[18]. A special procedure is prescribed for cases in which the testator is unable to read the will[19] or in case the testator does not use the language of the procedure[20], if the testator is mute, deaf or deaf and blind[21].

The last type of will is an *international* will[22]. This type of will was implemented into the Croatian legal system with the acceptance of the Convention Providing a Uniform Law on the Form of an International Will[23]. In this case, the testator simply confirms before the authorized person[24] and two simultaneously present witnesses that a document represents his or her last will and that the testator is familiar with its content[25]. The testator should then proceed to sign the will or recognize the signature placed on the will as his or her own. Afterwards, the witnesses and the authorized person sign the will. The authorized person then indicates the date of the will and issues a prescribed form confirming that the testator expresses his or her last will in accordance with the proper procedure.

2.1.2. *Wills in extraordinary circumstances*

As it is often the case comparatively, Inheritance Act foresees the validity of oral wills as well, but only if such wills were expressed in extraordinary circumstances when the testator is prevented from expressing the last will in any other valid

17 Art. 32 – 36 of the Inheritance Act.

18 Gavella; Belaj, *op. cit.*, note 3, p. 139, 140.

19 Art. 33 of the Inheritance Act.

20 Primarily, the Croatian language, but also one of the minority languages, when its equal use before pulic authorities is guaranteed by a special law.

21 Art. 150 of the Inheritance Act.

22 Art. 151 – 166 of the Inheritance Act.

23 Signed at Washington, 26. October 1971; Implemented by Official Gazette IA, No. 3/95.

24 These are a public notary, municipal judge, or judge trainee in Croatia and a consular/diplomatic-consular officer.

25 It is necessary to emphasize here that there are no language limitations in drafting of the international will – as the authorized person is not required in any way to review the content of the will. *See*, Art. 154/2 of the Inheritance Act – also *see:* Šarčević; Josipović; Gliha *et al.*, *op. cit.*, note 13, p. 241.

form[26]. Such circumstances must be extraordinary – if the circumstances are lasting or permanent, oral will shall not be valid. Furthermore, it is considered that such circumstances exist only in case the testator's life is directly endangered[27].

Testator's last will expressed orally must be witnessed by two simultaneously present witnesses who have a duty to write the content of the last will down and immediately deliver the document to the court or public notary for safekeeping. The fact that the witnesses have not fulfilled their duty, however, does not lead to invalidity of the last will.

If other conditions were met, orally expressed last will remains valid for a period of 30 days after the cessation of the extraordinary circumstances – meaning, if the testator survives the extraordinary circumstances, the legislator estimated that 30 days would be sufficient for expression of the last will in an another valid form.

2.2. Efforts to harmonize inheritance law on the EU level

Only certain aspects of the inheritance law are harmonized on the EU level. The crucial impediment to the development of the inheritance legal framework related on the European Union level is the lack of competence of the EU to carry out the complete harmonization of inheritance laws[28,29]. Even though parts of private law are harmonized on the EU level – it seems that harmonization bypassed the inheritance law, as other problems in divergences of national private law systems required more immediate attention[30]. However, after it was proclaimed in a number of instruments adopted at the EU level that in order to facilitate mutual recognition of decisions of Member States, it is necessary to harmonise conflict-of-laws rules and provide for the drawing-up of an instrument relating to wills and succession[31], the

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26 Art. 37 – 40 of the Inheritance Act.

27 German jurisprudence equalizes this with the threat of loss of testator capability. See Krätzschel, *op. cit.,* note 6, p. 269.

28 Private law on the EU level is harmonized primarily within the context of establishing and maintaining a functional internal market – see Josipović, T., *Privatno pravo Europske unije – Opći dio*, Narodne novine, Zagreb, 2020, p. 20.

29 Załucki, M., *Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future*, Iowa Law Review, Vol. 103, No. 5, 2018, p. 2324.

30 Such as the consumer protection law – see *ibid.* The area of the EU inheritance law was even described as "virgin territory" by Prof. Reinhard Zimmermann, the Director of the Max Planck Institute, emphasizing how this area of law is neglected – see *ibid.*

31 See Preamble p. 1 – 8 of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, 27.7.2012, p.107); See also: Lechner, T., *Die Reichweite des Erbstatuts in Abgrenzung zum Sachenrechtsstatut anhand der Europäischen Erbrechtsverordnung*

first significant harmonization of the inheritance law on the EU level took place. The result of this process is the Regulation 650/2012[32].

The Regulation 650/2012, however, deals primarily with the mutual recognition on decisions dealing with the succession, conflict of law rules and establishes the European certificate of succession and does not purport to harmonize material inheritance law on the EU level. Therefore, this represents the first and an important step in the harmonization of inheritance law and further steps are sure to follow.

2.2.1. *Further developments – laying foundations for the EU digital will?*

In 2014, the Estonian Ministry of Justice in close cooperation with the Estonian Centre of Registers and Information Systems and several project partners launched a project "*Further developments in the area of interconnection of registers of wills*" (hereinafter: "ICRW") aimed at exploring and enhancing the possibilities for exchanging succession related information and documents electronically between the Member States[33]. The project was co-funded by the European Commission based on the Multiannual European e-Justice Action Plan 2014-2018, which stipulates that an informal expert group on the interconnection of registers of wills should be created in co-operation with the Member States and notaries[34].

One of the main goals of the ICRW was to draw attention of the Member States to the importance of using modern electronic solutions for registration of wills and for exchanging information related to succession matters. In order to do that, it is recommended that Member States should adopt all necessary legislations to form a platform for a cross-border exchange of information and data on succession and wills. Also, it is recommended that a real-time Internet-based search from the national respective registers should be created and made available to the legal professionals or citizens dealing with succession cases[35]. In order to ensure this, the

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650/2012, Band 19 in: Dörner, H.; Hess, B.; Mansel, H.P. (eds): Internationales und europäisches Privat- und Verfahrensrecht, Nomos, Baden-Baden, 2017, p. 23.

32 *Op. cit.*, note 31. This was followed by the Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 359, 16.12.2014, p. 30).

33 e-Justice Expert Group, Interconnection of Registers of Wills, Final Report, p. 1., available at: [https://e-justice.europa.eu/fileDownload.do?id=a40a5542-6765-4ad0-9f42-5b1dcf70acd5], Accessed: 14 April 2021.

34 *Ibid.*, p. 1.

35 IC RW Expert Group, Recommendations on Electronic Will Registration and Data Exchange, p. 6 – 7, available at: [https://e-justice.europa.eu/fileDownload.do?id=6198a645-a2c5-4c39-b712-

exchange should encompass a) forwarding information on the existence of wills by using electronic means; b) forwarding a certified digitised copy of the will by using electronic means; and c) forwarding a copy of the succession certificate by using electronic means[36].

In the context of cross-border succession, it is especially interesting to analyse the recommendation concerning the creation and forwarding of the digitised copy of the will. Regardless of its form and particular national legislations regulating the will, this would seem as a possible approach to create a unique *European digital will*. Member States' authorities tasked with conversion of the will into its digital form intended for cross-border use could check the basic requirements related to its formal validity pursuant to their own laws. Once the will is uploaded, in order to ensure smooth use of *European digital will*, a presumption of validity regarding its original form should be foreseen on the EU level. This could be one possible approach in digitisation and modernization of the part of inheritance law dealing with wills.

Currently, there is no central EU register tasked with the cross-border exchange of information on wills. However, the non-profit European Network of Registers of Wills Association[37] has developed a platform, which interconnects 16 national registers of wills and enables to enquire information about the existence of wills[38].

3. INFLUENCE OF MEASURES AIMED AT CURBING GLOBAL PANDEMIC

Governments around the world approached the problem of global pandemic in variety of ways – from general aloofness and complete passivity, to strict limitation of movement and socialization aimed at preventing further spread of disease. To make matters worse, with the passage of time these approaches changed – stricter measures were relaxed over the time, whereas dire statistics forced some to act more determined, creating a sort of legal insecurity, which is reflected on reduction of cross-border movement[39]. In the end, there is no common approach, but it can be observed that as another statistical *wave* of new COVID-19 cases approaches,

f24f93116935], Accessed: 14. April 2021.

36 *Ibid.*, p. 7.

37 Croatian Notaries Chamber is currently only an observer member – for more information see: European Network of Registers of Wills Association – Members list, available at: [http://www.arert.eu/Members.html?lang=en] Accessed 12.2February 2021.

38 ICRW Recommendations, *op. cit.*, note 35, p. 2.

39 For an overview of introduced measures see European Centre for Disease Prevention and Control, *Data on country response measures to COVID-19*, available at: [https://www.ecdc.europa.eu/en/publications-data/download-data-response-measures-covid-19], Accessed 26. February 2021.

similar measures are introduced[40]. Such measures can be broadly grouped and analysed in the context of their impact on the expression of wills.

3.1. Restriction of movement and curfews

One of the most common measures is the restriction of movement – whether there is a form of curfew during certain times, or a complete lock-down of an entire region, county or town – they severely affect the interaction of individuals. Croatian government introduced the restriction of movement on two occasions so far[41]. One the most discussed issue in relation to this measure, in the context of inheritance law is the unavailability of public authorities tasked with the formation of formal wills[42].

As defined *supra*, if the testator chooses to draft his or her final will in a form of public will (which is definitely a preferred form if one expects that someone may try to invalidate the will after the testators passing), he or she must be able to visit the public notary or a judge. This might be aggravated if the movement is restricted[43] or if the persons authorized to draft or witness the formal will in the isolated county are unavailable (due to illness or self-isolation).

In such cases, testators who can only express their last will in a form of a public will (e.g. a blind person) are especially endangered[44]. If such situation really occurred and the testators could not reach the authorized persons, they could only express their last will orally – and such a will should be regarded as valid, as they could not express their will in any other form.

However, having in mind that there is a significant number of public notaries (and, to a measure, court officials) in each county[45] this does not seem as a likely

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40 See Krätzschel, *op. cit.,* note 6; Toader, I. A.; Dobrila, M. C., *Testamentul privilegiat* în *contextul pandemiei determinate de coronavirusul SARS-COV-2 (COVID-19)*, Revista Universul Juridic, Vol. 2020, No. 3, 2020, pp. 39 – 53.

41 Odluka o zabrani napuštanja mjesta prebivališta i stalnog boravka u Republici Hrvatskoj Official Gazette No. 35/20, which prohibited citizens to leave their place of residence (which measure was soon relaxed to include a wider area in which citizens could freely move) introduced on 23. March 2020 and Odluka o zabrani napuštanja županije prema mjestu prebivališta ili boravišta u Republici Hrvatskoj Official Gazette No. 141/20, which prohibited citizens to leave the county in which their place of residence is situated, introduced on 23. December 2020.

42 Krätzschel, *op. cit.*, note 6, p. 269.

43 Due to illness or preventive isolation. *Cf.* Krätzschel, *op. cit.*, note 6, p. 269, 270.

44 Other testators could just express their last will in any other form of private will permitted by the Inheritance Act.

45 There are currently 328 notarial offices active in Croatia, pursuant to public notary register (available at: [https://www.hjk.hr/Uredi], Accessed 14 April 2021. *Cf.* Panz, A., *Die Auswirkungen von SARS-*

scenario. Furthermore, even if such a situation occurred, it is likely that any person would be granted a pass to travel to a different county in order to arrange his or her legal affairs. Even Public Notaries Act[46] permits public notaries to perform their duties outside of their official seat in case this is justified by an *especially justified interest of their clients*[47].

3.2. Isolation of individuals

Another potential difficulty that comes into mind is a situation in which a testator is isolated – this could be because he or she is experiencing symptoms of the illness or if the testator was just exposed to the illness, whether at home, nursing home[48], or hospital. In this case, there might be certain difficulties in forming the last will.

Primarily, the testator cannot reach any authorized person in this case, so public will is out of the question. This could be quite problematic in cases when the testator is hospitalized for a longer period or if he or she is isolated in nursing home as a preventive measure of protection. It is inconceivable in such circumstances that the public notary would have to dress protective gear in order to perform the duties required of him or her as a part of this process. On the other hand, the formalities of public will ensure that the testator was in full mental capacity during the expression of last will and that the testator was not under undue influence. By removing the possibility for a successful creation of public will (especially among the elderly population), there may be a surge of potential court proceedings aimed at invalidation of various private wills created during periods of isolation of these individuals. If a person is isolated at home for a longer period and has no contacts with the outside world, it would be very difficult to ascertain whether the testator had a mental capacity to execute such legal act (as witnesses' testimonies are important for ascertaining the existence of adequate capacity[49]).

Furthermore, another problem is that in some cases of isolation, the testator would have trouble finding suitable witnesses[50]. This reduces testator's options

CoV-2 auf die notarielle Tätigkeit, Zeitschrift für das Notariat in Baden-Württemberg, Heft 1, p. 8.

46 Official Gazette No. 78/93, 29/94, 162/98, 16/07, 75/09, 120/16.

47 Art. 29, 30 of the Public Notaries Act.

48 *Cf.* Schaltke, M., *Corona-Fälle aus der Rechtsschutzpraxis,* Neue Juristische Wochenschrift, Heft 38, 2020, p. 2759.

49 This is regularly followed by an expertise of a medical expert witness – see e.g. Supreme court decisions number Rev-2691/90, Rev-1439/94, Rev-1098/06 and County court in Varaždin decision no. Gž-1/20.

50 Having in mind that the most common *available* witnesses would be persons living with the testator – in most of the cases, these are testator's family members. However, a defined circle of testator's family cannot be regarded as proper witnesses as they are expressly disqualified as witnesses in Art. 35 of the

just to a *holographic* will[51]. In this case, the testator must be able to write and must have proper material to write the will on at his or her disposal. Naturally, in most cases that would be paper, regularly available at any household, but even if testator would run out of paper for any reason, it should be noted that the Inheritance Act does not require that the will is written on the paper – it could be any other material suitable for writing (e.g. piece of cardboard, packaging, wood, wall, etc.)[52]. Certainly, a more significant problem seems to be testator's ability to write. If he or she is in such a state that his or her handwriting is illegible, the will would certainly be invalid (as his or her last will would be undeterminable).

Finally, problems of finding suitable witnesses could prevent the testator to successfully express a valid oral will.

3.3. Difficulties in drafting public wills

It seems that most of restrictions, whether in form of curfews, lock-downs or isolation of individuals, seriously affect the possibility of drafting public wills. Public notary can also perform his or her duties outside of the office[53], but this is not of much use if the contact with the isolated person is forbidden entirely[54]. This is already described *supra* under 3.1 and 3.2.

Further difficulties in drafting public wills may be caused by the limited availability of the authorized persons due to rules restricting their working hours or possibilities of overt contact with the potential testators[55].

Regulations in force prescribe that the formal will shall be expressed in the presence of an authorized person. If such contact is impossible, there is no possibility for drafting a valid formal will. Currently, there are no provisions enabling public notaries to use the electronic communication systems in performing their official

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Inheritance Act. Furthermore, even if persons living with the testator are not mentioned in the Art. 35, if they are witnessing testator's last will, they cannot receive any benefit in any form therefrom (Art. 36).

51 *Cf,* similarly – Toader; Dobrila, *op. cit.*, note 40, p. 51.

52 Gavella; Belaj, *op. cit.*, note 3, p. 145. In comparative analysis, there are numerous examples of wills being written on strange, even bizarre materials – one of the most famous US cases involves a will scratched on a tractor fender, made by an unfortunate testator after he was crushed by his tractor in an accident. In probate proceedings, tractor fender was brought into the courthouse and it was deemed that the testator made a valid handwritten will. See Horton D.; Kress Weisbord, R., *COVID-19 and Formal Wills,* Stanford Law Review Online, 73, p. 23.

53 Article 20 of the Public Notary Rules of Procedure Official Gazette No. 120/14.

54 *Cf* similarly Toader; Dobrila, *op. cit.*, note 40, str. 48.

55 For example, Croatian courts only held urgent hearings – see European Commission, *Comparative Table on COVID-19 Impact on Civil Proceedings*, available at: [https://e-justice.europa.eu/fileDownload.do?id=f74aa89f-e4c7-4946-8e6e-985b6b250473], Accessed 15 March 2021.

duties. However, recently Croatian Notaries Chamber published a call for the delivery of offers to design and maintain a platform for teleworking[56]. Judging by the content of this call, there is an initiative to provide a possibility for public notaries to offer their services by using means of electronic communication. This is a welcome step, which would render most of mentioned issues obsolete. After such platform is active, it will surely be followed by necessary regulatory changes.

Again, it is necessary to emphasize that despite these potential obstacles, testators could draft a last will in any other valid form. If drafting of the regular will is impossible, they can make an oral testament in accordance with the rules on the extraordinary will.

4. THE USE OF ELECTRONIC TOOLS IN TESTAMENTARY DISPOSITIONS

Within the context of the problems related to application of provisions of Inheritance Act described *supra,* the next step is to analyse whether such problems can be alleviated or entirely solved through use of various electronic tools. Two approaches come into mind here – current legal framework could be adapted by a more *loose* interpretation of norms, or the legal framework can be entirely changed to accommodate new legal instruments.

In this context, it must be noted that the Croatian inheritance law (like in other civil law systems) is subject to strict interpretation rules and the mentioned loose interpretation does not encompass approaches such as *harmless error doctrine*[57] in which certain deficiencies in the procedure can be *overlooked* for the overall protection of the testator's true intent.

4.1. Adaptation of current legal solutions

4.1.1. *Recording – a mixed will or a facilitation tool?*

Testator, especially one who is isolated from social contacts, may decide to record his or her last will. Most of us today carry some sort of portable device that has the option of recording of video, or at least, the voice. This may lead some to decide and to record their last will.

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[56] Published on web page of Croatian Notaries Chamber, available at: [https://www.hjk.hr/], Accessed 26 February 2021.

[57] Developed in Australian jurisprudence in the 1970s and widely used in the US – it allows judges to enforce a writing which does not comply with the US Wills Act if there is clear and convincing evidence that the testator intended it to be effective – Horton; Weisbord, *op. cit.,* note 52, p. 24.

In comparative jurisprudence, in common law jurisdictions, the question of acceptability of a recorded last will was in some cases posed before the courts deciding on validity of such wills[58]. Australian jurisprudence seems to be most inclined to accept such wills – for example in a case before the Queensland Supreme Court a video recording on a mobile phone belonging to *Marion Demowbray* was declared a valid final will[59]. In another example before the Supreme Court of the State of Victoria, a will recorded with the web camera was considered valid[60].

Pursuant to the Inheritance Act, a visual or a voice recording would not represent a valid will. However, it would represent a helpful tool to ascertain the correct content of the last will and the capacity of the testator. In a case before the Court of Appeal of Louisiana *Corley v. Munro*[61], an elderly testator who made nine wills previously, wanted to make sure that the last one will be valid. In order to achieve that she recorded the whole testamentary procedure even inviting the doctors to establish that she has the necessary mental capacity. As she expected, after her passing, her last will was challenged as invalid, due to lack of mental capacity, but the court rejected the motion on the basis of the videotape, which was further analysed by psychiatric experts in the court proceedings[62].

Furthermore, some interesting issues may arise here – suppose that the testator is making an oral will in extraordinary circumstances. The testator wishes that his or her last will is correctly and precisely relayed to his or her heirs so he or she decides to make a recording of the ceremony. After testator's passing, witnesses repeat testator's last will in front of the judge at municipal court. The judge then draws up an official record containing the content of the testator's last will and proclaims the official record as the testator's will in accordance with the law. However, whether intentionally or accidentally, they completely alter the content of the will. Upon hearing the testator's recording, potential heirs discover that this is in a complete contradiction to the proclaimed will. In the potential clash of the evidentiary value of a recording and a testimony, it is quite likely that the court, absent other evidence, would decide that the recording as a more reliable

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58 For a good overview of some more famous cases of use of various electronic devices in drafting wills in comparative jurisprudence – see Klasiček, *op. cit.,* note 4.

59 *Ibid.* p. 39.

60 *Estate of Sheron Jude Ladduhetti*, unpublished judgement – see Załucki, M., *op. cit.*, note 4, p. 8.

61 Court of Appeal of Louisiana, Third Circuit. 2. February 1994. 631 So. 2d 708.

62 Perrillo Rodriguez, M., *Testamento audiovisual: Una evolucion al derecho de sucesiones,* Trust and Estates 53, no. 2, 2014, p. 293. *Cf.* decision of County court in Zagreb, No. Gž-5980/17 – audio recording of a testament was used as a template for *allographic* will which was later written down.

evidence[63] (provided that, of course, the recording is not a forgery itself). In this case, heirs can try to invalidate the proclaimed will, as a forgery. However, how can they validate the true will of the testator? Can they initiate the court procedure to prove the existence of a *destroyed, lost and hidden will* (a procedure foreseen primarily for written wills)?[64] A loose interpretation of Art. 50 may offer a solution – it stipulates that the provisions of will must be interpreted according to the true intent of the testator. Would the court be permitted to disregard the official content of the will to follow the true intent of the testator even if these two are in obvious contradiction?[65]

Due to clear wording of the Art. 37, the recording, regardless of its reliability or quality, cannot replace the witness and it cannot be inferred that a witness was present if he or she later saw or heard the recording – the Inheritance Act clearly stipulates that two witnesses must simultaneously be present *before* the testator at the moment of his or her oral expression of the last will. So the validity of any kind of *mixed* will would be out of the question.

In the end, it can be concluded that within the current framework a recording (whether audio-visual or vocal) can only be used as a tool that facilitates the determination of testator's true intent and his or her mental capacity[66].

4.1.2. *Digital holographic wills*

Holographic wills are one the simplest wills that can be made by a potential testator. One only needs a piece of paper and a pen to write a will. However, in the digital era, we often find ourselves lacking these items and the amount of written documents (including personal notes) is diminishing.

In 2012, a terminally ill patient in the US hospital refused a blood transfusion for religious reasons. He was aware that this would certainly lead to his death, so he called his brother to help him prepare the last will. His brother did not have any

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63 See – evidentiary value in common law proceedings – for audio recordings: Beyer, G. W.; Hargrove, C. G., *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution,* Ohio Northern University Law Review, Vol. 33, No. 3, p. 881; for video recordings – *ibid.,* p. 884.

64 Art. 41 of the Inheritance Act.

65 It seems that this was not of concern for the legislators, having in mind that the regulation of this type of oral will remained relatively unchanged since 1955 – although the issues related to the audio recorded wills in extraordinary circumstances appeared much earlier in the 20th century than one would expect – in Nazi Germany, courts refused to recognize the validity of a will recorded on a gramophone – see Załucki, *op. cit.*, note 4, p. 3.

66 Additional actions undertaken in the testamentary process, even if they are not foreseen by the law as necessary, do not cause will's invalidity (unless they are explicitly forbidden) – see decision of the County court in Varaždin, No. Gž-230/09.

paper or pencil with him, so he took his touchscreen tablet. Testator's last will was ultimately written down and signed using stylus for tablets. After his passing, the Ohio probate court confirmed that such will satisfied all the conditions for written will[67].

Croatian courts could as well be faced with a question whether a will written down by using electronic device that transmits or recreates testator's handwriting, may be accepted as a valid holographic.

Pursuant to Art. 30 of the Inheritance Act, there are only two conditions for the validity of the holographic will – it must be personally handwritten and signed by the testator. It is deemed that a will typed down with the help of a device (such as a computer or a typewriter) does not constitute a valid holographic will[68]. The main reason for this is to avoid the counterfeiting of the will – handwritten will can easily be compared with a specimen of handwriting of a testator to ascertain whether this indeed represents his or her handwriting[69]. However, if a device realistically and precisely captures one's writing – could this be considered as handwriting for the purpose of holographic will? There are opposing views on this matter in the European legal doctrine[70]. It is necessary to emphasize that in drafting the holographic will, the material, which captures the handwriting itself, is irrelevant[71]. Therefore, if an electronic device captures the handwriting to a sufficient detail that allows its comparison, there seem to be no obstacles to recognizing such will as a valid holographic will.[72]

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67 *Estate of Javier Castro*, No. 2013ES00140 (Ohio C.P., 19. June 2013) - *See* Banta, N., *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age,* Baylor Law Review, Vol. 71, No. 3, p. 580, 581.

68 See Gavella; Belaj, *op. cit*., note 3, p. 134; Kreč, M.; Pavić, Đ., *Komentar Zakona o nasljeđivanju sa sudskom praksom,* Narodne Novine, Zagreb, 1964., p. 202.

69 *Cf.* Beyer; Hargrove, *op. cit.,* note 63, p. 877 – 891; *Developments in the Law: More Data, More Problems*, Harvard Law Review, No. 6, 2018, p. 1793. This argument, however, is also becoming obsolete, as more and more people are using electronic devices to make notes and draft documents, so in some cases, there aren't any specimens of testator's handwriting that could be compared to the holographic will – see Beyer; Hargrove, *op. cit.,* note 63, p. 898, Sasso, *op. cit*., note 3, p. 188.

70 See Sasso, *op. cit*., note 3, p. 187 – Sasso claims that *writing on a touch screen does not materially imprint the author's writing on a surface, but merely sends the computer's memory input to reproduce handwriting on the screen through conversion into a binary sequence that by its nature is duplicable and modifiable*. For a different view which seems to support the treatment of such input as handwriting, under the condition that the graphic reproduction of handwriting is not distorted – see Hren, P., *Oblik oporok v slovenskem pravu in možnost elektronske oporoke,* Pravni letopis, 2017, p. 198, 201.

71 See Kreč; Pavić, *op. cit.,* note 68, p. 202. *Cf.* Krätzschel, *op. cit.*, note 6, p. 269.

72 Another frequently discussed issue closely related to this question is whether a will with electronic signature could be deemed valid, as the electronic signature substitutes subject's signature in legal acts. This would have to be answered in negative, as holographic will must entirely be handwritten.

4.2. New potential solutions

To overcome the potential issues described *supra* under point 3, it is also possible to introduce a completely new set of measures (as opposed to more loose interpretation of the current legal framework analysed *supra*). Legislators comparatively already introduced a number of different measures. Some comparative legal solutions existed from long before coronavirus appeared and could prove valuable in the current circumstances. In addition, because some of these solutions are in place for a certain period, it is already possible to see if such solutions are working and what problems arise in association with them.

4.2.1. *Remote witnessing*

One of the best solutions to overcome the problems in finding suitable witnesses is the introduction of *remote witnessing*. The United Kingdom amended its Wills Act of 1837 so that the *presence* of those making and witnessing wills includes a virtual presence, via video-link, as an alternative to physical presence[73]. This amendment is temporary, however, and will only encompass wills made between 31 January 2020 until 31 January 2022. UK government published a detailed guidance for those who wanted to use the new solution; however, it is still emphasized that traditional forms of wills should be preferred[74]. The type of video-conferencing or device used in remote witnessing is not important, as long as the person making the will and their two witnesses each have a clear line of sight of the writing of the signature. Similar measures have been introduced in certain US states[75].

Pursuant to the Inheritance Act, the allographic will can be drafted in front of two simultaneously present witnesses. The term *presence* has not yet been interpreted by the Croatian courts in order to encompass virtual presence as well. However, in other areas of civil law this question has been raised and even resolved – Art. 293 of the Obligations Act[76] which regulates the conclusion of contracts in electronic form deems an offer given in an electronic form as an offer to a *present* person if that person can immediately respond with a counter-statement to any statement of the offeror. If such a regime is foreseen for conclusion of contracts, could it be extended to drafting of wills as well? This seems unlikely, given that the basic prin-

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73 See – UK Government, *Guidance on making wills using video-conferencing*, available at: [https://www.gov.uk/guidance/guidance-on-making-wills-using-video-conferencing], Aaccessed 09 March 2021.

74 *Ibid.* See also – the BBC, *Coronavirus: Wills witnessed by video link to be made legal,* available at: [https://www.bbc.com/news/uk-53530228], Accessed 09 March 2021.

75 Connecticut, Illinois, Kansas, Michigan, New York, Tennessee and Washington DC – See Horton; Weisbord, *op. cit.,* note 52, p. 27.

76 Official Gazette No. 35/05, 41/08, 125/11, 78/15, 29/18

ciple of obligation law is the informality of contracts, whereas the will is a strictly formal legal act, so no loose interpretation could be applied to the procedure of drafting a will – this option would have to be explicitly foreseen in the law.

Apart from clear advantages of having such an option in the process of drafting of a will, one must not forget the possible disadvantages. Remote witnessing increases the possibility of fraud – with increasingly developing technologies (such as *deepfake* for example), it seems increasingly easy to recreate a fake witness or to provide fake statement by a person involved in a procedure. Furthermore, the interaction of the witnesses with the testator is limited to the duration of live feed. This could be important if the question of testator's mental capacity arises – if the witnesses are physically present with the testator, they can observe his or her behavior immediately before and after the expression of last will and will likely engage with him or her in a conversation or small talk – this can either convince them that the testator is mentally fit or unfit to draft a last will. In case of remote witnessing, this important social aspect is left out[77].

4.2.2. *Digital will*

Different meanings are attached to the term *digital will* – it can either mean i) a set of issues related to the *post mortem* transfer of one's digital assets, or ii) a last will drafted with the help of electronic devices and saved in the digital form[78]. The term *digital will* in the latter meaning is often interchangeably used with the term *electronic will* and it is used to denote a number of various forms of wills created with the help of digital technologies – from wills made in the form of video recording to the ones made in a form of an electronic document or a note[79]. Regardless of the method of its capture into the digital format, the digital wills could be separated into three different categories on the basis of their security and formalities that have to be completed in their drafting[80]: i) *offline digital wills* are simple typed and/or recorded wills stored onto an electronic device; ii) *online digital wills* are wills that are uploaded on a server belonging to a private actor (posted on social media, stored in the cloud, sent in form of an e-mail message, etc.) – they exist on the internet and are a subject to data protection laws; and finally there are iii) *qualified custodian wills* where a subject, acting as a qualified custodian (whether

77 *Cf.* Ghatak C., *Leaving My Legacy Online – Weighing the Viability of Recognising Digital Wills in India*, Nirma University Journal, Vol. 7, No. 1., 2018, p. 96.

78 Sasso, *op. cit.*, note 3, p. 171.

79 *Cf.* Hren, *op. cit.,* note 70, p. 197, 198.

80 *More Data, More Problems*, op. cit. note 69, p. 1791, 1792.

a private company or a public institution or organisation) creates and stores the testator's will[81].

Although courts in some common law jurisdictions have decided on the validity of certain offline and online digital wills[82] and although there are already private companies offering services of creating and storing digital wills thus acting as custodians (although such companies always have the option of printing the will which is then sent to the testator so he or she can sign it in a proper procedure to satisfy legal conditions for its validity) only few jurisdictions have actually regulated the digital will and set conditions for its validity. Nevada Electronic Wills Statute from 2001[83] is certainly the most interesting for the analysis. It prescribes that the will can be drafted in *an electronic form* (not specifying the type of electronic record the will must be stored on) and it must contain *testator's signature* (in addition, the will must include at least one of *authentication characteristics* of the testator – this can be the digitized signature of the testator, retinal scan, fingerprint, etc.). Furthermore, there can only be *one authoritative copy* of testator's will which is original, unique, identifiable and unalterable and which is *controlled* by the testator or a custodian designated by the testator. Any and all attempts at its *alteration must be identifiable* and all copies *must be readily identifiable as copies*[84].

From these requirements it is immediately clear what was the main concern of the experts working on the statute – as the computer are *the perfect copying machine, every copy is a perfect copy, indistinguishable from the original* it is very hard to determine which file containing the will is the original unaltered file[85]. Any tampering with the will by a third party after the death of the testator must therefore be easy

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81 *Ibid.,* p. 1791, 1792.

82 Digital will in form of a note in *Evernote* application deemed valid under harmless error doctrine (State of Michigan) – see case *Estate of Horton – In re Estate of Horton*, Harvard Law Review, Vol. 132, No. 7, 2019, pp. 2082 – 2089; digital will in form of a word document deemed valid (State of New South Wales) – see case *Yazbek v Yazbek* – Klasiček, *op. cit.* note 4, p. 34, 35; digital will in form of a document stored on iPhone deemed valid (State of Queensland) – see case *Re: Yu* – Klasiček, *op. cit.* note 4, p. 37, 38; digital will in a document saved on a hard disc, accompanied by a handwritten statement that the electronic document represents last will of the deceased deemed valid (South Africa) – see case *MacDonald v. The Master* – Snail, S.; Hall, N., *Electronic Wills in South Africa*, Digital Evidence and Electronic Signature Law Review, Vol. 7, 2010, pp. 67 – 70; digital will signed by the testator by typing his name in a cursive font and then subsequently signed by witnesses deemed valid (State of Tennessee) – see case *Taylor v. Holt* – Boddery, S., *Electronic Wills: Drawing a Line in the Sand against Their Validity*, Real Property, Trust and Estate Law Journal, Vol. 47, No. 1, 2012, p. 202 – 203; a digital will in form of an unsent text message stored on a mobile phone deemed valid (State of Queensland) – see case *Nichol v. Nichol – More data, more problems*, p. 1806.

83 Nev. Rev. Stat. § 133.085.

84 Beyer; Hargrove, *op. cit.,* note 63, p. 887 – 889.

85 *Ibid*, p. 891. Sasso, *op. cit*., note 3, p. 174.

to detect. Even during testator's life, in case someone hacks testator's will and alters it, the testator could be oblivious to this for a long period of time – this is not a problem with the traditional forms of will in which copies and alterations to the original will are easier to identify and wills in material form can be kept by the testator in a safe or a similar place easily accessible to him or her[86].

Technology that could satisfy all of the above-mentioned criteria was not readily available to the general population; therefore, the legislation was virtually inapplicable at first after its introduction[87]. Only in 2009 did the State of Nevada establish a legal framework for establishing and maintaining the *Nevada Lockbox – an online registry that allows a person to post an electronic copy of a will (…) and retrieve that document when needed*[88]. Having to choose between making a complex legal act involving the use of biometric data retriever as well as entering in a relationship with a qualified custodian on one hand and making a simple handwritten will on the other hand clearly hinders the further development of the digital will in Nevada. Finally, although paper is a material also prone to degradation with the passing of time, media carrying electronic data are far less reliable[89]. Only cloud storage offers a relatively secure option for a long-term storage if servers are regularly maintained and replaced. However, due to extremely speedy advancement of technology, it is questionable whether the software in the future would support reading of files created 20, 30 or 40 years before, as even in the shorter time spans serious problems arise in reading files made with an out-dated versions of software. Despite of these difficulties, a number of US States have adopted statutes permitting some sort of digital will since[90] and some authors are even supporting their introduction in certain European states[91].

In conclusion, despite the widespread use of digital technologies and electronic devices, the introduction of a purely *digital* will would trigger more problems than benefits (as it is evident from the comparative perspective) and citizens who are able to form their testamentary disposition in digital form would rather opt for a traditional form of will. Therefore, it seems that the digital will shall reach affirmation in the future once the technological solutions exist that can eliminate the abovementioned problems. Having in mind the affirmation of technologies

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86 Also, there must be a way to determine when was will created and/or altered – this one of the main issues with wills in currently valid forms as well – see e.g. decision of County court in Rijeka – No. Gž-516/19.

87 See Boddery, *op. cit.,* note 82, p. 199 – 200.

88 *Ibid,* p. 200.

89 *See* Beyer; Hargrove, *op. cit.,* note 63, p. 894, 895.

90 For example Arizona, Florida and Indiana – see Horton; Weisbord, *op. cit.,* note 52, p. 26.

91 See Sasso, *op. cit.*, note 3, p. 191.

involving the use of biometric data, spread of personal encryption and authentication software (such as tokens) and increasing number of safe deposit services and services intended for communication of citizens with the government (such as the *e-građanin* in Croatia), this moment could be soon.

4.2.3. *Electronically certified will*

Finally, similarly to *remote witnessing,* there is a possibility of remote notary certification of the will – the entire testamentary process could be performed by the use of electronic devices, so that the testator and the public notary (or a court official) do not come into physical contact. This approach is often comparatively discussed[92] and, judging by some activities (see point 3.3 *supra*), it could soon appear in Croatia as well.

Current legal framework does not allow a notary to remotely certify a will and the provisions of the Inheritance Act foresee that the entire testamentary process in drafting of a public will happens in the presence of the public notary (or a court official). Therefore, the current legal framework would have to be adjusted for the introduction of remote notary certification of the will.

5. CONCLUSION – DO WE NEED A NEW TYPE OF WILL?

The use of electronic devices and digital technologies has entered almost every aspect of our everyday lives and the law is adapting to these circumstances. Inheritance law, as a more conservative branch of law, seems to resist these changes. An extraordinary set of circumstances, in the form of rapid spread of global pandemic, have intensified the discussion related to the introduction of new solutions that foresee the use of electronic devices and digital technologies in the process of testamentary disposition. The pandemics have not caused the total disruption of our everyday lives to such an extent that serious measures had to be introduced into civil law (and hence, there is still no urgent need to introduce such measures in inheritance law). However, some changes that would eventually occur have been expedited. One such change is a possible introduction of *remote notary certification*.

Another way to facilitate drafting of the will in the times of pandemics is to introduce *remote witnessing* option, however, such option would only be reserved for extraordinary circumstances due to its shortcomings[93] (possibility of mimicking

[92] See Sasso, *op. cit.*, note 3, p. 181 -184

[93] As pointed out *supra,* the UK also limited the validity of wills drafted with the use of remote witnessing to 2 year.

someone's appearance which leads to uncertainties related to identification of individuals and a limited possibility of assessing someone's mental capacity to draft a legal act). Remote witnessing cannot replace the actual spatial presence of witnesses foreseen by the current Croatian legal framework.

Another important aspect of introduction of digital technologies in the inheritance law is the introduction of a digital will. This seems unlikely to happen soon in Croatia, as well as in other EU countries[94], although tendencies to recognize the validity or regulate the digital will already appeared in certain common law jurisdictions. However, in the EU succession law, there is a tendency to establish a joint database for succession cases and wills. Initiative also calls for *digitisation* of existing wills drafted in accordance with the laws of Member states where the will was drafted. This could be a basis for the creation of an instrument such as the *European digital will*. Based on the data published by the European Commission[95], there are approximately 450.000 cross-border succession cases in the EU. In this context, such tools could greatly improve the smooth functioning of the internal market and cross-border succession procedure.

Digital holographic wills are the only types of digital will that currently could be recognized as valid in Croatia, although the question whether digitised handwriting satisfies the criteria for handwritten will is still comparatively heavily debated.

Some consider that a video recording of the last will could represent a valid alternative for a holographic will[96], however, such will would not be recognized as a will due to strict wording of the Inheritance Act.

In conclusion, it could be foreseen that changes to the inheritance law, in the form of introduction of digital technologies, are inevitable and are probably expedited due to COVID-19. However, having in mind the stability of inheritance law institutes, the changes would certainly not be dramatic, but incremental. Let us not forget that it took written will centuries to become the *regular* form of will and to replace the oral will, which is today still widely recognized (at least in its form of *extraordinary* will)[97].

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94 An initiative to include typed or digital holographic will in German law was unsuccessful – see Sasso, *op. cit.*, note 3, p. 178. There are also initiatives to modernize Polish, Swiss, Dutch and UK inheritance law – see Załucki, *op. cit.*, note 4, p. 10.

95 ICRW Expert Group, Recommendations on Electronic Will Registration and Data Exchange, p. 1.

96 Sasso, *op. cit.*, note 3, p. 189.

97 *Cf.* Beyer; Hargrove, *op. cit.,* note 63, p. 896.

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Topic 4

EU family law

UDK 341.981:347.6
347.6(497.7):341.981
Original scientific article

SPECIALIZATION OF JURISDICTION BACK FROM OBLIVION – A NEW ATTENTIVE AND ASSIDOUS APPROACH TO COMPLEX CROSS BORDER FAMILY LAW CASES OR POSSIBLE REVITALIZATION OF 'MUTUAL TRUST'

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ABSTRACT

New trend emerges in the quest for establishing real actual trust between the main stakeholders in the complex cross border family law cases, which is providing for concentration of jurisdiction. The Hague Conference of Private International Law (HCCH) and the European Union (EU) are in forefront of establishing concentrating jurisdiction for those proceedings based on limitation of the number of courts in order to solve two problems: to enhance the predictability and the uniformity of the outcomes in these cases and to re-establish the mutual trust on realistic grounds instead of its current notion as a political decision. Such strategy is welcomed since it starts from the bottom and it tends to elevate the trust between the persons concerned in these proceedings and with that it stretches its prerogatives to the top, which is to enhance the trust between the legal systems. Whether it will succeed it depends again on the modalities of its establishment in the national legal systems.

Generally, specialization of jurisdiction is frequently considered to be an important reform initiative in improving the development of a successful judicial system which is why it is recognized as a rapidly growing trend regarding the organization of the judiciary systems worldwide. The article will discuss the concepts of specialization of jurisdiction and its possible implementation in the national legal system of Republic of North Macedonia (N. Macedonia) regarding the complex cross border family law cases.

***Key words**: concentration of jurisdiction, cross border family law cases, judicial specialization, specialized courts and divisions.*

1. INTRODUCTORY REMARKS

Judicial specialization is frequently recognized as a key reform initiative in enhancing the development of a successful judicial system since it can play a significant role in improving the efficiency and quality of justice. Due to such perception, in recent years it is identified as a rapidly growing trend regarding the organization of the judiciary systems worldwide.

In general, the concept of specialization suggests division of work in number of different spheres, which should be entrusted to different institutions and actors who possess special skills or knowledge required to handle specific matters in each particular field that requires such expertise.[1] In the context of making the judicial organization compatible with the requirements of expertise, specialization is commonly considered as a tool to ensure that judges have the knowledge and skills required to do their job in a timely and correct manner.[2] In terms of specialization on the basis of the type of work they do, it is assumed that all adjudicators are specialized in judging.[3]

Judicial specialization can take different forms. In the legal theory there are different approaches in defining the forms of judicial specialization. For instance, distinctions are made between: 1. long-term and short-term specialization; 2. full-time and part-time specialization; 3. distinction regarding the extensiveness of the cases handled by the specialized court; and 4. specialization regarding criminal law.[4] On the other hand, judicial specialization can be classified in different organizational forms as well. In that regard, we can speak about jurisdictional specialization, as the most typical form of specialization which implies division of work between several branches of jurisdiction that have separate appellate instances and

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1 Uzelac A., *Mixed Blessing of Judicial Specialsation: The Devil is in the Detail*, Russian Law Journal, Vol. II, Issue 4, 2014, p. 148.

2 Mak E., *Balancing Territoriality and Functionality; Specialization as a Tool for Reforming Jurisdiction in the Netherlands, France and Germany*, International Journal for Court Administration, Vol. 1, Issue 2, October 2008, p. 1.

3 In general, all judges are specialized simply by doing the job of a judge. Baum L., *Judicial Specialization and the Adjudication of Immigration Cases,* 59(8) Duke Law Journal 1501, 2010, p. 1531.

4 Distinction between long-term and short-term specialization is made depending on whether the judges have permanent assignments to particular type of cases, or they are assigned to particular types of cases for specified or unspecified periods, moving from one subject matter to another over time. Full-time and part-time specialization refers to whether the judges focus on a single type of cases or move back and forth between a broad docket and a narrower one. The third distinction concerns the breadth of cases that a specialized court or a unit of that court hears and in that regard the extensiveness of a judge's specialized field. The specialization regarding criminal law implies that in this field, specialization is not based only on subject matter of the case, but also by defendant type. For further details, see Baum L., *Probing Effects of Judicial Specialization*, 58(7) Duke Law Journal 1667, 2009, p. 1673-1675.

form a separate pyramid of hierarchical institutions (specialization of court structures), and several other categories of specialisation, such as internal specialization, personal specialization and procedural specialization.[5]

Judicial specialization can be interpreted from different perspectives. Commonly, it is anticipated as specialization in terms of case type or type of disputes handled by the judge. In that regard, distinction is being made between "generalist" judges and "specialist" judges, those handling wide range of cases as opposed to those who hear narrow range of cases.[6] Subject matter specialization can be defined in terms of cases as well as judges. Specialization by judges concerns the extent to which judges focus on narrow sets of cases. That is the more common dimension. The other dimension of subject matter specialization is the concentration of cases, which concerns the extent to which a particular type of case is decided by a narrow set of judges.[7] Referring to the specialization in this context, the concept of concentration of cases as a particular form of specialization is defined as mechanism through which one or more courts in specific territories have exclusive competence to deal with certain categories of cases.[8] In that regard, the frequently mentioned notion of concentration of jurisdiction implies that within particular national jurisdiction, only certain court or limited number of courts are allocated to handle specific and distinct legal issues.[9]

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5 The internal specialization refers to division of labor in the particular court with distribution of the cases to "specialized" unit or division within the court made internally. Since the possibility of engagement of specialized judges may be provided within a "specialized" court but also within a separate division or unit within the "generalist" courts, the distribution of cases in the particular court, although invisible for the court users, will be done internally. The personal specialization is related to distribution of cases to single judges taking into account their different skills, approaches and competences. The procedural specialization appears when special procedures apply when dealing with "special" type of cases, i.e. when different methods are prescribed or regulated by law for handling different cases. See Uzelac, *op. cit.*, note 1, p. 148-149.

6 The Consultative Council of European Judges (CCJE), uses the term "specialist judge" to imply a judge who deals with limited areas of the law (e.g. criminal law, tax law, family law, economic and financial law, intellectual property law, competition law) or who deals with cases concerning particular factual situations in specific areas (e.g. those relating to social, economic or family law). Para 5 of the Opinion (2012) no. 15 of the CCJE on the Specialisation of Judges adopted at the 13th plenary meeting of the CCJE (Paris, 5-6 November 2012).

7 See Baum L., *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 Law & Society Review 823, 1977, p. 826-827.

8 Mak ,*op. cit.*, note 2, p. 2.

9 Concentration of cases within particular national jurisdiction can be achieved through different models. The basic organizational scheme can be shaped so that concentration of cases either falls within the jurisdiction of a court of higher level (appellate court); the jurisdiction of specialized courts; or within jurisdiction of one or several first instance courts. On models of concentration of jurisdiction in cross-border family matters see Župan M.; Poretti P., *Concentration of Jurisdiction in Cross-Border Fam-*

Regarding specialization through concentration, in recent years it can be noticed that reforms that are undertaken concerning the organization of the judiciary shift the focus to an organizational standard based on functionality rather than upholding to the traditional standard based on territoriality in order to make the judicial organization more compatible with the requirements of expertise. In that respect, the allocation of jurisdiction based on subject matter is being highlighted.[10]

2. *PRO ET CON* OF JUDICIAL SPECIALIZATION – IS SPECIALIZATION OF JUDGES PREFERABLE IN THE CONTEXT OF PROMOTING THE PROPER ADMINISTRATION OF JUSTICE?

It can be noticed that the extent and degree of judicial specialization increases over time due to the fact that the law is becoming more complex and specific in certain fields. When opting for certain reforms that will improve the organizational structure of judiciary in order to achieve a pleasing level of quality regarding the proper administration of justice, the policymakers typically recognize the concept of judicial specialization as desirable and attractive. Still, even though several desirable objectives can be achieved with its promotion, it shouldn't be *a priori* identified as something that always brings positive results. Along with the advantages, certain issues arise as drawbacks meaning that judicial specialisation in certain aspects can produce negative effects as well.[11]

The proponents of judicial specialization emphasize three main advantages of specialization of judges: 1. higher quality in decision making; 2. consistency and coherence of case law resulting in enhanced legal certainty; and 3. greater efficiency and improvement of case management of the court.

Generalist judges sometimes are referred to as novices at everything and experts to nothing.[12] In-depth knowledge and greater expertise in certain legal field is always

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ily Matters – Child Abduction Cases in Vinković M. (ed.), New Developments in EU Labour, equality and human rights law, Pravni fakultet Osjek, 2015, p. 344.

10 Mak, *op. cit*., note 2, p. 1.

11 If we look at the big picture, discussions over pluses and minuses of judicial specialization and the existing trend towards specialized judiciary in many national legal systems may imply that specialization of judges has more positive than negative effect on the functioning of the system of administration of justice. Yet, this postulation should be taken cautiously when reaching conclusions about the desirability of judicial specialization since there are limited information that exist on its impact. Few empirical studies in that regard have been carried so the empirical evidence on the impact of specialization is limited. Baum, *op. cit.,* note 4, p. 1680-1681.

12 Generalist judges work on a broad array of legal areas all typically but master none, thereby producing decisions that, because they do not reflect in-depth expertise, run the risk of being lower in quality.

desirable since it is likely to produce higher quality decisions especially in complex areas of the law. It is assumed that specialist judge with greater expertise in his specific field can have greater impact on enhancing the authority of the court as well.[13] The concentrated jurisdiction over certain type of cases along with the higher quality of decision making leads to enhancing the uniformity and consistency in applying the law in certain areas when the dispute settlement is in the competence of a specialist judge. That contributes to greater predictability and builds the public confidence in the court system.[14] Overall, greater uniformity always leads to promotion of legal certainty.[15] Finally, advanced expertise is probable to enhance the efficiency of the judiciary and attain better case management.[16] Specialist judge is expected to deal with cases more efficiently and more expeditiously due to the much greater frequency in adjudicating certain type of cases. Developing routines, the greater familiarity and versatility to its tasks leads to streamlined operations and more efficient processing of cases. By repeating similar tasks, the specialist judge is likely to develop expertise to adjudicate disputes in more efficient and timely manner.[17] Regarding the case management, judicial specialization is considered as a factor for fostering efficiency in allocation of cases since diverting a certain type of cases to specialized court divisions or specialized courts can increase the overall efficiency of the justice system, especially when the courts of general jurisdiction are overburdened by growing caseloads.[18]

Although, the value of judicial specialization *per se* is not being questioned since it is certain that it can produce positive effects in terms of achieving greater efficiency of the processing of cases, there are certain issues indicating that specialization itself can have potential drawbacks that can produce negative impact on the proper administration of justice.

In its Opinion (2012) no. 15, the CCJE asserts a relatively long list of potential risks of judicial specialization. The following issues are being identified as pos-

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Zimmer M., *Overview of Specialized Courts*, International Journal for Court Administration, August 2009, Vol. 2, Issue 1, p. 2.

13 Para 9 of the Opinion (2012) no. 15 of the CCJE on the Specialisation of Judges adopted at the 13th plenary meeting of the CCJE (Paris, 5-6 November 2012).

14 See Gramckow H.; Walsh B., *Developing Specialized Court Services, International Experiences and Lessons Learned,* Justice and Development Working Paper Series, World Bank, 2013, p. 6.

15 Para 10 of the Opinion (2012) no. 15 of the CCJE on the Specialisation of Judges adopted at the 13th plenary meeting of the CCJE (Paris, 5-6 November 2012).

16 Para 13 of the Opinion (2012) no. 15 of the CCJE on the Specialisation of Judges adopted at the 13th plenary meeting of the CCJE (Paris, 5-6 November 2012).

17 See Zimmer, *op. cit.,* note 12, p. 1, Gramckow; Walsh, *op. cit.*, note 14, p. 6, Baum, *op. cit.*, note 4, p. 1676.

18 Silvestri E., *Judicial Specialization: In Search of the 'Right' Judge for Each Case*, Russian Law Journal, Vol. II, Issue 4, 014, p. 168.

sible minuses: 1. possible separation of specialist judges from the general body of judges; 2. impeding the evolution of case law since specialist judges might tend to reproduce previous decisions; 3. compartmentalisation of law and procedure which could weaken the principle of legal certainty; 4. undermining necessary versatility of judicial work; 5. risk to the unity of the judiciary since the specialist judges can get the impression that they are some kind of elite, which can negatively affect the public confidence in generalist judges; 6. potential exposure of judges to increased pressure from parties, interest groups and state authorities; 7. risk of excessive proximity between judges, lawyers and prosecutors due to frequent formal or informal contacts; 8. potential inequalities in access to justice due to concentration of jurisdiction on one or several courts which can also create excessive distance between the judge and the litigant; 9. potential violation of the right to be heard since the specialist judge may tend to consult or advise his colleagues from the bench without presenting the matters to the parties; and 10. risk of inequality among courts and judges regarding material and human resources.[19]

Also, the inability of the judge to see the 'big picture' could also be listed as drawback among the other issues. Namely, if the focus is set predominantly on a certain specific and narrow field, it is expected that the judge will develop a narrow or even one-sided view of issues that will sometimes compromise the quality of decisions since he would be unable to incorporate his expertise into the larger framework that needs to be taken into account for an optimal solution. His decision might be flawless in respect of the area of law he is specialized with, but flawed in terms of broader settings of the case in regard to different areas that are beyond his own specialty but are relevant for reaching a rightful decision.[20]

One of the biggest concerns of the potential risks of judicial specialization seems to be its possible interference with the classic values of impartiality and independence of the judge. The specialist judge must meet the requirements of impartiality and independence as his generalist peer. The 'randomness principle' in allocating cases among generalist judges who are supposed to be equally qualified to hear and decide particular case, so it is irrelevant which judges does so, seems to enhance the public confidence in the impartial administration of justice. Random allocation of cases rather than by reference to judicial expertise or preference is always perceived as an ally of the principle of judicial impartiality.[21]

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19 Para 14 – 23 of the Opinion (2012) no. 15 of the CCJE on the Specialisation of Judges adopted at the 13th plenary meeting of the CCJE (Paris, 5-6 November 2012).

20 Silvestri, *op. cit.*, note 18, p. 168.

21 Mack K.; Roach Anleu S.; Wallace A., *Caseload Allocation and Special Judicial Skills: Finding the 'Right' Judge?*, International Journal for Court Administration, Vol. 4, Issue 3, December 2012, p. 1.

The key question that arises from the analysis of the *pro et con* of judicial specialization is whether the specialization of judges appears to be preferable in the context of promoting the proper administration of justice. Studies that have been carried out to identify the impact of specialization show that specialization can enhance the efficiency of procedure and quality and timeliness of decision-making. Still, the potential drawbacks must be taken into serious consideration regarding the overall impact of specialization on the functioning of the system of administration of justice. In that regard, the CCJE stresses out that judicial specialization is justified only if it promotes the administration of justice, i.e. if it proves preferable in order to ensure the quality of proceedings and decisions.[22] It is certain that specific level of in depth knowledge and expertise is preferable in areas of law that are considered as time-consuming, problematic and complex. Still, all judges, regardless if they are considered as generalist or specialist must be experts in the art of judging, must meet the requirements of independence and impartiality and must be of equal status.[23]

Other question that also draws attention is in which areas of law the judicial specialization is considered as most desirable and justified. How do we recognize what is a complex legal and factual setting that needs an extra expertise in order to reach a quality decision? Which criteria should we use to differentiate 'ordinary' cases from 'complicated' ones, the ones that are considered to be better handled by a specialist judge? This issues endure especially given the fact that the area of civil law covers matters that are usually specific and ask a certain level of expertise. The strict adherence towards judicial specialisation brings the risk of unnecessary multiplication of number of specialized courts although there is no rationale for such thing.[24]

3. REVITALIZATION OF "MUTUAL TRUST'

Mutual trust stands in the center of the whole EU legal system and it is the basis upon which all of its modalities are functioning.[25] This position of mutual trust has been acknowledged by the CJEU in Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights where it was stated that the principle of mutual trust is at the heart of the EU and a "fundamental premise" of the Eu-

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22 Para 38 of the Opinion (2012) no. 15 of the CCJE on the Specialisation of Judges adopted at the 13th plenary meeting of the CCJE (Paris, 5-6 November 2012).

23 Conclusions of the Opinion (2012) no. 15 of the CCJE on the Specialisation of Judges adopted at the 13th plenary meeting of the CCJE (Paris, 5-6 November 2012).

24 See also Silvestri, *op. cit.*, note 18, p. 167.

25 European Commission, Press Release 'Building Trust in Justice Systems in Europe: 'Assises de la Justice' Forum to Shape the Future of EU Justice Policy', 21 November 2013.

ropean legal structure.[26] The European Commission has stated that 'mutual trust is cornerstone of judicial co-operation in the EU'.[27] Even the European Court of Human Rights (ECtHR) has reassured this position where it is stated that the Brussels regime in the EU 'is based on the principle of 'mutual trust in the administration of justice' in the European Union'.[28] Recognition and enforcement of foreign decisions in the EU represents one of the legal areas where the principle of 'mutual trust' is very important and in these filed the principle of "mutual trust" is manifested through the principle of 'mutual recognition'. This idea is not something new, since it was present in the very first EU cross-border recognition and enforcement instruments where it was considered that exequatur should be based on the principle of mutual 'confidence'.[29] From this point, "mutual confidence" as principle has evolved as the 'principle of mutual trust' which is precondition for mutual recondition in the single market.[30] In this modality, the principle of "mutual trust" is acknowledged as the basis for the functioning of the EU and regarding recognition and enforcement of foreign judicial decisions it has been manifested as mutual recognition..[31]

The central component of the free circulation of judgments in the EU is the 'mutual recognition'.[32] Often "mutual trust" and "mutual recognition" are considered to be synonyms, however this assumption is neither correct, nor precise. Mutual recognition of judgments is a goal, an objective,[33] while the principle of mutual recognition is a legal principle of EU law[34] and a fundamental principle in judicial cooperation in civil and criminal matters.[35] In essence mutual trust contains an obligation of all the authorities of a Member State to trust the authorities of the other Member State

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26 See Opinion 2/13, ECLI:EU:C:2014:2454, para.168 and 169.

27 European Commission, Press Release 'Towards a true European area of Justice: Strengthening trust, mobility and growth', 11 March 2014.

28 Avotiņš v Latvia, app. no. 17502/07, para. 49.

29 Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968) by Mr P. Jenard, Official Journal of the European Communities No. C 59/1, p. 46-47.

30 Completing the Internal Market, White Paper from the Commission of the European Communities to the European Council, COM (85) 310 final, Brussels, 14.06.1985, para.93.

31 Wischmeyer, T., *Generating Trust Through Law? – Judicial Cooperation in the European Union and the 'Principle of Mutual Trust'*, 17 German L. J., 2016 p. 351.

32 Mutual recognition plays important role also in other EU legal fields, see Kramer, X., *Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure*, International Journal of Procedural Law, 2011, p. 209.

33 Arenas García R., *Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgments: Too Many Words in the Sea*, Yearbook of Private International Law, 2010, p. 362.

34 C-120/79 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1980] ECR 00731.

35 Kramer, *op. cit.,* note 32, p. 209.

and therefore to assume their decisions[36] and with that it builds a true European judicial area.[37] As a consequence mutual trust is a factual and political ground for the implementation of mutual recognition which leads to directly proportional nexus: when mutual trust exists, mutual recognition should be improved.[38]

Free circulation of judgments within the EU it was implemented for the first time in the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIbis Regulation)[39] for certain cases of child abduction and access rights. Similar tendencies are followed in several other EU instruments such as Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation Brussels Ibis) and Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Regulation 1111/2019)[40]. The construct of the idea of free circulation of judgments is based upon 'mutual trust' and 'mutual recognition'. Theoretically, increased 'trust' between the Member States lowers the need for the 'control' in essence exequatur represents. The directly proportional formula stands: 'mutual trust' improves the procedures for recognition and enforcement. However, 'trust' as it was defined by Luhmann[41] requires direct assurance (confidence in one's own expectation) that the other person behaves accordingly (actual trust). In terms of the mutual trust in the EU, this represents imposed 'trust', a political decision that Member States can have confidence in the political assessment of the EU institutions that other Member States' behaviors are satisfying expectations. As such, mutual trust in terms of EU is 'indirect trust' gained through the assessment of the EU institutions. This can produce undesired effects of circumvention of the application of the Brussels IIbis Regulation regarding 'mutual recognition'.[42]

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36 Arenas García, *op.cit.* note 33, p. 375.

37 European Council, 'The Stockholm Programme - An open and secure Europe serving and protecting the citizens' (Official Journal of the European Union, C 115 2010) 11.

38 Arenas García, *op.cit.* note 33, p. 362.

39 OJ L 338, 23.12.2003, p. 1–29.

40 OJ L 178, 2.7.2019, p. 1–115.

41 Luhmann N., *Vertrauen*, Frankfurt, 4th ed, 2000, p.1, (translated by Weller, M., *Mutual Trust: In Search of the Future of European Private International Law,* Journal of Private International Law, Issue 1, 2015, p. 68.

42 For more on the effectiveness of "mutual trust" see Misoski, B., Rumenov, I.. *The Effectiveness of Mutual Trust in Civil and Criminal Law in the EU*, EU and Comparative Law Issues and Challenges Series

Therefore, in view of enforcement of judicial decisions in the EU, a question of balance between the 'trust and 'control' stands. The EU regarding the abolition of exequatur in Brussels Ibis Regulation, made a certain compromise, by keeping the control but in a later stage. 'Control' was taken in the form that the *ex ante* control by the state now is transformed to *ex post* control initiated by the parties. So the abolition of the exequatur in the Brussels regime represents moving the coordination to a later stage of the implementation of recognition and enforcement.[43]

In context to the importance of the 'mutual trust' regarding the family law matters with cross-border implications, the Regulation 1111/2019 unambiguously highlighted that the EU has set an objective of creating, maintaining and developing an area of freedom, security and justice, in which the free movement of persons and access to justice are ensured[44] and in that manner the rights of persons, in particular children, in legal procedures should be reinforced in order to facilitate the cooperation of judicial and administrative authorities and the enforcement of decisions in family law matters with cross-border implications.[45] This is particularly important because of the smooth and correct functioning of a EU area of justice with respect for the Member States' different legal systems and traditions. In the background of these processes is the 'mutual trust' manifested through three basic principles: enhanced 'mutual recognition' of civil decisions, simplified access to justice and improved exchanges of information between the authorities of the Member States.[46] This means that for the Member States to institutionally and legally effectuate the 'mutual trust' the authorities should communicate directly building trust among themselves, provide for procedures that facilitate the access to justice and keep the grounds for non-recognition to the minimum in the light of the underlying aim of the Regulation which is to facilitate recognition and enforcement and to effectively protect the best interests of the child.[47] In comparison with its predecessor, the Regulation 2201/2003, the new recast goes into more details, effectuating the three principles upon which 'mutual trust' should be achieved. For example, direct Court communication in the Regulation 2201/2003 was mentioned only in relation with communication between the Courts when issuing a non-return order (Article 11(6)) and the Article 15 (Transfer to a court better placed to hear the case) while in the Regulation 1111/2019

(ECLIC), Vol. 1, 2018, pp.364–390.

43 See Section 3 of the Brussels Ibis Regulation. On the practical application of the Brussels Ibis Regulation see, Kramer X., et others, *The application of Brussels I (Recast) in the legal practice of EU Member States Synthesis Report*, Asser Institute and Erasmus University Rotterdam, 2016, p. 1-56.

44 Recital (3) of the Regulation 1111/2019.

45 *Ibid.*

46 *Ibid.*

47 Recital (55) of the Regulation 1111/2019.

it is general rule that the courts can cooperate and communicate directly with, or request information directly from, each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.[48]

4. SPECIALIZATION OF JURISDICTION AS A MODALITY FOR IMPROVEMENT OF "MUTUAL TRUST"

One of the examples for the Member States how to abide the propositions for enhancing 'mutual trust' regarding the cross-border family law relations, determined in the Regulation 1111/2019 is the modality of the specialization of the jurisdiction, provided in the form of concentration of jurisdiction.[49] This idea of providing for specialization of jurisdiction in the judicial cooperation in civil matters in the EU is not a novelty, but it has been gradually developed in accordance with the EU legal sources and the jurisprudence of the CJEU. The quest of finding balance between territoriality and functionality principles in the EU has not been exclusive only for family law matters[50] and expands to other legal fields such as maintenance relations,[51] consumer contracts[52] and regarding European Account Preservation Order (EAPO).[53] The rationale for this approach is that although the Brussels jurisdictional regime and the regimes under the other Regulations provide for compete and closed set of jurisdiction rules, designed to grant jurisdiction to the court best qualified to ensure respect for the best interest of the child and/or sound administration of justice,[54] in certain situations the traditional rules of

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48 See in comparison Article 55 and 56 of the Regulation 2201/2003 and Article 86 of the Regulation 1111/2019.

49 Recital (41) of the Regulation 1111/2019.

50 C-498/14 PPU David Bradbrooke v Anna Aleksandrowicz, ECLI:EU:C:2015:3.

51 Joined Cases C-400/13 and C-408/13, Sophia Marie Nicole Sanders, represented by Ms Marianne Sanders, v. David Verhaegen (C-400/13), and Barbara Huber v. Manfred Huber (C-408/13), ECLI:EU:C:2014:2461.

52 Case C-498/16, Maximilian Schrems v. Facebook Ireland Limited, ECLI:EU:C:2018:37.

53 For more on the reforms regarding the specialization of jurisdiction in cases concerning EAPO see the Finnish, Austrian, Slovakian and the newest Czech experience. Carlos Santaló Goris, *A centralized court for the EAPO Regulation in the Czech Republic?* conflictoflaws.net [https://conflictoflaws.net/2021/a-centralized-court-for-the-eapo-regulation-in-the-czech-republic] Accessed 18 April 2021.

54 Recital (12-13) of the Brussels IIbis Regulation, Recital (15) of the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, p. 1–79 (Maintenance Regulation) and Recital (16) of the Brussels I Regulation.

jurisdiction can be abandoned and rules on concertation of jurisdiction can be integrated in order to facilitate access to justice.[55]

The categorization of the EU legal instruments provides for more specific overview of the principles according to which the specialization can be achieved and the modalities that can be applied, based on their protective aim and purpose: first group of EU legal instruments that relate to private international law and civil procedure in the field of cross-border civil and commercial matters which provide protection of economic interest of the parties, and second group of EU legal instruments in the field of cross-border family law matters whose specific nature requires special social protection.[56] Both of these groups are basing their possible specialization on different aims: the first group aiming to achieve more cost-effective proceedings and enhance legal certainty, while the latter group intending to enable specialized courts to have greater expertise to conduct the proceedings especially those involving children and minors.[57]

The situation with the Regulation 1111/2019 in correlation with the specialization of jurisdiction is particularly interesting. Concentrated jurisdiction is not provided in the operative part of the Regulation, rather it is proposed as a suggestion or principle which should improve access to justice especially in the cases that relate to the mixed child abduction regime established by the Regulation 1111/2019 and the 1980 Hague Convention of on the Civil Aspects of International Child Abduction.[58] The Regulation 1111/2019 adds another factor that goes in line of the general aims of the concentration of jurisdiction, that is the enhancement of the effectiveness of the procedure and the promptness of all of the measures taken by the relevant authorities in situations of wrongful removal or retention. Also such reasoning has been developed and affirmed by the CJEU in regard to maintenance relations, where in case C-400/13, the CJEU stated that:

> "…a centralization of jurisdiction, such as that at issue in the main proceedings, promotes the development of specific expertise, of such a kind as to improve the effectiveness of recovery of maintenance claims, while ensuring the proper administration of justice and serving the interests of the parties to the dispute."[59]

In Regulation 1111/2019 this reasoning was explicitly explained that:

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55 Župan, M.; Poretti, P. *Concentration of Jurisdiction – Is Functionality of Judiciary Becoming an Obstacle to Access to Justice?*, EU and comparative law issues and challenges series (ECLIC), Vol. 3, 2019, p. 320.

56 *Ibid*.

57 *Ibid*.

58 Internal organization of the judiciary is not in domain of the EU competences nor its regulatory activity. See, Župan; Poretti, *op.cit.,* note 9, p. 357.

59 C-400/13, Sanders and Huber, 18 December 2014, ECLI:EU:C:2014:2461, para. 45.

> "In order to conclude the return proceedings under the 1980 Hague Convention as quickly as possible, Member States should, in coherence with their national court structure, consider concentrating jurisdiction for those proceedings upon as limited a number of courts as possible. Jurisdiction for child abduction cases could be concentrated in one single court for the whole country or in a limited number of courts, using, for example, the number of appellate courts as point of departure and concentrating jurisdiction for international child abduction cases upon one court of first instance within each district of a court of appeal."

Child abduction cases represent prototype for concentration of jurisdiction[60] because of two factors: first, the judge should adjudicate very promptly in the proposed timeframe within 6 weeks[61] and secondly for the judge to be able to take all of the measures provided in the 1980 Hague Convention certain knowledge and expertise is necessary.[62] In the EU, this complex and particularly delicate procedure for the return of the wrongfully removed or retained children is further complicated with the interplay between the Regulation 1111/2019 and the 1980 Hague Convention.[63] Such position directly refers to the issue of mutual trust and mutual recognition, because of the possibility of reevaluation of the decisions by the Court of the habitual residence of the child with a goal that this court should be the final arbitrator of the child's future.[64] Additionally, this system is positioned in a way not to encroach upon the parties' procedural rights or interests by discouraging the abducting parent from challenging a non-return order in the Member State where the child is actually present and that the left-behind parent will normally be the best placed to present his or her arguments before the courts of the Member State of habitual residence.[65] Such structure is based on the mutual recognition principle, where the custody decisions (containing a return of the child), which fulfill the necessary conditions and are in the proper form, can be certified and can be directly enforceable in all Member States without formal application for recognition and without any possibility of recognition being

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60 Župan; Poretti, *op.cit.*, note 9, p. 346.

61 Article 11 of the 1980 Hague Convention.

62 Župan; Poretti, *op.cit.*, note 9, p. 346.

63 Article 96 of the Regulation 1111/2019 "Where a child has been wrongfully removed to, or is being wrongfully retained in, a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, the provisions of the 1980 Hague Convention shall continue to apply as complemented by the provisions of Chapters III and VI of this Regulation. Where a decision ordering the return of the child pursuant to the 1980 Hague Convention which was given in a Member State has to be recognized and enforced in another Member State following a further wrongful removal or retention of the child, Chapter IV shall apply".

64 McEleavy P., *The new child abduction regime in the European Union: Symbiotic relationship or forced partnership?* Journal of Private International Law, Issue 17, 2005, p. 34.

65 Case C-195/08 PPU *Inga Rinau* [2008] ECR I-05271 Opinion of AG Sharpston delivered on 1 July 2008 para 80.

refused.[66] A removal of a child to another Member State has therefore no effect on the decision of the court of origin.[67] The final decision on the child wellbeing is positioned at the Court in the Member State where the child was habitually resident immediately before the wrongful removal or retention and this Court has already been seized of proceedings to examine the substance of rights of custody, or within three months of the notification of a decision for non-return of the child based on Articles 13(1)(b) and 13(2) of the 1980 Hague Convention, one of the parties seizes a court in the Member State where the child was habitually resident immediately before the wrongful removal or retention in order for the court to examine the substance of rights of custody.[68]

The system which was established with the Brussels IIbis Regulation and the position of the abolishment of the exequatur represented manifestation of the concept of 'mutual recognition' and reflected the integration and the trust that exists in the European Judicial Area.[69] There are two main justifications for this policy: the economical and the political.[70] In the first case, the abolition of the exequatur increases the economic welfare of the European economic actors and citizens.[71] In the second case, 'mutual recognition' exists to ensure that judgments circulate freely within the European Union.[72] For civil and commercial aspects, the fulfillment of these goals brings certainty and efficiency.[73] Such rationales in the cases of child abduction are problematic. Firstly, the timeframe for return of the wrongfully removed and retained children to their habitual residence is very narrow. This mechanism is centered around the premise that the Courts and the Central Authorities cooperate among themselves. In complex situations as child abduction cases are, there are multiple legal acts that need to be taken into consideration

66 Article 29(6) of the Regulation 1111/2019.

67 See, Article 29(6) of the Regulation 1111/2019 in conjunction with Chapter IV Section 2 regarding recognition and enforcement of certain privileged decisions.

68 Article 29(3) and Article 29(5) of the Regulation 1111/2019. However, Regulation 1111/2019 provides for possibility of refusing the recognition and enforcement of decisions issued in accordance with Article 29(6) of the Regulation 1111/2019, on the grounds that decision shall be refused if and to the extent that it is irreconcilable with a later decision relating to parental responsibility concerning the same child which was given: (a) in the Member State in which recognition is invoked; or (b) in another Member State or in the non-Member State of the habitual residence of the child provided that the later decision fulfils the conditions necessary for its recognition in the Member State in which the recognition is invoked (Article 50 of the Regulation 1111/2019).

69 McEleavy, *op.cit.,* note 64, p. 32.

70 Cuniberti G.; Rueda I., *Abolition of Exequatur. Addressing the Commission's Concerns*, Rabels Zeitschrift, 2011, p. 286-316 (31).

71 *Ibid.* p. 291.

72 *Ibid*.

73 McEleavy, *op.cit.,* note 64, p. 32.

– Brussels IIbis Regulation, 1980 Hague Convention and the vast number of case law surrounding these legal sources. This certainly provides problems in the proper application of provisions in such short timeframe.

So for these problems, the concentration of jurisdiction does not represent the "magic potion" that solves all of the above described problems. Regulation 1111/2019 tries to provide for one certain step into the right direction, by very carefully suggesting solution for building actual trust in the cases of the child abduction because the internal organization of the judiciary is not in domain of the EU competences nor its regulatory activity.[74] However, the experience with the implementation of the 1980 Hague Child Abduction Convention has shown that specialized jurisdiction has indeed improved its application and is in line with the more expeditious procedure required for the return of the wrongfully removed or retained children.[75] Bulgaria has conducted a double concentration – first to a single court (Sofia Regional Court) and second to a specialized section of the court (family law section) which has proven successful.[76] Germany has boosted the promptness of the procedure on 43% of the return application resolved in the six week timeframe when implemented the concentration of the jurisdiction from 620 family courts to only 24 family courts.[77] Finally the example of Netherlands shows that the concentration of the jurisdiction form 19 District Courts to one District Court in the Hague, reduced the length of the procedure from 18 months to a period of six weeks or less.[78] Such effects of the reduction of the delay in the proceedings, provides for better use of the resources for training and implementation of mediation in these cases,[79] which provides for greater expertise and builds actual trust which is essential in the development of "mutual trust" between the relevant authorities. .

5. MACEDONIAN PERSPECTIVE ON JUDICIAL SPECIALIZATION

There is no unified or universal approach that can be followed in organizing the judiciary when specialization is set as a key principle. Also, there is no international standard that strictly proposes or disapproves the notion of judicial special-

74 Župan; Poretti, *op.cit.*, note 9, p. 357.

75 Lee Ho, K., *The Need for Concentrated Jurisdiction in Handling Parental Child Abduction Cases in the United States*, Santa Clara Journal of International Law, Vol.14, Issue 2, 2016, p. 614.

76 Lee Ho, *op.cit.,* note 75, p. 609.

77 *Ibid*.

78 *Ibid.*

79 *Ibid.*

ization or the method how such specialization should be implemented. Since the judicial specialization can be interpreted from different perspectives, the specific local circumstances and the particular needs of the system of administration of justice play a key role in that regard. Due to the fact that judicial specialization can take various forms, its implementation in the judicial system can be carried out through different models: 1. establishment of separate specialized courts; 2. formation of separate specialized divisions in the court of general jurisdiction; and 3. specializing judges in certain area of law to process cases that require particular expertise that a court may occasionally receive.[80]

The organization of the Macedonian judiciary is regulated by the Law on Courts.[81] According to its provisions, our judicial system accepts the division of jurisdiction between courts of general jurisdiction and specialized courts, although these terms are not explicitly used in the Law. The concept of specialized courts is limited to the establishment of separate administrative courts. The Law on Courts explicitly states that principally the work in the courts is performed in specialized court divisions. The specialized court divisions are established depending on the type and scope of work in the court, particularly in the area of criminal law, juvenile delinquency, civil law, commercial law, labour disputes and for other types of disputes that fall within the competence of the court.[82] As for the specialization of judges, it is carried out within the specialized court divisions. As a general rule, the judge is elected to adjudicate in certain respective areas of law. The allocation of judges in certain court divisions is performed through the annual work schedule determined by the president of the court upon previously obtained opinion from the session of judges, i.e. the general session of the Supreme Court of N. Macedonia taking into account the determination of the judge for specialization in criminal, civil, commercial, administrative and other legal field. The judge may not be transferred from one court division to another without his/her consent.[83]

Given the aforementioned provisions, it follows that all the matters that fall within the scope of civil justice are adjudicated by courts of general jurisdiction.[84] Re-

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80 For further details on the models of specialization see Gramckow; Walsh, *op. cit.*, note 14, p. 10-12.

81 In the judicial system, judicial power is exercised by the primary courts, the appellate courts, the Administrative Court, the Higher Administrative Court and the Supreme Court of the Republic of Macedonia (Art. 22 of Law on Courts, Official Gazette of RM No. 58/06, 62/06, 35/08, 150/10, 83/18, 198/18 and Official Gazette of RNM No. 96/19).

82 A special court division is established in the court if more than five judges adjudicate that particular type of cases (Art. 66 para. 3 of the Court Rules).

83 See Art. 12 and Art. 39 of Law on Courts.

84 Regarding the primary courts, they are established for one or more municipalities. There are a total of 27 primary courts in N. Macedonia. *Competentia ratione materiae* of the primary courts is determined by the rules of general legal delegation. The primary courts are established as courts with basic

garding judicial specialization in the sphere of adjudicating civil and commercial matters, the judiciary is organized by accepting the model of establishment of specialized court divisions.[85]

If we make a retrospective of the organization of Macedonian judiciary in terms of specialization regarding adjudication in civil and commercial matters, it can be noticed that the current approach with the sole acceptance of the model of specialized court divisions wasn't always the case and that Macedonia had a relatively long tradition of existence of specialized courts. Namely, for almost fifty years, firstly as a republic in the federal system of Yugoslavia and afterwards as an independent country, Macedonia was familiar with the model of specialized courts regarding adjudication in commercial disputes. The establishment of commercial courts was part of the judicial reform carried out in 1954. Until 1954 the adjudication of commercial disputes was in the competence of the state arbitration. Commercial courts were established as regular courts that had jurisdiction to adjudicate certain types of disputes and perform other tasks within the competence of the regular courts that require specific (specialized) expertise of judges and other judicial stuff. Regarding its structure, they were organized in two stages, as district commercial courts and the Commercial court of Macedonia.[86] Commercial courts were abolished with the Law on Courts from 1995.[87] Although the exact reasons for its abolishment remains unclear, it is assumed that the main impetus for such reform step was the rationalization of the organization of the judiciary and concentration and allocation of human, financial and materiel resources in the courts of general jurisdiction. Given the fact that the organization of first instance courts of general

jurisdiction and courts with extended jurisdiction. Within primary courts with extended jurisdiction, establishment of specialized court divisions that will adjudicate certain types of cases is obligatory. It should be noted that although all the primary courts are established as courts of general jurisdiction, the Law on Courts established a different *ratione materiae* jurisdiction of the primary courts for the area of Skopje as the capital city. Namely, the two primary courts that are situated in Skopje are organized as 'specialized' courts with complete separation of jurisdiction in criminal and civil matters. Previously known as Primary Court Skopje 1 and Primary Court Skopje 2, the primary courts in Skopje are now renamed as Primary Criminal Court Skopje and Primary Civil Court Skopje.

85 For example, in the Primary Civil Court Skopje the organization of the separate special divisions is as follows: according to the annual work schedule of the Court, the judges are deployed in four divisions: 1. division for property disputes, family disputes and small claims disputes; 2. division for labor disputes; 3. division for non-contentious civil procedure and probate procedure; and 4. division for commercial disputes, bankruptcy and liquidation.

86 For the territory of Macedonia, there were three district commercial courts. For further details, see Georgievski S., Marina P. Matovski N., *Judiciary System of SFRJ*, 1983, p. 105 *et seq*, Georgievski S., *Judiciary in Republic of Macedonia*, Yearbook of the Faculty of Law in Skopje, Vol. XXXIV, 1990/1991, p. 43-46.

87 According to the Law on Courts from 1995, the commercial courts ceased to operate on July 30, 1996. See Art. 111 of Law on Courts 1995 (Official Gazette of RM No. 36/95, 45/95, 64/2003).

jurisdiction was structured through the principle of general legal delegation, with establishment of specialized court divisions for certain areas of law, it was expected that such judicial organization would fulfil the requirements of efficient, professional and competent judiciary.[88]

5.1. Specialization of jurisdiction regarding child abduction cases in N. Macedonia

The child abduction cases represent very delicate and important cases because of the irreversible harm that can be conducted upon the wrongfully removed or retained children which are unilaterally relocated from their familiar environment and displaced in different place from their habitual residence. Usually, these cases are resolved before a judicial authority,[89] but the 1980 Hague Convention refers directly to both procedures,[90] administrative and judicial, thus leaving to the contracting party to determine the type of procedure that will apply regarding these type of cases. The procedure for the return of the wrongful removed or retained children in accordance to the 1980 Hague Convention in N. Macedonia is envisaged as administrative procedure.[91] The Centre for Social Work is the authority which decides about the return of abducted children, while the Central Authority

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88 It was assumed that within the system of courts of general jurisdiction there are organizational and functional possibilities for rational use of the professional potential of the courts, as well as previous professional experience. In simple terms, the concentration of jurisdiction in first instance courts of general jurisdiction was seen as a factor of quality, rationality and economy in the adjudication process. It was considered that the acceptance of the concept of general court system without the existence of specialized courts will establish the judiciary as an extraordinarily clear and productive organization without dissipating of the competencies of different courts and their interference. See Dimiškovski D., *On Macedonian Judiciary (1995-2000)*, Skopje, 2003.

89 Lee Ho, *op.cit.*, note 75, p. 609; Duraković A.; Meškić Z., *Operation of the Hague Child Abduction Convention in Bosnia and Herzegovina,* in Župan, M., (ed.), Private International Law in the Jurisprudence of European Courts - Family at Focus, Pravni fakultet Osjek, 2015, p. 213; Župan M.; Hoško T., *Operation of the Hague Child Abduction Convention in Croatia,* in Župan, M. (ed.), Private International Law in the Jurisprudence of European Courts - Family at Focus, Pravni fakultet Osjek, 2015, p. 227; Kostić-Mandić M., *Country Report on Application of the Hague Child Abduction Convention – Montenegro*, in Župan, M. (ed.), Private International Law in the Jurisprudence of European Courts - Family at Focus, Pravni fakultet Osjek, 2015, p. 253; Marjanović S., *Some Open Issues in the Application of the 1980 Hague Child Abduction Convention in the Republic of Serbia,* in Župan, M. (ed.), Private International Law in the Jurisprudence of European Courts - Family at Focus, Pravni fakultet Osjek, 2015; Kraljić S., *Operation of the Hague Child Abduction Convention in Slovenia,* in Župan, M. (ed.), Private International Law in the Jurisprudence of European Courts - Family at Focus, Pravni fakultet Osjek, 2015, p. 279.

90 See for example, Articles 11-18 of the 1980 Hague Convention.

91 Rumenov I., *Application of the Hague Child Abduction Convention in Macedonia*, in Župan, M. (ed.), Private International Law in the Jurisprudence of European Courts - Family at Focus, Pravni fakultet Osjek, 2015, p. 247.

is seated within the Ministry of Labour and Social Policy of the Republic of N. Macedonia.[92] The communication between the relevant authorities in the Republic of N. Macedonia is conducted promptly, however, they have not been able to abide the timeframes of the HC 1980.[93] The length of the procedure is between six and twelve weeks, although in some cases it can be longer than that. In addition, there is no concentrated jurisdiction. All of the 29 Community Centres for Social Work can decide on a return order. They are coordinated by 16 Intercommunity Centres for Social Work. The procedure is administrative and the administrative authorities directly apply the HC 1980.[94] In some situations, when the outcome was predictable, the parents would often come to an agreement about the return. In these situations, the Central Authority and administrative authority did not receive information whether the child was returned or not, so these cases are unaccounted. Another concerning circumstance is when, in the finishing stages of a return procedure, rather than issuing a (non-)return order, the relevant authorities and the Central Authority would simply inform the other central authority via e-mail that the child would not be returned to the place of his/her habitual residence.[95] In light of the mentioned circumstances, the statistical data regarding the child abduction cases vary because of the unaccounted cases. For example, in the period from 2008-2014 there are 32 applications, out of which 28 are regarding return of wrongfully removed or retained child and 5 applications are regarding access rights.[96] In 2013 there were 12 applications out of which 8 were decided and 4 were pending.[97]

It is certain that some degree of specialization in regard to the complex child abduction cases is required. Firstly, N. Macedonia should seriously reconsider the position of the child abduction cases from administrative to judicial procedure. Secondly, from the experience of the judicial specialization in the EU and in the region there are several possible solutions that can be applied, but for proper functioning and effect of the applied modality, notion has to be given to the characteristics of the Macedonian judiciary. The proposed model in the Regulation 1111/2019 to consider concentrating jurisdiction for child abduction cases upon as limited number of courts as possible and that jurisdiction for child abduction cases could be concentrated in one single court for the whole country or in a lim-

92 Rumenov *op.cit.,* note 91,p. 243.

93 *Ibid.*, p. 245.

94 *Ibid.*, p. 247.

95 *Ibid.*

96 *Ibid.*, p. 245.

97 The inconsistency in the statistical data is because the Central Authority does not possess any software programme for processing, documenting and/or archiving application files (relevant documentation) and cases are processed in hard copy. *Ibid.*, p. 245.

ited number of courts, using, for example, the number of appellate courts as point of departure and concentrating jurisdiction for international child abduction cases upon one court of first instance within each district of a court of appeal. Moreover, the Bulgarian experience in these cases of a double concentration seems efficient – first to a single court (Sofia Regional Court) and second to a specialized section of the court (family law section).[98] Their experience shows that not only territorial concentration is desirable but also it provides for more attentive and experienced judges in the field of cross border family law to render more effective and well-founded decisions. It is therefore preferable that N. Macedonia should follow these concepts and implement more attentive and assiduous approach in assuring that the unilateral measures taken by the parent which wrongfully removed or retained the child from its habitual residence are not the final arbiter, instead the best interest of the child assured by the closest forum to the child and that is the Court where the child had his habitual residence before the abduction, maintains its jurisdiction to finalize these delicate cases in regard to the custody rights.

6. CONCLUSION

The extent of judicial specialization through different models of its implementation in the national judicial systems worldwide increases over time due to the fact that the law is becoming more complex and specific in certain fields. In that regard, specific level of in depth knowledge and expertise always seems preferable in areas of law that are considered as time-consuming, problematic and complex. Specialization is firmly linked to the organization of a particular judicial system and no universal approach exists in organizing the judiciary when specialization is set in the focus of the judicial reform. Additionally, no international standard endures in terms of strictly proposing or disapproving the judicial specialization or the method how such specialization should be carried out. The particular needs for an efficient system of administration of justice that will ensure the quality of the proceedings and decisions, as well as the specific local circumstances are of significant importance in that respect. The experience of the EU in the construction of the "mutual trust" in light of the child abduction cases gives an insight of the construction of "mutual trust" in the whole EU. This is something that is not achievable as a political decision because trust is generally social construct deeply rooted in the interconnection of humans. Most of the organized systems such as the economical, legal and religious systems are constructed on the basis of "trust" which is practically implemented by the persons which are inside these systems. This is also applicable in regard to the principle of mutual trust in the EU. If

[98] Lee Ho, *op.cit.*, note 75, p. 609.

this principle operates practically, then trust in the whole system is achievable. If mutual recognition is operating in the EU without legal circumvention, then actual trust emerges. Specialization of jurisdiction is more than welcomed solution, especially in complex cases which need to be conducted promptly and very assiduously, such as the child abduction cases. Building mutual trust between the relevant authorities that implement the 1980 Hague Convention not only does provide for political points for the operation of the area of freedom, security and justice, in which the free movement of persons and access to justice are ensured, but also helps in the development of a save environment for children in which the legal system guarantees their wellbeing and proper development as functioning part of our society.

The position of the child abduction cases in N. Macedonia shows that there is certain room for improvement of the implementation of the 1980 Hague Convention. Moreover, N. Macedonia is a candidate country to the EU and is required to follow the EU *acquis communautaire*. Specialization of jurisdiction is not directly part of these EU legal sources, however the requirement of a functioning legal system that assures access to justice and further enhances free movement of people is. In the cases of child abduction, these freedoms are directly under attack, because a wrongfully removed or retained child is exactly an example of limited freedom for developing normal relations between child and a parent. In this light, N. Macedonia should further consider firstly to transfer the procedure from administrative to judicial and secondly to consider for some model of specialization of jurisdiction in this type of cases with notion to the characteristics of the Macedonian judiciary.

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UDK 342.7-053.2:614.4
Review article

IMPACT OF COVID CRISIS ON CHILD'S RIGHT TO EDUCATION

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ABSTRACT

The right to education is regulated by norms of many international and regional documents. It includes many rights and plays an important role in the "all-round development of man" and its scope: physical, emotional, ethical, aesthetic, intellectual, professional, civic and international. The right to education is not the exclusive right of children. It is first and foremost the right of children and is essential for children's development. Therefore, it is generally accepted that educational opportunities should be equal for children.

Unfortunately, the right to education has been severely curtailed in a short period of time due to the COVID -19 pandemic. According to UNESCO, 191 countries have temporarily closed national or local schools to contain the spread of COVID -19. This has resulted in school-age children being unable to receive basic education.

This situation is particularly difficult for children from dysfunctional or disadvantaged families. Some families do not have internet, computers or books. Some parents cannot help them with homework because of educational or language limitations. All these unequal educational opportunities limit schooling.

On the way to eliminate inequality in access to education and protect children from rights violations, the author will discuss whether Rawls' principle of fairness provides a good basis for the government to take action to eliminate unequal opportunities for education.

Keywords*: equality of opportunity, children, right to education, COVID-19 pandemic*

1. INTRODUCTION

Education is usually defined as "the acquisition of knowledge, skills, and a moral code that are indispensable prerequisites for the ability to eventually pursue a cho-

sen profession and thereby earn a living."[1] Thus, it can be understood that education is considered essential for human beings to face the challenges of daily life, as it enables human beings to satisfy basic needs such as health and dignity and to develop their own personality with full freedom.[2]

Equal access to education is very important for children, because children who do not have equal educational opportunities are deprived of the possibility to succeed in education, in the labour market and in civic and social life.[3] To achieve the goal of equal access to education, all children must have access to education, to universal and inclusive education, i.e. in terms of children's rights, access to education is the right of every child to receive education on the basis of equal opportunities.

Since March 2020, schools for more than 168 million children worldwide have been completely closed for almost a year due to the COVID -19 pandemic.[4] In Europe, some 58 million school-age children who attended primary and secondary schools are deprived of the opportunity to learn regularly and privately with educational professionals.[5] Thus, the pandemic has led to growing inequality in education. The inequality among children is due to the lack of internet access, the lack of a quiet place to study when all or most families are at home during the pandemic, the lack of reading materials which affects reading opportunities, and the lack of important sources of information, while the materially disadvantaged children lose an important source of their daily nutrition as schools are the main providers of their daily meals.[6]

According to the report on educational inequalities and physical school closures during Covid-19, the proportion of children who do not have internet access varies widely between and within countries.[7] For example, children with parents

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1 Beiter, K., D., *The Protection of the Right to education The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights*, Martinus Nijhoff, International Studies in Human Rights, Vol. 82, 2006, pp. 18-19.

2 *Ibid*., p. 18.; Pimentel, C., *The Human Right to Education: Freedom and Empowerment*, Multicultural Education, Vol. 13, No. 4, 2006, p. 5.

3 Weishart, J. E., *Reconstituting the right to education*, Alabama Law Review, Vol. 67, No. 4, 2016, p. 958.

4 [https://www.unicef.org/press-releases/schools-more-168-million-children-globally-have-been-completely-closed], Accessed 31 March 2021.

5 Blaskó, Z.; Schnepf, S., V., *Educational inequalities and physical school closures during Covid-19*, 2020, [https://ec.europa.eu/jrc/en/research/crosscutting-activities/fairness], Accessed 31 March 2021.

6 *Ibid.*

7 The report used data from the International Association for the Evaluation of Educational Achievement's 2016 Progress in International Reading Literacy Study (PIRLS) for the analyses. The following European countries were analysed: Austria, Belgium, Bulgaria, Czech Republic, Denmark, England, Finland, France, Georgia, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands,

with lower levels of education are 5-11% less likely to go online than children with parents with higher levels of education.[8] Even if a child can use the internet and has at least one device at home, that doesn't necessarily mean they can use it for home schooling.[9] In addition, the report found that in 21 European countries, 25% of young children do not have a quiet learning environment, compared to 9% in Denmark and 49% in Italy.[10] In 21 European countries, at least 10% of children surveyed and as many as 24% of children from disadvantaged families did not receive enough reading material.[11] Analysing all the data on inequality in education, more than a fifth of children lack at least two resources (i.e. a room of their own, reading opportunities, internet access, parental involvement), leading to unequal educational opportunities.[12]

As the crisis COVID -19 is still ongoing and it is still uncertain how long it will last and to what extent it will affect children's right to education, the question is whether we can eliminate unequal educational opportunities if access to education is challenged.

To answer this question, the author will analyse the meaning of the right to education in international and regional documents. In the next chapter, the author will analyse the components of most European constitutions and education laws that guarantee the right to education. Then, the concerns of unequal access to education in the case of the COVID -19 pandemic will be carried out and it will be discussed whether and to what extent the principle of equal opportunity is a good mechanism to address the inequality of educational opportunities.

2. INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK OF THE CHILD'S RIGHT TO EDUCATION

At the international level, the right to education is regulated by United Nation (UN) documents, which express the right in terms of principles whose implementation and enforcement is largely left to individual states.[13] The right to education, at international level, was first defined in the 1948 Universal Declaration

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Northern Ireland, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden. See [https://www.iea.nl/studies/iea/pirls/2016], Accessed 31 March 2021.; *Ibid*.

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 *Ibid*.

13 *Right to Education*, [https://www.right-to-education.org/page/international-law], Accessed 01 April 2021; [https://www.right-to-education.org/page/european-framework], Accessed 01 April 2021.

of Human Rights (UDHR), where Article 26 clearly states that education is a universal right.[14] The UDHR sets out the objectives of education in Article 26(2) by requiring that education "shall be directed to the full development of the human personality, the strengthening of respect for human rights and fundamental freedoms, the promotion of understanding, tolerance and friendship among all peoples, races and religious groups, and the encouragement of UN action for the maintenance of peace".

In 1960, the General Assembly of UN Educational, Scientific and Cultural Organisation (UNESCO) adopted the Convention against Discrimination in Education (CDE).[15] It is the first international instrument to set comprehensive international standards for public education in order to promote equality of opportunity and treatment for all in education.[16] Three provisions guarantee equality in education: Article 1(1), which defines "discrimination" as denying education to a person or a group of people and allowing a person or a group of people to receive a lower education; Article 3, which states that the state is obliged to ensure that there is no discrimination in enrolment; Article 4, which states that the state is obliged to promote equality of opportunity and treatment in education, to ensure that all public education institutions have the same level of education, and to ensure that teachers are trained without discrimination.[17]

The objectives of education are prescribed in Article 5(1)(a), which states that education "shall promote the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms; shall foster understanding, tolerance and friendship among all nations, races or religious groups; and shall promote the activities of the United Nations for the maintenance of peace."[18]

The right to education was also enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966.[19] Article 13 of the IC-

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14 Article 26(1) states that "everyone has the right to education…" See: UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), [https://www.refworld.org/docid/3ae6b3712c.html], Accessed 03 March 2021.

15 UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention Against Discrimination in Education*, 14 December 1960, [https://www.refworld.org/docid/3ae6b3880.html], Accessed 04 March 2021.

16 Hodgson, D., *The international human right to education and education concerning human rights, International Journal of Children's Rights*, Vol. 4, No. 3, 1996, pp. 241-242.

17 See Article 1(1), Article (3), Article (4) CDE.

18 Article 5(1)(a) CDE.

19 See Articles 13 and 14 UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, [https://www.refworld.org/

ESCR recognises education in general as a right and obliges states parties to realise the right to education. Article 13(1) of the ICESCR sets out the same educational objectives as Article 26(2) of the UDHR.[20] Article 13(2) of the ICESCR sets out the obligation to make education accessible.[21] This means that the state has the responsibility to ensure that all people have access to schools, teachers and educational materials, and to remove all barriers to enrolment so that all people can receive education.[22] The state, as duty bearer, should provide free and compulsory primary education; secondary education should be made public and accessible by all appropriate means, in particular through the progressive introduction of free education, so that all people have an equal opportunity to obtain higher education.[23] Article 13(2) embodies the social significance of the right to education and, together with Article 2(1) of the ICESCR, obliges states to strive "independently" for the full realisation of the right to education or "through international assistance and cooperation, in particular in the field of economic and technical cooperation".[24] The right to education in the ICESCR may be subject to restrictions. Under Article 4, rights may be restricted if the law imposes restrictions; if they are in the nature of the right to education, they are restricted; and the purpose of the restrictions is to promote the general welfare of a democratic society.[25]

Many other international documents prepared by UN also recognise the right to education. These include the International Convention on the Elimination of All Forms of Racial Discrimination (UN General Assembly, 1966b); the Convention on the Elimination of All Forms of Discrimination against Women (UN General Assembly, 1979); and the Convention on the Rights of Persons with Disabilities (UN General Assembly, 2006).[26]

Recognising that children are a particularly vulnerable group in society, the United Nations has developed specifics for the application of human rights to children's education. Thus, the Declaration of the Rights of the Child (DRC) was adopted

docid/3ae6b36c0.html], Accessed 03 March 2021.

20 Compare Article 13(1) ICESCR and Article 26(2) UDHR.

21 The 160 countries that ratified the ICESCR reaffirmed this commitment, promising to make secondary and tertiary education accessible and progressively free for all (Article 13). Heymann, J., *et. al.*, *Constitutional rights to education and their relationship to national policy and school enrolment*, International Journal of Educational Development, Vol. 39, 2014, p. 132.

22 Beiter, *op. cit.*, note 1, p. 96.

23 Article 13(2) ICESCR.

24 Article 2 (1) ICESCR.

25 Article 4 ICESCR.

26 Heymann, J. *et. al.*, *op. cit.*, note 21, pp.132-133.

in 1959 and the Convention on the Rights of the Child (CRC) in 1989.[27] The CRC supplemented and expanded the provisions of the DRC.[28] Like the UDHR, the DRC prescribes the right to education grants children the universal right to education, which is to be compulsory and free.[29] States parties to CRC undertake to ensure free and compulsory primary education, to make secondary education "available and accessible to every child" through "measures such as the introduction of free education and the provision of financial assistance to those in need", and to make higher education "accessible to all according to their abilities".[30] The right to education guaranteed by CRC must be achieved progressively and on the basis of equality of opportunity.[31]

In addition to the educational attainment obligations set out in the ICESCR, Article 28(1) of CRC introduces two new elements not included in the ICESCR. For example, Article 28(1)(d) obliges the state to provide and make accessible educational and vocational information and guidance to all children, while Article 28(1)(e) obliges the state to take measures to promote regular school attendance and reduce early school leaving.

The state shall, within its jurisdiction, "respect and ensure the right to education for every child without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." [32] In other words, the state has a duty to ensure that no one is denied access to educational institutions in a discriminatory manner and should take measures to ensure equality in the exercise of the right to education.[33]

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27 UN General Assembly, Declaration of the Rights of the Child, 20 November 1959, A/RES/1386(X-IV), available at: [https://www.refworld.org/docid/3ae6b38e3.html], Accessed 03 March 2021; UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, [https://www.refworld.org/docid/3ae6b38f0.html], Accessed 03 March 2021.; Beiter, *op. cit.*, note 1, p. 114.

28 *Ibid*.

29 Principle 7 of the DRC assigns parents' primary responsibility for their children's education and qualifies this responsibility by introducing "the best interest of the child" as the "guiding principle." Compare 26(1) i (3) UDHR and Principle 7 DRC.

30 The Committee on the Rights of the Child, established in 1991, monitors the implementation of CRC -protected rights, including the right to education. Heymann, *op. cit.*, note 21, pp.132-133.; Article 28 CRC.

31 *Ibid.*, Parks, A., *Children and International Human Rights Law: The Right of the Child to be Heard*, Routledge, 2013, p. 123.

32 Article 2(1) CRC.

33 Beiter, *op. cit.*, note 1, p. 122.

Article 29 (1) of the CRC adds a "qualitative dimension" to the right to education by establishing the holistic development of the child's full potential (29 (1) (a)), the development of respect for human rights (29 (1) (b)), a strengthened sense of identity and belonging (29 (1) (c)), the child's socialization and interaction with others (29 (1) (d)) and with the environment (29 (1) (e)) as objectives of education.[34]

The right to education is also protected by legal documents adopted at regional level by taking into account regional customs, values, culture and practices.[35] In Europe, the right to education has been protected by documents that are mainly drawn up by the Council of Europe and the European Community/Union. In 1952, the right to education was recognized as a universal right in Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (P-1 ECHR), which was adopted by the Council of Europe.[36] Article 2 of the P-1 ECHR protects the right to education as freedom of access to existing educational institutions and the right to equal access and use of educational institutions.[37]

The educational rights are also protected by European Social Charter (ESC) adopted by the Council of Europe which in its 1996 revisions of the article 17(2) requires that children and young people receive free education at primary and secondary

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[34] UN Committee on the Rights of the Child (CRC), *General comment No. 1 (2001), Article 29 (1), The aims of education*, 17 April 2001, CRC/GC/2001/1, paragraph 2., p. 2., [https://www.refworld.org/docid/4538834d2.html], Accessed 05 March 2021.

[35] Regional legal instruments have been prepared in the European, American, African and certain other regional contexts. Beiter, *op. cit.*, note 1, p. 155.

[36] Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9, available at: [https://www.refworld.org/docid/3ae6b38317.html], Accessed 28 April 2021.

[37] The European Court of Human Rights has interpreted Article 2 of P-1 ECHR broadly in a number of decisions: Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, European Commission of Human Rights v Belgium, Merits, App No 1474/62, App No 1677/62, App No 1691/62, App No 1769/63, App No 1994/63, App No 2126/64, (1979-80) 1 EHRR 252, IHRL 6 (ECHR 1968), 23rd July 1968., p. 28, para 3-5.; Golder v United Kingdom, Judgment, Merits and Just Satisfaction, App No 4451/70, A/18, [1975] ECHR 1, (1979) 1 EHRR 524, IHRL 9 (ECHR 1975), 21st February 1975, p. 32, para. 5; Şahin v Turkey, Admissibility and Merits, App No 44774/98, ECHR 2005-XI, [2005] ECHR 819, (2007) 44 EHRR 5, (2006) 45 ILM 436, [2006] ELR 73, 19 BHRC 590, IHRL 3279 (ECHR 2005), 10th November 2005, para. 134-138; Folgerø and ors v Norway, Merits and just satisfaction, App no 15472/02, (2008) 46 EHRR 47, IHRL 3235 (ECHR 2007), 29th June 2007, para. 83; Campbell and Cosans v United Kingdom, Merits, App No 7511/76, A/48, [1982] ECHR 1, (1982) 4 EHRR 293, IHRL 33 (ECHR 1982), 25th February 1982, para. 39-41; Tarantino and ors v Italy, Merits and just satisfaction, App nos 25851/09, IHRL 3986 (ECHR 2013), 29284/09, 64090/09, [2013] ECHR 255, 9th September 2013, para 50-51; Oršuš and ors v Croatia, Merits and just satisfaction, App no 15766/03, IHRL 3716 (ECHR 2010), 16th March 2010, para 111, 144-147.

level, as well as encouragement to attend school regularly".[38] Article 7 of ESC on child labor states that persons still in compulsory education shall not be employed as this would deprive them of the full benefits of education. The right to education is also guaranteed in Article 10, which guarantees the right to vocational training, and in Article 15, which regulates the right to education of persons with disabilities.

Further, articles 14 and 15 of the European Convention on Legal Status of Migrant Workers 1977 also protect the educational rights of migrant workers and their families.[39] Articles 12 to 14 of the Framework Convention for the Protection of National Minorities 1995 are generally dedicated to the educational rights of minorities, while Article 8 of the European Charter for Regional or Minority Languages 1992 is dedicated to the use of minority languages in education.[40]

The Council of Europe regularly issues recommendations on education, such as the 2012 Recommendation on Ensuring Quality Education, the 2000 Recommendation on the Education of Roma/Gypsy Children in Europe, the 2009 Recommendation on the Education of Roma and Travellers in Europe, and the 2010 Recommendation on Public Responsibility for Higher Education and Research.[41]

Beside the Council of Europe documents, several European Union (EU) documents are relevant to the regulation of the right to education. For example, Articles 149 and 150 of the 1957 Treaty Establishing the European Community confer powers on European Community in the field of education and vocational train-

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[38] The European Social Charter (ECSR was created in 1961 to protect fundamental social standards and recognize a wide range of economic, social and cultural rights, including the right to education. It was revised on 3 May 1996 to expand the rights articulated in the original Charter. See Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, [https://www.refworld.org/docid/3ae6b3678.html], Accessed 05 March 2021.

[39] *Council of Europe, European Convention on the Legal Status of Migrant Workers*, 24 November 1977, ETS 93, [https://www.refworld.org/docid/3ae6b388c.html], Accessed 19 March 2021.

[40] Council of Europe, Framework Convention for the Protection of National Minorities, 1 February 1995, ETS 157, [https://www.refworld.org/docid/3ae6b36210.html], Accessed 07 April 2021.; Council of Europe, European Charter for Regional or Minority Languages, 4 November 1992, ETS 148, [https://www.refworld.org/docid/3de78bc34.html], Accessed 07 April 2021.

[41] Council of Europe: Recommendation CM/Rec(2012)13 of the Committee of Ministers to member States on ensuring quality education, 12 December 2012, Council of Europe: Committee of Ministers, Recommendation No. R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe, 3 February 2000, R (2000) 4, [https://www.refworld.org/docid/469e04c02.html], Accessed 08 April 2021, Council of Europe: Recommendation CM/Rec(2009)4 of the Committee of Ministers to member states on the education of Roma and Travellers in Europe, 17 June 2009, Council of Europe: Committee of Ministers, Recommendation CM/Rec(2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy, 20 June 2012, [https://www.refworld.org/docid/50697ed62.html], Accessed 08 April 2021, *European Framework*, [https://www.right-to-education.org/page/european-framework], Accessed 19 March 2021.

ing; Articles 7 (2) and (3) and 12 of Regulation 1612/68 and Directive 77/486 regulate the education of migrant workers and their children.[42] In addition, Principle 1 of the 1984 European Community Resolution on Freedom of Education recognises the right of the child to education and the right of parents to determine the type of education for their children; Principle 2 states that the right to education is to be enjoyed without discrimination of any kind; and Principle 5 defines the purpose of education.[43]

Article 16 (1) and (2) of the 1989 Declaration of Fundamental Rights and Freedoms generally protects the right to education by stating that everyone has the right to education, to vocational training commensurate with his or her abilities, and to freedom of education.[44]

Article 14 of the 2000 Charter of Fundamental Rights of the European Union (Charter) also protects the right to equal access to education and vocational training, the right to compulsory education and the freedom to establish educational institutions while article 32 prohibits child labour and states that the minimum age for employment shall not be less than the age at which compulsory education is completed.[45]

3. BASIC COMPONENTS OF THE RIGHT TO EDUCATION

The international and regional documents entitle children, as holders of the right to education, to specific legal positions, the content of which has a complex internal structure ordered by the arrangement of the four basic components of rights - claim, privilege, power and immunity. [46]

Children have a claim-right which entitle them to the state, and it denotes educational adequacy.[47] In other words, it denotes equal access to adequate educational

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42 Treaty establishing the European Community (Consolidated version 2002) OJ C 325, 24.12.2002, p. 33–184; Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ L 257, 19.10.1968, pp. 2–12); Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers (OJ L 199, 6.8.1977, pp. 32-33).

43 *Resolution on Freedom of Education in the European Community* (OJ C 104, 16.4.1984, p. 69.).

44 Resolution adopting the Declaration of Fundamental Rights and Freedoms (A2-3/89, OJ C 120 of 16.05.1989, pp. 51-57.).

45 Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391–407).

46 The four components of rights are called "the Hohfeld incidents" after Wesley Hohfeld, an American legal theorist who discovered them. See Hohfeld, W., *Fundamental Legal Conceptions*, New Haven: Yale University Press, 1919.

47 According to adequacy theories, a fair educational opportunity requires only that students receive enough education to function as equal citizens. Burroughs, N. A., *Rawls, republicanism, and the ade-*

resources and services.[48] To achieve educational adequacy, the state should distribute educational resources equitably and state institutions should be designed to promote goals that are as equal as possible for all concerned.[49] It means bringing children to a certain level of education, which should not be too low, because every child with potential should receive an adequate education.[50] In order to define the adequacy threshold, the state must determine the right level of education by taking into account the educational goals that are usually associated with the idea that children can be able to be equal citizens after receiving the level of education.[51] In general, basic education is accessible to all and consists of primary education (the first level of basic education) and lower secondary education (the second level of basic education).[52]

Children's claim-right corresponds to a duty imposed on the state to provide children with a basic education so that they can make proper use of a variety of basic goods, including their rights and freedoms.[53] This means that the state has a duty to enact legal norms that promote basic education and ensure that children

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quacy–equity debate, Theory and Research in Education, Vol. 14, Issue 2, 2016, p. 1.; Menéndez, F. S., *Educational adequacy and educational equality: a merging proposal, Critical Review of International Social and Political Philosophy*, Vol. 22, Issue 1, 2019, p. 2.
Equality in education could be defined as equality in educational resources, quality, opportunities, or outcomes. Giesinger, J., *Educational justice: equality versus adequacy*, in: Peters, Michael A.(ed.), Encyclopedia of educational philosophy and theory, Cham, Switzerland: Springer Singapore, 2018, pp. 1-5.

48 Weishart, *op. cit*., note 3, p. 922.

49 Giesinger, *op. cit.,* note 47, p. 28.

50 Above a certain threshold, unequal educational opportunities are permitted. See: Burroughs, *op. cit*., note 47, p. 5.

51 Giesinger, *op. cit.,* note 47, p. 6.; Burroughs, *op. cit*., note 46, p. 9.

52 *Ibid*., p. 7., Satz, D., *Equality, Adequacy, and Education for Citizenship*, Symphosium on Education and Equality, Ethics, Vol. 117, No. 14, 2007, pp. 623-648.; [http://uis.unesco.org/en/glossary-term/basic-education], Accessed 22 March 2021.

53 Podschwadek, F., *Rawlsian liberalism and public education*, PhD thesis, University of Glasgow, 2018, p. 21, 146.; A small number of constitutions (e.g. Croatia, Germany, Ireland, Italy, Liechtenstein, Luxembourg and the Netherlands) within the 43 Council of Europe states contain provisions on education that focus entirely on the rights and duties of parents and the state, without explicit reference to an individual right of the child to receive an education. *Report on the Protection of Children's Rights, Council of Europe*, adopted by the Venice Commission at its 98th Plenary Session, Venice, 21-22 March 2014, p. 19, [https://rm.coe.int/168062cf94], Accessed 01 April 2021.
Article 63(1) The Constitution of the Republic of Croatia Official Gazette No. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14; CHR states that "parents have a duty to bring up, support and educate their children." Article 63(2) states that "parents are responsible for ensuring the right of their children to the full and harmonious development of their personalities." Article 63(3) requires the State to provide "special care for parentless minors and parentally neglected children," and Article 63(3) provides that "physically and mentally handicapped and socially neglected children have the right to special care, education and welfare." It is stated in Article 64 that "everyone shall have the duty to protect children."

grow up to be autonomous individuals capable of contributing to a democratic society.[54] Moreover, the state has the second-order power to create, abrogate or cancel an claim-right to education, as the legislature has complete control over children's education by virtue of international and regional documents.[55] On the other hand, the state has the privilege of exercising said power through the legislature and cannot be prevented from exercising it if it chooses to enact laws that "establish and maintain" schools that provide basic education or "establish detailed requirements for the provision of educational services."[56]

Comparative studies have shown that states parties to international and regional documents fulfil their duty to ensure basic education by guaranteeing it through their constitutions and laws. However, the conception of basic education varies, as not every state guarantees compulsory education.[57] For example, 68% of 1960s constitution's guarantee a right to compulsory primary education, while 67% of 1970s constitutions, 74% of 1980s constitutions, 95% of 1990s constitutions, and 97% of 2000s constitutions do so.[58] Some states impose compulsory primary education, while others impose compulsory primary and secondary education. The percentage of constitutions that guaranteed compulsory primary education increased significantly from 27% in the 1960s to 66% after 2000, but most constitutions enacted between 1960 and 2011 do not mandate secondary or tertiary education.[59]

The majority (52%) of constitutions adopted between 1960 and 2011 mentioned a general right to education without specifying the levels of obligation.[60] Some

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54 Not only does the state have a duty to promote basic education, but it should also refrain from actions that jeopardize a child's right to education by limiting his or her access to it. Weishart, *op. cit.*, note 3, p. 936, Podschwadek, *op. cit.*, note 53, p. 105.

55 Weishart, *op. cit.*, note 3, p. 927. The child's best interests must be the primary consideration in all actions involving the child. See Article 3. CRC; Heymann, *op. cit.*, note 20, p. 138.; Burroughs, *op. cit.*, note 45.

56 Weishart, *op. cit.*, note 3, p. 930, 936; The right to free primary education is guaranteed in the constitutions of almost all EU countries, and the state is responsible for providing it. The constitutions of Germany, Ireland, Austria and the Netherlands are notable exceptions to the explicit guarantee of free primary education. [https://www.worldpolicycenter.org/policies/does-the-constitution-explicitly-guarantee-free-education/does-the-constitution-explicitly-guarantee-citizens-right-to-free-primary-education], Accessed 22 March 2021.

57 Charges for education may mean that some parents are unable to educate all their children. Consequently, if education is not free, it cannot be made compulsory. Wilson, D., *Gender equality in education: Human right perspective*, p. 11., [https://www.ohchr.org/Documents/HRBodies/CEDAW/WomensRightEducation/DuncanWilson.pdf], Accessed 01 April 2021.

58 Constitutions adopted after 1990, primarily in low- and middle-income countries, were more likely to protect education rights. Heymann, *op. cit.*, note 21, pp. 131, 139.

59 One additional constitution, enacted in the 1990s, protected only the poor's right to free primary education. Heymann, *op. cit.*, note 21, p. 136.

60 *Ibid*.

81% of constitutions guaranteed universal primary education and 53% made it free, while a minority provided for secondary education (37%) and higher education (35%) or explicitly protected certain groups.[61] Today, within the EU, the constitutions of all countries guarantee compulsory and free primary education. [62] In Croatia, constitutional provisions guarantee that everyone has the right to free compulsory primary education under equal conditions and according to their abilities.[63] Secondary and higher education are accessible to all on equal terms and according to their abilities.[64] Although secondary education is not compulsory in Croatia, almost all children attend general or vocational higher education after completing primary school.[65] Completion of secondary education enables everyone to acquire knowledge and skills to work and/or further their education under equal conditions and according to individual abilities.[66]

International and regional documents, by guaranteeing the right to education, have given children an immunity that entails equality of educational opportunity.[67] This immunity prevents the state from enacting laws that promote an unequal distribution of educational opportunities, and it prevents the state from depriving a child of his or her entitlement (claim-right) to an adequate education.[68] It also protects children from the harms of educational disadvantage by working to eliminate background disadvantages and giving children of equal ability and motivation equal opportunities to succeed in school.[69]

About 6% of states include norms in their constitutions aimed at preventing gender inequality in education, 5% include positive provisions to promote equality in education for ethnic minorities, 2% for religious minorities, 9% for the socioeconomically disadvantaged, 14% explicitly guarantee equality in education and 7% guarantee universal access to education while prohibiting widespread discrim-

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61 *Ibid.*

62 *Is education compulsory?*, [https://www.worldpolicycenter.org/policies/is-education-compulsory/is-primary-education-compulsory], Accessed 01 April 2021; *Is education tuition-free and compulsory?*, [https://www.worldpolicycenter.org/policies/is-education-tuition-free-and-compulsory/is-primary-education-tuition-free-and-compulsory], Accessed 01 April 2021.

63 Article 66 CHR, Article 4 para 2, Article 12 para 1 Primary and Secondary School Education Act, Official Gazette, No. 87/08, 86/09, 92/10, 105/10, 90/11, 5/12, 16/12, 86/12, 126/12, 94/16, 154/14, 7/17; PSSEA.

64 Article 66 para 1 CHR.

65 *Organisation of the Education System and of its Structure*, [https://eacea.ec.europa.eu/national-policies/eurydice/content/organisation-education-system-and-its-structure-14_en], Accessed 24. March 2021.

66 Article 11 para 4 PSSEA.

67 Weishart, op. cit., note 3, p. 922.

68 Weishart, *op. cit*., note 3, p. 935.

69 Burrough, *op. cit*, note 47, p. 2.

ination on the basis of disability.[70] The importance of standards protecting equal opportunities is recognized in the EU. Almost all EU countries have included the principle of educational equality in their constitutions and have enacted education laws that protect gender equality as an objective of equal treatment in education.[71] The exceptions are Denmark and Italy, which have no specific reference in their constitutions or laws regulating gender equality in access to education.[72] In Croatia, constitutional norms ensure that everyone has access to education under equal conditions. Gender equality is formulated as an objective of the education system because education for gender equality is an integral part of this system and lifelong learning involves the preparation of both genders for active and equal participation in all aspects of life.[73]

In addition, in most EU countries, children from minority or ethnic groups, as well as children with physical or mental disabilities or special educational needs, have the right to attend mainstream schools.[74] They also have the right to expect to receive an education that will enable them to reach their full potential.[75] Under the conditions and in accordance with a special law on education of national minorities, children of national minorities in Croatia may be educated in primary and secondary schools with instruction in the language and script they use.[76] Refugees have the right to education protected by principles of equality in constitutions and education laws.[77] In Bulgaria, Latvia and Sweden, for example, legal norms explicitly guarantee refugees the right to education under the same conditions as native children.[78] While in Spain, legal norms ensure that every child, including refugees

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70 Heymann, *op. cit.*, note 21, pp. 135, 136.

71 *Ibid.*.; More than 103 million children who are not in school 57% are girls. *Equal access to education*, [https://europa.eu/capacity4dev/public-gender/wiki/equal-access-education], Accessed 01 April 2021.

72 *Gender Differences in Educational Outcomes: Study on the Measures Taken and the Current Situation in Europe*, Education, Audiovisual and Culture Executive Agency, 2010, p. 47., [http://lst-iiep.iiep-unesco.org/cgi-bin/wwwi32.exe/[in=epidoc1.in]/?t2000=028612/(100)], Accessed 23 March 2021.

73 Article 66 para 1 of the Constitution of the Republic of Croatia; Article 14 Gender Equality Act, Official Gazette, No. 82/08, 69/17.

74 *Steering Committee for Equality Between Women and Men (CDEG),* Strasbourg, 2011, p. 24. [https://rm.coe.int/1680596131], Accessed 01 April 2021.

75 *Ibid.*

76 *Minorities in Croatia*, 2003, p. 25, [https://www.refworld.org/pdfid/469cbf8f0.pdf], Accessed 24 March 2021; Article 11 of the Constitutional Act on the Rights of National Minorities, Official Gazette, No. 155/02, 47/10, 80/10, 93/11; Act on the Use of Languages and Scripts of National Minorities in the Republic of Croatia, Official Gazette, No. 51/00.

77 *Enforcing right to education of refugees: a policy protection*, United Nations Educational, Scientific and Cultural, 2019, p. 26, [https://www.gcedclearinghouse.org/sites/default/files/resources/190208eng.pdf], Accessed 07 April 2021.

78 *Ibid.*

and asylum seekers, has the right to education.[79] Legal norms in Spain and France even regulate whether refugees can receive free and compulsory education.[80] In Croatia, children under the age of 18 seeking international protection have the right to primary and secondary education under Croatian law.[81] They have the same access to primary and secondary education as Croatian citizens.[82]

As regards equal access to education for disabled children, not all EU constitutions contain explicit provisions.[83] Only the constitutions of Portugal, Spain, Italy, Hungary, Slovenia and Austria guarantee the right to education for disabled children.[84] In Croatia, legal provisions ensure that children with disabilities have equal access to primary education.[85] Children with learning difficulties are educated in mainstream schools with full or partial integration, with regular, individualized or special programs, depending on the type and degree of difficulty, or in exceptional cases in special educational institutions if the children need additional medical or social care.[86]

4. RAWLS AND DISTRIBUTION OF EDUCATIONAL RIGHT IN COVID-19 PANDEMIC

By regulating access to education, many European countries identify certain groups of children as vulnerable in their constitutions and education laws (e.g. children with disabilities, girls, minorities, refugees and the poor).[87] Although these constitutional and legal norms guarantee adequacy and equality of opportunity in access to education, inequalities exist between children. Across the EU gender inequalities in education persist in terms of subject preferences and achievement, as well

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79 *Ibid.*

80 *Ibid.*

81 Children who have begun to exercise their right to secondary education may continue to do so after the age of 18. Article 58 para 1 and 2 Law on International and Temporary Protection, Official Gazette, No. 70/15, 127/17; LITP.

82 Article 58 para 1 LITP.

83 *Is education compulsory?*, [https://www.worldpolicycenter.org/policies/is-education-compulsory/is-primary-education-compulsory], Accessed 24 March 2021.

84 *Ibid*.

85 Article 12 para 2 Act on Scientific Activity and Higher Education, Official Gazette, No. 123/03, 198/03, 105/04, 174/04, 02/07, 46/07, 45/09, 63/11, 94/13, 139/13, 101/14 and 60/15.

86 *Organisation of the Education System and of its Structure*, 2019, [https://eacea.ec.europa.eu/national-policies/eurydice/content/organisation-education-system-and-its-structure-14_en], Accessed 24 March 2021.

87 *Global education monitoring report, 2020: Inclusion and education: all means all*, Educational, Scientific and Cultural Organization, 2020, p. 67, [https://unesdoc.unesco.org/ark:/48223/pf0000373718], Accessed 01 April 2021.

as qualitative aspects of the education and training experience and the proportion of children who drop out of school.[88] For example, girls are less likely than boys to attend school and more likely than boys to drop out; performance in mathematics and science is gender neutral, but girls perform better than boys in reading, and so on.[89] There are significant differences in early school leaving rates across most EU countries, with boys clearly at higher risk of dropping out of school before completing upper secondary education than girls.[90] Countries with a high share of early school leavers, such as Spain, Malta, Portugal and Iceland, have more than 25% male and 20% female early school leavers, while countries with a low share of early school leavers, such as Czech Republic, Poland, Slovenia, Slovakia and Finland, have 5 to 10% male and 3 to 5% female early school leavers. Croatia has the lowest dropout rate in the EU, with 3.3% in 2018 and only 3% in 2019.[91]

The proportion of disabled children identified as having special educational needs varies widely across Europe, ranging from 1% in Sweden to 21% in Scotland (United Kingdom).[92] According to an analysis of access to education for children with disabilities, they are less likely to be enrolled, stay in school, and receive support.[93] In some European countries, such as Belgium and Germany, children with disabilities are educated in a special school or a separate class in a mainstream school.[94] Compared to their peers in primary, lower secondary and upper secondary education, they are 1, 4 and 6 percentage points more likely to miss school.[95]

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88 Lynch, K.; Feeley, M., *Gender and Education (and Employment): Gendered imperatives and their implications for women and men lessons from research for policy makers*, European Commission, 2003, p. 78, [http://www.nesse.fr/nesse/activities/reports/activities/reports/gender-report-pdf], Accessed 23 March 2021.

89 *PISA 2015 Programme for International Student Assessment – Europe and Central Asia*, World Bank Group Education, 2015, p. 7, [http://documents1.worldbank.org/curated/en/674021500448761959/pdf/117585-PIS A-2015-ECA.pdf], Accessed 23 March 2021; Of the estimated 72 million children not in school, girls are the majority. Women and the right to education, United Nations Human Rights Office of the High Commissioner, 2010, [https://www.ohchr.org/Documents/Issues/Women/GenderAndEquality/Infonote_Women_and_the_right_to_education.pdf], Accessed 23 March 2021.

90 The exception regarding gender inequality in early leaving the schools is recorded in Belgium, Czech Republic, Slovakia, Sweden. *Education*, [https://eige.europa.eu/gender-mainstreaming/policy-areas/education], Accessed 23 March 2021.

91 *Early leavers from education and training*, p. 77, [https://ec.europa.eu/eurostat/statistics-explained/index.php/Early_leavers_from_education_and_training], Accessed 23 March 2021.

92 Global education monitoring report, 2020, *op. cit.,* note 87, p. 74.

93 *World report on disability*, World Health Organisation, 2011, p. 206, [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/WHO_World_Report_on_Disability_2011_En.pdf], Accessed 31 March 2021.

94 *Ibid.* p. 210.

95 *Ibid.* p. 210.

In Croatia, 88.87% of all disabled pupils attended regular primary schools, while 11.13% attended special primary schools.[96]

There are some problems with equal access to education for ethnic minority children. For example, Roma children are the largest ethnic minority in Europe, living in poverty and facing prejudice, intolerance and discrimination.[97] Their educational attainment is low and Roma children are far less likely to attend school than non-Roma children.[98] Those who do attend school are often taught separately, as is the case in Czech Republic and Slovakia.[99] In Croatia, Hungary and Romania, at least 5% of Roma children and in Slovakia and Bulgaria at least 10% attend segregated classes in mainstream schools.[100]

Moreover, education systems face numerous challenges in providing equity to refugee children, who are five times more likely to be absent from school than non-refugee children.[101] For example, the 2016 report showed that 61% of refugee children attend primary school, compared to 92% globally.[102] Refugee children tend to drop out of school twice as often as local children (25.4% vs. 11.5%), and this is mostly due to socioeconomic reasons.[103] The number of refugee children in Croatia is rather low, with only 43 children enrolled in primary school and 7 in secondary school in 2017.[104] Compared to local children, their share among children attending school is around 1%.[105]

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96 Ćwirynkało, K. et. al. *Attitudes of Croatian and Polish Elementary School Teachers Towards Inclusive Education of Children with Disabilities*, Hrvatska revija za rehabilitacijska istraživanja, Vol. 53, 2018, p. 254.

97 In Europe, the number of Roma children ranges between 10 and 12 million. Global education monitoring report, 2020, *op. cit.,* note 87, p. 74.

98 In the national minority, the number of Roma children attending compulsory primary school is as high as in the general population, at 95%, but the enrolment rate drops significantly at secondary level, at only 35%. *Global Education Monitoring Report: Croatia, United Nations Educational, Scientific and Cultural Organization*, 2021, p. 28, [https://gem-report-2020.unesco.org/wp-content/uploads/2021/02/Croatia.pdf], Accessed 01 April 2021.

99 Global education monitoring report, 2020, *op. cit.*, note 87, p. 71.

100 *Ibid.*

101 *Global Education Monitoring Report/UNESCO, 2016, Global Education Monitoring Report 2016: Education for people and planet, Enforcing the right to education of refugees*, p. 4, [https://en.unesco.org/gem-report/taxonomy/term/198], Accessed 01 April 2021.

102 *Ibid.*, p. 5.

103 In 2017, 61% of refugee children attended primary school, compared to 92% globally. Enforcing the right to education of refugees. *Ibid.*, p. 5.

104 *Croatia: Education for better immigrant integration*, [https://www.cedefop.europa.eu/en/news-and-press/news/croatia-education-better-immigrant-integration], Accessed 25 March 2021.

105 *Ibid.*

Therefore, in addition to providing educational services to children, schools need to focus not only on academic achievement, but also on their health and social, emotional, mental and physical well-being in order to ensure an education that is inclusive and accessible, especially for vulnerable or disadvantaged groups.[106] However, the COVID-19 pandemic and with it connected school closings have a significant negative impact on academic performance and socio-emotional learning.[107] To reduce the loss of face-to-face teaching, schools have sought to rapidly disseminate education online and other distance learning resources, including teaching on the Internet, television and radio, and printed learning materials. These efforts have produced results that the content and quality of distance learning vary widely.[108] Children's ability to participate in learning is highly dependent on the resources and support available in each home.[109] Barriers to information and communication technology, infrastructure and digital literacy make it difficult for students to access distance learning options.[110]

Thus, the COVID -19 pandemic and with it related online education exacerbated the problem of equal access to education, as the shift to distance learning and the loss of instructional time exacerbated existing inequalities.[111] The physical closure of schools and the shift to distance learning increased the challenges for children in terms of needing good digital skills, access to technology or the internet and support for learning at home.[112] As technology was only an important part of the educational experience for a proportion of children, usually in secondary school, many children were denied access to education during the COVID -19 pandemic.[113]

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106 UNESCO, International Commission on the Futures of Education, "Education in a post COVID-19 world: Nine ideas for action", 2020, pp. 7, 9, [https://unesdoc.unesco.org/ark:/48223/pf0000373717/PDF/373717eng.pdf.multi], Accessed 29 April 2021.

107 *Ibid,* p. 7.

108 *Ibid*.

109 *Ibid.*

110 *Ibid.*

111 *Equity in school education in Europe Structures, policies and student performance*, Eurydice report, Luxembourg: Publications Office of the European Union, 2020, p. 13, [https://eacea.ec.europa.eu/national-policies/eurydice/sites/eurydice/files/equity_2020_0.pdf], Accessed 01 April 2021.

112 *Ibid.*

113 In Germany, for example, at most 1 in 4 8th grade students reported using information and communication technology weekly to work online with other students or to write and edit documents. *Global Education Monitoring Report/UNESCO, 2016, Global Education Monitoring Report 2016: Education for people and planet, Enforcing the right to education of refugees,* p. 59, [https://en.unesco.org/gem-report/taxonomy/term/198], Accessed 01 April 2021.

Children with disabilities (e.g. blind or deaf children) are at higher risk of exclusion in such circumstances, as many educational resources are still inaccessible to them, even when the technology is available. Children with mild learning disabilities (e.g. attention deficit hyperactivity disorder), on the other hand, find it difficult to work independently in front of a computer.[114] Children who are ethnic minorities, refugees, or live in low-income families face socioeconomic barriers to accessing resources for online learning because they do not have internet access, a quiet place to study during a closure, or reading materials.[115] All of the above issues have a negative impact on ensuring the adequacy and equitable access to quality distance learning opportunities guaranteed to children by the right to education.[116]

Regardless, all children should receive at least a minimum of a good education, and their achievement should be largely independent of natural gifts or socioeconomic background. In other words: if the state wants fair access to education, it must ensure that all children receive an appropriate level of education and equality.

The solution for this challenge could be found in Rawls' philosophical theory, which justifies giving priority to adequacy while maintaining the independent role of equality.[117] Rawls' theory of justice is useful because it can be related to the adequacy of education under Rawls' first principle of justice and equality of opportunity for school success, which can be related to the first part of Rawls' second principle.[118] Rawls' first principle is to guarantee equal fundamental rights and freedoms necessary to secure the basic interests of equal citizens and to pursue a broad range of conceptions of the good.[119] When it comes to education, Rawls' first principle states that children have a right to an education that is adequate for them to attain equal citizenship and enjoy other rights and freedoms. Adequate

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114 *Global Education Monitoring Report/UNESCO*, *op. cit.*, note 101, p. 60.

115 *Ibid.*

116 *Council conclusions on countering the COVID-19 crisis in education and Training*, Council of the European Union, 2020, p. 4, [https://data.consilium.europa.eu/doc/document/ST-8610-2020-INIT/en/pdf], Accessed 27 March 2021.

117 *Ibid.,* p. 9.

118 Burroughs, *op. cit.*, note 47, p. 2.
Rawls' two principles of justice are: "1. Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all. 2. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity and second, they are to be to the greatest benefit of the least advantaged members of society (the difference principle)". Rawls, J., *Justice as Fairness: A Restatement*, Cambridge, MA: Harvard University Press, 2001, p. 42.43.

119 *Ibid.*

education, then, requires setting a threshold that enables the child to receive an education sufficient for the full development of his or her personality, talents, and mental and physical abilities.[120] This means that the state should ensure that all children have equal access to education. It asks for support for the first part of Rawls' second principle, which states that places in schools should be open to all children, regardless of race, class or gender or socio-economic status.[121] It prohibits the state from providing access to education on a discriminatory basis, as it must be open to all who can learn and meet the educational threshold.[122] In the case of the COVID -19 pandemic, this would mean that the state should work to eliminate background disadvantages in the distribution of educational opportunities.[123] Using Rawls' principle of fair equity of opportunity, children with equal natural talents and abilities and willingness to use them should have equal prospects of access to education regardless of race, class, gender, or socioeconomic status.[124] The inequality of opportunities that can arise in access to education during the COVID-19 pandemic according to Rawls' principle of difference could only be justified if the state maximizes the well-being of the disadvantaged children.[125] In other words, any inequality in chances of access to education for children during the COVID-19 pandemic must be justified by the state with an increase in overall chances for those with fewer opportunities.[126] For example, if child A and child B have the same talents, but A has a better chance of managing online school classes than B because of a favorable family situation, with the principle of fair equality of opportunity, the state should use resources so that B can run the online classes at the same level as A.[127] In doing so, the state should reduce the arbitrariness of the natural lottery and maximizes the opportunities for the most disadvantaged children, defined as the opportunity to gain access to online education in the context of the COVID-19 pandemic.[128] Therefore, all children should receive an adequate minimum level of education and the additional contribution of race,

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120 *Global annual results report 2019: Goal Area 2*, UNICEF, 2019, [https://www.unicef.org/reports/global-annual-results-2019-goal-area-2], 27 March 2021.

121 Social and economic inequalities must satisfy two conditions: first, they must be associated with offices and positions open to all under conditions of fair equality of opportunity, and second, they must benefit the least advantaged members of society the most (the difference principle). Rawls, *op. cit*., note 118, pp. 42-43.

122 Satz, *op. cit*., note 52, p. 626.

123 Burroughs, *op. cit*., note 47, p. 2.

124 Rawls, *op. cit*., note 118, p. 73.

125 Alexander, L., A., *Fair Equality of Opportunity: John Rawls' (Best) Forgotten Principle*, Philosophy Research Archives, Vol. 11, 1985, p. 199.

126 *Ibid*., p. 200.

127 *Ibid*., p. 202.

128 *Ibid*., p. 203., Rawls, *op. cit*., note 118, p. 74.

class, or gender, or socio-economic status is not significant. Such online education should be: (a) available via application using trained teachers, classroom materials, computer facilities and information technology; (b) economically accessible; (c) acceptable in terms of curriculum and teaching methods; and (d) adaptable or "flexible" to the needs of changing societies and communities and to meet the needs of students in their diverse social and cultural environments.[129]

To achieve this goal, the state should take practical measures to provide online education to all children during the COVID-19 pandemic. This means that state needs to conduct research to identify appropriate distance learning options to establish minimum standards for online learning.[130] In addition, the state should ensure that new and existing online platforms are user-friendly and accessible to children with different disabilities, and the state should also invest in and develop online learning, including investing in technological equipment and developing online platforms and materials.[131] Children of different ages and levels of education also learn differently in distance learning which interferes with equal access to education. Younger children need more parent/teacher support for learning and do not have the same ability to learn and self-regulate for independent learning as older children.[132] Therefore, it is important that the state provides ongoing training and develop the skills of teachers, parents, and caregivers to support children's home learning and socio-emotional needs.[133]

5. CONCLUSION

Education is of particular importance to children because with a quality education, they are more likely to succeed in life and achieve better life goals than children who do not have a quality education. It gives children the opportunity to pursue their dreams, interests, and passions and makes all human intellectual accomplishments available. Due to differences in learning abilities caused by innate talents, influences and conditions outside of school, children around the world have unequal opportunities to access education. These inequalities deepened with

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129 *Right to education: impact of the COVID-19 crisis on the right to education: concerns, challenges and opportunities*, Report of the Special Rapporteur on the right to education, Article 14, para 1, 2020, [https://www.ohchr.org/EN/Issues/Education/SREducation/Pages/COVID19.aspx], Accessed 01 April 2021.

130 UNESCO, International Commission on the Futures of Education, *op. cit.* note 106, p. 53.

131 *Ibid.*

132 Andaleeb, A.; Priyamvada T., *Putting the "learning" back in remote learning, Policies to uphold effective continuity of learning through COVID-19*, UNICEF, 2020, p. 4, 7, [https://www.unicef.org/globalinsight/sites/unicef.org.globalinsight/files/2020-06/UNICEF-Global-Insight-remote-learning-issue-brief-2020.pdf], Accessed 30 April 2021.

133 *Ibid.*

the COVID-19 pandemic and the closure of educational institutions as many disadvantaged children lost access to education. At that time, states had failed to maintain the minimum level of education for all children as a basis for adequate education. To maintain the minimum level of education in a pandemic, the state must create policies that enable positive educational outcomes that are attainable for all children. Policies should be developed in line with Rawlsian theory of justice, which advocates for fair equality of opportunity that aims not only at adequate access to education but also at equal participation in it. This means that personal and social circumstances should not be a barrier to access to education and that every child has the right to the necessary educational resources to achieve an adequate level of education. To achieve this, the state must ensure that measures are available, accessible, acceptable and adaptable to remove barriers to education and target disadvantaged and vulnerable children to ensure their access to education.

For example, the state must ensure the availability of digital and other distance learning materials created to support the learning continuum; time-limited free internet data packages at zero cost for educational content or other measures, food vouchers, meal deliveries, take-home rations, cash transfers or other means, and so on.[134] In enacting these measures, the state should bear in mind that the right to education is particularly important for children and that any restriction on children's rights can be justified if it is in the best interests of children, especially the most vulnerable children, which is consistent with the second part of Rawls' second principle, which allows for inequalities only when they are for the greatest benefit of children.[135]

Although the measures aim to provide children with access to education and the right to education by protecting children's interests during a pandemic, they should only be a temporary solution because education, in addition to imparting knowledge, also aims to develop socio-emotional skills that require real human interactions between children and teachers and pears that can never be replaced by online schools.[136]

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134 *Building back equal: girls back to school guide*, The Malala Fund, Plan International, UNESCO, UNGEI and UNICEF, 2020, pp. 8.,10, [https://www.unicef.org/reports/building-back-equal-girls-back-to-school-guide-2020], Accessed 01 April 2020.

135 "… second, they are to be to the greatest benefit of the least advantaged members of society (the difference principle)". Rawls, *op. cit*., note 118, p. 42-43.

136 Burroughs, *op. cit*., note 47, p. 2.
Right to education: impact of the COVID-19 crisis on the right to education; concerns, challenges and opportunities, op. cit., note 118, Article 47.

