



LAW OF THE EUROPEAN UNION

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PREFACE

This project has been funded with support from the European Commission (TEMPUS InterEULawEast project No. 544117). This publication reflects 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.

This Textbook will contribute to the promotion of the European Law and increase the legal culture of not only students but public at large in all the countries involved in the project. The authors' objective was to encourage and provide an excellent foundation for the prospective Master's students in promoting and affirming the European values.

One of the goals of the TEMPUS InterEULawEast Project is the implementation of the Master's Programme "International and European Law" which is introduced within the TEMPUS InterEULawEast Project. Therefore, the experts from the European Union and teachers from co-beneficiary institutions are preparing all the necessary logistic and scientific materials for achieving this goal. This also serves to disseminate the knowledge and to gain results that will last after the project lifetime. Publishing of this book represents one of the achievements of the abovementioned goals and a contribution to the International and European Law Master's Programme.

The authors' intention is to collect in one book their knowledge and experience in teaching the European law issues and to present how to use different sources of European Law for research. Furthermore, their intention is to present in one book the representative European Court of Justice case law regarding four market freedoms.

This Textbook has two volumes. The first volume gives a clear overview of following themes: Fundamentals of the EU, Introduction to the EU law, EU's institutional structure, EU Citizenship. The second volume describes: Four market freedoms, European Company law, European Competition law.

As a result of studying the material presented in the textbook, students

ought to know:

- the basic rules of international, European and national law in different spheres of relations;
- the main features of the EU, the goals and objectives, structure, procedure for settlement of disputes within the organization;

- the correlation between international and European law and national law of the Member States;
- the framework of categories and concepts of the discipline

should be able to:

- interpret international acts and national legislation competently;
- apply the international and national legal norms to the relevant relations;
- use scientific and reference books on the topics of the disciplines;
- apply the knowledge gained in the process of studying the discipline in law-making and law enforcement;

should master:

- skills of implementing international and national law;
- skills of participating in the resolution of disputes in the relations studied;
- skills of expert evaluation.

The following student's competences are formed as a result of the course:

a) general culture:

- awareness of the social significance of a future profession, sufficient professional sense of justice;
- culture of thinking, ability to synthesize and analyze, the perception of information, setting goals and choosing the ways of achieving them;
- ability to build oral and written utterances logically and offer clear arguments;
- intolerance towards corrupt behavior, promotion of the respect for human rights and the law;
- striving for self-development, improving qualifications and skills;
- ability to analyze socially significant problems and processes;

b) professional competences:

in the regulatory activities:

- ability to participate in the development of regulatory legal acts in accordance with the profile of the professional work;

in the law enforcement activities:

- ability to carry out professional activity on the basis of a developed sense of justice, legal thinking and legal culture;
- ability to make decisions and take legal action in strict accordance with the law;
- ability to apply the EU law, to implement the substantive and procedural law in the professional activity;

- ability to qualify the facts and circumstances legally correctly;
- possession of skills to prepare legal acts;
- ability to correctly and fully reflect the results of professional work in legal and other documentation;
- ability to interpret different legal acts;
- ability to give qualified legal opinions and advice in specific types of legal work;

in educational activities:

- ability to provide effective legal education.

The possibilities of distributing the information through modern information technologies should be actively used by students. The Internet resources are clearly and simply presented by using figures and a descriptive way of presenting each Internet source. Knowledge and experience in researching within the relevant sources of EU law and other information is of utmost importance for Master's students as well as for others who study and research the EU topics.

Students will be able to find materials using different electronic and educational resources, including:

Institutes, bodies and agencies of the EU

European Council // <http://www.consilium.europa.eu/en/european-council/>

Council of the European Union // <http://www.consilium.europa.eu/en/home/>

European Commission // <http://www.ec.europa.eu>

European Parliament // http://www.europa.eu/about-eu/institutions-bodies/european-parliament/index_en.htm

Court of Justice of the European Union // <http://www.curia.europa.eu>

European Court of Auditors // http://www.europa.eu/about-eu/institutions-bodies/court-auditors/index_en.htm

European Central Bank // http://www.europa.eu/about-eu/institutions-bodies/ecb/index_en.htm

European External Action Service (EEAS) // http://www.europa.eu/about-eu/institutions-bodies/eeas/index_en.htm

European Economic and Social Committee (EESC) // http://www.europa.eu/about-eu/institutions-bodies/eesc/index_en.htm

Committee of the Regions of the EU (Cor) // <http://www.cor.europa.eu/en/Pages/home.aspx>.

European Investment Bank (EIB) // http://www.europa.eu/about-eu/institutions-bodies/eib/index_en.htm

European Ombudsman // http://www.europa.eu/about-eu/institutions-bodies/ombudsman/index_en.htm

European Data Protection Supervisor (EDPS) // http://www.europa.eu/about-eu/institutions-bodies/edps/index_en.htm

European Personnel Selection Office // http://www.europa.eu/epso/index_en.htm

Civil Service of the European Commission // http://www.ec.europa.eu/civil_service/index_en.htm

Interinstitutional bodies // http://www.europa.eu/about-eu/institutions-bodies/interinstitutional-bodies/index_en.htm

European Judicial Network in civil and commercial matters // <http://www.ec.europa.eu/civiljustice>

Jurisdiction Recognition Enforcement (JURE) database // <http://www.eur-lex.europa.eu/collection/n-law/jure.html>

Database from the European Court of Justice // <http://www.curia.europa.eu/juris/recherche.jsf?language=en>

Databases of EU Member States

Austria – Rechtsinformationssystem – <http://www.ris.bka.gv.at>

Belgium – Moniteur belge – http://www.justice.belgium.be/fr/service_public_federal_justice/organisation/moniteur_belge

Bulgaria – State Gazette – <http://www.dv.parliament.bg/DVWeb/index.faces>

Croatia – Narodne novine // <http://www.digured.hr>

Cyprus – CyLaw // <http://www.cylaw.org>

Czech Republic – Zakony pro lidi // <http://www.zakonyprolidi.cz>

Denmark – Retsinformation.dk // <https://www.retsinformation.dk>

Estonia – Riigi Teataja // <https://www.riigiteataja.ee>

Finland – Finlex // <http://www.finlex.fi/fi>

France – Légifrance // http://www.eur-lex.europa.eu/n-lex/info/info_fr/index_en.htm

Germany – Gesetze im Internet // <http://www.gesetze-im-internet.de>

Greece – Εθνικό Τυπογραφείο // http://www.eur-lex.europa.eu/n-lex/info/info_gr/index_en.htm

Hungary – National Legislative Database // http://www.eur-lex.europa.eu/n-lex/info/info_hu/index_en.htm

Ireland – Irish Statute Book web site (eISB) // <http://www.irishstatutebook.ie>

Italy – Normattiva // <http://www.normattiva.it>

Latvia – Latvijas Vēstnesis // <http://www.vestnesis.lv>

Lithuania – Lithuanian law online // http://www3.lrs.lt/dokpaieska/forma_e.htm

Luxembourg – Legilux // <http://www.legilux.public.lu>
 Malta – LAWS OF MALTA // http://www.eur-lex.europa.eu/n-lex/legis_mt/malta.lawsen_form_en.htm
 Netherlands – Wet-en Regelgeving // <http://www.overheid.nl>
 Poland – Internetowy System Aktów Prawnych – ISAP // <http://www.isap.sejm.gov.pl/index.jsp>
 Portugal – Digesto // http://www.eur-lex.europa.eu/n-lex/info/info_po/index_en.htm
 Romania – Romanian legal database // http://www.clr.ro/rep_dil_2002/rep.aspx
 Slovakia – Jednotný automatizovaný systém právnych informácií – JASPI – WEB // http://www.jaspi.justice.gov.sk/jaspiw1/jaspiw_mini_fr0.htm
 Slovenia – Register predpisov Slovenije // <http://www.zakonodaja.gov.si>
 Spain – Boletín Oficial del Estado // <http://www.boe.es>
 Sweden – lagrummet.se // <http://www.lagrummet.se>
 UK – Legislation.gov.uk // <http://www.legislation.gov.uk>

Documents for all topics

Treaty establishing the European Coal and Steel Community <<http://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:xy0022>>
 Treaty establishing the European Atomic Energy Community <<http://www.eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CE-LEX:12012A/TXT>>
 Treaty amending, with regard to Greenland, the Treaties establishing the European Communities [1985] OJ. L 29.
 Single European Act [1986] OJ C 120, p. 96.
 EEA Agreement 1992 <<http://www.efta.int/legal-texts/eea>>
 Treaty on European Union <<http://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012M/TXT>>
 Charter of Fundamental Rights of the European Union [2012] OJ C 326, p. 391–407.
 Treaty of Nice [2001] OJ. C 80.
 Treaty of Lisbon 2007 <<http://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12007L/TXT>>
 Consolidated version of the Treaty establishing the European Atomic Energy Community [2012] OJ C 327, p. 1–107.
 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, p. 47–390.
 Treaty on the Functioning of the European Union (Consolidated version) <<http://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>>

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ABBREVIATIONS

Art. – article

CFSP – the Common Foreign and Security Policy

EC – the European Community

ECB – the European Central Bank

ECJ – the European Court of Justice

ECR – European Court Reports

ECSC – the European Coal and Steel Community

ECHR – the European Convention on Human Rights

EEA – the European Economic Area

EEC – the European Economic Community

EMU – Economic and Monetary Union

ESCB – European System of Central Banks

EU – the European Union

EU-Nice – Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts

Treaty of Lisbon – Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007

MS – the Member State of the EU

OJ – ‘Official Journal of the European Community’, ‘Official Journal of the European Union’

SEA – the Single European Act

TEA – the Treaty establishing the European Atomic Energy Community

TEC – the Treaty on the European Community

TEEC – the Treaty establishing the European Economic Community

TEU – the Treaty on the European Union

TFEU – the Treaty on the Functioning of the European Union

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ПРЕДИСЛОВИЕ

Данный проект реализуется при финансовой поддержке Европейской комиссии (проект TEMPUS InterEULawEast No. 544117). Учебник отражает только точку зрения авторов, и Комиссия не несёт ответственность за любое использование содержащейся в нем информации.

Данный учебник будет способствовать продвижению европейского права и повышению правовой культуры не только студентов, но и широкой публики во всех странах, участвующих в проекте. Авторами была поставлена цель поощрения и обеспечения надлежащей образовательной базы для потенциальных студентов-магистров, а также для продвижения и утверждения европейских ценностей.

Одной из целей проекта TEMPUS InterEULawEast является также реализация магистерской программы «Международное и европейское право», которая была разработана в рамках проекта. Таким образом, эксперты из Европейского Союза и преподаватели университетов консорциума подготовили все необходимые учебно-методические материалы для достижения этой цели. Это также служит для цели распространения знаний и полученных результатов, которые будут продолжать использоваться и после завершения проекта. Издание данной книги представляет собой одно из средств достижения вышеуказанных целей и вклад в реализацию магистерской программы «Международное и европейское право».

Намерение авторов состоит в том, чтобы собрать в одной книге свои знания и опыт в обучении европейскому праву и объяснить, каким образом использовать различные источники европейского права для научных исследований. Кроме того, они постарались представить в одной книге актуальную прецедентную практику Европейского суда в отношении четырех рыночных свобод ЕС.

В результате изучения материала, представленного в учебнике, магистр

должен знать:

основные нормы международного, европейского права и национального права в различных сферах отношений;

особенности ЕС, цели и задачи, структуру, порядок разрешения споров в рамках этой организации;

соотношение норм международного, европейского права с национальным правом государств-членов ЕС;

уметь:

квалифицированно толковать международные документы и национальное законодательство;

определять применимые международно-правовые и внутригосударственные нормы к соответствующим отношениям;

пользоваться научной и справочной литературой по темам изучаемых дисциплин;

применять полученные в результате освоения дисциплины знания в правотворческой и правоприменительной деятельности;

владеть:

понятийно-категориальным аппаратом дисциплины;

навыками реализации норм международного и внутригосударственного права;

навыками по участию в разрешении споров в изучаемых отношениях;

навыками экспертной оценки.

Следующие компетенции обучающихся студентов формируются в результате освоения курса:

а) общекультурные:

осознает социальную значимость своей будущей профессии, обладает достаточным уровнем профессионального правосознания;

владеет культурой мышления, способен к обобщению, анализу, восприятию информации, постановке цели и выбору путей ее достижения;

способен логически верно, аргументировано и ясно строить устную и письменную речь;

имеет нетерпимое отношение к коррупционному поведению, уважительно относится к праву и закону;

стремится к саморазвитию, повышению своей квалификации и мастерства;

способен анализировать социально значимые проблемы и процессы;

б) профессиональные компетенции:

в нормотворческой деятельности:

способен участвовать в разработке нормативно-правовых актов в соответствии с профилем своей профессиональной деятельности;

в правоприменительной деятельности:

способен осуществлять профессиональную деятельность на основе развитого правосознания, правового мышления и правовой культуры;

способен принимать решения и совершать юридические действия в точном соответствии с законом;

способен применять нормативные документы ЕС, реализовывать нормы материального и процессуального права в профессиональной деятельности;

способен юридически правильно квалифицировать факты и обстоятельства;

владеет навыками подготовки юридических документов;

способен правильно и полно отражать результаты профессиональной деятельности в юридической и иной документации;

способен толковать различные правовые акты;

способен давать квалифицированные юридические заключения и консультации в конкретных видах юридической деятельности;

в педагогической деятельности:

способен эффективно осуществлять правовое воспитание.

Возможности распространения информации посредством современных информационных технологий должны активно использоваться студентами.

Авторы с благодарностью отнесутся к замечаниям и пожеланиям читателей.

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CHAPTER 1. FUNDAMENTALS OF THE EUROPEAN UNION

As a result of studying the material of this chapter students must:

know:

the composition, structure and trends of legal regulation of relations in the EU sphere,

goals, objectives and directions of reforming the legal regulation in the EU;
patterns of development of legal practice, including the judiciary, and its importance in the mechanism (system) of legal regulation in the EU;
state and development of international legal regulation in the relevant field;
relevant legislation, and (or) mechanisms of inter-sectoral institutions;

be able to:

apply legal norms in situations of gaps, conflicts of norms, complex interactions, solve complex problems of law enforcement practice in the EU;

argue decisions taken, including being able to foresee the possible consequences of such decisions;

analyze non-standard situations of law enforcement practice and to develop a variety of solutions;

interpret legal acts in their interaction competently;

examine legal acts, including, in order to identify the provisions facilitating the creation of conditions for corruption,

explain the effect of the law to their addressees.

possess:

skills for making legal written documents;

skills for drafting regulatory and individual legal acts;

skills for making oral presentations on legal matters, including, in competitive proceedings, arguing and defending their points of view in oral debates;

skills for discussion, business negotiations, mediation in order to reach a compromise between parties of a conflict;

skills for drawing up expert opinions;

skills for counselling citizens on legal issues in the sphere.

1.1. The history of the European Union

1.1.1. Short history of the European Integration

The creation of the European Communities was inspired by plenty of people who worked tirelessly towards the European project but in particular by such visionary leaders as: Konrad Adenauer, Joseph Bech, Johan Beyen, Winston Churchill, Alcide De Gasperi, Walter Hallstein, Sicco Mansholt, Jean Monnet, Robert Schuman, Paul-Henri Spaak, Altiero Spinelli. From resistance fighters to lawyers, the founding fathers were a diverse group of people who held the same ideals: a peaceful, united and prosperous Europe.

Six countries (Germany, Belgium, France, Holland, Italy and Luxembourg) agreed to create the European Coal and Steel Community (hereinafter – ECSC).

France had suggested the ECSC to control Germany and to rebuild industry. Germany wanted to become an equal player in Europe again and rebuild its reputation, as did Italy. The Benelux nations hoped for growth and didn't want to be left behind. France, afraid that Britain would try and quash the plan, didn't include them in initial discussions, and Britain stayed out, wary of giving up any power and content with the economic potential offered by the Commonwealth.

In order to manage the ECSC a group of 'supranational' (a level of governance above the nation state) bodies was also created: the Council of Ministers, the Common Assembly, the High Authority and the Court of Justice, all to legislate, develop ideas and resolve disputes. It was from these key bodies that the later EU would emerge, a process which some of the ECSC's creators had envisaged, as they explicitly stated the creation of a federal Europe as their long term goal.

The ECSC began to unite European countries economically and politically in order to secure lasting peace.

A false step was taken in the mid 1950s when a proposed 'European Defence Community' among the ECSC's six states was drawn up: it called for a joint army to be controlled by a new supranational Defence Minister. The initiative had to be rejected after France's National Assembly voted it down.

However, the success of the ECSC led to the member nations signing two new treaties in 1957, both called the Treaty of Rome.

The Treaties of Rome created the European Economic Community (hereinafter – EEC) and the European Atomic Energy Community (hereinafter – Euratom).

The EEC formed a common market among the member nations, with no tariffs or impediments to the flow of labor and goods. It aimed to continue economic growth and avoid the protectionist policies of pre-war Europe. By 1970 trade within the common market had increased fivefold. There was also the Common Agricultural Policy (CAP) to boost the members' farming and to put an end to monopolies. The CAP,

which wasn't based on a common market, but on government subsidies to support local farmers, has become one of most controversial EU policies.

Like the ECSC, the EEC created several supranational bodies: the Council of Ministers to make decisions, the Common Assembly (called the European Parliament from 1962) to give advice, a court which could overrule member states and a commission to put the policy into effect.

The 1965 Brussels Treaty merged the commissions of the EEC, ECSC and Euratom to create a joint and permanent civil service.

The 1960s was a good period for the economy, helped by the fact that EC countries stopped charging customs duties when they traded with each other. They also agreed on joint control over food production, so that everybody now had enough to eat – and soon there was even a surplus in agricultural produce.

In the late 1960s a power struggle led to the need for unanimous agreements on key decisions, effectively giving Member States a veto. It has been argued that this slowed down the union by two decades.

Over the 1970s and 1980s the membership of the EEC expanded, with Denmark, Ireland and the UK acceding in 1973, Greece in 1981 and Portugal and Spain in 1986.

Britain had changed its mind after seeing its economic growth lag behind the EEC, and after the USA indicated it would support Britain as a rival voice in the EEC to France and Germany. However, Britain's first two applications were vetoed by France. Ireland and Denmark, heavily dependent upon the UK economy, followed it to keep pace and attempt to develop differently from Britain. Norway applied at the same time, but withdrew after a referendum said 'no'. Meanwhile member states began to see European integration as a way to balance the influence of both Russia and America.

The European regional policy started to transfer huge sums to create jobs and infrastructure in poorer areas. The European Parliament increased its influence in EC affairs and in 1979 all citizens could, for the first time, elect their members directly.

The development of the union was slowed down in the 1970s, frustrating federalists who sometimes referred to it as a 'dark age' in development. Attempts to create an Economic and Monetary Union were drawn up, but derailed by the declining international economy. However, impetus had returned by the 1980s, partly as a result of fears that Reagan's US was both moving away from Europe and preventing EEC members from forming links with Communist countries in an attempt to slowly bring them back into the democratic fold.

The remit of the EEC thus developed, and foreign policy became an area for consultation and group action. Other funds and bodies were created including the European Monetary System in 1979 and methods of giving grants to underdeveloped areas.

The Treaty on Greenland (1984) meant that the treaties would no longer apply to Greenland and established special relations between the European Community and Greenland modelled on the rules which applied to overseas territories.

In 1987 the Single European Act (hereinafter – SEA) evolved the EEC’s role a step further.

Now the European Parliament members were given the ability to vote on legislation and issues, with the number of votes depending on each member’s population. Bottlenecks in the common market were also targeted.

In 1981, Greece became the 10th member of the EU and Spain and Portugal followed five years later. In 1986 the Single European Act was signed. This was a treaty which provided the basis for a vast six-year programme aimed at sorting out the problems with the free flow of trade across the EU borders and thus created the ‘Single Market’. There was a major political upheaval when, on 9 November 1989, the Berlin Wall was pulled down and the border between East and West Germany was opened for the first time in 28 years, this led to the reunification of Germany when both East and West Germany were united in October 1990.

1.1.2. The Maastricht Treaty and the European Union

On 7th February 1992 European integration moved a step further when the Treaty on European Union (better known as the Maastricht Treaty) was signed. This came into force on 1 November 1993 and changed the EEC into the newly named European Union.

The treaty identified five goals designed to unify Europe in more ways than just economically. The goals are:

- 1) to strengthen the democratic governing of participating nations;
- 2) to improve the efficiency of the nations;
- 3) to establish an economic and financial unification;
- 4) to develop the “Community social dimension”;
- 5) to establish a security policy for involved nations.

The change was to broaden the work of the supranational bodies based around three “pillars”: the European Communities, giving more power to the European Parliament; a common security/foreign policy; involvement in the domestic affairs of member nations on “justice and home affairs”. In practice, and to pass the mandatory unanimous vote, these were all compromises away from the unified ideal. The EU also set out guidelines for the creation of a single currency, although when this was introduced in 1999 three nations opted out and one failed to meet the required targets.

In 1993 the Single Market was completed with the ‘four freedoms’ of: movement of goods, services, people and money.

In December 1991 in Maastricht, the Member States decided to initiate the next stage of their integration, viz. Economic and monetary union (hereinafter – EMU), implying a single monetary policy necessary for the management of a single currency, and the convergence of national economic policies, with a view to achieving economic and social cohesion.

EMU was based on the common market for goods and services, but the Union itself served the proper functioning of the common market, by eliminating exchange rate variations between Member States’ currencies, which hindered the interpenetration of capital markets, impeded the development of the common agricultural market and prevented the common industrial market from wholly resembling an internal market. This stage of the integration process was completed with the successful circulation of the euro, on 1st January 2002, just ten years after the introduction of the concept.

At the same time when they were promoting their monetary integration, in Maastricht, the Member States decided to coordinate their non-economic policies as well, i.e. justice and home affair policies, in order to achieve a common area of freedom, security and justice; and their foreign and security policies, so that the economic giant that they were creating through economic integration would have a voice commensurate with its size in the international arena. The euro is the new currency for many Europeans.

Currency and economic reforms were now being driven largely by the fact that the US and Japanese economies were growing faster than Europe’s, especially after expanding quickly into the new developments in electronics.

There were objections from poorer member nations, which wanted more money from the union, and from larger nations, which wanted to pay less; a compromise was eventually reached. One planned side effect of the closer economic union and the creation of a single market was a greater co-operation in social policy which would have to occur as a result.

The Maastricht Treaty also formalized the concept of EU citizenship, allowing any individual from an EU nation to run for office in their government, which was also changed to promote decision making. Perhaps most controversially, the EU’s interference into domestic legal matters – which produced the Human Rights Act and over-rode many member states’ local laws – produced rules relating to free movement within the EU’s borders, leading to paranoia about mass migrations from poorer EU nations to richer ones. More areas of members’ government were affected than ever before, and the bureaucracy expanded. Although the Maastricht Treaty came into effect, it faced heavy opposition, and was passed in France only by a limited number of people and forced a vote in the UK.

In 1995 the EU gained three more new members, Austria, Finland and Sweden. A small village in Luxembourg gave its name to the 'Schengen' agreements that gradually allowed people to travel without having their passports checked at the borders. Millions of young people study in other countries with EU support. Communication is made easier as more and more people start using mobile phones and the Internet.

In 1999 the Treaty of Amsterdam came into effect bringing employment, working and living conditions and other social and legal issues into the EU remit.

In particular, the Amsterdam Treaty introduced a number of important changes: first of all, the article dealing with the Human Rights was supplemented allowing the Court of the European Communities to apply this provision in case of considering the actions of the Member States, if the actions fall under its jurisdiction; secondly, it strengthened significantly the protection of human rights and freedoms, the Member States adopted the decision on sanctions imposed on violators of the EU basic principles, Member States could now be excluded from the Union for serious and persistent violations, which included the violation of fundamental rights and freedoms; thirdly, the joint management of social policy was introduced which presupposed the observance of internal and external borders, common visa policy, the fulfillment of the asylum and immigration right, as well as cooperation in the field of judicial proceedings in civil cases; fourth, with regard to the EU's institutional system, in general, it affected stability of its basic structures, but there is a general development trend – strengthening of the supranational features of integration mechanisms not only preserves, but also strengthens the position; finally, this agreement, as well as the Maastricht, did not contribute anything in regard to the legal nature of the EU. The EU did not obtain the legal entity status.

The expansion of the European Union, and the failure of existing bodies and institutions to meet the needs of the growing EU were the basis for the development of a new series of reforms of the European Union constituent acts. In February 2000, a new Conference of EU Member States Governments was convened. The new agreement aimed at reforming the institutional structure was the Treaty of Nice, which entered into force on 1st February 2003.

The agreement brought about the following changes:

firstly, it increased the capacities of the EU institutions to monitor the compliance with the social order democratic principles by the Member States;

secondly, within the framework of the common foreign and security policy:

a) the number of issues resolved by the Council on the basis of a qualified majority increased;

b) the provisions on the Western European Union participation in a common defense policy of the EU formation were excluded;

c) the procedure for the conclusion and implementation of the EU international treaties with third countries and international organizations was clarified;

d) the Political and Security Committee to exercise political control and strategic direction in relation to crisis management operations was set up;

thirdly, in relation to the cooperation of police and judicial authorities in criminal matters the provisions of a new law enforcement agency of the Union – the European Union’s Judicial Cooperation Unit (Eurojust) were established; finally, the procedure of Member States usage of “enhanced cooperation” mechanism was clarified and simplified.

There were discussions over streamlining voting and modifying the CAP, especially as Eastern Europe had a much higher percentage of the population involved in agriculture than the west, but in the end financial worries prevented change.

Despite some opposition, ten nations acceded in 2004 (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) and two in 2007 (Bulgaria and Romania). By this time there had been agreements to apply majority voting to more issues, but national vetoes remained on tax, security and other issues. Worries over international crime – where criminals had formed effective cross border organizations – were now serving as an impetus.

1.1.3. The Lisbon Treaty

The Lisbon Treaty was signed on 13th December 2007 in the capital of Portugal – Lisbon by the leaders of 27 countries – the EU members. The Lisbon Treaty suggested amending the Treaty on European Union and the Treaty establishing the European Community. It also provided for a significant change in the EU structures and the rule of law, in the system of its institutions and in the conditions of obligatory decision-making.

The new treaty is known as the Reform Treaty 2007 and is regarded as the beginning of significant reforms. This is due to the fact that on the day after it was signed the heads of the EU Members States, at the summit on 14th December 2007 in Brussels, decided to establish an independent expert group targeted to consider the projects of new development directions and the projects aimed at the EU reforming, but in the long term – up to the 2020-2030.

The Lisbon Treaty introduced many innovations, but we will consider the most important changes that followed the Treaty of Lisbon entering into force (1st December 2009).

First of all, the Lisbon Treaty provided for the provision of the status of legal entity to the EU. Professor S. Yu Kashkin believes that “Recognition of the principle of a single legal personality of the EU is expressed in the following prerogatives:

- a) the EU is seen as a single competence entity given by the Member States;
- b) this competence is exercised through a single system of their own institutions, bodies and agencies;
- c) a unified system of legal acts (regulations, directives, etc.) published in all spheres of its competence has been formed;
- g) the existence of the EU as having “the most extensive legal capacity” of a legal entity and its tortious capacity, i.e. the ability to be responsible for contracts and other obligations has been recognized;
- d) the right of the Union to conclude international agreements with third countries and international organizations, to have privileges and immunities on the territory of the Member States, to set up diplomatic missions and representative offices have been presupposed; e) the existence of the Union’s own budget financed by its own resources also speaks for its financial autonomy.

The Treaty also simplified the internal structure of the Union. “The structure of the three pillars” was eliminated. It allowed to eliminate the ambiguity of the terms “European Union” – “European Community”. All references to the European Community were replaced by the European Union.

For the first time in the history a new legal category – “values of the Union” was introduced – in Art. 2 of the Treaty. It is assumed that these values are “moral and ethical principles of the European, and indeed global civilization.” All Member States of the EU should respect and follow them; the same requirement is applied to all the States joining the EU. Sanctions are also provided in the form of suspension of certain rights in the EU membership in case of disrespect for these values. Among the values of the EU are: human dignity, freedom, democracy, equality, the rule of law, human rights.

The main principles of the Treaty of Lisbon considered earlier as declarative, such as the protection of EU citizens across the world, the economic, social and territorial cohesion, cultural diversity, etc. along with social goals, became fundamental objectives of EU policy. Another objective of the EU was the creation of an “internal market” and achievement of a number of objectives: full employment, social progress, a high level of environmental protection, social justice, protection of children’s rights, fight against discrimination, etc.

The Lisbon Treaty gave the EU Charter of Fundamental Rights of 2000 the same legal force which the founding treaties had. In addition, the EU joined the Convention for Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950). At the same time we should not forget that the fundamental rights, as guaran-

teed by the Convention and as they result from the constitutional traditions common to the Member States, are included in the content of Union law as the general principles (p. 3 of Art. 6 of the Lisbon Treaty).

Another innovation of the Lisbon Treaty is the fact that for the first time the right of the states to freely exit from the EU structure was recognized. In addition, this Agreement restored the Member States' right to "veto" on certain issues, delayed the timing of some of the institutional changes, and made partial concessions to some countries (UK, Ireland, Poland, France, Italy, and Bulgaria).

The question of the EU competence and national governments correlation is one of the most important. In accordance with the Lisbon Treaty, the EU has an exclusive competence in defining and implementing the common foreign and security policy, in identifying actions to support, coordinating or supplementing the actions undertaken by Member States, without prejudice to their competence in these areas.

Questions of the Customs Union, of the internal market; monetary policies of Member States where the euro is the official currency; common commercial policy and the conclusion of international agreements in a number of cases are also included in the competence of the Union.

The areas of joint competence under the Treaty include functioning of the internal market, social policy, economic, social and territorial policy of cohesion, agriculture and fisheries, the environment, consumer protection, transport, energy, area of freedom, security and justice, the common problems of public health, research, technological development, space, cooperation development and humanitarian aid, the coordination of employment and social policy in the Member States. In such areas as the protection of public health, industry, culture, tourism, education, youth and sport, the Union will provide support to the Member States.

The issue of mandatory collective responsibility of the countries – members of the EU is also one of the most important. The Treaty of Lisbon prescribes that if a state has become a victim of aggression, the other States are obliged to provide assistance and support "by all possible means."

The Lisbon Treaty gives the EU the right to determine the model of coordination of economic policies of the countries – members of the euro zone. The Commission may make a warning to the government that its economic policies are not consistent with the general framework of the economic policy of the EU.

The Reform Treaty provides for such a concept as "civil initiative". In accordance with this concept, the EU citizens have the right to initiate a proposal to the European Parliament and the Council to change the law. To do this, you should enlist the support of millions of citizens for this initiative. The Commission reserves the right to decide whether to take action to meet this request or not.

Thus, from the above said we can state that, first of all, the EU formation process has taken a long period of time in the history (since 1951 till the present day); secondly, since the advent of the European Communities the association has really functioned as a regional economic inter-governmental organization; thirdly, the debate about the legal nature and the actual status of the EU is still going on; fourthly, despite the application of the provisions about the EU as a legal entity, with that status being conferred by the Lisbon Treaty, the question of what the prospects for further development of the EU are will become clear only with time.

Croatia joined the European Union on 1 July 2013.

In conclusion, it should be noted that currently the European Union (EU) is a unification of 28 MSs united to create a political and economic community throughout Europe. Though the idea of the EU might sound simple at the outset, the European Union has a rich history and a unique organization, both of which aid in its current success and its ability to fulfill its mission for the 21st century, namely to continue promoting prosperity, freedom, communication and ease of travel and commerce for its citizens. The EU is able to maintain this mission through the various treaties making it function, cooperation of Member States, and its unique governmental structure.

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1.2. Objectives and principles of the European Union

The objectives and principles of the international organization can demonstrate the contents and features of its substantive competence, i.e. those areas of activity that are entrusted to it by the founding states. The founding treaties of the European Community have significant features that reflect the content of the concept of Member States' integration. The EC/EU is a political community constituted as an international organization whose aim is to promote integration and common government of the European people and countries. When French Foreign Minister Robert Schuman proposed integrating western Europe's coal and steel industries in 1950, his ideas were set out in the Treaty of Paris the following year, and the precursor of the EU – the European Coal and Steel Community – was born. Since then, the EC has regularly updated and added to the treaties to ensure effective policy and decision-making.

1.2.1. Objectives of the European Communities/Union

The Treaty of Paris (Treaty Establishing the European Coal and Steel Community) establishing the European Coal and Steel Community was signed in Paris on 18 April, 1951 and entered into force in 1952.

The aim of the Treaty, as stated in Article 2, was to contribute, through the common market for coal and steel, to economic expansion, growth of employment and a rising standard of living. Thus, the institutions had to ensure an orderly supply to the common market by ensuring equal access to the sources of production, the establishment of the lowest prices and improved working conditions. All of this had to be accompanied by growth in international trade and modernisation of production.

In the light of the establishment of the common market, the Treaty introduced the free movement of products without customs duties or taxes. It prohibited discriminatory measures or practices, subsidies, aids granted by States or special charges imposed by States and restrictive practices. It expired in 2002.

The objectives of the European Union appeared in Article 2 of *the Treaty of Rome* in 1957, which respectively set the mission of the Community and the goals that were set by the Member States to the European Economic Community. The Treaties of Rome establishing the European Economic Community (Treaty Establishing the Eu-

ropean Atomic Energy Community – EEC Treaty) and the European Atomic Energy Community (Treaty establishing the European Atomic Energy Community – Euratom Treaty) were signed in Rome on 25 March, 1957 and came into force in 1958.

The preamble of the Treaty of Rome establishing the European Economic Community states that it is the preservation of peace and freedom, which implicitly assumes the existence of certain political objectives, which should be provided with tools of economic integration. Subsequently, in the preamble to the Single European Act member states of the community expressed their “determination to contribute to the joint efforts of the development of democracy, which is based on the fundamental rights ... and, above all, the right to freedom, equality and social justice.”

According to this article, the mission of the Community is creation of a common market, economic and monetary union, as well as the implementation of policies and activities to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth, protection of the environment, achieving a high degree of convergence of economic performance, a high level of employment and social protection, raising the standard of living and quality of life, economic and social cohesion and solidarity among Member States.

The *Single European Act* (SEA) was signed in February, 1986 and came into force in 1987. The Single European Act set as a goal the completion of the internal market and for the first time codified the provisions on political cooperation between Member States. It amended the EEC Treaty and paved the way for completing the single market.

The *Treaty on European Union* (the Maastricht Treaty) was signed in Maastricht on 7 February, 1992 and came into force in 1993. It established the European Union, gave the Parliament more say in decision-making and added new policy areas of co-operation.

Under the Treaty of Maastricht, the European Union was created, and the European Economic Community was renamed European Community (EC). With every change, new areas of competence were added. In that way the EU has gradually evolved with the development of a single market, the removal of border controls and restrictions on trade and services, and the introduction of a common currency, the euro.

In the preamble to the Maastricht Treaty Member States reaffirmed “their commitment to the principles of liberty, democracy, respect for human rights, fundamental freedoms and the rule of law” and declared “the desire to deepen the solidarity between their peoples on the basis of respect for their history, culture and traditions.”

Article 3 of the Treaty establishing the European Community lists various tools used by the Community for the realization of the objectives set out in Article 2 of the Treaty, including the abolition of customs duties and quantitative restrictions on the import and export of goods in trade between States, common commercial policy, and

others. Thus, it becomes clear that in its objectives, aimed at the creation of a specific inter-state economic union, the constitutive act of the European Community went beyond the usual framework of international intergovernmental organizations, which tend to be limited to the tasks of policy coordination of its Member States.

Apparently the terminology was not randomly selected either: in 1950 Western European states instituted not an “international organization” but a “community,” in other words, the union, characterized by greater interpenetration of national interests of the Member States than is the case in a simple “organization.”

According to Art. 2 of the Maastricht Treaty, the Union has to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular by creating a space without borders, through economic and social cohesion and the creation of economic and monetary union, including eventually a single currency in accordance with the provisions of the Treaty; promote the establishment of its independent role in the international arena, especially through the implementation of a common foreign and security policy, including the progressive framing of a common defense policy that might lead to a common defense; strengthen the protection of the rights and interests of the citizens of the Member States through the introduction of a citizenship of the Union; maintain and develop the Union as an area of freedom, security and justice in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border control, asylum, immigration, preventing and combating crime; fully maintain *acquis communautaire* and build on them in order to determine to what extent the policies and forms of cooperation set forth in this Treaty need to be reviewed to ensure effectiveness of the mechanisms and the institutions of the Community.

Although the initial version of the European Union, in contrast to the constituent acts of the Community does not provide for specific forms of international economic organizations (internal market, customs union, and so on) the wording used for these purposes leaves no doubt that the Union was created to ensure the implementation of the main objectives of the European Community.

The *Treaty of Amsterdam* (Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts) was signed on 2 October, 1997 and came into force in 1999.

A new stage is marked in the Amsterdam Treaty, which is included in Article 6 of the Maastricht Treaty, which states that “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States” . It should be noted that respect for these principles is a condition of membership of the Union (Article 46 of the Maastricht Treaty) and the Treaty provides for the possibility of applying sanctions in case of violation by a Member State (Article 7).

These principles were then confirmed, expanded and transformed into a “value”, i.e. the provisions of a higher level than just principles, as was first stated in the preamble to the Charter of Fundamental Rights of the Union, which establishes that the Union is founded on the indivisible and universal values – human dignity, freedom, equality and solidarity; it relies on the principle of democracy and the rule of law.

More recently, the *Charter of Fundamental Rights* proclaimed by the Union in Nice in 2000 reiterated and broadened these founding principles. The Charter was initially solemnly proclaimed at the Nice European Council on 7 December, 2000. The Charter of Fundamental Rights of the EU brings together in a single document the fundamental rights protected in the EU. The Charter contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens’ Rights, and Justice. Proclaimed in 2000, the Charter became legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009. At that time, it did not have any binding legal effect. The Charter strengthens the protection of fundamental rights by making those rights more visible and more explicit for citizens. As a result, there is plainly a set of values underlying the edifice of the European Union.

The *Treaty of Nice* was signed on 26 February, 2001 and entered into force in 2003. It streamlined the EU institutional system so that it could continue to work effectively after the new wave of Member States joined in 2004.

The objectives are to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency.

The *Treaty of Lisbon* (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community) was signed on 13 December, 2007 and came into force in 2009. It introduced new structures with a view to making the EU a stronger actor on the global stage.

The Lisbon Treaty paves the way for a more democratic and transparent Union. The Lisbon Treaty aims to further promote a Europe of rights and values, as well as solidarity and security, notably through the incorporation of the European Charter of Fundamental Rights into European primary law, and through new solidarity mechanisms aiming at a better protection of the European citizens.

The Union gets greater capacity to act on freedom, security and justice. New provisions on civil protection, humanitarian aid and public health aim at strengthening the Union’s ability to respond to threats to the security of European citizens. The official version pursuant to Article 1a, runs as follows: “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.”

The Lisbon Treaty gave a clear picture of the purpose of the Union that was expressed in Article 3.

Article 3b set up the principle of conferral, principle of sincere cooperation, principle of subsidiarity, and principle of proportionality. According to the main aim of enhancing the democratic legitimacy of the Union set in the Preamble, for the first time in the Treaties, the Lisbon Treaty includes explicit provisions on democratic principles in its Title II.

The Union takes a responsibility to combat social exclusion and discrimination and promote social justice and protection, equality between women and men, solidarity between generations and the protection of children’s rights, it recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as dependency and old age.

Earlier treaties are now incorporated into the current consolidated version, which comprises the *Treaty on European Union 2007 (TEU)* and the *Treaty on the Functioning of the European Union 2007 (TFEU)*.

The European Union also established a set of values in Article 2 of the TEU: “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”. The EU Court can take values and aims into account when it decides on case law.

Article 10 of the TEU incorporates the most important democratic statements, which are complemented by a whole set of new provisions that increase the power of most democratic institutions. These new reforms mainly strengthen the role of the European Parliament and the national parliaments, and provide for citizens’ initiatives, with the purpose of increasing the democratic legitimacy of the EU.

They represent a set of values held in common by the Member States and which they decided to incorporate into the foundations of the Union. These values include liberty, democracy, a respect for human rights and basic civil liberties, and rule of law. They are proclaimed in the treaty founding the Union, to which the Charter of Fundamental Rights added the dignity of the human being, equality and solidarity.

The Treaties contain provisions aimed at reinforcing democracy in its representative and participatory dimensions: 1) Representative democracy, by empowering the most democratic institutions such as the European Parliament and the national and

regional chambers' participation and control with regard to EU acts; and 2) Participatory/Direct democracy, by establishing new participatory mechanisms, such the European citizens' initiative, and new channels of communication and information with European civil society.

So, currently, the EU is based on two Treaties: TEU and TFEU. These two Treaties, together with the protocols and the Charter of Fundamental Rights of the European Union, form the legal core of the EU.

According to Art. 3 of the TEU, the general objectives include, among others:

- the promotion of peace and the well-being of the Union's citizens;
- an area of freedom, security and justice without internal frontiers in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime;
 - solidarity and mutual respect among peoples;
 - a social market economy – highly competitive and aiming at full employment and social progress;
 - a free internal market, based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment;
 - free and fair trade;
 - sustainable development, based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment;
 - the promotion of scientific and technological advance;
 - the combating of social exclusion and discrimination, and the promotion of social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child;
 - eradication of poverty and the protection of human rights, in particular the rights of the child;
 - strict observance and the development of international law, including respect for the principles of the United Nations Charter;
 - respect of rich cultural and linguistic diversity, and safeguarding and enhancing Europe's cultural heritage.

1.2.2. The Principles of the European Union

The use of the word ‘principle’ in the Treaty text has special character. The Treaty maker thus assigns enhanced significance to the relevant element or even to whole provisions and provides orientation to the reader in a text which is difficult to penetrate. At the same time, a principle usually lays down general requirements, e.g. in Article 6 (1) of the EU-Nice.

The authors of the Treaties like the term ‘principle’: it is employed remarkably frequently in most language versions. The English and the French versions of the previous version of the EU Treaty use it 22 times, those of the TEC 48 times, according to the Treaty of Lisbon even 98 times altogether, and the Charter of Fundamental Rights employs ‘principle’ 14 times in its English and French versions. The context in which this term is used ranges from the principle of democracy (Article 6 of the EU-Nice) to the principles of national social security systems (Article 153 (4) of the TFEU); some principles are even to be laid down by the Council (Article 291 TFEU). In the German version, the word ‘principle’ appears far less frequently, only three times in the previous version of the EU Treaty and four times in the EC Treaty, mostly in connection with the subsidiarity principle. This atrophy of principles in the German version is due to the fact that instead of the English ‘principle’ or the French ‘principe’, the German word ‘Grundsatz’ is used; this also holds true for the German version of the Charter of Fundamental Rights.

The principle of conferral, the principle of proportionality and subsidiarity are extremely important because they underlie everything the European Union does in areas where it does not have the right of exclusive competence.

Pursuant to Article 5 of the Treaty on European Union: “The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality”.

The principle of conferral

The official version runs as follows: 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States (Art. 5 of the TEU).

Under the principle of conferral the Union must act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. Indeed, Principle of Subsidiarity of Union is based on the rule of law.

The principle of subsidiarity

The official version runs as follows: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level” (Art. 5 of the TEU).

The principle of subsidiarity aims at determining the level of intervention that is most relevant in the areas of competence shared between the EU and the EU countries. This may concern action at European, national or local levels.

The principle of proportionality

The official version runs as follows: “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties (Art. 5 of the TEU).

The principle of proportionality regulates the exercise of powers by the European Union. It seeks to set actions taken by EU institutions within specified bounds. Under this rule, the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties. In other words, the content and form of the action must be in keeping with the aim pursued.

In plain English, it means that the EU should not get involved in matters which do not concern it. This means in practice that the European Commission must justify the relevance of any proposals against the principle, and in fact, when proposals go to the European Parliament committees it is one of the first tests they consider.

If you feel that a proposal is just another example of over regulation, i.e. it is entirely disproportionate, you may have strong grounds for opposing it on the grounds of proportionality.

Equally, if you believe that the issue being addressed by the legislation is not trans-European, and should therefore be addressed by individual Member States then again you might have grounds for opposition on the grounds of subsidiarity.

Article 5 of the TEU defines the division of competences between the EU level and that of EU countries. It first refers to the principle of conferral according to which the EU has only those competences that are conferred upon it by the Treaties.

Subsidiarity and proportionality are corollary principles of the principle of conferral. They determine to what extent the EU can exercise the competences conferred upon it by the Treaties. By virtue of the principle of proportionality, the means implemented by the EU in order to meet the objectives set by the Treaties cannot go beyond what is necessary.

The Protocol (№ 2) on the application of the principles of subsidiarity and proportionality sets out the criteria for defining, applying, and implementing the principles.

The Commission applies the principles of subsidiarity and proportionality both to direct its initiatives and to evaluate the need for European legislation, both future and existing. It conducts wide-ranging consultations and whenever necessary, presents reference documents (Green Papers) prior to proposing legislative texts. In the explanatory memorandum accompanying its proposals, the Commission includes a “subsidiarity recital” summarising the objectives of the proposed measure, its effectiveness and why it is necessary. The Council verifies that a proposal of the Commission is in accordance with the provisions of Art. 5 of the TEU (ex Art. 5 of the TEC), on the basis of the preamble and the explanatory memorandum of the proposal. The Court of Justice has consistently held that the choice of the legal basis of a European measure must be based on objective factors, which are amenable to judicial review. Among those factors are in particular the purpose and content of the measure (Case C-295/90). Difficulties arise if the measure in question pursues several aims for which different legal bases can be selected. According to the Court, in that case, the principal aim of the measure should determine the choice of the legal basis (C-155/91). When a measure involves the competence granted to the institutions by the EC treaty, it should have this treaty as legal basis, even if some of its objectives or components are related to the EU treaty.

The principle of the “four freedoms”

The Treaties said they would reduce the differences existing between various regions and backwardness of the less favoured regions. According to Art. 3 of the TEU, Art. 2 of the Lisbon Treaty “The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.

Among the designated European Union principles of particular importance for the development of the Union and its activities is the principle of the “four freedoms”.

The term “Four Freedoms” is used in the framework of European economic integration. The origins of the term go back to the 1957 Treaty of Rome establishing the European Economic Community. The concept of a single economic area, which emerged at a later stage in the development of the European integration and was developed by the Treaty of Rome, implies movement towards the creation of conditions for free movement of goods, services, labor and capital.

The development of a common market between the participating countries (later renamed the single market), as well as the creation of the Customs Union were two

of the main objectives of the creation of the European Economic Community. In this case, if the customs union involves the prohibition of any duties in trade between Member States and the formation of a common customs tariff in relation to third countries, the Common Market extends these principles and removes other obstacles to competition and interaction of the economies of the union, ensuring the so-called “four freedoms”: *freedom of movement of goods, freedom of movement of persons, freedom of movement of services, freedom of movement of capital* (see in details – chapter 5).

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1.3. Competences of the EU

The EU competence is a set of rights and responsibilities required for the activities of the Union. It relates to matters under the jurisdiction of the EU, and ability of the EU to influence the solution of the questions belonging to its competence.

The competence of the EU is based on EU law and has functional character because the purpose is to implement functions of the EU. EU documents should have their own legal basis defined by EU treaties.

The Lisbon Treaty clarifies the distribution of power between the European Union and the Member States.

Under fundamental principle of EU law (principle of conferral), the EU acts only within the limits of the competences that EU States have conferred upon it in the Treaties (Art. 5 of the TEU). These competences are defined in Articles 2–6 of the TEU. Competences not conferred on the EU by the Treaties thus remain with EU countries.

The TEU outlines the limits of the competence of the EU (the principle of conferral or principle of attribution of competence) and measures of its implementation (principles of subsidiarity and proportionality) (art. 5.1 of the TEU).

Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States (art. 5.2 of the TEU). The boundaries of powers of EU

should be respected both by authorities of the Union and by the Member States. As the European Court of Justice (hereinafter – ECJ) emphasized, the principle of conferral must be respected both in external and in the internal activities of the Community.

The attribution of competence also means that any competence not granted to the Union in the Treaties belongs to the Member States (articles 4.1 and 5.2 of the TEU). The membership in the EU leads to the restriction by the Member States of their sovereign rights, some of which are passed on the EU.

On the other hand, the principle of attribution of competence limits the freedom of action of the EU. The power of the EU comes from MSs. The EU cannot change its competence; only MSs are authorized to do this.

The principle of subsidiarity defines the legal framework for the implementation of the competence of the EU. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality (hereinafter – the Protocol). National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol (Art. 5.3 of the TEU). This definition implies that the subsidiarity is limited to cases where the competence of the EU complements the competence of the Member States.

The Protocol provides for imposing on the Commission the obligation to conduct extensive consultation addressed to local and regional issues before drafting any laws; including in the draft law the explanation of their compliance with the principles of subsidiarity and proportionality and to provide the accompanying documents, containing substantiation of the financial and legal implications of the adoption of the act of Union, and acknowledge the necessity of its adoption at the EU level; giving the national parliaments of Member States the right to control the draft law of the EU in accordance with the principle of subsidiarity and send to the body responsible for drafting the law their motivated opinions; providing Member States and national parliaments with the right to file a claim in the European Court of Justice concerning the violation of the principle of subsidiarity.

The principle of proportionality also defines the measures of realising the competence of the EU. It complements the principle of subsidiarity. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality (Art. 5.4 of the TEU). We are talking

about such a correlation of aims and measures within which the chosen means should correspond or be proportional to the legal objectives.

To ensure monitoring of the compliance, the Protocol contains the same requirements when it comes to including in a draft national act an explanation about its compliance with both the principles and findings on the financial and legal consequences of its adoption at the EU level. Other ways of monitoring compliance with the principle of proportionality are more limited than in the cases of applying the principle of subsidiarity. National parliaments only have the right to read the draft law. They can't control the compliance of the draft law with the principle of proportionality by sending their opinion to its developers, or addressing the claim about violation of the principle to the ECJ. Such a claim can only be initiated by the MSs.

In the consolidation of the texts of the Treaties different categories of competences, legal instruments for their implementation and procedures for their adoption are manifested. We can distinguish the internal and the external areas of the responsibility of the EU.

The EU internal competence provides for regulating relations in the MSs. The main legal instruments for implementing the internal competencies are the documents the adoption of which is stipulated in art. 288 of the TFEU. These include regulations, directives, and decisions.

The external competence is necessary for regulating relations with other subjects of international law. External competence is realized through the conclusion of international agreements (Art. 216 of the TFEU).

Internal and external competence of the EU may be explicit or implicit. Explicit and implicit competence may be exclusive, shared with MSs and supporting.

The Treaty of Lisbon contains the following main categories of competences. These are divided into:

- 1) exclusive competences;
- 2) shared competences;
- 3) supporting competences.

1. Exclusive competences – areas in which the EU alone is able to legislate and adopt binding acts. EU countries are able to do so themselves only if empowered by the EU to implement these acts. According to Article 3 of the TFEU, the EU has exclusive competence in the following areas:

‘1. The Union shall have exclusive competence in the following areas:

- (a) customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market;

- (c) monetary policy for the Member States whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy;
- (e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope’.

2. *Shared competences.* The EU and EU MSs are able to legislate and adopt legally binding acts. EU countries exercise their own competence where the EU does not exercise, or has decided not to exercise, its own competence.

In accordance with Art. 4 of the TFEU, the competence shared between the EU and EU countries applies in the following areas:

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

- (a) internal market;
- (b) social policy, for the aspects defined in this Treaty;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the

exercise of that competence shall not result in Member States being prevented from exercising theirs’.

3. *In the frameworks of the supporting competences* the EU can only intervene to support, coordinate or complement the action of EU countries. Legally binding EU acts must not require the harmonisation of EU countries’ laws or regulations.

According to Art. 6 of the TFEU, supporting competences relate to the following policy areas:

‘The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

- (a) protection and improvement of human health;
- (b) industry;
- (c) culture;
- (d) tourism;
- (e) education, vocational training, youth and sport;
- (f) civil protection;
- (g) administrative cooperation’.

The EU is endowed with an explicit internal competence in such areas as the internal market (Art. 26-66 of the TFEU), area of freedom, security and justice (Art. 67-89), transport (Art. 90-100), general rules of competition, taxation and approximation of laws (Art. 101-118), employment (Art. 145-150), social policy (Art. 151 – 161), etc. In addition to the articles of the TFEU, the internal competence is based on other acts of the EU. Explicit external competence exists in defined areas such as common foreign and security policy (Art. 21-46), cooperation with third countries and humanitarian aid (Art. 208-214), restrictive measures (Art. 215), international treaties (Art. 216 -219), etc.

A very important role is played by the ECJ. It interprets provisions of EU law. Despite the existence of Treaties provisions, which clearly strengthen the powers of the EU in specific areas of internal and external competence of the EU, it is possible to establish the scope of these powers only taking into account the relevant decisions of the ECJ.

The implied competence is not expressly stated, but its presence is allowed for achieving the objectives of the founding treaties. Article 352 of the TFEU determines implied competence as follows:

“1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously

on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union'.

The doctrine of parallel competence promotes the implied competence. Article 101 of the Treaty establishing the Euratom declares:

'The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organisation or a national of a third State.

Such agreements or contracts shall be negotiated by the Commission in accordance with the directives of the Council; they shall be concluded by the Commission with the approval of the Council, which shall act by a qualified majority.

Agreements or contracts whose implementation does not require action by the Council and can be effected within the limits of the relevant budget shall, however, be negotiated and concluded solely by the Commission; the Commission shall keep the Council informed'.

The essence of the doctrine of parallel competence is that the EU can conclude international agreements in all spheres in which it has internal legislative powers.

The ECJ in the case 22/70, *Commission v. Council [1971]* stated that Art. 210 of the Treaty establishing the European Community (now article 47 TEC) not only enshrines the civil legal capacity of the Community but also recognizes (its) international personality. So the ECJ formulated the doctrine of parallel competence. In other judgments the ECJ declared that the competence of the EU in the area of external relations may also determine the provisions of the founding Treaties even in the absence of relevant domestic measures. Those areas include measures aimed at competition rules, etc.

The powers to conclude international agreements may arise out of the acts adopted by EU institutions. Related to the scope of the implied competence by the ECJ are social policy, international road transport, and fisheries.

The decisions of the ECJ clarify the definition of the boundaries of exclusive competence. They can facilitate the practical application of the relevant provisions of the Lisbon Treaties.

In the EU practice frequent are the cases where exclusive external competence derived from internal legal acts has no clear provisions regarding the conclusion of international agreements. It causes most conflicts in relations between the EU and Member States. According to the decisions of the ECJ in these cases, the following presumption must be obeyed: when the Association adopts common rules, Member States should not, through international agreements make commitments that may conflict with the provisions of the common rules.

Conclusion

The European Union has competence granted to it by the Member States. This allows the EU to regulate the integration within the EU and to participate in international relations. The legal basis of the competence is defined by the Treaties and the decisions of the ECJ.

The EU cannot modify its competence.

The EU competence may be internal and external, explicit and implied. Expressed and implied competence can be exclusive, shared with Member States, supporting and special.

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1.4. Enhanced cooperation in the EU

1.4.1. Enhanced cooperation in the EU: definition and sources

In the European Union there was formed and now operates the mechanism of deeper integration, which is known in the European law as enhanced cooperation of States” or “the principle of flexibility.” This principle was first introduced in the European Community in the late 1950s and was formulated by the Minister of European Affairs of Spain Carlos Westendorp in his report of 5 December, 1995.

“Enhanced cooperation” is a natural result of European integration. It was originally intended to exercise the so-called “linear integration”, the essence of which was that all States move at the same tempo without any exceptions and transitional periods. In the course of accession of the new states to the Communities this system became more and more unrealistic. The idea of a flexible approach to merging of the European states, which implies granting freedom of choice to the Member States, arises along with the idea of integration of the European states.

The principle of flexibility was first introduced into the European law in accordance with the Treaty of Amsterdam. A clear procedure for the establishment of flexible integration relations was established under the name of “closer cooperation”. This procedure was significantly changed by the Treaty of Nice which came into force in 2003. The Nice Treaty uses the term “enhanced cooperation”.

The Treaty of Lisbon 2007 concretizes and extends the scope of enhanced cooperation in the European Union.

Currently, the enhanced cooperation (principle of flexibility) means the possibility for a certain number of EU member states to deepen integration in any sphere through the use of the institutions, procedures and mechanisms of the Union. At the same time,

Member States which were not included for any reason in the leading group, may join later, upon the occurrence of the necessary conditions.

Before the creation of its legal basis, enhanced cooperation in the EU was carried out in various forms: multispeed movement, European vanguard, Europe's core, various geometry, la carte, concentric circles, etc. Respectively, now within the EU the concepts with the same name of the enhanced cooperation are realized.

The concept of the multispeed movement presupposes that a certain group of the EU states wishing and able to do it follows the way of deeper integration, and the others gradually join the leading group. All member states have uniform common goals and wish to reach them; the element of flexibility concerns only the period of time during which all EU member states will achieve common approved objectives. Enhanced integration can happen at the same time in various areas of cooperation, and the corresponding "subgroups of cooperation" can unite various member states. So, the Schengen agreement united five states of Europe in the beginning, gradually other EU member states joined it.

Examples of the "multispeed Europe" concept can be found in the so-called adaptation provisions of the treaty of accession of new member states to the EU. Thus, paragraph 1 of article 3 of the Act on conditions of accession of the Czech republic, Republic of Estonia, Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and amendments to foundation agreements of the European Union provides that provisions of the Schengen acquis and acts adopted on their basis and otherwise related, as well as any subsequent acts which can be adopted before the date of the entry of a new member states into the EU will be considered legally obligatory and are to be applied in these new member states from the date of their accession to the EU. However, the second paragraph of this article describes the situation indicating that the application of the specified provisions in new member states is put under certain conditions and is actually postponed for some time, namely before the corresponding conditions. Paragraph 2 of art. 3 of the Act provides that the legal statuses about the Schengen acquis specified in para 1 article 3, though they will be considered legally obligatory for new member states from the date of their accession to the EU, will be applied in new member states only after acceptance by the Council of the decision confirming that according to the Schengen assessment procedures the necessary conditions for use of all parts of the Schengen acquis are executed in this member state, and after consultations with the European Parliament. Thereby, the EU shows flexible approach to integration of new members into the Union. For some time they remain in the second echelon of the organization, move on the way of integration at a slower pace in comparison with the states making the Union up to May 1, 2004.

In the EU the enhanced cooperation arises in the beginning and is first fixed in practice and only then in law. The Schengen area is the first concrete example of the enhanced cooperation between the member states of the European Union.

1.4.2. The basic concepts of enhanced cooperation

European avant-garde is considered one of the forms of the “multi-speed Europe” model. Vanguard is a group of the most developed leading EU member states grouped for the purpose of further accelerating progress towards jointly established goals of integration in various fields. Moreover, this group of states is more resistant in comparison with the advanced group of countries moving at the highest rate according to the multi-speed Europe concept.

Another embodiment of the concept of avant-garde is the “*core of Europe*” which suggests that a certain number of countries within the framework of the avant-garde would like to go further in European integration and adopt policies within the enhanced cooperation. Traditionally France and Germany are considered the potential leaders of the “core”.

The concept of variable geometry is based on the factor of space and presupposes dividing the European Union into geographical areas, one of which is more developed and the other is less developed. This form of differentiation suggests a difference both in the speed of integration and the final goals of integration. The fundamental point of this concept is the recognition of the fact that there are significant differences between the ability and the desire to integrate between the twenty-eight European Union member states. There are several examples “of variable geometry” in the contemporary European Union: the European Social Charter and the attitude of the UK to it, Economic and Monetary Union and the participation of the UK and Denmark in it.

The concept of a la carte, or “*prefer and choose*” provides the European Union member states with the opportunity to choose as if from the menu those areas of integration in which they will and are able to participate. Such flexibility provides exceptions or the freedom of choice in the interests of certain states that may be involved or excluded fully or partially from the application of certain rules or institutions.

1.4.3. The importance of enhanced cooperation for the future of European integration

Enhanced cooperation was taken by the European Union from constitutional theory and practice of such European countries as Germany, Switzerland, Belgium, France, and Spain, in which it is a constitutional principle and is manifested in a horizontal contractual relationship between the constituent units of federations and between the

administrative-territorial entities of unitary states as well as in vertical contractual relations between federations and their constituent units.

Later the principle of flexibility was enshrined in the Treaty of Amsterdam in 1997 under the term of “closer cooperation”, then in 2003 in the Treaty of Nice which uses the term “enhanced cooperation” and finally in the Lisbon Treaty of 13 December, 2007.

The acts on enhanced cooperation are adopted by the European Union member states on the basis of the rules on enhanced cooperation and are binding only for the states participating in them. They have the most important features: the conventional character, the direct application on the territory of the European Union member states which carry out enhanced cooperation, subject to the jurisdiction of the Court of Justice of the European Union. They perform preparatory and integrative function: they pre-determine the future of European integration, identify the priority areas of the cooperation between the European Union member states and develop the legal basis of the cooperation in specific areas. Moreover, they are of subsidiary nature: if the European Union is unable to carry out further integration in a specific area of cooperation, a certain number of member states can make it within the framework and using the procedures and mechanisms of the Union. If there was not a mechanism for enhanced cooperation in the European Union, its expansion would not possibly be happening so rapidly and the membership of states that have recently joined the European Union would be highly problematic.

Enhanced cooperation ensures the interests of the European Union member states which do not participate in enhanced cooperation. Such states have the opportunity not to engage in deep integration temporarily, but remain the members of the Union; they can join enhanced cooperation at any time later, when there will be fully mature economic, social, political and other conditions. Moreover, the non-participating member states may apply to the European Court of Justice in case of disagreement with the establishment of enhanced cooperation policy if they deem that such situation violates the provisions of the founding treaties of the Union. For instance, the United Kingdom has repeatedly filed cases in the Court on annulment of the EU Council decisions on authorizing enhanced cooperation. One of the latest cases reviewed by EU Court concerned the requirement of the UK to cancel the Council Decision 2013/52/EU of 22 January, 2013 authorizing enhanced cooperation in the area of financial transaction tax. The Council Decision on the establishment of enhanced cooperation in the area of the unitary patent also faced the opposition on the part of the non-participating EU member states – Spain and Italy, which filed cases on annulment of this decision in the EU Court of Justice.

The European Union’s appeal to the mechanism of enhanced cooperation and its legal regulation in the main founding documents of the Union is caused by a number

of reasons. First, there strengthens the contradiction between the European Union MSs committed to the integration and those seeking to preserve the traditional inter-state relations without deepening the integration. There is no consensus between EU member states on the prospects of integration and consequently the Union's objectives. Secondly, the enlargement of the European Union requires a flexible approach in view of the significant differences between member states in the economic, social, cultural and other spheres. It should, on the one hand, enable the member states of the European Union which will and are able to integrate further and deeper to do so and, on the other hand, ensure the rights and interests of non-participating member states.

Enhanced cooperation, on the one hand, is a mechanism that can preserve the European Union as an integrative formation; on the other hand, it is a way to ensure the sovereignty and national interests of the European Union member states. Thus, enhanced cooperation solves the dual task: it provides unity and diversity within the European Union.

The important question is the interrelation of enhanced cooperation and state sovereignty. Enhanced cooperation is the realization of the state sovereignty of the European Union member states, and it involves a choice – to participate or not to participate in a treaty regulating the issues of cooperation in certain areas. Enhanced cooperation indicates not only the pragmatic approach to European integration but often the reluctance of member states to renounce their national sovereignty.

The essence of the enhanced cooperation is twofold. On the one hand, this cooperation is “for selected ones”, for a limited number of European Union member states, so that in the issues of integration they are not decelerated with the slow movement of the other member states. On the other hand, this collaboration aims to promote the interests of the Union as a whole and the gradual involvement of all member states in such cooperation. Enhanced cooperation is not the mechanism of separation, it is the mechanism of integration. A certain temporary isolation of a number of European Union member states from the specific policy takes place in order to maintain the development strategy of the Union as a whole and presupposes association with the other member states at subsequent stages of the integration.

The practice of interstate relations on a global scale indicates the practical application of enhanced cooperation and its prospects. The European law has already formed a system-wide institution of enhanced cooperation, which permeates virtually all of its branches and is a set of interrelated legal standards.

The enhanced cooperation of states can subsequently grow into a system-wide institution of international law, because not only the EU refers to the mechanism of enhanced cooperation but also the states within the Commonwealth of Independent States. The practice of enhanced cooperation of states is being formed, the first region-

al agreements are being concluded, but there is no formed international legal framework for enhanced cooperation of states yet, namely the set of interrelated international legal norms in this area. As being legally formalized in the system of international law enhanced cooperation could find a place along with such recognized system-wide institutions of contemporary public international law as the institution of international legal personality, the institution of international representation, international rule-making institution, the institution of international legal responsibility, the institution of settling international disputes. "...There are so-called supra institutions penetrating several sub-branches or branches" of international law, as Professor D. Feldman wrote in his monograph "The system of international law". System-wide institutions permeate all branches and sub-branches of contemporary international law, they are cross-cutting. The institution of enhanced cooperation will be able to permeate all branches of international law the same way. Enhanced cooperation is possible in any sphere of international relations, if the subjects of international law wish so.

The conditions of close and enhanced cooperation provided for in the founding treaties of the European Communities and the European Union turned up to be very difficult to comply with. The main difficulty is a quantitative condition on the minimum number of member states which can form an advanced group. Under the Treaty on European Union, there must be nine member states. For example, Prüm Convention – Schengen III is not considered to be an act of enhanced cooperation because it unites only seven European Union member states. The elimination of the condition on the minimum number of European Union member states which form the enhanced cooperation group would serve the benefit of the case. It would be expedient not to consider enhanced cooperation the "last resort", but to consider it a kind of peculiar alternative mechanism of the European Union integration.

1.4.4. The legal nature of enhanced cooperation acts

The question of the legal nature of the acts on enhanced cooperation of the European Union member states is important both from the viewpoint of the theory of European law and the practice of its implementation. It defines the correct understanding of the scope of such acts, binding force of their provisions, the possibilities of appeal to the Court, etc. The founding treaties of the European Union do not contain the specification of the legal form of enhanced cooperation acts. Moreover, in order to implement the provisions on enhanced cooperation of states properly it is necessary to determine the place of acts on enhanced cooperation in the structure of European law.

The first acts on enhanced cooperation were referred to in the Treaty of Amsterdam of 1997, paragraph 2 of Article K.15 of which provides for the acts and decisions adopted for the implementation of closer cooperation.

The Treaty of Nice in paragraph 1 of Art. 44 provides that for the purpose of adoption of acts and decisions necessary for the implementation of enhanced cooperation the relevant institutional provisions of this Treaty and the Treaty establishing the European Community will be applied. Such acts and decisions did not form a part of the *acquis communautaire* of the Union.

The Treaty establishing the Constitution for Europe said nothing about the legal nature of the enhanced cooperation acts. Only in paragraph 4 of Article I -44 it was stressed that the acts adopted in the sphere of enhanced cooperation are binding only for the member states participating in enhanced cooperation. They were not considered as part of the *acquis* which should be adopted by the candidate states for accession to the Union.

The TEU and the TFEU do not define the legal nature of the enhanced cooperation acts either. These treaties are silent on the form and order of the adoption of such agreements. The Treaty on European Union in Article 20 only confirms that acts adopted in the framework of enhanced cooperation are binding only for the member states that take part in it. They are not considered as *acquis* which must be accepted by candidate states for accession to the Union. The TFEU provides that the Commission of the European Union takes the necessary transitional measures concerning the application of the acts that have already been adopted in the framework of enhanced cooperation (Art. 331).

The practice of enhanced cooperation in the European Union indicates the establishment of the enhanced cooperation relations between EU member states long before the legal regulation of those in the founding treaties. These are the Schengen Agreements, the provisions on the Economic and Monetary Union, the treaties on accession of the new states to the European Union and others.

Schengen law is, first of all, the Schengen Agreement of 1985 and the 1990 Convention on the implementation of the Schengen Agreement of 14 June, 1985 as well as the normative regulatory acts adopted by the Schengen Executive Committee.

The Economic and Monetary Union was established in 1992 by the Maastricht Treaty on European Union (Art. 2, paragraph 4). The Protocol thereto contains special provisions for the UK, Denmark and Sweden. Regulations of the Council and the decisions of the European Council in this area were adopted later.

Treaties of accession of new states to the European Union are contracts between the Member States of the European Union.

Thus, the acts of enhanced cooperation are international legal agreements of the Member States. The Amsterdam and Nice treaties did not consider them as part of the *acquis communautaire* (EU law communitarian) which was to be adopted by candidate countries for accession to the European Union. It is important to define how acts

of enhanced cooperation relate to EU law after the reforms that have been carried out by the Lisbon Treaty, as a result of which the EU is entitled to fully replace the communitarian law and whether they will ever be part of it.

1.4.5. Place of enhanced cooperation acts in the structure of European law

Based on the fact that acts of enhanced cooperation are not considered to be part of EU law, that is the main component of European law, it can be assumed that these acts are as a specific part of European law. It seems that these acts will be acts of international public law, to decorate the relations between members of the international public law – sovereign Member States. According to international public law, there are rights and obligations for States that adopt them, rather than directly for legal entities and citizens of these countries. Now we'll try to define the place of enhanced cooperation acts in the structure of European law. We can start from the concept of European law of professors L.M. Entin, who considers it in the vertical and horizontal perspective. In considering the European law in the vertical perspective Professor L.M. Entin divides it into primary rules (rules of the Treaties and the Union of Communities), secondary (legally binding regulations issued by the European Union institutions) and tertiary rights («complementary», that is additional rights, which are the source of agreements and conventions which are concluded by Member States). Acts of enhanced cooperation cannot be attributed to the rules of primary law, since they are not the rules of the Treaties. They also cannot be attributed to secondary law because the latter combines legally binding regulations which are published by the European Union institutions. The acts of enhanced cooperation can hardly be attributed to tertiary law because agreements and conventions that are accepted in the framework of tertiary law are binding on all Member States and are subject to the unanimous ratification.

It is more difficult to determine the place of acts of enhanced cooperation in the horizontal perspective of European law. According to Professor L.M. Entin (2009), it consists of (1) the law of the European Union and (2) the provisions of the European human rights protection system. It is obvious that the acts of enhanced cooperation do not belong to any of these components.

Thus, the acts of enhanced cooperation are formed along with the European Union law. They contain the necessary potential to become later a part of Union law. Acts of enhanced cooperation are not included in European law, and constitute a potential European law.

In support of our statement we present a number of arguments:

1. In accordance with Article 43 (1) (j) of the Nice Treaty the enhanced cooperation «is open to all Member States» of the EU. This provision should be interpreted in conjunction with the provision of Article 43 of the Nice Treaty, which gives more detailed regulation, namely: the enhanced cooperation in its establishment is open to all MSs and is still open to them at any time in accordance with Articles 27.E and 40.B of this Treaty and Article 11A of the Treaty establishing the European Community. Moreover, the European Commission and the Member States participating in enhanced cooperation, sought to encourage the participation of a larger number of MSs in advanced areas of cooperation.

Under the TEU and the TFEU, it is expected that all European Union Member States will sooner or later become parties to enhanced cooperation.

Thus, paragraph 1 of Art. 20 of the TEC states that «the enhanced cooperation is open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.» This article specifies that the enhanced cooperation in its establishment is open to all Member States, with the qualification about the necessity to comply with certain conditions.

The Commission and the MSs that participate in enhanced cooperation care about promoting the participation of as many Member States as possible.

Paragraph 2 of Art. 20 of the TEC stipulates that a decision authorizing the enhanced cooperation shall be adopted by the Council as a last resort, where the Council determines that the objectives pursued by the data collaboration, as a whole cannot be achieved by the Union within a reasonable time. Moreover, this paragraph establishes a quantitative benchmark for such cooperation, namely, “that it involves at least nine Member States”.

2. The enhanced cooperation in accordance with Art. 43 (1) (a) of the Nice Treaty was “intended to contribute to achieving the objectives of the Union and the Community to protect and ensure their interests and advance their integration process.”

According to paragraph 1 of Art. 20 of the TEC, “the enhanced cooperation is intended to contribute to achieving the objectives of the Union, protect its interests and reinforce its integration process.” Article 334 of the TFEU provides that the Council and the Commission ensure the consistency of actions undertaken in the framework of enhanced cooperation and also provides the consistency of such activities with the policies of the Union, and cooperate for this purpose.

3. The enhanced cooperation is carried out by using European Union institutions. Article 43 (1) of the EU-Nice provides that the European Union Member States which intend to implement the enhanced cooperation can use institutions, procedures and

mechanisms that are covered by this Treaty and the TEC, on the condition that the planned cooperation “respects ... a single institutional framework of the Union.”

Paragraph 1 of Article 20 of the EC Treaty provides that Member States that wish to establish enhanced cooperation between themselves within the framework of non-exclusive competence of the Union can make use of its institutions.

4. Areas in which the enhanced cooperation defined in the TEU and the TFEU. Thus, in accordance with paragraph 1 of Article 329 of the TFEU, the scope is stipulated by the contract, except for areas of exclusive competence of the Union. Procedures for the implementation of enhanced cooperation are defined in Articles 329-331 of the TFEU.

These arguments in favor of the acts of enhanced cooperation are not acts of European law, but have certain features that allow them to continue to be incorporated into the law of the EU, and thus become part of European law.

Thus, the enhanced cooperation acts are special acts that are formed along with the traditional European law and required only for a certain range of the European Union Member States. It is possible to imagine the picture of the bubbles in the bulk material, which then exist separately from each other and from the substance, then merge with each other but not with the substance, and then suddenly burst and disappear, or dissolve in the substance (if all Member States of the EU join the advanced group and acts of enhanced cooperation become part of the *acquis*), or disappear at all – unnecessary, obsolete or unclaimed, like light smoke on the substance carried by the wind.

Acts of enhanced cooperation contribute to the formation of the vanguard in the framework of the Union, which may be called “*unions in the Union*.”

Some acts of enhanced cooperation can become a part of European Union law. This happens in the case of merger of all or most of the EU Member States for the specific policy of enhanced cooperation. This happened as a result of the incorporation of the Schengen agreements and the provisions of the Monetary Union.

Based on the aforesaid it is possible to identify the following features of enhanced cooperation acts. They: 1) have a conventional character; 2) are binding only on the States participating in enhanced cooperation; 3) are directly applicable to participating Member States’ territories; 4) fall under the jurisdiction of the Court of Justice.

Enhanced cooperation formed the basis of the structure of European law. So, according to most scholars, European law is made up of two elements: international and supranational. Initially, and by definition this legal system combines two main components. They are, on the one hand, the rules of law which have their origin in international legal acts by their nature; on the other hand, the rules of law which are the source of acts issued by the EU institutions. In other words, the legal system of

the EU is generated as a result of international cooperation and supranational formal activity, and this is definitely its specificity. From this point of view, we can also talk about a complex and ambiguous structure of European law. With regard to the Community, the European law acts as a symbiosis of international and supranational basis, in which the latter is prevalent; it is applied to the field of foreign and security policy, justice and internal affairs (police and courts) is the predominant method of legal regulation, closer to traditional forms of international legal cooperation. The interethnic basis is materialized in such sources as the rights of international legal instruments, whereas supranational basis is evident in regulations, directives and other legal acts that are adopted by the institutions of the Community and the Union.

Thus, the acts of enhanced cooperation are agreements that are concluded with the institutions of the European Union in the form of international legal instruments, binding only for the part (at least nine) of the European Union Member States. Some acts of enhanced cooperation can be further incorporated into European Union law and, therefore, become part of European law, in the case of merger of all or most of the EU Member States for the specific policy of enhanced cooperation.

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1.5. Membership in the EU

Six European countries – Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands – founded the European Coal and Steel Community (ECSC) in 1952. This international organization formed a single market in two major sectors of the industry under the control of an independent supranational body. Getting to this integration project, its creators placed their hopes that the ECSC would be able to control the military industry and promote economic interdependence, thus making another conflict in Europe unthinkable.

In 1957, six MSs of the ECSC signed two new international treaties in Rome: the first established the European Economic Community (EEC) to develop a common economic policy and integration of individual national markets into a single market where goods, people, capital and services could move freely; the second one established the European Atomic Energy Community (Euratom) to ensure the use of nuclear energy for peaceful purposes. These two agreements, which are usually referred to as the «Treaties of Rome», came into force in 1958.

The famous Merger Treaty was signed in Brussels on 8 April, 1965 and entered into force on 1 January, 1967. It brought together the major institutions of the three communities, with the result that the ECSC, EEC and Euratom became known as the European Communities (EC).

The first enlargement of the EU (1973)

Despite the fact that the Treaty on the ECSC, the TEEC and TEA entered into force as classical multilateral international treaties, each of them pointed out that they are agreements of open type.

The three Treaties established the basis for further expansion of the Communities, with the possibility for new states to accede. In particular, Art. 98 of the Treaty on the ECSC, Art. 237 of the TEEC and Art. 205 of the TEA proclaimed that treaties are open for accession to «any European state».

These provisions were used during the first enlargement of the Community in 1973, when it was joined by Denmark, Ireland and the United Kingdom. The attempt of Norway to join the EU failed.

The accession took place in several stages:

- a) the application stage,
- b) the negotiation stage,

c) the accession stage.

a) At the first stage the four above mentioned states applied for EU membership. Thus, the requests of the United Kingdom, Ireland and Denmark were sent in 1961, and of Norway – in 1962. However, the process was interrupted by France, in particular, because of the rejection of the UK.

The United Kingdom applied again on 10 May, 1967; Denmark and Ireland – on 11 May, 1967, and Norway – on 21 July, 1967.

Each State submitted a single application for the membership to all the three Communities, despite the fact that they are separate international organizations and their founding Treaties contain various articles about the accession of new members. However, it was evident during the first EU enlargement that all the three Communities were perceived as one «integration association».

b) The negotiations during the first expansion took shape in the form of the Conference between the European Communities and the Applicant States. The conference took place in 1970 in Luxembourg on two levels – multilateral and bilateral. In the first case, the negotiations were conducted between the Community and all the states-candidates; in the second – between the Community and the specific Applicant State. The Commission played a key role in the technical and substantial issues of the negotiations and was like the «expansion engine».

c) The accession stage of the first enlargement of the EC was complicated mainly by the differences between Art. 237 of the TEEC, Art. 205 of the TEA, on the one hand, and Art. 98 of the Treaty on the ECSC, on the other hand. In order to avoid a violation of any provisions of these Agreements, «Acts of Accession» presented a complex combination of several legal documents:

1) *Decision of the Council on accession of Denmark, Ireland, Norway and United Kingdom in ECSC*. It was based solely on Art. 98 of the Treaty of the ECSC and, by its nature, is a unilateral decision of the Council. It defined the conditions of accession and specified unilateral instruments of accession supplemented by the applicant countries;

2) *Treaty concerning the Accession of the Kingdom of Denmark, Ireland, Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the EEC and Euroatom*. This agreement was signed by the six MSs of the EEC and Euratom in accordance with Art. 237 of the TEEC and Art. 205 of the TEA. By its legal nature, it was a multilateral international treaty.

The agreement was signed after the Council's decision to allow accession of the four candidate countries (on 22 January, 1972). With the exception of Norway, all contracting States subsequently ratified the Treaty on the Accession;

3) *Act concerning the conditions of accession and the adjustments to the Treaties.* The act was an integral part of the Council Decision on the accession to the ECSC and of the Treaty on accession to the EEC and EAEC. It contained the conditions for accession for all Applicant States in relation to the three Communities. Differentiation for individual states, particularly with regard to transitional measures, was stipulated in the Annex to the Act;

4) *The Final Act* was adopted after the signing of the previous acts and accompanied by a text procedure for the adoption of certain decisions and other measures to be taken during the period preceding the accession.

The Acts of the accession entered into force on 1 January, 1973, expanding the number of members of the Communities to nine.

Second enlargement of the ECs (1981)

The Greek accession to the ECs had one interesting feature. In contrast to the States of «the first expansion» Greece had a prior Association Agreement with the ECs since 1961. It was designed as an agreement between the EEC and the third State.

The agreement did not include an explicit goal of further accession of a new State to the community, but in the case of accession of the Hellenic Republic Art. 72 of the Agreement directly pointed to the fact that “as soon as the operation of the Agreement has advanced far enough to justify envisaging full acceptance by Greece of the obligations arising out of the Treaty establishing EEC, the Contracting Parties shall examine the possibility of the accession of Greece to the Communities.” The Agreement was aimed at strengthening ECs economic and trade relations, as well as to ensure the development of the Greek economy, removing the obstacles to the Greek application for membership in the Communities.

Greece accession procedure was similar to that of «the first expansion». Greece submitted a single application for membership to the Communities on 12 June, 1975. In contrast to the first enlargement, the Commission considered the possibility of immediate Greek accession to the Community, however, the Council, contrary to the Commission, decided to move it to the stage of accession negotiations, which lasted for three years (1976-1979). The negotiations were successfully completed on 28 May, 1979 when the Act of the accession of Greece was signed.

On 1 January, 1981 Greece became the tenth Member State of the Communities.

The third enlargement of the ECs (1986)

Unlike Greece, Spain and Portugal didn't furnish their relations with the Community in the form of Association Agreements, but they had preferential Trade Agreements with the ECs, based on Art. 113 of the TEEC.

Portugal submitted an application for membership on 28 March, 1977 and entered into negotiations on 17 October, 1978. Spain submitted an application for membership on 28 July, 1977 and the negotiations began on 5 February, 1979, however, the Act of the accession was signed on 12 June, 1985 by both countries. It entered into force on 1 January, 1986. From this date the ECs had 12 Member States.

The fourth enlargement of the EU (1995)

Accession of Austria, Finland and Sweden had some novelties in conjunction with the provisions of the Single European Act of 1986 (SEA) and the Maastricht Treaty of 1993.

Thus, Art. 8 of the SEA introduced the need for approval of the accession of any new MS by the European Parliament. The main consequence of this reform was an increase in the value of the European Parliament. This reform reflected the general political efforts (and pressure) for the democratization of the Community institutions. Thus, the preamble expressed the focus of the SEA MSs to «work together to promote democracy» and the belief that «the European Parliament, elected by universal suffrage, is an indispensable means of expression». However, it would be fair to say that this article of SEA had never been applied. Later this article was replaced by Art. «O» of the Maastricht Treaty in 1993, which also canceled Art. 98 of the ECSC Treaty, Art. 237 of the TEC, and Art. 205 of the TEA.

Article «O» stipulated: «Any European State may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

The conditions of the admission and the adjustments to the Treaties on which the Union is founded which such admission entails, shall be the subject of an agreement between the Member States and the Applicant State. This agreement shall be submitted for ratification by all the contracting states in accordance with their respective constitutional requirements.»

This article introduced two major novelties in the EU accession procedure. First, it meant applying for accession to «the Union». Second, it introduced «new player» in the «communitarian phase» of the accession negotiations – the European Parliament. Its consent should be a prerequisite for accession of a new State to the EU.

From this time, accession of a new Member State was no longer the prerogative of the Member State itself. It became «the matter of citizens of the European Union.»

Article «O» of the Maastricht Treaty was first implemented during the fourth enlargement of the European Union.

The legal tools necessary for the accession of Austria, Finland and Sweden to the European Union, were as follows: 1) Decision of the Council of the European Union on the admission of Austria, Finland, Norway and Sweden to the European Union; 2) The Accession Treaty; 3) Act concerning the conditions of accession and the adjustments to the Treaties on which the Union is founded; 4) Final Act.

The fourth enlargement also included Norway, but the Treaty of Accession wasn't ratified as a result of the negative outcome of the referendum, which was held on 28 November, 1994. Norway did not become an EU Member State.

With the accession of Austria, Finland and Sweden the EU now consisted of 15 members.

The fifth enlargement of the EU (2004)

In March 1998, the EU began negotiations on accession with Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia. In December 1999, the EU decided to start negotiations with six other countries: Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia.

In December 2001, the EU announced that 10 of these countries (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) would be able to complete the accession negotiations by the end of 2002. As a result of the negotiations in 2002, agreements were reached on the issues of agriculture and regional aid, as well as budgetary matters. The final decision on the accession of 10 countries was adopted at the EU summit of December 2002; the final act of negotiations was signed on 3 April, 2003

The Treaty of Accession was signed between the EU Member States and 10 new countries on 16 April, 2003, as well as a number of other important documents: the Accession Treaty, 18 Annexes, including transitional measures for acceding States, and the Final Act.

The Accession Treaty of 10 new MSs of 2003 came into force on 1 May, 2004. As a result of the fifth enlargement of the EU the number of its Member States grew to 25 MSs.

The sixth enlargement of the EU (2007)

Despite the fact that the applications of Bulgaria and Romania to the EU were sent back in the mid 1990s, the negotiations phase lasted long enough. It had no time to be completed by the end of the fifth expansion, largely due to the inconsistency of the judicial system of these countries and high level of corruption.

Negotiations concerning the accession of Bulgaria and Romania to the EU with the endorsement of the European Council were officially completed on 17 December, 2004.

This was followed by a request for the European Parliament's approval of the accession of new members. The Commission presented a positive conclusion of accession of Bulgaria and Romania to the EU on 22 February, 2005. The European Parliament approved the accession of Bulgaria and Romania on 13 April, 2005.

The Treaty of Accession was signed on 25 April, 2005 and entered into force on 1 January 2007. As a result of the sixth expansion the number of EU Member States increased to 27.

The Treaty of Lisbon of 2007 introduced a new legal basis for the accession procedure. It is based on Art. 49 of the TEU, which establishes the conditions of eligibility to apply for EU membership and the procedure for becoming a member. Article 49 provides for an application for membership from a «European state» respecting and committed to promoting the Union's values set out in Art. 2 of the TEU.

Moreover, the applicant country must: be within geographical Europe; respect and be committed to the values set out in Art. 2 of the TEU, namely: respect for human dignity, freedom, democracy, equality and the rule of law; respect for human rights, including the rights of persons belonging to minorities; and respect for a pluralistic society and for non-discrimination, tolerance, justice, solidarity and equality between women and men.

The applicant country must also satisfy EU eligibility criteria. These are commonly referred to as the Copenhagen criteria as they were defined by the European Council that took place in Copenhagen in June 1993. These criteria are the following: stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy and the capacity to cope with competition and market forces in the EU; the ability to take on and implement effectively the obligations of membership, including the aims of political, economic and monetary union.

The European Council that took place in Madrid in December 1995 added that the candidate country must be able to apply EU law and must be able to ensure that the EU law transposed into national legislation is implemented effectively through appropriate administrative and judicial structures.

The EU reserves the right to decide when the candidate country has fulfilled the accession criteria. Also, the EU itself must be able to integrate new members.

The seventh expansion of the EU (2013)

The seventh and final expansion of the EU is the smallest since the number of EU member states was supplemented with only one – Croatia.

Croatia signed the Agreement on Stabilization and Association with the EU in 2001. It provided Croatia with financial and technical assistance from the EU.

The application for EU membership was submitted by Croatia in February 2003. In June 2004, the European Union recognized the state as an official candidate for membership.

EU-Croatia negotiations were opened in October 2005 and ended in June 2011, which was largely due to the border dispute with Slovenia, as well as the problems of harmonization of legislation with the *acquis* of the Union in 2008.

The Commission expressed a positive opinion on Croatia's accession to the EU on October 2011. The European Parliament expressed its consent to the accession on 1 December, 2011.

Croatia signed the Accession Treaty in December 2011. Other legal acts connected with the accession procedure should be highlighted: the Act on the conditions of accession and nine annexes, as well as the Protocol on Croatia's fulfillment of the Kyoto Protocol to the United Nations Framework Convention on climate change and the Final Act.

In January 2012, the citizens of Croatia approved the State's accession to the EU in a referendum with 66 % in favor. All the EU member states ratified Croatia's accession treaty by June 2013. Croatia became the EU's 28th member state on 1 July, 2013.

According to current EU legislation, any European State which respects the values referred to in Article 2 of the TEU and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements. The conditions of eligibility agreed upon by the European Council shall be taken into account.

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CHAPTER 2. INTRODUCTION TO THE EU LAW

As a result of studying the material of this chapter students must:

know:

- composition, structure and trends of legal regulation in the EU,
- goals, objectives and directions of reforming the law of the EU;
- patterns of development of legal practice, including the judiciary, and its importance in the mechanism (system) of law of the EU;
- state and development of international legal regulation in EU law;
- relevant sectoral legislation, and (or) mechanisms of inter-sectoral institutions;

be able to:

- apply legal norms in situations of gaps, conflicts of norms, complex interactions, solve complex problems of law enforcement practice in EU;
- argue decisions taken, including being able to foresee the possible consequences of such decisions;
- analyze non-standard situations of law enforcement practice and develop a variety of solutions;
- interpret EU acts in their interaction competently;
- explain the effect of the EU law to their addressees.

possess:

- skills for making legal written documents;
- skills for drafting regulatory and individual legal acts;
- skills for making oral presentations on legal matters, arguing and defending their points of view in oral debates;
- skills for discussion, business negotiations, mediation in order to reach a compromise between parties of a conflict;
- skills for drawing up expert opinions;
- skills for counselling citizens on legal issues in the sphere.

2.1. Sources of European Union law

2.1.1. Definition and classification of sources of European Union law

Taking into account reforms and changes in the structure of the European Union, the sources of EU law and their system have undergone certain changes. Before turning directly to sources of law of the European integration, it is necessary to define the “source of law” concept. In the social and legal sciences, there are different approaches to the understanding and interpretation of the very definition of the “source of law” concept.

In formal legal sense, a source of law is a way of officially recognized expression of standards, providing such standards a quality of juridical (legal) norms. Therefore, the question of sources of law in legal sciences is treated somewhat differently, and the legal acts adopted on the basis of special arrangements and in special forms, in which legal requirements are collected and set forth, serve as the sources of law in first place. As a general rule, the sources of law also include customs, precedents, statutory agreements (typical and international), and a doctrine taken with certain qualifications.

The system of EU sources of law is being established under direct influence of national legal systems of the EU Member States. However, it should be recalled that the legal systems of these states are not uniform.

In a strictly legal sense, only regulatory documents serve as sources of law in the European Union. But the literature provides for a broader approach. In this case not only legal instruments – international Treaties, EU institutional acts of general nature – serve as sources of the EU law, but also all other legally binding judgments and decisions.

Proceeding from the above said, we can conclude that the system of EU sources of law corresponds to principles inherent mainly for the Romano-Germanic legal family, since the first founding states of the European Communities were France, the Benelux countries, Germany and Italy. The dominant positions in all these countries belong to the Romanic-German law.

However, the system of EU law sources is characterized by a certain specificity and autonomy. It is preconditioned by the peculiarities of the nature and the structure of the European Union as an integration association. The range of sources of law of the European Union is wide and varied in terms of subject and content. These are international treaties, and documents of international organizations, and precedents of the European Court of Justice (case law of the EU). Some authors (e.g. Craig P., Búrca G., 2011) formulated the EU customs, but their role as an independent source has not been officially recognized yet (M.K. Entin, 2015).

Considering the sources of the European law, it should be noted that the following features are important for understanding their nature and character:

1. A unique legal nature and character of sources of the EU legal system. The principal difference is the will and interest. The basis of the sources of the EU law consists in combined interest of European peoples and their will; the basis of sources of national law is the will and interest of a people of a certain state; the basis of constituent acts being the grounds for EU foundation is the will and interest of all involved in treaty relations of the states (Dinnage J., Murhy J., 1996).

2. A unique legal nature and character of legal acts emanating from supranational institutions as represented by the European Parliament, the Council, the European Commission, the European Central Bank, the Chamber of Accounts and other institutions – the concerted will and interests of these institutions are manifested indirectly. Some scientists believe that these acts are neither national nor international law (in a space-territorial aspect they are regional acts, but in essence, purpose and content they occupy an intermediate position between national and international legal acts). Other scientists consider them a form of acts of international organizations.

3. Constituent acts of the EU belong to the international legal order, and legal acts of the European Union – to the national legal order;

4. The emergence and development of sources of the European law together with the EU legal system is based on the principles and traditions of two major legal families – Romanic-German and Anglo-Saxon laws (T. Hartley, Diez Thomas, 2010; R. Harrison, 1974; M.N. Marchenko, 2010 etc.). The result of this connection and interaction of the two legal families is the existence and functioning of such different sources of law as the “law” in the broadest sense (coming from legislative and executive and administrative bodies of the EU) and the “precedent” (it comes from the European Court of Justice) in the legal system of the EU.

5. The effect of the European law sources in unlimited area (i.e. in the territory that is the territory of the European Union and, at the same time, the territory of its Member States). The legal order of “collective” EU territory is characterized by a lack of any sovereign power in respect to it. The European Union is not authorized to negotiate changes in the territory and is unable to review the boundaries of the EU, although it may regulate the spatial scope of application of the European law through establishment of exceptions and limitations (St. Sieberson, 2010; A. Kapustin, 2010).

A differentiated procedure of adoption and entry into force of the EU law sources (S.Y. Kashkin, P.A. Kalinichenko, 2015; E.A. Cherginets, A.O. Chetverikov, 2013), as well as inclusion of regulations contained in them into national law of the EU Member States (M.N. Marchenko, E.M. Deryabina, 2010). Differentiated procedure for the adoption and entry into force of different EU law sources is preconditioned by the fact that they have different legal nature, character, role and purpose.

Proceeding from the above, the *sources of the EU law* may be defined as the external forms of expression and consolidation of legal norms adopted by the institutions of the European Union within their powers and in accordance with established procedures.

Sources of law of the European Union in scientific literature are classified into different types:

1. *Depending on the scope of application and orientation of the effect of sources*, they are divided into domestic (constituent treaties, current legislation and general principles of the EU law) and external (international treaties)

2. *Based on the method of formation and adoption of a source of the EU law* (depending on a form of its expression), they are subdivided into: *constituent treaties* (“comparable with national constitutional laws in importance” and “other acts that regulate the most important questions of organization and functioning of the European Union”); *acts adopted by the EU institutions* (“comparable with regular laws and regulations of national law”); *decisions of the European Court of Justice* (“based on legal norms of constituent acts of the EU and other sources of law – the general principles of the EU and international law, the legal doctrine);

3. *According to subject and content of the EU legal sources*, they consist of regulations, law-making treaties, and precedents of the European Court of Justice;

4. *According to legal force*: binding and non-binding (e.g., in the European doctrine (J. Shaw, 2010), the sources of the European Union law include political and advisory acts, which are not binding. The term “soft law” is used as their collective name – unlike the “hard” law, i.e. the law in traditional sense of the word (A. Berlinguer, 2013).

Despite the wide range of EU law sources, all sources of the European Union law form a unified and coherent system built on hierarchical principles. This system consists of sources of *primary* (French – *droit primaire*), *secondary/derived* (French – *droit secondaire/derive*) and *case/precedent* law.

The sources of *primary* law are the basis (core) of the EU legal system, consisting of the documents of fundamental nature characterized by supreme legal force.

The sources of *secondary law* are documents adopted on the basis of the primary law. Most legal regulations that form the legal system of the EU are enshrined here. The sources of secondary law in its legal force must comply with the primary law; if they contradict it, they must be cancelled.

An important independent role in the system of EU sources of law has also been attributed to precedents created by the decisions of the Union Institution – the European Court of Justice, briefly – the *case law* (M. Biriukov, 2015; V. Gorshkov, 2012; S. Kashkin, 2015).

The law of the European Union is also subdivided (M. Biriukov, 2015; P. Biriukov, 2015) into *primary* (founding), *secondary* (derivative) and *tertiary* (complementary).

The procedural and material criteria are placed in the core of the European law sources system. The place of each instrument in the system is determined, to a great extent, by what and how this particular act is intended to regulate. From this point of view, we can clearly and distinctly isolate what refers to primary (founding) sources of law, and what may be attributed to secondary (derivative) sources, or tertiary (complementary) law. In practice, only the use of a procedural criterion allows to separate legislative acts and regulations, even if they are provided with a common title – regulation or directive.

There are also other criteria of classification of sources of the European Union law, but the most common and well-established is the criterion, according to which, depending on the legal force, the EU law sources are divided into the sources of primary and secondary law. Particular attention should be paid to the sources of primary law of the European Union.

2.1.2. Sources of the EU primary law

There are many ideas about the types of sources that should be attributed to primary law sources. At the same time, scientists use different criteria for classifying various sources of law as primary ones.

However, with all variety, the authors express the consensus that the primary law of the EU is the so-called analogue of national constitutional law, with constituent treaties being the analogue of national constitutions. From the title “sources of primary law” it is clear that they must serve as fundamental documents of constituent character. In legal terms, a founding act of a state is a constitution that should be approved by a people’s congress (the parliament, the constituent assembly), or directly by people on a referendum.

The founders of the European Union are the Member States (founding states). Therefore, “the constitution” of the European Union is formalized not as a basic law, but as an international treaty. Since the foundation, the treaties concluded for this purpose by Member States have been laid down in the basis of the Communities (by the founding states). These treaties are fundamental constituent acts. Due to the peculiarities of the EU formation, several treaties, including TEU and TFEU have been laid down in its basis.

The system of primary law sources may be subdivided into two parts:

- 1) the above mentioned constituent acts of the European Union;
- 2) All other documents by which amendments and additions to the constituent treaties are made (such as the Treaty on accession of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, Slovakia, the Treaty on accession of Bulgaria and Romania, the Treaty on accession of Croatia) supporting the adoption and development of constituent treaties, documents in the form of protocols, declarations, and other applications that develop and explain the provisions of the treaties (for example, the Protocol on Privileges and Immunities of the European Union (as amended by the Lisbon Treaty of 13 December 2007)).

According to some scientists (M. Marchenko, E. Deryabina, 2010; M. Ross, 2013 et al.), the sources of the EU primary law have:

- a) the highest legal force in the system of EU sources and the constitutional nature with respect to all sources of the EU law;
- b) a differentiated character in relation to each other;
- c) immediate goal and direction – formation and regulation of intra-institutional relations;
- d) direct action in relation to national law and order.

The TEU is currently the main constituent document of the EU. It consists of a preamble, six sections, and 55 articles.

The TEU, based 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 within the communities characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men) enshrines the goal (to promote peace, its values and the well-being of their peoples, etc) and the most general principles of its construction and regulations (a principle of provision of competence, subsidiarity and proportionality, the provisions on democratic principles, the provisions on institutions, the provisions on profound cooperation, the general provisions on foreign policy of the Union and special provisions for the common foreign and security policy), the relationship with Member States and the international community.

The TFEU is an amended TEC. This treaty consists of a preamble, seven parts (which in most cases are divided into sections) and 358 articles.

The TFEU establishes detailed rules for the functioning of the Union and consists of the following parts: principles (categories and spheres of the Union's competence; the provisions of general application); non-discrimination and citizenship of the Union; internal policy and activities of the Union (the internal market, free movement of goods, agriculture and fisheries, free movement of persons, services and capital; an area of freedom, security and justice; transport; common rules on competition, taxation and approximation of law; the economic and monetary policies; employment; social policy; the European social fund; culture; health; education, vocational training, youth and sport; consumer protection; industry; trans-European networks, economic, social and territorial cohesion; scientific research, technological development and space; environment; energy; tourism, civil defense, administrative cooperation); association with overseas countries and territories; foreign policy of the Union; institutional and financial provisions; general and final provisions.

It should be noted that these two treaties are of equal supreme legal force in the legislation of the European Union; do not duplicate each other (TEU defines the foundations and purpose of the Union, its objectives and tasks while TFEU governs creation of the mechanism to achieve these goals and objectives and ensures its functioning); they complement each other; are intended to be used together, and form a uniform legal framework of the Union.

Therefore, Art. 1 of the TEU states that “by this Treaty, the parties establish the European Union (hereinafter referred to as the “Union”) conferred by the Member States a competence to achieve their common goals. The Treaty marks a new stage in the process of creating a more cohesive union of the peoples of Europe, in which decisions shall be taken under the fullest possible compliance with the principle of transparency, and as much as possible close to the citizens. The Union is founded on this Treaty and on the TFEU (hereinafter referred to as the “Treaties”). These two Treaties have the equal legal force. The Union replaces the European Community and is its legal successor.”

In the same manner, part 2 of Art. 1 of the TFEU stipulates: “This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as “the Treaties”. On this basis, a uniform legal system of the European Union is built and all legal instruments are taken, which form the main block of the EU law sources.

The constituent documents set out the rights and obligations of public authorities (Member States, institutions, bodies, and institutions of the European Union), and individuals, which means that they are able to have direct effect.

A principle of direct action of EU laws is applied to the constituent documents subject to certain requirements established by the precedents of the European Court of Justice. The regulations should be unconditional, specific and clear and have a distinct character. They a) do not need additional measures (acts) taken by national and supranational authorities for their application; b) do not leave any significant alternatives or discretions for national and supranational authorities.

Therefore, if certain rules of the constituent documents are directly applicable, not allowing any ambiguity in the understanding and interpretation of the article (for example, prohibition of discrimination between citizens of MSs definitely and clearly stated in Art. 18 of the TFEU, or prohibition of discrimination of workers from Member States on the grounds of national citizenship in the matters of employment, wages and other working conditions, stated in Art. 45 of the TFEU), the others act more as a “program provisions” for institutions and the Member States (as they are qualified by the European Court of Justice). It is impossible to deduce any subjective rights from them (for example, increasing employment, improving living and working conditions that ensure alignment under parallel progress, adequate social protection, social dialogue and other social policy objectives laid down in Art. 151 of the TFEU).

The TEU and the TFEU were concluded for an indefinite period (Art. 53 of the TEU and Art. 356 of the TFEU), but there is a possibility to amend them in accordance with the established revision procedure.

An integral part of the constituent documents of the European Union is *the protocols* attached to them at different times (to the TEU and to the TFEU simultaneously), for example, the Protocol on the role of national parliaments in the European Union of 2007 and the Protocol on application of principles of subsidiarity and proportionality of 2007.

In particular, the protocols and appendices that form an integral part of the TEU and the TFEU disclose, supplement and clarify their provisions. They are used for the interpretation of specific rules and reveal the mechanism of their implementation (for example, the Protocol on principles of subsidiarity and proportionality discloses the mechanism of realization of the principle of subsidiarity and, partially, the principle of proportionality).

They contain special provisions on certain issues which are considered inappropriate to be included in the main part of the constituent documents (for example, statutes (charters) of the European Court of Justice, the European Investment Bank, the European System of Central Banks and the European Central Bank). They secure integration of the Schengen agreements into the EU legal system and their supplementing regulations (Protocol on the Schengen Acquis integrated into the framework of the EU).

These documents define the legal consequences of the expiry of the ECSC Treaty (Protocol on the financial implications of expiration of agreement on the ECSC and the Research Fund of Coal and Steel). They may set exemptions and exceptions for individual Member States (e.g. with respect to transition to a single currency – euro – the Protocol on certain provisions in respect of the United Kingdom of Great Britain and Northern Ireland of 1972, etc).

Protocols have their own structure: a preamble, articles, in most protocols there are chapters and sections. For example, the Protocol on the Statute of the European System of Central Banks and the European Central Bank consists of 50 articles organized in nine chapters. The Protocol on the Statute of the European Court of Justice contains 64 articles organized in five sections.

Up to now, there are many of these protocols. Some of them have been in power from 1957; others were made later, including the ones enclosed to the Treaty of Lisbon of 2007 (for example, the Protocol on the Statute of the European Court of Justice; the Protocol on the Statute of the European System of Central Banks and the European Central Bank; the Protocol on the Statute of the European Investment Bank, etc).

As well as the constituent Treaties, all previously signed protocols are still valid in the wording of the Treaty of Lisbon.

Besides protocols, an integral part of the constituent documents is formed by applications containing various schedules: the schedule of agricultural products covered by the common agricultural policy of the EU, the schedule of “overseas states and territories”, i.e. colonial possessions of individual Member States remaining outside the EU.

It is necessary to note that the treaties and protocols are different as far as the procedure for amending is concerned. However, by its nature and status, protocols may be attributed to the sources of primary law.

Despite the ability for direct action, the constituent documents of the European Union have never included a full “catalogue” (a list) of fundamental rights and freedoms obliged to comply with by the Union in the course of its activities. This gap was filled by the adoption of the *Charter of the European Union on Fundamental Rights*, which, due to the reform of the Lisbon Treaty, has become another source of the EU primary law.

For example, Art. 6 of the TFEU stipulates that the Union recognizes the rights, freedoms and principles set out in the Charter of the European Union on Fundamental Rights of 7 December 2000, amended on 12 December, 2007, which has the same legal power as the Treaties. The provisions of the Charter in no way extend the competence of the Union, as it has been defined in the Treaties. The rights, freedoms and principles set out in the Charter are interpreted in accordance with the general provisions of Section VII of the Charter governing its interpretation and application, with

due regard to the explanations provided for in the Charter that indicate the sources of its provisions.

The Union joins the European Convention on Human Rights. This does not alter the Union's competences as defined in the Treaties. Fundamental rights, as they are guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States, are included in the content of the Union law as general principles.

The Charter consists of a preamble, seven chapters and 54 articles. The Charter reaffirms the rights which are derived primarily from the constitutional traditions common to the Member States and international obligations, from the Treaty on the European Union and Community instruments, the European Convention for Protection of Human Rights and Fundamental Freedoms, social charters, as well as from rulings of the European Court of Justice and the European Court of Human Rights. Exercising these rights gives rise to the responsibility and creates obligations both before other individuals and in relation to human society and future generations as well. The Union recognizes the rights set forth in the Charter, the principles and freedoms. The Charter's validity period is not limited to any term.

Therefore, three interrelated documents – TEU and TFEU (constituent documents, or the “Treaties” – the basis for foundation and functioning of the Union) and the Charter (confirming and enshrining the fundamental rights of individuals to be respected in all activities of the European Union) – serve as the main sources of primary law of the European Union.

In addition to the main sources of primary law, there are also complementary ones.

Scientists include the so-called “*revision treaties*” in this group. These are treaties amending the constituent documents of the EU. They have no independent value, since amendments made by them are incorporated in the constituent documents.

An example of a revision treaty is the Treaty of Lisbon. It consists of a preamble and seven articles (Art. 1 and 2 are pivotal and are directly related to changes in the Treaty, and Art. 3-7 contain final provisions). Two protocols are attached directly to the text of the Treaty of Lisbon; these protocols are also of the revision nature: Protocol № 1 has amended the protocols previously annexed to the constituent documents of the EU, and Protocol № 2 has amended the Treaty on Euroatom, which is no longer a part of the EU.

Due to change of order and numbering of articles of the constituent documents of the European Union, the Treaty of Lisbon also contains an appendix indicating the correspondence between the old and new numbers of TEU and TFEU articles.

Treaties of accession to the EU (on the admission of new members, accession agreements) are the treaties under which new states join the EU. They are concluded

between EU MSs and one or more candidate countries, and must be pre-approved by the European Parliament. Then they should be ratified by the parliaments of all member states, as well as by parliaments of candidate states.

Over the past half a century of the EU existence, the membership has increased significantly, as the conditions and the mechanism of accession of new states to the EU have changed. Since the first expansion of the Union, fewer than 10 treaties of accession were concluded: the Treaty on Accession of Great Britain, Denmark and Ireland of 1972, the Treaty on Accession of Greece of 1979, the Treaty of Accession of Spain and Portugal of 1985, the Treaty of Accession of Austria, Finland and Sweden of 1994, the Treaty on Accession of 10 European countries, the Treaty of Accession of Bulgaria and Romania of 2005 and the Treaty of Accession of Croatia of 2011.

Treaties on accession can also be attributed to the sources of primary law as far as they: 1) make changes to the constituent acts of the EU and relate to the institutional structure, order of formation and activities of individual institutions and bodies; 2) provide for acceptance of requirements set forth in the statutory and other legal acts by candidates for accession, and the implementation of the necessary reforms by them.

Treaties on accession have a number of special features:

- a) They legally confirm accession of new MSs to the EU (the main part of treaties);
- b) Their provisions are temporary in nature (as they cease to have legal power after a certain transitional period);
- c) They contain provisions designed for independent and continuous application;
- d) As a result of entering into such treaties, certain provisions of the constituent documents of the European Union and other sources of the European law are amended; these amendments are called “adaptations” (for example, in order to include the languages of new Member States in the official languages of the European Union, to increase the authorized capital of the European Central Bank and the European Investment Bank by contributions from new MSs).

Therefore, revision treaties and treaties on accession are not intended for independent use and are a source of complementary regulations of the primary law aimed at clarification of rules of the constituent documents of the EU in relation to the new Member States. Their goal is to adapt the EU to the accession of new Member States through amending the constituent documents and other sources of law of the European Union.

Thus, in accordance with Article 7 of the Protocol on the Faroe Islands of 1972, annexed to the Treaty on Accession of Great Britain, Denmark and Ireland, the inhabitants of this Danish island, which did not join the EU along with its mother country,

are not recognized as citizens of the Member States, and therefore are not considered citizens of the Union as a whole.

The Treaty establishing the European Atomic Energy Community (Euratom Treaty) can be considered another specific source of primary law of the European Union.

Up to December 1, 2009 (before entry of the Lisbon Treaty into force), the Euratom Treaty was one of the constituent documents of the Union as a whole, as the European Atomic Energy Community was one of the elements of the first pillar of the EU. Eventually the Euratom became a formally independent organization consisting of the same Member States as the EU, because it was separated from the EU.

As a result, the Euratom Treaty is no longer *de jure* a part of the primary law system. It serves as a source of primary law of the legal system, separate from the legal system of the Union – the Euratom law. *De facto*, this Treaty may be considered as a complementary source of the primary EU law, extending the powers of EU institutions to the questions of nuclear power. It is known the Euratom does not have its own governing bodies and is governed by EU institutions. In practice, it remains inextricably linked with the EU, and the Euratom law – with the EU legislation.

As for the structure and content of the Euratom Treaty, it should be noted in brief that it contains a preamble, six sections (community objectives; provisions on assistance in the field of nuclear energy progress; regulations governing activities of institutions; financial provisions; general provisions; provisions, related to the initial period), final provisions, 225 articles, and four annexes containing various schedules (e.g. the list of materials covered by the common nuclear market of Euratom: Annex IV).

The main element in the structure and content of the Euratom Treaty is Section 2 “Provisions on assistance in the field of nuclear energy progress” (which is divided into chapters and contains Articles 4-106). In this same section the rules of integration of Member States in the sphere of development and use of nuclear energy are fixed. These include, in particular, the rules for nuclear research and development and its results, for protection from accidents and other hazards posed by radioactive materials, for establishment and functioning of common market for nuclear energy, etc. On the basis of the provisions of the second section of the Euratom Treaty, the institutions of the European Union publish regulations, directives and other legal acts in the field of nuclear energy related to the second group of the most important sources of law of the European Union (as well as the legislation of the European Community for atomic energy) – the secondary law.

Based on the foregoing, one may conclude that the sources of primary law are the constituent acts on which the Union is based.

These are:

a) Constituent treaties (TEU and TFEU, Protocols, the Charter of the European Union on the fundamental rights);

- b) The Treaty establishing the European Atomic Energy Community; Treaties, changing the constituent Treaties of the European Union (for example, the Treaty of Lisbon);
- c) Treaties on accession to the European Union (for example, on accession of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Poland, Malta, Slovakia, Slovenia, and Hungary);
- d) Other basic documents of the European Union (for example, Future of the European Union (Laeken Declaration).

2.1.3. Sources of the EU “secondary law”

The term “source of EU secondary law” and its content emphasizes that each source of this law arises and is realized on the basis of primary law and in compliance with it; it entirely relies on it, and cannot contradict it.

In accordance with these requirements and depending on the legal force, a kind of hierarchy is built, where the sources of primary law are on top and secondary law is at the bottom.

As stated by some scientists (S.Y. Kashkin, A.O. Chetverikov, 2015; T. Hartley, 2010; Ph. Raworth, 2011), the sources of secondary law (both homogeneous and single-type phenomenon) feature a number of common characteristics:

- a) substatutory (by-law) nature (manifested in the demand of their emergence and development on the basis of the provisions of primary law, in accordance with them, and within the powers conferred to authorities of the European Union);
- b) a lesser degree of generality and abstractedness as compared to the sources of primary law;
- c) focus on the achievement of more concrete goals and addressing more specific problems;
- d) wider variety of sources and scope of secondary law sources compared to the scope of primary law sources;
- e) focus on ensuring a stable everyday functioning of the European Union and its legal system;
- f) focus on operational management of current affairs of the European Union and search for new, optimal ways to implement the primary law;
- g) availability of both acts of direct (immediate) action and acts of indirect action in the legal system of the EU and MSs, including through issuance of complementary instruments;
- h) inextricable connection with EU institutions that adopt such acts within the framework of fixed competence and in compliance with legally established procedures.

Discussing similarities of the sources of secondary law, it is necessary to pay attention to the following facts.

One is about adoption of laws in the spheres of exclusive competence of the European Union, and in the spheres of joint competence with the Member States, for execution of activities aimed at supporting, coordinating, and complementing actions taken by Member States. We mean regulatory documents adopted in compliance with the regular procedure, and instruments adopted on the basis of a special procedure.

EU instruments – the sources of secondary law – are the result of legislative activities of institutions of given supranational build-up. Common features and peculiarities of secondary law sources are reflected in each particular instrument, and, above all, in regulations, directives and decisions.

Some authors (e.g., M. Marchenko, 2010) consider that secondary law source group consists of regulations, directives and decisions, as well as recommendations and conclusions/opinions, the difference being that the latter two are not legally binding.

The Treaty of Lisbon simplifies the situation and, to some extent, eliminates the disparity that exists in understanding and application of legal acts similar in designation and content but different in names (E. Deryabina, 2010; T. Hartley, 2010 et al.). These acts may have different legal status and, as a consequence, occupy different levels in the hierarchy of law sources of the European Union (regulations or directives may have both legislative and by-law nature). In principle, it stipulates that legislation will regulate the most important areas of public relations. However, the constituent acts do not articulate a single criterion. At the same time, these same basic instruments contain a specific indication of what kind of act is to be applied and what the procedure is for the adoption of these acts while indicating the way how this or that problem or the scope of integration relations is regulated.

It is necessary to note that secondary law sources of the European Union contain not only the above instruments. Let's consider the acts included in each of the groups adhering to the classification of secondary law sources into two groups (legal acts of the European Union and other acts of secondary law of the European Union).

The acts issued by the EU institutions form an important group of secondary law sources. They are the “legal acts of the Union” (French – *actes juridiques de l'Union*).

A separate chapter 2 “Legal acts of the Union. Procedures of accession and other provisions” of the TFEU is dedicated to them. For example, Art. 288 of the TFEU clearly states that institutions adopt regulations, directives, decisions, recommendations and conclusions for implementation of the Union competence. Therefore, the institutions may issue legal acts. They are distinguished, as a rule, by complex legal language and by numerous blanket norms that refer to other acts.

A central place among the EU legal acts is devoted to instruments issued by the EU legislative institutions – the European Parliament and the Council.

In accordance with articles 289 and 290 of TFEU, the legal acts adopted by legislative procedure serve as the so-called “legislative acts” (French – *Actes législatifs*). In most cases they are taken together with the European Parliament and the Council under proposal of the major executive institute of the EU – the European Commission (so-called “ordinary legislative procedure”).

In accordance with Art. 291 of the TFEU, the European Commission is also empowered to issue instruments aimed at the implementation of the legislative acts of the European Union. These powers are called executive, and acts published within their framework are called “the executive acts” of the EU. In some cases, executive powers may also be given to the Council. In accordance with Article 290 of the TFEU, the European Commission could also be given a responsibility to issue “*delegated acts*” – the acts issued under authorities delegated by legislative institutions. The purpose of delegation is to ensure more time-efficient amendment to legislative acts that does not substantially alter their meaning (“modify or complement individual elements of a legislative act without substantial value”).

The title of delegated and executive acts must always be designated by words “delegated” or “executive”.

The legal acts of the EU which do not belong to legislative ones are classified by the EU (Art. 290 of the TFEU) constituent documents as “non-legislative acts” (French – *actes non législatifs*).

Among the non-legislative acts only the executive ones serve as by-law acts, since they are issued pursuant to legislative acts. The delegated acts, because they are grounded on delegating legislative powers to the European Commission, are equal in legal power to legislative acts, which may be amended separately by them.

Another condition of delegating powers is the one that a delegated act may enter into force only if within a period established by a legislative act, the European Parliament and the Council do not lodge their objections. An illustration of the above may be Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2010 on application of patients’ rights in cross-border health care. The European Commission is granted an authority to issue delegated acts on certain matters set out in it. Such acts shall take effect within two months from the date of adoption, provided none of the legislative institutions put forward the objections during this period.

In accordance with Art. 290 of the TFEU, the European Parliament or the Council may adopt the decision to cancel a delegation.

According to Art. 288 of the TFEU, legal acts of the EU are issued in five forms: regulations, directives, decisions (legally binding; may be both legislative and

non-legislative acts), recommendations and opinions (non-binding, recommendatory acts, always considered non-legislative).

A *Regulation* has a general effect; it is binding in its entirety and directly applicable in all Member States (Art. 288 of the TFEU). The legal properties of a regulation contain the following ones:

- a) It contains rules of general behavior, rather than of individual nature;
- b) It is binding on all the territory of the EU Member States;
- c) It is an act of direct action, i.e. directly provides natural and legal persons with subjective rights and duties;
- d) The adopted regulations do not require any ratification or implementation by the Member States at conclusion of international treaties for entry into full force;
- d) In accordance with the practice of the European Court of Justice, the Member States are not entitled to substitute regulations with their own rules.

Therefore, by issuing regulations, the European Union directly regulates relations in the whole territory and introduces uniform rules of conduct for its members. As scientists observe, regulations supersede the laws and by-law acts of the Member States in regulating particular areas of public life, since they have precedence over national law.

A *directive* is an act binding for each Member State to which it is addressed in terms of result to be achieved, but it leaves a choice of form and methods of achieving a result to the competence of national authorities (Art. 288 of the TFEU).

A directive:

- a) Contains rules of general nature, i.e. it is a normative document fixing the basics of legislation in a particular sphere of public life;
- b) Is legally binding;
- c) Does not require ratification by Member States and may act against the will of some of them;
- d) Is, as a rule, mandatory on the entire territory of the EU. Although Article 288 TFEU allows for issuance of directives in respect of individual Member States, in practice, however, the vast majority of directives are adopted as binding for all states;
- d) Unlike the regulations, is not normally intended for direct application.

These rules are confirmed by the decisions of the European Court of Justice (Cases C-6, 9/90 *Francovich vs Italian State* (*Francovich-1*); Case 103/88 *Constanzo* (1989); Case 158/80 *Butter-buying Cruises* (1981), etc).

A directive is addressed to Member States, which are required to bring their national law into conformity with the Union standards. In this case they independently make a choice of form and methods for achieving the result.

By the ruling of the European Court of Justice C-144/04 Mangold, a directive was recognized as an act of direct horizontal effect. However, as is noted by many authors, a direct effect of directives is not unconditional.

It is required to perform four conditions established in the practice of the European Court of Justice (see Case 152/86 “Marshall”). These are: a) provisions of a directive must be unconditional and fairly clear; b) a transformation period must expire; c) a directive is not fully transformed by a particular State; g) a directive cannot impose obligations on individuals by itself.

Transformation of directives into national law is carried out by amendment or cancellation of existing or issuance of new laws and by-law acts within a specified period. If a state fails to bring legislation into compliance within the specified period, such omission equals to offense of law, for which it may be held liable by the Commission before the European Court of Justice, including imposition of penalties to be paid in the EU budget. All legal acts adopted with a purpose of transforming any particular directive must contain a reference to it (i.e., indicate, for example, that such a law has been adopted in accordance with a Directive of the European Parliament and the Council of a certain date and provided with certain name and official number); texts of national acts of Member States should be sent to the European Commission as the EU institution supervising the observance of the EU legislation.

A *decision* is binding in its entirety; when the decision specifies those to whom it is addressed, it is mandatory only for the specified addressees (Article 288 of the TFEU).

As emphasized by many (A. Chetverikov, 2015 et al.), a decision:

- a) is legally binding;
- b) normally, does not require ratification by Member States;
- c) unlike regulations and directives, is not aimed at harmonizing national laws;
- d) is issued by the EU institutions for four main purposes (establishment of individual prescriptions, addressed to Member States, natural or legal persons; appointments to positions at institutions, bodies, and EU authorities; implementation of foreign policy events, especially within a framework of common foreign policy and EU security policy; establishment of individual organizational provisions).

Along with legally binding juridical acts (regulations, directives, and decisions), EU institutions can issue acts of advisory nature, which, in accordance with Art. 288 of the TFEU, are issued in the form of *recommendations* and *conclusions*.

These acts have the following common features.

They:

- a) are not legally binding;

b) are always considered non-legislative acts of the EU, even if they have been issued by the Union institutions that perform legislative functions (the European Parliament and the Council);

c) court action against them in the EU Court of Justice by claims for cancellation is not applicable (Art. 263 of the TFEU).;

d) can be regarded as “pre-judicial” acts, since their preparation is often preceded by issuance of legally binding acts in the form of regulations, directives, and decisions;

e) are taken in those areas where the European Union does not have the authority to issue legally binding acts in the form of regulations and directives aimed at harmonization of national laws;

f) cannot be regarded as completely devoid of legal consequences.

However, some distinguishing features between recommendations and conclusions of the European Union also exist. For example, recommendations are acts by which an institution of the European Union proposes to voluntarily perform certain actions or to refrain from acting (M. Marchenko, E. Deryabina, 2010). They can have both individual and normative nature; regulatory recommendations contain general rules of conduct; violation of these rules does not ensure legal responsibility (considered in the Western doctrine (L. Senden, 2005) as sources of “soft law”).

In turn, conclusions are acts which express official position of the institution of the European Union on any matter; different EU institutions, for example, the Court of Auditors may issue conclusions in the course of everyday activities (Art. 287 of the TFEU).

It is worthy to note that despite the fact that recommendations and conclusions, as such, are not legally binding, these acts cannot be regarded as completely devoid of legal consequences. For example, in cases, when legally binding acts of the European Union should be taken after consultation with other institutions, non-receipt of their opinion or failure to provide reasonable period of time to form an opinion are considered by the European Court of Justice as a fundamental breach of the procedure, which can lead to cancellation of already adopted legally binding act (Case C-322/88 “Grimaldi”).

In addition to legal acts issued by the EU institutions, some other types of mandatory or advisory documents are also considered sources of secondary law. They are made on the basis of the constituent documents of the EU and cannot contradict them.

For example, *other sources of secondary law* include internal regulations (procedural rules). Each institution of the EU, being a collegiate body, needs rules governing its internal structure and operation (order of meetings, drawing up the agenda, struc-

tural units, auxiliary units, etc). The most important rules of this kind are enshrined in the founding documents, and their adaptation for each institution is ensured by special act called “Rules of Procedure” (French – *Reglement interieur*). An example of the first one may be internal regulations of the European Parliament or “procedural” (internal) rules of the European Court of Justice; and an example of the second one – the rules of internal organization of an institution (L. Entin, 2009).

It should be noted that the auxiliary collective bodies and EU institutions have their own internal regulations (for example, rules of procedure of Eurojust). Some characteristic features of internal regulations (rules of procedure) are: they adjust domestic structure and functioning of relevant institution, authority or EU body; they are intended to regulate only internal life of a particular institution, authority or body; they are legally binding for the members and staff of the relevant institution, authority or body; they may contain provisions that confer rights on other subjects, including natural and legal persons entering into a relationship with relevant institutions, bodies or EU authorities.

Institutional acts sui generis (of special order) should be considered separately. As a general rule, EU institutions must consolidate their orders only in the forms stipulated by the constituent documents, i.e., in the form of “legal acts of the Union” envisaged by Art. 288 of the TFEU (regulations, directives, decisions, recommendations and conclusions stated above), as well as in the form of their own “internal policies”, “targets” and “instructions” of the European Central Bank (to be discussed below). In practice, these forms were not enough, and EU institutions “invented” an arsenal of additional forms called acts *sui generis* in the European legal doctrine (as for A. Masson (2008) – “acts not provided for in the Treaties” or “acts beyond the nomenclature”).

There are some special features of the acts *sui generis*.

They:

- a) are issued by the EU institutions in the forms not stipulated by the constituent documents of the EU;
- b) are not legally binding for other subjects;
- c) feature either preparatory or program nature (issued in the course of preparation of regulations, directives, and decisions – legally binding legal acts of the Union), or political nature (reflect political position of an institution on a particular issue).

Before submitting a new draft of legislative acts to the European Parliament and the Council, the European Commission publishes the legislative program and the so-called “consultation documents” in the form of “white papers” (French – *livre blanc*), “green papers” (French – *livre vert*) and “communication” (in English and French).

These documents should also be sent to the parliaments of all member states. The Commission shall organize a broad public discussion on possible options for EU action and determine its own political and legal approaches to solution of various issues through consultation documents. It should be noted that there are also communications used as instruments of interpretation of certain provisions of the constituent documents, or other sources of legally binding EU law.

Resolutions and declarations are issued as political *sui generis* acts. For example, the adoption of legally binding Charter of the European Union on the fundamental rights preceded the adoption of such instruments as the Joint Declaration of the European Parliament, the Council and the Commission of 3 April, 1977. These documents underlined the top priority of compliance with fundamental rights in the framework of the European Union, and of the Declaration of Basic rights and freedoms, approved by resolution of the European Parliament on 12 April, 1989.

Following the meeting, EU institutions take “conclusions” (English, French conclusions), which should not be confused with an “opinion” as a form of legal acts of the Union (French – *avis*).

Proceeding from the above, we can conclude that in their legal characteristics *sui generis* acts:

- a) usually serve as “pre-judicial” acts predicting adoption of legally binding instruments; they are similar to the above mentioned recommendations of the Union;
- b) in institutional practice there have been cases of official interpretation by *sui generis* acts of legal norms that affect the legal position of Member States, citizens and legal entities; the European Court of Justice admits the possibility of appealing against *sui generis* acts by stakeholders, including through submission of claims for cancellation of such acts (C-242/00 “*Allemagne vs Commission*.”);
- c) are able to serve as sources of “soft law”, i.e. recommendatory provisions intended for voluntary application.

The European Central Bank (the ECB) is the Institute of the EU responsible for development and conduct of a single monetary policy of the European Union within the euro area. Within its powers, it issues legal acts of the Union in the form of regulations, decisions, recommendations and conclusions. The only exception is a directive. Instead of it, the ECB has the right to issue the «guidelines» (French – *orientation*) in accordance with the constituent documents of the EU.

In accordance with Art. 14.3 of the Protocol on the Statute of the European System of Central Banks and the European Central Bank, the ECB “guidelines” are the acts adopted for implementation of ECB tasks in the area of monetary policy; they are legally binding for the central banks of the Member States that adopted the euro. A special place in the system of these acts is occupied by ECB instructions, which have

the same purpose and the same legal nature as the guidelines. However, there is a difference – guidelines come from the highest governing body of the ECB (Governing Council) while the instructions are adopted by the ongoing management authority of the ECB (the Directorate). Thus, the ECB instructions complement and elaborate guidelines. They are not usually published in the ‘Official Journal’.

Inter-institutional agreements are also secondary law sources of contractual nature.

In accordance with Art. 295 of the TFEU, the European Parliament, the Council and the Commission consult each other and organize a procedure for their cooperation under mutual agreement. To this end, they may enter into binding inter-institutional agreements subject to the Treaties.

Therefore, it comes out that the inter-institutional agreements:

- a) are Treaties concluded between the EU institutions;
- b) are mostly triple, rather than bilateral (concluded between EU institutions having legislative and executive functions);
- c) are similar in purpose and content to domestic regulations (procedural rules) and contain detailed rules of procedural nature, but, at the same time, are focused on concretizing the procedures of joint activities and cooperation between EU institutions in all or in certain spheres;
- d) are expressly stipulated in the constituent documents as viable and binding;
- d) cannot contradict the EU constituent documents as sources of secondary law.

An example of inter-institutional agreements can be special agreement on juridical methods concluded between the European Parliament and the Council in 1998 – the Inter-institutional treaty on common guidelines on editorial quality of the Community legislation. The adoption of this agreement was preconditioned by the fact that legal acts of the EU had very complex juridical language, numerous blanket regulations referring to other acts; the need to improve the quality of presentation of legal norms of the Union, to make them understandable not only for lawyers, but also for ordinary public. According to this document, “the provisions of acts should be formulated concisely,” “should avoid too long articles and sentences, complex formulations if no direct need in them exists.” In 2003, the European Parliament, the Council and the Commission signed another inter-institutional treaty with the original name “*Mieux legiferer*” (Better quality of legislative activity).

An important role in the development of the EU legislation is also played by Treaties into which the Union, as a subject of international law, enters with other (third)

countries and international organizations. A term “*international treaty*” (Section V “International treaties”, fifth part “A Foreign political activity of the Union” of the TFEU) is used as a general name.

In accordance with the norms set forth in this section of the TFEU, the Union may enter into agreements with one or more third countries or international organizations when stipulated by the Treaties, as well as in cases when an agreement is either necessary for the achievements of one of the purposes set out in the treaties subject to the Union’s policy, or is provided for in a legally binding act of the Union, or likely to affect common rules or alter their action.

Agreements/treaties concluded by the Union are binding on the Union institutions and Member States. Article 217 of the TFEU says that the Union may conclude agreements with one or more third countries or international organizations on establishing an association characterized by reciprocal rights and obligations, joint actions and special procedures.

International treaties of the EU may be unilateral or multilateral (e.g. Treaties and conventions concluded by EU within the framework of the UN, WTO, the Council of Europe and other international organizations).

Regarding nuclear energy, similar agreements are concluded by the Union institutions of behalf of Euratom (on the basis of Article 10 “External Relations” of Section II “Regulations on facilitation of progress in the sphere of nuclear energy” of the TE as amended by the Treaty of Lisbon).

In accordance with Article 216 of the TFEU, international treaties of the EU are binding for the EU institutions and all MSs. A principle of direct action established by the case law of the European Court of Justice (C-192/89 “Sevince”) applies to international treaties of the EU. Norms of international treaties of the EU, which consolidate a “clear and precise obligation”, are able to confer rights and responsibilities directly on individuals and legal entities, not just on the European Union and Member States (C-416/96 “Eddline EI-Yassini”).

Exceptions are agreements concluded by the EU and the WTO. As pointed out by the Court of the European Union, such documents are aimed at creating mutual commitments between the European Union in general and other (third) countries – its counterparts and partners in the WTO. Rights and obligations of individuals and legal entities being the parties of these agreements should be determined by legal acts issued on their basis by EU institutions or authorities of the Member States within the framework of their competence (C-93/02P “Biret International”).

EU international treaties outrank regulations, directives and other legal acts by their legal force. At the same time, the EU international treaties cannot contradict the sources of primary law. To this end, Art. 218 of the TFEU stipulates that Member

States, the European Parliament, the Council or the Commission may receive an opinion of the Court on compliance of the planned arrangements with the Treaties (in case of negative conclusions of the Court, the planned treaty cannot enter into force unless the Treaties are amended or revised).

A special category of sources of secondary law is the *joint acts of Member States*. They are similar to the constituent instruments as a source of the EU primary law (in terms of procedure of adoption). However, in contrast to the TEU and the TFEU, joint acts are not endowed with the highest legal power in the EU legislation. They: a) cannot contradict the legal acts of the Union issued by its institutions; b) shall be adopted directly by consensus of the Member States rather than issued by institutions, bodies, and agencies of the European Union.

In this regard, the European legal doctrine often separates joint acts of the Member States into a separate category of sources of the European law, inferior in power to secondary law – a “supplementary law” (French – *droit complémentaire*).

Joint acts of Member States are adopted in the following cases:

a) when the constituent documents of the EU provide for adoption of certain measures not by institutions, bodies, or the Union authorities, but directly by Member States under common agreement (an example is a situation when, in accordance with articles 253 and 254 of the TFEU, members of the European Court of Justice are appointed by common accord of the governments of MSs;

b) acts on the appointment of EU officials, respectively, are formalized as “decisions of conference of Member States government representatives”;

c) joint acts of MSs may also be issued in case of the lack of specific guidance in the constituent instruments, in particular, when there is a need to establish harmonized rules on the issues for which the EU institutions do not have lawmaking powers. Therefore, in 1980 the MSs concluded a Convention on the law applicable to contractual obligations for the establishment of uniform rules of international private law, subsequently authorized for interpretation by the European Court of Justice. Over time, the document was amended by Regulation (EU) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)).

It may be concluded from the above that joint acts of the Member States:

a) are considered acts adopted by the Member States on the basis and (or) in addition to the constituent instruments of the EU;

b) refer to the secondary law, because they cannot contradict the constituent instruments of the EU and the Charter of Fundamental Rights;

c) must not conflict with legal acts of the EU issued on behalf of the EU institutions, and may subsequently be canceled and replaced by the latter; may be both legal-

ly binding (as a rule, are formalized by joint decisions of Member States' governments or conventions between them), and advisory (normally adopted as resolutions).

The role of joint acts of MSs in the EU legal system is limited and continues to decline in proportion to the expansion of the EU competence and joint acts previously adopted by the Member States in the form of conventions are replaced with legislative acts of the European Union in the form of regulations, directives, and decisions.

2.1.4. Other sources of the EU law

A special group of sources of the European law is *the case law*. It consists of a set of legal provisions established by the European Court of Justice.

Case law as a source of law is differently assessed by the representatives of various law schools and legal systems (Y. Orlova, 2014; et al.). The EU legislation is not case law in the proper sense understood by the common law countries.

It should be noted that it makes extensive use of the experience gained by jurisprudence of the European Union for resolution of current problems and disputes, as well as settlement of vital issues of European integration.

The role of the ECJ is to ensure "observance of law" in the course of interpretation and application of the constituent documents, as well as other sources of European law based on them. This activity is carried out by the Court in considering specific cases falling within its jurisdiction (claims against Member States, institutions, bodies, agencies of the EU, prejudicial requests of courts of the Member States).

During the consideration of cases the Court gives official (normative) interpretation of the EU law. Legal positions worked out by the Court form judicial provisions which in civil law countries are usually called jurisprudence. The Court refers to these legal provisions in its subsequent decisions. The same is done by the courts of all Member States governed by the precedents of the European Court of Justice in cases related to the application of the European law.

Since its inception, the Court resorted to its authorities to interpret in a very broad manner – for the purpose of clarifying the meaning of existing law, and in order to derive new principles and norms of law binding on Member States, other EU institutions and all other subjects of European law.

Fundamental principles governing the interaction of the European law and the law of Member States – principles of supremacy and direct effect of the EU law – gained their legal consolidation in legal precedents of the Court. The same applies to the principle of legal certainty, the principle of legitimate expectations, and other legal provisions called by the Court as "general principles of the Union law."

These are the legal precedents of the Court that formulated definitions for many key concepts used in the EU constituent documents: the concepts of "capital", "public order", the "goods", etc.

The legal precedents of the European Court of Justice may gain real norm-creating nature while interpreting legal acts of the Union, i.e. sources of secondary law issued by the other juridical institutions of the EU (S. Tumanyants, 2015; M. Entin, 2009; et al.). Since legal precedents of the Court have not only interpretative but also a norm-creating nature, they are also officially referred to as case law in the English-language sources. Therefore, terms “legal precedents” and “case law” in the European law are synonymous.

Although the Court is not formally bound by its precedents (can adjust them and supplement them with new rules), in its subsequent decisions it regularly refers to them as the “established jurisprudence” (French – *Jurisprudence bien etablie*), or the “established case law” (the same).

Thus, the case law of the EU:

a) comprises diverse principles and norms of the European law created in the course of interpretative activities of the Court;

b) clarifies and complements other norms of the legal system contained in the constituent documents, regulations, directives and other sources of primary and secondary law;

c) since the case law is established by the Court in the course of official interpretation of other sources of European law, case law provisions have the same legal force as the provisions of primary or secondary law sources from which they have been derived.

The main source of case law is judicial decisions / court judgments. At the same time they should not be confused with the above mentioned “decisions” as a form of legal acts of the Union within the meaning of Art. 288 of the TFEU relating to the secondary law sources.

The European Court of Justice can also issue: a) rulings (they refer to matters of procedure and do not make an independent contribution to formation of new case law) and b) conclusions (a court assesses compliance of draft international agreements of the European Union with third countries with the constituent instruments; they are binding and able to contain new legal positions).

Because rulings and conclusions of the European Court of Justice are not only law enforcement acts but also law-making acts, they, as a general rule, are officially translated into all 23 official languages of the European Union and published in these languages (Art. 30 of Procedural Rules of the Court). The operative parts of these acts are published in the Official Journal of the European Union (C series). The official organ of the ECJ – The European Court Reports abbreviated as ECR (French – *Recueil de la jurisprudence*) is specially designated for publication of the full texts of judg-

ments, conclusions and rulings. Case law of European Court of Justice is summarized in annual reports containing an abstract of its activities over the past calendar year.

General principles of the EU law (to be discussed below) also fall into the EU sources of law.

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2.2. Law-making in the EU

2.2.1. Law-making process in the EU: concept, features, and subjects

Since the inception of the EU, an issue of passing binding legal acts has been causing disputes and controversy. However, as the EU advances, the situation, albeit slowly and with great difficulty, is beginning to change: the circle of decision-makers and subjects of legislative initiative as well decision-making procedures allowing more frequent use of a qualified majority principle instead of a unanimity principle

are tending to expand; the involvement and expansion of powers of the European Parliament tends to grow.

The Lisbon Treaty has made significant changes to the procedure of revision and amendments of the constituent acts. Its provisions serve as a background for a new legislative procedure; introduce new varieties of applied legislative procedures; provide for a program of phased implementation of new procedure of voting, etc.

The legislative process in the EU is an important part of special political and legal mechanism for the development of the European integration. It consists of a transfer of a part of sovereign powers of EU Member States to supranational bodies. The above-mentioned bodies are empowered to issue legally binding acts both for Member States and their executive bodies, and for their citizens and legal entities. Moreover, this procedure provides for active involvement of each Member State in the legislative process at the European level.

Proceeding from the specifics of law-making activities of the EU, its functional designation and existing opinions, one can determine the contents of the *law-making process in the EU* concept as focused, logical, consistent, and coherent activities delivered by its subjects in accordance with the provisions of the constituent Treaties, within well-established procedures and in compliance with certain authorities, related to the creation, modification and amendment, revision and abolition of the EU legal acts.

The Lisbon Treaty commemorated the completion of the initial phase of reforms directly related to a law-making process: the expansion of the range of subjects; the definition and delimitation of powers between the Member States and EU institutions; the improvement of legislative procedures; the formation of a system of primary and secondary legislation; the definition of legislative and non-legislative acts, etc.

The characteristic features of a law-making process in the EU are its complexity, diversity, versatility, a wide range of subjects of legislative initiative, and an activity that should be carried out within powers granted to them, the interests of the EU and the Member States, at the same time.

The main subjects of the legislative activities in the EU are the subjects of legislative initiative: the EU institutions (the Commission, the European Council, the Parliament, and the Council of Europe); the Member States (Art. 289 of the TFEU); and the “Citizens of the Union in the amount not less than one million people» (para 4 Art. 11 of the TEU).

Apart from these, the lawmaking is contributed by: the Committee of Permanent Representatives; the Social and Economic Committee; the Committee of the Regions; the Chamber of Accounts; the European Central Bank; the EU Court of Justice; the parliaments of the Member States; financial institutions, advisory and auxiliary bodies

and agencies, which, in accordance with specific agreements, take part in legislative activities at their different stages and phases; in some cases – the High Representative of the Union for Foreign Affairs and Security Policy, alone or jointly with the Commission, the European Central Bank and the European Court of Justice.

It is worth mentioning that among the subjects of the legislative activities of the EU special place is occupied by the Council, Parliament and Commission, because in addition to legislative proposals, they have the right to propose delegated and non-legislative acts. The founding treaties contain the following features of the participation of the European Council in lawmaking. On the one hand, legislative activity is forbidden (Art. 15 of the TEU), and, hence, the involvement in the legislative proceedings; on the other hand, it is a political institution which gives impetus to lawmaking, sets priorities, and identifies strategic interests.

It should be noted that, in accordance with the Lisbon Treaty, not only the range of legislative process subjects has been extended but their internal reform aimed at functional improvement (the European Parliament legislative powers have been expanded, the citizens have been granted the right of legislative initiative, control by the national parliaments has been set), which has led to more rational and efficient nature of legislative process, and the one that incorporated interests of legal regulation subjects.

2.2.2. The procedure for reviewing and amending the constituent acts

As a result of adopting the Lisbon Treaty, the parties rejected pre-existing uniform order, according to which only one general procedure has been applied in all cases of preparation and amendment of the constituent acts. A novelty was adopted, which, according to some researchers, constituted one of the most important changes introduced to the EU legislation by this Treaty. According to Art. 48 of the TEU, the constituting treaties may be revised and amended by applying two possible procedures: ordinary and simplified ones. Let us consider each of them.

The main criterion for application from a variety of possible options is the significance of changes introduced.

The general procedure is used in cases when the applied changes significantly expand or, on the contrary, narrow down a competence of the EU. The general legislative procedure presumed by the Lisbon Treaty significantly expands the range of persons that can initiate a legislative proposal. Therefore, in accordance with Article 48 para 2 of the TEU, the government of any Member State, the European Parliament or the Commission may introduce drafts to the Council aimed at revision of the Treaties, i.e. proposals for revision of the current constituent instrument may be contributed by governments of each of the EU Member States, as well as by the European Parliament

and the European Commission. In general, inclusion of the European Parliament in the scope of subjects authorized to review the constituent instrument fits the overall concept of expansion of its legislative authority. These drafts may be directed, *inter alia*, at expansion or reduction of competences given to the Union by the Treaties. These drafts are handed over by the Council to the European Council and serve as a subject of notification of national parliaments. In other words, the initiative goes to the EU Council, which sends them, by its decision, to the European Council and report on them to the national parliaments of EU Member States in accordance with the rules of subsidiarity. If after consulting the European Parliament and the Commission, the European Council takes a decision, by a simple majority, in favor of considering the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of national parliaments, heads of states, or governments of the Member States, the European Parliament and the Commission (para 3, Article 48 of the TEU). In case of institutional changes in the monetary field, an opinion of the European Central Bank should be considered.

The convening of the European Convention is not an innovation in the practice of the EU and some experience in this regard already exists. For example, the European Union Charter of Fundamental Rights (endorsed and proclaimed) was developed due to convening of the Convention. Another example of convening the Convention was an issue related to the development of draft Constitution for Europe.

The Convention is supposed to consider the draft revision and to accept recommendations addressed to the Conference of representatives of the Member States' governments, provided for in paragraph 4 of Art. 48 of the TEU, on the grounds of mutual consensus. According to the rules introduced, the Convention is summoned to discuss critical proposals aimed at radical reform primarily on the terms of reference and competence of the EU. It has, on the grounds of mutual consensus, to approve a recommendation submitted to the consideration of the Conference of representatives of the Member States' Governments.

After approval by the European Parliament, the European Council may, by simple majority, decide not to summon the Convention when its convening is not reasonable in terms of the extent of changes proposed. It is about the cases when amendments to the Treaties are minor in terms of content and/or importance. In this case, the European Council should set a mandate for the Conference of representatives of the Member States' governments.

The Conference of representatives of the Member States' governments is summoned by the Chairman of the Council with a view to adopt the amendment to the Treaties. The amendments enter into force immediately after ratification by all Member States in accordance with the constitutional rules of each state.

If, within two years from signing a draft amendment to the constituent acts, it is approved only by four-fifths of the Member States, and other countries have faced certain difficulties in conducting the above ratification, the European Council should return to consideration of the issue. The TEU does not specify the legal consequences of such a repeated discussion at the European Council.

The TEU also provides for a *simplified revision procedure*. There are two options. In accordance with para 6, Art. 48 of the TEU, the government of any Member State, the European Parliament or the Commission may submit to the European Council draft amendments aimed at the revision of all or some of the provisions of the third part of TFEU related to the internal policy and activities of the Union.

Thus, the first option of a simplified revision procedure is for an amendment to be made to the third part of the TFEU, or to any provision of this part of the Treaty. We are talking here about the general nature of the internal policies or actions undertaken on the basis of internal regulations of EU legislation. The scope of subjects of legislative initiative remains the same – the governments of member states, the European Parliament and the Commission. The European Council may adopt a decision amending all or certain provisions of the third part of TFEU. The European Council shall act unanimously after consulting the European Parliament and the Commission, and the ECB in the case of institutional changes in the monetary sphere. This decision shall enter into force only after the approval by the Member States in accordance with the constitutional rules of each country. The decision cannot extend the competence given to the Union by the Treaties.

In accordance with para 7, Art. 48 of the TEU, when the Council decides unanimously according to the TFEU or Section V of the Treaty, the European Council may adopt a decision obliging the Council to decide by a qualified majority. This rule does not apply to decisions with military or defense implications.

When, according to the TFEU, the Council adopts legislative acts in accordance with a special legislative procedure, the European Council may take a decision authorizing the adoption of the above acts under the general legislative procedure. Thus, in cases when a constituent treaty provides that a legislative act in this field is adopted on the basis of a special legislative procedure, the European Council can replace application of the specialized procedure by general legislative procedure. In other words, any initiative put forward by the European Council on the basis of the first or second paragraph shall be passed to national parliaments.

If, within six months after such transfer, any national parliament sends in an objection, the decision referred to in the first or second paragraph fails to be accepted. If no objections are put forward, the European Council may adopt the said decision. For the purposes of taking the decisions referred to in the first or in the second paragraph,

the European Council shall decide unanimously after approval by the European Parliament, which has reached its decision by a majority of its members.

Simplified procedure for amending the constituent acts has significantly changed the previous procedure that required the ratification of draft amendments to the constituent instruments in every case. For example, all Member States (except for Ireland) decided to enact the Lisbon Treaty by parliamentary review and approval (rather than through a referendum). The simplified procedure allowed to collect a large majority of positive decisions by national parliaments of EU Member States fast enough. To date, the simplified procedure of parliamentary ratification is being applied and implemented.

2.2.3. Procedures for the adoption of acts

Law-making process in the EU is reflected in several legislative procedures. The procedures of decision-making in the European Union may be classified into two groups: general and special.

The *general* ones are those used in one way or another when making decisions in various fields through the prism of empowering articles (which sometimes provide a multivariance of these procedures). In theory, the general procedures may cover any sphere of activity of the Union. The general procedures include “the Commission – the Council” procedure, a consultation procedure, a co-decision procedure, an authorization procedure, and a cooperation procedure.

Special procedures include those used only when deciding on particular issues; they do not apply to other matters; these procedures depend on the specifics of issues and the nature of the procedure flow is organically linked with the scope of the decision. Thus, the budgetary procedure is dependent on the structure of articles of the Union budget and, for example, the procedure for concluding international agreements by the EU depends on the specifics of international agreements and their transformation in the legal framework of the Union.

According to their prevalence, *general legislative procedures* may be subdivided into core and non-core ones.

The core ones are the most common procedures for consultation and joint decision-making, they can also be attributed to “the Commission – the Council” procedure. The characteristic features of the legislative process are: the presence of the same actors involved in decision-making; decision-making process always passes through three stages (preparation of a draft decision and legislative initiative, the discussion of the draft decision, and decision-making); a hallmark in the legislative procedures of the Union is the second phase – the phase of discussion.

Non-core procedures are cooperation and authorization procedures.

After the Lisbon Treaty entered into force, the concepts of “law-making/legislative process” and “legal procedures” refer only to adoption of legally binding (as a rule, regulative) documents of the Union institutions – the European Parliament and the Council. Other procedures (procedures for approval of “non-legislative” acts within the meaning of the Lisbon Treaty) are considered other law-making procedures.

The TFEU (Art. 289) sets two main procedures for the adoption of the EU legislative acts: general legislative procedure and special legislative procedure. The analysis of general and special procedures, including a budgetary one, a procedure for delegation of powers to the Commission, etc. reveals special nature of the legislative procedures in the EU, not similar to those existing in the national legal systems, embodying the process of interaction between the EU institutions and bodies in the legislative process, and constituting the way of harmonization of national and supranational interests in the EU.

Article 289 of the TFEU has consolidated the *general legislative procedure* as the core, and stipulated its application in more than 100 articles of the founding treaties. In accordance with Part 1 of Art. 289 of the TFEU, the general legislative procedure consists in cooperative adoption of regulations, directives or decisions by the European Parliament and the Council at proposals from the Commission. This procedure is defined in Art. 294 of the TFEU, according to which, when for the purposes of adoption of an act, the Treaties refer to the general legislative procedure, the following procedure shall apply, which somewhat balances the value and the role of the principal legislative institutions – the Parliament and the Council.

Thus, the Commission submits a proposal to the European Parliament and the Council. Overall, the draft decision goes through three readings. The European Parliament adopts its position at the *first* reading and passes it over to the Council. If the Council approves the European Parliament’s position, the proposed act is adopted in the wording which corresponds to the position of the European Parliament. If the Council does not approve the European Parliament’s position, it shall adopt its own position at the first reading and pass it over to the European Parliament. The Council should fully inform the European Parliament of the reasons which led it to adopt its position at the first reading. The Commission should fully inform the European Parliament of its position.

The *second* reading. If within three months after the passage, the European Parliament:

a) approves the Council’s position at first reading or does not express its opinion, the proposed act shall be deemed adopted in the wording which corresponds to the Council’s position;

b) rejects the Council's position at first reading by a majority of its members, the proposed act shall be deemed failed to be adopted;

c) proposes amendments to the Council's position at first reading by the majority of its members, the text thus amended shall pass to the Council and the Commission supposed to issue an opinion on those amendments.

If within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority: a) approves all amendments, the proposed act shall be deemed accepted; b) does not approve all amendments, the President of the Council is supposed to summon a conciliation committee within six weeks, with the consent of the Chairman of the European Parliament.

The Council shall decide unanimously on those amendments which have received a negative opinion from the Commission.

The Conciliation Committee, which brings together members of the Council or their representatives and an equal number of members representing the European Parliament, has the task, within six weeks of being convened, to reach an agreement on a joint draft document on the basis of the positions of the European Parliament and the Council on second reading: by a qualified majority of the Council members or their representatives and by a majority of members representing the European Parliament. The Commission participates in the work of the conciliation committee and shall take all necessary initiatives to facilitate the rapprochement of the positions of the European Parliament and of the Council. If, within six weeks of being convened, the Conciliation Committee does not approve a joint draft decision, the proposed act shall be deemed not accepted.

The *third* reading. If within the said period the Conciliation Committee approves a joint draft decision, then from the moment of the approval, the European Parliament and the Council have each six weeks out to accept the proposed draft document as amended: the European Parliament – acting by a majority of the votes, and the Council – by a qualified majority. If the parties fail to achieve an agreement, the proposed act shall be deemed not accepted. The periods of three months and six weeks referred to in Article 294 TFEU, should be extended, respectively, for a maximum of one month and two weeks on the initiative of the European Parliament or the Council.

The same Article contains *special* provisions, according to which in the cases provided for in the Treaties, a legislative act should be adopted in accordance with the general procedure at the initiative of a group of Member States, on the recommendation of the European Central Bank, or at the request of the Court. In this case, some parts (paragraphs) of Art. 294 the TFEU shall not apply.

In accordance with para 1, Art. 297 of the TFEU, legislative acts adopted in accordance with the general legislative procedure shall be signed by the Chairman of

the European Parliament and by the Council Chairman. The legislative acts shall be published in the '*Official Journal of the European Union*'. They enter into force on the date specified in them, or – if no date is mentioned – on the twentieth day following their publication.

It should be noted that the regulatory support of general procedure is provided by the provisions of the Treaties, the rules of procedures of the Parliament, the Council, the Commission, and other acts (Declaration, inter-institutional agreement, etc.).

In specific cases provided for in the Treaties, the adoption of regulations, directives or decisions by the European Parliament with the participation of the Council or by the Council with the participation of the European Parliament, form a *special legislative procedure*. It is understood that it is the Council that is supposed to approve legislative acts rather than the Parliament. As researchers note, in practice this kind of ruling, in contrast to the general legislative procedure, which equates the rights and opportunities of the two leading co-lawmaking institutions, clearly gives an advantage to the EU Council.

A special legislative procedure is significantly different from the one described above, namely, it does not require co-decision (i.e. the Parliament and the Council are not acting together); a legislative act in this case is approved directly by one of the institutions (i.e. the EU institutions may be initiators of a legislative act – para 4, Art. 289 of the TFEU, or a group of MSs – Articles 228, 308, 349 of the TFEU).

Taking into account the importance of the EU budget as a financial instrument for organized regulation of integration processes of its development and adoption, another special legislative procedure is a special budget procedure.

In accordance with Art. 297 of the TFEU, the documents adopted according to a special legislative procedure shall be signed by a chairman of the institution which adopted them. They are published in the '*Official Journal*' and enter into force on the date specified in them or – if no date is mentioned – on the twentieth day following their publication.

An important condition that consolidated two legislative procedures is an indication of consistent application of the principle of subsidiarity. According to the Protocol of the principle of subsidiarity and proportionality, in all cases when it comes to the adoption of a new legislative act, appropriate draft documents should be submitted to the national parliaments to determine compliance with the principle of subsidiarity. The objections put forward by national parliaments that refused to approve the draft document, if such is not less than one third of them, practically stop the legislative procedure and require either re-drafting of the bill, or abandoning it. The exact nature of the involvement of other institutions, advisory opinions, or approbation by the Parliament within the framework of a special legislative procedure, is established strictly

on an individual basis in the founding treaty depending on the situation and subject of regulation (C.F. Bergstrom, 2005; E. Best, 2008).

The Lisbon Treaty has significantly expanded the limits of legislative power of the Commission (Articles 290 and 291 of the TFEU) regarding adoption of delegated acts – non-legislative acts of general application for supplement and amendment of certain non-essential provisions of legislative acts, and implementing acts to be adopted if necessary in uniform conditions for implementing legally binding acts of the Union (para 2, Art. 291 of the TFEU). Accordingly, it is reasonable to conclude that numerous acts adopted directly by the Commission, as a general rule, should be attributed to administrative acts. The Commission's role in the process is usually the role of the subject of legislative initiative.

Describing special features of legislative power, one should pay attention to another important aspect. Article 295 of the TFEU expressly provides that the European Parliament, the Council and the Commission shall consult each other and organize a procedure for their cooperation by mutual agreement. To this end, they may enter into inter-institutional binding agreements, provided the conditions of the Treaties are met.

2.2.4. “Soft” legal instruments in the system of EU law

The legislative process has a special place for a separate category of acts, which are an integral and efficient part of the European law system. In the EU legislative system, this is a large group of acts not related to EU legislation. Today they are called “acts not provided for by the constituent treaties”, “a special kind of acts,” “atypical acts”, etc.

The European Parliament resolution of 4 September, 2007 on institutional and legal implications of the use of ‘soft law’ instruments (2007/2028 (INI) defines these acts as “soft” legal instruments (“soft law” is legislation which plays an important role in the European integration process). “Soft” legislation is studied by many scientists (D. Trubek, L. Trubek, 2005; L. Senden, 2005; D. Shelton, 2000 et al.). The classical definition of the EU soft law was given by F. Snyder (1994), who describes the soft law as rules of conduct that are not legally binding but may have practical implications.

Therefore, the main feature of the soft law instruments is that they are not formally binding and do not generate clear rights and obligations, although they may contain normative prescriptions.

Western authors determine three main characteristics of “soft” legal instruments: a) they establish rules of conduct and duties; b) these rules of conduct or obligations are contained in the instruments that are not legally binding but can give rise to legal consequences; c) they are aimed at achieving practical results or influence the behavior.

These same features of the soft law instruments may serve a basis for their classification against their functions and purposes of enacting. L. Senden, in particular, indicates the following groups:

Group 1 – preparatory and information acts – green books, white papers, action programs, informational messages (their objective is preparation of the EU draft legislative acts or policies, or providing information about the activities of the EU);

Group 2 – acts used to interpret and promote the implementation of adopted legal acts (they are aimed at clarification of the application of existing EU legislation, do not change the legislation and complement it): messages/notifications and comments (notices) of the Commission, some codes, framework documents, for example in the sphere of competition and state aid;

Group 3 – formal and informal guidance tools aimed at providing additional impetus for achieving the goals of the EU and implementation of its policies: declaration or conclusions, etc.

The approach of the Commission to the definition of this category of acts in the system of EU legislation is more practical and rational, and the one that takes into account their individual functionality and purposes of establishing appropriate “soft” legal instruments. Perhaps, the Commission has not defined their exact name yet (in different sections of the official EU legal website Eur-lex they are called differently – atypical acts, and acts of the EU institutions, bodies and authorities). As for the Parliament’s position, it considers “soft” legal instruments ineffective, requiring careful use, etc.

According to the official information posted in the Eur-lex system, a common criterion that unites all these acts in a separate category is their optionality. These include acts of the EU institutions in the forms not stipulated by Article 288 of the TFEU, and the acts of other EU bodies and authorities.

The legal basis for establishing “soft” EU legal instruments is the provisions of the Treaties (Art. 223, 230 of the TFEU), legislative acts and the Rules of procedure for the EU institutions. “Soft” legal instruments include the rules of procedure of the EU institutions, which are sometimes called internal regulations. The founding treaties provide for adoption of relevant acts in the context of political dialogue between the institutions of the EU aimed at reaching a consensus among the subjects of legislative activity and the consistency with internal policies and objectives of the EU (e.g. negotiating guidelines and inter-institutional agreements on cooperation in different areas, for example on the budgetary procedure, on improving the quality of legislative activity, the implementation of the principle of subsidiarity, etc.).

Another type of “soft” instruments are action programmes adopted by the Council and the Commission on their own initiative, or the initiative of the European Council, and are a method of lawmaking activities of program implementation in order to promote the EU goals. If the development of action programmes is stipulated in the founding treaties, the EU institutions have to develop them, for example, in the form of white papers. If their development is not stipulated in the founding treaties, those action programs are optional and may be developed, for example, in the form of green books (papers). White and green papers published solely by the Commission have only a functional value (i.e. serve as preparatory acts in the process of developing legislative proposals). As a result of the findings obtained with the help of green papers, the Commission may issue white papers containing detailed information on the required measures at the European level.

“Soft” legal instruments not provided for in the provisions of the Treaties are considered acts that are mandatory EU instruments within the scope of their responsibility. For example, the European Parliament adopts *resolutions* or *declarations* to express its international political position; the European Council adopts *resolutions*, *guidelines*, and *conclusions* following the results of its meetings.

Apart from these, it is necessary to highlight the ECB acts issued in accordance with paragraph 1 of Article 12 of the Protocol on the Statute of the European System of Central Banks and the European Central Bank. The Governing Council is supposed to issue guidelines and take the decisions necessary to carry out the tasks entrusted to the ESCB by the Treaties and this Statute. The Governing Council determines the monetary policy of the Union, which includes, when appropriate, taking decisions on interim financial objectives to guide interest rates and to supply reserves within the ESCB; it publishes guidelines required for the execution of these decisions.

Guidelines (French – *orientations*) are a specific type of legal acts of the ECB. Among other acts of the Bank issued in “standard” forms (regulations, decisions, recommendations, and conclusions – see Article 34 hereof), these instruments are recognized as the sources of the European Union law and published under series «L» of the Official Journal. An example of such sources may be a Benchmark of the ECB of 31 August, 2000 “On instruments and procedures of the Eurosystem’s monetary policy” with subsequent amendments.

Paragraph 3 of Art. 14 of the same Protocol stipulates that national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council takes the necessary measures to ensure compliance with the ECB guidelines and instructions, and requires providing the ECB with all the necessary information.

Another group consists of “soft” legal instruments specified in EUR-lex system in the “Collections of legal acts” section as preparatory acts. It consists of the acts published by lawmaking subjects at all phases and stages of the legislative process, including the budget adoption process: the legislative proposals of the Commission, the Council or the Commission’s position, the Council’s common positions, legislative and budgetary resolutions of the Parliament, initiatives and requests of the Parliament, conclusions of the social-economic Committee and the Committee of the regions, etc. The European Parliament’s opinion should be noted that the documents of this group (category), which have a key role in the legislative process, should be attributed to legislative acts.

As for other acts that are not part of the EU institutional mechanism and are not stipulated in the constituent treaties of the EU, these include: acts of the European Ombudsman, the Economic and Social Committee, Committee of the Regions, Europol, Eurojust, the European agencies, etc. As a general rule, the acts of these bodies are published in the form of *sui generis decisions* (special type) or in the form of *resolutions, declarations*, and opinions, etc. They feature the following characteristics: only recommendatory nature, but may give rise to binding legal effects if it is expressly provided for in the constitutive documents or the EU legal acts; if necessary, they may be appealed to the EU Court, etc.