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UDK 342.7: 616-036.22
Review article

THE IMPACT OF COVID-19 ON CHILDREN'S RIGHTS*

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ABSTRACT

In emergency situations, the people most affected are often those who are already vulnerable, and this certainly includes children. The "new normal" we are living in to defend ourselves against this tiny yet dangerous enemy has serious repercussions on children's lives. This becomes even more evident if we think of those children who are doubly vulnerable – they are even more fragile because they live in conditions of particular hardship when they live outside their family, have a disability, or live in poverty.

Since the beginning of the Covid-19 pandemic, we have witnessed the proliferation of numerous initiatives by various national and international children's rights institutions, which have called for urgent measures to protect children's rights. At this precise moment, the concept of the child's best interests is also reinterpreted as a result of a reasonable compression of certain children's rights and the prevalence of others.

The present paper will attempt an analytical reconstruction of children's fundamental rights by analyzing how these rights have changed during the pandemic. In fact, it is necessary to know if and/or how much have the rights of minors changed as a result of the emergency.

The second part of the paper is dedicated to the question of which children's rights will be most compromised or changed in the post-Covid-19 era. In reflecting on the inevitable consequences that the pandemic will leave on the delicate balance of the development of children's rights, the author will offer some proposals on how to contain the encountered difficulties.

Keywords*: children's Rights, child's best interest, Covid-19, pandemic, right to family life.*

1. INTRODUCTORY REMARKS

The pandemic caused by the Covid-19 outbreak is putting the whole of society and, above all, the protection of the fundamental rights guaranteed to each indi-

* This work has been fully supported by the University of Rijeka under the project uniri-drustv-18-252 "Legal aspects of the digital transformation of society".

vidual, to the test.[1] The "new normal" that has become our collective reality has inevitably lead to questions about how and to what extent has the pandemic affected people's lives, their personal relationships, as well as how these will change once the acute phase of this health emergency is finally over.[2]

It is widely known that, in emergency situations, the most affected groups are often those who are already vulnerable, and this certainly includes children.

As to the impact of Covid-19 on children's rights, in the months dominated by the health emergency, numerous initiatives have been undertaken by national ombudspersons for children,[3] by the European Network of Ombudspersons for Children (ENOC),[4] as well as by UNICEF[5] aimed at calling for urgent measures to protect the rights of minors, paying particular attention to those who are even more defenseless because they live in conditions of particular hardship on account of living outside their family, due to disability, or poverty.[6]

The purpose of this paper is to reflect on how the pandemic is impacting children's lives and rights. Precisely, it is manifest that the impact is strong. The health emergency we are living in, in some respects, is reshaping many dynamics. Thus, it is necessary to think about the consequences this pandemic will leave on minors, especially in the *post-Covid* period. In other words, one has to question whether this impact, which now, in the midst of the pandemic, is resulting in a clear weakening

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1 For an overview of how Covid-19 disrupted the world and rights, among many, see Pistor, K., *Law in the Time of COVID-19*, 2020. Books. 240. Available at: [https://scholarship.law.columbia.edu/books/240]. Accessed 1 March 2021. Dolso, G. P.; Ferrara, M. D.; Rossi, D. (eds.), Virus in fabula, *Diritti e Istituzioni ai tempi del covid-19*, EUT Edizioni Università di Trieste, 2020. Available at: [https://www.openstarts.units.it/handle/10077/30878] Accessed 1. March 2021. In particular, as to the Human Rights see Gioffredi, G., *La pandemia Covid-19 e la tutela dei diritti umani nel sistema delle Nazioni Unite*, in Ellerani, P.; Cristante, S. (eds.), Le Scienze Umane alla prova della distanza sociale, Liber-O. Collana Didattica Open Access dell'Università del Salento, 2020, p. 61-74.

2 For a very interesting analysis from a comparative perspective see Cuocolo, L. (eds), *I diritti costituzionali di fronte all'emergenza Covid-19. Una prospettiva comparata*, Osservatorio emergenza covid-19 18.3.2020., Federalismi.it, pp. 3-96. Referring to an interesting analysis of pandemics in ancient history see Fiorentini, M., Caelum pestilens. *Riflessi delle pandemie antiche nel diritto romano*, in Dolso, G. P.; Ferrara, M. D.; Rossi, D. (eds.), Virus in fabula, cit., pp. 47-60.

3 About the Croatian Ombudsperson for Children see: [http://dijete.hr/category/koronavirus/], Accessed 23 March 2021.

4 European Network of Ombudspersons for Children (ENOC) see [http://enoc.eu/?p=3515], Accessed 23 March 2021. In particular see the Report on Ombudspersons and Commissioners for Children's Challenges and Responses to COVID-19.

5 For all Covid-19 news and resources, as well as tips on how to protect children and families, see [https://www.unicef.org/coronavirus/covid-19], Accessed 23 March 2021.

6 Many interesting documents written by the Committee on the Rights of the Child can be found here: [https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx], Accessed 23 March 2021.

of children's rights, making them even more vulnerable, could be an opportunity to further strengthen the legal position of children or, at least, to make it clear to those who should be protecting children's rights how many weaknesses have emerged – even more clearly – in this serious world crisis. Indeed, as it will be pointed out in this paper, while it is beneficial to have an exhaustive catalogue of children's rights, there is still a long way to go before children can fully enjoy their rights and have their "voice" heard.

At this very moment, it should be noted that many personal freedoms are being restricted, compressed by putting the protection of the right to health (individual and collective) first. The question now is whether these current restrictions should be considered ordinary or extraordinary. In some cases, the question is whether this limitation is proportional to the emergency.[7] However, once the emergency is over, it will be necessary to talk about life not during the coronavirus, but after it, which will require many measures everywhere.

This paper will, therefore, attempt to reconstruct, at the supranational level, the fundamental rights to which every child is entitled. After identifying these rights and attempting to interpret the complex concept of the best interests of the child, the impact of the Covid-19 pandemic on children's rights will be examined.

2. OVERVIEW OF THE FUNDAMENTAL RIGHTS OF CHILDREN

Before analyzing what changes are taking place as a result of the Covid-19 pandemic, it is necessary to provide an overview of the fundamental rights of children.[8] It should also be pointed out that all reconstructions and reflections start from international and supranational sources, in particular, European sources (here, we refer to the term "European" in a broader sense than EU law).[9] The analysis will be limited to shared supranational principles and values, given the common framework of fundamental principles guaranteed to the individual – children, in this specific case – on a supranational level, which can be transposed to the realities of the different European legal systems.[10]

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7 Dolso, G. P., *Emergenza sanitaria e libertà di circolazione*, in Dolso, G. P.; Ferrara, M. D.; Rossi, D. (eds.), Virus in fabula, cit., pp. 263-278.

8 For more see Hrabar, D. (ed.), *Prava djece. Multidisciplinarni pristup*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016; Rešetar, B. (ed.), *Dijete i pravo*, Pravni fakultet u Osijeku, Osijek, 2009.

9 Majstorović, I., *Europski obiteljskopravni sustav zaštite djece*, in Hrabar, D. (ed.), Prava djece. Multidisciplinarni pristup, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, pp. 39-62.

10 Referring to the Croatian legal system see *ex plurimis* Hrabar, D., *Dijete – Pravni subjekt u obitelji*, Zagreb, 1994.

First and foremost, reference should be made to an international source that is the most important one in terms of protecting the fundamental rights of children. Indeed, the UN Convention on the Rights of the Child signed in New York in 1989 represents a radical change in the view of children's rights. This convention, certainly one of the most important documents in the history of the United Nations and one of the most ratified ones of all time, imposes a paradigm shift.[11] By laying down a catalogue of fundamental rights of minors with regard to both their relations in their own families, as well as in the community as a whole, the UN Convention on Children's Rights leads individual legislators, as well as international bodies and the European Union itself, to a clear reinterpretation of fundamental rights within the family in a way centered on children.[12] A first reading of the text of the Convention is enough to see that among the most important rights of every child are: 1) the child's right to life and health; 2) the right of the child to live with his or her parents; 3) the right to education; 4) the right to be informed and freely express one's opinion; 5) the right to know one's origins; 6) the right to psychophysical and emotional development, and 7) the right to play.

These rights are also protected at the European level, albeit partly through the role played by the UN Convention.[13] Namely, the UN Convention on children's rights is the foundation for the regulation of children's rights in many legal systems and, obviously, also in the European Union.[14] In this regard, reference should be made to Article 24 of the Charter of Fundamental Rights of the EU, which states in its first paragraph that "children shall have the right to such protection and care as is necessary for their well-being.[15] They are free to express their opinion. Their views shall be taken into consideration on matters which concern them in accordance

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11 Baruffi, M.C., *Il principio dei* best interests of the child *negli strumenti di cooperazione giudiziaria civile europea*, in Di Stasi, A.; Rossi, L.S., (eds.), Lo spazio di libertà, sicurezza e giustizia. A vent'anni dal Consiglio europeo di Tampere, Napoli, 2020, pp. 233-254. In the Croatian Family law cfr. Hrabar, D., *Uvod u prava djece*, in Hrabar, D. (ed.), Prava djece. Multidisciplinarni pristup, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, pp. 13-37, 27 *et seq*.

12 *Ex plurimis* see Cvejić Jančić, O. (ed.), *The Rights of the Child in a Changing World, 25 Years after the UN Convention on the Rights of the Child*, Springer International Publishing Switzerland, 2016. With regard to Croatian law in the work, see Hlača, N.; Winkler, S., *The Rights of the Child: Croatian National Report*, pp. 83-96.

13 Bergamini, E., *Human rights of the children in the EU context*, in Bergamini, E.; Ragni, C. (eds.), Fundamental Rights and Best Interests of the Child in Transnational Families, Intersentia, Cambridge, Antwerp, Chicago, 2019, pp. 3-20.

14 Korać Graovac, A., *Povelja o temeljnim pravima Europske unije i obiteljsko pravo*, in Korać Graovac, A.; Majstorović, I., (eds.), Europsko obiteljsko pravo, Narodne novine, Zagreb, 2013, pp. 25-51. Stalford, H., *Children and the European Union, Rights, Wealfare and Accountability*, *Modern studies in European Law*, Hart Publishing, Oxford and Portland, Oregon, 2012, p. 42. Petrašević, T., *Dijete u pravu Europske unije*, in Rešetar, B., (ed.), Dijete i pravo, Pravni fakultet u Osijeku, Osijek, 2009, pp. 273-293.

15 Charter of the Fundamental Rights of the European Union, OJ C 202/389, 7.6.2016.

with their age and maturity." The second paragraph then states that "in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration." Finally, the third paragraph states that "the child shall have the right to maintain on a regular basis a personal relationship and direct contact with both parents, unless this is contrary to his or her interests." All three paragraphs concisely reproduce the content of the Convention on the Rights of the Child, confirming its extraordinary influence on European sources. This is an example of the phenomenon of cross-fertilization, whereby the possible absence of specific precepts concerning children is filled in, while affirming the universal scope of the Convention on the Rights of the Child.[16]

Apart from the Charter, the need for greater protection of children has become firmly established in the collective consciousness and is also enshrined in Article 3 of the Treaty on European Union.[17] Basically, over the last few decades, legal systems throughout Europe have been influenced by numerous reforms that have swept through all countries like a wave (although not necessarily at the same time). In the wake of the changes and the increased movement of families in the common European area, European legislators have also realized the importance of laying down the rules of the principle to strengthen the legal protection of children.[18]

Nonetheless, the reference to the provisions of international sources capable of protecting the fundamental rights of minors may be insufficient if the interpretation of the rules cited is not combined with Article 8 of the European Convention on Human Rights - ECHR (but also with Article 7 of the Charter) aimed at protecting the fundamental right to private and family life of each person.[19] The combination of these provisions must then be interpolated with the rules of the

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16 Hrabar, D.*, Prava djece u Europskoj uniji – pravni okvir*, in Korać Graovac, A.; Majstorović, I. (eds.), Europsko obiteljsko pravo, Narodne novine, Zagreb, 2013, p. 56.

17 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 202/1, 7.6.2016. In the literature see Winkler, S., *Obiteljski odnosi*, in Mišćenić, E. *et al*., Europsko privatno pravo, Školska knjiga, Zagreb, 2021, pp. 442-485. For a more specific analysis see Franzina, P., *The Place of Human Rights in the Private International Law of the Union in Family Matters*, in Bergamini, E.; Ragni, C. (eds.), Fundamental Rights and Best Interests of the Child in Transnational Families, Intersentia, Cambridge, Antwerp, Chicago, 2019, pp. 141-155.

18 Hrabar, *op. cit.,* note 17, p. 53 *et seq*.; Petrašević, *op. cit.,* note 15, p. 289.

19 Hrabar, D., *Posredni utjecaj Vijeća Europe na Europsku uniju u svjetlu obiteljskopravnih vrijednosti*, Godišnjak Akademije pravnih znanosti Hrvatske, 10, 2019, 1, pp. 133-162. As to the importance of art. 3 of the Convention on the Rights of the Child see: de Graaf, C., *The Legal Impact of Article 3 CRC as a Corrective Remedy - Is Article 3 CRC to Youth Law what Article 8 ECHR was/is to Family Law?*, in Rogerson, C. *et al.* (eds.), Family Law and Family Realities, 16th ISFL World Conference Book, Eleven International Publishing, The Hague, 2019, pp. 421-433. More on human rights in the EU in Crnić-Grotić, V.; Sgardelli Car, N., *Ljudska prava u Europskoj uniji i praksi Europskog suda u Luksemburgu*, Zbornik Pravnog fakulteta u Zagrebu, 60, 2010, 5, pp. 971-994.

individual national systems. Hence the difficulty and originality of the argumentative paths followed in view of the different cultures, traditions and social contexts that inevitably permeate the family law of each country.[20]

Article 8(1) of the ECHR provides that "everyone has the right to respect for his private and family life, his home and his correspondence." Similarly, moving to the level of primary EU law, Article 7 of the Charter of Fundamental Rights of the EU states that "everyone has the right to respect for his private and family life, his home and his communications." Leaving aside some minor terminological differences, the two rules are practically equivalent, even though they were written almost fifty years apart. Thus, it is undisputed in the doctrine and case-law that the protection of private as well as family life is elevated to the rank of fundamental human rights. Still, neither of these provisions offers a definition of family. This is not surprising since the legal regulation of family relationships is an exclusive competence – at least with regards to substantive law – of each national legislator. Every person's family life – including children's – enjoys authoritative protection and any breach of it is sanctioned in the first instance by the European Court of Human Rights, which ensures that the fundamental rights enshrined in the Convention are respected.

When speaking specifically about the family life of a child, the importance of recalling all the sources mentioned so far becomes clear, especially with regards to the rights of the child in his or her family. Every child has the right to live with his or her parents; in other words, the right to the unity of the family or, if this is not possible, to maintain personal contact with both parents. Even outside the boundaries of the nuclear family, every child needs to cultivate relationships with other family members with whom he or she has an emotional involvement (i.e., siblings, grandparents…). However, it should be pointed out that there is always a limit given by the primacy of the child's best interests. This concept will be discussed below, as will the impact of the pandemic on the various aspects of the child's family life.

After all, the importance of the child's need to have personal contact with his or her family is reconfirmed by the existence of other international conventions issued within the Council of Europe.[21] These conventions are: the European Convention on the Exercise of Children's Rights, adopted by the Council of Europe in Stras-

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[20] Gephart, W., *Family Law as Culture*, in Boele-Woelki, K.; Dethloff, N.; Gephart, W. (eds.), *Family Law and Culture in Europe*, Intersentia, Cambridge – Antwerp – Portland, 2014, pp. 347-360. For an interesting and comprehensive historical reconstruction see Antokolskaia, M., *Harmonisation of Family Law in Europe: A Historical Perspective*, *A Tale of two Millennia*, Intersentia, Antwerp – Oxford, 2006.

[21] Majstorović, *op. cit.,* note 10, pp. 47-48.

bourg on 25 January 1996 and Convention on Contact concerning Children, adopted by the Council of Europe in Strasbourg on 15 May 2003.[22] Although they deal with issues of absolute significance, since now they remain almost ignored because the vast majority of member countries of the Council of Europe have not ratified them.

3. THE CONCEPT OF THE BEST INTERESTS OF THE CHILD

There is no doubt that, when deciding in actions concerning children, the impact of Covid-19 on children's rights begs the question what is in the child's best interests in this extraordinary situation. Indeed, we are questioning the real meaning of some concepts that *prima facie* might at times be taken for granted, such as the best interests of the child. As far as we are concerned, some new questions arise. How are these interests to be assessed when guaranteeing the protection of the rights of the child in times of a pandemic?

Actually, even in the pre-Covid-19 era, i.e., during "normal" life conditions, the interpretation of the concept of the best interests of the child was the subject of numerous evaluations.[23]

Article 3(1) of the Convention in the Right of the Child states "in all actions concerning children, whether taken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." It follows clearly from the provision that the best interests of the child is paramount in the legal protection of the child in any decision affecting him or her in any way and with reference to any person. The point is that the Convention on the Rights of the Child does not define what it means by 'best interests of the child.' Many years after the Convention was issued, the General Comment No. 14 of the UN Committee on the Rights of the Child finally helps to interpret the best interests of the child.[24] According to the explanation offered by this source, the notion of the best interests of the child is

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[22] Hrabar, D., *Europska konvencija o ostvarivanju dječjih prava - poseban zastupnik djeteta*, in *Dijete u pravosudnom postupku - Primjena Europske konvencije o ostvarivanju dječjih prava*. Zbornik priopćenja sa stručnih skupova pravobraniteljice za djecu, Zagreb, 2012, pp. 103-116; Lulić, M.; Rešetar, B., *Međunarodne obveze Republike Hrvatske vezane uz provedbu Konvencije o kontaktima s djecom (2003)*, in Rešetar, B. (ed.), Pravna zaštita prava na (zajedničku) roditeljsku skrb, Pravni fakultet u Osijeku, Osijek, 2012., pp. 89-119.

[23] An interesting analysis is offered by Long, J., *Il principio dei* best interests *e la tutela dei minori*, available at: [https://www.questionegiustizia.it/speciale/articolo/il-principio-dei-best-interests-e-la-tutela-dei-minori_86.php], Accessed 25 March 2021.

[24] Committee on the Rights of the Child: [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf].

composed of three aspects. Firstly, the best interests of the child would be understood as a real right of the child to have his or her best interests assessed and taken into substantive consideration;[25] secondly, it would be an interpretative source;[26] finally, the best interests of the child would be a procedural rule in any situation where a matter concerning a child is to be decided.[27]

The concept of the best interests of the child is not built on objective characteristics; on the contrary, it necessarily requires a case-by-case assessment. What may be in the best interests of a certain child at a given moment in history and in a given social context is not so true for every child living in the same reality.

This is how the concept is interpreted also in the Croatian family law literature. Namely, on the occasion of the analysis of the transposition of the Convention into Croatian family law in the doctrine, it has been observed that this "new legal concept" cannot be generalized, nor can it be relativized, but must be assessed on a case-by-case basis. More specifically, it has been noticed that, although the concept of the best interests of the child is not defined, it is definable.[28] In fact, the acknowledgement of the best interests of the child is closely linked to the detection of a specific need of the child that must be met in the best possible way. This specific need of the child must be understood as functional to the optimal psychophysical and emotional development of the child, which is enshrined in the Convention on the Rights of the Child as one of the most important minor's rights. As clearly underlined in the family law literature, for this purpose three elements are relevant: 1) the needs of the child, 2) the autonomy of the parents in the exercise of parental responsibility, and 3) the circumstances, the environment, the conditions, the society – which may be referred to as environmental factors – in which the child lives.[29] It is quite evident that the latter has quite changed throughout the last year.

In addition, see the very recent General comment No. 25 (2021) on children's rights in relation to the digital environment, of 2 March 2021, available at: [https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/25&Lang=en], Accessed 25 March 2021.

25 Quoting Comment no. 14: "Article 3, paragraph 1, (…) gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere."

26 Again, Comment no. 14, where it is highlighted how the concept of the best interests of the child is considered even as a "fundamental, interpretative legal principle."

27 Finally, in Comment no. 14, it can be found that this concept represents also a rule of the procedure. Indeed, quoting: "the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned."

28 Hrabar, D., *Pravni odnosi roditelja i djece*, in Alinčić, M. *et al.*, Obiteljsko pravo, Narodne novine, Zagreb, 2007, pp. 126-307, pp. 234 *et seq*.

29 Hrabar, *op. cit.,* note 29, p. 236.

Could the Covid-19 emergency (always) be considered as a circumstance justifying the restriction of children's rights since any other decision would be against the best interests of the child?

4. THE IMPACT OF COVID-19 ON CHILDREN'S RIGHTS

After the reconstruction of children's fundamental rights, which was purposely carried out on the supranational level, since the question of the impact of the pandemic concerns all minors regardless of the individual national legal systems, it is time to consider how the pandemic has affected these rights. A distinction was previously made between children's rights guaranteed within his or her families and children's rights in relation to the community. In the continuation, situations of severe limitations of children's rights in both segments will be considered.

Regarding children's rights in their own families, in times of Covid-19, the right to live with their parents or to maintain regular contacts with the parent with whom they do not live is seriously compromised.[30] Thus, seen from the point of view of both children and parents, the right to co-parenting suffers great limitations in times of Covid-19.[31]

The absolute centrality of that right in the life of the child is certainly confirmed by Article 9 of the Convention on the Rights of the Child and Article 24 of the Charter, which must be read in conjunction with Article 7 of the Charter and Article 8 of the ECHR. Regarding national legislation, Article 84(3) of the Croatian Family Act also expressly refers to the right of the child to live with his or her parents.[32] Moreover, given the universal scope of the Convention on the Rights of the Child, it is not at all surprising that many other jurisdictions also have an equivalent provision affirming the right of the child to live with his or her parents or, where this is not possible, the right to co-parenting by maintaining stable contact with the parent with whom the child does not live permanently.[33]

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30 As already mentioned, on the same way it can be noticed a limitation on the minor's right to maintain relations with the other family members i.e., siblings, granparents and other relatives or persons other than relatives with whom the child has emotional ties.

31 From a psychological point of view see Roskam, I., *Psychological Insights. Parent-Child Relationships in the Light of Psychology*, in Sosson, J.; Willems, G.; Motte, G. (eds.), *Adults and Children in Postmodern Societies, A Comparative Law and Multidisciplinary Handbook*, Intersentia, Cambridge – Antwerp – Chicago, 2019, p. 669.

32 Croatian Family Act (Obiteljski zakon), Official Gazzette No. 103/2015, 98/19 and 47/20. In the literature see Hrabar, D., *Prava djece u obiteljskom zakonodavstvu*, in Hrabar, D. (ed.), Prava djece. Multidisciplinarni pristup, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, p. 69.

33 Among many see art. 315-bis of the Italian Civil code (codice civile) and § 1626 of the German Civil code (BGB Bürgerliches Gesetzbuch).

As already mentioned, this right is, in any case, subject to the assessment of the best interests of the child. Therefore, is the risk of infection by Covid-19 always an element justifying the limitation of the exercise referred to above? Can the right to co-parenting be contrary to the best interests of the child because of Covid-19? Of course, the answer can never be unequivocal. In some cases, the limitation will be justified; in others, however, it might not be.

Unfortunately, the health emergency we are experiencing also lends itself to easy manipulative tactics aimed at undermining the relationship between the child and one of the parents. In the context of the many problems that exist, especially when there are situations of conflict between ex-parents or ex-partners, it is legitimate to ask whether this extraordinary situation is being abused, leading to the child being voluntarily removed from the non-custodial parent.

This is about conducts that are not aimed at protecting health, but at exacerbating family conflicts, or even worse, behaviours through which the children are exploited to advance the opposing and conflicting positions of the two parents. Actions which, in the end, violate the right to family life. But one cannot look at it only in a pessimistic way. It has to be said that there are parents who, on the other hand, renounce visiting rights in order not to expose their children to health risks. We could call it a "renouncement of love."

Thinking hypothetically about the practical resolution of these problems, although it is too early to discuss case-law as we are still living in an emergency, some decisions can be found in national experiences, especially when discussing urgent measures. While it is difficult to find precedents in our legal system during a pandemic, some decisions can be found above all in the jurisprudence of the most populous states in Europe, which have also been subjected to very restrictive anti-covid-19 measures in recent months. One such example is Italy, where in the very present moment, we may observe a significant compression of the child's right to maintain regular relations and direct contacts with the parent with whom he or she does not live permanently.[34]

In reality, this compression is evident even where, as the courts often rightly argue, there is no basis for it: a health emergency in itself should not legitimize the suspension of contact with the non-custodial parent unless there are specific health risks. In that case, there are alternative ways (video platforms, video calls, telematic tools) capable of preserving the affective relationship between the child and the

[34] Silvestri, C., *Chiaroscuri della frequentazione genitori-figli nell'emergenza coronavirus*, approfondimento 24 aprile 2020, Giustizia civile.com, pp. 2-15.

parent, albeit by transposing it into virtual reality – even on a daily basis.[35] Concretely, alternative ways of maintaining the relationship are possible and needed. The aim is not so much (or only) to guarantee the relationship in the present, but to try to preserve it in the future, in the post-Covid life. It is known that not being in touch risks souring the relationship as well as that distance might lead to dissolvement of relationships and affections. These problems are even more difficult to solve in the presence of cross-border elements.[36]

In all these situations, the importance of guaranteeing the child the right to be heard emerges fully; but even before being heard, the child has the right to be informed. Indeed, recalling once again the UN Convention on the Rights of the Child, as well as the Charter of EU fundamental Rights or the European Convention on the Exercise of Children's Rights, all these sources enshrine the right of the child to express his or her opinion and to be informed of the facts concerning any action that may affect their lives. Of course, children's right to be informed and heard has to be practised in a manner appropriate to their age and maturity. It goes without saying that, in times of a pandemic, children should be informed about the health emergency and the consequences of the spread of the Covid-19 infection.

The protection of the exercise of children's rights, as listed above, depends on this. Every child has the right to be enabled to understand the context in which he or she lives in order to be able to consciously express his or her opinion. Even more so now that many of their rights are being curtailed, children have the right to know what is happening in the world around them.

In the second large group, we include the rights that children have in the context of the society in which they live, or rather the community to which they belong.

However, before moving on to some reflections on these rights, we need to reflect further on one aspect of the child's life within his or her family. The family environment, which until now has been spoken of as the natural society that in a pandemic should be the safe refuge for every person, a warm home that offers pro-

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35 Piazzoni, D., *Diritto alla bigenitorialità, diritto di visita e frequentazione e coronavirus: un mosaico in composizione?*, approfondimento del 04 maggio 2020, Giustizia civile.com, pp. 2-22.

36 In general, with regards to issues concerning children in cross-border situations, many insights can be found in Kunda, I. (ed.), *Obitelj i djeca: Europska očekivanja i nacionalna stvarnost/Family and children: European expectations and national reality*, Pravni fakultet u Rijeci, Hrvastka udruga za poredbeno pravo, Rijeka, 2014, as well as in Župan, M., *Dijete u međunarodnom privatnom pravu*, in Rešetar, B. (ed.), Dijete i pravo, Osijek, 2009, pp. 223-257. In addition, it is useful to take note of the HCCH COVID-19 Toolkit available at: [https://www.hcch.net/en/news-archive/details/?varevent=731], Accessed 20 March 2021.

tection especially to the most vulnerable, has unfortunately turned into a prison for many. Indeed, in times of Covid-19, the domestic walls have seen far too much domestic violence.[37] Thus, another very serious problem has been identified in recent months as the difficulty to protect children from domestic violence. The pandemic has paralyzed a large part of the justice system and so, in the isolation that kept us in our homes, many child victims of domestic violence have been literally imprisoned at home with violent parents and/or family members.[38] Actually, only in the future will it be possible to understand the true extent of the violence that is now taking place in lockdowns, which will affect children's psychophysical and emotional development.

Without wishing to diminish the seriousness of the violence that is taking place in many families and harming many children, it must be noted that this pandemic will also cause many worrying economic consequences, which will undermine the stability of many families.[39] I am referring here both to the right to maintenance and, more generally, to poverty.[40] How will these affect family life? What impact will this have on the relationship between parents and children?

Poverty is, unfortunately, like a bridge that brings into the social context the manifestation of the reality that the child lives in his or her family. In times of Covid-19, poverty has an even greater impact on social exclusion, undermining the rights, even the fundamental rights, of children – especially the most unfortunate ones who live on the margins of society. [41]

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37 Several studies have been carried out this issue. More details are available at: [http://www.emro.who.int/violence-injuries-disabilities/violence-news/levels-of-domestic-violence-increase-as-covid-19-pandemic-escalates.html]. See also: [https://eige.europa.eu/publications/covid-19-pandemic-and-intimate-partner-violence-against-women-eu], Accessed 25 March 2021. Since the beginning of the pandemic in 2020, there has been a need to study the impact of Covid-19 on domestic violence by conducting research in the psychiatric field. See Roje Đapić, M.; Buljan Flander, G.; Prijatelj, K., *Children Behind Closed Doors Due to COVID-19 Isolation: Abuse, Neglect and Domestic Violence*, *Archives of Psychiatry Research*, 56, 2020, pp. 181-192.

38 Rittossa, D.; Golenko, D., *Information Needs of Vulnerable Groups in the Time of COVID-19: The Theoretical Framework*, in Sander, G. G.; Pošćić, A.; Martinović, A. (eds.), Exploring the Social Dimension of Europe, Essays in honour of prof. Nada Bodiroga Vukobrat, Verlag Dr. Kovač, Hamburg, 2021, pp. 407-419.

39 Poverty was a very worrying problem long before the pandemic. For more see *Combating child poverty: an issue of fundamental rights*, dating from 2018 and available at: [https://fra.europa.eu/en/publication/2018/combating-child-poverty-issue-fundamental-rights], Accessed 23 March 2021.

40 With regards to the relationship between poverty and rights see Rodotà, S., *Il diritto di avere diritti*, Editori Laterza, Bari, 2012, pp. 232-242.

41 About the child's poverty and the impact of Covid-19 see: [https://data.unicef.org/topic/child-poverty/overview/], see also [https://www.unicef.org/social-policy/child-poverty]. Accessed 23 March 2021. In the doctrine, see Hlača, N., *Ljudska prava u siromaštvu*, Godišnjak Akademije pravnih znanosti Hrvatske, vol. X, 1/2019, pp. 119-131. Speaking about children's poverty see Družić Ljubotina, O.;

The "new poverty" is characterized by indebtedness and economic uncertainty, unemployment, job loss, falling incomes, rising education costs, as well as by the increase of the number of citizens living in absolute poverty (homelessness – including children).[42]

The unequal treatment of children during the pandemic because of the different economic families' capacities clearly emerges when it comes to the exercise of a fundamental right such as the right to education.[43] During these months, distance learning is being practiced almost everywhere depending on the waves and peaks of the Covid-19 infection. Do all children have the same chances and conditions to educate themselves in these extraordinary living conditions? Even before that, did they all have access to the internet? Do they have the same computer equipment? Clearly, the answer is no.

In the very present moment, the existence of a digital divide is unavoidable. Indeed, the various economic possibilities of the families will lead to a disparity in the use of educational services through technological tools, which risks creating discrimination among minors. The possible violation of the right to education combined with the danger of an evident discrimination against children represents a real risk.

A number of issues arise in this respect that should be highlighted here. The first question is related to the digital world itself and has a wider scope than just the protection of children's rights: is the right to access the internet to be understood as a fundamental right? There is a debate on this point and, in connection with this, there is also the question whether the impossibility of accessing the internet actually entails a form of social exclusion. In particular, this refers to the already mentioned phenomenon of the digital divide, which can lead to a form of social segregation and *de facto* could be described as an expression of the so-called new poverty. Thinking about the education in the pandemic life, it would be nice to

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Kletečki Radović., M., *Siromaštvo i djeca*, in Hrabar, D. (ed.), Prava djece. Multidisciplinarni pristup, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, pp. 243-281, pp. 256 *et seq.*

42 When it comes to „absolute poverty" the right to food comes into question. In particular about this right during the Covid-19 pandemic see Vinković, M., *Hunger as a Social Problem – the Right to Food in a Time of Crisis*, in Sander, G.G.; Pošćić, A.; Martinović, A., Exploring the Social Dimension of Europe, Essays in Honour of Nada Bodiroga-Vukobrat, Verlag dr. Kovač, Hamburg, 2021, pp. 87-97, pp. 91 *et seq*.

43 See The European Child Guarantee: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/eu-strategy-rights-child-and-european-child-guarantee_en]. The goal of this document is to support persons under the age of 18 at risk of poverty or social exclusion. See also: [https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-action-plan/skills-and-equality_en], Accessed 20 April 2021.

imagine all children having the same possibilities and that the emergency has in fact "only" forced a shift from the old normal offline to the new normal online. Unfortunately, access to and use of the new technologies, which should serve as a suitable tool for adapting to the new forms of exercising fundamental rights, such as the fundamental right to education, appears to be a right in itself, or rather, a privilege that cannot be enjoyed by all children. It is rightly considered that IT inclusion should be a fundamental right of individuals, otherwise, the different economic capacities of families would lead to a disparity in the use of educational services through technological tools, which risks creating discrimination among minors and isolation from online relationships, which, in conclusion, generates a digital divide. This would basically lead to discriminatory consequences and, thus, to a possible violation of Article 14 of the ECHR. Reflecting on the digital divide, it must be stressed that it is not limited to the impossibility of connecting to the network. Instead, it goes deeper and refers to the consequent impossibility of acquiring information and knowledge necessary to be able to become part of the digital world. The fundamental problem lies in the fact that the digital divide creates profound differences in the level of information acquired depending on whether or not a child has the possibility of accessing the internet and, more generally, whether or not he or she has the computer tools necessary to achieve this goal. A recent report published by UNICEF offers very discouraging data: more than two-thirds of the world's school-age children do not have access to the internet.[44]

This gap can have various consequences, many of which, recalling another fundamental right of the child, can have a negative impact on his or her psychophysical and emotional development, as well as on his or her right to be informed. In fact, this gap leads to different levels of digital skills from subject to subject, which inevitably reflect in the different forms of expression of the person and involve different developments of cognitive faculties.[45] Moreover, it should be of very serious concern that the digital divide hinders the subject (child) in the conscious and responsible use of the network. [46]

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[44] For more see [https://www.unicef.org/press-releases/two-thirds-worlds-school-age-children-have-no-internet-access-home-new-unicef-itu], Accessed 23 March 2021.

[45] For more see the General comment No. 25 (2021) on children's rights in relation to the digital environment. Specifically, the document stresses the importance of the child's "evolving capacities."

[46] Lisičar, H., *Pravni aspekti zaštite maloljetnika u elektroničnim medijima*, in Hrabar, D. (ed.), Prava djece. Multidisciplinarni pristup, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, pp. 119-145. Generally speaking about the right to education in the context of the Charter of fundamental rights of the EU see Korać Graovac, *op. cit.,* note 15, p. 42. Stalford, *op. cit.,* note 15, p. 143 *et seq.*

In addition to the right to education, another right that is seriously compromised is the right to play. Namely, Article 31 of the Convention on the Rights of the Child enshrines a specific right for all children to have rest and leisure, to engage in play and recreational activities proper to their age, and to join freely in cultural life and the arts.

Among these, rights such as access to education, recreation, and a balanced psychophysical development of the child are being severely tested at the present time.

From a psychological point of view, distance learning as well as the limitation of opportunities for play and leisure lead to the conclusion that the impact of Covid-19 is devastating on the psychophysical and emotional development of children. The absence of the socialization normally associated with school and leisure activities carries a serious risk of damaging the health (especially mental health) of children.

5. WHAT IS THE FUTURE OF CHILDREN'S RIGHTS IN THE POST-COVID WORLD? SOME CONCLUDING REMARKS

After having made a "snapshot" of the current state of children's rights, we need to ask ourselves what will happen once we return to normal life, or at least once the state of emergency is over.

As far as the rights of minors within the family are concerned, it seems necessary to continue strengthening legislative policies aimed at providing minors with concrete protection of their rights. It means to strengthen children's right to be informed in all situations that concern him or her, as well as his or her right to be heard. Hopefully the post-Covid-19 period will serve to awaken the adults about the need to listen to children: the exercise of such a right allows an informed assessment of what is really in the best interests of the child.[47] Referring to the policies of the "child friendly justice," although these goals are already present as fixed point on the national and supranational agendas with regard to the protection of children's rights, such rules should become binding.[48]

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47 In this regard, see Korać Graovac, A., *Pravo djeteta da bude saslušano – Opći komentar br. 12 Odbora za prava djeteta (2009.)*, in Dijete u pravosudnom postupku - Primjena Europske konvencije o ostvarivanju dječjih prava. Zbornik priopćenja sa stručnih skupova pravobraniteljice za djecu, Zagreb, 2012, pp. 117-137. Majstorović, I., *The realisation of the right of the child to express his/her views – How "visible" are children in Croatian family judicial proceedings?,* Ljetopis socijalnog rada, 24, 2017, 1, pp. 55-71.

48 Regarding child-friendly justice see the *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice* available at: [https://www.coe.int/en/web/children/child-friendly-justice], see also: [https://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals_en.pdf],

As far as the rights of the child in the social context are concerned, this pandemic has shown the many vulnerabilities of society in caring for children. One among them appears to be of worrying proportions: the digital divide.

Nowadays, it is unimaginable that a person – especially a child – is unable to exercise his or her rights (not only those to education) in the same way offline and online. A genuine digital revolution should lead to the realization of this purpose.

Equal opportunities, which also include combating the new forms of energy poverty, must be guaranteed to all minors so as not to create discrimination and different opportunities for growth and psychophysical development.[49]

A first step that at least shows an awareness of the gravity of the situation seems to have been taken at the supranational level with the issuing of The EU Strategy on the Rights of the Child and the European Child Guarantee on 24 March 2021.[50] It is now hoped that the efforts made in times of the pandemic to protect children, who are certainly among the most traumatized by this situation, will not come to a standstill once the acute phase of the emergency has been overcome. The various efforts made at the international and supranational level must contribute to a systematic improvement in national legislative policies aimed at improving the protection of children's rights.

"All grown-ups were once children... but only few of them remember it."

Antoine de Saint-Exupéry, The Little Prince

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49 See *supra* footnotes 40, 41, and 42 and the European Parliament resolution of 14 April 2016 on meeting the antipoverty target in the light of increasing household costs (2015/2223(INI)), OJ C 58/192, 15.2.2018.

50 The EU Strategy on the Rights of the Child and the European Child Guarantee are available at: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/eu-strategy-rights-child-and-european-child-guarantee_en]. See also: [https://ec.europa.eu/info/sites/default/files/child_rights_strategy_version_with_visuals3.pdf], Accessed 15 April 2021.

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UDK 342.7-053.2:347.61]:614.4
Preliminary communication

THE CHILD'S RIGHT TO MAINTAIN CONTACT WITH BOTH PARENTS IN THE AGE OF PANDEMIC

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ABSTRACT

The COVID-19 pandemic and the accompanying extraordinary measures engaged restrictions of fundamental human rights and liberties to an unprecedented scale. Inevitably, this had implications in the family context as well. Even though children are not considered to be an endangered category from a medical perspective, they are adversely affected by the pandemic in practically all aspects of life, in the short-term and in the long-term. One of the child's rights directly affected is the right to maintain direct contact with both parents on a regular basis. Digital means of communication can somewhat mitigate the lack of personal contact, however, not everyone has access to the necessary technologies and there might be various disagreements about exercising such indirect contact. The closure of judiciary and social services placed the burden of resolving contact related disputes almost entirely upon parents. This paper aims to examine the relevant legal framework and measures taken in relation to the child's right to maintain contact with both parents in the circumstances of the pandemic, with particular focus on the Croatian context and the response of the Croatian authorities to the challenges arising from this extraordinary situation, and to identify actions which could be taken in order to improve the child's unfavourable position.

Keywords*: best interests of the child, child's rights, contact, COVID-19, pandemic, parents, restrictions*

1. INTRODUCTION

There were several key implications for children arising from the pandemic[1], and here we are focused on the implications in the family context, specifically the right to contact with both parents. Achieving and maintaining child-parent contact

[1] Council of Europe, The COVID-19 pandemic and children: Challenges, responses and policy implications, 2021, [https://rm.coe.int/covid-19-factsheet-revised-eng/1680a188f2], Accessed 9 June 2021, p. 1.

arrangements is often a challenging process within the 'regular' circumstances. Confinement and other restrictive measures have contributed to limiting the child's contact with the non-resident parent, increasing the risk of parental alienation, delaying the proceedings relating to contact, and the difficulties in enforcing court-orders on visitation rights[2]. Due to the closure of judiciary and social services, which could have been accessed to only in urgent situations that could not be remedied otherwise, the primary responsibility and the greatest burden for resolving issues concerning contacts during the pandemic was placed upon parents themselves, but therein lies a great potential for conflicts.

Certain recommendations and guidance were issued for parents and other carers regarding child contact arrangements during pandemic. Generally, it was recommended that during the lock-down the contacts be exercised indirectly, by using distance communication means if it was not possible otherwise due to the risk of infections, and after the quarantine ended, it was recommended that the contact arrangements envisaged by existing decisions are to be maintained, subject to respecting the best interests of the child as a primary concern and to abiding to all COVID-19 related measures. Digital means of communication can somewhat mitigate the lack of personal contact, however, not all children and parents have access to the necessary technologies; also, some parents might not have agreed to such a substitute for direct contact regardless of the health risks. It is also likely that some parents have used the pandemic related restrictions to obstruct or prevent the child having regular contact with the other parent.

Being mindful of the fact that maintaining contact is not only the right of the child, but also the right and the duty of the parents[3], we will examine the relevant legal framework, international (United Nations, Council of Europe, European Union) and Croatian, dealing with contacts concerning children from the perspective of the child's right to maintain contacts with both parents. Child's right should be of greater importance with its parents being obligated to adapt to the circumstances that necessarily changed in the COVID-19 pandemic. After all, it is generally accepted that the child's rights are more than a moral category as they are recognized in international law[4], and that the parents' duties exist as a correlation of the child's rights because the parents are the ones responsible to enable the

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2 *Ibid*., p. 14.

3 Within the international, regional and national legal framework it is recognised that other family members and other persons close to the child have the right to contact with the child, however, due to limited space available, this paper does not deal with that aspect of the issue of contact concerning children.

4 Jakovac-Lozić, D., *Susreti i druženja djeteta s odvojenim roditeljem u presudama Europskog suda za ljudska prava*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 55, No. 3-4, 2005, p. 872.

child to exercise its rights[5]. Focusing on the issue of child-parent contact in the Croatian pandemic related context, we will examine how the domestic authorities responded to the pertaining challenges. We will use the analysis of the legal framework and domestic measures taken for the purposes of finding guidance as to what could be done to mitigate as much as possible the negative effects of restrictions brought about by the pandemic.

2. INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

2.1. United Nations Convention on the Rights of the Child (1989)

Whenever in search for answers regarding a child's right, the United Nations Convention on the Rights of the Child (1989)[6] (CRC) is a common starting point. It is a kind of ''world constitution" of the rights of the child that the international community accepts,[7] and it is also the first instrument that guaranteed the child's right to maintain contact with both parents on the international level[8]. The CRC provides the basis for understanding the significance attached to the family and the indispensable role that parents are expected to play in the realisation of all the child's rights.

By prescribing the obligation of the States Parties to respect the right of the child to preserve its identity, including also family relations, (art. 8) the CRC treats preserving connections with its family as an element of the of the child's right to identity.[9] Fundamental in this context is art. 9 which unambiguously lays the principle of not separating the child from its parents against their will, except when competent authorities decide so, thus making it obvious that the child's right to maintain contact with its parents is one of the most important rights in the family context; it reflects the goal of ensuring the child has the opportunity to be cared for by its parents and, in case of their separation, to maintain meaningful contact with a non-resident parent.[10]

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5 Alinčić, M.; Hrabar, D.; Jakovac-Lozić, D.; Korać Graovac, A., *Obiteljsko pravo*, Narodne novine, Zagreb, 2007, p. 222.

6 Konvencija o pravima djeteta, Službeni list SFRJ – Međunarodni ugovori, no. 15/90, Narodne novine - Međunarodni ugovori, no. 12/93, 20/97, 4/98, 13/98. Available in English at: [https://www.ohchr.org/en/professionalinterest/pages/crc.aspx], Accessed 17 February 2021.

7 Lopatka, A., *An Introduction to the United Nations Convention on the Rights of the Child*, Transnational Law and Contemporary Problems, vol. 6, 1996, p. 252.

8 Rešetar, B., *Pravna zaštita prava na susrete i druženje*, Pravni fakultet u Osijeku, 2011, p. 118.

9 Vučković Šahović, N.; Petrušić, N., *Prava deteta*, Pravni fakultet Univerziteta u Nišu, 2016, p. 108.

10 Khazova, O.A.; Mezmur, B.D., *Continued Reflections on Family Law Issues in the Jurisprudence of the CRC Committee: The Convention on the Rights of the Child @ 30*, in: Brinig, M. (ed.), International Survey of Family Law, Intersentia, Cambridge-Antwerp-Chicago, 2020, p. 339.

Such separation may have different causes, including the measures taken by the state against the parents or the children (e.g. deprivation of parental responsibilities, taking the child into public care), natural causes (e.g. natural disasters) or external causes (e.g. armed conflict, political unrest).[11] The impossibility or at least a severely limited possibility of maintaining contact between the child and its parents during the COVID-19 related lock-down could not be fit strictly into one of these categories but rather it seems that it would represent a sort of fusion of different reasons as grounds for their separation.

In the context of potential separation of a child from its parents it is indispensable to carry out the assessment and determination of the child's best interests.[12] Namely, in accordance with CRC art. 3/1, in all actions concerning children, whether undertaken by public or private bodies, the best interests of the child shall be a primary consideration. However, applying the standard of the best interest of the child is often complicated as it is, and the pandemic raised the level of difficulty very high. The state of emergency caused by COVID-19 pandemic put states in a tough position as they were faced with conflicting demands of having to meet the child's best interest's by enabling it to maintain contact with both parents, while at the same time fulfilling the child's best interest in protecting its health[13] and development. Furthermore, the state has to respect the rights and duties of parents[14] and it must protect the public interests, namely through protecting the health of its citizens which also touches upon the interests of the child as it concerns the protection the state had to provide for the members of the child's family.

According to CRC art. 3/2, the state is to take all appropriate measures in order to provide the child such protection and care as is necessary for his or her well-being. Considering this provision in the context of pandemic, all the measures that states imposed, as restrictive as they were, could now be considered as ''appropriate" since they were aimed at protecting the child and its family, thus protecting the child's interests.

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11 Vučković Šahović; Petrušić, *op. cit.*, note 9, pp. 146-147.

12 Right to preservation of the family environment and maintaining relations is one of the elements that have to be taken into account when determining the best interest of the child. UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013, [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf],. pt. 58, Accessed 28 January 2021. More details: *Ibid.*, pts. 58-70.

13 'Care' in CRC art. 3/2 must be interpreted broadly to take account of the health care rights. See more in: Freeman, M., *A Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child*, Martinus Nijhoff Publishers, Leiden-Boston, 2007, p. 68.

14 In accordance with CRC art. 3/2. More details in: *Ibid.*, pp. 69-71.

Certain obligations of the states are focused directly on enabling the child to exercise its right to personal contact with its parents in case that parent resides in a different state, and the restrictions in that area may be justified only if they are prescribed by law, necessary to protect e.g. public health, and consistent with the other rights recognized in the CRC (art. 10). Maintaining contact with the non-resident parent if they are separated by state borders becomes especially difficult for the child[15]. Crossing the state borders during the global lock-down was practically impossible which also suggests depriving children in such situation of the right to maintain contact with their parents. However, considering the grounds for introducing them, it would be hard to argue successfully that those restrictions fall into category of 'unjustified'.

The child's right to maintain contact with both parents reflects the principle of art. 18 that both parents have common responsibilities for the upbringing and development of the child.[16] Parents are the primary bearers of those responsibilities, while the state has a duty to extend appropriate assistance to parents if they lack abilities to perform their responsibilities. Realisation of the child's rights depends on its family and particularly parents being aware that it is upon them to provide the child with appropriate direction and guidance in the exercise of its rights, in a manner consistent with the evolving capacities of the child (CRC art. 5). What should be observed here is that by using the term ''parental responsibilities", the CRC suggests a partnership between parents and children[17] and the parents should be fully aware of the crucial significance for the child of them adequately fulfilling their role.

In art. 12 it is established that every child has the right to freely express its views in all matters affecting it, as well as the right for those views to be given due weight, according to the child's age and maturity. Also, the child has a right to be heard directly or indirectly through a representative in all proceedings affecting it. These provisions emphasize the importance of participation and respect for the personality of the child[18], and impose a clear legal obligation on states parties to recognize this right and ensure its implementation[19]. At the same time, it is also important that parents encourage and facilitate their children in expressing themselves freely

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15 Khazova; Mezmur, *op. cit.*, note 10, p. 340.

16 Hodgkin, R.; Newell, P., *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Children's Fund, Geneva, New York, 2007, p. 130.

17 Lopatka, *op. cit.*, note 7, p. 255.

18 *Ibid*., p. 256.

19 UN Committee on the Rights of the Child, General Comment No 12 (2009): The right of the child to be heard, CRC/C/GC/12, 20 July 2009, [https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf], pt. 15, Accessed 28 January 2021.

in accordance with art. 12 considering the family is the first point of social contact for the child[20]. When it comes to decision making process of the competent authorities, their determination of the child's best interest necessarily requires including the child itself.[21]

The CRC treats family as a unit primarily responsible for the child and the most important place for realisation of the child's rights, while at the same time it obliges the states to provide support to families lacking abilities to fulfil their functions adequately. Therefore, the international law does not abandon the child to the exclusive responsibility of the family, especially when the child finds itself in an unfavourable situation.[22] However, confinement measures, quarantine, and lockdown engaged most intense restrictions of human rights and freedoms in general, and they inevitably prevented states in providing that support to families to a great extent. It seems safe to conclude that it all reflected negatively on the child's well-being.

2.2. Council of Europe

2.2.1. *Convention for the Protection of Human Rights and Fundamental Freedoms (1950)*

When talking about the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[23] in connection to the protection of human rights of the family members as well as the child's rights with regard to its family, we are referring to the right to respect for family life, as guaranteed to everyone by its art. 8, as well as to the case-law of the European Court of Human Rights[24] (ECtHR).

It is a widely accepted opinion that the ECtHR has given a significant contribution to strengthening of children's rights in Europe[25] notwithstanding the fact the

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20 Parkes, A., *Children and International Human Rights Law: The Right of the Child to be Heard*, Routledge, London, 2013, pp. 41-42.

21 Bubić, S., *Standard najbolji interes djeteta i njegova primjena u kontekstu ostvarivanja roditeljskog staranja*, Zbornik radova Dani porodičnog prava ''Najbolji interes djeteta u zakonodavstvu i praksi", Pravni fakultet Univerziteta ''Džemal Bijedić" u Mostaru, Mostar, 2014, p. 13.

22 Vučković Šahović; Petrušić, *op. cit.*, note 9, p. 140.

23 Konvencija za zaštitu ljudskih prava i temeljnih sloboda te Protokoli br. 1, 4, 6, 7, 11, 12, 13, 14, 15, Narodne novine – Međunarodni ugovori, no. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10, 13/17. Available in English at: [https://rm.coe.int/1680a2353d], Accessed 26 March 2021.

24 European Court of Human Rights was established as an organ of implementation of the ECHR. See Section II of the ECHR, art. 19 and following. *Ibid*.

25 Faye Jacobsen, A., *Children's Rights in the European Court of Human Rights – An Emerging Power Structure*, The International Journal of Children's Rights, 24:3, p. 549.

ECHR does not explicitly mention that category of rights. The Court's approach to the more specific question of contact is to emphasise the vital nature of contact between parents and children in order to maintain the family life relationship in accordance with art. 8.[26]

It is well established in the Court's case-law that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down[27]. Interference with the right to family life may be justified only if, as follows from art. 8/2 ECHR, it is in accordance with the law, pursues a legitimate aim and can be regarded as necessary in a democratic society. It is up to the State to identify the legitimate aim of interference in the rights guaranteed by the ECHR[28]. In cases concerning family life, the protection of the rights and freedoms of others and the protection of health or morals are most frequently used legitimate aims and it seems safe to say the interferences related to restrictive measures imposed during pandemic could be placed under the both of these categories.

When parents do not live together, the relevant ECtHR case-law has set forth various obligations in an effort to put a halt to events that could cause a breakdown in the parent-child relationship[29]. In cases where contact disputes concerning children arise between parents, parents have the right to have measures taken with a view to them being reunited with their children, and it is an obligation for the domestic authorities to take such measures.[30] Lack of cooperation between separated parents is not uncommon, however it is not a circumstance which can by itself exempt the authorities from their obligations, but instead it imposes on them an obligation to make effort to reconcile[31] those conflicting interests[32]. It is also worth mentioning that not only the behaviour of contact-seeking parent should be taken into account, but also the behaviour of the parent with whom the child resides when there are allegations of manipulation of the child[33]. In sum, the states' posi-

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26 Kilkelly, U., *Children's Rights – A European Perspective*, Judicial Studies Institute Journal, 2004, 4:2, 2004, p. 74.

27 E.g. Kacper Nowakowski v. Poland, no. 32407/13, 10 January 2017, § 70; Suur v. Estonia, no. 41736/18, 20 October 2020, §71.

28 Harris, D.J.; O'Boyle, M.; Bates, E.P.; Buckley, M., *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, Oxford University Press, 2014, p. 509.

29 Roagna, I., *Protecting the right to respect for private and family life under the European Convention on Human Rights*, Council of Europe, Strasbourg, 2012, p. 70.

30 E.g. Ribić v. Croatia, no. 27148/12, 2 April 2015, § 89.

31 See Bubić, S., op. cit. note 21, p. 27.

32 See: Z. v. Poland, no. 34694/06, 20 April 2010, § 75.

33 More details in: Vertommen, E., *Balancing the Rights of Parent and Child in Case on Non-Compliance with Contact Arrangements: A Case Law Analysis*, in: Boele-Woelki, K.; Martiny, D. (eds.), Plurality and

tive obligation is not one of a result, but one of means employed, and the key consideration is whether authorities have taken all necessary steps to facilitate contact as can reasonably be demanded given the circumstances of a specific case.[34]

Effective respect for family life requires that future relations between parent and child be determined in the light of all the relevant considerations, and not by the mere passage of time[35], therefore, there is a duty to exercise exceptional diligence[36]. Furthermore, when assessing the compliance with the states' obligations under art. 8, the ECtHR requires that the fair balance is struck between the competing interests of the individual and the community, including other concerned third parties, and the state's margin of appreciation; it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family.[37]

As to the procedural requirements implicit in art. 8, what has to be determined is whether the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests[38]. The states' margin of appreciation in the field of child protection has historically been rather wide because of the complex and sensitive nature of these situations, which national authorities are usually in a better position to solve.[39] However, stricter scrutiny is applied in respect of restrictions on contact rights, because such measures entail the danger of family relations between parents and child being effectively curtailed.[40] The domestic courts are expected to conduct an in-depth examination of the entire family situation and of a whole series of factors (factual, emotional, psychological, material, medical), with the aim of finding the best solution for the child.[41]

Even though the ECHR does not mention the best interest of the child, in cases involving children the best interest test is now the accepted criteria for determining the compliance of the state interference with family life within the meaning of art. 8 ECHR[42]. In cases involving the contact restrictions, the ECtHR emphasises

Diversity of Family Relations in Europe, Intersentia, Cambridge, 2019, pp. 194-196.

34 E.g. A.V. v. Slovenia, no. 878/13, 9 April 2019, § 74.

35 See: V.D. and Others v. Russia, no. 72931/10, 9 April 2019, § 116.

36 E.g. Ignaccolo-Zenide v. Romania, no. 31679/96, 25 January 2000, § 102.

37 See: Jeunesse v. the Netherlands [GC], no. 12738/10, 3 October 2014, §§ 106, 117.

38 See: A.K. and L. v. Croatia, no. 37956/11, 8 January 2013, § 63.

39 Roagna, *op. cit.*, note 29, p. 49.

40 E.g. Pavel Shishkov, no. 78754/13, 2 March 2021, § 78; V. v. Slovenia, no. 26972/07, 1 December 2011, § 82.

41 E.g. Petrov and X v. Russia, no. 23608/16, 23 October 2018, §§ 98-102.

42 Kilkelly, *op. cit.*, note 26, p. 72.

that the child's interests must come before all other considerations[43] and that interests may, depending on their nature and seriousness, override those of the parents[44]. The child's interests dictate that its ties with the family must be maintained, except in cases where the family has proved particularly unfit, but it is also in the child's interests to develop in a sound environment; therefore a parent cannot be entitled under art. 8 to have such measures taken which would harm the child's health and development.[45] When it comes to realising the child's right to active participation in making decisions that affect its life, as guaranteed by the art. 12 CRC, the Court finds it important that the due weight is given to the child's views and feelings[46]; however, those views in itself are not necessarily sufficient to override the parents' interests, especially in having regular contact with their child, without any other factors being considered.[47]

It would seem that the general development of the Court's case-law does go in favour of the child's rights perspective, but the child's best interest is less influential in cases where its rights have to be balanced against parents' interests[48] protected by the art. 8 ECHR. At the same time, this approach could also be seen as protecting their mutual long-term interest in protecting their right to contact, thus also protecting their right to family life[49]. In the context of COVID-19 confinement measures, what unfortunately follows from what is stated above is that most of the state's obligations imposed by the ECHR and the Court's case-law in the area of child's and parent's right to enjoy mutual company could probably not have been fulfilled.

2.2.2. *European Convention on the Exercise of Children's Rights (1996)*

European Convention on the Exercise of Children's Rights[50] represented another step forward in the inauguration of children's rights by affirming the possibilities of the child to fulfil its interests in its own special way. Namely, this Convention

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43 See: Strand Lobben and Others v. Norway, no. 37283/13, 10 September 2019, § 204.

44 E.g. Johansen v. Norway, no. 17383/90, 7 August 1990, § 78.

45 E.g. Kocherov and Sergeyeva v. Russia, no. 16899/13, 29 March 2016, § 95; Sommerfeld v. Germany [GC], no. 31871/96, 8 July 2003, § 64.

46 More details on the application of art. 12 CRC in the case-law of ECtHR in: Parkes, *op. cit.*, note 20, pp. 111-113; Vertommen, *op. cit.*, note 33, pp. 183-184.

47 E.g. N.Ts. v. Georgia, no. 71776/12, 2 February 2016, § 72; C. v. Finland, no. 18249/02, 9 May 2006, §§ 57-58.

48 Faye Jacobsen, *op. cit.*, note 25, pp. 566, 570.

49 Rešetar, *op. cit.*, note 8, p. 137.

50 Europska konvencija o ostvarivanju dječjih prava, Narodne novine – Međunarodni ugovori, no. 1/10, 3/10. Available in English at: [https://rm.coe.int/168007cdaf], Accessed 12 April 2021.

contains rules aiming at making it possible for the child to express its views in family proceedings.[51] While it is not specified in which family proceedings the child's rights should be exercised, art. 1/3 includes particularly those involving the issue of access to children. These proceedings have been chosen due to their importance for the child.[52] Throughout the text of the Convention two important family law notions are restated – the idea that in proceedings concerning the child its best interests should be the primary consideration, and the right of the child to be informed and express its views in such proceedings.[53]

This Convention recognises the child's rights to receive all relevant information, to be consulted and express its views, and to be explained and informed of the possible consequences of compliance with these views and the possible consequences of any decision (art. 3). This is a guarantee of the child's right to actively participate in the proceedings, further followed by the right to apply for a special representative in art. 4[54], in cases that the relevant domestic laws see as conflict of interests between the child and its parents. Also, in case of such conflict of interest, the court has the power to appoint a special representative for the child (art. 9). Even if parents are not the child's representatives within the meaning of this Convention, they should help their children in exercising their right to actively participate in the proceedings. In any case, the assistance provided to the child in view of exercising these rights must correspond to the child's level of maturity and understanding.[55]

The courts are required to ensure that, before taking any decision, they have sufficient information at their disposal, which means sufficient information to take a decision in the best interests of the child. The court must also perform its part in the exercise of the rights guaranteed in art. 3 by ensuring that children have been provided with all relevant information, consulting the child in person when it's appropriate, allowing the child to express its views and giving those views due weight (art. 6).[56]

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51 Jakovac-Lozić, D., *Međunarodne otmice djece od strane roditelja*, Zbornik radova Pravnog fakulteta u Splitu, Vol. 34, No. 45-46, 1997, p. 87.

52 Council of Europe, Explanatory Report to the European Convention on the Exercise of Children's Rights, 1996, [https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5ee], p. 3, Accessed 11 April 2021.

53 Nikolina, N., *Divided Parents, Shared Children: Legal Aspects of (Residential) Co-Parenting in England, the Netherlands and Belgium*, Intersentia, Cambridge-Antwerp-Portland, 2015, pp. 23-24.

54 Rešetar, *op. cit.*, note 8, p. 139.

55 More details in: Council of Europe, *op. cit.*, note 52, pp. 4-7.

56 *Ibid.*, p. 7.

In principle, these provisions should equip the child with tools that should enable it to effectively exercise its right to active participation in the proceedings regarding the issue of contacts. However, when considered in connection to all the restrictions that pandemic brought, it is hard to imagine that these rights could have been exercised anywhere close to a satisfactory level.

2.3.3. *Convention on Contact concerning Children (2003)*

Principles relevant for the child's right to contact with parents, particularly in the area of transfrontier contact, stem especially from the Convention on Contact concerning Children[57] which is devoted entirely to improving the issues relating to exercising contact rights. This document provides further valuable elaboration of certain elements of this child's right and as such it can be considered to be complementary to the CRC.

This Convention emphasizes that the child and its parents have the right to maintain regular contact with each other.[58] By using the term ''contact", it reflects the contemporary tendencies that perceive the child not as an object to be accessed to, but as an active subject upon whose views, opinions and wishes sometimes depends the contact itself.[59]

Three different forms of the right to contact concerning children are identified in art. 2: a) direct contact which includes the child staying for a limited period of time with or meeting with the parent; b) indirect contact which means any form of communication between the child and the parent, e.g. by telephone, letters, e-mail, etc.; c) the provision of information to the parent about the child or to the child about the parent. The two latter levels of contact can be used in addition or instead of direct contact in specific circumstances when direct contact is not possible or it is contrary to the best interests of the child.[60]

Reiterating the significance attached to this right both for the child and the parents, art. 4 allows for restriction or exclusion of that right only where it is beyond

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57 Konvencija o kontaktima s djecom, Narodne novine - Međunarodni ugovori, no. 7/08, 1/09. Available in English at: [https://rm.coe.int/168008370f], Accessed 25 January 2021.

58 Nikolina, *op. cit.*, note 53, p. 24.

59 More in: Jakovac-Lozić, D., *Europska konvencija o kontaktima u vezi s djecom (2003.) i prilagodba obiteljskog zakonodavstva Federacije Bosne i Hercegovine zahtjevima Konvencije de lege ferenda*, Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, no. 2, Mostar, 2004, pp. 155, 157.

60 Council of Europe, Explanatory Report to the Convention on Contact concerning Children, Strasbourg, 2003, [https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?-documentId=09000016800d380d], p. 5, Accessed 25 January 2021.

any doubt that the best interests of the child concerned require so. This means that no other less restrictive solution was available, but in any case the court will have to duly justify the necessity of such decision[61]. This also makes it obvious that practical obstacles such as the fact the child and the parent reside in different states will not be sufficient grounds for restricting/denying contact[62], as opposed to the case where contact represents physical or psychological jeopardy for the child from the part of its parent.[63]

The child's procedural rights in the proceedings for deciding on the issue of contacts (art. 6) originate and are completely harmonised with the demands contained in the aforementioned European Convention on the Exercise of Children's Rights.[64] Furthermore, the courts must ensure both parents are informed of the importance of regular contact and to encourage them in reaching amicable agreements[65] to that end (art. 7), for instances through family mediation and other processes for resolving family disputes. Thus it could be said that this Convention sends out a positive message about the desirability of more intensive cooperation between the parents by promoting contact between both parents and the child despite practical obstacles[66], as well as by obliging the competent authorities to motivate parents towards out-of-court ways of resolving their issues.

2.3. European Union

The European Union (EU) also has high regard for the child's right to maintain contact with both parents. Even though the EU does not have powers to directly influence national substantive family laws and/or children's rights in its Member States, the child's rights in general have been gaining more importance on the EU level.

The promotion of the rights of the child was set for the first time as one of the objectives of the EU in art. 3 of the Treaty of Lisbon[67]. Among the rights, freedoms and principles contained in the Charter of Fundamental Rights of the European

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61 *Ibid*., pp. 8-9.

62 Nikolina, *op. cit*., note 53, pp. 24-25.

63 Council of Europe, *op. cit*., note 60, p. 9.

64 Lulić, M.; Rešetar, B., *Međunarodne obveze Republike Hrvatske vezane uz provedbu Konvencije o kontaktima s djecom (2003)*, in: Rešetar, B. (ed.), Pravna zaštita prava na (zajedničku) roditeljsku skrb, Pravni fakultet u Osijeku, Osijek, 2012, p. 110.

65 The European Convention on the Exercise of Children's Rights also encourages mediation or similar processes for resolving disputes affecting children (see art. 13), *op. cit*., note 50.

66 Nikolina, *op. cit*., note 53, p. 25.

67 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, 17.12.2007.

Union[68] (Charter), protection of the family and the child's rights also found their place. The right of every individual to respect for his private and family life is guaranteed in art. 7 of the Charter, and its meaning and scope is to be interpreted in line with the corresponding right enshrined in the ECHR (art. 52/3 of the Charter).[69]

Without prejudice to children enjoying other human rights and freedoms set forth in the Charter, art. 24 highlights few of the child's rights which might be considered as especially important.[70] It envisages the child's right to protection and care necessary for its well-being and requires that its best interests be a primary consideration in all actions concerning the child. Furthermore, it recognises the child's right to express its views freely on matters concerning it, as well as the right to have those views given due weight in accordance with the child's age and maturity. While these rights are certainly significant for resolving issues concerning the realisation of the child's right to contact with both parents, it is of particular importance that art. 24/3 explicitly prescribes the child's ''right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests".

Therefore, among many child's rights, the creators of the Charter chose to accentuate the child's right to contact with both parents. The reason for this might be the fact the EU is based on the freedom of movement of people. The parent's changing of his habitual residence and/or domicile within the EU requires finding the way to enable the child to maintain personal contact with both parents[71] in the new circumstances that include a cross-border element.

Respect for the child's right to maintain direct contact with both parents is apparent also in the provisions of the Council Regulation (EC) No 2201/2003 of 27 November 2003[72], the so-called Brussels II bis regulation, which deals with jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. Namely, this Regulation declares that it seeks to ensure respect for the fundamental rights of the child as set out in art. 24 of the Charter (recital 33, preamble of the Brussels II bis). Brussels II bis applies

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68 Charter of Fundamental Rights of the European Union, *OJ C 326, 26.10.2012.*

69 See also the Consolidated version of the Treaty on European Union, *OJ C 326, 26.10.2012, art. 6.*

70 Korać Graovac, A., *Povelja o temeljnim pravima Europske unije i obiteljsko pravo*, in: Bodiroga-Vukobrat, N. *et al.* (eds.), Europsko obiteljsko pravo, Narodne novine, Zagreb, 2013, p. 45.

71 *Ibid.*, p. 47.

72 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ L 338, 23.12.2003.*

in civil matters relating to parental responsibility, which include rights of access (art. 1/1(b), 1/2(a)). The right of access is defined as including ''in particular the right to take a child to a place other than his or her habitual residence for a limited period of time" (art. 2/10). It is important to notice that the Brussels II bis regulation provides for a 'fast track' regime for recognition and enforcement of judgments on the rights of access[73]. Namely, if the right to contact is granted in an enforceable judgment in a Member State, it shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without the possibility of opposing its recognition, provided that the conditions laid down by this Regulation are fulfilled (art. 41); one of those conditions is that the child was given an opportunity to be heard (art. 41/2(c)) which also demonstrates the importance attached to the child's rights.

The role of the Court of Justice of the European Union (CJEU) is to make sure the EU law is interpreted and applied in the same way in all Member States[74]. Even though the search through the CJEU's case-law[75] so far does not reveal cases which would include both the issue of contact between the child and its parents and the COVID-19 related restrictions on freedom of movement, the available jurisprudence, albeit mainly concerning the issue of return of the child, offers valuable insight into the CJEU's approach in this area.

In the CJEU's case-law, the protection of the child and of the child's fundamental rights is considered to be a legitimate interest which, in principle, justifies a restriction of a fundamental freedom guaranteed by the Treaty on the Functioning of the European Union[76] (TFEU). The conceptions regarding the level of protection and the related rules differ between Member States, but the CJEU does not consider it necessary that measures aimed at protecting the rights of the child be unified in all the Member States.[77]

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73 McEleavy, P., *Brussels II bis: Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition*, The International and Comparative Law Quarterly, Vol. 53, No. 2, 2004, p. 511. The author explains that the 'standard track' regime is reserved for matrimonial matters and the majority of matters of parental responsibility. The 'fast track' procedure is envisaged for the judgments on the rights of access and on the return of the child and is covered by the Chapter III, Section IV of the Brussels II bis regulation.

74 See *Consolidated version of the* Treaty on the Functioning of the European Union, *OJ C 326, 26.10.2012, art. 267.*

75 See the official website of the CJEU: [https://curia.europa.eu/juris/recherche.jsf?language=en], Accessed 14 June 2021.

76 *Consolidated version of the* Treaty on the Functioning of the European Union, *op. cit.*, note 74, art. 21.

77 C-454/19, 19 November 2020, §§ 40-42.

In cases where the issue of jurisdiction arises, the CJEU emphasises that the objective of Brussels II bis is meeting the best interests of the child, which is why it favours the criteria of proximity and entrusts the jurisdiction primarily to the courts of the Member State of the child's habitual residence[78]. Family environment is of particular importance when determining the infant's habitual residence, and that environment includes not only the parent with whom the child lives on a daily basis, but the other parent as well if the child maintains regular contact with that parent.[79]

When application is made for change of the previously made decision on contacts, the CJEU established that if the courts of the Member State made a decision that became final concerning parental responsibility with regard to a minor child, they no longer have jurisdiction to alter that decision if the habitual residence of the child is in another Member State[80]. In case that an application relating to parental responsibility is made at the time when the child has already acquired its habitual residence in a third State, one cannot rely on indefinite retention of jurisdiction of the courts of the Member State of origin, as that would not be compatible with respecting the best interests of the child as one of the fundamental objectives pursued by the Brussels II bis regulation.[81] In the context of the proceedings for the return of the child, Member States are not precluded from allocating to a specialised court the jurisdiction to examine questions of custody with respect to a child, under the condition that such an allocation of jurisdiction is compatible with the child's fundamental rights set out in art. 24 of the Charter, and that the procedures are conducted expeditiously.[82]

The importance attached to the child's right to maintain contact with both parents is also apparent from the fact the CJEU requires that art. 7 of the Charter, protecting the right to family life, be interpreted in a way that takes into consideration the child's best interests, and taking into account the fundamental right of a child to maintain regular contact with both parents[83]. Moreover, even though art. 24 of the Charter mentions only the parents as holders of the right to contact with the child, the CJEU confirmed that the grandparents' application to be granted rights of access to their grandchildren is also covered by the Brussels II bis regulation,

78 E.g. C393/18 PPU, 17 October 2018, §§ 48-49.

79 C512/17, 28 June 2018, especially §§ 48, 65.

80 C499/15, 15 February 2017, §§ 61-70; father applied to the courts of his Member State seeking to change the child's place of residence, the amount of maintenance and the contact arrangements.

81 C-603/20 PPU, 24 March 2021, §§ 58, 60, 64; father applied to the referring court seeking an order for the return of the child and a ruling on rights of access.

82 C-498/14 PPU, 9 January 2015, §§ 51-54.

83 See e.g. C540/03, 27 June 2006, §§ 58; C400/10 PPU, 5 October 2010, § 60.

thus the concept of ''rights of access" must be interpreted accordingly[84]. This view of the CJEU is in line with the commitment of the EU to respect the fundamental rights guaranteed by the ECHR as general principles of the Union's law (art. 6 TFEU).

Even though it is obvious that the EU, within the field of its powers, makes effort to provide protection to the child's right to maintain regular and direct contact with both parents, the objective barriers, resulting from the measures imposed in an effort to contain the COVID-19 pandemic, prevented to a large extent the realisation of this right in practice, especially in cases of the cross-border contact.

3. CROATIAN FAMILY LAW APPROACH TO THE CHILD'S RIGHT TO CONTACT WITH BOTH PARENTS

In Croatian family law parental responsibilities represent a sum of duties, rights and privileges whose purpose is to promote and safeguard the child's rights and welfare in accordance with the child's developing capacities, including the child's health and development, and enjoying and maintaining personal relations.[85] The Family Act (2015)[86] (FA) requires of parents to discuss and agree upon the individual aspects of parental care with the child, according to the child's age and maturity. Parents are not allowed to waive their right to parental responsibility (art. 91), nor to transfer this right to another person, which is why this right is placed among personal and subjective rights and constitutes an element of the individual's personal status[87].

Widely accepted views about contact with both parents as being in the best interest of the child and the overall goals in that regard incited significant shift in the regulation of this dimension of relations within the families[88], so it is not surprising that the gradual development in this area led to this right of the child currently being placed among the fundamental principles of the FA (art. 5/2), together with

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84 C-335/17, 31 May 2018, §§ 33, 37; the referring court requested a preliminary ruling on the question whether the concept of ''rights of access" encompasses also the child's access to relatives other than the parents, in this case the grandparents.

85 Korać Graovac, A., *Zajednička roditeljska skrb u praksi Europskog suda za ljudska prava – slučaj Zaunegger v. Germany*, in: Rešetar, B. (ed.), Pravna zaštita prava na (zajedničku) roditeljsku skrb, Pravni fakultet u Osijeku, Osijek, 2012, p. 72.

86 Obiteljski zakon, Narodne novine, no. 103/15, 98/19, 47/20.

87 Alinčić; Hrabar; Jakovac-Lozić; Korać Graovac, *op. cit.*, note 5, p. 219. While the parents may not transfer the right to parental responsibility itself, they are allowed to transfer parts of parental responsibilities to third persons, e.g. by temporarily transfering daily care to third persons or to an institution. See arts. 102 and 103/1 of the FA.

88 Jakovac-Lozić, *op. cit.*, note 4, p. 880.

the primary right, duty and responsibility of parents to live with and care for their child (art. 6). It is the duty of courts and public bodies adjudicating in cases affecting children's rights to protect the rights of the child and its well-being before all (art. 5/1). Encouraging amicable resolution of family matters is prescribed as a task of everyone included in providing the family with professional assistance or decide on family relations (art. 9).

Right to live with its family which includes both parents is indispensable for the child's emotional stability, however this is a relative right and it will not always be possible to exercise it[89], for example, in the case the parents' divorce. In such cases the child's right to contact with both parents serves as a kind of substitute.[90] The child's right to contact with the non-resident parent is prescribed as one of the child's personal rights (art. 84/4), while at the same time the right and duty to protect the child's personal right to contact is declared as one of the basic elements of parental care (art. 92/1). Forbidding or restricting the parent's right to contact with the child is possible only by a court's decision if such a measure is necessary for the protection of child's well-being (art. 123).[91]

Different forms of contact between the child and the parent derive entirely from the aforementioned Convention on Contact concerning Children; thus the FA provides for direct contacts (the child staying with the parent or meeting with the parent for a limited period of time); indirect contacts (using available means of communication, e.g. telephone, SMS, etc.; providing of information to the parent about the child and vice versa (art. 121).

Furthermore, aiming at the realisation of the child's right to contact to the widest possible extent, the legislator imposed certain specific duties upon both parents. The non-resident parent has the right and duty to maintain personal contacts notwithstanding this parent's right to exercise the parental care (arts. 95/1, 112); the parent with whom the child resides has a correlative duty to enable and encourage maintaining contacts of the child with the other parent, and to refrain from acting in a way that could hinder those contacts (arts. 95/2, 119). Duties of the resident parent could be seen as part of the legislator's attempts to demonstrate the parents just how important for the child's life is maintaining contact with both of them. Parents should be made aware that the legislator also provided for sanctions in case they breach those duties. Namely, FA prescribes in art. 126 that the parent has to compensate the damages caused to the other parent by not complying with

89 Hrabar, D., *Dijete - pravni subjekt u obitelji*, Zagreb, 1994, pp. 94-96.

90 Alinčić; Hrabar; Jakovac-Lozić; Korać Graovac, *op. cit*., note 5, p. 246.

91 Conditions for making such a decision are prescribed in accordance with the Convention on Contact concerning Children, see supra, section. 2.2.3. and art. 123/2 of the FA.

the court's decision on the contact of the latter with the child without justifying reasons for his actions.

In the spirit of encouraging cooperation for the sake of the child's best interest, the legislator provided the parents with possibility of reaching an agreement on exercising contacts with the child (art. 122). Also, parenting plan[92] is a written agreement of parents on the manner of the exercise of the joint parental responsibility, including the child's contact with both parents, in the circumstances of them permanently not living in a family union. Moreover, parents are required to inform their child of the content of the parenting plan, provide it with the opportunity to express its opinion, and give that opinion due weight (art. 106).

Parents may also initiate the non-contentious proceedings related to maintaining of contact with the child. However, prior to initiating such proceedings they are obliged to attend mandatory counselling[93] (arts. 322/1, 329/1(8), art. 478/4) at the social welfare centre. Specific aims of this procedure are making participants aware of their duty to take account of the child's well-being when deciding on their family disputes, of the negative effects of such disputes on the child, of the advantages of amicable resolutions of family matters, of the duty of parents to take into account the child's views, and informing the participants about the possibility of resolving their disputes in the context of family mediation (art. 330).

Family mediation is another out-of-court option that the FA provides for parents who need professional assistance in resolving their disputes and reaching agreements on issues affecting the child is explicitly placed amongst the principal purposes of this procedure (art. 331).

The legislator also envisaged some specific rules to be applied in the decision making process about the contact between the child and the parent. Namely, art. 416 of the FA obliges the court to give the child an opportunity to express its views prior to making a decision on the matter of contact. Since the court decides on the issue of contact when there is no agreement between parents, the latter should be mindful of the fact the court will take into account their cooperativity with regards the proceedings of mandatory counselling and family mediation, and with regard to encouraging the contacts of the child with the other parent. The court is also under the obligation to warn the parents about the exercise of contact being especially important for the child's well-being and to encourage them to reach an

[92] For spouses with children, parenting plan represents a condition for obtaining decision on non-contentious divorce. See arts. 52-55, art. 327 of the FA.

[93] Mandatory counselling is a form of aid provided to family members for the purposes of reaching an agreement on family matters. See art. 321/1 of the FA.

agreement and to participate in family mediation. The explanation of the court's decision must include a warning about the possible sanctions for a parent who does not comply with the duty of enabling the child's contact with the other parent[94], which include fines, imprisonment, and the modification of decision on the child's place of residence (art. 417).

Croatian family law obviously asserts the view that joint parental responsibility is to the child's benefit, regardless of the parents' mutual relationship, hence it imposes upon them the duty to cooperate even when they do not live together or their relationship is conflictive. Of course, the latter situation can turn the joint parental responsibility into a burden, especially for the residing parent[95], but also for the child who is caught in between parents. Besides that, the parents should have in mind that their child's right to participation implies that including the child should not only be a momentary act, but the starting point for an intense exchange between children and adults[96], thus building a cooperative relationship between them.

In this context it is also worth mentioning that all the proceedings on the matters related to the child's personal rights are explicitly defined as urgent, with the courts being required to hold the first hearing within 15 days since the application was made. However, exceeding the time limits is allowed on account of important reasons (art. 347), which provided courts with the grounds to justify delays that were simply inevitable due to COVID-19 related measures.

When it comes to the child's procedural rights, the FA is in line with demands of both the European Convention on the Exercise of the Children's Rights and the Convention on Contact concerning Children and is providing those guarantees in all the proceedings affecting the child's rights.[97] For instance, child is a party to all the judicial proceedings affecting its rights and interests (art. 358); in proceedings on matters affecting the child's personal rights and interests the court may allow the child who has reached the age of 14 to present the facts, submit evidence, lodge legal remedies and take other actions in those proceedings (art. 359/1); the court will give the child the opportunity to express its views, and it must also be satisfied that the child receives information about the proceedings (art. 360).

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94 Arts. 418-419 FA also provide for a number of safeguards and guarantees which should contribute to carrying into effect of decisions on contact. Those measures fully correspond to the requirements of arts. 9 and 10 of the Convention on contact Concerning Children.

95 Korać Graovac, *op. cit.*, note 85, p. 85.

96 UN Committee on the Rights of the Child, *op. cit.*, note 19, pt. 13.

97 Lulić; Rešetar, *op. cit.*, note 64, pp. 109-110.

Notwithstanding the relevant legal framework which formally offers significant guarantees, children are faced with a number of barriers to the effective exercising of their procedural rights.[98] This assertion is valid in the 'regular' circumstance which means that all the usual obstacles to that end were exacerbated when the quarantine was imposed to an extent that could almost be equalized to the annulment of those rights.

4. MEASURES CONCERNING MAINTAINING CONTACT BETWEEN THE CHILD AND THE PARENTS DURING LOCK-DOWN

Due to significantly increased risk of transmission of COVID-19, on 19 March 2020 the Civil Protection Headquarters of the Republic of Croatia (Headquarters) adopted the Decision on the temporary ban on crossing the state border at the border crossings of the Republic of Croatia[99], which was followed by the Decision on prohibition on leaving the place of residence and permanent residence in the Republic of Croatia[100], adopted on 23 March 2020. In an effort to reduce the possibility of further spread of the disease, these decisions imposed a complete lock-down and practically put the country in quarantine by placing severe restrictions of freedom of movement internationally and within the country.

The latter decision allowed for certain exceptions so the prohibition did not include leaving the place of residence due to vital family reasons such as the care of children (pt. II/e). Leaving the place of residence was possible only if a special permit for entry or exit was issued by the local civil protection headquarters. In any case, all the measures related to social distancing, not staying in public areas, and possession of a valid permit when entering or leaving the area of permanent residence had to be observed (pt. III). Therefore, children and parents residing in different states basically lost any possibility of having direct contact while the ban

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98 Poretti, P., *Pristup pravosuđu za djecu*, in: Župan, M. (ed.), Prekogranično kretanje djece u Europskoj uniji, Pravni fakultet Sveučilišta Josipa Jurja Strossmayera u Osijeku, Osijek, 2019, pp. 76-77. The author writes about the subjective barriers, explaining them as being conditioned by the characteristics of the child as a holder of rights, and the objective/systemic barriers, meaning the vicinity and accessibility of the court, adaptation of the court to the child as a party, legal assistance. *Ibid.*, pp. 76-81

99 Odluka o privremenoj zabrani prelaska preko graničnih prijelaza Republike Hrvatske, Narodne novine, no. 32/20, 48/20, 56/2020. This Decision was amended many times since May 2020, almost on the monthly basis, by extending the period of application, softening the restrictions, introducing conditions relating to COVID-19 tests and etc. For more information, see e.g. [https://civilna-zastita.gov.hr/odluke-stozera-civilne-zastite-rh-za-sprecavanje-sirenja-zaraze-koronavirusom/2304], Accessed 1 April 2021.

100 Odluka o zabrani napuštanja mjesta prebivališta i stalnog boravka u Republici Hrvatskoj, Narodne novine, no. 35/20, 39/20, 44/20, 48/20, 56/20.

was in force, while those children and parents residing in Croatia faced more or less obstacles in that regard, depending mostly on their individual circumstances and the interpretation the local headquarters decided to give to 'the vital family reasons' and 'care for children'.

Prohibition of cross-border travel was loosened by opening borders for Croatian citizens on 9 May 2020 under the strict condition of following the recommendations of the Croatian Institute of Public Health. Also, an exception to the prohibition was added so that persons travelling for urgent personal reasons were now included.[101] After that the restrictions were gradually eased, as the situation allowed. Prohibition of leaving the place of residence was lifted completely on 11 May 2020.[102]

Prompted by frequent written submissions and phone calls from parents who are not living together and from the centres for social welfare because of the difficulties in exercising contacts between children and their non-resident parents, on 1 April 2020 the Ministry of Labour, Pension System, Family and Social Policy (the Ministry) published a Recommendation on maintaining contacts of children and parents and exercising parental responsibilities in the circumstances of pandemic[103]. The Ministry explicitly pointed out that it is primarily the duty and responsibility of parents to make effort in reaching the agreements and adapting their relations with their children in accordance with the measures imposed for the purposes of containing the spread of COVID-19, and to protect the health of the child.

If exercising direct contacts between the child and the non-resident parent would not be in accordance with all the measures prescribed by the Headquarters and/or keeping such contacts would increase the risk of infections, it was recommended that the contacts be exercised indirectly, via electronic and/or telecommunication means e.g. telephone, Skype, WhatsApp, Viber etc. While those conditions applied, the resident parent was to enable the child to make use of those means for the purposes of maintaining contact with the other parent to the maximum possible extent. In sum, direct contacts were not officially forbidden, however, generally imposed restrictions itself surely made them impossible for some children and

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101 Odluka o izmjenama i dopuni Odluke o privremenoj zabrani prelaska preko graničnih prijelaza Republike Hrvatske, Narodne novine, no. 56/2020, pts. I and II.

102 Odluka o stavljanju izvan snage Odluke o zabrani napuštanja mjesta prebivališta i stalnog boravka u Republici Hrvatskoj, Narodne novine, no. 56/2020.

103 Ministarstvo za demografiju, obitelj, mlade i socijalnu politiku, Preporuka – Održavanje osobnih odnosa djece s roditeljima i izvršavanje roditeljske skrbi u uvjetima pandemija, 1.4.2020., [https://www.koronavirus.hr/najnovije/preporuka-odrzavanje-osobnih-odnosa-djece-s-roditeljima-i-izvrsavanje-roditeljske-skrbi-u-uvjetima-pandemija/366], Accessed 13 January 2021.

parents. Also, they were, obviously, almost completely left to the will of parents and their capability for cooperation.

The Ministry reminded that the inability to recognize and prioritize the child's need for stability and health protection stands for violation of the child's rights which implies the possibility and/or the necessity of taking other actions in the area of family law or criminal law protection of the child. The Centres were recommended to pass this reminder on to parents.

Another thing that stands out is the fact the Ministry expressly stated that parental conflicts regarding maintaining personal contacts between children and parents are not considered as emergency situations. It would seem that this explicit remark may have implied that the parents must be aware of the impossibility of obtaining access to courts during the lock-down for the purposes of resolving their disputes regarding the issue of contact and are therefore forced to cooperate. This, we believe, is the area that offers significant space for improvement. The state should make more effort in educating parents not only of their legal responsibilities, rights and duties pertaining to parental responsibility, but also of all the consequences that could result from the inadequate performance of their role.

Centres for social welfare were instructed to take an individualized approach to every single situation and possibilities or limitations in maintaining contact, first of all taking into account the risks to the health of the child.[104] For those parents who are not able to reach agreements themselves, the Ministry recommended[105] using the counselling services and family mediation as very efficient methods of preventing the escalation of conflicts within family.

Inevitably, the operating of social services during the period of maximum restrictions was significantly reduced. The centres for social welfare were forced to close their doors and received clients only in urgent situations which could not be remedied any other way[106] and it is doubtful whether the circumstances enabled responding even to all of the really urgent situations where the child's life, health, development and/or safety were endangered. Not unlike centres for social welfare, during the period of lock-down family centres also operated solely through the

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104 Ministarstvo za demografiju, obitelj, mlade i socijalnu politiku, Održavanje osobnih odnosa djece s roditeljima i izvršavanje roditeljske skrbi u uvjetima pandemija, 31.3.2020., [http://czss-osijek.hr/wp-content/uploads/2020/04/CZSS-SVI-odr%C5%BEavanje-osobnih-odnosa.pdf], Accessed 13 January 2021.

105 See: [https://mrosp.gov.hr/print.aspx?id=11816&url=print], Accessed 18 January 2021.

106 See e.g. notifications of Centres for social welfare in Split – [https://czss-split.hr/index.php/novosti/193-obavijest-o-radu-centra], Osijek – [http://czss-osijek.hr/obavijest-gradanima/], Našice – [http://www.czss-nasice.hr/obavijest-gradanima/], Accessed 19 January 2021.

electronic means of communication[107] which represented another significant obstacle[108] in the process of providing counselling as well as participating in that process.

The Ministry monitored the course of events and on 11 May 2020 issued a fresh Recommendation on maintaining contacts between the child and the non-resident parent[109], stating that contacts are to be exercised according to the courts' decisions in force. However, the restrictions will apply in case one of the parents or another member of their family end up in self-isolation or infected with COVID-19. In all other circumstances, it is again the parents responsibility to assess the interest of their child depending on its state of health as well as the health of each parent's household members.

The Ministry reminded the interested parties about the possibility of reaching out to social welfare centres for professional assistance. The possibility of family and household members coming under the obligation of isolation or self-isolation probably resulted in many different variations of restrictions which would apply to contacts of the child and the parent, so even after the lock-down ended the circumstances were still a fertile ground for conflicts regarding maintaining direct contact.

At this point we do not have relevant specific data to conduct comprehensive analysis of the actual effects of COVID-19 lock-down on the right of the child in Croatia to maintain contact with the non-resident parent. Presumably, exercising the right to contact was considered as ''vital family reason of caring for the child", however we do not know how many permits were issued on the grounds of that exception to the prohibition on leaving the place of permanent residence[110], or

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107 See: [https://mrosp.gov.hr/print.aspx?id=11816&url=print], Accessed 18 January 2021, *op. cit*., note 88.

108 For instance, Croatian government set up funding schemes to provide laptops or other technological devices for children who were otherwise unable to access online learning. See: Council of Europe, op. cit., note 1, p. 16. This is certainly a commendable measure and one that should be considered in the future in a wider context of providing assistance to the families in need.

109 Ministarstvo za demografiju, obitelj, mlade i socijalnu politiku, Preporuka – Održavanje osobnih odnosa djeteta s roditeljem s kojim ne stanuje, 11.5.2020., [https://mrosp.gov.hr/UserDocsImages/dokumenti/COVID-19/3_Preporuka%20roditeljima%2011.5..pdf], Accessed 19 January 2021.

110 By 18 May 2020, when the obligation of obtaining them way cancelled, there were 2,202,518 permits issued, [https://www.dw.com/hr/hrvatska-bez-e-propusnica-jednog-od-najefikasnijih-oru%C4%91a-u-sprje%C4%8Davanju-%C5%A1irenja-zaraze/a-53474226], Accessed 13 January 2021. However, we do not know how many of them were issued for the purposes of caring for the child and whether exercising the right to contact was actually treated as a vital family reason. Generally, circumstances regarding issuing permits were rather vague, lacking transparency and predictability.

how many contacts were missed due to condition of obtaining the permit itself. We still do not know how many court proceedings were halted or delayed, or how many proceedings were initiated during the period of severe restrictions of freedom of movement as a result of parents' disagreements about the way of exercising the right to contact; also, we do not know how many disputes concerning contact were successfully resolved during that period, using the means available.

Publicly available case-law of the Croatian courts so far does not suggest a large number of such proceedings.[111] Available decisions which are both related to the right of contact and mention COVID-19 restrictive measures from the period after the lock-down ended suggest that, in principle, those restrictions were not seen as obstacles for maintaining contact between the child and the parent. However, two cases suggest that the lock-down was (ab)used by one of the parents to the detriment of the child's contact with the other parent. One case concerns the mother moving to another city claiming that it was safer there due to a better epidemiological situation and that the children were not safe when staying with their father[112]. Circumstances of another case suggest that the father used the period of lock-down, which the child spent with him on the basis of the parents' agreement, to manipulate the child against its mother.[113]

What we find encouraging and where we see an opportunity for learning from this experience and for further improvement, is the fact that some of the court's decisions mentioned above contain specific references to the relevant provisions of the international instruments protecting the child's right to contact with its parents,

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111 See: Županijski sud u Puli-Pola, Gž Ob-277/2020-2, 14.9.2020., where the decision includes an instruction to the parents about their obligation to respect all the decisions and the recommendations of the Croatian Institute for Public Health and the Headquarters while the pandemic is ongoing; Županijski sud u Puli-Pola, Gž Ob-367/2020-2, 1.12.2020., where the father claimed COVID-19 restrictions prevented him from visiting his children placed in SOS Children's Village L., however the court rejected that argument because there was no evidence that the father ever requested the permit for leaving his place of residence; Županijski sud u Splitu, Gž Ob-819/2020-2, 3.12.2020., where the court rejected mother's argument against determining the location for contacts at the local shopping centre since such places have not been identified as the sources of jeopardy for public health in the context of COVID-19 pandemic, provided that protective measures are applied.

112 Županijski sud u Puli-Pola, Gž Ob-357/2020-2, 16.11.2020. Mother appealed against the decision determining the place of residence of her children at the address of their father in Zagreb and the contact arrangements. She moved with two daughters from Zagreb to Umag, claiming it was safer there due to minimal risk of earthquakes in Istra and due to a better epidemiological situation. In her appeal she claimed children were in danger when staying with their father in Zagreb.

113 Županijski sud u Puli-Pola, Gž Ob-257/2020-2, 1.9.2020. The father is retired and the mother is working so they agreed upon child staying with the father during COVID-19 pandemic and while the online classes were on. However, the child gradually started resisting visiting its mother. The court found that that the child's behaviour was the result of the father's manipulation as the child had previously lived with its mother since the day of birth till the pandemic broke out.

with which the courts tried to made parents more aware of their duties regarding enabling the child in exercising that right. As mentioned earlier, art. 417 of the FA obliges the courts to inform the parents about the significance of maintaining contact with both of them and to warn them of the possible sanctions for violating their duties thereof. We believe that there is a space for further improvement in this area also.

5. CONCLUSION

The international community expressed its view regarding the rights of the child who is not able to live with both parents through, inter alia, recognizing the child's right to contact with the parent from whom it is separated in order to preserve their relationship[114], and the Croatian legal framework is definitely abiding to that consensus. It recognises that the right to contacts is equally important for the child and the parents and it recognizes the child's procedural rights. It also accentuates the cooperation between parents and between parents and children as a crucial element in building positive relationship between the child and both parents.

In general, the state has the role of the protector of the family and the child, however it is often the case that the state does not rise up to the challenge of its duties or the state is the one violating the rights of parents and children[115]. That being said in the context of the still ongoing pandemic, it is obvious that fulfilling the protective role of the state with regard to exercising the right to contact between children and parents was significantly compromised for objective reasons. For instance, social services in Croatia were already over-stretched and in need of reform and the pandemic only further amplified these deficiencies.[116]

It was not necessary to describe in detail in this article the extent to which children's everyday lives were disturbed by the global lock-down, with closing down everything and confining everyone to their homes. Today, we are all still sharing the experience of this global crisis. Moreover, it is safe to say at this point that we do not know when the pandemic will be over. Even though the lock-down is no longer in force, a lot of other restrictions are. Nobody expected this state of emergency to last this long, so there is no point to just keep waiting 'for all of this to be over' and the competent authorities should take this opportunity to learn from the experiences that the crisis brought.

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114 Jakovac-Lozić, *op. cit.*, note 4, p. 870.

115 Vučković Šahović; Petrušić, *op. cit.*, note 9, p. 140.

116 Mutatis mutandis: Council of Europe, *op. cit.*, note 1, p. 3.

Examination of the relevant legal framework for the child's right to maintain regular contact with both parents revealed not only what rights children and parents have in that regard and what the role of the state and the competent authorities entails, but it revealed also the extent to which those rights and duties were objectively and effectively disabled. There are so many legal tools aimed at protecting and promoting the child's rights, but they were simply unfeasible. Contact issues were left to parents to agree upon, but many parents are not capable of resolving such issues in the spirit of cooperation, putting their child's interest in front of their own.

Precisely in this regard the pandemic revealed a need to further develop counselling services. Also, the competent authorities shoud initiate educative activities aimed primarily at parents, with a view of educating and counselling them about the contents and significance of their parental role, and the crucial influence of cooperation on their family relations. Parents should be made aware that the child's rights are not just a few words on a paper archived somewhere far away in the United Nations or the Council of Europe; they must be fully aware that those words are written in the national legislation and that not acting in accordance with their parental responsibilities may result in certain sanctions.

It is our belief that even if COVID-19 was to disappear tomorrow, this would still be a good investment, so to say, for the future. The skills acquired through participation in such educational and counselling activities would stay with that family even after the pandemic is over, and would generally contribute to reducing the level of conflict and raising the level of cooperation in resolving family matters, thus reducing the need for engaging the judicial or social welfare system. For those who need a stronger incentive, more efforts should be put within the judicial system, respectively through empowering judges who decide on family matters. Their duties in that regard also include making parents aware of the importance of the child's right to maintain meaningful contact with both of them, warning them about the legal consequences they may face in case they do not comply with their responsibilities, but they also include deciding on such consequences.

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UDK 343.549-053.2:341
342.726-053.2:342.56]:614.4
Original scientific paper

COVID-19 CHALLENGES TO THE CHILD ABDUCTION PROCEEDINGS*

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ABSTRACT

While creating a new notion of everyday life, the COVID-19 pandemic also affects the resolution of cross-border family disputes, including the international child abduction cases. The return of an abducted child to the country of his or her habitual residence is challenged by travel restrictions, international border closures, quarantine measures, but also by closed courts or cancelled hearings. Those new circumstances that befell the whole world underline two issues considering child abduction proceedings. The first one considers access to justice in terms of a mere possibility of the applicant to initiate the return proceeding and, where the procedure is initiated, in terms of the manner of conducting the procedure. The legislation requires a quick initiation and a summary resolution of child abduction proceedings, which is crucial to ensuring the best interests and well-being of a child. This includes the obligation of the court to hear both the child and the applicant. Secondly, it is to be expected that COVID-19 will be used as a reason for child abduction and increasingly as justification for issuing non-return orders seen as a "grave risk" to the child under Article 13(1)(b) of the Child Abduction Convention. By analysing court practice from the beginning of the pandemic in March 2020 to March 2021, the research will investigate how the pandemic has affected child abduction proceedings in Croatia. Available national practice of other contracting states will also be examined. The aim of the research is to evaluate whether there were obstacles in accessing the national competent authorities and courts during the COVID-19 pandemic, and in which manner the courts conducted the proceedings and interpreted the existence of the pandemic in the context of the grave risk of harm exception. The analyses of Croatian and other national practices will be

* The work of doctoral student Martina Drventić has been fully supported by the "Young researchers' career development project – training of doctoral students" of the Croatian Science Foundation.
This paper is a product of work that has been fully supported by the Faculty of Law Osijek Josip Juraj Strossmayer University of Osijek under the project nr. IP-PRAVOS-23 „Contemporary Issues and Problems to the Protection and Promotion of Human Rights".

used to gain an overall insight into the effectiveness of the emerging guidance and suggest their possible broadening in COVID-19 circumstances or any other future crises.

***Keywords**: international child abduction, Child Abduction Convention, Brussels IIbis Regulation, COVID-19 pandemic, access to justice, grave risk of harm exception, undertakings*

1. INTRODUCTION

The COVID-19 pandemic affects the resolution of cross-border family disputes, including international child abduction cases. The most important international instrument which regulates international child abduction, i.e. the Convention on the Civil Aspects of International Child Abduction (hereinafter: the Child Abduction Convention),[1] defines international child abduction as a wrongful removal or retention of a child to a country different from that of their habitual residence. Such removal is unilaterally decided by the abductor, usually a parent, without the other parent's consent or subsequent acquiescence.[2] The aim of the Child Abduction Convention, which is to restore the *status quo* by means of a safe and prompt return of a child to the state of his or her habitual residence,[3] is now being challenged by the COVID-19 pandemic circumstances such as travel restrictions, closed international borders, quarantine measures, but also by closed courts or cancelled hearings.[4]

This complex matter of child abduction cases is regulated at international and EU level, as well as by national laws.[5] The research will be focused on the EU level, where the rules on child abduction between the Member States are amended by Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No

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1 HCCH, *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Hague XXVIII. Convention on the Civil Aspects of International Child Abduction (Konvencija o građanskopravnim vidovima međunarodne otmice djece), Official Gazette, International Treaties, No. 8/2018.

2 Child Abduction Convention, Art 3. González Beilfuss, C., *Chapter C.8: Child Abduction*, in: Basedow, J.; Rühl, G., Ferrari, F.; de Miguel Asensio, P. (eds.), Encyclopaedia of Private International Law, Edward Elgar Publishing, Cheltenham, UK, Northampton MA, USA, 2017, pp. 298–300.

3 Pérez-Vera, E., *Explanatory Report on the 1980 HCCH Child Abduction Convention*, HCCH, 1982, Para. 16.

4 See Lebret, A., *COVID-19 pandemic and derogation to human rights*, Journal of Law and the Biosciences, Vol. 7, No. 1, 2020, pp. 1-15.

5 See Kruger, T., *International Child Abduction: The Inadequacies of the Law,* Hart Publishing, Oxford and Portland, Oregon, 2011, pp. 1–15.

1347/2000 (hereinafter: the Brussels II*bis* Regulation).[6] The paper will also consider the regulation and conduction of the proceedings in the Republic of Croatia.[7] The Act on the Implementation of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter: the Implementation Act) was enacted on 1 January 2019, and became applicable in the Republic of Croatia.[8] As to the implementation of the child abduction proceedings in Croatia, several ECtHR rulings have pointed out the inefficiency of child abduction proceedings in Croatia.[9] Moreover, the research study on the four period prior to the enactment of the Implementation Act (hereinafter: the Župan/Kruger/Drventić Study) indicated problematic aspects of handling international child abduction cases in Croatia.[10] It still remains open to see whether the Implementation Act has brought any improvements to the child abduction proceedings.

The first aspect identified as being affected by the pandemic is access to justice in terms of a mere possibility of the applicant to initiate the return proceeding before the Central Authorities and courts, and, where the procedure is initiated, in terms of the duration and manner of conducting the procedure. The second aspect

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6 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338 (hereinafter: Brussels II*ter* Regulation).

7 Croatia became a party to the Child Abduction Convention on 8 October 1991, pursuant to the Notification of Succession of 8 October 1991 (Odluka o objavljivanju mnogostranih međunarodnih ugovora kojih je Republika Hrvatska stranka na temelju notifikacija o sukcesiji) – Official Gazette, International Treaties, No. 4/94. The Brussels IIbis Regulation is applicable in Croatia since 1 July 2013. The revised Brussels II*ter* Regulation will become applicable in the whole EU on 1 August 2022. Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction [2019] OJ L 178 (hereinafter: Brussels II*ter* Regulation).

8 Act on the Implementation of the Hague Convention on the Civil Aspects of International Child Abduction (Zakon o provedbi Konvencije o građanskopravnim vidovima međunarodne otmice djece), Official Gazette No. 99/2018.

9 Such as *Karadžić v Croatia*, App. No. 35030/04, 15 December 2005, and *Adžić v Croatia,* App. No. 22643/14, 12 March 2015, both denouncing the long duration of return proceedings; *Vujica v Croatia*, App. No. 56163/12, 8 October 2015, and *Adžić v Croatia (No. 2)*, App. No. 19601/16, 2 May 2019, both concerned the way in which the proceedings were conducted.

10 The results of this research will be mostly compared with the research in: Župan, M.; Drventić, M.; Kruger, T., *Cross-Border Removal and Retention of a Child – Croatian Practice and European Expectation*, International Journal of Law Policy and the Family, Vol. 34, No. 2, 2020, pp. 60–83. Other research conducted by Župan, M.; Ledić, S., *Cross-border family matters - Croatian experience prior to EU accession and future expectations*, Pravni vjesnik, Vol. 30, No. 3-4, 2014, pp. 49–77; Župan, M.; Hoško, T., *Application of the Hague Child Abduction Convention in SEE region: Croatian national report*, in: Župan, M. (ed.), Private International Law in the Jurisprudence of European Courts – family at focus*,* Faculty of Law Osijek, Osijek, 2015, pp. 227–243; Medić, I.; Božić, T., *Haška konvencija o građanskopravnim aspektima međunarodne otmice djeteta (1980) - casus belli*, in: Rešetar, B. (ed.), Pravna zaštita prava na (zajedničku) roditeljsku skrb*,* Faculty of Law Osijek, Osijek, 2012, pp. 161–197.

touches upon the COVID-19 pandemic used both as a reason for child abduction and increasingly as justification for issuing non-return orders seen as a "grave risk" to the child under Article 13(1)(b) of the Child Abduction Convention.[11]

As in all other legal aspects affected by COVID-19, adjustment of child abduction proceedings is unavoidable as well. To remove a possible barrier to accessing the Central Authorities and courts, the European Union[12] and the Council of Europe[13] are both offering their support in terms of collection and release of the information on the management of the judiciary and judicial cooperation in civil matters in their Member States during the pandemic. As to the manner of conducting the proceedings, the Hague Conference for Private International Law (hereinafter: the HCCH) issued a brief Toolkit[14] giving the guidelines to help mitigate the impact of the COVID-19 crisis on a wrongfully removed or retained child. The HCCH addressed that the safe and prompt return of a child to the state of habitual residence needs to be properly carried out in a timely manner. The impact of the pandemic can be mitigate such that the authorities need to focus on each individual child on a case-by case basis, while carefully navigating the return exception cases and ensuring continuing and suitable contact between the parent and the child. It also stresses the significance of considering the application of the provisions that provide for urgent provisional measures for the protection of the child.[15]

By analysing court practice in incoming cases from the beginning of the pandemic in March 2020 to March 2021, the research will investigate how the pandemic has affected child abduction proceedings in Croatia. This research was made based on the entire case files, and data were collected on the operation of the Central Authorities, courts and other institutions involved. For that reason, Croatian practice will be mostly analysed within the framework of access to justice. Available national practice of other contracting states will also be examined in processing the matter of the application of the grave risk exception from Article 13(1)(b) of the

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11 Freeman, M., *The Child Perspective in the Context of the 1980 Hague Convention*, In-depth Analysis Requested by the JURI committee, 2020, p. 17, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659819/IPOL_IDA(2020)659819_EN.pdf] Accessed 15 March 2021.

12 European Commission, *Comparative Table on Covid-19 Impact on Civil Proceedings*, 2021, [https://e-justice.europa.eu/content_impact_of_covid19_on_the_justice_field-37147-en.do], Accessed 23 April 2021.

13 Council of Europe, *Management of the judiciary - compilation of comments and comments by country*, 2021, [https://www.coe.int/en/web/cepej/compilation-comments], Accessed 23 April 2021.

14 HCCH, *Toolkit for the HCCH 1980 Child Abduction Convention in Times of COVID-19* (hereinafter: HCCH Toolkit), 2020, [https://www.hcch.net/en/news-archive/details/?varevent=741], Accessed 15 March 2021.

15 *Ibid*.

Child Abduction Convention. The aim of the research is to evaluate whether there were obstacles to accessing the national competent authorities and courts during the COVID-19 pandemic, and in which manner the courts conducted the proceedings and interpreted the existence of the pandemic in the context of the grave risk of harm exception. While drawing the conclusions, the research will consider the usage of modern technologies, direct judicial communication and safeguards such as protective measures and undertakings. The analyses of Croatian and other national practices will be used to gain an overall insight into the effectiveness of the emerging guidance and suggest their possible broadening in COVID-19 circumstances or any other future crises.

2. ACCESS TO JUSTICE AND THE OPERATION OF THE RETURN PROCEDURE

The Child Abduction Convention stresses the need for speed by advocating for a prompt procedure.[16] It obliges the Contracting States to use the most expeditious procedures available,[17] while the judicial and administrative authorities shall act expeditiously in return proceedings and, where a decision has not been reached within six weeks from the commencement of the proceedings, the applicant or the Central Authority of the requested State has the right to request a statement of the reasons for the delay. A number of provisions are designed to maximise the accessibility of the Convention to left-behind parents by removing financial or other obstacles to submission of applications under the Child Abduction Convention.[18] The compliance with those rules can be challenged by the extraordinary circumstances such as the pandemic. This chapter will elaborate how the pandemic affected the operation of Central Authorities and courts.

2.1. The Application before the Central Authority

The application of the Child Abduction Convention will in broad outline depend on the instruments brought into being for this purpose, including the acting of Central Authorities.[19] The left-behind parent usually applies to the Central Authority of the child's habitual residence, although he or she can apply directly to the Central Authority of the requested State or even straight to the courts of the

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16 Child Abduction Convention, Preamble and Arts. 1, 2, 7, 9, 11 and 12(1).

17 Child Abduction Convention, Art. 2., Pérez-Vera, *op. cit.*, note 3, Para. 63.

18 Shulz, R., *The Hague Child Abduction Convention. A Critical Analysis*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 11.

19 Beaumont, P.; McEleavy, P., *The Hague Convention on International Child Abduction*, Oxford University Press, Oxford, 1998, p. 242.

requested Member State.[20] Where the left-behind parent applies to the Central Authority of the requesting State, that Central Authority has to ensure that the application meets the requirements of the Child Abduction Convention and that all necessary supporting documents, translated where necessary, are attached to the application before forwarding it to the Central Authority of the requested State.[21] Upon receipt of the application, the Central Authority of the requested State will also check whether the application meets the requirements of the Convention, before transmitting the request to the court, and where necessary, ask the requesting State to supply further information. The functions of the Central Authority are much broader and not only related to application management. They are prescribed by Article 7 of the Child Abduction Convention, which determines how, among other things, Central Authorities shall initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and taking all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues. The system of the Central Authorities in Articles 53-55 of the Brussels II*bis* Regulation corresponds to the procedures of the Child Abduction Convention.[22] The new wording of the Brussels II*ter* Regulation identifies the oversights and regulates more broadly and precisely the functions of the Central Authorities, while incorporating the specific function of the Central Authorities within the Child Abduction Chapter.[23] The next chapters will focus on the accessibility and speed of the acting of Central Authorities.

2.1.1. *The Operation of EU Central Authorities*

The Child Abduction Convention does not explicitly regulate the time limit for the Central Authority acting, still considering the six-week time limit for a return decision and 12 months for mandatory return; it is clear that it should act expeditiously. The Brussels II*bis* Regulation does not provide for a provision regulating this matter either. There was an attempt in the wording of the Brussels II*bis* Recast

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20 Child Abduction Convention, Art. 29, Pérez-Vera, *op. cit*. note 3, Para. 139.

21 HCCH, *Guide to Good Practice Child Abduction Convention: Part I - Central Authority Practice*, 2003, paras 5.1–5.8., [https://assets.hcch.net/docs/31fd0553-b7f2-4f34-92ba-f819f3649aff.pdf], Accessed 16 March 2021.

22 See Župan, M., *Cooperation between Central Authorities*, in: Honorati, C. (ed.), Jurisdiction in Matrimonial Matters, Parental Responsibility and International Abduction. A Handbook on the Aplication of Brussels Iia Regulation in National Courts., Peter Lang, Torino, 2017, pp. 265-293.

23 Brussels II*ter* Regulation, Art. 23., Musseva, B., *The recast of the Brussels IIa Regulation: the sweet and sour fruits of unanimity*, ERA Forum, Vol. 21, 2020, p. 136.; Župan, M.; Hoehn, C.; Kluth, U., *The Central Authority Cooperation under the Brussels II ter Regulation,* Yearbook of Private International Law, Vol. 22, 2020/2021, pp. 217-231.

Proposal providing that the Central Authorities should complete their acting of preparing the file to be transferred to a court in six weeks, save where exceptional circumstances make this impossible.[24] Such provision has not become part of the new Brussels II*ter* Regulation, which merely states that such authorities should act expeditiously.[25]

In some Contracting States the implementing legislation sets time limits for various stages of legal proceedings which can include the acting of the Central Authority.[26] The Croatian Implementation Act stipulates only that the acting of the Central Authority should be expeditious.[27] The Lowe/Stephens Study showed that in 2015 Central Authorities took an average of 93 days to send applications to a court.[28] The Župan/Kruger/Drventić Study affirmed that the average time the Central Authority needed to transmit the application to a court was 86 days. Case-by-case analyses indicated that the long periods taken by the Central Authority are mostly caused by incomplete applications. The completion of the application was additionally prolonged by the periods needed for the issuance of public documents, the making of translations, or simply inactivity of the applicant.[29] In circumstances of the pandemic, this time could be even prolonged due to work organisation or human and technological capacities of Central Authorities. This period can also be affected by the accessibility of other institutions, from which e.g. the left-behind parent needs to issue some documentation, obtain legal aid, make the translation of documentation, and the like. [30]

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[24] Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), Brussels, 30.6.2016, COM(2016) 411 final, 2016/0190 (CNS) (hereinafter: Brussels II*bis* Recast Proposal), Recital 27 and Art. 63(1)(g). See: Beaumont, P.; Walker, L.; Holliday, J., *Parental responsibility and international child abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings*, International Family Law Journal, Vol. 2016, 2016, pp. 307-318.; Kruger, T.; Samyn, L., *Brussels IIbis: successes and suggested improvements*, Journal of Private International Law, Vol. 12, No. 1, 2016, pp. 132-168.

[25] Brussels II*ter* Regulation, Art. 23(1).

[26] HCCH, *Guide to Good Practice Child Abduction Convention: Part I - Central Authority Practice*, *op. cit.,* note 22, p. 44. See: Schuz, R., *Disparity and the Quest for Uniformity in Implementing the Hague Abduction*, *Convention,* in: Rains E, R., The 1980 Hague Abduction Convention. Comparative Aspects, Wildy, Simmonds & Hill Publishing, London, 2014, pp. 1-58.

[27] Implementation Act, Art. 9(11).

[28] Lowe, N.; Stephens, V., *Global Trends in the Operation of the 1980 Hague Abduction Convention: The 2015 Statistics*, Family Law Quarterly, Vol. 52, No. 2, 2018, p. 376.

[29] Župan; Drventić; Kruger, *op. cit.,* note 11, p. 70.

[30] See: Župan, M.; Drventić, M., *Prekogranične građanskopravne otmice djece*, in: Župan, M. (ed.), Prekogranično kretanje djece u Europskoj uniji, Pravni fakultet Osijek, Osijek, 2019, pp. 357-360.

In order to inform the judiciary, national authorities, legal practitioners but also the citizens, the European Commission has collected through the European Judicial Network contact points and published the Comparative Table on the Covid-19 Impact on Civil Proceedings (hereinafter: the Comparative Table).[31] This informative table contains the information on EU judicial cooperation for 25 Member States that provided their answer.[32] 16 Member States replied that all or most of the caseworkers of the Central Authority work from home, i.e. telework.[33] Some of them provided additional information on the mode of operation, indicated that e-mail is the best form of communication and warned of possible delays. Some of them stressed that, despite the fact that most of the work is carried out by teleworking, there are employees on premises who deal with the post or urgent cases.[34] Seven Member States indicated that their Central Authority is operational, without providing the manner of work organisation.[35] Greece submitted the answer that the work is carried out in a mixed system of remote working and physical attendance at the workplace in rotation. The Republic of Croatia informed that the Central Authority is operational. Still, the employees work in rotating groups, which was prescribed at national level by the Government Decision for all state administration employees.[36] Czechia reported that the Central Authority works in emergency mode, i.e. with no personal contact and in limited working hours. Despite the mode of operation, some of the Member States indicated that they accept the applications attached as a scanned document, while delivery of a hard copy of original documents can be postponed.[37]

It is clearly noted that the Comparative Table serves only for the information purposes and it is not binding on either Member States or the Commission. It is unquestionable that such kind of information enhanced cooperation when the EU was confronted with the pandemic and lockdown. Objections to the questionnaire refer to the fact that the question dealing with the operation of Central Authorities was merely named "EU Judicial Cooperation". As a consequence, the answers were

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31 European Commission, *Comparative Table on Covid-19 Impact on Civil Proceedings*, *op. cit*. note 13.

32 Data were not delivered by Cyprus and Sweden.

33 Austria, Belgium, Denmark, Estonia, Finland, France, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, and Slovenia.

34 Belgium, Finland, France, and Portugal.

35 Bulgaria, Croatia, Germany, Hungary, Latvia, Malta, and Spain.

36 Decision on the Work Organisation in the State Administration Bodies during the Epidemic of the COVID-19 Disease Caused by SARS-CoV-2 Virus (Odluka o organizaciji rada tijela državne uprave za vrijeme trajanja epidemije bolesti covid-19 uzrokovane virusom SARS-CoV-2), Official Gazette No. 32/2020. See: Grgurev, I., *COVID-19 and Labour Law: Croatia*, Italian Labour Law e-Journal, Vol. 13, No. 1, 2020, p. 3.

37 Estonia, France, Poland, Romania, Slovakia, Slovenia, and Spain.

delivered to different extents and with different meanings. Despite a clear disclaimer that this represents only the overview document which cannot reproduce relevant measures adopted by Member States in their entirety, with all details and exceptions, it would have been more useful if the Commission had drafted the questionnaire with some sub-questions which would have contributed to the uniformity of answers. Such sub-questions could be related to a work flexibility arrangement (teleworking or working in the office), a type of communication (personal or remote – written, by phone or e-mail), and whether the Central Authority receives and transfers the application without original documentation. To assure full utilisation and effectiveness of this kind of informative document it is also necessary to be sure that the information is regularly updated. It is for sure that the information provided was in force at the beginning of the pandemic, in the period from March to May 2020. Although there have certainly been periods of normalisation or successful adaptation of administrative work, the EU is still confronted with the pandemic. Judicial and administrative cooperation is still not normalised, and the manner of its organisation needs to be regularly updated in order to assure functional cross-border cooperation, especially in those sensitive cases such as child abduction.

2.1.2. *The Operation of the Croatian Central Authority*

In the period from March to May 2020, which was marked by the beginning of the pandemic and the strictest lockdowns, there were no new incoming return cases initiated before the Croatian Central Authority, seated within the Ministry of Labour, Pension System, Family and Social Policy.[38] The two incoming cases were initiated after the start of the pandemic, in months following that initial period.

In the first case, on 29 June 2020, the Swedish Central Authority addressed the Croatian Central Authority via e-mail, following abduction of the child taken by the mother from Sweden to Croatia. The Croatian Central Authority reacted promptly and only a few day later asked the Swedish Central Authority to send the original documents and simultaneously sent the scanned documents to the competent Social Welfare Centre to check whether the mother agrees to return the child voluntarily. On 21 July 2020, the Croatian Central Authority informed the Swedish Central Authority that the mother does not agree to return the child voluntarily and asked again for the original documents to be able to send the ap-

[38] Ministry of Labour, Pension System, Family and Social Policy, [https://mrosp.gov.hr/obitelj-i-socijalna-politika/obitelj-12037/djeca-i-obitelj-12048/medjunarodna-suradnja-u-podrucju-zastite-djece-12054/prekogranicni-postupci-o-roditeljskoj-skrbi-12055/12055], Accessed 17 March 2021. See: Župan, M.; Medić, I.; Poretti, P.; Lucić, N.; Drventić, M., *The Application of the EUFam's Regulations in Croatia*, in: Viarengo, I.; Villata, F. (eds), Planning the Future of Cross Border Families. A Path Through Coordination, Hart Publishing, Oxford, 2020, pp. 429-461.

plication to the court. The Croatian Central Authority decided not to wait further for the documents to be completed and hence forwarded the application to the Municipal Civil Court of Zagreb, noting that the remaining documents are to be sent subsequently. The Municipal Civil Court received the application on 8 September 2020. It took around 60 days to transmit the application from the Central Authority to the court. There is no sign that the pandemic has slowed down the acting of any Central Authority is this case. It is assumed that a delay in completion of documentation occurred due to the applicant's lack of financial sources.[39]

In the second case conducted upon the application of the Central Authority of the United Kingdom filed in October 2020, no extraordinary delays in the operation of the Central Authority were identified. It took around 60 days to transmit the application to the Court because the Croatian Central Authority needed to locate the child in Croatia, since the child did not reside at the address written in the return application. This communication and transfer between the competent institutions were conducted without difficulties caused by the pandemic.[40] The cases analysed have shown that there were no delays in the operation of the Croatian central authority in child abduction cases during the pandemic. Work was organised such that sensitivity and emergency of the child abduction cases were a priority. Communication with the central authority was uninterrupted both in writing and by e-mail.

2.2. Return Proceedings

The Child Abduction Convention obliges the authorities to act expeditiously in proceedings for the return of a child and aims at issuing a decision within six weeks from the date of commencement of the proceedings.[41] This means that the authorities have to use the fastest procedures in their legal systems and give priority to return applications.[42] The same time frame was provided by the Brussels II*bis* Regulation.[43] The rule was additionally strengthened by the Commissions' Practice Guide for the application of the Brussels IIa Regulation and taking a stand that Member States should seek to ensure that a return order issued within the prescribed six weeks shall be enforceable within the same period.[44]

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39 Municipal Civil Court of Zagreb, No. 131 R1 Ob-1746/20-8 of 21 October 2020.

40 Municipal Civil Court of Zagreb, No. 147 R1 Ob-2726/20-16 of 25 January 2021.

41 Child Abduction Convention, Art. 11.

42 Pérez-Vera, *op. cit.*, note 3, Para. 104.

43 Brussels II*bis* Regulation, Art. 11(3).

44 European Commission, *Practice Guide for the application of the Brussels IIa Regulation*, 2016, p. 56. [http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf], Accessed 17 March 2021.

Finally, the Brussels II*ter* Regulation clarifies this provision further, by providing that a six-week time frame for the procedures applies to each instance.[45] By proposing these time frames the legislator provided for a more realistic time frame.[46]

Proceedings are conducted in accordance with procedural law of each Contracting State. The expeditious acting should be ensured through a national implementation legislative.[47] In addition to the timing of the operation, there are some obligations imposed on the courts that need to be met in that short time frame. First and foremost, there is an obligation to hear a child. The Child Abduction Convention does not contain a general provision on the hearing of a child. It does, however, refer to the child's objections to return: Article 13(2) stipulates that the court may refuse return if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.[48] This provision was supplemented by the Brussels II*bis* Regulation, explicitly stating that, when applying Articles 12 and 13 of the Child Abduction Convention, the child must be given the opportunity to be heard.[49] In order to address the shortcomings of the current Brussels II*bi*s Regulation,[50] the Brussels II*ter* Regulation raised the principle of hearing the child to a higher level by introducing a separate provision on the right of the child to express his or her views.[51] This provision makes the hearing of the child a general rule for all cases in matters of parental responsibility and not only in relation to return proceedings. In addition to the obligation of hearing the child, the Brussels II*bis* Regulation provides that a court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.[52]

In order to secure the prompt return during the pandemic the HCCH advised the Contracting States to promote mediation, including online and remote mediation; to arrange information, electronic and communications technology in order to ensure that abduction cases advance towards a resolution, including electronic filing of documents, virtual and/or hybrid hearings, and the taking of evidence by electronic

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45 Brussels II*ter* Regulation, Art. 24(2) and (3).

46 Beaumont; Walker; Holliday, *op. cit.*, note 25, p. 313.

47 Župan, M., Foreword, in: Župan, M. (ed.), *Private International Law in the Jurisprudence of European Courts - Family at Focus*, Faculty of Law Osijek, Osijek, 2015, pp. 17–36.

48 Child Abduction Convention, Art. 13(2).

49 Brussels II*bis* Regulation, Art. 11(2).

50 See: Ubertazzi, B., *The hearing of the child in the Brussels IIa Regulation and its Recast Proposal*, Journal of Private International Law, Vol. 13, No. 3, 2017, pp. 568–601.

51 Brussels II*ter* Regulation, Art. 21.

52 Brussels II*bis* Regulation, Art. 11(5) and Brussels II*ter* Regulation, Art. 27(1). Pataut, E., *Article 11 Return of the child*, in: Magnus, U.; Mankowski, P. (eds.), Brussels IIbis – Commentary, Sellier European Law Publishers, München, 2012, pp. 127-145.

means; to safeguard equal participation and access to information, resources, and technology, e.g. equal access to video- and teleconferencing equipment and internet connectivity and to communication and collaboration among members of the judiciary across borders through direct judicial communications or the International Hague Network of Judges (hereinafter: IHNJ).[53] The chapter will further analyse whether there were any pandemic related obstacles preventing the court from acting expeditiously and hearing the child. It will also be examined whether the recommendations of the HCCH were employed by the Member States.

2.2.1. *The Operation of the Judiciary in EU Member States*

In addition to the information on Central Authorities, the Comparative Table also contained the information collected on time limits, the organisation of the judicial system and the judiciary in EU Member States.

Some of the Member States introduced many legislative measures in order to regulate the time limits in civil procedure, while in some of them there were no changes. Most of the measures concerned the suspension of the limitation period for the court acting, with certain exceptions.[54] Even though many States listed the cases and procedures which are exempted from suspension, none of the answers listed child abduction. Most of the Member States also extended the time periods for parties to act, especially when applying for legal remedies.[55] There were countries which did not introduce any measures.[56]

Regarding the organisation of the judicial system and the judiciary, most of the Member States informed that they postponed hearings in civil matters in non-urgent cases.[57] Some of them listed urgent cases, which mostly include family matters and child protection matters.[58] Some Member States indicated that, when the procedure continues, a decision can be issued without hearing, i.e. on the basis of conclusions drawn by parties and given in writing.[59] Many Member States also indicated the possibility of conducting remote hearings.[60] Denmark and Germany informed that the judges are the ones deciding on urgent cases.

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53 HCCH Toolkit, *op. cit.*, note 15, p. 2.

54 Austria, Belgium, Bulgaria, Cyprus, Czechia, Estonia, France, Italy, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain.

55 Belgium, Bulgaria, Estonia, France, and Luxembourg.

56 Denmark, Finland, Germany, Ireland, Lithuania, and Sweden.

57 Belgium, Croatia, Cyprus, Estonia, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

58 Estonia, France, Ireland, the Netherlands, Lithuania, and Portugal.

59 Belgium, the Netherlands, and Luxembourg.

60 Belgium, Bulgaria, Croatia, Estonia, Finland, France, Hungary, Latvia, the Netherlands, Portugal, and Romania.

Like in the part referring to the operation of Central Authorities, the information on the operation of the judiciary differs a lot. For that reason, it cannot be stated for sure that all Member States have secured that the court will deal with the abduction proceedings as expeditiously as possible. Still, it can be derived from most of the information that in some countries there was the possibility of conducting hearings in person with the health measures respected, while in some of them, distance hearings could be held.

2.2.2. *The Operation of Court Proceedings in Croatia*

The Implementation Act has now introduced more stringent and specialised rules of procedure to be applied in international child abductions.[61] The Act was enacted in response to the ECtHR *Adžić v Croatia*[62] judgment, where the court determined that the judicial procedure in Croatia lasted 151 weeks longer than the envisaged 6 weeks.[63] The Župan/Kruger/ Drventić Study has shown that the average duration of the first instance procedure was 56.66 days. The longest and the shortest trial recorded lasted for 239 days and 22 days, respectively.[64]

The Implementation Act introduced concentrated jurisdiction in child abduction cases.[65] This Act placed all international child abduction cases within the jurisdiction of the Municipal Civil Court of Zagreb and all appeals in this matter within the jurisdiction of the County Court of Zagreb.[66] This was in the line with the previous recommendation by the practitioners and stakeholders,[67] as well as aca-

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61 Implementation Act, Arts. 16-19.

62 *Adžić v Croatia,* App. No. 22643/14, 12 March 2015.

63 Župan; Hoško, *op. cit.*, note 11, p. 238.

64 The Lowe/Stephens 2015 Study has provided the information for selected countries, where the time it took the national courts to conclude applications varied, for instance, an average of 43 days in Scotland and 82 days in Germany. Lowe; Stephens, *op. cit.*, note 29, p. 377.

65 See: Župan, M.; Poretti, P., Concentration of jurisdiction in cross-border family matters – child abduction at focus, in: Vinković, M. (ed.), *New developments in EU labour, equality and human rights law,* Faculty of Law Osijek, Osijek, 2015, pp. 341–359.

66 Implementation Act, Art. 14. Prior to that, there were 24 municipal courts dealing with the return requests in the first instance and 3 county courts functioning as courts of second instance in family matters in the Republic of Croatia. Act on the Territorial Jurisdiction and Seats of the Courts (Zakon o područjima i sjedištima sudova), Official Gazette No. 67/18.

67 Hague Conference on Private International Law, *The Judges' Newsletter on International Child Protection*, Vol. XX / Summer-Autumn 2013; Permanent Bureau of the Hague Conference on Private International Law, *Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22–28 March 2001),* p. 10, [https://assets.hcch.net/docs/ee6929b5-2244-4466-ad5a-6d2ccbd772e3.pdf] Accessed 20 March 2021; Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of Interna-*

demics.[68] To ensure that the first-instance procedure lasts no longer than six weeks, the Implementation Act empowers the courts with additional tools to depart from ordinary family law procedures, e.g. parties may be summoned by a phone call, telefax or e-mail, the court does not have to hold an oral hearing, and the court has to render its decision within eight days of the date of the conclusion of a hearing. Furthermore, the Implementation Act encourages judicial cooperation, with the aim of speeding up the collection of evidence from abroad. The said Act has also introduced the provision on issuing a second-instance decision within 30 days.[69] No extraordinary appeal is permitted.

Four cases were conducted before the Municipal Civil Court of Zagreb in the examined period, i.e. from March 2020 to March 2021. Two of them were initiated before the court in Croatia prior to the outbreak of the pandemic in March 2020. The analyses will focus on the part of the proceedings conducted in the period from March 2020 to the end of proceedings.

n the case initiated by the central authority of Bosnia and Herzegovina, the applicant father asked the return of a child taken by the mother to Croatia. The Court ordered the return of the child by its decision from the end of 2019.[70] The court of second instance accepted the mother's appeal and returned the case to the court of first instance for a renewed procedure with its decision of 28 January 2020.[71] As the court of second instance decided that the reasons set out in Article 13(1) (b) were not examined broadly enough when the case was returned, on 4 March 2020, the court of first instance addressed the competent Social Welfare Centre to ask for its opinion. The Centre delivered its opinion on 1 July 2020. The significant delay in the Centre's proceedings can be noticed and can be credited to the outbreak of the novel pandemic. The Court hearing was held in person on 16 September 2020, with only legal representatives of both parties present. The new first-instance non-return decision was issued on 19 November 2020, i.e. 10 months after the second-instance decision.[72] It took too long for the whole proce-

tional Child Abduction, PART II – Implementing Measures, 2003, p. 29, [https://assets.hcch.net/docs/de043c72-ee0e-477b-8bae-53726a4b8545.pdf], Accessed 20 March 2021.
The latest, the Brussels II*ter* Regulation in recital 41 provides that Member States should consider concentrating jurisdiction in child abduction cases in a limited number of courts.

68 Beaumont; Walker; Holliday, *op. cit.*, note 25, pp. 307-318.; Župan; Poretti, *op. cit.*, note 65, pp. 341-359; Župan, M.; Poretti, P., *Concentration of Jurisdiction – Is Functionality of Judiciary Becoming an Obstacle to Access to Justice?*, EU and Comparative Law Issues and Challenges Series (ECLIC), Vol 3, 2019, pp. 297–323;

69 Implementation Act, Art. 16(4).

70 Municipal Civil Court of Zagreb, No. 130 R1 Ob-937/2019-22 of 18 November 2019.

71 County Court of Zagreb, No. 39 Gž Ob-100/20-3 of 28 January 2020.

72 Municipal Civil Court of Zagreb, No. 130 R1 Ob-349/2020-55 of 19 November 2020.

dure to be renewed due to a delay in the acting of the Social Welfare Centre. The Court asked the Croatian authorities to question the father's situation, while the circumstances of the father's situation in the requesting State should be examined. The delays can be undoubtedly mostly attributed to the pandemic; there are still some matters attributable to the court not acting in accordance with the aim of the Child Abduction Convention.[73]

The second case was initiated at the end of 2019 by the father, also through the Bosnian Central Authority. By the Court decision of 7 February 2020, the Municipal Civil Court of Zagreb ordered a return decision of the two children to Bosnia and Herzegovina.[74] The court of second instance received the case and the appeals on 12 March 2020. It issued a decision on 28 May 2020.[75] It missed a 30-day deadline prescribed in the Implementation Act by more than two times. The court of second instance abolished the decision and returned it for a new trial before the court of first instance. The Municipal Civil Court of Zagreb issued a new decision on 1 July 2020,[76] again ordering the return of the children to Bosnia and Herzegovina. The case considered very sensitive circumstances which included sexual abuse of the child, and it took a long time to examine those allegations and evidence. It can be concluded that the court of second instance was the one that caused a delay first by long proceedings and second by insisting on a thorough examination of the situation.

The two cases were initiated during the pandemic, and have been previously described in the chapter on the operation of the Central Authorities. They will be further analysed in this chapter. In the case initiated by the Swedish Central Authority, the Court received the return application from the Croatian Central Authority on 8 September 2020.[77] Just one day after receipt of the request, the Croatian IHNJ judge contacted the Swedish IHNJ judge and asked about the regulation of parental responsibility in Sweden in the cases where the parents are not married. It took only one day to receive the answer stating that according to Swedish law, if the parents are not married, custody of the child is awarded to the mother. On 21 October 2020, the Court issued a non-return decision, explaining that removal of the child was not illegal in accordance with Article 3 of the Abduction Convention, since the father did not submit any evidence of joint parental responsibility. It took the Court 43

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73 See: Župan; Kuger; Drventić, *op. cit.*, note 11., p. 78.; Župan, M.; Drventić, M., *Kindesentführung vor kroatischen Gerichten mit besonderer Rücksicht auf die aus Deutschland kommenden Anträge*, Revija za evropsko pravo, Vol. 20, No. 1, 2018, pp. 63-83.

74 Municipal Civil Court of Zagreb, No. 97 R1 Ob-2368/19-41 of 7 February 2020.

75 County Court of Zagreb, No 76 Gž Ob-323/2020-4 of 28 May 2020.

76 Municipal Civil Court of Zagreb, No. 97 R1 Ob-1130/20-4 of 1 July 2020.

77 Municipal Civil Court of Zagreb, No. 131 R1 Ob-1746/20-8 of 21 October 2020.

days, i.e. exactly 6 weeks, to issue a decision. There were no delays because of the pandemic. The case provides a good example of using direct judicial communication, which in this case led to a faster case resolution.[78]

In the case initiated by the Central Authority of the United Kingdom, the Court received the application from the Central Authority on 11 December 2020.[79] As soon as the Court received the application, it ran multiple actions in parallel, i.e. it referred back to the Croatian Central Authority to obtain some information about the application, issued a decision on appointing a guardian ad litem to the minor child, requested the competent social welfare centre to provide its opinion regarding the existence of the circumstances which would require the application of Article 13(a)(b) of the Child Abduction Convention. It took less than 10 days for the Social Welfare Centre to provide its opinion. The hearing was held in person on 22 January 2021, the mother and the applicant father were present, together with their representatives. The hearing was also attended by the child's guardian ad litem. The father was heard at the hearing. The child was heard on 23 January 2021 personally by the guardian ad litem on the premises of the Centre for Special Guardianship, which provided the court with an extensive report afterwards. The Court issued a decision on 25 January 2021, 44 days after the commencement of proceedings, which corresponds to the 6-week time frame. No delays were recorded in the court acting, all other institutions included – the Social Welfare Centre and the Centre for Special Guardianship acted expeditiously, with no obstacles caused by the pandemic.

The analysis of the case law indicated that the court of first instance acted expeditiously despite the pandemic. The first instance decisions were issued in the 6 weeks timeframe and had met all procedural requirements. The use of the direct judicial communication is commended. There are noted delays in the acting of the second instance court and Social Welfare Centre in the most critical period of the pandemic. The previously observed difficulties related to the broad analyses of circumstances in the country of abduction, which extends beyond the aims of Child Abduction Convention, are still present.

3. GRAVE RISK OF HARM EXCEPTION

The Child Abduction Convention provides a limited number of grounds for refusing the return. The authorities of the Contracting States most often use the

[78] See: Lortie, P., *Neposredna sudačka komunikacija i Međunarodna haška sudačka mreža prema Haškoj konvenciji o otmici djece iz 1980.*, in: Župan, M. (ed.), Private International Law in the Jurisprudence of European Courts - Family at Focus, Faculty of Law Osijek, Osijek, 2015, pp. 135-149.

[79] Municipal Civil Court of Zagreb, No. 147 R1 Ob-2726/20-16 of 25 January 2021.

return exception provided by Article 13(1)(b).[80] According to that article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body opposing its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The implementation of that article seemed to be challenging to the national courts, consequently being the subject of several decisions of the European Court of Human Rights (hereinafter: the ECtHR).[81] The ECtHR indicated that in abduction cases the court deciding on abduction must take into account the individual child's interests. The court has a difficult task to carefully examine the best interests of the child in the context of the return decision, without examining the best interests of the child to be conducted in the context of a meritorious decision on parental care.[82]

The necessity of guidance was recognised by the HCCH, which issued a Guide to Good Practice dedicated especially to the application of Article 13(1)(b) (hereinafter: the Guide to Article 13(1)(b)).[83] It offers information and guidance on the interpretation and application of the grave risk exception, and shares good practice taken from a variety of jurisdictions. The Guide offers valuable guidelines, still not predicting the situation like the pandemic that occurred after its publication. Still, the guidance on the understanding of the grave risk exception, which distinguishes between three types of "grave risk" that are often employed together, and its step-by-step analyses, is universally applicable.[84] The guidance that can be linked by analogy with the pandemic can be found in the part which explicitly discusses the risks associated with the child's health, stating that in those cases*, the*

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80 See: Lowe; Stephens, *op. cit.*, note 29, p. 15 and 60.

81 *Neulinger and Shuruk v. Switzerland*, App. No. 41615/07, 6 July 2010, *Šneersone and Kampanella v. Italy*, App. No. 14737/09, 12 July 2011, *X v. Latvia*, App. No. 27853/09, 23 November 2013.

82 McEleavy, P., *The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?*, Netherlands International Law Review, Vol. 62, 2015, p. 310.

83 HCCH, *Guide to Good Practice Child Abduction Convention: Part VI - Article 13(1)(b)*, 2020, [https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf], Accessed 20 March 2021; Marjanović, S.; Živković, M., *Tumačanje iznimke ozbiljne opasnosti u slučaju građanskopravne otmice djeteta*, in: Župan, M. (ed.), Prekogranično kretanje djece u Europskoj uniji, Pravni fakultet Osijek, Osijek, 2019, pp. 381-397.