A special feature of “soft” EU legal act publication is that they are published in the ‘Official Journal’ in a special series C “Information and Notices” section.

Therefore, “soft” legal instruments are of particular importance in the legislative process of the EU. Their legal form is defined by legal acts of the EU. However, they are not mandatory, are advisory in nature, and at the same time, in most cases, give rise to legal consequences. These documents provide a way to harmonization and implementation of legislative work programs. They play a key role in the legislative process in terms of achieving a consensus between the actors of the legislative activity; they set a point of view for the subjects of the legislative process; they are applied in many areas in the most effective way for achieving EU objectives, as they provide a basis for further legislative regulation of certain social relations.

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2.3. The principles of EU law

2.3.1. The concept of the principles of EU law

Versatility, overall significance, and high imperativeness inherent in the principles of law determine their specific role in the structure of the legal system. To date, there is no single approach to the interpretation and understanding of the principles of EU legislation.

I.A. Grytsiak (2004) believes that the principles of EU law are unwritten sources of law generated by judicial inventiveness and being applied by the judge in accordance with the common values and norms forming constitutional philosophy and jurisdiction policy. According to S. Kashkin (2013) and M. Arakelyan (2012), the principles of EU law are the basic principles of the legal system, which determine the content of law-making, and law-enforcement activities of the Union as a whole and of its Member States individually. T. Dron and M. Pastukhov (2012) define the principles of the EU legislation as the guiding principles, the ideas of the legal system which determine the content of all spheres of the EU activities as a whole and its Member States in particular.

T.K. Hartley (2009) believes that if the legal norm has been derived from a sufficiently general principle in order to form a general consensus, then a court judgment gains a solid legal basis. It is on this basis that the EU Court of Justice formed up a concept according to which the legal norms may be derived not only from the Treaties and legislative acts, but also from the general principles of law.

The definition given by V. Kolesnichenko (2010) seems to be the most comprehensive. *The principles of the EC legislation* are "the guidelines that express the most important essential features and values inherent in the legal system of the European

Union, define the specific content and overall conceptual directions of legal regulation of social relations in the framework of integrated association – the European Union, are characterized by the diversity of their sources of origin (material sources) and consolidation (formal sources), in terms of content and with a functional value”.

To date, the EU principles fixed in the form of resolutions of the founding treaties, are an integral part of the EU legislation and represent the most significant legal basis.

The principles have certain characteristics; in most cases they are formulated in the form of a framework law. In the EU legislation, the rules – principles address institutions, bodies and EU institutions, EU Member States, but they do not generate direct rights and obligations for individuals and legal entities. Accordingly, their implementation requires an application mechanism to be established.

In this case, the principles are relevant not only for the EU law, but also for the national legal systems. For example, as noted by J. Hanlon (2003), the implementation of a principle of the European law supremacy, “even if it entails the abandonment or amendment of national legislation contrary to supranational legislation”, plays a role that is hard to overestimate in terms of both establishing and maintaining a “constitutional certainty” in national and supranational legal systems, and for development of the above.

2.3.2. Sources of the EU legislative principles

Initially, the founding treaties did not provide for general principles of law which have to guide the Community in the course of execution of the assigned goals and objectives. However, some general principles were subsequently introduced in their text. Thus, paragraph 1 of Art. 6 of the TEC (as amended by the Amsterdam Treaty) secured the fundamental nature of a principle for protection of fundamental rights and freedoms in the EU legislation and for functioning of all its organs, institutions and agencies.

In 1992, the constituent documents were consolidated in terms of principles of subsidiarity (complementarity) and proportionality introduced into the legal system of the EU by the Court of Justice. Detailed regulation for application of these principles is reflected in the special protocol “On application of the subsidiarity and proportionality principles” of 1997.

S. Kashkin (2008) highlights that the principles of supremacy and direct action of the law have precedential origin: being not directly enshrined in the founding treaties, they have been established by legal precedents – the decisions of the EU Court of Justice.

For example, firstly in 1963, the Court recognized the principle of direct action (the Van Gend en Loos case). Then, in 1964 – the principle of supremacy (Costa case).

In subsequent years, the Court clarified the content and conditions of application of these principles, including the declared priority of the Community provisions over the constitutions of the MSs (1970 decision on the *Internationale Handelsgesellschaft* case and the decision of 1978 on the *Simmenthal* case).

In 1980-s, the Court of Justice derived the principle of loyal interpretation from the principle of supremacy, also called a principle of indirect action. In 1991, the Court established the principle of property liability of Member States to natural/legal persons for damage caused by violation of norms and regulations of the EU legislation (a *Francovich* principle, a decision on the case of the same name).

When signing the Lisbon Treaty, the Member States, by a special declaration, re-affirmed their commitment to the principle of supremacy (primacy) of the European law in a form in which it was formulated by legal precedents of the Court (the “Declaration of the primacy” dated December 13, 2007).

The constituent treaties initially ascertained some principles. For example, the principle of equality in the form of “prohibition of any discrimination on grounds of belonging to a particular nationality” was ascertained in the original version of the TEC. Later it was reproduced in § 2 of Art. 21 of the Charter of 2000, and confirmed by court decisions, for example, in *Ian William Cowan* and *Gabrielle Defrenne* cases.

The Lisbon Treaty introduced the concept of “values of the Union”, a direct connection with the principles of which is easy to notice.

For example, Art. 2 of the TEC was amended as follows: “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 within the framework of a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.”

As one can see, many of these (freedom, democracy, rule of law, respect for human rights and fundamental freedoms) have previously been enshrined in Art. 6 of the TEC of 1992 as the “principles”. Moreover, according to systemic interpretation of the TEU regulations in the wording of the Lisbon Treaty, the above values in other Articles of the same document (e.g., Art. 21) are called the “principles”.

Therefore, in our opinion, in this case it is reasonable to talk about the principles-values which, according to S. Kashkin (2008), “represent the moral principles of the European, and in its nature, the world civilization”. I. Rusenko (2010) also believes that “the values of the European Union” are the general principles of EU legislation of the highest order (“mega-principles”), reflecting the basic principles, which constitute the legal achievements of modern European civilization, the observance of which is guaranteed at the highest – supranational level. Given that these “mega-principles” have a legal life, they may also be called principles-values.

2.3.3. Classification of the EU legislation principles

The problem of legislation principles classification has great theoretical and practical significance. This is preconditioned by the fact that natural connections, vertical and horizontal linkage between different groups (types) of legislative principles of the same kind are established and settled in the process of legislation principles classification, which is crucial for their effective application; favorable conditions for further perception and sophisticating are created, and all prerequisites for a clearer definition of the place and role of each type in the systemic hierarchy of the legislative principles take shape.

Thus, V. Kernz (2002) attribute “the principles of law that are common to all Member States” to four groups, depending on the origin of sources:

- 1) General principles derived from the nature of Community law;
- 2) Principles common to the legal order of a few Member States’;
- 3) Fundamental human rights;
- 4) The general principles of international law.

P. Svoboda (2011) attributes basic principles of functioning of the Communities and the European Union – the principles of loyalty, solidarity, subsidiarity and the prohibition of discrimination – to an individual group.

Typically, the literature highlights the following principles in the constituent acts, depending on the importance and scope of the applicability:

- The principles of general nature. As a rule, they are universal (the principles enunciated in the Preamble, Article 5 of the TEC, the Charter; transcendental definitions formulated in the form of resolutions in the founding treaties, etc.);
- The principles of technical nature relating to the well-defined scope the implementation of which is associated with a specific procedure of law adoption and application (for example, foreign policy principles that apply to all areas of the EU’s external relations; qualifying principles of EU law and principles of justice, etc.).

The purpose of these guidelines is to prevent violation of the harmony of the EU legal system as a whole (Horak, H, Dumančić, K., Pecotić Kaufman, J., 2010). General principles of law are intended to harmonize not only public safety, but also to protect the major achievements of civilization, which include democracy, fundamental human rights and freedom.

Most Western European articles of this kind contain classifications of general principles of the European Union legislation only. As a rule, other groups of principles of the EU law, except for general principles of law, are not differentiated.

British scientist A. Tatham (1998) offers his classification of the general principles of the EU legislation. However, he insists that one should not identify general principles that make up the unwritten law of the EU and other legal principles defined in the founding treaties, such as principles of free movement of goods and persons, prohibition of discrimination on grounds of sex or nationality, etc.

M. Arakelyan (2012), supporting separation of the EU principles of law into general and specific ones, admits that general principles should consist of three groups: the general principles of law (for example, the principle of legal certainty), the general principles of the European law (the principles of subsidiarity and proportionality), and the principles of international law (the principle of non-use of force, the faithful execution of international obligations, etc.).

Para 2, Article 6 of the TEC (as amended by the Amsterdam and Nice Treaties) provides that the general principles of EU legislation include the provisions of the European Convention on Human Rights and Fundamental Freedoms of 1950 (hereinafter – the ECHR), as well as generally accepted and recognized rights and freedoms, enshrined in the constitutions of Member States.

This provision of the Treaty has caused a mixed reaction, including the one from the EU Court of Justice. On 28 March 1996, the Court stated that the European Communities could not accede to the Convention because the Treaty establishing the European Community did not provide authority to establish standards or international agreements in regards of human rights.

A similar position was taken by the ECHR, which refused to accept complaints of misconduct of the EU institutions, according to the plaintiffs. ECHR stressed that the EU was not a party to the Convention and it is not covered by the compulsory jurisdiction of the ECHR (see Douglas-Scott S., 2012).

In turn, the EU Court refused to hear the case, the core of which consisted of issues of human rights and fundamental freedoms, which correlated quite fully with the principle of mutual respect of international courts.

In this connection, it is interesting to know the position of the ECHR in the *M&Co. vs Germany* case. The ECtHR concluded that ECHR did not preclude transferring authorities by Member States to international organizations; this delegation did not exclude a liability of a Member State for breach of the ECHR in respect of delegated powers; such transfer of powers did not contradict the ECHR in cases, if human rights and fundamental freedoms were subject to appropriate protection in the framework of international organizations (*M & Co v Federal Republic of Germany*, 1990).

To date, according to pp 2.3, Article 6 of the TEU,

“2. The Union joins the European Convention on Human Rights. This accession does not alter the Union’s competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention on Human Rights, and as they result from the constitutional traditions common to the Member States', are included in the content of the Union legislation as general principles."

This is yet another confirmation of the fact that the ECHR, despite its international legal origin and nature, is considered a source of the EU legislation.

The EU powers to join the ECHR are also provided in para 6, Art. 218 of the TFEU and in Declaration No. 2.

The implementation of these provisions will improve control over observance of fundamental human rights on the European scale, since it became possible, firstly, to appeal decisions of supranational bodies of the Union (including the EU Court) in the ECHR; secondly, a uniform interpretation of the fundamental rights contained in both the Charter of 2000, adopted on December 12, 2007, and the European Convention of 1950 on the basis of judicial practice (legal precedents) of the European Court of Justice of Human Rights.

In this case, the question of the place of general principles of law in the hierarchy of sources of EU law is still not entirely clear. However, taking into account the practice of the Court of Justice and national jurisprudence, one may conclude that the validity of EU document is largely determined by the fact whether these acts comply, by their content, not only with the founding treaties, but also with the general principles of law. The presence of such non-compliance in the event of legal action for annulling a decision in the EU Court will serve an undisputed ground for cancellation of the relevant normative-legal acts adopted by the EU institutions.

Given the fact that historically the economy was the first area of integration within the Community, the most important among the specific principles are the ones governing the legal regime of the EU internal market, the principles of free movement of goods, individuals, services and capital (Art. 26 of the TFEU). Each of the above principles establishes a set of rights of individuals and legal entities (mainly enterprises), so they are often described by the term "freedoms" (for example, a freedom of goods movement).

There are also the principles of the narrower scope of budgetary law, such as the principle of balanced revenue and expenditure of the Union budget (Art. 310 of the TFEU), the principles of the Community food law, such as a "precautionary principle" (Article 7 of Regulation (EC) No.178/2002 of the European Parliament and the Council of January 28, 2002 "On general principles and general requirements of food law, on establishing the European authority for food safety and the procedures related to the food safety"), etc.

Special principles link together principles disparate in nature, in particular: the principles of the EU activities (the principle of legality, transparency, the principle of

respect for the national identity of the MSs); sectoral principles (principle of a pollutant responsibility – in the field of environmental law, the principle of equal pay for men and women – in the field of labor law); principles of the economic system and economic policy of the EU; institutional principles of EU legislation; principles of legal status of individuals, etc.

S. Kashkin (2015) believes that principles that define the relationship of the EU legal system with the legal systems of MSs (the principle of supremacy of EU law and the principle of direct effect of the EU law) shall not be included in the system of the EU legislative principles.

It appears that these examples of the EU principles classification confirm two main points – the impossibility of uniform interpretation of principles and the absence of fundamental differences in classifications. Some principles allocated by certain researchers are essentially a concretization of more general principles in the works of other authors, or overlap them.

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2.4. Prejudice and Preliminary rulings in EU law

2.4.1. The role of the preliminary rulings in EU law

According to Information note on references from national courts for a preliminary ruling of 2009, the preliminary ruling system is a fundamental mechanism of European Union law enabling national courts to ensure uniform interpretation and application of that law in all the Member States.

Recommendations to national courts in relation to the initiation of preliminary ruling proceedings 2012 state that the reference for a preliminary ruling is a procedure exercised before the Court of Justice of the European Union (CJEU). This procedure is open to all Member States' national judges. They may refer a case already underway to the Court in order to question it on the interpretation or validity of European law. In contrast to other judicial procedures, the reference for a preliminary ruling is therefore not a recourse taken against a European or national act, but a question presented on the application of European law.

The practice of the EU Court gives the following insight characteristics and functions of preliminary ruling proceedings.

The Court of Justice and the national courts are deemed equivalent judicial bodies. Consequently, the preliminary ruling proceedings are characterised not by hierarchy but by cooperation which requires a national court and the Court of Justice – each within its own jurisdiction – to make direct contributions to achieve a decision that

guarantees uniform application of EU law in all Member States. The Court of Justice only rules on the interpretation or validity of the relevant dispositions of the EU law. It is for the national court to assess the legality of the legal rule or legal act for domestic law, in light of the Court's response to the preliminary question (Case 16/65, *Schwarze*).

The most important function of the preliminary ruling proceedings is to ensure uniform interpretation of EU law. Secondly, the proceedings facilitate the application of EU law by offering national courts a helping hand in resolving the problems that sometimes accompany the application of EU law (Case 166/73, *Rheinmühlen*).

In general, the role of the preliminary ruling procedure is as follows:

- 1) indirect action (interlocutory proceedings) in which the national judge – not the individual – refers a question on Union law to the CJEU;
- 2) CJEU gives judgment independently of the pending national case;
- 3) preliminary ruling procedure was needed because of decentralised application, interpretation and judicial review of Union law at national level;
- 4) instrument of co-operation between the national judge and the genuine Union judge;
- 5) preservation of legal unity by ensuring the uniform interpretation and application of Community law;
- 6) safeguarding legal redress for the individual;
- 7) further development of law.

The Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of European Union law and on the validity of acts of the institutions, bodies, offices or agencies of the Union. That general jurisdiction is conferred on it by Article 19 of the Treaty on European Union ('the TEU') and Article 267 of the Treaty on the Functioning of the European Union ('the TFEU').

Article 19 TEU provides: «The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts... *it shall ensure that in the interpretation and application of the Treaties the law is observed...*

The Court of Justice of the European Union shall, in accordance with the Treaties:

- (a) rule on actions brought by a Member State, an institution or a natural or legal person;
- (b) *give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;*

(c) rule in other cases provided for in the Treaties».

It's obvious that judicial control in the EU is carried out on two infringement procedures – direct verdict on compatibility of the member's conduct with EU law (public enforcement procedures and private enforcement procedure) and preliminary ruling (no verdict on the member's behavior, merely interpretation of EU law, leaving it for national courts to decide).

Preliminary ruling does not infringe the procedure. CJEU does not award remedies, or a verdict on validity of national laws. Individuals do not have a right of appeal to CJEU, national courts decide after CJEU sends the answer back.

Article 267 TFEU stipulates: «The Court of Justice of the European Union shall have jurisdiction to *give preliminary rulings* concerning:

- (a) *the interpretation of the Treaties*;
- (b) *the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union...*».

There are two types of reference for a preliminary ruling:

– a reference for a ruling on the *interpretation* of the European instrument (primary law and secondary law): the national judge requests the Court of Justice to clarify a point of interpretation of European law in order to be able to apply it correctly;

The main provisions of the interpretation of the treaties are:

- a) the CJEU simply interprets EU law;
- b) the national courts then use the law as it was interpreted in their court case;
- c) a preliminary reference is not an appeal procedure, it is triggered during litigation and is preliminary;
- d) the national courts decide questions of fact and national law, whereas the court of justice determines abstract questions of interpretation;
- e) the application of the preliminary ruling rests with the national courts.

The practice of the EU Court gives the following basic understanding of the interpretation of the treaties.

Case 314/85, Foto-Frost provides: «the national courts have no jurisdiction themselves to declare that measures taken by Community institutions are invalid».

Case 6/64, Costa v ENEL provides: «the court of justice has no jurisdiction to apply a treaty to a specific case or to decide upon a provision of a domestic law in relation to a treaty... cannot question the validity of domestic law... if it has to do so, it must reformulate the question or refuse the reference».

Case 26/62, Van Gend en Loos provides: «preliminary reference procedure is to ensure uniform application and interpretation of the Treaties by national courts».

There are the following methods of judicial interpretation: literal (the ordinary dictionary meaning is taken to be what the legislators wanted to convey), contextual (the whole concept of EU law is examined as a whole, this is generally used to help understand why the provision is there in the first place) and purposive (legislation is interpreted in such a way that most suits the purposes of the Union, this happens in EU law due to the «preamble» before legislation which sets out the aims and objectives of the legislation itself).

The European Court of Justice tends to interpret legislation using both contextual and purposive techniques.

The Court may be asked to interpret the Treaty and all the acts of the European institutions and the European Central Bank without exception (Case C-11/05, Friesland Coberco Dairy Foods).

The term «acts» also covers the international agreements concluded by the European Union (Case C-192/89, Sevince).

The national courts and the EU courts operate independently of one another. The Court of Justice does not evaluate the reasons of a national court for deeming that the interpretation of a provision of EU law is necessary for giving judgment in a pending case. It is for the Court of Justice to issue the interpretation of the provision and for the national court to apply it subsequently (Case 5/77, Tedeschi/Denkavit).

– a reference for a preliminary ruling on the *validity* of a European instrument of secondary law: the national judge requests the Court of Justice to check the validity of an act of European law.

Summary of challenging the validity:

- a) the court of justice cannot rule on the validity of the treaties;
- b) only secondary legislation can be challenged;
- c) national courts can personally decide that EU law is valid and decide not to refer but they cannot take the Court of Justice's authority and declare it invalid.

The Court of Justice is the only court with jurisdiction to rule on the validity of acts of the EU institutions, i.e. regulations, directives and decisions. In preliminary ruling proceedings concerning the validity, all the grounds for declaring such acts void may be put forward, i.e.:

- lack of competence;
- infringement of an essential procedural requirement;
- infringement of the treaty or any rule of law relating to its application;

– misuse of powers.

In addition, the Court of Justice may review the validity of acts in the light of general principles of EU law which are binding on the Union and which have direct effect (Joined cases 21-4/72, International Fruit Company).

A national court may reject the grounds of invalidity, but it has no power to declare EU decisions to be void.

However, if a national court has serious doubts as to the validity of an act of an EU institution on which a national law or decision is based, the court may, in special cases, suspend the application of such act or may order any other interim relief with regard to such act. The national court should subsequently refer the question of validity to the Court of Justice, setting out why it believes that the Community act must be considered invalid (Case 314/85, Foto-Frost).

Information note on references from national courts for a preliminary ruling explains that the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. It is not for the Court either to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law.

In ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute, but it is for the referring court to draw the appropriate conclusions from that reply, if necessary by disapplying the rule of national law in question.

However, «a judgment in which the court gives a preliminary ruling on the interpretation or validity of an act of a Community institution conclusively determines a question or questions of Community law and is binding on the national court for the purposes of the decision to be given by it in the main proceedings» (Case 69/85, Wünsche Handelsgesellschaft).

2.4.2. When is referring a question a right, and when a duty?

As for the question of whether the reference for a preliminary ruling is a duty or a right, it is necessary to consider the following:

1) discretionary reference procedure – where such a question is raised before *any court or tribunal* of a Member State, that court or tribunal may, if it feels it is necessary *to give* their decision and judgement, *request* the Court of Justice to give a ruling on the aspect of EU law at hand;

2) mandatory reference procedure – where any such question is raised in a case *pending* before a court; where there is *no judicial remedy* for its decision (such as a court of last instance,) that court or tribunal must bring the issue regarding EU law to the Court of Justice; or if the case is in regards of a person being held in *custody*, the court of justice shall act with the minimum delay.

The obligation for the highest court to refer may lose its absolute character in a number of cases. However, the courts still have the option of referring in such cases.

Acte éclairé. The highest court is not under an obligation to refer if the question that has arisen has already been answered in an earlier judgment of the Court of Justice (Joined cases 28 30/62, *Da Costa et Schaake*).

Acte clair. The highest court is not obliged to refer either if the question has not yet been answered in the case law of the Court of Justice, but the answer to that question is beyond all doubt. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious both to the courts of the other Member States and to the Court of Justice. In this respect the national court should bear in mind that:

- a) the interpretation of a provision of EU law involves a comparison of the different language versions of the provision concerned;
- b) terms and concepts in EU law do not necessarily have the same meaning as the laws of the various Member States;
- c) every provision of EU law should be interpreted in the light of EU law as a whole, taking into consideration its objectives and its state of development at the moment of application of the provision in question (Case 283/81, *CILFIT*).

The exceptions set out above only apply to requests for interpretation and cannot be applied to questions relating to the validity of acts of the Union. Even if the Court of Justice has declared the corresponding provisions of a similar act invalid in the past, the national courts are still required to refer (Case C-461/03, *Gaston Schul*).

Under Article 267 TFEU, any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of judicial nature, may as a rule submit a request for a preliminary ruling to the Court of Justice. The status of a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law, the Court taking account of a number of factors such as whether the body making the reference is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter parties, whether it applies rules of law and whether it is independent.

Whether or not the parties to the main proceedings have expressed the wish that it do so, it is for the national court or tribunal alone to decide whether to refer a question to the Court of Justice for a preliminary ruling.

The court gives an explanation of *definition of National Court and Tribunal*. According to Case C-205/08, *Alpe Adria* the CJEU lays down six conditions which must be met by a national court or a tribunal in order to ask for a preliminary ruling on interpretation or validity of European Union law. The Court of Justice of the European Union held: «according to settled case-law, in order to determine whether the body making a reference is a court or tribunal ... the Court takes account of a number of factors, such as whether the...

- body is established by law, whether
- it is permanent, whether
- its jurisdiction is compulsory,
- whether its procedure is inter parties,
- whether it applies rules of law and whether
- it is independent».

The rules for proceedings before the Court of Justice are laid down in the Protocol № 3 on the Statute of the Court of Justice of the European Union of 2010 and the Rules of Procedure of the Court of Justice of 19 June 1991 (the last amendments dated 24 May 2011).

2.4.3. The main stages of the preliminary procedure

The main stages of the preliminary procedure are usually: (1) order for a reference made by a national “referring court”; (2) publication of the reference questions in the Official Journal; (3) observations/submissions from the parties/interested persons; (4) oral hearing; (5) Advocate General’s (AG) Opinion; (6) judgment/order; (6) completion of the main proceedings by the national referring court.

Article 23 of the Protocol № 3 on the Statute of the Court of Justice of the European Union (OJEU C 83/210 of 30.3.2010) stipulates that the decision of the court and tribunal of a Member State to suspend its proceedings and refer a case to the Court of Justice shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute. Within two months of this notification, the person mentioned above, shall be entitled to submit statements of case or written observations to the Court.

According to Art. 104 of the Rules of Procedure of the Court of Justice of 19 June 1991, the decisions of national courts or tribunals shall be communicated to the Member States in the original version, accompanied by a translation into the official language of the State to which they are addressed. Where appropriate on account of the length of the national court's decision, such translation shall be replaced by the translation into the official language of the State to which it is addressed of a summary of the decision, which will serve as a basis for the position to be adopted by that State. The summary shall include the full text of the question or questions referred for a preliminary ruling. That summary shall contain, in particular, in so far as that information appears in the national court's decision, the subject matter of the main proceedings, the essential arguments of the parties in the main proceedings, a succinct presentation of the reasoning in the reference for a preliminary ruling and the case law and the provisions of European Union and domestic law relied on.

The judgment or order in which the court submits a question for a preliminary ruling should contain a brief statement of the reasons as well as all the information necessary for the Court of Justice and for those on whom the judgment must be served (the Member States, the Commission and, when appropriate, the Council and the European Parliament) for a proper understanding of the factual and legal framework of the case (Case C 338/04, *Placanica*).

Thus, the procedure for filing a request can be briefly described as follows. The proceedings start with a request from a national court, which submits to the Court of Justice the decision to which the preliminary question relates and a copy or summary of the file for the proceedings. This is done in the language of the national court. The decision to refer is translated into all other official languages of the Union, but the proceedings file is not. It is then transmitted to the parties in the main action, the Member States and the Commission. The Court of Justice may ask the referring court to provide further clarification.

As regards the representation and attendance of the parties to the main proceedings in the preliminary ruling procedure the Court shall take account of the rules of procedure of the national court or tribunal which made the reference.

Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order in which reference is made to its previous judgment or to the relevant case law. The Court may also give its decision by reasoned order, after informing the court or tribunal which referred the question to it, hearing any observations submitted by the persons referred to in Article 23 of the Protocol № 3 on the Statute of the Court of Justice of the European Union

and after hearing the Advocate General, where the answer to the question referred to the Court for a preliminary ruling admits no reasonable doubt.

As regards the hearing of the case, the parties, the Member States, the Commission and, where appropriate, the European Parliament and the Council have only one opportunity to submit written observations.

After the judge-rapporteur has delivered his or her report for the hearing, the parties and the authorities and institutions mentioned above may ask the Court to handle the case orally so that they can elucidate their viewpoint at the hearing. A few weeks or months after the hearing, the Advocate-General will deliver his or her conclusions. The parties cannot give their reaction to these.

A few weeks or months after the Advocate-General has delivered his or her conclusions, the Court of Justice will issue judgment in open court. The Court informs the parties concerned of its judgment beforehand. The judgment is then announced to all parties and to the court that referred the preliminary question. It is binding for all judicial bodies that may have to hear the substance of the case. Other courts can either follow the interpretation provided or refer to the Court of Justice. The Court's interpretation is applicable from the entry into force of the provision that the Court interpreted.

A preliminary ruling binds the national court that requested the judgment as well as all bodies which may have to decide the same case on appeal. Although the decision is binding, the court may request a second preliminary ruling in the same case (Case 29/68, *Milch, Fett unter Eierkontor*).

Preliminary rulings do not bind courts in other cases. However, these courts should realise that the interpretation of the Court of Justice is incorporated in the provisions and principles of the EU law to which it relates. The binding effect of the interpretation then simply coincides with the binding effect of the provisions and principles to which it relates and which has to be observed by all the national courts of the Member States. If an act of an institution of the Community is declared void in a judgment, this is a sufficient reason not only for the referring court, but also for any other national court of the Member States to consider that act void. However, should the national court have doubts as to the grounds, the scope and possibly the consequences of the nullity established earlier, then this court is free to raise a question before the Court of Justice once again (Case 66/80, *International Chemical Corporation*).

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2.5. EU law and international law

The resolution of an issue of compliance of the EU legislation with international treaties depends on the fact whether a member state has entered into an international treaty prior or after its accession to the EU.

If an international treaty is signed by a state before its accession to the EU, Article 351 of TFEU should apply:

“The provisions of Treaties do not affect the rights and obligations arising from the agreements between one or more member states, on the one hand, and one or more third states, on the other hand, which were entered into before 1 January 1958, or – in respect of acceding states – before the day of their accession.

To the extent, in which these agreements contradict the Treaties, the subject Member State or Member States resort to any appropriate means to eliminate established non-compliance. If necessary, Member States shall assist each other in achieving this goal and, where appropriate, develop a joint approach.

In the course of enforcement of agreements mentioned in the first paragraph, the Member States should take into account the fact that the benefits provided by each member state according to the Treaties, form an integral part of the Union's foundation and, for this reason, are inseparably connected with establishment of common institutions, conferring them powers and providing similar advantages by all other member states.”

This article, therefore, means the following:

Firstly, the principle *pacta sunt servanda* applies to the concluded treaties;

Secondly, a state may apply an international agreement, but it must take steps to eliminate this contradiction (perhaps, timing, methods and conditions of such elimination are not established).

Interpretation of the meaning of para 1 Art. 351 of the TFEU and a procedure of execution of the obligations imposed by paragraph 2 thereof are given in decisions of the European Court of Justice.

For example, in a judgment on T.Port case, the Court found that the purpose of this article was to establish conditions in accordance with the principles of international law, when a Member State must fulfill its obligations under an international treaty/agreement, notwithstanding the existence of a rule of EU legislation that contradicted the treaty, which in turn means a non-application of the rule of EU legislation in this particular case.

The European Court of Justice ruled that “61. Two conditions must be met in order to a regulation of the Community legislation be unenforceable as a result of an international treaty: the treaty must be concluded before the entry of the Treaty into force, and a third Member State shall acquire rights on its basis, the compliance with which this state may request from the relevant Member State” (Case T-2/99 T. Port).

In the Case 812/79 Attorney-General v. Burgoa, the European Court of Justice found that “even though the first paragraph of article 234 (now – 351 of the TFEU) mentions only obligations of Member States, it would be impossible to achieve their goals, if this paragraph did not imply an obligation on the part of the Communities institutions not to interfere with the Member States obligations arising from previously concluded treaties”.

In a series of other decisions, the European Court of Justice ruled what exactly, in its opinion, a state should do in case of contradiction between a provision of the EU legislation and an international treaty with the participation of the state. For example, some of the answers were given in a famous judgment in the Commission v Portugal case:

“Paragraph 58. A State is obliged to remove this discrepancy, and if the state faces difficulties that make it impossible to change the treaty, an obligation to denounce it shall not be excluded.

Paragraph 59. This article allows the state to choose the most appropriate means to bring this treaty into agreement with the EU legislation”.

If an international treaty has been concluded by the states after their accession to the EU, the following rules apply.

In this particular application, the case of AETR (Case 22/70, Commission v Council) is significant, in which the European Court of Justice gave a teleologically oriented interpretation of implied powers. It formulated a rule, according to which once the

EU establishes common rules, Member States forfeit the right to enter into international agreements/treaties that affect or alter them. As a need for such treaties inevitably occurs, the powers at their conclusion automatically go to the EU.

In particular, paragraph 17 states that “whenever the Community adopts provisions establishing common rules, ... Member States no longer have the right, acting individually or even collectively, outside institutions of the Community, to assume obligations that may affect such rules”.

Moreover, the Court stated that the EU Member States may be considered to have violated their obligations under the EU legislation if provisions of international treaties concluded by the EU Member States with third states come into conflict with the existing regulations of EU legislation. Accordingly, this rule applies if:

- A treaty was concluded after accession of the state to the EU;
- There is a fact of discrepancy between regulations contained therein and the actual rules of the existing EU legislation (“effect-based test” – N. Lavranos).

Subsequently, the Court developed a concept of external support, substantiated in details in findings of the Trial 1/76 concerning a request for establishment of Fund and Trial 2/91 concerning a request of the ILO Conventions. In accordance with the concept, conferring on the EU a competence to take regulatory acts in order to achieve set goals empowers it to enter into international treaties for this purpose.

Upon establishment of the principles of subsidiarity, proportionality and strict control over the choice of legal basis for external actions in the EU legislation, the European Court of Justice reiterated its position that Member States forfeit the right to conclude international treaties when the EU has taken advantage of sufficient or proper degree of its competence (Opinion 1/94 on request of the WTO).

An established position of the European Court of Justice on the issue of interaction of EU legislation and international treaties (“effect-based test”) has changed as for today. First of all, this is due to the judgment in the case of Kadi (Joint Cases C-402/05 P and C-415/05 P) of 2009, in which the European Court of Justice gave its assessment of an argument put forward by the First Instance Court and a number of Member States that Article 307 of the Treaty on Communities (taken in conjunction with Art. 103 of the UN Charter) should be regarded as sufficient grounds for immediate execution by Member States of the UN Security Council resolutions in relation to anti-terrorism sanctions against individuals suspected of having links with the Taliban and Al-Qaeda, even if these resolutions are contrary to both primary and secondary EU legislation.

Responding to this argument, the European Court of Justice stated that Article 307 (351 TFEU) does not “give the right to deviate from the principles of freedom, de-

mocracy and respect for human rights and fundamental freedoms enshrined in Article 6 (1) of the European Union Treaty, as the Union basis”, thus having created a new doctrine of “key foundations of the EU public order”, which are of absolute priority even over obligations imposed on the Member States by the UN Charter”, in the opinion of A. Ispoliniv and A. Anufrieva.

This position gained momentum in the decisions on cases C-205/06 – Commission vs Republic of Austria, C-249/06 – Commission vs Kingdom of Sweden, and C-118/07 – Commission vs Republic of Finland, in which the European Court of Justice has maximally extended the scope of the concept of contravention of Member States international treaties with the EU legislation to any case of such a conflict, including the potential one, not yet existing at the time of hearing the case, by descending from the “effects-based test” to the concept of “hypothetical inconsistency”:

- Just a potential for conflicts of international treaty with the EU legislation is sufficient to recognize it inappropriate under the EU law, and the states that entered into it – as the ones that violated their obligations imposed by the EU legislation;
- The Commission has actually received authorization of the European Court of Justice for search and preventive suppression of potential conflicts.

Essential for the evaluation of interaction of the EU legislation with the international law are decisions taken by the European Court of Justice, related to issues of direct effect of international law on the territory of the EU and to the issues of responsibility.

It is known that the decisions and acts adopted in the framework of profound cooperation do not become an integral part of the *acquis communautaire*. Accordingly, the EU neither ensures in the legal terms, nor guarantees the appreciation of all treaties and agreements previously signed by the EU by new member states.

There are several ways to enter into international treaties between the EU and third states and the EU and international organizations:

- Within the exclusive competence of the EU in accordance with Article 3, para 2 of TFEU. In this regard, it is worth recalling the case 104/81 Kupfenberg, when the European Court of Justice decided that the issue of direct application of treaty provisions cannot be left to the responsibility of a Member State, since it is desirable to consider whether its provisions may have direct effect;
- In the case of joint action of the EU and Member States (mixed treaty). As a general rule, international agreements concluded jointly by the EU and Member States with third states and international organizations (the so-called mixed treaties) do not have immediate direct effect in the EU. In this case, the possibility of direct implementation is provided by special clauses or court procedures that allow to allocate, within the framework of mixed agreements, decisions that should be given direct ac-

tion. With regard to this particular case, the case No.87/75 *Bresciani* is an illustrative one, in which the European Court of Justice found that Article 2.1 of the Yaoundé Convention on association had direct effect;

– in case of granting the EU competence in succession. In cases No.21-24/72, *International Fruit Company*, the European Court of Justice recognized that, in general, such agreements could have direct effect. However, after detailed study of GATT, the European Court of Justice concluded that Article XI of the agreement had no direct effect.

In decisions of 2004-2008 the Courts of the EU confirmed that acts of international organizations, with the exception of decisions of the UN Security Council, were not directly applicable in the territory of the EU. Accordingly, the decisions of the UN Security Council cannot be challenged in the Courts of the EU. The possibility of the judicial revision applies only to acts that ensure their enforcement.

In the Case C-459/03 *Commission v Ireland*, the Court recognized that a Member State's appeal to arbitration, on the basis of international conventions, on matters falling within the EU jurisdiction was illegal. These kinds of decisions may not have legal force in the European Union.

The interaction of the EU and the European Council is also of interest in this context. In order to facilitate the EU accession to the conventions and agreements of the European Council, the agreements often contain the so-called "exclusion clauses", which define the cases when such agreements are not applicable to the EU. These provisions allow the EU to adhere to its own direction of development, its dynamics, and to use only adequate measures, or resort to other, more appropriate approaches to problem-solving, subject to its obligations under convention when concluding agreements with third countries. These clauses include, among others, conventions of the European Council approved in 2005 that regulate the issues of counter-terrorism, anti-trafficking and money-laundering. According to them, states-participants of the convention, which are also members of the EU, can apply EU legal acts in these spheres, unless it contradicts the subject and purpose of the convention, and without prejudice to the provisions of the convention in its entirety with other partners (Joris T., Vandenberghe J.). All in all, as of 2013, the EU has ratified only 11 of 52 conventions that make such accession possible, as O. Streltsova notes.

We need specially to touch upon the right of the WTO. Before the establishment of the WTO, the practice of the European Court of Justice included few cases where the Court had recognized the direct effect of GATT provisions under exceptional conditions. They were about the application of GATT provisions to the EU standards – Case 69/89, *Nakajima v. Council*, 1991 and international trade rules – a *Fediol vs the Community* case (Case 70/87 *Fediol v. Commission* 1989).

In judgments on these particular cases, the Court noted that it was possible to revise legislation concerning the conduct of the EU institutions, in the light of WTO law, if the Communities intended to implement “specific commitment” in the context of the WTO (the Nakajima case), or if a provision of law of the Communities “had a clear sending” on certain provisions of the agreements with WTO (the Fediol case). The rationality of rulings about a direct effect of the norms of WTO legislation, made during the hearing of the Nakajima case, was also supported by chief lawyer Giihloed in his dissenting opinion in the case *Egenberger GmbH Molkerei und Trockenwerk vs Bundesanstalt*: “In the case where we have obvious fact that one or another measure was taken by the Communities solely for the purpose of implementation of a specific obligation arising from the WTO legislation, the Communities legislation essentially deliberately restricted its own “room for maneuver” in the negotiations by incorporating the above-mentioned commitment to the right of the Communities “ (AG Geelhoed’s opinion, 1st of December 2005, C-313/04 *Egenberger GmbH Molkerei und Trockenwerk v Bundesanstalt* par. 64).

The European Communities deliberately ruled out the possibility of direct effect of WTO rules when ratifying the Marrakesh Treaty on establishing the WTO.

In this regard, it is worth recalling the *Portugal vs Council* and *Fiamm & Fedon* cases. On 3 May 1996, the Portuguese Republic filed a claim, in accordance with the first paragraph of Article 173(230) of the EU Treaty, on cancellation of the European Council decision of 26 February 1996 concerning signing a Memorandum of Understanding between the European Communities, the Republic of India and between the European Communities and Islamic Republic of Pakistan with regard to access to the market of textile products. In its decision on the case, the Court confirmed that WTO participants are free to initiate dispute resolution. However, if the Court had canceled the Communities legislation contradicting the WTO law, the Commission and the Council of the European Union would have lost the flexibility to apply the Communities’ legislation for determining mutually acceptable compensation, thus placing the EU in unfavorable position.

In *Fiamm & Fedon* case, the problem raised essentially narrowed down to three main issues: 1. The refusal of the European Court of Justice to recognize the WTO dispute settlement authority as a judicial body; 2. The lack of reciprocity; 3. The risk of lawful responsibility for the EU.

As a result, the European Court of Justice did not recognize the direct effect of WTO rules. Moreover, it reiterated the ruling made in *Portugal vs Council* case, noting out that, given the nature and structure, WTO agreements were not regulations in the light of which the Court was obliged to review the lawfulness of measures taken by the EU institutions. According to the findings of the Court, “many negotiating parties have concluded that the WTO agreements should not be taken into account when

revising a domestic legal order ... and such a lack of reciprocity ... would entail the risk of an imbalance in the application of WTO regulations.”

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2.6. The interaction of the EU law and Member States’ national laws

2.6.1. Principle of the EU law supremacy

In the scientific literature, the authors siding with the positions of the traditional state sovereignty, when analyzing the nature of interaction of the European Union law and national laws of the Member States, theoretically proceed from the fact that due to its legal nature and characteristics of the legitimacy, the EU legal system should be considered as “external”, and the legal systems of Member States – as “internal” law.

Accordingly, the relationship between them should be interpreted not only as relations arising within single legal tier subdivided into various components, but as relations between different legal tiers.

In fact, the practice is such that using the constituent treaties, the Member States oblige themselves, through their various, including legal, means, to facilitate in every possible way the completion of the tasks of the Union, and refrain from taking any, including legal, actions, “able to threaten the achievement of objectives” identified in the treaties (K. Lenaerts, P. Nuffel).

Being one of the main and one of the most important principles of EU legislation, the *principle of its supremacy* over domestic law was not directly proclaimed and approved in any constituent and subsequent treaties (or issued on the basis and in the development of their inherent regulatory provisions). In this regard the legal literature has stated that none of treaties concerning the question of interaction between EU law and national laws “has indicated what to do in case of contradiction between the supranational and national law”. Such article (a Supremacy Clause), as the one “by analogy” in the United States Constitution, which would indicate the supremacy of some rules or regulations over others, is missing.

At the same time, the issue is “absolutely critical” for successful implementation of the legal norms of the European Union, regardless of the fact whether they are contained in the founding treaties, directives, regulations, decisions of courts, the general principles of European Union law, or in any other forms and manifestations (Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Berlastigen*).

The question of supremacy of the EU legislation over national laws has for a long time been the exclusive subject of the European Court of Justice, which, defining the nature of interaction of the European Communities with member states and, as a consequence, the nature of interaction between their legal systems, well in the early 1960s, while hearing the case of *Van Gend en Loos* (26/62), pointed out that the Member States “limited their sovereign rights, albeit within a certain narrow areas” when they assigned their authorities to the European Union (Case 6/64, *Costa v. ENEL*). That, with regard to the said problem, among other things, meant nothing else than indirect recognition of priority of the Communities’ legal acts taken in such areas on the basis of sovereign rights delegated by Member States with respect to the relevant national legal acts.

The next step of the Court on the recognition of supremacy of the European Communities’ legislation was a decision in the case of *Costa vs ENEL* (the “Costa” case) issued by the European Court upon request of one of the Italian Courts in 1964. In that decision, the Court first made explicit recognition of the supremacy of the European Communities’ law over the laws of Member States (Case 6/64, *Costa v. ENEL*).

Indicating that it marked the beginning of formation “of own legal system” of the Communities which is “an integral part of national legal systems”, which must be observed and applied by courts of Member States, the Court emphasized the supremacy of the European Communities’ legislation over national laws. Accordingly, legal regulations issued on the basis of the provisions contained in a constituent treaty cannot be canceled or amended by domestic acts, as this may negatively affect the legal basis and the entire system of the Communities.

In the end, the final decision of the Court (in respect of the subject issue) was reduced to the fact that assignment by member states “of their rights and obligations arising from the treaty from their domestic legal systems to the legal system of the Communities is accompanied by permanent limitation of their sovereign rights, in relation to which later unilateral act, incompatible with the concept of the Communities cannot prevail”.

The essence of the said *Costa vs ENEL* case can be summarized as follows. Mr. Costa, the owner of shares of the Italian company Edison Volta, “engaged in generation and distribution of electricity in the country,” appealed to the court of Milan with a claim for compensation of damage caused to him, in his words, through nationalization of the company. The claim was addressed to the newly established company – ENEL.

Challenging the eligibility of this nationalization, the applicant claimed that it was conducted with violation of several provisions of the Rome Treaty of 1957. Since the question touched upon supranational law, the court of Milan, acting in accordance with existing regulations, applied to the European Court for clarification and interpretation of the relevant provisions of the Treaty. However, well before receiving an explanation, the Constitutional Court of Italy took the initiative in addressing the issue related to eligibility of ENEL foundation and came to the conclusion that since the Rome Treaty had been ratified by the Parliament of the country through adoption of a national act issued following the treaty, then, accordingly, the provisions of the latter, in the event of a collision with supranational law, must have priority with respect to the relevant provisions of the Treaty.

Disagreeing with the decision of the Constitutional Court of Italy, the European Court pointed out that the Community, having “the real power that arises through limitations of national sovereignty and the assignment of a part of the powers from national governments”, also adopts legal acts, although not in all spheres, which are binding for both supranational and national bodies and institutions.

Having received direct recognition and binding legal precedent of the European Court, established as a result of *Costa vs ENEL* case hearing in 1964, the principle of the European Communities’ law supremacy gained its further development in other

decisions and declarations concerning the nature of the interaction between the legal systems.

So, in 1970 the Court, in course of the development of the doctrine of supremacy of European law over national law, formulated a position according to which the legality and validity of measures taken at the level of the European Communities, as well as their effectiveness on the level of national legal systems of Member States cannot be questioned on the grounds that “they are directed against or contradict the principles of national constitutional arrangements and institutions.”

In 1977, strengthening the principle of supremacy of the EU legislation, the European Court of Justice (in *Simmenthal* case, 106/77) pointed out that “any national court” is obliged to apply the Communities’ legislation “in its entirety”, and that it “is accordingly obliged to set aside any provisions of national law” that “may contradict regulations that have been taken earlier or later legal acts” being integral parts of the Communities’ acts. In the conclusion to this case, the Court ruled that “in accordance with the principle of priority of the Communities’ law, an interaction between regulations of (constituent) Treaty and institutional acts of direct application, on the one hand, and national law – on the other hand, is such that after entry of these provisions into force (Communities’ law), they not only automatically convert any existing national law which contradicts to them into unenforceable ... but also impede legitimate adoption of new national legislation, in the extent it might be incompatible with the Communities’ regulations.”

In addition to the above cases and decisions, the issues of formation and development of the principle of supremacy of supranational law over national law was repeatedly addressed by the European Court in other, subsequently following cases. The Court separated and considered this principle not only as it was but also in the system of the other related interactions of subject legal systems, considering the principles such as, among other things, principles of direct and indirect effects of the European law on national legislations, a principle of public obligations and responsibilities of Member States, related to application of supranational law inside the domestic one, etc.

The Lisbon Treaty did not stress the principle of primacy of the Union’s law over national laws of MSs. It is contained in Declaration No. 17, the so-called Declaration of primacy, which is an annex to the Treaty of Lisbon and has no binding nature. The Declaration refers to the precedents of the European Court of Justice.

Among special features of the principle of supremacy of the EU law over national legislation, we should highlight the universal nature of the principle, which is manifested in the fact that:

a) it is enforceable on the territory of not individual but all Member States without exceptions;

b) not only the constituent treaties, but also all the other acts of the European Union have precedence over the rules and provisions of national law;

c) the EU legislation has priority not only over the norms of current legislation, but constitutional law as well. The consequence of precedence is that “national courts must offer effective remedy from national law contradicting the Communities legislation.”

In addition, its universal nature is not identical to its absolute nature. The evidence of this is, first of all, the fact that, although the formal legal principle of the rule of supremacy the European Union law has continuously existed since its identification in a supranational legal system, in practical terms, it manifests itself only in case of a conflict between legal norms of the European Union, on the one hand, and the national laws, on the other hand.

And secondly, relatively universal nature of the principle of supremacy of European law over national law is indicated by the fact that it does not apply in any form and in any kind to any legally significant acts regulating the relations of the EU and Member States in the field of common foreign and security policy. In this area the European Court of Justice has no jurisdiction at all:

Article 24, para 1, part 2 of the EU Treaty stipulates:

“The European Court of Justice has no authority in respect of these provisions, with the exception of its powers to monitor compliance with Article 40 hereof (and to control the legitimacy of some of the decisions referred to in the second paragraph of article 275 of the Treaty on functioning of the European Union.”

Article 40 of the TEU provides:

“Implementation of the common foreign and security policy shall not affect application of the procedures and the appropriate scope of institutional authorities, since such procedures and authorities are set by Treaties for implementing the Union competences referred to in Articles 3 – 6 of the Treaty on functioning of the European Union.

Similarly, implementation of the policy referred to in the said articles shall not affect application of the procedures and appropriate scope of institutional authority, since such procedures and powers are set by Treaties on implementing competence of the Union on the basis of this article. “

Article 275 of the TFEU provides:

“European Court of Justice has no authority with regard to provisions on the common foreign and security policy, as well as in respect of acts adopted on their basis.

However, the European Court of Justice is empowered to monitor compliance with article 38 of the European Union Treaty and adjudicate claims, applied under the

conditions provided for in the fourth paragraph of article 263 of the Treaty, in order to monitor the legality of decisions taken by the Council under Chapter 2 Section V of the European Union Treaty, which provides for restrictive measures against natural or legal persons.”

Legal consequences of the EU legislation supremacy are as follows:

- The EU legislation cannot be considered inferior in relation to national law (case Internationale Handelsgesellschaft GmbH);
- National legislation contradicting the law of the EU cannot be applied;
- National Courts must refrain from using national legislation contradicting the EU law, even if it has been adopted after putting the EU law into action, and should not wait for a decision of a higher court. That means that Member States should give the EU law action in national legal systems since acquisition of membership or admission to the EU for the purpose of law unification (Case Simmenthal Spa № 2).
- The need for a common interpretation of the EU legislation (Case C-372/88 Milk Marketing Board of England and Wales vs Cricket St. Thomas.).

2.6.2. Direct application and direct effect of EU law

The principle of the Union law supremacy over national law is closely linked with the principles of direct effect and direct applicability.

Direct application of the EU law means that some of its provisions are introduced into domestic legal order of member states without special acts for their implementation, and can operate in legal systems of member states without the need of further putting into effect.

Direct effect of the EU law means that certain provisions may establish rights and obligations for which individuals may refer to national courts.

Entry of the rules of direct action into force (such as those set forth in the EU regulations – Article 288 of TFEU) takes place from a date specified in them, or, if no date is available, on the 12-th day following its publication in the Official Journal of the European Union.

Sometimes it is considered that the legal basis for application of the norms of direct action in the EU Member States may be acts of public authorities of the Member States on ratification or approval of the constituent treaties of the EU, acts of accession, etc. In this case, they are considered general transformation acts. However, in practice, after their adoption by EU institutions the norms of direct action have power on the territories of Member States in each case automatically, without mandatory authorization by national authorities.

One should separately consider the constituent treaties of the EU. Thus, the EU constituent treaties are subject to ratification by a member state in accordance with

the procedures provided for by national legislation for ordinary international treaties. These procedures vary depending on what kind of approach – a monistic or dualistic – is provided by the legislation.

In the states that adhere to the monistic approach to interaction between international law and domestic law, it was enough to adopt a ratification act for enacting the provisions of the constituent treaties in the domestic legal order. For example, in France it was implemented on the basis of Article 26 of the Constitution of 1946. States which adhere to the dualistic concept proceeded from the need to transform provisions of the constituent treaties by enacting laws by national parliaments. For this purpose, similar laws have been adopted by the parliaments of Luxembourg and the Netherlands, although these countries cannot be assigned to the category of countries with a dualistic approach.

The European Court of Justice, by its decisions, made a successful attempt to unify the approach to the procedure of introduction of provisions of the EU law into domestic legal order of Member States. In its judgment of case No.9/65 *San Michel*, it stressed the fact that the reception did not result in transformation into domestic law and, therefore, national courts should apply them as the EU legislation, not as the domestic law.

Over time, this position of the European Court of Justice has been recognized by national courts and states joining the EU, which proceeded from the need to create conditions for implementation of the EU legislation as an autonomous rule of law that features the priority and direct action.

In order to provide legal basis for validity of the EU legislation on their territory, the majority of Member States introduced some changes in national constitutions, incorporating into them provisions on assignment of powers, priorities and direct action of the EU law. Some examples are article 28 of the Greek Constitution, article 91 of the Polish Constitution, article 7 of the Constitution of Hungary, article 5 of the Constitution of Bulgaria, section VI of the Constitution of Romania, article 1 of the Constitution of Cyprus, article 8 of the Portuguese Constitution, article 9 of the Constitution of Austria, article 93 of the Spanish Constitution, article 5 of the Constitution of Sweden, article 123 of the Constitution of Czech Republic, article 10 of the Constitution of Estonia, and article 8 of the Constitution of Slovenia. The constituent treaties of the EU have been ratified on the basis of these articles.

Some Member States have adopted legislation providing general incorporation of the EU legislation: the United Kingdom (The Act on European Communities), Ireland (The Act on European Communities), Denmark (The Law on Acceding), Latvia (The Act on Membership), Lithuania (The Act on Membership), and Malta (The Special Law).

Some member states (Luxembourg) do not have legal provisions that ensure the validity of the EU legislation in their territories, which does not in any way preclude the effective implementation of norms of the EU legislation in their territories, mostly due to national courts.

Returning to direct action, the European Court of Justice has established the requirements for direct action in Van Gend en Loos case: a) the provisions should be clear and not ambiguous; b) they must be comprehensive, i.e. not requiring any extra tools for their implementation; c) they must not be conditional on the part of the state.

For example, the European Court of Justice determined that provisions of the Treaties on free movement of goods (articles 28, 30, 34 – 35 of the TFEU) had direct effect.

Direct action can be both vertical and horizontal. When obligations under the Treaties are imposed on a Member State itself, the provisions create the *vertical direct effect*, therefore these provisions may be applied only to Member States, not to natural persons (this concept also applies to local or state authorities (cases Van Gend en Loos, C-188/189 Foster vs British Gas pls.). The *horizontal direct effect* appears when obligations are provided for individuals, thus creating relationships between individuals (case 43/75 Defrenne vs Sabena (No.2)).

However, the rules may not be regarded as having direct effect, if they are formulated too unintelligibly, leaving a lot of issues to be resolved by member states. In case 230/78 Friadna, the European Court of Justice came to the conclusion that direct nature of the application of regulations does not prevent them from containing provisions on their implementation. Accordingly, no measures on implementation are required, except when they are mandatory. The regulations may have both horizontal and vertical direct effect.

As is known, directives do not have direct action in accordance with the Treaties. However, in case 9/70 Grad vs Finanzamt Traustein, the European Court of Justice ruled that a directive may have direct effect. If the period for implementation has not expired, the directive does not have direct effect. Upon expiration of this period, even if the directive has not been implemented, it may have a direct effect (Case 148/78 Publico Ministero vs Ratti). If the directive is not required to be implemented, it may have a direct effect, if it meets the requirements of direct action (Case 41/74 Van Duyn vs Home Office).

Similarly, with regard to decisions there are rules that, in case of compliance with requirements of direct action, are deemed acts of direct action (Case 9/70 Grad vs Finanzamt Traustein). At the same time, they are mandatory only for those to whom they are addressed (one or more member states, natural or legal persons, EU institutions), i.e. they are of individual nature.

The general principles of EU legislation are not always binding for Member States. The question of direct action is considered each time by the European Court of Justice in pre-judicial manner. So, they may have a direct effect in limited circumstances, such as:

a) in a claim of an individual, in which he/she opposes using partial lifting of a law on the basis of reservation on public manner (Articles 36 and 52 of the TFEU) on the grounds of the fact that such lifting violates general principles of the EU legislation;

b) when a party to a dispute declares the invalidity of the EU measures, as they violate the general principles of the EU legislation.

2.6.3. Approximation of national legislation of the EU States

Article 114 TFEU provides:

“1. Unless otherwise provided by Treaties, the following provisions shall apply for achievement of the objectives set out in Article 26. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting with the Economic and Social Committee, adopt measures on the approximation of legislative, regulative and administrative provisions of the Member States, which are devoted to creation or functioning of the domestic market. “

The Treaty of Lisbon does not define the concept of ‘harmonization’, and at the same time assumes the need for its implementation. In the TFEU, the harmonization is assumed in the areas of creating room for freedom, security and justice, for regulation of relations in the domestic market of the EU, and in certain sectors of cooperation. At the same time, the TFEU contains a variety of terms to refer to the process of bringing domestic legislation into compliance with the EU legislation: “approximation” (Articles 81, 114, 115, 151), “harmonization” (Articles 113, 149, 165, 166, 191), “the establishment of minimum rules and standards” (Articles 78, 82, 83). The term “unification” is not found in the Treaties, but proceeding from the characteristics of the regulations, it may be argued that “unification” is the right term to be applied.

The provisions of the Treaties ensure that the main purpose of directives is harmonization of the Member States’ legislation (Article 114, 115 of the TFEU), in contrast to regulations being the unification tools (Article 118 of the TFEU).

There are different approaches to the issue of interaction between the concepts of “approximation” “harmonization”, and “unification” (see S. Dudar, A. Rossett, W. Hummer, B. Simma, Ch. Vedder, F. Emmert, etc.). Their analysis is beyond the scope of our study. In our view, unification and harmonization should be considered as separate ways of law approximation.

The concept of “harmonization” is derived from the Greek *harmonia* that means “harmony, well-being.” A necessary condition for achievement of harmony is unity between objects subject to harmonization. The concept of “unification” is derived from the Latin *unio facere* – «to make consolidated” and means “to bring to uniformity, bringing something to a single form, a system, and common norms”, “bringing to uniformity (similarity).”

Harmonization and unification are different in terms of legal form of achievement of their objectives. Thus, the uniform norms are fixed in the form of legally binding acts, the issuance of which is subject to integration of invariable versions into national legal systems. Accordingly, the “unification” in the context of Art. 288 of the TFEU applies only to regulations, whereas harmonization (directives) may be implemented through acts that are not legally binding.

Harmonization and unification differ in their results. The result of harmonization is overcoming the contradictions and forming up minimum legal standards through the adoption of general legal principles. The result of the unification is introduction of equal (similar) legal norms into national legal systems.

While harmonization affects individual norms and areas, unification influences not so much the individual rules but the legal system as a whole.

It should be noted that harmonization and unification should be considered exactly as means, not steps or stages of approximation. This is why the steps (stages) are a part of overall process separated in time and having individual objectives and specific tasks. Unification and harmonization may be held in parallel and have a common goal – concordance, convergence of legislation blocks in several countries. Both methods should not be mandatorily applied simultaneously. If there is no need for unification, only harmonization may be used (O. Turchenko).

It should be noted that by the mid-1980s the approximation of national legislations, regulations and administrative provisions had been carried out mainly within the framework of the concept of “strict (basic, maximized) harmonization”, when the so-called “vertical” directives, setting European standards for certain types of products, were taken by unanimous approval with due regard to the smallest details on the basis of the former Article 100 of the Treaty of Rome.

Basic harmonization was complemented by a principle of mutual recognition incorporated in the decision of the European Court of Justice on the Cassis de Dijon case (1979) (the so-called second Cassis principle). It means that when there are no reasonable grounds for admission of goods and services produced and traded or made available legally on the territory of a Member State, then such goods and services must be approved for distribution on the territory of all other Member States. National standards, if they do not meet the mandatory requirements established by the European Court of Justice, become invalid.

Financial services, recognition of qualifications, and technical standards have become the main spheres in which harmonization is carried out by means of mutual recognition of national standards. In 1985, a “new approach” to technical harmonization and the development of standards was approved, the basic principles of which were mutual recognition, mutual information and targeted harmonization. In 2008, the “new approach” to harmonization was reformed by adoption of EU Directive № 768/2008 and Regulation EU № 765/2008. Through these acts, the basic principle of the new approach was formed, according to which the harmonization of legislation should be limited to establishing essential requirements determining the level of protection).

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2.7. Enforcement of EU law

2.7.1. Enforcement of the EU law: general provisions

Adoption of an act is not an end in itself; subsequent implementation is assumed when establishing provisions. Legal acts lose their social significance without further enforcement of regulations in practice.

Implementation of rights and freedoms of citizens and organizations requires certain behavior of all the participants of existing interactions. Subjects of implementation of the right ensure enforcement of legal regulations and concretize their performance in specific situations and processes.

Legal regulations are different in nature and category. A degree of activity of subjects in the process of implementation is also different. In this regard, one may distinguish four forms of law enforcement: use, enforcement, application, and compliance.

Let us dwell on the enforcement. This form of implementation of rights is characterized by manifestation of active behavioral actions of a subject, in fact, it is mediated by obligation. This form comes down to completion of obligations (duties) expressly provided for by law or arising from it.

One may select the following guidelines for implementation of rights through enforcement:

- The need for proactive actions of subjects for implementation of the established regulations;
- The enforcement is predetermined by indispensable public-willed nature;
- The obligation is considered completed in case of timely actions and appropriate performance of the requirements in due place.

Talking about the enforcement of the EU laws, one may distinguish two types of performance depending on the enforcement subject:

1. Immediate (or direct) enforcement executed by institutions, authorities and bodies of the EU directly in cases well-defined by acts of primary law, and on account of directly applicable EU primary and secondary law. Immediate type of enforcement covers both internal sphere of the Union's activities (for example, the human resource issues, budget execution, internal organization), and the external sphere (competition law, the right to receive subsidies, trade and social policy);

2. Mediate (or indirect) enforcement executed by authorities of the Member States. In this case the national law "works", i.e. the enforcement is carried out through issuance of national acts.

But we should not forget that the acts of EU legislation, including those governing procedural problems, are primary ones in relation to national procedural law, which is the same in content. The procedural regulations of the EU must comply with the requirements of uniform application of the EU legislation in the Member States in order to avoid unequal treatment of legal parties involved. For example, the EU legislation has gained certain limitations: for example, the enforcement of the EU legal norms may not be practically impossible or complicated (principle of effectiveness), and the national law may not be less favorable compared with the procedural rules, being the grounds for taking decisions in equivalent purely national cases (the equivalence principle).

Enforcement of the primary law requirements may take place along with their simultaneous interpretation and concretization. For example, the European Court of Justice in *Bresciani*, *Heygeman*, *Demirel*, *Pabst*, *Kus*, and *Anastasio* cases set the minimum and maximum standards related to the content of the association treaties, the conclusion of which is envisaged by Articles 198-199, 217 of the TFEU.

In the Case 17/81 *Pabst & Richarz KG v Hauptzollamt Oldenburg*, the court ruled that the Treaty on Association of the Community and Greece may contain provisions having direct effect. In this context, the Court highlighted the existence of provisions aimed at creation of a customs union, harmonization of agricultural policy, the implementation of the free movement of workers and other measures adapted to the requirements of the Community.

The *Anastasio* case was about a direct effect of certain rules of Protocol of 1977 on the Association Agreement signed between Cyprus and the Community. Analyzing this agreement, the EU Court of Justice emphasized that it was “aimed at gradual elimination of barriers of trade turnover between the Community and Cyprus”; the terms and conditions provide clear, precise and unconditional obligations of the parties and are subject to direct application by the national courts (Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasio (Pis-souri) Ltd and others (Anastassiou)*).

The EU Court’s decision on the *Demirel* case of September 30, 1987 is of fundamental importance for formation of legal nature of the association (Case 12/86 *Meryem Demirel v Stadt Schwabisch Gmund*). The Court found that the association agreement has created special, privileged relations with non-member countries, so the latter should take appropriate part in the Community’s system. It is not about the participation in the EU institutions, but it provides that the sphere of cooperation of the latter with associated countries is determined by *acquis communautaire*.

Talking about the enforcement, one should mention such essential points as the entry of the act into effect and its termination, because only existing instruments make the enforcement possible. Putting the grounds for one’s legitimate demands on a legal procedure, or protecting oneself with the help of it from unsubstantiated claims, it is necessary to know for sure if it was valid at the time of law violation and the emergence of contentious relations.

According to Art. 297 of the TFEU, the legislative acts come into force on the date specified therein – and if no date is available – on the twentieth day following their publication. Directives, as well as decisions, which specify the addressees, should officially be forwarded to their addressees and take effect by means of such notification.

The adopted regulations and guidelines do not require ratification or implementation by Member States of other actions carried out at conclusion of international

agreements for entry into force. The EU decisions, as a general rule, do not require ratification by Member States.

According to para 2, Art. 290 of the TFEU, a delegated act may enter into force only if during a period established by a legislative act, the European Parliament and the Council have not raised objections.

For example, in accordance with Directive 2011/24/EC of the European Parliament and the Council of 9 March, 2010 on application of patients' rights in cross-border health care, the European Commission gained the power to issue delegated acts on certain issues associated with it. Such acts take effect within two months from the date of adoption, if none of the legislative institutions has submitted objections during this period.

With regard to the legal acts of the Union in other forms issued before entry of the Lisbon Treaty into force, they remain valid until the expiry date or (if they are open-ended) until replacement by modern EU legal acts.

For example, framework decisions adopted by the EU Council on the former third support of pre-Lisbon Union – cooperation of police and judicial bodies in criminal matters (framework decision on criminal responsibility for counterfeiting, terrorism, human trafficking and other criminal acts, on the European warrant for arrest, on a status of victims in criminal proceedings, etc.). To date, more than 20 of the framework decisions according to which Member States amended their criminal procedure legislation are still in force. According to their legal properties, the framework decisions were analogues of directives, i.e. they should be transformed in legal acts of the Member States; but, in contrast to the directives, their provisions could not have direct effect.

According to Article 297 of TFEU, regulations and directives addressed to all Member States, as well as decisions with no addressees specified, shall be published in the Official Journal of the European Union, published by the European Agency for official publications in printed and electronic forms.

Extra responsibilities for publication were laid down in Regulation (EC) of the European Parliament and of the Council No. 1049/2001 of 30 May 2001 regarding public access to documents of the European Parliament, the Council and the Commission (Art. 15), as well as in the internal regulations of the EU Council (Article 13). According to these acts, the international agreements of the Union with third countries and international organizations are also subject to publication in the Official Journal of the EU. However, under the EU Council decision, some agreements on common issues of foreign and security policy may be declared top secret, secret or confidential documents, and should not be published in the Official Journal. For example, the agreement on military cooperation between the EU and NATO (the agreement "Berlin Plus" 2002-2003) has not been published.

Moreover, the EU Council may also publish its own decisions in the Official Journal on matters of common issues of foreign and security policy and the documents adopted by it in the form of *sui generis* acts, for example, conclusions and resolutions, in accordance with its internal regulations.

The European Central Bank in each particular case decides whether to publish its acts in the form of guidelines and instructions in the Official Journal of the European Union.

The Official Journal is published almost daily (several issues may appear within one day) in all 23 official EU languages. It is published in two major series:

- “L” series – legislation (EU legislation acts, non-legislative (including delegated and executive) acts, internal institutional regulations, inter-institutional agreements, etc.);

- “C” Series – information and communications (acts that have no binding force, as well as individual bills, reports on cases brought to consideration of the EU Court of Justice and decisions on them (only operative part), the protocols of the sessions of the European Parliament and advisory bodies of the EU (Economic Social Committee, Committee of the Regions), the official reports of institutions, bodies, EU authorities, the MSs (for example, a minimum amount of money required for entry and stay of third-country nationals, advertisements of competitive vacancies for the European commission, etc.), other information materials and references).

We should recall that in the framework of Art. 264 of the TFEU, the European Union Court of Justice may declare the contested act null and void. At the same time, the European Union Court of Justice shall, if it considers this necessary, state which effects of the canceled act shall be considered conclusive. Accordingly, in the context of a prejudicial decision temporal action, its provisions, as a rule, apply from the date of entry into force, i.e., proceeding from the *ex tunc* principle – from the moment of decision taking (B. Broberg). Thus, the prejudicial decision containing provisions on invalidity of a particular act of EU legislation or on cancellation of a specific judicial decision shall be retroactive in time. Despite the fact that the prejudicial decision contains a correct *ex tunc* interpretation, national courts should not yet be deprived of the right to apply national rules related to validity of previously issued court decisions (A. Fastovets).

2.7.2. Control over observance of the EU legislation

Political control over the observance of fundamental EU values

By virtue of general principles of the EU, all Member States are required not only to honestly and conscientiously implement the commitments, but not to take any action that could harm the common interests of the EU.

Political control over observance of fundamental values of the EU, which suggests the possibility and terms to prosecute Member States charged with a violation or infringement of the fundamental values of the EU, lies within the competence of the two main institutions of the EU – the Commission and the European Council, and is expressly provided by Article 7 of the Treaty of Economic Cooperation:

“1. Upon reasonable request of one third of the Member States, the European Parliament or the European Commission, the Council, acting by a majority of four fifths of its members after the approval by the European Parliament can ascertain the existence of clear threat of a serious breach of values mentioned in Article 2 by a Member State. Before making such a statement, the Council shall hear the Member State concerned and may, acting in accordance with the same procedure, submit recommendations to it. The Council shall regularly review whether the causes that have given rise to such a statement are still in power.

2. The European Council, acting unanimously on a proposal of one third of Member States or the European Commission, and after approval by the European Parliament, may establish the existence of a serious and sustained violation of values mentioned in Article 2 by any Member State, suggesting first this Member State to submit any comments on this issue.

3. When a statement referred to in paragraph 2 has been done, the Council, acting by a qualified majority, may decide to suspend certain rights deriving from the application of Treaties to certain member state, including the right to vote for a representative of the Member State government in the Council. By making this decision, the Council takes into account possible consequences of such a suspension for the rights and obligations of individuals and legal entities.

In all circumstances, the duties that are assigned to the appropriate Member State according to the Treaties, remain binding on this state.”

Therefore:

1. The Council may ascertain the existence of clear threat of a serious breach of the values by a Member State (part 1);

2. The Council is called upon to regularly monitor the abidance of conditions, causes and motives that led to taking the decision containing such a statement;

3. The European Council can establish the existence of a serious and sustained violation of values by any Member State (Part 2). Taking a decision on the presence of a

heavy and stable threat from the Member State to EU values is preceded by a request to and a feedback from the accused state;

4. The European Council may impose sanctions up to suspension of membership rights, including the right to vote, of a representative of the government of a Member State in the Council, except for expulsion from the EU. At the same time, even in the case of suspension of certain rights and powers, all provisions of the Treaty, obliging the EU Member State, shall remain valid and enforceable;

5. The Council continues to monitor the situation after the decision. If it finds that there have been positive changes, it may propose to amend the decision taken by the Council or by the European Commission. A procedure and conditions of decision taking of this kind are defined in Art. 354 of the TFEU;

6. Within the framework of Art. 269 of the TFEU, upon the request of a Member State, which has become a subject of an act of the European Commission or the European Council (during one month after the date of the said act), the Court shall have the power to decide on the legality of the act adopted by the European Commission or the European Council on the basis of Article 7 of the European Union Treaty, but exclusively in respect of compliance with procedural requirements established by the Article.

Control over the execution of constituent and other acts of the EU

Control over the execution of the constituent acts is vested in the Commission.

The European Commission accumulates, compiles and analyzes all the information related to the state of affairs in the EU. Its concentrated assessment is given in an annual report of the European Commission on the situation in the EU, which provides a chronology of major events within the reporting period (part 2 of article 249 TFEU – “The Commission each year, not later than one month before opening of the session of the European Parliament, shall publish a general report on the activities of the Union”).

According to Article 258 TFEU, if the Commission decides that a Member State has not complied with any of the duties assigned to it under the Treaties, the Commission shall issue a reasoned opinion on the matter after giving the state an opportunity to submit its comments.

It is brought to the attention of the interested states. If necessary, and in absence of adequate response, the corresponding opinion can be made public and published. At the same time, the EC offers its option of problem solution and tackling the crisis (one

of the last fundamental proposals was formulated by the European Commission for adoption of measures to support the EU economy during the crisis).

If the state concerned fails to put itself into compliance with the said opinion within the time limit set by the Commission, the latter may apply to the European Court of Justice.

Moreover, in accordance with part 2 of Art. 260 of the TFEU, if under discretion of the Commission, a Member State concerned has not taken the measures required for execution of the decision of the European Court of Justice, then the Commission, after giving an opportunity to the state to submit its observations, may also apply to the European Court of Justice.

The Commission shall specify the size of the lump sum or penalty to be paid by a subject Member State, which, in the Commission's view, meets the circumstances. If the European Court of Justice recognizes that the Member State concerned has not put itself into conformity with its decision, it may impose the obligation to pay a fixed sum or penalty on this Member State.

In the event of particularly acute and dangerous situations involving violations of the basic values and principles of the EU, the Commission (as well as the Parliament or Member States) may initiate application of a special procedures of political control described in para 2.8.1.

Control over execution of acts of the Union rests on the three EU institutions, namely:

- On the Commission and the Council (according to para 2, Article 291 of the TFEU); when uniform conditions are needed for execution of legally binding Union acts, these acts provide executive powers to the Commission, or – in special cases, duly justified, and in the cases provided for in Articles 24 and 26 of the European Union Treaty, – on the Council;

- On the European Parliament – in cases stipulated by article 226 of the TFEU (while carrying out its tasks, the European Parliament, at the request of one quarter of its members, may form up a temporary investigation commission in order to, without prejudice to the powers provided by the Treaties to other institutions or bodies, check allegations of alleged offense which has taken place, or maladministration in the progress of the Union law application, except for cases when the alleged facts are the subject of proceedings in a court until full completion of the court procedure).

The responsibility of EU Member States for exceeding implementation time limits or for unfair implementation of directives

Failure to proceed on time or unfair implementation do not release a state from liability. The Commission controls the implementation process.

If necessary, it may appeal to the European Court of Justice. According to Part 3 of Art. 260 of the TFEU, in case the Commission applies to the European Court of Justice with a claim, believing that the Member State concerned has not complied with its duty to report on transformation of a directive adopted in accordance with the legislative procedure, the Commission may, on its discretion, also specify a sum of payable lump sum or penalty, which, in its view, meets the actual circumstances.

If the European Court of Justice asserts a violation, it may request the Member State concerned to pay a fixed sum or penalty within a sum specified by the Commission.

An illustrative example of this situation is the decision of the Court regarding combined cases No.6/90 and No.9/90 *Andrea Francovich vs Italian Republic* dated 19 November 1991. In this case, the Court gave the answer to the prejudicial inquiry: “Can a private person, by virtue of current EU law, and harmed by non-fulfillment of Directive 80/987, what was stated by the European Court of Justice, require a state to implement sufficiently clear and specific provisions of the Directive, referring to the direct effect of EU regulations concerning the EC act of guaranteed payment, or, in any event, claim damages, though it is not provided by the Directive?”

Accordingly, the Court concluded that a mechanism of recovery for damage caused by the failure of mandatory norms of the EU law must exist, because it is the only way to ensure their actual implementation. Otherwise, even the mere existence of the Union will be challenged.

However, since we are talking about restricting the rights of the states, the Court has developed a list of conditions, which might serve as the mandatory grounds for harm recovery. These conditions include the following:

- 1) Providing powers to individuals should be a result of the Directive effect;
- 2) Those powers must clearly follow from the Directive (there should be a possibility to determine the content of those powers on the basis of the Directive);
- 3) A causal link must exist between breach of obligation by the state and damage inflicted on an injured person.

Under these conditions, a Member State must compensate the inflicted damage in accordance with the provisions of national law on liability. To this end, each Member State should develop a legislative mechanism for such reimbursement.

In addition, with regard to conditions, contents and forms established by various national laws in the field of redress, they may not be less favorable than those related to domestic national liability, and cannot be amended in such a way as to make receiving compensation for damages practically impossible or extremely difficult.

Control over compliance with the competition rules

The Commission is also vested with the rights of independent control of compliance with competition rules and, if necessary, may conduct independent investigations and take measures to eliminate the discrepancies discovered. This applies, in particular, to a collusion, abuse of dominant position, payment of unjust state subsidies, etc. The powers of the Commission in this sphere are defined in details in para 1, Section VII (Articles 101-109 of the TFEU).

According to Art. 105 of the TFEU, the Commission controls application of principles laid down in Articles 101 and 102. Upon request of a Member State, or on its own initiative, the Commission, together with competent authorities of the Member States providing the assistance, investigates cases of alleged violations of the said principles. If the Commission states an infringement, it should offer adequate tools for its elimination.

If violations persist, the Commission, by means of a reasoned decision, establishes the fact of the violation of principles. It may publish its decision and authorize Member States to take the necessary measures to remedy the situation under conditions and in the manner specified by it.

The possibility of taking relevant directives or decisions addressed to the Member States by the Commission, in case of necessity, is also provided in part 3 of Art. 106 of the TFEU.

Refusal to perform may entail the imposition of penal sanctions. The experience shows that the sanctions may be of very impressive scale (in two cases against the American company Microsoft they involved many hundreds of millions of euros. At the end of 2008, as a kind of indicative measures, the Commission first imposed fines significantly over one billion euros).

Judicial review of acts taken by the EU institutions

The main purpose of the Court of Justice is to ensure uniform understanding and application of the constituent treaties and legal acts issued on their basis.

The scope of competence of the Court of Justice is determined in general in para 3, Article 19 of the Treaty of Economic Cooperation, and in more details in Articles 258-273 of the TFEU, according to which the European Court of Justice continues to implement its traditional powers of the EU Court, which may be classified as follows:

- Control over violations of EU law by legally responsible Member States (through consideration of claims of non-compliance with EU legislation);

- Control over legality of acts or omissions of the EU institutions (through consideration of claims for annulment of EU acts, claims for omission of the EU institutions and excluding the illegality of institutional acts that can be lodged by member states, EU institutions, as well as, under certain conditions, by individuals);

- Interpretation of EU law in prejudicial procedure (by submitting the request for consideration of prejudicial questions regarding the interpretation of rules of the EU law);

- Assessment of validity of institutional acts (by considering the prejudicial issues concerning assessment of acts validity);

- A statement of a non-treaty liability of the EU;

- Disputes between the EU and its officials and other agents on its service;

- Advice on international treaties;

- Appeals against the Court rulings.

In accordance with Art. 263 of the TFEU, the European Court of Justice controls the legitimacy of legislative acts, acts of the Council, the Commission and the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and the European Council aimed at creating the legal consequences in relation to third persons. In addition, the European Court of Justice controls the legitimacy of acts issued by the Union's bodies or agencies aimed at creation of legal consequences in relation to third parties.

Article 51 of the Protocol (No.3) on the Statute of the European Court of Justice of 17.04.1957 states that the Court is designated for adjudication of claims referred to in Articles 263 and 265 of the TFEU, lodged by MSs and directed:

a) Against acts or omission of the European Parliament, the Council or both these institutions when they act together, with the exception of claims against:

- Decisions taken by the Council on the basis of the third item of paragraph 2, Article 108 of the Treaty on functioning of the European Union;

- Acts of the Council, taken in accordance with the regulations of the Council on measures of trade defense within the meaning of Art. 207 of the TFEU;

- Acts of the Council, by means of which the latter exercises executive powers in accordance with paragraph 2 of Art. 291 of the TFEU;

b) Against acts or omission of the Commission on the basis of paragraph 1 of Art. 331 of the TFEU.

In addition, the Court reserves claims referred to in the same articles lodged by institutions of the Union against an act or omission of the European Parliament, the Council, both those institutions when they act together, or the Commission, as well as claims submitted by institutions of the Union against act or omission of the European Central Bank.

According to para 6 of Art. 263 of the TFEU, such claims must be filed within two months, which start, depending on the case, from the date of publication of the act, from the date of notification of the plaintiff, or – if no such publication or notification exists – from the day when the plaintiff became aware of the act. Besides, Article 46 of the Protocol specifies that, when appropriate, the provisions of the second paragraph of Art. 265 the TFEU should be applied (such claim may be taken into consideration only if the relevant institution, body or agency was first proposed to act. If, after two months from the date of such proposal, the institution, body or agency still does not define its position, the claim may be filed within the next two months).

It should be noted that the number of claims for annulment is small. For example, according to annual reports of the European Court of Justice for 2009, in 2008 the Court gave 207 rulings in cases of default, in 2009 – in 142 cases of default and in 1 case of annulment in comparison with 302 cases heard in prejudicial mode.

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CHAPTER 3. EU'S INSTITUTIONAL STRUCTURE

As a result of studying the material of this chapter students must:

know:

composition, structure and trends of legal regulation of relations in the EU,
goals, objectives and directions of reforming the legal regulation of relations in the EU;

patterns of development of legal practice, including the judiciary, and its importance in the mechanism (system) of legal regulation in the EU;

state and development of international legal regulation in the relevant field;

relevant sectoral legislation, and (or) mechanisms of inter-sectoral institutions;

be able to:

apply legal norms in situations of gaps, conflicts of norms, complex interactions, solve complex problems of law enforcement practice in EU;

argue decisions taken, including being able to foresee the possible consequences of such decisions;

analyze non-standard situations of law enforcement practice and develop a variety of solutions;

interpret legal acts in their interaction competently;

examine legal acts, including, in order to identify the provisions facilitating the creation of conditions for corruption,

explain the effect of the law to their addressees.

possess:

skills for making legal written documents;

skills for drafting regulatory and individual legal acts;

skills for oral presentations on legal matters, including, in competitive proceedings, arguing and defending their points of view in oral debates;

skills for discussion, business negotiations, mediation in order to reach a compromise between parties of a conflict;

skills for drawing up expert opinions;

skills for counselling citizens on legal issues in the sphere.

3.1. EU institutions

The European Union has a complex arrangement that is built on a combination of elements of the international organizations and state-like formation. Improvement of this mechanism is the determining motive of the major EU reforms undertaken over the last decade of the XX century (Amsterdam Treaty and EU-Nice). It was a central point of discussion during the preparation of the Lisbon Treaty in 2007.

There is a three-level court system in the European Union:

1) The highest level is occupied by EU institutions: the European Parliament; the European Council; the Council; the European Commission; the European Union Court of Justice; the European Central Bank; the Court of Auditors.

Fundamentals of the European Central Bank and the legal status of the Court of Auditors are determined entirely by the TFEU. On the basis of these provisions, each institution, as a collegial body, develops its internal rules of organization and operation referred to as “Rules of Procedure” or “procedural regulation” (the EU Court of Justice). In addition, the protocols to the constituent documents lay down the detailed rules governing the functioning of the EU judicial system (“Protocol on the European Union, the Statute of the Court”) and the European Central Bank, together with the system of the Member States’ central banks formed around it (the “Protocol on the Statute of the European System central banks and the European central Bank”).

The political institutions of the EU, i.e. the governing authorities, the joint efforts of which are aimed at the development and implementation of Union policies in all its areas, are the European Parliament, the European Council and the EU Council, and the European Commission.

Each of the EU institutions has specific functions. The most extensive powers are established in respect of the European Council, which brings together national leaders and the authorized representatives of the supreme bodies of the EU authorities. Elected by «direct» elections, MEPs represent the European citizens in the European Parliament. The EU’s interests in the general sense are implemented by the European Commission, whose members are appointed by national governments. National ministers protect the interests of their countries in the EU Council.

The European Council sets the overall policy guidance of the EU, but has no powers to pass laws. It is headed by the President and consists of Heads of State or national governments, as well as the Chairman of the Commission. It holds meetings once in a few days, but at least twice every six months.

Three main EU institutions are involved in the legislative process:

1) The European Parliament, which represents the EU’s citizens and is directly elected by them.

2) The Council, which represents the governments of individual Member States. The Presidency of the Council rotates among the governments of the EU Member States.

3) The European Commission, which represents the interests of the EU as a whole.

All these three agencies carry out the adoption and development of a common EU policy and the adoption of documents by «General legislative procedures». The Commission systemically proposes new EU documents while the European Parliament and the Council adopt them. The Commission and the Member States then implement new laws, and the Commission ensures their proper implementation and realization.

The EU Court upholds the rule of law of European integration, while the Court of Auditors checks the financing of the EU. The powers and responsibilities of these institutions are established by the agreements, which are the foundation of the EU. They also lay down rules and procedures that other EU institutions must follow. Agreements are approved by the President and (or) the Prime Ministers of all European countries and ratified by their parliaments.

2) The second level consists of the structure that has not received the status of the «Institution of the Union» and is referred to as its «bodies». The number of bodies is not fixed: the latter may be created by the founding EU documents and legal acts of the institutions of the Union.

The EU bodies are the Economic and Social Committee, Committee of the Regions, as well as other advisory and auxiliary bodies. Among them are the Social Protection Committee; European Ombudsman; The European Data Protection Supervisor; The European Office for the fight against fraud (OLAF).

The European Data Protection Supervisor guarantees the confidentiality of personal data. The European Economic and Social Committee represents civil society, employers and employees. The Committee of the Regions represents regional and local authorities. The European Ombudsman investigates complaints about maladministration by the EU institutions and bodies.

3) The third level consists of «agencies» of the EU, i.e. European Union agencies which are designed to perform specific functions and have a separate legal personality. The creation of agencies may be provided directly by the constituent documents (for example, the European Investment Bank, Europol, Eurojust, the European Defence Agency).

The EU law also provides the possibility of formation of the so-called «executive agencies», i.e. temporary establishments created under the decision of the European Commission for the implementation of individual programs financed from the budget, for example, the Executive Agency for Research created at the end of 2007.

Let us consider the activities of the EU institutions in more details.

3.1.1. The European Parliament

The European Parliament is a «political» institution of the Union representing the EU nations combined. The European Parliament was established in 1952 as a general meeting of the European Coal and Steel Community and in 1962 it was renamed the European Parliament. Since 1979 it has been elected by direct (immediate) elections. It is located in Strasbourg (France), Brussels (Belgium), and Luxembourg. According to Art. 14 of the TEU, the European Parliament consists of representatives of the peoples of the EU Member States.

The EU features affect the nature and characteristics of the European Parliament. The process of the formation of its institutions resembles national parliaments to some extent.

The structure of the European Parliament includes 751 deputies (hereinafter MEPs). MEPs are elected by direct universal suffrage by all EU Member States for a five-year period. The main requirement for the participants of the election is to be citizens of the EU. MEPs have free mandates, i.e. they are not bound by orders of voters and cannot be withdrawn ahead of time. They are independent from their governments and voters during the period of the legislature and have parliamentary immunity.

The first elections to Parliament by universal suffrage were held in 1979 by nine states. For a long time after the accession of 10 new states to the EU parliamentary elections were not held; they were held only in summer of 2009.

The number of MEPs per country is roughly proportional to its population, but the proportionality is approximate: a country cannot have fewer than 6 or more than 96 MEPs, and the total number cannot exceed 751 (750 plus the President). The President represents Parliament and other EU institutions in the outside world, and gives the final approval of the EU budget. MEPs are grouped together on the basis of political affiliation rather than on a national basis. Member States may establish a legislative barrier, but it cannot exceed 5 % of the votes cast, i.e. the minimum number of votes that the party should get to be in the European Parliament.

The Lisbon Treaty established the form of the European Parliament's interaction with other institutions. First, no significant EU Council decision is taken without the approval of Parliament. Secondly, Parliament has the right to establish a Commission of Inquiry, which is obliged to respond to its oral (verbal) and written requests.

Thirdly, Parliament has the right to hear the European Council and the EU Council in accordance with the conditions provided by their internal regulations (Art. 225, 230 of the TFEU).

The European Parliament has unicameral structure. It works on a permanent basis. Art. 229 TFEU provides that «The European Parliament shall hold an annual session. It shall meet, without requiring to be convened, on the second Tuesday in March». It approves its program of work annually. Parliament's annual session opens on the second Tuesday of March and lasts for 11 sessional periods. The structure and procedure of functioning of the European Parliament are determined by the Internal Regulations (para. 1, Art. 232 of the TEU).

The Chairman and his deputy (Vice-Chairman) are elected for a term of half period of the work of its staff. He organizes and conducts meetings of the Chamber, provides administrative management and performs disciplinary functions. 14 Vice-Presidents and 6 Quaestors help the Chairman. Under the direction of the President the Bureau of Parliament, which includes the chairman, his deputies, and six quaestors with an advisory vote, carries out its tasks. Determining the agenda is the responsibility of the President of the Conference, which includes the chairmen of the parliamentary political groups (a kind of parliamentary factions), chairmen of parliamentary committees, which are controlled by the Secretary-General (Art. 192 of the Internal Regulations), and two representatives from the deputies who are not in factions and have no right to vote. Parliamentary committees are created on a permanent or temporary basis.

20 standing committees were created and now operate in the European Parliament: foreign affairs, development, international trade, Fiscal Affairs, Economic and Monetary Affairs, Employment and Social Affairs; Environment, Public Health and Food Safety; industry, energy research; the internal market and consumer protection, transport and tourism, regional development, agriculture and rural development, fisheries, culture and education on legal issues; Civil Liberties, Justice and Home Affairs; Constitutional Affairs, Women's Rights and Gender Equality, Petitions.

The committees may have general or special purpose. In quantitative terms, they are elected in proportion to the number of political groups. In addition to these committees there are inter-parliamentary delegations. The structure of the European Parliament includes the Conference of Committee Chairs, the Conference of Delegation Chairs, and the Conference of Parliamentary Committees for Union Affairs (COSAC). The members of the latter are representatives of the specialized agencies of the national parliaments on EU activities. The work of the conference is attended by members of the European Parliament. Parliamentary political groups are created in accordance with the procedure referred to in Article. 29 of the Rules of Procedure. Recognition of a political party and its operation on the European stage takes place in the way prescribed by Art. 224 of the TFEU.

The analysis of the European Parliament's work confirms that its functioning is characterized by advisory procedure, procedures for cooperation, joint decision and joint representation.

In fact, the main directions of the European Parliament's activity coincide with the functions of parliaments of states outside the EU. However, the scope of powers of the European Parliament is less than that of the higher legislative bodies of the MSs. The European Parliament's functions can be categorized as legislative, budgetary and political control, foreign policy and advice. Each group of these functions corresponds to a certain kind of powers. In details, the basic functions of the European Parliament are as follows: legislative, the participation in the process of adoption of EU laws together with the Council of the EU on the basis of proposals prepared by the European Commission; the adoption of international agreements; the adoption of a comprehensive solution; an overview of the program of work of the Commission in order to identify proposals to change the legislation.

The European Parliament adopts most of the Directives and Regulations together with the EU Council, setting goals which all EU states should achieve. Pursuant to Directives, the EU states develop and adopt their own laws. One example is Directive 2011/83 of 25 October 2011 on the protection of the rights of EU consumers, which enhances the consumers' rights in the EU by eliminating hidden charges and costs on the Internet as well as extending the period under which consumers may opt out of the sale and purchase contract.

Regulations are legislative acts which are binding and must be applied throughout the EU. Examples include Regulation (EC) № 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment companies.

As a supervisory authority the European Parliament monitors all the EU institutions for compliance with the basic principles of democracy; elects the President of the Commission and approves the Commission as a body with the right of no-confidence vote which requires the Commission to dissolve. It discharges from obligations, that is, confirms that EU property funds were spent wisely. It examines citizens' applications and makes the appropriate inquiries. It discusses monetary policy with the European Central Bank. It makes requests to the Commission and the EU Council. It monitors elections. Being a budgetary control body, the European Parliament, together with the EU Council approves the current and long-term EU budget.

Parliamentary work includes the work of the committees and the plenary sessions itself. Committees carry out legislative functions. Parliament consists of 20 committees and two subcommittees, each of which performs its functions in a separate sphere of politics. The committees examine proposals for legislation. Members of Parliament and political groups may propose amendments or propose to reject a bill. All problems

shall be subject to prior discussion within the political groups. The plenary session is held in public, all the members of the EP gather in the Chamber to cast a final vote on the proposed law or amendment. The sessions are normally held in Strasbourg for four days a month, but sometimes an additional session is held in Brussels.

Ordinary legislative procedure allows the European Parliament and the Council to carry out the whole range of powers on a variety of issues (such as economic management, immigration, energy, transport, environment and consumer protection). The vast majority of European laws are adopted jointly by the EP and the Council. Co-decision procedure was introduced by the Maastricht Treaty, and expanded and modernized by the Amsterdam Treaty. The Lisbon Treaty renamed ordinary legislative procedure and it became the main legislative procedure of the system of decision-making in the EU. The European Parliament may approve or reject a bill and propose amendments to it. The EU Council is not obliged to take into account the parliamentary opinion, but in accordance with the case law the Council does not take a decision without having received the approval.

Consider the example of Market Abuse Regulation («MAR») and the Directive on Criminal Sanctions for Market Abuse («CSMAD»), collectively known as MAD II.

MAD II has been negotiated at length, first between the Commission and the Council of the European Union and then between the European Parliament and the Council. Political agreement was reached on 9 September, 2013 with respect to MAR, and on 4 February, 2014 with respect to CSMAD. The Council adopted MAD II on 14 April, 2014.

The European Parliament issues documents in the form of regulations, directives and decisions.

In most cases the documents should be issued jointly by the European Parliament and the Council on a proposal from the Commission in the framework of the «ordinary legislative procedure» (paragraph 1 of Art. 289 of the TFEU). For example, Regulation (EC) № 439/2010 of the European Parliament and of the Council of 19.05.2010 «On the establishment of the European Office for Asylum»; Directive 2000/12/EC of the European Parliament and of the Council of 21.04.2004 «On the markets in financial instruments.»

The Lisbon Treaty has retained the so-called «consultation procedure» for many bills, for example, on taxation, some issues of social policy, environmental policy, a number of measures in the area of freedom, security and justice, and others.

In the beginning, the Treaty of Rome of 1957 gave Parliament an advisory function in the legislative process. The Commission makes a proposal, and the Council adopts the document. The Single European Act of 1986 and the Maastricht, Amsterdam, and Lisbon Treaties successively extended parliamentary prerogatives. Consultation has

become a special legislative procedure used in a limited number of cases, such as the benefits of the internal market and competition law. Parliamentary consultation is also required for the approval of international agreements.

As part of the consultative procedure an EU legislative document is adopted solely by the Council of the EU «after consultation» with the European Parliament. The opinion of the latter has only an advisory (consultative) character, and the amendments of the European Parliament and the opposition can at best act as a suspensive veto. Other types of special legislative procedure, which are rarely used, are the procedure when the legal act is adopted solely by the European Parliament after the approval by the Council, or, on the contrary, solely by the Council after the approval by the European Parliament. This procedure is known as the doctrine of «authorization procedure», which has two versions respectively.

The first version of the authorization procedure («European Parliament after approval by the Council adopts ...») is provided for the publication of legislation on the legal status of MEPs, on exercise of the investigative powers by the European Parliament and on the status of the European Ombudsman (paragraph 2 of Art. 223, Art. 226, paragraph 4 of Art. 228 of the TFEU).

The second version of the authorization procedure (the Council after approval by the European Parliament adopts ...) is used, for example, in case of approval of multiannual financial framework plan which defines the limits for expenditure of the Union (paragraph 2 of Art. 312, Paragraph 1 of Art. 86 of the TFEU). After the approval of the European Parliament some other EU measures must also be adopted, which do not relate to legislative acts, such as treaties of accession of new member states or agreements on withdrawal of the MSs from the European Union, and EU individual international agreements with third countries and international organizations.

Budgetary powers of the European Parliament are rather multifaceted. «The European Parliament and the Council set the annual budget of the Union» (Art. 314 of the TEU). Its authority on the functioning of the budget is as follows:

- 1) to make amendments relating to optional costs (social, cultural, academic programs, foreign aid, etc.).
- 2) to approve the report on execution of the budget;
- 3) to approve or reject the report (drawn up by the Chamber of Auditors) on execution of the budget.

The specifics of the budgetary procedure are connected with the division of the budget into mandatory and optional costs. The budget-related powers of Parliament come down to the discussion and adoption of the EU general budget. The budget is adopted jointly with the Council, and these institutions have different rights. For example, the Parliament has the right to amend the articles on optional expenses (Art. 272 of the TEU). The Parliament does not have the right to introduce its own bill on

financial issues and the general budget. Such a draft is presented and modified by the European Commission.

The control powers of the European Parliament are manifested in its right to control the activities of the Commission. Control norms and methods are quite diverse. Parliament has the right to receive information. The Council and the Commission shall send a report to Parliament on the results of operations. It has the right to address written and oral questions to the Council and the Commission. In accordance with Art. 226 of the TFEU, Parliament at the request of 1/4 of deputies from all members has the right to create a temporary investigative commission. The Commission is not created if the questions addressed are the Court of Justice's prerogative. There is an institution of parliamentary responsibility of the government, in this case of the Commission. However, this principle remains mostly declarative. Parliament has the right to examine individual or collective petitions. In accordance with Art. 228 of the TFEU, Parliament elects the Ombudsman from among its members, who has the right to receive complaints from EU citizens or from persons or entities under the jurisdiction of the EU Member States.

The powers of the European Parliament on the implementation of EU foreign policy activities come down to a series of minor rights. Thus, the Parliament has the right to obtain information about the state of the Union's foreign policy. It may give advisory opinions on international agreements, and formulate a positive conclusion. Parliament is actively involved in the discussion of foreign policy issues. Its responsibility is to maintain relations with national parliaments on foreign relations.

The European Parliament also has a number of prerogatives. Among them, for example, is the approval of the conclusion by the EU of the most important international agreements with foreign states and international organizations, or permission for accession of the new states into the EU. Parliamentary consent is also required to make changes in the rules of the legislative instruments adopted by the European Parliament. Among them are international treaties making amendments to legal acts under the co-decision procedure (regulations, directives and decisions of the EP and the Council). These are other important EU treaties:

- a) association agreements with third countries or international organizations;
- b) agreements relating to the establishment of joint bodies of the Union with third countries or international organizations;
- c) agreements with important budgetary implications for the Union;
- d) agreement relating to the right of the European Parliament to file a request the Court of Justice on the constitutionality of the draft of an international treaty, i.e., on its compliance with the EU founding treaties. Noteworthy are executive powers, and powers related to the formation of organs and appointment of officials.

The European Parliament has impact on the current management, mainly through its supervisory powers, as well as using the right of approval of the President of the European Commission and the composition of the Commission itself. In some cases, treaties confer on the Parliament the right to directly participate in the discussion and adoption of measures of executive administrative nature – the right to be informed of the decisions taken or planned (the Council, for example, informs Parliament about the «main directions of economic policy,» about sanctions against Member States that have fiscal deficit, etc.).

The High Representative of the Union for Foreign Affairs and Security Policy regularly consults the European Parliament and informs it «about the development of these policies» (Art. 36 of the TEU). The European Parliament may address questions or make recommendations to the Council and the High Representative. The Commission is also required to inform the European Parliament of any implementation measures taken by the Union acts. It is necessary to remember the case when the EP participates in exercise of the Union's executive authority, having a casting vote. This case is related to giving consent for the recognition of a Member State as a violator of the general principles of the EU founding order. Without such consent, the Parliament sanctions against the state of the accused cannot be adopted (Art. 7 of the TEU).

Subject to the approval by the European Parliament are the Commission and its Chairman. It may also dismiss the whole of the Commission ahead of time. It appoints the Ombudsman. The European Parliament is involved in the formation of the Union institutions and bodies, as a rule, with a deliberative vote (members of the Court of Auditors, the European Central Bank and its President of the Directorate, and others). In accordance with the Rules of Procedure of the European Parliament, its opinion is requested in the appointment of the EU Council Secretary-General – the highest representative of the Common Foreign and Security Policy, heads of diplomatic missions (delegations) and others.

The responsibility of the European Parliament:

a) there is collective responsibility to the EU Court of Justice for making decisions such as the abolition of acts, performance of certain actions (failure to act);

b) the deputies' individual responsibility equals non-responsibility due to parliamentary immunity and other restrictions. For example, the MP is not subject to criminal or other prosecution and detention, if not caught in flagrante delicto. In all other cases (e.g., for initiating criminal proceedings against him, or to arrest) the consent of the EP is required;

c) disciplinary responsibility, which is imposed by the Chairman (reprimand, loss of voting rights for a period from 2 to 10 days, deprivation of positions held by a deputy, the posts held by them in Parliament, and others).

3.1.2. The European Council

The European Council was established in 1974 at an informal forum, in 1992 it acquired a formal status.

After the entry into force of the Lisbon Treaty, the European Council acquired the status of the institution of strategic guidance, political planning and political arbitrator between the Member States. In 2009, the Council was officially recognized as an EU institution. Its location is in Brussels (Belgium).

The European Council outlines the general political direction and priorities of the EU. The European Council forms a common position of the EU leaders in order to set the political agenda of the EU. It represents the highest level of political cooperation between the EU countries.

The main principles of the European Council are (Section II «provisions on democratic principles» of the TEU): the rule of law; the principle, according to which all persons within the jurisdiction of the EU can enjoy human rights and fundamental freedoms; principle of sincere and active cooperation in order to achieve the objectives of the European Union.

The European Council includes the Heads of State or Government of the EU Member States, as well as its Chairman and the President of the European Commission. The High Representative of the Union for Foreign Affairs and Security Policy also participates in its work.

During the session each member of the European Council is accompanied by Head of the Ministry of Foreign Affairs while the Chairman of the Council is accompanied by a member of the European Commission whose activities are similar to the activities of the Minister of Foreign Affairs.

The European Council shall be convened by the Chairman twice every six months (Art. 15 of the TEU). Decisions are usually made by consensus, but the treaties provide for cases in which decisions are taken by qualified majority, or a simple majority (paragraph 1 and 3 of Art. 235 of the TFEU).

The Decisions of the European Council are policy guidelines which EU Member States should follow.

In accordance with Art. 13 of the TEU, the tasks the European Council are:

- 1) providing general political development of Europe;
- 2) adoption of general political guidelines of EU activities;
- 3) consideration of the various aspects of issues relating to the EU;
- 4) promoting cooperation in new areas;
- 5) the expression of common positions on foreign policy issues and others.

The European Council does not exercise legislative functions. Its goal is to send «pulses» to the Union to encourage its development, and determine «the general po-

litical directions and priorities» for it. The European Council may decide to consider any question of activity and the evolution of the EU.

The political nature of the European Council is that its decisions are addressed to other bodies and institutions of the Union: the EU Council, the Parliament, etc. Its decisions are not legal and are not issued in the form of a legal act, however, they are binding for all EU member states. Policy directives are implemented by the EU institutions and bodies. This body is all-Union and its activities cover the scope of the Union competence. The Chairman shall be elected by qualified majority for a term of two and a half years which may be renewed once.

The European Council consists of one senior representative of all Member States and shall be convened at least twice every six months. Its activity is based mainly on the procedures under the treaties, as well as the prevailing customs and usages. It does not have its own structural units and personnel and prescribed procedures. Four sessions (two in the first semester and two in the second one) are held. If necessary, an extraordinary session can be held.

The European Council as the organ of political coordination of the Union has the following functions:

- 1) strategic planning in all sectors of not only the Union but also the MSs;
- 2) carries out the tasks of the highest political authority in the resolution of disputes within the Union;
- 3) establishes general principles and guidelines of foreign policy.

The European Council is authorized to discuss a draft of «general orientations of economic policy» presented by the Commission, as well as decide on the creation of «common defense» of the EU.

The European Council also holds informal or extraordinary meetings of the heads of states and governments, sometimes with the participation of a third party (non-EU countries). After these meetings the leaders usually approve agreement or declaration instead of the official conclusions. The document produced by the European Council at the end of each session is called «Conclusions». It contains not legal rules but policy provisions addressed to Member States and institutions. The European Council is also entitled to issue resolutions and declarations.

The European Council takes its decisions by consensus; decisions on procedures and adoption of internal regulations are taken by a simple majority; decisions on some issues are taken unanimously and by a qualified majority. The Chairman of the voting and the Chairman of the Commission do not take part in the voting. At the discretion of the European Council is the right to issue certain organizational decisions aimed

at clarifying and amending the rules of the EU constituent documents. These include, for example, the determination of the quotas of the Member States for the European Parliament elections.

The European Council has a key role in the procedure of revision of the EU founding treaties. By its decision it convenes a special «convention» entitled to develop drafts to review the TEU or the TFEU.

The European Council also has the right to take a decision on the revision of certain provisions of the constituent instruments under the «simplified revision procedures», without convening a convention and the intergovernmental conference. However, in this case, the decision must be supported by all Member States. In the first case it must be ratified by all EU Member States, while in the second case acquiescence is enough, i.e. none of the EU member states objects.

Members of the European Council have individual political and legal responsibility: the Prime Minister is responsible to the national parliaments, the President of the Commission – to the European Parliament. The European Council shall submit to the European Parliament a report on each of its meetings and a yearly written report on the progress achieved by the Union.

3.1.3. The Council of the European Union

The Council of the EU is one of the leading institutions of the EU institutional system. The status and functions of the Council are defined in Art. 13, 16 of the TEU and Art. 237-243 of the TFEU, and in other basic instruments. The EU Council must ensure the harmonization of national interests of the Member States with the implementation of the objectives and goals of the EU. The Council is in Brussels (Belgium).

The EU Council is composed of representatives of the governments of the EU member states. Each EU member state has one seat, but with a different number of the so-called weighted votes. The Council shall refrain from making a decision, if one of the members of the Union disagreed on the merits of a decision, justifying his objection that its adoption would harm the national interests of his country.

The European Council is presided by a representative of one of the EU member states, the presidency rotates every six months. An exception is the formation of the Foreign Affairs, in which this role is played by the High Representative of the Union. Presiding States are assisted by the EU Council Secretariat, which ensures the implementation of decisions and all activities of the Union.

The Council consists of one authorized representative of EU Member States' governments (ministerial level) (Art. 16 of the TFEU). The Council members are ministers from each EU member state, according to the policy which will be discussed. Ministers from each EU country meet in the Council to discuss changes or adoption

of laws and the coordination of common policies. Ministers have the authority to take actions on behalf of their governments to validate the agreements approved at the meetings. During a year at least 100 meetings are held.

The Council has broad powers. Among them are the coordination of the general economic policies of the Member States, the adoption of binding decisions the execution of which is delegated to the Commission; maintaining social sectors (health, education, etc.); adoption and implementation of financial decisions; conducting foreign and security policy; leadership in the fight against crime; providing police coordination and cooperation in judicial proceedings; determining monetary policy; adoption of legal acts.

The Council structure includes: 1) The President; 2) Representatives of the EU Member States holding the office of the Ministers at least; 3) The subsidiary bodies (the Committee of Permanent Representatives (Coreper), ad hoc committees and working groups, «special purpose» committees, which coordinate on their territory economic and social policy and employment policy at the macroeconomic level; 4) General Secretariat – Council staff consisting of officers who are on the EU civil service. The Secretariat is chaired by the Secretary General.

The powers of the European Union Council

One of the main powers of the Council is that it is entitled to adopt regulations which are binding on all EU subjects. The Council exercises this law-making function independently or in cooperation with the European Parliament, which has the right to veto.

Among the joint regulations of the European Parliament and of the Council are the following: 536/2014 of 16 April 2014 on clinical trials of medicinal products for human use; 282/2014 of 11 March 2014 on the establishment of a third Programme for the Union's action in the field of health (2014-2020); 1288/2013 of 11 December 2013 on establishing «Erasmus +»: the Union program for education, training, youth and sport.

Some Joint Directives of the European Parliament and of the Council are 2011/83 of 25 October 2011 on the protection of consumers' rights; 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the internal market.

An example of the EU Council's own acts is Regulation 517/2013 of 13 May 2013 on the adaptation of certain regulations and decisions in the field of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food security ... because of Republic of Croatia's accession.

The legislative role of the Council of the EU is expressed in «determining the broad policy guidelines», the regulatory consolidation and representation of interests

of the EU Member States, decision-making on the issue of preparing and introducing new legislation, supporting intergovernmental cooperation principle by legal means. The Council adopts legal acts by a qualified majority, unless otherwise is provided for by the Treaty. In the latter case, the Council decides unanimously or by simple majority. For example, the Council shall act unanimously when taking in new members of the EU, and on a simple majority – on procedural matters, as well as the adoption of its internal rules (Art. 240 of the TFEU). Not only the Council but other institutions, including the Commission and the European Parliament participate in the legislative procedure.

Important powers are vested in the Council of the EU within the framework of the common foreign and security policy in the sphere of criminal legal action. It takes decisions on the basis of Regulation (Directive) of the European Council. The Council may request the Commission to formulate provisions necessary for the common foreign and security policy. If a Member State takes emergency security measures it is obliged to inform the Council of such measures.

In some cases, the courts of the Member States or private individuals turn to the EU Court of Justice requesting an official interpretation of certain EU Council Directives.

For example, in the Colson case 14/83 of 10 April 1984, prejudicial inquiry was carried out to explain the provisions of European Union Council Directive 76/207/EEC of 9 February 1976 «On the implementation of the principle of equality of men and women in employment, vocational training, promotion and working conditions. «

In the case C-52/10 of 9 June 2011 «Konstantinos Giannikos (the plaintiff) against the National Radio and Television Council (Ethniko Symvoulío Radiotileorasis)» Konstantinos Giannikos applied to the EU Court to interpret Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by laws, regulations or administrative action of the Member States concerning the pursuit of television broadcasting activities.

The Council has the right to establish courts («Chambers») and appoint their members. It is also empowered to appoint persons to a wide range of positions in the various bodies of the EU (Economic and Social Committee, Committee of the Regions, Ombudsman, European controller of data protection, etc.). Decisions on appointment by the Council shall be taken unanimously. The EU Council has the authority to exercise budgetary function, on the basis of which it adopts the EU budget together with the Parliament.

The Council has some other wide powers such as: it adopts the annual «broad economic policy guidelines» addressed to Member States; it approves all events, legal acts in the framework of the common foreign and security policy; it cooperates with Member States in the criminal law area, and oversees the execution of decisions taken by the Council; it concludes agreements with third countries on behalf of the Union.

The Council also makes appointments to the EU institutions and bodies on its own or with the consent of the European Parliament (the Chairman and members of the European Commission, members of the Chamber and others.). These powers correspond to several functions: legislative, budgetary, policy making and coordination, and others.

For each case the method of decision-making is determined by the articles of the Treaties. They take into account the importance of the sphere of public life and the enormity of the decision made. The following principles are applied for different situations: the principle of unanimity, qualified majority, a simple majority. Special decision-making procedure applies when the Council concludes that there is a clear threat of a violation by a Member State of the principles enshrined in Art. 6 of the TEU. The decision in this case is adopted by a majority of 4/5 of votes on the basis of a reasoned proposal of 1/3 of the EU countries, Parliament or the Commission with a positive resolution of the European Parliament.

Of great importance is the presence of the permanent Committee of Permanent Representatives (COREPER), which reviews and approves drafts of almost all decisions taken by the Council. The Committee considers the drafts submitted for approval by the Council, and tries to reach a consensus between the states. If it succeeds then the Council shall approve the agreed text without debate.

3.1.4. European Commission

The European Commission as the EU's leading institution is created to reflect and protect the interests of European integration. The Commission promotes the general interests of the Union and to this end acts with relevant initiatives (Art. 17 of the TEU). It has coordinating, executive and management functions.

The Commission is located in Brussels, and its individual departments are in Luxembourg.

The main purpose of the Commission is to ensure and protect the common interests of the Union and to adopt all the necessary measures to achieve this objective.

It is possible to identify four main groups of the Commission's powers.

Firstly, it ensures compliance with the Treaties and the EU Constitution, legal acts adopted by the EU institutions to implement and apply primary law.

Secondly, the Commission proposes recommendations and gives opinions on all the issues dealt with in the constituent acts.

The recommendations are not binding. For example, On 6 June, 2008, the Commission issued a recommendation concerning the limitation of civil liability of auditors, which is accompanied by the assessment of the impact of this initiative. In the case C-410/09 of 12 May 2011 «Polish Phone Digital Office against electronic communications» (*Polska Telefonia Cyfrowa* v Prezes Urzędu Komunikacji Elek-

tronicznej) on the interpretation of Art. 58 of the Act of Accession 2003, the EU Court of Justice concluded that the Guidelines issued by the Commission are not regulations per se. These acts should serve as a guidance for national regulatory authorities in the course of inspections.

Thirdly, the Commission has its own regulatory authority. It is involved in decision-making by other institutions, primarily the EU Council and the European Parliament.

Decisions are compulsory for those to whom they are addressed. For example, on 27 August, 2015 the European Commission issued a decision on the participation of the European Union in the various anti-terrorist organizations, which applies only to the activities of these organizations.

Fourthly, the Commission ensures the implementation of decisions taken by the Council.

The European Commission plays a proactive and executive roles, which is seen in the regulatory power, when functioning as a manager of credits and in the legislative process (Art. 13-17 of the TEU, art. 249 of the TFEU).

The Commission is empowered to:

- 1) make proposals for the adoption of laws and decisions on the basis of the powers specified in the treaty;
- 2) to monitor the implementation of legislation;
- 3) to manage the financial sources of the EU;
- 4) to represent the interests of the EU.

Decision-making initiative rests on the European Commission. It develops drafts of regulations and directives, which are then adopted or rejected by the European Parliament, the European Council or the Council of the EU. For example, the Directive of the European Commission of August 1, 2006 2006/70/EC laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of politically exposed person and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis.

The case of 'Costa v ENEL' of 1964, which is enshrined in primary law, recognizes validity of the provision of the EC Treaty, according to which the EU Member States are obliged to consult the European Commission on some issues.

The European Commission itself may initiate proceedings against the Member States. An example is Case № 302/86 «Commission of the European Communities against the Kingdom of Denmark», also having a brief designation of «DanishBir-Kans» (Danish Beer Cans), in which the Commission accused Denmark that by setting the system under which all beer and soft drinks containers must be reusable the

Kingdom of Denmark evaded execution of the commitments made in accordance with Art. 30 of EEC Treaty. (European Court of Justice decision of 20 September 1988).

Candidate for the post of the President of the Commission is proposed to the European Parliament by the European Council, which makes a decision by a qualified majority. Chairman of the Commission is then elected by the European Parliament by a majority of votes of its members. After the election of the President of the Commission selects 27 other members of the Commission on the basis of proposals made by the EU Member States. The final list of Commissioners shall be agreed between the elected president and the EU Council.

Members of the Commission are independent from their governments and act in the interests of the Union. Their work is monitored by the European Parliament. From 1 November 2014 the Commission (including its President and the High Representative of the Union for Foreign Affairs and Security Policy) the Commission is to include the number of members which would correspond to 2/3 of the number of Member States, unless the European Council changes this number unanimously. From 2005, each Member State may nominate one representative to the Commission.

To date, the Commission consists of 28 members: the 27 Commissioners and the President. The new team is appointed every five years. The appointment of the members of the Commission requires the consent of all 28 EU member states. Each member of the Commission has a specific scope (direction) of activity referring to a specific directorate. In total there are 26 Directorates-General, including the Directorates of Foreign Affairs, Economy and Finance, the internal market and industry, competition, employment and social issues, and others.

Directorates General are divided into directorates which include units. There are also departments. The Commission's activity is ensured by the General Secretariat. The Commission's central structure also comprises services:

- 1) common services (Eurostat, the Bureau of publications, press office, etc.).
- 2) the individual directorates-general of internal activities (economic and financial matters, agriculture, common research center, education and culture, etc.);
- 3) Directorates-General for External areas (trade, development, enlargement, humanitarian aid office);
- 4) domestic services (budget, financial control, legal service, etc.).

The procedure of the formation, operation and powers of the Commission

Members of the Commission are selected on the «one member from each state» system, but the leading role in this matter belongs to the EU. From 1 November, 2014 the number of members constituting the Commission corresponds to 2/3 of the number of Member States, unless the European Council decides otherwise. The for-

mation of the Commission is preceded by approval of its Chairman, after which the candidate is proposed by qualified majority of the European Council to the European Parliament. Following the approval of the President by the Parliament, the Chairman together with the governments of the EU Member States selects candidates for membership in the Commission. The list of candidates selected for membership in the Commission is also submitted for approval to the Parliament. Upon receipt by the Commission of the parliamentary investiture its members are appointed by a qualified majority by a special decision of the EU Council.

The term of the Commission's powers is five years. The powers of the Commission can be differentiated into four groups: 1) to ensure the implementation of the Treaties and other regulations; 2) to give recommendations and opinions on all matters dealt with in the founding treaties; 3) to exercise its own administrative powers, and participate in decision-making by other institutions (the Council, the Parliament, etc.); 4) to ensure implementation of the decisions adopted by the Council, if their implementation rests with the Commission. The Commission has broad discretion in lawmaking.

Each of these groups of powers can be further differentiated into more specific ones such as 1) collection of information; 2) investigation of offenses and imposition of penalties, execution of the budget; 3) powers in legislature; 4) powers to form organs and appoint officers; 5) powers in the sphere of international relations.

The European Commission works under the leadership of its President, who distributes the duties among members of the Commission, presides at the meetings, sets the agenda, and together with the Secretary-General signs reports approved at the meetings of the Commission. The Commission is a collegial body, whose decisions are made on a collective basis. The Commission meets on a weekly basis and is considered eligible only in the presence of a quorum under its internal procedural rules. The Commission may establish subsidiary bodies and specialized agencies.

The Commission is the only EU institution introducing laws to the Parliament and the Council on the following issues: the protection of the interests of the EU and its citizens on the issues with which it is impossible to deal effectively at the state level; obtaining technical details of the rights through the work of the expert consultants and the public.

The Commission:

- a) manages the policy of the EU and allocates funding for the EU;
- b) establishes the priority areas for funding in conjunction with the Council and the Parliament;
- c) makes annual budgets for approval by the Parliament and the Council;
- d) controls how funds are spent under the supervision of the Court of Auditors;

- e) gives effect to the EU documents. Together with the EU Court of Justice, it ensures that the EU document is properly applied in all countries;
- f) represents the EU at international level;
- g) represents all EU member states in international organizations, especially in the areas of trade policy and humanitarian aid;
- h) negotiates international agreements for the EU.

3.1.5. The European Central Bank

After the introduction of the single currency in the European Union, there was a reorganization of the banking system of the Member States, as a result of which central banks were combined with each other. Thus, there appeared the European system of central banks led by the European Central Bank (the ECB) in 1988. The ECB is located in Frankfurt (Germany).

The ECB and national central banks constitute the European System of Central Banks. Within the system, it was necessary to specify ‘euro zone’ banks, which form the Eurosystem. The most important feature of the European System of Central Banks (ESCB) is that it is controlled by the ECB’s bodies that implement its powers. The main objective of the ESCB is to ensure the functioning of all the currency components of the Economic and Monetary Union in order to outline and implement the single monetary policy of the EU.

The legal basis for the ECB’s activities is laid down in the Treaty on the functioning of the EU and the status of the European System of Central Banks and of the European Central Bank. The ECB has broad powers, which include the right to impose penalties on the company, represent the ESCB in international organizations, carry out the task of «soft» control of credit institutions.

The ECB has legal personality and is empowered to authorize the issue of euro, which, according to the Treaty on the functioning of the EU, is its exclusive competence. It is independent in the exercise of its powers and the management of its finances (Art. 282 of the TFEU). Institutions and bodies of the Union, and the EU member states must respect this independence.

The administrative body is the ECB’s Executive Board, which consists of the President as the highest official of the Bank, Vice-President and four other members. Members of the Board are appointed on the basis of the principle of consensus for a term of eight years by the States of the ‘euro area’.

The Governing Council is the main internal body of the ECB, which consists of members of the ECB’s Executive Board and the leaders (managers) of the central banks of member states of the “euro area” (Art. 283 of the TFEU.).

The Directorate consists of the Chairman, Vice-Chairman and four members. They are appointed by the European Council for eight years on the recommendation of the EU Council, and after consultation with the Parliament and the Governing Council of the ECB.

For the coordination of the monetary policy within the framework of the euro single currency system with the central banks whose currency is not the euro, the General Council was created, which consists of Chairman, Vice-Chairman of the ECB and the Governors of the central banks of EU Member States. The General Council is chaired by the Chairman, and in his absence – by Vice Chairman of the ECB. It strengthens the cooperation between the national central banks, strengthens the coordination of the monetary policies of the Member States, monitors the functioning of the exchange-rate mechanism, and performs other functions. Chairman of the Board and members of the Commission can participate in its work but without the right to vote. The Chairman prepares meetings of the General Council, he is assisted by the Secretariat of the ECB.

The ECB has the status of a legal entity, has legal personality and its own authorized capital and reserves. The ECB's capital is 5 billion euros, which may be increased by the Board of Governors.

Thus, the ECB control system consists of the following structural units: the Governing Council and the Directorate, which are responsible for managing the ECB's current affairs. The Governing Council issues guidelines and take decisions on the tasks entrusted to the ESCB, as well as determines the monetary policy of the Union, publishes guidelines for the execution of their decisions; adopts rules of procedure defining the internal organization of the ECB and its governing bodies. It carries out advisory functions. Within its competence the ECB may submit opinions to institutions, EU bodies and agencies, as well as the authorities of the Member States. The Chairman, or in his absence – the Vice-Chairman heads the Governing Council and the ECB Directorate.

The Directorate is responsible for the monetary policy in accordance with the guidelines and decisions adopted by the Governing Council. It gives the necessary instructions to national banks. The Governing Council can delegate some additional powers to it. The Directorate is responsible for the preparation of the Governing Council meetings.

The ECB exercises its powers by issuing regulations, guidance, directions to the central banks of the Member States.

For example, the Regulation of the European Central Bank of 16 April 2015 amending Regulation 1011/2012 concerning statistics on securities holdings (ECB/2012/24) (ECB/2015/18).

It also adopts recommendations and conclusions which are not binding. The ECB's independence is guaranteed by target and functional autonomy; institutional and financial autonomy; personal and legal autonomy.

The state budget is controlled by the Council and the Commission, which are assisted by the Economic and Financial Committee, whose main function is to assist in the coordination of economic and financial policies of the Member States.

The treaties provide for such form of control over the movement of funds as long-term financial program. It is designed for guaranteed ordering of changes in the Union's expenses that the Union can afford to provide with its own means. The leading role in the implementation of the program belongs to the Economic and Financial Committee. With this program, the Economic and Financial Committee defines the maximum annual allocation for the implementation of obligations under the various items of expenditure in the way prescribed by constitutional laws. There is also judicial control.

An important place in the development of the financial system, banking, and monetary policy of the ECB belongs to the Economic and Monetary Union.

Thus, the most important functions of the ECB are the establishment of the interest rates at which commercial bank grant credits in the euro area; management of the funds supply and inflation; management of foreign exchange reserves of the euro zone, buying or selling currencies in order to maintain the balance of exchange rates; monitoring that financial markets and institutions are controlled by the Member States; ensuring the functioning of payment systems; ensuring the safety and reliability of the European banking system; authorizing the production of euro banknotes in the euro area; monitoring price trends and assessing the risks to price stability.

3.1.6. The Court of Auditors

The Court of Auditors (hereinafter – the CA) was established in accordance with the 1975 Budgetary Treaty and acquired the status of the institution under the Maastricht Treaty. Its activities are regulated by Art. 285-287 of the TFEU. The Court of Auditors was established in order to control the use of the EU funds, and to assist the EU in improving financial management. The Court of Auditors is located in Luxembourg.

The Court of Auditors is composed of representatives of the Member States (one from each state). The total number of members is 28. The CA is formed by the EU institutions. The auditors are appointed for six years after consultation with the European Parliament by the decision of the EU Council, which is adopted by a qualified majority. The EU Council votes for the entire list of candidates.

The head of the Court of Auditors is the President, who is elected by members of the Court from among its members for three years. He coordinates the activities

of the CA, monitors the exercise of the auditors' powers and the effectiveness of the functioning of the Court of Auditors. The rest of the auditors are grouped into audit groups and are responsible for areas assigned to them. Each group is headed by the group auditor.

The CA has the following powers: auditing; assisting in monitoring the implementation of the budget; submitting the pay-sheet to the EU Council and the European Parliament; counseling the EU Council and other bodies on taking certain decisions; applying to the Court with claims for annulment (of regulations, directives and other legal acts of the EU institutions and bodies, other than recommendations and opinions) or about failures to act.

The Court of Auditors represents the interests of the EU taxpayers. The CA:

a) has the right to inspect any person or organization, mastering the EU funds, including carrying out random checks in the EU institutions, the EU and the countries benefiting from EU aid;

b) formulates conclusions and recommendations in the audit reports for the European Commission and national governments;

c) sends the reports on suspected fraud, corruption or other illegal activities to OLAF;

d) prepares an annual report to the European Parliament and the EU Council, which the European Parliament considers;

e) gives an expert opinion for legislative bodies of the EU on how to improve EU financial management;

f) publishes proposals to amend the law in the field of financial management in the EU, as well as policy documents, surveys and special publications on the EU finances.

The CA focuses on the EU Commission, the main body responsible for the execution of the EU budget. It also works closely with the national authorities, since the Commission manages most of the EU funds (some 80 %) together with them.

The CA provides three types of audits: a) Financial audit, i.e. an exact verification of the financial position, the results of the annual cash turnover; b) Procedural audit, i.e. compliance with the order of the financial rules; c) Trust Audit, i.e. checking the possibility to achieve the financed objectives with the fewest resources and the most economical way.

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3.2. European Court system

3.2.1. Court of Justice of the European Union: an overview

European Court system is represented by the Court of Justice of the European Union (hereinafter – CJEU). The European Court of Justice is the Union's specialized institution of non-political nature. Through its activities, the Court has greatly promoted the preservation and strengthening of the rule of law in the Community / Union.

The CJEU is an institution independent from the Member States. The main purpose of the Court is to ensure uniform interpretation and application of the European Union law, in the form in which it is enshrined in the constituent acts. It is also intended to protect the rights and interests of individuals and legal entities from their possible violations by the EC institutions and bodies.

The CJEU is both an institution and the highest court of the EU. The CJEU is the collective term for the European Union's judicial system, but the single institution consists of three separate courts, each enjoying its own specific jurisdiction:

1) the Court of Justice (CJ), which was formerly known as the European Court of Justice (ECJ);

2) the General Court (GC), which was formerly known as the Court of First Instance (CFI);

3) the Civil Service Tribunal (CST), which in the words of the Treaty constitutes the EU's single "specialized court".

The European Court of Justice was founded by the Treaty establishing the European Coal and Steel Community, signed in 1951 (the Treaty of Paris). It was a single

court called the Court of Justice of the European Coal and Steel Communities. The Treaty gave the Luxembourg-based European Court of Justice the task of ensuring that “in the interpretation and application of this treaty and of rules laid down for the interpretation thereof, the law is observed.”

In 1957, the ratification of the Treaty establishing the European Economic Community, and the Treaty establishing the European Atomic Energy Community (Treaties of Rome) expanded the ECJ’s jurisdiction considerably, leading to its emergence as a supranational entity, in particular the court is a single institution for all the three Communities. From that moment it got its official name – the Court of Justice of the European Communities (currently – the Court of Justice of the European Union).

The Single European Act of 1986, along with amending the three previous Treaties, created the Court of First Instance to aid the ECJ in face of the steadily increasing flow of cases put before it for consideration.

In 1992, the Maastricht Treaty established two new ‘pillars’ of the European Union, which, due to concerns over judicial activism, were left out of the jurisdiction of the ECJ. The Court also expanded its jurisdiction, in particular, the ECJ was given an opportunity to impose sanctions on the Member States not implementing its decisions. Subsequent amending Treaties, however, namely the Treaty of Amsterdam 1997, extended the ECJ’s jurisdiction to cover the Justice and Home Affairs pillar.

The Statute of the Court of Justice was amended by the EU-Nice to reorganize its internal structure as a response to the increase in the number of judges as a result of the forthcoming enlargement. With regard to extending the powers of the Court of Justice, the new Art. 229A of the TEC created a legal basis to allow the Council, acting unanimously, to adopt provisions to confer jurisdiction on the Court of Justice in disputes relating to industrial property rights. This provision applies essentially to disputes between private individuals concerning the future Community patent.

The Nice Treaty also extended the European Parliament’s right of recourse before the Court of Justice (Art. 230 of the TEC). The European Parliament can now bring a case to the Court of Justice under the same conditions as the other institutions.

Finally, the Treaty introduced greater flexibility to adapt the judicial system in the future by introducing a number of provisions in the Court of Justice’s Statute (including the division of jurisdiction), which can be amended by the Council at the request of the Court of Justice or the Commission.

The Nice Treaty also extended the jurisdiction of the Court of First Instance. It is still the competent body to hear direct appeals, with the exception of those which, pursuant to the Statute of the Court of Justice, are dealt with by the latter. The new Treaty also provides the possibility for the Council to create specialist judicial chambers to hear various categories of appeal concerning certain subjects in the first instance. For

example, Declaration No 16, annexed to the Treaty, calls on the Court of Justice and the Commission to prepare a draft decision to create judicial chambers called “judicial panels” to rule on disputes between the Community and its servants (Art. 236 of the TEC).

The Treaty establishes the division of jurisdiction between these two bodies but specifies that it may be adjusted by their respective Statutes (Art. 225 TEC).

The Statute of the Court of Justice was amended by the Nice Treaty.

The above documents have been amended by the Treaty on European Union 2007 and the Treaty on the Functioning of the European Union 2007, which set out the rules governing all aspects of the CJEU.

Further details are provided by the Statute of the Court of Justice of the European Union and the CJEU’s rules of procedure. The Member States are responsible for setting the rules in the Treaties governing the CJEU’s operation through the usual process of negotiation associated with international treaties. Broadly speaking, the three courts are responsible for setting their own procedural rules, though any measures for reform that the CJEU might suggest remain subject to approval by the Council.

Thus, the legal basis of the internal organization and activities of the CJEU are: the Maastricht Treaty 1992 (Art. 19); The Statute of the Court of Justice; the TEU; the TFEU, (article 251—281); Rules of Procedure of the Court of Justice; Rules of Procedure of the General Court; Rules of Procedure of the Civil Service Tribunal.

The Court has the power to settle legal disputes between Member States, EU institutions, businesses and individuals.

The Court of Justice deals with requests for preliminary rulings from national courts, relating to acts adopted in the field of state aid, trade protection measures (dumping) and acts by which it exercises implementing powers, direct actions, certain actions for annulment and appeals against the decisions of the General Court.

The General Court is a judicial body that deals with the cases of direct jurisdiction and rules on all actions for annulment brought by private individuals and companies and some of such actions brought by the Member States, as well as appeals against the decisions of the Civil Service Tribunal.

A specialized tribunal, the Civil Service Tribunal, also adjudicates in disputes between the EU and its civil servants.

Thus, the main purpose of interpretation and application of the EU law is set forth before all the three instances.

All the three instances participate in the implementation of the Court’s main function, i.e. ensuring the application of the law in the interpretation and enforcement of the founding treaties and legal acts issued on its basis.

The Court of Justice, as the supreme judicial institution of the Union, retains competence for other judicial actions on fundamental questions for the Community order

and carries out this mission by way of questions referred by the national jurisdictions for a preliminary ruling.

The language used for the application, which may be one of the 24 official languages of the European Union, is chosen by the applicant. The proceedings in the oral phase of the procedure are simultaneously interpreted, as necessary, into various official languages of the European Union. The judges deliberate without interpreters in a common language, French. French is the internal working language, and all written pleadings are translated into French.

At a preliminary ruling the language of the applicant national Court of Member State is used.

The EU courts have their seat in Luxembourg.

3.2.2. The European Court of Justice as the highest court of the EU

3.2.2.1. The European Court of Justice: an overview

The Court of Justice (CJ), which was called the European Court of Justice (ECJ) prior to the entry into force of the Lisbon Treaty, is the highest legal authority in the EU.

The Court of Justice represents the judicial body in the EU and like the other EU institutions – the European Parliament, the European Council, European Commission, the European Central Bank and the Chamber of Accounts, is included in the institutional mechanism, which is aimed at promoting the values of the Union, and achieving the objectives which the Union was created for.

The Court of Justice (CJ) has jurisdiction to decide cases involving interpretation and application of the EU law. EU institutions and Member States may bring actions against each other and appeal for failure to implement or properly apply EU law, for instance the Commission may file a case against a Member State for not implementing a Directive. Legal or natural persons may appeal to the Court against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. The Court will also give preliminary rulings in cases referred to it by national courts when questions of EU law are involved in domestic proceedings.

The procedure before the Court of Justice is governed by provisions of the Statute of the Court of Justice, by its Rules of Procedure and by related texts.

The European Court of Justice has one judge per Member State, so it is composed of 28 Judges, so that all the EU national legal systems are represented. There are no dissenting opinions.

The Judges are appointed by common accord of the governments of the Member States after consultation of a panel responsible for giving an opinion on prospective candidates' suitability to perform the duties concerned for a renewable term of 6 years. They are chosen from among individuals whose independence is beyond doubt and who possess the qualifications required for appointment, in their respective countries, to the highest judicial offices, or who are of recognized competence (Art. 255 of the TFEU). Each judge has the support of a team of 3 qualified lawyers ('référéndaires') and 2 secretarial and administrative staff.

Before taking duties the elected Judge gives a public oath, promising to carry out the powers responsibly and impartially, without disclosing the secrets of the deliberation room. In addition, the judge cannot engage in any income activity without the permission of the EU Council, and has no right to occupy any position (political, or government).

The Judges select the President and the Vice-President among themselves by an absolute majority. They serve for three years. The President directs the work of the Court and presides at hearings and deliberations of the full Court or the Grand Chamber. The President has right to take interim measures on the case and to suspend the enforcement of the disputed EU legal acts. The Vice-President assists the President in the exercise of his duties and takes his place when necessary.

The Court is assisted by 11 Advocates-General. They are appointed by the governments of the Member States for a period of six years. Their role is to present a reasoned and independent opinion on the issue of law on the cases brought before the Court. They must do so publicly and impartially.

The opinion (conclusion) of the Advocates-General has no binding force for the Court. However, it plays a very significant role because it contains the analysis of the facts, references to the relevant provisions of the legislation and the full analysis of the previous judgments, as well as the analysis of arguments of the parties to the dispute and the Advocate-General's own assessment of the issues considered by the Court. This marks the end of the oral stage of the proceedings. If it is decided that the case raises no new question of law, the Court may decide, after hearing the Advocate General, to give judgment without an opinion.

The opinion (conclusion) exerts a great influence on the Court's judgment. However, an Advocate-General does not take part in awarding a judgment.

Judges choose the First Advocate-General for one year from among Advocates-General, who in turn distributes cases between Advocates-General for preparation of the motivated opinion (conclusions).

The Secretary's functions are performed by the Registry consisting approximately of 1000 people under the Registrar's supervision. The Registrar is appointed by the

Court for a period of six years under the authority of the President of the Court. The Registry is responsible for maintaining the case-files for pending cases and for keeping the register in which all the procedural documents are entered.

The Registry receives, keeps and serves the applications, pleadings and other procedural documents sent to the Court by the lawyers and agents for the parties. It is responsible for all correspondence relating to the progress of proceedings before the Court.

The ECJ works in 10 Chambers. The Court of Justice can sit as a full Court, a Grand Chamber of 15 Judges, or Chambers of five or three Judges, depending on the complexity and importance of the case. The Court sits as a full court in the particular cases prescribed by the Statute of the Court (including proceedings to dismiss the European Ombudsman or a Member of the European Commission who has failed to fulfill his or her obligations) and where the Court considers that a case is of exceptional importance. It sits as a Grand Chamber when a Member State or an institution which is a party to the proceedings so requests, and in particularly complex or important cases.

Other cases are heard by Chambers of three or five Judges. The Presidents of the Chambers of five Judges are elected for three years, and those of the Chambers of three Judges for one year. Each case is assigned to 1 judge (the “judge-rapporteur”) and 1 advocate general.

One of the 3 judges of the chamber is appointed as “Judge Rapporteur” (JR). The Judge Rapporteur’s primary responsibilities are to examine the case in detail, to present to their colleagues a synthetic analysis of the issues and evidence after the written pleadings are filed, to take or propose any necessary procedural decisions, including the organization of the oral hearing, and then to draft a judgment that reflects their subsequent deliberations. At any one time, a Judge Rapporteur will typically be responsible for 50-70 pending cases at a time, each at different stages from newly filed to ready for judgment.

3.2.2.2. Jurisdiction of the Court of Justice

The rulings of the CJ take two main forms: preliminary rulings, and direct actions. There are:

- preliminary references, which provide interpretative judgments at the request of national courts in order to help them decide a case with an EU law dimension;
- infringement actions against Member States for non-compliance with EU law potentially leading to fines, brought by either the Commission or other Member States;

- actions for annulment of EU legislation or to require an institution to act, brought by a Member State or by one of the institutions, similar to judicial review proceedings in the UK.

- appeals against GC judgment.

The most common types of cases are:

A) Preliminary ruling

The courts in each EU Member State are responsible for ensuring that EU law is properly applied in that country. If a national court is in any doubt about the interpretation or validity of an EU law it may, and sometimes must, ask the Court of Justice for advice. This advice is given in the form of a binding ‘preliminary ruling’. This ruling is an important channel for citizens, through their national courts, to establish how far EU laws affect them.

By preliminary rulings the Court has affirmed and developed the basic principles of the European Union law.

Principle of “direct effect”

In the case of *Van Gend en Loos* (Decision 5.02.1963, case № 26/62), the ECJ stated the principle of “direct effect”, which allows individuals to rely on rights conferred by EC law, rather than just states being able to do this. The decision was based on the reasoning that:

“The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community Law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”

This ruling was crucial as it in effect incorporated EC law into the national systems, thus making it available to its citizens. This was purely an ECJ initiative using a teleological reading of the Treaty provisions, and was not made explicit anywhere in the text of the Treaty.

This judgments has over the years brought to light the fundamental principles which were implicit in the wording and the structure of the founding treaties and by giving judicial expression to those principles has defined the characteristic features of the community legal order. It is the first decision of the Court of Justice which is today recorded among the “famous trials” in history, the ones we consider as “classic” decisions.

Principle of “primacy”

The Court established the principle of the “primacy” of Community law in the case of *Costa v ENEL* (Decision 15.07.1964, case № 6/64). This principle was not made explicit anywhere in the Treaty provisions either. This principle dictates that where there is a conflict between national and EC law, EC law will prevail.

The case corroborated this “new legal order” stating that this direct effect could not be limited by the member states. In the *Costa v. ENEL* case the Court ruled that member states had definitively transferred their sovereign rights to the Community and Community law could not be overridden by domestic law. The judgment has been seen as the completion of a revolution. Now, this principle is fixed in the Declaration No. 17 attached to the Treaty of Lisbon of 2007.

The case *Internationale Handelsgesellschaft v Einfuhr* (Decision 17.12.1970, case № 11/70) has been seen as a necessary consequence of the two former cases, a case “typical of a period when, after the autonomous, supranational framework of Community law had been established, it had to be endowed with the principles inherent in the rule of law.” This effect was considered by the plaintiff as a violation of his right of action and economic liberty. The case “occupies a distinct position” or marked the “rights of passage” as the Court in 1970 declared that “respect for fundamental rights forms an integral part of the general principles of law” protected by the Court of Justice.

The principle of supremacy even when it comes to national legislation adopted at a later date than the Treaties was clearly expressed in the famous case of *Simmenthal SPA v Amministrazione delle Finanze dello Stato* (Decision 09.03.1978, case № 106/77). Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legal provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law. The establishment of the so-called principle of mutual recognition has attracted much attention.

We can therefore conclude that the ECJ’s rulings have had a large and probably even unexpected impact on the Community. The Court has set up some of the fundamental principle of EC law and has encouraged the law to expand to new areas. The ECJ has played a crucial role in the development of EC law.

B) Infringement proceedings (Actions for failure to fulfill obligations)

The Commission, or (in some rare cases) a Member State, can initiate these proceedings if it has reason to believe that a certain Member State is failing to fulfill its obligations under EU law. Before bringing the case before the Court of Justice, the Commission conducts a preliminary procedure in which the Member State concerned is given the opportunity to reply to the complaints addressed to it. If that procedure does not result in the Member State terminating the failure, an action for infringement of EU law may be brought before the Court of Justice.

The action may be brought by the Commission – as, in practice, is usually the case – or by a Member State. If the Court finds that an obligation has not been fulfilled, the State must bring the failure to an end without delay. If, after a further action is brought by the Commission, the Court of Justice finds that the Member State concerned has not complied with its judgment, it may impose on it a fixed or periodic financial penalty. However, if measures transposing a directive are not notified to the Commission, it may propose that the Court impose a pecuniary penalty on the Member State concerned, once the initial judgment establishing a failure to fulfill obligations has been delivered. The Court investigates the allegations and gives its judgment. If found to be at fault, the accused Member State must set things right without delay to avoid the fines the Court can apply.

C) Proceedings for annulment

If any of the Member States, the Council, Commission or (under certain conditions) the Parliament believes that a particular EU law is illegal they may ask the Court to annul it. These ‘proceedings for annulment’ can also be used by private individuals who want the Court to annul a particular law because it directly and adversely affects them as individuals.

The Court finds the act invalid from the moment of acceptance or if necessary from the moment of adjudication.

D) Proceedings for failure to act

The treaty requires the European Parliament, the Council and the Commission to make certain decisions under certain circumstances. If they fail to do so, the Member States, other EU institutions and (under certain conditions) individuals or companies can lodge a complaint with the Court so as to have this violation officially recorded.

The national courts in each EU country are responsible for ensuring that EU law is properly applied in that country. It is therefore very important for AGE to monitor relevant ECJ rulings and let its members know across the EU as this may have an impact on the way national courts take decisions.

Appeals on points of law may only be brought before the Court of Justice against judgments and orders of the General Court. If the appeal is admissible and well found-

ed, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself decide the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

Decisions of the General Court on appeals against decisions of the European Union Civil Service Tribunal may, in exceptional circumstances, be reviewed by the Court of Justice as provided in the Protocol on the Statute of the Court of Justice of the European Union.

In practice of the Court a number of proceedings are directly devoted to a problem of responsibility of Member States for non-execution of rules of law.

In case *Francovich and Bonifaci v Italy* (Decision 19.11.1991, case № 6/90), *Dillenkofer* (Decision 08.10.1996, case № C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94), the court established “state liability”. The idea of the case is that an individual who has been affected by the state not implementing a Directive on time can claim compensation from the state. Another aspect of the ECJ decision is that of remedies available to individuals where the states or national legal systems are at fault.

E) Appeals (appellate instance)

Appeals on points of law may only be brought before the Court of Justice against judgments and orders of the General Court. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself decide the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

The rulings of the CJ take two main forms: preliminary rulings, and direct actions.

3.2.2.3. *The procedure in the European Court of Justice*

All cases are submitted to the Registry at the Court and a specific Judge and Advocate General are assigned.

After submission, there are two steps: first, a written stage and then an oral stage. In the first stage, all the parties involved submit written statements and the Judge assigned to the case draws up a report summarizing these statements and the legal background to the case. This report is discussed at the Court’s General Meeting which decides on the panel of judges that will hear the case and whether oral arguments are necessary.

Then comes the second stage – the public hearing – where the lawyers put their case before the Judges and the Advocate General, who can question them. After the oral hearing, the Advocate General assigned to the case draws up his or her opinion.

In the light of this opinion, the Judge draws up a draft ruling which is submitted to the other Judges for examination. The Judges then deliberate and deliver their judgment. Judgments of the Court are decided by a majority and pronounced at a public hearing. In most instances the text is available in all official languages of the EU on the same day. Dissenting opinions are not expressed.

However, a distinction must be drawn between, first, references for preliminary rulings and, second, other actions, known as ‘direct actions’.

The national court submits questions to the Court of Justice about the interpretation or validity of a provision of European Union law, generally in the form of a judicial decision in accordance with national procedural rules. When that request has been translated into all the European Union languages by the Court’s translation service, the Registry notifies the parties to the national proceedings, and all the Member States and the institutions of the European Union of the request. A notice is published in the Official Journal of the European Union stating, *inter alia*, the names of the parties to the proceedings and the content of the questions. The parties, the Member States and the institutions have two months within which to submit written observations to the Court of Justice.

An action before the Court must be brought by application addressed to the Registry. The Registrar publishes a notice of the action in the Official Journal, setting out the applicant’s claims and arguments. At the same time, the application is served on the party sued, who has one month within which to lodge a defence. The applicant may lodge a reply and the defendant a rejoinder, the time allowed being one month in each instance. The time-limits for lodging these documents must be complied with unless an extension is granted by the President.

In both types of action, a Judge-Rapporteur and an Advocate General, responsible for monitoring the progress of the case, are appointed by the President and the First Advocate General respectively.

Not all cases follow this standard procedure. When the urgency of a case so dictates, simplified and expedited procedures exist which allow special forms of procedure.

Where a question referred for a preliminary ruling is identical to a question on which the Court has already been called on to rule, or where the answer to the question admits of no reasonable doubt or may be clearly deduced from existing case law, the Court may, after hearing the Advocate General, give its decision by reasoned order, citing in particular a previous judgment relating to that question or the relevant case law.

The expedited procedure enables the Court to give its rulings quickly in very urgent cases by reducing the time-limits as far as possible and giving such cases absolute

priority. On application by one of the parties, the President of the Court may decide, on a proposal from the Judge-Rapporteur, and after hearing the Advocate General and the other parties, whether the particular urgency of the case requires the use of the expedited procedure. Such a procedure can also be used for references for preliminary rulings. In that case, the application is made by the national court seeking the preliminary ruling and must set out in the application the circumstances establishing that a ruling on the question put to the Court is a matter of exceptional urgency.

Applications for interim measures seek suspension of the operation of measures which an institution has adopted and which form the subject matter of an action, or any other interim order necessary to prevent serious and irreparable damage to a party.

Preparatory inquiries

In all proceedings, once the written procedure is closed, the parties may state, within three weeks, whether and why they wish a hearing to be held. The Court decides, after reading the proposal of the Judge-Rapporteur and hearing the views of the Advocate General, whether any preparatory inquiries are needed, what type of formation the case should be assigned to, and whether a hearing should be held for oral argument, for which the President will fix the date.

The public hearing and the Advocate General's opinion. When it has been decided that an oral hearing will be held, the case is argued at a public hearing, before the bench and the Advocate General. The Judges and the Advocate General may ask the parties any questions they consider appropriate. Some weeks later, the Advocate General delivers his or her Opinion before the Court of Justice, again in open court. He or she analyses in detail the legal aspects of the case and suggests the Court of Justice completely independently the response which he or she considers should be given to the problem raised. This marks the end of the oral stage of the proceedings. If it is decided that the case raises no new question of law, the Court may decide, after hearing the Advocate General, to give judgment without an Opinion.

3.2.2.4. Judgments in the European Court of Justice

The Judges deliberate on the basis of a draft judgment drawn up by the Judge-Rapporteur. Each Judge of the formation concerned may propose changes. Decisions of the Court of Justice are taken by majority in closed session and no record is made public of any dissenting opinions.

The decisions are taken out on behalf of the Court in general, judges cannot declare a dissenting opinion (Rules of Procedure of the Court of Justice do not recognize a dissenting opinion of the judge). The results of the vote are not revealed. The judgment is passed by an odd number of judges.

Judgments are signed by all the Judges who took part in the deliberations and their operative part is pronounced in open court. Judgments and the Opinions of the Advocates General are available on the CURIA Internet site on the day they are delivered. They are, in most cases, subsequently published in the European Court Reports.

There are no court fees for proceedings before the Court of Justice. On the other hand, the Court does not meet the fees and expenses of the lawyer entitled to practice before a court of a Member State by whom the parties must be represented. However, a party unable to meet all or part of the costs of the proceedings may, without having to instruct a lawyer, apply for legal aid. The application must be accompanied by all necessary evidence establishing that party's lack of means.

3.2.3. The General Court

3.2.3.1. The General Court: an overview

The General Court (previously – Court of First Instance) was created in 1989 to hear certain types of cases (particularly those involving private individuals) in order to share the workload of the Court of Justice. The General Court has the task of ensuring that the law is observed in the interpretation and application of the Treaties of the European Union and the provisions adopted by the competent Union institutions.

The General Court has jurisdiction, *inter alia*, over actions for annulment of EU acts brought by natural or legal persons, as well as actions in the field of competition and anti-dumping law, EU trademarks and actions seeking compensation for damage caused by EU institutions or their staff. Within two months, the decisions of the General Court are appealable to the ECJ on points of law only.

The procedure before the General Court is governed by provisions of the Statute of the Court of Justice, in particular those contained in Title IV thereto, by its Rules of Procedure and by related texts.

The General Court is also composed of 28 Judges, appointed by common accord of the governments of the Member States for a six-year term. The judges are appointed by Member States after consultation of a panel responsible for giving an opinion on candidates' suitability to perform the duties of Judge. The Judges perform their duties in a totally impartial and independent manner.

There are no separate advocates-general, although any judge may act as such, in exceptional circumstances.

The Judges of the General Court also elect the President among themselves for a three-year term. The President is responsible for directing the activity and services of the Court, presides at hearings and deliberations in closed sessions and deals with applications for interim measures.

Similarly to the Court of Justice, the General Court works in 9 Chambers. This Court sits in Chambers of three or five Judges (sometimes a single Judge) to hold hearings. Around 80 % of General Court cases are heard by three Judges. A Grand Chamber of 13 Judges, or a full Chamber of 28, may meet if the complexity or importance of the case justifies this.

The Presidents of the Chambers of five Judges are elected from amongst the Judges for a period of three years. For each case within the chamber one of the 3 judges is appointed as Judge-Rapporteur. The Judge-Rapporteur's primary responsibilities are to examine the case in detail, to present to their colleagues a synthetic analysis of the issues and evidence after the written pleadings are filed, to take or propose any necessary procedural decisions, including the organization of the oral hearing, and then to draft a judgment that reflects their subsequent deliberations. A Judge -Rapporteur will typically be responsible for 50-70 pending cases at a time, each at different stages from newly filed to ready for judgment.

The General Court has its own Registry managed by the Registrar, but uses the administrative and linguistic services of the institution for its other requirements. The Registrar, appointed by the Court for a 6-year period, is responsible for assisting the Court, the President, and the judges in all their duties. The Registrar is responsible for the Court's archives and publications.

3.2.3.2. Jurisdiction of the General Court

The General Court has jurisdiction to hear and determine:

actions brought by natural or legal persons against acts of the institutions, bodies, offices or agencies of the European Union (which are addressed to them or are of direct and individual concern to them) and against regulatory acts (which concern them directly and which do not entail implementing measures) or against a failure to act on the part of those institutions, bodies, offices or agencies; for example, a case brought by a company against a Commission decision imposing a fine on that company;

actions brought by the Member States against the Commission;

actions brought by the Member States against the Council relating to acts adopted in the field of state aid, trade protection measures (dumping) and acts by which it exercises implementing powers;

actions seeking compensation for damage caused by the institutions or the bodies, offices or agencies of the European Union or their staff;

actions based on contracts made by the European Union which expressly give jurisdiction to the General Court;

actions relating to intellectual property brought against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) and against the Community Plant Variety Office;

– appeals, limited to points of law, against the decisions of the Civil Service Tribunal.

3.2.3.3. The proceedings

In principle, the proceedings include a written phase and an oral phase.

3.2.4. The written phase

An application, drawn up by a lawyer or agent and sent to the Registry, opens the proceedings. The main points of the action are published in a notice, in all official languages, in the Official Journal of the European Union. The Registrar sends the application to the other party to the case, which then has a period of two months within which to file a defence. In direct actions, in principle, the applicant may file a reply, within a certain time-limit, to which the defendant may respond with a rejoinder.

Any person who can prove an interest in the outcome of a case before the General Court, as well as the Member States and the institutions of the European Union, may intervene in the proceedings. The intervener submits a statement in intervention, supporting or opposing the claims of one of the parties, to which the parties may then respond.

The oral phase.

During the possible oral phase of the proceedings a public hearing is held opened by the President of the Chamber. When the lawyers are heard, the Judges can put questions to the parties' representatives.

The Judge-Rapporteur summarizes the facts relied on and the arguments of each party and, if applicable, of the interveners in a report for the hearing. This document is available to the public in the language of the case.

The Judges then deliberate on the basis of a draft judgment prepared by the Judge-Rapporteur and the judgment is delivered at a public hearing.

The decisions of the General Court may, within two months, be subject to an appeal before the Court of Justice, limited to points of law.

The measures of inquiry and the examination of witnesses concern the appearance of the parties, the request for information and production of documents, the witness

testimony, the expert's report, and an inspection of the place in question. Certain facts are proved by the witnesses. The latter are summoned by the Court, possibly at the request of the parties.

Proceedings for interim measures

An action brought before the General Court does not suspend the operation of the contested act. The Court may, however, order its suspension or other interim measures.

The President of the General Court or, if necessary, the Vice President, rules on the application for interim measures in a reasoned order.

Interim measures are granted only if three conditions are met: a) the action in the main proceedings must not appear, at first sight, to be without reasonable substance; b) the applicant must show that the measures are urgent and that it would suffer serious and irreparable harm without them; c) the interim measures must take account of the balancing of the parties' interests and of the public interest.

The order is provisional in nature and in no way prejudices the decision of the General Court in the main proceedings. In addition, an appeal against it may be brought before the Vice President of the Court of Justice.

Expedited procedure

This procedure allows the General Court to rule quickly on the substance of the dispute in cases considered to be particularly urgent.

The expedited procedure may be requested by the applicant or by the defendant. It may also be adopted at the General Court's own motion.

Special forms of procedure

An action for annulment does not have suspending effect; an application to suspend the operation of a contested measure may be made by the applicant if it brings an action before the Court. In particular, the application for suspension must specify the subject matter of the proceedings and the circumstances giving rise to the urgency, which justify the suspension sought.

Third-party proceedings

In the case of third-party proceedings, namely an application to the judge to rule again on a case which has already received a judgment, they can be requested within two months following publication of the judgment in the Official Journal. A revision of the judgment may also be required in the case of an error.

Settling the disputes relating to intellectual property rights

This type of dispute concerns appeals to the Office for Harmonization in the Internal Market (OHIM) concerning the application of rules relating to intellectual property rights.

Interveners other than the applicant may intervene during the course of the proceedings and shall have the same rights as the principal parties.

Appeals against decisions of the European Civil Service Tribunal

The General Court is responsible for handling appeals against decisions of the Civil Service Tribunal. For this type of appeal, an application is lodged with the Registry of the General Court or of the Civil Service Tribunal. The language of the proceedings is that of the Civil Service Tribunal decision which is the subject of the appeal.

The parties may present their case, which may lead to either the rejection of the appeal or to the annulment of the Civil Service Tribunal decision.

The procedure before the General Court is free of court fees. On the other hand, legal aid may be granted specifically to cover costs relating to legal assistance and representation before the Court.

3.2.4. Civil Service Tribunal

The Civil Service Tribunal has jurisdiction over disputes between the European Union and its civil servants.

The Civil Service Tribunal comprises 7 Judges appointed by the Council for a renewable period of 6 years, and the President, elected by the Judges themselves for a renewable period of 3 years. Those Judges may be supplemented by temporary Judges, who are called upon to stand in for member Judges who are prevented on a long-term basis from participating in the settlement of disputes.

When appointing the Judges on the proposal of the committee, the Council ensures a balanced composition of the Civil Service Tribunal on as broad a geographical basis and as broad a representation of the national legal systems as possible.

The Civil Service Tribunal works in 3 Chambers. However, whenever the difficulty or importance of the questions of law raised justifies it, a case may be referred to the full court. Furthermore, in certain cases determined by its Rules of Procedure, the Civil Service Tribunal may sit in a Chamber of five Judges or as a single Judge. The Judges appoint a Registrar for a term of 6 years. The Civil Service Tribunal has its own Registry, but makes use of the services of the Court of Justice for its other administrative and linguistic needs.

Within the judicial institution of the European Union, it is the Civil Service Tribunal whose special field is the sphere of disputes involving the European Union civil

service, this jurisdiction having previously been exercised by the Court of Justice and then, following its creation in 1989, by the Court of First Instance (now the General Court).

It has jurisdiction to hear and determine at first instance disputes between the European Union and its servants pursuant to Article 270 of TFEU, which as a result represents some 150 cases a year for approximately 40 000 members of staff of the institutions, bodies, offices and agencies of the European Union. These disputes concern not only questions to do with working relations in the strict sense (pay, career progress, recruitment, disciplinary measures, etc.), but also the social security system (sickness, old age, invalidity, accidents at work, family allowances, etc.). It also has jurisdiction in cases concerning certain specific employees, in particular, those of Eurojust, Europol, the European Central Bank, the Office for Harmonisation in the Internal Market (OHIM) and the European External Action Service. On the other hand, it may not hear and determine cases between national administrations and their employees.

The decisions given by the Civil Service Tribunal may, within 2 months, be subject to an appeal to the General Court on points of law only. The decisions on appeal by the General Court may in turn be re-examined before the Court of Justice, in exceptional circumstances.

The procedure before the Civil Service Tribunal is governed by provisions of the Statute of the Court of Justice, in particular those contained in Annex I thereto, by its Rules of Procedure and by related texts.

As a rule, the proceedings include a written phase and an oral phase.

The written phase

An application, drawn up by a lawyer and sent to the Registry, opens the proceedings. That document may be lodged by electronic means using the e-Curia application. The Registrar sends the application to the opposing party. The latter has a period of 2 months to file a defence. The Civil Service Tribunal may decide that a second exchange of written pleadings is necessary.

Any person who can prove an interest in the outcome of a case before the Civil Service Tribunal, as well as the institutions, bodies, offices and agencies of the European Union and the Member States, may intervene in the proceedings. The intervener files a statement in intervention, supporting or opposing the form of order sought by one of the parties, to which the latter may then respond. The intervener may also submit observations at the oral phase.

The oral phase

During the oral phase a public hearing is usually held. During the hearing, the Judges can put questions to the parties' representatives and, where appropriate, to the parties themselves. The Judge-Rapporteur draws up a preparatory report for the hear-

ing, containing the essential elements of the case and indicating the points on which the parties are to focus their oral arguments. This document is available to the public in the language of the case. The Judges deliberate on the basis of draft grounds prepared by the Judge-Rapporteur. The judgment is delivered at a public hearing.

Proceedings for interim measures: Bringing an action before the Civil Service Tribunal does not cause the operation of the contested act to be suspended. The Tribunal may, however, order suspension of the act or other interim measures. The President of the Civil Service Tribunal or, in some circumstances, another Judge rules on the application for interim measures by way of reasoned order.

Interim measures are granted only if three conditions are met:

1. the substance of the main proceedings must appear, at first sight, to be well founded;
2. the applicant must establish the urgency of the measures in the absence of which he would suffer serious and irreparable harm;
3. the interim measures must take account of the weighing up of the parties' interests and the public interest.

The order is provisional in nature and in no way prejudices the decision of the Civil Service Tribunal in the main proceedings. In addition, an appeal against it may be brought before the President of the General Court.

Amicable settlement of disputes

At all stages of the procedure, including the time when the application is filed, the Civil Service Tribunal may try to facilitate an amicable settlement of the dispute.

The procedure before the Civil Service Tribunal is free of court fees. On the other hand, the costs of the lawyer entitled to appear before a court in a Member State, by whom the parties must be represented, are not paid by the Civil Service Tribunal. A party that is not able to meet the costs of the case may, however, apply for legal aid.

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3.3. EU bodies

3.3.1. The European Economic and Social Committee

3.3.1.1. The European Economic and Social Committee: an Overview

The European Economic and Social Committee (hereinafter – EESC, the Committee) was established in 1957 on the basis of the Treaties of Rome with the purpose of involving the interested economic and social groups in the formation of the European market and ensuring the institutional machinery for briefing the European Commission and the Council of Ministers on matters relating to the conduct of the European Union.

The Single European Act 1986, the Maastricht Treaty 1992, the Amsterdam Treaty 1997 and the Nice Treaty of 2000 strengthened the role of the EESC.

Thus, the statutory basis of the Committee's activities is formed with the Treaty of Rome 1957, article 13 TEU and article 300-304 TFEU (as amended by the Lisbon Treaty).

The EESC brings together representatives of socio-professional groups open to expressing their points of view on topical issues of economic and social development of Europe.

The headquarters of the EESC are in Brussels.

The Committee has three main key objectives:

- a) to provide the balanced policy of the EU, including participation by consultation in the legislative process. It provides advisory support (through opinions, dialogues and other actions) of the European Parliament, the Council and the Commission;
- b) to promote the development of inclusive policy framework of the EU. The Committee acts as a bridge between the EU institutions and civil society, a forum for dialogue, exchange of experience and information;
- c) to ensure the interests of civil society organizations, as well as safeguarding the values on which the whole system of European integration is based.

Thus, the main task of the Committee is the formation and expression of opinions on pan-European issues to the Council, the Commission and the European Parliament.

Consultation of the Commission and the Council with the EESC is mandatory in certain cases, in others it is optional. However, the EESC can make an opinion on any issue of interest to it on its own initiative.

The Single European Act and the Maastricht Treaty extended the range of issues on which the Commission and the Council are obliged to request the advice of the Committee. In particular, they touched on new areas of activity such as regional policy and the environment. The Amsterdam Treaty also strengthened the role of the Committee,

providing that not only the Commission and the Council, but also the European Parliament are obliged to consult the Committee. On average, each year the Committee issues about 170 advisory documents and opinions, 15 percent being on its own initiative. All opinions of the Committee are submitted to the organs of the Community responsible for the decision-making and then published in the “Official Journal of the European Union”.

The EESC carries out active work in the field of preparation of proposals to the draft laws of the Council and the Parliament.

The EESC has been expanding its powers over the last years. It now acts as a forum for discussion of issues of the single market, and holds a number of events directed to the achievement of the main goal: to make the European Union closer to the people and society.