84 Guide to Article 13(1)(b), Paras. 23-27. See: Momoh, O., *The interpretation and application of Article 13(1) b) of the Hague Child Abduction Convention in cases involving domestic violence: Revisiting X v Latvia and the principle of "effective examination"*, Journal of Private International Law, Vol. 15, No. 3, 2019, pp. 626–657; Trimmins, K.; Momoh, O., *Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings*, International Journal of Law, Policy and the Family, Vol. 35, No. 1, 2021, p. 5.

grave risk analysis must focus on the availability of treatment in the State of habitual residence, and not on a comparison between the relative quality of care in each State.[85]

The HCCH toolkit does not refer to the matter of interpretation of Article 13(1)(b); yet it offers some advice in terms of securing the child's return, where feasible and permitted under the relevant laws and procedures of the individual Contracting Party, considering the availability of practical arrangements that allow for the safe return of the child, such as the placement of the returning child on flight priority lists, considering the purchase of medical and travel insurance in the case of COVID-19 infection, and where necessary, quarantine facilities at the destination.

The HCCH Toolkit gives advice on increasing access to knowledge, including the knowledge of relevant good practice and case law turning on issues related to COVID-19. In that light, the selected national case law will be analysed in terms of the interpretation of the grave risk of harm exception.

3.1. COVID-19 as the Grave Risk Exception in National Court Practice

The first case publicly accessible was the one that occurred before the court in the United Kingdom in March 2020.[86] The court was deciding on the return of the abducted child PT born in 2008 and living all of her life in Spain. In February 2020, the mother travelled with PT to England, and the father claimed that the trip was without his knowledge or consent. The case was brought before the court on 10 March 2020. The hearing was held remotely, i.e. via the Microsoft Teams platform, on 27 March 2020, and it was recorded. The mother refused to return the child stating, inter alia, that there are health risks posed by the current coronavirus pandemic. The judge decided to treat that posing as an objection under Article 13(1)(b). The judge referred to that objection in relation to the following two facts: first, that at the date of the preparation of the judgment the pandemic is more advanced in Spain than in the UK, and second, there is currently an increased risk of infection posed by international travel. Still, the judge decided that the Article 13(1)(b) defence is not applicable to the case. The judge thoroughly analysed and explained that PT does not fall into the category of the elderly or those with underlying health condition and that there is no evidence of which country is more or less safe than the other. He concluded that there is a genuine risk that PT could contract the virus whether she remains in England or returns to Spain. The judge admits that travelling associated with the return is likely to increase the risk that PT could contract coronavirus, but

[85] Guide to Article 13(1)(b), Para. 62.

[86] KR v. HH [2020] EWHC 834 (Fam), 31 March 2020, Family Division of the High Court of Justice of England and Wales (the UK), [INCADAT Reference No.: HC/E/UKe 1460].

still he did not consider that such a risk is sufficient to amount to the "grave risk" of physical harm required by Article 13(1)(b). The judge also accepted the father's numerous undertakings to support the PT's return to Spain, but none of them related the protection of child's health.

The case example from Germany refers to the child whose return was ordered back to Australia. The German Family Court ordered the child's return by its decision of 17 March 2020. It decided that no impediments existed to the child entering Australia. The obligation to undertake self-isolation for 14 days upon arrival did not endanger the child's well-being or pose a grave risk of harm. A short stopover in Dubai changed nothing about this as according to the information available to the court, the onward flight to Australia was guaranteed to take place.[87] Another German case referred to the child abducted from Armenia to Germany. On 5 February 2020, the father initiated the return proceedings before the German court. The court did not accept the mother's argument that the return of the child is not possible due to the lack of flight options as corresponding to a grave risk of harm for the child. The court explained that it was not apparent that the child would be exposed to greater health risks as a result of the COVID-19 pandemic in Armenia than in Germany, which is one of the countries with the highest number of cases worldwide and that the difficult character of the trip to Armenia does not constitute an intolerable situation.[88]

The interpretation of the notion of a grave risk of harm in Croatia has already been evidenced as very broad by the Župan/Kruger/Drventić Study. In the majority of cases analysed, there was actually no consideration of risk in the country of origin, but rather of the fact that a parent would be better suited to a child, in the court's view, and that due to a close connection between the child and the abducting parent, the separation would constitute a grave risk of harm.[89] From that point of view, it is hard to predict what kind of explanation the court would give if the abducting parent raised an objection to a grave risk of harm due to the pandemic since in none of the cases this objection was made by the parent. The indirect court position on that manner can be derived from the case where the court of second instance objected to the court of first instance that it had not taken into account circumstances that could hinder the children's return due to the epidemic in Croatia and Bosnia and Herzegovina. Following that objection, the Municipal

87 OLG Thüringen - 1 UF 11 20, 17 March 2020, Thuringia Higher Regional Court (Germany), [INCADAT Reference No.: HC/E/DE 1475].

88 AG Hamm - 32 F 14/20, 23 April 2020, Hamm Local Court (Germany), [INCADAT Reference No.: HC/E/DE 1472].

89 Beaumont; McEleavy, *op. cit.,* note 20, p. 145.

Civil Court of Zagreb issued a new decision,[90] again ordering the return of the children to Bosnia and Herzegovina and giving its stance regarding the epidemic situation. It explains that the anti-epidemic measures are issued at national level and that every person is obliged to adhere thereto. The court is not in the position to take the future measures as relevant since they are unpredictable. It is up to the parties to adhere to the measures in force when enforcing the return decision (e.g. a self-isolation measure when crossing the border). The court also refers to the pandemic as a possible danger for the child, stating that there is currently an increase in infected persons both in Croatia and in Bosnia and Herzegovina, but on 30 June 2020, there were more infected persons in Zagreb than in Mostar. It concludes that it will not take into account the epidemic circumstances in its decision since the situation is unpredictable and changeable, and the circumstances in the period of enforcement cannot be predicted.

In all cases analysed within this chapter, the courts took a similar stance and used the same argumentation. It can also be concluded that they share an opinion that neither the COVID-19 pandemic nor travel restrictions can be seen as a grave risk within the meaning of Article 13(1)(b) of the Child Abduction Convention. Yet, this cannot be taken as universal, following the HCCH guidelines on a case-by-case approach. The national court should be aware of the consideration of a grave risk of harm developed by the HCCH in the Guide to Article 13(1)(b) and used in its practice and reasoning, which was not noticed in the analysed case law. Moreover, a possible objection refers to poor employment of protective measures and undertakings securing the child's return in terms of his or her better health protection.[91] The matter that requires additional questioning is whether the practice of almost every court to compare the pandemic situation in the abduction state and the state of child's habitual residence is in line with the HCCH guideline stating that in a situation where the risk is associated with the child's health, *the grave risk analysis must focus on the availability of treatment in the State of habitual residence, and not on a comparison between the relative quality of care in each State.*[92]

4. CONCLUSION

As in all other legal aspects affected by COVID-19, the adjustment of child abduction proceedings was also unavoidable. It can be concluded with almost com-

[90] Municipal Civil Court of Zagreb, No. 97 R1 Ob-1130/20-4 of 1 July 2020.

[91] See: Župan, M.; Ledić, S.; Drventić, M., *Provisional Measures and Child Abduction Proceedings*, Pravni vjesnik, Vol. 35, No. 1, 2019, pp. 9–32; Pretelli, I., *Provisional Measures in Family Law and the Brussels II ter Regulation*, Yearbook of Private International Law, Vol. 20, 2018/2019, pp. 126.

[92] Guide to Article 13(1)(b), Paras. 23-27. See: Rusinova, N., *Child abduction in times of corona*, 2020, [https://conflictoflaws.net/2020/child-abduction-in-times-of-corona/], Accessed 25 March 2021.

plete certainty that the communication with the EU Central Authorities was not interrupted in relation to the communication and document exchange with other Central Authorities, parties, or other national institutions. Most of the Member States transformed their work to teleworking, ensuring a minimum presence in urgent cases and case management. At same level of certainty, it can be concluded that Member States have secured the expeditious operation of abduction proceedings before the courts. It is to be expected that child abduction cases are treated as urgent; in some countries, hearings continue to be held in person, while in some other, remote hearings were introduced.

The informative tool developed by the European Commission on the mode of operation and the organisation of the judiciary and central authorities is only partially useful. In order to achieve reliable administrative and judicial cooperation in child abduction matters, more detailed and uniformed information on the operation of national authorities needs to be collected, published and regularly updated due to the uncertainty of the ongoing pandemic. This kind of digital assistant that could be useful for any future crisis will have an impact on their work. This should also serve as a lesson to those Member States, if they have not done that yet, to invest in the modernisation of their administrative and judicial systems, IT equipment and proper education of civil servants.

The analysed Croatian case law has shown that during the pandemic there were no delays in the operation of the Central Authority and that the court of first instance in Croatia acted expeditiously, mostly remaining within the 6-week time frame. It showed its willingness to employ direct judicial cooperation. Delays in the proceedings were identified when certain activities recorded a decline in the most critical period from March to May 2020, when the action of either the court of second instance or the social welfare centre was prolonged. Unfortunately, that prolongation cannot be attributed only to the pandemic, but to issues of tendency already evidenced to broadly examine a child's situation beyond the limits of the return procedure.

Comparative case law analysed has shown that courts share the opinion that neither the COVID-19 pandemic nor travel restrictions can be seen as a grave risk within the meaning of Article 13(1)(b) of the Child Abduction Convention. National courts should be aware of the consideration of a grave risk of harm developed by the HCCH in the Guide to Article 13(1)(b) and used in its practice and reasoning. Moreover, a possible objection refers to poor employment of protective measures and undertakings securing the child's return in terms of his or her better health protection.

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Topic 5

EU and economic challenges

UDK 336.2(497.5)]:614.4
Preliminary communication

THE IMPACT OF COVID-19 ON TAX ADMINISTRATION IN THE REPUBLIC OF CROATIA*

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ABSTRACT

The crisis and special measures caused by the Covid-19 virus pandemic have greatly disrupted the business and survival of small and medium-sized enterprises, as well as larger industries. The state and its institutions were forced to take certain measures to facilitate the survival and continuation of business, and to save jobs for entrepreneurs and their employees. The Tax Administration is a state institution whose measures directly affect every business. So it was among the first to take some measures, i.e. to adjust its business and tax collection to the new situation. This paper discusses the first measures introduced, those from March and April 2020. It discusses the deferral or installment payment of due and deferred tax liabilities. The measure of deferral, installment payment of tax liability, is certainly the most important and most popular measure among taxpayers. It is explained how tax measures during a pandemic should look according to the recommendations of the Organization for Economic Co-operation and Development (OECD). We explain other measures that have been introduced to facilitate business. These are the extension of the deadline for filing income tax, the exemption from VAT, the enforcement procedure and the payment of the annual tax rate. Despite the measures taken so far, it is important to emphasize that the Covid-19 pandemic is still ongoing, and that according to some experts, a real crisis with visible consequences of the pandemic is still to be expected. Accordingly, it is to be expected that the current measures are very likely to be further changed, upgraded and adjusted as the situation changes.

* This paper is a product of work that has been fully supported by the Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, under the project No. IP-PRAVOS-21 "Fiscal policy and development of the public finance system".

We consider it important to note that the framework of this paper does not allow a detailed analysis and that we are forced to limit ourselves exclusively to some aspects of the issue at hand.

***Keywords**: Covid-19, pandemic, Tax Administration, measures, taxpayers*

1. INTRODUCTION

A new coronavirus emerged in Asia in the second half of 2019, spread to Europe at the beginning of 2020, and entered Croatia at the end of February 2020, when the first case of infection was recorded. The official name of the coronavirus named by the World Health Organisation is SARS-CoV-19, and the disease it causes is called coronavirus disease 2019, or COVID-19 for short.

As a result of these events, the jobs of the employed people were compromised. For this reason, the government was forced to take certain measures, i.e. to make some moves in order to make it easier for employers to fight such unprecedented situation. The government introduced a new measure in the form of compensation of salary costs to employers in the amount of HRK 4,000 per month per employee if they were unable to carry out their business activities in those months. Accordingly, the Tax Administration had to adopt certain measures. It could be said that this government institution is directly related to employers and measures in this situation, because business entities that were unable to operate were not able to pay all of its imposts. For this reason, the Government of the Republic of Croatia has adopted measures on several occasions to monitor the current situation.

This topic was chosen to take a closer look at the impact of this most current topic today on the Tax Administration, i.e. taxpayers and measures that seek to mitigate this extraordinary situation. The topic was also chosen because of the unprecedented situation in the new tax systems due to which it was necessary to modify the way in which both taxpayers are treated and taxes are paid in a situation when there is almost no taxable income.

"Apart from the fact that this pandemic has hit people's health hard, its growing economic impact can also be seen in national economies all over the world. In order to maintain a certain level of revenue to cover public expenditures, national and local governments had to secure funding through loan financing or different sources of finance available. This is especially true of parts of the economy that are significantly affected by the global pandemic, and this primarily refers to selling goods or services through direct contact, on business premises, because in order to protect human health and due to keeping a safe distance for the purpose of infectious disease control, there are restrictions related to carrying out the activities and even shutting down stores where services are provided and goods are sold."[1]

[1] Cipek, K.; Hadžić, A., *Osvrt na porezne i ekonomske mjere tijekom globalne pandemije bolesti COVID-19*, Porezni vjesnik, No. 10, October 2020., p. 27

2. TAX MEASURES RECOMMENDED BY THE OECD

The Organisation for Economic Co-operation and Development has identified the following tax measures supporting the fight against COVID-19:

- Emergency response - Emergency response refers to the rapid adoption of measures. The necessity of such reaction is essential to combat permanent disruption in the market and the economy as a whole (i.e. to prevent economic collapse). Measures that are macroeconomic in nature have focused mainly on emergency liquidity assistance provided by central banks. The liquidity of entrepreneurs proved to be a threat to resume economic activities.
- Properly designed incentive packages - Based on the experience of the 2008-2009 crisis, it can be concluded that poorly designed incentive packages can have long-lasting negative consequences for global trade and national well-being. Although there is an urgent need to implement the measures as soon as possible, it should be taken into account that today's support does not cause permanent market distortion, including overcapacity, over-reliance on industrial investment by one country trying to solve its own economic problems by means of funds compounding the economic problems of other countries.
- Targeting measures at the sectors most severely affected by the crisis - It is necessary to take measures in favour of entrepreneurs whose businesses are most significantly directly impacted by the pandemic in order to avoid business decline or rescue companies that could not withstand the impact of the COVID-19 pandemic. This will reduce the risk that support spawns a new cohort of corporate zombies (companies that had difficulties in doing business even before the crisis) or national champions (corporations that are technically private businesses put in a dominant position in a national economy due to governmental policy) that could limit competition, slow down domestic productivity growth, distort international markets, hinder economic recovery, and in some cases exacerbate economic disparities.
- Targeting measures to support small- and medium-sized enterprises - This recommendation applies in particular to entrepreneurs operating in the service sector, as well as to those investing in strengthening health care and social security systems from which everybody benefits. Support for small- and medium-sized enterprises is less likely to cause excessive global market distortions. The biggest threat is expected in relation to employment and social stability.

- Time limited support - Support measures should be time-limited by provisions of acts and automatically abolished once the crisis is over. This will help mitigate the risk that temporary support strengthens and outlives its purpose.
- Targeting support properly - It is also important for the economy who gets support. Governments should give priority to the most vulnerable, of course where possible, and give companies the freedom to decide how to spend the cash they receive. This differs from measures that link support to the consumption of certain goods or services, which can cause relative price distortion, send misleading signals to producers, and reduce consumer choice.
- Investments in society - In times of crisis, governments may have to invest in companies directly, and several have already announced their willingness, if need be, to invest in businesses struggling to survive in the market. Governments have also offered states the opportunity to buy shares in the troubled companies being bailed out as a way of strengthening accountability, equal share in terms of financial gains or losses, or as safeguards against foreign business takeovers.
- Measures that provide additional long-term benefits - Governments could adopt measures that provide additional benefits and thus help ensure that long-term policy objectives are not sacrificed for short-term economic support.
- Tax incentives and the availability of funding - Tax (fiscal) measures that have been announced or used at this stage include wide-ranging tax relief (e.g. reduced VAT and mandatory social security contributions), wage subsidies, unemployment benefits, utility payment deferral, mortgage relief, lump-sum payments to households, loans and loan guarantees for businesses, as well as government investments in companies whose stability has been disrupted by the crisis. This may also include bridging business loans by public investment banks and government agencies, government recapitalisation, or government loan guarantees.

Crisis conditions can dramatically reduce the availability of private funding. Increased economic uncertainty may encourage banks to be more selective in their investment conditions or to charge unusually high interest rates to now risky borrowers.

- Transparency of measures – The measures that have been proposed and implemented shall apply objective and transparent criteria for determining the eligibility of companies, especially to distinguish between temporary liquidity problems at which assistance should be targeted, and existing structural to solvency or

performance of a company. The most important aspect of implementing measures in a crisis is for governments to be transparent about the measures they decide to adopt.

Transparency in terms of who benefits from subsidies and support programmes also contributes to public support at national level, as citizens can see that taxpayer money helps not only large multinational corporations, but also small- and medium-sized enterprises. Transparency also enables countries to know and exchange information about what each government is doing to boost the economy, thus reducing potential present and future tensions in the market, enabling countries to learn from each other's experiences, and paving the way for further international cooperation.[2]

3. MEASURES ADOPTED IN MARCH AND APRIL 2020

The first amendment to the General Tax Act[3] was published on 19 March 2020, and it defines special circumstances whose occurrence resulted in the measures adopted for the purpose of facilitating payment of tax liabilities such that they can be deferred or paid in instalments, provided that neither interest is charged during the deferment or instalment period nor the statute of limitations runs in the said period[4].

The measures adopted in March 2020 are the first measures adopted by the Government to assist taxpayers in the aftermath of the COVID-19 pandemic. They referred to:

- Tax payment deferral
- Reduction of monthly advance payments of personal income tax or corporate income tax

"The possibility of applying for tax payment deferral is provided for in Article 107(a) of the General Tax Act, which regulates tax payment in special circumstances. "Special circumstances" refer to an event or situation "which could not have been foreseen and affected, which endangers the life and health of citizens, property of greater value, significantly impairs the environment, disrupts economic activity or causes significant economic damage." If such special circumstances

2 [https://read.oecd-ilibrary.org/view/?ref=128_128575-o6raktc0aa&title=Tax-and-Fiscal-Policy-in-Response-to-the-Coronavirus-Crisis], Accessed 10 April 2021.

3 Official Gazette No. 32/20.

4 *Ibid*.

make it difficult or impossible to regularly settle tax liabilities, it is possible to defer and/or pay due tax liabilities in instalments."[5]

This possibility applies to both taxpayers with income from professional activities of liberal professions who pay a lump-sum tax on their income earned in this way, and corporate taxpayers whose tax liability is payable as a lump-sum.[6]

It is impossible to reduce the monthly lump sum tax payable on a quarterly basis for such taxpayers. Pursuant to Article 3(5) of the Ordinance on estimated (lump-sum) taxation of liberal professions (independent personal services),[7] in case of temporary suspension of such activity reported to both the competent authority with which the activity is registered and the competent Tax Administration office, no tax liability is determined for that period.

APPENDIX 1: Request for deferral of payment due to special circumstances

MINISTRY OF FINANCE	
TAX ADMINISTRATION	
BRANCH OFFICE	
LOCAL BRANCH OFFICE	
PLACE AND DATE	
APPLICATION FOR TAX PAYMENT DEFERRAL DUE TO SPECIAL CIRCUMSTANCES	
1. INFORMATION ABOUT THE APPLICANT	
1.1. SOCIAL SECURITY NUMBER (OIB)	1.2. COMPANY/NAME AND SURNAME
2. APPLICATION CONTENT	
In accordance with the General Tax Act and the Ordinance on the Implementation of the General Tax Act, I am herewith submitting an application for deferred payment of tax liabilities for a period of three months due to the occurrence of special circumstances caused by the COVID-19 virus, or SARS-CoV-2 disease.	
Facts relative to deciding on the application:	

5 Mijatović, N., *Porezne mjere u Republici Hrvatskoj za trajanja COVID(a) -19.* (11.05.2020.), IUS-INFO.

6 Act on Tourist Board Membership Fees, Official Gazette No. 52/2019, Article 7.

7 Official Gazette No. 1/20.

2.1. All tax liabilities were settled prior to the occurrence of special circumstances, or on the day of submitting this application, current debt recorded on the tax and accounting book of records amounts to less than HRK 200.
YES NO
2.2. Due to the occurrence of special circumstances, revenue/income were reduced by at least 20% in the month preceding the month of application, compared to the same period of the previous year.
YES NO
2.3. Due to the occurrence of special circumstances, revenue/income is expected to be reduced by at least 20% in the next three months following the month of application, compared to the same period of the previous year.
YES NO
2.4. Value of supplies of goods and services of more than HRK 7.5 million excluding VAT was not recorded, the tax base is determined based upon the deliveries made, and the invoices issued on the basis of which the value added tax liability was determined have not been charged.
YES NO
3. EXPLANATORY STATEMENT
As an authorised person, I hereby declare under substantive and criminal liability that the information provided is true and correct.
SIGNATURE:

The second measure adopted in March 2020 referred to the reduction of the monthly advance payments of personal income and corporate income tax. "Pursuant to Article 107(a) of the General Tax Act, in relation to taxpayers who have suffered damage in their operations, i.e. they suspended and restricted their business operations due to special circumstances, the Tax Administration may not only postpone, but also reduce advance payment of personal income or corporate income tax to a smaller amount, i.e. to HRK 0.00. Natural persons engaged in a liberal profession (their income is determined on the basis of business records) and corporate taxpayers are entitled to the right to reduced advance payment. The Tax Administration may decide on a deferred tax liability:

- Ex officio, in the case of taxpayers whose activities have been suspended by the decision made by the competent authorities. The Tax Administration will ex officio determine advance personal income tax and advance corpo-

rate income tax in the amount of HRK 0.00. This measure referred to tax liabilities based on advance tax payment for February 2020 (due in March 2020).

- Upon request of a taxpayer, if the taxpayer was adversely affected by special circumstances that have reduced their economic activity (this is also the case when some decisions made by the competent authorities have an indirect impact on and cause a decline in their economic activity), the taxpayer is eligible to apply for a reduction of advance tax payment, based upon which the Tax Administration may reduce advance personal income or corporate income tax or determine advance tax to amount HRK 0.00."[8]

On 2 April 2020, the Government of the Republic of Croatia presented the second (extended) package of economic measures aimed to further mitigate the adverse effects of COVID-19 on the economy and to preserve jobs. The measures are implemented by the Croatian Employment Service, the Croatian Bank for Reconstruction and Development (HBOR), the Tax Administration within the Ministry of Finance, and the Croatian Agency for SMEs, Innovation and Investments (HAMAG BICRO).

The second amendment to the General Tax Act published in the Official Gazette No. 42/20 on 7 April 2020 enabled taxpayers who are entitled to and have received support aimed at helping businesses retain their employees to be exempt from paying public imposts related to net salaries co-financed by the Croatian Employment Service. Furthermore, the aforementioned amendment stipulates that if a taxpayer's business activity is suspended or significantly hindered by a decision of the competent authority due to the occurrence of special circumstances, they may be fully or partially exempt from paying tax liabilities. It is also prescribed that during special circumstances, deadlines, payment of value-added tax on import and donations, the implementation of enforcement measures, interest rates, and procedural provisions may be prescribed in a different way.[9]

According to Mijatović, the measures adopted in April of the same year extend the existing Article 107(a) of the General Tax Act by legal amendments stipulating that a taxpayer who has exercised the right to support aimed at helping businesses retain their employees (i.e. co-financed salaries) during special circumstances shall not be charged any public imposts. If, due to these same special circumstances, a taxpayer is prohibited from working by a decision of the competent authority, or if, due to business conditions, a taxpayer's business activity is suspended or sig-

8 Mijatović, *op. cit.*, note 5.

9 Act on Amendments to the General Tax Act, Official Gazette No. 42/20.

nificantly hindered, they may be granted a full or partial tax exemption. The same legal changes allow for different regulatory deadlines, VAT payment referring to import and donations, enforcement proceedings, interest rates, and the like. If it is subsequently established on the basis of submitted incorrect or misleading data that the beneficiary of measures activated by special circumstances has obtained ill-gotten gains for themselves or another person, both the measures and tax deferral will be declared null and void (with other legal liability).

Amendments to the Ordinance on the Implementation of the General Tax Act[10] were adopted a day later, on 8 April 2020. They further elaborate on Article 107(a) of the General Tax Act, which provides for the procedure of deferred and/or instalment payment of a due tax liability, exemption from contribution liabilities for co-financed net salaries, exemption from tax liabilities and the implementation of other special circumstances provisions.[11] Also, all entrepreneurs, regardless of their annual income, may pay value-added tax when they collect payment of an invoice and not when they issue an invoice.

The deadline for filing tax returns as well as for submitting other forms and annual financial statements was extended to 30 June 2020. The due date established for the corporate income tax liability is 31 July 2020, while the obligation to pay fees to the Financial Agency is abolished upon their publication.[12]

Both amendments to the General Tax Act provided for the above-mentioned measures to be prescribed in more detail by the Minister of Finance in the Ordinance, and hence amendments to the Ordinance on the Implementation of the General Tax Act were adopted prescribing a code of conduct of tax authorities during special circumstances.[13]

4. DEFERRAL AND/OR INSTALMENT PAYMENT OF A DUE DEFERRED TAX LIABILITY

Not only the most important, but also the most popular measure among taxpayers is deferral, i.e. payment of tax liability in instalments. Any liability that falls due

10 Official Gazette No. 43/20.

11 [https://esavjetovanja.gov.hr/ECon/MainScreen?cv=1&entityId=9961], Accessed 10 April 2021.

12 Frequently asked questions related to the package of measures adopted in the spring wave of the epidemic caused by the spread of the COVID-19 virus, *Tax Administration*, [https://www.porezna-uprava.hr/Stranice/NPP_COVID_mjere.aspx#covid1?cv=1], Accessed 10 April 2021.

13 Ordinance and Amendment to the Ordinance on the Implementation of the General Tax Act, Official Gazette Nos. 45/19, 35/20, 43/20 and 50/20.

before the expiry of the three-month period after 9 April 2020[14] (entry into force of the amended Article 107(a) of the General Tax Act) is considered due. If special circumstances last longer, the period of up to three months may be extended for a further period of three months.[15]

Although it is a tax liability, the Ordinance on the Implementation of the General Tax Act needs to be interpreted more broadly as it can be applied to the majority of public imposts: taxes, fees, contributions, concession fees, and all imposts and charges determined and/or collected and/or supervised under special regulations within the jurisdiction of the tax authority. It does not apply to customs and excise duties.

An applicant applying for tax payment support measures is any entrepreneur, natural and legal person, associations without legal personality that perform their economic activity permanently, independently and for the purpose of generating revenue, income, profit, or other economically assessable benefits, that makes it impossible to pay a due tax liability, provided that on the day of filing the claim their tax debt, if any, amounts to less than HRK 200 because that amount corresponds to the minimum cost of an enforcement proceeding.[16] In the case of a due VAT liability, only an applicant whose tax base is determined based upon the deliveries made can submit a tax deferment application.[17]

According to Mijatović, a taxpayer is considered unable to pay due tax liabilities if they record at least a 20% reduction in revenue/income in a month preceding the month of application relative to the same month of a previous year, or if the taxpayer expects a revenue/income decline of at least 20% in the next three months following the month of application relative to the same period of the previous year. [18]

4.1. Applying for tax relief measures and making decisions thereupon

A taxpayer who would like to apply for support measures according to the place of residence or place of establishment shall submit a reasoned request in writing to

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14 Relief measures to reduce the economic effects of coronavirus II, *Liberfin*, [https://liberfin.hr/mjere-za-rasterecenje-gospodarstva-od-posljedica-koronavirusa-ii/?cv=1], Accessed 10 April 2021.

15 Determining the VAT liability pursuant to the new rules, *RRIF*, [https://www.rrif.hr/Utvrdivanje_obveze_PDV_a_prema_novim_pravilima-1754-vijest/?cv=1], Accessed 10 April 2021.

16 Article 170 of the General Tax Act, Official Gazette Nos. 115/2016, 106/2018, 121/2019, 32/2020, and 42/2020.

17 Tax relief measures in the Republic of Croatia during COVID-19, [https://www.iusinfo.hr/aktualno/u-sredistu/41555], Accessed 10 April 2021.

18 Tax deferral, *Deloitte*, [https://www2.deloitte.com/hr/hr/pages/about-deloitte/articles/covid-19-odgoda-placanja-poreznih-obveza.html?cv=1], Accessed 10 April 2021.

the competent tax authority. The tax authority is obliged to decide on the submitted application in a simple and urgent procedure and inform the applicant of its decision appropriately (this can also be done electronically). If the submitted application is assessed by the Tax Administration as justified, deferred payment with no interest will be granted for due tax liabilities.[19]

"Deferred payment is granted for a period of three months, with the deadline commencing on the legally prescribed due date of each individual tax liability. If special circumstances remain in force longer, an additional three-month period may be granted for a deferred tax liability. If an additional period is granted, it is possible to expand the scope of deferred tax liabilities (with no interest included), provided that a new application has been submitted.

In a specific case of a due VAT liability, an applicant whose tax base is determined based upon the deliveries made (VAT deferral does not apply to taxpayers who determine their VAT liability based upon the charges collected) can be granted VAT payment deferral in the amount higher than the amount they would have been liable for if they had calculated VAT pursuant to the tax procedure taking into account charges collected.

Deferral of payment may be granted for the amount of the due tax liability higher than the amount which the taxpayer would have been liable for if they had calculated VAT pursuant to the tax procedure taking into account charges collected. Deferred VAT payments are granted for a three-month period commencing on the due date for the VAT liability payment.

No interest is charged on due tax liabilities for which payment deferral has been granted. The aim of due VAT liability deferral is to oblige the taxpayer, for the duration of special circumstances, to pay VAT on the invoices issued and collected, and the incoming invoices received and paid, while the remainder is treated as a deferred tax liability. If the taxpayer is unable to pay the deferred tax liability at the end of the deferral period, they may request payment in instalments (without any interest included)."[20]

Payment of deferred tax liabilities in instalments - for a maximum period of 24 months - may be granted on request to an applicant unable to settle the deferred tax liability after the expiry of the deferral period. In that case, no interest is charged. A written and reasoned request for payment of a deferred tax liability

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19 [http://www.tzomedulin.org/g/kutak-za-iznajmljivace/obavijesti-za-iznajmljivace/?cv=1], Accessed 10 April 2021.

20 Instruction on VAT deferral and payment in special circumstances, *Tax Administration*, Class No. 410-19/20-02/129; File No. 513-07-21-01/20-1.

in instalments may be submitted within five days of the due date of the liability that the applicant is unable to pay. The request for paying deferred tax liabilities in instalments may relate either only to a deferred tax liability due but not paid yet (approval of the application excludes the possibility of applying for payment of deferred tax liabilities in instalments which will become due in the future), or to all deferred tax liabilities (due and outstanding at the time of filing the application), where the deferred tax liabilities that are not yet due become due and their payment in instalments is approved (instead of approving an additional deferral period). If the taxpayer does not comply with the approved deadlines for paying tax liabilities in instalments, the approved instalment agreement will be revoked.[21]

However, if the taxpayer has been granted tax payment deferral and/or instalment payment, the tax authority may subsequently verify the facts on which the previously submitted claims are based and on the basis of which some of the said tax payment support measures have been approved. The tax authority may, as a final measure - if it subsequently determines that the conditions cannot be met - declare the tax payment support measure null and void, i.e. tax liabilities become payable immediately.

In addition, if it is established that during special circumstances the applicant made false statements of material facts by means of which they supported their application and/or acted contrary to tax regulations and/or abused tax payment support measures in order to gain illegal benefits, the tax authority will notify the applicant thereof, and calculate appropriately the relevant tax liability and the applicable default interest rate.

There follows an example of a deferred tax liability taken from the Ministry of Finance: On 2 April 2020, an entrepreneur submitted an application and provided revenue figures for March 2020 relative to March 2019 = a revenue decline of more than 20% was apparent. The Tax Administration notified the taxpayer as soon as possible that their application was justified. The taxpayer then submitted the JOPPD (i.e. report on income, income tax and surcharge, and contributions for compulsory insurance) payroll form for March due on 5 April 2020 – it was booked on 5 July 2020 while processing the tax liability of the related taxes and contributions. An income tax return for 2019 was filed by the taxpayer on 30 April 2020 - the difference in the form of income tax refund was issued on 31 July 2020. Advance corporate income tax, an advance Tourist Board membership fee, and a Croatian Chamber of Commerce membership fee - due on 30 April 2020

[21] Tax deferral, *Deloitte, op. cit.,* note 18, [https://www2.deloitte.com/hr/hr/pages/about-deloitte/articles/covid-19-odgoda-placanja-poreznih-obveza.html?cv=1], Accessed 10 April 2021.

- were charged on 31 July 2020. Tax liabilities due in May and June were charged subject to deferral in August and September.

4.2. Exemption from contribution liabilities for co-financed net salaries

A taxpayer who gets support from the Croatian Employment Service, which is aimed at co-financing net salaries during the period relating to special circumstances and preserving jobs, is released from the obligation to pay compulsory insurance contributions for the amount of a co-financed net salary. In this case, all contribution liabilities are borne by the state budget.

If circumstances are subsequently determined which did not justify financial support for the net salary paid to the beneficiary, the granted exemption from the contribution liabilities will be declared null and void in the amount of an unjustifiably granted exemption. The application of tax exemption ex officio will be carried out by the Tax Administration (by reducing liabilities on the employer's tax and accounting book of records, on the basis of its own records and data exchanged with the Croatian Employment Service).

The following example shows the employee payroll calculator with financial support provided by the Croatian Employment Service, partial exemption from paying contributions, and deferred payment of the difference in contributions, taxes and surcharges.

APPENDIX 2: Employee payroll calculator – an example

Gross salary of HRK 10,000, support of HRK 4,000 by the Croatian Employment Service, and deferred payment of taxes and contributions	Salary calculation (in HRK)	Exemption from paying contributions (proportional to HRK 4,000 net)	Deferred payment of the difference between contributions and taxes	Compulsory payments to the employee
Gross salary	12,000			
Pension insurance - Pillar 1 15%	1,800	-750	1,050	
Pension insurance - Pillar 2 5%	600	-250	350	
Total contributions	2,400			
Income	9,600			
Personal allowance	4,000			
Tax base	5,600			

Personal income tax 24%	1,344			
Income tax surcharge 18%	241.92			
Total tax and surcharge	1,585.52		1,585.52	
Net salary	8,014.08			8,014.08
Health insurance 16.5%	1,980	-825	1,155	
Total	13,980	-1,825	4,140.92	8,014.08

Source: Mazars Extraordinary Tax Newsletter - Supplement, 9 April 2020

4.3. Tax exemption

Tax liabilities in this context are taxes, fees, contributions, fines for tax offenses, concession fees and all other imposts that are determined and collected or supervised by the Tax Administration, relative to which the taxpayer has applied for tax relief measures and that are due as of 1 April 2020.

"An applicant is fully exempt from paying taxes if, due to special circumstances, their business activity is prohibited, suspended or significantly hindered by the decisions of the competent authority, and therefore, they record at least a 50% decline in revenue/income in a three-month period as of 1 April 2020 (a decline in revenue/income is calculated by comparing it with the same period in the previous year).

Provided that in the previous year such taxpayer (applicant) recorded the value of supplies of goods and services of more than HRK 7.5 million (excluding VAT), they will be partially exempt from paying due tax liabilities proportionally to a decrease in revenue/income compared to the same period in the previous year (e.g. if they earned HRK 10 million, they are entitled to a write-off of public imposts amounting to HRK 5.5 million, whereas they can apply for a payment deferral of the remaining HRK 4.5 million)."[22]

Taxpayers who earn their income by renting flats, rooms and beds to travellers and tourists and organising camps, and pursuant to that basis, pay a lump-sum tax, are entitled to tax exemption in the amount of ¼ of the annual lump-sum income tax and income tax surcharge.[23]

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[22] Mijatović, *op.cit.*, note 5.

[23] Frequently asked questions related to the package of measures adopted in the spring wave of the epidemic caused by the spread of the COVID-19 virus, *Tax Administration*, *op.cit.,* note 13, [https://www.porezna-uprava.hr/Stranice/NPP_COVID_mjere.aspx#covid1?cv=1], Accessed 10 April 2021.

Taxpayers who registered a drop in revenue/income of at least 30% in the period from 20 March to 20 June 2020 are entitled to the right to apply for tax exemption. The taxpayer are exempt from paying taxes and other imposts due in the period from 1 April to 20 June 2020. This tax relief measure does not include value added tax, customs duties, excise duties, mandatory pension contributions, taxes and surcharges on final income, imposts on betting, liabilities under previously concluded administrative contracts and liabilities rescheduled from pre-bankruptcy and bankruptcy proceedings.[24]

Taxpayers do not have to apply specifically for this support measure since the Tax Administration will implement this measure ex officio on the basis of the information at its disposal.

4.4. Corporate tax extension deadline

A procedural provision is, *inter alia*, the one on requesting an extension of time to file a corporate income tax return. In special circumstances, the deadline for filing corporate income tax returns was extended to 30 June 2020. Corporate income tax liabilities incurred from such returns were due on 31 July 2020. The above provisions do not apply to taxpayers whose selected tax period does not qualify as a calendar year (e.g. the opening of a bankruptcy procedure, changes in business status, termination of business).[25]

4.5. VAT exemption

The next provision is the exemption from VAT on donations. "VAT payers are exempt from paying VAT for goods and services supplied without fees and consideration, and at the same time, necessary to fight the effects of the COVID-19 disease pandemic. VAT exemption in the cases given above applies to supplies made in March 2020 and the first quarter of 2020, due by 30 April 2020, and supplies made by 20 June 2020.

If VAT exemption is realised in the cases described above, this does not exclude the possibility of deducting tax prepayment for donated goods or services supplied without compensation or consideration that are necessary to combat the effects of

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[24] Implementation of tax payments and the submission deadlines for financial statements in special circumstances, *Deloitte,* [https://www2.deloitte.com/hr/hr/pages/about-deloitte/articles/covid-19-mjere-placanje-poreza-predaja-financijskih-izvjesca.html?cv=1], Accessed 10 April 2021.

[25] Frequently asked questions related to the package of measures adopted in the spring wave of the epidemic caused by the spread of the COVID-19 virus, *Tax Administration*, *op.cit.*, note 12, [https://www.porezna-uprava.hr/Stranice/NPP_COVID_mjere.aspx#covid1?cv=1], Accessed 10 April 2021.

the COVID-19 pandemic. If goods and services necessary to combat the effects of the COVID-19 pandemic are supplied for a fee or paid for by cash donations, the said VAT exemption shall not apply to such supply."[26]

"Exemption from VAT is prescribed on imports of certain goods. On 3 April 2020, the Commission (EU) adopted Decision 2020/491 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020. This Decision provides for exemption from value added tax on the final importation of certain goods. Beneficiaries are state organisations (including state bodies, public bodies and other bodies governed by public law), organisations approved by the competent authorities in the Republic of Croatia, or another person importing goods on their behalf. This exemption applies to goods imported until 31 July 2020."[27]

4.6. Administrative contract in special circumstances

The General Tax Act normally allows the tax authority and the taxpayer to enter into an administrative agreement to settle a tax debt. It can refer to a settlement of a tax debt in full or in part, for a maximum period of 24 months. It is exceptionally allowed to conclude an administrative contract in special circumstances referring to due tax liabilities that are not subject to deferral, i.e. tax liabilities to which no tax exemption applies (provided that they fall due in the three-month period as of 9 April 2020).

Unlike an administrative contract in normal circumstances, an administrative contract in special circumstances includes, *inter alia*, the following features: statutory default interest reduced by 3 percentage points applies to the repayment period (currently 3.11%); the contract can also be concluded without any security for the tax debt; and under certain conditions, it may be concluded even if the taxpayer already has a pre-bankruptcy settlement procedure, a pre-bankruptcy agreement or an administrative contract referring to liabilities due before 9 April 2020. During the administrative contract in special circumstances, the taxpayer may not be granted an administrative contract referring to a tax liability incurred and/or due after the conclusion of the said administrative contract."[28]

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26 Instruction on VAT deferral and payment in special circumstances*, Tax Administration*, *op.cit.*, note 20.

27 *Ibid.*

28 Mijatović*, op.cit.*, note 5.

4.7. Advance and annual tax liability payments of personal income tax and corporate income tax under special circumstances

The Corporate Income Tax Act[29] stipulates that a taxpayer pays advance tax on the basis of a tax return for the previous tax period. Monthly instalments are paid by the end of the month for the previous month, in the amount obtained when the tax liability for the previous tax period is divided by the number of months of business activity in the same tax period.

"The Decision on measures to limit social gatherings, work in shops, provision of services and the staging of sports and cultural events[30] came into force on 19 March 2020, which was adopted in order to prevent the coronavirus epidemic and brought a major change in the activities of certain taxpayers. Taking into account the Notification to taxpayers of the reduction of monthly advance personal income and corporate income taxes,[31] which was published on 26 March 2020 on the Tax Administration website, it can be concluded that the Tax Administration applied the provision of Article 34(2) of the Corporate Income Tax Act in order to reduce advance payment of corporate income and personal income taxes for taxpayers that recorded a decline in business activity by the implementation of given anti-epidemiological measures.

Therefore, pursuant to the aforementioned Notification, and based on the decisions of the competent authorities it is aware of, the Tax Administration reduced advance payment of corporate income and personal income taxes to taxpayers whose business operations were suspended due to special circumstances to HRK 0.00, starting with tax liability due on 31 March 2020 and advance corporate income and personal income taxes for February 2020.

4.8. Decision on measures to mitigate the negative consequences on the business of caterers and craftsmen in the City of Zagreb

The Official Gazette of the City of Zagreb adopted the Decision on measures to mitigate the negative consequences on the business of caterers and craftsmen in the City of Zagreb caused by the epidemic of COVID-19 disease.[32] Taxpayers are

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29 Official Gazette No. 177/2004, 90/2005, 57/2006, 80/2010, 22/2012, 146/2008, 148/2013, 143/2014, 50/2016, 115/2016, 106/2018, 121/2019, 32/2020, and 138/2020.

30 Official Gazette No. 32/2020.

31 Notification to taxpayers of the reduction of monthly advance personal income and corporate income taxes, *Tax Administration*, [https://www.porezna-uprava.hr/Stranice/Vijest.aspx?NewsID=2881&List=Vijesti], Accessed 10 April 2021.

32 "Službeni glasnik Grada Zagreba", No. 27 of 30 October 2020, Class No. 021-05/20-01/417, File No. 251-01-03-20-8.

required to calculate consumption tax at the rate of 2% and it should be expressed on receipts and on the prescribed PP-MI-PO form that should be submitted by the 20th of current month for the previous month.

The City of Zagreb has transferred the task of determining and collecting consumption tax to the Tax Administration, which will cancel the amounts owed ex officio in accordance with the Decision, thus avoiding additional costs of adjusting to the system that taxpayers could have by implementing the said Decision.

The Tax Administration supervises the legality of general acts issued by representative bodies of cities, and in accordance with its powers, it determines whether the Decision on measures to mitigate the negative consequences on the business of caterers and craftsmen in the City of Zagreb caused by the epidemic of COVID-19 disease was made in accordance with regulations governing the tax procedure.

5. ENFORCEMENT PROCEEDINGS DURING SPECIAL CIRCUMSTANCES DUE TO AN EPIDEMIC CAUSED BY THE COVID-19 VIRUS

As of 9 April 2020, the Tax Administration has the right to apply special rules when conducting enforcement proceedings. These rules oblige the Tax Administration not to issue decisions on enforcement on financial assets against all taxpayers during special circumstances, and in the initiated enforcement proceedings against movables from the implementation of the public auction. The Tax Administration will not take enforcement action against real property either.

Special circumstances do not prevent the Tax Administration from issuing warnings to inform the debtor about tax debt, when implementing measures to ensure the collection of tax debt by issuing a decision on enforcing movable assets by seizing; implementing measures to secure the collection of tax debt by placing a lien on the debtor's real estate. "The first amendment to the Act defines special circumstances for the occurrence of which measures were adopted to facilitate the payment of tax liabilities in such a way that tax liabilities can be deferred or settled in instalments with no interest or statute of limitations.

The second amendment enabled the taxpayer entitled to and granted support to preserve jobs, to be exempted from paying public imposts on co-financed net salaries. Also, if due to special circumstances the taxpayer is prohibited from working by the decision of the competent authority, or if their business activities are suspended or significantly hindered, they may be fully or partially exempted from paying taxes and during special circumstances deadlines, VAT on imports and

donations, the implementation of enforcement measures, interest rates and procedural provisions may be provided for in a different way."[33]

In special circumstances, the taxpayer and the tax authority may enter into an administrative contract for due tax liabilities. An administrative contract in special circumstances is concluded for a debt of more than HRK 200. An administrative contract must contain the following provisions:

- The tax liability stated in the tax and accounting book of records is considered compliant with the tax liability with no certification required.
- Taxpayers express their intention to conclude an administrative contract by submitting a request, and the Tax Administration confirms this by the administrative contract signed by the head of the authority.
- The administrative contract is concluded for 24 months with statutory default interest amounting to 3.11%.
- An administrative contract can be concluded without collateral.[34]
- A taxpayer may enter into an administrative contract even though they have a pre-bankruptcy settlement procedure in force, provided that they have settled all due annuities of the pre-bankruptcy settlement.

A request addressed to the competent Tax Administration office concerning the conclusion of an administrative contract can be submitted via the ePorezna platform,[35] while taxpayers who are not users of the ePorezna system can send the said request by mail.

The legislator also enacted a measure of relief for natural persons whose portion of income is confiscated for enforcement purposes. In order to make it easier for citizens in these situations to bear the burden of the negative economic consequences of the epidemic, the Act on Enforcement on Financial Assets[36] was adopted which entered into force on 18 April 2020.

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33 Radica, V.; Rudić, D, *Ovršni postupak za vrijeme trajanja posebnih okolnosti*, Porezni vjesnik, No. 6, June 2020., p. 35-36

34 Frequently asked questions related to the package of measures adopted in the spring wave of the epidemic caused by the spread of the COVID-19 virus, *Tax Administration*, *op.cit.*, note 12, [https://www.porezna-uprava.hr/Stranice/NPP_COVID_mjere.aspx#covid1?cv=1], Accessed 10 April 2021.

35 ePorezna is a unique web portal of the Tax Administration and a central place where taxpayers can access the electronic services of the Tax Administration according to the one-stop-shop principle. Services that are available include taxpayer data management, receipt of documents, submission of forms and applications, and many other services. For more details, see: Jerković, E., *REDUCING THE TAX COMPLIANCE GAP BY IMPROVING TAX ADMINISTRATION*, Josip Juraj Strossmayer University of Osijek, Faculty of Economics in Osijek, Croatia, Hochschule Pforzheim University, Osijek, 2018, pp. 989-990.

36 Official Gazette No. 47/20.

In these conditions marked by a decline in economic activity, the financial situation of natural persons is significantly more difficult. Consequently, although according to the existing special regulations, debtors are entitled to the right to have part of their income exempt from the enforcement procedure, these amendments enable a temporary suspension of all enforcement procedures on financial assets deposited in the natural person accounts.

5.1. Enforcement proceedings for the collection of tax debt

Since during special circumstances the Ordinance on the Implementation of the General Tax Act[37] also provides for special provisions relating to enforcement proceedings, the finance minister authorises the head of the tax authority to prescribe the procedure for implementing enforcement measures during special circumstances to be applied for a period of three months following the entry into force of the Act on Amendments to the General Tax Act, i.e. its Article 107(a).

In this regard, the Tax Administration will not initiate enforcement proceedings on the debtor's financial assets to collect its receivables from 20 March 2020 to 20 June 2020, regardless of which debt enforcement proceedings should be initiated and when it is due. During the said period, the Tax Administration will refrain from issuing decisions on enforcement on financial assets, decisions on enforcement on salaries and decisions on enforcement against the debtor's cash receivables to all taxpayers, as well as from conducting the sale of movable property within the framework of initiated enforcement proceedings. Likewise, the Tax Administration will not initiate enforcement proceedings on real estate during special circumstances. It should be emphasised that the Tax Administration will not suspend decisions on enforcement on financial assets received by the Financial Agency before 9 April 2020, except in cases provided for in Article 147 of the General Tax Act. During special circumstances, the Tax Administration will continue to issue warnings to tax debtors for the purpose of notifying them of arrears for which they could possibly use the support measures available under the Ordinance on the Implementation of the General Tax Act. Likewise, the Tax Administration will, regardless of the duration of special circumstances, continue to implement measures to ensure the collection of tax debt by issuing a decision on enforcement of the debtor's movable property and submitting proposals for securing monetary claims by putting a lien on the debtor's real estate.[38]

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37 Official Gazette No. 45/19, 35/20, 43/20 and 50/20.

38 Frequently asked questions related to the package of measures adopted in the spring wave of the epidemic caused by the spread of the COVID-19 virus, *Tax Administration*, *op.cit.*, note 12, [https://www.porezna-uprava.hr/Stranice/NPP_COVID_mjere.aspx#covid1?cv=1], Accessed 10 April 2021.

5.2. Enforcement on Financial Assets

The Act on Amendments to the Act on Enforcement on Financial Assets[39] (hereinafter: the Act on Amendments) entered into force on 18 April 2020. The purpose of the said Act is to adopt relief measures aimed at facilitating the position of natural persons whose portion of income is confiscated for enforcement purposes, all in order to make it easier for them to bear the burden of the negative economic consequences caused by special circumstances.

In addition to citizens, craftsmen and other natural persons engaged in economic activity are also categorised as natural persons whose financial assets related enforcement can be suspended.

The Act on Amendments defines special circumstances as an event or a certain situation that could not be foreseen and could not be affected, and which endangers life and health of citizens, property of greater value, significantly impairs the environment, impairs economic activity or causes significant economic damage.[40]

The Act on Amendments stipulates that during special circumstances the Financial Agency will suspend the implementation of enforcement on financial assets in relation to natural person debtors. Special circumstances last from the date of entry into force of the Act on Amendments until the expiry of a three-month period following its entry into force; however, this period may be extended by a decision rendered by the Government of the Republic of Croatia for an additional three-month period.

There is no statutory default interest during special circumstances. Therefore, the Financial Agency will not charge default interest calculated as set out in the basis of payment for the period of special circumstances. It should be emphasised here that the provision relating to non-existent default interest does not apply only to claims relating to ongoing enforcement proceedings on financial assets, but to all claims in terms of all legal relations with delayed payments. This actually means that during special circumstances in the Republic of Croatia, statutory default interest is not charged at all.

During special circumstances, neither the deadlines stipulated by the Act on Enforcement of Financial Assets[41] nor those stipulated by a special act related to the duration of an account freeze, i.e. unexecuted payments, are set, except for the

39 Official Gazette No. 47/20-

40 *Ibid*.

41 Official Gazette No. 68/18, 02/20 and 47/20.

deadline for the transfer of seized financial assets that starts when the Financial Agency receives the basis of payment.

Notwithstanding the above, the Financial Agency will not suspend the implementation of enforcement on financial assets in relation to a natural person debtor if enforcement is carried out to settle a claim for legal child maintenance, other claims when enforcement is carried out to settle instalments due in the future, claims on the basis of due but unpaid salaries, salary compensations or severance pay, in the case of security measures in criminal law proceedings and enforcement on a specified purpose account.[42]

If after the suspension of enforcement under the Act on Amendments a natural person debtor has no basis for payment based upon which the Financial Agency continues with the implementation of enforcement, it will send an order to debtor's banks to unblock the bank account within ten working days.

Exceptionally, if during special circumstances a condition arises for the transfer of financial assets seized before the occurrence of special circumstances, the Financial Agency shall issue orders to debtor's banks to transfer seized financial assets to the bailiff.

During special circumstances, the Financial Agency will receive new payment bases issued to natural persons and record them in the Registry, but will not send orders to banks for their execution, i.e. no further action will be taken after their entry in the Registry.

Upon termination of special circumstances, the Financial Agency will continue to carry out enforcement in accordance with the provisions of the Act on Enforcement of Financial Assets, and deadlines suspended by the Amendment Act continue to run.

5.3. Emergency measures in enforcement and bankruptcy proceedings

The Act on Emergency Measures in Enforcement and Bankruptcy Proceedings for the Duration of Special Circumstances[43] (hereinafter: the Emergency Measures Act) entered into force on 1 May 2020, and it defines special emergency measures in enforcement and bankruptcy proceedings during special circumstances caused by the coronavirus pandemic. The purpose of the Emergency Measures Act is to adopt measures to alleviate the position of natural persons whose portion of

[42] Act on Amendments to the Act on Enforcement of Financial Assets, Official Gazette No. 47/20.

[43] Official Gazette No. 53/20.

income is seized due to enforcement on salaries, pensions or other permanent income, economic entities threatened by bankruptcy proceedings, beneficiaries of grants for projects financed from national funds or the European Union budget, and beneficiaries of aid schemes paid due to the occurrence of special circumstances.

The duration of special circumstances provided by the Emergency Measures Act is determined to cover the period starting on the day the Emergency Measures Act entered into force and ending with the expiry of a three-month period following its entry into force, i.e. from 1 May 2020 to 31 July 2020.

The said Act stipulates that during special circumstances all enforcement proceedings are suspended, with the exception of those enforcement proceedings that are carried out to settle claims for legal child maintenance, other claims when enforcement is carried out to settle instalments due in the future, claims on the basis of due but unpaid salaries, salary compensations or severance pay, and in the case of security measures in criminal law proceedings.

In addition to the above exceptions, enforcement will also be carried out in the case when a judge deems it necessary and urgent to carry out the enforcement procedure, taking into account the circumstances of each individual case.

The Emergency Measures Act provides for suspension of all enforcement proceedings during special circumstances; however, enforcement on salaries is especially stressed because in most cases employers do not have necessary knowledge to monitor extensive regulations governing enforcement and in this way, on the one hand, it is easier for employers to monitor regulations, and on the other hand, debtors are guaranteed the proper application of regulations. Pursuant to the provisions of the Emergency Measures Act, enforcement on salaries is carried out such that the employer, i.e. the payer of other permanent remuneration, is obliged to receive new enforcement documents for the purpose of getting the settlement priority, but will not confiscate portion of income for the bailiff.

In relation to bankruptcy proceedings, the Emergency Measures Act stipulates that bankruptcy reasons arising during special circumstances are not a prerequisite for filing bankruptcy proceedings. Exceptionally, the debtor may submit a proposal for opening a bankruptcy proceeding, while the Financial Agency and the bailiff may submit that proposal only for the protection of the interests and security of the Republic of Croatia, nature, the natural environment and human health.

During special circumstances and within the meaning of the Emergency Measures Act, no default interests are due.

5.4. Compulsory establishment of a statutory lien

The Tax Administration may have a lien on movable property and a lien on real estate owned by the debtor.

When it comes to a lien on movable property, a proceeding is initiated by issuing a decision on enforcement through seizure, assessment and sale of property. Since the Act on Emergency Measures in Enforcement and Bankruptcy Proceedings for the Duration of Special Circumstances[44] stipulates that all enforcement proceedings[45] are suspended during special circumstances, it follows that the Tax Administration cannot issue a decision on enforcement during special circumstances, so it cannot seize the debtor's movable property, i.e. get a lien on movable property.

Unlike the aforementioned lien on movable property, a lien on real estate is established such that the Tax Administration submits an application through the State Attorney's Office for compulsory establishment of a lien on the debtor's real estate to the competent court in whose territory real estate is located. Since the Act on Emergency Measures in Enforcement and Bankruptcy Proceedings for the Duration of Special Circumstances does not contain provisions relating to compulsory securing of monetary claims, the decision is left to the judge who will receive a proposal for securing a monetary claim by compulsory establishment of a statutory lien.

5.5. Support measures to assist debtors whose business activities have been suspended

Pursuant to the Ordinance on the Implementation of the General Tax Act,[46] taxpayers or debtors whose business activities have been suspended by the Decision of the Civil Protection Headquarters of the Republic of Croatia and the tax authority may conclude an administrative contract in special circumstances to pay tax debt for tax liabilities due during the said suspension.[47]

The following provisions shall apply to an administrative contract in special circumstances:

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44 Official Gazette No. 53/2020 and 83/2020.

45 Nacional, 16 July 2020, [https://www.nacional.hr/za-tri-mjeseca-produzeno-trajanje-posebnih-okolnosti-vezano-za-ovrhe/], Accessed 10 April 2021.

46 Ordinance on the Implementation of the General Tax Act (Official Gazette No. 45/19, 35/20, 43/20, 50/20, 70/20, 74/20, 103/20, 114/20, and 144/20).

47 Notification to taxpayers whose business activities have been suspended by the Decision of the Civil Protection Headquarters of the Republic of Croatia, *Tax Administration*, 30 December 2020, [https://www.porezna-uprava.hr/Stranice/Vijest.aspx?List=Vijesti&NewsID=3075], Accessed 10 April 2021.

- the tax liability stated on the tax and accounting book of records is considered compliant with the taxpayer, with no certificate of outstanding debt issued by the competent tax authority required,
- taxpayers express their intention to conclude an administrative contract by submitting a request, and the tax authority by signing the administrative contract of the head of the authority or a person authorised by the head of the authority,
- the administrative contract is concluded for a maximum period of 24 months with statutory default interest for the repayment period reduced by 3 percentage points,
- an administrative contract can also be concluded without collateral,
- an administrative contract can also be concluded even if a taxpayer has a pre-bankruptcy settlement procedure, a pre-bankruptcy agreement or an administrative contract in force, provided that they have settled all liabilities due before the entry into force of this article, provided that all due liabilities have been settled by the day of submitting the request for concluding the administrative contract and in accordance with the annuity plan for repayment of the pre-bankruptcy settlement, a pre-bankruptcy agreement or an annuity plan which is an integral part of the previous administrative contract.[48]

A taxpayer whose business activities have been suspended by the Decision of the Civil Protection Headquarters of the Republic of Croatia, and whose liabilities have been rescheduled on the basis of a pre-bankruptcy settlement, a pre-bankruptcy agreement, a bankruptcy plan, an administrative contract or payment in instalments, may submit a request a delay in payment of outstanding rescheduled liabilities from the above procedures that fall due at the time of suspension. Liabilities for which a grace period has been granted fall due after the last annuity of previously rescheduled liabilities.

No interest is charged on tax liabilities for which a grace period for the payment has been granted.[49]

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48 Ordinance on the Implementation of the General Tax Act, *op.cit.,* note 46, see also note 28.

49 Notification to taxpayers whose business activities have suspended by the Decision of the Civil Protection Headquarters of the Republic of Croatia, *Tax Administration*, 30 December 2020, *op.cit.,* note 47, [https://www.porezna-uprava.hr/Stranice/Vijest.aspx?List=Vijesti&NewsID=3075], Accessed 10 April 2021.

The request for the grace period must be submitted no later than 5 days after the annulment of the Decision of the Civil Protection Headquarters of the Republic of Croatia suspending business activities.[50]

6. CONCLUSION

The crisis caused by the occurrence of the COVID-19 virus is still ongoing, and according to some scientists, it has not yet reached its peak. Nevertheless, it can be concluded that the Tax Administration is coping well with the new situation.

Given that this situation, i.e. pandemic, as well as other emergencies, is extremely difficult or impossible to predict, the legislator incorporated the measures adopted during the COVID-19 pandemic into laws and bylaws so that they can also be activated quickly and efficiently in the event of a new, unpredictable, and economically dangerous situation.

As already indicated in the introduction, there will always be a certain number of taxpayers who do not settle their tax liabilities, with or without a justified reason. When it comes to justified reasons, this primarily refers to job loss, unpaid salaries or a situation when tax debtors themselves cannot collect their receivables so they cannot settle their own debts either. Unjustified reasons most frequently refer to intentional tax evasion or the disparity of revenue and expenditure in situations where taxpayers spend more than they earn. Regardless of which group they belong to, from the tax aspect, they are all in the same position, i.e. they are in a position to become tax debtors who do not pay their due tax debts on time.

With the advent of this situation and the majority of physical activities switching "online", the electronic tax administration system, i.e. eTax, has largely enabled the normal functioning of the entire system. Usage of such an already existing platform increased, and some of its parts were upgraded and improved in order to facilitate business activity in these conditions and reduce physical presence of customers in the Tax Administration.

The Government has enacted tax measures and amendments to acts and regulations to help the survival of vulnerable sectors of the economy, primarily small- and medium-sized enterprises in those sectors directly affected by the pandemic, such as the hospitality industry or tourism. The most significant measures are,

[50] Notification to taxpayers whose business activities have been suspended by the Decision of the Civil Protection Headquarters of the Republic of Croatia, *Tax Administration*, 30 December 2020, *op.cit.,* note 47, [https://www.porezna-uprava.hr/Stranice/Vijest.aspx?List=Vijesti&NewsID=3075], Accessed 10 April 2021.

inter alia, a payment deferral and a reduction of monthly advance payments of personal income tax or corporate income tax, and there was great interest in deferral, i.e. payment of due and deferred tax liabilities in instalments. Many other measures have been introduced to provide assistance, i.e. to protect the survival of legal and natural persons and their material assets due to this pandemic and its consequences.

In order to warn tax debtors of the existence of a due tax debt at the beginning of the tax-debt relationship, the Tax Administration issues a warning to them, which provides the possibility of paying the debt within eight days without initiating enforcement proceedings. In addition, taxpayers have at their disposal the institute of an administrative contract, the conclusion of which, on the one hand, enables the repayment of tax debt in several monthly instalments, and on the other hand, enforcement proceedings cannot be initiated against them as long as the administrative contract remains in force.

Initiation of an enforcement proceeding is an extremely inconvenient procedure for all participants engaged in the procedure and the Tax Administration, i.e. officials working in the Collection and Enforcement Services, pay special attention to choosing the enforcement measure that is both most effective in terms of collecting tax debt and at the same time least painful for the debtor. Consequently, tax debt collection by confiscating financial assets deposited in the bank accounts of debtors is the most common enforcement measure that is resorted to first. The relationship between the amount of debt and the choice of enforcement measure is also taken into account, and by amending the Enforcement Act the legislator tends to protect the most vulnerable groups of tax debtors, i.e. enforcement cannot be initiated on the debtor's property for a debt amounting to less than HRK 40,000. In this way, on the one hand, one wants to prevent a disproportion between the amount of debt and the value of the property that is subject to enforcement, and on the other, the aim is to protect tax debtors who live in the only immovable property they possess.

Legislation is constantly changing, including that concerning enforcement proceedings. The goal of the legislator, and thus the Tax Administration as a national administration authority in charge of tax collection, is not to repress taxpayers with the aim of providing funds for the state budget, but to make the Tax Administration a service to citizens, legal entities and individuals that will help them in their daily business activity.

Despite all the above, the real consequences of this pandemic on the economy of the Republic of Croatia, but also on the world as a whole still cannot be predicted.

Given that the danger of the virus, but also its consequences on the economy, is still present, it is to be expected that there will most likely be new extensions and amendments to acts and bylaws to make the situation as easy as possible for citizens and reduce the consequences as much as possible.

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UDK 004.738.5: 061.1(4-67EU)]:614.4
330.341.1(4-76EU)
Review article

THE EU REGULATORY ACTIVITIES IN THE AREA OF DIGITAL PLATFORMS AND SERVICES PROVISION

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ABSTRACT

New and innovative ways of service provisions based on digital platforms have changed the ways in which doing business, communicating and connecting providers to users in the EU Internal Market are shaped and transformed. Since the adoption of the Directive 2000/31/EC (the E-Commerce Directive) in 2000 digital services have gained market dominance, and this has become especially evident during the Covid-19 virus crisis when the importance of digital technologies in all aspects of modern life became prominent. It has clearly shown the dependency of the economy and the society on digital services highlighting both the benefits and the risks that stem from the current framework for the functioning of the services provided by the digital platforms regardless of whether they are defined as digital services or not.

In the European Commission (EC) Communication "Shaping Europe's Digital Future" the EC committed to update the horizontal rules that define the responsibilities and obligations of digital service providers, and online platforms in particular. Additionally, the European Parliament's "Report on the Digital Services Act and fundamental rights issues posed" highlights the need for legal clarity of platforms and users, as well as respect for fundamental rights in the light of the rapid development of technology.

According to the current data, the digital platforms account for over 10% of the EU's 45 million users. These platforms are subject not only to the specific obligations in controlling their own risks, but also to a new oversight structure.

In 2020 the EC initiative was finalized by the "Proposal for a Regulation on a Single Market for Digital Service" which addresses the negative consequences arising from certain behaviours on platforms. Since the EU Internal market is impacted significantly by platforms that serve as intermediaries for business users to reach their customers, sometimes these companies assume control over the entire platform ecosystems, which in turn can grant them the opportunity to regulate certain relations. The controlling power comes from the practices that platform companies exercise and from using the data of the businesses and users operating on these platforms.

This paper aims to analyse the current regulation on digital platforms and digital service provisions in the EU Internal Market and offer some conclusions on its possible impact on the market's functioning especially in the times of the Covid-19 pandemic and subsequently.

***Keywords**: digital services, regulation, EU Internal market, digital platforms, Covid-19*

1. INTRODUCTION

The digital society is characterised by four specific features: the irrelevance of geographical location, the key role of the platforms, the importance of connectivity and the use of big data.[1] These features differentiate the digital market from the traditional one, especially as a result of the transformation of the associated value chain.[2] Technology is part of everybody's daily life, which this creates a vital framework for all modern economic sectors and raises the importance of the digital market and information society services. This importance was recognized in the European Commission Digital Single Market Strategy[3] that was created to facilitate the free movement of persons, services and capital in situations where the individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition while providing a high level of consumer and personal data protection, irrespective of their nationality or place of residence.[4]

It should be noted that the Digital Single Market Strategy was one of the first strategic documents of the European Commission that dealt with digitalisation. This document was preceded by the E-commerce[5] and Services[6] directives, which no longer corresponded with the rapid progress of technology especially the mobile phones and the implementation of roaming facilities in Europe. Consequently, the existing regulation was not in line with the provision of certain services, espe-

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1 Charrié J.; Janin L., *Ficalité du numérique Le numérique: comment réguler une économie sans frontière ?,* La note d'analyse 35, Paris, France Stratégie, 2015, Vol. 90, No. 7-8, pp.67-73, available from [https://archives-gfp.revuesonline.com/article.jsp?articleId=37983], Accessed 1 May 2021.

2 Valenduc, G.; Vendramin, P., *Work in the digital economy: sorting the old from the new, European Trade Union Institute, Working paper* 2016.03, 2016, p. 7.

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and Tthe Committee of The Regions A Digital Single Market Strategy for Europe, Brussels, 6.5.2015, COM(2015) 192 final (The Digital Single Market Strategy).

4 Frosio; G. F., *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 NW. U. L. REV. ONLINE 18 (2017-2018), pp. 19-46 .

5 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, OJ L 178, 17.7.2000, p. 1–16 (Directive on electronic commerce).

6 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68 (Services directive).

cially those provided through digital platforms.[7] As a reaction to the fast development of digital platforms, the need for the new regulatory framework arose.

The aime of this paper is to analyse the current regulatory framework on digital platforms and digital service provisions in the EU Internal Market and offer some conclusions on its possible impact on the market's functioning in the light of new regulatory package proposed by the European Commission in the year 2020. Paper is devided into 6 chapters including Introduction and Conclusion. Chapter 2 gives an overview of the exsisting regulation on the digital services. In chapter 3 suggestions for the future research are presented. Chapter 4 analyses the specific characteristics of digital services accentuating the difference between information society services and others based on the analysis of the rulings of the Court of Justice of the European Union (further CJEU). Finaly, in chapter 5 the new regulatory framework for the digital services is presented.

2. OVERVIEW OF THE EXISTING REGULATION ON THE DIGITAL SERVICES

The European Commission has adopted a series of documents highlighting the digital economy as one of the European Union's priorities. In 2010, The European Commission adopted the Digital Agenda for Europe[8] with the aim to enable the economy and the citizens of the European Union to achieve their maximum by using digital technologies. The importance of the digital economy is clear from the title of the document and elaborated in the subtitle "Restarting the European economy," which highlights the priority goal: to enable citizens and businesses to make the best use of digital technologies. As stated in the Digital Agenda, "The Internet has no borders, but its market, both globally and in the European Union, is still divided by multiple restrictions." These restrictions result from different national legislations governing, *inter alia*, certain areas that pertain to the field of digital economy.

The Digital Agenda has enabled further development of legislation in the field of digital economy at the level of the European Union and its implementation in national legislations. Its aim is to maximize the sociological and economic potential of information technology, especially the Internet in the areas of business, work, games, communication and free expression. The goal is to increase innovation and

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7 Juncker, J. C.: *Extract from the Political Guidelines for the next European Commission – A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change* (15 July 2014).

8 Communication from the European Commission to the European Parliament, the Council and the European Economic and Social Council and the Council of the Regions: A Digital Agenda for Europe, COM (2010) 245, Brussels, 19.5.2010 (The Digital Agenda).

economic growth, and thus improve everyday life for citizens and businesses. In order to achieve these goals, it is necessary to harmonize national legislations and introduce a common regulatory framework at the level of the European Union. It is believed that future developments will lead to more efficient use of digital technology by enabling the EU to address the key challenges and enhance the Europeans' quality of life through improved healthcare, safer and more efficient transport, cleaner environment, new media opportunities, and easier access to public services and cultural content.[9]

In 2014 the European Commission engaged its efforts to "make better use of the great potential of digital technologies that know no borders, and in order to do so it is necessary to have the courage to overcome national obstacles in the field of telecommunications regulations, copyright regulations and data protection, radio wave management and the application of competition rules."[10] As a result of this initiative, European Commission Communication "The Digital Single Market Strategy for Europe"[11] was adopted in 2015 in order to enable the implementation of internal market rules on the four freedoms, as the result of a need for introducing a single strategy that will include not only the "physical" – internal market but also the digital market.

The Digital Single Market Strategy for Europe ushered a number of documents adopted by the European Commission in 2016 that encourage the use of digital technologies and lay the foundation for future regulation. The Communication on online platforms and the Digital Single Market[12] was adopted. It introduced the sound regulatory framework for the digital economy, which will contribute to the promotion of sustainable development and the development of business models for platforms in Europe.[13] Harmonized rules at the EU level, such as the General Data Protection Regulation[14] and the Network and Data Security Directive,[15]

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9 *Ibid.*, pp. 3.

10 Policy Guidelines for the New European Commission - A New Beginning for Europe: My Agenda for Employment, Growth, Justice and Democratic Change, 15.7.2014.

11 The Digital Single Market Strategy, o*p.cit.*, note 3.

12 The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Council and the Council of the Regions: Online Platforms and the Digital Single Market Opportunities and Challenges for Europe (COM (2016) 288 final, Brussels, 25.5.2016.

13 *Ibid.,* pp. 4.

14 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (Text with EEA relevance) OJ L 119, 4.5.2016, p. 1–88 (General Data Protection Regulation).

15 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,

extend the applicable rules to the online platforms and above. It also pointed out that online platforms are subject to the existing EU rules in the areas such as competition, consumer protection, personal data protection and single market freedom, and that harmonization of all the related platforms with these rules is crucial to ensure fair competition for all participants, thus developing the confidence of companies and the general public in working with online platforms.

At the same time, the need to define the collaborative economy, which began to grow in the European Union market together with a number of digital platforms, was recognized. As the first step towards the regulation, the Commission's Communication under the title "A European agenda for the Collaborative Economy was adopted.[16] Subsequently, the Digital Single Market Strategy[17] preceded the adoption of the Joint Declaration on the EU's legislative priorities for 2018-19,[18] outlining the political responsibility of the EU institutions to complete the key legislation in the Digital Single Market by the end of 2017. To achieve these goals, the Communication emphasizes that the European Union's strength is based on fully integrated internal market and open global economic system. One of the most important goals of the Communication in relation to the regulatory framework is to promote the cooperation of regulatory bodies around the world. This goal clearly indicates that the digital economy has no physical boundaries, and that regulation must take this into account, as neither national nor local regulations alone can meet all the requirements set by this form of economy. Then the Commission issued a Communication on "Creating a Common European Data Space"[19] which makes recommendations for further regulation on the use of data in the Internal Market. Apart from these strategic documents, the European Union has adopted a number of regulations and directives.[20]

OJ L 194, 19.7.2016, p. 1–3.

16 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A European agenda for the collaborative economy, COM/2016/0356 final, Brussels, 2.6.2016. (Agenda for the collaborative economy).

17 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the mid-term review of the implementation of the Digital Single Market Strategy (Digital Single Market for All) (Brussels, COM (2017) 228 final 10.5.2017).

18 European Commission Joint Declaration on the EU's legislative priorities for 2018-19, 17.12.2017.

19 The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Creating a Common European Data Space (COM (2018) 232 Final Brussels, 25.4.2018.

20 The most important of which are Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, 186, 11.7.2019, pp. 57–79, General Data Protection Regulation, *op. cit.,* note 14, Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying

3. DIRECTIONS FOR FURTHER REGULATION

The described legal framework does not fully meet the needs of regulating the services provided through the platforms that have experienced a significant increase in recent times. The digital platforms and the collaborative economy are regarded as the most controversial parts of the Digital Single Market regulatory framework.[21] Such rapid development of platforms that competed with traditional service providers has caused disruptions at the European as well as at the national and local levels, and inputs were gathered from different stakeholders, such as civil society, associations, trade unions and others.[22] The Agenda for the Collaborative economy introduced the 'problem' of the digital platformisation after the situation at the local level regarding the application of the European and national laws escalated. The discussion that followed the rulings of the CJEU revolved around the right to restrict the activities of platform service providers Uber and Airbnb in certain member states.

When searching for the applicable legal regime for the collaborative economy the applicability of the internal market freedoms has to be provided, especially regarding the service provisions. Besides the provision of services, the freedom of movement of workers should also be discussed by addressing and differentiating between service providers who act as workers,[23] self-employed[24] persons, or just as peers[25] providing services as their second job, free to decide on their working hours[26] and considering themselves as independent contractors who wish to earn some extra income. This includes the question of the character of the service itself and the role of the platform.

The freedom to provide services within the EU law was primarily based on the idea of free movement of persons across the border in order to provide services in another member state or in order to receive them in a different member state. The

down a procedure for the provision of information in the field of technical regulations and rules on information society services (codified text) (OJ L 241, 17.9.2015, p. 1-15), Directive on services in the internal market, *op.cit.* note 6; Directive on electronic commerce, *op. cit*., note 5.

21 Adamski, D.: *Lost on the digital platforms:Europe's legal travails with the digital single market*, Common Market Law Review, Vol. 55, No. 3, 2018, pp. 719-751.

22 Inglese, M., *Regulating the collaborative economy in the European Union Digital Single Market*, Springer, 2019. p. 41.

23 Valenduc; Vendramin, *op.cit.*, note 2.

24 Todoli-Signes, A.: *The "gig economy:" employee, self-employed or the need for a special employment regulation*, ETUI, I-13, 2017, pp. 5-6.

25 Bauwens, M.; Niaros, V., *The emergence of peer production: challenges and opportunities for labour and unions,* ETUI Policy Brief European Economic, Employment and Social Policy, no 3/2017, pp. 2.

26 Inglese, *op.cit.*, note. 22, pp. 45.

cross border element in these transactions exsists in particulary in the movement of persons in order to provide or to receive the service. The third way or realising this freedom was the possibility to provide or receive a service without crossing the border in situations when the service was provided by specific means, such as the Internet or phone. This form of the service provision is especially accentuated in the digital economy which is supported by digital platforms. The freedom to provide services, just like other market freedoms, could be restricted by the national legislation with specific justifications that are established by the EU primary and secondary law. The requirement of licensing for specific activities and professions occurred as one of the limitations to the free service provisions. When discussing the freedom to provide services, the question of classification of services arises. In this regard, the definition of the service provided by the platform was questioned. In order to answer to the question of the character of the service, the service providers should also be analysed since in some cases the platforms were offering the services themselves while in others there were merely the intermediaries.

The Agenda for the Collaborative Economy identifies the platforms as the intermediaries that connect providers with users, and facilitate transactions between them. The first communication that was issued by the Commission in 2015[27] defines online platforms as "software-based facilities offering two- or even multi-sided markets where providers and users of content, goods and services can meet."[28] Nevertheless, the Pandora's Box was opened when it became clear that platforms play different roles in this tripartite relation among service providers, service users, and platforms as intermediary facilitators.[29] It was clear that platforms have outgrown their roles of meagre intermediaries in many cases.

4. ANALYSIS OF THE INFORMATION SOCIETY SERVICE IN CJEU JUDGMENTS

Information Society services are defined in Article 1(2) of Directive 98/34/EC[30] as "any service normally provided for remuneration, at a distance, by electronic

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27 Commission staff working document A Digital Single Market Strategy for Europe - Analysis and Evidence Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Single Market Strategy for Europe, COM(2015) 192 final, SWD (2015) 100 final.

28 *Ibid.*, pp. 2.

29 Newlands, G.; Lutz, C.; Fiesler, C., *Power in the sharing economy: European Perspectives*, Report from the EU H2020 Research project Ps2Share: Participation, Privecy and Power in the Sharing Economy, 2017.

30 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ L204 of 21 July 1998.

means and at the individual request of a recipient of services." The analysis of this definition of information society services requires clarification of the meanings of the terms. It refers to the service provided by electronic equipment and at individual request of the service user without the participants' concurrent presence at the same location.[31]

According to Directive 2000/31/EC on certain legal aspects of information society services in the EU internal market, in particular in e-commerce, no national measure on market access requirements should be discriminatory.[32] Under the existing EU law, service providers may be subject to market access requirements if such requirements are justified and proportionate. This assessment is made by the CJEU considering the specifics of each particular business model.[33]

In order to clarify which law is applicable regarding the service provided by a platform, the Court of Justice of the European Union (CJEU) undertook the examination of Uber company service.[34] The Uber cases[35] were the first to be analysed pursuant to the applicable EU law and its restrictions that were enacted by the national and regional authorities in predominantly tourism-orientet countries Spain and France.[36]

The main question is whether the service, which is referred to as collaborative economy service, is also an information society service[37] and, if so, whether such activities are protected under the EU law to provide services freely or under the national law of a specific sector of the Member State in which they operate. To reach a decision on this issue, it is necessary to analyse the activity of the platform and the connection of the electronic and non-electronic elements of their business. In the case of composite services,[38] *i.e.* services involving electronic and non-electronic elements, a service can be considered to be entirely provided by

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31 Opinion of the AG Szpunar in case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain*, 2017.

32 Hatzopoulos, V., *The collaborative economy and EU law*, Hart publishing, Oxford, 2018, pp. 31-32.

33 Smorto G. in Goniadis, A., *Collaborative economy*, European Parlament. DG for internal policies, 2017.

34 Davidov, G., *The status of Uber drivers: A Purposive approach*, Hebrew University of Jerusalem Legal studies Research Paper Series No. 17-7 to be published in the Spanish Labour law and Employment Relations Journal. 2017; Adams Prassl, J., *Pimlico plumbers, Uber drivers, cycle couriers and court translators: who is a worker?* Law Quarterly Review, 2017.

35 Domurath, I., *Platforms as contract partners: Uber and beyond*, Maastricht Journal of European and Comparative Law, Vol. 25, No. 5, 2018, pp. 565-581.

36 Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain*, ECLIC:EU:C:2017:981.

37 Hatzopoulos, *op. cit.*, note 35, pp. 33.

38 Sousa Ferro, M., *Uber Court: a look at recent sharing economy cases before the CJEU*, UNIO – EU Law Journal, Vol. 5, No.1, 2019, pp. 68-75.

electronic means when the supply, which is not provided by electronic means, is economically independent of the service provided by those means. This is particularly the case when the intermediary service provider facilitates commercial relations between users and independent service providers. An example of this case may be the platforms for airline tickets or hotel reservations as in these cases; the intermediary service has real value added for the consumer and trader.[39]

When service provider delivers the same services both on and off-line, it is necessary to establish the main conceptual component in economic terms. In order for a service to qualify as an information society service, its main element must be performed by electronic means. When the conclusion of the contract and the payment, are carried out by electronic means they should be covered by the definition of information society services. The delivery of the purchased goods is only a fulfilment of the contractual obligation with the intent that the provision on such delivery does not affect the provision of the principal service. In the case of composite services, consisting of electronic and non-electronic elements, the former should be economically independent in relation to the latter in order to be considered an information society service. [40]

According to the European Union's legislation, platforms are exempt from liability for providing the information that they store under certain circumstances. The applicability of this exemption will depend on legal and factual circumstances, and according to the Art. 14 of the EU E-Commerce Directive, platforms will be exempt from liability when providing hosting services. By definition, hosting services represent the activities that are passive, technical and automatic, which implies that the information society service provider has neither knowledge of nor control over the transmitted or stored information.

The first Uber case against Spain started as a complaint about the infringement of the national Spanish law and unfair competition practiced by Uber drivers in Barcelona in relation to the 'regular' taxi drivers associated in the professional association of taxi drivers. At that time, Uber was just beginning to gain its market share as an innovative platform business model that connected service providers (drivers) and consumers. The main difference between the Uber drivers and the 'traditional taxi drivers' was their membership in the professional association. The provision of taxi services provided by the Uber platform includes the connection between the drivers and passengers[41] in real time through the smartphone application, and the payment facilities which was also supported by the platform. Unlike

39 Opinion AG Szpunar, *op. cit*, note 34

40 *Ibid.*

41 Schaub, M.Y., *Why Uber is an information society service*, EuCML 3(2018), pp. 109-115, p. 113.

the traditional business model, this one had a platform that acted as an intermediary between the driver and the passenger.

In order to provide taxi services in Barcelona, one had to be a professional driver and a member of the professional taxi drivers' association, holding an appropriate licence or authorisation for delivering taxi services. The number of taxi drivers was limited by law and their activity was monitored by the local authorities. Providing taxi services supported by the Uber platform[42] caused disturbance in the taxi service market of Barcelona and the main question for CJEU was whether the national restrictions proposed to the Uber service providers were justified. Therefore, the character of the service itself was discussed. According to the CJEU, an intermediation service that enables the transfer, by means of smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver using his/her own vehicle in principle meets the criteria for classification as an information society service. However, with regard to the service itself and its purpose, it is obvious that it's the goal to drive persons from one place to another is identical to that of that of the taxi service.

Consequently, the CJEU undertook the assessment of the character of the Uber service and concluded that it connects passengers with drivers offering non-public urban transport services similarly to taxi transport. Therefore, it is classified as the service in the field of transport and, according to the Services Directive, this field is exempt from this directive and hence from the rules of the Internal market on free movement.[43] Hence, the CJEU concluded that the intermediation service provided by Uber must be regarded as an integral part of the overall service whose main component is transport, and therefore has to be classified as a "service in the field of transport" and not as an "information society service."[44] The justification for this reasoning features two arguments: firstly, without Uber platform there would be no transport service, and secondly, Uber has a decisive influence over the conditions under which the service is provided.[45] The case of Uber followed the same path in France.[46]

In its Uber Spain and Uber France judgements, the CJEU refers only to the service's intermediation as "integral part of an overall service whose main component

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42 Guda, H., Subramanian, U., *Your Uber is arriving: managing on-demand workers through surge pricing, forest communication and workers Incentives*, Management science, Vol. 65, No.5, 2019.

43 Article 58(1) TFEU.

44 Case C-434/15, *op. cit*., note 32, para. 38.

45 Case C-434/15, *op. cit*, note 32, para. 39.

46 Case 320/16 *Criminal proceedings against Uber France* [2018] ECLI:EU:C:2018:221.

is transport service."[47] By relying on its earlier case-law CJEU interprets what is meant by the concept of services in the field of transport and by analysing the definition of information society service which main part is to be provided "by electronic means."[48]

At the same time, CJEU examined a case in the accommodation sector.[49] It concerned Airbnb,[50] a digital platform connecting the providers and recipients of short term accommodation services.[51] The French court (Tribunal de grande instance de Paris) has lodged the preliminary reference to the CJEU asking, primarily, whether the services provided in France by Airbnb Ireland via its electronic platform, which is operated from Ireland, are included in the freedom of services granted by Article 3(2) of Directive 2000/31/EC (E-commerce directive).[52]

Again, the status of the 'information society service' was discussed. Airbnb is an online platform for accommodation services that connects hosts and guests who are looking for accommodation. This position was raised since in the Uber cases it was clear that if the service itself could be classified as the 'information society service' the EU law shall apply.[53] Whereas, in the judgment on the Airbnb Ireland case the CJEU followed the Opinion of AG Szpunar,[54] the legal status of this platform was evaluated differently from the previous judgements in the Uber cases.[55] According to the European Commission, a case-by-case analysis ought to be performed in order to set the legal nature of the platform's activities. The enduring legal uncertainty surrounding the aforesaid definition is the case of Airbnb, an online platform that does not provide a service by itself but is still deemed a professional trader.

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47 Case C-434/15, *op. cit*., note 32, para. 40.

48 A service is provided by electronic means if it is "sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely [emphasis added] transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means" (Article 1(1)(b)(ii) of Directive 2015/1535).

49 Case 390/18 Criminal proceedings against X [2019] ECLI:EU:C:2019:1112 (Airbnb Ireland).

50 Busch, C., *The Sharing economy at the CJEU: Does Airbnb pass the „Uber test"?* EUCML, Issue 4/2018, 2018. pp.172-174.

51 Guttentag, D. A., *Why tourists choose Airbnb: A motivation-based segmentation study underpinned by innovation concepts.* Thesis. Waterloo Ontario Canada. 2016.

52 Case 390/18, *op. cit*., note 49.

53 In short, the Uber cases excluded the possibility of applying of the EU law since its service was classified as a transport service and therefore exempt from the application of the EU law. The idea in the Airbnb case was to defend the thesis that the platform provides a different service than Uber and that the EU law should apply.

54 Case 390/18, *op. cit.,* note 49, Opinion AG Szpunar.

55 Case 526/15 *Uber Belgium BVBA v Taxi Radio Bruxellois NV* [2016] ECLI:EU:C:2016:830; Case 434/15 *op. cit*., note 32; Case 320/16, *op. cit*. note 46 .

The main dilemma for the CJEU in the Airbnb Ireland case [56] was whether the Services Directive applies to the Airbnb service, or if it is to be qualified as an information society service, within the meaning of Art 2(a) of E-Commerce Directive, as amended by the Information Society Services Directive. Under Art 1(1) (b) of Information Society Services Directive, the concept information society service covers "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services."

Relating to the question of whether the Airbnb service is provided 'at a distance' and 'by electronic means,' AG Szpunar illustrated his point as for Airbnb Ireland does not physically meet the recipients of its services: neither the hosts nor the guests. As is apparent from the preliminary observations concerning Airbnb Ireland's activities, the host is not required to approach Airbnb Ireland in person in order to publish his/her accommodation on the platform. Furthermore, the user of the platform managed by Airbnb Ireland may rent accommodation at a distance and need not be in physical contact with the service provider. However, it is clear that the connection of users of the platform managed by Airbnb Ireland results in using the accommodation, which may be regarded as a non-electronic component of the service provided by that company.[57]

Following the Opinion of AG Szpunar, CJEU found that the Airbnb Ireland intermediation service meets the four cumulative conditions provided in Art 1(1) (b) of Information Society Services Directive, and thus constitutes an 'information society service' within the meaning of E-Commerce Directive.[58] Moreover, the CJEU determined that the Airbnb Ireland intermediation service cannot be regarded as forming an integral part of overall service, the main component of which is the provision of accommodation.[59]

Interestingly, in its judgment the CJEU also made a distinction between Airbnb and Uber. In the Airbnb Ireland judgment, the CJEU stated that the case against Airbnb Ireland was unlike the case against Uber, as it cannot be established that Airbnb Ireland has a 'decisive influence' over the conditions for the provision of the accommodation services to which its intermediation service relates.[60] This differentiation is also in accordance with the European Commission idea that each sector should be regulated by specific 'tailor-made' regulation.

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56 Coyle, D.; Yeung, T.Y-C., *Understanding AirBnB in Fourteen European cities*, The Jean-Jacques Laffont digital chair, Working papers, 2017.

57 Case 390/18*, op. cit.,* note 49, Opinion of AG Szpunar, para 41.

58 *Ibid.*, para 49.

59 *Ibid.*, para 57.

60 *Ibid.*, para 68.

Namely, Airbnb does not determine the rental price charged for the property and allows buyers to choose which house to rent. In contrast, Uber sets the price for the ride in its application and assigns a driver to each passenger. The analysis of the policy document shows that significant documents and recommendations in the area of collaborative economy exist, but that significant issues remain that require consideration.[61]

Just like Uber, this business model has also provoked tectonic changes in the hospitality industry: the emergence of Airbnb has resulted in its opening virtually to any homeowner. The downside is that the profitability of short-term holiday rentals has an adverse effect on the housing markets as it reduces the number of available long-term housing at affordable prices.[62] This concern has led many communities to impose strict(er) rules on short-term rentals.[63] It was concluded that the accommodation sector is governed by "a range of pre-existing regulatory frameworks which have not been tailored to the collaborative economy".

5. NEW REGULATORY FRAMEWORK FOR THE DIGITAL PLATFORMS

The aforementioned situation regarding the regulation of the digital platforms resulted in more intensive activity of the European Commission and other European institution. In June 2019, the European Parliament and the Council introduced the Regulation on promoting fairness and transparency for business users of online intermediation services.[64] It introduces[65] new rules on transparency and disclosure for service providers and the business users or corporate website users that should be established in the Union and consumers located in the Union. The entities required to comply with this regulation shall be liable to disclose any competitive advantage that their products enjoy over the competitors, as well as explain how the data is collected, distributed, and used.[66] As the result of the application of this regulation, online platforms and search engines will have to disclose the main parameters used to rank goods and services on their site. The regulation

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61 Goudin P, *The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities*, European Parliamentary Research Service, 2016, pp. 106.

62 European Commission, *Study on the assessment of the regulatory aspects affecting the collaborative economy in the tourism accommodation sector in the 28 Member States*, 580/PP/GRO/IMA/15/15111J, 2018, pp. 154.

63 OECD, *Policies for the tourism sharing economy*, OECD Tourism Trends and Policies. 2016. Chapter 3.

64 Regulation (EU) 2019/1150, *op. cit.*, note 20.

65 *Ibid.*, recital 9.

66 *Ibid.*, Article 1.

is not applicable to business to consumer relationship, which leads to application of the consumer protection rights regarding the users of the digital platforms.

In 2020 the European Commission activities in this area flourished. Namely, besides this regulation on setting new rules on digital space, the Commission proposed two documents as future regulations indicating the way forward for regulating the digital business: the Digital Services Act (DSA)[67] and the Digital Markets Act (DMA).[68] Both Acts resulted from the reaction to the developing digital market and Internet activities. Since the 2000 e-Commerce Directive[69] and the 2006 Service Directive, the legal regime for services and online services did not change, except for the CJEU practice. Consequently, the European Commission committed to update the horizontal rules publishing Communication Shaping Europe's Digital Future[70] in February 2020.

The DSA develops the internal market principle established by the E-Commerce Directive and is complementary to the e-Platform-to-Business Regulation (EU) 2019/1150 (the P2B Regulation), effective from July 2020, and to the Directives that were adopted as part of the New Deal for Consumers, effective by May 2022.

The problem of competition between digital and 'regular' markets and their distinction is recognized when a platform is at the same time a platform and a competitor to other businesses within that platform. In order to classify the importance and adequate reaction to the importance and influence of each digital platform four levels of providers of the information society services are recognized: providers of intermediary services, hosts and online platforms providers, online platforms, and very large online platform providers.

The second proposal, the Digital Markets Act (DMA) addresses digital market imbalances in the EU and introduces a new term: '*gatekeeper*' platforms. These platforms are defined as large online platforms which meet a set of criteria established by the European Commission and aim to secure that certain unfair practices by '*gatekeeper'* platforms shall be prohibited. In order to define the "gatekeeper companies" the European Commission established a set of criteria that have to be met: strong economic and intermediation position and stability over time.

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67 Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services and amending Directive 2000/31/EC, COM/2020/825 final (Digital Services Act).

68 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector COM/2020/842 final, (Digital Markets Act).

69 Directive 2000/31/EC, *op.cit.,* note 5.

70 Communication from the Commission to the European Parliament, the Council, the European Committee and the Committee of the Regions Shaping Europe's digital future COM/2020/67 final.

It is necessary to emphasise that the two documents are not entirely aligned. The notion of '*gatekeeper*' used by DMA does not correspond to the DSA's notion of '*very large online platforms*'. For instance, a platform with more than 45 million monthly active end users established or located in the EU will be considered a very large online platform under the DSA, but it will need to meet all three criteria mentioned above to be designated as the gatekeeper under the DMA.

6. CONCLUSION

The DSA and DMA package is believed to be the driver of the changes of the ways ompanies offer and use digital services in the EU. Primarily, it will refer to large companies primarily, but it will also include the companies with a strong impact on the market.

The DSA goes further than consolidation and harmonisation. It contains many provisions that could help protect the users' fundamental rights, improve the transparency and accountability of internet platforms, and raise the awareness of contractual connections. The proposed transparency obligations should be deemed positive, especially for internet intermediaries, online platforms, and very large online platforms. The text of the proposed documents clearly demonstrates that the reasoning of the CJEU was taken into consideration and implemented into the regulatory act. These documents support the requirements that emphasized the need for regulation over analyses that imposed self-regulation. However, the application of DSA to business users will still leave a gap in relation to non-business users (regular non-professional consumers) who are the major users of these platforms. It is to be expected that the provider-platform-consumer triangle service will have to wait for the new round of regulatory activity. Until then the self-regulation and activity of the CJEU will apply. The DSA and DMA need to be examined conjointly in order to reach the final and the optimal solution for all the existing business models and for those that are yet to come.

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UDK 658.8:17]:614.4
Review article

CORPORATE SOCIAL RESPONSIBILITY IN TIMES OF CRISIS: COVID-19

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ABSTRACT

Corporate social responsibility implies business with concern for ethics, human rights, community needs, and investment in environmental protection. It is especially evident in crisis situations when the expectations of the environment about the application of these principles of the company are higher. The Covid-19 pandemic, as a crisis situation in which companies found themselves, led to changes in business models that had an impact on their stakeholders as well. In this segment, corporate social responsibility can be a useful and effective way to mitigate the potential effects of a pandemic and make it easier to deal with the consequences of a crisis.

The aim of this paper is to provide a theoretical framework for the study of corporate social responsibility in crisis situations with special reference to the situation related to Covid-19. For this purpose, the research methodology includes a review of the literature on corporate social responsibility in this situation by classification into external (community, customer, and environment) and internal (employees) dimensions of the application of corporate social responsibility. The paper highlights the problems and challenges associated with corporate social responsibility in the Covid-19 pandemic and suggests further research opportunities in this area.

Keywords: *corporate social responsibility, Covid-19, crisis, stakeholders, the external and internal dimension of CSR*

1. INTRODUCTION

The European Commission defines corporate social responsibility (CSR) as „a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of maximizing the creation of shared value for their owners/shareholders and civil society at large and identifying, preventing

and mitigating possible adverse impacts."[1] Therefore, the concept of CSR is based on the belief that companies have some responsibilities to the company other than the profit for shareholders[2] ie it is impossible to consider companies separate from the company in which they exist and social responsibility is necessary to all its stakeholders.[3] This is particularly evident in crisis situations[4] such as the current coronavirus pandemic[5] that has affected all aspects of society and life; in economic, financial, health, environmental, and sociological terms. Companies were forced to adapt to the new situation, which meant adopting business strategies and activities to meet the needs of the company and its stakeholders. In this segment, the application of CSR can be a useful and effective way to deal with global problems; in developing corporate resilience and reducing the potential effects of crisis situations,[6] but also how to turn a threat into an opportunity. [7]

The research questions that arise in the paper are to determine the importance of the application of CSR in crisis situations, ie does such a way of doing business help in overcoming crisis situations such as the Covid-19 pandemic? How do stakeholders perceive CSR activities in such situations, and what problems and challenges arise related to CSR at the time of Covid-19?

To answer these questions, the author analyzed the literature on CSR at the time of Covid-19 by classifying it into the external (consumers, community, and envi-

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1 European Commission, *Commission Staff Working document – Corporate Social Responsibility, Responsible Business Conduct, and Business and Human Rights: Overview of Progress*, 2019, [https://ec.europa.eu/docsroom/documents/34482?locale=hr], Accessed 10 March 2021, p. 3.

2 Carroll, A. B.; Shabana, K. M., *Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, International Journal of Management Reviews, Vol. 12, 2010, pp. 85 – 105.

3 Yelkikalan, N.; Köse, C., *The effects of the financial crisis on corporate social responsibility*, International Journal of Business and Social Science, Vol. 3, No. 3, 2012, pp. 292 – 300; Santos Jaen, J. M. *et al.*, *Impact on companies of their socially responsible actions in the face of the pandemic generated by Covid-19*, Razon Historica-Revista Hispanoamericana de Historia de Las Ideas, No. 46, 2020, pp. 1 - 11.

4 García-Sánchez, I-M.; García-Sánchez, A., *Corporate Social Responsibility during COVID-19 Pandemic*, Journal of Open Innovation Technology, Market and Complexity, Vol. 6, No. 4, 2020, pp. 1 – 21; Mao, Y. *et al.*, *Effects of tourism CSR on employee psychological capital in the COVID-19 crisis: from the perspective of conservation of resources theory*, Current Issues in Tourism, Vol. 23, 2020, pp. 1 -19.

5 The coronavirus outbreak, which started in China in December 2019, was spreading rapidly worldwide and was declared a pandemic by the World Health Organization (WHO) in March of 2020.

6 Huang, W.; Chen, S., *Corporate Social Responsibility and Organizational Resilience to COVID-19 Crisis: An Empirical Study of Chinese Firms*, Sustainability, Vol. 12, No. 21, 2020, pp. 1 – 19; Filimonau, V. *et al.*, *The COVID-19 pandemic and organizational commitment of senior hotel managers*, International Journal of Hospitality Management, Vol. 91, 2020, pp. 1 – 13; Higgins-Desbiolles, F.; Monga, M., *Transformative change through events business: a feminist ethic of care analysis of building the purpose economy*, Journal of Sustainable Tourism, Vol. 28, 2020, pp. 1 – 19.

7 Fernández-Feijóo Souto, B., *Crisis and Corporate Social Responsibility: Threat or Opportunity?*, International Journal of Economic Sciences and Applied Research, Vol. 2, No. 1, 2009, pp. 36 – 50.

ronment) and internal (employees) dimensions of CSR application. The paper is structured in such a way that in the first part the theoretical assumptions about the definition and concept of CSR and stakeholders and its application in crisis situations are presented. The research is based on the application of CSR in the Covid-19 situation according to the internal and external dimensions of CSR, and for this purpose, publicly available articles performed in the Web of Science and Scopus database are analyzed. The last chapter deals with the discussion and conclusion in which the author summarizes the ways companies respond to a crisis situation such as a coronavirus pandemic, but also the perception of its stakeholders to such activities and suggests further research opportunities in this area and limitations. Therefore, in addition to the systematization of recent literature, the scientific contribution of the work is in the recommendations for future research regarding the application of the concept of CSR in crisis situations.

2. THEORETICAL BACKGROUND

2.1. CSR and stakeholder classification

„Socially responsible business of the company implies attention with which we treat in an ethical and socially responsible way the stakeholders who are outside, but also within the organization."[8] Stakeholders are all those who have an impact, but also those who are affected by the business of a particular company.[9] „The Stakeholder theory suggests that as a social organization, a company should consider the effect of its every action and its CSR involvement must benefit the people, community, and society on a large scale."[10]

Margolis and Walsh[11] distinguish between the internal and external application of CSR, ie external stakeholders (local community, environment, and consumers) are beneficiaries of external CSR activities, and employees are beneficiaries of internal CSR activities. The specific CSR activities involved in this division relate to:

> „CSR targeting the community can include support for humanitarian causes, charitable giving, community development investments, and collaboration with non-governmental organizations (Farooq, Payaud, et al., 2014). CSR supporting the environment can include environmentally conscious investments, pollution prevention, ecological initiatives

8 Hopkins, M., *What is Corporate Social Responsibility all about*, Journal of Public Affairs, Vol. 6, No. 3-4, 2006, p. 299.

9 Freeman, R. E., *Strategic Management: A Stakeholder Approach*, Pitman, Boston, 1984.

10 Costa, R.; Menichini, T., *A multidimensional approach for CSR assessment: The importance of the stakeholder perception*. Expert Systems with Applications, Vol. 40, No.1, 2013, p. 155.

11 Margolis, J. D.; Walsh, J. P., *Misery loves companies: Rethinking social initiatives by business*, Administrative Science Quarterly, Vol. 48, No. 2, 2003, pp. 268 – 305.

> focused on the natural environment, and practices focusing on sustainable growth for future generations. CSR targeting consumers relates to the responsibilities of a business toward those who receive its services or consume its products. CSR practices within this domain include product safety initiatives and customer care programs. Internal CSR refers to practices focused on stewardship toward the internal workforce (i.e., employees). This has included activities such as employee training, continuing education programs, safe working environments, diversity policies, daycare programs, and ethical labor practices".[12]

Employees, consumers, and the community are considered vital stakeholders for the company because they are important for the business growth and long-term survival of the company and are also a central feature of all CSR Reports.[13] Due to all these features, CSR activities in crisis situations are most often carried out according to this group of stakeholders, as evidenced by research in the circumstances of the Covid-19 pandemic, which was discussed in this paper. CSR activities towards the environment have become extremely relevant in recent years, and are often associated with the concept of sustainability and sustainable development, ie development that efficiently uses resources in a way that meets the needs of today, while not compromising the needs of future generations.[14] Business sustainability must take into account the needs of the company as well as its stakeholders but at the same time, it must protect, sustain, and enhance the environmental, social, and economic resources that are crucial for the future. Sustainable business creates added value for the company, which reflects on the value of the company through its economic viability and financial utility.[15] Other, external stakeholders of the company are suppliers, shareholders, the state, managers, NGOs, government, ecosystems, and business partners.[16]

Following the above, it is necessary to emphasize the importance of both the internal and external environment in which the company is located and use CSR activities that will have an impact on both dimensions and so „ensure the long term continuity of the company, by balancing profitability and stakeholders'

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12 Farooq, O. *et al.*, *The Multiple Pathways through which Internal and External Corporate Social Responsibility Influence Organizational Identification and Multifoci Outcomes: The Moderating Role of Cultural and Social Orientations*, The Academy of Management Journal, Vol. 60, No. 3, 2017, p. 957.

13 Mahmud, A. *et al.*, *Corporate Social Responsibility: Business Responses to Coronavirus (COVID-19) Pandemic*, SAGE Open, Vol. 11, No. 1, 2021, pp. 1 – 17; Gürlek, M; Kılıç, İ., *A true friend becomes apparent on a rainy day: corporate social responsibility practices of top hotels during the COVID-19 pandemic*, Current Issues in Tourism, Vol. 24, No. 7, 2021, pp. 905 – 918.

14 Kolk, A., *The social responsibility of international business: From ethics and the environment to CSR and sustainable development*, Journal of World Business, Vol. 51, No. 1, 2016, pp. 23 – 34.

15 Pojasek, R. B., *A framework for business sustainability*, Environmental Quality Management, Vol. 17, No. 2, 2007, pp. 81 - 88.

16 Mahmud *et al.*, *op. cit.*, note 13.

harmony."[17] In addition, there is a spillover effect between the internal and external dimensions of CSR implementation through „a) moral and social values such as social cohesion, social responsibility, unity, solidarity, equity of access to resources; and b) economic values like: novel response and readiness strategies, renovation of policies and standards, the capacity of change."[18] The authors consider this spillover effect important in overcoming the crisis and improving functioning in the future, both for organizations and the community.

2.2. The importance of CSR in times of crisis

A crisis can be described in the general sense as a sequence of events (most probably unexpected) caused by internal or external factors, rapidly developing, undesired these can be threatening to the business and its environment.[19] Crisis situations present a challenge for companies and „the recent extraordinary COVID-19 pandemic is not just the largest healthcare challenge of this century but it disrupts jobs (mass unemployment or reduced working hours on the labor market), the economy (some sectors are highly affected, e.g., tourism)…"[20] In these circumstances, the concept of CSR comes to the fore, because then the social expectations of the company increase.[21]

Research shows that CSR in times of crisis has "an insurance-like function that mitigates the negative impact."[22] Companies that have used CSR even before crises will experience fewer losses, be more resilient, and take a shorter time to recover from attacks, unlike those companies that did not have or had weak CSR activities.[23] Likewise, consumer sensitivity is greatest in times of crisis, and their perception of a company that carried out CSR activities during the crisis will positively affect their product consumption, punishing those who do not react in this way.[24] However, if a company has overused corporate sponsorship based

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17 García-Sánchez; García-Sánchez, *op.cit.*, note 4, p. 18.

18 Ebrahim, A. H.; Buheji, M., *A Pursuit for a 'Holistic Social Responsibility Strategic Framework' Addressing COVID-19 Pandemic Needs*, American Journal of Economics, Vol. 10, No. 5, 2020, p. 301.

19 Yelkikalan; Köse, *op. cit.*, note 3.

20 Kolnhofer Derecskei, A.; Nagy, V., *Employee Volunteerism—Conceptual Study and the Current Situation*, Sustainability, Vol. 12, No. 20, 2020, p. 23.

21 García-Sánchez.; García-Sánchez, *op.cit.*, note 4.

22 Qiu, S. (C.) *et al.*, *Can corporate social responsibility protect firm value during the COVID-19 pandemic?*, International Journal of Hospitality Management, Vol. 93, 2021, p. 4.

23 Huang; Chen, *op. cit.,* note 6; Valls Martínez, M. d. C.; Martin Cervantes, P. A., *Testing the Resilience of CSR Stocks during the COVID-19 Crisis: A Transcontinental Analysis*, Mathematics, Vol. 9, 2021, pp. 1- 24.

24 Palma-Ruiz, J.M. *et al. Socially Responsible Investing as a Competitive Strategy for Trading Companies in Times of Upheaval Amid COVID-19: Evidence from Spain*, International Journal of Financial Studies,

on CSR for marketing purposes, the initial positive customer perception of that company changes.[25] Therefore, if used properly, CSR projects have a positive impact on consumer behavior.[26] Though significantly reduces the number and scope of CSR projects of large corporations in times of crisis [27] which could also be related to the costs of implementing the CSR activities.[28] Still, it needs to be looked at in the long run, because investing in CSR during a crisis has brought various benefits to the company such as increased reputation, profits, increased employee satisfaction, and opportunities to redefine trust between companies and society.[29] Accordingly, CSR in crisis situations is extremely important in the successful response of organizations to such a situation, enabling its sustainability and better connection with stakeholders who know how to recognize and appreciate the efforts of these organizations.

3. METHODOLOGY

For the analysis of socially responsible business in the Covid-19 pandemic by classification Margolis and Walsh[30] into external (community, customer, and environment) and internal (employees) dimensions of the application of corporate social responsibility and to find the potential for future research, a literature review by analyzing the extant literature was used. Systematic reviews help the research community understand better what has been empirically studied so far and what are the challenges for future research, based on the examined volume of previously published literature.[31] The guidelines were used for a review of the literature with modifications adapted to the purpose of this research:

1. Define the research question(s) to be addressed;

Vol. 41, No. 8, 2020, pp. 1-13; Eltoum, A. M. *et al.*, *Corporate social responsibility practices of business firms in Dubai during the COVID-19 pandemic*, Problems and Perspectives in Management, Vol. 19, No. 1, 2021, pp. 231- 243.

25 Fernández-Feijóo Souto, *op. cit.*, note 7.

26 Mohr L. A., *et. al.*, *Do Consumers Expect Companies to be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior*, The Journal of Consumer Affairs, Vol. 35, No. 1, 2001, pp. 45 – 72.

27 Zengin Karaibrahimo, Y. *Corporate social responsibility in times of financial crisis*, African Journal of Business Management, Vol. 4, No. 4, 2010, pp. 382 – 389.

28 Fernández-Feijóo Souto, *op.cit.*, note 7; Qiu, S. (C.) et al., *Can corporate social responsibility protect firm value during the COVID-19 pandemic?*, International Journal of Hospitality Management, Vol. 93, 2021, pp. 1 – 12.

29 Santos Jaen *et al.*, *op. cit.*, note 3; Fernández-Feijóo Souto, *op.cit.*, note 7; Qiu *et al., op.cit.*, note 28.

30 Margolis; Walsh, *op. cit.*, note 11.

31 Ginsberg, A.; Venkatraman, N., *Contingency perspectives of organizational strategy: a critical review of the empirical research*, Academy of Management Review, Vol. 10, No. 3, 1985, pp. 421 – 434.

2. Search for (i) a set of bibliographic databases, and/or (ii) in a well-defined and justified journal sample using one or more predefined keywords;
3. Include the keywords in the search fields (title);
4. Analyze each article to identify the theoretical framework, a methodological approach, and interesting potential lines of research.[32]

The author chose the Web of Science and Scopus as bibliographic databases to search for relevant academic articles.

The literature search was based on the following criteria:

- Timespan: 2020 (1 March) to 2021 (until 1 March),
- All Citation Indexes,
- Document Types: Article,
- Key words: „CSR, Covid, employee"; „corporate responsibillity, Covid, employee"; „CSR, Covid, community"; „corporate responsibillity, Covid, community"; „CSR, Covid, consumer"; „corporate responsibillity, Covid, consumer"; „CSR, Covid, customer"; „corporate responsibillity, Covid, customer"; „CSR, Covid, environment"; „corporate responsibillity, Covid, environment".
- Open access.

Table 1 shows the research results from the Web of Science (WoS) and Scopus database according to the given criteria.

Table 1 Distribution of CSR stakeholder

	Web of Science	**Scopus**	**Total**
Employee	14	10	24
Community	8	9	17
Customer	13	8	21
Environment	8	6	14
Total	43	33	76

Source: Research results

As can be seen from the table, a total of 76 papers are from the WoS and Scopus databases that analyze the internal (24) and external (52) dimensions of CSR application. Not surprisingly, overlapping articles appeared in both Scopus and the Web of Science, so we had to merge both lists and remove duplicates (7 „em-

[32] Vázquez-Carrasco, R.; López-Pérez, M. E., *Small & medium-sized enterprises and Corporate Social Responsibility: a systematic review of the literature*, Quality & Quantity, Vol. 47, No. 6, 2013, pp. 3205 – 3218.

ployee“, 5 „community“, 6 „customer“, 5 „environment“). The final list included 53 articles.

4. INTERNAL AND EXTERNAL DIMENSION OF THE APPLICATION OF CSR

Based on the results of the papers, the author identified overlaps in the articles, ie the same articles are in the results of different dimensions because several dimensions were also analyzed in the articles (24). Also, 1 paper could not be downloaded despite the open access criterion, 2 papers are not included in the topic (one research was conducted before the Covid situation and is not relevant to this topic and the second is not appropriate with topics) and are excluded from further analysis. The author removed the stated which is ultimately 26 papers for processing the internal and external dimensions of CSR application. According to the content and results of the papers, the author established the categories within the observed dimensions and processed them by the set. Interestingly, in almost a third of the papers (8), the research was conducted in tourism and hospitality firms.

4.1. Internal dimension - Employee

Based on the analysis of each article, the author divided the activities and the role of corporate social responsibility in the Covid-19 situation from the aspect of employees into two categories:

a) employee health and safety at work

b) job stability and work performance

a) Pandemic coronavirus highlighted the care of the health and safety of employees as the most important CSR activities towards this group of stakeholders. Mahmud *et al.*[33] quote specific measures taken by companies to protect employees (on a sample of the top 25 companies in the USA), and these are nine mechanisms such as work at home / remotely (60%), cleaning conventions and hygiene protocols (56%), health elevated quarantine (24%), and social distancing and travel restriction practices (36%), as well as offer, paid leave and sick leave with health benefits (48%), premium/bonus (16%), employee volunteering benefits (36%) and employee assistance programs (20%). In the home office segment, Parker[34] considers that such a management strategy reflects the choice of priorities between health

[33] Mahmud *et al.*, *op. cit.*, note 13.

[34] Parker, L. D., *The Covid-19 office in transition: cost, efficiency, and the social responsibility business case*, Accounting, Auditing and Accountability Journal, Vol. 33, No. 8, 2020, pp. 1943 – 1967.

and safety at work over the company's financial returns, while Jakulevičienė and Gailiūtė-Janušonė [35] argue that those companies that have previously provided opportunities for a better work-life balance by allowing their employees the opportunity to work remotely could adapt much more easily and quickly to the changing working conditions created by the COVID-19 pandemic and the resulting quarantine. Gürlek and Kılıç[36] on a sample of 100 world hotels identified five categories of CSR for employees, namely: health and safety, employee assistance program, career planning, salary, and rewards, the most important of which is health and safety, which includes training of its employees on how to protect themselves. COVID-19 and the supply of protective equipment for employees and guests as well as intensive cleaning of surfaces (door handles, elevator, etc.), to make both employees and guests feel safe. Gökmen Kavak *et al.*[37] in theirs paper emphasizes the importance of applying standards of risk management, health and safety of employees where such a course of action is the only correct and effective because by taking measures, the spread of disease can be minimized.

b) The coronavirus pandemic has created increased insecurity among employees, especially in tourism, which is the most affected branch in the pandemic, and most of the analyzed research was conducted in this industry.[38] Filimonau *et al.*[39] based on a sample of 244 senior managers in hotels in Spain, they found that hotel investment in CSR proved useful not only from the point of view of improved organizational resilience but also from the perspective of improved (perceived) job security and organizational commitment of senior management. Based on the results of a survey of 430 employees in tourism in China, Mao *et al.*[40] have proven that CSR has had a positive impact on increasing the psychological capital of employees which includes: self-efficacy, hope, resilience, and optimism of employees through their satisfaction with corporate COVID-19 responses. In a sample consisting of 374 Vietnamese full-time employees in hotels, Vo-Than *et*

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35 Jakulevičienė, L.; Gailiūtė-Janušonė, D., *The scope of legal expectations from business in human rights: carrot or stick*?, Entrepreneurship and Sustainability Issues, Vol. 8, No. 2, 2020, pp. 932 - 946.

36 Gürlek; Kılıç, *op. cit.*, note 13.

37 Gökmen Kavak, D. *et al.*, *The importance of quality and accreditation in health care services in the process of struggle against Covid-19,* Turkish Journal of Medical Sciences, Vol. 50, No. 8, 2020, pp. 1760 – 1770.

38 Gürlek; Kılıç, *op. cit.*, note 13.; Vo-Thanh, T *et al., How does hotel employees' satisfaction with the organization's COVID-19 responses affect job insecurity and job performance?,* Journal of Sustainable Tourism, Vol. 29, No. 6, 2020, pp. 907 – 925; Filimonau *et al., op.cit.,* note 6; Mao *et al., op. cit.,* note 4; Zhang, J.; Xie, C, *The effect of corporate social responsibility on hotel employee safety behavior during COVID-19: The moderation of belief restoration and negative emotions*, Journal of Hospitality and Tourism Management, Vol. 46, 2020, pp. 233- 243.

39 Filimonau, *et al., op. cit.*, note 6.

40 Mao *et al., op. cit.*, note 4,

al.[41] concluded that employee satisfaction with COVID-19's responses positively affected their work performance and moderately positive links between perceived health risk associated with Covid and job security. Zhang and Xie[42] are investigating the effect of CSR on employee safety behavior to 1594 respondents in 23 hotels in China where they conclusion that CSR practices of hotels are predicted employee positive work behavior, such as job engagement. Also, results indicated that employee perceptions of hotel CSR initiatives encouraged them to implement role safety behavior, such as complying with safety systems, as well as extra-role safety and citizenship behavior. Rivo-López *et al*[43] investigate the activities of CSR family businesses in the Covid-19 pandemic and shows how such businesses have been supporting their employees by avoiding layoffs as well as paying full pay which means they are company has decided to think more about the long-term and its employees than its financial results. Jakulevičienė and Gailiūtė-Janušonė[44] and Santos Jaen *et al*[45] through their work, find that commitment to work grows as companies address the needs of employees, and even though their involvement in employee volunteering programs as part of CSR companies. Kolnhofer Derecskei; Nagy[46] provide a preliminary study on how employee volunteering could work in the circumstances of the Covid-19 pandemic and states that such a situation could encourage employees to engage more in society (given that some will have more free time) while on the other hand, the effects of the pandemic may affect the reduced scope of employee volunteering (due to the increased risk of illness, lack of time because, for example, they have small children, etc.).

4.2. External dimension - Community

Based on the analysis of each article, the author divided the activities and role of corporate social responsibility in the Covid-19 situation from a community perspective into two categories:

a) helping the community cope with the crisis caused by the Covid-19 pandemic

b) the financial benefit of community CSR activities during a pandemic

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41 Vo-Thanh *et al., op. cit.,* note 38.

42 Zhang; Xie, *op. cit.,* note 38.

43 Rivo-López, E. *et al*., *Corporate Social Responsibility and Family Business in the Time of COVID-19: Changing Strategy*?, Sustainability, Vol. 13, No. 4, 2021, pp. 1 – 13.

44 Jakulevičienė; Gailiūtė-Janušonė, *op. cit*., note 35.

45 Santos Jaen *et al*., op. cit., note 3.

46 Kolnhofer Derecskei, A.; Nagy, V., *Employee Volunteerism—Conceptual Study and the Current Situation*, Sustainability, Vol. 12, No. 20, 2020, pp. 1 – 35.

a) Gürlek; Kılıç[47] divided CSR for community-oriented activities into three categories, namely CSR for health workers, the well-being of the local population, and health organizations. In particular, the hotels offered free accommodation for health professionals, donated protective equipment to the local population, and offered their facilities for health professionals. Mahmud *et al.*[48] also cite concrete actions taken by the top 25 companies in the US where 80% of the company's samples reported their relief efforts were pointing to their global community to effectively manage the challenges associated with the COVID-19 pandemic. Grants include direct efforts to provide cash and in-kind assistance, as well as fundraising and donations to nonprofits. About 68% of the sampled companies are directly involved in aid activities with cash donations and 80% of companies with natural support. Nearly 40% of the companies in the sample use the funds of their foundations to support society during this pandemic. About 36% of the company's samples have contributed to international, national and regional non-profit organizations, such as the International Red Cross, WHO, etc. to support vulnerable people around the world and national communities. Also, some sampled companies have launched various programs to keep the world a better place for children, their parents and the community. Higgins-Desbiolles and Monga[49] analyse of a case study of social entrepreneurship in Australia shows that it is imperative for businesses during, but also after the Covid-19 pandemic, to help build community, build care relationships and contribute to a more sustainable and fair future. Saiz-Álvarez *et al.*[50] analyse B Corps companies who are based on the conviction that it is possible to combine the concepts of social development and economic growth and given its purpose of existence, such companies go beyond the notion of CSR. These socioeconomic-related firms which base their purpose on helping the community, for this authors, can be one of the main pillars of the COVID-19 post-crisis. Eltoum *et al.*[51] examined the level of expectations and assessment of the business of companies in Dubai when performing CSR during the crisis with a survey questionnaire on the citizens of Dubai (145 respondents). The largest number of respondents (44%) believe that Dubai companies should prioritize the community in the Covid-19 crisis and then focus on their employees. In contrast to the results of the survey, the in-depth interview method determined that it was the pandemic time is the time for employees, then the community and no other

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47 Gürlek; Kılıç, *op. cit.*, note 13.

48 Mahmud *et al.*, *op. cit.*, note 13.

49 Higgins-Desbiolles, F.; Monga, M., *Transformative change through events business: a feminist ethic of care analysis of building the purpose economy*, Journal of Sustainable Tourism, Vol. 28, 2020, pp. 1 – 19.

50 Saiz-Álvarez, J. M. *et al., B Corps: A Socioeconomic Approach for the COVID-19 Post-crisis*, Frontiers in Psychology, Vol. 11, 2020, pp. 1 – 8.

51 Eltoum *et al.*, *op. cit.,* note 24.

rights are important at this time, neither investors nor shareholders, because these can wait. Job stability, health and safety for these employees should be a priority for the firm. Talbot and Ordonez-Ponce[52] in the article showed how Canada's banks are supporting their clients and communities, during the current health crisis. Authors have conducted a content analysis of Canada's ten largest banks' web pages and results showed that only three of the banks analyzed to have a proactive and strong commitment to their clients and communities. For example, banks are helping the community through many CSR activities: psychological support for caregivers, and donations to non-profit organizations, donated masks and surgical masks, etc. Rivo-López *et al*.[53] explore how business families can contribute during emergencies through philanthropy or company CSR activities. The results show that philanthropic activities for (local) community no longer focus solely on traditional economic or material donations but also include knowledge and organizational capacity, which many companies have made available to various governments to help manage and end the pandemic. For example, it includes providing logistical support to the government to purchase and supply essential sanitary equipment and restructuring production plants, and directing lines to the healthcare field by manufacturing protective equipment, ventilators, and disinfectant gel. Also, the authors emphasize the important role of institutions and the state in encouraging CSR in times of crisis through various (tax) measures.

b) Jakulevičienė and Gailiūtė-Janušonė[54] in their research confirm that involvement and engagement with the community is not only a matter of risk mitigation but can also be financially beneficial. Qiu *et al*.[55] agree, revealing in their study that participating in CSR activities can increase stock returns and the attention of hospitality stakeholders during a pandemic, stressing that community CSR has a stronger and more immediate impact on stock returns than CSR for customers and employees. The aim of Parker's paper[56] is to assess how office efficiency and cost control programs concerning government and community health and safety expectations in the Covid-19 situation intersect with corporate social responsibility. Research shows that Covid-19 caused a shift in teleworking and organizations continued (given that the pandemic is still ongoing) „with office cost reduction strategies under the guise of innovative office design."[57]

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52 Talbot, D.; Ordonez-Ponce, E., *Canadian banks' responses to COVID-19: a strategic positioning analysis*, Journal of Sustainable Finance & Investment, Vol. 10, 2020, pp. 1 – 8.

53 Rivo-López *et al*., *op. cit*., note 43.

54 Jakulevičienė; Gailiūtė-Janušonė, *op. cit*., note 35.

55 Qiu*et al*., *op. cit*., note 28.

56 Parker, *op. cit*., note 34.

57 *Ibid*, p. 1943.

4.3. External dimension - Customer

Based on the analysis of each article, the author divided the activities and the role of corporate social responsibility in the Covid-19 situation from the customer's perspective into two categories:

a) CSR towards customer

b) consumer perception of CSR activities of the company

a) Mahmud *et al*.[58] note that about 92% of the companies in the analyzed sample continued to work to provide their products to customers such as the supply of food, medicines, protective supplies, medical equipment, information, and other services. As for tourism, in a survey of 100 world hotels,[59] CSR activities include: health and safety of guests, additional disinfection of contact services (door handle, elevator, etc.), provision of free disinfectants, flexible booking rules and prices - waiver of the right to charge for changes and cancellation of purchased tickets. Winet and Winet[60] analyse another dimension of consumer concern, and that is that the pandemic has spurred an unprecedented e-mail inbox from companies that claim we are „all in it together" creating, according to the authors, a false sense of empathy. Consumer relationship with the brand at a time when online shopping is at its peak and such e-mail brings the company's product to the forefront. Smith and Casper[61] investigated CSR in major U.S. sports organizations at the time of the Covid-19 pandemic. The results of the research indicate their positive impact on society, ie fans where crisis communication took place through three topics: educate, (educate fans about proper social distancing in stadiums, arenas, and other social gatherings for their safety and health), assist (leagues will have to shift programs and support to long-term issues such as the economic impact of COVID-19) and inspire (shifting from shelter-in-place focused communication to long-term positivity needed by fans). Talbot and Ordonez-Ponce[62] show how Canada's banks are supporting their personal and business clients during the current health crisis. Most banks are not proactive about meeting the pandemic market's unique challenges. Three from ten analyzes banks have the same CSR activities. For example, for business clients, the banks from this cluster also stand out for offering increased operating credit lines and reduced interest rates for

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58 Mahmud *et al*., *op. cit*., note 13.

59 Gürlek; Kılıç, *op. cit*., note 13.

60 Winet, K; Winet, R. L., *We're Here for You: The Unsolicited Covid-19 Email*, Journal of Business and Technical Communication, Vol. 35, No. 1, 2021, pp. 134 – 139.

61 Smith, D. K.; Casper, J., *Making an Impact: An Initial Review of U.S. Sport League Corporate Social Responsibility Responses During COVID-19*, International Journal of Sport Communication, Vol. 13, No. 3, 2020, pp. 335 – 343.

62 Talbot; Ordonez-Ponce, *op. cit.*, note 53.

credit. They have also adopted some very innovative initiatives, such as suspended student loan payments for six months without interest, and some banks offer a psychological and legal assistance line for their clients.

b) Yang *et al*.[63] surveyed 473 respondents on how the dimensions of retailer service quality in the Covid-19 situation affect legitimacy, leading to a certain intention and behavior of consumers. The results establish that hygienic practice, reliability, safety, and empathy are determinants of pragmatic and social legitimacy, which encourages the consumer's intention to visit the retailer again. Liu *et al*.[64] based on an empirical analysis of 946 SMEs, they find that CSR SMEs can enhance consumer brand attitudes and that consumers positively perceive corporate self-sacrifice during the Covid-19 pandemic, resulting in a spillover that improves consumer attitudes about that business. Chua *et al*.[65] explore the perception of future behavior of American tourists towards European and Asian destinations under the influence of international travel risk and insecurity caused by the COVID-19 pandemic. The results of research on a sample of 367 respondents show that in the case of a pandemic Covid-19; CSR and observed efforts were crucial to generate attachment to destination and approach intentional behaviors, as well as that health preventative behavior and destination attachment, were important direct predictors of approach to intentional behavior. Also, it was found that monetary promotions were not sufficient to create destination attachment and bring the intentions of conduct closer to the international destination. Smith and Casper[66] researched CSR in major U.S. sports organizations at the time of the Covid-19 pandemic and investigated fan reaction to CSR programs implemented by those organizations. The analysis shows different effects in how fans feel in response to league CSR social media communications. It is positive in gratitude toward continued support ligues of fighting the pandemic and other causes and negative that they felt the ligues was not doing enough. Huang and Liu[67] provide empirical evidence to underscore the importance of CSR marketing in the time of COVID-19

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63 Yang, K. *et al., Effects of retailers' service quality and legitimacy on behavioral intention: the role of emotions during COVID-19*, The Service Industries Journal, Vol. 41, No. 1-2, 2021. pp. 84 – 106.

64 Liu, F. *et al., The influence of the corporate social responsibility disclosures on consumer brand attitudes under the impact of COVID-19*, Frontiers of Business Research in China, Vol. 14, No. 28, 2020, pp. 1 – 22.

65 Chua, B.-L. *et al., Tourists' outbound travel behavior in the aftermath of the COVID-19: role of corporate social responsibility*, *response effort, and health prevention*, Journal of Sustainable Tourism, Vol. 28, 2020, pp. 1 – 28.

66 Smith; Casper, *op. cit.*, note 62.

67 Huang, H.; Liu, S. Q.*, Donate to help combat COVID-19!" How typeface affects the effectiveness of CSR marketing?* International Journal of Contemporary Hospitality Management, Vol. 32, No. 10, 2020, pp. 3315 – 3333.

for hospitality organizations striving to capture customer loyalty. The article demonstrates that a well-made donation appeal can effectively encourage consumers' participation in COVID-19 fundraising campaigns and boost their brand loyalty. Results suggest that donation appeals featuring warmth-focused messages combined with hand-written type and competence-focused messages combined with machine-written typeface lead to higher donation intention and brand loyalty.

4.4. External dimension - Environment

Based on the analysis of each article, the author divided the activities and role of corporate social responsibility in the Covid-19 situation from the aspect of the environment into two categories:

a) CSR towards the environment

b) individual social responsibility

a) The environmental responsibility of companies as part of the CSR where the Covid-19 situation further highlighted the need for interdependence between social, environmental, and economic well-being by emphasizing the importance of socially and environmentally responsible business sector behavior.[68] Ikram *et al.*[69] state that the COVID-19 pandemic is a new challenge for the sustainability of enterprises, which is now marginalized mainly due to supply chains and their manufacturers, but is also an opportunity for organizations to review their sustainable business practices in changing their production strategy, supply chain and sustainability. Businesses and organizations are also responsible for the environment (sustainability) and for the community in which they operate, and this should be embedded in their corporate values, which represent general beliefs about what is or is not appropriate behavior.[70] Related to this, Yang *et al.*[71] view organizations as part of a complex ecological system consisting of socio-cultural norms that must be respected for sustainable development. The coronavirus pandemic requires the strengthening of the partnership between government, the economy, and civil society and their socially responsible behavior, the introduction and respect of new forms of interaction between business and society on the principles of systematicity and long-term.[72]

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68 Huang; Chen, *op. cit.,* note 6.

69 Ikram, M. *et. al., The Social Dimensions of Corporate Sustainability: An Integrative Framework Including COVID-19 Insights*, Sustainability, Vol. 12, No. 20, 2020, pp. 1 – 29.

70 Kolnhofer Derecskei; Nagy, *op. cit.*, note 46.

71 Yang *et al., op. cit.,* note 64, p. 86.

72 Galetska, T. *et al.*, Social Responsibility of Economic Enterprises as a Social Good: Practice of the EU and Ukraine, Baltic Journal of Economic Studies, Vol. 6, No. 3, 2020, pp. 24 - 35

b) Given the effects of the pandemic itself related to the system of production and consumption, Nova-Reyes *et al.*[73] analyse whether consumers exhibit socially responsible behavior during the Covid-19 pandemic. The authors find that consumers exhibit irresponsible behaviors (such as excessive demand for medical (e.g., masks and gloves) and other necessary products (toilet paper and disinfectants) that are temporary. According to the authors, a structural change to a more rational and sustainable consumption model is needed. Related to this, Vanapalli *et al.*[74] point out that the pandemic has affected our behavior patterns such as the demand for personal protective equipment, as well as the increased demand for plastic-packed food and groceries and the use of disposable utensils, which increases waste and the need to manage it. The authors conclude the need to switch to environmentally friendly materials with the application of individual responsibility, corporate action, and government policy to prevent the transition from one disaster to another. In paper, Terres *et al.*[75] emphasize the importance of applying prosocial behavior and consumption that reduces the negative effects of negative emotions caused by social alienation and promotes well-being during the COVID-19 crisis. Such behavior, according to the authors, would be beneficial not only to consumers, whose hopes and well-being would increase as a result, but also to companies in terms of increased sales and improved brand engagement, but also general awareness of sustainability needs. He and Harris[76] emphasize the ethical dimension of consumer decision that became prominent during the pandemic, and which is likely to redirect consumers to prosocial consumption.

5. DISCUSSION AND CONCLUSION

This paper aimed to theoretically address the application of CSR during the Covid-19 pandemic, concerning the internal (employees) and external (community, consumers, and environment) dimensions of CSR application. The research describes the important role of CSR during the crisis and examines the impact of the pandemic on the CSR practice of companies, as well as the perception of stakeholders about these activities. By reviewing the analyzed literature according to the internal and external dimensions of CSR application, the author determined

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73 Nova-Reyes, A. *et al., The Tipping Point in the Status of Socially Responsible Consumer Behavior Research? A Bibliometric Analysis*, Sustainability, Vol. 12, No. 8, 2020, pp. 1 – 23.

74 Vanapalli, K., R. *et.al.*, *Challenges and strategies for effective plastic waste management during and post COVID-19 pandemic*, Science of The Total Environment, Vol. 750, 2021, pp. 1 - 10

75 Terres, M. da S. *et al., The COVID-19 Pandemic: paths for future research in marketing involving the regulatory role of prosocial consumption*, Brazilian Journal of Marketing, Vol. 19, No. 3, 2020, pp. 611 – 641.

76 He, H.; Harris, L., *The impact of Covid-19 pandemic on corporate social responsibility and marketing philosophy*, Journal of Business Research, Vol. 116, 2020, pp. 176 – 182.

the categories within the observed dimensions. From the aspect of employees, two categories have been identified: employee health and safety, and job stability, and work performance. Within CSR, the health and safety of employees were strongly emphasized in the 1970s, while in recent decades research has focused more on employee morale and productivity, probably for the financial benefit of organizations.[77] The time of the Covid-19 pandemic re-emphasized the concern for the health and safety of employees, and the analyzed companies took the necessary measures to ensure this in their workplaces. Likewise, the pandemic has created increased insecurity among employees in terms of their employment (especially in tourism). It is noticed that the use of CSR activities of the company in which they work, affects the positive perception of employees about job security, which consequently has a positive effect on their work performance, but also on increasing their psychological capital. Companies that take care of their employees have tremendous benefits, even in crisis situations because human capital is the predictor that had the greatest impact on an organization's resilience at the time of Covid-19, followed by economic capital.[78] The challenges faced by companies in the Covid-19 situation are to comply with all regulations imposed by governments, experts, but also society. In addition to (costs) of supplying safety equipment (masks, disinfectants…) for their stakeholders, companies implement measures for the health and safety of employees, most often provided the equipment needed to work from home. This way of working has opened up some new issues that need to be regulated at higher levels (for example, the cost of working from home, and on the other hand, the costs of the company have been reduced). From a community perspective, two categories have been identified: helping the community cope with the crisis caused by the Covid-19 pandemic, and the financial benefit of CSR activities in the community during the pandemic. The results of the research show that the care for the community included mostly the care for those who were most exposed to the impact of the pandemic or the virus, namely health professionals. Through donations of necessary equipment and the provision of their premises and financial contributions, companies have helped the community cope with the effects of the pandemic. Besides, some companies provided their logistical support to the state, knowledge, and capacity to work together to combat the pandemic. Although these activities require new costs for the company, research shows that there is a long-term financial return because the community appreciates the efforts of the company. From the consumer aspect, two categories have been identified: CSR towards consumers, and consumer perception of CSR companies. As with employees, companies have taken great care of the health and

[77] Parker, *op. cit.*, note 34.

[78] Filimonau *et al.*, op. cit., note 6.

safety of their customers, but have also provided some flexibility in their business for the benefit of consumers (especially in tourism - for example, waiving the right to charge changes and cancel tickets; but also in the banking sector - deferred payments due to financial difficulties their clients). It is these activities that affect the positive perception of consumers, which improves consumer attitudes about the company and encourages its loyalty, which helps companies increase their market, reputation, and image. From the aspect of the environment, two categories have been identified: CSR towards the environment and individual social responsibility. Due to the detrimental impact that COVID-19 has had globally, significant changes in consumer behavior have occurred. Their individual social responsibility in the segment of product consumption is questionable, and the importance of the application of prosocial behavior and consumption is emphasized. On the other hand, the changes brought about by the pandemic affect the environment and sustainable development, and the synergy of individuals, companies and the state in the more efficient management of the area is needed.

Accordingly, CSR in crisis situations should be tailored to the needs of both external and internal stakeholders,[79] (although it is not possible to make all stakeholders happy),[80] but also not to forget the needs of the company. The paper finds that CSR has an important role in dealing with and overcoming the crisis, enables the development of resilience and more successful response to the situation, contributes to better connections with stakeholders who return positively perceive the efforts and investments of the company. Investing in CSR, although a cost in the short term, brings exceptional benefits to both the company and its stakeholders in the long run. It is therefore useful for companies to apply CSR not only in crisis situations but also regular basis as it will be easier to deal with a crisis when it occurs. Crisis situations, among other things, offer an opportunity for companies to be actively involved in some of the CSR activities and thus gain a new dimension of their business and development.

In addition to a systematic review of the literature, the paper presents the problems and challenges associated with CSR in the Covid-19 situation about the internal and external dimensions of its application, which provides an opportunity for future research. Despite the contribution of this study to the literature, several limitations are worth mentioning. Since the Covid-19 pandemic officially began in March 2020, and this study covered one year from the start of the pandemic, which included a specific sample from the Web of Science and Scopus databases, it is necessary to conduct tests after a certain time lag because is certainly increased

[79] Fernández-Feijóo Souto, *op. cit.*, note 7.

[80] Gürlek; Kılıç, *op. cit.*, note 13.

the number of published papers that could be analyzed and thus get a deeper analysis and conclusions in this area. Also, the research was based on three stakeholders, in future studies, it is possible to focus on only one of the stakeholders or include those who were not included in this research as well as to conduct an analysis of papers from other databases with multiple keywords included, i.e. all the synonyms. These limitations imply recommendations for future research of this type.

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UDK 339.1:004]:614.4
Review article

E-COMMERCE IN TRADE COMPANIES DURING THE CONDITIONS OF A PANDEMIC CRISIS – CASE STUDIES

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ABSTRACT

E-commerce in trade companies during the course of the pandemic crisis has become more than a technology; it includes a whole range of activities such as business processes, business organization, communication, customer relationship management, the E-sales orientation and business progress through the Information and Communication technologies. The consequences of the pandemic COVID-19 are reflected on the various spheres of social life, including the businesses of the companies. New strategies and techniques in business have positively contributed to the survival of trading companies on the market in the new situation. Therefore, trading companies were forced to adjust their way of working, doing business and maintaining contacts with the customers and suppliers in the new situation.

E-commerce in trading companies has become much more than the E-sales. Digitalising business leads to the implementation of E-commerce of the supply chain management that leads to speeding up and maintaining of the business processes. Due to rapid technological changes, E-commerce needs to follow new trends on the Information and Communication technologies market in order to remain effective. E-commerce can also help to organize communication processes. Online sales in the situation of the pandemic crisis have proven to be an effective

sales method with which trading companies can maintain their sales in contactless customer relations. With the E-commerce can be improved all the company's business relations by the introduction of opportunities that it provides in business, by building architecture of E-commerce and by implementation of applications for business enterprises taking into account the potential costs and benefits of introducing this kind of business. However, with the introduction of E-commerce, both of the marketing strategies and the market expansions can be improved.