The Committee meets in full force in plenary session nine times a year. The primary function of plenary sessions is the adoption of the Committee’s opinions on the basis of the drafts prepared by sections. Opinions are adopted by a simple majority vote.

There are some categories in the organizational structure of the Committee. These are structural units which are formed on a voluntary basis from members of the Committee. Each member can belong to only one category. At the end of 2015, their total number was five: The Consumers and Environment Category (CEC), The Farmers’ Category, The SMEs, Professions and Crafts, The Social Economy Category, the Transport Category.

For the purpose of monitoring and applied research within the Committee there are four supervisory sectors: The Single Market Observatory, The Sustainable Development Observatory, The Labour Market Observatory, The Former Lisbon Strategy Observatory.

Organizational support of the Committee’s activities is entrusted to the General Secretariat headed by the Secretary General, accountable to the President of the Committee.

The Committee maintains regular communication with regional and national economic and social councils. These relationships mainly include the exchange of information and joint discussions on specific issues.

The Committee organizes public hearings, discussions on important issues in the field of economics, and social policy, which affect related areas of activity, for example, the environment. So, in the beginning of 2016 the EESC helped initiate a public discussion on the issue of forming a new design of the energy market of Europe.

Thus, the Committee brings together representatives of various economic and social components of civil society in the EU. The Committee plays an advisory role for the three main institutions – the European Parliament, the Council and the European Commission. It represents a peculiar bridge between the EU and citizens of the EU Member States.

3.3.1.2. Internal structure of the Committee

The EESC brings together 350 representatives (councillors) from different socio-economic groups representing the interests of European civil society.

The members of the Committee are appointed by the Council for a term of five years upon recommendation of the national governments. They are independent and cannot hold any other mandates in the EU system. The last appointment was in October of 2015 (the mandate 2015-2020).

The members of the Committee belong to one of three groups: employers, workers and representatives of various interests.

The employers' group (Group 1) consists of 117 members, entrepreneurs and representatives of commercial organizations working in the fields of industry, commerce, services, and agriculture. The main objective of the Group is to support integration processes in Europe through the development of entrepreneurship and business.

The group of workers (Group 2) brings together representatives of more than 80 trade unions. The Group covers the areas of General professional employment: the fight against discrimination, against lack of education; the creation of secure and favorable work conditions.

The various interests group (Group 3) consists of 111 members who represent the interests of different social groups in specific areas of the economy, such as farming, small business, craft, noncommercial partnership, consumer market, and environment. The Group also represents socially vulnerable groups (disabled people, young people, poor people), volunteer sector, medical, scientific and academic community.

According to the lists submitted by national governments, the EU Council formally appoints members of the groups. The groups hold consultations with bodies of the Committee on any matters related to their activities. Each group elects its President.

Every two and a half years the EESC elects a Bureau with a President and two Vice-presidents from representatives of each of the three groups.

The President is responsible for organizing the current work of the Committee. The Vice-President, who replaces him in case of absence, assists him. The President represents the Committee in relations with third parties: the institutions and bodies of the EU, other organizations and States.

The main objective of *the Bureau* is to organize and coordinate, but also to determine the directions of various structural subdivisions of the Committee.

Six sections organize the Committee's work: Agriculture, Rural Development and the Environment (NAT), Economic and Monetary Union and Economic and Social Cohesion (ECO), Employment, Social Affairs and Citizenship (SOC), External Relations (REX), The Single Market, Production and Consumption (INT), Transport, Energy, Infrastructure and the Information Society (TEN).

The Advisory Committee on industrial changes (CCMI) has been incorporated into structure of the Committee.

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3.3.2. The Committee of the Regions of the European Union

3.3.2.1. The Committee of the Regions: an overview

The Committee of the Regions (hereinafter – the CoR) appeared in the structure of the EU according to the Maastricht Treaty in 1992. As a result of the development of the principle of subsidiarity within the EU, laid down in Article 5(3) of the TEU, the CoR has become an objective need to improve the representation of regional interests at the EU level. Under the principle, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol. Moreover, the Committee has its own practical guide on the infringement of the subsidiarity principle.

This principle set the vector for the realization of good governance in the areas of EU competence, such as support for regional policy in the sphere of industry, tourism, education and science. The Committee's role was to promote the local and regional interests with respect to the European Union law. The CoR does this by submitting reports (opinions, reports, resolutions) in response to a proposal of the European Commission.

According to Art. 300(1) of the TFEU, the Committee shall assist the European Parliament, the Council and the Commission, exercising advisory functions. Before making decisions, these authorities should consult the Committee on issues related to local and regional authorities in the EU (in the framework of employment policy, the environment or public health issues, and others).

In accordance with the provisions of Chapter 3 of the TFEU, the Council establishes a Committee (Committee members and their alternates) unanimously on a proposal from the Commission. In accordance with Article 305 of the TFEU, the number of members should not exceed 350 (and their 350 deputies). However, these figures were increased in connection with the accession of Croatia to the EU. Currently, the Committee has 353 members (and the same number of alternates) from all 28 EU Member States.

Members of the CoR and their deputies are appointed for a term of five years by the EU Council on the proposal of their States. While each State chooses its own candidates, the whole composition should reflect the national political, geographical and regional / local balance. Members are elected from the leaders and key figures of the local or regional authorities in their home region of the Member State.

For instance, Germany is represented in the CoR by 24 delegates and 24 deputies. Their election arises particularly from the federal structure of Germany. The delegation of Germany consists of: a) 21 members and 21 deputy representing the 16 federal states and the German Parliament; five seats are in the rotation system on the basis of the population; b) three members and their alternates representing the three local government organizations: the German Association of Cities (Deutscher Städtetag), German Association of Land (Deutscher Landkreistag) and the German Association of Towns and Municipalities (Deutscher Städte- und Gemeindebund). The federal government sends the EU Council the names of the delegates on the proposal of the above mentioned land authorities and government organizations.

The political distribution of seats is determined in accordance with the results of previous local elections. However, the geographical and political balance should be respected in the election. Currently, there are five main European political groups in the CoR: European People's Party; Party on European Socialists; Group of the Alliance of Liberals and Democrats for Europe; Group of the European Conservatives and Reformists; European Free Alliance.

The Committee shall elect its chairman and officers from among its members for a term of two and a half years (Art. 306 of the TFEU). The Committee also adopts its Rules of Procedure.

On the basis of Art. 304 of the TFEU the Committee shall be informed by the European Parliament, the Council or the Commission of the request for an opinion. Where it considers that specific regional interests are involved, the Committee may issue an opinion on the matter. The Committee may make an opinion on its own initiative when it considers useful, according to the Article 41(b) Rules of Procedure of the CoR. The opinion of the Committee, together with a record of the proceedings, shall be forwarded to the European Parliament, to the Council and to the Commission.

Thus, the Treaty of Lisbon has radically changed the relationship of the CoR with key EU institutions. The Committee has gained more influence at all stages of the creation of the EU law.

A novelty in the work of the CoR is an «early warning procedure» provided by the TFEU. The European Parliament may reject a legislative proposal by a simple majority votes of MEPs, if a majority of national parliaments express objections to the subsidiarity. Thus, the CoR, pointing to the «doubts» of national parliaments, indicates that they will be forwarded to the European Parliament. This fact testifies to strengthening the political ties of the CoR and the European Parliament. The Council of the EU has a similar competence.

The Committee's ability to monitor the implementation of the EU law by regional and local authorities of EU member states is also important, as they implement around 70 % of all EU law.

The Lisbon Treaty extended the competence of the CoR, including civil protection and climate change into the list of policy areas on which the EU institutions are obliged to consult with it. Thus, in 2014, the Committee adopted Opinion of the Committee of the Regions ENVE-V-042 «Affordable Energy for All».

The Committee shall be convened by the Chairman at the request of the European Parliament, the Council or the Commission. According to Article 307 TFEU, the EU institutions shall consult with the Committee where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation, in which one of these institutions considers it appropriate.

The Committee has a major impact on all European Union policy in general. The Committee's annual "impact reports" are quite interesting; they analyze the impact of its opinions in the key areas of political activity.

The Committee's activities are closely associated with all the EU institutions. The Committee's actions, in turn, are reflected in some documents and provisions of the European Parliament and the European Commission. The main EU institutions refer to the Committee's activities with due attention, cooperate with it and take into account its recommendations on current issues of economic and other policies. However, this is the bilateral cooperation, the dialogue between them, which is reflected in the recommendations of the EU institutions addressed to the Committee. This kind of cooperation increases the overall coordination of the joint work and its effectiveness in the long run. However, the main actor in the field of regional policy in the institutional structure of the Committee is the Commission on economic and social policy (ECON).

The Committee has the right to appeal to the European Court of Justice. The agreement gives the Committee the right to challenge EU documents before the Court, if there is reason to believe that in the process of their creation regional or local aspects were not taken into account, and if the EU institutions have violated the rights of the Committee to consultation. The presence of such a guarantee contributes to the implementation of the Committee's powers to protect regional interests and compliance with the subsidiarity principle in EU decision-making, as well as the effective implementation of its consultation rights. The right to appeal to the Court of Justice will ensure that the EU institutions will consult with the Committee again when the Commission, the European Parliament or the Council substantially change the contents of the bill. On behalf of the Committee, the application to the Court is served by the President.

There are two main cases when the Committee can initiate a case in the Court of the EU: a) where the EU law was adopted in violation of the principle of subsidiarity; b) if, during the legislative procedure of the EU institutions have bypassed the Committee and neglected its consultative right.

The Committee carries out its work on the basis of three principles: multi-level governance, proximity and subsidiarity.

Fields of competence of the Committee reflect key policies of the Committee, which, in turn, aim to promote the priorities of the European Union in the regions. In preparing the Committee's opinion on the bill of the Commission it performs most of the work: receiving a request from the EU institutions, the President of the Committee determines the relevant committee which shall be assigned to prepare a report. This report will be subsequently discussed at the plenary session of the Committee. In fact, it lays down the basis of the received opinion.

3.3.2.2. Internal structure of the Committee of the Regions

The structure of the CoR consists of the President, First Vice-President, the Bureau, the Plenary Assembly, the CoR commissions, the Secretary-General, and the Secretariat-General.

The President of the CoR is elected at a plenary session for a term of two and a half years and directs the work of the Committee led by its plenary meetings and is an official representative of the CoR. First Vice-President is also elected by the plenary and represents the President in his absence.

The Bureau is the executive body of the CoR. It includes the President, First Vice-President, 28 Vice-Presidents (one for each EU member state), the presidents of the political groups of the CoR and other members of national delegations. This allows the Bureau to reflect national and political interests. The Bureau generally meets seven / eight times a year, presents the program of the policy and requests the implementation of its decisions.

The Committee conducts five or six plenary meetings a year to determine the general policy and adopt opinions, reports and resolutions.

There are eight CoR commissions to prepare the opinions to be debated in plenary which consider the various policy areas (territorial cohesion (COTER); Economic and Social Policy (ECOS) and others). The Commissions function actively, in particular, they adopt “opinions”. The Commission’s “opinions” shall reflect such important principles of regional policy of the EU as the principles of multi-level governance in the EU and close relationship of the individual citizen with EU institutions (proximity), greater democratization and transparency of the dialogue between citizens and the Union at all levels of the political mechanism.

The Secretary-General of the CoR shall be appointed for five years by the Bureau. He is responsible for implementing Bureau decisions and the smooth operation of the administration. It is composed of seven departments: Administration and Finance; customs services and the Registry; advisory work; PR, media and events; horizontal policies and networks.

The Treaty of Lisbon for the first time confirmed the right of the CoR to appeal to the European Court of Justice to protect its prerogatives and the principle of subsidiarity.

In general, the CoR has two grounds of appeal to the Court of Justice:

- 1) when the EU legislation violates the principle of subsidiarity and, in particular, violates certain regional or local powers;
- 2) if, during the legislative procedure, the EU institutions have not consulted with the CoR, thereby diminishing its institutional rights. However, no such procedure has been initiated yet, and the technical and legal framework in this matter is still in the

process of development. However, this power strengthened the political role of the CoR, allowing it to operate more efficiently at EU level to promote its interests.

Under the Lisbon Treaty the European Commission is obliged to consult with local and regional authorities and their associations of the EU before the legislative stage. The Committee as the “voice” of local and regional authorities should take an active part in this dialogue.

Conclusion

Thus, the Committee of the Regions is an EU consultative body representing local and regional authorities in the EU. Today the organizational structures of the CoR have an extensive legal practice in different areas of the regional policy, reflecting the actual implementation of the principle of subsidiarity. The Committee has a significant influence on the development of European law in the area of economic policy, using specific procedures for cooperation with the EU institutions. In practice, it protects the interests of the regional economic sector, expresses the needs of small and medium-sized businesses for its security and sustainable growth.

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3.3.3. European Ombudsman

3.3.3.1. European Ombudsman: an overview

The Preamble of the TFEU enshrines the awareness of European countries of their common cultural, religious and humanistic heritage, which is based on universal values: the inviolability and inalienability of the rights of the human person, freedom, and democracy. The key instrument of control over compliance of the EU institutions with the European values is the institution of the European Ombudsman.

The activities of the institution are regulated by the EU Resolution adopted in accordance with articles (Article 138e of the EC Treaty, Article 20d of the ECSC Treaty and Article 107d of the EAEC Treaty) – Resolution on the European Ombudsman – Regulations and general conditions governing the performance of the European Ombudsman's duties, 17 December 1992.

The post of European Ombudsman was established in Strasbourg in 1995. The Ombudsman is intended to ensure proper administration of all EU institutions based on the principles of fairness, legality, equality and respect for human rights and fundamental freedoms.

The European Ombudsman is elected by Parliament for a term of five years. Every year the Ombudsman reports to the European Parliament about the work done. In carrying out his activities the Ombudsman is impartial, he does not perform the orders of any government or any political or economic organization.

The Ombudsman's work is conducted in 23 languages, requiring the presence of qualified staff, including linguists. In the structure of the Ombudsman's office special working organs are established, such as the Cabinet of the European Ombudsman; the General Secretariat; Communication; Unit 1 (ICT and Inquiries); Unit 2 (Inquiry Coordination); Unit 3 (Inquiries); Unit 4 – Inquiries; Unit 5 (Process Management and Inquiries); Strategic Inquiries; Personnel, Administration, and Budget; Data Protection Officer.

3.3.3.2. The Competence of the Ombudsman

The Ombudsman investigates citizens' complaints against EU institutions on the violation of European law, principles of fair administration, respect for human rights and fundamental freedoms. Examples of improper administration (maladministration) can be unfair management, discrimination, abuse of power, lack of information or refusal to provide such information, unnecessary delay; incorrect procedures.

The office of the Ombudsman begins the investigation on the basis of a citizen's complaint or on its own initiative. In case of dissatisfaction with administration of EU institutions every citizen has the right to complain to the Ombudsman under the following conditions:

- a) the applicant must be a citizen or resident of the EU; the legal entity must be registered in accordance with the legislation of the EU member state;
- b) the complaint must relate to management issues in the activities of EU institutions, which, according to the applicant, are improper;
- c) the Complainant may lodge a complaint, even if poor administration does not affect him personally, i.e., not violated his subjective rights in a particular situation;
- d) before lodging a complaint to the Ombudsman the citizen needs to make a complaint to the institution concerned;
- e) there is a Statute of limitation (which sets a term): within 2 years from the date when it became aware of the fact of improper management;
- f) the personal data of the institution against which the complaint is made, and the actual circumstances of the case and its claims must be properly reflected in the complaint.

A complaint may be filed both in written and electronic (on the website of the Ombudsman) form. If requested by the applicant, the confidential complaint procedure is allowed.

As a rule, during the investigation, the Ombudsman shall inform the institution of the EU. In any case, if necessary, he takes all necessary efforts to solve the problem. If, for any reason, informing the relevant EU institutions does not have a positive effect, the Ombudsman makes recommendations. In case of failure of EU institutions to adopt (follow) the recommendations, the Ombudsman submits a special report to the European Parliament, which independently determines actions to resolve the dispute.

The Ombudsman does not investigate complaints that are filed for improper administration of state and local authorities of the countries of the European Union, even if the subject matter affects national issues.

The Ombudsman does not also investigate complaints on matters that are the subject of Court proceedings in the EU.

Although the Ombudsman's recommendations are not binding, his role in the European integration should not be underestimated. In pursuit of his objective, i.e. "check the health of a democracy by checking the air of the administration; check to see, that the laws are being followed, but also that the people are being treated fairly, that the administration is just, ethical, and accountable" the Ombudsman shall be guided in his work by the following provision: "... the Ombudsman must never believe that he or she has limited powers simply because their recommendations, in general, are non binding by definition".

In 1996, the European Network of Ombudsmen (ENO) was created with the support of European Ombudsman, which brings together more than 95 offices in 36 European countries. The ENO brings together national and regional ombudsmen and the competent authorities of the Member States of the EU, candidate countries for membership in the EU, and other countries of the European economic area, as well as the European Ombudsman and Committee on Petitions of the European Parliament. Nowadays the ENO is a powerful collaboration tool for ombudsmen, which allows the European Ombudsman to work with complaints quickly and effectively.

With the participation of national ombudsmen and representatives of the institutional structures of the EU (mainly members of the European Parliament) the European Ombudsman conducts regular seminars on issues of observance of human rights and fundamental freedoms.

Thus, in November 2015 in Strasbourg a seminar was held devoted to the role of the Ombudsman in maintaining the democratic development of the European peoples (The Role of The Ombudsman in Modern Parliamentary Democracies – Keynote introduction).

The Ombudsman aims to provide "democratic" procedures in the framework of the EU authorities. The existence of this institution contributes to the effective implementation by the EC institutions of their activities from the point of view of how much their policies serve the interests of European citizens.

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3.3.4. European Data Protection Supervisor

3.3.4.1. European Data Protection Supervisor: an overview

The right to protection of personal data (PPD) is one of the fundamental human rights. The actions of the EU institutions, bodies and agencies must conform to the principle of respecting and guaranteeing the confidentiality of personal data while exercising their powers. The system of PPD in the EU is well-developed, both from organizational and regulatory sides.

In the early 1990s PPD was regulated by the rules established in national legislation. Despite the fact that by that time the Council of Europe Convention No. 108 on Data Protection had been adopted, national laws differed significantly. The development of the internal market required harmonization of the rules on operating and protecting personal data. Active development in the field of ICT served as a significant impetus to realize the necessity of establishing rules of PPD common to all EU Member States.

All this led to the adoption of Directive 95/46/EC in 1995, which takes the central place in the PPD system. It establishes the rules concerning the foundations of PPD of a person while processing the data and relocating databases. Implemented into the national legislation, the Directive is applied in all EU Member States and also in Iceland, Norway and Liechtenstein. Providing general rules on legal processing of personal data and its protection, the Directive requires each state to establish a special national body for PPD, which will monitor the execution of its provisions.

Two years later, the Directive on Privacy and Electronic Communications was adopted. Currently it is applied with amendments adopted in 2002 by Directive

2002/58/EC. It established new rules in the areas of privacy, billing, traffic data, and spam not regulated by Directive 95/46/EC.

These directives created a general and technology neutral system in the field of PPD in the EU Member States. However, at the EU level, PPD was not guaranteed. Adoption of Article 286 of the EC Treaty was intended to remedy the situation. It provides that all structures of the European Union in the implementation of their powers must guarantee PPD. Inside the European Union an independent supervisory authority should be created for ensuring PPD and monitoring the institutions of the Union in this area.

In 2001, Regulation (EC) No 45/2001 was adopted. Using the basic provisions of the Directives 95/46/EC and 2002/58/EC as a foundation, Regulation (EC) No 45/2001 combines the rights of personal data actors and the obligations of institutions and bodies whose work is related to the use of personal data, in a single legal instrument. The Regulation also establishes the EDPS as an independent body responsible for enforcing and implementing provisions on protection and processing of personal data by all EU institutions.

In 2008, the EU Council adopted a Framework decision on PPD in the criminal justice field.

Directive 95/46/EC started the formation of a unified supervisory system in the area of PPD. The Directive obliged all States to establish national supervisory bodies responsible for implementing the Directive's provisions in domestic relations. Subsequently, with the adoption of Regulation (EC) No 45/2001 a specialized body – the EDPS – was created. In addition, the staff of each institution and body has a special officer responsible for protecting personal data (data protection officers). These institutions and individuals form an interconnected system of PDD based on the principles of independence and cooperation.

3.3.4.2. European Data Protection Supervisor: functions and structure

The EDPS monitors processing of personal data by the EU institutions. The main areas of its responsibility are as follows: a) monitoring processing personal data by the EU institutions and bodies; b) giving recommendations on policy and legislation affecting private lives of citizens; C) cooperating with functionally similar national and European authorities with the aim of creating a unified system for protecting and safeguarding personal data.

The EDPS consists of the Inspector and his Assistant. The European Parliament and the Council unanimously take a decision to appoint these persons from the list of candidates, which is formed on the basis of the principles of publicity and openness.

The sphere of joint authority of the Inspector and his Assistant, in fact, forms the competence of the EDPS. It includes:

- a) forming a shared vision of PPD on a global scale and offering specific recommendations;
- b) providing strategic guidance with the aim of preventing the emergence of new problems in the field of PPD;
- c) maintaining relationships with stakeholders in EU Member States, third countries and international organizations.

Organizational support of the activities of the Inspector and his Assistant is assigned to the office of the EDPS, which is a dynamic team of qualified and experienced lawyers, IT professionals and administrators.

Currently the EDPS operations are regulated by the following central pieces of the EU legislation: Article 286 of the EC Treaty, Directive 95/46/EC, Regulation (EC) No 45/2001, EDPS Rules of Procedure, the Framework Decision on the protection of personal data in the field of police and judicial cooperation in criminal matters.

The main areas of the EDPS are as follows:

1) Monitoring and control. The EDPS monitors processing personal data by the EU institutions and guarantees compliance with the rules of processing personal data. Monitoring and control are carried out both in the form of pre-inspections in order to minimize the risks of violations in the field of PPD, and in the form of examination of complaints and investigations. To monitor compliance with the Regulation, the EDPS relies on special officers (DPOs) assigned to each institution and body of the Union. In addition to bilateral meetings and contacts with DPOs, the EDPS also participates in the regular meetings of the DPO network.

2) Consultations. The EDPS makes recommendations and proposals on the activities of the European Commission, the European Parliament and the Council, in particular in the development and making of a new law affecting PPD. The EDPS actively cooperates with the EU institutions and Member States in the field of police and judicial cooperation in criminal cases. He is also a member of the Working Party on Police and Justice set up by the European Conference.

3) Cooperation in the framework of the IT Eurodac. The system consists of national units (institutions under national jurisdiction) and the EU central unit (subject to the EU Data Protection Regulation). The consistency of the joint action of both units is ensured by coordination meetings organized by the EDPS twice a year.

On the basis of Regulation 45/2001 the EDPS investigates complaints from citizens or employees of the EU who believe that their right to privacy was violated by

the European institutions or bodies. According to the results of investigations they may be given recommendations on how actors of PPD can exercise their rights. The EDPS can express an opinion on the need for administrative measures related to PPD: to demand from the institutions and bodies of the European Union to correct the data, to impose a ban on its processing and to initiate the consideration of the question of the violation of the right to protection of personal data before the Court of Justice of the EU (article 47 of the Regulation).

Thus, currently control over processing personal data in Europe is carried out both at national and European levels. European Union citizens who consider that their right to privacy is violated may complain to any national bodies that oversee the personal data, or to the EDPS, which occupies a central place in the system of PPD.

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3.4. The Civil Service of the European Union

3.4.1. General characteristics of the EU Civil Service

The European Union is a branched network of institutions, other bodies and agencies, operability of which is dependent on the numerous personnel, united in the system of the European Civil Service (hereinafter referred to as ECS).

ECS includes more than 40 thousand officials and other civil servants who carry out their activities on the basis of the EU law. About 34 thousand of them work at the European Commission departments.

The entire European civil service is divided into several groups and categories. First of all, it concerns the so-called permanent officials.

Permanent officials are divided into three functional groups: administrators (AD), assistants (AST) and assistants-secretaries (AST-SC) (Article 5 of the Staff Regulations).

Administrator's career covers 12 categories from AD 5 to AD 16. AD5 category is designed for university graduates. AD9 / AD14 categories are the level of middle managers, AD14 / AD16 categories are the level of top management: directors and general managers. In order to participate in the selection for these positions previous experience in the field of management is required.

Assistants usually work in supporting roles and are crucial for the internal management of institutions, including the implementation of the budget, personnel management, political coordination and information services.

In order to compete for the vacant post of an assistant, you must have at least secondary education. 11 categories AST1 – AST11 are provided for career development of an assistant.

As a general rule, assistants-secretaries carry out the functions of office managers and administrative support. The AST / SC functional group includes 6 categories.

EU competence in the field of the development of the rules of its own civil service is stipulated in Art. 336 of the TFEU.

Moreover, paragraph 4 of Art. 340 of the TFEU contains a reference to the provisions on the employees' personal responsibility to the Union to the «Rules on officials» and the applicable «Working conditions».

The main document that regulates labor relations and the relations of civil servants directly associated with them is «Staff Regulations for officials» and «Working conditions of other employees of the European Economic Community and the European Atomic Energy Community», approved by Regulation 31 (EEC), 11 (Euratom) 18.12.1961 (as amended December 17, 2013).

A number of the Commission's decisions were adopted to resolve some specific issues that are important in the framework of the European Civil Service (hereinafter referred to as ECS).

Among them are the Commission's Decision of 26 April 2006 on the European Commission's policy on the protection of human dignity and the prevention of psychological pressure and sexual harassment, the Commission's Decision of 18 December 2009 concerning the implementation of teleworking at the departments of the Commission from 2010 to 2015.

The open competition procedure is governed by the General rules which regulate open competitions and were approved by the European personnel selection office (hereinafter EPSO) in 2015.

Terms of employment of contract staff recruited by the EU Commission are reflected in the Commission's Decision of March 2, 2011 as amended on 18 December 2013, which adopted General conditions for the implementation of Art. 79 (2) of Working conditions of other servants of the European Union. This article regulates the conditions of employment of contract staff under the rules of Articles 3a and 3b of these Conditions (hereinafter – General conditions for implementation).

The EU Commission's Decision of 12 November 2008 established the regulations of secondment to the Commission of national experts and national experts in the sphere of professional training (hereinafter – Rules on the secondment of National Experts).

In order to provide the selection of personnel for five European institutions (the European Parliament, the Council, the European Commission, the Court of Justice of the EU and the Court of Auditors) and a number of agencies (European External Action Service, the Economic and Social Committee, Committee of the Regions, the European Data Protection Supervisor and the European Ombudsman) the European personnel selection office was set up in the framework of the EU on 26 July 2002. The main objective of EPSO is the organization of the open competitions for the selection of personnel for permanent and non-permanent positions, including agents under contract, temporary staff, trainees, as well as maintaining the data bases of industry experts.

For the European Commission consultations on changes of the Regulation on the EU personnel Committee on the Status of staff should be established on a parity basis consisting of the representatives of the institutions and the representatives of the Staff Committee. The EU Agencies should be represented jointly by agreement between them and the EU Commission (Article 10 of the Staff Regulations).

In accordance with Art. 9 of the Staff Regulations the following organs must be created at each EU institution and agency: the Staff Committee, one or more Joint Committees, one or more Disciplinary Boards, one or more Joint Advisory Committees on professional competence, the Reporting Committee, Disability Committee. Their composition is defined in Annex 2 to the Staff Regulations.

In accordance with the Council's Decision of 02.11.2004 European Union Civil Service Tribunal (hereinafter – the Tribunal) was established in 2005. Subsequently the Tribunal has acquired the status of a specialized court within the Court of General Jurisdiction on the basis of Art. 257 of the TFEU.

Subject matter jurisdiction of the Tribunal includes not only the disputes arising from employment relations (concerning remuneration, promotion, hiring, disciplinary sanctions, etc.), but also the disputes arising from the relationship of social insurance (sickness, old age, disability, accidents at work, family allowances, etc.).

The procedure of dealing with disputes at the Tribunal is described in the provisions of the Charter of European Court of Justice, in particular its Appendix 1, as well as the Rules of Procedure. The Tribunal decisions can be appealed on questions of law at Court of general jurisdiction within 2 months from the date of their issuance. In exceptional cases, the appeal decisions of the Court of general jurisdiction may be revised in the EU Court of Justice.

The Federation of Trade Unions, which unites 20 trade unions of European and international civil servants – Union Syndicale Fédérale, provides the protection of the rights of employees. The trade union operates on the basis of the Charter, which was renewed at the Congress in Dubrovnik on 1-3 May of 2015.

Several service types are identified within the ECS:

- a) permanent officials;
- b) temporary staff;
- c) personnel under the contract;
- d) local staff;
- e) special experts;
- f) accredited parliamentary assistants;
- g) trainees.

The permanent officials of the EU are the persons appointed to an established post in the staffing of one of the institutions or agencies of the European Union by means of the instrument issued by a competent authority of such institution or agency (Article 1 of the Staff Regulations).

Temporary staff can be used for performing a variety of narrowly specialized or temporary tasks (Art. 2 of the Working conditions of other EU servants). The EU Commission also practices personnel hiring on the basis of short-term contracts for up to 6 months, mainly for performing secretarial work.

Contract staff (CAST) is hired beyond the staffing of an agency or an institution for special management and administrative tasks, or in the case when additional efforts

are needed in specialized fields where there are not enough staff officials with the necessary skills. Contract staff is subdivided into four functional groups depending on the duties performed. Each group has its own categories and levels (Art. 80 of Working conditions of other servants).

Local personnel means those recruited for physical labor or official duties in places outside the European Union in accordance with local practice, who are appointed to the positions that are not included in the list of posts appended to the section of the budget related to each institution and are paid from the total targeted allocations on this section of the budget (Art. 4 of Working conditions of other servants). The category of local staff also covers those persons who are hired for working outside the EU, and cannot be considered as officials or employees specified in Art. 1 of Working conditions of other servants.

According to Art. 5 of Working conditions of other servants a *special advisor* is a person who by virtue of his or her special qualification and despite a gainful activity in any different quality, is involved to assist one of the institutions of the Union on a regular basis or for a certain period, and whose work is paid from the total target allocations of the budget section related to the institution which he or she serves.

Accredited parliamentary assistants are the persons chosen by one or more deputies and employed by concluding a direct contract with the European Parliament for providing direct assistance to the deputy or deputies in performing the functions of members of the European Parliament, indoor of the European Parliament at one of the three places of work (Brussels, Strasbourg, Luxembourg), under their management and direction and in the relationship of mutual trust deriving from the freedom of choice which was enshrined in Art. 21 of Regulations for the European Parliament.

Trainees. A model of five-month internal traineeship is widely used within the framework of the European Commission. It is used for persons who recently received a university degree and wish to gain an understanding of the work and an experience of labor activity in the structure of the European Commission departments. The regulation of traineeships is carried out on the basis of the Rules governing the official traineeship scheme of the European Commission.

Seconded national experts (SNE). Within the framework of the EU Commission the staff employed for the civil service at the national, regional or local level as well as at the intergovernmental level is used. It is seconded to the Commission to carry out special tasks. The secondment period as a general rule may not exceed 4 years (Art. 4 (1) of the Rules on the secondment of National Experts).

3.4.2. The selection procedure for EU civil service

In order to get a job in the European Union's institutions, a multistage system of competitive selection is most commonly used. For most of the EU institutions a centralized competitive selection is carried out by the European Personnel Selection Office (EPSO). The European Central Bank, the European Investment Bank and the European Investment Fund have their own selection procedures. Agencies and decentralized bodies of the EU can carry out recruitment without a competition. Most of the decentralized agencies and some implementing agencies have the right to use the EPSO reserve list of successful candidates for the recruitment of contract staff. The exception is the decentralized agencies established in the financial sector: European Banking Authority (EBA), Single Resolution Board (SRB) as well as the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (EU– LISA).

The competition procedure gives all candidates an equal chance to demonstrate their abilities and guarantees a selection based on merit observing the principle of equal treatment.

The legal basis of the competition for permanent positions is Notice of competition which contains all the necessary information about a particular competition (for example, the duties, requirements for candidates, description of the tests, etc.) and the General rules governing open competitions (hereinafter General rules). The Notice is published in the «Official Journal of EU» and on the EPSO website when the competition opens for applications.

General rules governing open competitions have legal force equal with the Notice and establish the basic rules and procedures which are common for all open competitions. The current edition of the General Rules applies to competitions which were opened after February 27, 2015.

The legal basis for the announcement of the selection procedure of contract and temporary agents is a Call for Expression of Interest, which is an analogue to the Notice of Competition and the General Rules. It contains all the necessary information about a particular selection procedure (for instance, responsibilities, requirements for candidates, description of the tests, etc.). It is published on the advertisements page of EPSO website when the selection procedure is opened for the submission of applications.

For the competitive selection a particular Selection Board is created for each contest. It is responsible for the selection of candidates at each stage and for drawing up the final sheet of the successful candidates. Each Selection Board is composed of officials of the EU institutions and includes permanent members (usually appointed for a period of 2 to 4 years to ensure consistency between the selection procedures)

and non-permanent members (appointed for a specific selection process for technical expertise).

Competitive selection is based on the competency profile, which includes the following core competencies (1.2 of the General Rules): analysis and problem solving, communication (oral and written), ensuring the quality and results, educability and development, priorities nomination and the organization of work, resistance to stress and changes of the working environment, working with others, leadership (for administrators group).

Admission requirements (Article 28 of the Staff Regulations, paragraph 1.3 of the General Rules) are as follows: an EU member state citizenship, the full possession of the rights of an EU citizen, complying with all the obligations imposed on a person under the legislation on military service and deep knowledge of one of the official EU languages (C1 level) and satisfactory knowledge (B2 level) of the second language (English, French or German); for the language competition you must have excellent knowledge of one of the official languages (C2 level) and deep knowledge (C1 level) of second and third languages, one of which must be English, French or German.

The education requirements may vary depending on the job, but in general for all the positions that do not require higher education, you must have completed secondary education, and for positions that require higher education, it is envisaged that the candidate has completed a university degree (three years).

The announcement of the competition may contain specific requirements with regard to the qualifications and professional experience.

There are no age requirements for candidates, but officials automatically retire after reaching 65 years of age.

Applicants cannot be discriminated on the grounds of sex, race, skin color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property status, birth, disability, age or sexual orientation.

At the first stage of the competition in most cases EPSO organizes computer multioptional preliminary selection tests (paragraph 2.2 of the General Rules). In accordance with the results of testing, candidates included in the quota which is set out in the Notice of the competition are invited to the next stage of the competition.

For most profiles of specialists the stage called «selection based on qualifications» is provided. At this stage the selection board evaluates the applications and selects the candidates whose qualifying indicators meet the qualifying criteria set out in the Notice of Competition in the best way. Applicants who have got the best scores are invited to the next stage of the competition.

The next stage of the selection is called the Assessment Center and is usually held in Brussels or Luxembourg and can last for several days.

Within the framework of the Assessment Center candidates' core competencies defined above are being tested. The content of the Assessment Center can include the following competitive tests:

a) the study of a case and preparing a short explanatory note for the manager in which you need to present a discussion on a given topic, discussion of European initiatives on the issue, make specific recommendations on the application of European action in this area;

b) an oral presentation on a given topic within a given amount of information; and other tasks.

The applicants who have passed competitive tests are included in the reserve list, from which the EU institutions select new employees when they need them. Thus, the purpose of the contest is not filling a specific vacancy, but creation of a reserve for filling in the recruitment needs when they arise. The reserve list is published in «Official Journal of EU» and on the EPSO website.

The candidates who passed the tests receive a special document – a «certificate of competence», which reflects the quantitative and qualitative feedback on activities.

The EU institution with the need to fill the vacancy uses a reserve list of candidates selecting applicants suitable for it and conducts its own interviews for a final decision on hiring. Certificate of competence is used by the EU institutions for conducting interviews and subsequent career development of a new employee.

The results of the qualifying tests can be appealed both administratively and in the judicial order (the Tribunal).

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3.5. Interaction between the EU and Member States

Cooperation between the institutions is essential for the proper functioning of the European Union. Indeed, the Court of Justice has recognized the duty of sincere cooperation as a general principle of Community law. While sincere cooperation is not

explicitly mentioned in the Treaties, this does not affect its status as a requirement with which all Member States and European institutions must comply.

The principle of “sincere cooperation” stems from Article 4 of the Treaty on European Union (TEU) in the context of relations between the European Union (EU) and Member States and Article 13 of the TEU in the context of relations between the EU institutions.

Moreover, according to Article 14 of the Treaty on the Functioning of the European Union: «Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services».

Member States have a duty of sincere cooperation with the EU institutions. Accordingly, they are asked to support EU activities and not to hinder their proper functioning. This involves, for example:

- punishing infringements of EU law as strictly as infringements of national law;
- cooperating with the Commission in procedures linked to the monitoring of compliance with EU law, e.g. by sending the documents required in accordance with the rules;
- making good any damage caused by infringements of EU law;
- not unnecessarily hindering the internal operation of the European institutions (for example, by taxing reimbursements of the transport costs of MEPs travelling to Brussels and Strasbourg);
- cooperating with the Commission in the event of inaction on the part of the Council, so as to enable the EU to fulfil its responsibilities (for example, to fulfil urgent needs concerning the conservation of certain fish stocks).

Treaty on the Functioning of the European Union includes a plethora of provisions which fix the need for such cooperation. For instance, Article 33 – «Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to

strengthen customs cooperation between Member States and between the latter and the Commission»; Article 70 – «Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation»; Article 74 – «The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament», etc.

According to E. Pavelyeva, the EU has formed a peculiar mechanism of cooperation between the EU institutions and Member States, which includes parallel and cross methods of such interaction. The EU institutions, which have similarities with national authorities, carry out interaction with both the authorities of the Member States with similar functions and other bodies. For instance, the European Commission, the European Parliament, the European Council actively cooperate with the governments and parliaments not only directly vertically, but also diagonally with each of these bodies, as well as with other state authorities.

At the same time, the principles of proportionality and subsidiarity, which have already been mentioned, play a leading role in ensuring the interaction mechanism.

Some aspects of this interaction are provided by other acts of EU law. For instance, Protocol on the role of national parliaments to the Treaty establishing the Constitution contains a section "Inter-parliamentary cooperation". In particular, Article 9 of the Protocol fixes the obligation to carry out the interaction with the Parliament and parliament of Member States. Within the framework of this cooperation, Parliaments should exchange information, hold joint conferences, and carry out interaction with the help of subsidiary and advisory authorities.

The most vivid mechanism of interaction between the EU and Member States can be illustrated by common foreign and security policy.

It should be mentioned that Member States retain sovereign rights related to common foreign and security policy activities.

Developers of the Treaty of Lisbon 2007 attempted to maximally improve mechanism for the preparation and implementation of foreign policy acts of the Union. In particular, it comes about adopting common guidelines and decisions which help the EU to "fix actions, determine positions, set arrangements for carrying out decisions on

actions and positions and strongly reinforce systematic cooperation between Member States to ensure policy” (Art. 25).

However, nowadays structure of powers of authority in the triangle Commission – High Representative – the European Council is rather intricate. There is no clear separation of powers. The most acute issue is correspondence between the powers of the High Representative and the President of the European Commission. Such problem occurs due to the fact that Candidate for the Vice-President of the European Commission is appointed by the European Council, meanwhile, he reports the Council on Foreign Affairs. It leads to duplication of responsibility. In addition, there are no clear mechanisms of accountability of European Commissioners to the High Representative.

The High Representative shall conduct the Union’s common foreign and security policy. He shall contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council. The same shall apply to the common security and defence policy. The High Representative shall preside over the Foreign Affairs Council. The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union’s external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3. Thus, the High Representative actually belongs to the leadership of two political institutions of the Union.

In addition, the role of the High Representative is strengthened by the circumstance which is fixed in Article 30 of TEU. In particular, he may refer any question relating to the common foreign and security policy to the Council and may submit to it initiatives or proposals as appropriate with the Commission’s support (or without it).

Moreover, the High Representative is obliged to implement acts adopted under the CFSP, in cooperation with Member States (Article 18, Article 24), «to coordinate their action in international organizations and at international conferences, receive information from Member States concerning operation of international institutions, in particular, United Nations Security Council» (Article 34 TEU).

According to Para 2 Art. 27 of the TEU, the High Representative shall represent the Union in matters relating to the common foreign and security policy. At the same time, according to Para 1 Art. 17 of the TEU, the Commission shall promote the general interest of the Union concerning remained aspects (in particular, socio-economic issues). The European Council and the Council of the European Union are responsible for the development of the Common Foreign and Security Policy. These intergovernmental institutions retain the prerogative to approve decisions in the framework of CFSP. Namely, the European Council approves strategic issues, while the Council of the European Union approves current foreign policy issues (the Council).

The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter (Art. 42-46 of the TEU).

The Treaties also define the principle of collective self-defence of the Member States, i.e. the obligation of Member States to provide assistance and help to one of the States which will become the victim of external armed aggression. However, Para 2 Art. 42 of the TEU states: “The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realized in the North Atlantic Treaty Organization (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework».

The Agency in the field of defence capabilities development, research, acquisition and armaments (hereinafter referred to as ‘the European Defence Agency’) is open for all Member States which are willing to become its member (Para 3 Article 42, Art. 45 of the TEU). Let us remind that the European Defence Agency (Ea) was established by the European Council in 2004 in accordance with the mechanism of cooperation in CFSP field, which was fully reflected in the Treaty of Nice.

Herewith, those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. Such cooperation shall be governed by Art. 46 of the TEU and «Protocol (No 10) on permanent structured cooperation established by Article 42 of the Treaty on European Union».

Article 32 of the TEU provides convergence and solidarity actions in foreign and security policy field. ‘Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. Before undertaking any action on the international scene or entering into any commitment which could affect the Union’s interests, each Member State shall consult the others within the European Council or the Council’.

For instance, in 2010, a treaty on cooperation in defence and security field was concluded between France and the UK. It was based on the principles of industrial specialization and aimed at achieving certain goals of the Common Security and Defence issues.

Documents and literature

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CHAPTER 4. EU CITIZENSHIP (HUMAN DIMENSION OF THE EU)

On completion of this programme, students are expected to acquire the following knowledge and skills:

Knowledge:

- Acquire knowledge of terminology and concepts of European Citizenship and human rights law, and Schengen law;
- Understand the European integration process in the sphere of human rights law, and Schengen law;
- Recognize benefits that are given by EU Citizenship and human rights law and Schengen law;
- Become familiar with the European institutions and the decision-making processes concerning the Citizenship and human rights of the EU;
- Define the main benefits and possibilities of citizenship in the EU;
- List the main rights of a citizen of the EU and know the human rights in the EU.

Comprehension:

- To describe the main EU legal institutions that have competence in Citizenship and human rights in the EU;
- To recognize social and economic context of EU Citizenship and human rights law in the EU and Schengen law;
- To differentiate legal nature of national, EU and international human rights law;
- Develop knowledge of EU law-making by studying treaties, state practice and decisions dealing with citizenship and human rights Law in EU and Schengen law;

Application:

- To apply provisions of EU Schengen law and human rights law in business practice;
- Enhance the student's ability to use the appropriate research methods and tools in the framework of independent research projects;
- Provide students with the knowledge of and practice with electronic information sources on European law;

- Develop the ability to communicate the acquired knowledge and the outcome of research projects in an effective way, both in written and oral form;
- Develop the ability for group work incorporated into the structure of in-class presentations and case studies;
- Further develop skills of intercultural communication;
- Develop English language skills, both written and oral

Analysis:

- To formulate legal standpoints applicable to certain situations arising out of legal and business practice;
- To develop the ability for independent analysis of the interplay between national and European Law in case of tort in considerable spheres;
- To develop the ability to transpose the analysis of rules and events into a scientifically sound and feasible research project.

Evaluation:

- To predict legal consequences of business performance;
- To recommend legal solution of a certain legal and business issue;
- To stimulate critical attitudes, which are necessary for “life-long learning” and sensitivity to the importance of legal and ethical considerations and the ability to confront dominant, popular opinions with constructive criticism;
- To stimulate an awareness of the normative dimension of European legal policies and of related ethical, social and operational problems and dilemmas.

Synthesis:

- To defend legal position in legal negotiations and claims;
- To formulate legal definitions on such subjects as European citizenship, European human rights law, Schengen Law;
- To be able to prepare essays and presentations on the topics.

4.1. Legal status of a person in the EU

4.1.1. Definition of the legal status of a person in the European Union

Legal status of a person could be defined as a complex of rights and duties that are laid on the individual. It shows a specific connection between an individual and the legal system.

We should be aware that if we speak about the legal status of a person we mean a natural person, not an artificial person. But if we speak about the legal status of a person we define not just the amount of rights and obligations, but also differentiate a specific person from among the other individuals that have a different legal status.

Let us explain this using the following example. We all know such a specific legal status of a person as citizenship. The state divides all natural persons into specific categories and gives them a specific legal status. The first and the most important for the state is a status of a citizen. The other statuses are a non-citizen, which could be subdivided into a person with a different citizenship and a status of a person that doesn't have any citizenship, an illegal immigrant and a person that has a right of asylum.

The European legal doctrine does not define legal status of a person in the European Union. If we try to define the status of different natural persons under the law of the European Union, we should define the difference in regulation of the activity of natural persons.

4.1.2. Institution of legal status of person and citizen: a place in the system of EU law and its sources

It is important to notice that in modern Europe the foundations of the legal status of the individual do not only exist at the national level (within the framework of Member States of the EU), but are also formed at the supranational level, i.e. the level of the European Union. It is a set of rules of law of the European Union which reinforce the most important standards of human behavior and civil society common for the whole Union, as well as the principles of personal relationships with the public authorities.

This institution was originally born in the framework of the European Communities, where most of its provisions were created and have been operating to this day. However, compliance of the status of the individual with the initial legal principles, including fundamental rights, is now also necessary within the Common Foreign and Security Policy (CFSP), cooperation of police and judicial authorities in criminal matters (PJC).

The legal status of the individual consists of three main elements: firstly, the nationality of a stable legal relationship of person with the European Union; Secondly, the principles of the legal status of a person and a citizen; Third, the fundamental rights, freedoms and duties.

The sources of the legal status of person in the EU are: judicial precedents (judgments of the Court and the Court of Justice (ECJ) of the European Communities); the European Convention on Human Rights and Fundamental Freedoms of 1950; the Founding treaties: The Treaty Establishing the European Union and Treaty on the Functioning of the European Union; Charter of Fundamental Rights of 2000.

The Treaty on the Functioning of the European Union is the most important source of primary law of the Union as a whole. It contains provisions introducing the institution of the European Union citizenship. They are the subject of a separate part of the Treaty – part two of title two of the Treaty «Non-Discrimination and Citizenship of the Union», which enshrines a number of fundamental human rights (right of petition or the freedom of movement and choice of residence). Some individual rights, mainly in the economic sphere, are included in other parts of the TFEU (especially the third – «The policy of the Community»). These include the «freedom» of the common market (freedom of movement of workers, freedom of establishment, etc.), the principle of equality of women and men in matters of pay and some others. Finally, the TFEU established the most important guarantees for the protection of the rights and freedoms of man and citizen, especially from encroachment by supranational institutions: a complaint to the Ombudsman, the claims in the Court of Justice, including the compensation of damage caused to the individual by the Community and its officials, and others.

Treaty on European Union. In contrast with the TFEU, the Treaty on European Union (TEU) mainly governs the relationship between the Member States and supranational institutions in the second and third pillars. At the same time, the TEU includes general principles of the constitutional order which must be observed at all levels of the political authorities. Among them one of the most important principles can be distinguished, namely, the principle of respect for human rights and the foundation of freedom (Art. 6).

The case law of the EU Courts. EU supranational justice system, the ECJ, has played a key role in the development and protection of the democratic foundations of the legal status of the individual at the EU level, in particular the fundamental rights of person and citizen. The provisions on the fundamental rights and freedoms set forth in title of the TFEU could be considered as a codification of the case law of the Court, which found it mandatory for the European Communities as early as in the 1960s.

Among these «sources» of the Court's case law it also uses the common constitutional traditions of the Member States; universally recognized principles of international law and international human rights instruments (the International Covenant on Economic and Social Rights 1966, International Covenant on Civil and Political Rights of 1966, the European Social Charter of 1961 and others.).

The European Convention on Human Rights 1950. It is the Convention involving all Member States of the EU in the 1970s. The Court acknowledged that the Convention is a source of Community law and it must respect not only the Community (as the signatories of the Convention), but also the community as a whole. The Court decisions were confirmed by the Treaty on European Union in 1992. From that time

up to nowadays according to paragraph 3 of Article 6 TEU, «Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member-states, shall constitute general principles of the Union's law».

Declaration on the Human Rights of 1989. In 1989 in the framework of the European Communities two instruments on human rights with recommendatory force were adopted: the Declaration of Fundamental Rights 1989 and Freedoms and the Community Charter of the Fundamental Social Rights of workers 1990.

The Declaration of fundamental rights and freedoms is a relatively short act of 28 articles, which proclaims the fundamental rights of all categories, including socio-economic, as well as guarantees major principles of the legal status of the individual (the principle of equality before the law – Art. 3) and political system as a whole (principle of democracy – Art. 17). The Community Charter of the Fundamental Social Rights of Workers, as the name implies, establishes above all the social rights and guarantees of wage earners: the right to employment and remuneration, the right to improve living and working conditions, the right to social security, etc. Its main part consists of 30 items, many of which are of a programmatic nature. Although both documents are of great political significance, none of them has received a legally binding force of a normative act. In the doctrine, as already mentioned, they are usually described as sources of «soft law» – as opposed to «hard law» (law in the traditional sense of the word), the provisions of which are contained in the regulations, directives and other standard forms of law-making.

European Union Charter of Fundamental Rights 2000. The text of the Charter was developed by a special temporary authority, which included representatives of legislative and executive authorities of the Member States and the European Union: members of the national and European parliaments, the authorized representatives of the Heads of State or Government of the EU and Head of the European Commission. Following the approval by the heads of Member States, the Charter was adopted and solemnly proclaimed as a joint legal act of the three institutions of the Union: the European Parliament, the Council and the Commission. This event took place December 7, 2000 in Nice – almost simultaneously with the approval of the text of the Nice Treaty. At the same time the absolute majority of the rights contained in the Charter are human rights, recognized for every person, not only for the citizens of the European Union.

4.1.3. Citizenship of the European Union

The biggest role in the European Union law is given to the status of a citizen of the European Union. This legal category appears after signing of the Maastricht Treaty in 1992. This was the first time when the European Union citizenship was established. It

is very much different from the national citizenship and exists at a different level. So, this category gives an absolutely new type of citizenship – supranational citizenship.

The main ideas of the citizenship of the European Union were connected with enlarging of the federal doctrine of the European Community. From this side citizenship of the European Union was a new step in building the united Europe.

The second idea of the establishment of the European Union citizenship is to give European citizens a superior level of protection of their rights.

The third and the most practical impact of the European citizenship was to provide new possibilities that are given by the European common market. By implying European citizenship the goal was not to replace the national citizenship of the population of Member States of the European Union. European citizenship is a complex system of complementary rights and freedoms given to the citizens of the Member States of the EU, which are wider than those given by the national citizenship of the EU Member State.

This definition was discovered in the national legal doctrine and was adopted by national states and then included into the international legal doctrine in which we use the same categories for describing the specific legal status and the personality of specific individuals and entities.

The idea of developing such a specific legal idea was to give a superior level of rights and protection for the persons that are citizens of countries that are members of the European Union. The first attempt could be found in early Rome Treaty in 1957 where we can find the first attempts of extra rights for the persons that are citizens of the countries that are members of the European Union.

So, the formal status of citizenship of the Union was built on previous rights to free movement, residence and nondiscrimination for workers, service-providers and service recipients (interpreted by ECJ to include students after Case 293/83 Gravier [1985]), and others entitled to free movement under various Directives. ECJ, together with national courts, has been a key actor in the development of EU citizenship, with EU legislation reflecting many precepts initially developed by the judiciary (Citizenship Directive 2004).

Now with the creation of the Charter of Rights of European Union we could see that the idea of European citizenship made a full circle. All the rights and the benefits of European citizenship are categorized in the Charter of Rights of European Union.

European Union citizenship now extends the rights of movement and residence not only for workers and students, but also the non-economically active persons (retirees for instance), although they usually need to have health insurance and sufficient resources so as not to become an ‘unreasonable burden’ on the receiving state. The extent to which EU citizens are entitled to equal treatment depends on their econom-

ic activity, their degree of integration in the host state and the nature of the benefit claimed. The precise scope of entitlement is subject to intense debate, as explored below. EU citizenship entails directly effective rights, i.e. rights which are enforceable in national courts. These rights, in particular residence rights, may only be restricted subject to the principle of proportionality (Case C-413/99 Baumbast [2002]).

Security of residence is an essential feature of EU citizenship. The EU legislation allows only the refusal of admission or deportation of EU citizens, representing a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. «Only individually assessed risks to public policy, public health and safety are permissible grounds and EU citizens who have a permanent right of residence can be expelled only on serious grounds of public policy or public security (some concern has been expressed that some recent EU cases have not properly applied the 2004 Citizenship Directive in this context – Case C-145/09 Tsakouridis [2010], Case C-348/09 P. I. Judgment of the Court (Grand Chamber), 22 May 2012, see also Kochenov and Pirker 2013).

Greater degree of integration within the host Member State ought to lead to greater security of residence (although periods in prison do not count as periods of residence (Case C-400/12 MG and Case C-378/12 Onuekwere).

According to the European law, the other categories of the legal status of a person other than citizenship are just “persons” who are named so in the Founding Treaties.

This category is much broader than citizenship because it covers all natural persons given the basic rights and the basic level of protection by the European Union.

As stated in 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”.

4.1.3.1. EU citizenship: definition

EU citizenship is attributed only to those holding the nationality of a Member State. It is for each Member State to regulate the acquisition and loss of nationality, the extent to which EU law may shape Member State nationality remains unclear. However, it has examined deprivation of nationality: When withdrawing nationality, Member States must have ‘due regard’ for rights conferred and protected by the legal order of the Union and exercise the competence in accordance with the principle of proportionality (Case C-135/08 Rottmann [2010] ECR I-01449).

There have been other tensions between Member State laws granting nationality and EU citizenship. Following a decision of the CJEU granting residence rights to TCN parents deemed to be ‘primary caregivers’ of young children holding EU citizenship (Case C-200/02 Chen [2004] ECR I-9925), Ireland even held a constitutional referendum to amend the nationality provisions of its Constitution and nationality law. Nationality is no longer granted to all born on the island of Ireland. EU citizenship was invoked to rationalize the restrictive change in nationality law.

It is impossible to buy EU citizenship. EU legislation does not allow a simplified granting of citizenship either, including the possibility of purchasing real estate, investment, or other well-known similar ways that are used under the national legislation of some EU countries.

Recently, controversy surrounding proposals to make Maltese (and hence EU) citizenship available to investors (a practice many European states engage in in some form) brought the question of the EU’s role in relation to nationality to the fore. Malta’s Individual Investor Programme originally planned to offer citizenship to wealthy individuals in exchange for investing in Malta without any prior residence requirements. Arguments that this might be contrary to EU law, based on the duty of loyal or sincere cooperation in Article 4(3) TEU, seem somewhat tenuous. Nonetheless, the EU institutions voiced their concerns about the practice, and the Maltese Citizenship Act will now require effective residence in Malta for at least twelve months (Malta & the European Commission 2014).

The TEU proclaims that 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, in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail (Art. 2 of the TEU).

More specifically the TFEU prohibits any discrimination on grounds of nationality. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination (Art. 18 of the TFEU). They may also, acting in accordance with the ordinary legislative procedure, adopt the basic principles of Union incentive measures against discrimination. The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Art. 19 of the TFEU).

Case C-333/13 *Elisabeta Dano, Florin Dano v Jobcenter Leipzig*. The Court was uncertain whether provisions of EU law, in particular Article 4 of Regulation No 883/2004, the general principle of non-discrimination resulting from Article 18

TFEU and the general right of residence resulting from Art. 20 of the TFEU preclude the provisions of German law denying such benefits to Elisabeta Dano and her son. Therefore, the following questions were referred to the Court for a preliminary ruling under Article 267 TFEU:

(1) Do persons who do not wish to claim payment of any benefits of social security law or family benefits under Article 3(1) of Regulation No 883/2004 but rather special non-contributory benefits under Article 3(3) and Article 70 of the regulation fall within the scope *ratione personae* of Article 4 of the regulation?

(2) If Question 1 is answered in the affirmative: are the Member States precluded by Article 4 of Regulation No 883/2004, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of the regulation which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?

(3) If Question 1 or Question 2 is answered in the negative: are the Member States precluded by (a) Article 18 TFEU and/or (b) [point (a) of the first subparagraph of Article 20(2)] of the TFEU in conjunction with the [second subparagraph] of Article 20(2) of the TFEU and Article 24(2) of Directive 2004/38/EC, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of Regulation No 883/2004 which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?

(4) If, according to the answers to the abovementioned questions, the partial exclusion of benefits which guarantee a level of subsistence complies with EU law: may the provision of non-contributory benefits which guarantee a level of subsistence for Union citizens, outside acute emergencies, be limited to the provision of the necessary funds for return to the home State or do Articles 1, 20 and 51 of the [Charter] require more extensive payments which enable permanent residence?’

The Court (Grand Chamber) held:

1. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010, must be interpreted as meaning that ‘special non-contributory cash benefits’ as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation.

2. Article 24(1) of 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 read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004, as amended by Regulation No 1244/2010, must be interpreted as not precluding legislation of a Member State under which nationals of other member-states are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other member-states do not have a right of residence under Directive 2004/38 in the host Member State.

3. The Court of Justice of the European Union does not have jurisdiction to answer the fourth question.

Every citizen of the Union residing in a Member State of which he or she is not a national has the right to vote and to stand as a candidate at European and municipal elections in the Member State in which he resides, under the same conditions as nationals of that State [Article 22 TFEU, ex Article 19 TEC]. A directive lays down arrangements for the exercise of the right to vote and to stand as a candidate in European Parliament elections in the Member State of residence [Directive 93/109, last amended by Directive 2013/1]. While including provisions to ensure freedom of choice and to prevent individuals from voting or standing for election in two constituencies at once, the Directive is based on the principles of equality and non-discrimination and is designed to facilitate the exercise by the citizens of the Union of their right to vote and to stand for election in the Member State where they reside.

*4.1.3.2. EU citizenship: the right to vote and stand as candidates
in municipal elections*

The Directive laying down detailed arrangements for the exercise of the right to vote and stand as candidates in municipal elections ensures the same rights to Union citizens in elections by direct universal suffrage at local government level [Directive 94/80, last amended by Decision 2012/408]. Member States may, however, reserve for their own nationals the posts of mayor and deputy mayor, which involve participation in an official authority or in the election of a parliamentary assembly. The Directive also allows Member States where the proportion of nationals of other Union countries exceeds 20 % to restrict the right to vote and stand as candidate to those who meet certain criteria regarding length of residence.

Every citizen of the Union is, in the territory of a third country in which the Member State of which he or she is a national is not represented, entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State (Articles 35 TEU and 23 TFEU, ex Article 20 TEC). Two Decisions specify the right to diplomatic protection. This right is not negligible, as there are many cases where one Member State is not represented in a third country. It includes assistance in the event of death, illness or serious accident, arrest, detention or assault as well as help and repatriation in the event of difficulty [Directive 2015/637]. In practical terms, EU nationals whose passport or travel document is lost, stolen or temporarily unavailable in a country where their own Member State has no representation, may obtain an emergency travel document, from the diplomatic or consular representation of another Member State [Decision 96/409 consolidated version 01.01.2007].

Every citizen and their family members have a right to reside freely within the territory of the Member States of EU. On 29 April 2004 the Directive 2004/38/EE of the European Parliament and of the Council 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) 1612/68 was adopted. On the basis of that Directive, which improves the current arrangements and meets the concerns expressed by citizens bringing together the content of the existing directives and regulations, administrative formalities are reduced – EU citizens will no longer need to obtain a residence permit in the Member State where they reside: a simple registration with the competent authorities will be enough, and even this will only be required if it is deemed necessary by the host Member State.

Directive 2004/38 was designed to regulate the right of entry and residence for EU citizens by providing for:

- (a) the conditions in which the EU citizen and their families can exercise their right to move and reside freely within the 28 Member States;
- (b) the right of permanent residence and
- (c) the restrictions that may be imposed on the exercise of these rights on the grounds of public policy, public security or public health. For stays of less than three months the only requirement on EU citizens is that they possess a valid passport or identity document. Family members who do not have the nationality of a Member State enjoy the same rights as the citizen who they are accompanying.

The EU citizens must satisfy one of the following conditions concerning the right of residence for more than three months:

- (a) either be engaged in economic activity (as an employee or self employed); or

(b) have sufficient resources and sickness insurance to ensure that they do not become a burden on the social services of the host Member State during their stay;

or

(c) be following vocational training as a student who has sufficient resources and sickness insurance to ensure that they do not become a burden on the social services of the host Member State;

or

(d) be a family member of an EU citizen who falls within (a) to (c).

So citizens themselves no longer need to obtain a residence permit, but their family members who are not nationals of a Member State must apply for a residence permit. After five years of uninterrupted permanent legal residence in the host Member State the EU citizen acquires the right of permanent residence. There are no conditions attached to such residence. This also applies to family members who are not nationals of any EU Member State and who have lived with the EU citizen for five years. This right of permanent residence can be lost where there is more than two years absence from the host Member State.

4.1.3.3. EU citizenship: right of non-EU family members

Directive 2004/38/EC covers citizens of the EU or EEA member state who visit, live, study or work in a different member state; the EU citizen's direct family members, including their non-EU spouse and the spouse's direct family members (such as children); other family members who are "beneficiaries", including common law partners, same sex partners, and dependent family members, members of the household, and sick family members; family members (as outlined above), where the EU citizen has worked in another member state and now wishes to return to their "home" country to work.

C-423/12 *Flora May Reyes v Migrationsverket* case poses two questions to the CJEU for a preliminary ruling in accordance with Article 267 TFEU:

1. Can Article 2(2)(c) of Directive 2004/38 be interpreted as meaning that a Member State, on certain conditions, may require a direct descendant who is 21 years old or more – in order to be regarded as dependent and thus come within the definition of a family member under Article 2(2)(c) of Directive 2004/38 – to establish that he has unsuccessfully tried to obtain employment or help with supporting himself from the authorities of his country of origin and/or attempted otherwise to support himself?

2. In interpreting the term "dependent" in Article 2(2)(c) of Directive 2004/38, does any significance attach to the fact that a family member, owing to personal cir-

cumstances such as age, education and health, is deemed to be well placed to obtain employment and in addition intends to work in the Member State concerned, which would mean that the conditions for him to be regarded as a dependant family member (under that provision) are no longer met?’

The Court (Fourth Chamber) held:

1. Article 2(2)(c) of Directive 2004/38/EC must be interpreted as meaning that a Member State cannot require a direct descendant who is 21 years old or older, in circumstances such as those in the main proceedings, in order to be regarded as dependent and thus come within the definition of a family member under Article 2(2)(c) of that provision, to have tried unsuccessfully to obtain employment or to obtain subsistence support from the authorities of his country of origin and/or otherwise to support himself.

2. Article 2(2)(c) of Directive 2004/38 must be interpreted as meaning that the fact that a relative – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State does not affect the interpretation of the requirement in that provision that he be a ‘dependant’.

Directive 2004/38/EC does not apply to a person if a citizen is living in their home EU member state and has not worked in another EU member state; all movement of non-EU family members into the home state is governed by national law; some old-EU Member States have special “transitional” arrangements that curb the ability of citizens of new EU states (Bulgaria and Romania) to move freely for work; the curbs can be maintained until 2014. Citizens of new EU Member States can however travel without visas throughout Europe, and their non-EU family members can travel freely with them; citizens of non-EEA countries who are not travelling with or joining family members who are EU/EEA citizens.

Directive 2004/38/EC provides for no-cost, easy, fast issue of visas; easy right to stay for up to 90 days if so desired. EU citizens and their non-EU family can work if desired in this period, or play; easy right to stay longer if the EU citizen is working, is a student, or has medical insurance and is self sufficient; permanent residence after 5 years; right of facilitated entry if passports have been lost, or if a visa has not been obtained; applications can only be turned down in three limited circumstances (public health, public policy, national security), or when a marriage is determined to be fraudulent. Reasons for refusal must be spelled out in detail and there is a right of appeal.

EU citizens and their non-EU family members can not legally be treated differently than citizens of their EU host country.

The principles relating to the rights of EU citizens to move freely around the Member States can be easily identified, but the CJEU and national courts have to deal with a detailed application, and this is where problems can occur.

Conclusions

Thus, we can make the following conclusions.

1. Legal status of a person is a complex of rights and duties that are laid on the individual; it shows a specific connection between an individual and the specific legal system;

2. Citizenship of the Union complements, but does not replace, national citizenship. The concept represents the rights and responsibilities which belong to the European Union and are conferred on individuals. It is a political contract between the Union and its citizens;

3. Citizenship of the Union also confers on every EU citizen a right to move freely around the Union and settle anywhere within its territory. The Directive 2004/38/EC therefore maintains the requirement that EU citizens need to exercise an economic activity or dispose of sufficient resources in order to take up residence in another Member State. However, after five years of uninterrupted residence, Union citizens and their family members will acquire a permanent right of residence, which will no longer be subject to any conditions. This permanent right will be a clear expression of European citizenship, allowing EU citizens who have developed strong links with the Member State of residence to enjoy stronger rights;

4. Citizenship of the Union is conferred directly on every EU citizen by the Treaty on the Functioning of the EU. The TFEU entails the right: to non-discrimination on the basis of nationality when the Treaty applies; to move and reside freely within the EU; to vote for and stand as a candidate in European Parliament and municipal elections; to be protected by the diplomatic and consular authorities of any other EU country; to petition the European Parliament and complain to the European Ombudsman; to contact and receive a response from any EU institution in one of the EU's official languages; to access European Parliament, European Commission and Council documents under certain conditions.

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4.2. Protection of human rights in the EU

4.2.1. EU Charter of Fundamental Rights: the meaning and the contents

The beginning of creating the European Union (EU) supranational human rights protection system is associated with the event which took place on 7 December 2000,

when the Charter of Fundamental Rights was formally proclaimed in Nice in December 2000 by the European Parliament, the Council and the Commission. One year and a half before, in June 1999, the Cologne European Council concluded that the fundamental rights applicable at EU level should be consolidated in a Charter to give them greater visibility. The Heads of State or Government aspired to include in the Charter the general principles set out in the 1950 European Convention on Human Rights (ECHR) and its Protocols and those derived from the constitutional traditions common to EU countries. In addition, the Charter was to include the provisions of the EU Founding Treaties (on EU citizenship, on the main and social rights) as well as the economic and social rights contained in the Council of Europe Social Charter of 1961 and 1996 and the Community Charter of Fundamental Social Rights of Workers of 1989. It would also reflect the principles derived from the case law of the Court of Justice and the European Court of Human Rights.

The Charter was drawn up by a body specially created for this purpose – convention consisting of a representative from each EU country and the European Commission, as well as members of the European Parliament and national parliaments.

However, adoption of this document has generated a number of questions, unambiguous answers to which cannot be obtained until now.

The list of basic rights of the EU, which was to develop the Convention on Human Rights, was based on the consensus of the three fundamental rights of the individual at the European level (human dignity, self-determination and equality), on the one hand, and on the principle of indivisibility of fundamental rights, on the other hand.

EU Charter of Fundamental Rights contains a Preamble and 54 Articles grouped in seven chapters:

- chapter I: dignity (human dignity, the right to life, the right to the integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and forced labour);
- chapter II: freedoms (the right to liberty and security, respect for private and family life, protection of personal data, the right to marry and found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association, freedom of the arts and sciences, the right to education, freedom to choose an occupation and the right to engage in work, freedom to conduct a business, the right to property, the right to asylum, protection in the event of removal, expulsion or extradition);
- chapter III: equality (equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between men and women, the rights of the child, the rights of the elderly, integration of persons with disabilities);

- chapter IV: solidarity (workers' right to information and consultation within the undertaking, the right of collective bargaining and action, the right of access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labour and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection, consumer protection);
- chapter V: citizens' rights (the right to vote and stand as a candidate at elections to the European Parliament and at municipal elections, the right to good administration, the right of access to documents, European Ombudsman, the right to petition, freedom of movement and residence, diplomatic and consular protection);
- chapter VI: justice (the right to an effective remedy and a fair trial, presumption of innocence and the right of defence, principles of legality and proportionality of criminal offences and penalties, the right not to be tried or punished twice in criminal proceedings for the same criminal offence);
- chapter VII: general provisions.

The Charter applies to the European institutions, subject to the principle of subsidiarity, and may under no circumstances extend the powers and tasks conferred on them by the Treaties. The Charter also applies to EU Member States when they implement EU law.

If any of the rights correspond to rights guaranteed by the European Convention on Human Rights, the meaning and scope of those rights is to be the same as defined by the convention, though EU law may provide for more extensive protection. Any of the rights derived from the common constitutional traditions of EU Member States must be interpreted in accordance with those traditions.

In contrast to the Convention of 1950, which guarantees a limited set of preliminary personal and political rights and ensures the effectiveness by the judicial control mechanism, the Charter regulates the rights of all four generations. In this regard, we can observe that the main source of problems with the acquisition of the legal status of the Charter was precisely in the area of social and economic rights.

Currently, after the entry into force of the Treaty of Lisbon, the Charter has acquired legal force at the level of the Treaties (Art. 6 TEU). The Charter proved to be a too ambitious instrument, with the provisions which were originally adopted without complications and unanimously by all Member States as a political declaration, subsequently proved to be unacceptable to some States as an instrument of legal nature.

Protocol (No) 30 to the Treaties on the application of the Charter to Poland and the United Kingdom restricts the interpretation of the Charter by the Court of Justice and the national courts of these two countries, in particular regarding rights relating to solidarity (chapter IV).

After the proclamation of the Charter some questions were raised related to correspondence of its provisions with the ECHR system, which operates within the Council of Europe. Namely, why did the adoption of the Charter take place, if at that moment, all EU Member States were already full members of the Council of Europe and, therefore, they committed themselves in the prescribed manner to a legal obligation to comply with the provisions of the ECHR?

By making the EU Charter of Fundamental Rights legally binding on a par with the Treaties, the European Union announced its intention to create its own supranational system of protection of human rights and fundamental freedoms. Thus, in Europe there was a new system of human rights protection, which operated in parallel with the Council of Europe system. Note that for the EU, in contrast to the Council of Europe, human rights as an area had been in the “shadow” of its other integration priorities for a long time.

4.2.2. Human rights and freedoms under the EU Founding Treaties

Despite the formalization of certain rights of first generation in the Founding Treaties of the EU, the existence of certain restrictions in terms of their implementation and protection is obvious. Civil and political rights provided in the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU), at the initial stage of the existence of the EU were not considered as absolute. Naturally, they were limited to the application in the specific areas of cooperation of the Member States of the EU (usually economic one). We may find the confirmation in the decision of the EU Court of Justice in *SPUC v. Grogan*, in which, inter alia, it was emphasized that Art. 21 TFEU, as regards freedom of movement “of workers” and no legislative and other measures, subject to the rights belonging to “workers”, their family members and even any person lawfully in the territory of the EU, does not make these rights universal.

In 1992 the Maastricht Treaty greatly expanded the list of human rights which have become available to individuals since the Treaty entered into force. Its Preamble mentions the commitment to the principles of respect for human rights, and the rule of law. In this regard, it should be noted that the Preamble to the Single European Act, which was adopted in 1986 and came into effect on 1 July 1987, in contrast to the Preamble of the Maastricht Treaty of 1992, mentioned only democracy and human rights. In paragraph 2 of Art. «F» Treaty of 1992 (current Art. 6 TFEU), it was also noted that the EU shall respect fundamental rights guaranteed by the European Convention on Human Rights, and arising from the constitutional traditions common to all Member States, as the basic principles of EU law.

In the system of rights and freedoms enshrined by the Maastricht Treaty the right of citizenship of the European Union is of paramount importance, being a vivid example of the first generation rights. This right in fact created a basis for the forthcoming and normative consolidation of a number of other rights that traditionally belong to the group of civil and political ones. They are primarily about freedom of movement and residence in the territory of Member States of the EU, right to vote and to be a candidate in municipal elections and elections to the European Parliament, enjoy the protection of the diplomatic and consular authorities of any of EU Member States, and to submit petitions to the European Parliament.

In 1997 the Amsterdam Treaty brought the above-mentioned provisions to a new level. It clearly stipulates that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, the rule of law, principles which are common to the Member States” (Art. 6 (1) Treaty on European Union as amended by the Treaty of Amsterdam). Art. 7 of the Treaty (as amended by the Treaty of Amsterdam) provided for the possibility of termination by the EU Council of certain rights of a Member State arising from the membership in the European Union, in the event of a serious and prolonged violation by that State of the principles enshrined in Article 6 (1). Finally, with the adoption of the Treaty of Amsterdam it was officially established that only the European State that adheres to the principles enshrined in Article 6 (1) could be considered a potential candidate for EU membership.

It should be noted that the Treaty of Amsterdam, along with the development of the provisions of the Maastricht Treaty in the humanitarian context, also made some important amendments to the Rome Treaty establishing the European Economic Community in 1957, providing, in particular, as one of the key EU objectives the promotion of the gender equality and significantly expanding the list of grounds on which discrimination is prohibited (national criterion was supplemented by racial and ethnic origin, belonging to a particular gender, age, religion, health status and sexual orientation (Art. 13)). In addition, specific measures which should have been taken by the Council within five years after the entry into force of the Amsterdam Treaty aimed at implementing the European Union’s policy in the field of asylum and immigration (Art. 63) were recorded for the first time.

Thus, the group of second-generation rights was in a more “favorable” position than the first-generation rights in terms of their regulatory consolidation within the EU. This was largely due to a pronounced economic oriented functioning of the inter-state association. As is well known, it is for closer integration of the European states in the economic sphere that all the three communities were established in 1950s, namely, the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community.

However, some of the rights that traditionally belong to the category of social, economic and cultural, such as the right to a decent life, the right to education, the right to health, the right to social assistance, etc., were not only initially fixed in the constituent EU treaties, and later repeatedly confirmed in the documents such as the Single European Act, the Maastricht and Amsterdam treaties and the Nice and Lisbon treaties. The provisions contained in the preamble of the Single European Act and the Treaty of Amsterdam, directly pointed to the commitment to the fundamental social rights enshrined in the European Social Charter in 1961, adopted by the Council of Europe.

In 1989, the EU Charter of Fundamental Social Rights of Workers was adopted, and in 1992 in addition to the Maastricht Treaty – the Protocol on Social Policy of the same Agreement, which was attached to it. These documents significantly expanded provisions relating to human rights in the field of education, vocational training, health, and the rights and freedoms of a particular category of persons such as young people. By virtue of the adoption in 2000 of the EU Charter of Fundamental Rights, social, economic and cultural rights in the EU were supplemented by the freedoms in the field of science and art, respect for cultural and linguistic diversity, as well as the rights of such categories of persons as children, the elderly and the disabled.

In accordance with Art. 6 of the Treaty on European Union (as amended by Lisbon Treaty) “The EU respects the rights, freedoms and principles set out in the Charter of Human Rights”, it “has the same legal force as the basic treaties of the Union.” Despite the fact that the Charter is not incorporated into the text of the Treaty, its provisions are binding. The binding character of the Charter allows to monitor compliance with the secondary EU law sources of the principles set out in the Charter.

Another novelty, which appeared after the adoption of the Lisbon Treaty, is a collective right of EU citizens to come out with a civil initiative. EU citizens are entitled to submit a proposal to the European Parliament and the Council to change the law. To do this, one must enlist the support of millions of citizens for this initiative. The Commission, however, reserves the right to decide whether to take action to meet this request.

Thus, nowadays within the EU, there definitely occurs the formation of a comprehensive set of standards for the protection and monitoring of the wide range of social, economic and cultural rights recognized at universal and regional level. Respect for human rights and democracy is now regarded as one of the most important conditions for the membership of any candidate in the EU. Apart from the previously mentioned TEU and TFEU, the relevant provisions were consolidated in a number of agreements on association with the EU countries, which are potential candidates for EU membership. Most international agreements concluded by the EU with third countries include

different human rights provisions providing for termination of the agreement or part thereof in case of a breach in the State concerned of basic human rights and freedoms.

In addition, the contractual principle of respect for human rights was reflected in a number of other EU legal acts, among them the Joint Declaration by the European Parliament, the Council and the Commission on fundamental rights of 1977, as well as the same name of the Declaration adopted by the European Parliament in 1989.

4.2.3. The European Union Agency for Fundamental Rights and the European Ombudsman

A significant step towards the formation of the system of effective protection of human rights and freedoms within the European Union was the establishment of a special body – the Agency for Fundamental Rights (the Agency) – in March 2007. It operates based on the Council Regulation of 2007.

The Agency and the European Ombudsman are specially created bodies intended for monitoring respect for human rights by the European Union institutions and Member States. These bodies carry out extrajudicial monitoring of observance of human rights in the activities of the European Union institutions and bodies. The main purpose of the Agency is to promote the European Union and its Member States in dealing with any issues related to the promotion and protection of human rights and fundamental freedoms. Acting jointly with the European Ombudsman and the European Data Protection Supervisor, the Agency contributes to the formation of an independent EU system of human rights protection.

The scope of the Agency's activities is approved annually by the EU Council on a proposal from the European Commission and is issued in the form of the Work Program. Law-making powers of the Agency are limited to giving Opinions and Annual Reports, on the request of the European Commission or other EU institutions. The Agency cannot intervene in the legislative procedure established by Art. 263 of the TFEU.

The main powers of the Agency are:

- to collect, analyze and disseminate objective and reliable information, develop approaches to improve the objectivity and reliability of data at European level, as well as to conduct and promote research and surveys;
- to prepare and publish the findings and the position of the institutions of the Union and the Member States in the execution of EU law, on its own initiative or at the request of the European Parliament, the Council or the Commission;
- to publish an Annual Report on respect for fundamental human rights in the areas of the Agency's activities, focusing special attention on the results achieved;

- to publish thematic reports based on the results of the study;
- to develop communication strategy and promote dialogue with civil society to raise public awareness on issues of fundamental human rights and actively disseminate information about its activities.

Cooperation between the European Union Agency for Fundamental Rights (FRA) and the Council of Europe is based on FRA Founding Regulation и Agreement between the European Community and the CoE on cooperation between the FRA and the CoE. This Agreement established the general framework for cooperation in order to give benefit to the activities carried out by the Agency in cooperation with the Council of Europe.

Key objectives and strategic priorities for the protection of human rights, as determined by an exchange of views between the Agency and the Council of Europe, are achieved by: a) the development of joint projects in areas of mutual interest; b) participation in the dialogue with stakeholders in order to strengthen respect for fundamental rights; c) the coordination of communication activities in order to increase awareness of fundamental rights; g) operational data exchange and consultation with each other.

In accordance with Art. 12 of the FRA Founding Regulation “Regular consultations shall be held between the Agency and the Council of Europe Secretariat, with the aim of coordinating the Agency’s activities, in particular in carrying out research and scientific surveys as well as drafting conclusions, opinions and reports, with those of the Council of Europe in order to ensure complementarity and the best possible use of available resources”. Art. 17 of the Agreement stipulates that “The Committee of Ministers of the Council of Europe shall appoint an independent person to sit on the Management and Executive Boards of the Agency, together with an alternate member. The Council of Europe appointees shall have appropriate experience in the management of public or private sector organizations and knowledge in the field of fundamental rights”. The representative of the Council of Europe Secretariat also participates in meetings of the Board as an observer.

The Maastricht Treaty introduced the position of the European Ombudsman in 1992. The competence of this body includes receiving complaints on the inefficient activities of all the institutions and bodies of the European Union, with the exception of the Court of Justice. In order to avoid cases of interference in the domestic jurisdiction of Member States, the power to deal with complaints against national, regional and local authorities of the Member States was excluded from the powers of the European Ombudsman, even if the subject of the complaint is the law of the European Union.

Based on a complaint or on its own initiative, the Ombudsman considers cases involving irregularities in the administrative activities of the EU. He/she has the func-

tions of investigation. The organs and institutions of the EU are obliged to provide the Ombudsman with the materials he/she needs to carry out this work.

Within the jurisdiction of the Ombudsman are all complaints regarding the functioning of the shortcomings of institutions or bodies of the EU. These may be issues such as unnecessarily long periods of considering the issues, lack of transparency, refusal of information, the employment relationship between the institutions and their staff, competitions, contractual relations between the EU institutions and private firms.

Persons wishing to submit a complaint to the European Ombudsman must meet certain eligibility conditions:

- The complainant: any European citizen, or other natural or legal person residing or having a registered office in one of the Member States of the Union, may submit a complaint. The complainant does not have to be affected directly by the case of maladministration.
- The subject of the complaint: the complaint must relate solely to a case of maladministration on the part of a Community body or institution. “Maladministration” means, for example, an abuse of power, administrative irregularities, discrimination, etc.
- The deadline: a complaint regarding a case of maladministration must be lodged within two years of the date on which the facts were brought to the citizen’s attention. It should be noted that the submission of a complaint to the Ombudsman does not affect the deadlines set in any other legal or administrative procedures.
- The last resort principle: before submitting a complaint, the complainant must take the relevant administrative steps with the institution(s) concerned.
- The Ombudsman examines the circumstances in the complaint in order to determine its jurisdiction. If the complaint is in his/her jurisdiction, he/she shall inform the applicant of the further course of its consideration. If not, he/she provides a basis for refusing to consider it. In most cases, the Ombudsman advises the applicant on which body (for instance, National Office of the Ombudsman, Commission for Petitions, etc.) the applicant should contact.
- After the initial investigations, if the Ombudsman finds that a complaint is eligible, he/she informs the institution concerned and asks it to submit a detailed opinion within three months. Following this, the Ombudsman will send a report, with possible recommendations, to both the European Parliament and the institution concerned. The complainant will then be given the results of the Ombudsman’s inquiries, and possible recommendations, as well as the opinion of the institution concerned. The complainant has one month to submit any comments.
- If the Ombudsman finds evidence of any criminal wrongdoing, he must immediately inform the national authorities, the Community institution responsible for fight-

ing fraud, or the Community institution for which the official or agent in question works.

The Ombudsman may cooperate, under certain circumstances, with similar national authorities in order to enhance its investigations and to better protect the rights of the complainants. Likewise, the Ombudsman may also cooperate with national institutions responsible for protecting and promoting fundamental rights.

The European Union Agency for Fundamental Rights and the European Ombudsman are non-judicial human rights protection mechanisms in the European Union. The only supranational judicial institution of protection of human rights in the EU is the Court of Justice of the European Union, the practice of which marked the beginning of the development of human rights concepts in the framework of a new supranational legal system. However, the relationship of this concept with a pan-European concept of human rights, which was already established within the Council of Europe, is accompanied by a number of problems.

4.2.4. Cooperation of the European Union and the Council of Europe in the field of human rights protection

The European Union and the Council of Europe (CoE) share common values of human rights, democracy and the rule of law. In spite of the difference in legal nature of these two unions of European States, and a variety of tasks and functions in their daily activities, they complement each other.

The Council of Europe brings together 47 European States and is the only European intergovernmental organization which has offered a definition of “European State”, based on the idea of geographical proximity, cultural ties and common European values. The Council of Europe provides such recognition of the values at the European level by fixing a reasonable balance in the treaty legal standards and institutional sources of law, the compliance with which should be monitored, often using CoE technical and expert assistance. This assistance takes place, in particular, with the participation of European Union institutions.

The European Union considers the common European values a key element of European identity. In the development of its legal instruments and agreements within 28 Member States, the EU is often based on the Council of Europe standards. Fifty-three of the two hundred and seventeen Council of Europe treaties are open for the European Union. In addition, in its relations with States, many of whom are members of the Council of Europe, the European Union refers to, inter alia, the Council of Europe standards and activities of its monitoring mechanisms.

Because of the enlargement of the European Union, the competences of the EU and the Council of Europe in many areas have become similar and cannot be solely the EU effort. Thus, drug trafficking, organized crime, money laundering or terrorism affect not only the interests of the Member States of the EU, but also the interests of the European countries that are not EU members.

The negative aspect of this competence is the intersection of double standards, especially where there are bodies or institutions with similar competence, goals and objectives. An example is the sphere of human rights protection, in which there is a conflict of jurisdictions of the EU Court of Justice and the European Court of Human Rights. One can also give an example of the intersection between the competences of the European Union Agency for Fundamental Rights, which is established to monitor observance of and protection of human rights in the EU and its Member States and the Council of Europe's statutory bodies carrying out monitoring in this area.

Cooperation of the EU and the Council of Europe is carried out in two formats:

1. Treaty based cooperation, which in turn is divided into: a) unilateral acts of the European Communities, the European Union and the Council of Europe (letters, official statements, etc.); b) bilateral agreements between the European Union and the Council of Europe; c) the European Union participation in the Council of Europe treaties.

2. Institutional cooperation. In this case, institutional co-operation means relationship for coordination of actions between authorities, institutions and other bodies of the European Union and the Council of Europe.

The Lisbon Treaty has expanded the already considerable experience and expertise in the European Union framework in many areas. It was expanded cooperation on issues such as fight against human trafficking, sexual exploitation of children and violence against women. Moreover, the provisions of the Lisbon Treaty opened for the European Union the possibility of signing the Convention on the Protection of Human Rights and Fundamental Freedoms, 1950.

The possibility of EU accession to the ECHR is provided by two rules: Art. 6 of the Lisbon Treaty and Art. 59 of the ECHR, as amended in accordance with Protocol No14.

The idea of EU accession to the ECHR is not new. In 2001, the Working Group GT-DH-Eu was instructed to conduct a study on the issues that should be considered by the Council of Europe in the event of a possible EU accession to the ECHR in order to avoid contradictions between the EU legal system and the legal regime of the ECHR.

The European Commission initiated negotiations on EU accession to the ECHR on 17 March 2010. In turn, on 4 June 2010, EU Justice Ministers gave the European Commission a mandate to negotiate with the Council of Europe on their behalf. Thus, the active phase of drafting the Agreement on the Accession began.

The Council of Europe Committee of Ministers gave special powers to its Steering Committee for Human Rights (CDDH) to develop the necessary legal instrument of the EU accession to the ECHR together with the EU. The CDDH-UE ad hoc working group was established by the CDDH, consisting of 14 experts (7 from EU Member States and 7 from non-EU Member States). The group held eight meetings during the period from July 2010 to June 2011.

On 14 October 2011, the Steering Committee for Human Rights gave a progress report and a draft agreement in the annex to the Committee of Ministers of the Council of Europe. Given the political consequences, and some of the issues that were raised at the meeting on 13 June 2012, the Committee of Ministers instructed the CDDH to negotiate with the EU as part of a special group of “47 + 1” in order to harmonize the final text of the draft Agreement on the terms of accession. This ad hoc group held several meetings in Strasbourg. The last meeting took place on 2–5 April 2013, which presented the final text of the draft Agreement on the EU’s accession to the ECHR.

On 4 July 2013 the European Commission applied to the European Court of Justice requesting Opinion on the compatibility of the draft Agreement with EU law, pursuant to Article 218(11) TFEU. The Court, after noting that the problem of the lack of any legal basis for the EU’s accession to the ECHR was resolved by the Treaty of Lisbon, pointed out that since the EU cannot be considered to be a State, such accession must take into account the particular characteristics of the EU, which is precisely what is required by the conditions to which accession is subject under the Treaties themselves.

Having clarified this, the Court observed first of all that, as a result of accession, the ECHR, like any other international agreement concluded by the EU, would be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law. In that case, the EU, like any other Contracting Party, would be subject to external control to ensure the observance of the rights and freedoms provided for by the ECHR. The EU and its institutions would thus be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and judgments of the European Court of Human Rights.

The Court noted that it is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would be binding on the EU and all its institutions and that, on the other hand, the interpretation by the Court of Justice of a right recognised by the ECHR would not be binding on the ECtHR. However, it stated that cannot be the case as regards the interpretation of EU law, including the Charter, provided by the Court itself.

The Court pointed out in particular that, in so far as the ECHR gives the Contracting Parties the power to lay down higher standards of protection than those guaranteed by the ECHR, the ECHR should be coordinated with the Charter. Where the rights recognised by the Charter correspond to those guaranteed by the ECHR, the power granted to Member States by the ECHR must be limited to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.

The Court found that there is no provision in the draft agreement to ensure such coordination. The Court considered that the approach adopted in the draft agreement, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU. In particular, this approach does not take account of the fact that, as regards the matters covered by the transfer of powers to the EU, the Member States have accepted that their relations are governed by EU law to the exclusion of any other law. In requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Parties which are not members of the EU but also in their relations with each other, the ECHR would require each Member State to check that the other Member States observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States. In those circumstances, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law. However, the agreement envisaged contains no provision to prevent such a development.

The Court noted that Protocol No 16 to the ECHR, signed on 2 October 2013, permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto. Given that, in the event of accession, the ECHR would form an integral part of EU law, the mechanism established by that protocol could affect the autonomy and effectiveness of the preliminary ruling procedure provided for by the FEU Treaty, notably where rights guaranteed by the Charter correspond to rights secured by the ECHR. It cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a national court or tribunal could trigger the procedure for the ‘prior involvement’ of the Court, thus creating a risk that the preliminary ruling procedure might be circumvented.

The Court considered that the Draft Agreement fails to make any provision in respect of the relationship between those two mechanisms. Next, the Court recalled that the FEU Treaty provides that Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settle-

ment other than those provided for by the Treaties. Consequently, where EU law is at issue, the Court has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR. The fact that, according to the draft agreement, proceedings before the Court are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with the ECHR is not sufficient to preserve the Court's exclusive jurisdiction. The draft agreement still allows for the possibility that the EU or Member States might submit an application to the ECtHR concerning an alleged violation of the ECHR by a Member State or the EU in relation to EU law. The very existence of such a possibility undermines the requirements of the FEU Treaty. In those circumstances, the draft agreement could be compatible with the FEU Treaty only if the ECtHR's jurisdiction was expressly excluded for disputes between Member States, or between Member States and the EU, regarding the application of the ECHR in the context of EU law.

In addition, in the Draft Agreement, the co-respondent mechanism has the aim of ensuring that proceedings brought before the ECtHR by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate. The Draft Agreement provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party. If the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must prove that the conditions for their participation in the procedure are met, with the ECtHR deciding on that request in the light of the plausibility of the reasons given. In carrying out such a review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions. The ECtHR could adopt a final decision in that respect which would be binding both on the Member States and on the EU. To permit the ECtHR to adopt such a decision would risk adversely affecting the division of powers between the EU and its Member States.

The Court also expressed its view on the procedure for the prior involvement of the Court. It noted, first, that, to that end, the question whether the Court has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR can be resolved only by the competent EU institution, that institution's decision having to bind the ECtHR. To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case law of the Court. Consequently, that procedure should be set up in such a way as to ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent institution is able to assess whether the Court has already given

a ruling on the question at issue and, if not, to arrange for the prior involvement procedure to be initiated.

Secondly, the Court observed that the draft agreement excludes the possibility of bringing a matter before the Court in order for it to rule on a question of interpretation of secondary law by means of that procedure. Limiting the scope of that procedure solely to questions of validity adversely affects the competences of the EU and the powers of the Court.

Lastly, the Court analysed the specific characteristics of EU law as regards judicial review in matters of the common foreign and security policy (CFSP). It noted that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court. That situation is inherent to the way in which the Court's powers are structured by the Treaties, and, as such, can only be explained by reference to EU law alone. Nevertheless, on the basis of accession as provided for by the draft agreement, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, notably those whose legality the Court cannot, for want of jurisdiction, review in the light of fundamental rights. Such a situation would effectively entrust, as regards compliance with the rights guaranteed by the ECHR, the exclusive judicial review of those acts, actions or omissions on the part of the EU to a non-EU body. Therefore, the Draft Agreement fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in the area of the CFSP.

In the light of the problems identified, the Court concluded that the Draft Agreement on the accession of the European Union to the ECHR is not compatible with EU law.

The list of issues to which the EU Court of Justice referred in its Opinion 2/13 of 18 December 2014 is so long that it casts doubt on the possibility of EU accession to the ECHR in the short term period. If the negotiation process to overcome these inconsistencies continues, the Draft Agreement will be submitted to the EU Court of Justice once again.

If the Court of Justice recognizes the Draft Agreement on the accession as compatible with EU law, the European Parliament will have to give consent and the European Union and the Council will have to decide unanimously, which allows the signing of the Accession Agreement. All EU Member States and the European Union will have to ratify the Agreement. On the part of the Council of Europe, the Accession Agreement will have to be adopted by the Committee of Ministers and opened for signature and ratification by all 47 State Parties to the ECHR after receipt of (formal) opinions on the text (s) of the European Court of Human Rights and the Parliamentary Assembly of the Council of Europe.

What should be the outcome of the EU accession to the ECHR? The main expected result should be harmonization of approaches of the Council of Europe and the European Union in the field of human rights and fundamental freedoms. The European Union will have an important role in further strengthening of the system of standards for the protection of human rights and fundamental freedoms and overcoming the double standards of human rights protection in Europe.

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4.3. Schengen EU law

4.3.1. Schengen rules as a kind of «enhanced cooperation»

In the European Union there was formed and now operates the mechanism of deeper integration, which is known in the European law as «enhanced cooperation of

States» or «the principle of flexibility.» This principle was first introduced in the European Community in the late 1950s and was formulated by the Minister for European Affairs of Spain Carlos Westendorp in his report of 5 December 1995 (Dossier CIG: des institutions pour une Europe élargie. – Bruxelles: Parlemeuropeen).

«Enhanced cooperation» is a natural result of European integration. It was originally intended to exercise the so-called «linear integration», the essence of which was that all States move at the same tempo without any exceptions and transitional periods. In the course of accession of new states to the Communities this system became more and more unrealistic. The idea of flexible approach to merging of the European states implying granting freedom of choice to the Member States arose along with the idea of integration of the European states.

The principle of flexibility was first introduced into the European law in accordance with the Treaty of Amsterdam. A clear procedure for the establishment of flexible integration relations was established under the name of «closer cooperation». This procedure was significantly changed by the Treaty of Nice, which came into force in 2003. The Nice Treaty uses the term «enhanced cooperation».

The Treaty of Lisbon 2007 concretizes and extends the scope of enhanced cooperation in the European Union.

Currently, enhanced cooperation (principle of flexibility) is understood as the possibility for a certain number of EU member states to deepen integration in any sphere through the use of the institutions, procedures and mechanisms of the Union. At the same time, Member States which were not included for any reason in the leading group may join later, upon the occurrence of the necessary conditions.

Enhanced cooperation in the EU was carried out in various forms before the creation of its legal basis: multispeed movement, European vanguard, Europe's core, various geometry, la carte, concentric circles, etc. Respectively, now within the EU the concepts of the same name of the enhanced cooperation are realized.

The concept of the multispeed movement means that a certain group of the EU states wishing and able to do it follows the way of deeper integration, and the others join the leading group gradually. All member states have uniform common goals and wish to reach them; the element of flexibility concerns only the period of time during which all EU member states will achieve approved objectives. Enhanced integration can happen at the same time in various areas of cooperation, and the corresponding «subgroups of cooperation» can unite various member states. So, the Schengen agreement united five states of Europe in the beginning, gradually other EU member states joined it.

Examples of the «multispeed Europe» concept can be found in the so-called adaptation provisions of the treaty of accession of new member states to the EU. Thus, the

first paragraph of article 3 of the Act of conditions of accession of the Czech republic, Republic of Estonia, Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and amendments to foundation agreements of the European Union provide that provisions of the Schengen acquis and acts adopted on its basis and otherwise related, and also any subsequent acts which can be adopted before the date of the entry of new member states into the EU will be considered as legally obligatory and are to be applied in these new member states from the date of their accession to the EU. However the second paragraph of this article describes the situation indicating that application of the specified provisions in new member states is put under certain conditions and is actually postponed for some time, namely before the corresponding conditions are met.

Paragraph 2 of article 3 of the Act provides that the legal statuses about the Schengen acquis specified in the first point of article 3 though, will be considered legally obligatory for new member states from the date of their accession to the EU, will be applied in new member states only after acceptance by the Council of the decision confirming that according to the Schengen assessment procedures necessary conditions for use of all parts of the Schengen acquis are executed in this member state, and after consultations with the European Parliament. Thereby, the EU shows flexible approach to integration of new members of the Union. For some time they remain in the second echelon of the organization, move on the way of integration by smaller rates in comparison with the states making the Union till May 1, 2004.

In the EU the enhanced cooperation arises and is fixed in practice in the beginning and only then is fixed in the law. The Schengen area is the first concrete example of the enhanced cooperation between member states of the European Union.

4.3.2. The Schengen process: background, genesis, sources

Creation of a uniform area which would provide freedom of movement of goods, services, the capital and persons was one of the main tasks of the European integration project which was designated by founding fathers of the EU at the very initial stage of its formation. As for the first three freedoms, their fixing and realization were carried out within creation and functioning of the Communities. Fixing of freedom of movement of persons required conclusion of special agreements between the states which further received the name of the Schengen agreements (the Schengen acquis).

The foundation of the Schengen area was laid by the Agreement between the governments of Benelux countries (Belgium, the Netherlands, Luxembourg), Germany and the French Republic about gradual cancellation of checks on the general borders signed in Schengen on 2 March, 1985. Creation of the Schengen area forming the

territory within which free movement of persons is guaranteed was the general idea of the specified agreement. The Contracting parties of this agreement have assumed liability on gradual cancellation of personal passport control on the general borders between member states in relation to citizens of member states of the Communities, which was enshrined in Art. 1 of the Agreement.

To achieve the purpose of freedom of movement of persons according to provisions of Art. 2 of the Agreement of 1985, the parties reached agreement on implementation of simple visual surveillance of the vehicles crossing the general border at the slowed-down speed without the requirement to stop the vehicle.

In the field of visa control the states made the decision on the fastest rapprochement of visa policy for the purpose of prevention of negative consequences in the field of immigration and safety which can entail weakening of checks on the common borders.

Under the provisions of Art. 11 of the Agreement of 1985, in the short-term period the parties coordinated not to perform systematic checks in the field of cross-border transportation of goods and automobile transport, and also coordinated the direction on harmonization of rules licensing cross-border transportations of the professional motor transport, having determined for the purpose simplification, facilitation and a possibility of replacement of «unit license to travel «to» a license for a specified period». In the long term the parties planned cancellation of checks on the common borders and their transfer for external borders (Art. 17 of the Agreement).

Later the agreement of June 19, 1990 was concluded (Convention Implementing the Schengen Agreement of 14 June 1985). An essential contribution of the contracting states was the provision of Art. 2 of the Convention of 1990 according to which border control on all internal borders between contracting states was cancelled, and any personal control was cancelled too. However, the provision on the right of a contracting party, on condition of carrying out consultation with other contracting states, to make the decision on implementation of national boundary checks on internal borders during the limited period of time when that is demanded by a public order or introduction of this restriction was caused by measures of national security. However, the mode of external borders for contracting states remained invariable. So, according to provisions of Art. 3 of the Convention, external borders by the general rule can be crossed only in border check points during the determined time of their work. Article 5, and provisions of chapters 3 and 4 of the Agreement laid the foundation of the unified regulation of entrance of foreign citizens on the territory of member countries of the Convention. The specified rules gained further development in the visa code of the EU. The cornerstone of the Convention of 1990 was providing freedom of movement within external borders of member countries of the Convention. However, providing

freedom of movement was connected with a number of the so-called countervailing measures. Namely, the parties coordinated the mechanism for improving coordination between police and judicial authorities for safety in borders of the states – participants of the Convention, and, in particular, for fight against organized crime. For the purposes of coordination, Schengen Information System (hereinafter – SIS) representing the database used by bodies of member states of the Convention for data exchange on separate categories of faces and goods was created. The main objective of SIS is ensuring public safety in the conditions of free movement of persons within uniform visa space. National services which are responsible for protection of borders, issue of visas, and police have access to SIS.

SIS includes the information about the persons who are wanted, about foreigners to whom entry into the EU is forbidden owing to commission of crime or violation of the stay in the Schengen area, about the persons who are under special control. Entering of information about the person into the SIS database represents the basis for refusal in the issue of the Schengen visa, and in case of its receiving – for refusal of entry to the Schengen area.

The organizational basis of cooperation of police and judicial authorities of the EU for suppression of violations of the set mode was made by the Schengen Executive Committee which was allocated not only administrative, but also some rule-making powers. Its rather vigorous rule-making activity generated the so-called «Schengen law» (Schengen *acquis*, the Schengen achievements) which represented the system of the rules regulating cooperation of the states of the EU within the Schengen process. In 1990s the Schengen Executive Committee adopted more than 200 acts.

At the same time the Maastricht Treaty in 1992 provided inclusion of the issues of the Schengen agreements in the structure of competence of the EU whose institutes were also actively connected with the process of adoption of normative documents in this area of cooperation. Finally, there was a gradual integration of norms of the Schengen law into the legal system of the EU as its integral component.

Because not all members of the EU were participants of the Schengen agreements, such incorporation was realized by adoption of a separate act – «Protocol integrating the Schengen *acquis* into the framework of the European Union» – Protocol to the Treaty of Amsterdam in 1997. In particular, Art. 2 of the Protocol stipulated that from the date of entry into force of the Treaty of Amsterdam the Schengen law (Schengen *acquis*), including decisions of the Executive Committee founded by the Schengen agreements, the dates of entry into force of the Amsterdam Treaty adopted earlier, is subject to application by thirteen countries specified in Art. 1 of the Protocol without prejudice to provisions of Art. 2 of the Protocol. From the same date the EU Council replaced the Executive committee mentioned above.

The possibility of its application including the Court of the EU (paragraph 3 of Art. 2 of the Protocol) became a legal consequence of inclusion of Schengen acquis in legal area of the EU. Provisions of paragraph 2 of Art. 2 and provisions of Art. 7 of the EU Council Protocol assumed liability on taking any measures necessary for performance of provisions of Art. 2 of the Protocol. In particular, it adopted a number of normative documents.

So, for example, the Decision 1999/307/EU of May 1, 1999 fixed detailed regulations on integration of the Secretariat of Schengen into the structure of the General Secretariat of the Council, including the provision on integration of personnel of the Secretariat of Schengen into the General Secretariat of the Council.

The decision No. 1999/435/EU defined the legal area forming Schengen acquis, which was understood as all acts included in the list attached to the Protocol of the Amsterdam Treaty (Art. 1 of the Decision No. 1999/435/EU). The annex to the decision listed all the acts constituting the Schengen acquis for the purpose of carrying out the provisions of the second sentence of the second paragraph of Art. 2 of the Protocol to the Treaty of Amsterdam, namely the incorporation of the objectives of these provisions in the legal sphere of the Treaty establishing the European Community and the Treaty on European Union.

EU Council decision No. 1999/436 / EC of 20 May 1999 fixed the list of acts of Schengen aquis included in the legal area of the contracting parties. Thus, the Council of the EU actually differentiated between competence of the EU and the countries composing it. For example, asylum matters were delegated to institutions of the EU.

Due to large structural changes of foundation agreements of the EU after the Treaty of Lisbon there was a need for updating legislative base in the field of the Schengen achievements (Schengen acquis). The protocol No. 19 «integrating the Schengen acquis into the framework of the European Union» has fixed intention of contracting parties to keep the Schengen achievements in a legal form, after entry into force of the Amsterdam Treaty, and also intention to further develop these achievements for granting citizens of the Union freedom, safety and justice without fixing internal borders. The provision on the right of EU Member States to establish among themselves the enhanced cooperation in spheres which fall under operation of the provisions determined by the EU Council has been enshrined in article 1. The protocol has fixed regulations on implementation of measures for development of the enhanced cooperation by a number of the countries.

At the time of signing of the Treaty of Lisbon of 2007 Ireland and the United Kingdom did not participate in provisions of the Schengen achievements aimed at providing transparency of internal borders of member states, in particular cancellations of border control concerning natural persons. The specified countries also did

not participate in regulations on the uniform mode of crossing of external borders of the European Union, including regulations on Schengen visas. On the other hand, Ireland and the United Kingdom on the basis of decisions of the EU Council joined those provisions of the Schengen achievements which regulate interaction of member states in the sphere of fight against crime and other offenses. The obligation for full reception of the Schengen achievements by candidates for accession to the European Union has been enshrined in article 7 of the Protocol.

4.3.3. Schengen zone and the Schengen border: sources and regulation

The Schengen zone represents the area of application of the so-called Schengen achievements (Schengen *acquis*) and application of the Schengen visa and covers the Parties of the Schengen agreements, and also the states to which norms of the Schengen law *de facto* extend.

Expansion of the Schengen zone was carried out with continuous accession of new EU member states. Italy signed the agreement on November 27, 1990, Spain and Portugal – on June 25, 1991, Greece – on November 6, 1992, Austria – on April 28, 1995, Denmark, Finland and Sweden – on December 19, 1996, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia joined on December 21, 2007. Switzerland, though not being a member of the European communities, subsequently a member of the European Union, joined the Convention on December 12, 2008. The Schengen zone also includes such states as Iceland (1996), Liechtenstein (2008), Norway (1996), which aren't members of the EU. However the Schengen zone doesn't include some EU member states: Great Britain, Ireland, Cyprus, Bulgaria, Romania and Croatia.

Not all territories being under the jurisdiction of the so-called Schengen states enter the Schengen zone. In some cases, provided exemptions were related, as a rule, to the geographical remoteness of certain regions of these countries. In such cases the Schengen mode is not applied to these territories. The specified restrictions are set concerning the cities of Ceuta and Melilla (Spain), Greenland and the Faroe Islands (Denmark), Sint-Martina (Netherlands), overseas possession of France, Spitsbergen (Norway).

Vatican, San Marino, Liechtenstein, Andorra and Monaco are included *de facto* into the Schengen zone.

On 15 March, 2006 the Regulations of the European Parliament and Council No. 562/2006 establishing the Code of the EU about the mode of crossing by natural persons of borders or «Schengen Borders Code» were adopted. This act represents a codifying act adopted in the form of regulations of the European Union. Schengen

Borders Code consists of a preamble, more than 40 articles divided into sections and chapters devoted to legal regulation of crossing of internal and external borders, control of their crossing, conditions of boundary checks and fixes detailed regulations on a procedure of border control, and also eight appendices on special questions.

The preamble of the Schengen Borders Code provides that the establishment of a 'common corpus' of legislation, particularly via consolidation and development of the *acquis*, is one of the fundamental components of the common policy on the management of the external borders, as defined in the Commission Communication of 7 May 2002 'Towards integrated management of the external borders of the Member States of the European Union'. This objective was included in the 'Plan for the management of the external borders of the Member States of the European Union', approved by the Council on 13 June 2002 and endorsed by the Seville European Council on 21 and 22 June 2002 and by the Thessaloniki European Council on 19 and 20 June 2003. Owing to the related directions of policy of the EU the Schengen Borders Code extends the application not to all the territory of the European Union.

Beyond the Code were the United Kingdom and Ireland. Denmark is also formally bound by the rules of the Code, however, as a party to the Schengen Agreement, it had the right to adopt rules in its national law (see paras. 22, 27 and 28 of the preamble). The Code rules on the internal borders also temporarily do not apply to EU Member States that have not yet been included in the Schengen area (Bulgaria, Cyprus, Romania and Croatia). On the other hand, the rules of the Code shall apply in the territory of certain European countries outside the European Union, but participating in «Schengen *acquis*», – Iceland, Norway, Switzerland and Liechtenstein.

Since the adoption of the Schengen Borders Code the text was amended several times and the most significant amendments were adopted in 2009 and 2013. Code Reform of 2009 affected the use of the visa information system of the European Union, carried out on the basis of Regulation (EC) № 81/2009 of the European Parliament and of the Council of 14 January 2009 amending Regulation (EC) No. 562/2006 in regard to the use of visa information system (VIS) under the Schengen borders Code.»

These regulations were amended in paragraph 3 of Art. 7 of the Border Code under which a rule was established about checking people entering the territory of the Schengen area of third-country nationals using the visa information system. Reform Code of 2013, produced by Regulation (EC) of the European Parliament and of the Council of 26 June 2013 was more extensive in nature: it introduced a number of new concepts, changed the interpretation of existing terms, clarified the terms of short-term stay of citizens from third countries, introduced in particular Article 3, providing for compliance with the Charter of Fundamental Rights of the European Union, and acts of existing international law.

Currently the subject of legal regulation of the Schengen Borders Code, as indicated in Art. 1 of the Code, is the absence of border controls for individuals crossing the internal borders between the Member States of the European Union as well as rules on border control of persons crossing the external borders of the Member States of the European Union.

Article 2 determined that the internal borders are the common land borders, including river and lake borders, airports, intended for internal flights and sea, river and lake ports of the Member States for domestic regular ferry connections. In accordance with the rules of art. 2 of the Code, the external borders are land, including river and lake borders of the Member States, sea borders and their airports, river, sea and lake ports that they do not determine as internal borders. In accordance with paragraph 1 of Art. 4 of the Code, external borders may be crossed only at border crossing points. Article 5 shows general requirements of entry for third-country nationals, where the third-country national must have a valid travel document issued less than 10 years ago and which expires no earlier than three months after the intended date of departure, a citizen must have a valid visa, except for citizens of the countries set out in Regulation (EC) No. 539/2001, or citizens with a residence permit.

Additionally, entering persons need to explain the purpose and conditions of the intended stay, they have to have sufficient means of subsistence both for the period of stay in the member state of the European Union, and to return to the country of origin or transit to a third country where the access is guaranteed, or be able to legally obtain required funds.

Important criteria are the absence in SIS (Schengen Information System) of information request for the status of the object for the purpose of refusing entry, as well as sufficient criteria are that the entering citizen should not be considered to be a threat to public order, internal security, public health or international relations of any of the Member States and, in particular, is not for the same reasons, the object of the request for information for the purpose of refusing entry in the national databases of Member States. In accordance with the provisions of Art. 13 of the Code, in the case the non-citizen of a third country satisfies the conditions laid down in paragraph 1 of article. 5 of the Code, a body makes a decision to refuse entry to the territory of Member States.

Regulation crossing internal borders of states is defined in section 3 of the Code. In accordance with the provisions of Art. 20, any person, regardless of nationality has the right to cross internal borders. Regulation (EC) № 1051/2013 of 22 October 2013 disclosed and added provisions on the implementation of the temporary internal control at internal borders. The provisions of Art. 23 of the Code establish the right of the Contracting States to restore border controls at the internal borders if one of

the following conditions applies: the presence of a serious threat to public order or a serious threat to internal security of the member state. The temporary border controls could be set for up to 30 days, or for the duration of a serious threat, if it exceeds 30 days' period. Paragraph 4 of this article establishes the maximum permissible period of reintroduction of border controls, which is 2 years. The temporary reintroduction of border control at internal borders shall be subject to the state notification process of the other Member States and the Commission not later than 4 weeks before the planned recovery or for a shorter period of time (Article 24 of the Code.). However, if there is a serious threat to public order or internal security of the state, requiring immediate action, the State may, in exceptional cases immediately restore border controls at internal borders for a limited period of time, but not exceeding 10 days, and a notice on the application of these measures should be issued to other Member States and the Commission simultaneously with the adoption of these measures.

4.3.4. Schengen visa: sources, regulation

An important stage in the development of the Schengen acquis is the adoption in 2009 of Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009, establishing the EU Code on Visas (Visa Code). This codification act aims to summarize existing numerous documents in the field of Schengen rules, and it also has a direct effect throughout the Schengen area. Visa Code establishes the conditions and procedures for issuing visas for transit through or intended stay in the territory of member states for a duration not exceeding three months during any six-month period.

Visa Code introduced a number of innovations, among which, in particular, there is the creation of a single Internet site for information on the conditions and procedure for obtaining Schengen visas; the obligation to motivate the refusal to grant a visa with the possibility to appeal the decision to the competent authorities; creation of visa information system (VIS / VIS), which contains the biometric data of applicants for a visa; expanded use of visa application centers with the possibility of a direct submission of documents for a visa at the embassy (consulate); priority in the issuance of visas with the right to multiple entry into the Schengen zone.

In accordance with Art. 2 of the EU Visa Code, a visa is a permission obtained from a Member State in order to transit through its territory, or stay on its territory no longer than three months within a six-month period from the date of first entry into the territory of a Member State; or for the purpose of transit through the international transit area of the airport of a Member State.

Depending on the purpose of travel the Schengen provisions of Chapter 4 of the Visa Code zone fix the following three types of visas:

– The general (common) Schengen visa (Category A, B, C) – is valid within the entire Schengen area and gives the right to its holder to reside in the territory of the issuing state in transit or during a certain period of time, and to move freely within the entire Schengen zone;

– A visa with limited territorial validity – provides the ability to move within one or more well-defined states of the Schengen zone and has no effect beyond their limits. This type of visa is intended for the applicant's stay over 90 days for six months, or to circumvent established in the Schengen zone restrictions on individuals;

– National visa (Category D) – granted to persons who are in the country for training, in connection with work, or permanent resident persons. This type of visa gives you the right to stay in the territory for a longer period and to move freely within the Schengen area.

The general (common) Schengen visa related to a short-term stay of foreign persons within the Schengen area, depending on the purpose of entry is divided into three main categories:

– Category «A» – air transit visa, which allows you to stay in the international transit area of the airport of the Schengen States without the right to its evacuation. It is obligatory for a number of citizens of the states listed in the annex to the EU Visa Code (eg, Bangladesh, Iran, Nigeria, and others.);

– Category «B» – it was issued previously for the five-day stay in the Schengen zone for purposes other than «A» transit. However, since the entry into force in 2010, the EU Visa Code does not issue it;

– Category «C» – it gives its owner the right to stay for a limited time (no more than three months in the semi-annual period) on the territory of the issuing State, and to move freely within the Schengen area. This category of visa can be issued for single, double or multiple entries.

In accordance with the provisions of the Visa Code to obtain a visa a person has to submit an application on a special form no earlier than three months before the start of the planned visit to the consulate of the competent member state where the applicant resides (articles 6, 9 Visa Code). To the application there shall be attached documents listed in Art. 14 Visa Code. It is also necessary to submit proof of insurance for a person applying for a visa. The application is considered by the competent consular office, and it will either decide to issue a visa, or refuse to provide such information.

The total period of consideration of the application for obtaining a visa should not exceed 15 days, but it could be extendable to 30 days due to the need for additional testing or up to 60 days in exceptional cases.

Grounds for refusal of visa are set out in the provisions of Art. 32 Visa Code. They are related either to shortcomings in the documents attached to the application (for

example, providing a forged travel document), or if there is reasonable doubt about the authenticity of supporting documents submitted by the applicant or veracity of their contents, about the reliability of claims made by the applicant, or of his intention to leave territory of the Member States before the expiry of the requested visa. Notable is the right of applicants to appeal against refusal of a visa in accordance with the provisions of Art. 32 Visa Code to the competent authority.

The provisions of Chapter 6 describe the issue of visas at the external borders of member states. According to the rules of Art. 35 Visa Code, in exceptional case a visa could be issued at border crossing points if the following conditions are met: a) the applicant meets the conditions set out in paragraphs «a», «c», «d» and «e» of paragraph 1 of Art. 5 Schengen Borders Code; b) the applicant has not been able to pre-apply for a visa and, upon request submits documents confirming the actual existence of unforeseen and urgent reasons for entry, and c) the return of the applicant to his country of origin or residence or transit through States other than Member States fully applying the Schengen acquis, is guaranteed.

The provisions of Sections 4 and 5 of the Visa Code regulate administrative management and organizational issues as well as issues of cooperation of Member States of the Schengen area.

4.3.5. Information and organizational support for the Schengen process

The SIS (SIS) serves as the basis of information and organizational support of the Schengen process. It is an intergovernmental database, including information on persons and objects crossing the border of the Schengen zone. This information system was created on the basis of the Schengen agreements in 1985 and 1990. Its main task is to ensure national security in the conditions of free movement of persons within the Schengen common visa area. The Schengen Information System can be accessed by domestic services responsible for border protection, issuing visas etc.

The Schengen Information System includes the following information, which has a very specific purpose: the persons who are wanted, foreign citizens who are denied entry into the Schengen area in view of their crimes or violations of the stay in it, convicted persons, persons under special control, and others in the Schengen information system. The following data are entered in order to identify the above categories of persons: name, used aliases, nationality, physical characteristics, origins, the ability to resist, possession of firearms, etc. In addition, the SIS contains information on persons representing a danger to public, missing persons, including children, about the lost items (weapons, vehicles, documents) – this is the so-called «Alarms». All the above data are stored for a maximum period of 10 years.

The information about a person in the SIS database can be a basis for refusal to issue a Schengen visa, and a ground for denying entry into the Schengen zone. However, in accordance with the Visa Code, any foreign citizen may apply to the competent national authorities of one of the European countries with the request to provide him with information on entering in the SIS relevant records relating to their content, the objectives, conditions, and others. In addition, every person has the right to challenge the paid entry about it and demand its change or cancellation.

Structurally SIS includes national information system of each Schengen area Member State, combined informationally, organizationally and technically with the European database. Member States established special bodies whose main function is to control the process of entering data into the system and the inclusion of data from national competent authorities.

Cooperation between the competent national authorities of the Member States of the Schengen area is also implemented through the so-called SIRENE mechanism. Each Member State establishes special bodies to consider the request of the competent international bodies to provide additional information, in particular when deciding whether to enter information about a person or an object in the Schengen Information System.

SIS has gone through several stages of development during its existence, and quite effective functioning. In particular, since 2004 biometric data are introduced in the SIS, fingerprints and photographs of people within the area of interest of law enforcement authorities of EU Member States. In 2013 a new version of the Schengen Information System – SIS II began – started operating. Currently, the SIS II database is integrated with the EU Visa Information System (VIS), which contains information about all applicants who apply for a Schengen visa.

In 2005, European Agency for the Management of Operational Cooperation at the External Borders of the Member States – the so-called FRONTEX (from Fr. *Frontieresexterieures* – The external borders) started functioning. The main task of this body is ensuring cooperation between the EU Member States in this area, and ensuring appropriate interaction on the border for the EU countries. At the moment, the activity of the Agency is mainly focused on the creation of technical conditions for the exercise of control over areas adjacent to the shoreline of the relevant EU Member States (Spain, Portugal, France, Italy, Slovenia, Greece, Malta, Cyprus). For this purpose, the cash register Centre technical equipment (CRATE) was set up, which includes equipment such as airplanes, which the Member States are willing to provide, on the request of the country concerned for the implementation of border control and surveillance. Furthermore, FRONTEX has concluded a number of agreements on co-ordination of its activities with third countries, including, in particular, the Russian Federation.

4.3.6. Development and current problems of the Schengen acquis

Thus, the initial acts of enhanced cooperation were taken by Member States of the European Community in the form of international legal instruments (the 1985 Agreement and the Convention implementing the Schengen Agreement of 1990). The reason for the adoption of these «advanced» rules in a way is because they could not be included in the constituent documents and regulations of Communities. They were international legal instruments, and their parties were not all Member States of the Community and the Union, they occupied an independent place in relation to European law.

Gradually, part of the Schengen law, such as international legal treaties and acts adopted on their basis, were superseded by legislation of the European Communities and the Union. This happened as a result of the rights of the European Community and the Union in matters previously regulated by the Schengen rules. As a consequence the Schengen rules of law lost their validity. Another part of the Schengen law temporarily remained, but later changed its legal nature – it was incorporated into European law, and became a part of it.

Recent trends in the development of the Schengen acquis, proposed legislative initiatives to modernize the Schengen legislation gives us reason to believe that in the short term a radical change of the original sources (the Schengen agreements and acts of the Schengen Executive Committee) may occur, which is determined primarily by global problems of Schengen area itself and the perspectives for its further effective operation in connection with the crisis caused by the massive flow of refugees and other categories of persons, arriving in a growing number in the Schengen area. It is possible that the above-mentioned documents with varying degrees of speed will be replaced by regulations, directives and framework decisions of the EU institutions, so that the term «Schengen law» can be filled with different contents, more realistically reflect the trends and perspectives on global migration issues that have currently spread over the EU.

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CHAPTER 5. FOUR MARKET FREEDOMS

As a result of studying the material of the chapter students must:

know:

- economic, social, political and cultural background of economic integration in Europe, trends of legal regulation of this sphere,
- goals, objectives and directions of reforming the internal market of the EU;
- patterns of development of legal practice, including the judiciary, and its importance in the mechanism (system) of legal regulation in EU;
- relevant sectoral legislation, and (or) mechanisms of inter-sectoral institutions, its competence;
- legal tools used to build the internal market and concepts underlying them;

be able to:

- apply legal norms in situations of gaps, conflicts of norms, complex interactions, solve complex problems of law enforcement practice in the EU;
- understand the peculiarities of the legal regulation of EU internal market, primarily based on judicial decisions;
- argue decisions taken, including being able to foresee the possible consequences of such decisions;
- establish specificity of EU internal market law, its differences from other international integrational systems and national legal systems;
- interpret legal acts in their interaction competently;
- examine legal acts, including, the main stages of development of the basic definitions, institutes and branches of EU internal market law;
- explain the effect of the law to their addressees including at the EU and national level.

possess:

- skills for analyzing legal practice, including the judiciary;
- skills for drafting regulatory and individual legal acts;

skills for making oral presentations on legal matters, including, in competitive proceedings, arguing and defending their points of view in oral debates;
skills for discussion, business negotiations, mediation in order to reach a compromise between parties of a conflict;
skills for drawing up expert opinions;
skills for counselling citizens on legal issues in the sphere.

5.1. EU internal market

5.1.1. Introduction to the EU internal market

The Single Market can be regarded as a trading relationship, extending the European customs union to encompass the removal of non-tariff barriers and free movement of capital and labor as well as goods and services. That is the main basis of our analysis here. However, the promotion of trade is not the only goal of the Single Market – from the beginning its creators identified other goals for the project such as the deepening of political and social connections between the peoples and regions of Europe.

The removal of all barriers for the free movement of goods, people and capital – to the extent necessary to ensure the smooth operation of the European Common Market – was the central objective of the 1957 Treaty of Rome (articles 3a to 3c), while the removal of barriers for the provision of services was considered to be an implicit objective of the Treaty. The first stage in the creation of the European Common Market involved a ten-year program, starting in 1958, to eliminate all tariff barriers on industrial products. It proved to be a resounding success.

After the Treaty of Rome came into effect on 1 July 1958, there was gradual progress towards reaching the aims of a customs union. The Customs Union eventually entered into force on 1 July 1968 with the abolition of Member States' separate national customs tariffs, replaced by a common external tariff.

The late 1970s and early 1980s were periods of “Europessimism” and “Euroclerosis”, when politicians and academics alike lost faith in European institutions. To give a new impulse for the integration process of the European Economic Community (EEC) Member States, the Commission headed by Jacques Delors prepared and presented the Single Market Program (SMP) on completing the Internal Market in 1985. The SMP paid special attention to the executing and the timing. The timing of actions proposed by the SMP was based on an exact time schedule, which grouped the actions under the following three objectives:

1. The removal of physical barriers;
2. The removal of technical barriers;
3. The removal of fiscal barriers.

In her speech to the European Parliament in 1986 Margaret Thatcher declared: What we need are strengths which we can only find together. [...] We must have the full benefit of a single large market.

The Single European Act (SEA) linked liberalization of the European market with procedural reform. The first half of this reform package, incorporating 279 proposals contained in the 1985 EC Commission White Paper, aims to create “an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured”. To achieve this goal, European leaders committed themselves to comprehensive liberalization of trade in services and the removal of domestic regulations that act as nontariff barriers. The second half of the SEA reform package consists of procedural reforms designed to streamline decision making in the governing body of the EC, the Council of Ministers. The European Commission put forward a schedule for the creation of the Single European Market on 31 December 1992.

The legislation adopted has completely transformed the operation of the internal market and removed numerous barriers. Some significant examples are removal of all intra-EU frontier controls on products and all intra-EU capital controls; the approximation of technical regulations.

On 7 February 1992 the twelve Member States of the European Community signed the Treaty for European Union (TEU) in Maastricht, the Netherlands. The Maastricht Treaty marks an important beginning of a new stage in the process of European integration. Its main goal was the completion of an internal market having 345 million citizens, with persons, goods, services, and capital allowed to move freely within the Union. Among other things, it abolished systematic border controls, and all discriminatory charges, including, in particular, customs duties levied by Member States on goods originating in other Member States. A common customs tariff was to be applied to all third-country goods. Domestic VAT and excise regimes were partially harmonised to facilitate the free movement of goods.

The Treaty of Rome originally used the term common market. It was adopted to clearly distinguish between what already existed and what the Treaty of Rome said should exist – a real common market in which there should be no barriers to the free movement of goods, people, capital and services. The Single European Act of 1986 inserted the term internal market, which coexisted with common market in the language of the Treaty.

The Court has tended to use all three concepts interchangeably. For example, in *Gaston Schul* (Case 15/81) it stated that the common market “involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market”.

5.1.2. Legal Framework of the Internal Market

The Lisbon Treaty, which came into force in 2009, replaced all references to the common market with internal market. Article 26 of the Treaty on the Functioning of the European Union (TFEU) establishes an “internal market” amongst EU Member States and sets out its main elements by enshrining the four freedoms:

- Free movement of goods;
- Free movement of persons;
- Free movement of services;
- Free movement of capital.

The Lisbon Treaty establishes the EU single market as a free trade and, indeed a free movement, area. Article 26 (2) TFEU defines that the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

The Internal Market is founded on a number of principles:

1. Non-discrimination.

One of the fundamental principles of the Internal Market is the prohibition of any discrimination (meaning different treatment under the same circumstances) on grounds of nationality. Therefore it is prohibited to treat imported goods differently from domestic goods. The European Court of Justice contributed to adapting this principle to other circumstances, like in the context of services, where cases of discrimination were considered from the point of view of both nationality and residence. Other criteria, such as gender equality, have also been included in the scope of the principle.

2. Mutual recognition.

The principle of mutual recognition is closely linked with the principle of non-discrimination. The European Court of Justice laid down this principle in the *Cassis de Dijon* judgement of 1979, according to which a product which is lawfully produced and marketed in one EU Member State must be accepted in another, i.e. legislation of another Member State is equivalent in its effects to domestic legislation. This principle also has an impact on the other freedoms, particularly those involving the performance of services, where it underlies the concept of the recognition of diplomas.

3. Community legislation.

It means the approximation of the laws of Member States to the extent required for the functioning of the internal market. Article 3 of the Maastricht Treaty provides for

the approximation of the laws of Member States to the extent required for the functioning of the common market”, including opening up public procurement contracts, company law, financial services and intellectual industrial and commercial property. The main instrument of harmonisation was a directive.

This more flexible approach to harmonisation has successfully avoided the over-concentration on detail, which unnecessarily prolonged the process of drafting and negotiating legislation. Defining technical standards is left to specialised bodies such as:

- CEN (European Committee for Standardisation);
- CENELEC (for Electrotechnical Standardisation);
- ETSI (European Telecommunications Standards Institute).

With entrance of 10 countries the Commission adopted the Single Market Review on 20 November 2007. A program package was developed with the purpose of allowing every Member State of the EU gain advantage from the phenomenon of globalization through the Internal Market. The recommendation to the Commission was about expanding consumer rights, widening the opportunities of SMEs, strengthening European innovation and maintaining high quality social and environment protection norms, which the Heads of State and Government eventually approved in March 2008.

On the invitation of the Commission’s President Barroso, Mario Monti delivered a report on 9 May 2010 on the re-launch of the Single Market, a key strategic objective of the new Commission. One of the conclusions of the Report was as follows: a new strategy for the Single Market at the service of Europe’s economy and society is that the Single Market is less popular than ever, while Europe needs it more than ever. However, the economic crisis has challenged conventional views of the EU economy and has opened a window of opportunity for Europe to become more pragmatic and re-launch the Single Market.

The Report recommends taking a pro-active approach that would seek to re-energise the Single Market through a major policy initiative based on a comprehensive strategy. A “package approach” that brings together initiatives from different policy areas was proposed. The proposed strategy consists of three broad sets of initiatives:

- Initiatives to build a stronger Single Market;
- Initiatives to build consensus on a stronger Single Market;
- Initiatives to deliver a stronger Single Market.

It is worth mentioning Mario Monti’s conclusion that today, the *acquis communautaire* comprises 1521 directives and 976 regulations related to the various single market policy areas. An action to deepen the single market is therefore unlikely to require

a new wave of regulations and directives, as it was the case with the 1985 White Paper. Furthermore, the EU Better regulation agenda sets out strict requirements on how new legislation should be designed. However, this does not exempt from addressing the issue of what modes of regulation and policy making methods are the most appropriate to regulate the single market. Currently, 80 % of the single market rules are set out through directives. These have the advantage of allowing for an adjustment of rules to local preferences and situations. The downsides are the time-lag between adoption at EU level and implementation on the ground and the risks of non-implementation or goldplating at national level. Recent debates on regulation in the financial services area have shown the merits of having a single European rule book. Thus, there is a growing case for choosing regulations rather than directives as the preferred legal technique for regulating the single market. A regulation brings the advantages of clarity, predictability and effectiveness. It establishes a level playing field for citizens and business and carries a greater potential for private enforcement. However, the use of a regulation is not a panacea. Regulations are appropriate instruments only when determined legal and substantial preconditions are satisfied. They may not even result in greater efficiency, if the discussion that would have taken place at national level at the time of transposition is shifted to the European level at the time of adoption by the Council and Parliament. Harmonisation through regulations can be most appropriate when regulating new sectors from scratch and easier when the areas concerned allow for limited interaction between EU rules and national systems. In other instances, where upfront harmonisation is not the solution, it is worthwhile exploring the idea of a 28th regime, the EU framework alternative to but not replacing national rules.

The unfolding financial and later global general economic crisis caused the impulse of Single Market development to break and the commitment of Member States to diminish. In light of the developments, the Commission tasked Mario Monti, former EU commissioner responsible for the Internal Market and later for competition to prepare a report that was published on 10 May 2010, which identified the bottlenecks and the possible directions and means for going forward.

After this, the European Commission published its package of measures called the Single Market Act on 13 April 2011, which was based on the Mario Monti Report.

5.1.3. Single Market Act 2011

The first Single Market Act adopted in April 2011 came as a response to the crisis and the need to foster growth. It proposed 12 key actions to boost European competitiveness and to exploit the untapped potential of the Single Market to generate sustainable economic growth and additional employment, while at the same time helping to restore the confidence of citizens and businesses in the Single market.

The joint involvement of the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and many stakeholders in the first Single Market Act led to a widely shared political vision for further development of the Single Market. It focused political attention, creating a sense of urgency and fast-tracking key actions.

Single Market Act in its preamble defines that to remedy these shortcomings we must give the single market the opportunity to develop its full potential. To this end, a proactive and cross-cutting strategy should be developed. This means putting an end to market fragmentation and eliminating barriers and obstacles to the movement of services, innovation and creativity. It means strengthening citizens' confidence in their internal market and ensuring that its benefits are passed on to consumers. A better integrated market is needed which fully plays its role as a platform on which to build European competitiveness for its peoples, businesses and regions, including the remotest and least developed. There is an urgent need to act.

Twelve levers to boost growth and strengthen confidence were proposed: Access to finance for SMEs; Mobility for citizens; Intellectual property rights; Consumer empowerment; Services; Networks; The digital single market; Social entrepreneurship; Taxation; Social cohesion; Business environment; Public procurement.

The document explains the significance of each lever and then attaches to each one a key action. It also defines conditions for achieving success – a strengthened governance of the Single market in the Single Market Act. There are four such conditions:

- (1) a better dialogue with civil society as a whole;
 - (2) a close partnership with the various market participants;
 - (3) efficient provision of information for citizens and enterprises;
- and
- (4) closer monitoring of the application of single-market legislation.

Special attention was paid to the “global rules”: the success of the Single Market and of European businesses in international competition depends on the European Union's ability to ensure that its internal and external policies are consistent and complementary. The Commission will continue pursuing its policy of promoting regulatory convergence and will actively promote wider adoption of international standards. It will negotiate trade agreements with a particular focus not only on market access but also on regulatory convergence. Special attention should be paid to the candidates for accession to the European Union (who will be expected to adopt the *acquis communautaire*) and also to countries in the EU neighbourhood and to the Union's strategic partners, in order to promote economic integration and improve mutual market access and regulatory approximation, particularly on the basis of more far-reaching free-trade agreements.

5.1.4. Single Market Act II 2012

However, further progress is needed as a matter of urgency so the European Commission announced that EU institutions must act to prepare further steps, which was realised in Single Market Act II with the second set of priority actions. These actions are designed to generate real effects on the ground and make citizens and businesses confident to use the Single Market to their advantage.

The Communication on the Single Market Act II sets out key actions under four drivers for new growth:

- Developing fully integrated networks in the Single Market.
 - Improving the quality and cost efficiency of rail passenger services by opening domestic rail passenger services to operators from another Member State.
 - Establishing a true Single Market for maritime transport by no longer subjecting EU goods transported between EU seaports to administrative and customs formalities that apply to goods arriving from overseas ports.
 - Improving the safety, capacity, efficiency and the environmental impact of aviation by accelerating the implementation of the Single European Sky. This aims at addressing the fragmentation of the European airspace that causes high additional costs to airlines estimated at around €5 billion a year, which are ultimately borne by air passengers and the European economy.
 - Achieving a fully integrated Single Market for energy by improving the application and enforcement of the third energy package and making cross-border markets that benefit consumers a reality. An integrated energy market contributes to lower energy prices and facilitates investments. For example, it has been estimated that EU consumers throughout the EU could save up to €13 billion per year if they all switched to the cheapest electricity tariff available.
 - Fostering mobility of citizens and businesses across borders;
 - Enhancing the mobility of citizens by developing the EURES portal into a true European job placement and recruitment tool.
 - Improving access to finance for companies in the EU and boosting long-term investment in the real economy by facilitating access to long-term investment funds.
 - Improving the business environment for companies operating in Europe by modernising EU insolvency rules to facilitate the survival of businesses and present a second chance for entrepreneurs.
 - Supporting the digital economy across Europe.
 - Supporting online services by making payment services in the EU more efficient.
- With 35 % of internet users not buying online because they have doubts over payment methods and with remaining barriers to market entry, the improvement of the payments market is a priority.

- Reducing the cost and increasing efficiency in the deployment of high speed communications infrastructure. The access to broadband is a crucial factor for innovation, competitiveness and employment. A 10 % increase in broadband penetration can result in a 1-1.5 % increase in GDP annually and 1.5 % labour productivity gains.
- Promoting a paperless administration by making electronic invoicing the standard invoicing mode for public procurement. As an example, in the case of the public sector, a preliminary estimate indicates that in the next few years, savings of approximately €1 billion per year could potentially be achieved if all invoices were submitted in electronic format.
- Strengthening social entrepreneurship, cohesion and consumer confidence.
- Improving the safety of products circulating in the EU through better coherence and enforcement of product safety and market surveillance rules.
- Improving participation in economic and social life by giving all EU citizens access to a basic payment account, ensuring bank account fees are transparent and comparable, and making switching bank accounts easier.

The President of the European Commission Jean-Claude Juncker in his Political guidelines mentioned in 2014 stated that by creating a connected digital single market, we can generate up to € 250 billion of additional growth in Europe in the course of the mandate of the next Commission, thereby creating hundreds of thousands of new jobs, notably for younger job-seekers, and a vibrant knowledge-based society.

Functioning of the Digital Single Market (DSM) is likely to become ever more important for the single market. With digital technologies becoming more and more engrained in Member States' economies, their importance for the functioning of the single market as such increases. The European Parliament has stepped up efforts to foster the DSM with a dedicated strategy envisaging 16 measures until the end of 2016 to help tap the DSM's growth potential.

In addition, the Commission recently announced further steps to strengthen the internal market. Together, they show how increasingly intertwined the single market and digital issues have become. Big expectations have been attached to the DSM – but the gains associated with it are unlikely to materialise automatically. First, they are contingent on implementation. Second, isolated improvements may not deliver because multiple bottlenecks remain. Third, success of the DSM ultimately hinges on adoption of technology by consumers and enterprises – this is something regulation can encourage but hardly force. To that extent, perhaps the biggest challenge for realising the DSM is creating an environment supportive to – or at least allowing for – disruption and creative destruction in Europe

Modernising and deepening the Single Market is a continuous exercise. The Single Market must respond to a constantly changing world where social and demographic

challenges, new technology and imperatives, such as climate change, must be incorporated in policy thinking.

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5.2. Free movement of goods

5.2.1. Establishment of the Customs Union

The free movement of goods, together with the free movement of persons, services and capital, constitute the “four freedoms” that from the inception of the European Communities in 1957 (Treaty of Rome) until later amendments, have been the core of

the European integration process. Despite the fact that other policies have been gaining more and more importance (such as social policies, protection of the environment, etc.), they still shape the nature of the European Union, and the case law of the ECJ mainly relates to such issues. In the European legal system, they are considered as “fundamental freedoms”.

The principle of free movement of goods was first formulated in the Treaty of Rome, which stated that the EEC created a common market for goods. By this time, step by step removal of restrictions to trade in goods between Member States was intended, as well as the gradual establishment of a customs union and Internal Market of goods throughout the Union.

Since internal border controls between EU Member States have largely been removed for legally traded or purchased goods, the EU needs to create an external frontier of its own, so that goods entering and leaving the Internal Market are taxed at the same rate and go through the same processes and procedures before entering the Internal Market.

This requires Member States’ customs services to apply a common customs tariff and standardised customs procedures to goods entering and leaving the EU. This standardisation of customs procedures is the basis of the essence for the functioning of the Internal Market – EU Customs Union. Furthermore, customs controls need to strike the right balance between facilitating import and export trade while at the same time regulating and controlling the importation and exportation of goods.

All EU Member States are part of the EU Customs Union, however Customs Union has also been established between the European Union and Turkey, Andorra, San Marino and Monaco. Additionally, the four EFTA countries (Norway, Iceland, Lichtenstein and Switzerland) have agreements with the EU that allow them to participate in the Internal Market and benefit from the free movement of goods. These arrangements expand the area within which goods can move freely beyond the territory of the EU.

The ECJ defined goods as “products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.” Therefore, art treasures fell within the meaning of “goods” and the ECJ also extended this definition in a few cases. (*C-7/68 Commission v Italy (Arts Treasures)*).

In *Region of Wallonia case, Commission v. Belgium*, the facts were that Belgium prohibited the importation of waste and contended that waste did not constitute “goods” if it could not be recycled or reused because they have no commercial value. The ECJ rejected this submission and held that all waste was to be regarded as goods.

In *Almelo v. Energiebedrijf Ijsselmij* case, the ECJ made it clear that electricity constituted “goods”. However, the ECJ did not come up with the conclusion that all intangibles constituted “goods”.

According to Article 28 of the TFEU, the Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries. Once products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges (Art. 29 of the TFEU).

The free movement of goods provisions within EC Treaty should apply to all types of movements of goods.

Firstly, they apply to movement of goods from one Member State to be sold in another Member State.

Secondly, they apply to movement of goods in transit through one Member State to be sold in another Member State or outside the European Community.

In *SIOT v. Ministry of Finance* case, the ECJ confirmed that the freedom of transit within the Community constituted a general principle of Community legislation.

Thirdly, they apply to reimportation of goods which are imported from one Member State to another, where they were produced or put on the market.

Fourthly, they apply to parallel imports.

Fifthly, they apply to movement of goods by individuals.

In *GB-INNO-BM v. Confederation du Commerce Luxembourgeois* case, the ECJ confirmed that free movement of goods concerned not only traders but also individuals by holding that it requires, particularly in frontier areas, that consumers resident in one Member State may travel freely to the territory of another Member State to shop under the same conditions as the local population.

In *Schumacher v. Hauptzollamt Frankfurt Am Main* case, the facts were that the Customs Office in Germany rejected the importation of personal medicines from France by Mr. Schumacher. The ECJ held that the German law was inconsistent with Article 30 because a general prohibition of individuals' imports was not justified.

Finally, they apply to movement of goods involving no commercial transactions. It was confirmed by the ECJ in the waste disposal case, *Commission v. Belgium*.

The effect of *Cassis de Dijon* was essentially negative and deregulatory, serving to invalidate trade barriers which could not be justified by one of the mandatory requirements, but it did not ensure that any positive regulations would be put in place of the national measures which had been struck down.

In 1985, the Commission produced a White Paper 8 which was to provide the foundations for the passage of the SEA, one of whose main objectives was to facilitate the completion of the single market. The SEA introduced two major legislative innova-

tions which were of prime importance for the single market project: it determined the period for establishing the Internal Market and provided its definition and facilitation of harmonisation measures by allowing the Council to adopt measures for approximation of Member States' laws without the unanimity requirement. The completion of the single market was dependent upon two necessary conditions. There had to be a reform of the legislative procedure to facilitate the passage of measures to complete the internal market. There also had to be a new approach to harmonisation which would make it easier to draft and secure the passage of these measures. However, reform in the legislative process would not have been sufficient to secure the Internal Market, even though harmonization measures could now be passed more easily. This was because traditional Community harmonisation techniques had a number of disadvantages. They were slow and generated excessive uniformity. The Commission recognized these shortcomings in its White paper as well as in its proposals to the Council and Parliament for a New Approach to Technical Harmonization and Standards.

The general direction of the new approach is apparent in the extract from the Commission's White Paper on completing the internal market. There was to be mutual recognition through the Cassis de Dijon principle. National rules which did not come within one of the mandatory requirements would be invalid; legislative harmonization was to be restricted to laying down health and safety standards; and there would be promotion of European standardization. Four elements can be identified in the Community's new strategy:

- The first building block was the adoption of Directive 83/189 on the provision of information on technical standards and regulations. This measure, known as the mutual information or transparency directive, imposes an obligation on a State to inform the Commission before it adopts any legally binding regulation setting a technical specification. The Commission then notifies the other Member States, and may require that the adoption of the national measure be delayed by six months, in order that possible amendments can be considered. A year's delay is permitted if the Commission decides to push ahead with a harmonization directive on the issue.

- A second facet of the new approach was the willing acceptance of the Cassis jurisprudence. A product which had been lawfully manufactured in a Member State should be capable of being bought and sold in any other Member States. Mutual recognition should be the norm. Harmonization efforts should be concentrated on those measures which would still be lawful under Cassis exceptions or under Article 30 EC.

- The third aspect of the new approach was that legislative harmonization was to be limited to laying down essential health and safety requirements. When a standard

has been approved by the Commission, all Member States must accept goods which conform to it. There was also a procedure to settle disputes of Member States about compatibility between the standard and the safety objectives set out in the directive.

– The final element is the promotion of European standardization. Standardization is of importance both because it reduces barriers to intra community trade, and because it increases the competitiveness of European industry. It is important to be clear about the relationship between Community harmonization of essential requirements and the standardization process. A directive which is passed pursuant to the new approach will lay down in general terms the health and safety requirements which the goods must meet. The setting of standards is designed both to help manufacturers prove conformity to these essential requirements and to allow inspection to test conformity with them. Promoting Community-wide standards in the manner described above is designed to foster this process by encouraging the development of a consensus on what the relevant standards in a particular area should be. Allowing a manufacturer to show that its goods comply with the essential safety requirements, even if they do not comply with the Community standard, provides flexibility.

5.2.2. The principle of mutual recognition

The principal of mutual recognition is a basis of freedom of goods in the EU. There are three ways of realising free movement of goods in the internal market: liberalisation, approximation and mutual recognition. All three have limitations and no single method can suffice for all cases. In that sense they are complements. Liberalisation amounts to the imposition of free movement by prohibitions for member states to intervene in cross-border trade in direct or even indirect ways. These prohibitions derive either straight from the Treaty and the European Court of Justice (ECJ) jurisprudence or from EC regulations or directives building on such provisions. Approximation is the adaptation of national laws in such a way and to such a degree that cross-border trade is no longer hindered in a direct or indirect way. Approximation can be justified as a complement to liberalisation where market failures have to be overcome by regulation. In extreme cases of very high risk where uncertainty or discretion could have unacceptable consequences, such market failures might be addressed by centralised rules. The goal must then be defined (because the purpose of directives is to remove or overcome the market failure throughout the EU) and the instruments (that is, the detailed technical provisions) only insofar as they might hinder, directly or indirectly, intra-EU trade.

The notion of mutual recognition refers to the implication for national customs or inspectors or regulatory agencies or policy-makers that a good entering one Mem-

ber State from another EU country must be allowed unhindered access, even if the detailed specifications in the relevant domestic regulation differ from those in the country of origin, as long as the regulatory objectives are equivalent: from a narrow regulatory point of view, it would thus seem as if the importing country ‘recognises’ the regulatory regime of the exporting country. Because the principle has general application for the internal market, this “recognition” is “mutual”.

The principle of mutual recognition has been developed by the ECJ in its case law. In its famous *Cassis de Dijon* case, the ECJ held that, in principle, a Member State must allow a product lawfully produced and marketed in another Member State into its own market, unless a prohibition of this product is justified by mandatory requirements, such as health and safety protection. This means that Member States cannot apply certain specific details of national regulation to intra-EC imports of goods, if the objective or effect of the relevant law in other Member States is equivalent to that of the importing country.

The idea behind mutual recognition is that all Member States care for their citizens and cannot be assumed to produce, for instance, unsafe or unhealthy products, merely because technical specifications differ. Hence, the principle of mutual recognition plays a pivotal role in the internal market since it ensures free movement of goods without making it necessary to approximate/harmonise national legislation. Since free movement of goods is essential to the Internal Market, it is not surprising that the burden of proof of “non-equivalence” of objectives is on the member state which is unwilling to allow the import of the products concerned. Where the regulatory objective or effect is not equivalent, free movement can be impeded. In such cases, however, the Treaty offers a remedy to the free movement by allowing for the approximation of precisely those objectives or effects under Art. 110 of TFEU.

In *Dassonville* Case, the ECJ removed all uncertainties about the interpretation of the concept of measures having equivalent effect by declaring that trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

The ECJ gave its ruling on the following terms: All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions. In the absence of a Community system guaranteeing for consumers the authenticity of a product’s designation of origin, if a member state takes measures to prevent unfair practices in this connection, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.

This economic interpretation paved the way for a very broad interpretation of measures of equivalent effect. In its famous *Cassis de Dijon* ruling, the ECJ further refined the principle of equivalence and ruled that products lawfully produced and marketed in one member state must be admitted by another Member State, save where refusal is justified by virtue of mandatory requirements.

As a consequence, even in the absence of European harmonisation measures (secondary EU legislation), Member States are obliged to allow goods that are legally produced and marketed in other Member States to circulate and to be placed on their markets.

5.2.3. Prohibition of Customs Duties and Charges Having Equivalent Effect

Article 30 of TFEU contains prohibition of customs duties and charges having equivalent effect to customs duties on imports and exports. It sets that this prohibition shall also apply to customs duties of a fiscal nature. Customs duties are taxes, no matter how small, levied on imports or exports, whilst “any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact they cross a frontier, and which is not customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 28 and 30 of TFEU, even if it is not imposed for the benefit of the state, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product”.

The interpretation of the prohibition of customs duties and customs duties on import and export has not been controversial, however ECJ stretched the interpretation to encompass also charges imposed within Member States’ internal borders by reason of the fact that goods cross a frontier.

The law further goes on to say that not only customs duties are prohibited but also charges having equivalent effect. Neither of these terms is defined in the treaty but they are defined in *Commission v Italy* (Case 7/68) as “any pecuniary charge, however small and whatever its designation and mode of application which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier.”

Following case law, the courts have been consistent in the absolute abolishment of customs duties and charges having equivalent effect, no matter what the purported reason for the charge is. The fact that the charges were to test the sugar content of the jam in order to determine its suitability for the French market is baseless.

For example, in *Social Fonds Voor de Diamantarbeiders v SA* (Case C-2/69), in which a 0.33 percent charge on imported diamonds was paid into a social fund for workers in the diamond mining industry in Africa, the Court of Justice admitted that the charge was for a good cause but it was still considered as a charge having equiv-

alent effect to customs duty and thus prohibited by the Treaty. In the case of *Steinike and Weinlig* (Case C – 78/76), it was held that the prohibition applies so long as a duty or charge is imposed by reason of goods crossing a frontier. It does not actually have to be imposed at frontier.

5.2.4. Definition of a Measure Equivalent to a Quantitative Restriction

The free movement of goods is dealt with in Articles 34-37 of the TFEU. Article 34 is the central provision and states that ‘quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States’. Article 35 contains similar provisions relating to exports, while Article 36 provides an exception for certain cases in which a state is allowed to place restrictions on the movement of goods. It is necessary to understand the way in which Articles 34-37 fit into the more general strategy concerning the free movement of goods. Articles 28-33 TFEU provide the foundations for a customs union by eliminating customs duties between Member States and by establishing a Common Customs Tariff. If matters rested there free movement would be only imperfectly attained, since Member States could still place quotas on the amount of goods that could be imported, and restrict the flow of goods by measures that have an equivalent effect to quotas. The object of Articles 34-37 is to prevent Member States from engaging in these strategies.

The ECJ’s interpretation of Articles 34-37 has been important in achieving single market integration. It has given a broad interpretation to the phrase ‘measures having equivalent effect to a quantitative restriction’ (MEQR), and has construed the idea of discrimination broadly to capture both direct and indirect discrimination.

Article 34 covers quantitative restrictions and all measures that have an equivalent effect. It can apply to EU measures, as well as those adopted by Member States. The notion of a quantitative restriction was defined broadly in the *Geddo* cases to mean “measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit”. MEQRs are more difficult to define. The Commission and the Court have taken a broad view of such measures. Guidance on the Commission’s view can be found in Directive 70/150. This Directive was only applicable during the Community’s transitional period, but it continues to furnish some idea of the scope of MEQRs. The list of matters which can constitute an MEQR is specified in Article 2 and includes minimum or maximum prices for imported products; less favourable prices for imported products; lowering the value of the imported product by reducing its intrinsic value or increasing its costs; payment conditions for imported products which differ from those for domestic products; conditions in re-

spect of packaging, composition, identification, size, weight, etc, which apply only to imported goods or which are different and more difficult to satisfy than in the case of domestic goods; the giving of a preference to the purchase of domestic goods as opposed to imports, or otherwise hindering the purchase of imports; limiting publicity in respect of imported goods as compared with domestic products; prescribing stocking requirements which are different from and more difficult to satisfy than those which apply to domestic goods; and making it mandatory for importers of goods to have an agent in the territory of the importing state.

Article 2, therefore, lists a number of ways in which the importing state can discriminate against goods. It should be noted that, even in as early as 1970, the Commission was thinking of the potential reach of Art. 34 to indistinctly applicable rules, since Article 3 of the Directive, which will be considered below, regulates such rules to some degree. The seminal early judicial decision on the interpretation of MEQRs is *Dassonville*.

Article 34 prohibits action by a state that promotes or favors domestic products to the detriment of competing imports. This can occur in a number of different ways. The most obvious is where a state engages in a campaign to promote the purchase of domestic as opposed to imported goods. In *Re-Buy Irish Campaign* case, *Commission v. Ireland*, the facts were that Irish government sponsored advertising campaign. The ECJ held that the campaign was designed to substitute domestic products for imports, therefore, the Irish Government violated Articles 30 (now 34).

It seems clear that Article 34 applies to measures taken by the state, as opposed to those taken by private parties. Other Treaty provisions, notably Articles 101 and 102 of the TFEU, apply to action by private parties that restricts competition and has an impact on inter-state trade.

Article 35 prohibits quantitative restrictions and MEQRs in relation to exports in the same manner as does Article 34 in relation to imports. The ECJ has, however, held that there is a difference in the scope of the two provisions. Whereas Article 34 will apply to discriminatory provisions and also to indistinctly applicable measures, Article 35 will apply only if there is discrimination. An exporter faced with a national rule on, for example, quality standards for a product to be marketed in that state cannot use Article 35 to argue that such a rule renders it more difficult for that exporter to penetrate other markets. The rationale for making Article 34 applicable to measures which do not discriminate is that they impose a dual burden on the importer, which will have to satisfy the relevant rules in its own state and also the state of import. This will not normally be so in relation to Article 35.

5.2.5. Exceptions to the Prohibition of MEQR

Article 36 TFEU allows Member States to take measures having an effect equivalent to quantitative restrictions when these are justified by general, non-economic considerations (e.g. public morality, public policy or public security). Such exceptions to the general principle must be interpreted strictly, and national measures cannot constitute a means of arbitrary discrimination or disguised restriction on trade between Member States. Exceptions are no longer justified if Union legislation that does not allow them has come into force in the same area. Finally, the measures must have a direct effect on the public interest to be protected, and must not go beyond the necessary level (principle of proportionality).

Furthermore, the Court of Justice has recognised in its jurisprudence that Member States may make exceptions to the prohibition of measures having an equivalent effect on the basis of mandatory requirements (relating, among other things, to the effectiveness of fiscal supervision, the fairness of commercial transactions, consumer protection and protection of the environment). Member States have to notify the Commission of national exemption measures. Procedures for the exchange of information and a monitoring mechanism were introduced in order to facilitate supervision of such national exemption measures (as provided for in Articles 114 and 117 of the TFEU, Decision 3052/95/EC of the European Parliament and of the Council of 13 December 1995 and Council Regulation (EC) No 2679/98 of 7 December 1998). This was further formalised in Regulation (EC) No 764/2008 on mutual recognition, which was adopted in 2008 as part of the so-called New Legislative Framework (hereinafter – NLF).

Article 36 of the TFEU provides that “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

In the absence of harmonization MSs remain free to invoke the derogations. However, the Court has imposed two constraints on the Member States’ freedom to invoke the Article 36 derogations. First, since Article 36 constitutes a derogation from the basic rule of free movement of goods, it has to be interpreted strictly. Therefore, the exceptions listed in this Article could not be extended to include cases other than those specially laid down. Secondly, the derogation cannot be used to serve economic objectives.

Subject to these constraints, Member States can invoke any of the derogations laid down in Article 36. The burden of proof under this article rests with the Member State seeking to rely on it. Although it is somewhat artificial to separate the two conditions in Article 36, it is necessary to do it here. In order to be justified under this Article, national provisions must fall within one of the following grounds of justification:

– *Public morality.* Member States enjoy a margin of discretion to determine what constitutes public morality in their own territory. This was demonstrated through the judgment of the Court in *Henn and Darby*. However, Member States cannot place markedly stricter burdens on goods coming from outside than those which are applied to equivalent domestic goods.

– *Public policy.* The definition of public policy is potentially broad, but the ECJ has resisted attempts to interpret it too broadly. The Court has reasoned that since Article 36 derogates from a fundamental rule of the Treaty enshrined in Article 34, it must be interpreted strictly, and cannot be extended to objectives not expressly mentioned therein. A public policy justification must, therefore, be made in its own terms, and cannot be used as a vehicle through which to advance what amounts to a separate ground for defense. This derogation has increasingly been invoked by Member States to justify interference with the free movement of goods caused by protestors. But generally, the Court has not been sympathetic to such arguments.

– *Public security.* In the past, the Court was more sympathetic to arguments based on public security than those based on public policy, as *Campus Oil* demonstrates. However, the broad approach to public policy seen in *Campus Oil* has been more and more narrowed in the light of proportionality principle.

– *The protection of health and life of human, animals, or plants.* These are derogations most frequently invoked by the Member States. In the absence of harmonization, the ECJ will closely scrutinize such claims. First, the Court will determine whether the protection of public health is the real purpose behind the Member States' action, or whether it was designed to protect domestic producers. Secondly, the ECJ may have to decide whether public health is sustainable where there is no perfect consensus on the scientific or medical impact of particular substances. Thirdly, a Member State might not ban imports, but it might subject them to checks that rendered import more difficult, and it may do so even though the goods were checked in the State of origin.

– The protection of national treasures possessing artistic, historic, or archaeological value.

– The protection of industrial and commercial property.

This derogation consists of the forms of IPRs such as: patents, trade marks, copyright and other types of design rights. It is intended to protect private, as opposed to public, interests found in the other derogations. In this area, the Court has engaged in a delicate balancing act between Article 34 and the first and second sentences of Article 36.

The second condition which a national rule has to fulfill in order to be considered satisfied under Article 36 is that it must not constitute arbitrary discrimination nor a disguised restriction on trade between Member States. The function of this condition is to prevent restrictions on trade based on one of the derogations mentioned in the first condition of Article 30 EC from being diverted from their purpose and used in such a way as either to create discrimination in respect of goods originated in other Member States or indirectly to protect certain domestic products.

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5.3. Free movement of services

5.3.1. Regulating the Service Market in EU

The development of free movement of services has mirrored that of the Single Market as a whole, set out in the Single Market Balance of Competence review. The free movement of services covers both the freedom of establishment for individuals and companies to provide services in another Member State on a 'permanent' basis and the freedom to provide cross border services to a recipient established in another Member State on a 'temporary' basis. The latter may involve cross-border movement by the service provider or the recipient, or, in the case of services delivered online or at a distance, no cross-border movement by either party. Despite the clear basis in the Treaty, free movement of services was perhaps seen as the poor cousin to the other freedoms. During the post-war period, the overwhelming political focus was on the recovery of the manufacturing sector, with less emphasis on services.

The services sector was only a minor part of the overall European economy, with trade in goods dominating the economic activity of most Member States. The White Paper of 1985, seen as the blueprint for the Single Market, focused mainly on financial and telecommunications services.

During the 1970s, the EU used a vertical approach, harmonising national rules one profession at a time, leading to directives covering qualifications required for doctors, nurses, dentists and vets, as well as for trades in the construction, food and retail industries. A similar approach was used at the time for harmonising the technical standards for physical goods. Although this had the advantage of guaranteeing automatic recognition for professionals who met the required standard, negotiation of each of these directives was a grueling process.

It is considered that Community citizens should be free to engage in their professions throughout the Community, if they so wish, without the obligation to adhere to

formalities which, in the final analysis, could serve to discourage such movement. This led to a directive on the mutual recognition of professional qualifications at or above degree level, which was later followed by another directive covering professional qualifications below degree level. These two Directives were subsequently reformed through the Professional Qualifications Directive, which itself was recently revised.

In 2004, the European Commission proposed a new horizontal Services Directive, covering both the right of establishment and the provision of services within the Single Market. The initial draft was proposed by the then Internal Market Commissioner, Frits Bolkestein, towards the end of the Commission's mandate and was based on the 'country of origin' principle.

Under the 'country of origin' principle, no Member State would be able to prevent the provision of services by a service provider from another Member State, if the regulations governing that service provision in the country of origin of the service provider were met. In other words, the regulatory regime of the country of origin would apply, rather than the country in which the service was provided. This principle can be considered analogous to the 'mutual recognition' approach embodied in the *Cassis du Dijon* case and on which the free movement of goods is based. However, in the services sector the country of origin principle is more controversial because it could potentially allow poorly regulated and/or cheaper service providers from one Member State to undercut local service providers in another Member State. Concerns may also arise about consumer protection or evasion of legitimate regulatory standards.

The proposal provoked a sharp backlash and protests from trade unions in particular, which feared that the proposed Directive would undermine national regulations governing working conditions. In a foreshadowing of the current debate on the free movement of workers, the debate in France in particular focused on the proverbial 'Polish plumber,' who would, as it was claimed, be able to provide services. In the face of this opposition, negotiations on the draft directive swiftly became blocked. After attempting to reach a compromise on the original text, Bolkestein's successor as the Internal Market Commissioner, Charlie McCreevy, brought forward a new draft based on amendments proposed by the European Parliament.

Instead of using the country of origin principle, this compromise banned some national restrictions on service provision, for example, discrimination between service providers on the grounds of nationality, while permitting others in certain circumstances, for example, requiring service providers to take on a particular legal form or have a certain number of shareholders. The final text also excluded a number of service sectors from its scope, as a result of concerns from Member States about the impact on national markets. These include broadcasting, postal and audio-visual services, legal and social services, public transport and healthcare and temporary employment agencies, some of which are covered by sector-specific pieces of legislation.

A Commission evaluation of the implementation of the Services Directive conducted in 2012 found that whilst most Member States had transposed the Directive itself, by this stage, full implementation had yet to be completed. Whilst the economic benefit to date of the Services Directive could be conservatively estimated to be 0.8 % of EU GDP, the Commission estimated that further gains of up to 1.6 % of EU GDP could be realised if all Member States reached the degree of liberalisation of the five Member States with the lowest barriers in any given sector. This would equate to removing all of the existing barriers in various sectors.