In the paper are listed and analysed changes in the trade operations of the two companies due to the pandemic crisis; one deals with the sale of agricultural machinery and the other with the sale of food products: at this point we examine and compares the differences in the business processes management with the customers and suppliers in the normal way of doing business also in the new occasions, that is the consequential business adjustment in the course of pandemic.

Keywords: *business processes, E-commerce, online sales, the pandemic crisis, trade companies*

1. INTRODUCTION

Accordingly, towards today's modern trends for digitization and transformation of markets, e-commerce is evolving as a business model. The implementation of e-commerce in the company consists of several stages; from the introduction of the company's Website, e-sales to the introduction of e-commerce in all organizational units of the company. In the conditions of the COVID-19 pandemic, when direct contact between employees, employees and customers, as well as employees and suppliers is hindered, the e-commerce proved to be an ideal solution.

This topic was chosen for the purpose of determining the situation on the example of the two companies on how they have adapted to the market in the emerging pandemic situation with regard to their businesses. Also, we wanted to determine whether companies have improved their e-commerce, with regard to the online work from home, therefore in a situation of reduced social contacts and in what way.

In the paper, on the example of the two trade companies, the e-commerce and the changes that occurred in the conditions of the COVID-19 pandemic have been analysed. Analysed were the implementation of e-commerce in business processes and its results. Company X is a food stuff production and sales company, while company Y specializes in retail and wholesale and service of small agricultural machines.

2. THE MEANING OF E-COMMERCE

E-commerce represents a complex combination of business processes, entrepreneurial operations, and organizational structures that are needed to create a highly

efficient business model[1]. E-commerce can be used to: improve services and provide access to customers that exists outside the local market, to help in promotion and to help to organize business processes more efficiently in the company, enabling price comparison, also enabling market competitiveness, reduce business transaction costs, increase company visibility in the market, improved access to the company for customers and suppliers, enabled communication and doing business outside the office and facilitated the procurement of products and services[2]. The implementation of e-commerce can be seen as the ability of an organization to enrich technological innovation by adopting and using new business solutions for e-commerce[3].

When it comes to electronic business, most people first think of e-commerce. Electronic commerce (e-commerce) means the process of buying, selling, transferring or exchanging products, information's or services by means of the Internet. E-business or electronic business is a more complex term which, in addition to buying and selling products and services, implies servicing, cooperation with the business partners and performing electronic transactions within organizations[4]. E – commerce has developed in three phases[5]:

- The first stage is marked by the presence of E-commerce (1994-1997); i.e., to ensure that every business has its own Website and is present on the Internet
- The second stage characterised the business transaction phase (1997-2000); buying and selling through digital channels, and the goal was the flow of orders and gross profit
- The third stage is marked by the impact of e-commerce on the profitability of companies (from 2000 onwards); this phase is called e-commerce and includes all applications for enterprise operation and a comprehensive strategy of redefining old business models through the use of technology.

World trade is experiencing an increase in e-commerce; from 1,115,7 trillion US dollars in 2016 to 3,5 trillion US dollars in 2019[6].

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1 Kalakota, R.; Robinson, M., *E-business 2.0.* , Mate, Zagreb, 2002, p. 4.

2 Ministry of Entrepreneurship and Crafts, E-business for the competitiveness of your company in the modern world, Ministry of Entrepreneurship and Crafts, Zagreb, 2014., p. 12.

3 Hull, C. E. *et al.*, *Taking advantage of digital opportunities: A typology of digital entrepreneurship,* International Journal of Networking and Virtual Organisations, Vol. 4, No. 3, 2007, pp. 290-303.

4 *E- business – how, what, where?* 2018, [www.datalab.hr] Accessed 12 February 2021.

5 Kalakota; Robinson, *op. cit*., note 1, p. 5.

6 Clement, J., *Retail e-commerce sales growth worldwide 2017–2023*., 2020, [https ://www.stati sta.com/ stati stics /28848 7/forec ast-of-globa l-b2c-e-comme rce-growt h/] Accessed 18 June 2020.

E-commerce in today's business does not only encompasses a company's Website where the company introduces itself to the existing partners and customers, but also implies a powerful marketing tool for gaining new customers and business partners. E-commerce involves focusing on the customer and satisfaction of his needs[7]. The advantages and solutions provided by the application of e-commerce are related to the competitive advantage of the company. However, still missing is the empirical research that analyses the benefits of e-commerce and competitive advantage[8]. The use of the Internet in business has become a subject of interest to scientists and business entities. Information technology and its role in guiding the success of the company and the use of the Internet is of strategic importance to the company. Information Tecnology has transformed processes, products, enterprises and industries[9]. Conducted research on e-commerce[10] has shown that the adoption of e-commerce depends on internal and external resources. For instance, the government support, global orientation and an effective organizational structure of the company are significant prerequisites for the introduction of e-commerce to improve the competitiveness of companies.

An important part of e-commerce, especially in commercial companies is e-marketing. E-marketing is a way of conducting marketing activities of a company with a significant application of information (Internet) technology[11]. E-marketing is seen as the process of building customer relationships through online activities for the purpose of exchanging ideas, products and services for them to meet the goals of the parties involved[12]. The marketing functions of the economic entity that are applicable through the Internet are: product development policy, policy of product and service sales, gathering information's about the market, market research, promotion and advertising and e-distribution[13]. Through the e-marketing, the customer participates in the activities of the company, which enables the re-

7 Kalakota; Robinson, *op. cit*., note 1, p. 6.

8 Pilinkiene, V.; Kurschus, R.J.; Auskalnyte, G., *E-business as a source of competitive advantage*, Economics and Management, Vol. 18, No. 1, 2013, pp. 77-85.

9 Porter, M.E.; Millar, V.E., *How information gives you competitive advantage*, Harvard Business Review, Vol. 63, July-August,2013, pp. 149-160.

10 Shehata, G. M.; Montash, M. A., *Driving the internet and e-business technologies to generate a competitive advantage in emerging markets: Evidence from Egypt,* Information Technology & People, Vol. 33, No. 2, 2019, pp. 389-423.

11 Panian, Ž., *Internet and small business*, Informator, Zagreb, 2000, p. 15.

12 Mohammed, R.A., *Internet marketing: Building Advantage in a Network Economy*, Irwin/McGraw Hill, 2004.

13 Panian, *op. cit.,* note 11, p. 22.

organization of the product creation process according to the wishes of its users, which is more than it was the case in the traditional approach to marketing[14].

Here are the rules of E-commerce[15]:

- The technology for forming a business strategy represents its commencement and follows the guiding idea
- Impact on the flow of information and the ability to increase their efficiency provide more powerful and cost-effective services than those needed for the production and sale of material products
- The inability to move from an outdated business pattern leads to business failure
- By using e-commerce companies can become the most recognizable to customers
- Technology should be used not only to create a product but to improve the activities that surround the product
- In the future, reconfigurable e-commerce models will be used to better meet customer requirements
- The goal of the solution in e-commerce is to create flexible alliances, not only with the aim of reducing costs but also with the aim of delighting its customers
- Error that happens when creating urgent e-commerce projects when minimizing application structure needs can be costly
- The key to success is the ability to quickly plan the path taken by the e-commerce infrastructure and its construction
- A difficult task for management is how to quickly and correctly connect business strategies and processes.

In Table 1 are shown the main trends that govern e-commerce.

[14] Ružić, D.; Biloš, A.; Turkalj, D., *e- Marketing*, Faculty of Economics in Osijek, Osijek, 2009, p. 182.

[15] Kalakota; Robinson, *op. cit.,* note 1, p. 6.

Table 1. Main trends that govern e-commerce

Trend category	Trend
The customer	- Faster service - Self - service - Larger selection of products - Integrated solutions
E-self-service	- Integrated sales and service - Smooth support - Flexible fulfilment of orders - Increased process visibility
Organization	- Relocation of business to the external environment - Production based on contract - Virtual distribution
Employee	- Recruiting of the best - Retaining talented employees
Technology for business operations	- Integrated applications needed for the business of the company - Integration of multiple channels - Intermediary applications between old and new software and hardware and machinery
General technology	- Wireless Web applications - Mobile devices for information processing and exchange - Convergence of infrastructure components - Application of service providers

Source: Kalakota, Robinson, 2002, p. 42

The results of research on e-commerce during the COVID-19 pandemic[16] indicate a positive impact of external factors on the adoption of e-commerce and e-marketing.

The relationship between small businesses, technology and industrial systems generates e-commerce competencies. Industrial, technological, and social e-commerce encounters come together to create soft skills (e.g., for the ability to learn new trends) that help small businesses to adapt to the digital marketplace[17]. The growth of intellectual capital has been confirmed by the great advances in Information Technology and the growth of a knowledge-based economy in which investing in

[16] Patma, T. S., *The Shifting of Business Activities during the COVID-19 Pandemic: Does Social Media Marketing Matter?*, Journal of Asian Finance, Economics and Business, Vol. 7, No. 12, 2020, pp. 283–292.

[17] Mkansi, M., *E-business adoption costs and strategies for retail micro businesses*, Electronic Commerce Research, Vol. 21, No. 1, 2021, pp. 1-41.

e-commerce is crucial[18]. Modern companies need not only to implement e-commerce but also to create value for customers. This comprises converting resources into value and extracting profits. Businesses need to manage customer needs, produce what customers demand, and to provide product value to customers (to manage Internet commerce)[19].

Enterprises dealing with the e-commerce are in good position to use social influence among customers as a tool to help in the course of decision-making by enabling the customer to claim suitability guidelines and reviews[20]. In a research[21] from 2021 is indicated that companies that deals with the e-commerce can through the online channels make an agreement about forming the revenues to optimize decentralized decision-making and to achieve significant cooperation between supply chain participants. When implementing e-commerce, the main problem is the structure of software components and arising of possible, potential integration shortcomings that are often overlooked through the logic of a business application. The weakest link in e-commerce applications that are based on social networks is the logical subversion of the server-side component caused by the computer developers who are involved in the software design process[22]. A research[23] from 2021 indicates that the supply chain of the e-commerce platforms based on Internet of Things (IoT) technology have a lower risk of loss. The application of this type of technology will effectively reduce the market risk of the supply chains financing and it will better serve to the economic development. The Covid pandemic has affected online payments and e-commerce around the world. It has been shown with the researches and with the market reports that the buyer's interference on the Internet increases during a pandemic[24].

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18 Al-Omoush, K. S.; Simon-Moya, V.; Sendra-Garcia, J., *The impact of social capital and collaborative knowledge creation on e-business proactiveness and organizational agility in responding to the COVID-19 crisis*, Journal of Innovation & Knowledge, Vol. 5, No. 4, 2021, pp. 279-288.

19 Scarpa, P.F., *AN e-business blueprint-how you measure and manage the risks of an e-business will or will not give you that competitive edge: here's a model for success*, Ivey Business Journal, Vol. 64, No. 4, 2020, pp. 62-71.

20 Zong, *et al.*, *Or-based Intelligent Decision Support System for E-commerce,* Journal of Theoretical and Applied Electronic Commerce Research, Vol. 16, No.4., 2021.

21 Wang, D.; Lee, W., *Optimization algorithm and simulation of supply chain coordination based on cross-border E-commerce network platform Open Access,* Eurasip Journal on Wireless Communications and Networking, No. 1, 2021, Article number 23.

22 Nabi, F.; Tao, X.; Yong, J., *Security aspects in modern service component-oriented application logic for social e-commerce systems*, Social Network Analysis and Mining, Vol. 11, No.1, Article number 22.

23 Yu, H. *et al.*, *Research on the financing income of supply chains based on an E-commerce platform,* Technological Forecasting and Social Change, Vol. 169, 120820.

24 Afridi, F. E A. *et al.*, *The impact of Covid-19 on E-business practices and consumer buying behavior in a developing country*, The Revista Amazonia Investiga, 2021, Vol. 10, No. 38.

3. RESEARCH METHODOLOGY AND HYPOTHESES

For the purposes of this research, a primary survey of two trade companies in Osijek-Baranja County was conducted. The aforementioned research was conducted from January 10 to January 30, 2021. A qualitative research was conducted using the technique of free organized interview with encompassed of all of the management representatives from the both companies.

A research interview is an extraordinary and artificially created situation initiated by an interviewer with the aim of gathering information's relevant to some research problem, while taking into account the scientific tasks of describing, predicting and explaining of such problems[25]. The method of examination, which in a broader sense of the word is a method of collecting data on the subject that is researched is based on the opinion of the respondents, but in a narrower sense - it is actually a survey method, interview method, and also encompasses tests and scaling methods[26]. The research was conducted in a semi-structured interview manner.

The main goal of the research was to identify the use and implementation of e-commerce in the conditions of the COVID-19 pandemic in the two observed trading companies. The case method aims to connect the relationship between theory and practice, i.e., between deduction and induction. In the case method, in addition to the theoretical part, cases from practice are also presented[27]. The case study method deals with the study of a phenomenon as a convergence of circumstances in which there does not seem to be inflicted cause-and-effect sequence. In order to gain useful experience, it is necessary to observe not one but several other cases. In this way, tendencies can be reached in the studied phenomenon[28].

In relation to the set theoretical-methodological approach and the title of the issue, it is possible to set hypotheses:

$H_{1:}$ *The analysed companies by implementing e-commerce have adapted to the new situation.*

$H_{2:}$ *Due to e-commerce, the realization of sales was maintained with good results in 2020.*

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25 Milas, G., *Research methods in psychology and other social sciences*, Jastrebarsko, Naklada Slap, 2005.

26 Žugaj, M.; Dumičić, K.; Dušak, V., *Foundations of scientific research work: methodology and methodology*, Varaždin, Tiva, 2006. p. 114.

27 Baban, Lj. *et al., Application of professional and scientific research methodology*, Faculty of Economics in Osijek, Osijek, 2002, p. 144.

28 Ivanović, Z., *Methodology of scientific research*, Saiva, Kastav, 2011, p. 253.

4. E-COMMERCE OF THE COMPANY X

Since it is a large manufacturing company which has a developed organizational structure and is a market leader in the segment of products it produces, it is understood that e-commerce is implemented in all company processes, from production stages to sales. During the time before the pandemic, certain elements of e-commerce were used, such as e-mails, B2B (business to business - business model between the two companies) and B2C (business to customer - business model between the company and its customers), i.e., the platforms which were sufficient to support the classical business model, whether it was the production, acquisition or sale of the enterprise. E-commerce means P2P - the path to profitability[29]. Marketing is the one who listens to the needs of the market or even sometimes creates them and therefore indirectly and with the help of other services gives boost to the service development for the production of certain products that with the help of the engagement of the sales department will be offered to customers through various sales channels. In the circumstances before the pandemic of COVID-19 all departments within the company have communicated electronically, but not only and exclusively electronically. Large part of the businesses is arranged in classical meetings, face-to-face between the service area within the company or in meetings with the business partners. Usually, all meetings are accompanied by memoranda presented in electronic form and thus facilitate the uninterrupted continuation of the agreed activities at the meetings that were held. In the conditions before the pandemic, it is crucial to note that the e-commerce has been implemented in all aspects of the company's businesses, but it should once again be emphasized that it has almost always existed as a support and tool for easier business processes, and not strictly as an exclusive way of doing business. The emergence of the pandemic has brought completely new conditions, not just for companies that operates on the free market. but also, a new organization of the work itself within the company. The situation with the pandemic brought a number of restrictions in order to preserve human health, such as maintaining physical distance and limiting the gathering of the greater number of people in one place. The measures brought by the Civil Protection Headquarters introduced numerous restrictions, but not only in the unhindered movement of individuals, but they also directly limited certain economic branches, such as tourism, catering and trade. The company consequently can be compared to a living organism. A living organism needs oxygen in order to function smoothly, and also a company needs to achieve added value through the realization of its business functions, in order to be able to survive and move forward on the open market. E-commerce requires strategic business plan-

[29] Berman, D., *Dot-Coms: Can They Climb Back?,* 2020, [https://www.bloomberg.com/news/articles/2000-06-19/dot-coms-can-they-climb-back], Accessed 12 January 2021.

ning that takes place through specific steps[30]. All of these new circumstances required a quick reaction of the company's management in order for the company's business to continue in the new environment. The management made decisions related primarily to preserve the health of all employees of the company, but it has also brought decisions that ensured the continued manner of business activities that are extremely important for the wider community in which the company operates, because it is a company that produces and sells food products that are necessary for the withstand of the life of the population. The pandemic had made an impact on the transformation of business within all services in the company, as well as in mutual communication within the company and also in communication with the business partners and clients situated outside the company. Regardless of the circumstances in which the management had to make such decisions, the vision had to be taken into account as a clear idea of the nature of the future events, i.e., about the long-term desired result[31].

In the production service, multiple teams with a smaller number of employees were formed, in order to reduce unnecessary mutual contacts to a minimum. Novelties have been introduced in the shift schedule, with breaks between shifts so that all appropriate working places may apply the disinfection measures and disinfection of the working tools. The communication of responsible persons within the production service was transferred from internal meetings and briefings towards the online platforms: Zoom, Skype and Microsoft Teams. Production orders also began to circulate in e-form and WhatsApp groups began to be used on the mobile phones for all of the less important communication between employees within the service that were divided by rank of responsibilities and assigned to specific teams and project tasks. The procurement service has faced very big challenges in the conditions of the COVID-19 pandemic. In the conditions of numerous restrictions both in international traffic and crossing of state borders, as well in local traffic, it was necessary to provide unobstructed supply of raw materials necessary for uninterrupted production. Many partners and suppliers of raw materials were not able to deliver raw materials on time and in the conditions before the onset of the pandemic, which posed additional challenges to the procurement service. The entire procurement process has been transferred from classic business methods to the e-commerce. The search for the new suppliers in the newly emerging pandemic situation, negotiations with existing business partners and the mutual communication of teams within the service took place via e-platforms. Business meetings and direct contacts were moved to a virtual space via indirect contact, most often through the Zoom platform, but also all other available platforms,

30 Spremić, M., *Management and e-business*, Narodne novine, Zagreb, 2004.

31 Čičin-Šain, D., *Vision, mission and goals*, University in Zadar, 2013.

depending on the preferences and ways that were chosen by the business partners. Meetings via virtual communication platforms required a lot more preparation in order to achieve better communication and faster agreements in limited conditions. Employees of the service have been redeployed to work from home to ensure maximum safety for employees in terms of the health threat posed during the pandemic, for them to needlessly contaminate employees that are necessary for a smooth and continuous production process. Regardless of the work from home, all the work of the service necessary for the work of the company took place every day in the course of the normal working hours. Employees within the service were, with the help of mobile platforms and virtual meeting platforms, in daily communication. Delegation of tasks and reports on the fulfilment of set goals have also taken place through mobile e-commerce platforms. Administrative services, such as the legal service, the human resources service and the financial service are also maximally redeployed to work from home. The efficiency of the services should not be reduced in relation to the conditions set in normal circumstances. All contacts within the services take place through online platforms and mobile communication groups. The Information Technology department has done a tremendous job to ensure network security and the availability of databases of employees who are working from home. The maximum transparency of the entire organization of work in the course of a pandemic ensured that the end user of a particular service did not gain the impression that it was done in circumstances that were irregular. All requests for individual services have taken place via e-commerce platforms that are also serviced via electronic platforms. All available tools for virtual meetings and communications were used, such as Zoom, Microsoft Teams, Skype, WhatsApp and others. Of course, the classic communication done via the mobile phones and e-mails, which is supported by the new tools that were raised to a higher level of efficiency, should not be neglected. Classic business and circulation of documents in paper form was almost completely replaced by circulation of documents in electronic form, which did not affect the quality of the work performed, in fact, it has increased efficiency of certain tasks, with certain savings in time and resources that were used to perform the task.

For the sales department, which in normal business conditions is faced with a large number of challenges in order to achieve all the goals set before it by the company's management, the challenges have multiplied in the conditions of the COVID-19 pandemic. The service is structured in such a way that there are present the sales manager, key account managers, sales managers of certain areas, and the sales force that is in charge of sales execution and improvement of selling's at the exact selected locations to which they have delegated their responsibility. The employees of the sales department during the normal circumstances before

a pandemic have used a large number of tools which can be considered as tools of e-commerce. Therefore, customer orders are processed via electronic handheld devices based on mobile platforms. A significant place in the sales process is still occupied by personal contact of buyer-seller, i.e., face-to-face contact; however, in the conditions of a pandemic such contacts were not possible. With selling at higher levels, its activities of consultation and negotiation with business partners and potential customers through the platform for virtual meetings and communication were held. Communication within sales teams has moved to the field of mobile communication groups such as WhatsApp and the others. The most restrictive measures, which caused restrictions on the movement of persons and limited the number of persons in certain sales areas, required prompt organization of mobile contact centres that communicated with customers via mobile phones and then forwarded orders for processing via existing e-platforms. All of this required maximum flexibility for sales staff and increased understanding of the circumstances in which customers operated. As the existing sales channels could not absorb the increased customer demand for their products, the need for a new sales channel appeared. Sales were formed by means of a Web store that was developed very quickly and based on existing platforms and it comprehended the most of existing logistical and human resources to deliver goods to the doorstep. All the efforts invested in organizing sales and moving sales entirely to electronic and mobile platforms have yielded very good results for the company itself and justified the enormous effort of all involved in sales processes, each at their own level of responsibility. In Table 2. are shown the sales of product A in relation to year.

Table 2. Sales of product A by year in company X

2016.	**2017.**	**2018.**	**2019.**	**2020.**
7 950 000	8 100 000	8 350 000	8 200 000	7 600 000

Source: Business documentation of company X, 2021.

Communication within the company has almost completely moved into the virtual space on e-commerce platforms. All services within the company have undergone an organizational change within their regular business, and some new business practices based on e-commerce have begun to operate. Large part of the novelties that have been introduced as necessary in such exceptional circumstances, proved to be good and effective, and certainly is likely to continue to be used even after the pandemic of COVID-19, in times when their introduction will show additional benefits in terms of improving the efficiency and profitability of the very business processes. Numerous procedures have been simplified and digitized and are therefore much more transparent than before.

5. E-COMMERCE OF COMPANY Y

The business of company Y, which sells and services small agricultural machines, as well as the business of almost all other companies, due to the pandemic crisis of COVID 19 has undergone many changes, among which it is necessary to single out changes in digital business of the company. Due to the crisis itself, company Y had, like other companies with the same activity, a ban on operations by the competent institutions[32]. In such situation, all the forces of the business were focused on e-commerce. Since company Y has previously attached a lot of importance to e-commerce (by which it is meant that the company already has had developed its own Website, Facebook page and that these pages have been in circulation for a long time), not much was needed to be done for the e-commerce to prosper as well as possible.

At the very beginning of the development of e-commerce, company Y was based on its own created Website where it offered its products and services. Of course, at the very beginning, this was done simply without detailed business processes and thus digital business did not have a major impact on achieving of the sales results. As the time went on, company Y refined its Website several times, where day by day it published more and more information about the products from its range and the services it deals with. Consequently, the traffic on the site was higher and, of course, the higher was the business realization through e-commerce. During 2015, the company also opened a Facebook page where it occasionally publishes novelties in its range, but also other things that are of interest to potential customers. E- commerce requires a lot of effort and time to put all the products and spare parts that company Y has in stock on the Website, but since the company has recognized the potential of e-sales, it was decided to attach a great importance to it.

Additional employees were hired, who were tasked with photographing of all of the devices and spare parts owned by the company so that they too could be included in the offer on the Web. It was a great job for the company, but in the end, it paid off for the company, because a large number of customers from the Internet has an insight into the products that the company offered, and the realization itself was on the rise. Since all this had already been developed, due to the onset of the COVID - 19 pandemic crisis, it was not a problem for the company to adapt and even more - to base itself additionally towards the e-commerce. Of course, as the business enterprise was closed for customers who wanted to buy in the com-

[32] Civil Protection Headquarters of the Republic of Croatia , 2020, [https://www.iusinfo.hr/aktualno/u-sredistu/41376#o%C5%BEujak2020], Decision on the Civil Protection Headquarters of the Republic of Croatia, Accessed 15 February 2021.

panies' shops, dealing with the customers was quick and they have sent their own inquiries and, therefore the customer's orders have been sent via the Internet.

The attention of a large number of potential customers has shifted to digital media (such as Internet, computers, mobile devices). We are witnessing a time when more and more people are using these media, so the Company Y has decided to dedicate itself to this segment, especially during the course of the crisis. The reason why the company Y has focused more attention on digital business is certainly due to the number of people who are using Internet. Of course, during the closure of the company's stores, this was the basic and, in addition to telephone inquiries, the only option for the company's business.

The company realized that the more present it is on the Internet, the greater the chance that more people will think of it and want to do business with it.

Since in the year of 2020 the company had fewer costs when related to traditional business and marketing (by which is comprehended companies' expositions at trade shows, publishment of the magazines and the like), more resources and time have been spent in a development of e-commerce and e-marketing. The company has paid special attention to adapting its Website to mobile phones users (the number of customers that uses mobile phones is constantly on the rise) and posting new video content on its Website (Web, Facebook, Instagram). Company has regularly held Web seminars with its partners where they presented novelties, as well as how to handle the devices from the company's programme.

A large number of discounts were published by the company on its Website and this brought extremely good realization despite the crisis. Company Y managed to make some small increase in business realisation, but the most important thing was to save all the jobs. The question is what would 2020 be like for business if there has not been the COVID-19 pandemic. In Table 3. are shown the sales of product B by year.

Table 3. Sales of product B by year in company Y

2016.	2017.	2018.	2019.	2020.
166	179	228	248	279

Source: Business documentation of the company Y, 2021.

What can be established with certainty is that the company, despite the COVID-19 pandemic due to its focus on e-commerce, has not reduced its sales when compared to previous years.

6. RESEARCH RESULTS

The changes in the newly emerging pandemic situation related to e-commerce in company X are related to the implementation of e-commerce in all aspects of business. Prior to the onset of the pandemic, e-commerce as such has facilitated business operations, but it was not an exclusive business tool leading to a new organization of work within the enterprise. Company X's purchasing business has been completely transferred from the classic business trade to the e-business and all communication within the company takes place through the online platforms and mobile communication groups. The classic management of enterprise administration has been almost completely replaced by the circulation of documents in electronic form.

Changes in business during a pandemic situation in company Y are related to changes in the business organization. Prior to the pandemic, company Y had its own Website and Facebook profile and it formerly managed trading online but in the time of the onset of the pandemic, it has increased its Internet sales and e-marketing, which ultimately resulted in good business results.

By analysis of e-commerce and organization of these business processes in both observed companies in the course of the COVID-19 pandemic, H_1 hypotheses has been confirmed. When taking into account the case study of both companies, it was confirmed that with the implementation of e-commerce, companies have adapted to the new situation during pandemic conditions. By analysis of sales results of the two traditional products in both companies in the course of the observed years, the $H_{2.}$ hypothesis was confirmed. Because of the implementations of e-commerce, sales outcomes have maintained good results in 2020. Hypotheses have been confirmed by empirical, scientific methods, methods of analysis, and also by way of synthesis and comparison.

7. CONCLUSION

When we attempt to compare business in the conditions before the COVID-19 pandemic and business during the course of the pandemic, we can see many similarities, but also big differences in business. When doing business during a pandemic, the companies have moved larger part of the working activities from all of the services from the company's business offices to manage work from home. The distribution of information's which monitors the business processes of the company has been further accelerated thanks to the maximum use of e-commerce platforms and tools. The unhampering running of the business process itself required the engagement of a lot more of intellectual resources from all the levels

of employees - from top management to the production workers. The pandemic introduced great uncertainty into the business and required the adjustment of the business to the new conditions almost overnight. As a result, it did lead to the improvements of some business process and that, in fact, it brought the e-commerce to promotes the leading way of doing business of the enterprise with all its benefits that it brings, both in normal times and in limited business conditions, due to imposed numerous or restrictive measures for the protection of public health. The analysis of e-commerce and organization of business processes in both of the observed companies in the time of COVID-19 pandemic has confirmed the H_1 i.e., analysed companies by implementing the e-business have adapted to the new situation. The analysis of sales results of two traditional products in both companies during the observed years confirmed H_2 i.e., due to e-business, the realization of sales was maintained with good results in the year of 2020.

The sales results indicate that both companies achieved good sales results thanks to the rapid adaptation to the new situation and the use of e-business in the sales processes.

In the company Y has now been realised that e-commerce has got even greater potential and that it should be constantly improved. Unlike before when e-orders were processed only when there was time to do, now the company has an employee who deals exclusively with the orders and customer issues from the Internet. And in the future the e-commerce will have the very important role in business and will continuously work on improving and monitoring of e-technology in both of the observed companies. The differences in e-commerce between the companies X and Y relate to the use of e-business in business processes; the company X uses e – business in all business processes, while company Y uses e – sales and e – marketing, while in other business processes it has not yet implemented the e – business forms so far.

The limitations encountered during research were such that some results from the use of e-commerce in the observed companies has become quantitatively immeasurable, because it was dealt about improving and changing organizational business processes. Suggestions for further research may be a case study for the other companies who deals with the same sales range or companies selling other products, such as clothing and footwear (including the assumption that their sales have declined), or sales of furniture and household products (including the assumption that their sales have increased).

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UDK 351.712.2.043:614.8
Original scientific paper

PARTNERSHIPS IN MODERN PROCUREMENT SYSTEMS AS THE BASIS FOR COMPANIES' STABILITY AND GROWTH IN CRISIS AND UNPREDICTABLE CIRCUMSTANCES

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ABSTRACT

All functions within the company, regardless of its size and activity, meet with an extremely dynamic economy and an environment in which they perform many day-to-day activities. In that sense, procurement is no different. It no longer serves only the purpose of ordering goods or services at the request of production at the lowest possible prices. Today's modern procurement systems offer solutions, improvements and thoughts on all aspects of business operations in which they are involved. There is a special emphasis on the dynamic resolution of challenging situations, which lies in unpredictable circumstances and crisis. The procurement department always works closely with other functions that directly affect production, and this is where extremely dynamic, high-quality and timely communication is expected. Communication with functions within the company is followed by communication with partners, where procurement becomes a sort of link between production and suppliers.

Members of the procurement team are in most cases representatives of their companies, and it is based on their communication skills, behaviour and decisions that the image of the company is created among partners. Quality and timely communication of procurement team members

with partners can play a key role for the continuation of production in turbulent market situations. Managers must organize all procurement processes in a quality manner, as well as motivate, educate and reward members of the procurement department. With their comments, opinions, advice and experience, partners offer an additional perspective, solution and an alternative path in the further planning of steps which would help achieve all of company's objectives. Experienced management, especially in times of crisis, use all possible information to make quality decisions, but also learn from these situations in order to make all possible preparations in regular business operations to minimize the shock that a new crisis could cause.

The theoretical part of the paper will present a description of the concept of procurement business, management and crisis management, business and crisis communication, creating partnerships, and maintaining the company's image. The empirical research, conducted through questionnaires which were filled in by employees from the procurement department in the Republic of Croatia, provides us with answers about the importance of partnerships, with a special emphasis on the current coronavirus pandemic. In conclusion, we have explained proposals for improving and maintaining partnerships in the procurement business during crisis, as well as in regular business situations.

Keywords: *communication, crisis management, modern business, partnership, procurement.*

1. INTRODUCTION

Purchasing business in times of crisis and unpredictability shows its exceptional importance for any company, regardless of its size, activity or market orientation. In such conditions, procurement is by no means exclusively responsible only for negotiations with the suppliers, i.e., the procurement of required goods and services. From the procurement employees are required to have highly developed emotional intelligence and problem-solving mindset. Crisis situations usually come quickly and suddenly, and the procurement becomes a function in charge of solving challenges and obtaining solutions to the current problem. At no time should the business, production or performance of services be stopped or slowed down, especially in times of crisis, and this is a great burden that is born by every employee in the purchasing business. This paper is divided into a theoretical part that includes previous research done through scientific papers and a review of conclusions on crisis management from the expert literature. It is difficult to come to a conclusion without detailed research on how employees of the procurement business react to times of crisis, and it is difficult to confirm with certainty what factors have most affected and hindered business activities. Consequently, with the use of a questionnaire, the procurement employees were investigated that were based on the territory of the Republic of Croatia. In advance were set the hypotheses that were the basis for writing of the entire paper, and especially for the conducted research, and those are:

H1. Investing time in the activity of creating and maintaining partnerships is crucial during unpredictable crisis situations on the market.

H2. To the procurement employees, during the crisis situations are more important delivery dates, quality cooperation and supplier assistance when finding alternative solutions, than the lowest price and payment terms.

H3. Awareness of the importance of education about internal training on crisis management and the importance of team building activities is highly present among procurement staff.

2. PREVIOUS RESEARCH

Filipović, Krišto and Podrug conducted an empirical survey with questionnaires during the period from June 2016 to January 2017, and they included large companies in the Republic of Croatia therefore 106 companies participated in the survey. It was concluded that the correlation between external crisis situations and business continuity management development is positive and of medium strength, meaning that the increase in the risk of a crisis situation will increase the degree of development of business continuity management. Prediction of crisis situations is the initial step in business continuity management planning. Active enterprises predict and prevent the crisis situations, while, in passive ones, the establishment of business continuity management model is mediated by the intensity of recurrence of crisis situation.[1]

Mikušová and Horváthová have investigated the reactions of small business managers to crisis management in the Czech Republic. The survey was conducted during 2009, 2011 and 2016. Research dated from 2011 and 2016 were conducted to show changes and conclusions compared to the 2009 results. A total of between 925 and 1026 respondents participated in the surveys each year. The main conclusion is that small business managers simply did not know how they can and should prepare for crisis, and another reason is the cost of additional preparations during the times of a crisis due to the lack of financial experts. The answers varied with age, but it can be drawn the same conclusions. The authors believe that little time has passed since the 1990s, when the Czech Republic switched from a planned economy to an open market and thence managers had too little time and

[1] Filipović, D.; Krišto, M.; Podrug, N., *Impact of crisis situations on development of business continuity management in Croatia,* Management : Journal of Contemporary Management Issues, Vol. 23 No. 1, 2018, pp. 99-122.

opportunities to gain experience related to crisis periods.[2] The need to manage uncertainties indicates that quality risk management is the best crisis management and that primary a culture of crisis management is an understanding of management as a process leading to crisis avoidance.[3]

It turned out that crisis management is always connected with the planning process, so it can be a planning process before the crisis (preparation for crisis times), during the crisis (how to eliminate the crisis) and after the crisis (planning responses to future, similar crises). Operational and strategic management must be linked together in planning and executing planned tasks, and no level of management can function separately.

The basic function of any crisis plan is to define procedures and human and material resources and also to inform and guide participants towards the execution of the plan.[4] When any of the crisis breaks out, the most important thing is to face the consequences and establish crisis communication. Such communication must be with both the external and internal public, i.e., with all publics involved in the crisis.[5]

Planning is associated with the concept of communication, especially communication that is professional, timely, tangible and fast. Regular meetings on crisis communication bring many steps for the improvement of the crisis planning and process execution, cohesion within teams is developed, solutions are discovered and without difficulty is coming up with the new proposals to address any of the challenging situations.

Crisis managers have a duty to timely and accurately inform employees about the nature of problems, internal and external causes of business crisis, how to overcome and manage the business crisis, all with the aim of limiting opportunities for resistance, misunderstandings and unnecessary speculation.[6]

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Never in history has it been possible to predict the exact beginning of a particular crisis, its intensity, duration and methods of behaviour of the company to successfully survive the crisis. Previous crises can be great for analysing and structuring processes to deal more successfully with the future crises. All employees should observe the market closely and look for early signs of future crisis periods. This is exactly one great preventative method.

Structured business process management provides real early indicators of crisis that appear well before the numerical values are expressed in financial business reports (which are today considered as early indicators of crisis) and to give space for managers to take the necessary actions in time.[7]

3. THE IMPORTANCE OF PARTNERSHIPS IN CRISIS COMMUNICATION

Partnerships for any business entity are exclusively a positive factor for successful and efficient doing business, regardless of activity, size and market orientation. Crisis situations especially show the importance of mutually regulated partnerships, regardless of whether they were legally regulated partnerships or informal partnerships based on daily business. Representatives of the company with their behaviour, attitudes, manner of communication, degree of professionalism create a certain image of the company in public, which can attract potential partners or make them restrained in terms of cooperation with the observed company.

One of the basic needs of every businessman or individual in prominent social functions can separate the need to project of a favourable image into different target groups. By this we understood associates, superiors, business partners, customers.[8] The development of technology, especially the use of numerous electronic messaging systems has affected on the volume and dynamics of business meetings. Work in practice shows that a quality meeting between partners can remove many doubts in a short period of time, an agreement can be reached on future strategic projects and to create additional connections between partners. Partnerships are also created through informal communication, where purchasing and sales share their personal experiences and where employees connect on a professional and personal level.

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7 Kruljac, Ž.; Knežević, D., *Prevencija ili evidencija: prepoznati rane simptome krize ili evidentirati gubitke u poslovanju?,* Obrazovanje za poduzetništvo - E4E : znanstveno stručni časopis o obrazovanju za poduzetništvo, Vol. 10 No. 2, 2020, pp. 155-168.

8 Leinert-Novosel, S., *Komunikacijski kompas,* Plejada, Zagreb, 2012, p. 58.

Good meetings will bring together people with similar expectations, whose compliance can have a positive impact on most group members. It will create influence and will attract other individuals who will incline as on the same, like-minded people and people of the same tendencies for the development of the group and the whole company[9]. Professional public purchasers and private organizations must take note of how collaborative their contracting practices are and how they may influence partnering so that they can create strong basis for further partnering during procurement implementation.[10] Complaints should be approached like with any other negotiating situation in which there is a certain conflict of interest, so we shall prepare well and in accordance with the win-win philosophy try to remove sources of customer concern and offer solutions that are in the best interest of the both stakeholders[11].

Many managers share the opinion that the crisis cannot happen to them. They are too convinced of their own power, so they do not think about the possible dangers, and even less about the preparation of a crisis plan.[12] False self-confidence in one›s own knowledge and abilities without experience and regular market research can be disastrous during the first and most severe blows of a new crisis. Employees without management cannot make important and strategic decisions; there, management seek for calmness, knowledge and creativity that are required through making important decisions, quick adjustment of business processes and creation of alternatives. In a crisis, management must work with partners and with all other entities that directly and indirectly affect the company.

The challenge, however, lies in developing a management philosophy or corporate culture in which independent and autonomous trading parties can relinquish some sovereignty and control, while also engaging in planning and organizing which takes into account the needs of the other party.[13] By means of direct strikes, company management can improve the creation or further development of partnerships between its own employees and longstanding or future partners. A simple step is to invest in your employees, especially in the area of developing commu-

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9 Petar, S., *Sastankom do cilja : vještina vođenja uspješnih sastanaka,* Školska knjiga, Zagreb, 2013, p. 54.

10 Keränen, O., *Dynamics of the transition process towards partnership thinking in centralized public procurement*, Industrial Marketing Management, Vol. 65, 2017, p. 86-99.

11 Tomašević Lišanin, M., *Profesionalna prodaja i pregovaranje,* Hrvatska udruga profesionalaca u prodaji, Zagreb, 2010, p. 298.

12 Novak, B., *Krizno komuniciranje i upravljanje opasnostima : priručnik za krizne odnose s javnošću,* Binoza press Zagreb, 2001, p. 132.

13 Mohr, J.; Spekman, R., *Characteristics of partnership success: partnership attributes, communication behavior, and conflict resolution techniques*, Strategic management journal, Vol. 15, No. 2, 1994, p. 135-152.

nication and presentation skills. An important item of education is conflict management and education that is related to people's personality types. In particular, this conclusion applies to new, young employees without previous experience in negotiations. Those employees with longer work service and numerous meetings held may have gained experience, but this may not be the rule.

Mastering communication in order to improve business performance, especially in management and trade, where communication with associates and customer relations means business success or failure, is one of the priorities of every businessman.[14] Dealing with difficult people is the most demanding. They have fierce feelings or are hostile to others, so the other side often loses confidence. This is a challenge even for the most skilled negotiators, due to negative, disarming and manipulative behaviour.[15] The problem of communication during and after the crisis is that no two crises are the same. Some incidents require an immediate and aggressive communication with important stakeholders - consumers, customers, clients, government officials, the judiciary - and if this has not been done, the crisis may deepen and turn into a real disaster for the organization.[16] The right culture in both the customer and supplier organizations must exist to facilitate and encourage joint problem solving and decisionmaking across internal functions.[17] Face-to-face communication mediates the relationship between intra-organizational task interdependence and cognitive congruence. [18]

Communicating and creating partnerships in normal market conditions is challenging, but additional pressure on procurement staff creates communication in the conditions of crisis situations. Procurement is never a separate function, but communicates dynamically with all employees within the company, specifically with the production, marketing and finance departments. Procurement employees collect communication inputs from other functions, requests, compliments, complaints or negative reactions and have the task of shaping the correct communication messages towards partner. In times of crisis, procurement staff have the task of mitigating all the negative messages due to possible non-delivery of goods,

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14 Vodopija, Š., *Opća i poslovna komunikacija : priručnik i savjetnik za uspješnu komunikaciju,* Naklada Žagar, Rijeka, 2006, p. 53.

15 Biondić Vince, D., *Kako uspješno pregovarati i povećati svoju vrijednost, napredovati, te zaraditi više!*, vodič za vrhunske pregovarače, Biondi, Zagreb, 2012, p. 63.

16 Tafra-Vlahović, M., *Upravljanje krizom : procjene, planovi, komunikacija,* Visoka škola za poslovanje i upravljanje s pravom javnosti "Baltazar Adam Krčelić", Zaprešić, 2011, p. 193.

17 McIvor, R.; McHugh, M., *Partnership sourcing: an organization change management perspective*, Journal of Supply Chain Management, Vol. 36, No. 2, 2000, p. 12-20.

18 Grawe, S.J.; Ralston, P.M., *Intra-organizational communication, understanding, and process diffusion in logistics service providers*, International Journal of Physical Distribution & Logistics Management, Vol. 6, 2019, pp. 662-678.

delays in deliveries or deviations in quality. Here, the experience and development of emotional intelligence is crucial.

Crisis communication can be defined as a dialogue between an organization and its public immediately before, during and after a negative event.[19] Destructive negotiations are processes in which one or both parties try to win even when there is a danger of losing while formally one of the parties' may have won.[20] The factors that best model strategic performance are different from those that best model operational performance. Having joint partnership management and relation-specific assets goes hand-in-hand with enhancing the company's competitive position, and is therefore of strategic importance to the partners.[21] It can be concluded that destructive negotiations cannot bring good results to either side in the long run and it can occur as the illusion of victory to one or the other negotiating party. If no agreement can be reached, scheduling a new meeting at another time may yield better results than to accept destructive conclusions from one of the meetings.

4. RESEARCH METHODOLOGY AND ITS LIMITATIONS

The specificity of the topic of the paper required a targeted survey of procurement employees, while the survey questionnaire was developed through the Google forms platform. The authors sent surveys to procurement employees they know personally, and others were contacted via social media. In the survey were participated the procurement employees from the territory of the Republic of Croatia. A total of 48 procurement staff responded. After the survey and data collection, data processing was performed. Basic statistical parameters were calculated and descriptive data (frequencies, percentages, arithmetic means and standard deviations) were presented. The obtained results are presented in tables and graphs. Statistical processing of the collected data was performed using the statistical program IBM SPSS Statistics 20. The aim of the study was to make known the opinions of procurement staff in the Republic of Croatia related to procurement operations during the COVID-19 pandemic in 2020, which were the biggest challenges, and on which way the procurement business and operations of the company in general can prepare for future periods of crisis.

It was difficult to find the same number of employees in the procurement business from different sectors of the economy; to find the same number of employees

[19] Jugo, D., *Menadžment kriznog komuniciranja,* Školska knjiga, Zagreb, 2017, p. 29.

[20] Rouse, M. *et al.*, *Poslovne komunikacije : kulturološki i strateški pristup,* Zagreb, 2005, p. 194.

[21] Sodhi, M. S.; Son, B. G., *Supply-chain partnership performance,* Transportation Research Part E: Logistics and Transportation Review, Vol. 45, No. 6, 2009, p. 937-945.

according to different age groups and length of service. A conclusion could not be reached by a direct comparison of procurement employees by their activity, age and length of service, which would be otherwise an extremely interesting contribution to the research of procurement operations. Previous procurement business researches have not focused insofar on targeted survey of procurement employees, - especially was absent the lack of research related to crisis procurement management. In Table 1 is shown the structure of employees and the total number of respondents who responded to the survey questionnaire.

Table 1. Sample structure (*N* = 48)

		N	**Percentage**
Gender	Male	27	56.3%
	Female	21	43.7%
Age	25-34	15	31.3%
	35-44	23	47.9%
	45-54	10	20.8%
Length of service	0 - 10 years	15	31.3%
	11-20 years	26	54.2%
	21-40 and higher	7	14.5%
Education	Elementary School	1	2.1%
	Secondary education (SSS)	5	10.4%
	Higher education / professional study	8	16.7%
	University degree / university study	31	64.6%
	MSc / PhD	3	6.2%

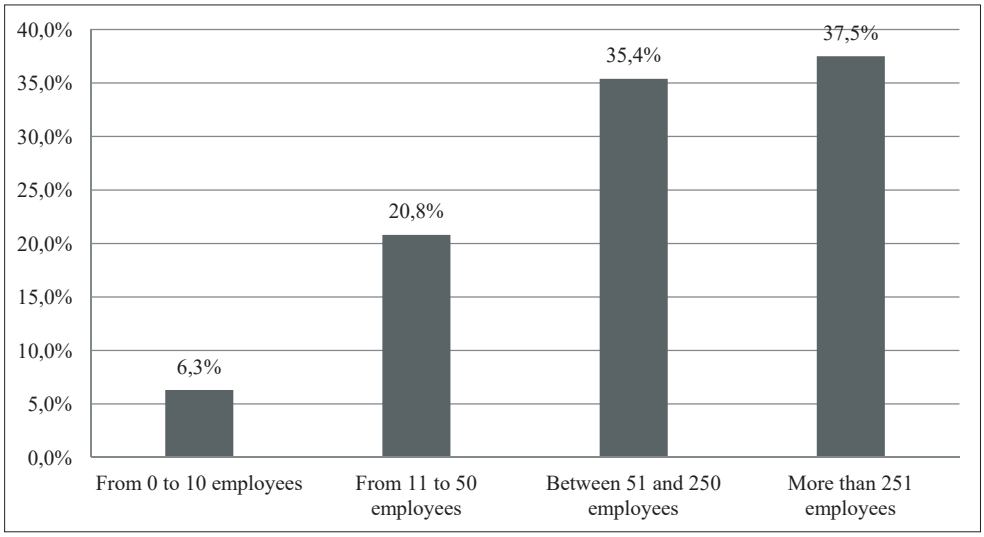
Source: authors.

The research was conducted on the sample of 48 employees employed in the procurement sector of various companies (56.3% of male and 43.7% of female) aged 25 to 54 years. Most of those employees have 11 to 20 years of work experience (54.2%) and have a university degree (graduated, 64.6%). Attempts were made to reach procurement employees who are about to retire (55-65 years old), however it was exceptionally hard to find employees of that age through direct contacts or through social networks. On the other hand, there were no respondents younger than 25 years of age. It is possible that most procurement jobs require a completed academic degree (bacc. Oec or titles from other social sciences) and it is more difficult for younger people to get the opportunity to work in procurement before they reach 25 years of age. On Figure 1 is shown the total number of respondents who responded to the survey questionnaire given the size of the company.

5. RESULTS AND DISCUSSION

Most of the employees who participated in the survey, work in companies with total of 51 and 250 employees and the companies with the more than 251 employees (a total of 72.9%). The goal was to examine an equal number of employees from all sizes of companies in order to draw better conclusions. More potential respondents were found from companies with a minimum of 51 employees. It would be interesting to compare the results of an equal number of surveyed procurement employees from micro and large enterprises. As a rule, the procurement function is more developed as there are more employees within the procurement team in larger companies due to the complexity of the procurement business.

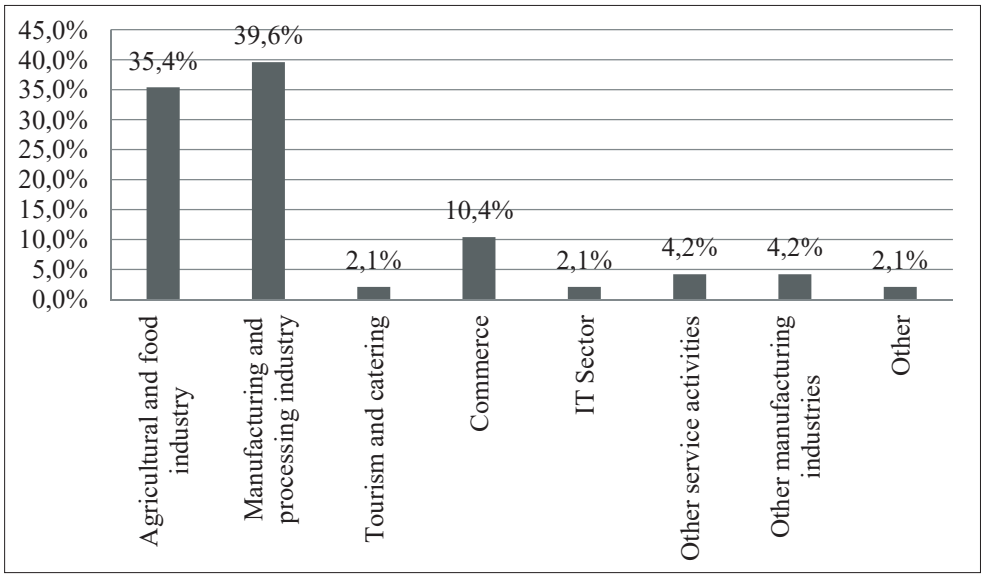
Figure 1. The size of the enterprise



Source: authors.

The distribution of procurement employees who responded to the survey questionnaire according to the activity of the company they come from is shown in Figure 2.

Figure 2. Company activity



Source: authors.

If we look at the results based on the activities of the company, most of the employees work in the production and processing (39.6%) and agricultural and food industries (35.4%). As stated in the research methodology, employees were targeted through personal contacts and social networks. The agricultural activity and the manufacturing and processing industry in general are the two most represented industries according to the structure of the respondents. The procurement function in these industries is extremely developed due to the complex business and the importance of procurement, especially in dynamic, crisis situations. IT companies, tourism and catering and similar service activities often do not have a developed procurement function, but the responsible person in addition with other obligations performs the function of ordering, i.e., procurement. In Table 2 is explained in detail the importance of factors for creating partnerships according to the responses of procurement employees.

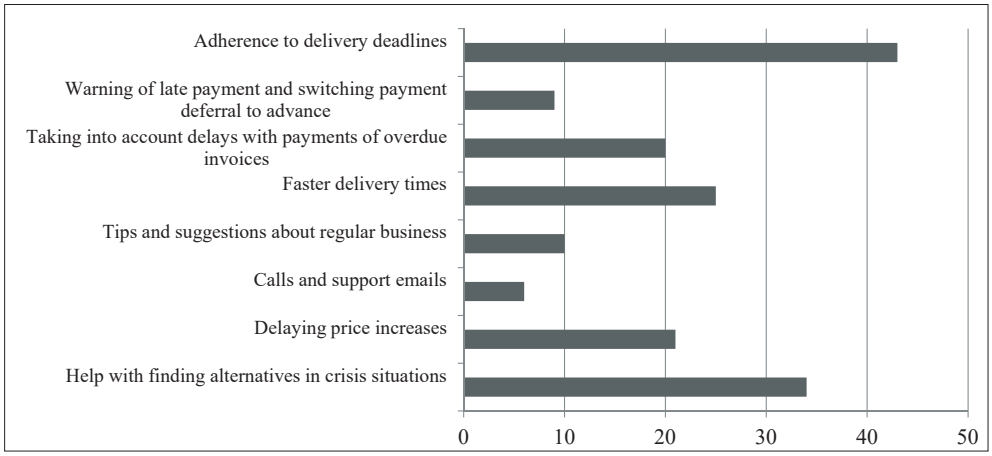
Table 2. The importance of factors for creating partnerships in the procurement sector

	It doesn't matter at all		It doesn't matter to some extent		It is neither important nor unimportant		It's somewhat important		It is extremely important		*M*	*SD*
	f	%	f	%	f	%	f	%	f	%		
Regular communication	0	0	0	0	1	2,1	7	14,6	40	83,3	4,81	0,445
Professional approach to communication	0	0	1	2,1	3	6,3	13	27,1	31	64,6	4,54	0,713
Holding regular meetings	0	0	1	2,1	10	20,8	16	33,3	21	43,8	4,19	0,842
As low as possible prices of the offered products / services	0	0	4	8,3	9	18,8	18	37,5	17	35,4	4	0,945
Timely response to a complaint	0	0	1	2,1	1	2,1	8	16,7	38	79,2	4,73	0,61
Shortening the delivery time in emergency situations	0	0	0	0	1	2,1	15	31,3	32	66,7	4,65	0,526
Currency of payment (advance payment, deferred payment)	0	0	5	10,4	11	22,9	11	22,9	21	43,8	4	1,052
Quality logistical support during delivery	0	0	1	2,1	3	6,3	15	31,3	29	60,4	4,5	0,715
Gifts and attention signs for holidays / birthdays	14	29,2	14	29,2	9	18,8	7	14,6	4	8,3	2,44	1,287
Quick replies to emails	0	0	0	0	4	8,3	15	31,3	29	60,4	4,52	0,652
Free help / advice on product / service development	2	4,2	0	0	9	18,8	17	35,4	20	41,7	4,1	0,994
Constant reminder of expanding collaboration and new orders	3	6,3	7	14,6	16	33,3	7	14,6	15	31,3	3,5	1,255
Pointing out the negative sides of competing companies	14	29,2	14	29,2	10	20,8	5	10,4	5	10,4	2,44	1,303

Source: authors.

Employees in the procurement sector as the most important factors assess regular communications (M = 4.81), timely responses to complaints (M = 4.73), shortening the delivery time in emergency situations (M = 65), quick responses to e-mails (M = 4.52) and the quality logistical support during deliveries (M = 4.50). It is not necessarily a matter of crisis communication, but regular communication of day-to-day business can build strong and stable partnerships that can last for a long period of time. Procurement representatives and supplier representatives (often two individuals) directly influence on the turnover between the two companies, building relationships, the way of resolving complaints, but also the partnership resolution of crisis situations. Respondents of the procurement business confirmed that regular communication is the most important and thus influenced on the confirmation of hypothesis H1. They consider gifts and signs of attention for holidays / birthdays and also pointing out the negative sides of competing companies, both as the least important factors (M = 2.44). Both statements are marked as equally unimportant in creating partnerships. Pointing out to the negative sides of competing companies is not only undesirable, but it's also not professional to negatively comment on other businesses without evidence and based only on insinuations. Procurement employees may get the impression that a supplier who negatively comments on a competition through manipulative data wants to reject a competitor. The ethics of such a way of communicating is highly questionable. Gifts and signs of attention should never be important, and at least crucial factors for creating a great partnership. There are numerous examples where expensive gifts are characterized as decisive factors for the selection of suppliers, which are by no means non-ethical, and in particular are not lawful actions in state-owned companies. Selection of procurement suppliers should work according to the well-established commercial criteria and quality criteria, and everything else would raise doubts about the ethics of such business. To the respondents were offered claims related to the supplier assistance in times of crisis, and which answers were selected by procurement staff are shown in Figure 3.

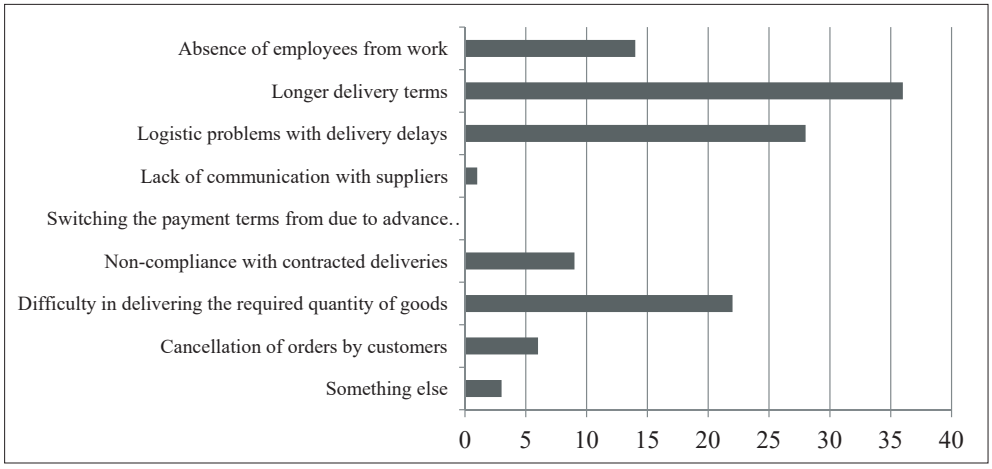
Figure 3. Supplier assistance during times of crisis



Source: authors.

Participants cite compliance with delivery deadlines and assistance in finding alternatives in crisis situations as the best ways for giving help to the suppliers during the course of crisis. The task of procurement in normal market conditions is to provide the required goods and services for uninterrupted business and business development. This task is especially pronounced during market instability, regardless of whether it was because of an increase in prices, a shortage of raw materials, war or pandemics. When creating a need for a particular good or service by production, sale or procurement itself, the estimated delivery time set by the selected supplier is taken into account at the outset. The production plan is based on the sales plan, and in the case of consumer goods, the logistical conditions and exact delivery dates to customers have certainly already been agreed. If the company's business is organized in this way, procurement has an easier job in crisis situations, because at least it has available information's related to the production needs for inputs or services. On the Figure 4 is shown which factors, according to the respondents' answers, had the greatest impact on business difficulties at the beginning of the COVID-19 pandemic.

Figure 4. Factors that caused the most problems at the onset of the Covid-19 pandemic



Source: authors.

Most of the problems at the beginning of the Covid-19 pandemic were caused by longer delivery times of suppliers, logistical problems with delivery delays and the inability to deliver the requested goods. The absence of employees during that period was not a key problem, as the pandemic still did not affect a large number of people as it did a year later. There was a crisis and market disturbance, initially even the borders between the Republic of Croatia and neighbouring countries were closed. After a few days of tension, the traffic of goods across the border was regulated, but the drivers were still under great pressure. For all of the above said resulted in delays in deliveries, the inability to find carriers and, in general, the inability to deliver goods. In Table 3 are shown the results of a survey of procurement staff related to activities to better prepare for the future crisis periods.

Table 3. Importance of activities for better preparation for the future crisis periods

	It doesn't matter at all		**It doesn't matter to some extent**		**It is neither important nor unimportant**		**It's somewhat important**		**It is extremely important**		***M***	***SD***
	f	%	f	%	f	%	f	%	f	%		
Better enterprise inventory planning	0	0	0	0	2	4,2	8	16,7	38	79,2	4,75	0,526
Adding an annex to the contract by which behaviour in times of crisis is defined	3	6,3	7	14,6	13	27,1	17	35,4	8	16,7	3,42	1,127
Creating additional financial stocks / better cash flow control	0	0	0	0	6	12,5	18	37,5	24	50	4,38	0,703
Internal training on crisis management	0	0	5	10,4	9	18,8	18	37,5	16	33,3	3,94	0,976
Internal training on crisis communication	0	0	3	6,3	11	22,9	19	39,6	15	31,3	3,96	0,898
Creating a list of trusted suppliers / partners	2	4,2	7	14,6	7	14,6	16	33,3	16	33,3	3,77	1,189
Team building activities in the company	3	6,3	8	16,7	12	25	12	25	13	27,1	3,5	1,238
Investing time and effort in improving partnerships	0	0	1	2,1	4	8,3	17	35,4	26	54,2	4,42	0,739
Creating a crisis strategy for all sectors	0	0	1	2,1	4	8,3	15	31,3	28	58,3	4,46	0,743

Source: authors.

Employees in the procurement sector state that the most important activities for better preparation for the future periods of crisis are better inventory planning of companies (M = 4.75), creating a crisis strategy for all sectors (M = 4.46), investing time and effort in improving partnerships (M = 4.42), and creation of additional financial stocks / better cash flow control (M = 4.38). Safety stocks primarily depend on the company's storage capacity, but a certain minimum stock must always be set for the key materials. The instability of deliveries during the first lockdown caused by the COVID-19 pandemic lasted a little less than a month, so companies that could and wanted to organize a one-month minimum stock of key materials survived the period without much turbulence. Crisis strategies do not have to be extremely detailed, but they must be arranged through well-developed procedures so that all sectors know how to behave in future crises. It is extremely risky to

create crisis procedures when the crisis has already started, because it can lead to even greater confusion and panic among the employees. Partnerships in any crisis prove to be crucial, because all partners are interconnected, regardless of whether they are in the role of a customer, supplier, intermediary, third party, etc. There will always be partners who will not act as partners in times of crisis, but will turn to protection their own business regardless of cost. All crises result in financial consequences, due to lack of demand, difficulties with production, delayed input or absence of employees. Through careful planning and stockpiling, company can create financial security that will always be one of the key factors.

6. CONCLUSION

Crisis and unpredictable situations that can negatively affect a company's business will always be a threatening danger. Welfare conditions can deceive employees and managers and can create false self-confidence that leads to insufficiently decisive and effective strategic and operational measures at the beginning of the crisis situations. Purchasing operations in all market situations have an extremely key function for achieving stability and growth, especially during crisis conditions. This research was conducted among employees of the procurement business from the territory of the Republic of Croatia. The research comprehended questions related to examining the factors that are important for creating and maintaining partnerships, how suppliers can help during times of crisis, the factors that most affected business difficulties at the beginning of the Covid-19 virus pandemic and also what activities of purchasing operations should be implemented to better prepare for the future crisis periods. The research has shown that for creating partnerships, the most important are regular communication, timely responses to complaints and shortening delivery times in emergency situations. Purchasing business has its own specific requirements towards partners, but the important conclusion is that among the most important factors we consider regular communication. Procurement employees responded that the most important activities of suppliers in times of crisis are compliance with delivery deadlines, faster (shorter) delivery deadlines and finding alternatives in crisis situations. The deadlines for the delivery of ordered goods and services directly affect the production in the final result of the business, so it is not surprising to see that the above statement received the most confirmation from the procurement staff. These statements have confirmed the hypothesis H2 – to the procurement employees in crisis situations are more important delivery times, quality cooperation and assistance from suppliers in finding alternative solutions than the lowest price and payment terms. Partners will always help each other when finding alternatives in any aspect of the business, especially if the situation is extremely urgent and threatens to stop production. The

COVID-19 virus pandemic has caused a number of turbulences and instabilities around the world, and it was especially challenging and unpredictable during the spring of 2020. Procurement employees were most challenged during this period by longer delivery times, logistical problems with the delayed deliveries, absence of employees from work and inability to deliver the requested goods. The three biggest factors are directly related to the supplier and the logistics part of the business. Longer delivery times were expected due to the announced restrictions on population movements and numerous measures that were announced, but the biggest challenge for planning of the procurement was the sudden restrictions for lorry drivers when crossing the border and entering other countries. The most difficult situation was at the beginning of April 2020, when the entire traffic between the Republic of Croatia and neighbouring countries was closed for a few days, but a few days later the decision was made that all drivers that were entering the country must be in a two-week quarantine. The price of transportation jumped sharply and it was almost impossible to find a vehicle to make the delivery. The situation was quickly regulated and transport traffic was returned to a certain normal, but with certain restrictions. From each crisis it is important to draw conclusions and adjust business to the new situations. Respondents from the procurement business answered that the most important measures for preparation for future crisis periods are better planning of companies' stocks of materials, creating a crisis strategy for all sectors and investing time and effort in improving partnerships. These results have fully confirmed the H1 and H3 hypothesis, i.e., (H1) investing time in the activity of creating and maintaining partnerships is crucial in unpredictable crisis situations in the market, and (H3) awareness of the importance of internal training on crisis management, and the importance of team building activities is highly present at the procurement employees.

When comparing this paper with other papers, some of the papers dealt with the business crisis of the whole company, not for just one isolated function. A small number of authors have dealt rigorously with crisis analysis within procurement. Analysed research has confirmed that active companies, which carry out activities to anticipate and eliminate business risks, better cope with crisis situations. In addition to the abovementioned, it turned out that many managers simply do not have enough experience in the environment or business history in the market in which they operate to offer adequate strategies to handle the crisis situations. Managers of smaller companies do not have enough experience, while managers of large companies do not have enough financial resources for preventive activities. The common conclusion between the observed research and this paper is the realization that managers are aware of the need to develop processes and strategies within the company to overcome crisis situations. The contribution of

science work is an overview of the opinions of procurement employees regarding to the development of partnerships and what are the expectations towards partners in crisis situations. Precisely presented are the activities that have the greatest impact on the development of partnerships and what is important to the procurement employees. Another contribution of science would be research related to the challenges of the procurement business during the COVID-19 pandemic, where it was shown exactly what were the biggest problems of the procurement business and what activities should be applied to help overcome future crises. There are very few papers that directly analyse the procurement business to so many specific processes and situations. Future research can offer answers to questions about which business strategies and processes within the company are most effective for crisis prevention with the least invested financial resources, and in terms of procurement operations, which specific activities would help procurement given the activity and size of the company to adapt everyday processes to future crises situations.

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UDK 658:614.4
Original scientific paper

ASSESSMENT OF MANAGEMENT CONTROLLING IN PANDEMIC TIMES

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ABSTRACT

The emergence of coronavirus led to evident consequences for the global economy. During the previous financial crisis, organisations have already determined the elements of crisis management so they could met the new corona crisis readily. Global changes, like the current pandemic situation, provide a different view toward the future expectations. The pandemic has caused new way of functioning under special circumstances such as various restrictions in many European countries, restrictions on people's mobility and other novelties that have encountered for the first time. Characteristics of this crisis include novelty and pressure in a business environment, which can reveal various vulnerabilities in organisations. Managers were affected by major business changes, and there appeared a need for rapid reorganisation of the current way of functioning. Management had to introduce new control systems that refer to their strategies for exchanging information and decision-making. In general, each crisis is a new opportunity for seeking modern and appropriate models and tools for business improvement. When business situations are challenging, managers are more oriented toward controlling. Therefore, organisations that focus on traditional management models are not very successful in normal circumstances, and even less so in a crisis.

This study aims to examine the extent of the structure and function of management control systems in pandemic conditions in Croatian organisations. An overview of current systems in organizations was given, as well as management challenges of the pandemic situations. This study includes the analysis of management control system during the pandemic times. The research was conducted using survey method what referred to analyses of strategic plans, performance evaluation systems, and management controls for performance evaluation in Croatian organisations. The factor analysis of the main components was conducted in order to examine the contribution of predictor variables in explaining the broad-scope management control system. In order to examine the contribution of gender, age, work experience, education, company size, aggregation, timeliness, and integration for explaining of broad-scope the management control system hierarchical regression analysis was conducted.

The results confirm that integration is significant predictor in the crisis controlling model, but at the same time, when the integration and timeliness should have positive connection, greater timeliness does not increase to the greater availability. This withdraws the conclusion that uncertainty of environment extents the speed of business processes. Despite of the equal integration during pandemic crises the remote working conditions caused the decrease of the promptness of reporting collected information, which requires new models of controlling in unpredictable situations.

***Keywords**: challenges, controlling, global changes, management control systems, pandemic*

1. INTRODUCTION

Businesses today face many challenges. The implementation of new mechanisms and management modalities is necessary in order to identify threats, as well as opportunities, in a timely manner. The global crisis is pandemic crises caused by Covid-19 virus and it is according to the World Health Organization (WHO) a new and highly contagious disease.[1] Coronavirus is a new virus discovered in 2019 that has not been known so far.[2] The virus appeared in Wuhan, Hubei Province in China, but spread very rapidly to other parts of China and the rest of the world.[3] The emergence of a pandemic is not only a blow to the health system, but also to the global economy. Since this is a new disease for which there was no cure at the time of its appearance, in many companies it brought changes to the way a certain business operates and disclosed the existing organizational problems. This

[1] World Health Organizations. (2020). Coronavirus disease (COVID-19) outbreak situation. Retrieved from the World Health Organizations (WHO) Online: [https://www.who.int/ emergencies/diseases/ novel-coronavirus-2019], Accessed 13 April 2020.

[2] World Health Organizations. (2020). Coronavirus disease (COVID-19) situation report – 83. Retrieved from the World Health Organizations (WHO) Online: [https://www.who.int/ emergencies/ diseases/novel-coronavirus-2019], Accessed 13 April 2020.

[3] Zhu, N.; Zhang, D.; Wang, W.; Li, X.; Yang, B.; Song, J.; Zhao, X.; Huang, B.; Shi, W.; Lu, R.; Niu, P., *A novel coronavirus from patients with pneumonia in China, 2019*, New England Journal of Medicine, Vol. 382, 2020, pp. 727-733.

crisis has revealed to us what lies beneath the surface of our organizations. Working from home, i.e. working remotely, has disturbed the balance between work and private life we have become accustomed to so far, and has become our new reality overnight. This way of working is nothing new, but Covid-19 has certainly accelerated the already growing trend that might even become permanent. The pandemic came on suddenly, and brings pressure on global business activities.[4] The consequences of the crisis for business activities came as quickly as the virus itself, which spread around the world. Employee safety, cash flow, sales, and supply chains are just some of the issues that required a quick response.[5] Covid-19 has amplified existing social inequalities and turned out to be a great revealer.[6] This crisis is putting pressure on the business environment, and managers need to react quickly and make changes in their business operations. The best response in such situations is to turn to a higher level of controlling in organizations. The pandemic has put companies that turn to traditional models of management at a disadvantage. Managers who have a broader view of the management situation, which they gain with a higher level of controlling in the organization, make better decisions in complex situations.[7],[8] With the increased amount of information, numbers and calculations that managers have at their disposal, they are able to make faster decisions that put the organization they lead in a situation where it can adapt to external influences and reduce uncertainty to a minimum. We conclude that controlling, regardless of the business environment, always plays an important role in management because it supports managers by providing them with the information necessary for quality decision making. Controlling is focused on the future by analyzing past and present events. Technological advances and globalization have greatly disadvantaged traditional business models and increased competitiveness. Controlling implies the overall business of an organization, and its parts represent strategic plans and analyses. It is perhaps the most important function in dealing with the organization's problems, and this department is directly responsible to management in informing them about the changes. Defining strategy, long-term

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4 Spicer, A., *Organizational Culture and COVID-19*, Journal of Management Studies, Vol. 57, Issue 8, 2020, pp. 1737-1740.

5 Pantano, E.; Pizzi, G.; Scarpi, D.; Dennis, C., *Competing during a pandemic? Retailers' ups and downs during the COVID-19 outbreak*, Journal of Business Research, Vol. 116, 2020, pp. 209- 213.

6 Corak, M. 2020. COVID-19 is not the great leveller, it's the great revealer. Economics for Public Policy, April 13. [https://milescorak.com/2020/04/13/covid-19-is-not-the-great-leveller-its-thegreat-revealer/], Accessed 2 June 2021.

7 Jordao, R.V.D.; Souza, A.A.; Avelar, E.A., *Organizational culture and post-acquisition changes in management control systems: An analysis of a successful Brazilian case*, Journal of Business Research, Vol. 67, 2014, pp. 542-549.

8 Nielsen, L.B.; Mitchell, F.; Nørreklit, H., *Management accounting and decision making: Two case studies of outsourcing*, Accounting Forum, Vol. 39, Issue 1, 2015, pp. 66-82.

sustainability and risk assessment are factors through which this process works. Growth, development and, ultimately, profit are the goal of every organization, and this is possible only if the aforementioned factors work successfully. MCS enhance the communication, learning and experimentation required for innovation in strategy formation.[9] Some researches emphasize management control system (MCS) as a key to management innovation.[10] Thus, a pandemic situation can demand unexpected innovative strategies and effort.

2. THEORETICAL APPROACH TO RESEARCH

Given that controlling is related to all management functions, it is difficult to define its activity.[11] When talking about controlling, different definitions arise. Controlling represents multidisciplinary knowledge that for the purpose of quality decision-making gathers information inside and outside the organization, necessary for those in management positions.[12] Common to all definitions of controlling is that it supports management in decision-making. The role of controlling is to connect all parts of the organization into a unified whole so as to create a comprehensive image of the company's business operations.

2.1. Controlling functions

The concept of controlling encompasses several functions: planning, control, and coordination. The planning function refers to determining future events, results and activity implementation. Future events represent possibilities for manoeuvre when it comes to activities.[13] It is important for organizations to prepare in time for the upcoming changes.[14] Execution is a key feature of management control.[15] The control function compares two or more values to determine deviations from the plan that are viewed as control signals. The control function processes information that takes place at strictly defined time intervals, and is not always the last stage in management, but follows the creation processes from the very beginning. The informative function includes systematic collection, processing and making

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9 Davila, T., *The promise of management control systems for innovation and strategic change,* in: Chapman, C.S. (ed.), Controlling strategy: Management, accounting, and performance measurement, New York, 2005, pp. 37-61.

10 Simons, R., *Levers of Control,* Harvard University Press, Boston, 1995, p. 5.

11 Očko, J.; Švigir, A., *Kontroling–upravljanje iz backstagea*, Knjiga print d.o.o., Zagreb, 2009.

12 *Ibid.*

13 Ziegenbein K., *Kontroling*, deveto prerađeno i aktualno izdanje, RRiF, Zagreb, 2008, p. 81.

14 Buble, M., *Osnove menadžmenta*, Ekonomski fakultet u Splitu, 2006, p. 86.

15 Merchant, K. A.; Van der Stede, W. A., *Management control systems: performance measurement, evaluation and incentives*, Pearson Education, 2017, p. 11.

available of information important for the management of organizations. Organizations put a lot of effort into their information systems because without them, controllers would find it difficult to perform their tasks.[16] The coordination function implies the harmonization of connected and separate processes.[17] The aim of coordination is to provide support in creating a value system. The integration function makes all parts of the company meaningfully interdependent. All parts connect and form a whole.

2.2. Concepts of controlling

The development of controlling itself is influenced by various factors, so each country develops the concept of controlling in its own way. Social and economic development are one of the most important factors influencing this. The concept of control reaches far back in history and already in the 1960s, in France, controlling was present in over 50% of the most important companies.[18] Controlling has evolved based on several concepts: the accounting-oriented concept, the information-oriented concept, and the management-oriented concept. The accounting-oriented concept looks more to the future. Some of the features of the accounting concept are the preparation of accounting data and a quantity-oriented approach, while its goal is to ensure liquidity and profit. It also represents an instrument of the management. The second concept is information-oriented, and seeks to build its own information system of all users in the organization, that is to match the needs and supply of information, and thus make decisions. The management-oriented concept connects all functions in the organization for more successful business operations. According to the management-oriented concept, the original controlling functions are performed. This form of controlling represents harmonization in leadership, integration and coordination.

3. DATA AND METHODOLOGY

Earlier research, reports that tehnology or strategy of organization explains use of management control systems. Menagment control systems used by the organizations is affected by organizational life cycle, especially in growing organizations. Broad scope menagment control system (MCS) reduce negative affect of COVID 19 under the supposition that decision makers use that information. Bradth of calculations that decision makers have at his disposal with menagment control sys-

16 Očko; Švigir, *op. cit.,* note 11, p. 35

17 Osmanagić Bedenik, N., *Kontroling – Abeceda poslovnog uspjeha*, Školska knjiga, Zagreb, 2007, p 104.

18 *Ibid.*

tem increase their chance for promptly movements in new situations, and decrease exposure to uncertainty.

This paper was based on previously validated constructs of the management control system provided by Chenhall and Morris (1986).[19] The basis of their study was a combination of the company's features to measure a broad scope management control system design (MCS). The measure of broad-scope includes non-economic information (customer preferences, employee attitudes, etc.), information about external factors (economic conditions), non-financial production data (output rates), and non-financial market data (market information).

The data for this paper was collected using the survey method. The analysis was made according to the experiences of working conditions in pandemic times due to the work effort, amount of work, level of difficulty, work productivity and quality. Sociodemographic data were also collected, such as gender, age, years of work experience, level of education. The survey included information about companies' characteristics, such as the type of work department in which participants are employed, the company size, and the companies type of business.

The data was collected using an online Google form. Via the snowball sampling method, a cross-sectional questionnaire was distributed. On average, the survey took about 10 minutes to complete. After collecting data statistical analysis were performed. Data analysis were conducted using Statistical Package for the Social Sciences (SPSS version 20.0, IBM, Chicago, IL, USA). The key statistical parameters and descriptive data were calculated. Factor analysis and reliability tests with Cronbach's alpha were conducted to examine the metric characteristics of measuring instruments. Hierarchical regression analysis (HRA) was conducted to examine the contribution of the predictor variables in explaining the broad-scope management control system.

The survey was conducted on a sample of 60 employees aged 21 to 57, with a mean age of 36.05 (SD=8.08). Most of them have finished graduate study (51.7 %). Table 1 presents the sample structure.

[19] Chenhall, R.H.; Morris, D., *The impact of structure, environment, and interdependence on the perceived usefulness of management accounting systems*, The Accounting Review, Vol. 61, Issue 1, 1986, pp. 16-35.

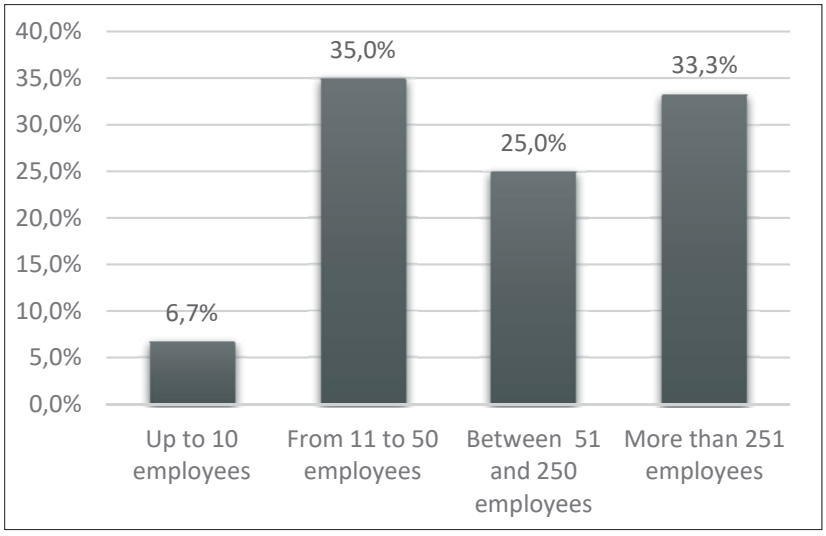
Table 1. Sample structure (N=60)

		N	**Percentage**
Gender	Male	39	65 %
	Female	21	35 %
Education	Vocational high school	2	3.3 %
	Four-year high school	10	16.7 %
	Undergraduate study	9	15 %
	Graduate study	31	51.7 %
	Postgraduate study	8	13.3 %

Source: Authors' calculation

The respondents mostly work in a company with 11 and 50 employees (35 %), but also in larger companies, with more than 51 (25 %), and with more than 250 employees (33.3 %). The company size structure is presented in Figure 1. On average the respondents have almost 13 years of work experience (M=12.86, SD=9.24).

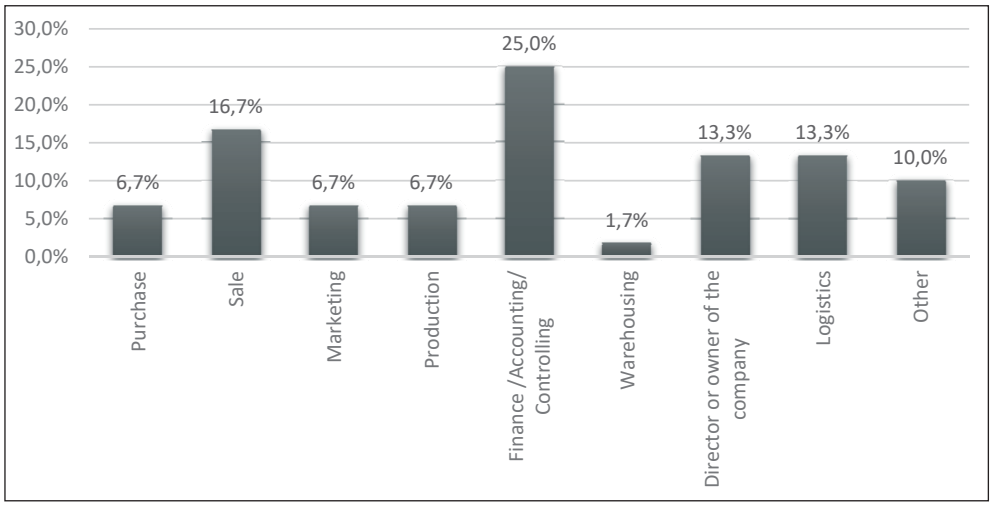
Figure 1. Company size



Source: Authors' calculation

Figure 2 presents the distribution of employees according to the department and agency (the type of company business). Most of them work in the finance, accounting, and controlling department (25 %), and in the sale department (16.7 %).

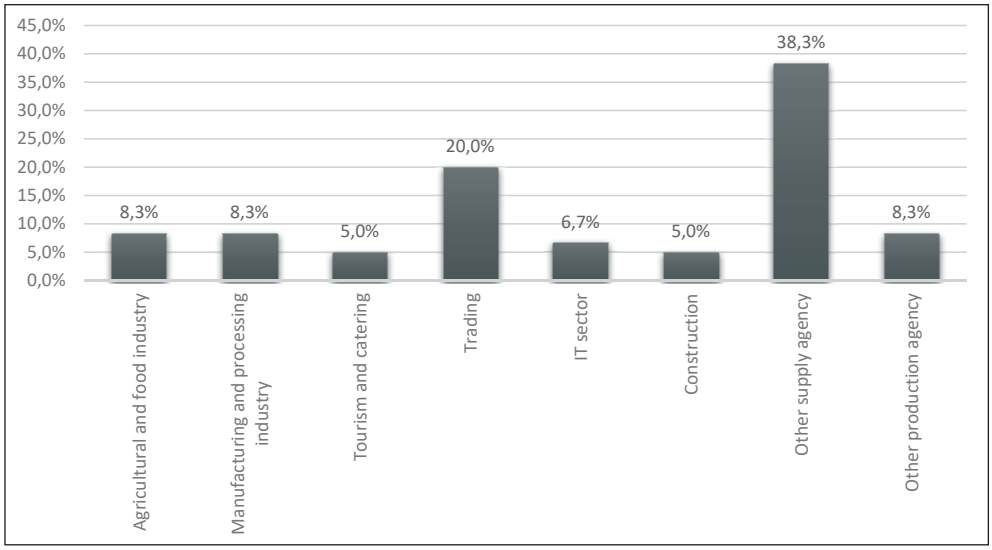
Figure 2. Employees work department



Source: Authors' calculation

Figure 3 shows the employees company agency. The company type of business of participants is mainly other supply/service agency (38.3 %), and trading (20 %).

Figure 3. Employees company agency



Source: Authors' calculation

After collecting data, the factor analysis was performed. The analysis showed a unidimensional measure that explains 77.16% of the variance (item factor load-

ings are above 0.86). The reliability coefficient of Cronbach's alpha is 0.93. In order to measure related constructs of a management control system, the availability of the following features was included: aggregation, timeliness, and integration. These features describe information characteristics that could be relevant for management control system design.[20] Participants gave their self-assessment on the scale of Likert's type with seven levels of assessment (from 1 - not at all available, to 7 - available to a great extent). Feature of aggregation describes department reports and process of decision making, timeliness describes the frequency of reporting, and integration includes precise targets and company's performance. Internal reliability was examined, and Cronbach alpha reliability coefficients for aggregation, timeliness, and integration were high: 0.90, 0.90, and 0.93, respectively. Similar results of Cronbach's alpha were obtained in previous research.[21]

4. RESULTS AND DISCUSSION

Before conducting the factor analysis, the normality of the distributions was examined. The distributions of all measured variables are not significantly different from normal. This confirmed indexes of skewness and kurtosis. Absolute values of skewness are than 3, and for kurtosis are less than 10, which indicate that distributions are normal.

Table 2. Descriptive statistics

	k	***Min***	***Max***	***M***	***SD***	I_S	I_K	α
Broad-scope MCS	4	1.25	7.00	4.33	1.46	.15	-.57	.93
Aggregation MCS	3	1.00	7.00	4.41	1.61	-.29	-.24	.90
Timeliness MCS	3	1.00	7.00	4.33	1.62	-.23	-.60	.90
Integration MCS	3	1.00	7.00	4.53	1.59	-.25	-.58	.93

Legend: k – number of items; I_S = skewness; I_K = kurtosis; α = Cronbach alpha reliability coefficient
Source: Authors' calculation

Table 2 presents the descriptive parameters and Cronbach alpha reliability coefficients for measured variables. Participants have assessed the availability of integration as the most available in their companies (M = 4.53, SD = 1.59). Overall, it

[20] Guenther, T.W.; Heinicke, A., *Relationships among types of use, levels of sophistication, and organizational outcomes of performance measurement systems: The crucial role of design choices*, Management Accounting Research, Vol. 42, 2019, pp. 1-25.

[21] Spencer, S. Y.; Adams, C.; Yapa, P. W., *The mediating effects of the adoption of an environmental information system on top management's commitment and environmental performance,* Sustainability Accounting, Management and Policy Journal, Vol. 4 Issue 1, 2013, pp. 75-102.

is evident that employees consider the measured features moderately available in their workplaces (all means are slightly above 4).

Hierarchical regression analysis was conducted in order to examine the contribution of gender, age, work experience, education, company size, aggregation, timeliness, and integration for explaining of broad-scope the management control system. Predictors of the proximal structure were introduced first, then predictors of distal structure. The conditions for using hierarchical regression analyses were first examined. The values of the Durbin-Watson test was 1.75, which indicating that residuals are not intercorrelated. Values of variance inflation factor (VIF) are considerably below 10, and values of tolerance above 0.2. Therefore, there is no multicollinearity. Intercorrelations between measured variables were also examined (Table 3).

Table 3. Interccorelations between predictors and criterion variable

	1	2	3	4	5	6	7	8	9
1. Gender	-	-.14	-.15	-.16	-.03	.01	-.09	-.03	.10
2. Age		-	.91**	.31*	.22	-.20	-.16	-.13	.22
3. Work experience			-	.26*	.15	-.28	-.25	-.23	-.13
4. Education				-	.02	-.05	-.04	-.06	-.11
5. Company size					-	-.12	-.12	-.08	-.11
6. Aggregation MCS						-	.87**	.89**	.87**
7. Timeliness MCS							-	.87**	.70**
8. Integration MCS								-	.83**
9. Broad-scope MCS									-

Note: ** $p < .01$; * $p < .05$
Source: Authors' calculation

Table 4. Hierarchical regression analysis for broad-scope MCS

Predictors	**1. step**	**2. step**
1. Gender	.07	.07
2. Age	.15	-.20
3. Work experience	-.21	.34*
4. Education	-.09	-.07
5. Company size	-.11	-.02
6. Aggregation		.87**
7. Timeliness		-.41**
8. Integration		.46**
ΔR^2	.040	.809
R^2	.040	.849
F	.451	35.97**

Note: ** $p < .01$; * $p < .05$
Source: Authors' calculation

After testing the conditions, a hierarchical regression analysis was conducted. In the first step of hierarchical regression analysis, gender, age, work experience, education, and company size were introduced. In the second step, the features of aggregation, timeliness, and integration were simultaneously introduced. Results of hierarchical regression analysis are shown in Table 4.

Predictor variables in the first step of hierarchical regression analysis were insignificant. However, results in the second step show that variables of work experience, aggregation, timeliness, and integration were statistically significant. Employees with more work experience estimate greater availability of non-economic information, information about external factors, and non-financial data about production and market. It can be assumed that employees with more years of work experience can recognise and identify this kind of information more successfully than those with less work experience. Those participants probably have greater authorise, so these forms of information are more accessible to them.

Aggregation is the most significant predictor of broad-scope management control system. The higher the capacity of a management control system to provide information in various forms is, the greater is the level of management control system design. Aggregation describes to what extent companies give data from various departments like time-aggregated information. Existing findings show that crisis could cause data overload or difficulties in decision-making.[22] Research results show that in our companies there was no significant negative effect of the pandemic on the aggregation of information from the various functional area, as well as monthly and yearly reports and data analysis.

Results show that integration was also a significant predictor in this model. Stronger coordination between various departments and areas causes internal, external, financial, and non-financial information more available. Such information is related to a wide range of various content, like customer satisfaction, product trends and costs, employee needs to government policies. Same as for the aggregation, results show that there was no decrease in integration due to the pandemic crisis. The findings were according to the expectations, concerning the other studies that showed that integration is common action between departments in which they are following company goals.[23] There are some ways to achieve differentiation, like rules and procedures. In the crisis time, there is a need for more differentia-

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22 Garcia Osma, B.; Gomez-Conde, J.; Heras, E., *Debt pressure and interactive use of control systems: Effects on cost of debt*, Management Accounting Research, Issue 40, 2018, pp. 27-46.

23 Chenhall, R. H., *Management control systems design within its organizational context: findings from contingency-based research and directions for the future*, Accounting, organizations and society, Vol. 28, Issue 2-3, 2003, pp. 127-168.

tion in order to face unknown situations, which can lead to integration problems. For such specific unpredictable situations, it is preferable to use some progressive mechanisms, like meetings and integrating employees, rather than a set of rules and procedures. Actions like this are a more organic type of structure and are more welcome in uncertain times.

One factor related to a broad-scope management control system is also frequency and promptness of reporting collected information, that is timeliness. According to some previous research, along with integration, the timeliness is becoming an increasingly important variable for management accounting data research.[24] Usually, it would be expected that timely and aggregated information would lead to sustainable commitment for internal, external and non-financial data. However, in this research the relationship is different. Greater timeliness does not lead to a greater availability, on the contrary. These unexpected finding can be interpreted with limitations that have occurred due to the pandemic crisis. The unknown situation, such Covid crisis is unpredictable and surely have affected on promptness in collecting and submission various information and reports. When there is environmental uncertainty, companies face challenges, which is manifested to the greatest extent in speed processing generally in business.

Results show that the model in total explained almost 85 % of the variance of a broad-scope management control system. Aggregation is the strongest predictor of a broad-scope management control system (β=.87, p<.01). This is in accordance with previous research on the important role of MCS which facilitates managers to make more accurate decisions in uncertain times and crisis.[25]

In addition to this analysis, since the pandemic has appeared, in the period from March 2020, many people have started remote working. Since controlling involves the interaction of business processes that are subject to interpersonal relationships, the survey included some features and experiences about remote working at the time of the pandemic. Table 5 shows employees experiences from working at a distance from their homes.

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[24] Chenhall, R. H., *Integrative strategic performance measurement systems, strategic alignment of manufacturing, learning and strategic outcomes: an exploratory study*, Accounting, organizations and society, Vol. 30, Issue 5, 2005, pp. 395-422.

[25] Gomez-Conde, J.; Malagueño, R.; Lopez-Valeiras, E.; Rosa, F.; Lunkes, R., *The Effect of Management Control Systems in Managing the Unknown: Does the Market Appreciate the Breadth of Vision?*, April 6, 2021, Available at SSRN: http://dx.doi.org/10.2139/ssrn.3675688.

Table 5. Data about working conditions in pandemic times

	f	%	f	%	f	%	f	%	f	%		
	Much less		Less		Equally		More		Much more		M	SD
The extent to which people invest effort when working from home	2	3.3	11	18.3	16	26.7	23	38.3	8	13.3	3.40	1.05
Amount of work when working from home	2	3.3	10	16.7	22	36.7	16	26.7	10	16.7	3.37	1.06
	Much harder		Harder		Equally		Easier		Much easier		M	SD
Organising work from home	8	13.3	15	25	19	31.7	12	20	6	10	2.88	1.18
	Does not compensate at all		Does not compensate		Partially compensates		Compensates		Fully compensates		M	SD
Cost recovery (electricity, internet)	24	40	12	20	14	23.3	5	8.3	5	8.3	2.25	1.29
	Much more insecure		Insecure		Equally (in) secure		Safer		Much safer		M	SD
General experience of job (in)security	11	18.3	11	18.3	24	40	12	20	2	3.3	2.72	1.09
	Completely disagree		Disagree		Neither agree nor disagree		Agree		Completely agree		M	SD
Work from home in the future	4	6.7	4	6.7	18	30	20	33.3	14	23.3	3.60	1.12
	More worse		Worse		Equally		Better		Much better		M	SD
Work productivity when working from home	1	1.7	15	25	25	41.7	12	20	7	11.7	3.15	0.98
Quality of online meetings	7	11.7	15	25	24	40	9	15	5	8.3	2.83	1.09

Source: Authors' calculation

The emergence of the Covid pandemic have an impact on various aspects of human lives, and also on their characteristics of work. Generally, the aspects of work conditions have an important role within the companies and with the external

environment.[26] Since the pandemic occurred, the working population was forced to work from home due to strict guidelines to avoid physical contact. Such new instructions become a part of daily life in private, but also in office life.

Participants report to the greatest extent that they invest more effort (38.3 %) or the same amount of effort (26.7 %) when working from home compared to work before the pandemic crisis. Employees have reported that they work equally (36.7 %) or more (26.7 %) when working from home. A quarter of the participants report that it is harder for them to organise work from home, and a third of them is the same in comparison to organising work before a pandemic. More than half of employees report that their companies do not compensate for their costs arising from work from home. Most participants perceive their job as equally secure or insecure as usually. The third of employees have stated that companies will strive to organise the work from home in the future also. Most of them (41.7 %) stated that the work productivity is the same as before pandemic situation, as well as the quality of online meetings in comparison with live meetings (40 %). In general, employees are least satisfied with the fact that their company does not compensate their costs when working from home.

These results will be used for the next research and the formation of an adequate model of management control system which will be designed according to the newly created working conditions.

5. CONCLUSION

The global pandemic crisis caused huge changes in every business process and forced companies to establish different business organizations. The management control systems had to adopt to the new environment and all concepts had to be redesigned according to the unexpected situation. The basic role of controlling refers to connecting all parts of the organization according to the constructs of a management control system. As the main constructors of controlling; aggregation, timeliness, and integration, were severely disturbed by the onset of the crisis, the analysis questioned the new settings and models in controlling should be defined. The starting point in the research was to define the main relationships that determine controlling model. The assessment was made by factor analysis. The analysis examined the availability of the aggregation, timeliness, and integration during pandemic times.

[26] Parker, L. D.; Jeacle, I., *The Construction of the Efficient Office: Scientific Management, Accountability, and the Neo-Liberal State,* Contemporary Accounting Research, Vol. 36, Issue 3, 2019, pp. 1883-1926.

The results show that stronger coordination between various departments and areas causes internal, external, financial, and non-financial information more available what makes the integration a significant element in the model even in the period of pandemic. The analysis of the second important feature, the timeline, confirmed that greater timeliness does not lead to a greater availability. The finding was contrary to the existing evidence and theory. The cause of the new postulate is connected to pandemic crisis and new organization of business process.

Although this research faced certain limitations, according to the relatively small sample and short observation period, the results are useful to the scientific and professional public, as well as to the management of various organizations, for designing new management control system.

This paper offers recommendations for further research, based on the results of remote working experiences at the time of the pandemic, concerning amount of working effort, organization of remote working, costs of working at home model, the work productivity and future trend predictions of working model.

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Topic 5

EU new trends

UDK 340.114:342.76](4-67EU)
Review article

EU LEGAL SYSTEM AND CLAUSULA REBUS SIC STANTIBUS

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ABSTRACT

We are witnesses and participants of Copernican changes in the world which result in major crises/challenges (economic, political, social, climate, demographic, migratory, MORAL) that significantly change "normal" circumstances. The law, as a large regulatory system, must find answers to these challenges. Primarily, these circumstances relate to (i) the pandemic - Corona 19, which requires ensuring economic development with a significant encroachment on human freedoms and rights; (ii) globalization, which fundamentally changes the concept of liberal capitalism as the most efficient system of production of goods and services and democracy as a desirable form of government; (iii) automation, robotics, artificial intelligence, and big data are changing the ways we work, live, communicate, and learn in a Copernican manner. The law should serve to shape the relationship between people in order to realize a life of love and freedom. This is done to the greatest extent through the constitutional engineering of selected institutions. The legal system focuses on institutions that have a raison d'etre in their mission, which is read as "ratio legis", as a desirable normative and real action in the range of causal and teleological aspect. Crisis situations narrow social cohesion and weaken trust in institutions. It is imperative to seek constitutional engineering that finds a way out in autopoietic institutions in allopoietic environment. We believe that the most current definition of law is that = law is the negation of the negation of morality. It follows that morality is the most important category of social development. Legitimacy, and then legality, relies on morality. In other words, the rules of conduct must be highly correlated with morality - legitimacy - legality. What is legal follows the rules, what is lawful follows the moral substance and ethical permissibility. Therefore, only a fair and intelligent mastery of a highly professional and ethical teleological interpretation of law is a conditio sine qua non for overcoming current anomalies of social development. The juridical code of legal and illegal is a transformation of moral, legitimate and

legal into YES, and immoral, illegitimate and illegal into NO. The future of education aims to generate a program for global action and a discussion on learning and knowledge for the future of humanity and the planet in a world of increasing complexity, uncertainty and insecurity.

***Keywords**: morality, legitimacy, legality, autopoiesis, clausula rebus sic stantibus*

"There is a lot of accumulation of vaccine stocks in rich countries. Global vaccination campaign is the greatest moral test of today".

Antonio Guterres, UN Secretary General

1. INTRODUCTION

"The motto of Croatia's EU presidency – 'A strong Europe in a world of challenges' – could not have better predicted the events we would all witness in early 2020 – the COVID-19 pandemic that altered the dynamic, technique, and to an extent the content of our activities and priorities."[1] This is the first time in history that all EU member states have simultaneously encountered an emergency[2] crisis affecting core values of democracy, human rights, and the rule of law as such. For all member states, including the Republic of Croatia, the COVID-19 pandemic poses a considerable moral, social, political and legal challenge in terms of how to effectively and humanely respond to the crisis while ensuring that measures undertaken do not impinge on the interest of protecting democracy (and its values of pluralism, tolerance, and freedom of thought), the rule of law, and human rights as core values informing all EU member states. In legal theory, a state of emergency is an exceptional situation, a state of crisis or danger representing a "threat" to the constitutional order of a country, inevitably leading to restriction or suspension of fundamental rights and freedoms of individuals. In the case of the COVID-19 pandemic, Council of Europe member states have a wide margin of appreciation as to whether or not something constitutes a "public emergency threatening the life of the nation."[3] The Republic of

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1 Plenković, A., *Virtualni sastanak članica Europske unije*, 19 June 2020, [https://hr.n1info.com/biznis/a519198-celnici-zemalja-clanica-na-virtualnom-sastanku-prvi-put-o-oporavku-eu-a/], Accessed 5 March 2021.

2 Clausula rebus sic stantibus – the changed circumstances clause (extraordinary, unpredictable, insurmountable circumstances).

3 Article 15 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16; European Court of Human Rights, Council of Europe (hereinafter: Convention), states: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by

Croatia has not declared a state of emergency[4] nor issued a notification of the derogation under Article 15 of the Convention.[5] Our parliamentary majority decided to treat this "new situation" within the scope of "regular situation,"[6] but under the category of "special circumstances."[7] Strategies for curbing the pandemic have not been agreed upon on the level of the EU – they are instead a matter of each state's discretion. Thus, the crisis has put the state and government in the limelight of fighting the pandemic – a fight requiring daily deliberation of legal and just application of "checks and balances" in decision-making. We face an unprecedented slowing down of the globalization process with Europe as a "global player," the closing of borders, regions and even continents, and a growing awareness of the importance of the nation state.[8] In states with multi-level governance such circumstances bring forward the problem of division of competences on the principle of subsidiarity. It is necessary to curb the spread of new polarizations and mutual tensions and turn to one's values as drivers and foundations of future progress. All upcoming changes on the global and European level require fair and smart national strategies and policies aligned with these changes. Adapting to emerging changes is hampered by a representative body operating as a "chatroom," which makes it seem weak, political parties and politicians who lost public confidence, and a passive and confused public lost in a pervasive sense of social powerlessness. We need to build a democracy whose purpose is to promote and respect universal human values, freedom and equality for all, while respecting human rights, freedom and justice that are also moral categories and must apply to everyone. It is now more imperative than ever to create smart policies up to date with scientific achievements. As a country in transition, Croatia must not blindly and mechanically copy suggested European solutions and others' goals, but instead look for economic and legal solutions helping us achieve autopoiesis through self-organization and self-education. The emphasis is on self-organization and self-reference, where quality action can only be achieved through teamwork,

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the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

4 Article 17 of the Constitution of the Republic of Croatia, Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10 i 5/14; hereinafter: The Constitution

5 As of 7 April 2020, eight states have issued notifications of derogation from the Convention, as follows: Albania, Armenia, Estonia, Georgia, Latvia, Moldova, North Macedonia, and Romania, after their competent authorities declared their respective states of emergency. Finland, Italy, Lithuania, Hungary, Portugal, Slovakia, Serbia, and Spain also declared states of emergency, but failed to issue a notification of the derogation from the Convention. A third group of Council of Europe member states, including Croatia, failed to do either of those.

6 Article 16 of the Constitution.

7 Article 22 (2) of the Civil Protection Act (hereinafter: CPA), Official Gazette No. 82/15, 118/18 and 31/20.

8 Current events regarding joint activities of the European Commision in the purchase of vaccines.

and individual differences do not hamper, but promote autonomy (while respecting morality, legitimacy and legality)."[9] Autopoiesis allows the morally and intellectually superior to lead technological advancement, economic and political development. We are currently facing a true test of democracy, and with that in mind, the authors of this paper will take into account the reactions of the Council of Europe (as the acquis of the Council of Europe, i.e. conventional law)[10] and our executive and legislative authorities, and attempt to detect if we are heading in the right direction in "governing" and safeguarding the fundamental values of our democratic society in the wake of these unpredictable circumstances.

2. INSTRUCTIONS – MEASURES FOR PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS DURING THE PANDEMIC

On 7 April 2020, the Council of Europe issued an information document entitled "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis".[11] The purpose of this document is to offer member states a tool for dealing with the current, unprecedented situation and the massive-scale crisis in a way that upholds fundamental values of democracy, rule of law and human rights. States are given the option of derogation during states of emergency (Article 15 of the Convention). It is important to note that derogation under Article 15 of the Convention does not depend on a formal declaration of a state of emergency or any other similar regime on a national level. Each derogation must have a clear basis in domestic law to protect from arbitrariness and must be necessary for dealing with the state of emergency. However, no action contrary to the main Convention requirements of legality and proportionality can be justified. The Council of Europe notes that even in states of emergency the rule of law must prevail. The term "law" refers not only to laws passed by the parliament, but also to those passed by the executive authority, provided they are consistent with the constitution. The legislature may also pass emergency regulations designed to combat the crisis that go beyond existing ones.[12] The duration of the state of emergency should be limited, and governments may be empowered to issue decrees having the force of the law. Regulations adopted during this time must have a so-

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9 Lauc, A., *Metodologija društvenih znanosti*, Pravni fakultet Osijek, 2000, p. 444.

10 Lauc, Z., *Acquis Vijeća Europe i hrvatska lokalna samouprava, Ustavne promjene Republike Hrvatske i Europska Unija*, Sveučilište u Splitu, Pravni fakultet Split, Split, 2010, p. 74-97.

11 [https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40], Accessed 5 March 2021.

12 These must be in accordance with the Constitution and international standards and, if applicable, reviewed by the Constitutional Court.

called "sunset clause" whose duration is overseen by the government. The principle of necessity requires that emergency measures achieve their goal with minimum deviation from the normal rules and process of democratic decision-making.[13] The executive authority must act quickly and effectively, for which purpose decision-making processes may be simplified and some checks and balances relaxed, as long as this is constitutionally advisable and allowed. The parliament, however, must retain its power to oversee the executive, while also maintaining the main function of the judiciary and the Constitutional Court. There is also a possibility of difficulties and restrictions in the conduct of elections, referendums and election campaigns. Member states must ensure an adequate level of medical care to persons deprived of liberty and to all other persons under state protection. States are required to ensure equal access to health institutions and medicinal products and to inform citizens about the pandemic and imposed measures. Such measures have an unprecedented influence on the right to freedom and safety, as well as the right to fair trial. Restriction of movement and deprivation of liberty must be strict and necessary in comparison to other, less restrictive measures. In the functioning of the judiciary (while respecting the right to fair trial), special care must be taken in urgent procedures (family and labor disputes, pre-trial detention etc.). Restriction of the right to privacy, freedom of conscience, freedom of expression and association is permitted only if it is based on law and proportional to a desired legitimate goal, which includes health protection.[14] Any restriction, regardless of whether it requires derogation, must be in accordance with the law and relevant constitutional guarantees, and proportional to the desired goal. Observing the conventional requirement of proportionality is only possible by achieving balance between force and prevention. Ensuring freedom of the press is also emphasized, as well as "smart" and ethical use of modern technology. Following these "technical" guidelines issued to all states, the European Parliament adopted on 4 November 2020 the Resolution on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights.[15] Council of Europe member states, all 47 of them, as parties to the Convention, have adopted similar anti-pandemic measures to avert the spread of COVID-19 infection in the circumstances of a global pandemic. Depending on epidemiological data and understanding of the potential danger of the virus in a particular state, such measures vary in scope and intensity.

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13 The principle of necessity is not invoked directly in the context of institutional exceptional measures, but may be derived from conditions of proportionality and necessity of extraordinary measures in the sphere of human rights – see Venice Commission, *Opinion on the Draft Constitutional Law on "Protection of the Nation" of France*, CLD-AD(2016)006, paragraph 71.

14 This includes restrictions of religious ceremonies, weddings, funerals etc.

15 [https://www.europarl.europa.eu/doceo/document/B-9-2020-0343_EN.html], Accessed 5 March 2021.

Still, despite being enforced to protect people's lives and health in circumstances of uncontrolled spread of the infection, they are undeniably restrictive of certain human rights and freedoms.[16] As vaccinations started throughout the European Union, on 27 January 2021, the Council of Europe adopted Resolution 2361 (2021),[17] which, among other things, found it necessary to "ensure that citizens are informed that the vaccination is not mandatory and that no one is politically, socially, or otherwise pressured to get themselves vaccinated, if they do not wish to do so themselves" and to "ensure that no one is discriminated against for not having been vaccinated, due to possible health risks or not wanting to be vaccinated." Citing Resolution 2337 (2020) on democracies facing the COVID-19 pandemic, the Council of Europe Assembly reaffirmed that, as cornerstone institutions of democracy, parliaments must maintain their triple role of representation, legislation and oversight in pandemic circumstances, and thus called on member-state parliaments to exercise these powers, as appropriate, also in respect of the development, allocation and distribution of COVID-19 vaccines. The Council of Europe Assembly determined it was necessary to ensure compliance to the principle of equitable access to healthcare in order to make COVID-19 vaccines available to citizens regardless of gender, race, religion, legal or socio-economic status, ability to pay, location and other factors that often contribute to inequities within the population; that it is necessary to develop strategies for the equitable distribution of COVID-19 vaccines within member States, to ensure that persons within the same priority groups are treated equally, with special attention to the most vulnerable people; to promote neutrality in access to COVID-19 vaccines between states; to refrain from stockpiling COVID-19 vaccines and allow everyone to evenly procure vaccines for its population and avoid manipulation of vaccine prices; to ensure that every country is able to vaccinate their health-care workers and vulnerable groups; to ensure that Covid-19 vaccines whose safety and effectiveness has been established are accessible to all who require them in the future.[18]

3. REVIEWING ADOPTED MEASURES

In this crisis situation, responses in averting the COVID-19 pandemic are accompanied by increased (expanded) powers of the executive at the expense of the legislature. The unprecedented reach of the adopted measures, their scope and how quickly they are introduced also highlights the importance of controlling their influence on

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16 Omejec, J., *Primjena Europske konvencije o ljudskim pravima u doba koronavirusa*, Informator, No. 6622, Zagreb, 2020, p. 1.

17 [https://pace.coe.int/en/files/28773], Accessed 5 March 2021.

18 Đuras, I., *Zabrana diskriminacije necijepljenih,* IUS-INFO, Zagreb, 2021, [https://www.iusinfo.hr/aktualno/u-sredistu/44524], Accessed 5 March 2021.

human rights with respect to the principle of legality and proportionality. In a crisis situation, the existence of mechanisms for reviewing (controlling) adopted measures is also necessary. When this is done by a court, it takes into account the legality[19] and proportionality[20] of adopted measures, whether they adequately respond to the extraordinary circumstances, whether they are used for the intended purpose, if their scope is limited, whether they are subject to strict guarantees, whether they involve any kind of justifiable discrimination, and whether they were devised in accordance with the law and the Constitution. There are currently only a small number of cases related to the COVID-19 pandemic that have been decided by national courts of EU member states. Reviewing the quality of laws enacted during emergency circumstances and their implementation in practice are key to preventing possible violations of these rights. The Constitutional Court of Bosnia and Herzegovina, in its decision of 22 April 2020, found that forbidding minors and persons over the age of 65 to leave their homes constitutes a violation of their right to freedom of movement, because the restrictions had not fulfilled the requirement of proportionality, while authorities did not clearly define why they believe certain age groups are at higher risk of becoming infected or infecting others. Similarly, authorities did not consider the option of introducing less restrictive measures, the measures did not have a strict time limit, and there was no obligation to regularly review their necessity. The Constitutional Court of Kosovo, in its decision of 23 March 2020, found that certain movement restrictions were not prescribed by law because they were not in accordance with the constitutional requirement that restrictions of rights and freedoms may be introduced only on the basis of a law enacted by the Assembly. The decision of the Frosinone District Court of 15 June 2020 established that the order of 31 January 2020 by which the Italian Council of Ministers declared a state

[19] There must be clear and accessible rules on when measures may be introduced and for which state of emergency. Legal effects and the basis for their adoption must be clearly stated, as well as the scope of the powers granted and situations in which it applies (for more details, see report related to the principle of legality, "Rule of Law Checklist," Venice Commission, 106th Plenary Session, 11-12 March 2016 [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)], Accessed 5 March 2021. Any law or measure must have a clear enough scope so that the public can understand what is required of them and to adapt their behavior accordingly.

[20] "The principle of proportionality requires that States only take measures which are strictly required by the emergency situation. Where exceptional powers are introduced, they must only be used for the reasons for which they were granted.. … Emergency measures should be limited in duration. … The burden must be on the executive to demonstrate the necessity of any extension. … Proportionality is also relevant to the ways in which measures are applied and enforced. Criminal sanctions should be used as a last resort to enforce restrictions on rights imposed to respond to the pandemic and fines should not be unreasonably high. Further, emergency powers must not be enforced in a discriminatory manner." Advice on Individual Rights in Europe, The AIRE Centre: Covid-19 and the Impact on Human Rights - An overview of relevant jurisprudence of the European Court of Human Rights, p. 158-159, 2020 AIRE Centre [https://www.rolplatform.org/wp-content/uploads/2020/10/covid-guide-eng.pdf], Accessed 5 March 2021.

of emergency was contrary to the Italian Constitution. An order of the Administrative Tribunal in Strasbourg of 20 May 2020 temporarily repealed the ordinance of the City of Strasbourg requiring all persons over the age of 11 to wear a mask when walking around the city. The Tribunal cited Article 8 of the Convention and principles of legitimate aim and proportionality, and decided that this measure was not justified by a strong reason relevant to local circumstances in Strasbourg. On the basis of the same principles, this ordinance was repealed on 2 September 2020 and local authorities were invited to amend it.[21] The Supreme Court of the USA ruled in an action brought by the Roman Catholic Diocese just before the onset of these measures in Croatia, in which it explicitly states that it is not justified or allowed to annul basic human rights during a declared pandemic, as done by the governor of New York whose measures restricted places of worship in the red zone to a maximum of 10 people, and those in the orange zone to 25. This was only a temporary measure, but the court injunction remains in force pending decision by the Court of Appeals for the Second Circuit, reviewing the justification for disputing the Governor's order. The decision in question is Roman Catholic Diocese of Brooklyn v. Cuomo[22], ruled by a 5:4 majority vote, for which (liberal) justice J. Sotomayor filed a dissenting opinion, stating: "Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily."[23] In February 2021, the Supreme Court of the USA issued another decision regarding the ban on gatherings within religious buildings, including indoor religious services, in the case South Bay United Pentecostal Church v. Governor of California.[24] In this most recent case, the court decided to (temporarily) repeal the total ban on religious services in churches, but upheld the state's power to restrict the number of worshippers in churches at religious services to 25% of their capacity. The court also upheld a part of the governor's order to ban singing and clapping during indoor religious services. Justices Kagan, Breyer and Sotomayor (the so-called liberal wing of the supreme Court) filed a joint dissenting opinion opposing the Court's decision, pointing out: "Justices of this Court are not scientists. Nor do we know much about

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21 The AIRE Centre, *op. cit.*, note 20, p. 164.

22 Supreme Court of the United States, The Roman Catholic Diocese of Brooklyn, New York, Applicant v. Andrew M. Cuomo, Governor of New York, on application for injunctive relief, 592 U. S. 2020 No. 20A87 Per Curiam, 25 November 2020 [Lower Court: United States Court of Appeals for the Second Circuit, Case Numbers: 20-3590], [https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf], Accessed 8 March 2021.

23 Sotomayor, J., dissenting, *ibid.*, p. 3.

24 Supreme Court of the United States, South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California, et al., on application for injunctive relief, 592 U. S. 2021 No. 20A136 (20–746), 5 February 2021, [https://www.supremecourt.gov/opinions/20pdf/20a136_bq7c.pdf.], Accessed 8 March 2021.

public health policy. Yet today the Court displaces the judgments of experts about how to respond to a raging pandemic. The Court orders California to weaken its restrictions on public gatherings by making a special exception for worship services. The majority does so even though the State's policies treat worship just as favorably as secular activities (including political assemblies) that, according to medical evidence, pose the same risk of COVID transmission. Under the Court's injunction, the State must instead treat worship services like secular activities that pose a much lesser danger. That mandate defies our caselaw, exceeds our judicial role, and risks worsening the pandemic."[25] By a preliminary ruling No.1 BvQ 28/20 of 10 April 2020, the Federal Constitutional Court of Germany upheld the ban on religious services ordered by the State of Hessen, challenged by a Catholic who wanted to attend mass and Easter services.[26] The court found a particularly severe infringement of the applicant's freedom of religion, but in the end concluded that mass gatherings in churches would seriously endanger public health and people's lives. So, after "weighing possible consequences," the Court denied the request, pointing out that the disputed regulation should be regularly reviewed, which means it is not a decision on the merits, but a request for an interim measure.

4. A STATE OF EXCEPTIONAL (CHANGED) CIRCUMSTANCES

"There are occasionally situations that, like lightning, cast a sudden light on the center of political power. These are states of emergency …"[27] Hegel defined long ago: measure = optimum. In other words, finding the best solution in the given circumstances. For constitutional rulings, it means sophisticated seeking of the right measure of "checks and balances," or balance between the needs and interests of individuals and the missions of the collective.[28] Discussions on a state of emergency did not bypass Croatia, quite on the contrary – despite the fact that more than a year has passed since declaring the COVID-19 pandemic, and the fact that the Constitutional Court has issued decisions on the adopted measures/laws, the state of emergency is still a hot topic of public discussion. There is no doubt that in an ideal political system the rule of law (which is disrupted in crisis situations), as the ultimate value of the constitutional order, would be most consistently up-

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25 Kagan, J., dissenting, *ibid*., p. 1, [https://www.supremecourt.gov/opinions/20pdf/20a136_bq7c.pdf#page=10], Accessed 8 March 2021.

26 [https://www.bundesverfassungsgericht.de/e/qk20200410_1bvq002820.html], Accessed 8 March 2021.

27 Schmitt, C., *Politiche Theologie*, Leipzig 1934 p. 11 .

28 Lauc, Z., *MORALITET – LEGITIMITET – LEGALITET = Trojstvo konstitucionalnog inženjeringa, HAZU 30-godišnjica Ustava RH (1990-2020); Ustavne promjene i političke nagodbe - Republika Hrvatska između ustavne demokracije i populizma,* HAZU, Zagreb, 2020, in press.

held if all relationships that could possibly arise in states of emergency were normatively regulated in advance. Real life, however, does not behave this way, and precisely because of the unexpected nature and scope of states of emergency, regulating them in advance would be ineffective.[29] Such situations are disruptions of social life that cause a discrepancy between normal and abnormal, between what is regulated by law and what occurs in specific, newly-occurred non-regulated circumstances. This means the executive must act by "new" means, based on special powers granted in order to preserve new relations altered by the emergency. "From the perspective of constitutionality and legality, it is a matter of modifying the existing order by creating a specific but legally regulated order that is expected to end and allow a return to the previous state as soon as circumstances return to normal."[30] All countries have faced two key phenomena: first, that this situation demands a modification of the legal order, requiring specific regulation (so-called special legality), and second, that the executive "enters" the domain of the legislature, resulting in restriction of fundamental human rights and freedoms. States of emergency require not only restrictions of certain rights and freedoms, but also a reaction with the aim of preservation and survival of the political community as such.[31] Protection of public health has led to restrictions of rights and freedoms of individuals[32] by decision of the executive, as well as a temporary suspension of requirements for continued checks and balances of the executive. According to Prof. Smerdel, in addition to its normal constitution, every democratic state has in reserve a "crisis constitution," allowing it to defend from attacks and preserve democracy during difficult times.[33] As mentioned above, Croatia has not declared a state of emergency by "activating" Article 17 of the Constitution, but treats this situation as a state of exceptional circumstances.[34]

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29 "If, and when legislative provisions exist, they regulate in advance only those measures whose effectiveness in a given emergency is determined on the basis of highest probability." Omejec, J., *Izvanredna stanja u pravnoj teoriji i ustavima pojedinih zemalja,* Pravni vjesnik Pravnog fakulteta u Osijeku, p. 172-196, 1996, p. 173.

30 *Ibid*., p. 174.

31 "In an emergency, the welfare of the nation should be the supreme law (Salus rei publicae suprema lex esto)." Smerdel, B., *Ustavno uređenje europske Hrvatske, II. izmijenjeno i dopunjeno izdanje*, Narodne novine, Zagreb, 2020 p. 126.

32 "… An individual's right to sneeze is inviolable, restricted only when circumstances demand it, or in case of emergency, as is the case with the pandemic caused by the COVID-19 virus in 2020" *Ibid*., p. 124.

33 "This highlights the need to respect legal standards: the principle of proportionality in the restriction of rights (Article 16 (2) of the Constitution of the Republic of Croatia), a test of public interest, a test of justifiability of individual measures in a democratic society and other means (tools) of independent judiciary in the process of protecting constitutional rights."

34 Omejec, J., in an expert review: "*Zašto članak 17. kada imamo članak 16. Ustava,*" ("Why Article 16 when we have Article 16 of the Constitution") [https://www.vecernji.hr/vijesti/omejec-na-izvanredno-

5. DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

With regard to the necessity of "activating" Article 17 of the Constitution, the Constitutional Court found that decisions on whether particular measures to combat the COVID-19 pandemic will be made under Article 16 or Article 17 of the Constitution are the exclusive domain of the Croatian Parliament. The Constitution left the aforementioned choice to the Croatian Parliament as the legisla-

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stanje-ne-treba-ni-misliti-a-kamo-li-ga-zazivati 1389637], Accessed 25 February 2021, states, among other things, that "the existing state is not such as to merit activation of Article 17 of the Constitution. The Constitution contains a general Article 16 with the same disposition as Article 17. The difference is that Article 16 is more broadly defined (referring to restriction of all rights and freedoms, not just those guaranteed by the Constitution), and has been in continuous use as a general provision. The Law on the Protection of the Population from Infectious Diseases has already passed the test of constitutionality (Constitutional Court Decision No. U-I-5418/2008 of 30 January 2014), incorporating Article 16 of the Constitution. This law allows strong restriction of constitutional rights and freedoms, particularly freedom of movement ... This law gives government the power, at the competent minister's proposal, to declare each new infectious disease as one whose prevention and control is of interest to the Republic of Croatia, and to decide appropriate measures … In this respect, by establishing the Civil Protection Headquarters [hereinafter: Headquarters], whose powers have been further broadened by the Parliament by amendments to the Civil Protection Act, the Government has acted in compliance with the cited provision. Decisions being made by the Parliament under Article 17 of the Constitution to control the coronavirus pandemic are a far worse choice than the existing model based on Article 16 of the Constitution. First, the Constitution defines a number of less restrictive and more appropriate measures than declaring a state of emergency. Second, the manner of declaring a state of emergency is not clearly defined in Article 17 … The proper interpretation is that a state of emergency is declared by a reasoned decision on restricting enumerated constitutional rights and freedoms, adopted by a 2/3 parliamentary majority, and which is in essence a derogation from these Articles of the Constitution for the duration of the state of emergency (similar to Article 15 of the Convention). Once this decision is adopted, the 2/3 majority requirement for further restrictions of rights and freedoms is lifted. Natural disasters and infectious diseases have disparate and incomparable legislative, administrative, and judicial regimes. Implementation of Article 16 of the Constitution proves that all necessary measures can be adopted within the "normal" democratic legal order. A deviation from Article 16 of the Constitution would be necessary only in the event that in the coming period, due to force majeure, operation of the Croatian Parliament is forcibly interrupted. Having established this constitutionally relevant fact, the Constitutional Court would also confirm that conditions are met for the state to begin operating under a modified constitutional regime, in which the President of the Republic and the Government (also) assume the capacity of the legislature. This means a state of emergency can be declared by their decision … This scenario should not even be considered at this moment, let alone invoked. Croatia is a representative democracy. Its representative body (the Croatian Parliament) is authorized and required – through its constitutional and legislative instruments – to regulate the preconditions for overcoming the present crisis within the framework of the Constitution, preserving and protecting the best democratic tradition as our country's foundation. They are effectively protected by keeping under parliamentary control the general legislative framework for managing the current health crisis, which inevitably results in severe restrictions of individual and collective rights and freedoms. As a representative body of the people, and within its function as seat of legislative power, the Parliament must firmly hold the reins of public health within the limits of Articles 16 and 69 of the Constitution, for as long as it is able to convene."

tive authority. The Constitutional Court has no authority to order the Croatian Parliament to choose one or the other constitutional option of restricting human rights and fundamental freedoms. So, according to the Constitutional Court, the fact that disputed laws (and measures) were not adopted under Article 17 of the Constitution does not make these laws unconstitutional. Regarding the Headquarters' authority to adopt measures/decisions, with respect to legitimate aim and proportionality, the Constitutional Court found that the Headquarters is an expert, operative and coordinating body for enforcing measures and activities of civil protection in disasters and catastrophes, operating under direct supervision of the Government. So, it is unquestionably a body with executive powers, given that this inevitably stems from provisions of the CPA which, among other things, regulate the status, composition, and authorities of the Headquarters, as well as supervision of its activities. Given the fact that the COVID-19 pandemic is a case of extraordinary circumstances and that it is a new infectious disease threatening the health of the population, the Constitutional Court has found that a new legal framework has been established, under which the Headquarters (along with the Minister of Health) is empowered to adopt decisions/measures for preventing the spread of the virus. Therefore, the Constitutional Court decided that the Headquarters had and still has legal authority to adopt measures in accordance with the law. The Constitutional Court, however, pointed out that this does not imply that Headquarters' decisions are not subject to control by the executive, legislative and judicial authorities. This is because, as mentioned above, The Headquarters operates under direct supervision by the Government. With respect to legitimate aim, the Constitutional Court has found that measures envisaged by the law and adopted by the Headquarters have the same goal – protecting the health and lives of citizens by preventing and mitigating the spread of the COVID-19 pandemic. So, the legitimacy of the aim sought by these measures is unquestionable. The Constitutional Court found that the Croatian Parliament acted within its constitutional powers when it enacted laws and amendments to laws that, with the aim of preventing the spread of infection in order to save people's lives and health, allow, among other things, adoption of measures restricting fundamental human rights and freedoms. With respect to the legal nature of the measures/decisions adopted by the Headquarters and the Constitutional Court's authority to decide on their constitutionality and legality, and taking into account the fact that certain measures/decisions undeniably restrict fundamental human rights and freedoms (and can, in certain cases, threaten the very essence of law), the Constitutional Court found that measures are considered "other provisions" under Article 125, indent 2 of the Constitution. Regarding the measure of self-isolation, the Constitutional Court found it indisputable that the measure represents a restriction of certain rights and freedoms, above all freedom of movement. Given that the

measure of self-isolation is stipulated by the relevant provision of the law, the Constitutional Court found that the legality of its adoption is, in principle, constitutionally solid. The Constitutional Court also justified the legitimacy of the aim sought by imposing the measure of self-isolation in individual cases. In other words, temporarily forbidding movement (self-isolation) to persons reasonably suspected to have been exposed to the risk of infection with COVID-19 aims to prevent the possibility of spreading the disease. Regarding restriction of operation of catering facilities, the Constitutional Court pointed out that the constitutionality and legality of individual Headquarters' decisions under Article 9a of the Hospitality and Catering Industry Act, including their proportionality, can only be assessed in special Constitutional Court proceedings. Regarding the necessary measure on mandatory use of face masks during the COVID-19 epidemic and the Decision on the organisation of public transport during the COVID-19 pandemic, the Constitutional Court found that imposing the obligation to use face masks, as mandated by disputed decisions of the Headquarters, is a necessary measure adopted to protect the health of citizens. This is because in special circumstances calling for urgent measures to protect the lives and health of citizens the state is obligated to take such measures in accordance with its powers. In such cases public interest (protecting the lives and health of citizens) outweighs individual citizens' rights, and they are obliged to respect and observe measures (preventive, safety, etc.) imposed by authorities to protect lives and health of the entire population. Regarding working hours and manner of operation of shops, the Constitutional Court found that, when adopting the disputed measure, the Headquarters violated the principle of proportionality. In conclusion, the above stances can be summarized as the Constitutional Court's assessment that given the present circumstances, and from the perspective of the Constitution and the Convention, certain rights or freedoms may be restricted only if absolutely necessary, whereby the intensity of the restriction should never put into question (jeopardize) the essence of a particular right. In addition, restrictions must be based on solid legal grounds, have a legitimate aim that promotes public interest and respect the requirements of proportionality, so that their scope and duration are proportional to the nature of the need for restriction in each individual case.[35]

[35] To date, according to available sources, of all Constitutional Courts whose jurisprudence is usually followed by the Constitutional Court of the Republic of Croatia, because of its significance for developing European and global constitutional court doctrine, none have made a decision on merits in these matters. Several interim measures/injunctions have been ordered, but no decisions on merits. Croatia is an exception in this regard. Constitutional Court orders Nos. U-I-1372/2020 et al., U-I-2162/2020 at al., U-II-3170/2020 et al., U-II-1373/2020 et al., U-II-1312/2020 et al., U-II-2027/2020 and U-II-1430/2020 and Decision No. U-II-2379/2020 of 14 September 2020. The Constitutional Court also issued the following Order No. U-II-5709/2020 and U-II-5788/2020 of 23 February 2021, rejecting the request for assessment of the Decision on necessary epidemiological measures restricting gatherings

6. THE ROLE OF EXPERTS

To help states (governments) achieve responsibility during the pandemic, a possibility was given to appoint experts or expert bodies with a purely advisory role. It is key that chosen experts act professionally and ethically (lege artis and bona fide). So, for example, it is possible to assign an ombudsman to monitor imposed measures and warn of potential violations of human rights and freedoms. As another possibility, it is advised to appoint workgroups composed of experts in certain fields.[36] For example, in South Africa, a former Constitutional Court judge was named as special judge on a COVID-19 "mission" to advise the government regarding the implementation of regulations and adopted measures. Interdisciplinary cooperation with independent experts from various fields (health, technology, economics, etc.) should aid the application of principles of legality and proportionality. Cooperation with experts should also contribute and help ensure decisions are based on scientific knowledge, serve their intended purpose (protecting health), and minimally restrict rights and freedoms. However, we have witnessed certain disagreements and dilemmas in the collaboration of our Government and its appointed Scientific Council, which has done little to help citizens feel they are in (relatively) "safe hands."[37] On the contrary, it has further impaired the already weakened citizens' trust in the ethics and morality of their joint operation and crisis management. It should also be noted that the media played a major role in fostering distrust in the Government and the Scientific Council[38], failing to

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and introducing other necessary epidemiological measures and recommendations in order to prevent the spread of COVID-19 through gatherings, while Order No. U-II-6087/2020 and U-II-6160/2020 of 23 February 2021 rejected proposals to initiate proceedings to assess constitutional and statutory compliance of these measures. Order No. U-II-5920/2020 et al. of 3 February 2021 rejected proposals to initiate proceedings to assess constitutional and statutory compliance of the following measures: Decision on temporary ban and restriction of border crossings, Decision on necessary epidemiological measures restricting gatherings, Decision on the organization of public transport. Šeparović, M., *Concurring opinion on Constitutional Court Order No. U-II-5709/2020 and U-II-5788/2020* of 23 February 2021: "Legally irrelevant statements by individuals are circulating in public, claiming it is a 'fact' that a pandemic is a natural disaster, and as such merits activating Article 17 (1) of the Constitution. Such claims wholly ignore the relevant legal framework, while also ignoring that 'natural disaster' is a legal category par excellence, and that only as such can it be constitutionally relevant, and only then does it imply legal consequences."

36 On 25 March, the Prime Minister issued the Decision on the Establishment of the Scientific Council for the Suppression of the COVID-19 Disease Epidemic Caused by the SARS CoV-2 Virus. The Scientific Council was founded as a multidisciplinary body composed of prominent Croatian scientists from Croatia and abroad – public health experts, molecular biologists, epidemiologists, infectologists and virologists – to exchange opinions on measures imposed to combat the COVID-19 infection.

37 [https://www.jutarnji.hr/vijesti/hrvatska/dramatican-apel-26-znanstvenika-i-doktora-ovo-su-nase-preporuke-za-suzbijanje-epidemije-15035240], Accessed 15 March 2021.

38 [https://net.hr/danas/hrvatska/tko-zapravo-donosi-mjere-i-kreira-nase-zivote-plenkovic-je-okupio-znanstvenike-oni-tvrde-da-su-nezavisni-ali-glavnu-rijec-vodi-netko-drugi/], Accessed 15 March 2021.

acknowledge the fact that appointing such an advisory body is among the "tools" recommended to all EU member states, and instead only reporting on the composition of its membership, accompanied by personal opinion and interpretation of its (advisory and independent) role.

7. MORAL CROSSROADS AND A CRISIS OF DEMOCRACY

The word "pan-demic" comes from Ancient Greek words *pan* (all) and *demos* (people) and indeed the entire population (world) has been affected by it in the same way – we are all equal before the virus. The EU Charter of Fundamental Rights states: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. … Human dignity is inviolable. It must be respected and protected."[39] The effects of this pandemic have caused a loosening of moral restraints and some long-delayed reforms and changes in society.[40] "The pandemic has shown that we are capable of not always making economic considerations our first priority. We have done the right thing morally, and decided to prioritize health at almost any economic price."[41] This pandemic has uncovered all the systemic weaknesses of the ruling ideology, including the belief we can manage human and moral values through the technological process. However, there can be no true progress without moral progress. The "recipe" for overcoming chaos and hopelessness and creating civilized communities (from local to supranational) rests on legal professionals, as social science technologists, using their highly professional, rational and ethical teleological interpretations to autopoietically shape constitutional standards of conduct and insisting on their fair and rational application. In the current pandemic, the Constitution and its guaranteed rights and freedoms are the basis for all further action, whereby Constitutions and constitutional rights have proven their freedom-winning function. The principle of legality guarantees that every law will embody certain moral standards of respect, fairness, and predictability, which are important aspects of the rule of law. Now more than ever, moral defensibility (good-bad), legal effectiveness (input-output) and political feasibility of individual regulations must be ensured. Constitutional values and principles have allowed a more subtle interpretation and

[39] Official Journal of the European Union No. 2012/C 326/02, [https://eur-lex.europa.eu/eli/treaty/char_2012/oj], Accessed 15 March 2021.

[40] "In the midst of every crisis, lies great opportunity." Einstein, A.

[41] Markus, G., German philosopher, in an interview for Der Spiegel, [https://www.dw.com/en/how-coronavirus-pandemic-has-spurred-change-in-germany/a-54500973], Accessed 15 March 2021.

application of the law (as witnessed in adopting pandemic-related measures).[42] So, the Constitutional Court had to strike a balance in each specific situation, finding the optimal model of achieving morality-legitimacy-legality of the authorities' decisions based on the rule of law. In this new situation it is important to ensure reliability and validity and seek consistent criteria and benchmarks.[43] The credo of constitutional engineering is creating relations between people to achieve a life in love and freedom. We live in a time when knowing is no longer enough, and knowing how becomes necessary. We need to change the paradigm of valuing profession instead of knowledge. Knowledge is power. If ignorance and power prevail, the world is in danger as arrogance and disregard take hold. In other words, current institutions should be "reset" (refreshed), especially through the filter of morality and legitimacy, using autopoietic technology to unlearn what has been learned. As a result of this pandemic crisis, we now also face a crisis (deficit) of democracy and a moral crisis. There is no honesty, empathy, correctness, respect. This is because democracy and justice have been marginalized and excluded as the only true corrective forces of society. In the midst of crisis as a "state of emergency," "recipes" suggesting reduction, even suspension of democracy are on the rise. This culminated in the current pandemic crisis, requiring a reconfiguration of desired behavior for both the individual and society in so-called "exceptional circumstances," promoted by authoritarian constitutional engineering, and weakening of the "true democratic constitution." The solution, however, is in the division of power (horizontal and vertical), in democratic checks and balances, in constitutional court rulings, in promoting human rights and freedoms, the rule of law, and a moral, legitimate, and legal government[44]. All this will not be possible without the synergy of Government and Parliament, and self-organized teams of people who are motivated and trained to possess and keep developing moral, intellectual and social capital. Institutions are made up of actual people whose motivation, morality, ethics, training (knowledge and skills), team networking, and social sensitivity are paramount in determining the content and process of decision-making and action. The resilience of democracy is characteristically dependent on the health of its institutions – vital components protecting minorities and contributing to resolving political disagreements in a peaceful and orderly manner. "Assumptions of an omnipotent (untouchable) government have proved

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42 The best example of this is the principle of proportionality, which is a part of Croatian constitutional order, emphasizing that regulations must always be proportional to their aim.

43 "Reliability means ensuring equal functioning in space and time for all, and validity means responding adequately, understanding the essence. Criteria are vantage points for evaluating the quality of results, and benchmarks are quantities measuring how well criteria are met." Lauc, *op. cit.,* note 28, p. 10 and 11.

44 *Ibid*., p. 29.

counterproductive, confusing legality and legitimacy while neglecting morality." Values and standards of the European Union should be recognized and developed in the context of Croatian statehood.[45] All the more so because (as witnessed in this pandemic), despite globalization, the nation-state (left to its own devices) has emerged as the fundamental unit of international relations. "Such a society, as any other, needs moral values like transparency in activities, honesty, responsibility, solidarity and, above all, vigilance against corruption and bribery.[46] Modern sovereignty implies strengthening (the morality, legality, legitimacy of) oneself. It has now become apparently clear that human rights and fundamental freedoms must not only be legally proclaimed, but also rationally justified, to align with the ethical and moral dignity of man.[47]

8. CONCLUSION

We chose this topic to contribute to the premise that the global vaccination campaign is today's greatest moral challenge, which perfectly complements our inquiry into the correlation of morality-legitimacy-legality. In other words, for all instances of the institute of changed circumstances (clausula rebus sic stantibus), we must seek, among other things, optimal legal regulation providing an autopoietic institutional framework on a global, European, national, regional, and local level of social and state constitutional organization. Law should serve to shape relations between people to achieve a life of love and freedom, which is consistent with law's mission as the negation of the negation of morality. It is an art to find balance, or the right measure (optimum is the measure) between contradictions in protecting rights and freedoms of individuals and the legal order, public morality and health (Article 16 of the Constitution). Only by a holistic, interdisciplinary approach (both/and, not either/or) and highly professional and ethical teleological interpretation can we overcome said contradiction, protecting people's health without compromising the rule of law. The solution is in the division of power (horizontal and vertical), in democratic checks and balances, in constitutional court rulings, in promoting human rights and freedoms, the rule of law, and a moral, legitimate, and legal government. In great crises, a lot that has been latent becomes manifest. This is a time of autopoietic restructuring of institutions, fol-

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45 In the words of former Constitutional Court President Jasna Omejec, "the legal system has turned into a 'patchwork' of unclear and contradictory solutions and new institutions foreign to Croatian tradition." Smerdel, *op. cit.*, note 31, p. 552.

46 Tomašević, L., *Etike „trećeg lica" i moralne vrednote,* Katolički bogoslovni fakultet, Sveučilište u Splitu, Split, 2015, p. 162.

47 By no coincidence, Article 1 of the Constitution of the Federal Republic of Germany places the utmost value on human dignity, emphasizing inviolable and inalienable human rights as the foundation of every human community, peace and justice.

lowing necessary, deep scientific analyses (quantum physics, epigenetics, automatization, robotics, artificial intelligence, big data), while renouncing revolutionary endeavors and discerning what to keep, and what to upgrade, both normatively and in practice. An important role surely belongs to the future of education aiming to generate a program for global action and discussion on knowledge and learning for the future of mankind and the planet in an increasingly complex, uncertain and insecure world. The "recipe" for overcoming chaos and hopelessness and creating civilized communities (from local to supranational) rests on legal professionals, as social science technologists, using their highly professional, rational and ethical teleological interpretations to autopoietically shape constitutional standards of conduct and insisting on their fair and rational application. A special place and role belong to constitutional courts, which is why we presented the existing case-law of the Constitutional Court of the Republic of Croatia. EU law (acquis communautaire & acquis of the Council of Europe), along with the law of member states, should be sophisticatedly multi-layered on the principles of subsidiarity and proportionality. Values and standards of the European Union should be recognized and developed in the context of Croatian statehood. All this is only possible by nurturing high-quality knowledge, motivation and team self-organization. The emphasis is on self-organization and self-reference, where quality action can only be achieved through teamwork, and individual differences do not hamper, but promote autonomy (while respecting morality, legitimacy and legality). Autopoiesis allows the morally and intellectually superior to lead technological advancement, economic and political development. To achieve this, we must learn to love ourselves and our country first, to learn to love our betters and learn from them, building a society of love and freedom that will equitably participate in the life of the European Union.