5.3.2. Freedom of Services and Freedom of Establishment

The general principle of the free movement of services was included in the original Treaty of Rome and its formulation has remained more or less unchanged since then. Article 3(3) of the TEU requires the EU to ‘establish an internal market’ and this internal market is defined in Article 26(2) of TFEU as: An area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

The Single Market is underpinned by these four freedoms. The free movement of services covers the exercise of two rights: the freedom of establishment of individuals and companies, and the free movement of services.

The freedom of establishment is set out in Article 49 TFEU, which deals with the self-employment of individuals and Article 54 TFEU, which states that companies must be treated in the same way as individuals.

Together, Articles 49 and 54 cover a number of situations:

The self-employment of an individual in another Member State;

The establishment and management of companies in another Member State by individuals or companies; and

The right of secondary establishment in another Member State for a company by setting up agencies, companies and subsidiaries.

The exercise of the freedom of establishment implies that the person, either an individual or a company, creates a longer term presence in the host Member State. In contrast, the freedom to provide services covers the provision of services by a provider established in one Member State to a recipient established in another, and any cross border movement of service provider or recipient is on a temporary basis.

The freedom to provide services is set out in Articles 56 and 57 of the TFEU. Services are defined under Article 57 as those services provided for remuneration that are not governed by the provisions on the free movement of goods, people or capital; voluntary services are therefore not in the scope as they are not provided for remuneration. Article 57 continues: Services shall in particular include (a) activities of an in-

dustrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions.

Case law has established that the following services are included within the definition in Article 57 of the TFEU: employment agency services, tourism, education, some medical services, broadcasting, lotteries, judicial recovery of debts and building loans provided by banks.

Articles 56 and 57 can cover three situations:

The freedom to travel to provide services – this was the classic situation envisaged by Art. 57;

The freedom to travel to receive services – this situation was not spelt out by the Treaty but it was covered by early secondary legislation and subsequently confirmed by the case law; and

The provision of services where neither the provider nor the recipient moves to another Member State, as is the case for online service provision.

Public Services: Services of General Interest. Some of the most widely-used services are provided to meet a public good which the market might not supply sufficiently or at all if left alone. Examples include health and social care, compulsory education and the supply of water, energy and transport services. There are widespread differences in the organisation and provision of public services across the EU, reflecting long-standing cultural traditions. For many citizens, services such as health care and social security form a fundamental part of their relationship with the state, and there has therefore been some resistance to the EU developing competence in this area.

Nevertheless, these services can represent a significant portion of EU GDP, so disregarding the Single Market framework entirely would limit the potential benefits of competition.

In EU law, these public services are known as ‘services of general interest.’ These can be further subdivided into non-economic social services of general interest (SSGIs), such as the court system or healthcare; and SGEIs, where there is a more direct economic relationship between the consumer and the supplier, as is the case with gas and electricity supplies, and where the EU has been more active in controlling the application of EU rules on competition and State aid.

Article 106 (2) of the TFEU stipulates that SGEIs are subject to the other provisions in the Treaties, particularly the rules on competition, as long as these rules do not prevent the operation of the service. A practical example of this is the rules relating to state funding of SGEIs which allow sufficient support for the service to be performed whilst not adversely affecting competition or trade. Where public services are pro-

vided by private sector organisations under contract with public authorities, then EU rules on public procurement, discussed elsewhere in this report, may apply.

Some SGEIs form part of network industries, where there is scope to connect individual national markets. For example, the EU has attempted to foster the creation of a single market for energy and transport services. Energy was considered in the report published in February 2014 and transport is also considered in a report to be examined and published.

5.3.3. Restrictions on the Freedom to Provide Services

The TFEU provides for the elimination of restrictions on the freedom to provide services in the EU. The main content of the freedom to provide services is fixed in Article 56 of the TFEU. According to this article “restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended”. Article 59 of the TFEU in its first paragraph provides that in order to achieve the liberalization of a specific service, the European Parliament and the Council, acting in accordance with ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives. Under Art. 60 of the TFEU the MSs shall endeavor to undertake the liberalization of services beyond the extent required by the directives issued pursuant to Article 59(1), if their general economic situation and the situation of the economic sector concerned so permit.

The provision of Art. 56 is intended to prohibit all restrictions which put foreign providers at a disadvantage in comparison with nationals or residents of the host State (where services are provided). But the nature and types of such restrictions are not clarified in the Treaty as referring to the scope of other freedoms. Thus, Article 56 of the TFEU contains no apparent criteria to determine the notion of a barrier impeding the realization of the freedom to provide services. Article 57 in paragraph 3 refers to the discrimination criterion. It is stipulated that the service provider may temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

It is important to point out that the principle of non-discrimination, as one of key principles of the economic liberalization process, is embodied in the TFEU. Article 18 provides that within the scope of the application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. This provision must also be certainly observed in the field of interstate trade in services. Consequently, the freedom to provide services, as with other freedoms of the EU internal market, implies the prohibition of discriminative regulations of Member States on the ground of nationality.

Firstly, it is necessary to pay closer attention to the judgment of the Court of Justice in Van Binsbergen case (Case C-33-74). The central part of the Court's ruling was directly connected with the TEC (now the TFEU) provisions concerning the freedom to provide services and the scope of this freedom. The Court ruled that the first paragraph of Art. 59 of the TEC (now 56 of the TFEU) and the third paragraph of Art. 60 of the TEC (now 57 of the TFEU) must be interpreted as meaning that the national law of a Member State cannot, by imposing a requirement as to habitual residence within that State, deny persons established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the applicable national law.

According to the Court, the restrictions to be eliminated under Articles 59 and 60 of the TEC (now 56 and 57 of the TFEU) include all requirements imposed on a service provider by reason in particular of his nationality or the fact that he does not habitually reside in the State where the service is provided, which do not apply to persons established within the national territory or which may prevent or otherwise obstruct the activities of the person providing the service. The significance of this statement is the prohibition not only of discrimination based on nationality (direct or overt discrimination) but also on place of residence (indirect or covert discrimination).

The Court has extended the scope of principle of non-discrimination to cases of the so-called discrimination in substance, or factual discrimination. The notion of discrimination on the basis of nationality has been widened to cases in which nationals from other Member States have been covertly discriminated against, using a criterion other than nationality to put those nationals at a disadvantage. The term indirect discrimination can be explained as illustrating the situation when a Member State's regulation of the service market, although applying equally to domestic and imported services, may in fact be more burdensome for services imported from other Member States.

In Van Binsbergen the Court concluded that not only are measures established by State prohibited, but also rules of private character, which have the objective to regulate the provision of services.

There remains the problem of how to interpret the notion of indirect discrimination. Which national regulations can be determined as indirect discrimination, and where and to what extent could a particular measure of a Member State be justified? In the Van Wesemael case (C – 110/78) the Court confirmed its approach, ruling that the essential requirements of Article 59 of the TEC (now 56 of the TFEU) abolish all discrimination against the person providing the service by reason of his nationality or the fact he is established in a Member State other than that in which the service is to be provided. This case was about licensing requirements for employment agencies which

were indiscriminately applied irrespective of nationality or establishment. This is a case of double burden regulation for providers established in another Member State.

The Court's view on the question was based on an expanded notion of prohibited restrictions. This approach was also taken by the Court in judging the *Debaue* case (C- 52/79) on the broadcasting of television signals. The Court was asked to rule on whether a prohibition to transmit advertising in television programmes is covered by Articles 59 and 60 of the TEC (now 56 and 57 of the TFEU) even if the prohibition is applied indiscriminately. Furthermore, it was concluded that the natural relief of the ground and of built-up areas and the technical features of the broadcasting systems used undoubtedly lead to differences in regards to the reception of television signals in view of the correlation between the location of broadcasting stations and television receivers. These differences could not be classified as discrimination according to the meaning of the Treaty. It is possible to regard as discrimination only the differences in treatment arising from human activity and, especially, from measures taken by public authorities.

In *Seco* (C- 63/81) the double burden occurred when the obligation to pay the employer's share of social security contributions imposed on persons providing services on a temporary basis within the national territory is extended to employers established in another Member State who are already liable under the legislation of that State for similar contributions in respect of the same workers and the same period of employment.

The legislation of the host State is more burdensome for employers established in another Member State than for national providers. On the one hand, the regulation is equally applicable to national and foreign employers, but on other hand, in effect, it has a discriminative nature because the foreign employers already pay such contributions in the Member State of their establishment (the home State). In this judgment the scope of the restrictions prohibited by Article 59 of the TEC (now 56 of the TFEU) was formulated in the same way as in *Van Wesemael*: Art. 59 and the third paragraph of Art. 60 of the TEC entails the abolition of all discrimination against the person providing the service by reason of his nationality or the fact he is established in a Member State other than that in which the service is to be provided.

The most important characteristic of this case is that the Court came to conclusion that these Articles prohibit not only overt discrimination based on the nationality of the person providing the service, but also all forms of covert discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result. Cases of double regulation are considered as covert (indirect) discrimination.

Consequently, it is possible to assume that in *Van Wesemael*, the Court also implies the concept of covert discrimination. WulfHenning Roth argues that this was an issue

of non-discrimination on the basis of nationality or establishment. But it is not clear which kind of non-discrimination he is talking about (factual or formal).

A pivotal role for the definition of the scope of the freedom to provide services was played by the judgment in case C-76/90 *Säger v. Dennemeyer* on patent renewal services. The Court concluded that Article 59 of the TEC (now 56 of the TFEU) “requires not only the elimination of all discrimination against a person providing services on the grounds of his nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services”. A constituent condition of Art. 56 of the TFEU is that the person providing services should be lawfully offering similar services in the State of his establishment.

Under the Court’s approach, a Member State cannot make the provision of services in its territory subject to compliance with all the conditions required for the establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services.

In *Säger* the Court did not examine the issue of the discriminatory character of the measure when assessing the applicability of Article 59 of the TEC (now 56 of the TFEU). It only dealt with that question when defining the possibility of the justification of restrictive measures. According to some doctrinal views, compared to the “*Dassonville* formula” from the goods sector, the test used in *Säger* is much narrower. One of the explanations is that it does not refer to regulations affecting “directly or indirectly, actually or potentially” cross-border trade. But this statement is disputed because in particular “any discrimination” from *Säger* implies these types of restrictions. Another explanation is that *Säger* precludes similar services that are provided by the same person in his home State, and in the trade of goods the relevant freedom applies to goods which are not only lawfully produced, but also commercialized in the home State.

The Advocate General in his opinion on *Säger* stressed that the test formulated in this judgment is more restrictive than the test used in the *Dassonville* case concerning the free movement of goods. Ultimately, he did not attach any importance to the discriminatory criterion and focused his study on whether the restriction could be objectively justified (by one of the justifications from the article 56 EEC (now Art. 52 of the TFEU) or the imperative requirements of general interest). This approach can be considered as disputable. He tried to determine a level of correspondence between the Court’s approach concerning the interpretation of Article 30 of the TEC (now 34 of the TFEU) on the free movement of goods after the *Keck* modification and Art. 59 of the TEC (now 56 of the TFEU) on the free movement of services. Moreover,

he proposed to apply a test similar to that elaborated in the case law concerning the free movement of goods. From conclusions made by the Court in *Säger* it follows that discrimination is not an unconditional requirement of Art. 56 of the TFEU, and it prohibits not only direct and indirect discrimination, but also restrictions of a non-discriminatory character. But it is often difficult to draw a line between these categories. It is controversial to classify national regulations as accounting for discrimination or non-discrimination.

In a recent judgment the Court took a more precise and more limited approach to the scope of Art. 56 of the TFEU. In the *Mobistar* judgment (C-545/03), which was about a tax on telecom masts and pylons necessary for the transmission of phone calls, it was stated (in paragraph 31) that measures, the only effect of which is to create additional costs in respect of the service in question, and which affect in the same way the provision of services between Member States and that within one Member State, do not fall within the scope of Art. 59 of the TEC (now 56 of the TFEU).

This conclusion contrasts with the extended concept of a prohibited restriction in *Alpine Investments and Gebhard*. The Court pointed out that the mere imposition of an equally applicable cost is not a restriction on services. In another judgment it was explained by the fact that such costs do not impede or make the provision of services less attractive.

Originally, the Court follows its traditional approach in using the discrimination criterion to define the scope of Art. 56 of the TFEU. It has never been in doubt that direct and indirect discrimination is prohibited. Subsequently, the concept of prohibited restriction has been expanded to non-discriminatory measures. The interpretation of Art. 56 of the TFEU by the Court demonstrates that it recognizes that MSs must prohibit all discrimination against a person providing services on the grounds of his nationality or the place of establishment, but also any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services. Indeed, in the light of the Court's recent judgments a restriction on services seems to comprise any measure which affects access to the national market for services. These measures disadvantage the foreign or the cross-border providers compared to domestic, and any measure which requires a person providing services to amend their services or business model in order to provide those services in another state.

It is necessary to stress that in recent case law the discriminatory test has nearly been abandoned. Generally the evolution of EU case law consists of the broadening of the scope of the freedom to provide services by the application of an expanded notion of prohibited restrictions. As a consequence, with ever increasing frequency, Member

States try to make these measures compatible with Art. 56 of the TFEU by relying on justifications provided by the TFEU provisions and the Court's practice. At the same time it should be taken into consideration that the Court's case law depends on the kind of issues it is required to rule on, and sometimes contains controversial rulings and disputed conclusions. However, this does not detract from its significance for the development of the liberalization process in the sphere of the provision of services in the EU. It continues to play a pivotal role in the evolution of the EU law concerning the freedom to provide services.

5.3.4. Directive of the European Parliament and the Council No. 123/2006 on Services in the Internal Market

The Directive entered into force on the day of publication in the Official Journal, and its implementation period is three years from the day of publication, i.e. December 28, 2009. In the words of the Commission, the aim of the Directive is to "to make progress towards a genuine Internal Market in Services". The expression "to make progress" is indeed appropriate to describe the true nature of the Directive which, with many exceptions, applies only to a small segment of services, whereas the remaining part remains subject to either the provisions of the TEC, particularly, articles 43 and 49 thereof, or to the specific sectoral directives which apply to specific categories of services as *lex specialis*.

The Directive does not make an attempt to harmonize national laws in area of services. It is a vehicle of negative integration that merely creates conditions for some future harmonisation. It builds on the well established case law of the European Court of Justice in the field of free movement of services. It strives to find a balance between the TEC, notably its Art. 14(2), which defines the internal market, and the sustainable economic and social development. As stipulated in the Preamble of the Directive, while eliminating barriers to the free movement of services, "... it is essential to ensure that the development of service activities contributes to the fulfillment of the task laid down in Article 2 of the Treaty of promoting throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life and economic and social cohesion and solidarity among Member States."

Those very general objectives can hardly be achieved by any regulatory policy. It is, therefore, no wonder that the Directive does not resolve, but merely creates conditions for resolving tensions which it regulates. It strives to reconcile often contra-

dictory interests such as those of Member States with the high level of integration of market in services, or the high standard of quality of services with removal of national barriers to trade.

In essence, the Directive does the following:

- Delimits the general area of free movement of services in the internal market from the specific, sectoral areas;
- Codifies the existing case law of the European Court of Justice that interprets relevant provisions of the EC Treaty;
- Creates an obligation to simplify administrative procedures in the area of free movement of services and prescribes their better transparency;
- Sets criteria for introduction of national authorization schemes;
- Introduces a black list of prohibited national criteria that restrict free movement of services;
- Sets conditions and methods of evaluation of national authorization schemes and conditions under which the Member States can restrict the free movement of services; and
- Regulates administrative cooperation between the Union and its Member States in the field.

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5.4. Free movement of persons

5.4.1. Nature of Free Movement of Persons

The free movement of people is a fundamental acquis of European integration. The free movement of people is inexorably linked to the original project of creating a grand, single Internal Market. The Rome Treaty set the goal of establishing a Common Market comprising the free movement of goods, people, services and capital designed to ‘to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.’”

The free movement covers the right to enter and move about within the territory of another Member State as well as the right to stay there to work and live there, under certain conditions, after having worked there. Confirmed by the Treaty on European Union (art. 3), freedom of movement is also guaranteed by the Charter of Fundamental Rights (art. 45) and by the jurisprudence of the Court of Justice.

With the Single European Act in 1986 and in the context of intergovernmental cooperation, five States (Germany, Belgium, France, Luxembourg, the Netherlands) signed the Schengen Agreements (1985) and their implementation Convention (1990). Within the Schengen Area the signatory States abolished their internal borders which were replaced by a single external border where entry checks were undertaken according to the same procedures. The right to a short stay is now applicable to third country citizens within the Schengen Area. The Schengen cooperation agreement was integrated into the EU’s legal framework by the Amsterdam Treaty of 1997 (Art. 67 of the TFEU).

Free movement is closely linked to European citizenship which was introduced with the Maastricht Treaty (1992), from which came the Treaty on European Union

(TEU). Article 9 of the TEU specifies that any person in the Union is a citizen of that Union if he/she has the nationality of a Member State. The Court of Justice stresses that European citizenship aims to be “the fundamental status of Member States’ citizens”.

In addition to the principle of equality, the TFEU (Art. 20 to 25) stipulates the list of rights that ensue from European citizenship. Some of these rights are specific to European citizens and distinguish them from third country citizens. The Council, voting unanimously can, after consultation with the European Parliament, adopt measures regarding social security or social protection, in order to facilitate the implementation of free movement (Art. 21(3) of the TFEU).

The right to free movement given to European citizens is also a result of the Charter of Fundamental Rights, which is now legally binding. Its preamble states that the Union “places the individual at the heart of its actions by introducing Union citizenship and by creating a space of freedom, security and justice.”

Article 45 of the TFEU relates to workers. It consists of four paragraphs:

- Freedom of movement for workers shall be secured within the Union;
- Such freedom of movement shall entail the abolition of discrimination based on nationality between Member States.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

- (a) To accept offers of employment actually made;
- (b) To move freely within the territory of Member States for this purpose;
- (c) To stay in a Member State for the purpose of employment, subject to the laws governing employment in that State;
- (d) To remain in a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions in this Article shall not apply to employment in the public service.

5.4.2. Freedom of movement of workers and their family members

The free movement of workers was one of the fundamental foundations of the EC Treaty. In Article 48 of the TEC (now Art. 45 of the TFEU), a provision was made for the free movement of labour, allowing workers who were nationals of the Member States to move freely across borders with their families to seek and take up employment in other Member States. This included a prohibition on discrimination based on

nationality between workers as regards employment, remuneration and other conditions of work and employment.

The principle of free movement of workers enshrined in the TFEU is further developed in EU secondary legislation, particularly in: Council Regulation (EEC) No. 1612/68 of October 15th, 1968 on freedom of movement of workers within the Community (has now been replaced by Regulation 492/2011) and Council Regulation (EEC) No. 492/2011 of April 5th, 2011 on freedom of movement of workers within the Union. Directive 68/3604 was repealed with effect from April 30 2006 and replaced by provisions contained in Directive 2004/38/EC (the Free Movement Directive). This gave rights to migrant workers, the self-employed and other migrant citizens including students and those of independent means.

As third-country nationals who are family members of EU citizens derive their rights under the Directive from the EU citizen, it must be established whether the EU citizen finds himself in a situation covered by the Directive. In principle, the Directive applies only to those EU citizens who travel to a Member State other than the Member State of their nationality or already reside there.

EU citizens residing in the Member State of their own nationality do not normally benefit from the rights granted by the Directive (as there is no element of free movement). However, the case law of the European Court of Justice has also extended the application of the Directive to EU citizens who return to their Member State of nationality after having resided in another Member State, as well as to those EU citizens who have exercised their right to free movement in another Member State without residing there, for example, by providing services in another Member State.

The following persons are defined in Article 2(2) of the Directive as ‘core’ family members:

- a) the spouse;
 - b) the partner with whom the EU citizen has contracted a registered partnership, on the basis of the legislation of any Member State, if the legislation of the host Member State treats registered partnership as equivalent to marriage;
 - c) the direct descendants who are under the age of 21 or are dependant as well as those of the spouse or partner as defined above;
- or
- d) the dependant direct relatives in the ascending line and those of the spouse or partner as defined above.

The following persons are defined in Article 3(2) of the Directive as ‘extended’ family members: any other (i.e. those not falling under Article 2(2) of the Directive) family members who are: dependants; members of the household of the EU citizen;

or where serious health grounds strictly require the personal care by the EU citizen; or the partner with whom the EU citizen has a durable relationship, duly attested.

Article 3(2) of the Directive stipulates that ‘extended’ family members have the right to have their entry facilitated in accordance with national legislation. In contrast with ‘core’ family members, ‘extended’ family members do not have an automatic right of entry. Their right of entry is derived from the national legislation transposing the Directive where the consulates should find detailed rules on this category of visa applicants.

A worker is not explicitly defined in either the article or regulation, however they both intended the definition of a worker to be one at European Union level so as to avoid the possibility of member states defining a worker in such a way as to restrict their rights.

In one of its early decisions, the Hoekstra case (C-75/63), the ECJ ruled that the definition of “worker” was not dependent on any national classification of workers and self-employed people, but was a Community law concept. It also recognized that persons could retain their status as workers though not actually employed, as, for example, when they were ill, or had retired from employment.

Levin Case gave further substance to the definition of worker. In Levin, Gordon Slynn was Advocate General. The case concerned a British national living in the Netherlands with her South African husband. She had worked regularly as a chambermaid in various hotels in Amsterdam, and was refused a residence permit, for which Community law provided. When she asked for the decision to be reconsidered, she was working part-time as a chambermaid for around twenty hours a week. Reconsideration, however, did not result in the granting of a permit. Advocate General Slynn was of the opinion that, under articles 2 and 3 of the European Economic Community Treaty, a person must be engaged in “an activity of an economic nature” to be considered a worker.

There was nothing in the scheme of the TEC which required the interpretation of worker to be restricted to a person who earns a particular wage or works for a certain number of hours per week. Nor is the presence or lack of private means to supplement the earnings to a certain level a relevant issue. For Advocate General Slynn, however, the person must be moving to another Member State for the purpose of the employment, though there is no requirement to show that that purpose is the dominant purpose. The Advocate General proposed that the Court answer the referred questions in the following terms: A national of one Member State who, on the territory of another Member State undertakes paid work under a contract of employment, qualifies as a “worker” within the meaning of Article 48 of the EEC Treaty and its implementing legislation, and is entitled accordingly to be issued with a residence permit of the kind

mentioned in Article 4 of Council Directive 68/360 even though such employment is so limited in extent as to yield an income lower than that which is regarded in that State as the minimum necessary to enable the costs of subsistence to be met. The decision of ECJ then added a formal test to the sufficiency test in the Lawrie-Blum case. To determine that a person is employed for the purposes of what is now article 45 of the Treaty on the Functioning of the European Union, the Court must answer three questions affirmatively:

1. Is the person obliged to work for another?
2. Is the work done for monetary reward or payment in kind?
3. Is the person subject to the direction and control of another?

The broad scope of the test established in the Levin case resulted in a later reference in the Kempf case. In Levin, the plaintiff argued that the couple had private means which enabled them to meet their living expenses. In Kempf, the question was whether a person would be a worker under Community law if his or her earnings, which were below subsistence level, needed to be supplemented by public assistance. The Court in Kempf followed the opinion of the Advocate General. The decisions in the Levin and Kempf cases remain key authorities on the definition of who is a worker under what is now article 45 TFEU. In the Kempf case, the Court said: The Court has consistently held that freedom of movement for workers forms one of the foundations of the Community. The provisions laying down that fundamental freedom and, more particularly, the terms ‘worker’ and ‘activity as an employed person’ defining the sphere of application of those freedoms must be given a broad interpretation in that regard, whereas exceptions to and derogations from the principle of freedom of movement for workers must be interpreted strictly. Similar statements and references to the Levin case can be found in more modern authorities.

One of the most significant cases in recent years on the free movement of persons is the Baumbast case (C-413/99). The case concerned two families, but exposition of the circumstances of one of them is sufficient for understanding how the ECJ developed its case law. Mr. Baumbast was a German national, and his wife was a Colombian national. They had two daughters. Mr. Baumbast had been a worker employed in the United Kingdom. He followed this employment with a period of self-employment, and held a five-year residence permit under the Community secondary legislation in operation at the time. When his self-employment came to an end, he obtained employment with a German company, but his work was abroad in China and Lesotho. The family continued to live in the United Kingdom, where his daughters went to school. The family had never claimed any social security benefits in the United Kingdom, and had comprehensive medical insurance in Germany, where they travelled from time to time for medical treatment.

The Secretary of State refused to renew Mr. Baumbast's residence permit on the grounds that he was no longer a worker, and refused the applications of his wife and children for indefinite leave to remain in the United Kingdom. Mr. Baumbast challenged the decisions, and questions were referred to the ECJ. The Court used the concepts of citizenship of the Union and the rights set out in Art. 18 of the TEC (now Art. 21 of the TFEU) to fill gaps in the treaty rules and provisions in the secondary legislation of the right to free movement. The Court said: A citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Art. 18(1) of the TEC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality.

The ECJ has increasingly given a constitutional significance to the economic, political, social, and other rights contained in the treaty provisions on citizenship. The current credo of the ECJ is as follows: In accordance with settled case law, citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for. Article 18 of the TEC (now Art. 21 of the TFEU) states the right "to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."

5.4.3. Right to Move and Reside within the Union in Secondary Law

This Directive applies to enterprises that post workers on the territory of a Member State within the framework of the transnational provision of services, provided there is an employment relationship between the enterprise and the worker during the period of posting:

- on its own account and under their direction, under a contract concluded between the commissioning enterprise and the party for whom the services are intended;
- in an organization or enterprise owned by the group;
- as an enterprise for a temporary job of a user enterprise.

For the purposes of this Directive, "posting worker" means a worker who, for a limited period of time, carries out his work on the territory of a Member State other

than that in which they normally work. The definition of a worker is contained in the law of the Member State to which the worker has been posted.

In Bulgaria, the provisions of Directive 96/71/EC are introduced by the Labour Code, Health and Safety at Work Act, Employment Promotion Act, and the Regulation on conditions and procedures for the posting of workers or employees from Member States or workers or employees from third countries to the Republic of Bulgaria in the framework of the provision of services.

Control over the observance of labour legislation, including the posting of workers in the framework of the provision of services, is provided by the General Labour Inspectorate Executive Agency.

The need for coordination of social security systems of the Member States is regulated in Art. 48 of the TTEU, which requires the European Parliament to take such measures in the field of social security as are necessary to ensure the free movement of workers.

From May 1st, 2010, the following provisions are applicable:

Regulation (EC) No. 883/2004 of the European Parliament and of the Council of April 29th, 2004 on the coordination of social security systems and Regulation (EC) No. 987/2009 of the European Parliament and of the Council of September 16th, 2009 laying down the procedure for implementing Regulation No. 883/2004 on the coordination of social security systems.

As of the same date, Council Regulation No. 1408/71 of June 14th, 1971 on the application of social security schemes to employed persons and their families moving within the Community and Regulation 574/72 for its implementations have been repealed. These regulations have been repealed for EU citizens but continue to apply to Norway, Iceland and Liechtenstein.

Regulation No. 883/2004 provides for the introduction of the principle of equal treatment, according to which the persons subject to the regulations receive the same benefits and have the same obligations under the legislation of any Member State as its citizens have. The provisions of the Regulation shall apply to all legislation concerning the following branches of social security: sickness compensations; maternity benefits and corresponding benefits for raising a small child by the father; disability compensations; age benefits; survivors' benefits; compensations for occupational accidents and diseases; death grants; unemployment compensations; pre-retirement benefits; family benefits.

It is important to bear in mind that the rules on coordination of social security systems do not replace national systems with a single European system. All countries are free to decide who should be provided under their legislation, what benefits are granted and under what conditions. The EU lays down general rules for the protection of a person's social security rights when they go from one European country to another.

From June 28th, 2012, Regulation (EC) No. 465/2012 of the European Parliament and of the Council of May 22nd, 2012 is amending Regulation (EC) No. 883/2004 and Regulation (EC) No. 987/2009. This Regulation aims to reflect legislative changes in some of the Member States relating to social security systems, thus ensuring legal certainty for the interested parties.

It is worth mentioning the approach of ECJ in relation to equal treatment.

For example, in *Ministere Public and Evens ONPTS* the Court developed a formula (AKA Even Formula) and stated that a social advantage is a benefit not directly linked to a contract of employment but granted to worker because of their status or as a result of their residency. In the Case *Netherland v Reed* the Court stated that an unmarried migrant worker could enjoy the presence of his partner (who had failed the right of residence independently) as long as this same right was given to nationals of the host state. This is now incorporated in Art 3 of Directive 2004/38 although article 2 (b) of the same directive states that in order to be someone's partner one needs to be registered.

Directive 2005/36 on the recognition of qualifications was adopted in part on Article 53 legal basis. It provides for a system for mutual recognition of qualifications which applies to both the employed and the self-employed so as to allow the holder of those qualifications access to that profession. It provides for a scheme for temporary mobility and also applies to professionals wishing to establish themselves in another Member State on a more permanent basis. It also includes provisions on knowledge of languages and academic titles. An automatic recognition system for professional qualifications applies for seven specified professions.

5.4.4. Restrictions on the Freedom of Establishment

According to Art. 48 of the TFEU, within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

Article 43 provides the unrestricted right of establishment for natural persons, their agencies, branches, or subsidiaries for self-employed or managing purposes within the EU. The same rights are granted for corporations under article 48.

For Art. 43 to be applicable the establishment must be permanent and the establishment must be set up to make profits. The difference from Art. 49 is mainly that a permanent establishment leads to the application of Art. 43, whereas a temporary presence leads to the application of Art. 49.

The difference from Art. 39 is simply that employees fall under Art. 39, while self-employed persons can appeal to Art. 43. The distinction is based on whether there is subordination or not and not on the classification under national law. But as the freedom of establishment and the freedom of movement for workers are based on the same principles, this distinction is of no great importance. The consequence of the direct applicability of the prevailing TEC is that the non-discrimination principle on the freedom of establishment has to be applied by the authorities (as well as the courts) to themselves and from the first instance on. But in reality it is up to the taxpayer and his consultant to appeal to prevailing fundamental freedoms.

Nevertheless, this opportunity makes the freedom of establishment especially one of the most important rules of EC law for direct taxation matters. Last but not least, it has to be said that potential discrimination is enough to be an infringement. And even the fact that carrying out cross-border activity is less attractive than the domestic activity is a possible infringement of the TEC.

Personal scope of Art. 48 of the TEU states that companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

Companies or firms means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making. All natural persons who are nationals of a member state fall under the personal scope of the freedom of establishment.

Every national of a member state has the right to pursue activities as a self-employed person, but for the right to establish branches, agencies, or subsidiaries the person has to be resident within the EU.

Article 48 of the TEU extends the scope to companies and firms that were formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business within the Community. Companies or firms means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making. Companies that have no legal capacity also fall under article 48, as long as they have economic purposes. The requirement

‘profit-making’ has to be interpreted in a broad sense, because only if profit-making is interpreted as following economic purposes, can legal persons by public law, which are listed in article 48, fulfill this requirement.

The law under which the company was formed constitutes the nationality for those corporations. This fact means that the TEC does not follow the control theory, which applies the legal system of the majority of the shareholders. As the control theory is not applied, corporations that are controlled from third states, but are established in and run from within the EU, are also entitled to rely on the fundamental freedoms. There are two additional theories about which legal system has to be applied to corporations. Continental Europe mostly follows the residence theory, which applies the legal system of the state of residence. The result is that with migration the company loses its identity. The other theory is the incorporation theory. It applies the legal system of the state of incorporation. It is more liberal, because migration is possible while keeping the company’s identity. The incorporation theory is the one that is more in accordance with the goal of the TEC. But the ECJ decided in the *Daily Mail* case that an agreement between the member states is necessary for the application of the incorporation theory, which has not been ratified yet. But this decision has been put into perspective by the decision in the *Centros* case. To be characterised as an establishment, there should be a genuine link to the economy of the member state where the establishment is created. But this genuine link must not be the nationality of the shareholders. This rule should exclude firms that merely have an accommodation address within the EU from the favourable provisions of the TEC, but the ECJ declined this requirement in the *Segers* case and stated that only the requirements that are listed in article 48 have to be met.

As the TEC only refers to nationality, but not to the residence, which is common as a link in tax law, nationals of third states, who only have their residence within the EU, are not covered by the favourable provisions of the TEC.

The substantive scope is defined in such a way that everyone (natural and legal persons) who falls under the personal scope and wants to establish an agency, branch, or subsidiary within another member state to manage undertakings or pursue activities as self-employed person, falls under the freedom of establishment. What kind of self-employed activity it is, is of no concern.

The difference between subsidiaries, branches and agencies is that a subsidiary is a legal independent entity that is controlled by the foreign parent, but is established according to the rules of the host country. Branches and agencies, on the other hand, are a part of the foreign firm, so they are only a permanent establishment. Subsidiaries are far less of a problem with respect to discrimination, because, since they are a firm of the host country, they are treated as a domestic firm. Thus, normally there is no dis-

crimination. However, the freedom of establishment not only applies to persons who want to cross a border into another member state, but also to employees who want to become self-employed. This is basically also seen in the Werner case.

Mr. Werner, a German national, who was educated and who had always worked in Germany, had been resident in the Netherlands for more than twenty years when he changed his employment status from employee to self-employed. Because of this, he fell outside the scope of the rule for employees of the DTC between the Netherlands and Germany that granted the right of unlimited taxation to the state of activity. From that point in time on, the DTC granted the state of residence – the Netherlands – the right to tax Mr. Werner unlimited and in the state of activity – Germany – Mr. Werner was only subject to limited tax liability. But, as nearly all his income originated in Germany, he could not get the relief resulting from the unlimited tax liability in the Netherlands. Mr. Werner saw this additional taxation as an obstacle to self-employment in Germany and, thus, as an infringement of the freedom of establishment.

Normally such facts are a clear discrimination. But in this case Mr. Werner had no economic link to another member state and because of that he could not appeal to any rights granted by the TEC. For that reason there was no comparability to a non-resident originating from another member state. Since these were the facts, the TEC and the fundamental freedoms provided with it are not applicable and the discrimination was no infringement. Of course, this is not true if there is a link to another member state (for example, nationality). Thus, in such a case this decision is not relevant.

Article 45 of the TEC declares that the provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority. The Council may, acting by a qualified majority on a proposal from the Commission, rule that the provisions of this Chapter shall not apply to certain activities.

Article 45 of the TEC provides the exception to the freedom of establishment. In article 45 activities that are connected with official authority are excluded from the scope of the freedom of establishment. That connection is also a reason for an exception if it only occurs occasionally. If the part of an activity that is connected with official authority is separable, only the part that is linked is excepted. The member states are allowed to define what is connected with official authority on their own but they may not exclude more than is necessary, because otherwise this would not be in accordance with the object and purpose of the TEC. However, it has to be said that this article is not really relevant for tax discrimination, as taxation is not useful in reserving to home nationals those activities that need the loyalty of home nationals.

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5.5. Free movement of capital

5.5.1. Introduction to the free movement of capital

Free movement of capital is at the heart of the Single Market and is one of its four freedoms. Together with free movement of goods, persons and services it enables integrated, open, competitive and efficient European financial markets and services.

The Maastricht Treaty, which set out the institutional provisions relating to Economic and Monetary Union, introduced new capital movement provisions which entered into force on January 1, 1994. While, like the other freedoms, these rules are capable of direct effect, they are distinctive in two other ways: they in principle extend to movements to and from third countries as well as to movements within the EU, but on the other hand, they appear to allow for a degree of differential tax treatment on the basis of residence or place of investment.

The Treaty on European Union introduced new provisions on capital and payments with effect from January 1, 1994. The fundamental rules are set out in paragraph 1 of Art. 56 of the TEC, which states that “within the framework of the provisions set out in that Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited;” paragraph 2 states that within the same framework, “all restrictions on payments between Member States and between Member States and third countries shall be prohibited”. Member States should progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested, but only “to the extent necessary to ensure the proper functioning of the common market.”

Before Treaty on European Union introduced new provisions on capital and payments, the legal effects of Art. 67 of the original version of the TEC were considered by the European Court in *Criminal Proceedings v Guerrino Casati*. It was seen that Art. 67 differed from the other freedoms laid down by the Treaty in that it was not drafted in absolute terms. It does not require restrictions on the movement of capital simply to be abolished; rather it requires them to be abolished “to the extent necessary to ensure the proper functioning of the common market.” In *Casati* it was held that the scope of that restriction might vary in time and depended on an assessment of the requirements of the common market and on an appraisal of both the advantages and risks which liberalization might entail. It was further stated that such an assessment was “first and foremost” a matter for the Council, and that the obligation to abolish restrictions on movements of capital could not be separated from the Council’s assessment of the need to liberalize the category of transactions in question.

Articles 56, 57, 59 and 60 of the TEU (respectively Articles 63, 64, 66 and 75 of the TFEU) embrace rules limiting the free movement of capital with regard to third countries and Article 58 of the TEU (Art. 65 of the TFEU) provides member states with the grounds to justify their restrictions on the free movement of capital. The unclear scope of these articles should be examined in detail since the concept of free movement of capital is potentially wide that it sometimes causes an overlap with other

freedoms, and also the purpose of liberalization with respect to third countries is more limited than the purpose as regards the free capital movement within the EU. The Lisbon Treaty does not bring substantial changes to the rules on capital and payment.

5.5.2. The Development of the Law on the Free Movement of Capital

Although the original Treaty provisions themselves may not have been capable of giving rise to rights enforceable by individuals, the first Council Directive under the original Article 67 was enacted during the first stage of the original transitional period on May 11, 1960, and was amended by Directive 63/21 at the end of 1962. It may be observed that in their recitals, these Directives claim to be made under a number of Treaty provisions, including not only Articles 67 and 69 on capital movements but also the former Article 106(2) on current payments. The basic pattern established by these Directives was to divide capital movements into four lists, with different degrees of liberalization. Member States were required to grant all foreign exchange authorisations for the transactions or transfers set out in List A, which included direct investments (defined so as to exclude purely financial investments) in an undertaking in another Member State, investments in real estate, certain personal capital movements, short (one year) and medium-term (one to five year) credits related to commercial transactions or provision of services, death duties, and damages to the extent they may be regarded as capital. List A also included transfers in performance of insurance contracts “as and when free movement in respect of services” was extended to them, authors’ royalties and “transfers of moneys required for the provision of services,” which would appear clearly to involve current payments rather than capital movements.

The transactions and transfers in List B had to be granted general permission by the Member States. List B largely consisted of various operations in securities, notably acquisition and liquidation by non-residents of domestic listed securities, and acquisition and liquidation by residents of foreign listed securities. On the other hand, while the transactions and transfers in List C had to receive foreign exchange authorizations in principle, Member States could maintain or reintroduce the exchange restrictions which were operative at the date of entry into force of the Directive where such free movement of capital might form an obstacle to the achievement of the economic policy objectives of the Member State concerned. List C included the issue and placing of securities of a domestic undertaking on a foreign capital market and of a foreign undertaking on the domestic capital market, cross-border acquisitions and liquidations of units in unit trusts, and the granting and repayment of certain long-term credits. Finally, List D set out the capital movements which did not have to be liberal-

ized, including in particular the opening and the placing of funds on current or deposit accounts, and the physical import and export of financial assets and personal loans.

In 1986, this framework was amended by Directive 86/566, which in effect merged the old lists A and B from the earlier Directives into a new List A, and added certain other elements to those lists from the former List C, notably the issue and placing of securities of a domestic undertaking on a foreign capital market and of a foreign undertaking on the domestic capital market, cross-border acquisitions and liquidations of units in unit trusts, and the granting and repayment of certain long-term credits noted above. What was left of List C was renamed List B, still subject to the power of the Member States to maintain or reintroduce the exchange restrictions which were operative at the date of entry into force of the Directive where free movement of capital might form an obstacle to the achievement of the economic policy objectives of the Member State concerned. List C also included transactions in unlisted securities, medium and long-term loans and credits not connected with commercial transactions or provision of services, and sureties and guarantees relating thereto. Finally, the old List D became List C, but still not liberalized.

A new approach was followed by Directive 88/361, which finally established the basic principle of free movement of capital as a matter of Community law with effect, for most Member States, from July 1, 1990. Free movement of capital thus became the only Treaty freedom to be achieved in the manner envisaged in the Treaty – by the enactment of a program of legislation, albeit twenty years after the time limit envisaged in the Treaty. Subject to its other provisions, Article 1(1) of the 1988 Directive provided that “Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States” and although there was still a nomenclature of capital movements annexed to the Directive, it was stated to be to facilitate its application, rather than to introduce distinctions in treatment. Annex I itself stated that the nomenclature was not intended to be an exhaustive list of the notion of capital movements, and it should not be interpreted as restricting the scope of the principle of full liberalization of capital movements in Article 1. However, in the absence of a Treaty definition, the headings of the nomenclature (which in reality owe much to the previous lists) indicate the concept of capital underlying the Directive: direct investments; investments in real estate; operations in securities normally dealt in on the capital market; operations in units of collective investment undertakings; operations in securities and other instruments normally dealt in on the money market; operations in current and deposit accounts with financial institutions; credits related to commercial transactions or to the provision of services in which a resident is participating; financial loans and credits; sureties; other guarantees and rights of pledge; transfers in performance of insurance contracts, personal capital movements, physical

import and export of financial assets; and other capital movements (defined so as to include transfers of the moneys required for the provision of services).

The introduction to the Annex further states that the capital movements mentioned are taken to cover all the operations necessary for the purposes of capital movements, i.e. the conclusion and performance of the transaction and related transfers, and should also include access for the economic operator to all the financial techniques available on the market approached for the purpose of carrying out the operation in question.

Nevertheless, despite the fact that free movement of capital rules now apply to movements into and out of the EU, the 1988 definitions drafted to cover movements within the Community in Directive 88/361 continue to be used. This was made clear when the Court confirmed that a mortgage fell within the scope of a capital movement as defined in the Directive in the case of *Trummer v. Meyer*, and further held that this interpretation should continue to apply to the free movement of capital under Article 56. In 1994 in the continued silence of the Treaty, the Annex to the Directive remained a useful source of illustration of the principle of the free movement of capital even after the entry into force of Article 56 to Article 60 under the Maastricht Treaty. Such a view had in fact been accepted by the Austrian *Landesgericht* in *Trummer v. Mayer*, but the *Landesgericht* interpreted the Annex so as not to cover the transaction in question. For its part, the ECJ took the view that Article 56 substantially reproduces the contents of Art. 1 of Directive 88/361 and held that “the nomenclature in respect of movements of capital Annexed to Directive 88/361 still has the same indicative value, for the purposes of defining the notion of capital movements, as it did before the entry into force of Article 56 et seq., subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive.”

In *Commission v. Italy*, it was held that an Italian requirement that undertakings engaged in the provision of temporary labor established in other Member States had to lodge a guarantee with a credit institution having its registered office or a branch of office in Italy was a breach both of the freedom to provide services under Article 49 and of the free movement of capital under Article 56; it was held to restrict the free movement of capital on the basis that under point IX of Annex I to Directive 88/361, guarantees granted by non-residents to residents or by residents to non-residents constitute movements of capital, which should therefore be liberalized under Article 56(1).

The broad use of the capital movement rules to deal with issues which might be thought to involve questions of freedom of establishment is very clearly shown in the series of decisions in relation to golden shares, where measures designed to enable the public authorities to limit the size of shareholdings or restrict the disposal of assets in privatized companies were held to amount to restrictions on investment in breach of the rules on the free movement of capital. Recent examples include the 2005 case of

Commission v. Italy, which involved Italian rules suspending voting rights attributed to shareholdings greater than two percent of the capital of companies in the electricity and gas sectors held by public undertakings. This was held to breach the capital movement rules in that it excluded these public undertakings from participating effectively in the management and control of Italian gas and electricity undertakings. Similarly in *Commission v. Netherlands*, special shares held by the Netherlands State in privatized undertakings giving it special rights to approve certain management decisions were held to breach the capital movement rules.

A particularly striking example is the recent decision involving the 1960 privatization legislation governing the Volkswagen company. This involved limiting, in derogation from the general law, the voting rights of every shareholder to twenty percent of Volkswagen's share capital; secondly, it required a majority of over eighty percent of the shares represented for resolutions of the general assembly, which, according to the general law, required only a majority of seventy-five percent; and thirdly, in derogation from the general law, it enabled the Federal State and the Land of Lower Saxony each to appoint two representatives to the company's supervisory board. The Commission brought its action on the basis that these provisions were liable to deter direct investment and for that reason constituted restrictions on the free movement of capital within the meaning of Article 56 EC.

In its judgment, the ECJ noted that the Land of Lower Saxony, for its part, still retained an interest in the region of twenty percent, so that the Volkswagen Law thus created an instrument enabling the Land authorities to procure for themselves a blocking minority allowing them to oppose important resolutions, on the basis of a lower level of investment than would be required under general company law, and that by capping voting rights at the same level of twenty percent, the Volkswagen Law supplemented a legal framework which enabled the Land authorities to exercise considerable influence on the basis of such a reduced investment. It concluded that this situation was liable to deter direct investors from other Member States, holding that this finding could not be undermined by the argument advanced by the Federal Republic of Germany to the effect that Volkswagen's shares are among the most highly-traded in Europe and that a large number of them are in the hands of investors from other Member States. It was further found that the right of the Federal State and the Land to appoint two representatives each on the supervisory board enabled them to participate in a more significant manner in the activity of the supervisory board than their status as shareholders would normally allow, and that therefore the influence of the other shareholders might be reduced below a level commensurate with their own levels of investment. The conclusion, therefore, was that by restricting the possibility for other shareholders to participate in the company with a view to establishing or maintaining

lasting and direct economic links with it such as to enable them to participate effectively in the management of that company or in its control, the Volkswagen Law is liable to deter direct investors from other Member States from investing in the company's capital, which brings us back to the debate about the dividing line between free movement of capital and freedom of establishment.

5.5.3. Connection between Freedom of Capital and Freedom of Establishment

The intra-EU freedom of movement of capital cases not related to direct taxation can be placed (with a few exceptions) into two dominant categories:

(a) challenges to laws requiring prior official authorization for certain transactions or activities such as the export of currency, the purchase of land by non-residents or non-nationals or investment in the host country generally;

and

(b) “golden share” cases.

The use of golden shares implicates two fundamental freedoms: the free movement of capital and the freedom of establishment. Therefore, principles from both bodies of law are relevant in analyzing golden share restrictions.

1. Interpretation of Art. 43: The Freedom of Establishment

Freedom of establishment, detailed in Art. 43, “includes the right to take up and pursue activities as self employed persons and to set up and manage undertakings” as well as enabling nationals of any Member State to establish “agencies, branches or subsidiaries” throughout the Community. Freedom of establishment covers investments as well (Case C-251/98, Baars v. Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem), and thus is closely related to the free movement of capital. Not surprisingly, an infringement of one is often linked with an infringement of the other. Since the Treaty of Maastricht, the ECJ has applied the laws governing the two freedoms in parallel.

The provisions of Art. 43 apply to investments which grant control of a company, but do not apply to those which represent a passive investment, such as one taken for portfolio diversification. However, the actual line between a purely passive investment and an investment with control rights is sometimes difficult to draw, and no clear answer exists. Advocate General Alber addressed this issue in Baars, which involved a Dutch decision to deny a tax exemption to a Dutch national for his investment in an Irish enterprise, of which he was the sole shareholder. Though Dutch law provided for such an exemption, when Baars applied the exemption to his taxes, it was denied.

The Dutch government argued that the specific tax provision in question was intended to prevent the double taxation of a sole shareholder who would have to pay both the wealth tax and the company tax. Baars challenged the denial on two grounds: it infringed upon freedom of establishment and also on the free movement of capital. The Commission and the Dutch government disagreed as to which rule was truly applicable, which is not surprising, as the law implicated both freedoms.

Advocate General Alber ultimately determined that the line between capital movement and the right of establishment was at the point where a shareholder ceases to confine himself to the mere provision of capital in support of a particular business activity carried on by another person, and begins to become involved himself in conducting the business. Naturally, where the shareholder is merely providing capital, his rights are still protected under Article 56. Because golden shares often limit the number of shares which an individual can hold precisely because a large holding may permit and in practice often does permit the investor to have some influence, the right of establishment is certainly at issue.

For this reason, the development of EU law regarding the freedom of establishment has implications for the golden share cases. The Court's approach to establishment cases imports much from recognized principles involving the free movement of services. Specifically, the notion that only those regulations necessitated by national interests can justify a restriction of a fundamental freedom was carried over from precedent regarding freedom of services. Thus, the Court imported the test it applied to freedom of establishment in Gebhard from previous case law on free movement of services.

Gebhard discussed the right of establishment as relating to self-employed persons, specifically a lawyer attempting to establish himself in another Member State. In evaluating an Italian law which restricted Gebhard's ability to open legal practice in Milan, the Court held: National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions:

- they must be applied in a non-discriminatory manner;
- they must be justified by imperative requirements in the general interest;
- they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

The Court has applied this four-prong test in many cases involving a restriction of a fundamental freedom.

The Court applies the wording of Article 43 literally, and will not permit restrictions which violate the letter of its text. *Centros Ltd. v. Erhvervs-Og Selskabsstyrelsen* involved Denmark's refusal of Centros's application to register a branch in Denmark because Centros, though incorporated in the UK, did not actually conduct business

in the UK. The sole purpose for Centros's incorporation in the UK was to evade the Danish paid-in capital requirements. For this reason, Denmark believed that refusing to allow registration did not violate the right of establishment. In finding that the refusal violated Centros's right of establishment, the Court noted that "the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty. If the company was not violating the law of the nation in which it was established, its intent to evade certain obligations of the company law of another Member State was unimportant and the literal application of Article 43 demanded this result.

2. Article 56 – The Free Movement of Capital

Before 1994, Member States were under no absolute obligation to open up their frontiers to capital from other Member States. Prior to the amendments adopted in Amsterdam, the ECJ considered that EC Article 67 did not itself accomplish the free movement of capital, but rather required legislative implementation. Thus, Article 67 urged liberalization of capital movements, but did not have direct effect; rather it required legislation to impose measures loosening such restrictions.

Two directives (Council Directive 60/921, and Council Directive 63/21) issued in the early 1960s implemented Article 67. Together, they liberalized the most common forms of both commercial and private capital movements.

Prior to the Treaty of Maastricht and the launch of the internal market project, there was little case law regarding the free movement of capital as an independent right. That is not to say that Article 67 imposed no duty on Member States to liberalize capital movements, particularly where capital movement was linked to the exercise of the other fundamental freedoms, the Court did not permit excessive restriction.

In 1985, the Commission released a White Paper on Completing the Internal Market, which advocated even greater liberalization of capital movements. After the White Paper, efforts to achieve free movement of capital were renewed. Thus, in 1988, the Council issued Directive 88/361/EEC to address the issue.

Prior to Directive 88/361/EEC, restricting capital flows was the norm for some Community members. The purpose of the directive was to accomplish the absolute liberalization of capital flows: "Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States."

The directive was subject to certain exceptions which included allowing measures required to protect bank liquidity and protective measures against short term capital movements which would threaten the Member State's foreign exchange balance.

The ECJ has defined the reach of this freedom broadly: in *Svensson & Gustavsson* the ECJ held that legislation which "is of a nature to dissuade individuals" from the

exercise of their Treaty rights is restrictive. A law which has the potential to restrict an investment is therefore contrary to the obligations of Article 56.

In *Trummer & Mayer* the Court held that a law permitting only mortgages backed in Austrian shillings to be recorded constituted a restriction in the free movement of capital. Fearing that such a requirement would inhibit the exercise of free movement of capital, the Court declared it incompatible with Treaty law. Thus, not only would the Court disallow direct restrictions, but it would also strike down measures which may indirectly restrict the free movement of capital as well.

Not long after the amendments in Maastricht mandated the free movement of capital, the Court held that free movement of capital had direct effect. In *Sanz de Lera*, the Court reviewed a Spanish law which required prior authorization for the exportation of currency over a certain value.

First, the Court determined that requiring consent from governmental authorities effectively gave those authorities discretionary powers over whether to restrict the free movement of capital. Permitting the freedom to be dependent upon the discretion of an administrative authority is such as to render that freedom illusory. Despite the validity of the purpose of the scheme – to prevent illegal activity such as money laundering – the Court held that the means chosen were not proportionate. Because the Spanish government could have achieved its objective with less restrictive means, by instead implementing a system of prior declaration, the Court held that the principle of proportionality was not met. Thus, the holding of *Sanz de Lera* was very important in the golden share cases, for it illustrated that any acceptable restrictive scheme must be the least restrictive means by which to achieve the stated objective. The Court applies this principle of proportionality whenever a fundamental freedom is restricted, from the free movement of goods in *Cassis de Dijon*, to the right to provide services in *In re Insurance Services*. *Sanz de Lera* established the importance of the principle in the context of capital movements.

Despite such broad interpretations, it is also clear that the protection against restrictions is not absolute. Thus, even where there is a valid justification under the EC Treaty, the Court will scrutinize a national law which infringes upon a fundamental freedom. Certain principles must be met in order to permit a restriction. Using the four step analysis developed in *In re Insurance Services*, carried over to the right of establishment in *Gebhard*, the Court first examines if the objective is acceptable. If it is, the means implemented must still be limited in scope so as to not go beyond what is needed to achieve them. This is the principle of proportionality.

The Court has found that some restrictions might be within the parameters permitted by the Treaty, though such instances are rare. For example, the ECJ interpreted the scope of Article 58's public security exception in *Albore*. An Italian law forbade the

sale of land to foreign nationals where the land was located in an area decreed by the Minister of Defense to be one of military importance. Despite the Court's recognition of a public security exception under Article 58, it held that the infringing law must still meet the principle of proportionality. In order to satisfy the requirements for such an exception, the threat posed by foreign ownership of the land in question must be real, specific and serious as well as one which could not be countered by less restrictive procedures. Not having sufficient factual information regarding the specific nature of the threat to the public security by foreign ownership of the coastal land, the Court left it to the Italian court to determine whether such a threat existed, and, if it did, whether the measure was as minimally restrictive as possible in addressing it.

In *Konle v. Austria* the Court considered a law mandating prior authorization for non-nationals wishing to purchase land in the Tyrol (Alpine) region of the country, which was of environmental concern. The stated purpose of the law in question was for the general national interest of urban planning. While the Court accepted that such an environmental concern was valid, it reiterated the principle that a procedure of prior authorization, which entails, by its very purpose, a restriction on the free movement of capital, can be regarded as compatible with Art. 73b (now 56) of the Treaty only on certain conditions. Austria had secured a derogation to maintain discretionary rules regarding the acquisition of secondary residences in its accession agreement. The purpose of the restriction, though not one explicitly condoned in Article 58, was considered an imperative interest, and thus could, under the right circumstances, justify some restriction.

However, since the specific law that prohibited Konle's purchase was not one which existed at the date of accession, but rather was a replacement (and significantly different) law for one which had subsequently been declared unconstitutional, it was not covered by the derogation. Because the system of review in place was not proportionate to the purpose of the restriction, it conflicted with Treaty obligations.

In *Eglise de Scientologie* the Court evaluated a French law that required prior authorization for any foreign investment which might be connected with the exercise of public authority, or which might pose a threat to public policy, health or security. The Court determined that a system of prior authorization is per se restrictive, and, to be acceptable, such a system must clearly delineate the criteria required for authorization. The French law in question was neither specific nor clear enough to permit such broad restrictions. However, the Court did state that there may be cases where a system of prior declaration is not sufficient to safeguard the interests of public policy or public security, and a system of prior authorization may be acceptable. Thus, the Court left some hope for the defense of such schemes in the future.

But *Eglise* also shows that this is a high burden to meet. The law must relate to a genuine and sufficiently serious threat and indicate to investors the specific circum-

stances in which prior authorization is needed. Legal certainty is required so as to apprise individuals as to the extent of any rights and duties that they have under the Treaty.

5.5.4. Correlation of Freedom of Capital and National Tax Systems

The interaction of freedom of capital with Member States' direct taxation systems has already yielded more cases than all the non-tax cases combined. There are cases on interest taxation, capital gains, wealth and inheritance taxes and charitable donations and there are many more pending. The earliest cases were primarily concerned with differential taxation by a Member State of domestic and foreign dividends received by individuals. More recently, taxation by a source state of outbound dividends has been the subject of legal challenge.

1. The Parent-Subsidiary Directive

Dividends received by corporations have not been the subject of litigation to the same extent as those received by individuals, due to the adoption in 1990 of the Parent Subsidiary Directive harmonizing (to a degree) the taxation of dividends paid from a subsidiary company in one Member State to a parent company in another Member State. In the original version in force from 1992 to 2004, a "parent" company had to hold at least 25 % of the capital of a "subsidiary". The minimum level of ownership was reduced to 20 % on January 1, 2005, to 15 % as of January 1 2007, and was further reduced to 10 % as of January 1, 2009, by amendments adopted in 2003.

The Directive requires EU Member States to eliminate withholding taxes on outbound dividends paid to a parent company, so that economic double taxation of company profits of the subsidiary by the subsidiary's home state, and juridical double taxation of the dividends by the two states are abolished. The Directive requires the parent company's state of residence to either refrain from taxing dividends received from subsidiaries (exemption method), or provide a tax credit which reduces the parent company's corporate tax liability by the subsidiary's corporate tax paid in its home state in respect of such dividends. From 2005, the Directive also requires Member States to provide a credit to the parent company for any lower tier subsidiary's corporate tax paid in another Member State. Economic double taxation of the subsidiary's corporate profits by the parent's home state is thus also eliminated.

Although in the form of an EU legislative act, the Directive operates multilaterally to prevent double taxation in the same manner as, though more fully than, the international tax system based on the network of bilateral double taxation conventions (or "tax treaties") concluded between Member States (and between many Member States

and third countries). Each Member State, including those which joined the EU after the adoption of the Directive, must bring its laws into conformity with its provisions, and taxpayers may directly enforce the Directive in the national courts of the Member States in any case where a Member State has failed to properly transpose the Directive's provisions into national law.

The Parent-Subsidiary Directive did not completely eliminate the possibility of intercorporate dividend taxation being found contrary to free movement of capital. A recent ECJ ruling may have revealed gaps in the Directive which are incompatible with freedom of capital, and the Court has also recently commented on Member States' obligations to conform with Community law even where the Directive is not applicable.

2. Inbound Dividends

The Verkooijen case can be seen as the beginning of the recent flood of cases on direct taxation and FMC, as it was the first direct tax ruling specifically and solely on this freedom, rather than as an alternative or secondary ground to services, workers or, most commonly, establishment. Verkooijen resolved a number of significant issues, but unfortunately the judgment is somewhat confusingly written. The facts predated the coming into force of the Treaty of Maastricht amendments, and the case therefore fell to be decided under old Art. 67 and Directive 88/361.

Mr. Verkooijen was a resident of the Netherlands, and received dividends on shares he held in Petrofina NV, the Belgian parent company of his employer, Fina Nederland BV. He was denied a tax exemption for the dividends he received on these shares in 1991.

The first ruling of note was that the cross-border payment and receipt of dividends was governed by Directive 88/361. Although not expressly mentioned in the nomenclature of capital movements in Annex I of the Directive, the receipt of dividends "presupposes participation in new or existing undertakings" which does appear in the Annex. Further, since the company paying the dividends was resident in another Member State and its shares were quoted on the stock exchange, the receipt of the dividends could be linked to the "acquisition ... of foreign securities dealt in on a stock exchange", and was thus "indissociable from a capital movement".

The principle position of the Netherlands government in defending its tax law was that the difference in treatment of Netherlands taxpayers' investments in shares of Netherlands companies and investments in foreign companies was not a prohibited restriction (or discriminatory) because the situations were not comparable, applying the test in Schumacker. The Court seemed to accept that the Schumacker principle can be applied when the distinction pertains to where capital is invested, but analyzed the

justifications by reference to the case law on what constitutes “an overriding reason in the general interest”, without making a clear finding as to whether the situations were in fact comparable.

The Court rejected the position that the measure could be justified by its objective of promoting the national economy, since “according to settled case-law” purely economic objectives cannot constitute justifications for restrictions of fundamental freedoms.

The Court did not directly address the argument based on prevention of domestic economic double taxation. It rejected all the justifications put forward, referring expressly to a number of its previous rulings in the context of direct taxation and restrictions on services, establishment and workers that concerned the underlying policy motivations for not extending the partial exemption to inbound dividends. Loss of tax revenue (or erosion of the tax base) has never been accepted as a justification for a measure that restricts a fundamental freedom (and was accordingly rejected in *Verkooijen*). Similarly, a Member State may not impose heavier taxation on foreign source income on the grounds that such income benefits from tax advantages in the Member State of source which compensate for the heavier tax in the state of residence. The “cohesion of the tax system” justification was rejected since there was no direct link between the taxation of company profits in other Member States, and the tax relief granted (or denied) to an individual Netherlands resident receiving dividends from such companies. A direct link exists only where the tax measures involve a balancing of a tax advantage available to a taxpayer with a tax charge applicable to the same taxpayer. *Verkooijen* made clear that domestic taxation of dividends received by individuals is in principle covered by FMC. It also confirmed that Art. 58 does not generally allow measures which discriminate or restrict FMC on the basis of residence or the place where one’s capital is invested. *Verkooijen* has been followed in a number of cases challenging dividend taxation measures applicable to individual shareholders in Austria, Finland, Germany, and the UK.

3. Outbound dividends

The compatibility of various national tax rules with Art. 56 with respect to outbound dividends, whether received by individuals or corporations, is much less clear than is the case with inbound dividends. Where the inbound dividends cases are concerned with different treatment based on where capital is invested, different treatment of outbound dividends is a question of different treatment based on residence of the recipient.

The Parent-Subsidiary Directive has eliminated withholding taxes where the recipient company holds at least 15 % of the capital of the distributing company, so that the

issue does not now arise in respect of dividends flowing within corporate groups. The Commission took the position in its 2003 Communication that a Member State could not exempt domestic dividends yet continue to levy a withholding tax on outbound dividends. In its view, a comparison of the total tax burden on domestic dividends with the effect of the withholding tax on outbound dividends is necessary to determine whether the system is compatible with free movement of capital.

The first case on outbound dividends and free movement of capital came from the EFTA Court in late 2004. Fokus Bank, resident in Norway, withheld tax of 15 % on dividends paid to two of its shareholders, companies resident in Germany and the UK. Since the Parent-Subsidiary Directive applies within the EEA, these companies' shareholding in the capital of Fokus Bank would have been below the 25 % level at which the Directive prohibited withholding tax at the time. A Norwegian resident shareholder was not subject to the 15 % withholding tax, and received a full imputation tax credit effectively exempting the dividend from Norwegian tax by treating a portion of the underlying corporate tax paid by Fokus Bank on its profits as having been paid by the Norwegian shareholder.

Fokus Bank challenged the Norwegian withholding tax as incompatible with Art. 40 of the EEA Agreement, which is the functional equivalent of Art. 56 except that it does not extend to countries not party to the EEA Agreement. The Norwegian court referred the interpretation of Art. 40 to the EFTA court.

Following the ECJ's ruling in *Ospelt*, the EFTA Court held that the rules governing free movement of capital in the EEA Agreement are essentially identical in substance to those in the EU Treaty and therefore should be interpreted and applied in the same way as Art. 56 between EEA countries. The EFTA Court accordingly treated the distribution and receipt of dividends as movements of capital, following *Verkooijen*. The different treatment by Norway of domestic and outbound dividends could deter non-residents from investing in Norwegian companies, and make it more difficult for such companies to raise capital outside Norway, and so in principle was incompatible with EEA Art. 40.

As to justification, the same approach as under the TEC was applied. Although tax laws may validly distinguish between taxpayers who are not in a comparable situation with regard to their residence, a difference in treatment is only compatible with Art. 40 if the situations of resident and non-resident are not objectively comparable, or is justified by reasons of overriding public interest. The difference in treatment must be proportional to the objective.

The EFTA Court found that the fact that Norwegian residents are subject to Norwegian tax on all their income, while non-residents are subject to Norwegian tax only on income from Norwegian sources did not prevent their situations being objectively

comparable in respect of the taxation of dividends (residents of other countries are also taxed on their worldwide income). The Court rejected the argument that outbound dividends are different from inbound, and relied on *Lenz* and *Manninen*. Since Norwegian taxpayers were protected from economic double taxation by Norwegian law, residents of other EEA countries had to be equally protected, so that denying them the imputation tax credit infringed Art. 40.

Norway sought to justify the different treatment as necessary to preserve the cohesion of the international tax system. It argued that if the source country is required to provide the same tax credit for non-residents as it does for resident shareholders, the effect is to eliminate the ability of the source state to tax the profits of resident companies distributed to non-residents. This is inconsistent with the allocation of taxing jurisdiction accepted in international tax law, in accordance with which the source country may tax such distributions, and it is for the shareholder's home country to offset the double taxation by means of a tax credit or exemption. The EFTA court held, however, that this would give precedence to the terms of bilateral tax treaties (which allocate taxing jurisdiction in this way) over the EEA agreement's guarantee of free movement of capital.

Norway also argued that the Court should take into account the tax credits available to non-resident shareholders in their home country either by reason of a bilateral tax treaty or under the home country's domestic law in determining whether outbound dividends were in fact subject to a greater tax burden than Norwegian domestic dividends. In response, the Court held that the availability of a Norwegian imputation credit for both resident and non-resident shareholders on the same basis as required by Art. 40 could not be made dependent on whether a tax advantage was provided in the non-resident's home state. Norway could not rely on the tax rules prevailing in other EEA countries to make good its discrimination against non-Norwegian shareholders.

Fokus Bank was a significant new application of freedom of capital. Norway amended its tax legislation in anticipation of the decision to conform with the EEA Agreement. The correctness of some aspects of the ruling is, however, in doubt as three rulings of the ECJ in 2006 on outbound dividends took a different view as to the applicability of the inbound dividends cases, and the relevance of bilateral tax treaty provisions to the issue of whether a measure actually results in less favourable treatment of outbound dividends.

5.5.5. The Third Country Dimension of Free Movement of Capital

The significance of the interpretation and application to be given to the third country dimension of free movement of capital is obvious in respect of both inbound and

outbound dividends. Although many EU Member States have revised their tax regimes for taxing inbound dividends since 1993 to remove any discrimination regardless of where the distributing company is resident, there are undoubtedly some situations where the amendments have been made only in respect of EEA source dividends. EU resident investors in Canadian companies whose ownership of shares does not amount to control may be able to assert claims based on the principles in *Manninen* and *FII Test Claimants* that dividends received from a Canadian company must receive the same advantageous treatment as domestic dividends. If the EU Member State provides an exemption, special rate or imputation credit to the dividend recipient in respect of domestic and EU/EEA dividends profits, it would have to provide the same relief in respect of Canadian source dividends.

The same is true in the case of outbound dividends. By way of example, a Canadian company holding less than a controlling stake in a company resident in an EU Member State will be subject to withholding tax of 5 % to 15 % imposed by the source State on the dividends under most of Canada's tax treaties with EU Member States. Canada will exempt the dividends from Canadian taxation if it is derived from active business activity by the distributing company in the source country, so that there will be no Canadian tax against which to credit the withholding tax. If the source country exempts domestic dividends, the conditions for *Denkavit* to apply are present, and the Canadian company can presumably recover the withholding tax by action in the national court of the source State.

There are three main issues in respect of the application of Articles 56-58 to third country movements of capital. The first is the problem of overlapping freedoms. If two or more fundamental freedoms are restricted by an EU Member State's tax measure, one of which is free movement of capital, in what circumstances will the Court base its ruling on free movement of capital and not another freedom? The second issue is the scope and application of Art. 57, the grandfather or standstill provision. The third is the issue of justifications for restrictions, whether as expressly recognized in Article 58 or under the doctrine of overriding reasons in the general interest, and more particularly, whether the justifications available in respect of third country capital movements are more extensive than in intra-EU situations.

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5.6. Economic and Monetary Union of the EU

5.6.1. Purpose of Economic and Monetary Union

The goal of the Economic and Monetary Union (hereinafter – EMU), sometimes also called the European Monetary Union, has been a central preoccupation of the Community for many years. In fact, the idea of substantial economic and monetary coordination dates to the origin of the Community, and a proposal for a monetary union was first advanced in 1971.

The Goals of the Economic and Monetary Union

The attainment of the Economic and Monetary Union will transform the European Community, and its over-arching structure, the European Union, in a more fundamental manner than any development since the substantial achievement of the internal market program. Indeed, the 1995 Green Paper on the Introduction of the Single Currency, discussed later, depicted EMU as the “logical and essential complement” to the internal market. The recent impetus toward EMU undoubtedly stems in large measure from the generally satisfactory progress to date in attaining an internal market.

The goal of EMU has three components:

- 1) an integrated Community monetary system;
- 2) an institutional structure, with the European Central Bank at its center;
- 3) a single currency, the Euro, replacing present national currencies in all the participating Member States.

The Commission estimated that the use of a single currency would save the Community annually around 20-25 billion ECU, or approximately 0.4 % of GDP, through the elimination of currency-related transaction costs, i.e. the expense of changes in currency when transacting commercial and personal affairs across frontiers within the Community. On the other hand, as planning for the introduction of the Euro moved ahead, private financial sector and other sources were estimating more precisely the transition costs in abandoning current currencies and shifting to a single currency. The final cost is still unknown, but it will represent tens and perhaps hundreds of billions of ECU in the aggregate.

However there is a further and more important economic benefit flowing from a single currency, namely, the achievement of far greater price and cost transparency in all trans-border financial, commercial and private transactions. Thus, purchasers of raw materials and supplies, intermediate distributors of products, persons providing services, and consumers of goods, services or credit are able easily and quickly to compare prices or expenses when dealing with domestic and foreign parties.

Prospects of greater market integration, especially in the financial services sector, were bound to lead to enhanced merger and acquisition activity, coupled with the disappearance of smaller or less efficient enterprises. The Commission estimated that several Member States are “over-banked,” having too many banks or other financial institutions in proportion to their general population and commercial activity. The wave of trans-border and domestic financial sector mergers and acquisitions increased sharply in 1996-97 and was expected to continue.

In fact, the initial European Economic Community treaty (Treaty of Rome) did include the topic of economic and monetary coordination, although naturally the idea of a monetary union was not yet advanced. Thus, in the EEC Treaty, Title II on Economic Policy contains several articles relevant to economic and monetary coordination. Article 104 required Member States to “pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, while taking care to ensure a high level of employment and a stable level of prices.” Article 105 further required states to “coordinate their economic policies,” as well as policies “in the monetary field.” Article 106 liberalized current trans-border payments for goods and services, and Articles 108 and 109 permitted safeguard measures for states encountering serious balance of payments difficulties.

Article 105(2) created a body whose importance has steadily increased over the years. This is the Monetary Committee, composed of two representatives from each Member State and two persons appointed by the Commission, whose role is to “review the monetary and financial situation of the Member States and the Community,” and to provide opinions and reports to the Commission and Council. Another specialist body, the Committee of Governors of Central Banks, was established in 1964 to facilitate contacts among the banks and to provide advice on monetary affairs.

Making use of Article 105, the Commission and Council began a series of attempts to alleviate monetary crises in particular Member States and to coordinate economic and monetary policy in order to achieve greater stability within the Community. The 1969 Barre Plan, named after Raymond Barre, the then president of the central bank of France, is usually considered to have initiated monetary coordination. In a related move, the Committee of Governors of Central Banks agreed on February 9, 1970, to provide lines of credit to support Member States in times of monetary crisis.

5.6.2. Phases of Economic and Monetary Union

A stage-by-stage plan for attaining economic and monetary union was presented to the Council of Ministers in October 1970 in the form of the Werner Report, named after the Prime Minister of Luxembourg. A Council resolution endorsed the Werner Report in general terms and resolved to develop an economic and monetary union over a ten-year period. Pursuant to this plan, Council Regulation 907/73 established a European Monetary Cooperation Fund to provide short-term monetary support and facilitate concerted monetary action. A later Council decision urged Member States to align their economic policies with guidelines to be issued periodically by the Council, and called on the central banks to coordinate their monetary policies. Most Member States entered a system to reduce exchange rate fluctuations to a narrow band, popularly called the “snake.” (The band is commonly called a snake, because, when graphically depicted, it resembles an undulating wave as a particular national currency moves above or below the pegged rate.)

In the late 1970s, the leadership of President Giscard d’Estaing of France and Chancellor Schmidt of Germany, both former Finance Ministers, together with Commission President Roy Jenkins, caused new attention to be focused on monetary coordination and stabilization. The European Council Meeting at Bremen in August 1978 officially endorsed the concept of a European Monetary System (EMS), which came into force in March 1979.

The principal aim of EMS was to reduce the disruptive impact of sizeable exchange rate devaluations and regulate changes in parities. The basic elements of the EMS were the definition of the European currency unit (or ECU) as a basket of cur-

rencies, and an Exchange Rate Mechanism (ERM) based on the concept of fixed currency exchange rate margins, but with variable exchange rates within those margins. Exchange rates were based on the ECU, whose value was determined as a weighted average of the participating currencies. A parity grid of bilateral rates was calculated on the basis of these central rates expressed in ECUs, and currency fluctuations had to be contained within a margin of 2.25 % on either side of the bilateral rates.

The EMS lasted from 1979 until the launch of the euro in 1999. During these two decades it went through four main phases and several periods of turbulence. 1979-85 represented the first phase of the EMS and some countries still maintained capital controls in place and exhibited significant inflation differentials. With fixed nominal exchange rates this resulted in continued misalignments that required frequent adjustment of the official parities. Full nominal convergence had not been established yet. Differentials in budget deficits and public debt were also substantial. The adjustment of official parities often occurred in the wake of financial market turmoil, which periodically brought up questions about the sustainability of the Exchange Rate Mechanism (ERM).

The second phase of the EMS spanned from 1986 to September 1992. Several EMS members, but not all, managed to bring down their inflation rates towards German inflation rates. In this phase the EMS is described by many as a “Deutsche Mark Area” as the monetary policies of all members (except Germany) were de facto surrendered, i.e. the Deutsche Mark was effectively the anchor of the EMS. Capital controls were being dismantled and were officially banned as of July 1990. All central banks participating in the ERM had de facto renounced an independent monetary policy.

This second phase of the EMS bore several fruits from the standpoint of further integration. An opportunity for setting a course towards economic and monetary union opened up after the adoption of the Single European Act in 1986 (that introduced the Single Market as a further objective of the Community). Jacques Delors, President of the Commission, set up a committee to study the feasibility of a monetary union. The resulting report of the Delors Committee was approved in Madrid in 1989. The completion of the Delors Report was accelerated at the time of the break-up of the former Soviet Union and the looming German reunification, i.e. a unique window of opportunity had just opened up. It laid out the blueprint of the Maastricht Treaty that was signed in February 1992. A three-stage process leading to the single currency and on designing the corresponding institutions was completely mapped out at the end of the decade.

The third phase of the EMS, from September 1992 until March 1993, is marked by the most severe crisis of the whole EMS arrangement. Some countries, which were unable to reduce inflation, gradually overvalued.

The fourth phase of the EMS runs until the launch of the euro, allowing the principle of fixed exchange rates, although much weakened, to be kept alive. The European Monetary System ceased to function in its original form when 11 EU countries irrevocably fixed their exchange rates in preparation to adopt the euro. The successor of the original arrangement was ERM II, launched on 1 January 1999. In it, the ECU basket is discarded and the euro becomes an anchor for other participating currencies.

5.6.3. Elements of Economic and Monetary Union

The European Monetary System has three basic components: 1) an artificial currency, the ECU; 2) exchange rates which are permitted to fluctuate only in a narrow band; 3) system of credit and loan reserves to stabilize Member State currencies in times of crisis.

First, the EMS created an artificial European monetary unit, the ECU, which replaced the prior artificial unit known as the European Unit of Account (EUA). The value of the ECU is fixed as a composite of a “basket” of Member State currencies with weighted values one to another. A macroeconomic calculation of the proportionate size of the national economy underlying each State’s currency is used in allocating weights to the different currencies. The weighted value assigned to each State’s currency in the basket is fixed at the outset. The weighted value is then revised every five years. To give an idea, in the 1989 revision, the German Mark was set at 30.1 % of the total basket value, the French Franc 19 %, the Pound Sterling 13 %, the Italian Lira 10.15 %, with the other currencies set at lower percentages. In 1994, as planning for Economic and Monetary Union began, the “basket” was frozen at the 1989 levels, pending the final creation of a single currency.

All revenues and all expenditures are calculated in the form of ECUs. This enables a standard base to be used in the calculation of budget items from year to year. The ECU is, of course, not an actual currency: there are no bills or coins denominated in ECU, nor is the ECU used as legal tender for everyday private commercial transactions.

The second component of the European Monetary System is its system for the stabilization of the exchange rates of the currencies of the Member States participating in the EMS. This is called the Exchange Rate Mechanism (ERM). The exchange rates were fixed in 1979 at the outset of the EMS and have been changed only at relatively infrequent intervals. A very moderate degree of floating was initially allowed between currencies, within a band with a maximum range of 2.25 % above or below the exchange rate. This band was permitted to be increased to 6 % for certain States during periods of monetary stress or weakness, for example, Italy was allowed to use the 6 % margin until 1989, and Portugal and Spain entered the ERM with the same 6 % margin.

The functional merit of this limited rate of fluctuation around pegged rates set for long periods of time is that it serves as a reasonably close approximation of the fixed rates of the Bretton Woods system. This means that financial institutions, commercial enterprises, and private investors can enter into medium and long-term transactions with a reasonable assurance that neither an unexpected exchange rate gain nor loss will occur at the end of the transaction. Moreover, the requirement that Member States must maintain their currencies within the flotation band means that Member States are encouraged to combat inflation and to avoid deficit spending on the one hand, and to spur investment and combat recession, on the other hand.

The third component of the European Monetary System is a credit mechanism by which short and medium term support can be given to Member States encountering serious monetary troubles. The usual mode of support foreseen was the Very Short-Term Financing (VSTF) facility, intended to provide support for 30-45 days. A reserve fund was created, composed of the equivalent of 20 % of the gold and 20 % of the dollars held by each participating State's central bank. This fund was initially set at 25 billion ECUs. The EMS can also provide medium term support for a maximum period of 5 years, with a loan fund available of up to 6 billion ECUs. A Member State receiving such a loan must reduce any deficit spending and take action to control inflation.

5.6.4. The start of the euro area

The introduction on 1 January, 1999, of the euro – the single currency adopted by eleven of the fifteen countries of the European Union – marked the beginning of the final stage of the Economic and Monetary Union and the start of a new era in Europe. This historic achievement was the culmination of a lengthy process.

The creation of a single currency and a single monetary policy has provided both extraordinary challenges and exceptional opportunities within Europe. A new financial infrastructure was necessary to handle transactions in the new currency.

Free movement of capital is an essential condition for the attainment of the Economic and Monetary Union. Significant restrictions on the movement of capital, or upon payment for sales or services, would frustrate the achievement of an integrated monetary system and of an integrated market with a single currency.

Nowadays Art. 3.4 of the TEU declares the establishment of the EMU as one of the objectives of the Union. The EMU covers a package of rules covering the free movement of capital and payments, economic union and monetary union. The original rules relating to the free movement of capital, which were in force for more than three decades, were repealed and with effect from 1 January 1994 were replaced by a new set of rules by the TEU in order to facilitate the establishment of the EMU. The rules relating to economic union are drafted in a more cautious manner but more clear and

binding rules are incorporated to establish the monetary union. All these three segments of EMU are subject to different degrees of amendments by the Lisbon Treaty.

The liberalization of the free movement of capital is treated as the first stage in the three-stage process of establishing the EMU. Unlike the legal provisions on the free movement of goods, services, establishment and workers, the capital freedom is liberalized not only within the Union but globally. The substantive rules and the globalised approach to capital movements remain intact in the Lisbon Treaty.

There are certain changes introduced to the rules on capital and payments in the Lisbon Treaty. The procedural rules relating to invoke Article 57.2 of the TEU dealing with external movements of capital have been amended. The competence to adopt measures to liberalize movement of capital to or from third countries, which was exclusively vested on the Council, should be shared in the future with the European Parliament. The original rules vesting exclusive competence on the Council to adopt measures unanimously if it constitutes a step back as regards such capital movements is retained in a new provision, which reads as Art. 64.3 (57.3) in the TFEU.