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UDK 342.7:351.941]:614.4
Professional paper

HUMAN RIGHTS OMBUDSMEN IN THE PANDEMIC – CHALLENGES IN PROTECTION OF VULNERABLE GROUPS

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ABSTRACT

Pandemic of virus COVID-19 posed numerous and unprecedented challenges to citizens and authorities which required shift in behavior and actions of all segments of society. Representing Ombudsmen Institution of Bosnia and Herzegovina, authors shared their experience in monitoring implementation of the decisions of all levels of government and presented challenges in striking the right balance between interests of public health and protection of rights of vulnerable groups. Public authorities in Bosnia and Herzegovina have passed emergency measures aimed at containing the spread of virus, but some of them failed to maintain human rights standards. Following the decisions of crisis centers to limit the freedom of movement, it was necessary to secure rights of children to education, protection from domestic violence and neglect in the family context. In introducing online education, authorities were asked to adapt recognition and grading system to the children in different conditions and circumstances, especially to the children with difficulties in development, children living in poverty and on margins of society such as Roma children or those living in institutions. Ombudsmen Institution registered increase in the number of domestic violence cases because measures limiting freedom of movement had impact on victims' ability to seek help from trusted sources, usually members of immediate family or representatives of law enforcement agencies. Having in mind that large number of citizens could not afford access to the official gazettes in any form, Ombudsmen requested that all enacted legislation be accessible online recommended that the decision banning reporters from conferences be reconsidered, guided by the right of citizens to be informed of their government actions. Examining the practice of placing COVID stickers on mail by the Post Office, Ombudsmen issued recommendation to stop such practice as it was deemed disproportional to the right to privacy and protection of personal data, while the pro-

tection of postal workers could have been ensured by other protective measures. It also became evident that national budgetary capacities had to be increased in order to prevent deterioration in provision of basic public services such as health and social protection, since economic consequences of the pandemic were disproportionally felt by the groups exposed to poverty, such as Roma, refugees or migrants. Drawing conclusion from concrete cases, authors offer review of particular emergency measures, analyze their adequacy, justifiability and timeliness, while presenting authorities' response to Ombudsmen's findings in formulating more adequate and efficient but, at the same time, least intrusive measures taken in response to the disaster. In search of common response to such widespread phenomenon, governments should recognize the intention of Ombudsmen Institutions to be in „permanent session" over protection of vulnerable groups and should more actively involve it in discussions on emergency measures and their effect on human rights and freedoms. It proved to be better suited to act quickly, to apply more effective remedies and to correct government actions thanks to its knowledge of the local context than traditional institutions for protection of human rights, such as constitutional courts, international courts or treaty bodies.

***Keywords**: pandemic, human rights, ombudsmen, social protection, vulnerable groups*

1. INTRODUCTION

Pandemic of virus COVID-19 posed numerous and unprecedented challenges to citizens and authorities which required shift in behavior and actions of all segments of society, from the decision makers to every individual. For the first time in history, all countries are concurrently affected by the same emergency crisis situation which swayed pursuit of the whole list of individual rights. In search of the best comparative solutions and practices, it is therefore useful to draw on varied experiences of institutions who acted as first responders to human rights violations in face of such challenges. Within its mandate of human rights protection, Ombudsmen Institution of Bosnia and Herzegovina monitors implementation of the decisions of all levels of government where the main challenge remains striking the right balance between interests of public health and protection of rights of vulnerable groups. Just as in other countries, public authorities in Bosnia and Herzegovina have passed emergency measures aimed at containing the spread of virus. Some of the decisions, however, failed to maintain human rights standards or did not take into consideration needs of vulnerable groups of citizens, such as children, women or those on social welfare. At the same time, civil rights such as right to access public information or media freedoms were constrained which required intervention of independent bodies. Reason for enacting such measures was the need to protect life and health of citizens in times of emergency, but they nonetheless had serious impact on many basic rights such as freedom of movement, economic liberties and activities or right to social protection. Generally, measures limiting fundamental rights and those aimed at prevention of the spread of the virus require special scrutiny, prompt reaction and close coordination between crisis centers and other competent authorities.

Such task proved to be a challenging one in a country with the divided jurisdiction between different levels of government, plurality of legal systems and complex administrative structure established by the Dayton Peace Agreement. Specific dilemmas on application of human rights standards, daily struggles to choose the way forward and maintain the course of action in face of protests and complaints are illustrated by concrete examples and case studies presented in the article. Pandemic brought fight against discrimination on completely different level in Bosnia and Herzegovina, where *de facto* inequality was caused by the fact that different levels of government pursued separate and uncoordinated efforts to contain the spread of the virus. Therefore, it not only deepened the existing divisions as it was the case in other parts of the world, but new divisions appeared in all spheres of life, depending where the citizens resided within the country. The goal of this analysis is to address main challenges in securing legality, transparency and proportionality of the measures and actions taken by the authorities, usually limiting or altogether suspending citizens' rights. In line with customary international law and practice, public health emergency can serve as legitimate reason for derogation of fundamental rights and freedoms, but it is indisputable that such emergency measures should be subject to periodic and independent review. It is precisely the intention of authors to review particular emergency measures, analyze the adequacy, justifiability and timeliness of measures taken by the government authorities and to present challenges in implementation of required standards in local context. With such analysis in hand, public authorities, particularly in legislative branch, can be facilitated in formulating more adequate and efficient but, at the same time, least intrusive measures taken in response to the disaster. It will also be demonstrated how the work of national human rights mechanisms themselves have been affected in response to the pandemic taking into account that it is impossible to know how long the pandemic will last and what the total consequences will be. Citizens' compliance with the protective epidemiological measures was limited, partly due to existing mistrust of the authorities. General recommendations from international authorities proved to be of little avail to numerous and varied incidents in reality, where decision had to be brought with utmost urgency, with no space for generally welcomed international support, expertise or cooperation. Even courts including local courts and European Court of Human Rights had to temporarily close its doors, postpone the hearings and delay decisions in cases brought to their attention. In the void that was created, Ombudsmen Institution relied on its decades long experience with crisis relief, sensibility developed in post-conflict environment and ability for quick reaction sharpened by several emergencies in recent past.[1] Its flexible, unbureaucratic and customized ap-

[1] 2014 unrest in Bosnia and Herzegovina, available at: [https://en.wikipedia.org/wiki/2014_unrest_in_Bosnia_and_Herzegovina#:~:text=The%202014%20unrest%20in%20Bosnia,and%20with%20the%20aim%20of], Accessed 13 March 2021; 2014 Southeast Europe floods, available at: [https://

proach, not bound by strict rules of procedures, proved to be crucial in finding solutions accepted by the government while being attuned to the needs of population.

2. RIGHTS OF CHILD

Since the outbreak of pandemic, Ombudsmen have issued umber of recommendations[2] aimed at protection of the rights of child and securing their best interest. Following the decisions of crisis centers to limit the freedom of movement[3], it was necessary to secure rights of children to education, protection from domestic violence and neglect in the family context. Faced with many uncertainties regarding duration, effects and outcome of the pandemic, educational institutions adopted measures aimed at uninterrupted completion of the school year, by introducing online education.[4] In doing so, they were reminded of their obligation to adapt recognition and grading system to the children in different conditions and circumstances, specially to the children with difficulties in development, children living in poverty and on margins of society such as Roma children, those deprived of liberty (e.g. in correctional facilities) or those living in institutions, such as children without parenting. Ombudsmen called upon educational authorities to issue clear guidance aimed at providing all necessary conditions for continuation of classes, including those related to hygiene, space and distance, staff and security. Many parents, citizens and NGOs expressed their dissatisfaction with complete prohibition of movement for all, including children, that was in place during first couple of months of the pandemic.[5] Ombudsmen carefully assessed views and opinions expressed by the citizens and at the same time called upon authorities to take into consideration best interest of the child when adopting or reviewing measures taken in protection of public health. This process resulted in the decision[6] of the Constitutional Court of Bosnia and Herzegovina, which ruled that complete and indefinite ban violated rights of appellants to freedom of movement and it was subsequently lifted. At the same time, Ombudsmen issued opinion according to which the limitations of office hours of competent authorities presented the

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2 Human Rights Ombudsman of Bosnia and Herzegovina, Recommendation no. P-86/21, P-127/20, P-59/20 and P-92/20.

3 Decisions no. 40-6-148-34/20 dated 20.03.2020 and 12-40-6-34-1/20 dated 27.03.2020.

4 Conclusion no. 01-3/20 dated 17.03.2020.

5 Human Rights Ombudsman of Bosnia and Herzegovina, Complaints no. Ž-SA-01-284/20, Ž-BL-01-311/20 and Ž-LI-01-268/20.

6 Constitutional Court of Bosnia and Herzegovina, AP – 1217/20, dated 22.04.2020.

risks for the increase of numbers of domestic violence incidents. Limited social contacts, unfortunately, proved to be detrimental to protection of rights of child within the family context. In their decisions, Ombudsmen made reference to the views of the United Nations Committee on Rights of Child which stated that limitations of movement can expose children to more physical and psychological violence at home, and issued recommendations to the member states to review measures limiting fundamental freedoms and to maintain only those that are necessary, proportional and minimal.[7] Analyzing responses from government during first months of pandemic, it transpired that lack of financial resources affected measures aimed at securing the best interest of child. Ombudsmen issued recommendations to the authorities that core services such as emergency measures of removing children from violent surrounding must not be affected. In that regard, it was underlined that all workers coming into direct contact with beneficiaries of public services must be provided with safety gear and uniforms as matter of priority, such as those employed by centers for social protection, judiciary or police. Accommodation of victims of domestic violence had to be adapted to the exigencies of pandemic, especially in cases of mandatory self-isolation, taking into account limited capacities of the institutions, foster families and shelters. Furthermore, it was necessary to ensure timely resolution of the court cases dealing with cases of child neglect and/or violence, which in turn required adjusting work organization in all involved agencies, such as police, prosecutor's office, social protection services, lawyers and correctional institutions for minors. In court cases involving detention or violence against minors, particular attention had to be accorded to temporary measures or court injunctions', especially against abusive parents.

3. WOMEN RIGHTS

Relevant to its function of Equality Body, Ombudsmen Institution established that consequences of Corona pandemic disproportionally affect women, since shift to information technologies in conducting business does not equally suit women and men, especially in rural areas. Women globally do almost as much unpaid care and domestic work as men, and they are more likely than men to face additional care giving responsibilities when schools close, making it harder to maintain paid employment.[8] At the same time there was evident lack of state efforts to educate, train or inform women or facilitate their adaptation to the new form of economy. Through regular contacts with government authorities, it became apparent that emergency response centers did not include representatives of

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7 The Youth Justice Legal Center, *COVID-19: United Nations Committee on the Rights of the Child recommendations for States,* London, 2020.

8 Human Rights Watch, *Human Rights Dimensions of COVID-19 Response,* New York, 2020.

civil societies, which would ensure better protection and realization of individual rights of the members of the most discriminated groups, while, at the same time, ensuring better transparency in the process of enacting restrictive and other emergency measures. During the period of March 2020 – March 2021, Ombudsmen Institution registered increase in the number of domestic violence cases and cases involving violence against women in general.[9] It is estimated that such increase was predicated upon measures limiting freedom of movement, since it had impact on victims' ability to seek help from trusted sources, usually members of immediate family, or representatives of law enforcement agencies.[10] Faced with limited government capacities for emergency shelter, police officers' response was indifferent to reports of the violence, according to several complaints.[11] Safe houses did not receive financial or any other aid, while in one of the cases, there were no staff present except the night guard and there was lack of essentials such as food.

In cases of domestic violence, victims usually initially turn to immediate family members and friends rather than authorities or centers for social protection. Risk of domestic violence increased upon introduction of measures limiting freedom of movement (during night hours) and imposing mandatory isolation for individuals at risk. Stress from potential financial losses, continuous stay of all family members at the same residence, additional duties placed on members of the same family and limited access to all types of services proved to have negative effect on women, children and elderly. In that context, Ombudsmen of Bosnia and Herzegovina, while respecting orders issued with the aim of containing the spread of the virus by crisis centers in Republika Srpska, Federation of Bosnia and Herzegovina and Brcko District made recommendations to the authorities:

- to raise awareness of impact of social distancing and restriction of movement to women, children and elderly who are at risk of being exposed to domestic violence;
- to establish designated services for individuals at risk of domestic violence such as hotlines or platforms for online reporting of incidents and to duly inform the public of such options, and
- to ensure that, regardless of exigencies of situation caused by COVID-19 pandemic, promptly process reports of domestic violence.

At the same time, Ombudsmen of Bosnia and Herzegovina made public appeal, reminding all victims of domestic violence of their possibility to address Institu-

[9] Institution of Human Rights Ombudsmen of Bosnia and Herzegovina, *Annual Report 2020*, p. 138.

[10] Human Rights Ombudsmen of Bosnia and Herzegovina, Complaint no. Ž-BL-06-496/20.

[11] Human Rights Ombudsmen of Bosnia and Herzegovina, Complaint no. Ž-BL-06-46/20

tion of Human Rights Ombudsmen in cases they feel their rights have not been sufficiently or effectively protected by competent authorities.

4. RIGHT OF JOURNALISTS AND ASSOCIATIONS TO ACCESS TO PUBLIC INFORMATION

During 2020 dozens of journalists, NGOs and citizens' associations reported difficulties in accessing legislation and other general legal acts, citing Council of Ministers of Bosnia and Herzegovina, entity governments and Government of Brcko District as responsible parties.

According to the applicable legislation at all levels of government, no legal act can enter into force before being published in the Official Gazette, which are public companies responsible to the executive branch. In order to ensure compliance with the regulation that applies to them, citizens must have access and knowledge of their content, but those publications are available only to the subscribers, whether in print or electronic form. Having in mind that majority of citizens in Bosnia and Herzegovina live at the edge of poverty, which was exacerbated by the pandemic, many of them could not afford access to the official gazettes in any form. Ombudsmen requested that all enacted legislation be accessible online or in other suitable form, reasoning that public interest in this domain overweighs commercial interests, since gazettes are publicly financed and serve as an important tool in realization of right to be informed and notified of all legislation in place. Furthermore, Ombudsmen issued recommendation[12] to crisis centers at Republika Srpska and Federation of Bosnia and Herzegovina to undertake necessary measures to publish all their decisions in print or digital media, in the most simple and easily accessible manner, to avoid any misunderstanding or confusion on the part of those affected.

Journalists submitted complaints[13] alleging that government authorities organize press conferences without presence of media representatives. Such complaints were based on the fact that journalists did not have opportunity to engage in direct dialogue with public officials during press conferences, which can lead to censorship and incomplete informing of the general public. They also claimed that practice of crisis centers varied from time to time, sometimes allowing for physical presence of maximum three journalists, for example, or receiving questions through e-mail or complete ban. After assessing all relevant standards Ombuds-

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12 Human Rights Ombudsmen of Bosnia and Herzegovina, Decision no. Oi-K-BL-114/2020 dated 13.04.2020.

13 Human Rights Ombudsmen of Bosnia and Herzegovina, Complaint no. SA-05-345/20

men of Bosnia and Herzegovina called for adoption of measures respecting principles of good governance and rule of law as well as proactive transparency.[14] Some of the negative effects of complete bans were complete withdrawal of media from coverage of press conferences.[15] In their decisions, Ombudsmen made reference to the verdict[16] of the Constitutional Court of Bosnia and Herzegovina which reasoned that ''(...) such event was unprecedented in recent history and thus affected functioning of all executive and generally, public bodies.“ Ombudsmen equally took into consideration arguments stating that the government faced the task of protecting public health, while at the same time ensuring access to information and other fundamental rights.

Government explained that it is often necessary to opt for more restrictive measures, at least in initial phases, which are periodically evaluated and only leaving those that are proportional to the goal of preserving health of all.

In the interest of securing freedom of expression and access to information, Ombudsmen called for crisis centers to consider alternative mechanisms they have at their disposal, such as using information technologies, better protection preventing physical contact, larger conference venues or even open venues. Ombudsmen also recommended that the decision banning reporters from conferences be reconsidered, taking into account everybody's health including their own.

5. RIGHTS OF PERSONS INFECTED WITH COVID

In order to demonstrate and examine treatment of persons infected with COVID-19, we hereby present one of the most illustrative cases[17] submitted to the attention of Ombudsmen Institution during 2020. Complainant and his wife entered period of self-isolation following positive results for one of them, after which they notified all their contacts of their status, including employers. On July 22, 2020, employee of postal services BH Post Office Ltd. Sarajevo delivered decision on isolation from Ministry of Health of Canton Sarajevo to them, without protective mask, in front of the apartment building where they reside, saying aloud that he will leave the envelope in front of the door because they are infected. Complainants were not initially aware how the serviceman knew their status until they

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14 Human Rights Ombudsmen of Bosnia and Herzegovina, Recommendation no. P-68/20

15 For example, reaction of media to such measures can be found at: [https://media.ba/bs/magazin-novinarstvo/medijski-bunt-u-hercegovini]; also: [https://media.ba/bs/magazin-novinarstvo/komuniciranje-kriznih-stabova-suzen-prostor-za-novinarska-pitanja] and bljesak.info, among others. Accessed 13 March 2021.

16 Constitutional Court of Bosnia and Herzegovina, AP-1217/20.

17 Human Rights Ombudsmen of Bosnia and Herzegovina, Complaint no. Z-BL-06-281/20.

saw inscription on the envelope stating „CAUTION!!! PERSON INFECTED WITH CORONA VIRUS“

Complainants contacted Cantonal Government asking why they are being publicly discriminated in such manner and they received response it was internally agreed procedure put in place to protect safety of postal workers. Ombudsmen initially contacted Agency for Postal Services asking for legal basis or formal decision affecting delivery of mail during pandemic and whether disputable stickers had legal basis. In their response, responsible Agency stated that due to pandemic caused by COVID-19 virus, Instruction regarding changes in delivery of mail was published in the Official Gazette of Bosnia and Herzegovina no. 23/20 according to which:

- Court mail shall be delivered in only one attempt
- Postman will deliver the mail in the mailbox or in front of the door of the residence with approval of recipient
- Instead of signature of receipt postman will make remark „COVID-19“ on the envelope slip and „C-19“ in the registry book

Instruction will be valid until the Decision of Council of Ministers on declaring emergency at the territory of Bosnia and Herzegovina remains in place.[18]

In assessing legality of introduced measures, Ombudsmen invoked Law on rights, obligations and responsibilities of patients receiving health care.[19] According to basic principles of that law, everyone is entitled to respect of human dignity and protection of personal data, including protection of information on status of their health. According to the same law, healthcare workers are forbidden from disclosing details about patient's health to any third party. According to the Law on personal data of Bosnia and Herzegovina,[20] information pertaining to the health of any individual falls under the „special category of personal data“.

Ombudsmen equally assessed measures introduced by the BH Postal Service aimed at protecting their workers in their daily activities, especially during contacts with customers which includes wearing protective masks, gloves, using disinfection products or keeping distance. Specifically, Ombudsmen analyzed claims that Post Office workers have approximately 750 direct contacts with customers daily and that stickers on envelopes were introduced as protective measures, and the Instruction mandating such practice was largely based on general principles of

18 „Official Gazette of Bosnia and Herzegovina“ no. 18/20.

19 „Official Gazette of the Federation of Bosnia and Herzegovina“ no. 40/10.

20 Article 3.

Law on postal services of Bosnia and Herzegovina and recommendations of Crisis centers of Federal Ministry of Health. Ombudsmen reasoned that institutions on all levels of government, which were involved in detecting infected citizens, were undoubtedly processing personal data and had to abide by the law on protection of personal data of Bosnia and Herzegovina. As the identity of recipients could easily be established and linked to the status of their health, it was evident that their privacy was violated and they were discriminated on the basis of their health condition.

According to the law,[21] discrimination is any different treatment, including exclusion, limitation or advantage based on real or supposed characteristics, including health condition. There are exceptions from the prohibition of unequal treatment, but such exceptions have to be based on law[22], necessary in democratic society and proportional to the legitimate purpose they serve. In concrete case, such practice was not based on law, but rather on instruction that was not adopted in standard legislative procedure. Although it served legitimate purpose of protecting public health, it was not deemed proportional since the protection of postal workers could have been ensured by other protective measures, such as maintaining distance, use of masks, special clothing or disinfects. Equally, COVID-19 is not the only contagious disease and such measures were not introduced in any other cases, nor such patients' personal data was revealed to anyone. Having taken all facts into consideration, Ombudsmen issued recommendation[23] to BH Post Office to stop the practice of placing stickers on envelopes addressed to infected citizens which was duly implemented.

6. SOCIAL BENEFITS RECIPIENTS

In the outset of COVID-19 pandemic, Ombudsmen made appeal[24] to all authorities to put all human rights including economic and social rights in focus of implementation of emergency measures, in order to overcome challenges resulting in deterioration of standard of living, health services and protection of human dignity. However, due to heritage of reduction of public expenditures caused by global financial crisis of 2008. and 2009., which deepened social inequalities within and between European countries, health and social services

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21 Law on prohibition of discrimination of Bosnia and Herzegovina, „Official Gazette of Bosnia and Herzegovina" no. 59/09 and 66/16.

22 *Ibid,* Art. 5.

23 Human Rights Ombudsmen of Bosnia and Herzegovina, Recommendation no. P-136/20.

24 Human Rights Ombudsmen of Bosnia and Herzegovina, Press Statement dated 06.05.2020. available at: [https://www.ombudsmen.gov.ba/Novost.aspx?newsid=1525&lang=EN], Accessed 14 March 2021.

were not prepared to respond to emergency situation caused by the pandemic. It was therefore essential to provide funds in public budgets for implementation of fiscal policies based on respect for fundamental freedoms and with due regard to the needs of marginalized groups. Ombudsmen reminded the state authorities of their international obligations under human rights treaties which require from them to use maximum of available resources to achieve complete realization of economic and social rights, as quickly and efficiently as possible. Measures from authorities were specifically scrutinized to ensure that state is not deviating from maintained standards of services and that is successful in ensuring *de facto* equality by mitigating disproportional effects to those at higher risk. In order to achieve such goals, crisis centers were called to raise transparency of the process of adoption of emergency measures and to include those who are directly affected by them.[25] In several cases, Ombudsmen made recommendations[26] to the governments to consider providing financial aid to businesses and institutions particularly if their activity was related to accommodation, nurture, water, sanitation, education, social insurance and employment. Regardless of the budgetary constraints imposed by international and European financial institutions, it became evident that national budgetary capacities had to be increased in order to prevent deterioration in provision of basic public services. Health and economic consequences of the pandemic were disproportionally felt by the groups exposed to poverty, racism or other forms of discrimination, such as Roma, refugees or migrants. It was therefore necessary to expand reach of social welfare during recovery and to consider different taxation policies, such as progressive rates and tax breaks for families in need. Equally, investments in health services needed to be understood more broadly to include access to accommodation, food, water and sanitation. That would not only help contain damaging effects of the pandemic but would increase resilience to future crisis. Support to reduction of risk from unemployment in emergency situation have to take into account workers in informal economy, such as women, migrants and low-skill workers, which make large percentage of workforce in Bosnia and Herzegovina. It is expected from state to draw lessons from past health epidemics and to adapt their policies to the needs of affected communities, while at the same time, coordinating relief efforts with other states to achieve maximum effects.

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25 Human Rights Ombudsmen of Bosnia and Herzegovina, Press Statement dated 31.03.2020. available at: [https://www.ombudsmen.gov.ba/Novost.aspx?newsid=1513&lang=EN], Accessed 13 March 2021.

26 Human Rights Ombudsmen of Bosnia and Herzegovina, Recommendation no. 33/21.

7. CONCLUSION

Measures undertaken by the state authorities in response to COVID-19 pandemic, can significantly limit fundamental freedoms while also affecting regular functioning of the judicial and administrative system. Many governments were thus provided with an ideal pretext to crack down on dissent and exploit fears of their citizens, restricting their rights and passing emergency legislation which can have long-term consequences, beyond the health crisis. In undertaking actions to suppress the pandemic of COVID-19, significant threat occurs to rule of law, protection of human rights, protection from discrimination, right to privacy or protection of personal data and rights of socially endangered groups.

In all their work, Ombudsmen remind responsible parties that international documents on human rights form an integral part of Constitution of Bosnia and Herzegovina. It is true that these documents in fact foresee possibility of temporary derogation of individual rights and freedoms in times of emergency. Such derogations, however, can only be made in case there is danger to public (such as wartime) and they have to be necessary and required by exigencies of concrete situation.[27] Those measures cannot be in disagreement with other obligations under international law while every High Contracting Party has a duty to fully notify Secretary General of the Council of Europe of the derogations it has made, their duration and cessation. It is clear from such provision that the possibility of derogation from basic rights is given to sovereign states and not to commercial enterprises or individual institutions.

When it comes to impact on protected groups, it became evident that pandemic of COVID-19 has made the most profound physical, emotional and psychological effects on children, that were further exacerbated by the state of emergency and limitation of movement. It was therefore necessary to factor health, socialization, education and economic rights of children into every decision passed by the crisis centers. Although emergency measures were passed on temporary basis, it is necessary to foresee the consequences in case pandemic lasts for longer time than anticipated and opt for least restrictive measures. Authorities should research alternative and creative solutions to enable children to enjoy their rights to leisure, entertainment, recreation and cultural and artistic activities. Online learning must not serve as a barrier to children with limited access to information technologies and cannot be seen as a replacement for traditional interaction between teachers and students. Core standard of living must be maintained despite the pressure on medical institutions, which includes provision of health, water,

[27] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5ECHR.

sanitation and medical protection. Special attention needs to be afforded to children in need, such as those with disabilities, migrant children, asylum seekers and refugees, through introduction of tailored means of contact, communication and provision of services (E.g. home visits). In Bosnia and Herzegovina women comprise 74% of health workers[28], including pharmacists and nurses increasing their risk of exposure and infection, which requires targeted measures to address the disproportionate impact of the crisis based on gender. Since many women work in informal sector, they may be the first to suffer the consequences of the crisis or lose their jobs, which necessitates the very best practices by governments, the public and private sector, international and national organizations, as alleviation of the negative socio-economic effects of this crisis should be shared. For example, expanded social insurance programs like unemployment benefits may permit female workers to stay on payroll and be paid when they cannot work because of a COVID-19 downturn.

The pandemic has also shone a light on the structural problems affecting health systems while years of austerity measures have led to a clear erosion of public health infrastructures, personnel and means. In some countries, including Bosnia and Herzegovina, response to the pandemic is clearly a result of the awareness of the weakness of the public health system and of the fact that the uncontrollable spread of the virus would overwhelm hospitals. When it comes to data confidentiality protection for the persons infected with the virus In the cases of Mokuta[29] v. Lithuania and Z. v. Finland[30] European Court of Human Rights ruled that the disclosure of such data may dramatically affect the private and family life of that person, as well as his status in society and employment if that person is exposed to shame and risk of persecution.

Encompassing implementation of enumerated rights, measures adjusting right of access to court should be designed to correspond to Article 6 of the European Convention of Human Rights, especially in cases with heightened attention of the judiciary, such as domestic violence or disputes involving rights of child. In case that the parliaments transfer additional powers and discretion to the executive, they must continuously safeguard the important checks-and-balances mechanisms and when new administrative simplifications are introduced, they should make the interaction between agencies and citizens easier. Finally, Government needs to recognize the intention of Ombudsmen Institution to be in „permanent session"

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28 Babic-Svetlin, K., *Analiza situacije Izvještaj o ravnoprovnosti polova u Bosni i Hercegovini*, Sarajevo, 2009, p. 22.

29 Mockutė v. Lithuania (2018) Application no. 66490/09

30 Z. v. Finland (1997) Application no. 22009/93

over protection of vulnerable groups and to more actively involve it in discussions on emergency measures and their effect on human rights and freedoms. Described examples proved Ombudsmen is better suited to act quickly, to apply more effective remedies and to correct government actions thanks to its knowledge of the local context than traditional institutions for protection of human rights, such as constitutional courts, international courts or treaty bodies.

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10. Human Rights Ombudsman of Bosnia and Herzegovina, Complaint no. Ž-BL-06-46/20
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UDK 342.7: 616-036.22
Original scientific paper

THE INSTITUTE OF VULNERABILITY IN THE TIME OF COVID-19 PANDEMIC – ALL SHADES OF THE HUMAN RIGHTS SPECTRUM*

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ABSTRACT

The vulnerability thesis is one of the most important legal concepts in contemporary legal theory. Apart from being studied by legal scholars, the notion of vulnerability has been embodied in concrete legal rules and transferred to national case law allowing courts to set its boundaries by the power of judicial interpretation. Even though it would be hard to contest Schroeder and Gefenas's statement that it is not necessary for an academic to say what vulnerability is because common sense dictates the existence of it, recent scholarly analysis clearly shows that the concept itself has become intolerably vague and slippery. More precisely, it is not quite clear what the essence of vulnerability is and what the effects of its gradation as well as repercussions are on other constitutional institutes across the human rights spectrum. The noted vagueness poses a great concern, particularly in the time of COVID-19, the greatest social stressor that humanity has faced in recent months. The COVID-19 crisis has had untold consequences on our health, mental well-being, educational growth, and economic stability. In order for the state to bear the COVID-19 social burden and adequately protect the vulnerable, it is of the utmost importance to set clear guidance for the interpretation and implementation of the vulnerability concept. Seeking to contribute to literature on these issues, the author brings light to constitutional and criminal legal standards on vulnerability set within the current jurisprudence and doctrine. Bearing in mind the influence of the European Court of Human Rights (hereinafter, the ECtHR or the Court) on developments in human rights law, 196 judgments related to vulnerability have been retrieved from the HUDOC database using a keywords search strategy. The quantitative analysis was supplemented with more in-depth qualitative linguistic research of the Court's reasoning in cases concerning vulnerable children, persons suffering from mental illness and victims of family violence. Although the vulnerability reasoning has considerably expended their rights within the ambit of the Convention, the analysis has shown that inconsistencies and ambiguities emerge around the formulation of the applicant's vulnerability and its gradation with respect to positive obligations. The full creative and transformative potential of the institute of vulnerability is yet to be realized.

***Keywords**: COVID-19, quantitative and qualitative analysis, state's positive obligations, the European Court of Human Rights, vulnerability*

* This work has been supported in part by Croatian Science Foundation under the project IP-CORONA-04-2086.

1. INTRODUCTORY NOTES ON SOCIAL VULNERABILITY IN THE WAKE OF COVID-19 PANDEMIC

The global pandemic of COVID-19 is affecting humanity in an unprecedented manner. From the first reports on 31 December, 2019, the virus has spread from Wuhan City and reached numerous countries on every continent infecting millions of people and changing individual and social life as we know it. On April 1, 2020, WHO Director-General clearly warned that the world was not prepared for the first coronavirus pandemic and that going forward the world community had to jointly do much better in future outbreaks.[1] His conclusions were supported by WHO's statistics, a valid global data set for coronavirus global monitoring, according to which, only three days later, there were 130,422,190 cases detected globally as well as 2,842,135 lost lives due to COVID-19 complications.[2] The number of infected citizens has also reached a grim milestone in Croatia. As of April 4, the total number of infected persons rose to 280,026 while the death toll was brought to 6,058.[3] As health professionals are unanimous in the claim that the virus has been proven to be highly contagious, it seems realistic to assume that additional burden will be placed on public health systems, social care and economy in terms of reduction in trade, lost work, workforce reduction, and increase in poverty.

In the time of COVID-19 pandemic, the virus substantially lowered the quality of health care causing a shortage of hospital beds for the infected and disrupting effective treatment of patients not related to the infection.[4] Furthermore, the economic and social blows are devastating. In a joint statement, FAO, ILO, IFAD and WHO estimated that the pandemic's economic and social outcomes are placing "tens of millions of people at risk of falling into extreme poverty" and "nearly half of the world's 3.3 billion global workforce at risk of losing their livelihoods", while the virus could push between 83 and 132 million people into chronic hunger by the end of 2020 contingent on the economic growth trajectories.[5] The global GDP scenario is not at all encouraging, since it envisaged a fall of 5 per cent

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1 World Health Organisation, *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 – 1 April 2021*, [https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-1-april-2021], Accessed 1 April 2021.

2 World Health Organisation, *WHO Coronavirus (COVID-19) Dashboard*, [https://covid19.who.int/], Accessed 4 April 2021.

3 Government of the Republic of Croatia, *Coronavirus - Statistical Indicators for Croatia and the EU*, [https://www.koronavirus.hr/en], Accessed 4 April 2021.

4 Altheimer, I. *et al.*, *The Impact of Covid-19 on Community-Based Violence Interventions*, American Journal of Criminal Justice, Vol. 45, 2020, pp. 810 – 811.

5 FAO, IFAD, UNICEF, WFP and WHO, *The State of Food Security and Nutrition in the World 2020. Transforming food systems for affordable healthy diets*, Rome, 2020, p. 3.

in the same year resulting with a loss of about $10 trillion for the global economy.[6] According to Makin and Layton, the fiscal policy responses of countries around the globe to the COVID-19 crisis has led to additional negative consequences, such as huge budget deficits and substantially increased, public debts, which were already high.[7] The official data show that the COVID-19 pandemic is a global phenomenon that has activated the most severe global recession since World War II.

The occurrence of the pandemic has triggered a wave of harmful social, economic, and political outcomes that are a clear predictor of further increasing social vulnerability. According to Biggs and colleagues, social vulnerability can be defined as "the degree to which a community is able to prepare and respond to a natural or man-made disaster, such as a hurricane, chemical spill, or disease outbreak" and research suggests that there is a clear link between the amplified social disadvantage and COVID-19 incidence.[8] Communities with increased social vulnerability carry the disproportionate burden of the pandemic because of their limited capacities to cope with and respond to the novel virus. The issues of social vulnerability and virus outbreak research responses are considerably discussed in the political arena and the present political discourse calls for immediate protection of vulnerable populations.[9] The Sustainable Development Goals are a good example of how to translate political proposals into a concrete, universal agenda.[10] In pandemic circumstances, their call to leave no one behind is of utmost importance as it places the most vulnerable in the centre of actions. The approach is praiseworthy and has to be further extended across the UN member states and embedded in government policies, practices and procedures. The fact is that those who live with social and individual disadvantages have little prospect of coping with coronavirus crisis.

A growing body of research has already assessed the effect of the government mandated restrictions designed to supress the impact of the COVID-19 pandemic on vulnerable groups. Depending on the methodology and design of the research, certain studies confirm a link between the coronavirus and the increase in family

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6 Naisbitt, B. *et al.*, *The World Economy: Global Outlook Overview*, National Institute Economic Review, Vol. 253, 2020, p. 35.

7 Makin, A. J.; Layton, A. *The Global Fiscal Response to COVID-19: Risks and Repercussions*, Economic Analysis and Policy, Vol. 69, 2021, p. 348.

8 Biggs, E. N. *et al.*, *The Relationship Between Social Vulnerability and COVID-19 Incidence Among Louisiana Census Tracts*, Frontiers in Public Health, Vol. 8, 2021, pp. 2, 6.

9 *See* for example Senator Sylvia Santana's amendment to include social vulnerability index as a decision point for the distribution of COVID-19 vaccines. Senate TV, *Protecting the Most Vulnerable*, [https://www.facebook.com/SenSylviaSantana/videos/425732561844665/], Accessed 25 February 2021.

10 The United Nations, *The Sustainable Development Goals*, [https://www.un.org/sustainabledevelopment/], Accessed 1 April 2021.

violence, while others show mixed conclusions, equal prevalence, or a decrease of delinquent behaviour in focus.[11] Although the research results seem quite inconclusive, the official criminal justice statistics in some countries confirmed the rapid growth of criminal offences in home settings caused by the coronavirus lockdown mandatory cohabitation. Over the first three weeks of lockdown measures in France, official reports recorded a 32% - 36% upsurge in family violence.[12] Due to a lack of access to criminal justice intervention services as well as to health, social care and other support services, the risk of abuse for family violence victims cannot be excluded. The lockdown measures have been perceived as a possible mechanism through which the pandemic also affects victimisation of children. Children may face the additional risk of abuse and neglect because of mandatory stay-at-home measures, school closures, disruption of child welfare services, and stress within family households. Even if a decrease of the suspected child abuse during lockdown is observed, there is a probability that it only reflects a lack of screening, a serious and exacerbated misreporting problem.[13] Throughout the pandemic, a number of research studies highlighted the fact that children and their parents experience the deterioration of their mental health and well-being. The psychological impact of the virus on general population and the infected has also been noted in different scholarly articles. People affected by COVID-19 may struggle with depression, anxiety disorders, and sleep disturbances and may experience diverse levels of stress, panic attack, irrational anger, and impulsivity. The list of mental health consequences also includes somatization disorder, emotional disturbance, posttraumatic stress symptoms, and suicidal behaviour.[14] It is clear that the coronavirus will have a long-term impact on mental health and negative psychological effects will not cease to exist once the pandemic is over. A study predicted the escalation of suicides after the COVID-19 crisis because of the intensity of lockdown and additional, multiple causes such as substance consumption, job loss, social isolation, anxiety, trauma, and living in resource-poor communities without adequate mental health support.[15]

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11 Arenas-Arroyo, E., *Can't Leave You Now! Intimate Partner Violence under Forced Coexistence and Economic Uncertainty*, IZA Institute of Labor Economics Discussion Paper, no. 13570, 2020, p. 2.

12 Usher, K. *et al.*, *Family Violence and COVID-19: Increased Vulnerability and Reduced Options for Support*, International Journal of Mental Health Nursing, Vol. 29, No. 4, p. 549.

13 Caron, A. *et al.*, *Was Child Abuse Underdetected during the COVID-19 Lockdown?*, Archives de Pédiatrie, Vol. 27, No. 7, p. 399.

14 Hossain, M. *et al.*, *Epidemiology of Mental Health Problems in COVID-19: A Review*, F1000Research, Vol. 9, No. 636, p. 1.

15 Standish, K., *A Coming Wave: Suicide and Gender after COVID-19*, Journal of Gender Studies, Vol. 30, No. 1, 2021, p. 116.

It appears that the COVID-19 pandemic has unfolded new vistas and research perspectives for scholars, urging them to explore the virus paradigm within the vulnerability boundaries. Even though COVID-19 is an infectious disease with physical health implications, a broad body of research tends to link it to the underlying individual and social factors leading to vulnerability. Two conclusions can be drawn from the above-mentioned findings. First, the pandemic has shown that the academic community and policy officials have to assess its impact in terms of different levels of vulnerability, i.e. the global, social vulnerability and the individual one. The second conclusion refers to the joint and interdependent action of vulnerability forces. In all likelihood, the drivers of vulnerability, combined with unexpected pandemic circumstances, generate additional vulnerability and it is hard to contest the conclusion that those who were vulnerable are now more vulnerable than ever. Understanding the different layers of vulnerability and forces behind it has the potential to place vulnerability within the human rights spectrum and to recall the state's positive obligation to effectively protect and guarantee the rights of vulnerable persons. In order for the state to bear the COVID-19 social burden and adequately protect the vulnerable, it is essential to solve the puzzle of the definition of vulnerability and to set clear guidance on the interpretation and implementation of the vulnerability concept.

2. DEFINING VULNERABILITY: THE FIRST STEP TOWARDS THE DEMYSTIFICATION OF VULNERABILITY CONCEPT

2.1. The Notion of Vulnerability in Public Discourses

The pandemic subset of the social climate has placed the notion of vulnerability at the heart of public discussions and political discourses. In one of his recent statements on the impact of COVID-19, Minister of Health Beroš warned that the health system in Croatia is vulnerable amid surging cases. Correspondingly, State Secretary at the Ministry of Economy and Sustainable Development Mikuš Žigman has concluded that the economy, along with the services that form the basis of the economy, is vulnerable.[16] Similarly, Dehaghani and Newman argue for a conceptual understanding of vulnerability as a condition associated with the criminal justice system.[17] According to them, the police service and the criminal legal aid system both have a vulnerable nature as vulnerability is revealed in the

[16] Prvi program Hrvatskoga radija, *Poslovni tjedan*, [https://radio.hrt.hr/prvi-program/ep/poslovni-tjedan/378307/], Accessed 12 April 2021.

[17] The identical argument was raised by the applicant in *Abdulla Ali v. the United Kingdom* (2015). According to the applicant, "le côté faible" of the criminal justice system in the United Kingdom lies in its reliance on juries.

early phases of criminal proceedings.[18] Apart from the fact that the education system has been labelled as vulnerable in recent months, state policy documents indicate that there are certain groups in higher education that share a common layer of vulnerability, e.g. students with children, senior students, and students who have completed vocational schools.[19] If considered through the lens of social exclusion based on economic status, the list of vulnerable persons is lengthy encompassing the poor, the unemployed, especially long-term unemployed, the homeless, returnees and displaced persons, migrants, especially asylum seekers and foreigners under subsidiary protection, persons living on islands and in rural areas.[20] The potentiality of invoking vulnerability in public debates seems endless and there are indications that political speech has also been transformed under the influence of the vulnerability context. As head of the opposition GLAS party, Mrak Taritaš stated in her comments on last year's parliamentary election results that the former mayor of Zagreb was vulnerable.[21] Associated with different state systems and political officials, the vulnerability narrative has transcendent significance and one occasion it went so far that, surprisingly, the Republic of Croatia was also said to be vulnerable.[22]

The analysis of Croatian public discourse shows the transformative capacity of the vulnerability idea in its finest forms. The intensity of invoking it confirms that vulnerability has become a permanent part of the public domain and political discussions, and that it is almost inevitable that, at some point, everyone and everything will become vulnerable. If so, it would be difficult not to agree with Schroeder and Gefenas's point that it is not necessary for an academic to say what vulnerability is. It is all around us and it requires recognition, knowing that "we

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18 Dehaghani, R.; Newman, D. *We're Vulnerable Too": An (Alternative) Analysis of Vulnerability within English Criminal Legal Aid and Police Custody*, Oñati Socio-Legal Series, Vol. 7, No. 6, 2017, p. 1199, 1222; A similar conclusion was reached by the Council of Europe's Parliamentary Assembly in Resolution 2015 (2014) adopted on 1 October 2014. According to the Parliamentary Assembly "the proceedings in sensitive legal cases (…) have revealed continuing vulnerabilities and deficiencies in the justice system (…)."

19 6th Aim of the Strategy of Education, Science and Technology, Official Gazette No. 124/2014.

20 Chap. 3.2. of the Strategy for Combating Poverty and Social Exclusion in the Republic of Croatia (2014 -2020.), [https://vlada.gov.hr/UserDocsImages/ZPPI/Strategije/Strategija%20borbe%20protiv%20siroma%C5%A1tva.pdf], Accessed 1 April 2021.

21 N1, *Newsroom*, [https://www.youtube.com/watch?v=TXihgyADthM], Accessed 2 April 2021.

22 3th Chapter of the Republic of Croatia National Security Strategy, Official Gazette No. 73/2017; Equally conceptualised, the state vulnerability is mentioned in *Vinks and Ribicka v. Latvia* (2020). The Court took note of the "concerns expressed by international experts that Latvia was vulnerable to being used for money laundering purposes".

can all see it, much more often than we care to".[23] Furthermore, a common thread that runs through all vulnerability scenarios is the susceptibility to different forms of harm, i.e. bodily, psychological, moral, economic, financial and institutional, and the absence of control over decisions, again leading to harm.[24] The central dimension granted to harm springs, on the one hand, from its use as a common rhetorical connection to vulnerability, and on the other, from the etymology of the word itself. Vulnerability, according to the Oxford dictionary, is "the quality or state of being exposed to the possibility of being attacked or harmed", and it was first coined in early 17th century from the Latin *vulnerare*, "to wound".[25] Still, the meaning of vulnerability depends on the disciplinary standpoint from which it is approached. While analysing the multidimensional meaning of the term, Truscan explains that economists think about vulnerability in terms of risk, precariousness, or insecurity while medical professionals focus on patients and their capacity to overcome physical or mental harm. Harm and resilience are in the centre of environmental scientists' attention; as for lawyers, vulnerability is associated predominantly with weakness and fragility.[26] This could further add to possible misunderstanding and general confusion about the whole concept of vulnerability. Despite the fact that the concept is gaining momentum, its meaning is intolerably vague, confusing, complex and ambiguous. It appears that there is a limited understanding of its definition, legal substance, boundaries and effects. Little is known about the legal notion of vulnerability and its implications on state duty to organise and implement specific measures aimed at reducing vulnerability and protecting the vulnerable. In order to better understand vulnerability in the legal context, further attention has to be given to Fineman's understanding of vulnerability as a universal phenomenon and its potential to redefine human rights standards.

2.2. Fineman's Understanding of Vulnerability - A Potent Theoretical Instrument

Marta Fineman's philosophical reasoning has considerably questioned the notion of universal human rights, the ultimate rights that are valid as such and to which everyone has a legitimate claim as a human being. Human rights are, therefore, universal because they do not need to be established or promulgated, but rather

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23 Schroeder, D.; Gefenas, E. *Vulnerability: Too Vague and too Broad?*, Cambridge Quarterly of Healthcare Ethics, Vol. 18, 2009, p. 113.

24 Peroni, L.; Timmer, A. *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, International Journal of Constitutional Law, Vol. 11, No. 4, 2013, p. 1058.

25 *Oxford Lexico*, [https://www.lexico.com/en/definition/vulnerability/vulnerable], Accessed 6 April 2021.

26 Truscan, I., *Considerations of Vulnerability: From Principles to Action in the Case Law of the European Court of Human Rights*, Retfaerd Årgang, Vol. 36, No. 3, 2013, pp. 64 – 65.

recognised or acknowledged by others. The universality of human rights lies on the thesis that a human rights holder is a free-born, autonomous individual. In the Western liberal tradition, John Lock's philosophy of liberal individualism has been a building block of the liberal model. Although its vision of equality has radical potential, according to Fineman, it can be interpreted narrowly in the form of sameness of treatment and prohibition of discrimination. Fineman argues that the formal equality model is too weak because it "fails to take into account existing inequality of circumstances… [and] to disrupt persistent forms of inequality".[27] While the list of material and social inequalities is long and growing, the society and its institutions perpetually produce and reproduce inequalities. Along with inequality generators we note the issue of state non-intervention. The state's passivity is mirrored by a policy of restraint and abstention acknowledging that there are certain activities and institutions that are out of the reach of state interventions. Having said that, Fineman concludes that we should abandon the liberal tradition thesis and replace it with one that puts at the centre of social policy discussions a more complex subject, the vulnerable subject.[28]

Vulnerability mostly carries negative connotations and implies that the vulnerable persons are different, isolated, placed on the margins of society, and in need of assistance and protection. The states' obligation to protect human rights of the disadvantaged or vulnerable categories of persons emerged in human rights and international legal discourses four decades ago.[29] Emerging literature on the vulnerability manifestations reveals that the term in question particularly refers to children, the elderly, victims of crime, disabled individuals, members of minorities, HIV infected patients, the poor and persons deprived of liberty in state institutions.[30] Such labelling can have a stigmatising effect and, therefore, the notion of vulnerability has to be freed from its limited and negative associations. A possible way to do that, Fineman claims, is to apply a reverse approach and acknowledge that vulnerability is "a universal, inevitable, enduring aspect of the human condition"[31] While exploiting the ambiguity and common use of the term in focus, she revises the essence of it and conceives a heuristic device for con-

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27 Fineman, M. A., *The Vulnerable Subject: Anchoring Equality in the Human Condition*, Yale Journal of Law and Feminism, Vol. 20, No. 1, 2008, pp. 2 - 3, 5.

28 *Ibid.*, p. 2.

29 Truscan, I., *op. cit.*, note 26, p. 69.

30 Fineman, M. A., *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, Boston University Law Review, Vol. 92, No. 6, 2012, pp. 1748 – 1750.

31 Fineman, M. A., *op. cit.*, note 27, p. 8; Similarly, Turner and Dumas talk about "ontological vulnerability", a condition that all human beings have in common. Turner, B. S.; Dumas, A., *Vulnerability, Diversity and Scarcity: On Universal Rights*, Medicine, Health Care, and Philosophy, Vol. 16, No. 4, 2013, p. 666.

ceptualising an almost pessimistic understanding of human resilience to internal and external stressors. Interestingly, similarly to Fichte's and Hegel's thoughts on vulnerability,[32] Fineman seeks to show that vulnerability inevitably emerges from human physical embodiment but also from embodiment in social institutions and relationships and constant susceptibility to change in bodily and social well-being.[33] Harm, injury, process of aging, misfortune, crime, natural disasters, disease, epidemics, resistant viruses all play part of Fineman's negative change scenario out of human control. Remarkably, the conceptualised perspective is best confirmed by the current COVID-19 pandemic circumstances. Vulnerability, because it is universal, inherent, constant, ever-present, and enduring, goes beyond dependency and has to be a leitmotiv of social policy and law. We, as vulnerable subjects, are in need of a more responsive and responsible state that acts through its institutions with equal regard for our shared vulnerability.[34] The principal governmental responsibility with respect to social justice issues, due to acknowledged human vulnerability, is significant and has to be fulfilled primarily through the formation and support of societal institutions.[35] These assertations rely on the assumption that social problems need social or collective solutions, rather than an individual one. Vulnerability cannot be erased, this is the fact, however, Fineman's idea to mediate, compensate, and reduce it through programmes, institutions, and structures seems quite promising.

In recent scholarly work different theoreticians have expressed criticism of the notion of human rights and the liberal subject, an imaginary bearer of human rights who is supposed to be male, white, autonomous, distant, lonely, capable of making his own decisions and choices, and whose rights have to be protected from infringement from state arbitrary actions. The concepts of human rights built around the idea of the liberal subject are predominantly seen as negative obligations to refrain from unjustified interventions, rather than positive state obligations to act and protect. Fineman's approach to vulnerability is a promising and viable option that offers a solution to raised issues putting an emphasis on the state's involvement in creating the effective factors to increase resilience to vulnerability. Fineman's call for a more responsive state lays the basis for a more extensive human rights protection and shifts the focus to the doctrine of positive obligations. In the blunt words of Alice Margaria, the said doctrine is perhaps "the tightest *trait*

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32 Dryden, J. *Embodiment and Vulnerability in Fichte and Hegel*. Dialogue, Vol. 52, No. 1, 2013, pp. 109 - 128.

33 Fineman, M. A., *Vulnerable and Inevitable Inequality*, Oslo Law Journal, Vol. 4, No. 4, 2017, p. 143.

34 Fineman, M. A., *Vulnerability and Social Justice*, Valparaiso University Law Review, Vol. 53, No. 2, 2019, p. 356.

35 Fineman, M., A., *The Vulnerable Subject and the Responsive State*, Emory Law Journal, Vol. 60, No. 2, 2010, pp. 255 – 256.

d'union" between Fineman's vulnerability model and the ECtHR juridical vision of the protection of individual rights.[36] Thus, it seems quite important to explore how the concept of vulnerability is shaped through the lens of ECtHR jurisprudence and how this provides the possibility for the Court in Strasbourg to create a more substantive frame for human rights protection.

3. THE CONCEPT OF VULNERABILITY – A DRIVING FORCE TO ENHANCE HUMAN RIGHTS PROTECTION IN THE CASE LAW OF THE ECTHR?

3.1. Methodological Determinants and Selection of the Research Sample

Regardless of the fact that in recent years vulnerability issues have attracted a considerable scholarly attention, little is known about vulnerability as a legal institute whose connotations are shaped in ECtHR discourse. The concept of vulnerability and its application in Court's case law has timidly fostered dialogue among practitioners and theoreticians about the boundaries of protection of basic human rights and freedoms. Some authors have acknowledged that vulnerability is an emerging concept in the Court's practice and a judicial tool with transformative potential,[37] yet scholars do not appear to examine how the concept itself evolves and modifies the already established constitutional institutes. To the best of the author's knowledge, this is one of a few academic essays looking into the definition of vulnerability, its gradation, and possible transformation of constitutional principles and relevant tests to protect the rights of vulnerable applicants set by the Court.

Account taken of the above, the goal of this study is, first of all, to investigate the prevalence of vulnerability cases in the Strasbourg Court's case law. The quantitative methodology will be applied to identify the number of cases that reached the Court and were adjudicated with reference to the vulnerability of the applicant. Additionally, the second research step involves the qualitative linguistic analysis of the Court's reasoning. Due to the fact that the text of the Convention is silent about vulnerability, the rigorous qualitative interrogation will show how judicial reasoning can create the scope and content of standards of protection for the vulnerable.

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36 Margaria, A., *Vulnerability and the ECHR System: Is it a Framing or a Substantive Issue?*, Workshop on Vulnerability and Social Justice, 17 - 18 June 2016, Leeds University, Leeds, 2016, pp. 3, 5.

37 Peroni, L.; Timmer, A., *op. cit.*, note 24, p. 1056; Timmer, A., *A Quiet Revolution: Vulnerability in the European Court of Human Rights*, in: Fineman, M.; Grear, A. (eds.), Vulnerability: Reflections on a New Ethical Foundation for Law and Politics, Farnham, Burlington, 2013, p. 147-170.

Another aim of the present study is to single out the evolving trends in defining these standards, and with critical analysis, to investigate the connection between the concept of vulnerability and the already established doctrinal institutes in ECtHR jurisprudence, e.g. the margin of appreciation and positive obligations. The literature on the interpretative mechanisms of ECtHR case law reveals that the said concept has been placed in the centre of its doctrinal discourse, however, what is less clear are its repercussions on classical ECtHR institutes.[38] The combined quantitative and qualitative methods form a new set of blended methodologies already applied in different studies discussing the ECtHR's adjudicative practice in a wider context.[39]

The first quantitative method mentioned above is well grounded in the body of academic research. For example, Al Tamimi's methodological approach was based on a systematic keyword analysis of an established online database that provides access to the case law of the Court (HUDOC). The database was searched using keywords "vulnerability", "vulnerable", and "vulnérabilité". The query revealed that the Strasbourg authority had discussed substantially issues related to vulnerability and protection of vulnerable individuals in 557 cases adjudicated until January 2014.[40] The very first case in which vulnerability was invoked was *Dudgeon v. the United Kingdom*, 1981,[41] and since then, the vulnerability jurisprudence of the ECtHR has evolved significantly.[42] Relying on Al Tamimi's quantitative methodological steps, identical keywords were used to build the query accepting, as it was shown above, that a core etymological meaning of the vulnerability concept inevitably entails the vulnerability / *vulnérabilité* of the applicants. The research period is extended from January 2014 to April 2021 to capture the effect of vulnerability context on Court's judicial review and decision-making. Creating the methodological mosaic in this fashion is a tried and tested way to enhance the research results reported in previous studies and gain a complete phenomenological insight into the ECtHR's vulnerability narrative. During the keyword search stage, it was sought to eliminate factors that may impact the retrieval of cases from the HUDOC caselaw collection. The keywords were entered individually

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38 Rittossa, D., *Strengthening the Rights of Sexually Abused Children in Front of the European Court for Human Rights - A Tale of Justice, Fairness and Constant Normative Evolution*, ECLIC - EU and Comparative Law Issues and Challenges Series, Vol. 4, 2020, p. 550.

39 *Ibid.*, p. 529 - 556; Faye Jacobsen, A., *Children's Rights in the European Court of Human Rights – An Emerging Power Structure*, International Journal of Children's Rights, Vol. 24, 2016, pp. 548 - 574; Al Tamimi, J., *The Protection of Vulnerable Groups and Individuals by the European Court of Human Rights*, European Journal of Human Rights, Vol. 5, 2016, pp. 561 – 583.

40 *Ibid.*, p. 562.

41 Judgement *Dudgeon v. the United Kingdom* (1981).

42 Truscan, I., *op. cit.*, note 26, p. 71.

or in combination using the Boolean operator "AND". In the interest of maintaining the strongest possible methodological consistency, repeated and irrelevant cases were excluded, and subsequently, the query revealed that there had been 196 judgments in which the Court precisely devoted a part of its reasoning to discuss, accept and develop arguments related to vulnerability.

The analysis has confirmed that only a minority of judgments on the issue held that there was no violation of the Convention (23 out of the total number of cases). The infringement of relevant Convention Articles was found in 148 ECtHR rulings. More precisely, the infringing acts had given rise to violation of applicant's right to life (Article 2; Article 1 of Protocol No. 6), right to personal integrity and dignity (Article 3), right to be free from slavery and forced labour (Article 4), right to liberty and security (Article 5), right to a fair trial (Article 6) as well as privacy rights as provided in Article 8 of the Convention. The Court's case law on vulnerability also includes judgments that establish breaches of freedom of expression (Article 10), freedom of assembly and association (Article 11), prohibition of discrimination (Article 14), collective expulsion of aliens (Article 4 of Protocol No. 4), property rights (Article 1 of Protocol No. 1), and the right to education (Article 2 of Protocol No. 1) coupled with an effective remedy for a violation of a right (Article 13) and with the right of individual petition to the Strasbourg Court (Article 34). The results implicate that the vulnerability momentum in the ECtHR's practice has been decisive to determine the content and the nature of civil-political and socio-economic rights as well. Such conclusions are similar to those of Palmer and Hansen who believe that both categories overlap to a certain extent and that in recent cases the Court expressed the firm willingness to explore different aspects of rights of vulnerable claimants.[43] The third category of cases represents rare judgments where the Court confirmed a violation and no violation of rights protected under the Convention depending on the stage of criminal justice process,[44] the assessed period of time, or other existing circumstances of the case.[45] The fourth group of rulings concerns concurring and dissenting opinions in part or in whole that substantially questioned the majority's holding relying on vulnerability criteria as a tool for providing greater protection for individual rights (20 out of the sampled cases).[46] In 3 remining judgments the issue of vulnerability

[43] Palmer, E.; Hansen, H. C., *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Bloomsbury Publishing Plc, London, 2009, pp. 65 - 66, 72.

[44] Judgement *Simeonovi v. Bulgaria* (2017).

[45] Judgement *Rooman v. Belgium* (2019).

[46] Judgement *Ertuş v. Turkey* (2014); *I.S. v. Germany* (2014); *Georgia v. Russia (I)* (2014); *Hämäläinen v. Finland [GC]* (2014); *A.V. v. Ukraine* (2015); *Adžić v. Croatia* (2015); *Adam v. Slovakia* (2016); *Borg v. Malta* (2016); *D.L. v. Bulgaria* (2016); *Kocherov and Sergeyeva v. Russia* (2016); *Mironovas and Others v. Lithuania* (2016); *V.M. and Others v. Belgium [GC]* (2016); *Ahmed v. the United Kingdom* (2017);

was raised, however, surprisingly, it seems that it did not affect the Court's conclusion as to the existence of a human rights infringement in any decisive manner. Although not so crucial but quite clear argumentative reasoning was constructed through a narrative telling of the applicant's personal characteristics and concluding that "no other particular circumstance can be noted which would indicate that the applicant was in a greater state of vulnerability"[47] or that "there is no indication that the applicants in the present case were more vulnerable"[48] than any other person in their place. It appears that the state of vulnerability has been habitually acknowledged to suspects questioned by the police or to asylum seekers, nevertheless, in recent court practice the vulnerability bar is raised across criterion groups, making it harder for the applicants to argue the case. The noted shifts in vulnerability assessment call for more intense scrutiny.

3.2. Phenomenological Distribution of Vulnerability in ECtHR's Vulnerable Groups' Narrative

A robust body of human rights literature shows that the vulnerability criteria is commonly associated with the group context of vulnerable members of society.[49] In each individual case, the Strasbourg authority evaluates the factual circumstances and legal arguments to determine whether the applicant belongs to a group of people who are vulnerable in the eyes of the Court. It is worth noting that the Strasbourg authority explicitly acknowledges the group approach by explaining that "the applicant may be considered to fall within the group of 'vulnerable individuals' entitled to state protection…".[50] Since *Dudgeon v. the United Kingdom*, a lack of maturity, mental disability and the state of dependence have been recognised as sources of vulnerability.[51] The results of the present study confirm the initial starting points of vulnerability reasoning showing that "vulnerable" is an adjective attached to children,[52] persons with disabilities[53] and to those who suffer

Lopes de Sousa Fernandes v. Portugal [GC] (2017); *Correia de Matos v. Portugal [GC]* (2018); *A and B v. Croatia* (2019); *M.A. and Others v. Lithuania* (2019); *Pryanishnikov v. Russia* (2019); *S.S. v. Slovenia* (2019); *Vovk and Bogdanov v. Russia* (2020).

47 Judgement *Beuze v. Belgium* (2018).

48 Judgement *Ilias and Ahmed v. Hungary* (2019); *See* also *Mahamed Jama v. Malta* (2016).

49 Sajó, A., *Victimhood and Vulnerability as Sources of Justice*, in: Kochenov, D.; de Búrca, G.; Williams, A. (eds.), Europe's Justice Deficit?, Oxford, 2015, pp. 344 - 345; Al Tamimi, *op. cit.*, note 39, p. 563-568; Timmer, A., *op. cit.*, note 37, p. 152; Peroni, L.; Timmer, A., *op. cit.*, note 24, pp. 1056-1057.

50 Judgement *Opuz v. Turkey* (2009), § 160.

51 Judgement *Dudgeon v. the United Kingdom*, *op. cit.*, note 41, § 47.

52 *See infra* Part 3.3.

53 Judgement *Krajnc v. Slovenia* (2018); *Lengyel v. Hungary* (2017).

from mental disorders.[54] Moreover, the Court is responsive to the fact that certain personal characteristics may create a vulnerability cohort and, therefore, acknowledges the vulnerability of mothers of a newborn baby,[55] HIV positive patients,[56] patients suffering from other serious illness[57] and those who underwent gender reassignment surgery.[58] Apart from the inherent vulnerability, the Court applies vulnerability reasoning in cases concerning specific external circumstances that generate different situations within the ambit of vulnerability. The research has shown that vulnerability is conceptualized in the Court's case law regarding the nature and scope of the rights of asylum seekers,[59] refugees,[60] suspects and accused offenders in criminal proceedings,[61] prisoners[62] as well as juvenile offenders.[63] A considerable number of enumerated cases concerns issues related to detention, and this leads to the conclusion that Timmer's paradigmatic image of the vulnerable applicant who cannot protect himself from the power of the state is still a dominant leitmotiv in the vulnerability jurisprudence of the ECtHR.[64] The current study also shows that an applicant's vulnerability may be the result of having no legal status[65] or being recognized by the law as a victim of domestic violence,[66] victim of a crime[67] or a member of certain minority. Deployments of vulnerability

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54 *See* for example *Association for the Defence of Human Rights in Romania – Helsinki Committee on Behalf of Ionel Garcea v. Romania* (2015); *Boukrourou and Others v. France* (2017); *Evers v. Germany* (2020); *Fernandes de Oliveira v. Portugal [GC]* (2019); *Gheorghe Predescu v. Romania* (2014); *M.S. v. Croatia (No. 2)* (2015); *Pranjić-M-Lukić v. Bosnia and Herzegovina* (2020); *R.E. v. the United Kingdom* (2016); *S.H. v. Italy* (2016).

55 Judgement *Dupate v. Latvia* (2021).

56 Judgement *Novruk and Others v. Russia* (2016).

57 Judgement *Paposhvili v. Belgium* (2016).

58 Judgement *S.V. v. Italy* (2018).

59 *See Abdi Mahamud v. Malta* (2016); *F.G. v. Sweden* [GC] (2016); *J.K. and Others v. Sweden* (2016); *L.M. and Others v. Russia* (2016); *M.K. and Others v. Poland* (2020).

60 Judgement *Tanda-Muzinga v. France* (2014).

61 *See A.T. v. Luxembourg* (2015); *Anatoliy Rudenko v. Ukraine* (2014); *Chukayev v Russia* (2016); *Dumikyan v. Russia* (2017); *G. v. Russia* (2016); *Ibrahim and Others v. the United Kingdom* (2016); *Ivko v. Russia* (2016); *Kanciał v. Poland* (2019); *Kondakov v. Russia* (2017); *Sitnikov v. Russia* (2017); *Turbylev v. Russia* (2016).

62 *See Aggerholm v. Denmark* (2020); *Drăgan v. Romania* (2016); *Helhal v. France* (2015); *Kondrulin v. Russia* (2017); *Sergey Antonov v. Ukraine* (2016).

63 Judgement *Ateşoğlu v. Turkey* (2015); *Blokhin v. Russia* (2016); *Bouyid v. Belgium* (2015); *I.E. v. the Republic of Moldova* (2020).

64 Timmer, A., *op. cit.*, note 37, p. 154.

65 Judgement *Kurić and others v. Slovenia* (2014).

66 Judgement *Bălşan v. Romania* (2017); *J.D. and A v. the United Kingdom* (2020); *Levchuk v. Ukraine* (2020); *T.M. and C.M. v. the Republic Of Moldova* (2014); *Talpis v. Italy* (2017): *Volodina v. Russia* (2019).

67 *See Al Nashiri v. Poland* (2015); *Beizaras and Levickas v. Lithuania* (2020).

are traditionally recognized in cases concerning Roma,[68] other ethnic minorities[69] and LGBTI persons,[70] however, the analysis has proven that the Court took a step further by recognizing the vulnerability of earthquake victims in Turkey.[71]

Although the Court's vulnerability reasoning has acknowledged a number of different groups as vulnerable thus disclosing a clear evolutive potential, the fact remains that it creates the system of identity categories and opens the door for exclusion of others who do not fit the criteria of group membership from state protection. For example, if acknowledging groups with shared vulnerability is considered to be the basis for claims of reparative justice, then, Sajó argues, the notion of vulnerability should apply only to those who were historically subjected to prejudice with long-standing consequences.[72] Thus, relying on moral grounds of justice and group-context vulnerability may create more narrow confines of vulnerability reasoning. Not surprisingly, the Strasbourg approach to the recognition of group vulnerability has been subjected to strong criticism in human rights discourses. Theoreticians argue that vulnerability portrays an experience rather than an identity of certain group.[73] Amongst other things, the vulnerable group concept is powerless when confronted with the task to eliminate material, social, and political inequalities that exist across groups.[74] There is a simple truth which the said concept ignores: not everybody is alike. Accordingly, the groups of vulnerable individuals cannot be considered as a homogeneous unity.[75] Furthermore, group categories unfortunately carry negative connotations with stigmatizing potential.[76] Clustering applicants into vulnerable groups, Timmer explains, is a classical example of liberalism's "others" subjected to marginalization. There is a thin line between the notion of group vulnerability and the gloomy conclusion that the Court "is doomed to reinforce the marginalization of the very people it seeks to protect."[77]

A more intensive insight into the analytical distribution of cases by vulnerable group categories has revealed that the applicants subject to arrest, police custody,

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68 Judgment *Behar and Gutman v. Bulgaria* (2021).

69 Judgment *Budinova and Chaprazov v. Bulgaria* (2021).

70 Judgment *Berkman v. Russia* (2021); *Identoba and Others v. Georgia* (2015); *M.C. and A.C. v. Romania* (2016).

71 Judgment *M. Özel and Others v. Turkey* (2016).

72 Sajó, A., *op. cit.*, note 49, p. 346.

73 Truscan, I., *op. cit.*, note 26, p. 70.

74 Fineman, M. A., *op. cit.*, note 27, p. 4.

75 Florencia, L., *Elucidating the Concept of Vulnerability: Layers Not Labels*, International Journal of Feminist Approaches to Bioethics, Vol. 2, No. 1, 2009, p. 123.

76 Fineman, M. A., *op. cit.*, note 34, p. 357.

77 Timmer, A., *op. cit.*, note 37, p. 162.

pretrial detention, and imprisonment have experienced and continue to experience the most frequent violation of their rights making up one third (33,2%) of all retracted cases. Recent bodies of scholarship have acknowledged the significant impact of the Court's judgments in children's rights development.[78] With this in mind, it is of no surprise that the recent surge of court cases has confirmed the vulnerability of children (13,8% of all cases). Vulnerability as a condition or situation was significantly related to persons suffering from mental disorders (9,7%) and criminally victimised applicants (5,1%). In the remaining cases, the vulnerability of applicants was almost incidental in vulnerable groups' narrative. The research results clearly indicate that the vulnerability scenario is an issue that disproportionately dominates ECtHR's adjudication processes. The vulnerability practice has been highly fragmented and the probable cause of this phenomenon lies in the fact that the institute of vulnerability is not regulated by the Convention, and the initial decision whether or not to proceed with the group vulnerability reasoning rests solely with the ECtHR. The unequal distribution of vulnerability reasoning concretized through Court's case law regarding vulnerability subgroups is a considerable methodological obstacle for qualitative analysis. In order to overcome those limits and strike the balance among the cases that the Court focused on in light of the vulnerability logic, the qualitative analysis will be conducted as a subgroup analysis concentrating on ECtHR's judgments that endorsed the vulnerability of children, victims of family violence and individuals who struggle with mental difficulties. Moreover, a more narrow application of the qualitative analysis is considered to be a suitable means to capture evolving trends in defining normative parameters of vulnerability standards.

3.4. The Vulnerability of Children as an Inherent Vulnerability Due to Young Age

Child vulnerability is an issue that has been significantly discussed in scholarly literature. Children have special physiologic, psychological, and other developmental characteristics and special needs which make them constitutionally different from adults. Relying on legal scholarship and empirical findings, Weithorn argues that there are two important themes in constitutional jurisprudence of children's vulnerability: children's status as not-yet-fully-developed persons and children's nature as persons undergoing an exceedingly rapid process of maturation. Those aspects hold a clear jurisprudential potential to invoke the vulnerability narrative emphasising, for example, that children are more susceptible to harm, influence, pressure, coercion than the adults. The youngest members of society have

[78] Faye Jacobsen, A., *op. cit.*, note 39, p. 549.

immature decisional and self-protective capacities and they are placed under the authority and control of others.[79] Furthermore, due to the inherent dependency, the position of children in the social context is well-recognised as being a vulnerable one. Children are inevitably dependent on their caregivers and this fact raises different types of duty of care, protection, support, and general justice towards children. Imposing legal duties on parents, guardians, educators, and different state agents has been perceived as a necessary remedy for "a disadvantage everyone suffered and would outgrow".[80] Children's need for assistance, nurturing, material and emotional care will diminish over a lifespan, however, it may increase under the unique, internal and external circumstances, and result in heightened vulnerability.

In recent years, the characterisation of children as vulnerable has been considerably cited by the ECtHR in the context of its attempts to construct higher Convention standards for rights protection in its jurisprudence relating to childhood. The analysis conducted for the purpose of this study leads to the conclusion that the Court in Strasbourg employs assertations about children's vulnerability in a variety of cases that call for interpretations of the Convention. The vulnerability of children has been specifically acknowledged in child sexual abuse cases. Apart from being expressly transported from national criminal legal provisions or international documents,[81] the vulnerability of children as very young persons was the cornerstone for the Court's assessment of the state's duty to provide effective protection from sexual abuse.[82] In *V.C.L. and A.N. v. the United Kingdom*, a ground-breaking case where the Justices elaborated on the state's decision to prosecute a (potential) child victim of human trafficking as an Article 4 issue, children were labelled as "particularly vulnerable".[83] The Court has also shown a particular understanding of the vulnerability of children in five cases against Norway and a case against Georgia that concern child's placement in care on emergency basis.[84] Moreover, the vulnerability assertation was voiced in domestic abuse cases in-

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79 Weithorn, L. A., *A Constitutional Jurisprudence of Children's Vulnerability*, Hastings Law Journal, Vol. 69, No. 1, 2017, pp. 185 – 186.

80 Fineman, M. A., *op. cit.*, note 33, p. 140.

81 Judgement *X and Others v. Bulgaria* (2021), § 115, 127, 131, 133; *I.C. v. Romania* (2016), § 43; *M.G.C. v. Romania* (2016), § 38; *Y. v. Slovenia* (2015), § 58, 70, 71.

82 Judgement *X and Others v. Bulgaria*, *ibid.*, § 177, 182, 195, 197; *Z v. Bulgaria* (2020), § 69, 70, 82; *M.M.B. v. Slovakia* (2020), § 60, 61, 65: *V.C. v. Italy* (2018), § 61, 83, 84, 89, 99, 102, 110, 111; *I.C. v. Romania*, *ibid.*, § 51, 55, 56; *M.G.C. v. Romania*, *ibid.*, § 54-56, 73; *O'Keeffe v. Ireland* (2014), § 144-146.

83 Judgement *V.C.L. and A.N. v. the United Kingdom* (2021), § 161.

84 Judgement *M.L. v. Norway* (2021); *Abdi Ibrahim v. Norway* (2020); *A.S. v. Norway* (2020); *Strand Lobben and Others v. Norway* (2019); *Jansen v. Norway* (2018); *N.Ts. and Others v. Georgia* (2016).

volving children[85] and minors who lost their lives in suspicious circumstances.[86] Placing children in state-run social care institutions,[87] educational institutions[88] or in police custody[89] create environmental conditions that may trigger the violation of rights guaranteed under the Convention, and the assessment of applicant's vulnerability, the analysis has shown, is an integral part of the Court's reasoning. According to the Strasbourg authority, children with disabilities share a particular vulnerability which cannot be overlooked when discussing their rights to education.[90] Notions of children as vulnerable were integrated into the Court's analysis to challenge the legislative presumption that children are susceptible to external influence and should not be exposed to "the propaganda of non-traditional sexual relations".[91] Specific concerns of children's vulnerability were included in relevant legal tests to scrutinise the state's responsibility for its policies and actions that resulted in the infringement of children's rights in the immigration context.[92]

The vast diversity of cases arising before the Strasbourg Court shows a clear potential for developing a progressive judicial interpretation of children's rights in order to firmly position the institute of vulnerability among judicial tools for remedying those rights violations. Yet, for the potential to be achieved in its fulness, it is vital that the Court provides sufficiently clear and transparent guidance, logical coherence and consistency of vulnerability reasoning. The crucial issue which has to be illuminated is, therefore, what is the true meaning of vulnerability in the Strasbourg jurisprudence? What does the Court mean when stating that children are vulnerable? Regrettably, the precise wording employed by the Court in reference to children's vulnerability does not elucidate the raised question. References to the vulnerability in focus are constructed by building sentences around the term "children and other vulnerable persons / individuals"[93] or by acknowledging that children are placed "in a vulnerable position / situation" [94] and belong to a "category of vulnerable individuals."[95] In the analysed cases, the Court has never provided a concrete definition of vulnerability or reasons that support referring to children as vulnerable. A glimpse of guidance is offered in *A.P. v. Slovakia* and the Court's

85 Judgement *D.M.D. v. Romania* (2018); *M. and M. v. Croatia* (2015).

86 Judgement *Hakim Aka v. Turkey* (2019).

87 Judgement *L.R. v. North Macedonia* (2020).

88 Judgement *V.K. v. Russia* (2017).

89 Judgement *A.P. v. Slovakia* (2020); *Zherdev v. Ukraine* (2017).

90 Judgement Çam *v. Turkey* (2016).

91 Judgement *Bayev and Others v. Russia* (2017), § 3.

92 Judgement *G.B. and others v. Turkey* (2020); *Khan v. France* (2019); *S.F. and Others v. Bulgaria* (2018).

93 Judgement *O'Keeffe v. Ireland*, *op. cit.*, note 82, § 144.

94 Judgement *V.C.L. and A.N. v. the United Kingdom*, *op. cit.*, note 83, § 195.

95 Judgement *V.C. v. Italy*, *op. cit.*, note 82, § 84.

tactical move to elaborate on the vulnerability of juveniles in the context of Article 3.[96] Although at first the judicial reasoning technique used by the Court may have seemed quite promising, it narrowed down the application of the vulnerability concept confining it exclusively to the boundaries of the right to personal integrity and dignity. Acknowledging the dignity of children as a precondition for their growth as full members of the community, the European Court condemned all forms of violence against children and underlined their "potential and vulnerability, their dependence on adults".[97] Taking the same view, academic literature confirms that the unavoidable reliance on others to meet one's basic needs generates vulnerability.[98] Psychophysical growth and the dependency upon the care of others appear to be the distinctive features of every child's uniqueness. The fact that the age could be a disempowering factor preventing children to lodge an application with the ECtHR is an additional argument to label them as vulnerable on account of their age.[99] Aside from that, the implied construct of children's vulnerability relies on doctrinal conclusions that exposing children to adverse experiences in childhood increases the likelihood of negative developmental outcomes.[100] Following the same argumentation line, the Strasbourg authority held that a five-year-old boy who experienced developmental trauma as a small child is vulnerable, and if exposed to stress, is at risk of serious harm to his mental health.[101]

Further indications of a possible vulnerability puzzle solution can be find in *X and Others v. Bulgaria* where the Court determined a set of special identifiers of a particular vulnerability. The majority concluded that "the applicants, owing to their young age and their status as children left without parental care and placed in an institution, were in a particularly vulnerable situation."[102] Developmental factors combined with external circumstances have suddenly become a useful tool for vulnerability gradation. Most notably, age is an intrinsic and universal source of human vulnerability and if additional vulnerability factors are triggered, the child has to be considered as a particularly vulnerable person. The process of quantifying vulnerability is recognised in theoretical perspectives on human rights as "com-

96 Judgement *A.P. v. Slovakia*, *op. cit.*, note 89, § 62.

97 Judgement *D.M.D. v. Romania*, *op. cit.*, note 85, § 50.

98 Herring, J., *Vulnerability, Childhood and the Law*, Springer, Oxford, 2018, p. 31.

99 Judgement *N.Ts. and Others v. Georgia*, *op. cit.*, note 84, § 53.

100 Hunt, X.; Tomlinson, M., *Child Developmental Trajectories in Adversity: Environmental Embedding and Developmental Cascades in Context of Risk*, in: Hodes, M.; Shur-Fen Gau, S.; de Vries, P. J. (eds.), Understanding Uniqueness and Diversity in Child and Adolescent Mental Health, Elsevier Academic Press, London, 2018, p. 156.

101 Judgement *A.S. v. Norway*, *op. cit.*, note 84, § 28-30, 65; A similar scenario prevailed in the case of *Abdi Ibrahim v. Norway*, *op. cit.*, note 84.

102 Judgement *X and Others v. Bulgaria*, *op. cit.*, note 81, § 193.

pounded vulnerability" or "intersectional acquired vulnerability".[103] In line with this argument, the Court concluded that the intellectual disability of a 14-year-old allegedly raped victim has placed her in a heightened state of vulnerability.[104] In *L.R. v. Macedonia*, the Court held that an 8-year-old mentally disabled deaf boy who could not speak was particularly vulnerable because he could not express any wishes or views regarding his needs and interests or complain at all about his treatment.[105] Depending on vulnerability factors, particular or heightened vulnerability can be increased even further and the applicant may gain a status of an extremely vulnerable individual. The Court held that extreme vulnerability of children has manifested itself in situations in which the child was unlawfully deprived of their liberty for 3 months in an immigration detention facility with unsuitable living conditions. Feelings of anxiety suffered by the applicant were another decisive element to conclude that the child was extremely vulnerable.[106] Even if the immigration detention of children in inhuman and degrading conditions is relatively short, lasting between 32 and 41 hours, it renders them extremely vulnerable at the time.[107] The extremely vulnerable children, as for example a twelve-year-old foreign unaccompanied minor and irregular migrant who lived in a hut, fall into the category of "the most vulnerable individuals in society".[108]

Even though the logic behind vulnerability gradation would be hard to contest, the structure of vulnerability subtypes due to the level of associated harm, risk, or danger has not been consistently followed in the Court's jurisprudence. Thus, for example, the fact that children were 15 and 16 years old was a sufficient reason for the Court to conclude that they were particularly vulnerable "due to their young age".[109] On the other hand, in *Jansen v. Norway,* a toddler who had encountered substantial instability and disorder in her first year and suffered attachment problems that required treatment was, in the Court's view, a "vulnerable child".[110] Additional confusion arises from the fact that in certain judgments the Justices perceive children to be vulnerable and at the same time conclude that national authorities have given little or no weight at all to the "particular vulnerability of young persons".[111] A boy who suffered grave and life-threatening neglect during

[103] Truscan, I., *op. cit.*, note 26, p. 70.

[104] Judgement *I.C. v. Romania*, *op. cit.*, note 81, § 56.

[105] Judgement L.R. *v. North Macedonia*, *op. cit.*, note 87, § 48, 80.

[106] Judgement *G.B. and others v. Turkey*, *op. cit.*, note 92, § 111.

[107] Judgement *S.F. and Others v. Bulgaria, op. cit.*, note 92, § 84-93.

[108] Judgment *Khan v. France*, *op. cit.*, note 92, § 92.

[109] Judgement *Hakim Aka v. Turkey*, *op. cit.*, note 86, § 41.

[110] Judgement *Jansen v. Norway*, *op. cit.*, note 84, § 100.

[111] Judgement *M.G.C. v. Romania*, *op. cit.*, note 81, § 55, 73; A similar ambiguity is noted in *M.M.B. v. Slovakia*, *op. cit.*, note 82, § 60, 61.

the first three weeks of his life was at the same time a "vulnerable" and a "particularly vulnerable child".[112] All said and done, few would disagree with the notion that the Court has furthered our understanding of different aspects of children's vulnerability. Yet, the analysis of judicial reasoning employed in the vulnerability jurisprudence shows a considerable fragility of interpretation. This accords with past research, which confirms that judicial activism has been a prime mover in the evolution of standards of children's rights protection, however, the judicial reasoning techniques used by the Court are susceptible to criticism.[113] The concept of vulnerability is rather vague and still clouded by the Court's individualistic and centralised focus on human rights. It seems that the ECtHR is attentive to setting the standard and resolving a particular case, and the issue related to standard implementation is left to the judgment of national authorities. The court should go beyond such narrow focus because otherwise the children's interests might be left outside of legal arena. The qualitative analysis of the Court's judgments in cases relating to persons with mental difficulties will explore whether the vulnerability concept is explained with a higher amount of judicial precision or simply wrapped up in judicial sound bites.

3.4. The Biopsychosocial Vulnerability of People with Mental Disorders

Different studies, research initiatives and public discussions have been conducted on mental health patients' experiences and emotions in an attempt to understand the human mind and its illness. When asked what kind of significance mental problems have for her, a female patient suffering from depression and schizophrenia compared her mental condition with a piece of mouldy bread, stressing that patients should seek help and treatment, or otherwise it will get worse and eventually everyone will reject them and throw them away.[114] The metaphorical description used to depict psychiatric patients' personal perspectives and needs most accurately explains the core of their vulnerability. Arguments describing this particular group vulnerability have rightfully shown that it is intrinsic and has the potential to generate severe, unwanted consequences for psychological stability and wellbeing of the individual. Those who struggle with mental health issues are vulnerable due to their compromised capability to make informed decisions. McCradden and Cusimano further supported this notion, showing that decisions made during an acute phase of the disorder may not correspond to patients' true

[112] Judgement *Strand Lobben and Others v. Norway*, *op. cit.*, note 84, § 218-219.

[113] O'Mahony, C., *Child Protection and the ECHR: Making Sense of Positive and Procedural Obligations*, International Journal of Children's Rights, Vol. 27, 2019, p. 668-669.

[114] Institute of Mental Health, *Mental Welness*, [https://www.imh.com.sg/wellness/page.aspx?id=1249], Accessed 21 April 2021.

beliefs and convictions.[115] Apart from being associated with cognitive and behavioural dysfunctions, vulnerability also has its external dimension due to the fact that it manifests itself in the form of negative reactions from the social environment. People with mental difficulties have experienced past injustices facing additional social handicaps and distress as a result of prejudice. The stigma around mental illness and the fear of those who suffer from it are historically intertwined, and together they create the situation of inequality and social exclusion as lasting consequences.[116]

Bearing in mind the empirical and doctrinal arguments described above, it is perhaps not surprising that the vulnerability narrative has long been in the Strasbourg vocabulary of applicants who cope with mental issues. The analysis conducted for this study confirms that the vulnerability discourse is employed across a range of factual substrates correlated with the violation of the rights of persons with mental health conditions. The Court acknowledged vulnerability clams in *Pedersen and Others v. Norway* raised by a mentally ill married couple who objected the Supreme Court's decision to deprive them of parental rights authorising their son's adoption. The applicants' argumentation under Article 8 of the Convention was firmly positioned on the assumption that their mental illness had placed them "in a vulnerable situation", however, the authorities failed to fulfil their positive duty to take appropriate measures to facilitate family reunification.[117] In another recent case that questioned the restriction on father's contact rights on the basis of his mental disorder in respect of his four-year-old daughter, the Strasbourg Court reaffirmed the assumptions that articulate vulnerability stemming from mental health issues. The Court, relying on its previous case law, took the position that mentally ill persons represent a vulnerable group whose rights merit special consideration.[118] It appears that the Court's vulnerability reasoning has not improved considerably in last few years and that Truscan's criticism of the Court's static, deductive reasoning still well describes the judicial pitfalls.[119] The standard vulnerability group test was assessed as the appropriate one in cases concerning a detained Albanian national who was exempted from criminal responsibility on account of paranoid schizophrenia.[120] The vulnerability of a detainee who suffered from mental health problems was evaluated through the constitutional lens

115 McCradden, M. D.; Cusimano, M. D., *Questioning Assumptions About Vulnerability in Psychiatric Patients*, AJOB Neuroscience, Vol. 9, No. 4, 2018, p. 221.

116 Sajó, A., *op. cit.*, note 49, p. 346.

117 Judgement *Pedersen and Others v. Norway* (2020); Iidentical arguments were raised, and subsequently, acknowledged by the ECtHR in *S.H. v. Italy* (2015), *op. cit.*, note 54.

118 Judgement *Cînța v. Romania* (2020).

119 Truscan, I., *op. cit.*, note 26, p. 74.

120 Judgement *Strazimiri v. Albania* (2020), § 110.

in the immigration context and, taken together with the duration of detention, amounted to the violation of applicant's right to liberty and security.[121]

It is of no dispute that the selection and application of judicial reasoning techniques rests entirely in the hands of the Court being the master of the characterization to be given in law to the facts of any case before it. However, the approach taken by the Strasbourg judicial interpretation raises serious concern. The inconsistencies noted in the Court's judicial review methodology in children's rights cases are persistent and spill over other closely related vulnerability case law. For example, in *Rooman v. Belgium*, the Grand Chamber of the ECtHR confirmed the *ratione materiae* right to obtain psychiatric treatment and effective care because, among other reasons, due regard has to be extended to the "applicant's vulnerability and his diminished ability to take decisions". The applicant was diagnosed with a severe mental disturbance making him incapable of controlling his actions and he was therefore put in compulsory detention in a specialised, French-speaking facility on continuous basis although he himself communicated only in German. He was then faced with linguistic obstacles that prevented him from receiving the necessary treatment and, due to his mental health condition, was more vulnerable than ordinary detainees. The vulnerability factors were both situational and intrinsic in nature, and they triggered different layers of vulnerability that surpassed the threshold of ordinary severity elaborated in the Council of Europe Recommendation REC (2004) 10. Even though the Strasbourg authority has substantially relied on the wording and conclusions of the international document in focus when deliberating on the dignity of persons with mental disorders and their human rights protection, surprisingly, it concluded that "the applicant is a vulnerable individual on account of his health condition and his detention".[122] The conclusion reached by the Court clearly contradicts its specific elaborations, according to which an intersectional effect of mental disorder and detention (hospitalization) under state control furthermore accumulates moral and legal merits of the particular vulnerability. Mentally ill individuals who are deprived of their freedom of movement are placed in a position of inferiority and powerlessness which is

[121] Judgement *V.M. v. the United Kingdom (no. 2)* (2019), § 38.

[122] Judgement *Rooman v, Belgium*, *op. cit.*, note 45, § 145, 164; A similar wording was present in *Frančiška* Štefančič *v. Slovenia* (2018) and *Boukrourou and Others v. France* (2017). The Court held that Mr Štefanić was "vulnerable" although "his vulnerability was compounded by a defenceless situation in which he found himself during the (police) intervention". In parallel, the Court has found that M.B., a psychiatric patient "who clearly did not understand" the meaning of police arrest he was committed to, was in a "vulnerable situation owing both to his psychiatric illness and to his status as a person deprived of his liberty".

typical of more heightened vulnerability.[123] Another puzzling moment that defies reasoning logic is noted in the Court's decision to introduce the notion of special vulnerability. According to the Court, the applicant who suffered from permanent psychological illness and was subjected to inhuman and degrading treatment by the police officers while being escorted to involuntary psychiatric examination had a special vulnerability.[124] Yet, the Court was silent as to the nature of the special vulnerability and its indicators, and possible overlapping scenarios that could occur between the special and particular vulnerability. The question of difference across the full spectrum of vulnerability thesis was left unresolved.

3.4. Family Violence as a Source of Context-specific Situational Vulnerability

Apart from inherent vulnerability due to age and mental health problems, legal doctrine and political thought accept other specific conditions in the external context that create new subgroups of human vulnerability. Dun and colleagues suggest that the situational vulnerability is context-specific, and surges from personal, social, economic, and cultural circumstances that depict different stages of our lives as humans.[125] The situational vulnerability, thus, relies on Fineman's conclusions on universal vulnerability applying theoretical ideas to a variety of external settings. Considering that family violence is a highly complex, multi-casual, negative phenomenon that cuts across social, cultural, political, and economic boundaries, situational vulnerability of such victims becomes a common thread that runs through violence in family settings. A range of threatening and other violent behaviours among family members may be associated with psychological harm, physical injury, violation of sexual integrity, economic deprivation, controlling and coercive behaviour leading to vulnerability.[126] Recent findings have expanded our understanding of aetiological factors related to family violence underlining the role of COVID-19 pandemic as a social stressor. In the time of pandemic, situational vulnerability and its correlation with family violence is fostered particularly by economic disadvantages, disaster-related instability, increased exposure to exploitative relationships, and reduced access to formal support.[127] It might well

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123 Judgement *Fernandes de Oliveira v. Portugal [GC]* (2019), *op. cit.*, note 54, § 113, 124; *I.N. v. Ukraine* (2016), § 48; *M.S. v. Croatia (no. 2)* (2015), *op. cit.*, note 54, § 76; *Mifobova v. Russia* (2015), § 54, 59; On the other hand, the facts of the case related to the applicant diagnosed with anxiety syndrome who was serving military service were assessed as determinants of a common, regular mental vulnerability. *Placì v. Italy* (2014).

124 Judgement *Pranjić-M-Lukić v. Bosnia and Herzegovina* (2020), *op. cit.*, note 54, § 80.

125 Dunn, M. C.; Clare, I. CH.; Holland, A. J., *To Empower or to Protect - Constructing the Vulnerable Adult in English Law and Public Policy*, Legal Studies, Vol. 28, No. 2, 2008, p. 241.

126 Judgement *Volodina v. Russia*, *op. cit.*, note 66, § 128.

127 Usher, K. *et al.*, *op. cit.*, note 12, p. 549.

be important to stress that, in such times of global suffering and uncertainty, the recognition of vulnerability of family violence victims is the first necessary step to adequately address their cases. In order for the judicial system to provide an effective implementation of family violence victims' rights, vulnerability analysis has to be included in courtroom discussion.

The Court has provided further insights into the concept of vulnerability in a few cases involving family violence by elucidating the role of environmental factors in the vulnerability aetiology. According to the Strasbourg authority, those who endured violence at the hands of a family member have a vulnerable status, and considering that the consensus of the international human rights community accepts family violence as a form of gender based violence, the advancement of gender equality supports the status recognition.[128] The phenomenon in focus is a human rights violation deeply rooted in abuse of power, stereotypes, and presupposed roles that cause gender inequality. The gender sensitive approach, therefore, affirms the criminological point of view that women and girls are abused within the family environment on the basis of their gender identity as well as statistical conclusions that they are considerably more affected by family violence than men. A gender sensitive interpretation of applicants' rights guaranteed under the Convention opened the path for increased protection and recognition of victims' particular vulnerability. In *Voladina v. Russia* the Court held that the victims may experience feelings of fear and anguish and lose their moral and psychological resistance. Their particular vulnerability calls for *ex officio* investigations of family violence cases as a matter of public interest.[129] A gender sensitive perspective also takes into account the particular circumstances in which family violence occurs and reoccurs. A mapping of the context of abuse has shown that a survivor of abuse often fails to report incidents being financially, emotionally, or otherwise dependent on the abuser and under the psychological effect of the risk of repeated harassment, intimidation, and abuse.[130] As expected, the compounding effect of criminological and victimological factors in cases relating to violence against women has led the Court to conclude that the victims are in a situation of extreme vulnerability.[131] The extreme psychological, physical, and material insecurity is a firm predictor of the highest vulnerability and has to be assessed in a due manner. The implicit recognition of the extreme vulnerability of applicants opens the door

128 Judgement *J.D. and A v. the United Kingdom* (2020), *op. cit.*, note 66, § 89, 93.

129 Judgement *Volodina v. Russia*, *op. cit.*, note 66, § 98, 99.

130 Judgement *T.M. and C.M. v. the Republic of Moldova* (2014), *op. cit.*, note 66, § 60; *Levchuk v. Ukraine* (2020), *op. cit.*, note 66, § 80; *Bălșan v. Romania* (2017), *op. cit.*, note 66.

131 Judgement *Talpis v. Italy* (2017), *op. cit.*, note 66, § 130.

to a more creative conceptualisation of the vulnerability institute and the possible evolving effect in imposing standards of protection of the vulnerable.

3.5. The Vulnerability Narrative in the Judicial Activism of the Strasbourg Court

Vulnerable individuals are entitled to effective protection of their rights and fundamental freedoms within the Council of Europe. Relying on the dynamic interpretation of the Convention and the idea of "practical and effective" not "theoretical and illusory" rights, the Strasbourg judicial body plays a pivotal role in setting the standards of protection and securing their collective enforcement. The judgments examined above show that the Court's main constitutional tool in fulfilling this task is the application of the doctrine of positive obligations. According to the Court's notion of positive obligations, the state has to act proactively to prevent and protect the vulnerable from human rights abuses being particularly attentive to their vulnerability.[132] For example, in *Bălșan v. Romania* the Court has affirmed that positive obligations flowing from the applicant's particular vulnerability may often overlap consisting of "the obligation to take reasonable measures designed to prevent ill-treatment of which the authorities knew or ought to have known and the (procedural) obligation to conduct effective official investigation where an individual raises an arguable claim of ill-treatment".[133] The substantive and procedural positive duties imposed upon states may considerably vary with respect to their typology and purpose to prevent human rights violations, and if they already occurred, to reply to, investigate and remedy any abuse no matter how "trivial the isolated incidents might be".[134] This is consistent with the principle of subsidiarity and the margin of appreciation providing states with a certain discretionary latitude when deciding on steps to be taken. If the primary duty to proactively secure the Convention rights within their national boundaries rests upon the states, the national authorities should have a certain space for manoeuvre depending on cultural factors, social circumstances and legal traditions. On account of the vulnerability status of the applicants, the margin of appreciation in positive obligation cases has to be narrowed down and explained by refined constitutional arguments. Regrettably, studies have found that cases involving judicial constructions of vulnerability rely on a wide margin of appreciation which is quite ambiguous on what is the precise amount of the state's discretion. Moreover, a lack of clarity in the Court's reasoning on other "classical" constitutional tests and institutes (e.g. the significant flow test, the accepted level of protection standard, effective investiga-

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132 Zimmerman, N., *Legislating for the Vulnerable? Special Duties under the European Convention on Human Rights*, Swiss Review of International and European Law, Vol. 25, No. 4, 2015, p. 553.

133 Judgement *Bălșan v. Romania*, *op. cit.*, note 66, § 57.

134 Judgement *Levchuk v. Ukraine*, *op. cit.*, note 66, § 80.

tion test, the standard of reasonableness, etc.) adds to the noted ambiguity that clouds the positive obligation standards in the ECtHR vulnerability case law.[135] No matter the shortcomings, the doctrine of positive obligations has proven itself to be an effective tool to extend the rights of the vulnerable subjects in evolutive manner.

Scholars maintain that the vulnerability reasoning is mainly used by the Strasbourg authority through the doctrine of positive obligations to deepen the existing rights and extend them into the socio-economic domain.[136] The constructive potential of the Court's judicial activism can clearly be seen in recent rulings concerning child sexual abuse cases. In *X and Others v. Bulgaria*, a groundbreaking case that sheds light on the standards of protection of "some of the most vulnerable of applicants that have come before (the) Court", a tight majority has found a violation of the procedural limb of the right to personal integrity and dignity.[137] The judgment holds doctrinal value and merits scholarly attention, not only for the fact that for the first time in its practice, the Strasbourg Court examined allegations of sexually abusing children in institutional settings, but also for the scrutiny applied throughout . Firmly stressing that it is not up to the Court to establish the facts of the case instead of the domestic authorities or to resolve the question of the alleged offender's criminal responsibility, the majority has in a meticulous way elaborated exactly what makes for an effective investigation. In order for the investigation to be effective, the Court suggested a number of constitutional tests. Relying on sufficient thoroughness, reasonable measures, serious attempt test, the requirement of promptness and reasonable expedition, the Court expounded constitutional demands insisting on the victim's effective participation in the investigation. The right of the child to be heard is the cornerstone of child friendly justice, a concept forged within the international child rights framework as to empower children to enforce their rights in modified judicial and administrative systems according to their best interests and needs. To conclude, children's particular vulnerability taken together with the effective implementation of their right to treat their best interest as a primary concern has considerably altered demands for compliance with positive obligations widening the standards of protection.

A similar evolutive line of human rights standards is observed in mental vulnerability cases. Persons suffering from mental disorder belong to a "particularly vulnerable group in society that has suffered considerable discrimination in the past"

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135 Rittossa, D., *op. cit.*, note 38, pp. 552 – 553.

136 Timmer, A., *op. cit.*, note 37, p. 167.

137 Joint partly concurring, partly dissenting opinion of Judges Spano, Kjølbro, Lemmens, Grozev, Vehabović, Ranzoni, Eicke and Paczolay in *X and Others v. Bulgaria*, *op. cit.*, note 81.

and "the state's margin of appreciation is considerably narrower". Restrictions imposed upon fundamental rights have to be justified by "very weighty reasons" and without discriminatory grounds. In *prima facie* cases of discrimination against persons with difficulties, the burden of proof shifts to the respondent state because, otherwise, the applicants would be faced with an extremely difficult task to prove that the restriction was discriminatory in nature.[138] There is a strong indication that the Court's powerful reasoning arguing for better protection of mentally ill persons has been presumably motivated by the model of inclusive equality. In recent doctrinal and political thought, mental disability, apart from being inherent and personal, is also a social construct which has to be addressed with a series of special measures recognising the value of diversity as a matter of human dignity and promoting diversity inclusion in society. Not surprisingly, a coherent and multidisciplinary approach is needed to provide specific and individualised care for particularly vulnerable members of society.[139]

The evolution in the Strasbourg Court's judicial reasoning towards vulnerability of family violence victims has been supported by the fact that violence against women has become a public justice issue. Positive obligations, thus, have to be tailored to the needs of victims in the context of situational vulnerability. In order to further develop its vision, the ECtHR has applied the gender sensitive interpretation of the Convention, as it was shown above, and concluded that the burden of proof shifts onto the authorities.[140] The particularly vulnerable applicants are entitled to demand that the state meets more challenging obligations, first and foremost, to change the general perceptions that violence against women is committed by private individuals in their intimate sphere of life, and therefore, does not merit a judicial response. The vulnerability theses embraced by the Court leaves no room for authorities' passivity by blurring the line between private and public in the family violence case of *Bălșan v. Romania*.[141] Applied in this way, the vulnerability theory has revealed its utmost potential providing mechanisms for building resilience through Fineman's more responsive state.

4. CONCLUSION

The challenging months behind us have taught us lessons about vulnerability and how important it is to have a comprehensive range of effective measures to quickly and adequately respond to COVID-19 outbreak. Swift and determined solutions

138 Judgement *Cînța v. Romania*, *op. cit.*, note 118, § 41, 79.

139 Judgement *Rooman v. Belgium*, *op. cit.*, note 45, § 119, 250.

140 Judgement *Volodina v. Russia*, *op. cit.*, note 66, § 111.

141 Judgement *Bălșan v. Romania*, *op. cit.*, note 66.

are needed to diminish the devastating consequences and restore balance in the areas of social life traditionally reserved to the state authority. While scholars and policy makers were assessing the detrimental impact of the COVID-19 crisis on health and well-being, educational growth, social care, and economic stability, research soon showed that even though we are all vulnerable under the attack of the pandemic, vulnerability and ensuing risks have not been equally shared across society. There are different levels of vulnerability, i.e. the global, social vulnerability and the individual one, and forces behind them create a social environment in which those who were vulnerable are now more vulnerable than ever. If we succeed in comprehending the different layers of vulnerability and its drivers, the vulnerability theme might be rightfully placed within the human rights spectrum seeking greater protection for vulnerable individuals. The first prerequisite for understanding vulnerability is understaning its true meaning. However, the analysis has demonstrated that the notion of vulnerability has a transcendent significance, and although invoked by many, it is still burdened by vagueness and ambiguity. It is often forgotten that the notion of vulnerability has to be placed, first and foremost, in legal context in order to capture its potential to redefine human rights standards.

In recent years, the ECtHR has accepted the challenge to include the vulnerability thesis in its reasoning. The European judicial authority has embraced the term, redefined its meaning, and empowered it with the normative authority designed to impose upon states explicit obligations to reduce vulnerability and to protect the vulnerable. There are no specific written rules that would guide the Court while performing this task. In each individual case the Court decides whether the applicant is "in a vulnerable position" or whether he or she "falls into a vulnerable group". Although implemented in a purely pragmatic and flexible manner in the Court's legal reasoning, the vulnerable group concept was not accepted without criticism. Critics argue that the concept itself has become intolerably broad and open-ended. As expected, the Court in Strasbourg has succeeded in putting under the same roof children, mothers of a newborn baby, victims of domestic violence, psychiatric patients, those who suffer from other serious illness, HIV positive persons, asylum seekers, refugees, Roma, prisoners, earthquake victims, and the list is not exhaustive. Another negative aspect of vulnerability group recognition is the possible stigmatizing effect and the inability to capture Fineman's notion of inherent, universal vulnerability. Paradoxical though it may seem, the Court's tactic to expend vulnerability beyond groups traditionally recognized as vulnerable is precisely a step further towards the reconciliation with Fineman's model acknowledging the high probability that we can all become vulnerable. What is even more worrying is the fact that the vulnerability case law is greatly fragmented and the

normative parameters of vulnerability standards are considerably fluid. The Court has never provided a definition of vulnerability or revealed why someone should be considered a vulnerable applicant. An additional source of uncertainty that clouds the true meaning of vulnerability in the Strasbourg jurisprudence arises from the ambiguous and rather imprecise gradation of the applicant's vulnerability. Without clear correlations between the level of associated harm, risk, or danger and the subgroups of ordinary, heightened, particular, and extreme vulnerability, the vulnerability reasoning remains somewhat vague and narrowly focused on individual entitlements claimable on the basis of human rights.

Noted inconsistencies in judicial reasoning notwithstanding, the efforts to include vulnerability considerations in the assessment of a possible violation of a provision of the Convention present an important interpretive development. In its recent judgments, the Court has heavily relied on the doctrine of positive obligations to extend standards of protection within the Council of Europe territory. The vulnerability concept, taken together with the already established legal principles and tests like the child's best interest, gender sensitive approach, and inclusive equality, has opened the door for the evolutive interpretation of human rights standards from the European perspective. Judge Serghides said that the Convention and other international human rights treaties are part of the same legal environment and "…like all living things, the Convention as a living instrument is impacted by the environment in which it flourishes".[142] The vulnerability narrative has echoed and expanded throughout the human rights community from an emerging concept to an international law tool. Recent developments in the Strasbourg jurisprudence affirm that the tool has gained a more substantive understanding as a legal institute whose full creative and transformative potential is yet to be seen.

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UDK 34-055.2: 616-036.21
Original scientific article

COVID- 19 PANDEMIC AND THE PROTECTION OF THE RIGHT TO ABORTION

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ABSTRACT

The COVID - 19 pandemic that swept the world in 2020 and the reactions of state authorities to it are unparalleled events in modern history. In order to protect public health, states have limited a number of fundamental human rights that individuals have in accordance with national constitutions and international conventions. The focus of this paper is the right of access to abortion in the Member States of the European Union. In Europe, the situation with regard to the recognition of women's right to abortion is quite clear. All member states of the European Union, with the exception of Poland and Malta, recognize the rather liberal right of a woman to have an abortion in a certain period of time after conception. However, Malta and Poland, as members of the European Union, since abortion is seen as a service, must not hinder the travel of women abroad to have an abortion, nor restrict information on the provision of abortion services in other countries.

In 2020, a pandemic highlighted all the weaknesses of this regime by preventing women from traveling to more liberal countries to perform abortions, thus calling into question their right to choose and protect their sexual and reproductive rights. This is not only the case in Poland and Malta, but also in countries that recognize the right to abortion but make it conditional on certain non-medical conditions, such as compulsory counselling; and the mandatory time period between applying for and performing an abortion; in situations present in certain countries where the problem of a woman exercising the right to abortion is a large number of doctors who do not provide this service based on their right to conscience.

The paper is divided into three parts. The aim of the first part of the paper is to consider all the legal difficulties that women face in accessing abortion during the COVID -19 pandemic, restrictions that affect the protection of their dignity, right to life, privacy and right to equality. In

the second part of the paper particular attention will be paid to the illiberal tendencies present in this period in some countries of Central and Eastern Europe, especially Poland. In the third part of the paper, emphasis will be put on the situation in Malta where there is a complete ban on abortion even in the case when the life of a pregnant woman is in danger.

***Keywords**: Covid -19 pandemic, Abortion on Request, Telemedicine, European Convention on Human Rights, Autonomy, Dignity*

1. INTRODUCTION

The COVID - 19 pandemic that swept the world in 2020 and the reactions of state authorities to it are unparalleled events in modern history. The pandemic was accompanied by extreme pressure on the health systems of the states and the introduction of measures to restrict the movement of individuals, i.e. the closure of state borders. In order to protect public health, states have limited a number of fundamental human rights that individuals have in accordance with national constitutions and international conventions.

A number of constitutional courts questioned the adequacy of the introduced state measures, the legitimacy of their goals, i.e. the proportionality of the introduced restrictions on human rights in relation to the existing threats to public health.[1] In this paper, the focus will be on the right of access to abortion in the Member States of the European Union.

It is important to note that in Europe, the situation with regard to the recognition of women's right to abortion is quite clear. All member states of the European Union, with the exception of Poland and Malta, recognize the rather liberal right of a woman to have an abortion in a certain period of time after conception. However, Malta and Poland, as members of the European Union, since abortion is seen as a service, must not hinder the travel of women abroad to have an abortion, nor restrict information on the provision of abortion services in other countries. Abortion thus emerges as a form of cross-border reproductive care.[2]

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1 Following the number of submissions for constitutional review of the legislative and other measures adopted in the context of the pandemic the Constitutional Court of the Republic of Croatia in its Decision of 14 September 2020 questioned, inter alia, the authority of the Civil Protection Headquarters for adopting measures restricting human rights.
The Constitutional Court of the Republic of Croatia, Decision No. U-I-1372/2020 and others from 14 September 2020, available on: [https://sljeme.usud.hr/usud/praksaw.nsf/C12570D-30061CE54C12585E7002A7E7C/$FILE/SA%c5%bdETAK%20-%20COVID-19.pdf], Accessed 20 April 2020.

2 See more on this issue: Tucak, I.; Blagojević, A., *Abortion in Europe,* EU and comparative law issues and challenges series (ECLIC), Vol. 4 (2020): EU 2020 – lessons from the past and solutions for the future; Mulligan, A., *The Right to Travel for Abortion Services: A Case Study in Irish Cross-Border Reproductive Care*, European Journal of Health Law, Vol. 22, No. 3, 2015, pp. 239-266.

In 2020, a pandemic highlighted all the weaknesses of this regime by preventing women from traveling to more liberal countries to perform abortions, thus calling into question their right to choose and protect their sexual and reproductive rights. This is not only the case in Poland and Malta, but also in countries that recognize the right to abortion but make it conditional on certain non-medical conditions, such as compulsory counselling; and the mandatory time period between applying for and performing an abortion; in situations present in certain countries where the problem of a woman exercising the right to abortion is a large number of doctors who do not provide this service based on their right to conscience.

As for the Council of Europe's position on abortion, the Parliamentary Assembly of the Council of Europe called on its member states to "guarantee women's effective exercise of their right of access to a safe and legal abortion".[3] The European Court of Human Rights did not issue a substantive verdict on abortion but pointed out that member states are obliged to comply with their abortion legislation.[4] This means that states that allow abortion on demand (regardless of medical reasons) are required "to ensure the effectiveness of this right".[5] It is also important to emphasize that the case law of the European Court of Human Rights also supports the principle of the inherent dignity of persons who may become pregnant.[6] For example, this is evident in decisions relating to the forced sterilization of women, mainly from marginalized groups or certain ethnic groups, which state that this violates not only their right to health but also their dignity.[7]

The paper is divided into three parts. The aim of the first part of the paper is to consider all the legal difficulties that women face in accessing abortion during the COVID -19 pandemic, restrictions that affect the protection of their dignity, right to life, privacy and right to equality. In the second part of the paper particular

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On Poland and Malta see European Parliament's Committee on Women's Right and Gender Equality, *Access to abortion services for women in the EU*, report made by Blagojević, A. and Tucak I., September 2020, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659923/IPOL_IDA(2020)659923_EN.pdf], Accessed 20 April 2020.

3 McGuinness, S.; Montgomery, J., *Legal Determinants of Health: Regulating Abortion Care*, Public Health Ethics, Vol. 13, No. 1, 2020, p. 35; Parliamentary Assembly of the Council of Europe, Resolution 1607 (2008), Access to Safe and Legal Abortion in Europe, [http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638], Accessed 11 April 2021.

4 McGuinness, S.; Montgomery, J., *op. cit.*, note 3, p. 35.

5 Lebret, A., *COVID-19 pandemic and derogation to human rights*, Journal of Law and the Biosciences, Vol. 7, No. 1, 2020, pp. 14-15; See *A., B. and C v. Ireland* (2011) 53 E.H.R.R 13; *R. R. v. Poland* (2011) 53 EHRR 31 and *Tysiąc v. Poland* (2007) 45 EHRR 42.

6 Yamin, A. E.; Boghosian, T., *Democracy and Health: Situating Health Rights within a Republic of Reasons*, Yale J. Health Pol'y L. & Ethics, Vol. 19, 2020, p. 110.

7 *V.C. v. Slovakia* (2011)-V Eur. Ct. H.R. 381; Yamin *op. cit.*, note 6, p. 110.

attention will be paid to the illiberal tendencies present in this period in some countries of Central and Eastern Europe, especially Poland. In its judgment of 22 October 2020 the Polish Constitutional Court addressed the issue of eugenic abortion and held that it is contrary to the Polish Constitution. In the last part of the paper, the emphasis will be on the situation in Malta where there is a complete ban on abortion even in the case when the life of a pregnant woman is in danger. The problematic situation in Poland and Malta was also highlighted in recent European Parliament's Committee on Women's Right and Gender Equality report "Access to abortion services for women in the EU" (September 2020).[8]

2. COVID - 19 PANDEMIC

The coronavirus SARS CoV-2 (Severe Acute Respiratory Syndrome Coronavirus-2) was detected in Wuhan, China and reported to the World Health Organization (hereinafter "WHO") on 31 December 2019.[9] COVID-19 is the name of a disease caused by this virus.[10] On 30 January 2020, the WHO described it as "a public health emergency of international concern", and on 11 March 2020 as a pandemic.[11] According to data from 1 June 2021, 174,582,356 cases and 3,764,746 deaths were recorded globally, while 2,242,769,750 people were vaccinated.[12] Although it is a new hitherto unknown virus, it is important to emphasize that the WHO has long pointed out the danger of a global pandemic of influenza and in 2019 it was ranked among the ten biggest threats to global health. The WHO predicted that this pandemic would surely occur: "The only thing we don't know is when it will hit and how severe it will be."[13]

The appearance of this disease occurred at the time of the greatest mobility of people and the global interconnectedness enabled its rapid spread.[14] The exponential rise

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8 European Parliament's Committee on Women's Right and Gender Equality, *Access to abortion services for women in the EU*, report made by Blagojević, A. and Tucak I., September 2020, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659923/IPOL_IDA(2020)659923_EN.pdf], Accessed 20 April 2020.

9 Thomson, S., C.; Ip, E., *COVID-19 emergency measures and the impending authoritarian pandemic*, Journal of Law and the Biosciences, Vol. 7. No. 1. 2020, 2.

10 See Najčešća pitanja i odgovori za koronu.pdf, [https://www.zzjzpgz.hr/obavijesti/2020/Naj%C4%8De%C5%A1%C4%87a%20pitanja%20i%20odgovori%20za%20koronu.pdf], Accessed 20 April 2020.

11 Thomson, S., C.; Ip, E., *op. cit.*, note 9, p. 2.

12 John Hopkins University of Medicine, Coronavirus Resource Center, [https://coronavirus.jhu.edu/map.html], Accessed 1 June 2021.

13 World Health Organization, Ten threats to global health in 2019 [https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019], Accessed 1 June 2021.

14 Thomson, S., C.; Ip, E., *op. cit.*, note 9, p. 7.

in infection and mortality rates has brought the health systems of many states to the brink.[15] Healthcare providers are facing the challenge of continuing to provide standard healthcare services while tackling a new and unknown infectious disease.[16] The capacities of intensive care units and morgues proved to be insufficient for the new needs, there was, among other things, a shortage of testing equipment, personal protective equipment, and mechanical ventilators.[17]States have introduced unprecedented measures to prevent the spread of infection, closed their borders, some have prevented the movement of their own population between cities and regions.[18]

In the efforts of states to stop the spread of this new type of coronavirus, there has been an increase in authoritarianism,[19] not only in states that have already been described as "disciplinary" or "tyrannical" but also in liberal democracies.[20] What is an unprecedented event is the fact that the COVID-19 pandemic has triggered the establishment of states of emergency, officially or de facto not only in one or two states but in most states.[21]

The authors describe the new situation as a constitutional "pandemic" that led to a decline towards authoritarianism.[22] In the long run, with all the restrictions on fundamental human rights and freedoms, but also on a health ethic based on human dignity and autonomy, this crisis could have consequences as severe as those following the COVID-19 pandemic.[23] One can speak of a constitutional pandemic because the abuse of public health emergency powers poses a threat to modern constitutionalism aimed at limiting state power.[24]

Some countries have taken advantage of this emergency to declare abortion an "elective procedure" rather than an "essential medical service"[25] and have thus made it impossible for women to access abortion due to the "time-sensitive"[26]

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15 *Ibid.*, 1.

16 Prandini Assis, M.; Larrea, S., *Why self-managed abortion is so much more than a provisional solution for times of pandemic*, Sexual and Reproductive Health Matters, Vol. 28, No. 1, 2020, 1.

17 Thomson, S., C.; Ip, E., *op. cit.*, note 9, p. 2.

18 *Ibid.,* 2.

19 *Ibid.*, 1.

20 *Ibid.,* 4.

21 *Ibid.*

22 *Ibid.,* 5.

23 *Ibid.*, pp. 1, 4.

24 *Ibid.*, 5.

25 Todd-Gher, J.; Shah, P. K., *Abortion in the context of COVID-19: a human rights imperative*, Sexual and Reproductive Health Matters, Vol. 28, No. 1, 2020, p. 29.

26 Romanis, E. C.; Parsons, J. A., *Legal and Policy Responses to the Delivery of Abortion Care During COVID-19*, International Journal of Gynecology and Obstetrics 2020 (Dec), p. 4.

nature of the procedure.[27]Among the countries that have not recognized abortion as an essential medical service are, for example, Germany, Austria and Croatia.[28] This practice is contrary to the position of the WHO, which described reproductive health care as an "essential health service that must be accorded high priority in COVID-19 response."[29] Some countries have gone even further in restricting access to abortion. For example, the Slovak government has issued a statement saying that access to abortion is not recommended at this time.[30]

When we talk about pregnancy and access to abortion, it is important to point out that we need more precise terminology, it is common to talk about the right of women to access abortion, but it is more precise to talk about the right of access to abortion of persons who may become pregnant.[31] Women are not the only ones who can get pregnant; so can transgendered males, nonbinary persons, and cis-gender women.[32]

Although in this paper we discuss the regulation of abortion in the countries of the European Union, it is important to emphasize that the EU only has "a supporting competence" in the field of health.[33] According to Article 6 of the consolidated version of the Treaty on the Functioning of the EU (TFEU)with regard to the protection and promotion of health,[34] the Union has the "competence to carry out actions to support, coordinate or supplement the actions of the Member States".[35]

2.1. THE CONNECTION BETWEEN LAW AND HEALTH

Health is not only related to "individual behaviors or biological pathogens" but is mostly "a product of social structures and relations" and can therefore be concep-

27 Prandini Assis, M.; Larrea, S., *op. cit.*, note 16, p. 1.

28 Romanis, E. C.; Parsons, J. A., *op. cit.*, note 26, p. 7.

29 WHO. WHO releases guidelines to help countries maintain essential health services during the COVID-19 pandemic. 2020 Mar 30. [https://www.who], Accessed 20 April 2021. [int/news-room/detail/30-03-2020-who-releases-guidelinesto-help-countries-maintain-essential-health-servicesduring-the-covid-19-pandemic], according to Todd-Gher, J.; Shah, P. K., *op. cit.*, note 25, p. 29.

30 Romanis, E. C.; Parsons, J. A., *op. cit.*, note 26, p. 7.

31 Yamin *op. cit.*, note 6, p. 110.

32 Nandagiri, R.; Coast, E.; Strong, J., *COVID-19 and Abortion: Making Structural Violence Visible*, International Perspectives on Sexual and Reproductive Health, Vol. 46, No. Supplement 1, Focus on Abortion (2020), p. 83. Nandagiri et al. use the terms "womxn"; See also Romanis, E. C.; Parsons, J. A., *op. cit.*, note 26, p. 1.

33 Lebret, *op. cit.*, note 5, pp. 1-2.

34 Article 6 (a) of the consolidated version of the TFEU.

35 Lebret, *op. cit.*, note 5, p. 2. See also Article 168 TFEU relating to public health.

tualized as a moral and legal right.[36] The law as one of the important means for the promotion and advancement of health is still insufficiently understood and used.[37] Poorly designed laws, as well as those that are not properly enforced, can particularly harm marginalized groups of people and contribute to discrimination.[38]

In this context, it is instructive to present the results of the McGuinness analysis based on the work of the Lancet-O'Neill Commission on Global Health and Law called *The legal determinants of health: Harnessing the power of law for global health and sustainable development.*

Law can be seen as a weapon in "culture wars".[39] For these reasons, no agreement has yet been reached on the human rights dimension of abortion, and even health aspects have been obscured. [40] The issue of abortion is seen primarily as a moral issue on which it is necessary to reach a compromise between the conflicting parties.[41] Such an approach is harmful.[42]

Throughout history, arbitrary and discriminatory laws have inflicted great harm on individuals and groups.[43] Criminal legislation did injustice to women and restricted their sexual and reproductive rights.[44] Existing legal frameworks often do not guarantee "clinically optimal care" but, in case they are based on the morality of abortion, interfere with "good clinical practice".[45]

Health systems may be "gender-blind", but this does not mean that they are neutral. [46] When regulating sexual and reproductive rights, states may impose restrictions on access to health care that are not only unnecessary but also harmful. [47] They are a participant in the making of "gendered harms".[48]

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36 Yamin *op. cit.*, note 6, p. 101.

37 McGuinness, S.; Montgomery, J., *op. cit.*, note 3, p. 34; Gostin, L.; Monahan, J.; Kaldor, J.; Debartolo, M.; Friedman, E.; Gottschalk, K.; Kim, S. C.; Alwan, A.; Binagwaho, A.; Burci, G. L.; Cabal, L.; DeLand, K.; Evans, T. G.; Goosby, E.; Hossain, S.; Koh, H.; Ooms, G.; Periago, M. R.; Uprimny, R.; and Yamin, A. E., *The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development*, The Lancet, 393, 2019, p. 1857.

38 *Ibid.*, 1857.

39 McGuinness, S.; Montgomery, J., *op. cit.*, note 3, p. 35.

40 *Ibid.,* 35.

41 *Ibid.*, 36.

42 *Ibid.*

43 *Ibid.*, 35; Gostin et al, *op. cit.*, note 37, p.1859.

44 *Ibid.*; Gostin *et al*, *op. cit.*, note 37, p.1890.

45 *Ibid.*, 34.

46 *Ibid.*, 36.

47 *Ibid.*

48 *Ibid.*

As examples of such harmful restrictions on the possibility of performing an abortion, McGuinness lists "medically unnecessary waiting periods, unnecessary informed consent rules, parental notification requirements and clinically unnecessary restrictions on where and by whom abortions may be performed."[49] These restrictions contribute to the stigmatization of abortion and have a particularly detrimental effect on women of low socioeconomic status.[50] Also, the refusal of doctors to perform abortions by invoking the institute of conscientious objection stigmatizes this procedure as well as those who undergo it.[51] All persons must be able to actively decide in the area of sexual and reproductive freedoms, and must not be merely passive recipients of "reproductive health services". [52] Only the full reproductive freedom of persons who may become pregnant enables them to be equal members of the social community, i.e. equal legal subjects.[53]

3. THE RIGHT OF ACCESS TO ABORTION IN THE EU DURING THE COVID-19 PANDEMIC

Today, in most of Europe, abortion laws are a kind of "moral compromise", according to which women are allowed to have an abortion on demand in the first trimester of pregnancy, and after that time period their access is limited.[54] Abortion due to non-medical indications is widely available in Europe, but the legal regulation of the abortion procedure itself is diverse.[55]

As we saw in the previous chapter, even prior to the COVID-19 pandemic, in "normal" times, pregnant women were faced with numerous barriers to exercising their right to abortion, in spite of the fact that this right is "central to gender equality, human rights, and social justice"[56] Those barriers differed from state to

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49 *Ibid.*

50 *Ibid.*

51 *Ibid.*

52 Yamin *op. cit.*, note 6, p. 110.

53 *Ibid.*

54 Allen, A., "Privacy and Medicine", The Stanford Encyclopedia of Philosophy (Spring 2021 Edition), Edward N. Zalta (ed.), [https://plato.stanford.edu/archives/spr2021/entries/privacy-medicine/], Accessed 11 April 2021.

55 Moreau *et al*, *Abortion regulation in Europe in the era of COVID-19: a spectrum of policy responses*, BMJ Sex Reprod Health, 2020, [https://srh.bmj.com/content/familyplanning/early/2021/02/22/bmjsrh-2020-200724.full.pdf], Accessed 3 April 2021, p. 2.

56 Mishtal, J.; Martino, A.; Zanini, G.; Capelli, I.; Rahm, L.; DeZordo S., Political (in)action in abortion governance during COVID-19 in Europe: a call for a harmonized EU response during public health crises, *Medical Anthropology Quarterly*, 2020, available on: [https://medanthroquarterly.org/rapid-re-

state and encompassed differing legal, social and procedural aspects.[57] Moreau et al. divide these various measures to restrict access to abortion into two categories:[58]

> "On the demand side, measures include mandatory counselling and waiting periods, parental consent, funding regulations or bureaucratic requirements (e.g. authorisation by several doctors)."
>
> "On the supply side, restrictions apply to the type of provider who can perform abortions, the type of medical interactions (in-person consultations vs remote consultations), the modalities of medication dispensation or the types of additional examination or procedures required (for gestational dating, anti-D immunoglobulin injection for women with Rhesus-negative blood group)."

The above restrictions are not based on science and place unnecessary barriers to abortion seekers.[59]

However, the impact of the pandemic on sexual and reproductive health and rights in general, and on access to abortion in particular, is enormous. Available reports and studies show that the lack of harmonized policy response to pandemic has widened the existing inequities in access to abortion in Europe.[60]

Access to contraception and abortion is further limited during a pandemic.[61] The reorganization of work in hospitals has led to a delay in performing abortions.[62] Some countries have enacted "gender neutral emergency regulations" that do not satisfactorily address emerging issues, and some have even used the new situation to remove existing rights.[63] Lockdowns and quarantines restricting freedom of movement have also exacerbated existing abortion restrictions requiring multiple clinic visits which increases the risk of infection for abortion seekers and health care providers themselves.[64] In addition, the pandemic has also jeopardized the supply of birth control pills as well as abortion medications.[65]

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sponse/2020/06/political-inaction-in-abortion-governance-during-covid-19-in-europe/], Accessed 3 April 2021.

57 Pinter, B.; Aubeny, E.; Bartai, G.; Loeber, O.; Ozalp, S.; Webb, A., Accessibility and availability of abortion in six European countries, *The European Journal of Contraception and Reproductive Health Care*, Vol. 10, No. 1, 2005, p. 56-57.

58 Moreau *et al.*, *op. cit.*, note 55, p. 2.

59 *Ibid.*

60 *Ibid.*, 1.

61 Lebret, *op. cit.*, note 5, p. 14.

62 *Ibid.*

63 *Ibid.*

64 Todd-Gher, J.; Shah, P. K., *op. cit.*, note 25, p. 28.

65 *Ibid.*

The COVID-19 pandemic is believed to increase the need for abortion both due to the increase in domestic violence and income insecurities.[66] Several countries reported that there was a serious increase in domestic violence during the COVID-19 pandemic, which has been identified by the WHO as a significant public health problem.[67] The UN Committee on the Elimination of Discrimination against Women described the "prohibition of gender-based violence" as a "principle of customary international law".[68] Forced continuation of an unwanted pregnancy has been recognized in several situations as a violation of human rights, especially where physical or mental influences on pregnant women are present.[69]

According to research by 100 European NGOs, the effect of the pandemic on access to abortion is threefold: firstly, in several European countries, the existing barriers to abortion access have been exacerbated (for example, in Romania, Germany, Italy, the Netherlands, Ireland, Spain); secondly, in some countries, negative steps aimed at further coercion measures were detected (for example, in Lithuania, Hungary, Poland); and thirdly, some countries took significant positive, progressive steps forward in the context of securing the right to abortion (for example, in the context of the promotion of telemedicine in the UK and France).[70]

Similar results were obtained by Moreau et al. in their analysis of policy responses enacted in 46 European countries/regions related to access to abortion services during the COVID-19 pandemic. Their research showed that, within the context of the pandemic, abortion "was available to varying extents in 39 countries/regions, banned for non-medical reasons in six countries (Andorra, Liechtenstein, Malta, Monaco, San Marino and Poland) and suspended in Hungary due to a ban on non-life-threatening surgeries in state hospitals".[71] According to this research, the situation in Croatia with regard to the abortion regulation during Covid-19 pandemic is as follows: gestational limit for non-medical indications is 10 weeks, there is mandatory waiting period, home abortion is not permitted, there is no

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66 *Ibid.*; See also Moreau *et al.*, *op. cit.*, note 55, p. 1.

67 Lebret, *op. cit.*, note 5, p. 9; See UN Women, "COVID-19 and Ending Violence against Women and Girls", [https://asiapacific.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2020/04/hq_covid-19_photos.pdf?la=en&vs=902], Accessed 10 May 2021.

68 Lebret, *op. cit.*, note 5, p. 9; See UN Women, "COVID-19 and Ending Violence against Women and Girls." CEDAW, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 14 July, 2017, at 2. CEDAW/C/GC/35.

69 Todd-Gher, J.; Shah, P. K., *op. cit.*, note 25, p. 28.

70 IPPF European Network & European Parliamentary Forum for Sexual and Reproductive Health and Rights, *Sexual and Reproductive Health and Rights during the COVID-19 pandemic*, A joint report, 22 April 2020, available on: [https://www.ippfen.org/sites/ippfen/files/2020-04/Sexual%20and%20Reproductive%20Health%20during%20the%20COVID-19%20pandemic.pdf], Accessed 6 April 2021.

71 Moreau *et al.*, *op. cit.*, note 55, p. 2.

availability of telemedicine, and the access to mifepristone is only possible in the clinic or the hospital.[72] In addition, in Croatia abortion was not recognize as essential service.[73] The activists of the Platform for Reproductive Justice warned that the access to abortion in Croatia became even more inaccessible and expensive during the pandemic.[74] According to their investigation, eight of 29 authorized hospitals do not perform this procedure and even in hospital that perform the procedure it is difficult to get appropriate information.[75]

France deserves particular attention among countries that recorded a positive and swift reaction in the context of ensuring the right to abortion during the pandemic. A swift reaction and mobilization of abortion professionals, women's associations, perinatal networks and regional health agencies resulted in a decision by the French authorities to adapt the abortion services and introduce several exceptions, such as the extended access to medical abortion at home from seven to nine weeks of pregnancy and introduction of telemedicine for medical abortion consultation.[76] Furthermore, during surgical abortion planning, the practice promoting local over general anaesthesia is observed, and all examinations and consultations are performed as outpatient procedures, instead of taking several days as was the case before the pandemic.[77] Still, it should be pointed out that, despite these measures, French hospitals recorded a drastic decline in the number of women seeking an abortion during the lockdown, which has been linked to "psychological barriers to services, and general physical immobility during lockdown".[78]

France's success in this area is related to telemedicine, and in the next subchapter we will point out its importance in providing abortion services.

3.1. Telemedicine

Women and "gender non-conforming people" have long been fighting for the "demedicalization of their bodies and health".[79] The problem is that a public health-

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72 *Ibid.*, p. 6.

73 Romanis, E. C.; Parsons, J. A., *op. cit.*, note 26, p. 7.

74 Pobačaj još nedostupniji i skuplji: cijene i do 3000 kuna, sve veći broj liječnika u prizivu savjesti, RTL vijesti, 28 April 2020, available on: [https://www.rtl.hr/vijesti-hr/novosti/hrvatska/3807661/pobacaj-zbog-pandemije-jos-nedostupniji-cijene-i-do-3000-kuna-sve-veci-broj-lijecnika-u-prizivu-savjesti/], Accessed 7 April 2021.

75 *Ibid.*

76 Mishtal *et al.*, *op. cit.*, note 56.

77 *Ibid.*

78 *Ibid.*

79 Prandini Assis, M.; Larrea, S., *op. cit.*, note 16, p. 2. On telemedicine and self-managed abortion see also European Parliament's Committee on Women's Right and Gender Equality, *Access to abortion*

based approach to the term "quality of care" does not include autonomy and control.[80] Abortion took place within "intimate circles of care" until the 19th century when this issue began to be regulated by law, i.e. a period of "medicalization of abortion" began.[81] During the COVID-19 pandemic, the issue of self-managed abortion was again emphasized. Access to abortion in these times of crisis can be facilitated "by providing early medical abortion (EMA) through telemedical services (TEMA)".[82]

> "EMA is the use of two drugs - mifepristone and misoprostol - taken 24-48 hours apart to procure an abortion". [83]
>
> "TEMA is the use of telemedical means to provide EMA remotely." [84]

TEMA allows women to have abortions at home so they do not have to travel and be exposed to the infection, but it also protects health care providers from infection.[85] There are big differences in the models in which TEMA appears today, for example it can be "a consultation by telephone or video call before abortifacients are posted to the patient".[86] In its COVID-19 guidance on maintaining essential health services, the WHO emphasized the need to ensure safe abortion in accordance with the law and stressed the need to 'minimize facility visits' and to give priority to 'telemedicine and self-management approaches'. [87] What must be satisfied is that pregnant women are informed "on effective protocols and access to follow up health care if needed."[88] The WHO recognized "the empowering role of self-managed abortion" and its crucial importance for the power and dignity of women.[89] WHO's Model List of Essential Medicines that states are required to provide includes misoprostol and mifepristone.[90]

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services for women in the EU, report made by Blagojević, A. and Tucak I., September 2020, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659923/IPOL_IDA(2020)659923_EN.pdf], Accessed 20 April 2021.

80 *Ibid.*

81 *Ibid.*, 1.

82 Romanis, E. C.; Parsons, J. A., *op. cit.*, note 26, p. 2.

83 *Ibid.*

84 *Ibid.*

85 *Ibid.,* 4.

86 *Ibid.*, 2.

87 *Ibid.,* 6. See WHO, Maintaining essential health services: operational guidance for the COVID-19 context, 1 June 2020, [https://apps.who.int/iris/handle/10665/332240], Accessed 1 June 2021.

88 Todd-Gher, J.; Shah, P. K., *op. cit.*, note 25, p. 28. See WHO, WHO consolidated guidelines on self-care interventions for health: sexual and reproductive health and rights, 2019, [https://www.who.int/reproductivehealth/publications/self-care-interventions/en/], Accessed 1 June 2021.

89 *Ibid.,* 29.

90 *Ibid.* WHO, WHO releases guidelines to help countries maintain essential health services during the COVID-19 pandemic, 2020.

Some European countries, such as France, have allowed remote consultations with patients seeking abortion because of the risk of infection. Ireland and the United Kingdom also allowed home use of mifepristone and misoprostol.[91] The UK has adopted guidelines that allow people who may become pregnant to manage the abortion process themselves.[92] Under the new regulation, which is still temporary, a person seeking an abortion can have a telemedicine consultation with a medical practitioner, and use the mifepristone and misoprostol pills delivered to them by mail at home. [93]

Requirements in some states that those accessing EMI must be monitored in clinics when consuming active medical abortion drugs[94] mifepristone and misoprostol, in situations where it is not medically necessary, portray women as "irresponsible, not trustworthy, and / or are incapable of making their own decisions about abortion".[95] Removing medically unnecessary abortion restrictions is not just about reducing possible harm but is "a human rights imperative".[96] States have a positive human rights obligation to ensure access to safe abortion.[97] Thus, enabling self-managed abortion, i.e. access to medicines and telemedicine counselling, and not punishing such behavior is a step towards fulfilling these obligations.[98]

3.2. Poland

The spread of so-called "illiberal democracies,"[99] or the development of illiberalism in Central and Eastern Europe, has been linked particularly with Poland and Hungary, and is characterized by the crisis of democracy and *backsliding*, meaning the creation of societies "that chose the path towards democratization, but returned to bad habits instead".[100] The functioning of "sophisticated 21st-century

91 *Ibid.*, 28.

92 Prandini Assis, M.; Larrea, S., *op. cit.*, note 16, p. 1.

93 *Ibid.*

94 Todd-Gher, J.; Shah, P. K., *op. cit.*, note 25, p. 29.

95 Romanis, E. C.; Parsons, J. A., *op. cit.*, note 26, p.7.

96 Todd-Gher, J.; Shah, P. K., *op. cit.*, note 25, p. 28.

97 *Ibid*.

98 *Ibid.*, 29.

99 Smerdel, B., *Kognitivna disonanca ili promjena paradigme? Kriza ili propast ustavne demokracije: što nakon populističke kontrarevolucije*?, in: Ustavne promjene i političke nagodbe. Republika Hrvatska između demokracije i populizma, HAZU, Zagreb, 2021, p. 66.

100 Kostadinov, B., *Vladavina prava – backsliding ili globalni kraj liberalne demokracije*?, in: Ustavne promjene i političke nagodbe. Republika Hrvatska između demokracije i populizma, HAZU, Zagreb, 2021, p. 367.

authoritarians" and the creation of a "Frankenstate" was explained by K.L. Scheppele using Hungary as a model applicable to Poland as well:

> "A Frankenstate is an abusive form of rule, created by combining the bits and pieces of perfectly reasonable democratic institutions in monstrous ways, much as Frankenstein's monster was created from bits and pieces of other living things. No one part is objectionable; the horror emerges from the combinations. As a result, if one approaches the monster with a checklist, the monster will pass the test (elections, CHECK; parliamentary government, CHECK). But the combinations – free elections with a paucity of parties; a unicameral parliament without independent "transparency institutions" like ombudsmen and audit offices – are where the problems lie."[101]

In the case of Poland, the practice consists of the opportunistic utilization of the constitutional provisions and the selective choice of "appropriate" constitutional provisions, dubbed "illiberal remodelling" by Drinóczi and Bień-Kacala. The term describes the practice of "governments routinely apply[ing] the illiberal version of the Rule of Law (illiberal legality)"[102], which has been detected even before COVID-19. In the last few years, the European Parliament adopted several resolutions with which it addressed the situation concerning respect for the rule of law, human rights and democracy in Poland. Within this context, the European Parliament resolutions of 13 April 2016[103] and 14 September 2016[104] on the situation in Poland regarding the impact of recent developments on fundamental rights, and the European Parliament Resolution of 15 November 2017[105] on the situation of the rule of law and democracy in Poland, and that of 17 September 2020[106] on the proposal for a Council decision on the determination of a clear risk of a serious

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101 Scheppele, K. L., *Not Your Father's Authoritarianism: The Creation of the "Frankenstate"*, APSA, European Politics & Society, 2013, p. 5, available on: [https://www.democratic-erosion.com/wp-content/uploads/2018/03/Scheppele-2013.pdf], Accessed 10 April 2021.

102 Drinóczi, T., Bień-Kacala, A., COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism, *The Theory and Practise od Legislation*, Vol. 8, 2020, p. 171, available on: [https://www.tandfonline.com/doi/full/10.1080/20508840.2020.1782109], Accessed 10 April 2021.

103 European Parliament Resolution of 13 April 2016 on the situation in Poland (2015/3031(RSP)), available on: [https://www.europarl.europa.eu/doceo/document/TA-8-2016-0123_EN.html], Accessed 4 April 2021.

104 European Parliament Resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (2016/2774(RSP)), available on: [https://www.europarl.europa.eu/doceo/document/TA-8-2016-0344_EN.pdf?redirect], Accessed 5 April 2021.

105 European Parliament Resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)), available on: [https://www.europarl.europa.eu/doceo/document/TA-8-2017-0442_EN.pdf?redirect], Accessed 4 April 2021.

106 European Parliament Resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017)0835), available on: [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0225_EN.html], Accessed 4 April 2021.

breach of the rule of law by Poland deserve special attention. The latter Resolution addresses three critical areas: the functioning of the legislative and electoral system, the independence of the judiciary and the protection of fundamental rights (para. 1). This is also a Resolution in which the parts on sexual and reproductive health and rights (paras. 56 and 57) call on the Polish authorities "to take measures to implement fully the judgments handed down by the European Court of Human Rights in cases against Poland, which has ruled on several occasions that restrictive abortion laws and lack of implementation violate the human rights of women." In the recent Interim Resolution the Committee of Ministers of the Council of Europe, which supervises the execution of the final judgements of the European Court of Human Rights, expressed concern over the lack of information on any measures putting in place with regard to the execution of the judgements *Tysiąc*, *R. R.* and *P. and S. against Poland*, and called on Poland to adopt clear and effective procedures for women to access lawful abortion.[107]

Even before the COVID-19 pandemic, Poland was considered one of the EU countries with the most restrictive abortion law. However, it is interesting to note that the Polish legal system used to be significantly more liberal during the Communist regime,[108] whereas the current abortion law from 1993 (with subsequent amendments) made abortion illegal with a few exceptions as follows:

> ''1. If the pregnancy constitutes a threat to the life or health of the mother; 2. If the pre-natal examination or other medical reasons point to a high probability of severe and irreversible damage to the foetus or on an incurable life-threatening disease of the child; 3. If there is a confirmed suspicion that the pregnancy is a result of a criminal act, the termination of the pregnancy in this case is allowed, if the woman is less than 12 weeks pregnant."[109]

Even before COVID-19, there has been significant variation in access to abortion within the EU, but the data on access to abortion in Poland show that Polish women were faced with an extremely difficult situation even before the pandemic. This claim is supported by the following data from the European Parliament

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107 Interim Resolution CM/ResDH(2021)44, Execution of the judgements of the European Court of Human Rights Tysiąc, R. R. and P. and S. against Poland, adopted by the Committee of Ministers on 11 March 2021, available on: [https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a1bdc4], Accessed 4 April 2021.

108 Blagojević, A., Tucak, I., *Rethinking the right to abortion*, Balkan Social Science Review, Vol. 15, 2020, p. 136.

109 European Parliament, Directorate general for internal policies, Policy department C: Citizens' rights and constitutional affairs, The Policy of Gender Equality in Poland – Update, 2016, p. 30, available on: [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571372/IPOL_STU(2016)571372_EN.pdf], Accessed 5 April 2021.

Resolution of 26 November 2020:[110] before the pandemic, roughly only 10% of hospitals contracted by the Polish National Health Fund provided legal abortions; doctors preferred not to be associated with abortion and widely invoked the conscience clause; it is estimated that about 200,000 women illegally terminated their pregnancies each year in Poland, while about 30,000 were forced to travel abroad to seek abortion and thus incur additional expenses. This brings into question the equal accessibility to all women, especially the socio-economically disadvantaged women and ultimately leads to the conclusion that safe abortion is only accessible to a limited group of women in Poland (paras. K., L and O. of the Resolution).

It should also be noted that for many years in Poland there have been periodic petition initiatives linked to the Catholic Church and pro-life organizations with the goal of amending the existing legislation to introduce an abortion ban or at least a more restrictive abortion law. For this reason, for example, an initiative called the Committee for Legislation Action "Stop Abortion" was formed in March 2016. It collected 450,000 signatures (the Constitution requires 100,000 signatures) for the total ban on abortion.[111] The initiative resulted in a string of protests and the mobilization of women's NGOs, but also in the creation of a counter-initiative named Committee for Legislation Action "Save the Women", which proposed the liberalization of abortion law and also successfully collected 250,000 signatures.[112] Two years later, also owing to mass "Black Monday" protests, and international attention and support, attempts to introduce a more restrictive abortion law were thwarted.[113]

It appears that the COVID-19 pandemic represented the perfect moment for the fulfilment of years-long efforts to enact a near-total ban on abortion. Guasti states that the Covid-19 pandemic "represents a new and unparalleled stress-test for the already disrupted liberal-representative democracies",[114] which has, in the case of the four Central European countries, or the so-called Visegrad Four, resulted in "fostering the rise of authoritarianism" and "illiberal swerving".[115]

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110 European Parliament Resolution of 26 November 2020 on the de facto ban on the right to abortion in Poland (2020/2876(RSP)), available on: [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0336_EN.html], Accessed 5 April 2021.

111 The Policy of Gender Equality in Poland, *op. cit.*, note 109, pp. 30-31.

112 *Ibid.*

113 Euronews: Huge protests in Poland over near-total abortion ban, 23 March 2018, available on: [https://www.euronews.com/2018/03/23/huge-protests-in-poland-over-near-total-abortion-ban], Accessed 4 April 2021.

114 Guasti, P., The Impact pf the COVID-19 Pandemic in Central and Eastern Europe. The Rise of Autocracy and Democratic Resilience, *Democratic Theory*, Vol. 7. Issue 2, 2020, p. 47.

115 *Ibid.*, p. 49.

This "illiberal swerving" in the times of pandemic in Poland had begun as early as two days before the first case of COVID-19 was diagnosed in the country, on 2 March 2020,[116] when the Polish Parliament (Sejm) adopted the Covid-19 Act and continued with the adoption of "massive and chaotic legislation",[117] commonly called "anti-crisis shield".[118] However, instead of declaring a "state of emergency" on the basis of the 1997 Constitution, the ruling majority introduced the "'state of epidemic" under the ordinary law.[119] The problem also lies in the fact that the introduced measures are "stricter than those that may be applied during the 'state of natural disaster',[120] and in some cases, they could also seen as unconstitutional,[121] particularly in relation to political rights, and especially in relation to the right to assembly. The additional constitutional issue is that in this state of affairs, the power of the executive branch is too dominant, concurrently weakening the 'checks and balances, parliamentary oversight, and the court'".[122]

Applying the "state of epidemic" the Government banned any kind of assemblies[123] and introduced serious restrictions on freedom of movement. So, people were able to leave their homes only due to particularly justified reasons, such as going to work or grocery shopping.[124] However, it is important to note that the ban on gathering is constitutional only if the "the state of emergency" or "the state of war" is declared beforehand; it is unconstitutional in the "state of epidemic." Even though, during a pandemic, certain restrictions on the right to public assembly would meet the requirements of "necessity and proportionality", a total ban during the pandemic violates the essence of this right.[125]

In those circumstances, the Sejm started a debate on legislative proposals on further restrictions on access to abortion and the criminalization of sex education with a proposed prison sentence of up to three years for teachers.[126] On 15 April 2020, the Polish Parliament enacted the "Stop Abortion" bill, and then, however, one day later sent it for further considerations in the parliamentary committees.

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116 *Ibid.*, p. 53.

117 Drinóczi, T.; Bień-Kacala, A., *op. cit.*, note 102, p. 18.

118 *Ibid*.

119 Przemyslaw, O., Limitations to the Right to Freedom of Assembly in Poland during the COVID-19 Pandemic: The Case of Women's Strike, *HAPSc Policy Brief Series*, 1(2), 2020, p. 197.

120 *Ibid*., p. 18.

121 *Ibid.*

122 Guasti, P., *op. cit.*, note 114, p. 53.

123 Drinóczi, T.; Bień-Kacala, A., *op. cit.*, note 102, p. 20.

124 Przemyslaw, O., *op. cit.*, note 119, p. 196.

125 Drinóczi, T.; Bień-Kacala, A., *op. cit.*, note 102, p. 20.

126 Guasti, P., *op. cit.*, note 114, p. 53.

In the meantime, mass protests all over Poland erupted again, but this time under new circumstances. Epidemiological restrictions were construed as "an excuse to limit civil liberties and prevent protests against government policy".[127] Still, this has not stopped civic initiatives and supporters of the Women's Strike to protest by employing innovative measures such as protesting online or hanging banners from the balconies, windows, rear windshields and other visible locations.[128]

Finally, on 22 October 2020, the Polish Constitutional Tribunal addressed the issue of eugenic abortion, i.e., abortion where prenatal examinations indicate a high probability of serious and irreversible disability of the foetus or an incurable life-threatening illness and held that it is contrary to the Polish Constitution.

Once again, the timing was everything: the second wave of the pandemic and health-based restrictions impeding any proper democratic discussions, and the sanitary restrictions impeding the protests. In addition, as it is stated in the aforementioned European Parliament Resolution of 26 November 2020, the authorities employed threats to prevent citizen's participation in protests, and the national public prosecutor and Minister of Justice have presented that criminal charges which could result with a prison sentence up to eight years will be filed against the organizers of the protests.[129] In that same Resolution, the European Parliament denounced the Constitutional Tribunal ruling and addressed it as a new attack on the rule of law and fundamental rights, particularly emphasising the fact that the "ruling was pronounced by judges elected by and totally dependent on politicians from the PiS (Law and Justice)-led coalition".[130] In other words, it reiterated the concern over the legitimacy and independence of the judges of the Constitutional Tribunal.

The aforementioned ruling could in practice truly result in a total abortion ban in Poland, as data for 2019 show that the legal basis for 1074 of 1100 pregnancy terminations[131] is precisely the one that the Constitutional Tribunal declared as unconstitutional. On the other hand, an almost total ban on the right to abortion in Poland will result in unsafe abortion, and the expansion of abortion tourism.

With regard to the protection of the right to abortion, the Slovak Republic is also under scrutiny. Pro-life supporters in Slovakia tried again last year to restrict access to abortion. In her letter of 7 September 2020 to the National Council of

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127 Przemyslaw, O., *op. cit.*, note 119, p. 199.

128 Ibid., p. 198.

129 European Parliament Resolution, *op. cit.* note 104, para. V.

130 Ibid., point Z.

131 Ibid., point Q.

the Slovak Republic, the Commissioner for Human Rights of the Council of Europe drew attention to a proposal submitted by several members "of the National Council, for a Draft Law which Amends and Supplements Act No . 576/2004 Coll. of Laws on Healthcare, Healthcare-related Services, and Amending and Supplementing Certain Acts as Amended, and which Amends and Supplements Certain Acts (Print No. 154, 19 June 2020)". [132]

In that proposal, the Commissioner for Human Rights recognized several controversial elements, in particular the extension of the mandatory waiting period, the "introduction of a new authorization requirement for performing abortions on health grounds, which would require two medical certificates attesting to such grounds, rather than one. as currently, except in the case of urgent care provision", and she also warned that changes "in relation to the provision of information on abortion and the collection and sharing of personal information have the potential to form substantial barriers to accessing safe and legal abortion services, and to stigmatize women seeking an abortion. The same is true for the proposed ban on 'advertising' abortion services".[133]

3.3. Malta

In the smallest country of the European Union and the only one with the complete legal ban of abortion, "barriers have always existed; COVID-19 has laid them bare".[134]

In the country whose Constitution proclaims Catholicism as the state religion, and where 90% of the population identifies as Catholic,[135] strict abortion laws "date back to the time of the Order of the Knights of St John in the 1700s, and in the 1850s they were written and enacted, as they remain today."[136] According to Maltese law, a person who is guilty of procuring an abortion has a risk of 18 months' to 3 years' imprisonment, while doctors risk up to four years' imprisonment.[137]

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132 Commissioner for Human Rights of the Council of Europe, [https://rm.coe.int/commdh-2020-18-letter-to-parliament-slovak-republic-en/16809f7d70], Accessed 1 April 2021.

133 *Ibid.*

134 Caruana- Finkel, L., Abortion in the time of COVID-19: perspectives from Malta, *Sexual and Reproductice Health Matters*, 28 (1), 2020, p. 1, available on: [https://www.researchgate.net/publication/342064817_Abortion_in_the_time_of_COVID-19_Perspectives_from_Malta], Accessed 6 April 2021.

135 Gravino, G.; Caruana-Finkel, L., Abortion and methods of reproductive planning: the views of Malta's medical doctor cohort, *Sexual and Reproductive Health Matters*, Vol. 27, Issue 1, 2019, p. 287.

136 Ibid., p. 288.

137 Ibid.

Despite the certain progressive developments in the society within the last few years, (for example, emergency contraceptive pills were introduced in 2016, and same-sex marriage was allowed in 2017[138]), with regard to reproductive rights, Malta is still called "a conservative bastion in Europe".[139]

Even though in 2019 Malta saw the founding of a pro-choice movement, abortion is still a rather stigmatized area. Caruana-Finkel states that misinformation is spread through media, education and religious institutions, and many healthcare professionals are unwilling to provide relevant information about abortion, even they are legally obliged to do so.[140] The result is that most abortion is done in secrecy and silence.[141]

It is estimated that every year around 370 women travel abroad for an abortion, whilst around 200 women purchase medical abortion pills.[142] Like Polish women, many travel to other countries with liberal access to abortion, and here they depend on their financial costs, health, mobility. The other (illegal) option is to purchase medical abortion pills online and many organizations (such as Women on Web) help women in this regard.[143]

It is important to stress that, over the last decade, several international organizations demanded that Malta decriminalize abortion and ensure safe access to abortion. Criticism of Malta's abortion legislation has been expressed, for example, by two United Nation's Committees (on the Elimination of Discrimination Against Women in 2010[144] and the Rights of the Child in 2019[145]), and by the Council of Europe's Commissioner for Human Rights, who has repeatedly stressed that

138 Caruana-Finkel, L., *op. cit.*, note 134, p. 1.

139 Galea, R., Abortion Debate in Malta: Between Progress, Catholic Morality and Patriarchy", *Green European Journal*, 2020, p. 1, available on: [https://www.greeneuropeanjournal.eu/abortion-debate-in-malta-between-progress-catholic-morality-and-patriarchy/], Accessed 6 April 2021.

140 Caruana-Finkel, L., *op. cit.*, note 134, p. 1.1.

141 Ibid.

142 Gravino, G., Caruana-Finkel, L., *op. cit.*, note 135, p. 289.

143 Caruana-Finkel, L., *op. cit.*, note 134, p. 1.

144 United Nation's Committee on the Elimination of Discrimination of Women, Consideration of reports submitted by States parties under article 18 of the Convention, Concluding observations – Malta, 4-22 October 2010, see: point 35, available on: [https://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-MLT-CO-4.pdf], Accessed 5 April 2021.

145 United Nation's Committee on the Rights of the Child, Concluding observations on the combined third to sixth periodic reports of Malta, 26 June 2019, see: point 33, avaliable on: [http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsg7%2B4%2FqMVk67oq8W3WL3NgfTU%2FnqqHmXO4VldQOdNY5c3Pzf%2F2kL%2For9buMreMtLkTY0jcdvxzAXai8qhoQwIJIGHA7s55TPcAcPp2m8Q0ML], Accessed 5 April 2021.

Malta's total ban of abortion goes against the international human rights norms and standards.[146]

Undoubtedly, COVID-19 put further emphasis on the problem of abortion in Malta. The closing of borders heightened the existing barriers and made the situation even worse. Due to the pandemic, travel restrictions resulted in an increased number of pregnant women who turn to abortion support groups and buy medical abortion pills online.[147] Due to the fact that at the beginning of the pandemic the government did not include birth control bills in the list of essential medicines, it is likely to expect the growth in use of unsafe methods to end unwanted pregnancies.[148] In its statement about the impact of COVID-19 on women' s sexual and reproductive rights of 7 May 2020, the Council of Europe Commissioner for Human Rights paid special attention to the situation in Malta and reiterated the fact that states must consider access to abortion care as an essential health care service to be maintained during the pandemic and take all necessary accompanying measures.[149]

4. CONCLUDING REMARKS

The COVID-19 pandemic is the largest "public health emergency" facing health systems in the 21st century. [150] It also reflected on the right of access to abortion, which is the most common surgical procedure women undergo. [151] Throughout history, law and medicine have tried to establish control over women's sexual and reproductive rights in a discriminatory manner.[152] They were instruments for "perpetuating gendered harms".[153] We are still witnessing the remnants of this approach today in the form of various restrictions on the right of access to abortion. Those barriers differ from state to state and encompass different legal, social and procedural aspects, such as the limited capacity of abortion services and practitio-

146 See: Muižnieks, Niels, Need to reform abortion law, Times of Malta, 26 February 2018, available on: [https://timesofmalta.com/articles/view/need-to-reform-abortion-law-nils-muiznieks.671761], Accessed 5 April 2021.

147 Caruana-Finkel, L., *op. cit.*, note 134, p. 2.

148 Ibid.

149 Council of Europe Commissioner for Human Rights, Statement: COVID-19: Ensure women's access to sexual and reproductive health and rights, May 7, 2020, available on: [https://www.coe.int/ca/web/commissioner/-/covid-19-ensure-women-s-access-to-sexual-and-reproductive-health-and-rights], Accessed 5 April 2021.

150 Thomson, S., C.; Ip, E., *op. cit.*, note 9, p. 1.

151 McGuinness, S.; Montgomery, J., *op. cit.*, note 3, p. 37.

152 *Ibid.*, 36.

153 *Ibid.*

ners, high abortion fees, or mandatory pre-abortion counselling.[154] In this paper, we investigated the legal systems of states that tried to facilitate women's access to abortion in the midst of the pandemic, but we also analyzed the legal systems of states with completely opposite approaches to the right to abortion. The emphasis in this second group was on the two countries that have the strictest abortion legislation in the European Union - Poland and Malta. We focused on "self-managed medical abortion via telemedicine". The acceptance of this model excludes the need for one or more visits to the clinic, mandatory waiting periods, excludes the ban on "telemedicine abortion counselling" and criminal sanctions for purchasing abortion medications by mail.[155]

Legal and policy measures to facilitate access to abortion, adopted by states during the pandemic, are temporary, but their positive effects on the protection of women's dignity and autonomy suggest that they should be maintained permanently. [156] Today, abortion health care is recognized as "a human rights imperative; to protect the lives, bodily autonomy, and reproductive autonomy". [157] Abortion must therefore be considered an "essential medical service". [158] In the context of abortion, the role of the law is crucial. Its 'inner morality' places limits on possible abuse as a mechanism of 'oppression, stigmatization and an adverse determinant of health'.[159] The law should not cause harm, but have a significant impact on gender justice and the reduction of discrimination. [160]

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154 Pinter *et al.*, *op. cit.*, note 57, pp. 56-57.

155 Todd-Gher, J.; Shah, P. K., *op. cit.*, note 25, p, 29.

156 Romanis, E. C.; Parsons, J. A., *op. cit.*, note 26, p. 7.

157 *Ibid.,* 1.

158 UN Human Rights Committee. General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, 2001. Available from: [http://ccprcentre.org/ccpr-general-comments], Accessed 20 April 2021.

159 McGuinness, S.; Montgomery, J., *op. cit.*, note 3, pp. 37-38; Fuller, L., The Morality of Law, New Have: Yale University Press, 1969.

160 *Ibid.,* 38.

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UDK 314.745.3-054.7:378.18
Review article

STUDENT ATTITUDES TOWARDS MIGRANTS IN THE PRE-COVID-19 PERIOD

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ABSTRACT

There is no doubt that prior to Covid-19 outbreak the issue of migration had been one of the top priorities across the European Union, especially after so-called ''refugee crisis" of 2015-2017. However, the situation rapidly changed since Covid-19 outbreak, when migration has fallen off the radar as a political issue. The aim of this paper is to analyse students' attitudes towards migrants, in the period before COVID-19, and our initial thesis is that the fact that attitudes towards migrants are rooted in individual values and when established can be resistant to change.

The paper consists of three parts. In the first part of the paper, we give an overview of available reports on the impact of Covid-19 to public attitudes towards migrants. Although is too early to make some general conclusions about it, the surveys made so far show that external factors, such as Covid-19, does not make important changes to public attitudes towards migrants. Having this in mind, in the second part of the paper we present the results of our research which was developed as a part of the project ''Creating Welcoming Communities" of the Association ''MI". The purpose of this research was to identify the attitudes of students of the Faculty of Law Osijek for the acceptance and integration of migrant into society. The target group of survey participants covered by the research was defined so as to include students of different levels (Intergrated Undergraduate and Graduate Study Programme, Professional Administrative Study Programme, University Undergraduate Study of Social Work) and the sample of students included 300 persons. Finally, in the third part of the paper we give a synthesis of our research and a review of the topic from the perspective of human rights and social work in the community.

***Keywords**: Covid-19, European Union, human rights, migrants, public attitudes, social work*

1. INTRODUCTION

There is no doubt that prior to Covid-19 outbreak the issue of migration had been one of the top priorities across the European Union, especially after so-called ''refugee crisis" of 2015-2017. However, the situation rapidly changed since Covid-19 outbreak, when migration has fallen off the radar as a political issue.

Not surprisingly, the results of the Standard Eurobarometer survey of summer 2020[1] show that the main concern of the Europeans is the economic situation, while the state of Member States' public finances and immigration (previously main concern at the EU level) share the second place. However, the analysis of the main concerns at national level shows that mentions of immigration, which ranks seventh place, are at their lowest level over the past six years, and some other issue became priorities in this context (the economic situation, health, unemployment, rising prices and cost of living, the environment and climate change, government debt). Of course, when it comes to immigration issue, there are considerable differences between Member States. This issue ranks first in ten countries, particularly in Malta, Cyprus, Estonia and Hungary, while in Slovenia and Bulgaria is the second most mentioned issue. Results for Croatia show that the most important issues, at the moment, facing the EU for the Croats are the economic situation and health, while the state of public finances and immigration share the third place. However, when it comes to issues facing Croatia, immigration ranks seventh place, while the most important issues are the economic situation, unemployment and health.

The aim of this paper is to analyse what students' attitudes were before the pandemic towards migrants, while during the pandemic the public focused almost entirely on the pandemic. Main hypothesis is that public attitudes towards migrants are created based on identification factors. This is because the attitudes towards migrants are rooted in individual's values and once established they can be resistant to change.

The paper consists of three parts. In the first part of the paper we give an overview of available reports and researches on the impact of Covid-19 to public attitudes towards migrants. Although is too early to make some general conclusions about it, the surveys made so far show that external factors, such as Covid-19, does not make important changes to public attitudes towards migrants. Having this in

[1] Standard Eurobarometer survey of summer 2020 was carried put between 9 July and 26 August 2020 in the 27 EU Member States, and also in the United Kingdom and in five candidate countries. Standard Eurobarometer 93, Summer 2020, Firts results: Public opinion in the European Union, available on: [https://data.europa.eu/euodp/en/data/dataset/S2262_93_1_93_1_ENG], Accessed 15 January 2021.

mind, in the second part of the paper we present the results of our research which was developed as a part of the project ''Creating Welcoming Communities" of the Association ''MI". The purpose of this research was to identify the attitudes of students of the Faculty of Law Osijek for the acceptance and integration of migrant into society. The target group of survey participants covered by the research was defined so as to include students of different levels (Intergrated Undergraduate and Graduate Study Programme, Professional Administrative Study Programme, University Undergraduate Study of Social Work) and the sample of students included 300 persons. Finally, in the third part of the paper we give a synthesis of our research and a review of the topic from the perspective of human rights and social work in the community.

2. RESEARCHES ON PUBLIC ATTITUDES TOWARDS MIGRANTS

Academic research has a long history of attempting to answer what determines public attitudes towards migrants. And yet, in spite of this academics from different disciplines, and also policy makers, have not yet reached a consensus about the ''drivers of attitudes" towards migrants.

An analysis of the extensive literature on attitudes towards migrants shows that most of the theories focuses on social-psychological, sociodemographic and socioeconomic explanations. Also, it is important to emphasize that attitudes towards migrants ''are shaped by both the attributes of the country and the characteristics of individuals residing in the country."[2]

In its comprehensive comparative review of theories and research of public attitudes towards migrants Ceobanu and Escandell[3] highlighted the existence of two theories of attitudes towards migrants: first, individual-level theories, focusing on the role of socioeconomic correlates and self-interests, identities and values and contact with out-group members, and second, contextual-level theories, focusing on structural conditions which try to answer why particular groupings of people develop certain views towards out-group members.

In its review of available literature on the subject Davidov and Semyonov conclude that researchers underscores a series of country-level attributes and individual-level characteristics that account for shaping attitudes towards migrants.

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2 Davidov, E.; Semyonov, M., *Attitudes toward immigrants in European societies*, International Journal of Comparative Sociology, Vol. 58, No. 5, 2017, p. 361.

3 Ceobanu, A. M.; Escandell, X., *Comparative Analyses of Public Attitudes Toward Immigrants and Immigration Using Multinational Surve Dana: A Review of Theories and Research*, Annual Review of Sociology, Vol. 36, 2010.

When it comes to country-level attributes, they found that the existing literature focuses on the size of the migrant population, economic conditions, the political climate in the country, welfare and migrant integration policies, state support of religious practices, frequency of terrorist attacks and (negative) media coverage on migrant-related news.[4] Attitudes towards migrants are also associated with a series of individual-level characteristics, such as fear of competition, nationalism, racial prejudice, conservative ideologies and basic human values.[5]

Markaki and Longhi analysed the theoretical and empirical contributions to the literature on anti-migrants attitudes and found that theories on the formation of attitudes towards migrants can be divided into two strands: first, that includes social-psychological, affective or ideological explanations, and second, that includes rational-based group and labour market competition theories.[6] With regard to the empirical implementation, they found that attitudes towards migrants (and minority groups in general) can be classified into three groups: cognitive (which relates to stereotypes), affective (which relates to prejudices) and behavioural (which relates to discrimination).[7]

Baričević and Koska found that anti-migration attitudes in liberal democracies can be explained with cultural (the fear of endangering of domestic culture), economic (the pressure on labour market and social status) and security framework (terrorist attacks and an increase in the general crime level).[8] They also argue that significant portion of these assumptions is relevant in Croatian public context.[9]

An indeed, the research conducted so far in Croatia show that the attitudes towards migrants are mainly negative, coloured by numerous prejudices and fears. In its research on attitudes of adult Croatian citizens towards migrant workers Čačić Kumpes, Gregurović and Kumpes found that the main ''drivers of attitudes'' towards migrants are socioeconomic and sociocultural factors, i.e. that potential migrant workers are seen to a large extent both as socioeconomic and sociocultural threat, and therefore the respondents (on average) expressed unwillingness for closer contacts with them.[10] Gregurović, Kuti and Župarić-Iljić analysed the

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4 Davidov; Semyonov, *op. cit.*, note 2, p. 361.

5 *Ibid*.

6 Markaki, Y.; Longhi, S., *What determines Attitudes to Immigration in European Countries? An Analysis at the Regional Level*, Norface migration, Discussion Paper No. 32, 2012, p. 4.

7 *Ibid*., p. 6.

8 Baričević, V.; Koska, V., *Stavovi i percepcije domaće javnosti o nacionalnim manjinama, izbjeglicama i migrantima*, Centar za mirovne studije, Zagreb, 2017, p. 14-15.

9 *Ibid*., p. 15.

10 Čačić Kumpes, J.; Gregurović, S.; Kumpes, J., *Migracija, integracija i stavovi prema imigrantima u Hrvatskoj*, Revija za sociologiju, Vol. 42, No. 3, 2012.

attitudes towards migrant workers and asylum seekers in Eastern Croatia (Osijek-Baranja and Vukovar-Srijem counties) and they results indicated significant perceptions of migrant workers as within the dimension of cultural threat, along with the expression of a considerable degree of social distance towards migrants. In addition, they found that asylum seekers are perceived as a security and economic threat.[11] The research made by Ajduković, Bakić, Stanković and Matić confirms the existence of prejudices towards asylum seekers and a moderate level of perceived threat from asylum seekers.[12]

Without any doubt, the Covid-19 outbreak presents a powerful test of attitudes towards migrants. With pandemic monopolising attention and public debates, ''it appears that the salience of immigration issues has decreased in public opinion."[13] However, the devastating impact of the pandemic on nations and individuals and the reactions to the pandemic led to increased feelings of threat, lack of control, competition and uncertainty that could have deleterious effects on attitudes towards migrants and could lead to a surge in xenophobia and anti-migrant attitudes.[14] As stated by Gregurović and others, even though migration issues have been suppressed by health and economic issues, ''the possibility of instrumentalisation anti-immigrant attitudes for political purposes has not disappeared."[15]

In his analysis for the International Organization for Migration Gaudagno states that the pandemic ''has been weaponized to spread anti-migrant narratives and call for increased immigration control and reduction of migrants' rights."[16] In this context he highlighted that the pandemic has triggered episodes of xenophobia directed towards internal migrants in China and Asian migrants in countries all

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11 Gregurović, M.; Kuti, S.; Župarić-Iljić, D., *Stavovi prema migrantskim radnicima i tražiteljima azila u istočnoj Slavoniji: dimenzije, odrednice i razlike*, Migracijske i etničke teme, Vol. 32, No. 1, 2016.

12 Ajduković, D.; Bakić, H.; Stanković, N.; Matić, J., *Odnos mladih prema integraciji azilanata*, in: Ćubela Adorić, V. *et al.* (eds.), 25. godišnja konferencija hrvatskih psihologa - Psihologija u promociji i zaštiti ljudskih prava i društvene pravednosti - Sažetci priopćenja, Zagreb, 2017.

13 OECD, Policy Responses to Coronovirus (COVID-19), *What is the impact of the COVID-19 pandemic on immigrants and their children?*, 19 October 2000, p. 21, availble on: [https://www.oecd.org/coronavirus/policy-responses/what-is-the-impact-of-the-covid-19-pandemic-on-immigrants-and-their-children-e7cbb7de/], Accessed 5 April 2021.

14 Esses, V. M.; Hamilton, L. K., *Xenophobia and anti-immigrant attitudes in the time of COVID-19*, Group Processes and Integroup Relations, Vol. 24, No. 2, 2012, available on: [https://journals.sagepub.com/doi/pdf/10.1177/1368430220983470], Accessed 4 April 2021.

15 Gregurović, M. *et al., Pandemic Management Systems and Migration*, Migracijske i etničke teme, Vol. 36, No. 2-3, 2020, p. 219.

16 Gaudagno, L., *Migrants and the COVID-19 pandemic: An initial analysis*, Internation Organization for Migration, 2020, p. 12, available on: [https://publications.iom.int/system/files/pdf/mrs-60.pdf], Accessed 5 April 2021.

over the world.[17] Vertovec thinks that it is clear that Covid-19 worsens xenophobia and racism worldwide and states that xenophobic sentiments related to the pandemic were evident in political sphere as well, i.e. in Trump's assertions about migrants and calling the new coronavirus as a ''Chinese virus", in Salvini's accusations against African migrants in Italy and in Orban's linkage of coronavirus with illegal migrants in Hungary.[18] White warns that the analysis of the histories of international responses to epidemic events show that the part of this history is the role of xenophobic responses to infectious disease threats.[19]

On the other hand, Dennison and Geddes do not assume that the pandemic will necessarily cause more negative attitudes towards migrants. They based their argument on two premises: first, on the general trend in attitudes towards migrants across Europe in 21st century (which is proven in mentioned Eurobarometer survey), and second, on the scientific researches which has shown the importance of early life experience in the formation of social and political attitudes. They argument that ''once established, attitudes can be resistant to change and also become an important aspect of a person's identity to which he or she feels an emotional attachment."[20]

Although is too early to make some general conclusions about it, we also suggest that Covid-19 does not and will not make important changes to public attitudes towards migrants. This is because the attitudes towards migrants are rooted in individual's values and once established they can be resistant to change. Additionally, we have to bear in mind that even major external factors as the 2008 financial crisis and the so-called migration crisis in 2015 did not lead to deviation from the long-term trend of more, not less favourable attitudes towards migration in Europe in the 21st century.[21]

Having this in mind, in the next part of the paper we present the results of our research that was developed as a part of the project ''Creating Welcoming Communities" of the Association ''MI".

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17 *Ibid*., p. 11.

18 Vehovec, P.*, Covid-19 and enduring stigma: The corona pandemic increases xenophobia and exclusion worldwide*, Max-Planck-Gesellschaft, April 27, 2020, available on: [https://www.mpg.de/14741776/covid-19-and-enduring-stigma], Accessed 5 April 2021.

19 White, A. I. R., *Historical linkages: pidemic threat, economic ris, and xenophobia*, The Lancelot, Vol. 395, 2020, available on: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30737-6/fulltext], Accessed 6 April 2021.

20 Dennison, J.; Geddes, A., *Why COVID-19 does not necessarily mean that attitudes towards immigration will become more negative*, International Organization for Migration, 2020, p. 2, available on: [https://publications.iom.int/books/covid-19-and-transformation-migration-and-mobility-globally-why-covid-19-does-not-necessarily], Accessed 5 April 2021.

21 *Ibid*., p. 7.

3. OBJECTIVE AND PROBLEM OF THE RESEARCH

The main goal of the research was to determine the attitudes of law and social work students towards migrants regarding students' identity characteristics. In accordance with the goal, the research problem was defined in relation to the identity characteristics of students, and the research tried to determine: whether there is a difference in attitudes between students of social work and law at the Faculty of Law in Osijek; whether there is a difference in attitudes towards gender, political orientation and religiosity. The goals and the research problem formed the research starting point based on the hypotheses: H1. Female respondents have more positive attitudes toward migrants and refugees than male respondents; H2. The field of social work science has a greater impact on the positive attitudes of respondents, compared to the field of law; H3. Political orientation on the right influences more negative attitudes towards migrants and refugees; H4. Respondents who are more religious have more positive attitudes toward migrants and refugees.

3.1. Research procedure and methodology

The research was conducted as part of the project activities of the Association "MI" from Split through the project "Creating welcoming communities", with financial support and cooperation with the UNHCR and the UN Agency for Refugees Representation in Croatia. Student volunteers, a total of 21 students, participated in the survey of students of the Faculty of Law in Osijek, including all academic years: undergraduate, integrated, or professional studies. The Faculty of Philosophy in Split, the Faculty of Philosophy in Rijeka and the Faculty of Law in Osijek participated in the joint creation of the questionnaire and research so that they could get a comparison at the regional level and map general students' attitudes and knowledge. The survey questionnaire was approved by the Ethics Committee of the Faculty of Philosophy in Split in May 2019. The research was conducted during the months of May and June 2019 at the Faculty of Law in Osijek in a way that respondents filled out a printed survey questionnaire. Respondents' participation was voluntary and anonymous. Before starting the examination, the aim and purpose of the research were explained to the respondents, the reasons and benefits of the examination and the information obtained were explained. The research was conducted as a quantitative research in which the survey questionnaire method was used for the purpose of collecting statistical data.[22]

[22] Halmi, A., *Temelji kvantitativne analize u društvenim znanostima – Kvantitativni pristup socijalnom radu*, Alinea, Zagreb, 2013.

3.2. Respondents

The research was conducted at the Faculty of Law in Osijek. Out of the total population of law students (1361 students) and social work (141 students), a total of 239 students of the Faculty of Law in Osijek participated in the survey. The total number of respondents in law studies includes full-time and part-time students of integrated law studies and professional studies. Out of a total number of law students, range in age is from 20 to 38 years of age. Social work students are undergraduate students, as graduate studies are just being formed, between the ages of 19 and 50, and include full-time and part-time students.

3.3. Data collection methods and data processing

For the needs of the research, a specially constructed survey questionnaire was used for this research. The survey questionnaire consisted of three parts. At the beginning of the questionnaire, sociodemographic data were collected: gender, age, place of residence, religion, political orientation and field of study. The first part of the questionnaire consists of twenty items and measures students' attitudes towards immigrants and refugees including: criteria for accepting migrants (culture, language, religion and political culture), willingness to help and acceptance, perception of impact on cultural values of our society, attitudes about quality life of migrants, placing barbed wire on borders, perception of security threats, economic impact and reasons for accepting migrants and refugees. The second part of the questionnaire consists of four particles and focuses on the perceived area and knowledge of students on the topic, while the third part of the six-part questionnaire, focuses on the perception of social distance. This paper will present data from the first part of the research related to students' attitudes towards immigrants and refugees.

The questions are constructed as a dichotomous (yes/no), nominal scale (choice of answers) or interval scale or Likert scale (I disagree, mostly disagree, neither agree nor disagree, mostly agree, agree). The part of the questionnaire, which is presented in this paper, and refers to the attitudes of students, has 20 particles and slightly lower reliability (Table 1) of 0.649 Cronbach's alpha[23]. The collected data were processed by the statistical program SPSS 22, descriptive statistics, variability, frequency of responses and chi-square test for comparison of constructs. The chi-square test was used for the independence of the research question of one independent variable and one dependent variable[24]. A set of predictors of identity

[23] DeVellis, R. F., *Scale Development: Theory and Applications*, Applied Social Research Methods Series, Vol. 26. Newbury Park, CA: Sage Publications, 1991.

[24] Gravetter, F.J.; Wallnau, L.B., *Statistics for the Behavioral Sciences,* [6th ed.] Australia; Belmont, CA: Thomson/Wadsworth, 2004.

characteristics (socio-demographic variables) and a set of responses defining attitudes towards immigrants and refugees were observed.

Table 1: Cronbach's alpha - statistical reliability

Reliability Statistics

Cronbach's Alpha	Cronbach's Alpha Based on Standardized Items	N of Items
.624	.649	20

Participation in the trial was completely anonymous and voluntary. During the research, the respondents were acquainted with the aim and purpose of the research with an explanation of what the obtained data will be used for. All participants were informed about the anonymity and confidentiality of the collected data and the way of presenting the results. The results are presented in tables and graphs for a clearer presentation of the obtained data.

4. RESULTS AND DISCUSSION

The research was conducted at the Faculty of Law in Osijek, as one of the faculties within the J.J. Strossamyer University in Osijek, with the aim of determining the attitudes of law and social work students towards immigrants and refugees. With regard to social work, as an aiding practice and social science, and law as an indispensable scientific segment of each practice, the research sought to obtain a deeper picture of students' attitudes in order to create the necessary and clear basis for the educational process in human rights and anti-discrimination practice.

4.1. Socio-demographic characteristics of respondents and results

The number of students, full-time and part-time, at the Faculty of Law in Osijek in 2019 was 1502 students, of which 1361 were law students and 141 social work students. Of the total number of students (1502) at the faculty level, 239 students (Table 2) participated in the survey or 17.6%. 167 law students participated, which is 12.3% of the total population of law students. Out of the total population of social work students (141 students), 51.8% of students in this field participated in the survey. In the sample, out of the total number of respondents (239), respondents in the field of law make up 69.9% or 167 respondents and 73 respondents are social work students or 21.8%.

Table 2: Distribution of students by study fields

Study fields

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Law	167	69.9	69.9	69.9
	Social work	72	30.1	30.1	100.0
	Total	239	100.0	100.0	

Of the total number of respondents, full-time and part-time students in both fields, 48 male respondents or 20.1% and 191 female respondents or 79.9% participated (Table 3). It can be seen that there are significantly fewer male respondents compared to females, and the difference is also visible between study fields, so there are more male students studying law (17.95) compared to the study field of social work (2,09%). Since the establishment of the Social Work Studies in Osijek in 2017, the enrollment of male candidates in the past four generations has averaged 3-5 students in relation to the total enrollment quota of full-time and part-time students, which is 70 students. We can relate this fact to the data of the new concept of division of labor today which brings new challenges[25]. The gender division In Croatia is present and women are mostly employed in sectors where a larger role of emotional work is needed[26]. There is a growing need for an emotional role in the workplace in a way that the feelings of the worker are adjusted to the service that the worker performs[27]. It is women who are most often employed in helping professions, which can be related to the number of male students in the study program of social work.

Table 3: Distribution of respondents by gender

Gender

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Male	48	20.1	20.1	20.1
	Female	191	79.9	79.9	100.0
	Total	239	100.0	100.0	

25 Castells, M.; Cardoso, G., *The Network Society. From Knowledge to Policy*, Washington, DC: Johns Hopkins Center for Transatlantic Relations, 2005.

26 Dobrotić, I., *Posao ili obitelj? Uloga i važnost politika usklađivanja obiteljskih obaveza i plaćenog rada*. Kerschoffset d.o.o., Zagreb, 2017.

27 Mali, J., *Starost, emocije in emocionalno delo v domovih za stare*, Socialno delo, Vol. 41, No. 6, p. 317-323, 2002.

4.2. Examining attitudes towards migrants and refugees

The conducted questionnaire, which determined the overall attitudes towards migrants and refugees, consisted of twenty items arranged in scales that define the level of agreement with individual statements, and define respondents' attitudes about migrants and refugees in the segment of assistance, access to migrants, impact on culture, security and economic aspect. The scale used is of the Likert type in which for each question it was necessary to select a degree of agreement of 1-5 whereby it was necessary to recode three questions from 5-1. After recoding, the summed results on individual particles show the total result (from a minimum of 10 to a maximum of 48 points) of the respondents' attitudes, with a smaller value showing a more negative attitude.

Table 4: Overview of attitudes towards migrants and refugees of all respondents

Attitudes towards migrants and refugees

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Medium negative attitude	40	16.7	16.7	16.7
	Neutral attitude	87	36.4	36.4	53.1
	Medium positive attitude	93	38.9	38.9	92.1
	Positive attitude	19	7.9	7.9	100.0
	Total	239	100.0	100.0	

The result at the level of all respondents shows that no respondent has a negative attitude, while 38% of respondents have a medium positive attitude and slightly less 36% a neutral attitude (Table 4). According to the interpreted results, we conclude that the attitudes of law and social work students are more positively oriented.

Table 5: Descriptive analysis of attitudes towards migrants and refugees of all respondents

Statistics

N	Valid	239
	Missing	0
Mean		31.40
Median		31.00
Mode		30[a]
Std. Deviation		5.560
Percentiles	25	27.00
	50	31.00
	75	35.00

a. Multiple modes exist. The smallest value is shown

The total number of respondents 239, both sexes achieved a result in the questionnaire and particles that measure attitudes (minimum 10 to maximum 48 points) ranging from 18 to 45 points. The variation width is 27, the standard deviation SD is 5.56 while the median is 31 and the mode is 30. The arithmetic mean is M = 31.40. It can be seen that the results according to the expressed frequency tend to the category of neutral to moderately positive attitudes of the respondents, while the median and mode in relation to the arithmetic mean are on the left and show a slight deviation from the normal distribution and slightly asymmetric distribution to the left (Table 5). In the attitudes about the quality of life of migrants and refugees, all respondents, regardless of study and gender, are of the same opinion that all those found in the territory of the Republic of Croatia should have a higher level of quality of life, which includes accommodation, food, hygiene and health care and over half of them 58% say it is necessary. All immigrants, regardless of the reason and the way they found themselves in the Republic of Croatia, are people in need and need help. A total of 48% of respondents agree with this statement, while 28% of respondents neither agree nor disagree, and almost 24% of respondents generally disagree or disagree. There are no significant deviations in the study areas, as well as the question of whether immigrants have an impact on the cultural and traditional values of Croatian society, where the number of respondents is divided, almost half say yes, while the other half say no. Half of the respondents who claim that there is an impact think that it is negative (26%) or neither positive nor negative (23%). One of the issues that also symbolically depicts the barrier and resistance to migrants is the issue of placing barbed wire as a solution to stop illegal immigration, where the difference between law and social work study programs is significant. Respondents in the legal field, 28% of them, believe that they agree or mostly agree with the use of barbed wire, 32% of them do not agree with the above, while 23% neither agree nor disagree. Respondents of social work studies, 85% of them disagree or mostly disagree. Uniformity of attitudes occurs in attitudes regarding the security of Croatian citizens and their vulnerability to the arrival of immigrants, where, out of the total number of respondents, 36% mostly agree or agree that the security of Croatian citizens is endangered while 32% generally disagree. The public, as well as the respondents, were exposed to media influence and the media that reported on migrant routes, the situation on the ground, the columns of migrants arriving, and the assistance provided to them. Respondents' perception of the way media reporting showed a difference in the attitudes of law students who mostly think, except too negatively 32%, that they do not know or too positively 22% and social work students who do not see media reporting as positive and neutral and objective but mostly negative 62%. Respondents, overall, agree on the main reasons why immigrants choose to leave their own country, with 30% of respondents citing an economic reason

while war and political insecurity were chosen by 54% of respondents. Likewise, respondents state that immigrants are a burden on Europe's economic development, 55% of them while 34% are neutral.

4.1.1. *Respondents' attitudes towards migrants and refugees in relation to gender*

The difference in attitudes towards migrants and refugees in relation to gender shows statistical significance. Women show more positive or moderately positive attitudes towards migrants and refugees 52.4% or 100 respondents out of 191 in total in the sample, while men express more moderately negative or neutral attitudes, a total of 36 respondents out of 48 or 75% of which 35% are oriented medium negative attitude (Table 6).

Table 6: Overview of respondents' attitudes towards gender and descriptive statistics

Gender * Attitudes towards migrants and refugees Crosstabulation

		Attitudes towards migrants and refugees				Total
		Medium negative attitude	Neutral attitude	Medium positive attitude	Positive attitude	
Gender	Male	17	19	10	2	48
	Female	23	68	83	17	191
Total		40	87	93	19	239

To obtain statistical significance between respondents by gender and in relation to attitudes towards migrants and refugees, and in accordance with the first hypothesis, the chi-square test was used for one independent variable (gender) and one independent variable (attitudes). The chi-square independence test showed a significant difference between gender and attitudes towards migrants and refugees ($p < 0.05$) with the obtained values (Table 6) of $c2$ (1, n = 239) = 0.281, p = 0.000, fi = 0.28 (Table 8). The correlation coefficient fi is 0.28, which according to Cohen's criteria[28] is the mean strength of the influence between the two variables. According to the results, there is a statistically significant difference in attitudes towards migrants and refugees between men and women.

[28] Cohen J., *Statistical Power Analysis for the Behavioral Sciences*, NY: Routledge Academic, New York, 1988.

Table 7: Overview of statistical data on respondents' attitudes towards gender

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	18.816[a]	3	.000
Likelihood Ratio	17.600	3	.001
Linear-by-Linear Association	16.109	1	.000
N of Valid Cases	239		

1 cells (12.5%) have expected count less than 5. The minimum expected count is 3.82.

Table 8: Display of symmetric measure

Symmetric Measures

		Value	Approx. Sig.
Nominal by Nominal	Phi	.281	.000
	Cramer's V	.281	.000
N of Valid Cases		239	

According to available research conducted in Croatia that includes gender as an identity determinant in the creation of attitudes, research[29] noted that women are more willing to help and have a more positive attitude towards migrants and refugees. The authors[30] of a survey conducted among young people also show that male respondents perceive migrants and refugees more as a social and cultural threat compared to female respondents. Based on the obtained results, it is necessary to point out the possible methodological lack of research, given that the number of male respondents is significantly lower (48) compared to the number of female respondents (191). According to the obtained result, gender, as one of the identity determinants of individuality, can be related to the creation of certain attitudes according to the authors Ceoban and Escandell[31] (2010) who defined the theory focused on the identity and values of each individual as a factor in creating attitudes.

[29] Ajduković, D. *et. al., Izazovi integracije izbjeglica u hrvatsko društvo: stavovi građana i pripremljenost lokalnih zajednica*, ACT Printlab d.o.o., Zagreb, 2019.

[30] Kalebić Maglica, B.; Švegar, D.; Jovković, M. , *Odnos osobina ličnosti, efekta okvira i stavova prema migrantima*, Društvena istraživanja, Vol. 27, No. 3, 2018, p. 495-517.

[31] Ceobanu, A. M.; Escandell, X., *Comparative Analyses of Public Attitudes Toward Immigrants and Immigration Using Multinational Surve Dana: A Review of Theories and Research*, Annual Review of Sociology, Vol. 36, 2010.

4.1.2. *Attitudes of respondents towards migrants and refugees in relation to the field of study*

The profession of social work is oriented towards facilitating the integration of migrants into the community, and strongly promotes the right to diversity, which is one of the key values of the Code of Ethics for Social Workers[32]. Legal science, as a social science, is an indispensable part of social work and is important in assessing the rights that groups of migrants and refugees have in helping these groups from a legal point of view. . At the Faculty of Law in Osijek, the study fields of law have existed for many years, while the study field of social work began with the implementation of the study program in 2017. Courses focusing on human rights, social justice, advocacy and anti-discrimination practice are conducted in both fields of study as an integral part of the study curriculum. Out of a total of 239 respondents, 69.9% are respondents in the field of law and 30.1% are respondents in the field of social work.

Table 9: Overview of statistical data on respondents' attitudes towards field of study

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	54.205[a]	3	.000
Likelihood Ratio	59.212	3	.000
Linear-by-Linear Association	51.545	1	.000
N of Valid Cases	239		

0 cells (0.0%) have expected count less than 5. The minimum expected count is 5.72.

Table 10: Display of symmetric measure

Symmetric Measures

		Value	Approx. Sig.
Nominal by Nominal	Phi	.476	.000
	Cramer's V	.476	.000
N of Valid Cases		239	

From the obtained results, in the graph (Graph 1), we see that law students have the most represented neutral attitudes (30.96%) but equally represented medium negative and medium positive attitudes. Social work students express a moderately positive or positive attitude, and an equally positive and neutral attitude. A chi-square test was used to obtain statistical significance between respondents according to the field of study in relation to attitudes towards migrants and refugees.

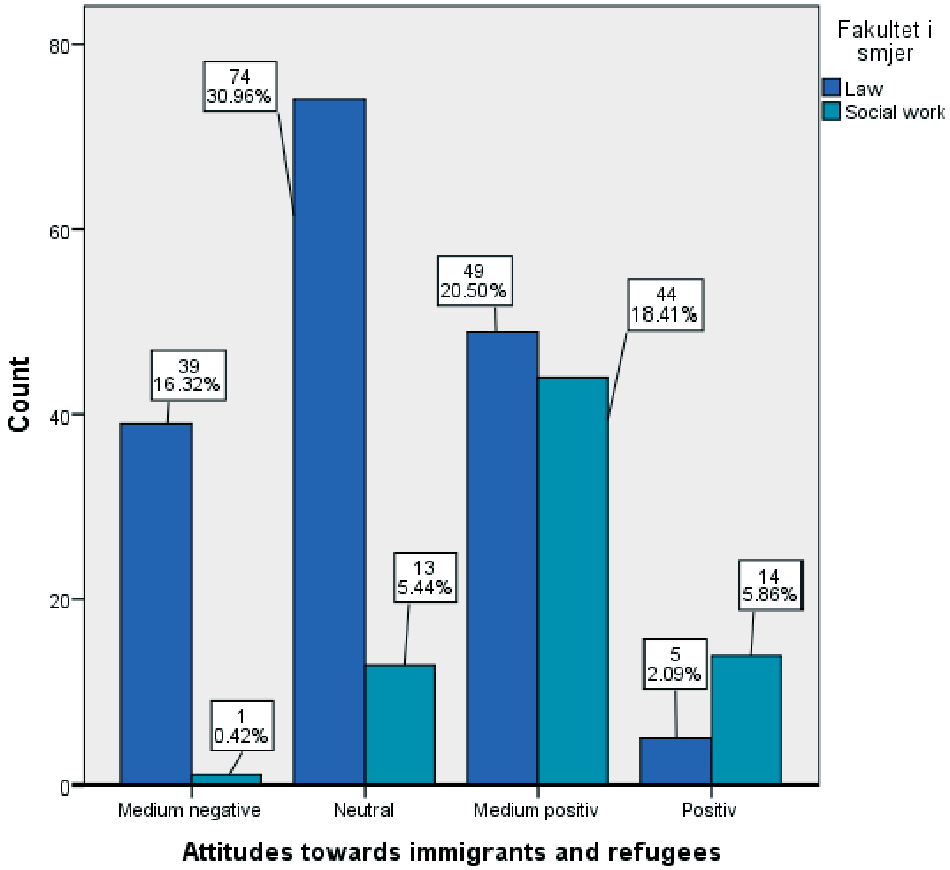
[32] Babić, G., *Djeca bez pratnje u svjetlu migrantske krize u Centru za pružanje usluga u zajednici Zagreb – Dugave*, Kriminologija i socijalna integracija, Vol. 28, No. 1, 2020, p. 115-132.

The chi-square independence test (Table 9) showed a significant difference between the study directions of law and social work in relation to attitudes towards migrants and refugees p=0,000 (p <0.05) with the obtained values of c2 (1, n = 239) = 0.476, p = 0.000, fi = 0.48 (Table 10). According to the results, there is a statistically significant difference in the attitudes of law and social work students towards migrants and refugees. Observing the total number of respondents, their opinion is clear who should be helped when talking about migrants and refugees, and the result shows that the attitude of respondents is mostly oriented to help those who come because of the war in their country, 57% of respondents. Those who come because of poverty and hunger should be helped, 23% of respondents think. If we compare respondents from the legal profession and social workers, we can see that the result is uniform in attitudes and that respondents are most supportive of helping people coming from war-torn areas. In the part of the survey of attitudes related to providing assistance and support in relation to the status of a foreigner, more than half of the total respondents 57% think that assistance should be provided to both refugees and immigrants while 28% of respondents think that help is needed only by refugees. There is a difference in attitudes in relation to the field of study, law students are more supportive of providing support to refugees 36% and refugees and immigrants 45%, while social work students, 84% of them choose the category of refugees and immigrants. A significant difference in the total number of respondents, in relation to the study program, arose with the question: Can immigrants successfully integrate into Croatian society ?. While most legal respondents believe that they can but only those with a culture similar to ours, most respondents of social work students believe that all immigrants can successfully integrate into society and the community. A significant difference in the attitudes of law students and social work students occurs in the topic of what to do with migrants, so 29% of law students think that they should be placed in refugee camps until a solution is found, 25% of them think that they should be sent back to their country of origin while 29% of them think they need to be integrated into society. Social work students in the majority, 77%, believe that migrants need to be socialized in society and work on their adaptation and integration into the community.

Research conducted on the student population shows that there is a difference in attitudes towards migrants and refugees depending on the field of study and the science to which they belong. Research[33] has shown that there is a statistically significant difference between students of natural, social and human sciences, with

[33] Sabljak, A., *Predrasude studenata prema imigrantima: povezanost predrasuda i socijalne distance te promicanje tolerancije u nastavi filozofije, logike i etike*, Master's thesis, University of Zagreb, Faculty of Humanities and Social Sciences, 2020.

a result that shows that students of biomedicine, technical studies and natural sciences show a higher degree of prejudice than students of social sciences and humanities.



Graph 1: Overview of attitudes towards migrants and refugees of law and social work students

4.1.3 *Respondents' attitudes towards migrants and refugees in relation to political orientation*

One third of the respondents or 35.6% defined that they do not know their political affiliation, while 28.9% of the respondents are apolitical, which makes a total of 64.5% of the respondents. Slightly higher orientation to the right is shown by 14.6% of respondents compared to the left orientation of 8.4% of respondents (Table 11).

Table 11: Political orientation of respondents

Political orientation:

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Extreme right	2	.8	.8	.8
	Right	35	14.6	14.6	15.5
	Center	26	10.9	10.9	26.4
	Left	20	8.4	8.4	34.7
	Extreme left	2	.8	.8	35.6
	Apolitical	69	28.9	28.9	64.4
	I do not know	85	35.6	35.6	100.0
	Total	239	100.0	100.0	

To obtain statistical significance between respondents according to their political affiliation in relation to attitudes towards migrants and refugees, and in accordance with the third hypothesis, a chi-square test was used according to the result c2 (1, n = 239) = 0.214, p = 0.017 , fi = 0.371 (Table 12). The result shows a significant difference between the political orientation of the respondents and the attitudes towards migrants and refugees p= 0,017 (p <0.05) (Table 13). The correlation coefficient fi is 0.371, which according to the Cohen's criteria is considered to be the mean influence between the two variables. Right-wing respondents show the most neutral and moderately positive attitudes towards migrants and refugees, while compared to left-wing respondents, who are exclusively neutral or moderately positive.

Table 12: Overview of statistical data on respondents' attitudes towards political orientation

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	32.928[a]	18	.017
Likelihood Ratio	23.616	18	.168
Linear-by-Linear Association	.375	1	.540
N of Valid Cases	239		

a. 13 cells (46.4%) have expected count less than 5. The minimum expected count is .16.

Table 13: Display of symmetric measure

Symmetric Measures

		Value	Approx. Sig.
Nominal by Nominal	Phi	.371	.017
	Cramer's V	.214	.017
N of Valid Cases		239	

More negative attitudes of right-wing politically oriented respondents, according to Markaki and Longhi[34], can be placed in a theoretical framework on anti-immigrant attitudes that includes ideological explanations, while social identity theory links "positive social identification with intragroup and negative evaluation outside groups through social counter identification" [35]. The possibility of a more negative perception of migrants and refugees is related to the characteristics of higher conservatism and lower liberalism. When we talk about political orientation, negative attitudes towards members outside the group can be explained by using the theory of right-wing authoritarianism or the theory of orientation to social domination which link negative attitudes to the perception of threats by migrants and refugees[36].

4.1.4. *Respondents' attitudes towards migrants and refugees in relation to religious affiliation*

Part of each person's identity is religious identity, so we view identity as identity with ourselves, which includes a sense of belonging to a group, religious community or nation[37]. We can say that religion determines collective and individual identity. If we look at the results of religious affiliation, we see that of the total number of respondents, slightly less than half or 43.5% think they are religious with the teachings of their religious community, while 37.2% think they are religious in their own way. Respondents who are not religious or do not know whether they are religious make up 19.3% of the total number of respondents (Table 14).

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[34] Markaki, Y.; Longhi, S., *What determines Attitudes to Immigration in European Countries? An Analysis at the Regional Level*, Norface migrtaion, Discussion Paper No. 32, 2012.

[35] Scheepers, P.; Gijsberts, M.; Coenders, M., *Ethnic Exclusionism in European Countries. Public Opposition to Civil Rights for Legal Migrants as a Response to Perceived Ethnic Threat*, European Sociological Review, Vol. 18, No. 1, 2002, p. 17–34.

[36] Gregurović, M.; Kuti, S.; Župarić-Iljić, D., *Stavovi prema migrantskim radnicima i tražiteljima azila u istočnoj Slavoniji: dimenzije, odrednice i razlike*, Migracijske i etničke teme, Vol. 32, No. 1, 2016, p. 99-122.

[37] Cvitković, I., *Identitet i religija*, Diskursi: društvo, religija, kultura, Vol. I, No. 1, 2011, p. 11-27.

Table 14: Religious affiliation of the respondents

Religious determination

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	I am religious in line with the teachings of my religious community	104	43.5	43.5	43.5
	I am religious in my own way	89	37.2	37.2	80.8
	I'm not sure if or not I'm religious	15	6.3	6.3	87.0
	I'm not religious	31	13.0	13.0	100.0
	Total	239	100.0	100.0	

The results of the relationship between attitudes towards migrants and refugees in relation to religious affiliation were obtained by the chi-square test, in accordance with the fourth hypothesis, and show that there is no statistically significant difference between respondents of different religious affiliation. The result of the chi-square test shows c2 (1, n = 239) = 0.235, p = 0.154, fi = 0.23 (Table 16). The result shows that there is no statistically significant difference between respondents who are of different religious affiliation and attitudes of respondents towards migrants and refugees p = 0.154 (p> 0.05) (Table 15).

Table 15: Overview of statistical data on respondents' attitudes towards religious determination

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	13.203[a]	9	.154
Likelihood Ratio	13.657	9	.135
Linear-by-Linear Association	7.081	1	.008
N of Valid Cases	239		

a. 3 cells (18.8%) have expected count less than 5. The minimum expected count is 1.19.

Table 16: Display of symmetric measure

Symmetric Measures

		Value	Approx. Sig.
Nominal by Nominal	Phi	.235	.154
	Cramer's V	.136	.154
N of Valid Cases		239	

The majority of respondents declare themselves as being religious in accordance with the teachings of their religious community, but despite this there is no statistically significant difference in attitudes towards migrants and refugees. Research

by [38]Gregurović, Kuti and Župarić-Iljić shows that, in addition to political orientation, religious affiliation significantly affects more negative attitudes towards migrants and refugees, and we find the same results in the research of [39]Marinović Jerolimov and Ančić. Negative attitudes towards migrants from the Middle East were also recorded by researchers (Kunštek, Miškec, Šarić, Šeremet and Štehec, 2016). Contrary to the above research, some research has shown that religiosity was not a significant predictor of any subscale of perceived threats by migrants and refugees [40]Kalebić Maglica, Švegar and Jovković. It is stated that more religious people, however, are oriented towards content that emphasizes the need for humane treatment of people who need help, which leads to a reduction of negative attitudes towards migrants and the perception of cultural threat.

5. CONCLUSION

According to the presented and interpreted results, the first hypothesis was set, H1: Female respondents have more positive attitudes towards migrants and refugees than male respondents, is accepted because a statistically significant difference was recorded but with the distance of the possibility of a methodological shortcoming which may be the number of male respondents which is 48 compared to 191 female. The second hypothesis, H2. The field of social work science has a greater impact on the positive attitudes of respondents, compared to the field of law., is accepted because the result shows a statistically significant difference between law students and social work students. The more positive attitudes of social work students can be related to the fact that the social work profession belongs to helping professions and a humanistic vocation aimed at marginalized and deprived groups of people. Hypothesis three, H3. Political orientation on the right influences more negative attitudes towards migrants and refugees, is accepted because there is a statistically significant difference in attitudes towards migrants and refugees in relation to the politically oriented, which is in line with previous research presented in this paper and in accordance with theoretical framework. Fourth hypothesis, H4. Respondents who are more religious have more positive attitudes towards migrants and refugees, are rejected because the results show that there is no statistically significant difference in attitudes towards migrants in relation to

[38] Gregurović, M.; Kuti, S.; Župarić-Iljić, D., *Stavovi prema migrantskim radnicima i tražiteljima azila u istočnoj Slavoniji: dimenzije, odrednice i razlike*, Migracijske i etničke teme, Vol. 32, No. 1, 2016, p.99-122.

[39] Marinović Jerolimov, D.; Ančić, B., *Religioznost i stavovi prema seksualnosti i braku odrasle populacije u Hrvatskoj*, Društvena istraživanja, Vol. 23, No. 1, 2014, p. 111-132.

[40] Kalebić Maglica, B.; Švegar, D.; Jovković, M., *Odnos osobina ličnosti, efekta okvira i stavova prema migrantima*, Društvena istraživanja, Vol. 27, No. 3, 2018, p. 495-517.

the religiosity of the respondents. Research has shown that religious people have a negative but also a positive attitude towards migrants and refugees, depending on the perception of whether they are people who need help or pose a threat. From the presented research results we can confirm that identity factors can influence the creation of attitudes, according to the theoretical framework of the authors Davidov and Semyonov, who link attitudes to the individual level taking into account the country framework.[41] The results of the research show a positive orientation of attitudes, which indicates a link, according to the authors Markaki and Longhi, an affective attitude that relates to prejudices.[42] Over 50% of respondents see immigrants as a cultural threat, which can be linked to previous research in Croatia, Baričević and Koska[43] and Gregurović, Kuti and Župarić-Iljić[44], who obtained similar results. There are also differences between the fields of study, which we can relate to the level of education in the field of human rights. The study, conducted from 2017 to 2019, on a student population of 624 medical students at the universities of Coimbra (Portugal), Melilla (Spain) and Toledo (Spain) shows a similar result. Overall, students, given the helping profession, have a positive attitude toward the immigrant population, while statistically significant differences emerge between universities.[45] The lack of education in the field of transcultural nursing increases with the more negative attitudes of students.

The shortcomings of the research were noticed in the insufficient representation of male respondents in relation to female, unequal representation of social work students (only undergraduate students are included) in relation to law students. A limitation in the research can be seen in the impossibility of conducting research at all faculties within the University of Osijek as well as in the impossibility of pilot testing. For future research, it would be good to use a larger and random representative sample to get a better generalization of the results. In addition, it would be of great importance to see how pandemic reflected to student attitudes towards migrants. Since we have a thesis that the attitudes towards migrants are

41 Davidov, E.; Semyonov, M., *Attitudes toward immigrants in European societies*, International Journal of Comparative Sociology, Vol. 58, No. 5, 2017, p. 361.

42 Markaki, Y.; Longhi, S., *What determines Attitudes to Immigration in European Countries? An Analysis at the Regional Level*, Norface migration, Discussion Paper No. 32, 2012, p. 4.

43 Baričević, V.; Koska, V., *Stavovi i percepcije domaće javnosti o nacionalnim manjinama, izbjeglicama i migrantima*, Centar za mirovne studije, Zagreb, 2017, p. 14-15.

44 Gregurović, M.; Kuti, S.; Župarić-Iljić, D., *Stavovi prema migrantskim radnicima i tražiteljima azila u istočnoj Slavoniji: dimenzije, odrednice i razlike*, Migracijske i etničke teme, Vol. 32, No. 1, 2016.

45 Ugarte Gurrutxaga, M. I. *et al.*, *Attitudes towards Immigration among Students in the First Year of a Nursing Degree at Universities in Coimbra, Toledo and Melilla*, International journal of environmental research and public health, Vol. 17, No. 21, 2020, p. 7977.

rooted in individual's values and once established they can be resistant to change, we believe that there will be no significant change in this particular area.

The advantage of research examining attitudes towards migrants and refugees in the student population in relation to identity factors in the formation of clearer directions in the educational process of students, focus on a multicultural approach and strengthening the importance and knowledge of the human rights segment.

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UDK 502.14:061.1(4-67EU):614.4
Review article

THE COVID-19 PANDEMIC AND THE IMPLEMENTATION OF THE EUROPEAN GREEN DEAL

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ABSTRACT

This paper aims to explore how the COVID-19 pandemic influenced the implementation of the European Green Deal and to which extent have the European Union's green growth and sustainable development goals been incorporated into its COVID-19 Recovery Strategy. The European Union's Green Deal, a 'generation defining' growth strategy, which lays down the strategic pathway of the European Union's economic development for the upcoming two decades, has been faced with a major challenge shortly after its adoption in December 2019. However, despite the COVID-19 pandemic, which has continuously been putting all European Union member states to a harsh challenge during the past year, climate change and the green transition have been at the top of the political agenda in the European Union and have managed to occupy the attention of the mainstream politics and European Union citizens. Furthermore, the unprecedented levels of public financing which have been mobilised due to the pandemic have provided an opportunity for speeding up the green transition, without which the achievement of the Green Deal's main aims and the fulfilment of the European Union's obligations under the Paris Agreement would likely be put in question. In order to analyse how the has the COVID-19 pandemic influenced the implementation of the Green Deal, the paper first examines how the member states and the European Union institutions initially reacted to the idea of pursuing the implementation of the Green Deal simultaneously with economic recovery. This is accomplished through an analysis of statements given by the European Union and member state officials and the adopted measures and legislative proposals. The paper then focuses on publicly available data on legislative delays in regard to the implementation of the Green Deal which took place due to the pandemic and concludes that no significant postponements occurred. It subsequently turns to examine which measures have been adopted at the European Union level that link the economic recovery and the green transition. In this regard, special attention is paid to the Recovery and Resilience Facility and its measures aimed at ensuring that member states pursue climate change and environmental objectives in their recovery plans. Given the size of the public investments which will take place in the following years, the paper emphasises the importance of stringent environmental standards in order to ensure that they contribute to the green transition and avoid a fossil fuel lock-in.

Keywords: *European Green Deal, climate change, carbon neutrality, green transition, COVID-19 pandemic, Recovery and Resilience Mechanism.*

1. INTRODUCTION

The European Green Deal,[1] which was presented in December 2019 by the newly appointed European Commission on its 11th day in office, has revolutionised the EU political discourse and has put climate change and the green transition at the top of the political agenda. The choice of climate change as a strategic priority was a logical one for the European Commission. It builds upon the image of the EU as a green leader, which has gained reinforced momentum after the 16th Conference of the Parties to the United Nations Framework Convention on Climate Change in Cancun in 2010 and especially after the adoption of the Paris Agreement on Climate Change in 2015.[2] Such an image reinforces the EU's position and legitimacy both internally and externally.[3] On the internal level, it came as the perfect and well-timed answer to the fast-growing consensus among EU citizens on the dangers of climate change[4] and increased public attention being paid to the issue, prompted by the Fridays for Future school strikes which gathered 13 million participants across the globe.[5] In this regard, the EU once again gained renewed legitimacy by engaging in environmental protection, an issues of common concern of its citizens. On the external level, the reinforcement of its image of a green leader contributes to its global influence and offers it a first-mover advantage in developing new technologies. These advantages were recognised by the European Council in 2019, when it announced "building a climate-neutral, green, fair and social Europe" as one of EU's priorities for the near future.[6] The European Com-

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1 European Commission, Communication from The Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal, COM(2019) 640 final; European Commission, A European Green Deal [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en], Accessed 5 May 2021.

2 Wurzel, R. K. W.; Liefferink, D., Connelly, J., *Introduction European Union climate leadership*, in Wurzel, R. K. W.; Connelly, J.; Liefferink, D., (eds.), The European Union in International Change Politics – Still taking a lead?, Routledge, 2018, p 8-9.

3 Torney, D., *European Climate Leadership in Question – Policies toward China and India*, The MIT Press, 2015, p. 40-41.

4 *Special Eurbarometer Report*, 490 Climate Change, April 209, p. 9-10., [https://ec.europa.eu/clima/sites/clima/files/support/docs/report_2019_en.pdf], Accessed 5 May 2021.
The growing support of EU citizens for environmental protection has also been reflected in 2019 elections for the European Parliament, in which the Greens have obtained 9.85% of MEPs, in comparison to the previously held 6.94%. Calculated on the basis of data available at European Parliament, *2019 European election results,* [https://www.europarl.europa.eu/election-results-2019/en/tools/comparative-tool/], Accessed 5 May 2021.

5 Fridays For Future, [https://fridaysforfuture.org/], Accessed 5 May 2021.

6 European Council, A new strategic Agenda 2019-2024, p. 5., https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf], Accessed 5 May 2021. The urgency to act and the importance of aligning EU action with the objective of keeping the rise in global temperature under 1.5 °C was emphasised by the European Parliament in the European Parliament Resolution of 28 No-

mission's Green Deal builds upon that momentum with a fresh political agenda at its focus, which has a strong unifying potential for the EU as a whole, which was very much needed after the sharply dividing issues which have recently been casting a shadow on the European project, such as the economic crisis, migration, Brexit and the rule of law, to name a few.

At its very outset, the European Green Deal proclaims tackling climate change as a "generation's defining task" and aims to "transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use."[7] In order to achieve this, the Green Deal identifies regulatory tasks that are to take place across all sectors of the economy. Special emphasis is being put on creating a circular economy and sustainable use of resources, decarbonising the energy sector, increasing energy efficiency of buildings, accelerating the transition to sustainable and smart transportation, the "Farm to Fork" strategy for ensuring a sustainable, fair and healthy food system, preserving and restoring ecosystems and biodiversity, as well as eliminating pollution. The financial sector, investments into research and development, as well as education are to play a crucial role at this. In order to ensure that no one is left behind in this transition, the Green Deal envisages a Just Transition Mechanism and a Just Transition Fund.[8] The transition towards green economy and the achievement of the 40% reduction target of greenhouse gas emissions by 2030 was estimated to require "€260 billion of additional annual investment", which represents "about1.5% od 2018 GDP".[9] From December 2019, the 2030 emissions reduction target has risen to 55%, and so have the estimated expenses for reaching it.

Some of the biggest challenges that the implementation of the Green Deal is facing are the risk of a fossil fuel lock-in and downsizing the Union's global environmental footprint.[10] The Green Deal, which is for the most part centred around

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vember 2019 on the climate and environment emergency (2019/2930(RSP)) [https://www.europarl.europa.eu/doceo/document/TA-9-2019-0078_EN.html], Accessed 5 May 2021.

7 European Commission, Communication from The Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal, COM(2019) 640 final, page 2.

8 Proposal for a Regulation of the European Parliament and of the Council establishing the Transition Fund, Just COM/2020/22 final.

9 European Commission, Communication from The Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal, COM(2019) 640 final, page 15.

10 For a description of the EU's environmental footprint, see Scott, J., *Reducing the EU's Global Environmental Footprint*, German Law Journal, Vol. 21, 2020, pp. 10-16.

the concept of green growth, does not in itself advocate a radical shift of the pre-existing environmental or climate change related policies.[11] In its present form, and state of implementation it is therefore not well-equipped to deal with over-consumption issues. However, provided that its implementation measures do not lead to greenwashing, it has potential to successfully deal with its other major challenge, a fossil fuel lock-in. This paper will explore which role has the COVID-19 pandemic played in this respect.

During the past year, climate change and the green transition have been at the top of the political agenda in the EU and have managed to occupy the attention of the mainstream politics and EU citizens despite the COVID-19 pandemic. The pandemic recovery and the implementation of the Green Deal have been addressed as "two sides of the same coin".[12] The two are indeed inseparable. Within the first quarter of 2020, the COVID-19 pandemic has put the newly adopted Green Deal to a harsh, to be, or not to be test.[13] However, at the same time the unprecedented levels of public financing which have been mobilised due to the pandemic have provided an opportunity for speeding up the green transition, without which the achievement of the Green Deal's main aims and the fulfilment of the European Union's obligations under the Paris Agreement seem unlikely.

In order to explore how the COVID-19 pandemic influenced the implementation of the Green Deal, the paper will firstly shortly examine how the European Union institutions and its member states initially reacted to the pandemic and the idea of continuing the implementation of the European Green Deal. Secondly, the paper describes legislative delays in the implementation of the Green Deal which took place due to the pandemic. The subsequent, third part of the paper is dedicated to the financial instruments which the European Union adopted in response to the pandemic and the measures they contain which are aimed at promoting green recovery of the member states' economies. The paper's fourth part focuses on the fossil fuel lock-in, which might be the result of massive public spending with no

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11 Ossewaarde, M.; Ossewaarde-Lowtoo, R., *The EU's Green Deal: A Third Alternative to Green Growth and Degrowth?*, Sustainability, Vol. 12, No. 23, 2021, 9825; [https://doi.org/10.3390/su12239825], p. 12.

12 Potočnik, J., *The European Green Deal and a post Covid-19 prosperity*, [https://medium.com/circulatenews/the-european-green-deal-and-a-post-covid-19-prosperity-e95608f7606f], Accessed 5 May 2021.

13 Colli, F., *The end of 'business as usual'? COVID-19 and the European Green Deal*, Egmont - European Policy Briefs, No 60, May 2020, [https://www.egmontinstitute.be/content/uploads/2020/05/EPB60.pdf?type=pdf], Accessed 5 May 2021; Elkerbout, M., *et al.*, *The European Green Deal after Corona: Implications for EU climate policy*, CEPS Policy Insights, No 2020-06 / March 2020, [https://www.ceps.eu/ceps-publications/the-european-green-deal-after-corona/], Accessed 5 May 2021.

green strings attached. The final part of the paper summarises the findings of the paper.

2. INITIAL REACTIONS TO THE PANDEMIC BY THE EU INSTITUTIONS AND MEMBER STATES

At the beginning of spring 2020, when the harsh consequences of the COVID-19 pandemic were becoming visible all across the European Union, some member states expressed concerns about the capacity of their economies to handle two crises at the same time. Members of the Czech Government called for an abandonment of the Green Deal and for the weakening of carbon dioxide emission standards for cars, while Poland advocated disconnecting from the ETS.[14] In addition, several MEPs have called upon the EU to "re-examine its political priorities" and to "postpone new legislation under initiatives such as the European Green Deal."[15] However, the European Commission quickly took a decisive stance to continue with the implementation in the Green Deal and emphasised the need for a green post-pandemic recovery.[16] At the end of March the European Council affirmed that the green transition is to be integrated into the Union's response to the pandemic and its recovery plan.[17] In addition, environmental ministers from

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14 Oroschakoff, K., *Coronavirus crisis cash threatens EU green plans*, Politico, March 19, 2020, [https://www.politico.eu/article/coronavirus-crisis-cash-threatens-eu-green-plans/?utm_source=POLITICO.EU&utm_campaign=0199d91bba-EMAIL_CAMPAIGN_2020_05_22_01_28&utm_medium=email&utm_term=0_10959edeb5-0199d91bba-189693589], Accessed 5 May 2021; Euractiv, *Czech PM urges EU to ditch Green Deal amid virus*, 17 March 2020, [https://www.euractiv.com/section/energy-environment/news/czech-pm-urges-eu-to-ditch-green-deal-amid-virus/], Accessed 5 May 2021; Euractiv, *Poland says virus fallout makes it 'even more difficult' to hit EU climate goal*, 27 March 2020, [https://www.euractiv.com/section/energy-environment/news/poland-says-virus-fallout-makes-it-even-more-difficult-to-hit-eu-climate-goal/], Accessed 5 May 2021.

15 Politico, [https://www.politico.eu/wp-content/uploads/2020/03/vdL-Sassoli-Michel-letter-26.03.2020-signatures-as-of-29.03.2020.pdf?utm_source=POLITICO.EU&utm_campaign=4eb3480635-EMAIL_CAMPAIGN_2020_03_30_04_56&utm_medium=email&utm_term=0_10959edeb5-4eb3480635-189693589], Accessed 5 May 2021.

16 Dupont, C.; Oberthür, S.; von Homeyer, I., *The Covid-19 crisis: a critical juncture for EU climate policy development?*, Journal of European Integration, Vol. 42, No. 8, 2020, 1095-1110, DOI: 10.1080/07036337.2020.1853117, pp. 1104-1105; Piccard, B., Timmermans, F., *Which world do we want after COVID-19?*, Euractiv, 16 April 2020, [https://www.euractiv.com/section/energy-environment/opinion/which-world-do-we-want-after-covid-19/], Accessed 5 May 2021; Čavoški, A., *An ambitious and climate-focused Commission agenda for post COVID-19 EU*, Environmental Politics, Vol. 29, No. 6, 2020, pp. 1112-1117, DOI: 10.1080/09644016.2020.1784010, p. 1116.

17 Joint statement of the Members of the European Council, 26 March 2020, [https://www.consilium.europa.eu//media/43076/26-vc-euco-statement-en.pdf?utm_source=POLITICO.EU&utm_campaign=11f700a891-EMAIL_CAMPAIGN_2020_03_26_10_12&utm_medium=email&utm_term=0_10959edeb5-11f700a891-189693589], Accessed 5 May 2021; Simon, F., *EU leaders back 'green transition' in pandemic recovery plan*, Euractiv, 27 March 2020, [https://www.euractiv.com/section/

17 member states expressed their support of the continued implementation of the Green Deal and scaling up investments "notably in the fields of sustainable mobility, renewable energy, building renovations, research and innovation, the recovery of biodiversity and the circular economy."[18] In its resolution from 17 April 2020, the European Parliament stated that the Green Deal should be at the core of the recovery package and highlighted the need to align the EU's response to the pandemic with its objective of climate neutrality.[19] The European Commission President also emphasised the need for strengthening the investments under the Green Deal and pointed out the first-mover advantage that the green recovery would bring to the Union economy.[20] The importance of approaching climate change and the pandemic with equal seriousness was furthermore painted by the UN secretary-general António Guterres at the very outset of the pandemic.[21]

3. THE PANDEMIC AND THE GREEN DEAL LEGISLATIVE SCHEDULE

The implementation of the Green Deal had been facing a very tight timeline even before the pandemic. [22] The EU was planning to revise its greenhouse gas emission target by summer 2020,[23] in order to prepare for the 26th Conference of the Parties to the United Nations Framework Convention on Climate Change (hereinafter: the COP 26), which was scheduled for November 2020. Working fast under these time constraints, the European Commission presented is Proposal for a European

energy-environment/news/eu-leaders-back-green-transition-in-pandemic-recovery-plan/], Accessed 5 May 2021.

18 Climate Home News, *European Green Deal must be central to a resilient recovery after Covid-19*, 9 April 2020, [https://www.climatechangenews.com/2020/04/09/european-green-deal-must-central-resilient-recovery-covid-19/], Accessed 5 May 2021.

19 European Parliament Resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP), point 20., [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.html], Accessed 5 May 2021.

20 European Commission, Speech by President von der Leyen at the European Parliament Plenary on the EU coordinated action to combat the coronavirus pandemic and its consequences, 16 April 2020, [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_675], Accessed 5 May 2021.

21 Gornall, J., *Climate change will still be a threat after COVID-19 is gone*, Euractiv, 17 March 2020, [https://www.euractiv.com/section/climate-environment/opinion/climate-change-will-still-be-a-threat-after-covid-19-is-gone/], Accessed 5 May 2021.

22 Simon, F., *2020: A test year for Europe's much-vaunted Green Deal*, 2 January 2020, [https://www.euractiv.com/section/energy-environment/news/2020-a-test-year-for-europes-much-vaunted-green-deal/], Accessed 5 May 2021.

23 European Commission, Communication from The Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal, COM(2019) 640 final, Annex to the Communication on the European Green Deal: Roadmap – Key Actions, page 2.

Climate Law on 4 March 2020, which left the most sensitive issue of the 2030 greenhouse gas emission reduction target to be decided in September 2020.[24] Despite the pandemic, within the first half of March 2020 the European Commission adopted the European Industrial Strategy[25] and a New Circular Economy Action Plan,[26] and opened the European Public Pact for public consultations.[27] However, some instruments, such as the EU Biodiversity Strategy for 2030[28] and the Farm to Fork Strategy[29] which were originally scheduled for adoption in March 2020 according to the timeline presented in the Green Deal Proposal, were postponed and instead adopted on 20 May 2020. The biggest delays took place in relation to several areas considered non-essential, such as New EU Strategy on Adaptation to Climate Change and the New EU Forest Strategy, which were originally scheduled for the last quarter of 2020, but were postponed for 2021.[30]

Due to the pandemic, at the beginning of April 2020 it was decided the COP 26 was to be postponed and it was later scheduled for November 2021,[31] which gave the EU precious additional time for setting its 2030 greenhouse gas emission reduction target. The European Commission presented its proposal for a 55% reduction target by 2030, with 1990 as the baseline year for counting the reductions, on 17 September 2020.[32] After very long and divisive negotiations, the

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24 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), COM/2020/80 final, Article 2(3).

25 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A New Industrial Strategy for Europe, COM/2020/102 final.

26 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A New Circular Economy Action Plan for a Cleaner and More Competitive Europe, COM/2020/98 final.

27 For an overview of the acts adopted under the Green Deal framework, see European Commission, *A European Green Deal*, [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en#documents], Accessed 5 May 2021.

28 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU Biodiversity Strategy for 2030 Bringing nature back into our lives, COM/2020/380 final.

29 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, COM/2020/381 final.

30 Simon, F., *Leaked: Full list of delayed European Green Deal initiatives*, Euractiv, 16 April 2020, [https://www.euractiv.com/section/energy-environment/news/leaked-full-list-of-delayed-european-green-deal-initiatives/], Accessed 5 May 2021.

31 UN, *COP 26 postponed* [https://unfccc.int/news/cop26-postponed], Accessed 5 May 2021.

32 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Stepping up Europe's 2030 climate ambition - Investing in a climate-neutral future for the benefit of our people, COM(2020) 562 final.

European Parliament and the Council agreed upon the 55% reduction target on 21 April 2021 and upon the legal obligation to reach climate neutrality by 2050, just ahead of the Earth Day Climate Summit organised by the US President.[33] The formal adoption of the agreed targets, along with other legislative changes, such as the amendment of the Emissions Trading Scheme, is scheduled for July 2021.

Despite causing some initial delays, the pandemic has thus not seriously shifted the legislative timeline for the implementation of the European Green Deal. Most importantly, the European Union managed to agree its mid-term and long-term greenhouse gas emission reduction targets in time for COP 26. Several factors have played an important role at this – the postponement of COP 26 for November 2021, the adoption of similar targets by other jurisdictions and the leverage which the financial stimulus included in the Recovery and Resilience Mechanism had on indecisive member states.

4. EUROPEAN UNION'S FINANCING OF THE POST-PANDEMIC GREEN RECOVERY

In order to facilitate the recovery of member states' economies, the European Union adopted a Next Generation EU, a temporary recovery instrument of 750 billion euro, 360 billion of which consists in loans, and 390 billion of which in grants.[34] The Commission in empowered to borrow those funds on the capital markets on behalf of the EU.[35] Together with the Multiannual Financial Framework, the Union's long-term budget for the period from 2021 until 2027, it provides an unprecedented stimulus package of 1824.3 billion euro aimed at rebuilding "a greener, more digital and more resilient Europe".[36]

The Next Generation EU recovery plan was proposed by the European Commission on 27 May 2020[37]. The European Parliament and the Council first agreed

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33 European Parliament, *President Biden's climate summit* [https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/690583/EPRS_ATA(2021)690583_EN.pdf], Accessed 5 May 2021; European Commission, *European Climate Law*, [https://ec.europa.eu/clima/policies/eu-climate-action/law_en], Accessed 5 May 2021.

34 Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, EUCO 10/20, point A5 and A6, [https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf], Accessed 5 May 2021.

35 *Ibid.*, A5.

36 European Commission, *Recovery Plan for Europe*, [https://ec.europa.eu/info/strategy/recovery-plan-europe_en], Accessed 5 May 2021.

37 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Europe's moment: Repair and Prepare for the Next Generation, COM/2020/456 final.

upon the recovery plan in the second half of July 2020, and finalised the agreement on 10 November 2020. [38] The Multiannual Financial Framework and the recovery plan were adopted on 17 December 2020.[39] According to the agreement reached in July 2021, 30% of the overall spending of both the Multiannual Financial Framework and the Next Generation EU is to be dedicated to climate action, which is to be reflected in sectoral legislation, and "all EU expenditure should be consistent with Paris Agreement objectives" and "the 'do no harm' principle of the European Green Deal."[40] In figures, under the Multiannual Financial Framework a total of 356 374 billion euro is dedicated to the Natural resources and the environment category.[41]

The main instrument of the Next Generation EU recovery plan is the Recovery and Resilience Facility, worth 672.5 billion euro and agreed upon on 10 February 2021.[42] As one of its general objectives, the Recovery and Resilience Facility lists "contributing to the achievement of the Union's 2030 climate targets" and "complying with the objective of EU climate neutrality by 2050", as means of "contributing to the upward economic and social convergence, restoring and promoting sustainable growth and the integration of the economies of the Union, fostering high quality employment creation", among others.[43] The financing through this mechanism is available for the period from 2021 until 2026 and it contains 312.5 billion euro in grants and 360 billion euro in loans.[44]

In order to obtain the funds from the Recovery and Resilience Facility, member states are to prepare national recovery and resilience plans which contain their investment agenda.[45] The provisional deadline for the submission of national plans is set on 30 April. Among other elements, national plans have to contain:

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38 Legislative Train Schedule, *New Boost for Jobs, Growth and Investment* [https://www.europarl.europa.eu/legislative-train/theme-new-boost-for-jobs-growth-and-investment/file-mff-2021-2027-mff], Accessed 5 May 2021.

39 European Council, Council of the European Union, *Timeline - Council actions on COVID-19,* [https://www.consilium.europa.eu/en/policies/coronavirus/timeline/], Accessed 5 May 2021.

40 Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, EUCO 10/20, point A21 and 18, [https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf], Accessed 5 May 2021.

41 Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, [2020] OJ L 433I/11, Annex I.

42 Taylor, K., *Historic step' as European Parliament approves green recovery fund*, Euractiv, 10 February 2021, [https://www.euractiv.com/section/energy-environment/news/historic-step-as-european-parliament-approves-green-recovery-fund/], Accessed 5 May 2021.

43 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, [2021] OJ L57/17, Article 4.

44 *Ibid.*., Article 6.

45 *Ibid.*., Articles 17, 18.

> "a qualitative explanation of how the measures in the recovery and resilience plan are expected to contribute to the green transition, including biodiversity, or to addressing the challenges resulting therefrom, and whether they account for an amount that represents at least 37 % of the recovery and resilience plan's total allocation, based on the methodology for climate tracking set out in Annex VI […],"[46]

and explain:

> "how the recovery and resilience plan ensures that no measure for the implementation of reforms and investments included in the recovery and resilience plan does significant harm to environmental objectives within the meaning of Article 17 of Regulation (EU) 2020/852 (the principle of 'do no significant harm')."[47]

Furthermore, it is explicitly proscribed that financing through the Recovery and Resilience Facility is only available to measures which comply with the principle of doing 'no significant harm' to environmental objectives, within the meaning of Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.[48]

Within two months of the submission of the national plans, the European Commission assesses them and when necessary, may ask for additional information and member states may revise their plans in case of need.[49] Pursuant to Article 19(3) of the Recovery and Resilience Facility Regulation, one of the assessment criteria, besides effectiveness, efficiency and coherence is the relevance of the plans.[50] Within the latter criteria the European Commission verifies whether the national plan "contains measures that effectively contribute to the green transition, including biodiversity, or to addressing the challenges resulting therefrom, and whether they account for an amount which represents at least 37 % of the recovery and resilience plan's total allocation, based on the methodology for climate tracking set out in Annex VI,"[51] and whether it complies with the 'do no significant harm' principle.[52] Failure to comply with the criteria prescribed under the abovementioned Article 19(3) prevents the member state concerned to benefit from financial contribution under the Recovery and Resilience Facility.[53] If all the criteria are

46 *Ibid.*., Article 19(e).
47 *Ibid.*., Article 19(3)d.
48 *Ibid.*., Article 5.
49 *Ibid.*, Article 19(1).
50 *Ibid.*., Article 19(3).
51 *Ibid.*., Article 19(3)e.
52 *Ibid.*., Article 19(3)d.
53 *Ibid.*., Article 20(4)c.

met, the assessment of the recovery plans is approved by the Council, upon the proposal of the European Commission.[54]

At the time of writing this paper, the following 17 member states have submitted their recovery plans: Belgium, Denmark, Germany, Greece, Spain, France, Croatia, Italy, Latvia, Lithuania, Luxembourg, Hungary, Austria, Poland, Portugal, Slovenia, and Slovakia.[55] According to the first assessment of the national recovery plans performed within the Green Recovery Tracker project, the recovery plans of Denmark, Bulgaria and Slovakia can make a positive impact on the green transition, the ones from Estonia, Portugal, Poland, Romania and Spain have potential for a positive impact, but lack information which would affirm such a conclusion, while the recovery plans of France, Germany and Latvia are estimated to have a moderate impact on the green transition.[56] The Czech recovery plan is expected to have an overall positive impact, but contains elements which present a risk of a fossil fuel lock-in.[57] The highest positive impact on the green transition is expected from the Finish recovery plan, which dedicates 42% of the EU spending on green projects.[58] The lowest percentage of such spending, only 5%, is envisaged by the Slovenian recovery plan, which is even estimated to negatively impact the green transition.[59] Other national recovery plans which have been submitted are still under preliminary evaluation.

In case their recovery plans are approved, member states may ask to receive prefinancing payment of up to 13% of their funding.[60] The majority of the funding under the Recovery and Resilience Facility, 70%, is to be made available by the

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54 *Ibid.*., Article 20(1). Examples of investments linked to the green transition, which are presumed to be met with approval from the European Commission, are given in European Commission's Guidance to Member States – Recovery and Resilience Plans, SWD(2021) 12 final, pp. 25-26.

55 European Commission*, Recovery and Resilience Facility: Croatia and Lithuania submit official recovery and resilience plans*, [https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2501], Accessed 15 May 2021.

56 Green Recovery Tracker, *Country reports*, [https://www.greenrecoverytracker.org/country-reports-overview], Accessed 15 May 2021. For a different preliminary analysis of national recovery plans, see Darvas, Z.; Tagliapietra, S., *Setting Europe's economic recovery in motion: a first look at national plans*, Bruegel Blog, 29 April 2021, [https://www.bruegel.org/2021/04/setting-europes-economic-recovery-in-motion-a-first-look-at-national-plans/], Accessed 15 May 2021.

57 *Ibid.*.

58 *Ibid.*.

59 *Ibid.*.

60 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, [2021] OJ L57/17, Article 13.

European Commission by the end of 2022, and the remaining 30% by the end of 2023.[61] All payments to the member states are to be made by the end of 2026.[62]

Financing of fossil fuel projects through the Recovery and Resilience Facility is not explicitly excluded, but as stated earlier, Article 5(2) of the Recovery and Resilience Facility Regulation requires that all measures which are financed through the mechanism respect the principle of 'do no significant harm'. The Technical guidance on the application of 'do no significant harm' under the Recovery and Resilience Facility Regulation state that, given the availability of low carbon alternatives, "measures related to power and/or heat generation using fossil fuels, as well as related transmission and distribution infrastructure, as a general rule should not be deemed compliant" with this principle.[63] However, exceptions from this rule are envisaged on a case by case basis, for "measures related to power and/or heat generation using natural gas, as well as related transmission and distribution infrastructure."[64] This exception is available to member states which face significant challenges in transitioning from "more carbon-intensive energy sources, such as coal, lignite or oil", if the use of natural gas can lead to "particularly large and rapid reduction in GHG emissions," and if they comply with conditions for avoiding a "carbon-intensive lock-in effect" and other environmental conditions from the Technical guidelines.[65] Some member states, such as Poland, Bulgaria, and the Czech Republic, have expressed strong criticism of the 'do no significant harm' principle and its criteria for the use of natural gas as a transition fuel, while others, such as Denmark, have voiced their concerns on lowering the limits imposed on the use of fossil fuels.[66]

In order to distinguish between environmentally friendly and unfriendly investments, the European Union has adopted the sustainable finance taxonomy.[67] The first draft of European Commission's EU Taxonomy Climate Delegated Act did

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61 *Ibid.*., Article 12.

62 *Ibid.*., Article 24.

63 European Commission Notice on Technical guidance on the application of 'do no significant harm' under the Recovery and Resilience Facility Regulation 2021/C 58/01, C/2021/1054, [2021] OJ C58/1., point 2.4.

64 *Ibid.*.

65 *Ibid.*.

66 Taylor, K., *Czechs lead the charge against EU's 'do no harm' green criteria*, 26 March 2021, Euractiv, [https://www.euractiv.com/section/climate-environment/news/czechs-lead-the-charge-against-eus-do-no-harm-green-criteria/], Accessed 5 May 2021.

67 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, PE/20/2020/INIT [2020] OJ L 198/13.

not recognise natural gas as a sustainable fuel,[68] but it has subsequently been considered for inclusion given the strong pressure from Bulgaria, Croatia, Cyprus, the Czech Republic, Greece, Hungary, Malta, Poland, Romania, and Slovakia.[69] The final decision about the classification of natural gas as sustainable/unsustainable has currently been postponed until the adoption of a complementary delegated act, which is expected by the end of 2021.[70]

Concerns about the green transition of member states which are heavily reliant on fossil fuels have been to a certain extent addressed by the Just Transition Mechanism, envisaged by the Green Deal. Under the Next Generation EU recovery plan, financing of additional 10 billion euro has been envisaged for the Just Transition Fund, which forms part of the Mechanism, leaving at its disposal a total of 17,5 billion euro.[71] These resources are aimed at alleviating the green transition for regions and sectors which are heavily dependent on fossil fuels, and can be used, *inter alia*, for re-skilling programmes, job creation and energy-efficient housing.[72] The biggest recipients of the abovementioned funding are the coal-mining regions in Poland, Germany and Romania.[73]

The 'do no significant harm' principle, the mandatory 37% of envisaged green financing in member states' recovery plans, the sustainable finance taxonomy and the Just Transition Mechanism all have a common goal of preventing a fossil fuel lock-in of member states' economies. Given the unprecedented levels of public

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68 Simon, F., *Gas denied 'transition' fuel status in draft EU green finance rules*, 11 November 2020, Euractiv, [https://www.euractiv.com/section/energy-environment/news/gas-denied-transition-fuel-status-in-eu-green-finance-rules/], Accessed 5 May 2021.

69 Simon, F., *Brussels postponed green finance rules after 10 EU states wielded veto*, 29 January 2021, Euractiv, [https://www.euractiv.com/section/energy-environment/news/brussels-postponed-green-finance-rules-after-10-eu-states-wielded-veto/], Accessed 5 May 2021.

70 European Commission, *Questions and Answers: Taxonomy Climate Delegated Act and Amendments to Delegated Acts on fiduciary duties, investment and insurance advice*, [https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1805], Accessed 5 May 2021.

71 Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, EUCO 10/20, point A14, [https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf], Accessed 5 May 2021; European Commission, *The Just Transition Mechanism: making sure no one is left behind*, [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/actions-being-taken-eu/just-transition-mechanism_en], Accessed 5 May 2021.

72 European Commission, Communication from The Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal, COM(2019) 640 final, page 16.

73 Abnett, K., *EU countries approve the green transition fund, look to challenges ahead*, Reuters, 3 March 2021, [https://www.reuters.com/article/us-climate-change-eu-justtransition-idUSKCN2AV2D0], Accessed 5 May 2021; Kucharczyk, M., *West Poland subregion aims to be first in the country to hit net zero*, 21 January 2021, Euractiv, [https://www.euractiv.com/section/energy/news/west-poland-subregion-aims-to-be-first-in-the-country-to-hit-net-zero/], Accessed 5 May 2021.

financing which have been mobilised due to the pandemic, the investments which will occur in the following years will either speed up the green transition, or make it more expensive.

5. AVOIDING A FOSSIL FUEL LOCK-IN

In its recently published report, the International Energy Agency has performed an analysis of the reforms which need to take place in the energy sector in order for it to have net zero emissions by 2050.[74] The report states that the energy sector's "path to net zero emissions is narrow: staying on it requires immediate and massive deployment of all available clean and efficient energy technologies" and that no new oil or gas fields nor coal mine capacities are required to satisfy the energy demand.[75] Given the authority of the International Energy Agency and the comprehensiveness and urgency of its report, it can be concluded that the risk of a fossil fuel lock-in is strongly present.

The importance of an energy transition, of removing subsidies for fossil fuels and avoiding a lock-in into unsustainable practices has also been recognised in the Green Deal.[76] However, even though the wording of the Green Deal leaves no doubt about the importance of this aim and the scope of changes which are necessary for its realisation, its achievement in practice remains dubious. An analysis of the European Union's 2030 Climate and Energy Policy Framework preformed in the first half of 2020 revealed that the proposed legislative and policy changes were insufficient for enabling a transformation required by the European Union's commitments under the Paris Agreement.[77] This shows that the prospective for a successful and timely implementation of the Green Deal was questionable at the outset. However, paradoxically, the COVID-19 pandemic, despite of its destructive consequences on member states' economies and tragic human losses, has made changes in many sectors inevitable, which in itself brings the implementation of

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74 International Energy Agency, *Net Zero by 2050 – A Roadmap for the Global Energy Sector*, [https://iea.blob.core.windows.net/assets/4482cac7-edd6-4c03-b6a2-8e79792d16d9/NetZeroby2050-ARoadmapfortheGlobalEnergySector.pdf], Accessed 18 May 2021.

75 *Ibid.*., p.14 and 21.

76 European Commission, Communication from The Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal, COM(2019) 640 final, pages 2, 17; European Commission, Communication from The Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - Powering a climate-neutral economy: An EU Strategy for Energy System Integration, COM/2020/299 final.

77 Kulovesi K.; Oberthür, S., *Assessing the EU's 2030 Climate and Energy Policy Framework: Incremental change toward radical transformation?* Review of European, Comparative and International Environmental Law (RECIEL) Vol. 29, No. 2, pp.151-166. DOI: 10.1111/reel.12358, at 165.

the Green Deal not beyond the realms of possibility. The COVID-19 pandemic has demonstrated that decisive and large-scale state action is possible in case of an imminent threat and when public support is present.[78]

As explained above, the opportunity that large scale public investments employed for post-pandemic economic recovery presents for the green transition has been recognised by the European Union, and it has undertaken several steps to link the use of the financial resources with the green recovery. Some member states have engaged in additional action to ensure that the resources they were making available to undertakings in need do not reinforce polluting and carbon-intensive practices. For example, as a part of its stimulus package, alongside VAT reductions Germany doubled the purchase premium for electric vehicles, incentivising thus at the same time the recovery of the market and the greening of its road transport.[79] Unfortunately, this noteworthy example of linking the economic recovery and the green transition is a rare one, but it depicts which level of opportunity member states currently have at their disposal for incentivising the markets to switch to green technologies, since similar types of market-intervention would be harder in normal market conditions. Some developments along similar lines took place in relation to bailouts for the airline industry.[80] Austrian Airlines has, in return for a 450 million euro bailout undertaken several climate change related commitments, such as reducing its greenhouse gas emissions by 30% by 2030 and dropping short-haul flights for which railroad alternatives with a commute time of under 3 hours exist.[81] Austria has also announced a raise in taxes which would influence the minimum price of air tickets.[82] Much milder climate change related non-legally binding promises were also given by Air France, which re-

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78 Hepburn, C., *et al*, *Will COVID-19 fiscal recovery packages accelerate or retard progress on climate change?*, Smith School Working Paper 20-02, p. 4, [https://www.smithschool.ox.ac.uk/publications/wpapers/workingpaper20-02.pdf], Accessed 5 May 2021; Gemenne, F.; Depoux, A., *What our response to the COVID-19 pandemic tells us of our capacity to respond to climate change*, Environmental Research Letters, Vol 15, 2020, 101002, p. 1, https://doi.org/10.1088/1748-9326/abb851.

79 Posaner, J., *German coalition agrees €130B economic rescue package*, 4 June 2020, Politico, [https://www.politico.eu/article/german-coalition-agrees-e130b-economic-rescue-package/], Accessed 5 May 2021

80 Transport & Environment, *Bailout Tracker*, [https://www.transportenvironment.org/what-we-do/flying-and-climate-change/bailout-tracker], Accessed 5 May 2021; Greenpeace, European Airline Bailout Tracker, [https://www.greenpeace.org/eu-unit/issues/climate-energy/2725/airline-bailout-tracker/], Accessed 5 May 2021.

81 Transport & Environment, *Austrian Airlines' bailout 'climate conditions' explained*, [https://www.transportenvironment.org/publications/austrian-airlines-bailout-climate-conditions-explained], Accessed 5 May 2021.

82 *Ibid.* This measure gas been suspected as protectionist by low cost airline operators. CAPA, *Austrian Airlines bailout protected by taxes and fare floor*, [https://centreforaviation.com/analysis/reports/austrian-airlines-bailout-protected-by-taxes-and-fare-floor-527571], Accessed 5 May 2021.

ceived state aid in amount of 7 billion euro. These include an improvement in fleet efficiency (which does not necessarily lead to lower overall emissions if the increased efficiency is cancelled out by increased traffic), use of a minimum 2% of alternative fuels by 2025 (not necessarily low-carbon fuels) and the reduction of domestic greenhouse gas emissions by 50%, but sufficient criteria for monitoring this obligation are not set.[83] Other European airlines were given bailouts with no conditions of a similar nature, which shows that member states strongly favoured their economic recovery and did not make this opportunity to speed up the sector's green transition. Given the slow-moving pace of the CORSIA international framework for greenhouse gas emission reductions under the ICAO, it is becoming more and more likely that the aviation sector will face a challenging path out of a fossil fuel lock-in.

From all of the abovementioned, it can be concluded that some opportunities for preventing a fossil-fuel lock in have so far been missed at the member state level. However, the biggest part of the post-pandemic recovery public spending is yet to take place, within the scope of the Recovery and Resilience Facility. If fossil fuel lock-in is to be avoided, environmental criteria contained therein are not to be compromised and their stringent application of should be given priority.

6. CONCLUSION

In December 2019, the European Green Deal marked an important shift in the European Union's political agenda and expressly identified tackling climate change and environmental protection as the biggest task that the Union is faced with.[84] The COVID-19 pandemic which followed shortly after the first steps for the implementation of the Green Deal were being taken has tested the dedication of Union's citizens, member states and institutions to pursue environmental aims, along with handling other pressing health and economic challenges. Despite some initial concerns about the additional financial pressure that the implementation of the Green Deal might put on their economies which were severely hit by the pandemic, the European Union never seriously considered to abandon the Green Deal. Some legislative delays in the implementation did take place, but the European Commission made sure to prioritise the essential parts of the Green Deal's agenda.

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83 Transport & Environment, *Air France's bailout 'climate conditions' explained*, [https://www.transportenvironment.org/publications/air-frances-bailout-climate-conditions-explained], Accessed 5 May 2021.

84 European Commission, Communication from The Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal, COM(2019) 640 final, page 2.

In order to facilitate the post-pandemic recovery of member states' economies, the European Union adopted a temporary recovery instrument of 750 billion euro, the Next Generation EU, and made amendments to its long-term budget, the Multiannual Financial Framework. 30% of the overall spending of both the Multiannual Financial Framework and the Next Generation EU are to be dedicated to climate action and all spending under these instruments is to be consistent with the aims of the Paris Agreement and the 'do no significant harm principle'. The main part of the Next Generation EU recovery package is the 672.5 billion euro Recovery and Resilience Facility. In order to benefit from its funding, member states have to draft national energy plans which must dedicate 37% of the spending to the green transition and comply with the 'do no significant harm' principle. Given the unprecedented volume of investments which will take place in the upcoming years and their potential for driving the green transition, strict application of these criteria and ensuring high environmental integrity of the sustainable investment taxonomy which will guide those investments will be of crucial importance. Any other option would lead to a sever risk of a fossil-fuel lock in and endanger the achievement of the goals of the Green Deal and the Paris Agreement.

The COVID-19 pandemic has demonstrated that decisive and large-scale state action is possible in case of an imminent threat and when public support is present. This can be illustrated by the size of the funding which the European Union mobilised in response to the pandemic – the recovery plan itself, Next Generation EU, amounts to 750 billion euro. Similarly, in response to the pandemic, the European Central Bank announced a 870 billion euro bond buying programme in 2020.[85] In comparison, the pre-pandemic plans for the financing the Green Deal amounted to 1 trillion euro of both public and private investments over one decade.[86] Given the size of the additional financial resources which are potentially available for green investments, there is an opportunity for an overall positive impact of the pandemic on the green transition.

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[85] Lagarde, C., *Our response to the coronavirus emergency*, The ECB blog, 19 March 2020, [https://www.ecb.europa.eu/press/blog/date/2020/html/ecb.blog200319~11f421e25e.en.html], Accessed 5 May 2021. The European Central Bank has not used its purchase programme to promote green investments, but has in the meantime been exploring options of such course of action. Taylor, K., *European Central Bank sets up climate team, considers green bonds*, Euractiv, 29 January 2021, [https://www.euractiv.com/section/energy-environment/news/european-central-bank-sets-up-climate-team-considers-green-bonds/], Accessed 5 May 2021.

[86] European Commission, *Financing the green transition: The European Green Deal Investment Plan and Just Transition Mechanism*, Press Release, 14 January 2020, [https://ec.europa.eu/commission/presscorner/detail/en/ip_20_17], Accessed 5 May 2021.

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UDK 378:004]:614.4
37.018.4
Project review

THE IMPLEMENTATION OF JEAN MONNET PROJECT ACTIVITIES IN PANDEMIC CONDITIONS: PAINS AND GAINS*

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ABSTRACT

The Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, has been granted in the year 2020 a financial support by the European Commission in implementation of the Jean Monnet Module No. 620231-EPP-1-2020-1-HR-EPPJMO-MODULE titled "Jean Monnet Module Language and EU Law Excellence", Decision No 620231 of September 15, 2020. The project has been elected for financing by the European Commission among almost 1500 project applications from the whole world. Three projects from the Republic of Croatia have been accepted, one of them being the "Language and EU Law Excellence" (LEULEX) project. The project beneficiary is Josip Juraj Strossmayer University of Osijek, and the project holder is the Faculty of Law Osijek. The implementation of the project has started in September 2020 and it will last until September 14, 2023. As the project encompasses teaching activities, events and workshops that were initially planned to be delivered in face-to-face form, the implementation of the project in conditions of the world pandemic of Covid-19 virus has become very challenging and needed adapting of all stakeholders to new conditions. The main goal of this paper is to present the ways, solutions and answers that were offered to these unexpected challenges and to explore how the participants in the project perceive the teaching activities within the project conducted by means of online platforms and tools with reference to improvements achieved in their knowledge and skills within the respective project activity. The method used in the research is a survey administered online among the participants of the Jean Monnet Project LEULEX. In the introductory part of the paper, the author, who is a coordinator and a contact person of the project, presents the Jean Monnet Module LEULEX and defines its main idea, goals and the planned outcomes of the project. The main part of the paper is dedicated

* This paper is a product of work that has been fully supported by the Jean Monnet Module Language and EU Law Excellence LEULEX, project no. 620231-EPP-1-2020-1-HR-EPPJMO-MODULE. The European Commission's support for the production of this publication does not constitute an endorsement of the contents, which reflect the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

to description of the implementation of the project that was adapted to the new Covid-19 pandemic situation. The results of the survey conducted among the project participants relating to implementation of online teaching tools, platforms, and technologies are discussed and analysed with reference to the outcomes of the project. In the closing part to the paper, conclusions are drawn on benefits and shortcomings of the changed approach to implementation of the project activities in the conditions of the Covid-19 pandemic, which has strongly influenced private and professional lives of the people all around the world.

***Keywords**: benefits, challenges, distance learning, Jean Monnet Module, teaching conditions*

1. INTRODUCTION

Because Croatian legal system is an integral part of the supranational law of the European Union as the multicultural and multilingual political and economic community, knowledge of the basics of EU law and mastering the working languages of EU institutions represent indispensable prerequisites for the legal profession and development of the professional career of Croatian lawyers. Since the establishment of European Communities, numerous European documents confirmed the commitment of European institutions to promote multilingualism in Europe and enhance communication skills in modern languages. For example, the Council of Europe Resolution of 1995, and especially the Sorbonne Declaration (1998) encouraged developing programs in higher education that would enable students to develop their language skills necessary for students' mobility within European universities.

2. JEAN MONNET MODULE "LANGUAGE AND EU-LAW EXCELLENCE"

In the year 2020, the Faculty of Law developed a Jean Module "Language and EU-law excellence" that was accepted to be financially supported by the European Commission. The undergoing idea of the project was that the students of the Faculty of Law Osijek should improve their knowledge of EU law and master English, German and French in the field of EU law to become more competitive on the labour market and be qualified for new jobs requiring both legal and linguistic knowledge. Accordingly, students of the Translation Section within the English Language and the German Language Studies at the Faculty of Humanities Osijek should be equipped with basic knowledge in EU law and legal terminology to be able to apply for new jobs requiring linguistic skills in the field of EU law. By implementing different types of activities, the project should increase the professional competencies of lawyers and law students on one hand and students and graduates of Foreign Language Studies at the University of Osijek on the other, and make them more competitive on the labour market.

The project found favour in the European Commission among more than 1440 applications as the first of three Jean Monnet project applications from the Republic of Croatia that were accepted by the European Union. The value of the project is estimated at 30.240,00 Euro, 75 % of which is financed by the European Commission and 25% by the Faculty of Law Osijek. The beneficiary of the project is J. J. Strossmayer University of Osijek, while the holder of all project activities is the Faculty of Law Osijek. The project team is composed of two professors from the Department of European Law and three professors from the Department of Foreign Languages and Sociology, the Faculty of Law Osijek, three associate members from the Faculty of Humanities and Social Sciences Osijek, as well as the French professor employed at the Comprehensive High School of Osijek. Special thanks for readiness to participate in the project both with its teaching staff and its equipment and licensed teaching tools goes to the dean of the Faculty of Humanities and Social Sciences of Osijek. The project could not have been implemented without their help and cooperation. The implementation of the project has started in September 2020 and will last till the end of August 2023.

2.1. Basic ideas, goals, and the target group of the project

The interdisciplinary project Jean Monnet Module "Language and EU-law excellence" is founded on the idea that in the European Union the knowledge of EU law and mastering English, French and German legal terminology are of utmost importance for the successful career of Croatian lawyers. The interconnectedness of law and language has been indisputable for centuries, and this fact was highlighted by many lawyers and linguists. For Paul Kirchhof, law lives in language and through language ("Recht lebt in Sprache und durch Sprache")[1], and for Otto Gierke language is the body of law (Die Sprache ist nicht nur das Kleid, sondern der wahre Leib des Rechts)[2].Accordingly, the translation in the field of law, which implies both legal and the linguistic knowledge of the translator, is a very demanding and responsible task: "Legal translation (…) leads to legal effects and may induce peace or prompt war".[3] Translating legal texts is very important in the functioning of EU institutions and the EU generally, and there are some new jobs and professions in EU institutions and their bodies in the member states that require both the knowledge of EU law and excellence in foreign languages, especially English, French, and German.

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1 Kirchhof, P., *Rechtsprechen ist mehr als Nachsprechen von Vorgeschriebenem*, in: Haβ – Zumkehr, U. (Hrsg): Sprache und Recht, Jahrbuch 2001, W. de Gruyter, Berlin – New York, 2001. pp. 119-135.

2 Gierke, O.*, Das bürgerliche Gesetzbuch und der deutsche Reichstag*. Berlin, 1896.

3 Šarčević, S., *Introduction,* in: Šarčević, S. (ed.), *Legal Language in Action: Translation, Terminology, Drafting and Procedural Issues,* Globus. Zagreb, 2009, pp. 9-21.

That is the reason why this interdisciplinary project aims not only at widening the students' knowledge of EU law but also at developing the awareness of the importance of mastering working languages of EU institutions for Croatian lawyers and translators in conditions of multilingual professional communication worldwide.

The target groups of students are a) law students on the undergraduate, graduate and postgraduate levels, b) graduate lawyers (representatives of non-governmental organizations, civil servants, judges, etc.), c) students of the Translation studies of the Faculty of Humanities and Social Sciences Osijek and the graduates of those Studies and d) young researchers, lawyers and other interested legal professionals from the partner universities in neighboring countries. Upon the fulfillment of all obligations within the project, the attendants receive the certificate of attendance signed by the dean of the Faculty of Law Osijek and the coordinator of the project.

2.2. Objectives, outcomes, outputs, and the impact of the project

The Jean Monnet Module "Language and EU-Law Excellence" aims at 1) enhancing foreign language teaching in the field of EU Law - English, French and German, in order to impact positively the mobility of students of the Faculty of Law and to facilitate their speaking and translation skills in the three languages, and 2) at strengthening their proficiency in EU law and its terminology in these three languages, 3) at developing cooperation and interdisciplinary teamwork with the Translation Studies from the Faculty of Humanities of the University of Osijek with an overall idea of developing and promoting excellence in academic and professional achievements of language students in the field of EU law and of the students of law in the field of foreign languages.

General objectives of the project are:

- to mainstream the development of the teaching process and methods of education within the European studies and contribute to their greater visibility at a national and international level;
- to enhance interdisciplinary synergy of students, teachers, and the wider community;
- to promote multilingualism, multiculturalism, and European values in all activities;
- to promote innovation in teaching by including new technologies, media, and methods (this turned out to be a most striking element in carrying out the objectives!);
- to contribute to the promotion and greater visibility of European values and ideas on the international level by attracting attendants from Serbia, Bosnia and Herzegovina, and Northern Macedonia.

Specific objectives include

- improving students' knowledge on EU Law and promoting EU values by stressing the EU law dimension in all courses,
- improving the knowledge and application of EU Law terminology in English, German and French to impact positively the mobility of students,
- developing students' communication skills in the field of law in the European context,
- developing translation skills in the field of law by using modern translation tools.

The undergoing overall aim of the project was to promote EU law and modern languages in the field of law. This should be achieved by seven teaching activities encompassing 75 hours, four workshops encompassing 12 hours, and four events including one international conference.

The main outputs of the project include the development of an original curriculum with some renewed and some completely new courses (some courses partly lean on the courses developed within the Lifelong Learning Program for Lawyer Linguists). In defining outputs and the impacts of the project, it was necessary to determine in advance which groups of people will benefit from the project. So we predicted the participation of 20 law students per year, 10 students from the Faculty of Humanities per year, 20 lawyers from different fields of legal profession, 10 representatives of the local self-government units and non-governmental organizations and 5-10 young academics from neighbouring countries per year – on average 70 participants per year. Beyond expectations, 120 participants joined the project in the first project year. Most of them were law students and graduates from the Faculty of Law, but there were also 22 students and graduates from the Faculty of Humanities (not only of Osijek, but also of Zagreb). 12 participants were researchers from the law faculties in Serbia, Bosnia and Herzegovina, and Northern Macedonia.

The main outcome of the project is defined as reinforcing a European dimension of law studies and translation studies and increasing the competitiveness of future lawyers and translators on the labour market in national and European contexts. The project should also contribute to a modern, dynamic and professional environment at the Faculty by its interdisciplinary approach, by developing innovative curricula and courses, and by applying modern teaching tools and methodologies. While planning the project, we could not imagine how important modern media and online teaching tools and platforms will be for the implementation of the project.

Due to the unexpected emergence of the Covid-19 pandemic that impacted all the aspects of our private and professional lives, the implementation of project activities was faced with serious challenges, which will be presented in the following chapters.

3. THE CHALLENGES OF PROJECT IMPLEMENTATION IN PANDEMIC CONDITIONS

As specified in the introductory part, project activities include teaching, workshops, events and final conference. In the first project year we have organized one promotional event, carried out the planned 75 hours of teaching and delivered four workshops. Due to the Covid-19 situation at the beginning of November 2020, the promotional event was held by hybrid approach with a rather small number of participants present in the Council Hall of the Faculty, while a great majority of participants attended the event via the platform Zoom. In those circumstances, it was impossible to give lectures and workshops as planned by face-to-face approach, so we sent a request to the EC administrator in charge of Jean Monnet Modules and asked for the permission to implement the teaching activities online. At the meeting held online with the representatives of the EC by the end of November, it was decided that distance learning and online platforms can be used as appropriate methodological approach in pandemic conditions.

So instead of being carried out by face-to-face approach, most activities were delivered online, by using the platform Zoom. Following courses were delivered as compulsory courses by using zoom platform exclusively: Legal language and the EU, Basics of EU-Law, Using Parallel Corpora in Translating EU Legislation, and Introduction to EU-Law Terminology – French. The courses EU-Law Terminology and Translation – English and EU-Law Terminology and Translation – German, as well as Modern Translation Tools are offered as elective courses, two of which become compulsory after being chosen by students.

In the two latter elective courses, a hybrid approach was used (a combination of face-to-face approach and distance teaching by using the platform Zoom). The course in German was elected by a rather small group of attendants. The problem was that they entered the course with a very different level of knowledge of that language. Some of them were very motivated to learn as much as possible (students waiting for the Erasmus exchange visit to Germany) and insisted on face-to-face teaching, while others have chosen virtual teaching by Zoom, so the professor held the course by hybrid approach. A similar situation concerning the initial knowledge level was a characteristic of the course Introduction to French Legal Terminology. The only teaching approach used in that course was by the Zoom

platform. Due to great differences in knowledge of French language, students who have never learned French were not able to advance through the course at the same pace with those who have attended the course in foreign languages schools. For them, individual work in a face-to-face approach would be a more efficient way of teaching. The elective course Modern Translation Tools, in which students practice the application of licenced online translation tools available at the Faculty of Humanities (Sketch Engine, TermEx, InterpretBank Software for Conference Interpreters, ApSIC Xbench, Subtitle Workshop, Dragon Naturally Speaking Premium, etc.), was also held in the hybrid form. Accordingly, the workshop on Conference Interpreting was held in hybrid form, with a limited number of students practicing conference interpreting in cabins individually, while others followed what they did in the virtual breakout rooms on the Zoom. Only the workshop on the CATT memo-Q was delivered face-to-face in a group of 14 students because of the limited number of computers with installed licenced memo-Q translation tool available at the Faculty of Humanities. The workshops "Litigation before CJEU" and "Databases and Information on the EU" were carried out by virtual teaching on the platform Zoom.

4. RESEARCH INTO STUDENT OPINIONS ON ONLINE PLATFORMS AND METHODS USED IN THE IMPLEMENTATION OF THE PROJECT

4.1. Theoretical background

In pandemic conditions, using information technologies and online teaching tools has become a usual way not only of communication with students but also the dominating method of delivering all the courses. Digital technologies have become, especially in recent conditions of Covid-19 pandemic, an indispensable tool in carrying out teaching activities at all education levels. According to Castro[4], digital platforms for distance teaching can improve learning-teaching activities a) by providing access to more students and facilitating self-paced online learning activities and b) by offering an individual path of learning for each student, thus improving out-of-class activities and feedback. The implementation of new media in teaching ranges from simple information gathering over distance and blended learning to Internet-based projects.[5] Research confirmed that blended learning (the combination of online and face-to-face instruction) produces better results

[4] Castro, R.: *Blended learning in higher education: Trends and Capabilities*, Education and Information Technologies (Springer) volume 24, 2019, pp. 2523–2546 (2019), https://doi.org/10.1007/s10639-019-09886-3.

[5] Dudeney, G.; Hockly, N. *How to Teach English with Technology*, Pearson, Essex, 2007.

in large classes.[6] The thesis by Ketterer and Marsh, that "the traditional classroom model of instruction is increasingly problematic in the face of new and emerging technologies of instruction"[7] are acceptable in a limited sense because many recent studies have shown that students still prefer face-to-face contacts with their teachers. Accordingly, a recent internal survey conducted online at the beginning of the academic year 2020/2021 at the Faculty of Law Osijek revealed that most students preferred attending courses face-to-face (42.7%), a slightly lower percentage of students (40.5 %) preferred virtual methods of distance teaching, while 16.8% said they would prefer the hybrid approach. The courses and workshops of the Jean Monnet Module Language and EU Law Excellence make no exception to that rule. This might have caused more difficulties for teachers who are mostly trained to deliver courses in face-to-face approach than for students, who belong to the generation of "digital natives", growing up surrounded by mobile phones, computers, and virtual social networks. In the given situation, teachers have shown great flexibility and readiness to exploit the opportunities of new media in teaching. In the implementation of the Jean Monnet project LEULEX, the application of modern media was seen not only as an inevitable method of delivering the courses in the conditions of pandemic, but also as a motivating factor and a way of introducing dynamics in the teaching process. Although some authors express "a healthy scepticism" towards the usage of information technologies in delivering courses ("Teachers should have at the same time a positive attitude towards and a healthy scepticism of these technological devices")[8], they do not deny their motivational role in the modern teaching process. Motivation in teaching is seen as a means of increasing the initiation of activities and of students' persistence in carrying out the tasks.[9] Information technologies can positively influence both intrinsic and extrinsic motivation and need to be integrated into modern course designs. However, many explorations of students' attitudes towards distance teaching by online platforms have been conclusive that students miss the face-to-face contact with their teachers. This confirms that the teacher has remained an important motivational factor, despite possibilities opened by new media. In terms of results

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6 Ketterer, J.; Marsh, G.,. *Re-Conceptualizing Intimacy and Distance in Instructional Models*, in: Online Journal of Distance Learning Administration, Volume IX, Number 1, 2006, [https://www.westga.edu/~distance/ojdla/spring91/spring91.htm]

7 Ibid.

8 Dudley-Evans, T.; St John, M.J., *Developments in English for Specific Purposes,* University Press, Cambridge 2007, p. 185.

9 Larson, W. R.; Rusk, N.. *Intrinsic Motivation and Positive Development*, in: Lerner, R. M.; Lerner, J. V.; Benson, J. (eds.), Advances in Child Development and Behavior, pp. 89-130, Academic Press, Burlington, 2011

achieved by distance teaching of the large groups of students, recent studies confirm that there are no differences between conventional and distance education.[10]

4.2. Methodology, hypothesis and the goal of the research

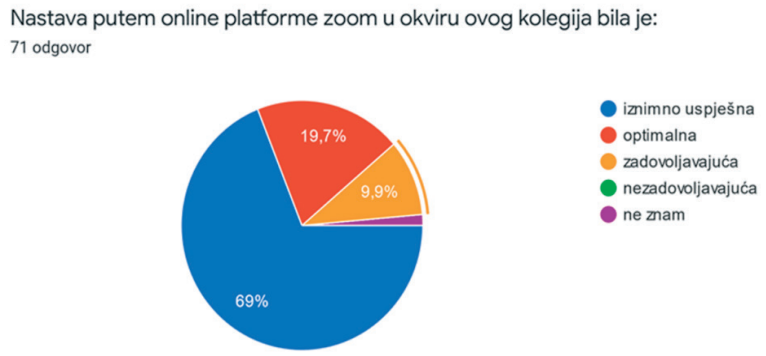
The research presented in this paper aimed to explore the attitudes of attendants of the Jean Monnet Module LEULEX towards the efficiency of the applied methods and tools of distance learning in the implementation of the project. By using an anonymous questionnaire administered online, students were asked to express their opinions on the appropriateness and efficiency of online platforms (the application Zoom or blended learning) in the delivery of each course. The received data will be presented and analysed by using statistical methods. The results will give feedback to teachers and help them improve the teaching approach in the next project year. The hypothesis of the research is that most respondents will be satisfied with the distance teaching methods in the given circumstances. However, differences in results between specific courses are expected, which will indicate for which courses the online approach is more suitable than for others.

5. FINDINGS

72 respondents out of altogether 120 project participants participated in the survey on volontary basis and assessed the application of online teaching methods for every course. The questionnaire was administered in the Croatian language, but results presented in the form of graphics are clear due to the consistent use of colours denoting specific assessment levels. The answers assessing the efficiency of online teaching methods were the following: extremely successful /iznimno uspješno/ - marked blue, optimal /optimalno/ – marked brown, satisfactory /zadovojavajuće/ – marked yellow, unsatisfactory /nezadovoljavajuće/ – marked green, and "I don't know" / "ne znam" – marked purple. The graphics are supplemented by students' comments that are chosen as representative for all the comments given for every subject.

[10] Dudley-Evans; St John, *op.cit.,* note 8

Graphics 1. Legal Language and the EU

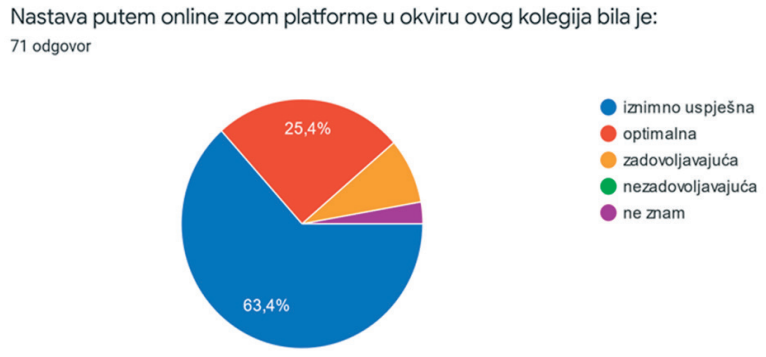


Comments: "Great professor with excellent skills! Lectures extremely interesting and useful!"

"Interesting lectures in a pleasant atmosphere; lectures were structured as an introduction to other courses within the project."

"All the professors have done their best in given conditions. I have learned a lot and gained new skills. I assess teaching by the online platform zoom as 'optimal' only because nothing can replace the face-to-face contact in teaching".

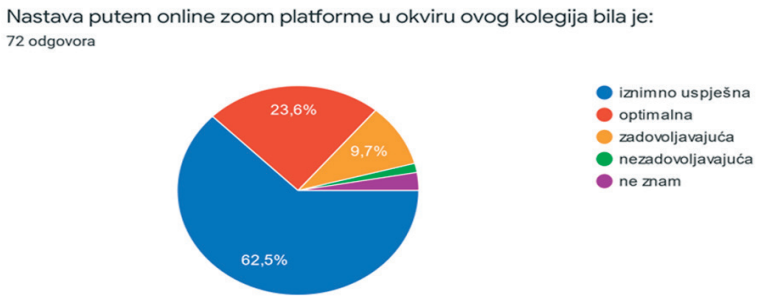
Graphics 2.: EU Law Terminology and Translation – English



Comments: "Excellent professor! Great and efficient lectures!"

"Very interesting lectures with lots of useful examples, but teaching face-to-face is always of a higher quality than teaching online."

Graphics 3.: Introduction to EU Law Terminology - French

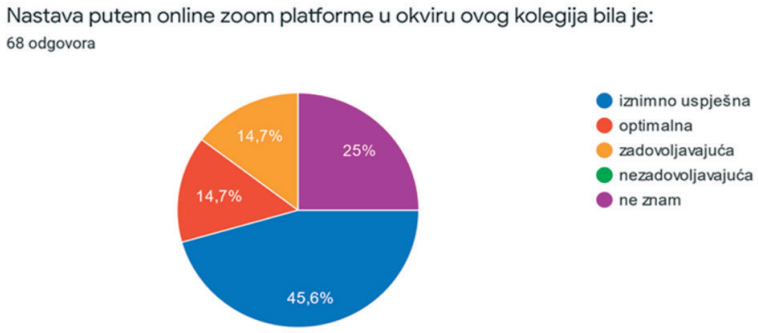


Comments: "Professor is an excellent expert, she invested a lot of effort and I admire her for successful combinations of different approaches in teaching students with different levels of knowledge. The approach face-to-face would have been better in those circumstances."

"Teaching approach could have been adapted more to us, total beginners in French."

"In some situations, using two screens by the professor would have been more efficient. And some materials presented were blurred."

Graphics 4: EU Law Terminology and Translation – German



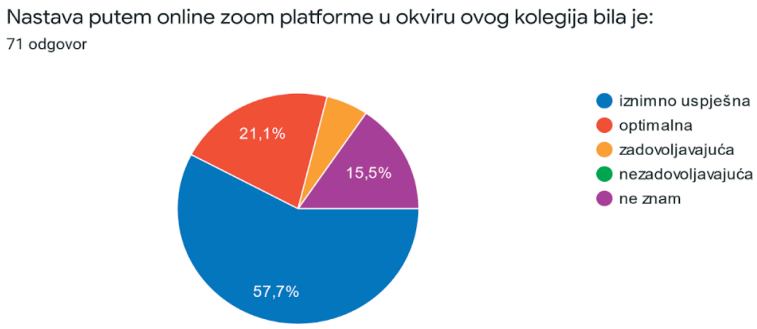
Comments: "It was interesting and I have learned a lot, though face-to-face teaching is always better than by using online platforms".

"I think that teaching approach should have been adapted to the beginners' level A1". "Sometimes it was difficult to follow all the tasks and advance through the course. In some cases, it would have been useful if we could have had two screens

to fulfil the tasks properly".

But also: "Zoom is an excellent platform for distance learning. It also enables interactive teaching and an efficient use of time".

Graphics 5: Basics of EU Law

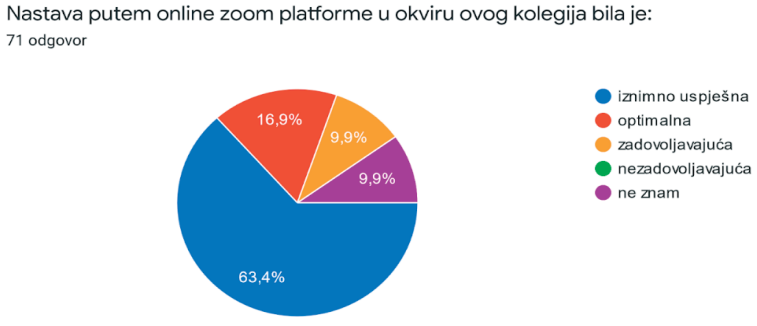


Comments: "The professors have done an excellent job, they are experienced teachers and experts in their field. Teaching face-to-face would have been an even better experience for us".

"I believe that activity and engagement of students would have been on a higher level if the lectures had been given face-to-face."

"The lectures were very successful, but as it was all theory, the results would have been the same no matter whether the lectures were online or face-to-face.

Graphics 6: Modern Translation Tools

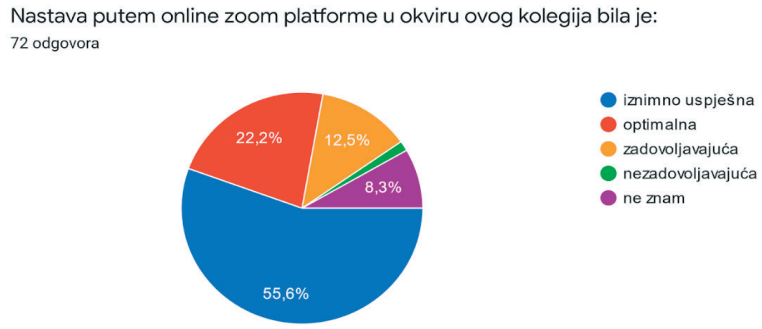


Comments: "The professor is an excellent teacher and professional. Excellent: both online and face-to-face."

"In many situations, two screens had been necessary so that we could have followed all the examples and steps in the application of programmes".

"The only problem for me was the pace of advancement through the course. It was difficult for me to follow all the programmes, as I have seen them for the first time. Sometimes, the server was slowed down because many of us were using it at the same time and it caused difficulties in following all the tasks properly".

Graphics 7: Using Parallel Corpora in Translating EU Legislation

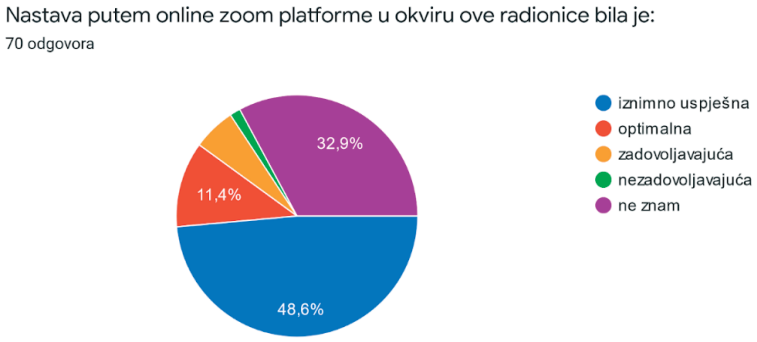


Comments: "The lectures were interesting and we learned a lot. It was awesome that all the time we were practicing the online sources and databases in 3 languages, and the professor was teaching the theory at the same time."

"For me, it was difficult to follow the lectures, I think I would have been more successful if the lectures had been face-to-face."

"In many situations, two screens were necessary so that we could follow the lectures and practice the application of parallel corpora available online".

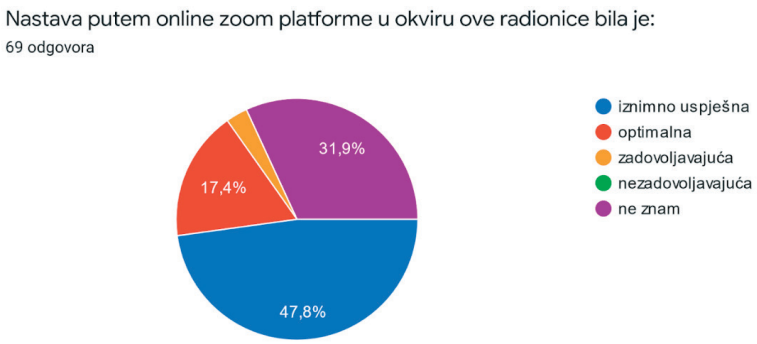
Graphics 8: Workshop Conference Interpreting



Comments: "A very useful and interesting workshop".

"It would have been better if we could have worked on the equipment normally. In the given circumstances, this experience will also be useful for us".

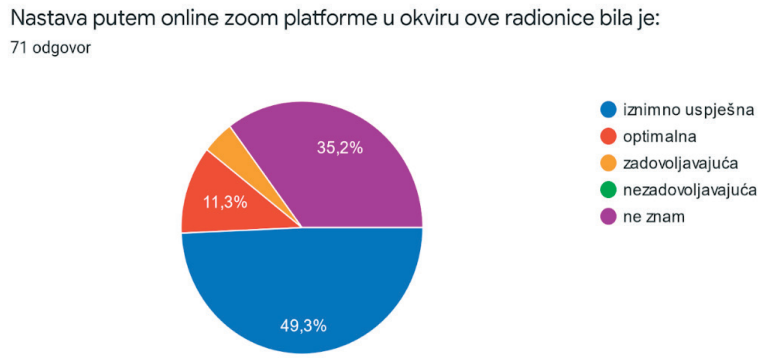
Graphics 9: Workshop Databases and Information on the EU



Comments: "Great workshop, very useful for my future work!"

"I think that this workshop is even more successful online than face-to-face because at the same time we could follow online the contents that the professor was speaking about".

Graphics 10: Workshop Litigation before the CJEU



Comments: "The professor is a great professional and an expert in the field".

"The teaching was very successful. Because of the specific teaching contents, the results would be the same regardless whether presented online or by face-to-face approach."

6. DISCUSSION

Respondents' answers indicate that most of them were extremely satisfied with the digital platform applied in the implementation of the project activities in the conditions of the Covid-19 pandemic. The teaching approach in most courses was assessed as "extremely successful" by the majority of respondents – on average over 60%. As for the workshops and the elective course in the German language, the majority of respondents gave the same answer, represented in these cases with a slightly lower percentage ranging between 45.6 % - 49.3 %. The reason for this slight difference is the fact that the course and the workshops are elective activities, so on average, 30% of respondents did not take the course/workshop. Another reason relating to the elective course EU Law Terminology and Translation – German was that the students taking the course mastered that language at different levels of knowledge – some mastered it at the B1 or even B2 levels, but some were beginners who have learned the language in primary school and forgotten most of that knowledge. For some of them, the pace of advancing through the course was too fast. Although most respondents assessed the teaching approach as extremely successful, their comments revealed that in most courses they would prefer a face-to-face approach. For the courses of theoretical character, they suggested that the same results would be achieved by using digital platforms online as by the conventional face-to-face teaching approach.

As regards the online platforms applied in the implementation of the project activities as an answer to the changed conditions caused by the Covid-19 pandemic, we have been faced with different types of challenges: the uncertainty of whether the project will be carried out and how in given conditions, the need for a quick adjustment of teachers to new teaching conditions; constant changing of teaching approach depending on the situation; changes of the timetable because of isolation measures and professors' sick-leaves, etc.

On the other hand, the situation has resulted in some positive outcomes as well. Firstly, teachers have improved their skills in using digital technologies and have learned the benefits and shortcomings of using digital platforms in teaching their courses. The most striking benefit resulting from this situation is a great number of students from different parts of Croatia participating in the project (Zagreb, Samobor, Dubrovnik), including twelve young researchers and postgraduates from the universities in the wider region (Sarajevo, Zenica, Niš, Beograd, Skopje, Štip). It is for us to hope that the number of participants will not decrease after the pandemic when the project activities will be carried out almost exclusively face-to-face.

7. CONCLUSIONS: BENEFITS AND SHORTCOMINGS OF PROJECT IMPLEMENTATION IN THE ERA OF PANDEMIC

Electronic media represent an indispensable aid in the modern teaching process and have proved as very practical teaching tools in pandemic conditions when distance teaching had to be applied at all education levels. Pandemic has forced the teachers to learn how to use all the possibilities of ICT and online teaching tools and improve their skills in that field. The existence of those possibilities enabled the implementation of project activities in the Jean Monnet project LEULEX without any delays. Students' attitudes towards distance teaching methods in the implementation of the project are generally positive. However, their comments reveal that in most cases they would have preferred a face-to-face teaching approach. This especially refers to the courses that should be delivered by using specific equipment and licenced software. The intensive use of online teaching tools due to the Covid-19 pandemic seems to suit best to students from neighbouring countries or those living in far-away cities in Croatia. That is probably one of the reasons why we had such an impressive number of participants in the first project year. Students' answers shall serve as reliable databases indicating which teaching approach should be applied in the following project years to specific teaching activities. The analysis has shown that in normal circumstances, the teaching approach should be adjusted to a specific course, its contents, and

the teaching equipment necessary for achieving the best results. It seems that the teaching model defined by American methodologists as "a teacher-focus blended model" seems to be the preferable model, as it encompasses both distance teaching methods and the face-to-face approach.

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UDK 614.4(497.5)
Review article

CROATIAN CITIES DURING THE COVID-19 CRISIS: CHALLENGES, RESPONSES AND ADJUSTMENTS

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ABSTRACT

The main research question of the paper is related to the identification and analysis of the challenges that Croatian local units face during the crisis caused by the COVID-19 pandemic. First, the regulatory framework of the civil protection system was presented to determine a direction of research of organizational and functional adjustments of local units for effective crisis management. Empirical research was conducted using the data content analysis (legal regulations, strategic documents, soft law documents, and web sourced data). Research findings have shown that local units face challenges in the areas of political governance, administrative and professional affairs, local budget, and the implementation of local democracy mechanisms. Therefore, in each of the identified areas, the author has analyzed elements that are subject to adaptation to national recommendations to reduce the spread of coronavirus. In doing so, attention is focused on large cities and county centers and their adjustments during crisis management were analyzed.

Keywords: *COVID-19, crisis management, Croatia, functional adjustments, local government, organizational adjustments*

1. INTRODUCTION

In recent decades, a series of transboundary crises have hit countries globally and demanded their cooperation in the field of crisis management. The current crisis is caused by the COVID-19 pandemic. The European Union has taken an active role to connect the national capacities of member states in the fight against a pandemic. In particular, by activating the EU Integrated Political Crisis Response (IPCR) arrangements as a coordination mechanism that brings together all information coming from different actors (member states, international orga-

nizations, EU institutions).[1] The ideal solution to a transboundary threat would be a joint state response in terms of arranging decision-making authority across multiple jurisdictions, synchronizing national responses, and facilitating the international exchange of resources.[2] And COVID-19 should be dealt with in this way. However, given that this is a global pandemic, there are different models of crisis management at the national, and especially at the subnational level, which is the backbone of reducing the pandemic. This paper analyzes the crisis management model applied by Croatian local units within the national regulatory framework.

After a short overview of the current course and management of the COVID-19 crisis in Croatia, the second part of the paper analyzes the legal framework relevant for the civil protection system and protection of the population from infectious diseases. The purpose of this analysis is to identify in which areas the elements of local governance and service delivery need to be adapted. Therefore, the main research question of the paper is the challenges that local units face during crisis management. Given a large number of local units and their uneven structure, this research will cover large cities and cities that have the status of county centers.[3]

The author will examine two hypotheses. First, the crisis will affect the increase in the concentration of political influence in the executive branch. Although the position of executive leaders was strengthened in 2007 with the introduction of direct elections of local executive leaders, [4] it is assumed that the pandemic contributed to further strengthening of their position and authority. The second hypothesis states that the crisis will additionally reduce the quality of local public services and impose restrictions on local democracy. In the early 1990s, the territory of Croatia was divided into too many small local units. About 60% of them do not have sufficient administrative or financial capacity for efficient and quality provision of services.[5] Also, local democracy is underdeveloped in Croatian local

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1 Council, The EU Integrated Political Crisis Response – IPCR – Arrangements Government of the Republic of Croatia, Bill on amendments to the Act on the protection of the population from infectious diseases with the Final Bill (PZ n. 921), 9 April 2020).

2 Ansell, C.; Boin, A.; Keller, A., *Managing Transboundary Crises: Identifying Building Blocks of an Effective Response System*, Journal of Contingencies and Crisis Management, Vol. 18, No. 4, 2010, pp. 195–207.

3 These are Bjelovar, Čakovec, Dubrovnik, Gospić, Karlovac, Kaštela, Koprivnica, Krapina, Osijek, Pazin, Požega, Pula, Rijeka, Samobor, Sisak, Slavonski Brod, Split, Šibenik, Varaždin, Velika Gorica, Vinkovci, Virovitica, Vukovar, Zadar, and Zagreb. The author will use the term "cities" for selected units, and the term "towns" for smaller cities that are not subject to analysis.

4 Koprić, I.; Škarica, M., *Evaluacija neposrednog izbora načelnika u Hrvatskoj nakon dva mandata: korak naprijed, dva nazad*, in: Gongeta, S.; Smoljić, M. (eds.) Zbornik radova 7. međunarodne konferencije "Razvoj javne uprave", Veleučilište 'Lavoslav Ružička' u Vukovaru, Vukovar, 2017, pp. 156-172.

5 Koprić, I., *Glavna obilježja postojećeg i prijedlog novog teritorijalnog ustrojstva Hrvatske – zašto nam treba teritorijalna reorganizacija,* in: Koprić, I. (ed.) Reforma lokalne i regionalne samouprave u Republici

political arena. Voter turnout in local elections after 2000 is 41% to 49%[6] and they are even less active in direct forms of local governance. Therefore, the crisis is expected to deepen such deficits even further.

For the purpose of testing hypotheses, the third part of the paper analyzes the adjustments implemented in the field of political steering of the crisis management, organization and work of the local administrative system, local finances, and local democracy. Based on the results, the last part contains comments on the given hypotheses and recommendations for better management during a future crisis.

2. COVID-19 CRISIS MANAGEMENT IN CROATIA (FEBRUARY 2020 TO FEBRUARY 2021)

At the end of February 2020, before the appearance of the first infections in Croatia, the Government introduced the first significant adjustment. Pursuant to the Civil Protection Act (hereinafter: CPA),[7] it issued a decision on the appointment of the Chief and members of the National Civil Protection Headquarters (hereinafter: Headquarters), whose primary task was to coordinate all services in the event of a coronavirus outbreak in the country. After the appearance of the first infections, from 25 February 2020, a number of special measures were gradually introduced related to the economy, public services, freedom of movement, etc. Given the growing number of patients, the Minister of Health passed a Decision declaring an epidemic,[8] in parallel with the decision of the World Health Organization to declare the COVID-19 global pandemic. At that time, regional and local civil protection headquarters began to be activated, cooperating directly with the Headquarters, and the main role in governing the state was taken over by the executive bodies at the central, regional, and local levels.

Since the number of patients increased significantly during March 2020, and the first death occurred, the work of all educational and cultural institutions was suspended. Most catering facilities and shops were closed, while all public transport was suspended along with the prohibition of leaving the place of temporary and permanent residence. It became very predictable what dramatic consequences the

Hrvatskoj, Institut za javnu upravu – Pravni fakultet Zagreb, Zagreb, 2013, p. 29.

6 State Election Commission, [https://www.izbori.hr/site/UserDocsImages/2266], Accessed 2 June 2021.

7 Civil Protection Act, Official Gazette No. 85/15, 118/18, 31/20.

8 Decision on declaring the COVID-19 epidemic caused by the SARS-CoV-2 virus, 2020, [https://zdravstvo.gov.hr/UserDocsImages/2020%20CORONAVIRUS/ODLUKA%20O%20PROGLA%C5%A0ENJU%20EPIDEMIJE%20BOLESTI%20COVID-19.pdf], Accessed 10 February 2021.

necessary measures would leave on the economy and society. Therefore, by the beginning of April, two packages of Government measures to preserve the liquidity and work of entrepreneurs were implemented.[9] During the "first wave" the "lockdown" lasted for a month, but the Croatian Parliament did not declare a state of emergency in the country. The first measures of remission followed at the end of April when a decrease in the number of patients was recorded. Apart from the declining number of daily illnesses, there was another important reason for the loosening of measures: on 5 July, the parliamentary elections were held.

Crisis management was assessed as extremely successful during the "first wave." The implemented measures and citizens' discipline very quickly showed good results in terms of a significant decline in the number of new cases. Croatia's measures in relation to the number of infected cases were among the most restrictive, which was confirmed by a University of Oxford study and the London company Deep Knowledge Group (DKG).[10] Their scientists compared the measures taken by countries and the number of their infected cases, and Croatia was at the top of the scale.[11]

However, the favorable situation lasted only two months. At the beginning of December, a dark record of 4,620 new cases in one day was achieved.[12] This was followed by daily decisions of the Headquarters on necessary epidemiological measures for certain counties, cities, and municipalities, a decision to ban border crossings[13] and a decision to re-ban citizens outside the counties of their temporary or permanent residence.[14]

It is interesting to note that during the "first wave," only 27 days after the first patient's appearance in Croatia and when the number of patients per day was 48, strict epidemiological measures were introduced. In contrast, analog measures were activated only five months after the start of the "second wave." At that time, the

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9 A list and more detailed information on all Government measures is available at: [https://www.koronavirus.hr/vladine-mjere/101], Accessed 13 January 2021.

10 DKG has developed analytical frameworks to analyze economic, social, and geopolitical stability to obtain results. The survey was conducted in 60 countries. Countries were assessed using 24 specific parameters in four different categories, including quarantine efficiency, government management efficiency, monitoring and detection, and emergency preparedness. DKG, [https://www.dkv.global/covid-safety-assessment-200-regions], Accessed 13 January 2021.

11 For example, on 3 April, the number of infected people was 1,079, and only 8 died (Official Government website for timely and accurate information on the coronavirus, [https://www.koronavirus.hr/], Accessed 12 February 2021). Thus, mortality was 0.741%.

12 *Ibid.*

13 Decision on the amendment to the Decision on temporary prohibition and restriction of border crossings of the Republic of Croatia, Official Gazette No. 139/20.

14 Decision on the prohibition of leaving the county based on the place of permanent residence or temporary stay in the Republic of Croatia, Official Gazette No. 141/20.

number of daily cases was almost 100 times higher than during the "first wave". Consequently, crisis management during the "autumn wave" did not achieve the success that was evident in the spring.

3. CROATIAN LEGISLATIVE FRAMEWORK ON CRISIS MANAGEMENT AND CIVIL PROTECTION SYSTEM

There are two basic regulations: the CPA and Act on the Protection of the Population from Infectious Diseases (hereinafter: APPID).[15] The first regulates the system and operation of civil protection, rights and obligations of state administration bodies, local and regional self-government units, legal and natural persons, administrative and inspection supervision, and other. The system is organized at the local, regional, and national level and connects the participants' resources and capabilities, operational forces, and citizens to reduce disaster risk. Regardless of the level, a headquarters performs tasks related to collecting and processing information on the possibility of a major accident and catastrophe, develops an action plan for the civil protection system in its area, performs public information activities and proposes a decision on termination of the implementation of measures and activities in the civil protection system.[16]

Due to the COVID-19, amendments to APPID were initiated. An institutional model of crisis management appropriate to the severity and urgency of the pandemic was established, which enables the realization of the principles of effectiveness and proportionality. Supervision over the achievement of these goals is the responsibility of the Government.[17] The APPID supplemented the list of infectious diseases with the COVID-19 virus, improved the existing regulation of the measure "isolation at home," and prescribed additional powers to sanitary inspectors to monitor the implementation of measures. During the "autumn wave", new security measures have been introduced – the obligation to wear a face mask, a prohibition/restriction of public and private gatherings. Also, the circle of supervisor of the implementation of safety measures has been expanded. In addition to the Government, supervision is now performed by police officers, inspectors of state administration bodies responsible for civil protection, inspectors of the State Inspectorate, and inspectors of other state administration bodies within their competence.[18]

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15 Act on the Protection of the Population from Infectious Diseases, Official Gazette No. 79/07, 113/08, 43/09, 130/17, 114/18, 47/20, 134/20.

16 Art. 21, para. 3 of the CPA.

17 Government, *Report on the effects of the implementation of measures under the Act on the Protection of the Population from Infectious Diseases during the COVID-19 pandemic caused by the SARS-COV-2 virus in the Republic of Croatia for the period from 11 March 2020 to 15 January 2021*, Zagreb, 2021, p. 3.

18 *Ibid.*

3.1. Civil protection system at the central level

The Government manages the activities of all participants in the civil protection system with the support of the Headquarters, and the MIA. The Government, at the proposal of the MIA, establishes and appoints the Headquarters.[19] The Minister of the Interior was appointed Chief of the Headquarters, along with other members, representatives of relevant ministries, the National Institute of Public Health (hereinafter: NIPH), the Croatian Red Cross, the Croatian Mountain Rescue Service, etc. Furthermore, the MIA performs administrative and technical tasks and ensures other conditions for the work of the Headquarters. On the other hand, the state bodies represented in the Headquarters are obliged to provide their representatives with the professional and operational support necessary for the effective implementation of the tasks.[20] In the event of special circumstances, the management of the Headquarters is taken over by the Prime Minister or a member of the Government authorized by him. The Headquarters is then authorized to make decisions and instructions that are required to be implemented by the headquarters at the local and regional levels.[21]

3.2. Civil protection system at the subnational levels

Decisions at the central level are taken in consultation with regional civil protection headquarters. In addition, local units can adopt their own measures that are in line with central authorities' decisions. Municipalities, cities, and counties are obliged to organize activities within their self-governing scope related to the planning, development, efficient functioning, and financing of the civil protection system. Powers in the field of civil protection are shared by the representative and executive body of the unit. Councils/assemblies in the process of adopting the budget adopt the annual plan for the development of the civil protection system with financial effects for a three-year period and guidelines for organization and development of the system which are considered and adopted every four years, and provide financial resources for the execution of decisions on the financing of civil protection activities. In addition, the executive bodies are responsible for adopting a civil protection action plan, submitting to the representative body decisions on establishing civil protection units, deciding on providing material and financial funding for the operational

19 Art. 2 para 1 of the Decision on the composition of the headquarters, the manner of work and the conditions for the appointment of the Chief, Deputy Chief and members of the Civil Protection Headquarters, Official Gazette No. 126/19, 17/20.

20 Art. 15 of the Decision on the composition of the headquarters, the manner of work and the conditions for the appointment of the Chief, Deputy Chief and members of the Civil Protection Headquarters, Official Gazette No. 126/19, 17/20.

21 Art. 22 and 22a of the CPA.

forces, providing conditions for maintaining the database on members, capabilities and resources of the operational forces, etc.[22] The executive body also establishes the civil protection headquarters and appoints the chief, deputy chief, unit administrative bodies, and other legal entities of special importance for the civil protection system. Following the example of the central level, the unit's headquarters' work is managed by the Chief. When special circumstances are declared, the management is taken over by the unit executive body. Additionally, the executive body may appoint a civil protection commissioner and his deputy for individual housing, residential buildings, streets, local committees and smaller settlements. They participate in the preparation of citizens for personal and mutual protection, provide information on the timely taking of civil protection measures, organize the protection of members of vulnerable groups, etc.[23]

Finally, the CPA envisages the institute of connecting several local units in the field of civil protection. Therefore, units that belong to the same geographical area and are connected into a single unit can organize a joint performance of civil protection activities. There are several possibilities for co-operation: joint administrative body, joint action plan for civil protection, which is confirmed by the executive bodies of the units, and joint civil protection units. The decision on co-operation is made by the representative bodies and then the executive leaders sign the agreement and submit it to the MIA.[24] About fifty local units have signed agreements on joint coordination of civil protection activities, establishing a coordinating body for civil protection headquarters. The establishment of coordination enabled unhindered movement without a pass between units that are spatially connected into a single whole.[25]

4. THE ROLE OF CROATIAN LOCAL UNITS IN CORONA CRISIS MANAGEMENT

4.1. A brief overview of the local government system in Croatia

The local self-government system in Croatia is organized at two levels, which means that the administrative-territorial division includes municipalities (428) and cities (127) at the first territorial level and counties (20) at the second. The average Croatian municipality with 2,957 inhabitants, and about 86 km² of the area belongs to

22 Art. 17. para. 1 and 3 of the CPA.

23 Art. 34 of the CPA.

24 Art. 18. para. 1, 2, 4, and 6 of the CPA.

25 Counties, [https://www.koronavirus.hr/zupanije/139], Accessed 24 May 2021.

the category of small local units on the European scale.[26] There are four cities (Zagreb, Split, Rijeka, and Osijek) with more than 100,000 inhabitants and that serve as regional centres. The 2005 amendment to the legislative framework introduced the category of large cities as units of local self-government, which are centers with more than 35,000 inhabitants.[27] Counties have an average of about 175,000 inhabitants and an area of about 2,800 km^2. Zagreb, as the capital city, represents a special and unique territorial and administrative unit, i.e., it has the status of both a city and a county. Counties, cities and municipalities are self-government units with their own scope of affairs, supplemented with delegated state administration functions (predominantly the capital city of Zagreb, counties, and large cities). Forms of sub-municipal decentralization also exist, with the purpose of citizens' participation in decision-making on local affairs of direct and daily impact on their lives and work in more than 3,500 sub-municipal councils. In addition, citizens can also participate in the election of local committee members, in local referenda, start citizens' initiatives and directly participate in discussions convened by the local assembly. However, the forms of direct participation are not widely used by citizens despite their potential to be very useful participation tools and a means for influencing decision-making processes. [28]

Furthermore, the weaknesses of territorial structure and functions which have appeared to be too fragmented reflect on local units' functioning, capacities and local services.[29] The financial and personal capacities of local governments are weak in general and are unable to provide equal quality and scope of local services to citizens. These circumstances also reflect on local unit responses to the challenges posed by the corona crisis.

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[26] Ivanović, M., *Problemi malih općina u svjetlu nove regulacije lokalne samouprave*, in: Koprić, I.; Đulabić, V. (eds.), Dvadeset godina lokalne samouprave u Hrvatskoj, Institut za javnu upravu, Zagreb, 2013, pp. 201-222.

[27] A total of seventeen cities.

[28] Out of 15 local referenda in the past 20 years, only 3 were successful (Blagojević, A.; Sesvečan, A. *Ustavnopravni okvir referendum u RH: trenutno stanje i budući izazovi,* Zbornik radova Pravnog fakulteta u Splitu, Vol. 56, No. 4, 2019, pp. 866-867).

[29] Domestic experts warned of the problems of local governance during the implementation of radical local government reform in the early 1990s, the irrationality of Croatia's territorial organization, the need for reorganization, and the implementation of functional and fiscal decentralization of the system. See: Ivanišević, S., *Glavni problemi i mogući pravci reforme lokalne samouprave u Hrvatskoj*, in: Pusić, E. *et al.*, Javna uprava u demokratskom društvu, Institut za javnu upravu and Organizator, Zagreb, 1999, pp. 111-120; Jurlina-Alibegović, D., *Financiranje lokalne samouprave*, in: Ott, K.; Bajo, A; Pitarević, M. (eds.), Fiskalna decentralizacija u Hrvatskoj, Institut za javne financije, Zagreb, 2002, pp. 92-106; Koprić, I., *Teritorijalna organizacija Hrvatske: stanje, kriteriji za prosudbu racionalnosti i prijedlog novog sustava*, in: Barbić, J. (ed.), Nova hrvatska lokalna i regionalna samouprava, HAZU, Zagreb, 2010, pp. 109-143.

4.2. Croatian local units in the COVID-19 crisis: challenges and results

There is no region in Croatia that has not been affected by the pandemic. The virus first appeared in the Primorje-Gorski Kotar, Zagreb, and Istria counties, and then it spread to southern, central, and eastern Croatia. Požega-Slavonia and Virovitica-Podravina counties were the last to record the infection. In mid-February 2021, the average rate of infection was 127.3 cases per 100,000 inhabitants, while the highest rate was recorded in Split-Dalmatia (218.9 cases), Međimurje (206.5 cases), Lika-Senj (168.2 cases), and Dubrovnik-Neretva County (165 cases).[30]

In the fight against a pandemic, the regional headquarters exercise two types of authority. The first consists of proposing measures to the Headquarters, which concern a certain area or the entire county. The county headquarters collect information from the local headquarters' area and have the best insight into the pandemic movement. The second authority relates to independent decision-making on measures to be applied in the county. Such decisions most often refer to educational policy, restricting the work of city services, catering facilities and shopping centers, activating isolation units for COVID-19-positive patients, postponement of sports meetings, and permission for recreational fishing and hunting activities.[31]

Local headquarters make decisions and recommendations in co-operation with the executive leaders of local units. Researching the Government's official website, we identified several areas in which decisions on necessary measures were made.[32] The data were collected for those cities for which information on measures was published. In the case of cities where the data were incomplete or unclear, their official gazette was analyzed. The first group of measures relates to educational policy, i.e., deciding on the application of a certain model of teaching for primary and secondary schools, wearing protective mask in classrooms and indoor schools, and temporary closure of kindergartens. The second measures relate to sports policy, i.e., the postponement of training on football fields, sports halls, small sports fields, and public sports, cultural and other gatherings. Third, measures in the field of service activities include a ban on nightclubs, bars, catering establishments, and adjusted working conditions for shopping centers, shops, bakeries, and retail markets. The fourth and fifth areas relate to utilities and public transport services. The recycling yard services and the removal of bulky waste were suspended, and a

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30 NIPH, *Coronavirus disease 2019. Report for the previous 7 days and daily report for the Republic of Croatia on the day February 15,* 2021, [https://www.koronavirus.hr/UserDocsImages/Dokumenti/Tjedno%20izvje%C5%A1%C4%87e%20za%2015.2.pdf?vel=613594], Accessed 1 March 2021.

31 Counties, [https://www.koronavirus.hr/zupanije/139], Accessed 17 January 2021.

32 Official Government website for timely and accurate information on the coronavirus, https://www.koronavirus.hr/, Accessed 12 February 2021.

special regime of public transport was introduced. During both waves, some bus lines were canceled, while in the first wave, traffic between different counties was additionally canceled. Some cities have established an Emergency Service or have agreed to cooperate with the Red Cross to deliver supplies or pay bills to the elderly (e.g. Slavonski Brod, Umag, Buje, Labin, Rovinj, Krapina, Rijeka, Varaždin, Velika Gorica, Gospić, and Osijek).

After a general overview, the following chapters analyze the areas of local governance that faced the most challenges during the crisis. For each area, the measures taken by large cities and county centers to achieve effective civil protection are presented.

4.3. Political steering of the crisis management by the local executive leaders

As in most countries, in Croatia, we see an increase in the concentration of political influence in the executive branch as one of the pandemic consequences. At the central level, it is the Government's influence, and at the lower territorial levels, local executive leaders (commissioners, mayors, and prefects). Executive leaders of local units have been given a number of new tasks, as described in chapter 3.2. Given that they are entrusted with overall responsibility for running local crisis management, they needed to strengthen coordination skills as well as remote management skills.[33] During the crisis, in twelve of the 25 cities observed, mayors were infected with COVID-19 or were in isolation at home.[34] Mayors of the cities of Požega and Slavonski Brod were hospitalized and left management to their deputies, while others state that they were able to continue to direct their administrations through working from home, by phone or online. As a rule, mayors have a satisfactory level of communication and co-operation with local and regional headquarters (which is often pointed out in media statements of chiefs of regional headquarters) and continued to successfully direct and supervise the work of local administrations and services during the lockdown.[35]

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[33] Weisband, S. P., *New Challenges for Leading at a Distance,* in: Weisband, S. P. (ed.) Leadership at a Distance. Research in Technologically-Supported Work, New York and London, 2007, pp. 1 - 30.

[34] These are the mayors of the cities of Bjelovar, Čakovec, Dubrovnik, Koprivnica, Osijek, Pazin, Požega, Pula, Slavonski Brod, Varaždin, Vukovar, and Zadar (the data were collected by web content research).

[35] For example: "The city administration functions without interruption regardless of the current situation and...we do our tasks every day and we are available to citizens and services" (mayor of the City of Split, 2020, [https://slobodnadalmacija.hr/split/koronavirus-i-u-banovini-andro-krstulovic-opara-obavijestio-zaposlenike-njih-vise-od-400-da-mogu-ocekivati-pozive-epidemiologa-1012790], Accessed 28 May 2021), or "I would like to note that the effective functioning of the city administration due to the new situation...in our area has not been called into question" (mayor of the City of Popovača, 2020, [https://www.popovaca.hr/vijesti/136-uncategorised/10235-gradonacelnik-josip-miskovic-pozitivan-na-covid-19], Accessed 28 May 2021).

In addition to the civil protection headquarters, the most frequently mentioned operational partners of the local units were the city red cross societies, police administration, voluntary and public fire brigades, city utilities, Home Help institutions (all of the observed cities),[36] but also the Community of Technical Culture (City of Dubrovnik), Croatian Chamber of Pharmacists (City of Opatija), the Association of Hairdressers (City of Petrinja) and associations of volunteers such as the Association SKANI 50+ (City of Rijeka).[37] In accordance with the epidemiological situation in each local unit, the mayors also coordinate the work of narrow teams of local headquarters with the territorially competent public health institutes in the area of enhanced supervision of social service providers in the social welfare system.[38]

The mayors also cooperates with clinical hospital centers in their area, family and dental medicine teams, as well as psychological counseling teams for children and adults.[39] Information on COVID-19 info centers and anonymous psychological help is regularly published on the official websites of the cities. Unlike the others, the cities of Koprivnica, Krapina, Sisak, Varaždin, and Virovitica have not provided local telephone line for psychological assistance to citizens but refer to telephone lines provided at the county level. The City of Rijeka has also launched a Website for online psychological counseling for young people.[40] Finally, in cooperation with the crisis teams, the mayors of all of the observed cities have to put a lot of effort into the procurement of protective equipment such as respiratory masks, disposable suits and disinfectants.[41]

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36 Public or private institutions have been established in nineteen cities, while in six cities home help services is provided by the Red Cross or the Center for Social Welfare (the data were collected by web content research).

37 For more details, see: Šogorić, S., *Hrvatska iskustva rukovođenja COVID-19 krizom na lokalnoj razini,* Epoha zdravlja, Vol. 13, No. 22, 2020.

38 Decision on the necessary measure of enhanced control of the implementation of the Guidelines for the Prevention and Suppression of the COVID-19 Epidemic for Social Service Providers in the Social Welfare System, Official Gazette No. 99/20.

39 It is important to involve the community in planning and implementing specific psychosocial support activities (as well as all activities in response to a crisis event), thus protecting the interests and needs of those affected and restoring a sense of control over the situation (Juen, B. *et al.*, *Psihosocijalna podrška i psihološka prva pomoć u kriznim situacijama Priručnik za predavače za obuku voditelja timova,* Innsbruck, 2018, p. 13).

40 Free online psychological counseling for young people from Rijeka, [https://svejeok.hr/], Accessed 1 April 2021.

41 The data were collected by researching the official websites of the cities and the daily press.

4.4. Adjustments of the local administration and service delivery

Observing the micro-level, organizational adjustments were made in buildings of public bodies and public services in order to minimize the risk of infection of employees and citizens. All offices had to be adapted to the new spacing rules of at least 1.5 - 2 meters, including strict distance and hygiene rules. In terms of functional adaptations, we have identified several areas. First, local administrations needed to adapt to additional online platforms for communication and teleworking. Since they either did not receive clients at all or were working part-time, the observed cities strengthened their activities on official websites and social networks and increased their visibility in the virtual environment. They have set up a COVID-19 info telephone due to the high demand for information. Many citizens' inquiries relate to the interpretation of the isolation and self-isolation measures, the emergency care and the local regulations for the opening of schools and day care centers, travel opportunities to and from Croatia, and issues related to vaccination. Inquiries from the local economy tend to relate to the right to salary compensation during self-isolation, the right to cash benefits for the duration of unemployment and the right to health insurance, the right to installment payment of deferred tax liabilities, etc.[42]

Second, local public services were also closed to work with customers and users. This applies in particular to health, educational and cultural institutions, utilities, and sports halls. Public transport services have also been limited, most transport lines have been suspended, and the remaining number of passengers are allowed to travel in one means of transport.

Third, an area that has been improved in terms of functionality is e-government. Through the e-Citizens system, a number of innovations have been introduced that make it easier and faster for citizens to communicate with the public sector and contribute to the transparency of the provision of public services. For example, services of issuing e-Passes, electronic records from the registers of non-profit persons, the system of payment of e-Fees, submitting applications for exercising the right to a pension, applying for student scholarships, registering children for kindergarten, etc.[43] Of the observed cities, only the City of Sisak does not offer e-services through the official website.

Fourth, during the pandemic, there was a need for intensified supervision of certain social activities in accordance with a series of decisions and instructions issued

[42] The most frequent inquiries of citizens were then published on the official websites of the Tax Administration, the NIPH, the Headquarters, the Ombudsman, ministries and the Croatian Tourist Board.

[43] Personal user box, [https://pretinac.gov.hr/KorisnickiPretinac/eGradani.html], Accessed 1 April 2021.

by the Headquarters and the NIPH. For example, movement between local units was possible only with the issuance of passes. Therefore, checkpoints were set up at the crossings between the units where police officers controlled the possession of passes in relation to all forms of transport.[44] Free movement of citizens is also limited by isolation and self-isolation measures which were primarily subject to active and passive health surveillance. But in case of violation of the measures of mandatory wearing of protective masks or isolation, the police intervened by collecting fines. Inspectors and members of civil protection and municipal wardens have basic powers in overseeing the implementation of measures banning public and private gatherings (eg. requesting access to the public document of a person suspected of having committed a misdemeanor, issuing misdemeanor warrants and fines).[45] However, in the event of the need to apply coercive or detention measures, inspectors may justifiably request the intervention of the police. In addition, the city headquarters of the City of Rijeka, Osijek, and **Đakovo** also established drone surveillance by the Public Fire Brigade.[46] Coordinated tourist and sanitary inspectors in the summer period controlled the legality of the work of catering facilities and compliance with epidemiological measures.[47]

Finally, at the time of the pandemic, the rate of domestic violence rose sharply globally.[48] Therefore, the City of Zagreb directs additional part of its human and financial resources to the promotion of gender equality and the prevention of gender-based violence. It supports three shelters for victims of domestic violence as well as six counseling centers organized by the City's social welfare institution and civil society organizations.[49] On their official websites, another eleven cities publish general information on local services in the field of protection of victims

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44 Instructions to the police directorate - pass control, 2020, [https://civilna-zastita.gov.hr/UserDocsImages/CIVILNA%20ZA%C5%A0TITA/PDF_ZA%20WEB/Uputa-za%20kontrolu%20e-Propusnica.pdf], Accessed 8 April 2021.

45 Law on Communal Activities, Official Gazette No. 68/18, 110/18, 32/20.

46 Counties, [https://www.koronavirus.hr/], Accessed 16 March 2021

47 Tourist and sanitary inspectors from 1 July in coordinated inspections - Elements of control in supervision, 2020, [https://dirh.gov.hr/vijesti/turisticki-i-sanitarni-inspektori-od-1-srpnja-u-koordiniranim-inspekcijskim-nadzorima-elementi-kontrole-u-nadzoru/309], Accessed 17 March 2021.

48 European and world statistics in the situation of pandemic and corona crisis record an increase in violence against women by more than 30% (Commission for Gender Equality of the County of Istria, 2020, [https://translate.google.hr/?hl=en&tab=rT&sl=hr&tl=en&text=Povjerenstvo%20za%20ravnopravnost%20spolova%20Istarske%20%C5%BEupanije&op=translate], Accessed 17 March 2021).

49 City of Zagreb team for prevention and fight against violence against women and domestic violence and Commission for Protection from Domestic Violence, *Joint press release and information on services for victims in the City of Zagreb,* Zagreb, 2 April 2020.

of violence (Bjelovar, Koprivnica, Krapina, Pazin, Požega, Pula, Rijeka, Samobor, Varaždin, Vukovar, and Zadar).

4.5. Local government financial burdens

Local units ended the pandemic year with a drop in revenue of slightly less than 4%, or a loss compared to 2019 of approximately 775 million HRK. The budget revenues of all 555 local units last year were 27.86 billion HRK, with cities doing significantly worse than municipalities, which had only a slight minus 0.2%, and counties, which recorded revenue growth of more than 7%.[50] More than 2.3 billion HRK from the EU was invested in local budgets last year, a third more than a year earlier, which significantly mitigated the loss of other revenues from domestic sources (income tax, utility fees, utility contributions and real estate transfer tax).[51] In addition to tangible and intangible costs for the work of local headquarters, part of the city funds was spent on the purchase of protective masks and disinfectants, information and communication equipment, financing of kindergarten services, school meals, and extended stays, and measures to help the economy (the award of grants, a temporary exemption from paying utility bills and rents for restaurants, the introduction of free parking around health facilities, and the payment of funds to the Red Cross).[52]

However, in 2020 cities have managed to maintain budget and investment liquidity thanks to an interest-free loan from the Ministry of Finance.[53] The loan funds are used exclusively to finance the public expenditures and expenses necessary to

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[50] Municipalities are the most successful beneficiaries of EU funds, and 700 million kuna (+64%) went into their budgets from the EU last year, while incomparably stronger cities withdrew 1.1 billion HRK for their programs (Budget loss of hundreds of millions of kunas: How cities, counties and municipalities fared in the pandemic year, 2021, [https://www.vecernji.hr/vijesti/lokalne-jedinice-diljem-hrvatske-zavrsile-u-minusu-od-775-milijuna-kuna-je-li-za-sve-kriva-korona-1479893], Accessed 29 March 2021).

[51] There was a decline in local tax revenues of 903 million HRK (-6%), utility contributions were collected 14% less (-132 million HRK), 11% less utility fees and 20% less rental income (-162 million HRK). The least income was collected for the sojourn tax, only 4 million HRK compared to 100 million a year earlier. There were also fewer purchase and sale transactions, as 948 million were collected from real estate sales tax compared to 1.14 billion in 2019. The tax on holiday homes was well collected, slightly more than before, while the consumption tax was almost halved. More money went into county budgets than from road vehicle taxes (*ibid.*).

[52] City measures in the fight against the coronavirus, [https://gradonacelnik.hr/u-fokusu/pandemija-korone-zatvaraju-se-skole-i-vrtici-u-istri-gradovi-otkazuju-sva-javna-dogadanja-zatvaraju-se-gradski-bazeni-i-dvorane/], Accessed 29 March 2021.

[53] Instructions on the manner of disbursement of interest-free loan to local and regional self-government units, the Croatian Pension Insurance Institute and the Croatian Health Insurance Institute, Official Gazette No. 46/20.

perform the basic tasks and functions of the borrower. The negative trend of revenue collection continued in the first quarter of 2021, and it is expected that by the end of the year, city revenues will decrease by an additional 900 million HRK. A special problem for the liquidity of cities in the second half of the year is the increased income tax refund for people under 30, which, together with the effects of the pandemic and tax reform, will leave cities without a main source of income for several months at the beginning of the new term. The Ministry of Finance is expected to provide a new interest-free loan to the most exposed cities so that the tax refund to citizens can be carried out without difficulty before the season, and the cities retain liquidity.[54]

A step further that local units have taken in relation to central institutions is the decision to reduce the city administration's salaries and companies and institutions owned by the city. During the "first wave," the mayors of the 17 observed cities[55] decided to reduce the salaries of the city administration and companies and institutions owned by the city by 2% to 50% for a period of one to six months. Seven of them (Koprivnica, Samobor, Split, Velika Gorica, Vinkovci, Virovitica, and Varaždin) applied a proportional reduction: the salaries of the lowest-paid employees were not reduced, and the salaries above the minimum amount were reduced by a higher percentage according to the amount. The cities of Bjelovar, Čakovec, Vinkovci, Virovitica, and Zagreb abolished the payment of Easter and Christmas bonuses, regresses, and jubilee awards. Compensation to local council presidents and councilors and payments to political parties were abolished in the cities of Dubrovnik, Čakovec, Koprivnica, Split, and Virovitica.[56] In this way, it was also possible to cover a part of the budget losses.

4.6. Challenges to local democracy

One of the important aspects of civic participation are local elections.[57] Regular local elections were held in Croatia on May 16, and May 31, 2021. Before the

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54 Budget loss of hundreds of millions of kunas: How cities, counties and municipalities fared in the pandemic year, 2021, [https://www.vecernji.hr/vijesti/lokalne-jedinice-diljem-hrvatske-zavrsile-u-minusu-od-775-milijuna-kuna-je-li-za-sve-kriva-korona-1479893], Accessed 29 March 2021.

55 The City of Rijeka has not implemented this measure. No online information was available for the cities of Gospić, Kaštela, Krapina, Osijek, Požega, Slavonski Brod, and Vukovar, nor did they respond to the author's inquiry about the measure in question.

56 Information was collected on Counties, [https://www.koronavirus.hr/zupanije/139], Mayor, [https://gradonacelnik.hr/], official websites of the cities, and by the author's individual inquiries to the cities.

57 For the catalogue of standards of local democracy in Croatia, see: Dobrić Jambrović, D., *European Standards in Regulating Public Participation on Subnational Levels: The Case of Croatia*, in: Nunes Silva, C. (ed.) Contemporary Trends in Local Governance. Reform, Cooperation and Citizen Participation, Springer, Switzerland, 2020, pp. 217 – 239.

elections, a total of 82% of cities believed that citizens should be additionally encouraged and motivated to participate regardless of the party's election campaign.[58] Therefore, cities faced the challenge of resolving the conflict between encouraging the highest possible turnout in elections on the one hand, and avoiding mass gatherings in line with epidemiological measures on the other.[59] In the observed cities, the voter turnout in the first round ranged from 28.23% to 49.31%, and in the second round from 14,23% to 51,05%. A comparison with voter turnout in the 2017 elections is only available concerning counties. In 2021, there was an increase in voters in the first round in eleven counties (from 0.35% to 3.8%), and in the second round in ten counties (from 0.8% to 10.7%).[60]

In addition to local political parties, local councils/county assemblies also faced a challenge. The Ministry of Administration has instructed all local and regional units that the representative bodies must adapt the way they work to the current situation. Therefore, if it is not about the decisions that need to be made and which do not suffer delays due to urgency, a convened session of the representative body may be postponed or canceled.[61] Also, meetings with citizens in local boards (sub-municipal government) were temporarily restricted. Holding sessions by video conference, communication via e-mail, or using other technologies to hold meetings at a distance, is considered acceptable, especially with regard to the possibility of recording participants and their voting. If there are no other technological solutions, sessions can exceptionally be held by telephone to make a decision that does not suffer a delay. In the latter case, it is necessary to take into account the way of subsequent verification of decision-making.[62]

Sessions of representative bodies are public and the presence of the public can be excluded only exceptionally, in cases provided by special laws and the general act

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58 Association of Cities, *Democracy and participation: the role of local governments in encouraging civic participation*, 2020, [https://www.udruga-gradova.hr/demokracija-i-participacija-uloga-lokalnih-samouprava-u-poticanju-gradanske-participacije/], Accessed 16 February 2021.

59 An additional challenge is the implementation of elections in accordance with the amendments to the Law on Local Elections, the Law on Local and Regional Self-Government and the Law on the City of Zagreb, which entered into force in December 2020.

60 State Election Commission, [https://www.izbori.hr/site/], Accessed 2 June 2021; official websites of the cities of Kaštela, Samobor, and Vinkovci.

61 Representative bodies independently assess the urgency of convening sessions. If they deem it necessary to convene an electronic session, it is obliged to hold it in a manner that follows the usual procedure, unreserved participation of each councilor and a statement on each item on the agenda, of which there must be evidence.

62 Ministry of Administration, *Sessions of the Representative Body of Local and Regional Self-Government - Instructions for Action*, Zagreb, 2020, p. 2.

of the local unit.[63] In the conditions of holding a session by e-mail or electronic video tool, the presence of the public at the session can be ensured in a very limited way, regardless of what is prescribed by law or general act. The first restriction is the ban on gathering more than a certain number of people in one place, which means that the public cannot be invited to follow the session from the immediate vicinity of the chairman. Attendance in case of a session via video service is possible but requires prior preparation (timely notification of the public about the manner of attending the session, with the announcement of the agenda, appropriate technical instructions, timely registration of those who want to participate, etc.).[64] Fifteen observed cities publish recordings of the sessions on their official websites, YouTube channel or Facebook page. Other nine cities held the session via video conference with the possibility for citizens to receive an audio recording upon request to the information officer. Only the City of Požega held live sessions throughout the pandemic.[65]

5. CONCLUSION

The crisis caused by the COVID-19 pandemic imposes demands on all levels of government, especially local and regional ones, to provide emergency services, curb the spread of the disease, mitigate the social and economic consequences of the pandemic, and coordinate recovery efforts. Taking into account the results of the research, we conclude that changes in the approach to local governance are necessary for local units to better adapt during the crisis, but also to effectively solve the problems of the post-crisis period. We identified several reasons why reform of the governance system is necessary to accelerate the response of units to socio-economic, political and other crises. First, crisis management in any context leads to strengthening centralization processes in the country.[66] Amendments to the CPA entrusted the Headquarters with very broad powers. When special circumstances occur that endanger citizens' lives and health, the Headquarters makes the necessary decisions and instructions that regional and local headquarters must implement. On the one hand, it is an insufficiently defined and extremely broad formulation of the phrase "instructions and decisions" and, on the other hand, it

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63 Art. 37 para. 1 of the Law on local and regional self-government, Official Gazette No. 33/01, 60/01, 129/05, 109/07, 125/08, 36/09, 36/09, 150/11, 144/12, 19/13, 137/15, 123/17, 98/19, 144/20.

64 Ivanović, M., *Holding a session of the representative body with the help of technological tools*, 2020, [https://informator.hr/vijesti/odrzavanje-sjednice-predstavnickog-tijela-uz-pomoc-tehnoloskih-alata], Accessed 19 February 2021.

65 The City of Požega, [https://www.pozega.hr/index.php?option=com_content&view=category&layout=blog&id=31&Itemid=292&limitstart=4], Accessed 20 April 2021.

66 Boin, A., *The Transboundary Crisis: Why we are unprepared and the road ahead*, Journal of Contingencies and Crisis Management, Vol. 27, No. 1, 2019, pp. 94-99.

is about the actual coordination of the work of headquarters at lower territorial levels, which is assumed not to have been implemented before. The Headquarters, the Minister of Health and the Director of the NIPH have issued numerous decisions, instructions and guidelines that form the basis for adapting a greater range of organizational and functional elements of governance and public service delivery. Both local and regional governments adapted to the selected national crisis management strategies. Therefore, we also see an increase in the concentration of political influence in the executive branch as one of the pandemic consequences. At the central level, it is the Government's influence, and at the lower territorial levels, local executive leaders. The CPA and the APPID have activated many new powers for the local executive leaders compared to those that they exercise out of crisis situations. Therefore, we accept the first hypothesis as well-founded because we assumed that the consequence of the crisis would be a greater concentration of power in the executive body of local units.

Second, in almost all areas of public service delivery, there have been adjustments in the work of public services. The greatest pressure was put on health institutions. Family physicians have adapted their actions by inviting citizens to try to resolve their inquiries by phone and e-mail whenever possible. In hospitals, part of the departments has been converted to COVID departments, reducing the capacity to receive patients. Preference is given to emergencies, as well as in terms of performing surgical procedures. A large decline in the quality of services provided is also observed at all levels of education. School institutions were closed on several occasions and online classes were organized. Although all relevant IT platforms are applied, teaching units are processed in a concise form and students' independent work is overemphasized. The objectivity of taking the exam has also been violated. Despite the use of certain safety systems, there are frequent examples of unethical student behavior when taking exams. Furthermore, the provision of a range of sports, cultural and transport services has been blocked. Except for the observed cities, an additional problem for small local units is the inadequate administrative-territorial division of the state. The citizens of municipalities and towns experienced the consequences of the existing territorial organization more than ever before when during the "first wave" the Headquarters decided to ban the movement of citizens between different local units. Since most citizens live in small local units, some of which do not have public services, they have been denied basic services.

Third, in the last year, information as the lowest level of civic participation is mostly practiced. Citizens are informed through official websites or newspapers, leaflets, brochures. Regarding the consultation process, local authorities use online platforms, which limits the participation of citizens who do not have IT equip-

ment or do not use internet services. Also, there is no possibility of civic participation through direct onsite dialogue.[67] City councils and local committees were holding sessions online or by telephone, which greatly limits citizens' participation in local governance. Considering that the second hypothesis contains an assumption that the crisis will reduce the quality of local public services and impose restrictions on local democracy, we conclude that it is also valid.

Finally, due to shortcomings in the regulation and implementation of crisis management in Croatia, we provide recommendations for improving resistance to similar challenges in the future. The recommendations were formulated taking into account the existing regulatory framework and experience of the surveyed cities in overcoming challenges.[68] First, strengthening multilevel governance and local autonomy. As crisis management requires rapid decision making and centralization, it has led to a further weakening of multilevel governance mechanisms in the name of efficiency and security. However, respecting the principle of subsidiarity and democratic local self-government, it is extremely important to recognize the key role of local authorities in crisis management and to involve them in the decision-making process during and after the crisis period. Through continuous cooperation, the representatives of national and local authorities should find an effective way to strengthen the role of local units as equal decision-makers and executors of agreed agendas to avoid weakening their autonomy and the principle of subsidiarity.[69] Also, there are different models of multilevel governance at the local and regional level. We recommend their application to strengthen the cooperation of cities and counties in shaping effective public policies and strategies.[70]

Second, strengthening functional and fiscal decentralization to increase the capacity of cities as executors of agendas. Decentralization of public functions contributes to increasing efficiency in the provision of public services since local governments, as the level closest to the citizens have the best insight into the needs of the local population. It also enables the mobilization of public revenues while reducing the costs of providing public services, harmonization of responsibilities

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67 For more details on public consultation and dialogue, see Dobrić, D., *Implementing open government policies on subnational levels*, SGEM Conference on Political Sciences, Law, Finance, Economics & Tourism, No. 1, 2015, pp. 175 – 182.

68 We note that research on the experience of municipalities and towns would certainly show a greater number of problems and the following recommendations would not be sufficient to improve their role in times of crisis.

69 Central to the multilevel governance concept, is the recognition that delivering policies, actions and strategies, is more effective when working together, across different levels of government. (Group of authors, *A Guide to Multi-Level Governance. For Local and Regional Public Authorities,* Coopenergy Consortium, 2015, p. 2.)

70 For example, six different models of collaboration are elaborated in the Guide. (*ibid.,* p. 19-20.)

for local public expenditures with available financial resources, strengthening of local revenues and cooperation between different levels of government.[71] In addition to decentralization of public affairs,[72] large cities should be provided with higher public revenues compared to the category of towns and municipalities.[73] In this way, they could fund not only city services but also services of wider areas that gravitate to them.

Third, ensuring equal access to public services. During the lockdown, residents of the observed cities had access to public services regardless of how their work was adjusted. However, this does not apply to residents of surrounding towns and municipalities who use the city services in non-crisis times (since some services are not organized in their area). Therefore, a necessary precondition for rational performance of public services is a certain size of the local unit. As the number of inhabitants increases and the area expands, the financial capacity of the local unit also increases.[74] The author supports an existing proposal to reduce the number of local units by creating an urban polycentric network consisting of 100 to 120 units (depending on the geographical specifics of each area) with similar scope and powers.[75]

Fourth, increase the level of civic participation. In addition to service delivery that plays a key role in ensuring citizen well-being and combating distrust, new ways of civic participation need to be implemented. Emphasis should be placed on higher levels of participation, i.e. dialogue and partnership. First of all, local authorities should make an effort to motivate citizens for active participation. For example, they could develop and deliver high-quality civic education that teaches people to respect and value democratic freedoms. After that, resources should be invested in additional participation mechanisms such as regular Q&A meetings on the

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71 Jurlina-Alibegović, *op.cit.* note 29, p. 94.

72 Decentralized functions of primary and secondary education, health, social welfare and firefighting are performed by about forty cities (out of a total of 127). The reason for this is the insufficient financial, organizational and administrative capacity of most local units. Instead, decentralized tasks are performed by counties. (Koprić, I., *Suvremeni trendovi u razvoju lokalne samouprave i hrvatska lokalna i regionalna samouprava,* in: Koprić, I. (ed.), Europeizacija hrvatske lokalne samouprave, Institut za javnu upravu, Zagreb, 2018, p. 36).

73 Gunnarsson stressed the importance of financial autonomy and resilience of local governments to deal with this crisis, but also their better adjustment for the future. This is crucial because local units often depend on other levels of government to provide basic resources for service delivery. (Group of authors, *Local Democracy,* UCGL-metropolis-UNHABITAT, 2020, p. 7).

74 There are exceptions to this rule. The increase in territorial units that are less populated and have a less developed economy due to various circumstances usually has the opposite effect. (Koprić, I., *Teritorijalna…, op.cit.,* note 29) There may be problems with maintaining a wider road network, more expensive infrastructure, physical planning, housing, etc.

75 Koprić, I., *Suvremeni…, op. cit.,* note 72, p. 42.

official website or social networks with the participation of local official, servants and citizens; online meetings of citizens with public service heads to improve local services; publication of infographics, data visualization, and videos to stimulate community debate; participatory budgeting or surveys on the topic of interest to residents. Meetings can be organized thematically, with a particular councilor or head of an administrative department. Representatives of public services and citizens could form a working group whose task will be to co-draft strategies for improving service delivery and joint decision-making. Also, citizens' representatives should be involved in the process of monitoring the fulfillment of agreed strategic goals, etc.

Finally, cities need to practice inclusion-oriented innovations. Although digital technology is used as a means of strengthening democracy, it also leads to a technological gap and affects social exclusion. Especially in relation to the elderly, low-income families and people with disabilities. True democratic inclusion is not only achieved through the participation of as many citizens as possible but also about the involvement of target groups. Therefore, we suggest combining online platforms with participation through telephone calls and surveys, audio conferences, delivery of press products and household surveys, thematic outdoor events while maintaining social distance, etc.

The biggest challenges imposed by the crisis are ensuring deliberative and inclusive governance, maintaining the accountability of institutions, avoiding restrictions on fundamental rights and ensuring the quality of public services. The proposed mechanisms should contribute to greater transparency, accountability, responsiveness and efficiency of local government in times of crisis, and beyond.

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UDK 614.4:005.931.11](4-67EU)
638.252:623.4.015
Review article

REGULATORY SYSTEMS OF SELECTED EUROPEAN UNION MEMBER STATES IN COVID-19 PANDEMIC MANAGEMENT AND LESSONS FOR THE FUTURE

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ABSTRACT

The European Union (EU) actively responded to the pandemic and the consequences of the pandemic in different areas of human activity (health, economic, social, etc.) adopting a series of regulations, measures and guidelines in different fields. EU member states acted in accordance with EU regulations and within their own legal system and the management structures. The aim of this paper was to analyze ten selected EU member states and their regulatory responses in the approach to pandemic control in relation to the mortality rate per million inhabitants on January 15, 2021. The following hypothesis was set: The regulatory systems and management structures of selected EU member states in the framework of the management of the COVID-19 pandemic have been successfully set up and implemented and have contributed to the lower mortality rate per million inhabitants until January 15, 2021.

Ten EU countries were selected for the study according to their mortality rate per million inhabitants on January 15, 2021. Besides Croatia (average mortality), research included three member states with high (Belgium, Slovenia, Czechia), three with average (Hungary, Austria, Slovakia) and three with low mortality rate per million inhabitants (Ireland, Denmark, Finland). All available data from EU and ten selected countries were collected and analysed: about legal framework for crisis management, regulatory powers, level of decentralization in the health care system and whether the timeline of the pandemic control criteria according to the Institute for Health Metrics and Evaluation (IHME) was adequately set. Data were analysed in Microsoft Office Excel.

Given the obtained results, hypothesis can be considered only partially proven. The legal framework used by studied EU countries for adopting pandemic control measures was not consistently associated with morality rate in this research. All studied EU countries used legal framework that existed prior to the COVID-19 pandemic, four of them had states of emergency provided in the Constitution (Czechia, Hungary, Slovakia and Finland), four of them effectively declared statutory regimes (Slovenia, Hungary, Croatia, Slovakia), and Belgium adopted pandemic control measures using special legislative powers. Three studied countries (Austria, Denmark, Finland) had high level of decentralised decision making in health sector and lower COVID-19 mortality rate. In the first pandemic wave (start in March, 2020) all studied countries respected the timeline in adopting pandemic control measures according to the IHME criteria. In the second pandemic wave (start in October, 2020) only four countries (Czechia, Ireland, Denmark, Finland) respected the timeline in adopting pandemic control measures and three (Ireland, Denmark, Finland) were in low mortality group.

Within the concluding considerations of the studied countries and in their pandemic management models, Finland and Denmark were recognised as the most successful with lowest COVID-19 mortality rates. Long tradition of Public Health, decentralized health care decision-making, high level of preparedness in crisis management and adequate timeline in implementation of the pandemic control measures led to lower mortality in COVID-19 pandemic. In the future EU could take even more active role within its legal powers and propose scientific based approach in crisis management to help countries implement measures to preserve lives of EU citizens.

***Keywords**: pandemic, COVID-19, legal framework, European Union member states, mortality rate*

1. INTRODUCTION

In December 2019 in the city of Wuhan, capital of the China province of Hubei, human to human transmission of an unknown virus started. Its origin or reservoir was unknown. Epidemic potential of novel virus made it very dangerous for globalised world used to intercontinental travel. In just a few weeks virus was identified and named SARS-CoV-2. Virus spread fast all around the world, and in March 2020 all European Union (EU) states had cases of infection in their territory. World Health Organization (WHO) made the assessment on March 11 that COVID-19 could be characterized as a pandemic.

There were several steps in controlling pandemic: to start scientific research of novel virus, to track pandemic, to decide what measures and when to take into account to control pandemic and to set the legal framework to act. All around the world, including the EU, countries have faced significant institutional and regulatory challenges in order to implement urgent and rigorous measures in their legal systems to preserve lives, health and public health. At the same time, the fundamental rights and freedom of citizens and the normal functioning of society have been questioned.

The European Union (EU), through its own regulatory powers, has been very active in responding to the pandemic caused by the novel coronavirus that causes COVID-19, adopting a series of regulations, measures and guidelines in various fields (public health, agriculture, competition, consumer rights, employment and social policy, entrepreneurship, regional policy, fisheries, human rights, etc.). Balancing with difficult decisions, EU countries have responded to pandemic crisis in various ways. At the start of the pandemic in 2020 most countries had more or less strict lockdown, and afterward measures started to vary considerably.[1]

Haug et al. made a study of non-pharmaceutical measures that influence the spread of SARS-CoV-2. They used more than 6,000 different measures and studied their effect on Rt (effective reproduction number) of COVID-19. Researchers concluded that finding the right moment for implementation of non-pharmaceutical measures, measures already in use, governance indicators and social development make difference in the effectiveness of interventions. In their paper, COVID-19 restrictions were grouped in seven categories. After validating their findings against more than 40,000 measures across 226 countries, they concluded that governments should consider, at first, less strict measures, but early enough, such as border restrictions, governmental support to vulnerable population and risk-communication strategies.[2] Timeline in introducing pandemic control measures was important. Institute for Health Metrics and Evaluation (IHME) has evaluated the COVID-19 epidemic in a different countries. They proposed that governments need to consider tightening the measures when 8 deaths/day/million inhabitants occur.[3] Mandates at that moment are important for making sure that hospital systems are able to handle all COVID-19 patients, otherwise there will be adverse effect on mortality trends.

The aim of this study was to analyze the management structures of selected member states of the EU and the Croatia, their regulatory responses in the approach to pandemic control in relation to the mortality rate per million inhabitants. In the analysis the following research questions were taken into account in the selected countries: whether they have a legal framework for dealing with crisis situations such as pandemics, which bodies have regulatory powers in managing

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1 *Angrist, S. et al., Oxford COVID-19 Government Response Tracker* i*n collaboration with the International Public Policy Observatory,* What we learned from tracking every COVID policy in the world, [https://theconversation.com/what-we-learned-from-tracking-every-covid-policy-in-the-world-157721], Accessed 28 March 2021.

2 Haug, N., *et al.*, *Ranking the effectiveness of worldwide COVID-19 government interventions*, Nat Hum Behav, No. 4, 2020, pp. 1303-1312.

3 Institute for Health Metrics and Evaluation (IHME), *COVID-19 resources*, www.covid19healthdata. [https://covid19.healthdata.org/global?view=total-deaths&tab=trend], Accessed on 22 January 2021.

the pandemic, what is the level of decentralization in the health care system and whether the timeline of the pandemic control criteria according to the IHME was adequately set and measures promptly implemented. Hypothesis was set: The regulatory systems and management structures of selected EU member states in the framework of the management of the COVID-19 pandemic have been successfully set up and implemented and have contributed to the lower mortality rate per million inhabitants until January 15, 2021.[4] The mortality rate per million inhabitants' indicator was used as a measure of success as one of the strongest indicators given that the COVID-19 pandemic is still ongoing.

2. METHODS

COVID-19 responses for the ten European Countries selected regarding mortality rate per million inhabitants on January 15, 2021 were studied: Croatia with the average COVID-19 mortality rate, three member states with high mortality rate (1200-1800 deaths/million inhabitants; Belgium, Slovenia, Czechia), three with average mortality rate (600-1200 deaths/million inhabitants; Hungary, Austria, Slovakia) and three with low mortality rate (less than 600 deaths/million inhabitants; Ireland, Denmark, Finland).[5] The mortality rate per million inhabitants' indicator was used as a measure of success as one of the strongest indicators given that the COVID-19 pandemic is still ongoing. Data for all countries were collected and analysed for COVID-19 legal framework, government response, state bodies with regulatory powers, level of decentralization in the health care system, timeline of the pandemic control measures and mortality rate per million inhabitants.

In order to analyze the regulatory responses in crisis management of the observed EU member states were taken into account: European Parliament study "States of emergency in response to the corona virus crisis", WHO data in "COVID-19 Health System Response Monitor" and Organisation for Economic Co-operation and Development (OECD) document "Decentralisation and performance measurement systems in health care" and other scientific papers of relevant authors. Public health and epidemiological data were analysed from „Coronavirus Pandemic (COVID-19)" on web site Our World in Data, Government Response Tracker (Oxford) and "Real Time Statistics Project" on web site Worldometers.[6]

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4 Roser, M. *et al.*, *Coronavirus Pandemic (COVID-19)*, www.ourworldindata.org, [https://ourworldindata.org/coronavirus], Accessed 20 January 2021.

5 Worldometers.info, *Covid-19 Coronavirus pandemic*, www.worldometers [http://www.worldometers.info https://www.worldometers.info/coronavirus], Accessed 15 January 2021.

6 Roser, *op. cit.*, note 4; Hale, T. *et al.*, *The Oxford COVID-19 Government Response Tracker (OxCGRT),* www.bsg.ox.ac.uk, [https://www.bsg.ox.ac.uk/research/research-projects/covid-19-government-response-tracker], Accessed on 10 January 2021; Worldometers.info, *op. cit.*, note 5.

In this research, mortality trends and governments policy responses summarized as Stringency Index were used.[7] Stringency Index takes into account nine categories of measures: school and workplace closures, cancellation of public events, restrictions on public gatherings, closures of public transport, stay-at-home requirements, public information campaigns, restrictions on internal movements, and international travel controls. Textual data were synthesised and numeric data analysed with Microsoft Office Excel.

3. RESULTS

3.1. EU regulatory activities related to the crisis caused by COVID-19

The Treaty of Lisbon[8] clearly defines and distributes powers between Member States and the EU, thus regulating areas in which the EU has exclusive competence, areas in which the EU has shared competence with Member States and areas in which the EU has the power to support, coordinate or supplement actions of the Member States.[9] The area of health, especially public health, falls into the latter area and the EU has no significant regulatory powers in this area, but since the WHO declared a pandemic, the EU has achieved some regulatory activity related to this area.

The EU institutions based their regulatory activities, in area of health, on the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU).[10] Thus, Article 168 of TFEU (Lisbon) regulates the field of public health, stating that EU action complements national policies and encourages cooperation between Member States, supports cooperation with third countries, but also with

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7 Roser, *op.cit.,* note 4.

8 The Treaty of Lisbon signed on December 13, 2007., and entered into force on December 1, 2009. It resulted in two treaties, the Treaty on the EU and the Treaty on Functioning of the EU. More in: Ćapeta, T., *Europska unija po Lisabonskom ugovoru,* Hrvatska komparativna i javna uprava, Vol. 10, No. 1, 2010., pp. 43 – 44; Ćapeta, T.; Rodin, S., *Osnove prava Europske unije*, Narodne novine, Zagreb, 2011., p. 11; Craig, P.; de Búrca, G., *EU Law Text, Cases and Materials, fourth edition,* Oxford University Press, Oxford, New York, 2008., pp. 12 – 34

9 Ljubanović, B.; Matković, B., *Lisabonski ugovor – o njegovoj strukturi i aspektima utjecaja na upravno pravo i javnu upravu,* Pravni vjesnik, Vol. 31, No. 2, 2015, p. 182. See also: Craig, P., *EU Administrative Law*, Oxford University Press, Oxford, New York, Second edition 2012., pp. 26 – 33. As the Treaty of Lisbon resulted in the Treaty on the EU and the Treaty on the Functioning of the EU, Art. 3. The Treaty on the Functioning of the EU regulates areas in which the EU has exclusive competence, Art. 4. areas in which the EU has shared competence with the Member States and Art. 6. areas in which the EU has the power to support, coordinate and supplement the action of the Member States are identified.

10 Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union [2012] C 326/47.

international organizations. In addition, Article 35 of the Charter of Fundamental Rights of the European Union determines that everyone has the right to access preventive health care and the right to treatment, in accordance with national legislation, and during the implementation and determination of EU policies, a high level of human health protection is ensured.

Acting within the aforementioned regulatory powers, at the time of writing this paper (early 2021), in the field of public health in the ordinary legislative procedure by the European Parliament and the Council, and in relation to COVID-19 pandemic, two regulations were adopted, and within the other normative activities of the EU institutions: 13 recommendations by the Council (EU), 8 implementing regulations by the Commission (3 no longer in force), 2 implementing decisions also by the Commission, 1 resolution by the Council and representatives of the Member States and 1 delegated regulation by the Commission.

It can be seen that the regulatory activity is significantly higher within the areas where the EU has exclusive competence and shared competence with the Member States than in other areas where it has the power to support, coordinate and complement action. In particular, the fundamental regulatory response of the institutions to the COVID-19 pandemic challenges was of economic nature.[11] Thus it can be seen that, in order to prevent the consequences of pandemic, the EU institutions and offices took regulatory actions and adopted 374 new or amended legal acts, and more than 30 acts in each of the following areas: economic and monetary policy, environment, consumers and human health, general financial and institutional policy, transport policy, agriculture, external relations, freedom of movement for workers and social policy and other areas.[12]

3.2. Regulatory responses of selected Member States to the health crisis caused by the COVID-19 pandemic

Since the WHO declared a global pandemic, the EU Member States have responded to the emerging global crisis with various normative activities. Some Member States regulate situation of infectious disease threat as a form of emergency and have normatively resolved it through their pre-pandemic constitutions, others through laws, while some states have or regulated and adapted to this circumstances during the pandemic.

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[11] Von Ondarza, N., *The European Parliament's Involvement in the EU Response to the Corona Pandemic,* www.swp-berlin.org, [https://www.swp-berlin.org/en/publication/the-european-parliaments-involvement-in-the-eu-response-to-the-corona-pandemic/], Accessed 15 February 2021.

[12] [https://eur-lex.europa.eu/search.html?scope=EURLEX&text=COVID&lang=hr&type=quick&qid=1614342642530&DTS_SUBDOM=LEGISLATION], Accessed 15 March 2021.

European Convention on Human Rights[13] in Art. 15. connects the state of emergency with war and other situations that threaten the survival of people. In such circumstances, any Contracting Party to the Convention may take measures derogating from its obligations under the Convention, provided that such measures do not conflict with other obligations under the international law. Furthermore, Charter of Fundamental Rights of the European Union[14] in Art. 52. refers to the above-mentioned situations by regulating that any restrictions on freedoms and rights, which are determined by the Charter itself, must be provided for by law in a way that the very essence of precisely those rights and freedoms is respected. These restrictions are framed by the principle of proportionality because they are possible only if necessary and are in line with the general interest objectives affirmed by the EU or the needs of protecting the rights and freedoms of others. Thus, both the Convention and the Charter refer to the necessity of legislative regulation of the state of emergency of the signatory states, i.e. the EU Member States, in a way that the same states are determined and concretized by national positive law.

Legal theory defines states of emergency as states of necessity, states of emergency measures or emergency situations when the freedoms and rights guaranteed by the constitution are restricted due to the need to defend against external enemies, riots, terrorism and major natural disasters such as floods and earthquakes aimed at opposing the enemy and preserving the political communities and the survival of the state. Then the Roman principle of "*Salus rei publicae suprema lex esto*" can be taken into consideration where the salvation of the state is taken as the highest law and constitutional rights and freedoms are suspended, and decision-making in the state is entrusted to the executive authorities until the danger is eliminated.[15] States of emergency are characterized as a situation in which the country is faced with death threats and is forced to take actions that are contrary to the principles of its own legal system.[16]

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13 European Convention on Human Rights, Official Gazette – international treaties, 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10.

14 Charter of Fundamental Rights of the European Union, Official Journal of the European Union [2012] C326/391.

15 Scheppele, K.L., *Law in a Time of Emergency: States of Exception and the Temptations of 9/11,* Journal of Constitutional Law, Vol. 6, No. 5, 2004, p. 1004; Smerdel, B.; Sokol, S., *Ustavno pravo,* Narodne novine, četvrto neizmjenjeno izdanje, Zagreb, 2009, p. 125.

16 Crego, M.D., Kotanidis, S., *States of emergency in response to the coronavirus crisis, Normative Response and parliamentary oversight in EU Member States during the first wave of the pandemic*, European Parliamentary Research Service, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf], Accessed 15 March 2021, p. 10. Authors determine four mentioned categories: Constitutional states of emergency refer to those states of emergency provided by the constitution of a Member State. Statutory regimes refer to those regimes provided by statute, rather than in the constitution, and which regulate the type of emergencies and powers attributed to the au-

The regulatory frameworks used by the EU Member States during the first and the second waves of the COVID-19 pandemic were, in fact, different. Some Member States have declared a state of emergency, in accordance with the provisions of the constitution or law, and others have channelled the taking of emergency measures through laws or other forms of normative acts. Yet in terms of content, the measures that have been prescribed by various sources of law in respect of each EU Member State were similar. In the "States of emergency in response to the corona virus crisis" study, four main normative intervention categories are set in most of the 27 EU Member States during the COVID-19 pandemic:

- "constitutional states of emergency,
- statutory regimes,
- measures adopted under special legislative powers,
- measures adopted almost exclusively under ordinary legislation."[17]

According to the research methodology, ten EU Member states COVID-19 pandemic responses were studied with an aim to prove hypothesis in question.

3.2.1. *Belgium*

Belgium does not provide for a state of emergency in its Constitution and even in Art. 187. of the same it is emphasized that the Constitution cannot be suspended either in whole or in part.[18] However, in accordance with Art. 105. of the same Constitution, the possibility is provided for the Parliament to delegate legislative powers to the Government in compliance with the prescribed legal principles, and the Government itself, when acting in accordance with the above, may restrict rights and freedoms but not abolish them. Belgium did not declare a state of emergency, but two laws adopted on March 27, 2020 enabled the adoption of measures to control the spread of the COVID-19 pandemic. These laws enable the Government to take measures to control the pandemic in the areas of public health, the economy and the proper functioning of the courts and to define sanctions against violators of the measures. Specific measures in the respective administrative areas have been implemented with the ministerial decree, especially by the Minister of the Interior, according to which cultural, sports and recreational activities were banned

thorities concerned in an organic manner. Special legislative powers refer to the constitutional powers granted to the executive to adopt normative acts with the same legal standing as primary laws under urgent/exceptional circumstances and subject to parliamentary oversight."

17 *Ibid*, p. 10.

18 Popelier, P., *COVID-19 legislation in Belgium at the crossroads of a political and a health crisis*, The Theory and Practice of Legislation, Vol. 8, No. 1 - 2, 2020, p. 138.

and schools and restaurants closed.[19] Additional measures were taken at local and regional levels as pandemic management could not be carried out at only one level. The pandemic management system in Belgium is based on the National Focal Point for the International Health Regulations, which is actually a national risk management body and which is based on two pillars, the Risk Assessment Group (RAG) which analyzes risks to citizens, based on epidemiological and scientific data and on the Risk Management Group (RMG) which makes decisions in the field of public health relying on the former.[20] As at the beginning of the pandemic, the crisis management system was poor because measures at various levels were taken spontaneously and inconsistently, the Prime Minister decided on March 12, 2020 to establish The National Security Council at the federal level. This body consists of the Prime Minister, the Deputy Prime Ministers and, more broadly, the Ministers-President of the Regions and Communities, and from that date this body has taken all political decisions concerning crisis management. There are three additional national bodies and seven more crisis bodies have been established outside the health care area. [21]

3.2.2. *Slovenia*

The Slovenian Constitution of 1991 in Art. 92. provides for a state of emergency in cases of great dangers that threaten the survival of the state. However, the state of emergency in Slovenia has not been declared, and the measures adopted to control the pandemic are based on laws, decrees and ordinances. On March 12, 2020, the Government of Slovenia adopted the Decree on the Declaration of COVID-19 epidemic, which is based on the Communicable Diseases Act and the expert opinion of the National Institute of Public Health. The Government has adopted several basic measures, among others measures to prevent gatherings and gatherings in public places, a ban on movement outside the municipality of permanent or temporary residence. However, in April 2020, the Slovenian Constitutional Court suspended measures relating to movement outside the municipality and instructed the Government to verify the justifications for the measures taken.[22] In November 2020, the legislative intervention continued in order to

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19 Binder, K. *et al.*, *States of emergency in response to coronavirus crisis: Situation in certain Member States*, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS_BRI(2020)649408_EN.pdf], Accessed 18 March 2021, p. 2.

20 European Observatory on Health Systems and Policies, *COVID-19 Health System Response Monitor,* www.covid19healthsystem.org, [https://www.covid19healthsystem.org/countries/belgium/livinghit.aspx?Section=5.1%20Governance&Type=Section], Accessed 18 March 2021.

21 *Ibid.*

22 Atanassov, N. *et al.*, *States of emergency in response to coronavirus crisis: Situation in certain Member States II,* [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651914/EPRS_BRI(2020)651914_EN.pdf], Accessed 20 March 2021, pp. 10 – 11.

respond to the second wave of the epidemic and the Slovenian National Assembly adopted the Act Determining the Intervention Measures to Mitigate the Consequences of the Second Wave of COVID-19 epidemic, which is actually a package of 6 regulations.[23] The management of the consequences of the COVID-19 pandemic in Slovenia is entrusted to the Government and the Ministry of Health, in coordination with the National Institute of Public Health.

3.2.3. *Czechia*

According to the provisions of the Czech Constitution, the Czech Parliament can declare a state of war, and additional regulation of state of emergency is covered by the Constitutional Act on the Security of the Czech Republic through a state of threat (to state sovereignty) and a state of emergency. The state of emergency was declared by the Government in the Czech Republic on March 12, 2020 for a period of 30 days and was extended twice, and ended on May 17, 2020. The state of emergency was re-declared on October 5, 2020 and was extended several times until February 14, 2021. The state of emergency is declared by a Government resolution or a decision of the Prime Minister that must be confirmed by the Government within 24 hours of its declaration.[24] It is crucial that the proclamation of a state of emergency by Government resolution determines which rights will be restricted and which duties will be imposed. Accordingly, 2000 the Crisis Management Act was adopted that authorizes the Government to manage the crisis and adopt restrictive measures concerning the restriction of gathering, movement and work but also the protection of national borders which can be taken only for a limited period, i.e. as long as the state of emergency lasts. In the implementation of this Act, the Government has adopted a number of Government resolutions on the crisis measures, such as the closure of borders, restrictions on movement and wearing masks in public. Pursuant to the Act on the Protection of Public Health, the Ministry of Health limited events and closed places of public gatherings. After the declaration of the state of emergency, the Government activated the Central Crisis Staff, which is a working body of the Government in charge of crisis management, and this body is chaired by the Minister of Defence or the Minister of the Interior.[25] The COVID-19 Central Management Team was estab-

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[23] European Observatory on Health Systems and Policies, *COVID-19 Health System Response Monitor,* www.covid19healthsystem.org, [https://www.covid19healthsystem.org/countries/slovenia/livinghit.aspx?Section=5.1%20Governance&Type=Section], Accessed 22 March 2020.

[24] Alexandre, Z. *et al.*, *States of emergency in response to coronavirus crisis: Situation in certain Member States IV*, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652002/EPRS_BRI(2020)652002_EN.pdf], Accessed 25 March 2021, p. 4.

[25] European Observatory on Health Systems and Policies, *COVID-19 Health System Response Monitor,* [www.covid19healthsystem.org], [https://www.covid19healthsystem.org/countries/czechrepublic/liv-

lished in March, an advisory body to the Government to implement Government decisions, monitor and coordinate testing and laboratory capacity and intensive care capacity, but also to monitor the occurrence of potential cases. This body also makes recommendations for the introduction of new measures in controlling the consequences of the COVID-19 pandemic. In mid-April 2020, the number of infected and dead began to decline, so the Government adopted the Restrictions Release Plan (RRP), which provided for the easing of measures in five phases.

3.2.4. *Hungary*

On 11 March, 2020 with the Government Decree, Hungary declared a state of emergency for the entire territory of the country, given the possibilities contained in the provisions of Art. 48. to 54. of the Fundamental Law of Hungary (Hungarian Constitution). Yet two important laws provide more detailed regulation of crisis management. Namely, the Disaster Management Act[26] has been in force since 2011 and regulates hazardous situations that can be caused by an epidemic and also sets out extraordinary government rules and measures that can be adopted during the state of emergency. Corona virus Containment Act[27] was adopted on March 30, 2020 and allows the Government more specifically to adopt measures to combat the COVID-19 pandemic, among other things the Government may issue Government Decrees that are repealed by the cessation of the state of emergency. The measures that the Government may adopt according to the said act are those which refer to the areas of protection of health, life, property and which enable the stability of the national economy. Pursuant to this act, the National Assembly (Hungarian Parliament) authorizes the Government to extend the application of decrees issued for a certain period, until the end of the state of emergency.[28] This Act also affected the amendments to the Criminal Code of Hungary, which amended the provisions relating to the existing criminal offense. Crisis management in Hungary is in the hands of the Government, and the basic support stems from the so-called Operative Corps consisting of the Minister of the Interior and the Minister of Human Capacities and representatives of the National Chief Medical Officer of the National Public Health Centre. He/she is responsible for the implementation of epidemiological measures together with re-

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inghit.aspx?Section=5.1%20Governance&Type=Section], Accessed 25 March 2021.

26 Act CXXVIII of 2011 on disaster management and amending certain related Acts, [https://net.jogtar.hu/jogszabaly?docid=a1100128.tv], Accessed 19 March 2021.

27 Act XII of 2020 on the containment of coronavirus [http://abouthungary.hu/media/DocumentsModell-file/1585661547-act-xii-of-2020-on-the-containment-of-coronavirus.pdf], Accessed 20 March 2021.

28 Binder, *op.cit.,* note 19, pp. 6-7.

gional and local government offices and their public health departments. In order to control the consequences of the crisis, the Government has established 10 action groups whose area of activity includes the adoption of defence, police, health and economic measures. It is worth mentioning at this point, the establishment of the National Hospital Directorate General on November 18, 2020, whose task is to monitor the health system and take care of a transparent health management system during the state of emergency, headed by the Minister of the Interior.[29]

3.2.5. *Croatia*

Constitution of the Republic of Croatia[30] Art. 17. provides for three types of emergency, namely in the event of a state of war, imminent threat to independence and unity, and in the event of major natural disasters. However, in accordance with the constitutional powers, the Government of the Republic of Croatia did not decide on the procedure for activating the emergency situation, but relied on the existing statutory framework relating to civil protection and prevention of infectious diseases.[31] The Civil Protection System Act[32] is amended by the provisions of the new Article 22a which regulates that, in case of special circumstances that could not be foreseen and controlled and which endanger the life and health of the citizens, property of higher value, environment, economic activity, the Civil Protection Authority makes decisions carried out by the civil protection headquarters of local and regional self-government units. The Infectious Diseases Protection Act[33] is also amended and regulates the implementation of epidemiological measures during the epidemic period, and that period is declared by the Minister of Health at the proposal of the Croatian Institute for Public Health (CIPH). The COVID-19 disease pandemic was declared by the Minister of Health on March 11, 2020. According to Art. 47. of the Infectious Diseases Protection Act, the Minister of Health may, at the proposal of the CIPH, order a series of special security measures mentioned in the article for the protection of the population, and also some of the measures mentioned in the article may be ordered by the Civil Protection Authority in coordination with the Ministry of Health and the CIPH. Decisions of the Civil Protection Authority

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29 European Observatory on Health Systems and Policies, *COVID-19 Health System Response Monitor,* [www.covid19healthsystem.org], [https://www.covid19healthsystem.org/countries/hungary/living-hit.aspx?Section=5.1%20Governance&Type=Section.], Accessed 20 March 2021.

30 Ustav Republike Hrvatske, Official Gazette 85/10 – consolidated version, 05/14.

31 Bačić Selanec, N., *Croatia's Response to COVID-19: On Legal Form and Constitutional Safeguards in Times of Pandemic,* [https://verfassungsblog.de/croatias-response-to-covid-19-on-legal-form-and-constitutional-safeguards-in-times-of-pandemic/], Accessed 27 March 2021.

32 Zakon o sustavu civilne zaštite, Official Gazette, 82/15, 118/18, 31/20, 20/21.

33 Zakon o zaštiti pučanstva od zaraznih bolesti, Official Gazette, 79/07, 113/08, 43/09, 130/17, 114/18, 47/20, 134/20.

are made under the supervision of the Government. As of March 16, 2020 in the Croatia, schools, universities and kindergartens ceased to operate, and three days later the Civil Protection Authority issued a series of measures to prevent the spread of the virus that were valid for 30 days or more and were repeatedly repealed and reintroduced.[34] In Croatia, County and City civil headquarters had the opportunity to make stricter decisions than those prescribed by the National Authority.

3.2.6. *Austria*

The Austrian Constitution actually consists of several constitutional acts and it does not provide for a state of emergency. However, certain procedures are envisaged that are applicable in times of distress according to Art. 18. of the Bundes-Verfassungsgesetz of 1945. But, as both houses of the Austrian Parliament could meet for the entire duration of the coronavirus pandemic, it was not necessary to engage previous constitutional and legal provisions. In March 2020 the National Council passed a series of laws based on the Epidemics Act of 1950, aimed at slowing the spread of the COVID-19 pandemic. This Act regulates measures to combat the spread of a disease, which includes quarantine, the implementation of protective measures for medical personnel or other vulnerable persons, measures for social gatherings, traffic restrictions, the closure of schools or other facilities, etc.[35] Several adopted the so-called "COVID-19 Acts" regulate the closure of factories, offices and companies that have direct contact with consumers, public gatherings, access to public institutions, the functioning of market etc. The governments of the federal units are in charge of implementing these measures at the federal level, and all measures must be proportionate to the nature of the need. Measures are determined not only by law, but also at the regional level by the governments of the federal states, which, if necessary, can adopt stricter measures for individual areas. Crisis management in Austria at the federal level, regarding the response to the COVID-19 pandemic, is entrusted to the Ministry of Health, which is headed by the Federal Minister for Health in consultancy with the Red Cross leaders and experts in other fields. A special body at the national level that coordinates the response of the Government to the crisis and takes care of public safety is The State Crisis Disaster Management.[36]

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[34] Vlada Republike Hrvatske, [https://vlada.gov.hr/vijesti/od-ponoci-na-snazi-odluke-stozera-civilne-zastite-rh-u-svrhu-sprjecavanja-sirenja-zaraze-novim-koronavirusom/29026], Accessed 27 March 2021; [https://www.covid19healthsystem.org/countries/croatia/livinghit.aspx?Section=5.1%20Governance&Type=Section], Accessed 30 March 2021.

[35] Atanassov, *op.cit.*, note 22.

[36] European Observatory on Health Systems and Policies, *COVID-19 Health System Response Monitor,* www.covid19healthsystem.org, [https://www.covid19healthsystem.org/countries/austria/livinghit.aspx?Section=5.1%20Governance&Type=Section], Accessed 20 March 2021.

3.2.7. *Slovakia*

In Slovakia, according to the provisions of Art. 5. of the Constitutional Act of 2002, when there is a threat to human life and health, including a pandemic and when there is a threat to the environment and property caused by natural disasters, industrial, traffic or other incidents, the Government may declare a state of emergency for a period of 90 days and only for the territory that is exposed to danger i.e. risk. On March 11, 2020 the Government, by the Government Resolution No 111/2020 on extraordinary situations, declared a state of emergency for the entire territory of Slovakia in response to the spread of the COVID-19 pandemic. Already on March 15, 2020 in compliance with the mentioned Art. 5, a state of emergency was declared by the Government Resolution No. 114/2020 for health care institutions and regions in order to deploy staff and health equipment more efficiently and to limit the strike of employees.[37] The state of emergency lasted for only few days when the Government extended it for the entire country and to all medical and social care institutions by Government Resolutions No 115/2020 and No 169/2020 of March 18 and 27 on extension of the state of emergency. In mid-March, all non-essential shops and services were closed and masks in public places and penalties were prescribed. Violations of isolation measures were also checked. The Government restricted movement throughout the country by Resolution No. 172/2020 from April 8 to 13. Since June, the measures have been eased. By Government Resolution No. 36 6/2020 on the end of emergency it is regulated that the state of emergency ended on June 13, 2020.[38] In addition to the Government, the management of the COVID-19 pandemic was the responsibility of the Ministry of Health of the Slovakia, which published a series of guidelines on March 20, 2020. The Internal Crisis Management Group, which was established within the Ministry of Health also had a significant role in the pandemic. The group was chaired by the Minister of the Interior, who cooperates closely with the Chief Public Health Officer in the adoption of appropriate measures. The Minister of the Interior is considered to be leading the action regarding the COVID-19 pandemic by working closely with the Prime Minister and other ministers. The basic legislative acts adopted or amended since March 2020 are: the Law on Certain Emergency Measures in Relation to the Spread of Dangerous Contagious Human Disease COVID-19 and in the Judiciary, the Law on Social Insurance and the Law on Education (Education Act).[39] On October 1, 2020, a state of emergency was declared again and had been extended three times.[40]

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37 Alexandre, *op.cit.*, note 24, p. 10.

38 *Ibid*, p. 11.

39 European Observatory on Health Systems and Policies, *COVID-19 Health System Response Monitor,* [www.covid19healthsystem.org], [https://www.covid19healthsystem.org/countries/slovakia/livinghit.aspx?Section=5.1%20Governance&Type=Section], Accessed 27 March 2021.

40 Migration Information Centre, [https://www.mic.iom.sk/en/news/637-covid-19-measures.html], Accessed 30 March 2021.

3.2.8. *Ireland*

The Irish Constitution provides for a state of emergency for cases of war and armed conflict, so the state of emergency was not declared in response to the COVID-19 pandemic. Within its jurisdiction, the Irish Parliament has enacted a series of laws to protect public health and the economy. In mid-March 2020, the Health (Preservation and protection and other emergency measures in the public interest) Act 2020 (Health Act 2020) was adopted (Act 2020 is updated 1947 Health Act) and the Emergency Measures in the Public Interest (COVID-19) Act 2020 (Emergency Act 2020) as well. Measures to implement these laws were enacted by the caretaker government until the new Government took office on June 27, 2020, with the Minister of Health being empowered to enact acts to prevent, limit and slow the spread of the virus. In addition, according to the provisions of this Act, in March, official instructions were issued regarding the social life, which became binding in April, and related to travel bans, the introduction of curfews, the closure of schools, universities, institutions and other objects. Under the provisions of the Emergency Act 2020, a number of Government measures have been enacted to address the economic consequences caused by the pandemic.[41] Both of these laws were passed for a certain period of time with the possibility to extend them depending on the consequences of the pandemic. In managing the pandemic the most important advisory government body was the National Public Health Emergency Team (NPHET), which was established in January 2020, by the Department of Health, a Special Department of the Government, chaired by the Chief Medical Officer, senior officers from the Department of Health, medical experts and scientists from relevant disciplines.[42] Since September 2020, NPHET was no longer directly accountable to the Government but to the authorized group that reported to the Government Committee for the COVID-19 pandemic, which accordingly shaped social and economic measures in response to the pandemic. In addition, it should be noted that the Parliament, in order to increase the control and responsibility of the enactment of the Act by the Government, founded a special temporary committee, the COVID-19 Committee, in May 2020, with 19 members, representatives of all the parliamentary parties and groups.

3.2.9. *Denmark*

The Danish Constitution (Grundloven) does not contain specific provisions on the state of emergency so pandemic management takes place based on the earlier adopted

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41 Alexandre, *op.cit.,* note 24, p. 7.

42 European Observatory on Health Systems and Policies, *COVID-19 Health System Response Monitor,* [www.covid19healthsystem.org], [https://www.covid19healthsystem.org/countries/ireland/livinghit.aspx?Section=5.1%20Governance&Type=Section], Accessed 25 March 2021.

Act on Measures against Infectious and Other Communicable Diseases (Epidemic Act). In order to deal with the consequences of COVID-19 pandemic as effectively as possible, the Government has proposed a series of amendments to the said Act, emphasizing the transfer of pandemic management powers to the Government and the Minister of Health. In March 2020, Minister of Health proposed amendments to this Act, that came into force in the same month, and are related to: the power of the Minister to order isolation of persons suspected of being infected, to limit gatherings and transportation to prompt access to medical service and other. [43] However, as early as March 17, 2020, the Prime Minister announced further restrictions that included a ban on the gathering of more than 10 people. According to the needs, since March 1, 2021, the new Epidemics Act has been in force. In addition to this Act, The General Health Law, regulated that executive bodies may require private hospitals to make their capacities available in the emergency situations.[44] The management of the epidemic was the responsibility of the Government and the Minister of Health, but it is important to point out that the Government interventions are previously defined by the National Security Council consisting of: Prime Minister, few Ministers, interim secretaries, Danish Health Authority, Danish Medicines Agency and the director of the Statens Serum Institute. Although the Parliament has passed a number of laws in urgent procedure in order to respond quickly to the consequences of the pandemic, the Government, as the executive body, adopted a number of measures in accordance with its delegated powers. In order to supervise such measures, the Parliament has authorized a special body, the Committee on the Rules of Procedure, to evaluate the measures and decisions adopted.[45]

3.2.10. *Finland*

According to Art. 23. of the Finnish Constitution, temporary exceptions to respect the fundamental rights of citizens are possible in cases of armed attacks on Finland or in other emergencies defined by a special act. The constitutional framework for the state of emergency consists of the State of Defence Act and the Emergency Power Act, where the latter defines various emergency situations in which the Government is authorized to adopt regulations to be in force for 3 or 6 months, and the Parliament will then decide whether the regulations will be

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43 European Observatory on Health Systems and Policies, *COVID-19 Health System Response Monitor,* [www.covid19healthsystem.org], [https://www.covid19healthsystem.org/countries/denmark/living-hit.aspx?Section=5.1%20Governance&Type=Section], Accessed 23 March 2021.

44 *Ibid.*

45 Bentzen, N. *et al.*, *States of emergency in response to coronavirus crisis: Situation in certain Member States III,* [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651972/EPRS_BRI(2020)651972_EN.pdf], Accessed 23 March 2021, p. 4.

adopted or repealed.[46] It is necessary for the Government, in coordination with the President of the Republic, to declare a state of emergency in order for the provisions of the Emergency Power Act to be enacted. This situation was declared on March 16, 2020. In accordance with the mentioned act and the Communicable Diseases Act, a number of measures were adopted for the functioning of the society and economy in dealing with the pandemic. The government issued a number of decrees, decisions and recommendations related to: restriction of movement, closure of restaurants and cafés (except for deliveries), keeping distance, border control, ban on public gatherings or self-isolation for those over 70 years of age.[47] In May and June 2020, measures were gradually eased. Management of pandemic effects in Finland is a planned process based on a previous influenza pandemic plan. Based on mentioned plan management of the pandemic is set according to the Government model for Government Civilian Crisis Management.[48] At the municipal level, agencies and district hospital physicians are responsible for the prevention of communicable diseases and play a key role during a pandemic. The Regional State Administrative Agencies coordinate and supervise the planning and implementation of regulations and measures at the regional level. The Ministry of Social Affairs and Health is responsible for ensuring that stated powers derive from the Communicable Diseases Act in the national plan, guidelines and communicable diseases supervision. The same Ministry is responsible for coordinating these issues with other ministries and with other international bodies and organizations as well as with the European Commission. An important role is entrusted to the Finnish Institute for Health and Welfare (THL), which is the main expert agency for advising the Ministry and the Government on the health isues. One of the first measures of the Government due to the COVID-19 pandemic was the establishment of a special body whose function is to plan, manage and coordinate measures in the field of health care and social welfare. This, Corona virus Coordination Group, consisted of: Permanent Secretaries, persons from the few Ministries' (Economic Affairs and Employment, Social Affairs and Health, Interior, Finance, Foreign Affairs, Transport and Communications) and the appointees from the Prime Minister's Office and the THL. Later, representatives from all other ministries were included in this group. The end of the declared state of emergency followed on June 16, 2020, but the Government continued to coordinate crisis and

46 *Ibid,* p. 5.

47 *Ibid.*

48 European Observatory on Health Systems and Policies, *COVID-19 Health System Response Monitor,* [www.covid19healthsystem.org], [https://www.covid19healthsystem.org/countries/finland/livinghit.aspx?Section=5.1%20Governance&Type=Section], Accessed 24 March 2021.

in September 2020 authorized the Ministry of Social Affairs and Health to adjust the action plan regarding the management of the COVID-19 pandemic.[49]

3.3. Level of decentralization in health system according to OECD

Ten countries from this analysis could be described as federal or unitary. In federal countries, constitutionally protected regional governments have large competences. In unitary countries, regions do not have a constitutional power which enables greater possibilities for the central government's intervention.[50] OECD recognizes three types of decentralization: fiscal, administrative and political decentralization and three levels of government: central, regional and local. In the analysis on level of decentralization in health care system, results from the 2018. Questionnaire on responsibilities and performance in health care systems were used.[51]

Table 1. Studied EU Countries by mortality, government type and level of health system decentralization

EU Country	Mortality	Federal/ Unitary government type	Central decision-making in the health sector (%)
Belgium	high	F	40-50
Slovenia		U	50-60
Czechia		U	40-50
Hungary	average	U	no data
Croatia		U	no data
Austria		F	< 40
Slovakia		U	no data
Ireland	low	U	50-60
Denmark		U	< 40
Finland		U	< 40

Data source: Beazley, I., et al., Decentralization and performance measurement systems in health care, OECD

Only two countries have Federal government type, Belgium and Austria. Central decision- making was used as indicator of health care system decentralization (less proportion means more decentralization) (Table 1). According to OECD, Austria, Denmark and Finland had mostly decentralized decision-making in the health sector, and lower mortality. On the other hand, Ireland and Slovenia had

[49] *Ibid.*

[50] Beazley, I., *et al.*, *Decentralisation and performance measurement systems in health care*, OECD Working Papers on Fiscal Federalism, No. 28, OECD Publishing, Paris, [https://www.oecd-ilibrary.org/deliver/6f34dc12-en.pdf?itemId=%2Fcontent%2Fpaper%2F6f34dc12-en&mimeType=pdf], Accessed 20 March 2021.

[51] *Ibid.*

more centralized decision-making processes in the health sector; the former had lower and the latter higher mortality rate on January 15.[52]

3.4. Analysis of government Stringency Index, timeline of measures introduction and mortality trends in ten European countries

Death rate is a solid enough indicator to be used in government pandemic response study. It is not ideal because of methodological problems. As the Global Change Data Lab in COVID-19 data explain: number of actual deaths is likely to be higher due to limited testing and attributed causes of death and a delay in reporting new deaths.[53] In spring of 2020 all observed states had similar approach to pandemic control and introduced strict lockdowns. As time passed, COVID-19 was studied and governments started to differ according to the manner of pandemic control.[54]

Depending on mortality as the most reliable indicator of efficient pandemic control, the studied countries are grouped in three mortality ranks: ones with high, average and low mortality on January 15, 2021. At that time, in most of the studied countries, the second pandemic wave ended.[55]

As shown in Table 2, countries differ in number of tests provided, number of cases and mortality rate per 1 million inhabitants. Denmark had three times more tests than any other studied country. In number of cases regarding number of deaths, mostly countries with more cases had more registered deaths. Exceptions were the Czechia and Croatia with more cases and lower death rate than comparable countries. Belgium and Hungary had less cases and higher death rate than comparable countries.

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52 *Ibid.*

53 Roser *et al.*, *op.cit.*, note 4.

54 Hale *et.al.*, *op. cit.,* note 6.

55 Worldometers.info, *op.cit.*, note 5.

Table 2. Studied EU Countries by mortality, number of tests, cases and mortality /1 million population on January 15, 2021

Country	Mortality	No. of tests/ 1 million population	No. of cases / 1 million population	No. of deaths / 1 million population
Belgium	high	644,247	57,923	1,747
Slovenia		356,085	70,683	1,501
Czechia		501,761	81,588	1,309
Hungary	average	302,486	36,192	1,159
Croatia		270,778	54,702	1,112
Austria		443,15	43,257	773
Slovakia		291,57	40,415	616
Ireland	low	548,039	32,825	501
Denmark		2,019,839	32,279	296
Finland		473,537	7,197	111

Data source: Worldometers.info, [https://www.worldometers.info/coronavirus/], Accessed date 15 January 2021

The countries are expected to track the spread of the virus and to implement crucial measures to suppress pandemic. Number of new cases and change in trends is one of few criteria that can be helpful with setting the correct timeline and tracking the hospital beds and ventilators in use. IHME set up criteria to help decision-makers to prevent hospitals being overwhelmed with patients in need.[56]

As shown in Table 3, all countries at the beginning of pandemic implemented strict measures with high estimated Stringency Index (SI), from 64.6 in Finland to 96.3 in Croatia. Measures were strengthened in a period between March 5 to 30, but seven out of ten countries already had strictest measures on March 23. Most of the countries raised SI from values of around 20 to 70 or higher. Half of the countries raised SI to the maximum values in about one week of March, and half of them in a two weeks period. In most countries, when strict measures are set, daily incidence rate reaches its maximum in two to three weeks and in one month the same happens with mortality trends.

Only Belgium and Ireland reached IHME criteria in the first pandemic wave (March 2020), but they did not differ significantly from other countries that avoided high mortality in the first pandemic wave according to defined timeline and criteria. Both implemented high SI at least 10 days before IHME criteria was met, but they had maximum daily mortality over 40/1 million inhabitants.[57]

[56] Institute for Health Metrics and Evaluation (IHME), *op.cit.,* note 3.

[57] Roser *et al.*, *op.cit.*, note 4.

Belgium, in the first wave, reached IHME criteria on March 31 (93 deaths/day). Measures were tightened in just one week from March 13 to 20; SI went from 24 to 82 eleven days before IHME criteria was reached. In addition, it was four weeks before maximum incidence rate and three weeks before maximum mortality rate was reached.

In Ireland, during the first wave, IHME criteria was reached (44 deaths/day) on April 16. Measures were tightened in two weeks from March 10 to 29, SI went from 11 to 85, 18 days before IHME criteria was reached. In addition, it was two weeks before maximum incidence rate and four weeks before maximum mortality rate was reached.

Table 3. Studied EU Countries in the first pandemic wave by IHME criteria, Stringency Index (SI), Strengthening measures timeline and mortality and incidence rate

Country	Mortality	IHME criteria met*	Maximum daily mortality/ 1 M pop	Strengthening measures timeline**				Date of max. daily incidence rate	Date of max. daily mortality rate
				SI 1	Date	SI 2	Date		
Belgium	high	31-Mar	42.8	24	13-Mar	82	20-Mar	15-Apr	10-Apr
Slovenia		null	2.9	25	10-Mar	90	30-Mar	27-Mar	7-Apr
Czechia		null	1.7	25	10-Mar	82	23-Mar	4-Apr	14-Apr
Hungary	average	null	2.4	19	10-Mar	77	28-Mar	10-Apr	24-Apr
Croatia		null	1.9	22	12-Mar	96	23-Mar	1-Apr	19-Apr
Austria		null	3.3	11	8-Mar	82	16-Mar	26-Mar	8-Apr
Slovakia		null	0.7	22	9-Mar	75	16-Mar	16-Apr	15-Apr
Ireland	low	16-Apr	44.6	11	10-Mar	85	29-Mar	10-Apr	24-Apr
Denmark		null	3.8	20	5-Mar	72	18-Mar	7-Apr	4-Apr
Finland		null	7.8	19	11-Mar	65	18-Mar	4-Apr	21-Apr

Data source: Worldometers.info, [https://www.worldometers.info/coronavirus/], Roser, M. *et al.*, Corona virus Pandemic (COVID-19), [https://ourworldindata.org/coronavirus], Accessed date 20 January 2021

*Date when more than 8 deaths/day/ 1 million inhabitants were reached

**Stringency Index lowest/highest values and measures introduction timeline

As shown in Table 4, in the second pandemic wave all countries accept Ireland and Finland reached IHME criteria. Only Denmark actually avoided second autumn wave, but it followed at the end of the year 2020, IHME criteria was reached on

January 15. Countries varied significantly in the second wave. An IHME criterion was reached in all countries except Ireland, Finland and Denmark between October 24 in Slovenia and November 19 in Czechia. Countries started with higher SI baseline than in the first wave, from 39 in Croatia to 59 in Austria. Unlike in the first wave, maximum SI values were lower than in the first pandemic wave, from 51 in Croatia to 82 in Austria.

Unlike in the first wave, when all countries started strengthening measures before they reached IHME criteria, in the second wave Belgium and Croatia started after criteria was reached. In all countries with high or average mortality rate (except Czechia) strictest measures were introduced after IHME criteria was reached, in Belgium and Croatia one month later, and in Slovenia, Hungary, Austria and Slovakia few days to one week later.

It was expected that, like in the first wave when tightened measures are set, daily incidence rate would reach its maximum in two to three weeks and in one month the same would happen with mortality trends, but differences were recognized. In Belgium and Slovenia, maximum death rate was reached before maximum incidence rate.

Table 4. Studied EU Countries in the second pandemic wave by IHME criteria, Stringency Index (SI), Strengthening measures timeline and mortality and incidence rate

Country	**Mortality**	**IHME criteria met***	**Maximum daily mortality/ 1 M pop**	**Strengthening measures timeline****				**Date of max. daily incidence rate**	**Date of max. daily mortality rate**
				SI 1	**Date**	**SI 2**	**Date**		
Belgium	high	27-Oct	29.8	55	2-Nov	66	30-Nov	29-Nov	10-Nov
Slovenia		24-Oct	31.7	47	17-Oct	69	30-Oct	6-Jan	8-Dec
Czechia		19-Nov	27.5	48	21-Oct	73	26-Oct	4-Nov	10-Nov
Hungary	average	3-Nov	20.0	41	1-Nov	72	10-Nov	29-Nov	5-Dec
Croatia		6-Nov	22.4	39	27-Nov	51	14-Dec	10-Dec	16-Dec
Austria		14-Nov	24.2	59	17-Oct	82	17-Nov	13-Nov	17-Dec
Slovakia		12-Nov	12.3	54	21-Oct	73	15-Nov	31-Dec	4-Jan

Ireland	low	null	3.2	52	6-Oct	82	21-Oct	18-Oct	1-Dec
Denmark		15-Jan	10.4	52	3-Jan	70	9-Jan	18-Dec	15-Jan
Finland		null	4.0	41	22-Nov	52	7-Dec	10-Dec	28-Dec

Data source: Worldometers.info, [https://www.worldometers.info/coronavirus/], Roser, M. et al., Corona virus Pandemic (COVID-19), [https://ourworldindata.org/coronavirus], Accessed date 20 January 2021

*Date when more than 8 deaths/day/ 1 million inhabitants were reached

** Stringency Index lowest/highest values and measures introduction timeline

Table 5. summarizes the results of the conducted research related to the regulatory approach to the pandemic management and the obtained results related to mortality trends on January 15 2021.

Table 5. Studied EU Countries in the COVID-19 pandemic by legal regulatory response, level of health care decision-making decentralization and strengthening COVID- 19 control measures timeline according to IHME criteria

EU country	Mortality	No. of deaths /1 million population	States of emergency provided in Constitution	Statutory regimes effectively declared	Measures adopted using special legislative powers	Measures adopted under ordinary legislation	Central decision making in the health sector (%)	First pandemic wave		Second pandemic wave		
								IHME criteria met	Timeline respected	IHME criteria met	Timeline respected	Delay
Belgium	high	1,747	-	No	Yes	No	40-50	31-Mar	Yes	27-Oct	No	5 weeks
Slovenia		1,501	No	Yes	No	Yes	50-60	null	Yes	24-Oct	No	< 1 week
Czechia		1,309	Yes	No	No	No	40-50	null	Yes	19-Nov	Yes	-
Hungary	average	1,159	Yes	Yes	No	No	no data	null	Yes	3-Nov	No	1 week
Croatia		1,112	No	Yes	No	Yes	no data	null	Yes	6-Nov	No	5,5 weeks
Austria*		773	-	No	No	Yes	< 40	null	Yes	14-Nov	No	< 1 week
Slovakia		616	Yes	Yes	No	No	no data	null	Yes	12-Nov	No	< 1 week

Ireland	low	501	-	No	No	Yes	50-60	16-Apr	Yes	null	Yes	-
Denmark		296	-	No	No	Yes	< 40	null	Yes	15-Jan	Yes	-
Finland		111	Yes	No	No	No	< 40	null	Yes	null	Yes	-

Source: Worldometers.info, [https://www.worldometers.info/coronavirus/]; Crego, M.D., Kotanidis, S., *States of emergency in response to the corona virus crisis, Normative Response and parliamentary oversight in EU Member States during the first wave of the pandemic*, European Parliamentary Research Service; Roser, M. et al., Corona virus Pandemic (COVID-19), [https://ourworldindata.org/coronavirus], Accessed date 20 January 2021

* The national constitution does not provide for a state of emergency or the state of emergency is not suitable for health emergency

4. DISCUSSION

EU with its legal authority actively approached the pandemic by regulating areas in which the EU has jurisdiction, mostly in the economic field. The area in which the EU complements the actions of the Member States with its approach is, among others, health and health care. Treaties and regulations were the basis for the regulatory activities of the EU institutions in COVID-19 pandemic crisis.

As shown earlier in Table 5, some Member States have normatively resolved pandemic control measures through their pre-pandemic constitutions, others have regulated such situation through laws while some states have regulated and adapted legal framework during a pandemic. In the studied countries, legislative framework for crisis regulation was only partially associated with countries' achievements in pandemic mortality control. For example, states of emergency were declared in mid-March of 2020 to provide faster regulatory responses through government decrees in four studied countries (Czechia, Hungary, Slovakia and Finland) but only in Finland low mortality rates were maintained while in Czechia mortality rate was high.

Level of decentralization in health care system decision making was only partially proven important in managing pandemics. For instance, Denmark and Finland have a high level of decentralization and favourable mortality trends. Austria had partial success in pandemic management in the given decentralization level. Belgium and Czechia, with similar level of decentralization in health care setting as Austria, had high mortality trends (Table 5). In incidence, mortality and Stringency Index data analysis, it is observed that countries obtain different results with different methods and strengthening measures timeline. Angrist argues that COVID-19 restrictions work in the best manner if strict measures are imple-

mented earlier at once, than weaker ones gradually. This approach works better for COVID-19, but also for the economy and society as well.[58] All studied countries tried to control the pandemic in the second wave with less stringent and delayed measures which did not prove to be effective except in Finland (Table 5.).

Finland had the best results among the studied countries with the lowest mortality rate. It did not reach IHME criteria in the first or in the second pandemic wave. An analysis of the regulatory responses following the declaration of "states of emergency" in Finland shows that the decisions were based on a pre-designed plan for an influenza pandemic, but also on the previously established crisis management models well organized from the local to the national levels.

Although Denmark did not declare a state of emergency, the pre-existing regulatory framework for crisis and epidemic management enabled the timely adoption of the pandemic control measures. Denmark was the only studied country (besides Finland) that avoided the second pandemic wave in autumn. According to OECD, Denmark and Finland had highly decentralized decision-making in the health sector.

Ireland waited for too long with the introduction of stricter measures in the first pandemic wave. For 10 days in March 2020, the implemented measures were moderate. In Ireland in the first pandemic wave, national mortality figures were significantly impacted by high mortality among nursing home residents, which contributed to more than half of all COVID-19 mortality in May 2020.[59] Ireland has provided regulatory responses through legislation enacted in the regular procedure and made some adjustments in pandemic management in the second half of the year. For better coordination, as of September 2020, the Government's National Public Health Emergency team was no longer directly accountable to the Government but to the COVID-19 task force. That helped for appropriate social and economic measures to take place faster and in a timely manner.

Czechia and Slovakia, as well as Slovenia and Croatia, shared the same legislative framework for responding to the crisis in the past. In the past few decades differences within the legal framework and response to the crisis occurred, which have led to the different approaches to the pandemic control and also different outcomes. Thus, Slovenia and Czechia on January 15 had significantly higher mortality rates than Croatia and Slovakia. All four states successfully controlled the pandemic in the first wave. In the second wave, all four countries tightened

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58 *Angrist et al., op.cit.,* note 1.

59 National Public Health Emergency Team, COVID 19, *Comparison of Mortality Rates between Ireland and other countries in EU and internationally*, [https://www.gov.ie/en/press-release/e000c4-statement-from-the-national-public-health-emergency-team-monday-4-ma/], Accessed 22 February 2021.

measures too late, which was reflected in the number of deaths. According to OECD Slovenia had more centralized decision-making processes in the health sector than Czechia, for Croatia and Slovakia data were missing (Table 5.).

Although Austria did not declare a state of emergency through law passed in the national parliament, it managed to keep an average mortality rate, among the studied countries. More serious consequences were prevented thanks to the measures taken timely within the governments of the federal states, but also at the regional level given that Austria is also one of the states that according to the OECD had mostly decentralized decision-making in the health sector.

Average mortality rate in Hungary could be explained by its having declared a state of emergency and intensive regulatory activity, especially through government decrees and their application from the local to the national levels. Modification of Criminal Code of Hungary and the application of defence and police force measures in controlling compliance with epidemiological measures played the role also.

Belgium had high mortality rates during both the first and the second pandemic waves. Crisis management has been decentralized, which complicated decision-making and implementation of measures. Also a large number of management structures and bodies have been set up to control the effects of the pandemic. Nine regions, together with their ministers, made decisions and informed the public, which did not contribute to an effective approach, although the legal framework has been established in a timely manner as well as the definition of sanctions for violators. In addition, at the beginning of COVID-19 pandemic, Belgium had limited PCR testing capacity, only in laboratory in Leuven.[60]

In Slovenia and Belgium, during the second wave, maximum death rate was reached before maximum incidence rate. One of the possible explanations was insufficient testing capacity. As in the case of Ireland in the first wave, virus entering into nursing homes contributed to the high mortality rate. Belgium is the country that was among the first in the EU to reach the IHME criteria, and had to act fast in the period when there was no sufficient experience with COVID-19.

Emergency measures are always justified by the need to protect human rights and the democratic order, and emergencies are characterized as situations in which countries face a serious threat and are forced to take actions contrary to the principles of their own legal order, often in interference with the European Convention on Human Rights. As Haug recognised in his research, it is important not to look only for measures in force but also for public compliance to those measures.[61]

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60 European Observatory on Health Systems and Policies, *op. cit.,* note 23.

61 Haug, N., *et al., Ranking the effectiveness of worldwide COVID-19 government interventions*, Nat Hum Behav, No. 4, 2020, pp. 1303-1312

5. CONCLUSION

EU member states in line with their specific regulatory mechanisms in crisis successfully set up and implemented different measures that have contributed to lower mortality rate per million inhabitants. Governments' responses to COVID-19 showed significant heterogeneity. Given the obtained results of the analysis, hypothesis can be considered only partially proven, considering that, only some of the selected countries have successfully controlled COVID-19 mortality.

Countries like Finland or Denmark with their long tradition of Public Health, decentralized health care decision-making, citizens that trust authorities and high level of preparedness in crisis management had lower mortality in COVID-19 pandemic. In the future EU could take even more active role within its legal powers and propose scientific based approach in crisis management to help countries implement less popular measures to preserve lives of EU citizens.

New viral strains in Europe made it impossible to control the pandemic with less stringent measures in second pandemic wave that were sufficient in the first wave. Final conclusion about successes of failures of different countries should wait until COVID-19 pandemic ends. The next waves of the pandemic should be observed in the light of the success of population vaccination, legislation, political, economic and social framework.

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UDK 339.924:061.1(4-67EU)]:614.4
Original scientific article

UNITED WE STAND - DIVIDED WE FALL: ASSESSING THE POTENTIAL OF THE EU AND ITS CITIZENS TO CONFRONT THE CORONAVIRUS PANDEMIC AS A CHANCE TO REAFFIRM THE EUROPEAN IDENTITY

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ABSTRACT

The main aim of this paper is to assess the potential of the EU and its citizens to face the Coronavirus pandemic as a chance to reaffirm the European identity. This paper consists of three complementary parts. In the first part conceptualization of the European identity is presented according to the views of the EU institutions and relevant authors with purpose to signify its importance for further development of the EU project. In the second part the extent to which the EU citizens are currently affiliated with the European Union is assessed, especially with regard to the response of the EU to confront the pandemic (i.e. by relying on recent Eurobarometer surveys). Third and the central part of this paper is focused on providing the review and analysis of relevant solidarity actions directed to confront Coronavirus crisis by the EU institutions and representative CSOs active specifically at the EU level in the field of promoting European citizenship. The key findings of this inquiry indicate that analysed initiatives contain solidarity dimension, and therefore, have potential to reaffirm the European identity, that is, to enhance cohesion and unity among the EU citizens.

Key words*: Coronavirus pandemic, EU citizenship, European identity, European Union, civil society organizations (CSOs).*

1. INTRODUCTION

Considering that overall approaches taken by the EU to confront the Coronavirus pandemic will either have beneficial or detrimental impact on the future of the European integration process, the main aim of this paper is to assess the potential of the EU and its citizens to face this crisis as a chance to reaffirm the European identity.

In other words, by focusing on the responses (i.e. selected policies and initiatives) directed to meet the challenges of the Coronavirus crisis by the EU institutions and CSOs active in the field of promoting European citizenship, this paper shall signify that analyzed initiatives contain solidarity dimension, and for that reason have potential to enhance cohesion and unity among the EU citizens which may positively affect the European integration process in and after the pandemic. Nevertheless, to reach relevant findings it will be necessary to apply qualitative methodology to this inquiry, which refers to the content analysis of relevant primary and secondary sources.

Moreover, besides introduction and conclusion, this paper will consist of three complementary parts. Therefore, in the first part it will be needed to conceptualize the European identity according to the views of the EU institutions (i.e. by referring to the EU's legislation and documents) and relevant authors (i.e. Risse, Delanty & Rumford, Castells and Shore) with purpose to signify its importance for further development of the EU project. Likewise, in the second part it will be necessary to assess the extent to which the EU citizens are currently affiliated with the European Union, especially with regard to the response of the EU to confront the pandemic (i.e. by relying on recent Eurobarometer surveys). Third and the central part of this paper will be focused on providing the review and analysis of relevant solidarity actions directed to confront Coronavirus crisis by the EU institutions and representative CSOs active specifically at the EU level in the field of promoting European citizenship (i.e. Civil Society Europe, European Citizen Action Service and European Civic Forum). Final remarks regarding the findings of this inquiry will be provided in the conclusion. Lastly, the significance of this topic springs from the view that despite of evident detrimental effects, this crisis can also be perceived as an opportunity which has potential to increase solidarity and cooperation across the EU Member States.

2. CONCEPTUALIZING EUROPEAN IDENTITY ACCORDING TO THE VIEWS OF THE EU INSTITUTIONS AND RELEVANT AUTHORS[1]

2.1. Overview of the evolving approaches aimed at bringing Union closer to its citizens by the EU institutions

In order to portray how the EU institutions view European identity it is needed to concisely refer to selected EU documents which in general indicate for what rea-

[1] It is important to notify that certain insights regarding the conceptualization of the European identity derive from the author's Doctoral thesis: Dorotić, J., *Krajobrazne politike i njihova uloga u izgradnji identiteta EU*, (*Landscape Policies and Their Role in Building the EU Identity*) Doctoral thesis, Sveučilište Josipa Jurja Strossmayera u Osijeku, 2019.

sons, by which means and in what forms are EU policy-makers aiming at bringing European Union closer to its citizens. Therefore, by examining the evolving approaches of the EU institutions aimed at rising affiliation of European citizens towards the Union it appears that, in general, initial intention expressed in the Treaty of Rome (1958) "to lay the foundations of an ever-closer union among the peoples of Europe"[2] was eventually articulated in creation of European citizenship – a concept which fosters identification with the EU and therefore closely corresponds with the notion of European identity. Specifically, this is evident by chronological overview of several EU documents which are reveling evolving ideas and mechanisms of the EU institutions directed towards making European citizens aware of their association with the EU. In general these documents encompass the Declaration on European Identity (1973),[3] then the Solemn Declaration on European Union (1983),[4] following the reports on a People's Europe initiative (1985)[5] and the Treaty on European Union (TEU, 1993)[6] - by which European citizenship was introduced within the primary EU legislation. Likewise, following the subsequent amendment of the TEU and the Treaty on the Functioning of the European Union (TFEU, 1958)[7] by the Treaty of Lisbon (LU, 2009)[8], the Charter of Fundamental Rights of the European Union (CFREU, 2000)[9] was incorporated within the primary EU legal framework which reconfirmed previously indicated specifications regarding the rights of the EU citizens.

More precisely, due to growing common stands of the nine Member States of the European Communities in the global context, in 1973 their leaders explicitly addressed the importance and defined the contours of European identity "in a light of the progress made in the construction of a United Europe".[10] Accordingly, authors of the Declaration on European Identity were already at that time aware of the fact that belonging of the Member States to common heritage, values

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2 Treaty establishing the European Economic Community. Rome, 25 March 1957, preamble, p. 2.

3 Declaration on European Identity, (Copenhagen, 14 December 1973), Bulletin of the European Communities. December 1973, No 12 (Declaration on European Identity).

4 Solemn Declaration on European Union, (Stuttgart, 19 June 1983), Bulletin of the European Communities, No. 6/1983 (Solemn Declaration on European Union).

5 A People's Europe: Reports from the ad hoc Committee, Bulletin of the European Communities, Supplement 7/85. Luxemburg: Office for Official Publications of the European Communities, 1985 (A People's Europe).

6 Treaty on European Union (Consolidated Version 2016), OJ C 202, 7.6.2016.

7 Treaty on the Functioning of the European Union (Consolidated version 2016), OJ C 202, 7.6.2016.

8 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007.

9 Charter of Fundamental Rights of the European Union (2016), OJ C 202, 7.6.2016. The Charter was proclaimed in 2000, but became legally binding in 2009 by the Treaty of Lisbon.

10 Declaration on European Identity, *op. cit.*, note 3, p. 48.

and institutions in the global context has great significance for further European integration process, which should eventually lead towards the "United Europe". Specifically, by this document European identity was framed within the three subsequent areas: firstly, in the area of recognizing commonalities and the current state of unity between the Member States; secondly, in the area of asserting contemporary common position of the Community in international affairs; and thirdly, in the area which considers the dynamic nature of European unification process.[11] Apart from the first two areas of the document it is significant to refer directly to the last one, since within it notable role of European identity was specified in the context of articulating common foreign policy, which would eventually contribute to successful European integration process. In this regard the following is stated in the same document: "The European Identity will evolve as a function of the dynamic construction of a United Europe. In their external relations, the Nine propose progressively to undertake the definition of their identity in relation to other countries or groups of countries."[12]

Furthermore, ten years later the significance of European identity for the European integration process was additionally signified in 1983 through the Solemn Declaration on European Union (which preceded the Single European Act and the Maastricht Treaty). Namely, among the main objectives of this document, it has been clarified that leaders of the Member States "on the basis of an awareness of a common destiny and the wish to affirm the European identity, confirm their commitment to progress towards an ever closer union among the peoples and Member States of the European Community."[13] Moreover, in the same document specific connection is made between common cultural heritage and European identity. In other words, among other objectives of the document which are all aiming "to consolidate the progress already made towards European Union", the intention is also expressed for "closer cooperation on cultural matters, in order to affirm the awareness of common cultural heritage as an element in the European identity."[14]

However, already in 1984 the European Council has appointed an *ad hoc* Committee chaired by Pietro Adonnino to coordinate a People's Europe initiative in order to articulate specific mechanisms and areas of action which "should respond to the expectations of the people of Europe by adopting measures to strengthen and promote its identity and its image both for its citizens and for the rest of

11 *Ibid.*, p. 48.

12 *Ibid.*, p. 54.

13 Solemn Declaration on European Union, *op. cit.*, note 4, p. 25.

14 *Ibid.*, p. 25.

the world."[15] In this regard, it is important to signify several measures initiated within the subsequent reports of the mentioned Committee during 1985, which are specifically aiming at bringing Union closer to its citizens in the following fields: the special rights of citizens (e.g. participation in the political process in the Community), culture and communication (e.g. encouragement of European audiovisual co-productions, access to museums and cultural events), youth, education, exchanges and sports (e.g. language teaching, exchanges between schools, promotion of the European image in education, endorsing 9th of May as Europe Day), twinning (i.e. between towns and cities), and strengthening of the Community's image and identity (e.g. introduction of Community's symbols such as a blue flag with 12 golden stars and anthem 'Ode to Joy').[16]

Consequently, by the Treaty on European Union in 1993 the European citizenship was introduced within the primary legal framework of the Union as a concept which directly associates European citizens with the EU, and therefore closely reflects and fosters the official EU stands regarding the European identity. In this regard, by referring to consolidated versions of TEU and TFEU within the Lisbon Treaty (2009) it is important to denote that already within the preamble of TEU it is clarified that leaders of the Member States are "resolved to establish a citizenship common to nationals of their countries" as well as it is specifically stated that European identity shall be reinforced in the context of implementation of common foreign and security policy and subsequent common defence policy.[17] However, precise content of European citizenship, which in general refers to specific rights and duties, is articulated between Articles 9 and 12 TEU,[18] as well as between Articles 18 and 25 TFEU[19].

In this regard, and due to limited framework of this paper, it is adequate just to extract that within the Article 9 TEU it is explicitly stated that all nationals of the Member States hold the EU citizenship which "shall be additional to and not replace national citizenship."[20] Also, by referring to the Article 20 TFEU it is possible to denote that EU citizenship comprises of the rights and duties such as the right to move and reside within the EU Member States, the right to vote and to be elected in elections to European Parliament, the right to enjoy protection by available diplomatic authorities of Member States in the third countries, and the

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15 A People's Europe, *op. cit.*, note 5, p. 5.

16 *Ibid.*, pp. 18-30.

17 Preamble TEU (Lisbon), p. 16.

18 See: Articles 9 – 12 TEU (Lisbon).

19 See: Articles 18 – 25 TFEU (Lisbon).

20 Article 9 TEU (Lisbon).

right to address the EU institutions.[21] In this context it is necessary to add that these rights have been further reconfirmed between Articles 39 and 46 CFREU.[22] Likewise, it should also be signified that in the Declaration no. 52 TFEU, most of the EU Member States have expressed their attachment to the symbols of the European Union by stating "that the flag with a circle of twelve golden stars on a blue background, the anthem based on the "Ode to Joy" from the Ninth Symphony by Ludwig van Beethoven, the motto "United in diversity", the euro as the currency of the European Union and Europe Day on 9 May will for them continue as symbols to express the sense of community of the people in the European Union and their allegiance to it."[23]

Finally, according to this overview it can be emphasized that since the early stages of the European integration process the EU institutions have been gradually developing and promoting its official ideas aimed at bringing its citizens closer to the Union through various policy fields and numerous initiatives that relay upon the above mentioned documents. In view of that, it can also be asserted that one of the most tangible tools to eventually reach this aim refers to articulation of European citizenship as a concept which adds certain component of identification with the EU to Member States nationals, and therefore can be closely related with the notion of European identity. Nevertheless, to assess as well as to broaden presented overview of the official EU stands regarding the conceptualization of the European identity, it is necessary in the following subchapter to reflect upon several conceptual considerations on the given subject provided by selected authors.

2.2. European identity according to relevant authors

Due to various conceptual approaches aimed at articulating European identity, it is necessary to narrow down the focus on a given subject by relying on particular conceptualizations deriving mostly from the field of social sciences. For this reason it seems appropriate to firstly reflect upon specific views on the phenomena of European identity approached from the perspective of Social Constructivism, since, by looking through its conceptual lenses it is possible to grasp some of the main contours which are shaping the ongoing debate about this contested concept. In this regard valuable insights are provided by Risse who in his articulation of social construction of European identity criticizes essentialist approaches to collective identities. In other words, by relying upon the idea that human everyday interactions constitute what Berger and Luckmann (1966) articulated as "the

21 Article 20 TEU (Lisbon).

22 See: Articles 39-46 CFREU (Lisbon).

23 Declarations by Member States, 52. Declaration, TFEU (Lisbon), p. 202.

social construction of reality", Risse further explains that "the social environment in which we find ourselves, defines (constitutes) who we are, our identities as social beings".[24] Therefore, from the perspective of Social Constructivism Risse approaches the contested nature of the European identity by arguing on empirical grounds that "individuals hold multiple social identities", and for that reason "people can feel a sense of belonging to Europe, their nation state, their gender, and so forth".[25] According to these arguments he signifies that "there might be much more 'Europeanness' enshrined in national culture and, hence, a much stronger collective European identity than is usually assumed."[26]

Consequently, to articulate complementary relationship between European and national identities, Risse explains that multiple identities may mutually correspond in following ways: firstly, as a nested or layered identities (e.g. local, national and European identities), secondly, as a cross-cutting identities (e.g. some group members may belong to another identity group), and finally as a "marble cake" model of multiple identities (e.g. different identity components of individuals may be mutually intertwined in various ways).[27] Moreover, in order to clarify what identification with Europe and the EU means, he indicates that "different groups might fill it with different content" such is the case of diverse meanings attached to Europe by the French, German and British political elites.[28] Likewise, by pointing that meanings attached to Europe, the EU and the European identity by the EU institutions and European elites include "the values of modernity and enlightenment", he clarifies that "modern and post-national values have become constitutive for the EU."[29] Nevertheless, Risse also stresses that as an opposition to this official viewpoint of Europe and European identity stands the conceptualization of "fortress Europe", which in general implies that "Europe and the EU are constructed as exclusionary entities".[30]

Although according to given constructivist perspective it has been clarified that European identity can be perceived as part of multiple identities which are mutually inclusive and not exclusive, as well as it is explained from the same standpoint that identification with the EU and its Member States can be viewed in various forms of complementarity, still, it is needed to provide wider conceptual explana-

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24 Risse, T., Social Constructivism and European Integration. In: Diez, T.; Wiener, A. (eds.), *European Integration Theory*, pp. 144-160, 2nd Edition, Oxford University Press, 2009, pp. 145-146.

25 *Ibid.*, p. 151.

26 *Ibid.*, p. 152.

27 *Ibid.*, pp. 152-153.

28 *Ibid.*, p. 153.

29 *Ibid.*, pp. 153-154.

30 *Ibid.*, p. 154.

tions on the given subject to further indicate why, how and in what possible forms is European identity emerging. In this regard corresponding views are provided by Delanty and Rumford who in order to define European identity firstly recognize four important aspects of identity. Namely, first of these aspects refers to constructed nature of identity which derives from social actions, whereas, second aspect refers to its narrative dimension. Furthermore, third aspect refers to relational aspect of identity between self and other, and finally, fourth aspect refers to multiple aspect of collective identity.[31] In line with these considerations same authors are criticizing the idea of "superior European identity" which would be in tension with national identities by arguing that "to varying degrees, all national identities in Europe contain elements of a European identity, which is not an identity that exists beyond or outside national identities."[32]

Furthermore, they differentiate between personal and collective variants of European identity emphasizing that "proliferation of Europeanized personal identities does not produce a European collective identity as such".[33] Therefore they assert that collective identity emerges "from a distinctive social group or institutional framework" which is apparently lacking in the case of collective European identity promoted by the EU.[34] However, they further explain that behind efforts to create such an official collective identity by the EU stands its "legitimating function", which is vaguely indicated in Maastricht Treaty, but more explicitly expressed recently through "symbols of Europeanness", that is, through mechanisms similar to those once used for creation of national identities such as "an emerging EU cultural policy, the euro currency, a passport, and scientific and educational policies aimed at enhancing a consciousness of Europe."[35] Nonetheless, although Delanty and Rumford are questioning the ability of the EU to foster collective identity similar to national, they are stressing "that the EU is having an impact on personal identities."[36] Yet, beyond personal and the EU's visions of European identity, same authors are also distinguishing "wider European cultural identity", which is actually referring to "*identities* in the plural, such as national, regional, political, etc. that are defined by an orientation to a broad cultural conception of Europe."[37] Finally, in line with these thoughts, Delanty and Rumford provide

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31 Delanty, G.; Rumford, C., *Rethinking Europe: Social Theory and the Implications of Europeanization*, London: Routledge, 2005, pp. 51-52.

32 *Ibid.,* p. 54.

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*, p. 55.

36 *Ibid.*

37 *Ibid.*

conceptualization of European identity which can be perceived "as a cosmopolitan identity embodied in the cultural models of a societal or civilizational identity rather than as a supra-national identity or an official EU identity that is in tension with national identities."[38]

As complementary to these conceptualizations, it is also important to emphasize some of the main ideas regarding European identity articulated by Castells in the broader context of his approach to the European Union as a network state.[39] More precisely, besides brothering previous insights, in this way some explanations will be specified regarding the importance of the European identity for the persistence of the EU project. Therefore, along his general considerations aimed at characterizing the EU in the context of globalization and Information Age as a network state which builds legitimacy on "the ability of its institutions to link up with subnational levels of government", Castells is also emphasizing that "Europe will only unify, at various degrees and under forms yet to emerge, if its citizens want it."[40] In this regard Castells is reasoning that European identity is necessary for the endurance of the European unification, but at the same time he is questioning its challenging conceptual nature by arguing that such identity cannot be achieved around Christianity, democracy, ethnicity, national identity or around European economic identity.[41]

Nevertheless, despite recognizing a fact that "there is no European identity" Castells still considers that such identity is possible and "it could be built, not in contradiction, but complementarity to national, regional, and local identities".[42] In other words, he suggests that that European identity could be socially constructed "as *project identity*; that is, a blue print of social values and institutional goals that appeal to a majority of citizens without excluding anybody, in principle."[43] In line with these thoughts Castells is optimistically asserting that according to his views "there are embryos of a European project identity" and concludes that "only if these embryos find political expression will the process of European unification ultimately be accomplished."[44]

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38 *Ibid.*, p. 56.

39 Castells, M., The Information Age: Economy, Society and Culture. Volume 3, Second edition, *End of Millennium*: Wiley-Blackwell, 2010, pp. 365-368.

40 *Ibid.*, p. 367, p. 368.

41 *Ibid.*, pp. 368-369.

42 *Ibid.*, p. 369.

43 *Ibid.*, p. 369.

44 *Ibid.*, p. 369-

To conclude this conceptual overview which so far illustrates various, but affirmatively inclined corresponding insights about why, how and in what forms European identity is or could be envisioned, it is also needed to complement these views with more critical standpoints regarding the same subject. In this regard it is important to refer to several critical concerns about the EU's approaches in the cultural field directed towards the European identity building process by Shore who, from anthropological point of view, emphasizes that the EU lacks common culture and for that reason "there is no popular 'European consciousness' to rival that of the nation-state or lend support to those economic and legal foundations."[45] In the same context Shore recognizes that legitimacy represents the biggest problem to European integration because "the 'European public', *or demos*, barely exists as a recognizable category."[46] Therefore, since the success of the Single market and the EU in general depends on the ability of its institutions to foster collective sense of "Europeanness", Shore recognizes how for that reason, since the 1980s, the EU institutions have intensified their involvement in the field of its vaguely defined "cultural sector", which in addition to arts, heritage and media also encompasses areas such as information, tourism, education and sports.[47]

Moreover, besides growing commercial aspect of "culture" under the EU's legal framework, the main reason behind this involvement lies also in a fact that "notion of culture itself is now recognized as a key dimension of European integration."[48] So, since "European idea" promoted by the EU representatives implies "identity-formation" as well as "culture building", Shore is providing answers to self-posed questions regarding "*how* is this new Europe being imagined, and whose images prevails?" by analysis of what he ascribes as the "agents of European consciousness".[49] More precisely, according to Shore this term refers to "all those actors, actions, artefacts, bodies, institutions, policies and representations which, singularly or collectively, help to engender awareness and promote acceptance of the 'European idea'."[50] Thus, Shore argues that these elements "all contribute to creating the conceptual and symbolic foundations that make it possible to *imagine* the new Europe as a political entity and community, and conceive of one*self* as part of that community."[51] In this regard Shore concludes that purpose of "Eu-

45 Shore, C., *Building Europe: The Cultural Politics of European Integration*, London: Routledge, 2000, p. 18.

46 *Ibid.*, p. 19.

47 *Ibid.*, pp. 20-25.

48 *Ibid.*, p. 25.

49 *Ibid.*, p. 26.

50 *Ibid.*

51 *Ibid.,* pp. 26-27.

ropeanisation" apparently is "to reconfigure not only the map of Europe but the terms and processes by which people in Europe perceive themselves and construct their identities."[52]

3. ASSESSING THE EXTENT TO WHICH EUROPEAN CITIZENS AFFILIATE WITH THE EU AT TIMES OF CORONAVIRUS PANDEMIC: REVIEW OF RECENT EUROBAROMETER SURVEYS

With the aim of assessing the extent to which the EU citizens are currently affiliating with the European Union, especially with regard to the response of the EU to confront the Coronavirus pandemic, it is adequate to rely upon recent Eurobarometer surveys conducted during the 2020. In addition, it is needed to notice that, since these surveys are requested by the European Commission, this also indicates that up-to-date reflections about the level of affiliation of the European citizens to the Union are of great importance to the EU institutions. Nevertheless, what follows is concise review and analysis of certain aspects covered by specifically designed Eurobarometer surveys carried out recently with purpose to provide insights about the European Union Citizenship and Democracy[53] and the Future of Europe[54].

Therefore, although survey on European Union Citizenship and Democracy was conducted at the beginning of Coronavirus pandemic in Europe (i.e. in February-March 2020), still, it offers fairly up-to-date findings about the extent to which Member States nationals are aware of their EU citizenship by offering insight regarding several corresponding areas. Specifically, these areas in general explore the awareness, attitudes and opinions of the respondents on the following issues: their EU citizenship status, their EU citizenship rights, their views on free movement within the EU and available benefits while staying in a non-EU countries, their electoral rights when residing in other EU countries, and finally, their views on the measures which could increase the turnout in European elections.[55] Accordingly, some of the key findings of this survey in general indicate that majority of respondents (91%) are highly familiar with the term "citizen of the European Union" as well as on average they are also highly aware of certain EU citizens' rights (81%).[56]

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52 *Ibid*., p. 27.

53 Flash Eurobarometer 485, *European Union Citizenship and Democracy*, Summary, Fieldwork: February-March 2020, Kantar, European Union, 2020 (Flash Eurobarometer 485).

54 Special Eurobarometer 500, *Future of Europe*, First Results, Fieldwork: October-November 2020, Kantar, European Union, 2021 (Special Eurobarometer 500).

55 Flash Eurobarometer 485, *op. cit.*, note 53, pp. 1-3.

56 *Ibid.*, p. 5.

Moreover, majority of respondents (84%) think that the economy of their countries benefits from the free movement of the EU citizens, and likewise they are mostly (71%) aware of their electoral rights at European, national, regional and municipal levels.[57] Furthermore, for majority of respondents (63%) it is justifiable that EU citizens who are living in the EU country other than their own may vote on national elections and referendums in their country of residence.[58] Finally, regarding the views of respondents about the measures which could increase the turnout in the next European Parliament elections, most of them expressed greater willingness to vote if more information was provided about both, the effects of the EU on their lives and programs of candidate parties (both 79%).[59]

Apparently, despite the fact that this survey reflects certain stands of the Member States nationals prior to Coronavirus pandemic, yet, it indicates that in contemporary moment respondents are to a large extent aware of their European citizenship status, rights and benefits. Moreover, results of this survey also provide insights about respondents' views on actions which, if applied, could potentially increase their political participation at the EU level, and therefore increase their affiliation with the EU.

However, in order to more closely assess the extent to which the EU citizens are affiliating with the Union with regard to the response of the EU to confront the Coronavirus pandemic, it is necessary to complement previous insights with recent survey on the Future of Europe. In this regard it is needed to signify that this survey was carried out during the second wave of the Coronavirus pandemic in Europe (i.e. in October - November 2020), and for that reason sheds more light on the current stands and perceptions of the EU citizens regarding the EU in general, and its role in confronting the Coronavirus pandemic in particular. Apparently, this survey accentuates contemporary views of European citizens about the future of Europe as its central issue, but it also explicitly explores their contemporary views regarding the EU's response to the Coronavirus pandemic. More precisely, areas covered by this survey examine respondents' views on the following issues: their attitudes towards the EU, their ability to be heard at the EU level, their opinions about the Conference on the future of Europe, their views on the future of Europe, and finally, their stands regarding the approach of the EU to confront the Coronavirus pandemic.[60] Nonetheless, due to limited framework of this paper and its thematic context, it is adequate just to refer to certain findings

[57] *Ibid.*

[58] *Ibid.*

[59] *Ibid.*, p. 6.

[60] Special Eurobarometer 500, *op. cit.*, note 54, pp. 3-6.

which correspond to major questions of this paper within selected issues covered by this survey. Therefore, some of the findings in the context of exploring the attitudes of the EU citizens towards the EU indicate that almost half of respondents have positive image of the EU (47%), whereas a significant number of them views the EU neutrally (39%) and minority negatively (14%).[61] However, it is significant to notice that in regard to perceived evolution of the EU's image in the period over the past six month - which refers to period during the pandemic which took place approximately between May and October 2020 - most respondents haven't changed their image of the EU (60%), although some did in both negative (26%) and positive (13%) direction.[62] Also, most of the respondents (60%) confirmed that the Coronavirus pandemic made them reflect on the future of the EU.[63]

Likewise, it is noticeable that Coronavirus pandemic have made recognizable impact on respondents' viewpoints regarding the future of Europe. In other words, findings indicate that as a main EU's assets respondents rank the respect for democracy, human rights and the rule of law (32%), and then its economic, industrial and trading power (30%). But also, besides valuing the standard of living of the EU citizens (23%), it is significant to notice that respondents consider the good relationship and solidarity between the EU's Member States (23%) to be on top of the most important assets of the EU.[64] Furthermore, it is as well noteworthy that along with challenges such as climate change (45%), terrorism (38%) and forced migration and displacement (27%), respondents also view health-related risks (37%) as one of the main challenges for the future of the EU.[65] Moreover, it is interesting to indicate that besides comparable living standards (35%), among the most helpful developments for the future of Europe respondents view stronger solidarity among Member States (30%) as well as development of a common health policy (25%).[66] Also, among respondents' explicit views regarding the approach of the EU to confront the Coronavirus pandemic, findings indicate that in their opinion the EU should prioritize the development of European health policy (32%), as well as it should increase investments for treatments and vaccinations (30%) and develop a European strategy in order to be able to face a similar crisis in the future (26%).[67] Lastly, in regard to the EU's financial response to the Coronavirus pandemic respondents mostly consider it to be effective, which in

61 *Ibid.*, 9-10.
62 *Ibid.*, p. 11.
63 *Ibid.*, p. 12.
64 *Ibid.*, p. 26.
65 *Ibid.*, p. 28.
66 *Ibid.*, p. 30.
67 *Ibid.*, p. 33.

particular refers to their views on the effectiveness of the EU's financial support to keep people in jobs (74%), including public subsidies to companies facing difficulties (72%) as well as the "Next Generation EU" recovery plan (68%), and the effectiveness of allowing national governments to make public deficit to support the economy (67%).[68]

In general, according to these findings it can be emphasized that Coronavirus pandemic had significant impact on respondents' views regarding the EU and its future. Specifically, this is evident by observing the facts which imply that respondents have ranked the good relationship and solidarity between the EU's Member States among the most important EU's assets, as well as they view health-related risks as one of the main challenges for the future of the EU. Moreover, the impact of Coronavirus pandemic is further evident by respondents' attitudes which indicate that stronger solidarity among Member States and prioritization of the development of common health policy are to be considered among the most helpful developments for the future of Europe. Lastly, it can be argued that according to views of respondents - which indicate that the EU should prioritize the development of its common health policy, increase investments for treatments/vaccinations, and establish a common strategy to face similar crisis in the future - all point to certain aspects, which have potential if applied successfully with existing financial supports, to rise the affiliation of the European citizens towards the EU in and after the Coronavirus pandemic.

4. APPROACHING SOLIDARITY ACTIONS OF THE EU AND ITS CITIZENS TO CONFRONT THE CORONAVIRUS CRISIS AS INSTRUMENTS THAT FOSTER EUROPEAN UNITY

4.1. The response of the EU to confront the Coronavirus crisis through solidarity actions

With the aim to provide insights about solidarity actions directed to confront the Coronavirus crisis by the EU institutions, firstly it is needed to indicate solidarity dimension of such major initiatives, and then, to identify other, more informal EU's solidarity actions which transcend mere financial support, and for that reason can be viewed as instruments that are explicitly or implicitly enhancing a sense of cohesion and unity among the European citizens. Therefore, it is important to signify that the EU institutions have reacted promptly (i.e. 30 March 2020) to the outbreak of the Coronavirus by amending existing provisions of the EU Solidarity Fund in order to provide urgent assistance to Member States facing not

[68] *Ibid.*, p. 35.

just natural disasters, but also major public health emergencies. More precisely, according to its competences and in line with the principle of subsidiarity, the EU institutions have expressed their motivation to do so by amending Regulation (EU) 2020/461 in the following words: "In the event of major public health emergencies, the Union should show its solidarity with Member States and the population concerned by providing financial assistance to help the population affected, to contribute to a rapid return to normal living conditions in the affected regions and to contain the spreading of infectious diseases."[69]

However, the most evident and exceptional response of the EU institutions to confront the Coronavirus pandemic is reflected in the overall composition of its new long-term budget for the period 2021-2027, which together with its recovery instrument amounts EUR 1.8 trillion. Namely, adopted in December 2020, the EU's new Multiannual financial framework (2021-2027)[70] amounts EUR 1.074 trillion, whereas its Recovery Instrument (i.e. "Next Generation EU")[71] amounts EUR 750 billion. In this regard, and due to limited format of this paper, it is adequate just to emphasize that, in general, both instruments contain specifically designed solidarity measures which are aiming to "help repair the economic and social damage caused by the coronavirus pandemic and steer the transition towards a modern, sustainable and resilient Europe."[72] Nevertheless, since the purpose of the EU's Recovery Instrument is explicitly directed to face the Coronavirus crisis, it is noteworthy that one of its aims signifies integrative dimension of this initiative by supporting "measures in the form of reforms and investments to reinvigorate the potential for sustainable growth and employment in order to strengthen cohesion among Member States and increase their resilience."[73]

Moreover, besides mentioned formal actions directed to tackle the Coronavirus pandemic which inevitably contain solidarity dimension, the EU institutions have also initiated, supported or promoted various informal solidarity actions which can be viewed as instruments that enhance cohesion and unity among the EU

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69 Regulation (EU) 2020/461 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EC) No 2012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency (OJ L 99, 31.3.2020, p. 9–12), preamble.

70 Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 (OJ L 433I, 22.12.2020, pp. 11-22).

71 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (OJ L 433I, 22.12.2020, pp. 23-27) (Council Regulation (EU) 2020/2094).

72 *The EU's 2021-2027 long-term Budget and NextGenerationEU: Facts and figures*, European Union, 2021, p. 6.

73 Council Regulation (EU) 2020/2094, art 1.

citizens. In view of that, it is suitable to refer to the webpages within the official website of the European Union (i.e. Europa.eu) as a source which contains relevant information about the common EU response to COVID-19.[74] In this context, among the available information on the given subject at this web source, it is relevant to concisely reflect upon the provided materials complied under the online initiative titled "European solidarity in action", which, in general, points users to various activities, testimonials and stories of European solidarity provided by the subsequent webpages of the European Parliament (i.e. webpage #EuropeansAgainstCovid19), the European Commission (i.e. webpage Coronavirus: European Solidarity in action) and the European Council along with the Council of the EU (i.e. webpage European Solidarity in action: Europeans vs COVID-19).

Therefore, on the indicated webpage of the European Parliament users can get insights about numerous stories of European solidarity across the Member States, as well as they can get involved personally in sharing and promoting similar cases by the initiative #EuropeansAgainstCovid19. In this regard, it is worth noticing that this webpage also contains narratives that promote common actions in facing the Coronavirus crisis such as: "It's not in division that we move forward, it's in togetherness".[75] Likewise, previously specified webpage of the European Commission presents various solidarity actions taken by the EU institutions, its Member States, citizens and companies to face the Coronavirus crisis by indicative examples of European solidarity in treating patients, protecting health workers and citizens, bringing people home and supporting asylum seekers. In view of that, among these initiatives it is as well significant to point at the European Solidarity Tracker - an interactive application that offers to users a visual representation of solidarity interactions among the EU Member States and the EU institutions.[76] In a similar way, it can also be noticed that mentioned webpage of the European Council and the Council of the EU contains unifying narratives reflected in syntaxes such as "Europeans vs COVID-19" and "We stand together" - used for titles of the webpage content. Correspondingly, this webpage also presents to users various examples of European solidarity in treating patients, sharing medical supplies and bringing EU citizens home, as well as it provides examples of the Member States supporting one another during the Coronavirus crisis.[77]

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74 Europa.eu. *The common EU response to COVID-19*, [https://europa.eu/european-union/coronavirus-response_en], Accessed 9April 2021.

75 Europarl.europa.eu. *#EuropeansAgainstCovid19*, [https://www.europarl.europa.eu/europeans-against-covid19/en/], Accessed 9April 2021.

76 Ec.europa.eu. *Coronavirus: European Solidarity in action*, [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/coronavirus-european-solidarity-action_en], 9 Accessed April 2021.

77 Consilium.europa.eu. *European Solidarity in action. Europeans vs COVID-19*, [https://www.consilium.europa.eu/en/policies/coronavirus/european-solidarity-in-action/], Accessed 9 April 2021.

Lastly, although it can be emphasized that this overview illustrates that the EU's response to the Coronavirus crisis, through its both formal and informal initiatives, has solidarity dimension which can enhance a sense of cohesion and unity among the European citizens, still, the reach and effectiveness of these actions remains questionable. With this in mind, it seems suitable to conclude this subchapter - and to pave the way for the following one - by pointing at the important role of civil society in recovery of Europe. Namely, this will be portrayed by briefly referring to Resolution adopted by the European Economic and Social Committee (EESC) in June 2020 which holds the following formal title, but also explicitly descriptive and suggestive subtitle that resonate evident integrative dimension: Resolution on "EESC proposals for post-COVID-19 crisis reconstruction and recovery: *"The EU must be guided by the principle of being considered a community of common destiny"*".[78] In this regard, since the EESC as an official consultative body of the EU represents - among various economic and social interest groups - also, the civil society organizations at the EU level,[79] it is noteworthy that in the introductory part of specified Resolution it is stated that "The participation of all citizens, through the organizations of the social partners and of civil society, will make the process of reforming the economy and society possible. The Member States and the EU must therefore ensure that in this complex process no one is left behind."[80]

4.2. The response of representative CSOs active in the field of promoting European citizenship to confront the Coronavirus crisis through solidarity actions

Since it was previously indicated that the EU's response to the Coronavirus crisis has solidarity dimension which can enhance cohesion and unity among the EU citizens, it is also necessary to complement these considerations with insights about the same matter beyond the EU institutions, that is, from the perspective of civil society organizations (CSOs) active in promotion of European citizenship. Therefore, in order to do so, first it will be needed to present representative CSOs in the context of the subject matter, and then, to provide a concise review of their solidarity actions which can be viewed as instruments that, from horizon-

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78 Resolution on 'EESC proposals for post-COVID-19 crisis reconstruction and recovery: "The EU must be guided by the principle of being considered a community of common destiny."' based on the work of the Subcommittee on post-COVID-19 recovery and reconstruction, OJ C 311, 18.9.2020, p. 1–18 (Resolution on 'EESC proposals for post-COVID-19 crisis reconstruction and recovery).

79 Eesc.europa.eu. *European Economic and Social Committee, About*, [https://www.eesc.europa.eu/en/about], Accessed 12 April 2021.

80 Resolution on 'EESC proposals for post-COVID-19 crisis reconstruction and recovery, *op. cit.*, note 78, p. 2.

tal perspective of governance, foster cohesion and unity among the EU citizens. However, prior to do that it is important to stress that from the perspective of the EU institutions civil society plays important role for the European integration process, which has been clearly signified within the Article 11 of the Treaty of Lisbon (i.e. consolidated version of TEU) in the following words: "The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society."[81] Thus, in view of the fact that there are numerous CSOs active at the EU level, it is necessary to provide exemplary insights about the CSOs which are promoting engagement of European citizens at the EU level. In this regard, relevant CSOs which will be presented, along with their actions in response to the Coronavirus crisis, are the Civil Society Europe (CSE), the European Citizen Action Service (ECAS) and The European Civic Forum (ECF).

Accordingly, the Civil Society Europe (CSE) was established in 2014 as a result of cooperation between organizations involved in the European Year of Citizens, and as such it encompasses 28 European CSO networks which are "working towards regenerating the European project around the shared values of Equality, Solidarity, Inclusiveness and Democracy."[82] Also, the CSE is pursuing its aims through partnerships, campaigns, events, projects, publications and its working groups. Nevertheless, the CSE reacted promptly (i.e. April 16 2020) to the Coronavirus crisis by organizing an online campaign titled "Covid 19: Civil society at the forefront" by collecting and presenting through its webpages numerous initiatives made by the European CSOs to confront the Coronavirus crisis. In other words, these initiatives are organized within the categories which are representing available resources, actions and appeals as responses of the CSE members and their partners to the pandemic.[83] In this regard, it is important to note that besides representing a valuable resource on the subject matter, this campaign also indicates that there are numerous CSOs which are currently active at the EU level, as well as it shows that during the Coronavirus crisis they are mutually cooperating or individually providing solidarity initiatives concerning European CSOs in general, and European citizens in particular. Moreover, in regard to its response to the Coronavirus crisis the CSE also reacted with an open letter to the EU institutions a day before the meeting of the European Council (i.e. June 19 2020) which discussed the new EU's budget and its recovery plan. The aim of this letter, cosigned by 52 CSO platforms, was therefore to stress the position and expectations of the European

81 Article 11 TEU (Lisbon).

82 Civilsocietyeurope.eu. *Civil Society Europe - European coordination of civil society organizations*, [https://civilsocietyeurope.eu/], Accessed 13 April 2021.

83 Civilsocietyeurope.eu. *Covid 19: Civil society at the forefront*, [https://civilsocietyeurope.eu/covid-19-civil-society-at-the-forefront/], Accessed 13April 2021.

civil society in the context of this meeting. However, it is notable that among the appeals stressed in this letter, it was also pointed that funding within the area of Cohesion and Values of the new EU's budget "should be targeted to benefit civil society organizations which work to promote and realize EU values at national and local level, supporting their work beyond short-term project grants."[84]

Next relevant CSO on the subject matter is the European Citizen Action Service (ECAS), which is for almost 30 years active in the field of promoting EU rights and European democracy with mission to "empower citizens in order to create a more inclusive and stronger European Union."[85] Also, the ECAS is aiming to achieve its goals through various initiatives, projects, publications, partnerships and trainings. In the context of its response to Coronavirus crisis, it is noteworthy that in January 2021 ECAS has published a study titled "Under a Double Lockdown: The Impact of the COVID-19 Pandemic on Mobile EU Citizens' Rights". In general, this study provides valuable insight about the effects of the pandemic on one of the most important EU rights - the freedom of movement. Moreover, the study also resulted in articulation of recommendations on the subject matter appointed towards the EU institutions.[86] Furthermore, in January 2021 the ECAS organized online Conference dealing with the current issues of the free movement titled "State of the Union Citizens' Rights 2021: Moving Together Beyond the Pandemic".[87] In addition, it is as well important to point at particular ECAS's service that was available before the pandemic, but which gained importance due to the its outbreak. Namely, this refers to a free online service titled "Your Europe Advice" which purpose is to offer legal advices regarding personal EU rights to European citizens by the experts in both the EU and national laws.[88]

Finally, the last representative CSO is the European Civic Forum (ECF), a pan-European network established in 2005 which encompasses more than 110 organizations in 29 European countries. In general, the ECF "connects civic actors, institutions, academics and media through conferences, forums, alliances, and

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84 Civilsocietyeurope.eu. *EU institutions repond to our letter on Europe's recovery after the pandemic and civil society*, [https://civilsocietyeurope.eu/eu-institutions-repond-to-our-letter-on-europes-recovery-after-the-pandemic-and-civil-society/], Accessed 13April 2021.

85 Ecas.org. *European Citizen Action Service*, [https://ecas.org/], Accessed 13 April 2021.

86 Ecas.org. ECAS Publications, *Under a Double Lockdown: The Impact of the COVID-19 Pandemic on Mobile EU Citizens' Rights*, [https://ecas.org/under-a-double-lockdown/], Accessed 13April 2021.

87 Ecas.org. ECAS Publications, *Key Messages from the 'State of the Union Citizens' Rights 2021: Moving Together Beyond the Pandemic' Conference*, [https://ecas.org/key-messages-from-the-state-of-the-union-citizens-rights-2021-moving-together-beyond-the-pandemic-conference/], Accessed 13 April 2021.

88 Ecas.org. *Your Europe Advice (YEA)*, [https://ecas.org/services/your-europe-advice-yea/], Accessed April 13 2021 ; Civilsocietyeurope.eu. *Covid 19: Civil society at the forefront*, [https://civilsocietyeurope.eu/covid-19-civil-society-at-the-forefront/], Accessed 13 April 2021.

campaigns, thus fostering a transnational expression of citizenship, Europeanizing civic participation."[89] Therefore, in a view of the Coronavirus outbreak the ECF also reacted promptly (i.e. 10 April 2020) by sending an open letter (cosigned by numerous European CSOs) to representatives of the EU institutions, with an aim to seek support and to address their major concerns at the EU level regarding the position of the CSOs in the current situation.[90] Moreover, the ECF have also launched an online campaign titled "Solidarity amid COVID - 19 crises" (available at their official webpages), through which they have mapped and made visible a numerous solidarity initiatives coming from CSOs, citizens or businesses across Europe. In the framework of this initiative the ECF have also published a position paper titled "The future must be different from the past" in which they have drafted a "ten lessons learned out of the crisis, for wide discussion".[91] At last, in the context of the overall approach of the ECF to the Coronavirus crisis it is noteworthy to refer to a statement titled "At a distance, united as never before" written by the president of the ECF to its member at the very beginning of the pandemic in Europe (i.e. 16 March 2020). Namely, in this statement among other highlighted points it is also underlined that "We want the EU to be a major actor to organize solidarity in the crisis" as well as it is accentuated that "The crisis tests European claimed values: let's pass this test successfully".[92] Clearly, this narrative signifies a need for common actions to be taken to overcome the Coronavirus crisis in Europe. Moreover, according to presented views these actions should be taken at the European level and by the EU, as well as in accordance with European values.

On the whole, provided insights about the solidarity actions of the representative CSOs to confront the Coronavirus crisis complement previously presented EU's actions. Likewise, they as well indicate that particular representatives of European citizens are approaching the Coronavirus crisis not just as a threat, but also as a chance to enhance cooperation, influence policy-makers and provide assistance to other CSOs and European citizens at the EU level. For that reason, presented reviews of solidarity actions directed to confront the Coronavirus crisis of both, the EU institutions and representative CSOs, can be viewed as complementary instruments that foster cohesion and unity among the EU citizens.

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89 Civic-forum.eu. *European Civic Forum*, [https://civic-forum.eu/], Accessed 13 April 2021.

90 Civic-forum.eu. *Open letter to Ms von der Leyen, Ms Jourova and Mr Reynders: CSOS must be able to act in response to social emergencies*, [https://civic-forum.eu/publications/open-letter/national-platforms-call-eu-commission], Accessed 13 April 2021.

91 Civic-forum.eu. *The future must be different from the past*, *Ten lessons learned out of the crisis, for wide discussion,* [https://civic-forum.eu/position/lessons-learned-from-covid-19-crisis], Accessed 13nApril 2021.

92 Civic-forum.eu. *At a distance, united as never before,* [http://civic-forum.eu/press-release/at-a-distance-united-as-never-before], Accessed 13 April 2021.

5. CONCLUSION

The main aim of this paper was to assess the potential of the EU and its citizens to face the Coronavirus pandemic as a chance to reaffirm the European identity. To achieve this aim qualitative methodology was applied to provide a review and analysis of the responses directed to meet the challenges of Coronavirus crisis by the EU institutions and the CSOs active in the field of promoting European citizenship. As a result of that, the key findings of this inquiry indicate that analyzed initiatives contain solidarity dimension, and therefore, have potential to reaffirm the European identity, that is, to enhance cohesion and unity among the EU citizens.

Accordingly, in this paper it was indicated that evolving approaches of the EU institutions aimed at bringing European citizens closer to the Union have found its articulation in European citizenship - a concept which fosters identification with the European Union and for that reason is closely related with the notion of the European identity. However, broader conceptualizations of European identity (or identities), beyond the official EU's views, indicate a contested nature of this concept, which in general refers to variety of possible ways of belonging to the EU and Europe, none of which is in tension with national identities. Nevertheless, since the prospect of the EU project depends on the consent of the Member States nationals - who are simultaneously the EU citizens - it is not surprising that occurrence of the Coronavirus pandemic and initial discords of the EU leaders on how to deal with it, have been regarded by many as a great test of persistence for the Union. For this reason, reviewed recent Eurobarometer surveys provide valuable insights. More precisely, they indicate that the Coronavirus pandemic had significant impact on respondents' views regarding the EU and its future. Still, they are also pointing to a potential of the EU institutions to bring their citizens closer to the Union in and after the Coronavirus pandemic, if they attain their expectations (e.g. by prioritizing the development of common health policy).

Moreover, provided insights about the solidarity actions of the EU and representative CSOs to confront the Coronavirus crisis suggest that they can be viewed as complementary instruments that foster cohesion and unity among the EU citizens. Likewise, this also suggests that ability to further utilize this potential may have positive impact on the European integration process in and after the pandemic. Nonetheless, the results also reveal that the extent and effectiveness of both, reviewed and future similar initiatives, remains questionable due to still unknown outcomes of the Coronavirus pandemic. In other words, it can be argued that further actions of the EU in handling this pandemic, will be the main source of either beneficial or detrimental effects regarding the level of cohesion and unity

among the EU citizens. In view of that, it can be expected that European CSOs, and specifically those active in promotion of European citizenship, will continue to influence EU policy-makers to articulate decisions aimed at facing the Coronavirus pandemic in alignment with the European values expressed in the EU Treaties, and which inevitably promote unity in solidarity. In this regard, European CSOs shouldn't merely promote official EU views, but should remain to be constructively critical whenever is necessary.

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UDK 336:061.1(4-67EU)]:340.131
Review article

"WOULD MONEY MAKE A DIFFERENCE?": HOW EFFECTIVE CAN THE RULE-OF-LAW-BASED PROTECTION OF FINANCIAL INTERESTS IN THE EU STRUCTURAL AND ENLARGEMENT POLICY BE?

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ABSTRACT

In recent years, the rule of law and, especially, its "proper" implementation has become one of the most debated topics in Europe in recent years. The "Big Bang Enlargement" marked the beginning of dilemmas whether the new EU Member States fulfil the necessary rule of law criteria and opened the way for divergent views on how to implement TEU Article 2 values in practice. Furthermore, constant problems and difficulty of the candidate countries to fulfil the necessary rule of law criteria added to the complexity of the problem. In turn, the European institutions have tried to introduce a series of mechanisms and procedures to improve the oversight and make the states follow the rules - starting from the famous Treaty on the European Union (TEU) Article 7, the Rule of Law Mechanism, annual reports on the rule of law and the most recent Conditionality Regulation.

The Conditionality Regulation was finally adopted in December 2020 after much discussion and opposition from certain EU Member States. It calls for the suspension of payments, commitments and disbursement of instalments, and a reduction of funding in the cases of general deficiencies with the rule of law. On the other hand, similar provisions were laid out in the February 2020 enlargement negotiation methodology specifying that in the cases of no progress, imbalance of the overall negotiations or regression, the scope and intensity of pre-accession assistance can be adjusted downward thus descaling financial assistance to candidate countries.

The similarities between the two mechanisms, one for the Member States, the other for candidate countries shows an increased sharing of experiences and approaches to dealing with possible deficiencies or breaches of the rule of law through economic sanctioning, in order to resolve challenges to the unity of the European union. The Covid-19 pandemic and the crisis it has provoked on many fronts has turned the attention of the Member States (i.e. the Council) away from the long running problematic issues. Consequently, the procedures against Poland and Hungary based on the Rule of Law Mechanism have slowed down or become fully stalled,

while certain measures taken up by some European states have created concerns about the limitations of human rights and liberties.

This paper, therefore, analyses the efforts the EU is making in protecting the rule of law in its Member States and the candidate countries. It also analyses the new focus of the EU in the financial area where it has started to develop novel mechanisms that would affect one of the most influential EU tools – the funding of member and candidate countries through its structural and enlargement policy. Finally, it attempts to determine and provide conclusions on the efficiency of new instruments with better regulated criteria and timing of activities will be and how much they would affect the EU and its current and future member states.

***Keywords**: rule of law, financial interests, Western Balkans, EU, Covid-19*

1. INTRODUCTION

The breach of the fundamental values of the TEU Article 2,[1] and more concretely the rule of law, pertains to the most serious violation of the Union acquis. This matter touches upon the most sensitive and core values which should be unequivocally ensured and shared among the Member States. In order to have a Union across which the acquis is equally valid in all its constituent members, there needs to be a common understanding about what these values are, along with a full and indubitable respect and commitment to them. Numerous examples of various views on what the rule of law is abound in theoretical research.[2] At the same time, the practical side of it, i. e. how the rule of law should be practically implemented, monitored, safeguarded and sanctioned in the cases of possible violations, has shown that the rule of law is becoming an ever more divisive issue for the EU.

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1 Article 2 of the Treaty on European Union: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" - Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01

2 More on this from extensive literature that exists: Tamanaha, B., *On the Rule of Law, History, Politics, Theory,* Cambridge University Press, Cambridge 2004; Peerenboom, R. *Varieties of Rule of Law: An Introduction and Provisional Conclusion,* Asian Discourses of Rule of Law, Routledge Curzon, 2014; Skaaning, S.; Moller, J., *Systematizing Thin and Thick Conceptions of the Rule of Law,* APSA 2010 Annual Meeting Paper, 2010; Beaulac S., *What Rule of Law Model for Domestic Courts Using International Law in States in Transition: Thin, Thick or 'A La Carte*', Transitional Justice Institute Research Paper No. 10-13, 2019; Peirone F., *The Rule of Law in the EU:* Between Union and Unity, 15 Croatian Yearbook of European Law & Policy, No. 57, Zagreb, 2019.; Palombella, G., *The Rule of Law as an Institutional Ideal, The Rule of Law and Democracy*, in: L. Morlino L.; Palombella, G. (eds.), Internal and External Issues, Brill Publishing, 2010.; Raz, J., *The Rule of Law and Its Virtue*, in: Raz, J. (ed.), The Authority of Law: Essays on Law and Morality, Clarendon Press, Oxford, 1979.

What is more problematic is the fact that the EU has been entirely unprepared for rule of law backsliding in its democratic Member States.[3]

Proposals for and the already implemented monitoring and reporting mechanisms that came in the last decade have bourgeoned, but rarely succeeded to alter or stop the deteriorating state of the rule of law in the EU. In recent years, the EU has tried to bring together the initiatives and contingency procedures such as TEU Article 7, the Rule of Law Framework, and annual reports on the rule of law; it has finally established the European Public Prosecutor's Office and in the recent period invested considerable efforts to bring the issue of the rule of law to the forefront of the budgetary discussions with the proposed new mechanisms of financial conditionality based on the respect for the rule of law. This has added to the ongoing debate on how to find a way of dealing with the growing problem of opposing views on what the rule of law is, how it is to be respected, promoted and protected - in tandem to preserving the Union as it is.

This article tries to answer the question whether the new mechanism of the recently adopted Conditionality Regulation together with the existing rule of law mechanisms will start to make change with its better regulated procedures, stricter deadlines and more focus on the funds that are disbursed to the Member States. It also tries to address the introduction of a similar conditionality for the enlargement countries, where the rule of law should condition disbursement of pre-accession assistance. These two recent initiatives have been welcomed by those who advocate the rule of law as a *sine qua non* for the survival of the Union based on the common values where no aberrations are allowed. Time shall say if this move will help unity or actually lead to more misunderstandings and difficulties for the 'European project'.

2. RULE OF LAW AND EU INSTITUTIONS

The already famous TEU Article 7 is a prime and the most valued example of the sanctioning mechanism that can be used to protect the value of the rule of law in the EU. It has been towering over the two Central European Member States, but also over the unity and future of the European Union as we know it. The European Council conducted a hearing of the two states for the clear risk of a serious breach of the rule of law by the authorities of Poland and Hungary. However, it has not yet formally started a discussion on Article 7 directed at Poland through

[3] Kochenov, D., *The Acquis and Its Principles, The Enforcement of the 'Law' versus the Enforcement of 'Values' in the EU*, in eds. Jakab, A.; D., The Enforcement of EU Law and Values, Ensuring Member States' Compliance, Oxford University Press, Oxford, 2017, p. 24.

the procedure initiated by the European Commission four years ago, nor directed at Hungary following the initiative of the European Parliament (EP) in 2018. The only similar action of this sort was the one with Austria after the election of the extreme right-wing Haider Government in 2000. In the words of Cramer and Wrange "The Haider affair, in a sense, put the finger on a gap between the basic idea prevailing in the treaty on European Union… and the common values of human rights".[4] The failure to enact a cordon sanitaire against the ruling coalition and the subsequent withdrawal of measures after the Three Wise Men Report,[5] ended the experiment with the suspension of certain rights of the Member State concerned. Consequently, the whole affair had such a profound effect on the Council that Member States have been reluctant to openly act in a similar way towards their fellow Member State in the Council. In spite of this, Article 7 was further strengthened to clarify procedures in the cases of similar problems with fellow Member States. However, the procedures still allow the Council to decide on a common position without time-constraints, and allow for the process of sanctioning to continue. Considering the challenges that the EU has been facing, it would be, difficult, therefore, to predict when or whether the European Council will hold a debate on Poland and Hungary, which would be the next required step according to the procedures, or to vote with four-fifths of Member States on the finding of risk to the rule of law in the Member State(s) concerned.

The von der Leyen Commission slowly but steadily continued along the steps of its predecessors. In its Communication on 'Further Strengthening the Rule of Law in the Union'[6] it cautiously stated that the Council's progress in two cases (Poland and Hungary) of activating Article 7 could have been more significant and that the Council should have established new procedures for implementing it in practice. At the same time, it stated the need to set up an early warning mechanism for detecting breaches of the rule of law. In July 2019, the EC published its outline for action in the field of the rule of law.[7] Through the Plan, the Commission announced it would work to deepen the process of monitoring developments in the

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4 Cramer, P.; Wrange, P, *The Haider Affair, Law and European Integration,* SSRN Electronic Journal, 2001, p. 55

5 Report on the Austrian Government's Commitments to the Common European Values, in Particular Concerning the Rights of Minorities, Refugees and Immigrants, and the Evolution of the Political Nature of the FPO (The Wise men Report) by Martti Ahtisaari, Jochen Frowein, Marcelino Oreja, Paris, 8 September 2000.

6 Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps, COM/2019/163 final Brussels, 3 April 2019.

7 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening the rule of law within the Union, A blueprint for action COM/2019/343 final, 17 July 2019.

field of rule of law in the Member States through the so-called 'rule of law review cycle'. This initiative became one of the most critical issues for the Council in the ensuing debate as Poland and Hungary opposed the proposal, but ultimately they could not prevent the review. The resulting review became a reality in September 2020 with the Rule of Law Report.[8] The scope of the report includes the existence of systemic problems in the law-making process, the ability of member states to fight corruption, media pluralism and freedom, and the ability of the judiciary to function independently. The basis of the Report is found in the Venice Commission's rule of law checklist.[9]

This Member State-by-Member State assessment of 27 country complements other EU instruments such as the EU Justice Scoreboard, the European Semester, and the most recent Next Generation EU instrument. However, the annual assessment will take time to become truly effective and have a deterrent effect. A significant challenge is the time required for the new mechanism to really take root and have an impact. During that time, however, certain Member States could further develop their vision and version of the rule of law and insist on national and constitutional identity, as can be seen in the case of Hungary and Poland, but also in the case of the already reasoned judgment of the Federal Constitutional Court of Germany in the Weiss case.[10]

The Commission will continue to review the effectiveness of the existing procedure for identifying breaches of the acquis, as well as call on the Council to clearly support its efforts to establish unambiguous deadlines and guidelines when the Rule of Law Framework is activated. There is also a question of further non-functionality of the system if, for example, after the Commission initiates proceedings before the Court of Justice of the EU and this results in a certain member state still not complying with a judgment of the Court. In that case, the Commission is left with only a fine in accordance with Article 260 TFEU, with the Commission determining the amount of the lump sum or penalty to be paid by the Member State which it considers appropriate in the circumstances. In this context, the question could immediately be asked how high the punishment would have to be in cases of violation of the rule of law to really provoke a reaction from a member state. In the proceedings so far, fines have proven to be effective, however the question is if they could apply to fundamental values and produce the wanted effect. It

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8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 2020 Rule of Law Report, The rule of law situation in the European Union, COM/2020/580 final, 30 September 2020, Brussels.

9 European Commission for Democracy through Law (Venice Commission) Rule of Law Checklist, CDL-AD (2016)007rev, Strasbourg, 18 March 2016.

10 BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 -, paras. 1-237.

remains to be seen whether the Commission and Council's approach, which Pech, Wachowiec and Mazur call "oscillation between procrastination and dereliction of duties … endangering the functioning of the EU legal order"[11] will transform into a more coherent and unison mechanism of dealing with the risks to the EU law and the unity of the Union.

On the other hand, the European Parliament, having less restrictions than the Council or the Commission, and considering its political nature, has already proposed concrete procedural changes in the area of the rule of law. The directness of the changes is best summed up its 'Resolution on the Rule of Law Mechanism' from 2016.[12] Namely, the EP proposed that Article 2 TEU and the Charter of Fundamental Rights become the legal basis for legislative measures adopted in the ordinary legislative procedure, as well as to enable national courts to initiate proceedings before the Court of Justice of the European Union in regard to the legality of procedures of the Member States. It was also suggested that Article 7 TEU be reviewed in order to determine appropriate and applicable sanctions against any Member State, in order to to identify which rights of Member States that are at fault (including voting rights in the Council) could be suspended. It could also include, for example financial sanctions or the suspension of Union funding, which was a harbinger of the Conditionality Regulation[13] provisions. The EP also proposed that one third of Members of Parliament be allowed to report to the Court of Justice on Union legislation, once adopted and before its enforcement. It is also proposed that natural and legal persons directly or individually affected by the action bring actions before the Court of Justice of the EU for alleged violations of the Charter, either by Union institutions or by a Member State, by amending Articles 258 and 259 TFEU. The issues that the EP pinpointed, raise a very important question on whether the existing procedures in the Treaty and the mechanisms already established leave too much flexibility and manoeuvre-space for the Member States concerned.

The Court of Justice of the European Union ensures that the law is observed in the interpretation and application of the Treaties (TEU Article 19), thus its primary concern is that each Member State has the same understanding of the principle of the rule of law. The application of this principle has to be common and the rules

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11 Pech, L.; Wachowiec, P.; Mazur D., *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In) Action,* Hague Journal on the Rule of Law, The Hague, 2021, p. 42.

12 European Parliament Resolution with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), Brussels, 25 October 2016.

13 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

have to be the same, a fact that has been confirmed on multiple occasions through the case law[14] making the Court into one of the most important custodians of the rule of law in the EU. This practice will only increase since there a number of ongoing rule of law cases before the Court.[15] What is more, the case law of the Court is having an impact on the preparation of the candidate countries[16] for their reforms and adaptation to the EU standards through the negotiation of the Judiciary and Fundamental Rights Chapter. It is, therefore, expected that the Court of Justice through its judgments will additionally clarify the constituent issues pertaining to the rule of law, such as the independence of the judiciary, judicial protection, etc,[17] thus aiding other institutions and advocates of the common approach to this divisive issue.

As it can be seen, the European Institutions have approached the issue of the rule of law from various angles in the past period. The Council, the Commission, the EP and the Court have all added to the build-up of mechanisms and tools the intention of which is to position the rule of law as a necessary respected criterion in all Member States alike. In this process, the EU needs to ensure that through this approach to the rule of law, it does not undermine, or even destroy, adherence to the principle of the rule of law in the Member States.[18] The fine balance between the forces pulling indifferent directions is best seen in the Council, which is the most cautious institution in the decision-making process on the rule of law. Recent developments regarding the acquis that should regulate the conditionality between the respect of the rule of law and the financial means at the disposal of the Member States demonstrate the same causality of relationships and problematics that have marked the processes with other rule of law tools.

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14 For example, the most articulate ones include: Judgment of 23 April 1986, Les Verts v. Parliament, 294/83, EU:C:1986:166; Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C64/16, EU:C:2018:117; and Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C216/18 PPU, EU:C:2018:586.

15 For example, the most recent Advocate General's Opinions in Cases C-487/19 W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court - Appointment) and C-508/19 Prokurator Generalny (Disciplinary Chamber of the Supreme Court - Appointment), where the Advocate General found that the two newly-created chambers of the Polish Supreme Court are liable to fail the requirements established by EU law in a situation where the judges concerned were appointed to those positions in flagrant breach of the national laws applicable to judicial appointments to that Court**.**

16 Matić Bošković, M., *Role of Court of Justice of the European Union in Establishment of EU Standards on Independce of Judiciary,* EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 4, Osijek, 2020, p. 332.

17 Lenaerts, K., *New Horizons for the Rule of Law Within the EU,* German Law Journal, CUP, 2020, p. 34.

18 Kochenov, D.; Bard, P., *Rule of Law Crisis in the New Member States of the European Union: The Pitfalls of Overemphasising Enforcement*, Reconnect, 2018, p. 26.

3. THE RULE OF LAW CONDITIONALITY

Conditionality is a tool that uses conditions attached to the provision of benefits - an instrument that the European Union has been traditionally using in its external mechanisms, either in its trade policies with third countries, or in its neighbourhood and enlargement policy. The nature of this conditionality has been mostly unilateral, the EU being the sole party in the process that "conditions and then decides".[19] The Copenhagen Criteria[20] represent the most explicit example of prescribed conditions that regulate the enlargement process on a "take-it-or-leave-it" basis. In certain cases, a pre-accession conditionality regime was transferred over after the accession date, as in the example when unfulfilled rule of law obligations of Bulgaria and Romania continued to be a condition through a post-accession Cooperation and Verification Mechanism.[21] In recent years, conditionality has increasingly gained more importance within the European Union, as one can see with the entry requirements to the 'eurozone' or to Schengen. Finally, it has also gradually transformed into an "EU internal governance mechanism" that is utilised to "foster compliance, change domestic regulatory frameworks, implement EU policies, encourage structural reforms and advance a wide array of EU objectives at the national level through the route of EU budget".[22] This means that budget conditionality may be credibly used for the purpose of strengthening the authority of the rule of law.

Consideration of EU financial interests through multiannual financial framework and EU budget has always been one of the key worries of the EU. The Commission has aspired to defend the Union's budget against generalised deficiencies, thus aiming to develop efficient and overarching mechanisms that guarantee the safeguard of the huge amounts of financial means it is disbursing to the Member

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19 Vlajković, M., *Uslovljavanje u spoljnoj politici Evropske unije: Izazovi pravno-političkog „izvoza" vrednosti u susedstvo*, Međunarodno javno i krivično pravo u XXI veku, Udruženje za međunarodno krivično pravo, Tara, 2020, p. 318.

20 Membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union - European Council Conclusions, Copenhagen, 21-22 June 1993, p. 1

21 The Mechanism for Cooperation and Verification has been designed by the European Commission to monitor the post-accession implementation of commitments of Bulgaria and Romania in the area of judicial reform, corruption and organised crime. Although set up as a transitional measure in 2007, it is still valid for these two Member States.

22 Vita, V, *Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality*, Cambridge Yearbook of European Legal Studies, Centre for European Legal Studies, Cambridge, 2017, p. 28.

States and its institutions. This is essential if it wants to take care of its revenues, expenditures and assets covered by, acquired through, or due to the Union budget and the budgets of the institutions, bodies, offices and agencies established under the Treaties and budgets managed and monitored by them. The added element to the already existing mechanisms of protecting financial interests is the rule of law element as a necessary pre-condition for any disbursement of financial means. The funds allocated through the EU budget should thus be conditioned not by adhering to financial rules that protect the financial interests of the Member States, but by more indirect links to the respect of the rule of law. The underlining idea is that a Member State has to respect the rule of law principle and apply it according to the agreed rules, otherwise it lacks the credibility of the system and the state that is to spend the Union's budgetary means.

To put it at in concrete terms, Poland and Hungary should jointly receive more than EUR 150 billion[23] in the 2014-2020 financial perspective (114.7 and 35.5 billion euros respectively). Depriving them of this money because of evidenced general deficiencies with the rule of law could cause far-reaching consequences for those governments that rely on these allocations in their budget programming and disbursement. Put into the words of Commission Vice-President Věra Jourová, the mechanism's capacity for encouraging countries like Hungary and Poland to act according to the bloc's principles through financial pressure can be summed up as: "The one who can't understand the values, can understand the money".[24] The conditionality of the budget disbursement on the basis of the respect of the rule of law is thus one of the most sensitive and divisive issues that burdens the discourse of the Council in the recent period. The impact of this rule of law-based-financial-conditionality remains to be seen, but even the long preparations that led to its application have caused much disharmony and trouble.

4. THE DIALOGUE LEADING TOWARDS THE ADOPTION OF THE CONDITIONALITY REGULATION

In the context of the growing initiatives and calls for a more strengthened conditionality on the European funds, on 15 May 2018, the Commission established the 'Proposal for a Regulation of the Council establishing the Multiannual Finan-

[23] *Summary of 2014-2020 EU budget amounts assigned to EU countries for support for specific programmes in the Cohesion Policy and the Common Agricultural Policy*, European Commission, [https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2014-2020/spending/pre-allocations_en], Accessed 15 April 2021.

[24] Maukonen, R., *Věra Jourová: EU underestimated the role of media in upholding democracy*, International Press Institute, 17 Febryary 2021, [https://ipi.media/vera-jourova-eu-underestimated-the-role-of-media-in-upholding-democracy/], Accessed 15 April 2021.

cial Framework (MFF) for the period 2021-2027',[25] which would have the possibility for the Council to adjust the MFF ceilings or to allow "re-budgeting" as a consequence of the lifting of suspension measures decided under the protection of the Union's budget in the case of generalised deficiencies as regards the rule of law in the Member States. The primary aim of the Commission was, therefore, to enhance the link between core values and the distribution of budget funds, i. e.to condition the distribution of EU money on compliance with the rule of law so that EU money no longer funded those governments that do not abide by the rule of law. This was to be done through a new regulation that would specify a general regime of conditionality for the protection of the Union budget.

The European Council concluded on 21 July 2020 that the Union's financial interests should be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU, and underlined the importance of the protection of the Union's financial interests and the respect of the rule of law.[26] This conclusion came after an unusually long European Council meeting and deliberations that took five days (the usual time frame being two days), at the end of which the EU leaders reached a landmark €1.82 trillion budget with a recovery package that includes €390 billion worth of grants and €360 billion worth of loans for dealing with the consequences of the Covid-19 pandemic. The deal on a "conditional regime to protect the budget" was adopted after a long debate and a sharp rift between the Member States. In the end, everybody was, at least to the public, left 'satisfied'. While European Council President Charles Michel stated that it was the first time in European history that the rule of law is a decisive criterion for budget spending, the Prime Minister of Poland, Mateusz Morawiecki expressed his satisfaction that there was no link between the rule of law and funds in the proposed deal.[27]

The general language of the conclusions and these contrasting public statements actually meant that additional discussions were necessary in order to have a compromise to be reached at the latest by the December 2020 European Council i. e. before the start of the next financial perspective 2021-2028. The German Presidency took the tough task of preparing Council Conclusions that would make all the sides satisfied. The compromise on the Multiannual Financial Framework, Next Generation EU and consequently the biggest stumbling block in the nego-

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25 Proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027, COM/2018/322 final - 2018/0132 (APP).

26 European Council Conclusions, Brussels, 17-21 July 2020.

27 Gehrke, L, *How Europe reacted to the new EU budget and coronavirus recovery fund deal*, Politico, 21 July 2020 [https://www.politico.eu/article/madness-and-historic-day-europe-reacts-to-the-budget-deal/], Accessed 15 April 2021.

tiations – the so-called Conditionality Regulation, was finally reached in December 2020. However, the European Council in its conclusions also provided an interpretation of the start of the application of the Conditionality Regulation i. e. the effective implementation of the newest rule of law mechanism.

The interpretative language of the Conclusions was actually a catalyst for the compromise adoption of the full package. The Commission was invited to "develop and adopt guidelines on the way it will apply the Regulation"[28] in close consultation with the Member States. However, before the Commission could do that, the European Council actually envisaged the suspension of the application of the Regulation in the case of an action for annulment is introduced. This would mean that the Commission cannot propose measures under the Regulation and the guidelines cannot be finalised before the judgment of the Court of Justice "so as to incorporate any relevant elements stemming from such judgment".

Obviously, this formula created a lot of stir and various opinions about the "legality of the interpretative declaration" and the award of "a great victory to Orbán and Kaczyński" and "watering down the mechanism".[29] When preparing the Conclusions and defining the language of the possibility to legally challenge the regulation, it was apparent that Hungary and Poland would go that way and thus try to protract as long as possible the application of the act. Although there is an element of finality - as the Court of Justice of the EU will come up with its judgement, either through an emergency procedure (less likely) or in an ordinary one (more likely), and in the case the Court acknowledges the legality of the Conditionality Regulation the start of its application would not be without problems. Essentially, hitting "offending nations in the wallet"[30] could appear to hit back as an extremely strict conditionality sanction that could very much affect the unity of the Council and the overall EU. Already the investment of energy, time and struggle that both sides concerned had put into this extremely politically sensitive process shows us all the magnitude of the problem the EU is facing with the question of the rule of law respect and the mechanisms to protect it.

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28 European Council Conclusions, Brussels, 10-11 December 2020.

29 Scheppele, K. L.; Pech, L.; Platon, S., *Compromising the Rule of Law while Compromising on the Rule of Law, VerfBlog,* 2020/12/13, [https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/], Accessed 15 April 2021, p. 1.

30 Heinemann, F, *Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework,* Inter- economics, Vol. 53, No. 6, Nov.–Dec. 2018, p. 297.

The response of the EP, shortly after the European Summit, was, as per usual, very direct and came in the form of a Resolution;[31] it welcomed the historical political agreements on a EUR 1.8 trillion package and a functioning Rule of Law conditionality. However, it expressed its strong regret that "due to the unanimity rule in the Council", the adoption of the entire package was unduly delayed and reminded that the "content of the European Council conclusions on the Regulation on a general regime of conditionality for the protection of the Union budget is superfluous". It also stressed that the conclusions of the European Council "cannot be made binding" on the Commission in applying legal acts. They underlined that the Parliament would defend the validity of the Regulation before the Court and it would expect the Commission to do the same. Finally, it also announced its readiness to activate Article 265 TFEU to lodge an action for failure to act against the Commission in the case of no activity from the EC. However, although a legal opinion was prepared by the EU Parliament's legal service addressing the legality of the EUCO Conclusions, the decision of the EP Committees was "not to bring a legal action against the Conclusion" on 22-23 February 2021.[32] Thus, although the EP was quite direct in its December 2020 Resolution, it refrained from entering a legal struggle with the Council over the legality of its Conclusions.

Eventually, as was expected, Hungary and Poland launched a legal challenge against the Conditionality Regulation at the Court of Justice of the EU on 11 March 2021. On this occasion, the Hungarian Justice Minister Judit Varga stated that they could not accept that EU legislation "which seriously infringes legal certainty"[33] be kept in force. On the other hand, the Polish Government was even more direct stating that the EU "has no competence to define the concept of 'the rule of law' or to lay down the conditions for assessing compliance with underlying principles".[34] Warsaw based its initiative on the belief that the solutions as expressed in the Conditionality Regulation "do not have a legal basis in the Treaties, interfere with the competences of the Member States and infringe the law of

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31 Motion for a Resolution to wind up the debate on the statements by the Council and the Commission pursuant to Rule 132(2) of the Rules of Procedure on the Multiannual Financial Framework 2021-2027, the Inter-Institutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (2020/2923(RSP), B9-0428/2020, 14 December 2020.

32 Alemanno, A., *The EU Parliament's Abdication on the Rule of Law (Regulation), VerfBlog,* 2021/2/25, [https://verfassungsblog.de/the-eu-parliaments-abdication-on-the-rule-of-law-regulation/], Accessed 15 April 2021.

33 *Poland and Hungary file complaint over EU budget mechanism,* Deutsche Welle, 11 March 2021, [https://www.dw.com/en/poland-and-hungary-file-complaint-over-eu-budget-mechanism/a-56835979], Accessed 15 April 2021.

34 Zalan, E., *Poland and Hungary challenge rule-of-law tool at EU court, e*uobserver, 12 March 2021, [https://euobserver.com/political/151211], Accessed 15 April 2021.

the European Union"[35] as well as that the disbursement of funds from the Union budget should be made subject only to the fulfilment of objective and specific conditions that clearly arise from legal provisions.

At the same time, Members of the European Parliament, in their debate on the same day, requested an expedited procedure at the Court to produce a judgment as soon as possible.[36] Furthermore, the EP adopted a new Resolution on the Conditionality Regulation on 25 March 2021 where they repeated their strong political language of the previous December 2020 Resolution on the same subject; and urged the Commission to adopt the guidelines under the regulation and provide Parliament with information on it by 1 June 2021. In the case it fails to perform this, the "Parliament will consider this to constitute a failure to act and subsequently shall take against the Commission under Article 265 TFEU".[37] At the time of finalising this article, the Court had not rendered a Decision on the respective cases.

5. THE CONDITIONALITY REGULATION MECHANISMS

Aside from all the criticism on the implementation approach that the Council set forth for the Conditionality regulation, this act bestowed a very clear and defined mechanism of dealing with various deficiencies of the rule of law. Article 3 of the Conditionality Regulation specifies indicative breaches of the rule of law as those endangering the independence of the judiciary. Also, a breach could be a failure to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest. Finally, limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and the lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law could also be considered as violation of the rule of law.

At the same time Article 4 defines the breaches of the principles of the rule of law in relation to this Regulation in the field of the proper functioning of the

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35 Skarga do Trybunału Sprawiedliwości UE, Kancelaria Prezesa Rady Ministrow, 11 March 2021, [https://www.gov.pl/web/premier/skarga-do-trybunalu-sprawiedliwosci-ue], Accessed 15 April 2021.

36 *Application of Regulation (EU, Euratom) 2020/2092, the rule of law conditionality mechanism* (debate), European Parliament, 11 March 2021, [https://www.europarl.europa.eu/doceo/document/CRE-9-2021-03-11-ITM-005_EN.html], Accessed 15 April 2021.

37 *Resolution on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism,* 2021/2582(RSP), Brussels, 25 March 2021.

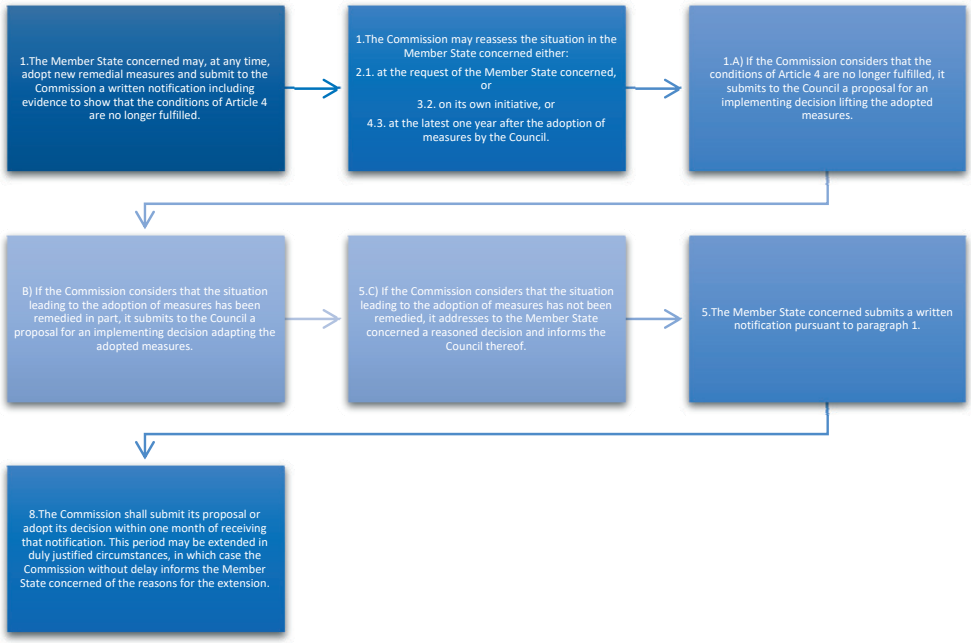
authorities implementing the Union budget and the authorities carrying out financial control, monitoring and audit. Furthermore, the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union will also be under scrutiny. An effective judicial review by independent courts of actions or omissions by the authorities referred to in the previous points will also fall under the scope of the Regulation. The prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union are all important elements of this act. Furthermore, the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities, as well as the recovery of funds unduly paid are under the focus of the Regulation. Finally, effective and timely cooperation with OLAF and with the EPPO in their investigations or prosecutions and other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union are an integral part of the Regulation's scope.

Based on such established breaches, the Commission may, in cases of direct or indirect management, suspend payments or of the implementation of the legal commitment, prohibit entering into new legal commitments; suspend the disbursement of instalments in full or in part or an early repayment of loans guaranteed by the Union budget; suspend or reduce the economic advantage under an instrument guaranteed by the Union budget; and prohibit entering into new agreements on loans or other instruments guaranteed by the Union budget. Where the Commission implements the Union budget under shared management with Member States, it can suspend the approval of one or more programmes or an amendment thereof; suspend or reduce commitments; including through financial corrections or transfers to other spending programmes; reduce pre-financing; interrupt payment deadlines; and finally suspend payments. Throughout all this period, the Commission is obliged to keep the European Parliament and the Council informed of any measures proposed, adopted or lifted.

The procedures of imposing and lifting of measures under the Regulation are best presented in a visual form as they require a very complex mechanism of decision making followed by an involvement of a number of stakeholders.

Table 1: Imposing of measures according to the Conditionality Regulation

Table 2: Lifting of measures according to the Conditionality Regulation



It remains to be seen how the Commission will devise the guidelines for the full implementation of the Regulation in the light of the Council's December 2020 instructions. Justice Commissioner Reynders gave assurances that these instructions to the Commission did not bring any substantial change in terms of substance because the text of the Regulation remained the same after the discussion in

the European Parliament, and that his services are working on the guidelines and collecting evidence from the Member States.[38]

Nonetheless, one can note the very cautious approach and a lot of safety measures before the measures are imposed on a Member State, as well as the omnipresent role of the Council and the EP in the procedures. Elaborate, too complicated, but also, at some points, under-regulated procedures have provided for procrastination of the decision-making within the Article 7 mechanism. The communication and correspondence that the Commission has with a Member State concerned may come in the form of written notifications, structured dialogues, provision of information, observations and proposals. This opens up possibilities for protracting the process while the controversial practices in the Member States related to the rule of law breaches continue unimpeded and at the same time the distribution of EU funding flows unstintingly - even more so in the case of the Next Gen rapid disbursement of the financial means.

Unlike, however, the Article 7 procedures, the Conditionality Regulation now prescribes deadlines and thus limits the possibility of delaying decisions once the notification is delivered to the Member State concerned until the implementing decision is adopted by the Council. This sets an element of finality to the whole process meaning that, once the procedures have been launched, there are strict deadlines to be followed. No matter what the future guidelines by the Commission would be, and on the condition that the Conditionality regulation does not get successfully legally challenged, it would be very important to see the implementation of the provisions of the regulation are applied and the deadlines respected on a practical level. This would be key not only for the sake of the very Conditionality Regulation status, but could also provide an invigorating example for the two Article 7 procedures and very much influence any such mechanism to be used in the enlargement arena.

6. THE ENLARGEMENT PROCESS AT THE ACTUAL MOMENT

The Conditionality Regulation, in its preamble (para 4 and 5), notes that the accession criteria established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995 are the essential conditions that a candidate country has to satisfy to become a Member State of the Union (Article 49 TEU). It also underlines that once a candidate country becomes

[38] *Democracy Institute Event Offers Debate on the Rule of Law in Europe*, Central European University, 26 January 2021, [https://www.ceu.edu/article/2021-01-26/democracy-institute-event-offers-debate-rule-law-europe], Accessed 15 April 2021.

a Member State, it joins a legal structure that is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU. Therefore, the expectations from the candidates for EU membership are at the same level as for the Member States.

This premise of common values i. e. the rule of law has been gradually strengthened and enhanced throughout the last two decades of the enlargement process. The process started with the "Big Bang Enlargement" and the specific arrangements that were implied for the Bulgarian and Romanian entry into the EU through the Cooperation and Verification Mechanism. Later on, the EU put much more focus on Negotiating Chapter 23 and 24 during the Croatian negotiations constantly pointing out the importance of the rule of law in its negotiations with this candidate country.

Finally, this new approach of placing the rule of law and chapters 23 and 24 at the heart of the accession negotiation process was officiated in 2012 with the start of the accession talks with Montenegro. The European Council instituted "the new approach proposed by the Commission as regards the chapters on the judiciary and fundamental rights, and justice, freedom and security and"[39] and later on ,,urged Montenegro to tackle the issues of … the independence of the judiciary, the fight against corruption and organised crime, and the need for Montenegro to step up its efforts in order to establish a solid track record in the course of the negotiations".[40] This marked a new phase of accession negotiations where the Commission was tasked with identifying how a feasible and effective instrument could allow for more balanced and conditional accession talks based on progress in the rule of law. This approach, although somewhat extended to Chapter 35,[41] was later also applied to Serbia when it opened the accession talks in 2014. Although this new approach allowed both candidate states to resolve the deadlock on opening new accession processes and to push forward with the opening of chapters.[42] Montenegro and Serbia are still negotiating and still unable to fulfil the interim benchmarks[43] for the rule of law chapters.

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39 European Council Conclusions 9 December 2011, p. 5.

40 General Position on the Ministerial Meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union, EU Opening Statement for Accession Negotiations, 8339/12, Brussels, 29 March 2012, p. 2.

41 This otherwise usually empty chapter in the case of Serbia dialogue between Belgrade and Pristina.

42 Pejović, A. A., *Vladavina prava u politici prijema u Evropsku uniju,* Matica crnogorska, No. 66, Podgorica, 2016, p. 24.

43 Interim benchmarks are a new generation of benchmarks that were inserted for chapters 23 and 24 within the new approach of negotiations with Montenegro and Serbia for the first time. They represent

Four years after Serbia opened accession talks, in June 2018 the European Council[44] endorsed the conclusions on enlargement and Stabilisation and Association process previously adopted by the Council that set out "the path towards opening accession negotiations in June 2019"[45] and convening an opening accession conference with Albania and North Macedonia by the end of 2019. However, the EU General Affairs Council decided to postpone their decision on opening negotiations to October 2019,[46] and postpone it yet again in October 2019[47] due to the lack of compromise in the Council. Finally, the decision was made on 25 March 2020 during the first lockdowns in Europe, and after the European Commission presented its new methodology in the Communication entitled 'Enhancing the accession process - A credible EU perspective for the Western Balkans'[48] on 5 February 2020. The Council of the European Union, therefore, decided to open accession negotiations[49] under the new methodological framework and invited the Commission to submit a proposal for negotiating framework with Albania in July 2020. This framework should establish the guidelines and principles governing the accession negotiations with the Republic of Albania and should be the basis of all the future work in the accession talks process. Although prepared and extensively discussed by the Member States throughout 2020, the document, however, has not been approved by the Council yet, meaning that the first intergovernmental conference can only be convened after the adoption of the negotiating framework by the Council.

7. THE NEW ENLARGEMENT METHODOLOGY

When the European Commission presented the new enlargement methodology, Member States expressed the expectation that this improved approach would lead to stronger political governance, based on objective criteria and with rigorous conditionality, which may be considered as both positive and negative. A part of

a mid-term mark of progress of a candidate in delivering results in the framework of action plans for these two chapters. Their fulfilment opens up the way to the adoption of closing benchmarks for these two chapters that guide the candidates to the overall conclusion of accession talks.

44 European Council Conclusions, Brussels, 28 June 2018, p. 10.

45 General Affairs Council Conclusions, 26 June 2018, 10555/18, p. 16 & 19.

46 Outcome of the 3702nd Council meeting, General Affairs Council, Luxembourg, 18 June 2019, p. 4.

47 Outcome of the 3722nd Council meeting, General Affairs Council, Luxembourg, 15 October 2019, p. 3.

48 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Enhancing the accession process - A credible EU perspective for the Western Balkans*, Brussels, 5.2.2020 COM (2020) 57 final.

49 General Affairs Council Conclusions on Enlargement and Stabilisation and Association Process - the Republic of North Macedonia and the Republic of Albania, 7002/20, 25 March 2020.

proposed changes will be applied not only to Northern Macedonia and Albania, but also integrated into existing negotiating frameworks with Montenegro and Serbia,[50] which also expressed their intention to join the new methodology in the May and July 2020 respectively. The new methodology accentuated the need that the candidate countries would show their commitment to the strategic goal of joining the Union. The Commission also expressed the expectation that candidate countries should be even more committed to rule of law reforms in order to achieve deeper sectoral integration and overall progress.

One can say that the greatest novelty in the new enlargement methodology is the new architecture of clusters of chapters. The Commission expects the clusters to provide a stronger focus on key sectors in the political dialogue, and that the candidate country could decide which are the most important and urgent reforms by sector. The negotiating chapters are organised in six thematic clusters to bring together the chapters or areas according to broader themes and to allow for a stronger focus on core sectors. Negotiations on each cluster are opened as a whole, with all chapters within the cluster opened simultaneously. The most important Cluster is the first one – the Fundamentals. It is covering the two rule of law chapters 23 and 24, along with the three more chapters on public procurement (5), statistics (18) and financial control (32), as well as the economic criteria, functioning of democratic institutions and public administration reform. Here, one can notice that the issues that are of the greatest interest for the rule of law and the proper functioning of the budget are actually being joined in the fundamentals' cluster.

The negotiations on the fundamentals area will be opened first and concluded last. This will be a very important requirement for the countries that are to open talks, but to Montenegro and Serbia it will impact only the closing phase. Interim benchmarks will still remain for the rule of law chapters within the first cluster, but in the improved new approach, the provisional closures of any chapter will no longer be possible before the interim benchmarks for the fundamentals cluster are fulfilled. The fundamentals cluster, in addition to the rule of law, implies the adoption of additional roadmaps - on the functioning of democratic institutions and public administration reforms.

The new methodology brought more innovations in relation to the mechanism for monitoring progress and the role of the Commission and the Council. In addition to supporting progress in reforms through progress in the negotiation process and financial support, the need for proportionate sanctions for any serious or prolonged stagnation or even lagging behind in implementing reforms and meet-

[50] Non-paper on the application of the revised methodology to Montenegro and Serbia.

ing the requirements of the accession process was emphasised. In serious cases, the Commission will still be able to make proposals to the Council, independently of the annual report, at any time on its own or at the request of a Member State. Member States are thus called upon to make a more systematic contribution to the accession process. On top of that, the EU Member States have been given another more powerful tool in their relations with the Commission through the new methodology. In contrast to the 2012 Enlargement Methodology, when one third of Member States were needed to launch an initiative towards the Commission in the event of breaches of the rule of law,[51] the enhanced 2020 approach brought the possibility that only one Member State can do so. In the context of decision-making in the Council of the EU, Member States could, upon a proposal, decide to postpone negotiations in certain areas, or in the most serious cases, to fully suspend them. Furthermore, already closed chapters can be reopened or rearranged in case certain issues need to be reconsidered.

8. FINANCIAL CONDITIONALITY IN THE NEW METHODOLOGY

The new approach envisages increased investments and funding if a candidate country makes sufficient progress on reform priorities agreed in the negotiations. This would also cover an increased access to pre-accession assistance in line with applicable legal provisions, rules and procedures and a closer cooperation with relevant International Financial Institutions to leverage investments and support. On the other hand, the scope and intensity of pre-accession assistance may also be scaled down in accordance with applicable rules and procedures. An exception to this possible reduction in pre-accession funds would be civil society organisations in the candidate countries.

Unlike the Conditionality Regulation, the downward adjustment of pre-accession assistance has not been elaborated either in the new enlargement methodology or the negotiation frameworks for North Macedonia and Albania. One can only imagine how the procedure would or could be further set down in order to cover the situations in which the EU decides to reduce the funding under the instrument for pre-accession (IPA). Some of the examples that took place in the past offer some ideas but they have been ad hoc solutions for very specific situations. Here, the case of Bosnia and Herzegovina provides an illustrative example.

[51] Article 22 of the *General Position on the Ministerial Meeting opening the Intergovernmental Conference on the Accession of Serbia to the European Union*, EU Opening Statement for Accession Negotiations, AD1/14 Brussels, 21 January 2014, p. 9.

When IPA II for Bosnia and Herzegovina was being planned, an amount of EUR 165.8 million was determined only for the period 2014-2017 instead of 2014-2020 like the other pre-accession countries.[52] The reasoning was that Bosnia and Herzegovina did not meet the first criterion of sectoral approach - the existence of sectoral strategies at the state level, which meant that they could not get help for key sectors: agriculture and rural development, transport, environment and energy - until they adopted them. Bosnia and Herzegovina was at the time gradually moving towards the sectoral approach, but its main weaknesses was the lack of harmonised countrywide strategies in key sectors with clear budget allocations and a medium-term expenditure framework. The way Bosnia and Herzegovina is structured with multiple levels of governance and lack of functional coordination and policy-making mechanisms between the different levels impeded the establishment of solid sector and donor coordination of the country.

This was corrected only during the 2018 revision[53] when the full amount was determined for all seven years 2014-2020 in the amount of EUR 552.1 million. The adoption of a coordination mechanism in EU matters in 2016 was a crucial step forward that allowed for the harmonisation of positions on EU matters among various state and entities' stakeholders in their shared competences. Furthermore, seven sectors met the pre-conditions for implementation of sector approach under IPA II in the period 2018-2020 based on countrywide sector strategies. Once the deficiencies were removed and there was an agreement between the EU and Bosnia and Herzegovina that all the conditions had been met, the full seven-year allocation for Bosnia and Herzegovina was approved.

As one can see, in contrast to the regulated and very defined procedures and roles of various institutions, in the case of postponement of programming the full seven-year allocation for Bosnia and Herzegovina, this was done without any specific prescribed rules, on an ad hoc basis and through the initiative and decision-making processes of the Commission. Considering the notion of the possibility of adjusting the pre-accession assistance in relation to the situation with the rule of law and the deficiencies thereof in the enlargement countries, it would be very important to see if the EU should prescribe the procedures for these cases. The institutions of the EU have a tendency towards heavily regulating procedures that have to tackle sensitive and risky situations, as one can notice in the Article 7 and Conditionality Regulation procedural requirements. The negotiation frameworks for North Macedonia and Albania, on the other hand, regulates in detail a whole

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52 More information on the allocations for the accession countries in: Pejović, A. A., *Instrument pretpristupne podrške Evropske unije* 2007-2027, Evropsko zakonodavstvo, No 72, Beograd, 2020, pp 16-29.

53 *Revised Indicative Strategy Paper for Bosnia and Herzegovina* (2014-2020) adopted on 3 August 2018.

number of very elaborate corrective measures on proportional sanctioning of any serious or prolonged stagnation or even backsliding in reform implementation and meeting the requirements of the accession process.

In the case the EU would really aim to utilise the proposed suspension or downscaling to pre-accession assistance, a further elaboration and specification of the rules and procedures would be necessary if one wants to bring more transparency and understanding to the whole process. It would also allow for both parties to understand what the risks, requirements and procedures could be. However, neither the new enlargement methodology nor the negotiation frameworks for Albania and North Macedonia give any hint that this procedure will be further regulated.

9. RULE OF LAW IN THE CONTEXT OF THE COVID-19 PANDEMIC

What one needs to be aware of is that both the process of strengthening the rules of protection of financial interests of the EU for its Member States and an ever-more stringent conditionality in the enlargement process are operating in very specific surroundings of the Covid-19 virus and its overwhelming impact on Europe and beyond. Ever since the start of the pandemic in Europe, this specific crisis has delayed or slowed down a number of processes and ordinary procedures in the EU. In spite of initial progress including hearings in 2018 and 2019, the proceedings against Poland and Hungary, have almost completely stopped. Apart from that, in aiming to address the pandemic, the measures taken by the governments of certain member states have been seen as a breach of human rights and freedoms due to the state of emergency. Therefore, in a state of emergency, it is not disputable that certain rights and freedoms are revoked because the constitution and laws allow it, but the real issue, like most things related to the content of the rule of law, is related to the scope and depth of these special measures which are assigned during the emergency state, as well as the internal and external reactions to them. For example, the Polish ruling party PiS changed the election legislation in the middle of the pandemic, in order to allow voting by mail, which prompted thirteen EU member states to issue a diplomatic statement[54] in which they expressed deep concern over the risk of violating the principles of the rule of law, democracy and fundamental rights arising from the adoption of certain urgent measures.

[54] Government of the Netherlands, Statement by Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Spain, Sweden, Diplomatic Statement, 1 April 2020.

The same postponement and stagnation of decision-making processes have been visible in the cases of Albania and North Macedonia and their opening of accession talks. Although this was coupled with the reluctance of certain Member States to commence negotiations with new candidate countries. Notwithstanding, the Covid-19 pandemic has also taken its toll on the whole process. Lack of contacts, conferences and meetings have insulated the stakeholders and prevented any real diplomatic communication or lobbying for the official initiation of accession talks.

On the other hand, the Recovery Next Gen Fund has been created to address the urgent needs of the EU Member States in countering and mitigating their problems with the economic, financial and social effects of the virus. Since huge sums will be released in the course of the implementation of the Next Gen funding, the protection of financial interests and the focus on the rule of law as a key requirement will have to find a way to function together. Apart from the disbursement of the EU budget funding, the Next Gen will add to the pressure on the releasing of much more funds than planned, which would also leave less time for the usually sensitive and reluctantly triggered mechanisms in the cases of the rule of law breaches.

10. CONCLUSIONS

Further deterioration of the situation with the rule of law is inescapably going to impact the EU's stability and its future internal integration as well as its enlargement. The rule of law is slowly but consistently creating more and more pressure on the Member States and the EU institutions to find a viable solution acceptable for all parties. Unlike the other issues that overburden the Union, the rule of law controversy destabilises the very foundations of the European project as it touches the core values of the Member States. This has far-reaching consequences and a significant impact on the manner how the EU will build its mechanisms to protect the core values it is based on and thus survive as a union of values.

The EU has developed various mechanisms and tools in recent years to protect the fundamentals of the TEU Article 2. The recently invoked TEU Article 7 procedure, setting up the European Public Prosecutor's Office, upgrades to the Rule of Law Framework and the annual reports on the rule of law – they have all been topped up with a conditionality regulation that would be used to restrict access to the EU funds for actors whose actions constitute the violations of the rule of law.

The latest enlargements have also to a great extent changed the way the EU operates and how it perceives the possibilities of any future entry into the Union. The

last decade oversaw a gradual metamorphosis of the enlargement policy into a tool that is more and more based on strict conditionalities and requirements putting the rule of law at the heart of the process. This has led to a situation where none of the current candidate countries that is either conducting negotiations or is preparing to initiate them can hope to enter the EU in a short-term perspective. The rule of law conditionality brings more complicated and complex conditions on opening and closing chapters, together with very elaborate mechanisms of suspension, blocking and regressing in the accession procedures. This dents the prospects of the enlargement countries to such a degree that no one can predict their date of entry into the Union. Although the provisions on reducing the scope and intensity of pre-accession assistance to candidate countries in the cases of no progress, imbalance of the overall negotiations or the regression have not been specified and further developed in any of the recent enlargement documents, the insertion of this notion into the new enlargement mechanisms is bringing a potential game-changer in the manner pre-accession funds are being disbursed. Now, not only that a candidate country may be suspended or fully stopped in its integration efforts, but it may also lose a part or considerable amount of its pre-accession allocations.

What has become clear, is that the EU is moving towards increasingly developed mechanisms for dealing with possible deficiencies or breaches of the rule of law in connection to the financial tools that the Union has at its disposal, be it its structural funds or pre-accession instruments. The Covid-19 pandemic has added to the problem with the shift of focus to other domains beyond the rule of law. Furthermore, the pandemic has had a stagnating impact on the procedures. Nevertheless, no matter how the pandemic unfolds in the coming period, one can conclude that the already-commenced instruments of monitoring and protection of the rule of law will be further strengthened both in the internal and external policies of the Union.

The Conditionality Regulation comes as an energising new addition in the already long process of struggle to find a common solution for the rule of law respect and protection in the EU. It has tried to rectify the deficiencies of Article 7 procedures and to build upon the latest rule of law framework mechanisms such as the annual reports of the Commission. Now, the focus is on the financial means, an important part of the EU agenda, especially for the pockets of the Member States that joined the Union in 2004 and later. A timid initiative to duplicate this approach onto the access to pre-accession funds in the new enlargement framework, would need to rely on the success of the Conditionality Regulation once it comes to life in order to become as applicable for candidate states as it is with the Member

States. Whether money would finally start to make a difference in both processes, remains only to be seen.

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UDK 342.722:616-036.22
Preliminary communication

ADMINISTRATION OF JUSTICE DURING THE COVID-19 PANDEMIC AND THE RIGHT TO A FAIR TRIAL

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ABSTRACT

On 11 March 2020 the World Health Organization announced the Covid-19 (coronavirus) to be a pandemic. To combat the pandemic, many countries had to adopt emergency measures and some of these measures have affected the judicial system, especially the functioning of courts. The pandemic has been characterised as far as the judiciary is concerned by complete or partial closure of court buildings for the parties and for the public. It is clear that the functioning of national judicial systems has been severely disrupted. This limited functioning of courts impacted the individuals' right to a fair trial guaranteed, in particular, under Article 6 of the European Convention on Human Rights. The aim of this article is to examine the manner of the administration of justice during the Covid pandemic and its impact on the due process guarantees. Focus is put on the extent to which different Covid measures, in particular remote access to justice and online hearings have impacted the guarantees of the right to a fair trial and the due process guarantees in general, notably in detention cases. In this connection, the article provides a comparative overview of the functioning of the European legal systems during the pandemic. It also looks into the way in which the two European courts – the European Court of Human Rights and the Court of Justice of the European Union functioned, as well as the way in which the Croatian courts, including the Constitutional Court, organised their work during the pandemic. The article then provides an insight into the issue of online/remote

* Any opinion expressed in this Article is the author's personal opinion.
* *Ibid.*

hearings in the case-law of the European Court of Human Rights and in the Croatian Constitutional Court's case-law. On the basis of this assessment, the article identifies the differences in the use of remote/online hearings between and within jurisdictions. In conclusion, the article points to some critical considerations that should be taken into account when devising the manner in which any Covid pandemic experience with the administration of justice (notably with regard to remote/online hearings) can be taken forward.

Keywords: *Covid pandemic, functioning of the judiciary, access to court/justice, remote/online hearings, right to a fair trial, detention, European human rights law, European Court of human rights, Court of Justice of the European Union, Croatian Constitutional Court*

1. INTRODUCTION

The Covid pandemic[1] has disrupted the daily life of people worldwide, including the work of all state bodies. Restrictions on the freedom of movement, the lockdown measures and social distancing also impacted the functioning of justice systems, including the work of courts.[2] However, even during the pandemic, judicial institutions were expected to continue to function effectively and to maintain functionality, accountability, transparency, and integrity, ensuring due process and the continuity of judicial activities, including efficient access to justice consistent with the right to a fair trial and other fundamental rights and freedoms.[3]

Access to justice is a fundamental component of the rule of law.[4] It could be argued that at all times, the access to justice must be ensured, and special attention must be devoted to the access to justice by vulnerable groups who are even more affected by extraordinary situations, such as the Covid pandemic.[5] Thus, during

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1 For instance, Council of Europe Secretary General, *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states*, SG/Inf(2020)11, 7 April 2020, p. 2.

2 For instance, Turner, J.I., *Remote Criminal Justice*, Texas Tech Law Review, Vol. 53, No. 2, 2021, p. 198.

3 Resolution 44/9 (16 July 2020), *Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers*, paras 17-18.

4 See further on the different restrictions and their modalities, European Commission for Democracy through Law (Venice Commission), *Report - Respect for Democracy Human Rights and Rule of Law during States of Emergency – Reflections*, CDL-PI(2020)005rev, 26 May 2020; Peršak, N., Editorial: *COVID-19 and the Social Responses thereto: Penal and Criminological Lessons, Human Rights and Rule of Law Implications*, European journal of crime, criminal law and criminal justice, Vol. 28, 2020, pp. 205-216. See also Spano, R., *The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary*, European Law Journal, 2021, pp. 2-5.; Lenaerts, K., *Federalism and the Rule of Law: Perspectives from the European Court of Justice*, Fordham International Law Journal, Vol. 33, No. 5, 2011, p. 1378.

5 See further Kamber, K., *Measures related to health issues*, Regional online round table The impact of the COVID-19 pandemic on human rights and the rule of law, Strasbourg, 28 April 2020.

the pandemic, judicial systems were expected to give priority to cases that involved urgency (notably detention cases), but also cases of domestic violence, cases involving elderly people or persons with disabilities, etc.[6]

The different Covid restrictions rendered, in particular, the in-person hearings challenging or impossible.[7] At the time of the worldwide lockdown in March 2020, many states have temporarily postponed all non-urgent court hearings and/or sought ways to keep the courts running through means of remote access – online hearings,[8] including via video link or similar substitutes for physical presence (e.g., telephone hearings).[9] However, in this connection, the critical question is the extent to which these measures have had an adverse impact on the guarantees of the right to a fair trial and the due process in general, notably in detention cases.

The article examines the manner of the administration of justice during the Covid pandemic and its impact on the due process guarantees,[10] with an emphasis on the effects of remote/online hearings in this context. In Section 2, the article provides a comparative overview of the functioning of the European legal systems during the pandemic. Section 3 looks into the manner in which the two European courts – the European Court of Human Rights ("ECtHR") and the Court of Justice of the European Union ("CJEU") – operated during the pandemic. Section 4 examines the manner in which Croatian courts, including the Constitutional Court, have organised their work during the pandemic. Section 5 analyses the relevant case-law of the ECtHR and the Constitutional Court relating to remote/online hearings. A conclusion is provided in Section 6.

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6 *CEPEJ Declaration Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic*, CEPEJ, Ad hoc virtual CEPEJ plenary meeting, Strasbourg, 10 June 2020, see principle 2 (Access to justice), p.2.

7 *Management of the judiciary – compilation of comments and comments by country*, CEPEJ, 10 July 2020, accessed 1 April 2021.

8 See further McKeever, G., *Remote Justice? Litigants in Person and Participation in Court Processes during Covid-19*, Modern Law Review, No. 5, 2020.

9 *Courts COVID-19 measures as of 15 April 2020*, available at [https://rm.coe.int/courts-covid-19-measures-as-of-15-april-2020/16809e2927], Accessed 1 April 2021.

10 From the perspective of the right to liberty and the right to a fair trial. See further ECtHR's *Guide on Article 5 of the European Convention on Human Rights: Right to liberty and security,* Strasbourg, 2020; ECtHR's *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb)*, Strasbourg, 2021.

2. FUNCTIONING OF THE EUROPEAN LEGAL SYSTEMS DURING THE PANDEMIC

2.1. The functioning of the judiciary

In response to the Covid outbreak, different European countries have acted differently: some have declared a state of emergency and some others a coronavirus pandemic. The different Covid restrictions impacted the work of courts[11] as (physical) access to courts[12] has come under severe restrictions. Some countries closed court buildings fully, others partially, dealing only with "urgent"[13] cases.[14]

The extent to which judges and court staff have been able to operate in person and remotely, especially during the national lockdowns, depended on several factors: the state's response to the pandemic, the regulations imposed by the authorities[15] and the respective courts' scope and type of competence.[16] Moreover, it should be noted that not all courts in all countries experienced the same issues so there was a significant variation in how countries have approached the issue of court management.[17]

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11 Including delays in proceedings, impact on procedural time limits, and the provision of legal aid services, see Consultative Council of European Judges ("CCJE"), *Statement of the President of The CCJE, The role of judges during and in the aftermath of the COVID-19 pandemic: lessons and challenges*, CCJE (2020)2, 24 June 2020, p. 2.

12 The CCJE has already emphasised that the rule of law is guaranteed by the fair, impartial and effective administration of justice, and these principles developed by the CCJE, as well as by the Council of Europe as a whole, notably including rights to access to a court and an effective remedy, should be strictly safeguarded during emergency situations in general and a pandemic in particular, Ibid.

13 The International Commission of Jurists ("ICJ") has provided helpful principles to assist in the determination of urgency, see *The Courts and COVID-19, International Commission of Jurists* (ICJ), 5 May 2020, [https://www.icj.org/wp-content/uploads/2020/05/Universal-ICJ-courts-covid-Advocacy-Analysis-brief-2020-ENG.pdf], Accessed 15 April 2021.

14 For instance, in Croatia, Denmark, Cyprus, France, and Greece, see *Coronavirus Pandemic in The EU – Fundamental Rights Implications: With A Focus on Contact-Tracing Apps*, Fundamental Rights Agency, Bulletin No. 2, 21 March – 30 April 2020, p. 28.

15 In some jurisdictions, decisions on how to manage courts during pandemic have been taken by the executive authorities, with or without consultation from the judiciary, in some states, measures have been set out in legislation and procedural laws, while others have been determined by the judicial authorities such as judicial councils or by judges themselves, see *The Functioning of Courts in the COVID-19 Pandemic*: Primer, October 2020, pp. 17-18, [https://www.osce.org/files/f/documents/5/5/469170.pdf], Accessed 15 April 2021.

16 *Ibid,* p. 5.

17 The legal regulation of court proceedings in the pandemic time, in some legal systems is the part of a broader package of economic measures to mitigate the effects of the COVID-19 epidemic, see for instance Italy's Economic Measures to Mitigate the Effects of COVID-19 (e.g. "Simplification Decree", "The Legislative Decree no. 15", "The Law Decree No. 129/2020"), 18 March 2020, available at https://www.clearygottlieb.com/news-and-insights/publication-listing/italys-economic-measures-to-mitigate-the-effects-of-covid-19, accessed 15 April 2021, or is the part of the regulating the

At the time of the worldwide lockdown, many European countries have temporarily postponed all non-urgent court hearings, seeking ways to keep the courts[18] running during the emergency, and turned to remote hearings using online videoconferencing technology and other similar tools as an alternative to in-person hearings in the context of pre-trial and trial proceedings. The experience has shown that there were different approaches to this matter, within, and between different jurisdictions.

However, in general, there were two ways in which countries decided whether the case could proceed remotely:

- Consent of the person – for instance, in Romania, the authorities required a signed consent from the defendant to participate in a remote hearing, as opposed to Germany and Belgium, where the judges had the power to decide on whether to have a remote hearing without the defendant's consent, and

- Type of cases – for instance, initially the Netherlands had put limits on remote hearings, excluding them in cases involving minors or persons with mental disabilities, but these restrictions were later lifted giving judges the discretion to decide on whether to hold hearings remotely. In Spain, remote proceedings were allowed in all criminal cases, except for cases of serious crime, and in Latvia, videoconferencing was used for persons in custody.[19]

Countries where videoconferencing was used in civil and criminal proceedings included: Austria, Croatia, France, Hungary, Ireland, Kazakhstan, Portugal, Serbia, Slovenia, Sweden, and the United Kingdom.[20]

Furthermore, different courts in different jurisdictions have conducted remote proceedings using different online platforms[21] (or by telephone conference call,

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functioning of courts and communication between courts and parties, like in Germany, see Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law of 27 March 2020, (Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht, BGBl. I Nr. 14, 27. 3. 2020).

18 As a Declaration of the European Commission for the Efficiency of Justice ("CEPEJ") stressed "The key standards underpinning the operationalization of the courts must continue even during times of emergency", see note 6. See also Ritscher, C., *COVID-19 and International Crimes Trials in Germany*, Journal of International Criminal Justice, 2021, pp. 1-4.

19 *Beyond the Emergency of the COVID-19 Pandemic: Lessons for Defence Rights in Europe*, June 2020, Fair Trials, p. 14., [https://www.fairtrials.org], Accessed 16 April 2021.

20 See further about the videoconferencing and remote hearing, problems faced with IT solutions, and conditions and criteria for the use of remote hearings, *op. cit.*, note 15, pp. 22-24.

21 The concern about the proceedings via Zoom platform in the context of personal data before the Family Court in England and Wales has been stressed in the Council of Bars and Law Societies of Europe (CCBE) *Guidance on the use of remote working tools by lawyers and remote court proceedings*, 2020, p. 6., available at [https://www.ccbe.eu]. Furthermore, there are other issues, for instance, in relation to

for instance in France). On the other hand, some hearings were held in a "hybrid" format, where some participants participated in person and others remotely.[22]

Although many courts have recently reopened, due to the measures taken during the pandemic, they are now facing backlog.[23] At the same time, in some states (e.g. Belgium, Hungary and Spain), the authorities have made proposals to continue to use remote hearings after the pandemic[24] as a solution for the time and cost-effective functioning of courts.[25] However, it would not appear that these measures could be taken without giving a due consideration for the implications on the right to a fair trial and other due process guarantees associated with the physicial presence of an accused in the proceedings.[26]

The Covid pandemic has also brought to the fore the challenges that courts faced for years in several states, especially financial constraints and inefficient procedures. Some states during the pandemic saw a shift in power from the judiciary to the executive.[27] However, the positive effect is that the pandemic has created an incentive for countries to review and reform judicial systems.[28]

The challenges to the work of judges and prosecutors,[29] and other legal professionals, are particularly demanding in the context of a pandemic. They had to adapt to

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equality of arms: a disadvantage to parties lacking access to IT, the effect of poor internet speeds, the difficulty for a judge to effectively assess the credibility of a witness without seeing the witness in the flesh, the problems with the security of remote connections, etc., *Ibid*., p 7.

22 See an interesting example of criminal proceedings in Scotland, *Ibid*, p. 8.

23 See [https://www.fairtrials.org/news/], Accessed 16 April 2021.

24 Susskind, R., *Online Courts and the Future of Justice*, Oxford University Press, Oxford, 2019.; Legg, M., *The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality*, Federal Law Review, Vol. 49, 2021, pp. 20-46.

25 For instance, in June 2020, Poland introduced remote pre-trial detention hearings by means of a permanent modification of the Criminal Code of Procedure; in Hungary, a government decree was issued in March 2020, making remote hearings obligatory when procedural acts could not be postponed, [https://www.fairtrials.org/news/impact-covid-19-rule-law-hungary-and-poland], Accessed 16 April 2021.

26 *Op. cit.*, note 22.

27 For instance, in Albania, the lack of a functioning Constitutional and Supreme Court has hampered effective oversight of urgent legislation, [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/albania_report_2020.pdf], and [https://ec.europa.eu/commission/presscorner/detail/en/COUNTRY_20_1794], Accessed 16 April 2021.

28 See *Global Prison Trends 2020. Alternatives to Imprisonment, Penal Reform International*, [https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25819&LangID=E], and [https://idpc.net/publications/2020/05/global-prison-trends-2020], Accessed 15 April 2021.

29 See further about the work of prosecutors in a pandemic, Consultative Council of European Prosecutors (CCPE) Opinion No. 15 (2020): *The role of prosecutors in emergency situations, in particular when facing a pandemic*, Strasbourg, November 2020.

the rapidly changing circumstances linked to the different phases of the pandemic. It is thus not surprising that there might have been different views about the relevant priorities, which mandated for the stablishment of a dialogue between all judicial stakeholders, such as associations of judges, bar associations, etc.

However, it is reasonable to assume that all of them agreed over the necessity of preventing the propagation of the virus. Indeed, the courts took the necessary measures to that effect, such as disinfecting the building, wearing protective masks, measuring the temperature of all visitors, etc., and where possible, court staff who were at risk worked remotely or in shifts.

2.2. Lawyer's response to the pandemic

Exceptional circumstances which require court closures, such as the Covid pandemic or earthquakes (like those experienced in recent times in Croatia),[30] seriously limit various defence rights, especially the right of access to a lawyer.[31] Remote communications – in courts, police stations and prisons – represented a challenge for lawyers and defendants to interact with each other and to have confidential and effective consultations.[32]

According to the first reports relating to the effects of the Covid pandemic, lawyers experienced difficulties in being able to provide assistance in the context of remote hearings. For instance, in the Netherlands and Spain, confidential lawyer-client communication was not possible for lawyers during hearings where the defendant was only allowed to appear via videoconference. In France, lawyers complained about the inability to participate in detention hearings because of a lack of videoconferencing equipment in some courts, and in Poland and Hungary concerns were raised about the confidentiality of communication between lawyers and de-

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30 Earthquake occurred in Zagreb on 22 March 2020, which destroyed numerous judicial and penal facilities. The earthquake hit the hardest the Zagreb County Court, the Zagreb Commercial Court and the State Attorney's Office, so parts of the courts that could not be used moved to the locations of the Zagreb Municipal Criminal Court and to another location, see Markušić, S. *et al.*, *The Zagreb (Croatia) M 5.5 Earthquake on 22 March 2020*, [https://res.mdpi.com/d_attachment/geosciences/geosciences-10-00252/article_deploy/geosciences-10-00252-v2.pdf], Accessed 16 April 2021.

31 See further about the right to effective assistance of counsel, Babcock, E.; Johansen, K., *Remote Justice? Expanding the Use of Interactive Video Teleconference in Minnesota Criminal Proceedings*, William Mitchel Law Review, Vol. 37, No. 2, 2011, p. 679.

32 There are numerous examples of courts in Croatia which limited its work to varying degrees, which could be conclude by following the courts' websites, and which for parties and parties representatives are unfavourable, because each court has its own restriction determined by each president of the court individually, see for instance the Municipal Civil Court in Zagreb, [http://sudovi.pravosudje.hr/ogszg/], Zagreb County Court [https://sudovi.pravosudje.hr/zszg/], Accessed 15 April 2021.

fendants, especially when prisons guards are present.[33] In the United Kingdom, lawyers noted that some platforms used by the courts did not allow them to speak with their client at all once the hearing had started,[34] and Portugal enacted restrictions on access to a lawyer for persons in prison.

Furthermore, some states did not allow access to the case files, which limited the possibility of the defence to prepare its case. In addition, there was a big disparity between the European countries' capacity to arrange for the filing of submissions to the court by mail or otherwise electronically.

All these restrictions indicate that lawyers faced many difficulties to preform their tasks during the pandemic. It was therefore critical, as already stated above, to ensure cooperation between all legal professions, including lawyers. The legal professionals must communicate when adopting any measures[35] in the context of the pandemic.[36] This is important in order to take into account all possible effects and impacts of adopted measures and to avoid conflict and disagreements within the judicial systems.[37] Thus, measures and protocols adopted in relation to courts need to be communicated effectivelly to all relevant persons, including lawyers and their associations.[38]

2.3. The conditions of detention during the pandemic

Both detainees and the prison staff were particularly vulnerable during the pandemic: detention facilities often provide limited access to sanitation and health facilities, and are overcrowded, making physical distance and isolation almost impossible, and thus increase the possibility of infection.

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33 See note 25.

34 *Op. cit.*, note 21.

35 See further about the question of decision-making powers and responsibilities, especially who has the authority for deciding how the judicial system should respond to the pandemic at various stages, see *op. cit.*, note 15, pp. 12-13.

36 As the CEPEJ stressed, "Greater consultation and coordination with all justice professionals (including lawyers, enforcement agents, mediators and social services) will help to ensure a good level of access to justice"; *op. cit.*, note 6.

37 For instance, lawyers in Greece who went on strike after the reopening of some courts, *op. cit.,* note 15, p. 11. On the other hand, The Macedonian Young Lawyer Association and the Kosovo Law Institute's Free Legal Aid Center offered legal aid during the lockdown, for more see *op. cit.*, note 15, p. 19.

38 For instance, see the communication between the Croatian Bar Association, Minister of Justice of the Republic of Croatia and the President of the Supreme Court of the Republic of Croatia, available at [http://www.hok-cba.hr/hr/obavijest-o-poduzetim-radnjama-hok-vezano-uz-covid-19-i-potres-u-zagrebu], Accessed 16 April 2021.

To reduce the risk of infection in places of detention, different measures were introduced, such as limited visits by lawyers and families.[39] This, in turn, limited the rights of detainees to maintain contact with their families, which is their right guaranteed under Article 8 ECHR,[40] and, as noted above, to mount an effective defence in the pending legal proceedings.

In addition, different countries across the European Union face a long-standing crisis of prison overcrowding, which is partially due to the excessive use of pre-trial detention.[41] During the pandemic, most States adopted measures to reduce the prison population (for instance by early/temporary releases)[42] and some of them temporarily delayed the execution of prison sentences. Adopted measures and efforts certainly led to the reduction in prison population in many European countries. However, there are concerns over the 'boomerang' effect after the crisis is over.[43] According to the first reports, these concerns do not appear to be misplaced.[44]

3. FUNCTIONING OF THE TWO EUROPEAN COURTS (THE ECTHR AND THE CJEU) DURING THE PANDEMIC

Just as all other courts, the two European Courts, have taken measures to adapt their activities in response to the Covid pandemic, including by postponing physi-

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39 These measures have had consequences on the detainees, in particular on their mental health. There are reports of suicides, for instance in the UK, see further European Prison Observatory, COVID-19: *What is happening in European prisons?* Update #9, 5 June 2020, p.8., available at [http://www.prisonobservatory.org/index.php?option=com_content&view=article&id=32:covid-19-what-is-happening-in-european-prisons&catid=7&Itemid=101], Accessed 16 April 2021.

40 *Khoroshenko v Russia* [GC] (2015).

41 Prison overcrowding is a problem in the several EU Member States, including Belgium, Romania, Greece, and Hungary, see *Prison Studies, Highest to Lowest - Occupancy level* (based on official capacity), available at [https://www.prisonstudies.org/highest-to-lowest/occupancy-level?field_region_taxonomy_tid=All], Accessed 15 April 2021, see also *Green Paper Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, available at [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52011DC0327], Accessed 16 April 2021.

42 *Op. cit*., note 39. See further about the prison measures, Fair Trials, *op. cit.*, note 26.

43 See further about the success of the different measures adopted to reduce prison populations in many EU Member States, and a failure to reduce the number of detainees, Beyond the Emergency of the COVID-19 Pandemic: *Lessons for Defence Rights in Europe*, June 2020, Fair Trials, pp. 42-43, see note 19., accessed 16 April 2021.

44 See Aebi M.F.; Tiago, M.M., *Prisons and Prisoners in Europe in Pandemic Times: An evaluation of the medium-term impact of the COVID-19 on prison populations*, Council of Europe Annual Penal Statistics, Strasbourg, Lausanne, December 2020.

cal hearings, enhancing online hearing capabilities, prioritising urgent cases and extending the procedural time-limits.

The ECtHR took the decision to hold online hearings with the exclusion of the public. However, as will be discussed in more detail further below, it managed to ensure, through the use of information tecohnology, the public character of those hearings.[45]

The ECtHR took several other exceptional measures during the national lockdown in France between 16 March and 10 May 2020. The President of the ECtHR extended the six-month time-limit for the lodging of applications based on *force majeure* for three months until 15 June 2020. The time limits allotted in pending proceedings were also extended for a further two month period from 16 April 2020.

The ECtHR has been able to fulfill its public service mission during the national lockdown period by ensuring continuity of its core activities, handling urgent cases, and receiving and allocating applications to the relevant judicial formations. The Grand Chamber, Chambers Committees, and single judges continued to examine cases by written procedures. Most of the Registry staff and all judges during the national lockdown continued to deal with the cases by written e-mail procedure. The ECtHR therefore managed to continue to function and deal with cases expeditiously.[46] A significant achievement was also the organisation of the Grand Chamber hearings, which took place by videoconference which could be viewed online.[47] In this way, the ECtHR was able to continue to carry out its mission and ensure the public nature of the hearings through webcasting.[48]

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45 Because of the Covid pandemic and until further notice, hearings at ECtHR are not open to the public and may be held by videoconference, by decision of the President of the Grand Chamber or the relevant Chamber, see notification available at [https://www.echr.coe.int/Pages/home.aspx?p=hearings&c=], Accessed 1 April 2021.

46 During the national lockdown more than 5400 applications were processed and because of that activity, the total stock of pending cases has remained stable; see *The ECHR and the Pandemic – Rule of Law as the Lodestar of the Convention System*, speech by Robert Ragnar Spano, President of the ECtHR, held on the Seventh Regional Rule of Law Forum for South-East Europe, 16 and 17 October 2020, author participation via Zoom platform.

47 This was a major technical challenge for the Court, but it manages to hold three online hearings during the pandemic; all online (public) hearings are available at [https://www.echr.coe.int/Pages/home.aspx?p=hearings&c=], Accessed 2 April 2021; see also the first videoconference on the execution of ECtHR judgments held on 29 January 2021; the Execution Department organised the first videoconference with the Belgian authorities, including the Office of the Government Agent to the ECtHR and representatives of the Ministry of Justice, available at [https://www.coe.int/en/web/human-rights-rule-of-law/-/belgium-videoconference-on-the-execution-of-ecthr-judgments], Accessed 2 April 2021.

48 *Op. cit.*, note 9., p. 4. Regarding the webcasting of court sessions, in normal conditions, webcasting is being used to reach a wider audience and encourage a broader interest in the aspects of public life

For its part, the CJEU[49] has also been obliged to change its working arrangements due to the Covid pandemic.[50] These changes concerned the conduct of the written phase[51] of the proceedings and, in particular, the extension of certain time limits[52] for the filing of parties' statements or observations as well as the conduct of the oral phase of the proceedings.[53]

The procedural time limits continued to run despite the pandemic and the parties had to comply with those time limits, without prejudice to the possible application of the Protocol (no 3) on the Statute of the Court of Justice of the European Union ("the Statute") Article 45 paragraph 2.[54]

All necessary measures were taken to ensure that the hearings took place under optimal conditions, from both a logistical and sanitary perspective, but the holding and conduct of the hearings remained dependent on the decisions of the national authorities to combat the transmission of the coronavirus. If it was completely impossible for a party to travel to Luxembourg, it was allowed, under certain conditions, to attend a hearing by videoconference. To ensure efficient conduct of

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touched upon by courts. Accordingly, when it comes to an emergency situation, webcasting may be even more justified in order to expressly demonstrate that justice is being performed openly and in public.

49 The number of cases resolved for the first quarter amounted to the same as in 2019. Procedural measures compensated for the incapacity to hold hearings. All hearings and pleadings were postponed to a later date; 60 cases were considered urgent and one Urgent Preliminary Request was kept in progress for which the chamber has decided to waive the hearing and to put questions to the parties for written answers.

50 See further about the working conditions of the CJEU Popotas, C., *COVID-19 and the Courts. The case of the CJEU',* Access to Justice in Eastern Europe, Vol. 2-3, No. 7, 2020, pp. 160-171.

51 Written questions to the parties replaced the debates that would normally take place in courtrooms. Deliberations amongst judges were in the first period conducted through written procedures via secure email, and later replaced by secure videoconferencing.

52 On 19 March 2020, the CJEU temporarily changed the working arrangements for its two constituent courts: The Court of Justice and the General Court. Court of Justice time limits prescribed in all non-urgent ongoing proceedings was extended by one month. Time limits to be fixed by the registry of the CJEU were also extended by one month. Hearings before the Court of Justice listed to take place before 3 April 2020 were postponed. Urgent cases before the General Court were dealt with as a matter of priority, and time limits were fixed by the registry of the CJEU.

53 These measures remain subject to frequent modifications depending on how the health crisis evolves, see [https://curia.europa.eu/jcms/jcms/p1_3012066/en/], Accessed 3 April 2021.

54 See Protocol (no 3) on the Statute of the Court of Justice of the European Union, Official Journal of the European Union, C 202/210, Article 45 paragraph 2: "No right shall be prejudiced in consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances or of force majeure". See further about procedural time limits COVID-19 - Information - Parties before the Court of Justice, [https://curia.europa.eu/jcms/jcms/p1_3012066/en/], Accessed 3 April 2021.

the hearings, particularly from a linguistic perspective, the parties' representatives were requested to inform the Registry whether they would attend or not a hearing.

To facilitate communication with the parties, the courts of the Member States and the parties' representatives were strongly encouraged to become familiar with the CJEU online system (e-Curia) and to have an e-Curia account, which is a secure application and allows procedural documents to be filed and served electronically in cases brought before the CJEU.

Following the decisions of the Court of Justice and the General Court gradually to resume hearings with effect from 25 May 2020, the strictest sanitary measures[55] have been adopted (in compliance with the laws adopted by the Luxembourg authorities) to allow hearings to proceed under the best possible conditions.

4. FUNCTIONING OF THE LEGAL SYSTEM IN CROATIA DURING THE PANDEMIC

4.1. The functioning of the judiciary

The Croatian government did not declare a state of emergency but declared a coronavirus pandemic on 11 March 2020. However, in Croatia, not only the Covid pandemic, but also the earthquakes in Zagreb,[56] significantly affected the functioning of courts,[57] especially due to the difficulties in holding hearings in person before the trial courts.

The recommendations of the Ministry of Justice[58] and decisions of the President of the Supreme Court,[59] as well as the decisions of presidents of the lower courts, regulated the functioning of courts[60] in Croatia. However, notwithstanding these recommendations, the courts have limited their work to varying degrees.

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55 Those measures concern access to the institution's buildings and the rules that must be complied with while moving around within them, and the arrangements for the hearing itself, which have been adapted in response to the current exceptional circumstances.

56 See further about earthquakes in Croatia, [https://www.pmf.unizg.hr/geof/seizmoloska_sluzba/o_zagrebackom_potresu_2020?@=1lrg6], Accessed 16 April 2021., see also note 30.

57 See further about restrictions on court working in Croatia, CCBE *Questionnaire Restrictions on court working*, *Croatia*, pp. 13-15., available at [https://www.ccbe.eu], Accessed 2 April 2021.

58 See further about the recommendation of the Ministry of Justice, [https://mpu.gov.hr], [http://www.hok-cba.hr], Accessed 2 April 2021.

59 See further about the decision and the recommendation of the President of the Supreme Court, [http://www.vsrh.hr], Accessed 2 April 2021.

60 See further about the functioning of the Zagreb Municipal state Attorney's Office, the State Attorney's Office of the Republic of Croatia, and the Office for the Suppression of Corruption and Organized

On 17 March 2020, the Ministry of Justice issued a recommendation[61] applicable during the Covid pandemic in order to protect the health of all judicial staff and parties to the proceedings. On 20 March 2020,[62] the President of the Supreme Court issued a recommendation to the Presidents of the High and County Courts according to which in every situation the technical means of remote communication available to judges and courts, including when communicating within the court (e-mail, video link, etc.), should be used.[63] Videoconferencing (online hearings), as up to then a non-common practice, were also introduced concerning the detention proceedings.[64]

Furthermore, lawyers, court experts, bankruptcy trustees and legal entities were able to communicate electronically with the courts via the system of e-Communication.[65] The e-Communication system provided lawyers, citizens, and other users access to the content of all documents if they had a content entered in the e-Case system (court case management system).

According to the decision of the President of the Supreme Court, most of the courts in Croatia conducted hearings remotely, especially in urgent cases – detention cases and some criminal and civil cases. The ability of courts in Croatia to conduct hearings remotely was possible on the basis of the existing laws. In

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Crime for instance in *Coronavirus pandemic in the EU – Fundamental Rights Implications, Croatia*, Centre for Peace Studies, Human Rights House, 2 July 2020, p. 7.

61 The Minister of Justice made the following recommendations regarding the prevention of the transmission and suppression of the coronavirus epidemic: 1. The judicial authorities continue to operate and carry out all urgent procedures and actions with appropriate security controls; 2. Hearings and other non-urgent actions are adjourned for 14 days; 3. Employers allow to work from home in business locations where possible; 4. Electronic communication should be conducted in dealing with parties and all participants in the process, wherever possible, see [http://www.hok-cba.hr/hr/preporuke-ministarstva-pravosuda-i-vrhovnog-suda-rh-u-vezi-rada-pravosuda-i-epidemije-koronavirusa], Accessed 15 April 2021.

62 Letter no. Su-IV-125/2020-5 of 20 March 2020.

63 Furthermore, the President of the Supreme Court by Decision no. Su-IV-125/2020-50 of 31 March 2020 ordered the presidents of the departments of that court to determine the work schedule of judges and legal advisers in the court department and court registry to conduct court business in those matters, related to non-delayed proceedings, such as urgent criminal cases related to time limits, which include pre-trial detention.

64 Criminal Procedure Act, Official Gazette, Nos. 52/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17 and 126/19, contains provisions on actions that can be taken by the application of appropriate audio-visual devices, Article 129. para 2.

65 E-Communication enables participants in court proceedings to submit submissions to the courts electronically, receive court documents in a secure electronic mailbox and remotely inspect court cases; see [https://usluge.pravosudje.hr/komunikacija-sa-sudom/], Accessed 16 April 2021. See also notifications of the Ministry of Justice, available at [https://pravosudje.gov.hr/vijesti/ekomunikacija-priblizava-sudove-gradjanima/21945], Accessed 16 April 2021.

civil proceedings, it has been possible to hold remote hearings since September 2019, as provided for in Article 115 of the Civil Procedure Act,[66] and in criminal proceedings,the same was possible under Article 129 para 2 of the Criminal Procedure Act.[67]

The courts in Croatia started to function in accordance with the recommendation of the President of the Supreme Court[68] as of 11 May 2020. At present, the work of courts has almost completely normalised, and presidents of the courts had in the meantime issued decisions to continue to work in full capacity with further adherence to the general preventive measures (maintaining social distance, hand disinfection, wearing masks, etc.).

The courts currently regularly hold trials in all cases, but in so-called "new" conditions, which reflect the recommendations issued by the President of the Supreme Court for the prevention of the spread of the virus. In particular, there are two models of organisation of the work of courts during the pandemic: model A and model B.

According to model A, the first-instance courts need to act in all types of cases by complying with certain restrictions in order to reduce the number of persons in the court premises and they must ensure conditions for a physical distance between persons of at least 2 meters. For this purpose, the court presidents need to take a close control over the scheduling of the courtroom use. In this mode, it is also recommended to use audio-video conferences as much as possible, for instance, if a person deprived of liberty should appear at a court hearing, an audio-video conference should be used wherever possible, and if this cannot be arranged, the hearing must be scheduled well in advance. In relation to pre-trial detention, including the judicial control of the situation in places of detention, it is recommended to use the video link where possible.

With regarding to the appeal courts, the presidents of these courts must take charge of the court schedules and court sessions should be held via an audio-video

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66 Civil Procedure Act, Official Gazette, Nos. 53/91, 91/92, 112/99, 88/01, 117/03, 82/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13, 89/14 28/13 and 70/19.

67 See note 53.

68 The President of the Supreme Court recommended the presidents of all courts to check whether the courts have courtrooms of sufficient size to hold hearings with respect to physical distance, to draw up a schedule for the use of these courtrooms and to check the ability to connect multiple rooms in the court via video link to hold hearings with a larger number of participants. Such hearings would refer to "old" cases and those cases that are already being finalised, regardless of the court department and branch of the law. The presidents of the courts will therefore be those who will determine the measures that will gradually increase the volume of work in each court, see notification of the Supreme Court, available at [http://www.vsrh.hr], Accessed 16 April 2021.

conference. Where the latter is not possible, the court sessions must be held so that there is at least a physical distance of at least two metres between persons.

According to model B, the first-instance courts take actions only in urgent cases. Hearings in all other cases are postponed for fourteen days, and the audio-video conferencing should be used as much as possible. The appeal courts are expected to operate in a similar way as described above for model A.

As of 3 November 2020, the presidents of all courts are expected to organise the work according to model A, and according to model B only if there is an unfavourable development of the epidemiological situation. To switch to Model B, the president of each court must request an approval of the President of the Supreme Court.[69]

Regardless of the model according to which the work is organised, the President of the Supreme Court requested the president of all courts to ensure the implementation of all epidemiological measures, communicate with the participants exclusively electronically, and deliver mail using email services and, where possible, limit the admission of parties in the land registry department or court register.

4.2. Lawyer's response to the pandemic

It should be noted that lawyers and the Croatian Bar Association ("CBA") continued to operate effectively and to keep contact with the relevant courts and other judicial authorities.[70] In addition, the CBA established the Crisis Staff of the CBA to take urgent intervention measures in cooperation with all competent bodies in Croatia to mitigate all negative consequences of the events that significantly affected the legal service and the position of lawyers.[71] Furthermore, on 18 March 2020, the CBA decided to waive the membership fee for all members of the CBA for April 2020, while it was up to the local branches to make decisions with respect to the membership fees due to them.

On the same date, the CBA sent to the Ministry of Justice a draft Act on the Intervention Measures in the area of judicial and administrative proceedings due to the Covid pandemic.[72] This draft dealt, in particular, with the following: the

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69 See further about two models of organisation of the work of courts during the pandemic, [http://www.vsrh.hr], Accessed 16 April 2021.

70 Notices of action taken by CBA regarding Covid-19 and the earthquake in Zagreb, see note 30.

71 *Ibid*.

72 The CBA referred to similar measures taken in other EU Member States, adopted for the purpose of preventing the spread of infection caused by COVID-19 disease and the need to enable the proper functioning of courts, state bodies, local and regional self-government bodies of public authorities. For

interruption of deadlines; the manner of work of courts; the regulation of hearings via audio-video link; the suspension of deadlines in the administrative proceedings; the manner of work of public bodies; measures in the field of execution of criminal sanctions; and the termination of accumulation of default interest in the judicial and administrative proceedings.

Furthermore, immediately after the earthquake, in which a significant number of law offices had been damaged and as a result of which certain lawyers had been barred from entering their offices due to a danger of collapsing, the CBA once again addressed the Ministry of Justice, the Ministry of Finance and the Supreme Court seeking assistance and intervention.

In addition, it should be noted that during the national lockdown, lawyers were not given any special privilege of free movement. However, in urgent proceedings (such as the proceedings on pre-trial detention, family proceedings, psychiatric internment), lawyers were able to obtain a permit that allowed them to move outside their place of residence.[73] Moreover, there were no possibilities of consulting lawyers through videoconferencing.[74]

4.3. The conditions of detention during the pandemic

As regards the prison system, attention has been given to the prevention of contagion, and precautionary measures, such as increased hygiene of persons and premises, disinfection of facilities, and additional supply of the protection equipment.[75] In addition, more frequent outdoor activities were organised, and every prison facility has ensured specific rooms to isolate persons with the Covid symptoms. Isolation areas of a greater capacity were also put in place in prisons.[76]

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instance, Slovenia adopted the Act on Interim measures in relation to judicial, administrative and other public law cases in order to control the spread of the infectious disease SARS-CoV-2 (COVID-19) – Act on Interim Measures in Relation to Judicial, Administrative and Other public law matters for the control of the spread of the infectious disease SARS-CoV-2 (COVID-19), Official Gazette of the Republic of Slovenia, No. 36/20. The Act was published on 28 March and entered into force on 29 March 2020.

73 See CCBE *Replies to the questionnaire on the implications of the COVID-19* (urgent issues), 18/06/2020, pp. 2-3., available at [https://ccbe.eu/], Accessed 16 April 2021.

74 See Council of Bars and Law Societies of Europe (CCBE) Survey: *Exchange of experiences and best practices between bar*, *Croatia,* p. 14.

75 See more about measures and activities in the prison system aimed at preventing the spread of coronavirus, available at [https://www.koronavirus.hr/mjere-i-aktivnosti-u-zatvorskom-sustavu-usmjerene-prevenciji-sirenja-korona-virusa/307]; see further [https://www.hzjz.hr/wp-content/uploads/2020/03/Postupnik-Zatvorski-sustav.pdf], Accessed 1 April 2021.

76 See CEPEJ Compilation – Comments for Croatia, *op. cit.*, note 7.

The right of prisoners to receive visitors has been limited, but that is changing depending on the development of the pandemic. According to the measures initially introduced in 2020, the right of prisoners to receive visitors from a family members and others has been temporarily restricted, in particular from 14 March 2020 until 1 April 2020, but they could contact their lawyers by telephone, and only exceptionally receive visitors. From 1 April 2020 this measure has not applied to visits by lawyers representing persons deprived of their liberty in criminal and other proceedings.[77] Videoconferencing with the competent courts has been intensified and the possibility of organising video visits to prisoners has been broadened.[78]

4.4. The functioning of the Constitutional Court

The Constitutional Court of the Republic of Croatia ("Constitutional Court") has continued to operate during the pandemic in accordance with the recommendations of the Croatian Institute of Public Health and the National Civil Protection authority (*Stožer civilne zaštite*)[79] as well as the Ministry of Justice and internal organisational measures.[80] The Court took several exceptional measures during the national lockdown.

In March 2020, the Constitutional Court ceased to receive submissions directly from the parties at its premises. The submissions initiating or proposing the initiation of the proceedings, could be sent to the Constitutional Court by mail, while other submissions by e-mail and by fax.

Furthermore, the Court informed the parties and their representatives that its decisions would be published immediately on the website, while they would be sent in writing to the parties or their representatives when the conditions were met. The Constitutional Court also issued a decision temporarily allowing the applicants to institute proceedings (a constitutional complaint and an appeal against the decisions of the National Judicial Council), by submitting it by e-mail and fax. While these measures were later eased, upon the favourable developments of the epidemiological situation, the Court kept the obligation to follow some of the general health care measures listed in the earlier recommendations, such as physi-

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77 All information on the situation in the prison system as well as other measures are available on the website of the Ministry of Justice and Administration, [https://mpu.gov.hr/], accessed 2 April 2021.

78 *Op. cit.*, note 63., pp. 13–14.

79 All Notifications and decisions regarding the pandemic situation of the Constitutional Court are available at [www.usud.hr].

80 Constitutional Court has delivered organisational measures related to the organisation of its operating, which varied according to the situation related to the COVID-19 pandemic. All notices are available at [www.usud.hr], Accessed 16 April 2021.

cal distancing, hygiene measures, disinfection, wearing of a protective mask upon arrival and stay at the Court's premises.

The Constitutional Court also delivered organisational measures related to the organisation of its work, which varied depending on the situation related to the Covid pandemic.[81] In particular, during the national lockdown, all Chambers[82] and all judges continued to examine cases by a written procedure and by videoconferencing. In this way the work of sessions, expert meetings, and chambers continued. It could therefore be said that the Constitutional Court has been working in continuation and fulfilling its mission of protecting human rights and its role as the guardian of the Constitution, adapting its work to the conditions caused by the Covid pandemic, but also the earthquakes that have hit Zagreb.

5. SELECTED EUROPEAN AND CROATIAN CASE-LAW ON THE EFFECTS OF THE PANDEMIC AND THE ISSUE OF REMOTE HEARINGS

5.1. The ECtHR case-law

The ECtHR case-law concerning the remote/online hearings, in general and in the context of the Covid pandemic, is scarce.[83] However, in its case-law the EC-

[81] Several phases of organising the functioning of the Constitutional Court were observed. During the first phase of the Covid measures, in a time of the national lockdown from 16 March to 4 May 2020, the staff was invited to work remotely, while accesses to the Court premises were permitted for half-staff in view of dealing with issues that could not be handled at a distance. All judges and all Chambers, as well as all legal advisers, continued to work and to have virtual meetings via the internet platform during the remote work period on a regular schedule. The second phase lasted from May 4 to 1 June 2020, following favourable situation regarding the epidemiology and easing of measures, in which the work of staff was organised in such a way that half of the staff was present at the court premises each week, given compliance with epidemiological measures, while all judges were working from the court premises. On 1 June 2020, the Constitutional Court continued its work regularly in accordance with epidemiological measures (maintaining social distance, hand disinfection, wearing masks, etc.) and this third phase lasted until 26 October 2020. The fourth phase began on 26 October 2020 by organising work in shifts at the Court and from home (where possible) with participation in sessions and expert meetings through an online platform. Since 1 December 2020, new organizational measures have been in force related to the organization of sessions and expert meetings held according to the regular schedule. Thus, all expert meetings and sessions of the Court have been held online, the judges participate via the platform from the Court premises and legal advisers participate via the platform from the Court premises or home, depending on the working schedule.

[82] Chambers for deciding on constitutional complaints, Chambers ruling on requirements for deciding on constitutional complaints, Chambers for electorate disputes and Chambers for deciding on appeals against decisions on dismissal from judicial office and decisions on the disciplinary responsibility of judges.

[83] To date (10 May 2021), the ECtHR has in total decided three cases concerning the effects of the Covid pandemic, none of which specifically dealt with the issue of online hearings: (1) *Le Mailloux v France*

tHR did provide certain guidance criteria for the authorities' recourse to online hearings. These criteria, although developed in the context of an ordinary situation where the recourse to online hearings is just another procedural facility in the hands of the authorities, undoubtedly also bear relevance for any recourse to online hearings in the exceptional circumstances of the Covid pandemic, where online hearings were used due to necessity.

According to the ECtHR case-law, the personal presence of an accused in the proceedings should be taken as the rule. Indeed, the ECtHR has explained that an oral, and public, hearing is a "fundamental principle" of the right to a fair trial under Article 6 ECHR. This principle is of a particular relevance in the criminal context where an accused has the right to have her case "heard" by the relevant court. This means, more specifically, that the accused is entitled, *inter alia*, to give evidence in her defence and to hear the evidence against her/him, as well as to examine and cross-examine the witnesses.[84]

In practice, the exercise of the right to an oral hearing implies the physical presence in the proceedings. This is particularly relevant for the first-instance proceedings where, as the ECtHR stressed, the exercise of different Article 6 guarantees – such as those under sub-paragraphs (c), (d) and (e) of paragraph 3 that guarantee the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter …" – require the personal presence of the accused.[85] On the other hand, in the appeal proceedings, the personal attendance of the accused is not of the same crucial significance. In that context, different considerations are relevant for deciding whether the Article 6 requirements have been complied with, notably, the special features of the proceedings involved (whether the issues of facts and/or law are examined); the manner in which the proceedings have been conducted as a whole and what is the role of the appellate court in the overall conduct of the proceedings.[86]

Similar considerations to those under Article 6, concerning hearings on the merits of a criminal case, also apply in the pre-trial detention context under Article 5 ECHR. In this connection, it should firstly be noted that any person deprived of liberty in the context of the criminal proceedings must be "physically brought be-

(2020), concerning allegations of inadequate measures taken to address the pandemic; (2) *Feilazoo v Malta* (2021), concerning an issue of prison conditions; and (3) *Fenech v Malta* (2021), which will be analysed below.

84 *Jussila v Finland* [GC] (2006), par. 40.

85 *Sanader v Croatia* (2005), par. 67. It should be noted, however, that Article 6 ECHR does not exclude, under certain conditions, the possibility to hold hearings in absentia: see further *Sanade*r, par. 68-74.

86 *Hermi v Italy* [GC] (2006), par. 60; *Zahirović v Croatia* (2013), par. 54.

fore a judicial officer promptly" pursuant to Article 5(3) ECHR. This is important as it guarantees protection against arbitrary behaviour by the authorities, incommunicado detention and ill-treatment.[87]

Moreover, the ECtHR has explained that the procedural guarantees concerning the operation of a habeas corpus procedure under Article 5(4) ECHR do not always necessarily have to be attended by the same guarantees as those required under Article 6, but they must have a judicial character and be effective. In particular, where an individual is detained in the context of criminal proceedings, a hearing is required. This means that the detainee must normally be heard in person.[88]

However, neither in the context of Article 6, nor under Article 5, the right to an oral hearing and personal physical presence operates as an absolute requirement. Thus, accordingly, the recourse to online hearings is not as such contrary to the requirements of the ECHR.

From the perspective of Article 6 ECHR, in some exceptional instances (cases concerning minor/administrative offences of technical/purely objective nature), the case may be examined without holding an oral hearing.[89] At the same time, in some instances, the case may be heard remotely by using the relevant communication technologies.

In this latter connection, the ECtHR has accepted that an accused's participation in proceedings by videoconference is not as such contrary to the ECHR, neither in the appeal[90] nor in the first-instance proceedings.[91] However, recourse to this measure in any given case must serve a legitimate aim, such as prevention of disorder, prevention of crime, protection of witnesses and victims, compliance with the reasonable time requirement. In addition, the arrangements for the giving of evidence must be compatible with the requirements of due process. This means, in particular, that the accused must be able to: (a) see the persons present and hear what was being said, and (b) be seen and heard by the other participants, without technical impediments. Moreover, the accused must have an effective and confidential communication with a lawyer.[92]

It should also be noted that the ECtHR has accepted that in some instances participation of an accused in a hearing via video link may be a measure ensuring

87 *Öcalan v Turkey* [GC] (2005), par. 103.

88 *Idalov v Russia* [GC] (2012), par. 161.

89 *Jussila*, *op. cit.*, note 84., par. 41-43; *Sancaklı v Turkey* (2018), par. 45.

90 *Grigoryevskikh v Russia* (2009), par. 77 and 83.

91 *Asciutto v Italy* (2007), par. 62-63.

92 *Marcello Viola v Italy* (2006), par. 67 et seq.; *Sakhnovskiy v Russia* [GC] (201), par. 98.

effective participation in the proceedings.[93] In any event, the physical presence of an accused serves the greater goal of securing the fairness of the proceedings and is not an end in itself.[94] It must therefore be seen in the context of the overall compliance with the procedural guarantees of a fair trial.[95]

With respect to the requirement of effective legal defence by a lawyer in this context, the ECtHR has stress that it must be respected "in all circumstances".[96] Moreover, the ECtHR has held that the right to legal assistance takes on particular significance where the accused communicates with the courtroom via video link.[97] Thus, the appointment of a lawyer to an accused who participates in the proceedings via video link may be required in the interest of justice.[98]

The effective legal representation implies, above all, the possibility of confidential communication between the accused and the lawyer.[99] Thus, the provision of necessary communication technologies must be ensured in order to satisfy this requirement. The communication should be ensured prior to, and where needed, during the hearing[100] and sufficient time should be provided for any consultations needed.[101] There should be a possibility for the accused to have the presence of the lawyer next to her and/or in the hearing room.[102] In any event, with respect to the limitations on the defence rights flowing from the recourse to online hearings, measures should be taken to compensate for any such limitations caused.[103]

Similar to the above considerations under Article 6, in the context of the decisions on pre-trial detention under Article 5 ECHR, the ECtHR has accepted that during a habeas corpus hearing the detainee's arguments may also be heard "through some form of representation".[104] In any event, Article 5(4) ECHR does not require that a hearing is held each time a decision on pre-trial detention is taken, but rather that such hearing is held in reasonable intervals.[105]

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93 *Bivolaru v Romania (no. 2)* (2018), par. 138-139 and 144-145.

94 *Golubev v Russia* (2006).

95 See for instance *Ichetovkina and Others v Russia* (2017), par. 45.

96 *Sakhnovskiy*, *op. cit.*, note 92., par. 102

97 *Op. cit.,* note 90, par. 92.

98 *Shulepov v Russia* (2008), par. 34-39.

99 *Sakhnovskiy*, *op. cit.*, note 92., par. 97 and 104.

100 *Golubev*, *op. cit.*, note 94.

101 *Sakhnovskiy*, *op. cit.*, note 92., par. 103.

102 *Marcello Viola*, *op. cit.,* note 92., par. 75; *Golubev*, *op. cit.*, note 94.

103 *Sakhnovskiy*, *op. cit.*, note 92., par. 106.

104 *Idalov*, *op. cit.*, note 88., par 161.

105 *Çatal v Turkey* (2012), par. 33.

With respect to the first appearance of the arrested person, where, as noted above, the ECtHR has explicitly referred to a prompt physical appearance before a judicial officer, it has nevertheless accepted that such physical appearance may be delayed in very exceptional circumstances.[106]

It follows from these considerations that, although still not explicitly addressed in the case-law, it would be difficult to consider that in exceptional circumstances (such as the Covid pandemic), the prompt physical appearance before a judicial officer could not be ensured via communication technologies, provided, of course, that as soon as the circumstances cease to exist, the detainee is physically seen and heard by the relevant officer. Comparable requirements would then exist with respect to any subsequent bringing of the detainee before the court.

In this connection, in order to support the above conclusion, it may be useful to provide a more detailed analysis of one of the rare so far decided cases on the effects of the Covid pandemic.

In *Fenech v Malta*,[107] the applicant (who is detained) complained under Article 5 §§ 1 (c) and 3 ECHR that the emergency measures introduced by the Maltese Government led to a postponement of the criminal proceedings against him and thus to a lack of foreseeability concerning his continued detention. He also complained under Article 6 ECHR about the restriction on his right of access to court and about the length of the criminal proceedings against him in relation to the suspension of the proceedings as a result of the Covid pandemic. The ECtHR disagreed with him on all the complaints, declaring them inadmissible as manifestly ill-founded.

With respect to Article 5 ECHR, the ECtHR noted that in reality the proceedings had been suspended for some three months as a result of the fact that the court work was stalled due to the Covid pandemic. However, this did not mean that the applicant's detention lost the purpose of bringing him before the component legal authority for trial, as required under Article 5 § 1 (c). Moreover, the ECtHR remarked that the relevant domestic court had examined the applicant's requests for release on bail despite the closure of the court business at the time. For the ECtHR, from the perspective of Article 5 § 3, it was also important to establish whether the domestic courts acted with due diligence. In this connection, the ECtHR stressed the following (par. 96):

106 *Medvedyev and Others v France* [GC] (2010), par. 127-134.

107 *Op. cit.*, note 83.

> "[T]he Court notes that the applicant has not referred to any failings, delays or omissions on the part of the authorities, apart from the time during which the proceedings were suspended due to the emergency measures … There is no indication that they were not being actively pursued before the emergency measures were put in place … or afterwards. Moreover, this temporary suspension was due to the exceptional circumstances surrounding a global pandemic which … justified such lawful measures in the interest of public health, as well as that of the applicant. It follows that it cannot be said that in the circumstances of the present case the duty of special diligence was not observed."

Similar reasoning led the ECtHR to declare the applicant's complaint under Article 6 inadmissible as manifestly ill-founded.

It thus follows that, in principle, the health risks associated with the Covid pandemic could justify the suspension of the court hearings for a certain period of time. However, the domestic authorities must show that they acted diligently and took measures to actively pursue the case and to respond to any relevant requests (such as release on bail) made by an accused during the suspension of the proceedings.

In sum, drawing from the existing Article 6 case-law,[108] it follows that in the intermediary period (between the suspension of the proceedings and the possibility of ensuring a hearing in physical presence), the recourse to online hearings may be seen as a measure ensuring effective participation in the proceedings, provided, of course, that the relevant safeguards and the due process guarantees are put in place and effectively applied in practice.

5.2. The Constitutional Court's case-law

Since the beginning of the pandemic,[109] the Constitutional Court has dealt with several cases regarding remote/online hearings.[110] For the moment, these are only detention cases (urgent criminal cases), which the Constitutional Court can examine while the proceedings are still pending. [111] The Constitutional Court has

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[108] See note 92.

[109] In the context of the Covid pandemic, the Constitutional Court decided in several cases through abstract control of legislation, see cases Nos. U-I-1372/2020 et al. of 14 September 2020, U-II-2379/2020 of 14 September 2020, U-II-2027/2020 of 14 September 2020, U-II-364/2021 of 23 February 2021, U-II-6087/2020 et al. of 23 February 2021, U-II-5920/2020 et al. of 3 February 2021, U-II-4784/2020 of 3 February 2021, U-I-5918/2020 et al. of 3 February 2021, U-II-1312/2020 of 14 September 2020, U-II-1430/2020 of 14 September 2020, etc.; accessed 1 April 2021.

[110] Selected case-law derives from the period of 11 March 2020 to 15 April 2021; all decisions are available on the website of the Constitutional Court of the Republic of Croatia [www.usud.hr], last accessed 2 May 2021.

[111] See also Article 63 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette, No. 49/02 – Constitutional Court shall initiate proceedings even before all legal

not yet examined, and has not yet received, any criminal or civil case decided on the merits where an issue of remote/online hearings during the Covid pandemic has been raised.

Article 29 of the Croatian Constitution ("Constitution")[112] corresponds to Article 6 ECHR, and that is the provision which applicants most commonly invoked in their constitutional complaints. In addition, it should be pointed out that Article 22 of the Constitution corresponds to Article 5 (right to liberty) ECHR, which is the relevant provision invoked and applied in the pre-trial detention cases. Additionally, in some cases, applicants raised complaints about their health and health condition in detention, invoking Article 21 (1) of the Constitution, corresponding to Article 2 ECHR (right to life), as well as Article 23 (1) of the Constitution, corresponding to Article 3 ECHR (prohibition of torture).

In the first case No. U-III-3957/2020[113], a hearing to decide whether to extend the pre-trial detention was held in the period of national lockdown[114] in the absence of both the defendants and their lawyers, who proposed in a written statement (via e-mail) that the pre-trial detention measure be repealed.[115] The applicant's lawyer

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remedies have been exhausted in cases when the court of justice did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights.

112 Constitution of the Republic of Croatia, Official Gazette, Nos. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14.

113 Decision No. U-III-3957/2020 of 22 September 2020.

114 In several cases, the applicants invoked the pandemic as a reason for the release from pre-trial detention or its replacement with the preventive measures, that is, in other words, as a reason why he/she could not commit the same or a similar criminal offence; see decisions No. U-III-1255/2020 of 22 April 2020, para 6.3.; U-III-1292/2020 of 29 April 2020, para 3.; U-III-1393/2020 of 19 May 2020, para 3.; U-III-2268/2020 of 4 June 2020, para 3.8.; U-III-3957/2020 of 22 September 2020, para 5.3. In case No. U-III-1255/2020, for instance, the applicant complained that at the time of the lockdown, the epidemiological situation in the Croatia decreased the possibility of reoffending since measures to combat the epidemic significantly prevented the commission of such criminal offences (unauthorised possession and trade in illicit drugs) without exposing the health of potential participants in the criminal offences. Moreover, it considers that, regardless of the above, the risk of reoffending could be eliminated by one of the preventive measures. The Constitutional Court did not accept these arguments as valid.

115 As to the applicant's allegations before the competent courts of the possibility of contagion in the prison in the circumstances of the Covid pandemic, the competent courts stated that no contagion had been detected within the prison. They also stated that according to the available data, the prison had previously been successful in preventing the spread of infectious diseases, so the court had no reason to believe it would not be the case in the future, and that during the current pandemic measures had been taken within the prison system to prevent the spread of the infection. Also, the competent court noted that the current pandemic is a circumstance that prevents the normal functioning of the court and its availability to the participants in the proceedings, but according to publicly available data of temporary and transitory nature and does not in itself constitute a reason for the quashing of pre-trial detention.

sent a written statement to the court from his e-mail address, which is listed on the official website of the CBA. The disputed first-instance decision was served via prison, on 9 April 2020, on the applicant's lawyer's email address which had for years not been in use.

In the constitutional complaint, the applicant stated that his right to appeal under Article 18 para 1 of the Constitution had been violated due to the improper delivery on the wrong e-mail address of his lawyer. He further stated that he had been deprived of his liberty for four months without a valid and lawful court decision, which violated his right to liberty under Article 22 of the Constitution.

The Constitutional Court found that the first-instance and the appeal courts did not provide any reasons on why the disputed decision had been sent to the applicant's lawyer's earlier e-mail address and not to the one listed on the CBA website. The Court further found that due to the irregular delivery of the disputed decision via e-mail, the applicant's lawyer had been able to challenge the disputed first-instance decision only two months after its adoption. The Constitutional Court found that the first-instance court had not met the requirements of adversarial proceedings and equality of arms because it had not duly delivered the first-instance decision to the applicant's lawyers and thus violated the applicant right guaranteed by Article 24 para 3 of the Constitution, i.e. Article 5 (4) of the ECHR.

Further, cases Nos. U-III-3678/2020[116] and U-III-1393/2020[117] concerned the adjournment of the hearings scheduled in the period of the national lockdown.

In case No. U-III-3678/2020, the first-instance court postponed the hearing scheduled for 6 April 2020 due to the pandemic and the national lockdown. In his constitutional complaint, the applicant pointed out that he had submitted extensive medical documentation to the lower courts confirming that his health condition was poor and that he needed to undergo a surgery, but the courts had failed to take that into account. He also contended that his physical disability made him unable to commit any criminal offence or reoffend.

The Constitutional Court pointed out that this case was an urgent case where delays were inacceptable as the case concerned the most severe restriction of the

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116 Decision No. U-III-3678/2020 of 22 September 2020; all decisions and rulings are available on the website of the Constitutional Court of the Republic of Croatia [www.usud.hr], Accessed 16 April 2021.

117 Decision No. U-III-1393/2020 of 19 May 2020; in this case, constitutional complaint of the applicant is almost identical to the constitutional complaint in case No. U-III-3678/2020, consequently, the decision is almost the same.

fundamental human right of individual liberty. However, the Court stressed that the competent authorities in criminal proceedings had to take the specific and objective circumstances into account (such as those relating to the pandemic) when taking the procedural actions. If they established the existence of extraordinary circumstances such as the pandemic due to which it was not possible to conduct a scheduled procedural action, even with the application of the protection measures, then they should provide sufficient reasons in that respect. In the absence of such reasons and having regard to the letter and the decision of the President of the Supreme Court,[118] the Constitutional Court found no justification for the delays in the work of courts in the applicant's case,[119] The Court therefore found a violation of Articles 22 and 25 para 2 of the Constitution.

At the same time, it dismissed the constitutional complaint in the part relating to the extension of the pre-trial detention and rejected the constitutional complaint in the part relating to a complaint about the provision of adequate health care to the applicant during his pre-trial detention.[120]

In case No. U-III-2269/2020 et al.[121] the hearing during the national lockdown was held via video link with the applicant who was in prison.[122] Referring to the pandemic, the applicant's lawyer requested that the pre-trial detention be replaced by one of the preventive measures because the applicant's stay in the pre-trial detention would pose risk to his health in the circumstances of the pandemic. The first-instance court found such a proposal by the applicant and his lawyer unfounded. Moreover, regarding the measures related to the pandemic, the first-instance court stated that all measures were taken in the prison to prevent possible infections, and the same measures were taken by the court. Thus, a hearing to

118 See notes 47. and 48.

119 With regard to the applicant's complaint that he cannot receive adequate medical care in prison, the Constitutional Court reiterated that persons in pre-trial detention should complain about the conditions in pre-trial detention, including those related to health care, in accordance with Article 17 of the Enforcement of Prison Sentences Act, to the sentence-execution judge. An appeal against the decision of the sentence-execution judge is allowed to the three-member panel of the competent county courts. Only against such a decision, a constitutional complaint is allowed. Given that the applicant had not proved that he had exhausted the legal remedy under the Enforcement of Prison Sentences Act (Official Gazette Nos. 128/99, 55/00, 59/00, 129/00, 59/01, 67/01, 11/02, 76/07, 27/08, 83/09, 18/11, 48/11, 125/11, 56/13, 150/13 and 98/19) nor did he claim otherwise, the Constitutional Court could not examine the merits of the complaint concerning the lack of adequate health care and the incompatibility of the remand measure with the applicant's state of health.

120 As regards the applicant's complaint that he could not receive adequate medical care in prison, the Constitutional Court reiterated that persons in pre-trial detention should exhaust the remedies before the sentence-execution judge; see note 119.

121 Decisions no. U-III-2269/2020, et al. of 24 June 2020

122 See also decision no. U-III-2266/2020 of 16 June 2020 as a good example of a remote hearing.

extend the pre-trial detention could be held via video link in order to avoid any contact with a defendant infected with the virus.

In the constitutional complaint, the applicant complained that there had been no special circumstances for extending the pre-trial detention. He also stated that his stay in detention in the circumstances of the pandemic would pose risk to his health, considering that it was impossible to ensure in detention even the least requisite protection from the virus.

The Constitutional Court accepted the findings of the relevant courts, especially regarding the explanation of the epidemiological situation in Croatia caused by the pandemic. It also held that all measures have been taken in the prison to successfully prevent the infections. Lastly, the Constitutional Court considered that the extension of the applicant's detention had been justified.

Another relevant case is case No. U-III-2173/2020,[123] which concerned the decision on involuntary placement in a psychiatric institution of an applicant, who was not present at the hearing before the first-instance court, although the prosecutor and his *ex officio* lawyer (whose appointment the applicant opposed) were present.

In particular, in this case the applicant had only once been heard by the judge via video link from the prison hospital. However, later the judge decided to hold a hearing scheduled at the time of the national lockdown at which the applicant needed to be examined. In this regard, the judge sent a letter to the prison hospital for the applicant to waive his right to participate in the hearing, and the applicant agreed to that signing the letter. The hearing was held in the absence of the applicant, but in the presence of the prosecutor and the applicant's *ex officio* lawyer. At that hearing, the judge adopted a judgment ordering the applicant's psychiatric internment. All those present waived their right to appeal and the judgment, and an accompanying detention order, became final.

The applicant complained to the Constitutional Court contending, in particular, that he had been represented by an *ex officio* lawyer who had never communicated with him and had represented him against his will. Moreover, he argued that he had not been present at any hearing during the proceedings, including the last hearing, so that he had not been given the opportunity to present his defence and his evidence. He also stated that all his objections to the lower courts had been ignored.

[123] See decision No. U-III-2173/2020 of 24 June 2020.

The Constitutional Court agreed with the applicant and found multiple violations of the Constitution and the ECHR. In particular, in so far as relevant for the present discussion, the Constitutional Court found a violation of the right to an effective defence and the right to be tried in presence (Article 29 paras 2, 3, 4 and 5 of the Constitutions and Article 6 (3) (c) ECHR). It found that the trial judge had not heard the applicant and had failed to justify the applicant's non-participation at the hearing. In this connection, a mere reference to the pandemic did not suffice. The Constitutional Court did not consider that the applicant had made a valid waiver of his right to participate in the hearing. In addition, the Constitutional Court stressed that the judge conducting the proceedings had not provided any reasons for not hearing the applicant via video link at the relevant hearing. In this connection, the Constitutional Court stressed that the judge had been obliged under the relevant provisions of the Code of Criminal Procedure to inform the applicant about his rights and the consequences of his failure to act. The applicant should have also been instructed that he had the right to use legal remedies, which could be waived only after the judgment had been served on him. The Court also found that the *ex officio* lawyer had not protected the interests and rights of the applicant, and although she had been obliged to ensure the applicant's proper representation, she had failed to do that and remained passive during the proceedings.

It should also be noted that in several cases before the Constitutional Court, the applicants who challenged the decisions on their pre-trial detention referred exclusively to the health condition associated with the Covid pandemic. However, in many of those cases the relevant remedies had not been (properly) exhausted.

In case No. U-III-5334/2020,[124] the applicant complained in relation to his health condition stating that he was in such a bad and life-threatening health condition that, regardless of his previous convictions, it was not advisable to keep him in detention. The Constitutional Court accepted the Supreme Court's explanation that the applicant had been provided with adequate medical care in detention, which was confirmed by the information available in the case.

In the next case No. U-III-2186/2020 the applicant complained about the prison overcrowding, as well as the health conditions and his state of health. He argued, in particular, that his stay in detention had significantly endangered his health and that the relevant sanitary measures against the pandemic had not been put in place. However, the Constitutional Court declared the applicant's complaints

[124] Decision No. U-III-2186/2020 of 28 May 2020.

inadmissible for his failure to exhaust the relevant remedy before the prison administration and the relevant courts.

In case No. U-III-3217/2020[125] the applicant complained that her life and health had been endangered by her detention because certain persons in the prison were positive for Covid virus (see also Decision No. U-III-2465/2020 of 29 July 2020). The Constitutional Court assessed this complain under Article 21 of the Constitution and Article 2 ECHR. In particular, the Constitutional Court stressed that the State should ensure that the health and well-being of detainees were adequately protected and that the detainees were provided with the necessary medical assistance. However, in the particular case at issue, the applicant had not raised her complaints before the relevant courts and thus her complaint was inadmissible for non-exhaustion of remedies (see, similarly, case No. U-III-414/2021[126]).

6. CONCLUSION

There is no doubt that the various Covid measures severly impacted the functioning of justice systems, causing restrictions on the work of courts.

This article pointed to different aspects of the courts' functioning, which has been limited to varying degrees. There was a lack of consistent approach across courts, regarding the physical and procedural adaptations in response to the Covid pandemic, which is not surprising, since not all courts in all countries experienced the same issues. However, this seemed to indicate from the point of view of the parties and their procedural rights that the level of protection of the right to a fair trial and the health and safety of those involved in urgent criminal proceedings, as well as their right to liberty, varied depending on which court and which judge was competent for the proceedings. This, however, contributed to a sense of legal inequality and uncertainty. In this conection, as the article shows, resorting to remote justice and additional changes in policy during the Covid pandemic seriously limited access to justice and defence rights, including ability to exercise the right to legal assistance, to obtain access to the materials in the case file, etc. This is even more evident in a national context of pre-trial detention.

Some European countries (for instance Slovenia), in order to maintain legal certainty and security in the new circumstances and to ensure an equal level of humans' rights in court proceedings, provided legal framework to enable the functioning of courts and communication between courts and citizens. The CBA made a similar attempt in Croatia, proposing a draft Act on the Intervention Measures

[125] Decision No. U-III-3217/2020 of 23 July 2020.

[126] Decision No. U-III-414/2021 of 2 February 2021.

in the area of judicial and administrative proceedings due to the Covid pandemic, which would have addressed, among other things, the regulation of audio-video link hearings. While this could have been welcomed by the parties and their representatives, the proposed Act was not adopted.

Compared to the effect of the Covid pandemic on other European countries, Croatia is no exception. The Constitutional Court's case-law is an example that when it comes to the cases in which a hearing was scheduled at the time of a national lockdown, the competent courts acted differently, regardless of the recommendations of the Ministry of Justice and the decisions and recommendation of the President of the Supreme Court. The Constitutional Court has so far found a violation of several Articles of the Constitution (and ECHR) in several decisions in relation to online hearings (the right to adversarial proceedings, equality of arms, effective legal representation, etc. as the aspects of the right to a fair trial, also right to liberty, etc.).

Drawing from the existing ECtHR case-law, neither in the context of Article 6, nor under Article 5 of the ECHR, the right to an oral hearing and personal physical presence operates as an absolute requirement. The recourse to remote/online hearings is possible but it must pursue a legitimate aim and must be accompanied with the relevant procedural safeguards. Moreover, in the context of the Covid pandemic, the domestic authorities must show that they acted diligently and took measures to actively pursue the case and to respond to any relevant requests made by an accused.

Nonetheless, the experience of the Covid pandemic and other emergency situations, has shown that when determining measures, the courts should consider how to maintain a balance between the requirements of clarity and foreseeability of their decisions and their case management solutions, on the one hand, and the flexibility of their decision-making, on the other. While many questions still remain open, the main considerations from the analysis of the ECtHR's and the Constitutional Court's case-law (notably on remote/online hearings) could certainly assist the courts during the pandemic and inform their decisions on the *manner in which the Covid pandemic experience with* the administration of justice *can be taken forward*.

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ISBN 978-953-8109-39-3