A direct link is established between the operation of Art. 64 and 65 (57 and 58) of the TFEU respectively. The aim of this amendment is to further enhance the tax competence of Member States in relation to third countries. A new paragraph of Art. 65 (58) of the TFEU provides that if no measures are adopted in terms of Art. 64.3 (57.3) of the TFEU or in the event that the Commission does not act within three months on a request from a Member State, the Council may decide unanimously that restrictive tax measures adopted by such a Member State against any third countries are justified and compatible with the internal market.

The safeguard measures in Art. 59 of the TEU renumbered as Art. 66 of the TFEU are retained and could be invoked in case of threat or serious difficulties for the operation of the EMU. Since not all Member States joined the EMU, there was an element of doubt as to whether it applies only to the Eurozone or the Union as a whole. It is a missed opportunity for the Lisbon Treaty to precisely clarify its scope of application.

The current system of a two-tiered decision-making procedure to invoke Art. 60 of the TEU in order to interrupt economic and financial relations with third countries is retained and renumbered as Art. 75 (61H) of the TFEU. The latter provision is transferred from the chapter on capital and payments and integrated with the general objectives set out in Art. 67 (61) of the TFEU, which declares that the Union shall constitute an Area of Freedom, Security and Justice with respect for fundamental rights and different legal systems and traditions of the Member States. In addition to widening the scope of the meaning of Art. 75 (61H) of the TFEU, a new procedure is prescribed for its implementation. In the future the Council should act together with the European Parliament to adopt regulations in order to define a framework for

administrative measures with regard to capital movements and payments such as the freezing of funds, financial assets or economic gains belonging to or owned or held by natural or legal persons, groups or non State entities.

In the current Treaty framework, Art. 60 of the TEU should be read together with the chapter on Common Foreign and Security Policy (CFSP) to interrupt or impose financial embargoes on third countries. After the Lisbon Treaty, its scope of application should be ascertained by reference to the chapter on Freedom, Security and Justice, which has replaced the TEU provisions on visa and immigration. A positive effect in shifting Art. 60 of the TEU to this chapter is that it would be easier to adopt measures by means of ordinary legislative procedure provided in Art. 251 of the TEU. The current procedure prescribing to implement Art. 60 of the TEU is more complex and requires unanimity voting in the Council due to its linkage to CFSP.

5.6.5. Economic and Monetary policy of the EU

The rules on economic policy are enumerated in Art. 120-126 (98-104) of the TFEU respectively. The Member States and the Union have shared competence in the field of economic policy and the status quo would remain the same even after the Lisbon Treaty. This is evident in the new Title 1, Article 2.3 of the TFEU which requires Member States to coordinate their economic and employment policies and also recognizes the competence of the Union in such coordination.

The competence of the Commission has been enhanced in relation to the enforcement of Art. 121 and 126 of the TFEU respectively. In terms of Art. 121 of the TFEU the Council drafts broad guidelines of the economic policies of the Member States and of the Union. It also prescribes a system of multilateral surveillance of economic policies conducted by the Member States. The Council shall have the competence to address a first warning to Member States in case of deviation from the economic guidelines and after the Lisbon Treaty this competence will be shifted to the Commission.

Article 126 (104) of the TFEU expressly prohibits Member States to run excessive government deficits. An elaborate procedure is set out to monitor and establish such excessive deficits. The Council shall establish the existence of an excessive deficit based on a recommendation of the Commission. After the Lisbon Treaty, the Council shall exercise such powers based not on a recommendation but a mere proposal from the Commission. In the future Member States running an excessive deficit will be given an opportunity to present their case in the Council but are deprived of the right to vote in such proceedings.

Under the Lisbon Treaty the Commission and not the Council shall have the competence to address an opinion to the Member State with an excessive deficit. In terms of Art. 126.7 of the TFEU, on the basis of a recommendation by the Commission, the

Council “without undue delay” adopts its recommendations in relation to the Member State concerned. The addition of the phrase “without undue delay” is significant as it acknowledges that there were undue delays in the Council to enforce the Stability and Growth Pact.

Articles 127–133 of the TFEU deal with monetary policy and the Lisbon Treaty expressly declares and reiterates in Art. 3.1c of the TFEU that the Union shall have exclusive competence in this field. The chapter on monetary policy deals *inter alia* with the powers and functions of the European System of Central Banks (ESCB).

There are certain changes introduced to the chapter on monetary policy in the form of amendments and deletions necessitated by the introduction of the euro. After the introduction of the euro, the TEU even after its subsequent amendments refers to the single currency as the ECU. The use of such words is rectified by the Lisbon Treaty in its appropriate contexts.

There are also other similar amendments, which are of trivial nature as they are unlikely to produce any adverse legal consequences such as the reference to the European Monetary System being replaced by exchange rate mechanism, European Monetary Institute replaced by European Central Bank, etc. Council Regulations No 1103/97 and No 974/98 provide a clear legal framework for the smooth introduction and switch over from the national currencies to the euro. It is however a useful exercise to make the necessary changes in the Treaty framework itself.

5.6.6. European System of Central Banks

Article 282 of the TFEU defines the ESCB as constituting the European Central Bank (ECB) and the national central banks of all the Member States. The ECB together with the national central banks of the Member States whose currency is the euro shall constitute the Eurosystem, which shall have the exclusive competence to conduct the monetary policy of the Union.

An element of legal inconsistency could be detected by a comparison of the Lisbon Treaty provisions on ESCB and the Statute of the ESCB and ECB. The Lisbon Treaty rightly refers to the Eurosystem as the competent body to conduct monetary policy of the Union. On the other hand, the Statute of the ESCB refers to the ESCB as having similar competence.

It is useful to refer to Art. 141 of the TFEU in this context, which shall replace Art. 123.3 of the TEU. This Treaty provision declares that as long as there are Member States with derogation, the General Council of the ESCB shall constitute the third decision making body of the ECB. This body has no competence to formulate or implement monetary policy except as a meeting point of the Governors of the euro and

non euro Member States. It is only a transitional body which will be dissolved when all Member States adopt the euro as their single currency.

The President, Vice President and the members of the Executive Board of the ECB are appointed by common accord of the European Council on a recommendation from the Council in consultation with the European Parliament and the Governing Council of the ECB. In terms of Art. 283 of the TFEU, the unanimity procedure in the European Council will be replaced by qualified majority after the Lisbon Treaty comes into force. This Treaty provision refers to the European Council as a whole which would mean its composition of both euro and non euro Member States of the Union. On the other hand, it is required to consult not the ESCB but the Eurosystem which excludes the Governors of Member States that have not adopted the euro.

In terms of Art. 122.2 of the TEU, the Council has the power to abrogate derogation by qualified majority on a proposal from the Commission. Under the Lisbon Treaty, the Council shall act having received a recommendation of a majority of those among its members representing Member States whose currency is the euro and comprising at least three fifths of that population of those Member States. These members shall act within 6 months of the Council receiving the Commission's proposal to abrogate the derogation.

A new Chapter 4 (3a) covering Art. 136–138 of the TFEU shall apply specifically to MSs that have adopted euro as their single currency. The aim of this chapter may be to shed more clarity and certainty regarding the rules that shall apply exclusively to euro states.

Article 136 of the TFEU authorizes the Council to adopt measures necessary to ensure the proper functioning of the EMU and such measures should be adopted in accordance with the procedure prescribed in Art. 121 and 126 of the TFEU respectively. The voting rights are limited to Member States of the Euroland.

There are also certain transitional provisions set out in Art. 139 of the TFEU which applies to countries like Sweden referred to as Member States with derogation. This provision shall repeal Art. 116 of the TEU. According to the new legal arrangement, countries referred to as Member States with a derogation are shielded from the application of various Treaty provisions on economic and monetary policy such as certain parts of broad economic policy guidelines; coercive means of remedying excessive deficits; appointments, objectives and tasks relating to the ESCB; rules governing the euro, etc.

Protocol on the Euro Group. One of the drawbacks in relation to the management of the euro is that it does not have a political authority to represent either within the Union or at the global level. This is in contrast with other international currencies where the Minister of Finance or a person holding a similar position acts as its polit-

ical guardian. The ECB has the responsibility to protect the stability of the euro by pursuing the appropriate monetary policy but this mandate does not extend to act as its political authority.

This deficiency was addressed and rectified in Art. 137 of the TFEU. A special protocol on the Eurogroup is also annexed, which provides that the euro Ministers shall elect a President for two and a half years, by a majority of those Member States. The Commission shall be represented as of right at the meetings but the ECB could do so on an express invitation by the Council. The aim of establishing the post of President of Eurogroup of Finance Ministers was not only to fill the political deficiency but also to provide a political counter weight to the ECB.

The creation of this post may contribute to further securing a prominent place in the international monetary system for the euro. The currency will no longer exist in political institutional isolation. The Council of Euro Finance Ministers could adopt decisions on matters of particular interest for the euro such as a unified representation within the competent international financial institutions and conferences. All matters relating to unified representation in international financial institutions and conferences and on matters of particular interest for EMU within such international financial institutions and conferences shall be decided by the Council on a proposal from the Commission and after consulting the ECB. Such decisions shall be adopted in terms of Art. 238 (205) of the TFEU and the voting rights in the Council will be limited to Ministers representing the Eurozone.

If the aim of creating this mini-ministerial body is to provide additional protection to the euro in the shape of a political guardian, such a move would have been even more effective if the President of the ECB or his representative also had a right similar to the Commission to attend its meetings. It would have been also a conducive and secure forum for the politicians and central bankers to exchange their views on monetary policy rather than using verbal attacks against each other in the public, thereby causing much harm to the stability of the euro.

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CHAPTER 6. THE EU COMPANY LAW

As a result of studying the material of the chapter students must:

know:

- composition, structure and trends of legal regulation of relations in the EU corporate sphere,
- goals, objectives and directions of reforming the legal regulation of corporate relations in the EU;
- patterns of development of legal practice, including the judiciary, and its importance in the mechanism (system) of legal regulation in the EU;
- state and development of international legal regulation in the relevant field;
- relevant sectoral legislation, and (or) mechanisms of inter-sectoral institutions;

be able to:

- apply legal norms in situations of gaps, conflicts of norms, complex interactions, solve complex problems of law enforcement practice in the EU;
- argue decisions taken, including being able to foresee the possible consequences of such decisions;
- analyze non-standard situations of law enforcement practice and develop a variety of solutions;
- interpret legal acts in their interaction competently;
- examine legal acts, including, in order to identify the provisions facilitating the creation of conditions for corruption,
- explain the effect of the law to their addressees.

possess:

- skills for making legal written documents;
- skills for drafting regulatory and individual legal acts;
- skills for making oral presentations on legal matters, including, in competitive proceedings, arguing and defending their points of view in oral debates;
- skills for discussion, business negotiations, mediation in order to reach a compromise between parties of a conflict;
- skills for drawing up expert opinions;
- skills for counselling citizens on legal issues in the sphere.

6.1. EU Company law: an overview

6.1.1. *The Internal Market and EU Company law*

A company is a form of business which acts as a vehicle for market economy. On the one hand, by regulating legal persons, legislators create possibilities for organizing business. On the other hand, they provide limits. They resolve conflicts of interests providing relevant framework. In a case when companies trade outside their home states, distinctiveness and trust become more and more important.

The pluralism and diversity of various forms of enterprise are recognized in the EU founding treaties and by different legal acts that have been approved or are currently under consideration. This diversity is also an essential basis for achieving the Lisbon objectives for growth, jobs, sustainable development and social cohesion based on maintaining and developing the competitiveness of enterprises. The diverse forms of enterprises existing in the EU derive from complex and varied historic evolution. Each of them responds to a particular historical, social and economic situation, often different in every European country. Moreover, enterprises have to evolve and be continuously adapted to the changing societies and market trends, even modifying their legal form. Therefore, the pluralism and diversity of the different forms of enterprise are valuable aspects of the European Union's heritage and are crucial to achieving the aims of the Lisbon Strategy for growth, jobs, sustainable development and social cohesion based on maintaining and developing the competitiveness of enterprises. Protecting and preserving this diversity are of the utmost importance to guarantee competitive markets, economic efficiency and the competitiveness of the economic agents, as well as maintaining the EU's social cohesion.

The formation and development of the internal market cannot make the ends justify the means and a legal and regulatory framework that reflects the characteristics of the different economic operators in the market should consequently be established so that a level playing field is created between all different forms of enterprise, taking into consideration the characteristics of each form. At present, this framework is generally designed for large listed companies and its application to all types of enterprises creates obstacles for smaller enterprises. This framework should be effective in encouraging operators to behave efficiently, which in turn will help to make the system more equitable. This framework will be applied through company law, accounting, competition and tax law, statistical harmonization and enterprise policy.

This is recognized by the European institutions in the provisions of Articles 48, 81 and 82 of the TEC and in the Lisbon Treaty (4), Article 3.3 of which proposes, as one of the objectives of the Union, a social market economy based on a balance between market rules and the social protection of individuals as workers and as citizens.

Article 54 of the TFEU declares the following:

‘Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

“Companies’ or ‘firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making’.

Article 55 of the TFEU states: “Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Art. 54, without prejudice to the application of the other provisions of the Treaties”.

Company law belongs to the branch of law often called economic or commercial law. This branch comprises part of contract, bankruptcy, and land law, and the three areas of law fundamental for commercial activity: company law, fair marketing law, and competition law.

Nowadays legal regulation of the company sphere by the EU law is supplemented by existing national regulations. That is the real context for discussing the EU company law. This branch of EU law has been developing slowly, meeting a lot of obstacles caused by, first of all, big difference between national laws of member states.

The EU company law is a *sui generis* type of company law as far as its composition and substance is concerned. Some lawyers note that there is no systematic EU Company law. Relevant EU legal provisions concern different issues of the company law field, e.g. types of companies, corporate governance, etc.

Moreover, its exact substance is determined by national laws of 28 EU Member States, which furthers the diversity of protective instruments and policies.

The aim of EU company law has always been the creation and reinforcement of the Internal Market, a task carried through the primary EU legislation.

At the present time according to Art. 3 of the TEU,

«3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro...»

To achieve these objectives, Art. 3 of the TEU distinguishes between three instruments: first, the establishment of a common market; second, the establishment of an economic and monetary union; third, the implementation of certain common policies or activities. These three instruments are worked out at great length in Art. 3-5 of the TFEU:

According to Art. 3 of the TFEU, the Union shall have exclusive competence in the following areas of common commercial policy.

“2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope”.

Article 4 of the TFEU prescribes that

«1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

- (a) internal market;
- (b) social policy, for the aspects defined in this Treaty;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement pro-

grammes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs».

Provisions of Art. 5 state that:

«1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

3. The Union may take initiatives to ensure coordination of Member States' social policies».

The establishment of the Internal Market is one of the instruments to reach the objectives of the EU. The term «Internal Market» is used in the EU primary legislation without being explicitly defined. The concept of the Internal Market is of great importance for the characteristics of EU company law, especially, via provisions on the freedom of establishment, giving EU the competence to regulate the field of company law.

Freedom of establishment, which means that citizens of Member States have the right to live and run business activities on the territory of the whole European Union, is one of the main principles of the EU Single Market.

According to Art. 49, within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 50 of the TFEU provides:

«1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legisla-

tive procedure and after consulting the Economic and Social Committee, shall act by means of directives.

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

(a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;

(b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned;

(c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;

(d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;

(e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2);

(f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;

(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;

(h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States».

From Art. 50(2)(g) of the TFEU we learn that the company law rules should aim to protect creditors and third parties. This principle is the crucial one because the original objective of the involvement of the Community in the regulation of company law was, following the express wording of the TFEU Article 50 (2) (g), to co-ordinate

the safeguards, which, for the protection of the interests of members and others, are required by member states of companies and firms with a view to making such safeguards equivalent (as a condition for the freedom of establishment for the companies within the EU).

According to the case law of the Court of Justice, foundations, associations and other non-profit organizations can be 'economic operators' if they carry out 'economic activities' within the meaning of Articles 43 and 49 of the TEC, and are therefore included in this classification.

Article 50 (1) provides that, in order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

This has very old origin. In the 1960s, scholars defined concepts of negative and positive integration. Negative integration refers to all activities whose purpose is to provide for business opportunities to work freely throughout the whole space of this regional block. Proponents of this approach believe that when barriers between countries disappear, market forces will create a single economic space, similar the national one, by themselves. Its opponents see the meaning of integration in creating a new quality of economic environment that will allow national economies to function in optimal regime.

In other words, negative integration is the elimination of obstacles, and positive integration is the creation of new forms of union.

Thus, in the view of the drafters of the Treaty, integration would, along with the elimination of obstacles through the basic prohibitions, be further achieved by common policy-making, by creating single Community/Union rules. This will include approximation and harmonization of national legislations as well as adoption of uniform legislation.

The essence of harmonization is to bring divergent national laws more in line with each other and to establish the single market. Harmonization measures, particularly directives and other EU acts, may be adopted by the EU institutions under a wide range of provisions of the EU primary law.

We can say that even brief analysis of legal regulation of the sphere by the laws of MSs shows big difference between national legislations which still exist. Obviously, such difference quite often becomes an obstacle in the way of proper functioning of the EU Internal Market. This circumstance leads to many problems traditionally connected with the sphere of international private law such as the lack of reciprocal recognition of legal bodies, difference in the volume of their legal capacity and requirements, and, finally, diversity of localizations defining nationality of legal persons.

These problems are topical issues for the EU Internal Market, which should provide equal conditions for all legal persons established by means of national laws.

Existence of such principal differences in the national company legislation, shaping for centuries, also means that it will be difficult even to approximate local laws, to say nothing of unification of some issues of the regulation of legal bodies. The EU institutions also have rights to act only within the corporate memorandum, which still does not provide enough opportunities for full-rate supranational EU company law. On the whole, the regulation of legal bodies within the European Union is conducted on the national level.

It should also be noted that the term ‘harmonization’ here may also include what the Court of Justice regularly calls ‘coordination’, which relates to EU rules that try to resolve conflicts or disparities between national legal systems. Positive integration may, besides measures of harmonization, also include what is called uniform measures — uniform legislation. The main purpose of these uniform measures is not to bring divergent national laws more in line with each other. Instead, these uniform measures are aimed at offering genuine EU facilities, such as EU legal forms for doing business.

Harmonization can take different forms both in substance and in choice of legal instrument. Harmonization can provide common rules and standards or it can remove obstacles. The choice of legal instrument ranges from directly binding regulations over directives necessitating national implementation to mere recommendations, and the legislation subsequent to the Lisbon Treaty is supplemented by a new layer of rules made pursuant to Art. 290 and 291 of the TFEU.

According to Art. 290,

«1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.

The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

- (a) the European Parliament or the Council may decide to revoke the delegation;
- (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective ‘delegated’ shall be inserted in the title of delegated acts».

Article 291 provides that

‘1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers.

4. The word “implementing” shall be inserted in the title of implementing acts’.

These provisions provide a tool box of regulatory possibilities that should enable harmonization to be finely calibrated at the problems requiring action at a Union level. The actual choice of instrument and content should be made when a sufficient basis for action has been established.

Where harmonization at the Union level is deemed necessary after careful vetting of the facts, the proposed measures should be focused on the particular problem in question and should not rely on broad and imprecise categorizations. Harmonization should address a particular problem and should include all company forms that are relevant, irrespective of their categorization or form.

In order to attain its objectives, the EU primary law provides various institutions and empowers them to issue certain acts.

6.1.2. EU institutions in the area of company law

The principal actors in the field of the EU company law are the Commission, the Council, the European Parliament and the Court of Justice. Which of these institutions and particularly in what role is involved in the adoption of an act depends on the legal basis which is provided in the EU primary law. Some of these legal documents provide changing role for the European Parliament and illustrate further inter-institutional conflicts, with Case C-436/03 European Parliament v Council of the European Union serving as an example of this.

In the case, the European Parliament sought the annulment of Council Regulation (EC) No 1435/2003, which was adopted on the basis of Article 308 EC. The Regulation lays down a single statute applicable to the European cooperative society (SCE) in order, inter alia, to remove all barriers to cross-border cooperation of companies. As is well known, recourse to Article 308 EC is possible only where no other provision of the Treaty gives the Community institutions the necessary power to adopt it.

The initial proposal of the Commission was based on Art. 100a of the TEEC (now Article 95 of the TEC), but the Council changed that legal basis to Art. 308 of the TEC.

Because of this, the Council reconsulted the Parliament, which requested that Article 95 of the TEC should be retained as legal basis. Nevertheless, on 22 July 2003, the contested regulation was formally adopted by the Council under Art. 308 of the TEC.

The Parliament, supported by the Commission as intervener, subsequently sought to annul the Regulation on the ground that it should have been adopted under Art. 95 of the TEC rather than 308 TEC.

In a nutshell, they argued that considering the diversity of the various company laws of the Member States hindering the activities of cooperative societies, there was nothing standing in the way of a regulation having Art. 95 of the TEC as its legal basis.

The Court of Justice has been playing an important role in the formation of EU company law. Company law rules are formulated in the ECJ practice, where the ECJ has stated that these terms comprise all interested parties on a number of cases.

Case C-191/95 – Commission of the European Communities v Federal Republic of Germany. On 16 June 1995, the Commission applied to the Court for a declaration that, by failing to provide for appropriate penalties in cases where companies limited by shares fail to disclose their annual accounts, as required in particular by Directives 68/151/EEC and 78/660/EEC, Germany had failed to fulfil its obligations under the EC Treaty and under those directives.

With regard to the admissibility of the action, the German Government claimed that the Commission was in breach of the principle of collegiality when the reasoned opinion was issued and proceedings before the Court commenced, steps which were taken under the delegation procedure. It argued that, although recourse to that procedure was compatible with the principle of collegiality for the purpose of adopting measures of management or administration, it could not be used for decisions of principle such as the adoption of a reasoned opinion and the commencement of proceedings before the Court.

The German Government also claimed that the Commission had not established that the members of the college, when they decided to issue the opinion and to commence proceedings, had sufficient information available to them as regards the con-

tent of those measures. The college ought to have had available all the relevant information of fact and law to enable it to ensure that its decisions were unambiguous and to guarantee that the measures notified had actually been adopted by the college and in accordance with its intention, since it is the Commission as a whole which takes political responsibility for them.

The Commission stated that for reasons of efficiency, given the number of proceedings for failure to fulfill obligations, Commissioners did not have available draft reasoned opinions when adopting the decision to issue such measures; this was not necessary since reasoned opinions do not have immediate binding legal effect. However, the crucial information was available to the members of the Commission, in particular the facts complained of and the provisions of Community law which, in the view of the Commission's officials, had been breached. Thus the college reached its decision on the proposals of its officials to issue the reasoned opinion and to commence proceedings in full knowledge of the facts. Drafting of reasoned opinions takes place at administrative level, under the responsibility of the member of the Commission with competence in the matter, following the Commission's decision to take such a step.

The Court notes, first, that the functioning of the Commission is governed by the principle of collegiate responsibility. It is undisputed that decisions to issue a reasoned opinion and to commence proceedings are subject to that principle, based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions should be the subject of collective deliberations and that all the members of the college of Commissioners should bear collective responsibility at political level for all decisions adopted.

Nevertheless, the formal requirements for effective compliance with the principle of collegiality vary according to the nature and legal effects of the acts adopted by the Commission. The issue of a reasoned opinion is a preliminary procedure, with no binding legal effect for the addressee of the reasoned opinion. The purpose of that pre-litigation procedure provided for by Article 169 of the Treaty is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position. If that attempt at settlement is unsuccessful, the function of the reasoned opinion is to define the subject-matter of the dispute.

The Commission is not, however, empowered to determine conclusively, by reasoned opinions, the rights and duties of a Member State or to afford that State any guarantees that a given line of conduct is compatible with the Treaty. According to the system of the Treaty, the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court. The reasoned opinion therefore has legal effect only in relation to the commencement of proceedings before

the Court, so that where a Member State does not comply with that opinion within the period allowed, the Commission has the right, but not the duty, to commence such proceedings. The decision to commence proceedings, whilst an indispensable step for the purpose of enabling the Court to give judgment on the alleged failure to fulfill obligations by binding decision, nevertheless does not per se alter the legal position in question.

Both the Commission's decision to issue a reasoned opinion and its decision to bring an action for a declaration of failure to fulfill obligations must be the subject of collective deliberations by the college of Commissioners. The information on which those decisions are based must therefore be available to the members of the college. It is not, however, necessary for the full Commission itself formally to approve the acts which give effect to those decisions and put them in final form. In this case it is not disputed that the members of the Commission had available to them all the information which they considered necessary for the purposes of adopting the decision when the college decided, on 31 July 1991, to issue the reasoned opinion, and approved, on 13 December 1994, the proposal to bring the present action. In those circumstances, the Commission must be considered to have complied with the rules relating to the principle of collegiality when it issued the reasoned opinion to the Federal Republic of Germany and brought the court proceedings.

The Court found the action admissible in its entirety.

The Court reiterated that the appropriate legal basis on which an act must be adopted should be determined according to its content and main object (see case law below).

So, the Court, referring to Tobacco Advertising and British American Tobacco (and other case law mentioned below), held that Article 95 EC empowers the Community legislature to adopt legislation intended to

‘(1) improve the conditions for the establishment and functioning of the internal market and they must genuinely have that object, contributing to the elimination of obstacles to the economic freedoms guaranteed by the Treaty, which include the freedom of establishment’ (para. 38) or

‘(2) prevent the emergence of obstacles to trade resulting from heterogeneous development of national laws; the emergence of such obstacles must, however, be likely and the measure in question must be designed to prevent them (para. 39)’.

The Court held that the contested regulation fulfills neither of these criteria, mainly because it leaves unchanged the different national laws already in existence and hence could not be regarded as aiming to approximate the laws of the Member States.

For decades, company law cases were extremely rare. But during the last decades, the Court of Justice became an important player in the company law field. Some gaps left by legislation have been filled in by the ECJ.

The following judgments can illustrate this, having largely influenced Member States' company legal regulation.

1. ECJ Judgement of 27 September 1988. *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*. Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division – United Kingdom. Case 81/87.

Daily Mail was a UK company, which wanted to transfer its central management and control to the Netherlands without losing legal personality or ceasing to be a company incorporated in the UK. British company legislation permitted companies to transfer their real seat while keeping their legal personality and continuing to be incorporated in the UK. The UK tax legislation, however, relied on the real seat of a company and would, thus, cease to be applicable in the case of a seat transfer abroad.

One of the UK tax law provisions required the consent of the Treasury, should a company wish to cease being a UK resident under the UK tax regime. Daily Mail applied for the consent to move its administrative seat, and, subsequently, opened its new management office in the Netherlands without waiting for the Treasury's reply.

The Treasury then refused permission for the transfer of seat and Daily Mail initiated legal proceedings, basing its argumentation on Articles 52 and 58 TEEC. The competent British court turned to the ECJ, asking whether the requirement of prior consent was, under the given circumstances, contrary to the freedom of establishment.

The ECJ began its analysis by stating that, in general, Articles 52 and 58 EEC grant companies established under one Member State's company law the right to establish themselves in another Member State. Otherwise, these Articles would be devoid of meaning since the Member States would be able to prohibit seat transfers abroad. However, the Court found that «unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning».

Therefore, the questions, which circumstances are required as a connecting factor and whether the registered or real seat may be transferred into another Member State, fall into the scope of national law. Consequently, Articles 52 and 58 EEC do not grant companies the right to transfer their administrative seat to another Member State while continuing to be subject to the company law of the first Member State.

2. ECJ Judgment of 9 March 1999. *Centros Ltd v Erhvervs-og Selskabsstyrelsen*. Case C-212/97.

Centros Ltd was a private limited company registered in England and Wales, whose shares were held by two Danish nationals residing in Denmark. The company's registered office was in London.

In 1992, Centros' director requested the Danish Trade and Companies Board ("the Board") to register a branch in Denmark. The Board, however, denied the request, arguing that Centros was actually intending to form a principal establishment in Denmark, since it had not been engaged in business in the UK so far. By carrying out the registration, the Danish rules regarding the paying-up of minimum capital amounting to 200 000 DKK would be circumvented.

Centros then instituted legal proceedings, claiming that, due to its lawful formation in the UK, the Board's refusal to register a branch in Denmark was contrary to Articles 52 and 58 of the TEEC. The Board argued that its refusal was justified by the need to protect private and public creditors and other contracting parties as well as by the aim of preventing fraudulent insolvencies.

The first instance court confirmed the Board's decision, the second instance court referred the question of compatibility with Articles 52 and 58 of the TEEC to the ECJ. The Court began by rejecting the submission of the Danish Government, which had argued that the scenario at hand constituted a purely internal situation. It found Centros' lack of intent to conduct business in the UK to be immaterial.

Regarding the question referred, it stated that Articles 52 and 58 of the TEEC gave companies, *inter alia*, the right to set up branches in other Member States, and that the refusal to register such a branch prevented the companies from exercising their freedom of establishment.

The Danish authorities claimed that Centros' course of action constituted an abuse of its rights conferred by Articles 52, 58 of the TEEC and that, consequently, Denmark was entitled to prohibit the abusive conduct.

The Court clarified that a Member State is indeed authorized to prevent abuse of national or Community law, but the situation has to be assessed whilst taking into account the objectives of those provisions. The Danish provisions in question concern the formation of companies. The freedom of establishment, however, applies to undertakings which are already incorporated.

Furthermore, the Court stated that a national of a Member State was free to choose to incorporate its company in the Member State whose company law regime appeared the most favourable to him. The exercise of this free choice of company law could, therefore, not be considered as abusive. Consequently, under the given circumstances, the refusal to register Centros' branch in Denmark was contrary to Articles 52 and 58 of the TEEC.

The Danish government argued that its restriction of the freedom of establishment was justified by reasons of creditor protection and the financial soundness of the

undertakings. The ECJ found, however, that the refusal to register Centros' branch in Denmark was not suitable for protecting creditors, since, had Centros conducted business in the UK before, its branch would have been registered in Denmark nonetheless, even though creditors would have been affected in the same way. Therefore, the criteria for a justification of the restriction of Articles 52, 58 EEC were not met.

Finally, the Court was of the opinion that it was apparent for creditors that the company at hand was incorporated in the UK. By this, they were informed that the company was governed by different laws than those applicable in Denmark.

6.1.3. EU bodies and agencies in the area of company law

Three special bodies in the sphere of EU company law can be distinguished:

- a) the European Corporate Governance Forum;
- b) the Group of Non-Governmental Experts on Corporate Governance and Company law;
- c) the Informal Company Law Expert Group.

A) The European Corporate Governance Forum was established in 2004 by the decision of the European Commission. The primary aim of its creation was coordination of corporate governance efforts of Member States. In its 2003 Action Plan on modernizing company law and enhancing corporate governance in the European Union the Commission considered as a priority to encourage the co-ordination and convergence of national codes through regular high level meetings of the European Corporate Governance Forum. The Commission specified that the Forum, to be chaired by the Commission, could meet two or three times a year and that it would comprise representatives from Member States, European regulators (including CESR), issuers and investors, other market participants and academics. Notwithstanding doubts expressed by the European Parliament on this subject, the Commission set up the Forum anyway.

The members of the Forum are appointed by the Commission for a three-year period, which can be extended. The Forum held its first meeting in January 2005. In 2008, the mandate of the Forum was renewed and its composition slightly changed. The Forum meets, under the chairmanship of the Commission, two to three times a year and delivers a yearly report to the Commission.

The Forum is specifically established to enhance the convergence of national codes of corporate governance and to provide advice to the Commission, either at the Commission's request or on its own initiative, on policy issues in the field of corporate governance.

The Work Programme of the Forum included the following points:

- 1) Short and middle term issues;

- 2) Empty voting and transparency of investors' positions;
- 3) Cross-border voting;
- 4) Application of CG codes in cross-border situations (double listings etc);
- 5) Rules on acting in concert (current situation in the Member States; basic principles that can be established at EU level; work of the OECD).

Longer term issues included 1) Working group on minority shareholder protection; 2) Working group on Corporate Governance Infrastructure.

Other issues raised in the discussion were Influence of workers' representation in companies' boards; Influence of recommendations from voting agencies' on decisions taken in general meetings; Impact of hedge funds, Private Equity and Sovereign Wealth Funds on CG; Adaptability of CG principles to new market participants and their instruments; Disclosure issues for state owned enterprises.

Since its setting up, the Forum has issued a number of statements and recommendations to the Commission. Furthermore, it publishes a report on its activities annually. The minutes of its meetings are also made available on its website.

B) The Group of Non-Governmental Experts on Corporate Governance and Company law was established in 2005 by a decision of the Commission. The creation of this Group is an initiative not explicitly laid down in the Action Plan to Modernize Company Law. The Group has been established in a view of the fact, that «the Action Plan recognizes the importance of expert and public consultation as an integral part of the development of company law and corporate governance at Community level». Consultation of the Group will supplement, not replace, public consultations.

This EU body comprises a maximum of twenty members, who are to be appointed by the Commission for a three-year period, which can be extended. The Commission will regularly consult the Group, chair Group meetings and establish the calendar for meetings. The role of the Group is to provide technical advice to the Commission on the Commission's initiatives in the field of corporate governance and company law at the Commission's request. The chairman of the Group may suggest that the Commission consults the Group on any related matter. The «technical work» of the Group should be contemporary to «the more strategic role» in the convergence of corporate governance in Europe, carried out by the European Corporate Governance Forum.

C) The Informal Company Law Expert Group. The 2011 Report of the Reflection Group on the Future of EU Company Law and the 2012 Action Plan «European company law and corporate governance — a modern legal framework for more engaged shareholders and sustainable companies» identified a number of initiatives in the area

of company law aiming at improving the framework for cross-border operations of EU companies and removing barriers for cross-border operations.

The key issues identified in the report and in the Action Plan include, inter alia, the need to improve the mechanism for cross-border mergers, to enable cross-border divisions and to consider possible actions as regards groups of companies.

The group should assist the Commission in developing policies to improve the framework for cross-border operations of EU companies. For this purpose, the tasks of the group include:

Assisting the Commission in improving the mechanism for cross-border mergers by developing possible amendments to the Directive on cross-border mergers;

Assisting the Commission in developing an initiative to provide a framework for cross border divisions, possibly through an amendment of the cross-border mergers Directive;

Advising the Commission on the development of a possible initiative to improve both the information available on groups and recognition of the concept of «group interest»;

Advising the Commission on other company law issues, e.g. related to the already existing proposals or new initiatives.

The members of the group shall be selected among persons with academic and/or professional experience in particular in the field of company law, the experience in other fields such as corporate governance, insolvency and comparative law being an asset.

Candidates are requested to respond to the present call for applications. In order to ensure a workable format, the group will be composed of 10 to 14 experts appointed in personal capacity; these experts shall act independently and in the public interest. Selection shall be carried out in such a way as to avoid any conflict of interests that could be prejudicial to their independence.

Members are appointed by the Director General of DG Internal Market and Services for a period of 3 years. Members, who are no longer capable of contributing effectively to the group's deliberations, may be replaced for the remainder of their term of office. The mandate of the members may be renewed. Replacement of members shall be chosen among those who have responded to the call. The group shall be chaired by a representative of the Commission.

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6.1.4. The codification of EU company law

Over the years, the EC/EU institutions have taken numerous initiatives in the area of company law. As early as in the 1960s, the Commission expressed its vision in the sphere, regarding it as a broad task to harmonize national company laws. Since then, it initiated a wide range of legislative measures, with apparent success: between 1968 (First Directive) and 1989 (12th Directive), 9 Directives and one Regulation were adopted.

From this perspective, this period has aptly been described as the «golden age» of company law harmonization. It should be noted that although the quantity of the measures adopted may typify as a success, during this age the scope of the harmonization program and the Commission's attitude towards harmonization changed in comparison with the early days, scaling down its ambitions. Whereas the First Direc-

tive still covered all limited liability companies, priority was later given to the public company, with the exception, in particular, of the accountancy Directives. Whereas the early Directives arguably laid emphasis on uniformity and had a prescriptive character, this soon gave way to more flexible approaches which placed greater stress on Member State autonomy.

From its initial high activity on company law harmonization in the 1960s, the Commission changed to pragmatism by the 1980s. Then there was a very slow movement, a period from 1989 to 2001, when no company law instruments were brought about. European company law harmonization lost its dynamism.

The explanation of the proposal has been that in the context of a people's Europe, the Commission attaches great importance to simplifying and clarifying the law of the Union so as to make it clearer and more accessible to citizens, thus giving them new opportunities and the chance to make use of the specific rights it gives them. This aim cannot be achieved so long as numerous provisions that have been amended several times, often quite substantially, remain scattered, so that they must be sought partly in the original instrument and partly in later amending acts. Considerable research work, comparing many different instruments, is thus needed to identify the current rules. For this reason a codification of rules that have frequently been amended is also essential if the law is to be clear and transparent.

The purpose of this proposal is to undertake a codification of Sixth Council Directive of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (82/891/EEC), 11th Council Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (89/666/EEC). Safeguards are required by Member States of companies, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

On 1 April, 1987 the Commission decided to instruct its staff that all acts should be codified after no more than ten amendments, stressing that this is a minimum requirement and that departments should endeavour to codify at even shorter intervals the texts for which they are responsible, to ensure that their provisions are clear and readily understandable. Moreover, the Conclusions of the Presidency of the Edinburgh European Council (December 1992) confirmed this, stressing the importance of codification as it offers certainty to the law applicable to a given matter at a given time.

Codification must be undertaken in full compliance with the normal procedure for the adoption of acts of the Union. Given that no changes of substance may be made to the instruments affected by codification, the European Parliament, the Council and the Commission agreed, by an interinstitutional agreement dated 20 December 1994,

that an accelerated procedure may be used for the fast-track adoption of codification instruments.

The European Commission developed a variety of new kinds of supranational legal entities whose activity was supposed to be aimed at the implementation of EU-shared tasks connected with both trade development and the social policy sphere. The issue is drafts of statutes of such juridical entities as European association and European mutual society.

Employee involvement was chosen as the main imperative for the new forms of juridical persons. At the level of member-states' legislation this problem, firstly developed in the Germany law, found its resolution in the Directive on European works councils № 94/95 adopted in 1994.

In 2003 the Commission presented an Action Plan on «Modernizing Company Law and Enhancing Corporate Governance in the EU». The Action Plan is the Commission's response to the Final Report, presented in November 2002, of the High Level Group of Company Law Experts.

The Action Plan aimed to be flexible in application, but firm on principles. It also supposed to help shape international regulatory developments. The main objectives of the Action Plan were:

- to strengthen shareholders' rights and protection for employees, creditors and the other parties with which companies deal, while adapting company law and corporate governance rules appropriately for different categories of companies;
- to foster the efficiency and competitiveness of business, with special attention to some specific cross-border issues.

The Plan was needed to modernize the European regulatory framework for company law and corporate governance for the following reasons: the growing trend for European companies to operate cross-border in the Internal Market, the continuing integration of European capital markets, the rapid development of new information and communication technologies, the forthcoming enlargement of the EU to 10 new Member States, and the damaging impact of recent financial scandals.

The Action Plan was prioritized over the short-term (2003-2005), medium-term (2006-2008) and long-term (2009 onwards), and indicated which type of regulatory instrument should be used for each proposal, with approximate timescales. The Action Plan was also based on a comprehensive set of legislative and non-legislative proposals.

Many initiatives of the Action Plan were realized. It is possible to say that the document reactivated the whole process of company law harmonization. The adoption of

the European Company Regulation and its accompanying Directive on the involvement of employees in October 2001 made this reactivation considerably easier. The fact is the Directive was able to establish some standard principles for worker participation, an issue which, as stated, had blocked not only the European Company itself for many years, but other key EC company law instruments as well, such as Directive on cross-border mergers, for example. Other factors, such as the development of capital markets and their regulation and a series of corporate scandals (e.g. Enron and Parmalat), contributed to the reactivation of the harmonization process.

Moreover, in 2006, the Commission presented a Strategic Review of Better Regulation in the European Union, including a proposal for a target to reduce the administrative burdens on businesses by 25 % by 2012. Ten concrete proposals for «fast track action» were thereupon identified in the Action Programme for reducing administrative burdens in the EU of 2008. One of these proposals concerned EC company law, more particularly, the Third and the Sixth Directives.

In 2007, an official proposal for a Directive, amending these Directives, was made, and this Directive 2007/63/EC of the European Parliament and of the Council amending Council Directives 78/855 EEC and 82/891/EEC as regards the requirement of an independent expert's report on the occasion of merger or division of public limited liability companies was adopted in November 2007.

In 2012 the European Commission adopted an Action Plan outlining future initiatives in the areas of company law and corporate governance. The main aim of the Action Plan is to make European company law and corporate governance sure that companies are competitive and sustainable. The Commission's analysis and consultations clearly indicated that further improvements can be made, by encouraging and facilitating long-term shareholder engagement, by increasing the level of transparency between companies and their shareholders and by simplifying cross-border operations of European undertakings.

On the basis of its reflection and the results of the consultations, the Commission identified several lines of action in the area of company law and corporate governance that are fundamental to putting in place modern legislation for sustainable and competitive companies.

Internal Market and Services Commissioner Michel Barnier said: «This Action Plan on company law and corporate governance sets out the way forward: shareholders should receive additional rights, but also fully assume their responsibilities to make sure that the company remains competitive over the longer term. Companies should also become more transparent in several respects. This will contribute to effective governance of companies».

The key elements of the action plan are:

1. Increasing the level of transparency between companies and their shareholders in order to improve corporate governance. This included, in particular, increasing companies' transparency as regards their board diversity and risk management policies; improving corporate governance reporting; better identification of shareholders by issuers; strengthening transparency rules for institutional investors on their voting and engagement policies.

2. Initiatives aimed at encouraging and facilitating long-term shareholder engagement, such as: more transparency on remuneration policies and individual remuneration of directors, as well as a shareholders' right to vote on remuneration policy and the remuneration report; better shareholders' oversight on related party transactions, i.e. dealings between the company and its directors or controlling shareholders; creating appropriate operational rules for proxy advisors (i.e. firms providing services to shareholders, notably voting advice), especially as regards transparency and conflicts of interests; clarification of the 'acting in concert' concept to make shareholder cooperation on corporate governance issues easier; investigating whether employee share ownership can be encouraged.

3. Initiatives in the field of company law to support European businesses and encourage their growth and competitiveness: further investigation on a possible initiative on the cross-border transfer of seats for companies; facilitating cross-border mergers; clear EU rules for cross-border divisions; follow-up of the European Private Company statute proposal (IP/08/1003) with a view to enhancing cross-border opportunities for SMEs; an information campaign on the European Company/European Cooperative Society Statute; targeted measures on groups of companies, i.e. recognition of the concept of the interest of the group and more transparency regarding the group structure.

In addition, the action plan saw merging all major company law directives into a single instrument. This would make EU company law more accessible and comprehensible and reduce the risk of future inconsistencies.

EU company law and corporate governance rules for companies, investors and employees must be adapted to the needs of today's society and to the changing economic environment. European company law and corporate governance should make sure that companies are competitive and sustainable.

With its 2011 Green Paper on EU corporate governance the Commission initiated an in-depth reflection to evaluate the effectiveness of the current corporate governance rules for European companies. It also carried out an on-line public consultation

on the future of European company law, which generated a large number of responses by a wide variety of stakeholders.

In 2014 the Commission presented a proposal for the revision of the Shareholder Rights Directive, a Recommendation on corporate governance reporting and a proposal for a Directive on single-member private limited liability companies.

The Commission has adopted measures to improve the corporate governance of around 10 000 companies listed on Europe's stock exchanges. This would contribute to the competitiveness and long-term sustainability of these companies. Other proposals would also provide cost-efficient company law solutions for SMEs which operate across borders. The package of measures implements key actions identified in the Communication on the long-term financing of the European economy of 27 March 2014.

The Shareholder Rights Directive will tackle certain corporate governance shortcomings relating to the behaviour of companies and their boards, shareholders (institutional investors and asset managers), intermediaries and proxy advisors (i.e. firms providing services to shareholders, notably voting advice). The Recommendation aims at improving corporate governance reporting by listed companies. Finally, the Directive on single-member companies aims to facilitate the creation of companies with a single shareholder across the EU. It should make it easier for businesses to establish subsidiaries in other EU States as, in most cases, subsidiaries tend to have only one shareholder – a parent company.

“Entrepreneurship 2020: a three-step plan for unlocking Europe's entrepreneurship potential” is a blueprint to reinvigorate Europe's entrepreneurial culture. It focuses on education and training and creating the right environment, as well as role models and reaching out to specific groups. The entrepreneurship 2020 aims to support entrepreneurs, who play an essential role in boosting employment, growth and a stronger economy. The action plan seeks to change the culture and attitudes of European citizens with regard to entrepreneurship and to see it as an attractive and realistic career. It invites Member States to make entrepreneurship education a mandatory part of school education and aims to change the public's perception of entrepreneurs, so that they get the recognition and support they deserve. The action plan also addresses the multiple barriers faced by would-be entrepreneurs, such as the lack of appropriate education and training, difficulty in accessing credits and markets, problems in transferring businesses, fear and stigma of failure and too much red tape.

The action plan's proposals, which are to be put into action by administrations at all appropriate levels (European, national, regional and local) and of which only a selection are shown here, are grouped under three headings. As part of the Europe 2020 strategy, the EU is redrawing its policy to ensure a strong, diversified, resource-effi-

cient and competitive industrial base to meet the challenges of the global market. A European Social Entrepreneurship Fund (ESEF) label is designed to identify funds focusing on European social businesses, making it easier for them to attract investment.

On 3 December 2015, the Commission adopted a proposal to codify and merge a number of existing company law Directives — the Directive relating to certain aspects of company law (codification). The aim of this proposal is to make EU company law more reader-friendly and to reduce the risk of future inconsistencies. It does not involve any change to the substance of these Directives.

The explanation of the proposal has been that in the context of a people's Europe, the Commission attaches great importance to simplifying and clarifying the law of the Union so as to make it clearer and more accessible to citizens, thus giving them new opportunities and the chance to make use of the specific rights it gives them. This aim cannot be achieved so long as numerous provisions that have been amended several times, often quite substantially, remain scattered, so that they must be sought partly in the original instrument and partly in later amending acts. Considerable research work, comparing many different instruments, is thus needed to identify the current rules.

Thus, the EU has made significant progress in the sphere of company law codification, as well as in the process of unification and harmonization of legal regulation of the corporate area. The EU company law has developed mechanisms for implementation of norms of EU primary law by institutions and bodies of the Union. The rules of secondary law have been adequately reflected in national legislations of the EU Member States.

Thus, the EU company law develops in the following directions:

- 1) Formation, capital & disclosure requirements;
- 2) Domestic mergers & divisions;
- 3) Business operations involving more than one country;
- 4) EU legal entities.

Reforms of EU company law remove obstacles for free movement of capital, and remove legal barriers for the development of international trade.

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6.2. EU Company Law Directives

6.2.1. *The Directives on commercial companies*

The EU company law deals with profit-making legal bodies judicable in one of member countries. The problem is that the meaning of the term “legal body” and its characteristics differ from each other in the legislation of different countries. We will use the term “companies and firms” as stated in the TEU. Further in the chapter the term “company” will be used to name legal bodies that work within the freedom of establishment without saying about their national identity.

Freedom of establishment spreads upon a legal body possessing the following definite characteristics, according to one of the provisions of Art. 48 of the TEU:

- 1) It is established within the legislation of one of the member countries;
- 2) It is recognized as a legal body according to *lex societatis*;
- 3) At least one of the factors should be situated on the territory of the EU: registered address, management authority or the main place of business-making;
- 4) Profit-making orientation.

It does not matter if it was established according to civil or trade law of the member-country. According to Art. 48 of the TEU, legal bodies of public law also belong to trading partnership (if they do not fall into exception under § 1 Art. 45 of the TEU on executing functions of public authority).

Limited liability companies, especially corporations prevail in the economy of the developed countries. They were chosen as an object of harmonization of local legislation. On the one hand, in the vast majority of cases, it is their business which runs trans-border activity, and the other hand, their responsibility is limited only by nominal capital. It is of importance that the set requirements refer to all trading partnerships, not just to those ones which participate in international trade, have foreign stockholders, etc.

The vast majority of Directives is applied to limited liability companies. They usually include three types of *companies*: stock corporations, limited liability companies and joint-stock companies.

All the three types of companies exist in the law of Germany, France, Belgium, some countries of Southern Europe, while, for instance, Finland and Sweden are known to have just one type of stock corporations. In the Netherlands there are closed stock corporations.

Finally, in Great Britain and Ireland the categories of ‘limited liability trading company’ are joined under the term ‘companies incorporated with limited liability’.

As a substitute for stock corporations they have “public company limited by shares” and “public company limited by guarantee and having a shared capital”, while the analogue limited liability corporations is “private company limited by shares” or “private company limited by guarantee”.

Directives aimed at harmonization of national legislation became the main instrument in regulation of company law. The Council was empowered to pass by a solid vote the General Programme for the abolition of restrictions on freedom of establishment. That program was issued in 1962 and involved, as a part, measures in the field of company law.

Developed and partially adopted during the following 45 years, the Directives are traditionally referred to in accordance with their numerical order, which reflects the priority of presenting prepared drafts. That is why the numbers of the Directives do not always coincide with the priority in which they were adopted. The adopted Directives connected with company law and regulating the following questions will be described in details below. The questions are: a) obligatory disclosure of information (the First, Second and 11th Directives); b) merging and division of stock corporations (the 3rd, 6th and 10th Directives) and also acquisition on stock corporation as a result of engrossment of the stocks or other securities by outward investors (13th Directive); c) one man companies (12th Directive).

Moreover, in 1978 – 1984 the 4th, 7th and 8th Directives were adopted. They are dedicated to harmonization of the norms of financial accountability of trading companies. They are aimed at approximation of accounting standards applied to limited liability companies and stock corporations, which are equivalent and comparable. These Directives, which refer to financial rather than company law as a part of civil law, are sometimes viewed as a prototype of the European Code of Accounting.

The Fourth Directive contains common rules about the procedure for filing and contents of annual accounts, methods of evaluation of economic activity of a partnership, and the order of issuing such accounts. The Seventh Directive regulates consolidated accounts, i.e. accounts of interdependent companies. The legal framework of legal bodies' accounts is finalized by important provisions about principles of organization of audit written in the 8th Directive. The text was replaced by new Directive 2006/43/EU of the European Parliament and Council on audit of annual financial accounts and consolidated accounts.

The drafts of the 5th Directive are interesting too. The last one is dated 1991. If it is passed, a wide range of the questions connected with the local law will be harmonized. These questions are connected with the structure of the stock corporations and authority of their management. Member countries can choose between three-tier structure of the management (general shareholders meeting – management board –

board of supervisors) or two-tier structure (general shareholders meeting – management board). In the second case they create single administrative authority, where there are special supervisors monitoring the activity of managers. The main reason why the draft was not adopted was that it had too detailed regulation of organization and activity of stock corporations.

The failure of the draft of the 5th Directive shows the existence of principal difference between the company law systems of member countries and their unwillingness to make serious reforms in order to approximate regulation of trading companies. The experience of the development of regulation of legal bodies in the EU law reflects that harmonization of certain aspects of the trading partnership activity important for common market development is successful. That is why the draft of the 14th Directive on trans-border replacement of legal seat of trading partnership of member countries is interesting. The European Commission is planning to present it.

In 2006 it presented the draft of the Directive on exercise of right of vote of stakeholders intended to stipulate minimal standards and guarantees for rights of stakeholders to participate in general shareholders meetings on the territory of the whole EU.

In 2007 Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies was adopted.

From empirical evidence and the responses to public consultations, it appears that the main obstacles to cross-border voting for investors are the following, in the order of importance: the requirement to block shares before a general meeting (even where it does not affect the trading of the shares during this period), difficult and late access to information that is relevant to the general meeting and the complexity of cross-border voting, in particular proxy voting. Blocking shares and the complexity of proxy voting also have a considerable impact on the costs of cross-border voting.

Abolishing existing constraints which hamper the voting process requires amendments to the relevant national legislation. A directive seeking to remove the key obstacles to the cross-border voting process and focusing on selected rights of shareholders in the general meeting seems the most appropriate type of instrument, if effective simplification of the cross-border voting process is to be achieved and the disparities between Member States reduced. Other topics covered in the public consultations, which are indirectly related to the exercise of voting rights, such as stock lending, depositary receipts or the rules governing languages, could form part of a Commission recommendation.

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms amended Directive 2007/36/EC.

6.2.2. The Directives on disclosure of information

The First Directive was adopted in 1986 and is valid for all the three types of limited liability companies. In the title of the Directive there is a quotation from § 2, article 44 of the TEU: on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies with a view of making such safeguards equivalent throughout the Community.

It is possible to distinguish three main directions of harmonization of law according to the First Directive: exposure of main documents of trading partnership, validity of liabilities of partnership, conditions and effects of voidness of partnership. All of them are aimed at protection of creditors of limited liability trading partnership.

According to the provisions of Art. 2 of the Directive, member countries were to ensure obligatory publishing of a set of documents by the trading company. They are the following:

- a) charter and all the alterations made;
- b) information about appointments to and release from positions of persons enabled to carry on business on behalf of the company, to represent it in court, to participate in management, supervision and control of the company;
- c) annual balance sheet and statement of operations;
- d) information about liquidation procedure of the company, etc.

Issue of these materials is ensured in the following ways. First of all, the information declared must be published in the official source of the corresponding country. Legal bodies cannot use unpublished juridical facts against third party unless the legal body can prove that the third party knew about such a fact. Secondly, there is an official record about any partnership in the public register. A certified copy of the record or its part should be given to any body at the written request. The price of the service cannot be higher than usual administrative costs held for its accomplishment. Thirdly, the company's letterform should include legal reference, legal body location, name of the register where the record is held, and the number of the record.

In 2003 the text of the First Directive was amended. Alterations made concerned the matter of divulgation of information about legal bodies in electronic form, and also the opportunity to provide the information in different languages from the list of official languages of the European Union.

The second question of the company law regulated in the First Directive is validity of obligations accepted by partnership. Obligations stated by establishing partnership will be valid only after their acceptance by its appropriate body. In case of lack of such an acceptance or other agreement, bodies that made a transaction, are liable fully

and equally. Furthermore, partnership is not supposed to be established until all the information is published.

Directive 68/151/EC was repealed by Directive 2009/101/EC. Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies has the aim to frame the guarantees required of companies in order to protect the interests of members and third parties. This Directive applies to companies incorporated with limited liability.

Companies must disclose certain documents and information relating in particular to: the instrument of constitution and the statutes, and their amendments; the appointment, termination of office and particulars of the persons who have the power to represent the company in legal proceedings and who take part in the administration, supervision or control of the company; the amount of the capital subscribed; any change of the registered office; the winding-up of the company; the liquidation of the company. All of these disclosed items shall be recorded in a file opened in a central register, commercial register or companies register. The file may be available in electronic format or on paper.

Any change must be recorded in the central register and made public within 21 days after the complete transmission of information. Companies must have a unique identifier for communication between registers. This unique identifier includes the elements which shall enable the following to be identified: the Member State of the register; the domestic register of origin; the company number in that register. Member States shall be responsible for the publication of the above information in the national gazette or other means. They shall take the necessary measures to avoid any discrepancy between the pieces of information provided and shall ensure that this information is kept up-to-date. This information must also be made available on the European e-Justice portal in all the official languages of the EU, and also in electronic format using the system of interconnection of central registers.

The system of interconnection of registers shall provide access free-of-charge to the following information: the name and legal form of the company; the registered office of the company and the Member State where it is registered; the registration number of the company.

The Commission shall provide a search service on companies registered in the Member States. In addition, it shall introduce a central European portal which aims to ensure the inter-operability of the registers.

The processing of personal data is subject to the provisions of the Directive on the protection of personal data.

If action has been carried out on behalf of a company being formed before it has acquired legal personality, the persons who acted shall be liable therefor and not the company itself.

Once a company has acquired legal personality, acts performed by the organs of the company shall be binding upon it in respect of third parties, including such acts that go beyond the limitations of the objects of the company, except where these acts exceed the powers conferred upon those organs.

Even if the formalities of disclosure concerning the persons who are authorised to represent the company have been completed, any irregularity in their appointment shall not be relied upon against third parties. The company may only rely on such disclosure if it provides proof that the third parties had knowledge of the irregularities.

MSs shall provide for the nullity of companies by decision of a court of law. The nullity of a company may only be ordered in the following cases: a) no instrument of constitution has been executed; b) the objects of the company are of an unlawful nature or contrary to public policy; c) there is no statement of the name of the company, subscriptions, the total amount of capital subscribed or the objects of the company; d) failure to comply with the provisions of national law concerning the minimum amount of capital to be paid up; e) the incapacity of all the founder members; f) the number of founder members is less than two.

Once nullity has been officially recognised, the company is liquidated. However, shareholders must pay up the capital agreed to be subscribed by them but which has not been paid up with respect to creditors.

Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings amended Directive 2006/43/EC and repealed Directives 78/660/EEC and 83/349/EEC.

Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 was amended by Directive 2013/34/EU. This Directive regulates the disclosure of non-financial and diversity information by certain large undertakings and groups and requires companies concerned to disclose in their management report information on policies, risks and outcomes as regards environmental matters, social and employee aspects, respect for human rights, anticorruption and bribery issues, and diversity in their board of directors.

This will provide investors and other stakeholders with a more comprehensive picture of a company's performance. This is a legislative initiative with relevance for the European Economic Area (EEA). The new rules will only apply to some large companies with more than 500 employees. This includes listed companies as well as other public-interest entities, such as banks, insurance companies, and other companies that are so designated by Member States because of their activities, size or number of employees.

6.2.3. The Directives on reorganization

Third Directive 78/855/EEC was approved in 1978. It regulates some questions connected with joint-stock companies fusion and serves to protect shareholders of those. In 1982 the 6th Directive was passed that finally harmonized legislation concerning the division of public limited liability companies.

The Commission attached great importance to simplifying and clarifying Community law so as to make it clearer and more accessible to the ordinary citizen, thus giving him new opportunities and the chance to make use of the specific rights it gives him. This aim cannot be achieved so long as numerous provisions that have been amended several times, often quite substantially, remain scattered, so that they must be sought partly in the original instrument and partly in later amending ones. Considerable research work, comparing many different instruments, is thus needed to identify the current rules. For this reason a codification of rules that have frequently been amended is also essential if Community law is to be clear and transparent.

On 1 April 1987 the Commission therefore decided to instruct its staff that all legislative acts should be codified after no more than ten amendments, stressing that this is a minimum requirement and that departments should endeavour to codify at even shorter intervals the texts for which they are responsible, to ensure that the Community rules are clear and readily understandable.

The protection of the interests of members and third parties requires that the laws of the MSs relating to mergers of public limited liability companies be coordinated and that provision for mergers should be made in the laws of all the Member States. In the context of such coordination it is particularly important that the shareholders of merging companies be kept adequately informed in as objective a manner as possible and that their rights be suitably protected.

In October 26, 2005 after a huge debate the European Parliament and the Council approved the text of the 10th Directive about cross-border mergers. It reproduced the classification and general fusion principles of the Third Directive. However, unlike the last one which regulated mergers between companies within one state, the 10th one is more suitable for cases when the subjects belong to different countries. This directive also regulates cross-border mergers of companies with limited liability and other companies which are founded in a form of fund fusion. Even before the 10th Directive was adopted relevance of cross-border mergers within unified European market was approved in case law of EU Court.

The Directive 2011/35/EU deals with mergers between public limited liability companies in a single EU country. It covers protection for shareholders, creditors and employees. The Directive 2011/35/EU repealed Directive 78/855/EEC (former 3rd Directive).

The Directive 2011/35/EU aims at coordinating the legislation of MSs on mergers of public limited liability companies to protect the interests of members and third parties.

Member States need not apply this Directive: to cooperatives; to companies which are being acquired or will cease to exist and are the subject of bankruptcy proceedings, proceedings relating to the winding-up of insolvent companies, judicial arrangements, compositions and analogous proceedings.

Mergers by acquisition or mergers by the formation of a new company may be effected where one or more of the companies which are ceasing to exist is in liquidation, provided that the companies have not yet begun to distribute their assets to their shareholders.

Where the administrative or management bodies of companies decide to carry out a merger, they must draw up draft terms of merger in writing which include, in particular: the type, name and registered office of the companies; the share exchange ratio; terms relating to the allotment of shares; the rights conferred by the acquiring company.

The administrative or management bodies of the companies must make the draft terms of merger public at least one month before the date fixed for the general meeting, pursuant to the conditions laid down in the Directive 2009/101/EC. They shall be exempt from this requirement if the draft terms are made available on the company website for that period. In order to be valid, the merger must be approved by the general meeting of each of the merging companies.

All mergers require the approval of the general meeting of each of the merging companies. However, MSs need not make the merger subject to approval by the general meeting if: a) publication of the merger takes place at least one month before the date fixed for the general meeting; b) all shareholders of the acquiring company are entitled to inspect certain documents (draft terms of merger, annual accounts, for example) at least one month before the date fixed for the general meeting; c) one or more shareholders of the acquiring company holding a minimum percentage of the subscribed capital (no more than 5 %) is/are entitled to require that a general meeting be called to decide whether to approve the merger.

The merging companies shall protect employees' rights pursuant to the provisions of the Directive 2001/23/EC on the safeguarding of employees' rights when the ownership of a company or business is transferred. They must also provide creditors with safeguards as regards their financial situation.

After a merger, the following situations may occur: a) all assets and liabilities have been transferred; b) the shareholders of the company being acquired become shareholders of the acquiring company; c) the company being acquired ceases to exist.

The laws of the Member States may lay down nullity rules for mergers, in particular if:

- a) nullity is to be ordered in a court judgment;
- b) a defect liable to render a merger void can be remedied;
- c) the judgment declaring a merger void does not affect the validity of obligations.

One or more companies may be wound up without going into liquidation and transfer all of their assets and liabilities to another company which is the holder of all their shares, in accordance with the provisions described earlier. Nevertheless, Member States may choose not to impose certain requirements.

6.2.4. The Directive on single-member private limited liability companies

The 12th Directive passed in 1989 keeps aloof from the EU directives on associations. This Directive obliged MSs to admit partnership with only one subject of civil law (physical or any other body corporate). In contrast to previous ones this directive contains just seven substantial assets and that is why it is an excellent pattern of market directives that the Treaty of Amsterdam urged to use more actively in the EU law. Based on the instruction about small and middle-sized enterprises approved by the Council in 1986 the 12th Directive provided an opportunity to establish single-member companies from January 1th, 1992. The main reason for passing this directive was the necessity to provide the EU private entrepreneurs with opportunities to limit their responsibility in commercial relationship.

However, Directive 89/667/EC was repealed by Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies.

A private limited liability company may be a single-member company from the time of its formation, or may become one because its shares have come to be held by a single shareholder.

The Commission attached great importance to simplifying and clarifying Community law so as to make it clearer and more accessible to the ordinary citizen, thus giving him new opportunities and the chance to make use of the specific rights it gives him. This aim cannot be achieved so long as numerous provisions that have been amended several times, often quite substantially, remain scattered, so that they must be sought partly in the original instrument and partly in later amending ones. Considerable research work, comparing many different instruments, is thus needed to identify the current rules. For this reason a codification of rules that have frequently been amended is also essential if Community law is to be clear and transparent.

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6.3. European legal persons

6.3.1. The European Economic Interest Grouping (EEIG)

Simultaneously with the development of drafts of the first directives on commercial partnerships in 1974, the Commission made a proposal to grant legal status to a special kind of legal entity, which received the name of the European economic interest grouping. Appropriate regulatory act was passed in 1985 in the form of Council Regulation (EEC) № 2137/85 of 25 July 1985 on the European Economic Interest

Grouping (EEIG) containing the EEIG statute and entered into force in August 1989. This Regulation meets the need for the harmonious development of economic activity throughout the EC and the establishment of a common market offering conditions analogous to those of a national market. To achieve this, and alleviate the legal, fiscal and psychological difficulties encountered by natural persons, companies, firms and other bodies in cooperating across borders, the EC decided to create a suitable legal instrument at Community level in the form of the European Economic Interest Grouping.

Legal form of the EEIG was not an invention of the European Commission. It was based and substantially copied from the model of the association with common economic goal existing in French law, which can be formed by two or more enterprises in order to simplify economic activities by pooling resources and knowledge.

The goal of creating a new type of business entity at supranational level is to facilitate and encourage cross-border economic cooperation within the common market. For companies located in different countries, in particular for small and medium-sized, aimed at in-depth cooperation, joint venture or a full merger may be too complicated and expensive. In this case, the form of the European economic interest grouping is the best way for establishing cross-border relations and close cooperation. The EEIG form allows businesses to consolidate efforts to achieve this goal without loss of autonomy.

An example of the European economic interest grouping can be a network of “Multi-Poles EEIG”. The association was converted from the structure for innovation and technological exchange established under the auspices of the European Commission. It unites organizations in research, investments into high-tech development, engineering, legal protection of intellectual property and licensing trade in the EU. However, using the EEIG form even smaller economic actors, such as lawyers, can combine their efforts.

The EEIGs activity should be linked with the economic activities of its members, but in no case should completely replace it – otherwise it will be a joint venture. Association may be aimed at achieving an economic goal of participants, which is, for example, in the marketing of goods, joint scientific research, addressing emerging legal issues. The purpose of the grouping is to facilitate or develop the economic activities of its members by a pooling of resources, activities or skills. This will produce better results than the members acting alone. It is not intended that the grouping should make profits for itself. If it does make any profits, they will be apportioned among the members and taxed accordingly. Its activities must be related to the economic activities of its members, but cannot replace them. The EEIG cannot employ more than 500 persons. The EEIG can be formed by companies, firms and other legal entities

governed by public or private law which have been formed in accordance with the law of a Member State and which have their registered office in the EU. It can also be formed by individuals carrying on an industrial, commercial, craft or agricultural activity or providing professional or other services in the EU. The EEIG must have at least two members from different EU States.

The EEIG is not a commercial organization and should not be aimed at making profit. If his work is still profitable, this profit should be distributed among the participants. Moreover, the EEIG is not entitled to management control over the activities of its members, or other enterprises. Thus, this form cannot be used to create a holding company. Finally, the property relations between the Association and its director are very limited.

The EEIG participants may be legal entities established under the laws of the Member States and located in the European Union, as well as individuals – businessmen and other self-employed persons. It is necessary for participants to originate from at least two different Member States for Association to get European character and to become a subject to the rules of the Statute.

The subjects of law of non-Member States of the EU cannot be members of the EEIG. The exception is the States participating in the agreement on the European economic area (Iceland, Norway and Liechtenstein), the subjects of law of which may, equally with the Member States of the EU, establish the European unions with a common economic purpose and participate in their activities.

The issue of giving the EEIG the status of a legal entity is left to the discretion of the national legislator. This decision seems fair, taking into account that the legal system of the European Union does not imply the appearance of more of the subjects of private law – *sui generis*. The national law of the Member States remains the only source which gives associations of persons and capital legal capacity. However, the EEIG should have the capacity to acquire rights and assume duties on their own behalf throughout the EU, conclude transactions and act as a plaintiff or respondent in court (p. 2 art. 1 of the Statute of the EEIG) – i.e., in any case, it is *de facto* a legal personality.

An important factor that distinguishes the EEIG from a classic legal entity is the property of “Not-isolation”. The EEIG authorized capital remains the property of the participants. Moreover, the EEIG can also be established without share capital. Finally, it has no right to attract investment and can be financed only by the participants (in the form of contributions or loans). At least two control centers are created in the EEIG: a general participants’ meeting, and individual or collective executive body. The executive body of the EEIG is responsible for relations with third parties and has the right to take, on its behalf, the rights and obligations within the general purpose for which the EEIG was created.

It is important to keep in mind that the founders of the EEIG have unlimited and joint responsibility for the obligations of any nature (art. 24 of the regulation). This provision of the Statute is the result of the lack of any requirements to the capital of the EEIG and is intended to protect the rights of the creditors of the EEIG. The EEIG gains and losses are shared between the participants in the proportions laid down in the Charter. In the absence of such stipulation in the Charter shares of the participants are considered equal. The European Union with a common economic purpose is not subject to taxation: the financial results of activities relate directly to the EEIG, and pay taxes in the usual manner.

Memorandum of the EEIG is subject to registration in the State where the EEIG is located, whereby the legal address of the Community must be located on the territory of the European Union. It can be transported from one State to another with the minimum of formalities, which distinguishes the new formation from classical legal entities, the cross-border movement of which is very difficult, and sometimes impossible. The information on the establishment and dissolution of each EEIG is published in the official journal of the European communities.

Since the EEIG is a supranational entity, the main source of law for it is considered to be the Regulation, mentioned above, containing the Statute of the EEIG. However, some special issues are left to the regulation at the national level, as it is mentioned in the Statute. In the Member States the legislative acts are taken, which complement the provisions of the Statute on the questions like the procedure for registration of the EEIG, the requirements to the managers, compulsory audit, provisions on the liquidation of the Community.

The project of the establishment of the supranational union of legal entities governed by the EU law has brought success, and the activities of the European Commission aim to further increase such associations in the EU economy. So, in 1997, the commission noticed that although during the eight years the European Union has created more than 800 associations with a common economic purpose, this form of cooperation is still not widely used by European enterprises. The commission noticed the positive features of the EEIG, such as the Pan-European nature, flexibility and transparency, and pointed out that they pretend to be a very suitable instrument for the realization of the programs of financing from the budget of the Union and the MSs.

6.3.2. The European Company (SE)

Harmonization of national legal systems carried out according to art. 44 of the TEU has remained incomplete: a draft of 5th Directive of EU, which contained detailed regulation of joint stock companies' organization and activity, has not been endorsed. However, this work on the approximation of legal systems of the member

states does not relieve the European business from having to choose a particular legal system, according to which a joint stock company is established.

So, the idea is to ensure legal unity in the EU in addition to creating economic unity. European businessmen should be able to work in legal form unified for the whole community and should not depend on differences in national norms. In 1970, the Commission proposed to adopt a new statute of supranational legal entity – SE. Due to insurmountable differences on the participation of employees in the enterprise management in 1989 it was decided to divide the document into two parts, and expunge these disputable issues, which need to be governed by separate directive, from regulations.

Adoption of regulations on the SE in the early 1990s was fraught with great difficulties, but the results of further work, first of all, on the issue of the draft directive, were approved by the Heads of State and Governments of the member states in December, 2000 at the meeting of the European Council in Nice. The Council Regulation (EC) № 2157/2001 of 8 October 2001 on the Statute for a European company (SE) 2001 is an EU Regulation containing the rules for a public EU company, called European Company (*Societas Europaea*, SE). The legal basis for the enactment of regulations is Art. 288 of the TFEU. Article 288 says: “To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States”. It is provided triennial period to prepare coming into force: Regulations came into force only in October 8, 2004.

Restructuring and coordinating operations involving companies from different Member States gives rise to legal and psychological difficulties and tax problems. The approximation of Member States’ company law by means of Directives based on Art. 44 of the Treaty can overcome some of those difficulties. Such approximation does not, however, release companies governed by different legal systems from the obligation to choose a form of company governed by a particular national law. The legal framework within which business must be carried on in the Community is still based largely on national laws and therefore no longer corresponds to the economic framework within which it must develop if the objectives set out in art. 18 of the Treaty are to be achieved. That situation forms a considerable obstacle to the creation of groups of companies from different Member States. MSs are obliged to ensure that the provisions applicable to European companies under this Regulation do not result either in discrimination arising out of unjustified different treatment of European companies compared with public limited liability companies or in disproportionate restrictions on the formation of a European company or on the transfer of its registered office. It is essential to ensure as far as possible that the economic unit and the legal unit of

business in the Community coincide. For that purpose, provision should be made for the creation, side by side with companies governed by a particular national law, of companies formed and carrying on business under the law created by a Community Regulation directly applicable in all Member States.

Statute of SE was substantially reduced in volume. On the one hand, the reason is that EU corporate law has advanced considerably since the beginning of the 1970s, which allows to refer to the national regulation of joint stock companies on issues that have already been harmonized by directives. On the other hand, a number of problematic issues were excluded from the object of regulation of the statute due to failure to achieve a universal compromise between member states to date. Primarily, it applies to taxation issues which are beyond the scope of SE Regulations.

There are 5 ways of forming the SE. As a general rule (p. 1.3 Regulation of Statute), the SE is referred to as a normal joint stock company established under the laws of the country of registration of JSC. At the same time a hierarchy of standard acts regulating activity of SE is established: Statute of SE; in the cases mentioned in the Statute – the Article of a proper SE; provisions of national law adopted pursuant to EU directives in the field of corporate law; other national legislation on JSC; other provisions of the relevant Article.

Exceptions to this rule include norms of specific national legislation, which are applicable to SE like to an ordinary JSC, incorporated in a particular state, for example, on issues of licensing of certain kinds of activity. Regulations fix four ways to create SE: association of joint stock companies; creation of the holding on the basis of trade limited liability partnerships; establishment of a joint subsidiary by legal entities; transformation of existing joint stock company into the SE.

Creating SE requires that all the legal entities combined in this form or establishing the SE were established in accordance with the laws of member states, were registered in the respective countries and their head offices were located in the EU. The admission to participate in the SE is granted to legal entities registered in the EU and having a stable relationship with the common market, if their head offices are located in other countries left to national legislation (p. 5.2 Regulation of Statute).

Besides, to make JSC pan-European, its participants must be registered, at least, in two member states or must have a subsidiary or branch in another member state for two years. European character of SE is emphasized by the corporate name that no matter in what language must contain the abbreviation SE.

As in the case of any limited liability partnership creditors' claims are collateralized by property of SE. So, the Statute provides for a considerable minimal authorized capital: at least 120 000 Euros (whereas for domestic trade associations the Second directive set the bar four times lower). SE must be registered at the location and legal address must match the location of the head office.

Besides uniform legal status, the major advantage of the new form of trade associations is a simplified procedure for trans-boundary transfer of SE's place of registration within the Community without changing the legal entity. In accordance with the requirements specified by the Regulations (Art. 8), such transfer is obligatory. Exceptions include tax and other public obligations which are determined by national legislation and must be performed before the transfer of place of registration. Furthermore, special attention is given to the proper observance of the rights of minority shareholders and creditors of SE.

One of the most interesting provisions of the statute is the question of its control. The compromise is that the founders can choose the type of internal organization of SE. The choice is between two-sectional and three-sectional management systems. We can remind that the differences between the Member States on this issue prevented the adoption of the draft of the Fifth Directive.

Besides provisions on general rules of institution, the statute of SE contains four models (Art. 15-37 of the Regulation), as well as provisions governing the two-sectional and three-sectional management structure (Art. 38-60 of the Regulation). Norms of annual and consolidated financial statement of SE only have reference nature. Moreover, separate provisions on termination of SE are included, but Regulations do not control bankruptcy questions.

Adoption of the statute of SE allows counting on realization of the idea of European Corporate Association, which has more than 40-year history. Owing to ECA, the trade unions in the EU for the first time got a chance to free trans-boundary merging and movement at the territory of the Cooperation, which became another step in strengthening common free market zone within the framework of the EU.

6.3.3. The European Cooperative Society (SCE)

The same opportunities are also available for cooperative organizations, which from now have a right to be established and reorganized on the whole territory of the EU in the form of a European Cooperative Society (SCE) (lat. – Societas Cooperativa Europaea). The legal status of SCE is based on the Community law. The EEA-wide laws governing the SCE legal form consist of two pieces of EU legislation:

a) Council Regulation (EC) № 1435/2003 of 22 July 2003 which established the SCE legal form;

b) Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees which sets out rules about representation and involvement of employees in SCE.

The SCE should have as its principal object the satisfaction of its members' needs and/or the development of their economic and/or social activities, in compliance with the following principles:

- a) its activities should be conducted for the mutual benefit of the members so that each member benefits from the activities of the SCE in accordance with his/her participation;
- b) members of the SCE should also be customers, employees or suppliers or should be otherwise involved in the activities of the SCE;
- c) control should be vested equally in members, although weighted voting may be allowed, in order to reflect each member's contribution to the SCE;
- d) there should be limited interest on loan and share capital;
- e) profits should be distributed according to business done with the SCE or retained to meet the needs of members;
- f) there should be no artificial restrictions on membership;
- g) net assets and reserves should be distributed on winding-up according to the principle of disinterested distribution, that is to say to another cooperative body pursuing similar aims or general interest purposes.

According to art. 1 Regulation № 1435/2003, a cooperative society may be set up within the territory of the Community in the form of a SCE on the conditions and in the manner laid down in this Regulation. The subscribed capital of an SCE shall be divided into shares. The number of members and the capital of an SCE shall be variable. Unless otherwise provided by the statutes of the SCE when that SCE is formed, no member shall be liable for more than the amount he/she has subscribed. Where the members of the SCE have limited liability, the name of the SCE shall end in "limited". An SCE shall have as its principal object the satisfaction of its members' needs and/or the development of their economic and social activities, in particular through the conclusion of agreements with them to supply goods or services or to execute work of the kind that the SCE carries out or commissions. An SCE may also have as its object the satisfaction of its members' needs by promoting, in the manner set forth above, their participation in economic activities, in one or more SCEs and/or national cooperatives. An SCE may conduct its activities through a subsidiary. An SCE may not extend the benefits of its activities to non-members or allow them to participate in its business, except where its statutes provide otherwise.

The SCE shall have legal personality. The SCE may be formed as follows:

- a) by five or more natural persons resident in at least two Member States;
- b) by five or more natural persons and companies and firms within the meaning of the second paragraph of article 48 of the Treaty and other legal bodies governed by

public or private law, formed under the law of a Member State, resident in, or governed by the law of, at least two different Member States;

c) by companies and firms within the meaning of the second paragraph of Article 48 of the Treaty and other legal bodies governed by public or private law formed under the law of a Member State which are governed by the law of at least two different Member States;

d) by a merger between cooperatives formed under the law of a Member State with registered offices and head offices within the Community, provided that at least two of them are governed by the law of different Member States,

e) by conversion of a cooperative formed under the law of a Member State, which has its registered office and head office within the Community if for at least two years it has had an establishment or subsidiary governed by the law of another Member State.

A Member State may provide that a legal body the head office of which is not in the Community may participate in the formation of the SCE provided that legal body is formed under the law of a Member State, has its registered office in that Member State and has a real and continuous link with a Member State's economy.

The capital of the SCE shall be expressed in the national currency. The SCE whose registered office is outside the Euro-area may also express its capital in euro. The subscribed capital shall not be less than EUR 30 000. The laws of the Member State requiring a greater subscribed capital for legal bodies carrying on certain types of activity shall apply to SCEs with registered offices in that Member State.

The statutes shall lay down a sum below which subscribed capital may not be allowed to fall as a result of repayment of the shares of members who cease to belong to the SCE. The date laid down in art. 16 by which members who cease to belong to the SCE are entitled to repayment shall be suspended as long as repayment would result in subscribed capital falling below the set limit. Variations in the amount of the capital shall not require amendment of the statutes or disclosure.

The subscribed capital of the SCE shall be represented by the members' shares, expressed in the national currency. The SCE whose registered office is outside of the Euro-area may also express its shares in euro. More than one class of shares may be issued. The statutes may provide that different classes of shares shall confer different entitlements with regard to the distribution of surpluses. Shares conferring the same entitlements shall constitute one class. The capital may be formed only of assets capable of economic assessment. Members' shares may not be issued for an undertaking to perform work or supply services.

Shares shall be held by named persons. The nominal value of shares in a single class shall be identical. It shall be laid down in the statutes. Shares may not be issued

at a price lower than their nominal value. Shares issued for cash shall be paid for on the day of the subscription to not less than 25 % of their nominal value. The balance shall be paid within five years unless the statutes provide for a shorter period. Shares issued otherwise than for cash shall be fully paid for at the time of subscription.

The law applicable to public limited liability companies in the Member State where the SCE has its registered office, concerning the appointment of experts and the valuation of any consideration other than cash, shall apply by analogy to the SCE. The statutes shall lay down the minimum number of shares which must be subscribed for in order to qualify for membership. If they stipulate that the majority at general meetings shall be constituted by members who are natural persons and if they lay down a subscription requirement for members wishing to take part in the activities of the SCE, they may not make membership subject to subscription for more than one share.

When it considers the accounts for the financial year, the annual general meeting shall by resolution record the amount of the capital at the end of the financial year and the variation by reference to the preceding financial year.

At the proposal of the administrative or management organ, the subscribed capital may be increased by the capitalization of all or part of the reserves available for distribution, following a decision of the general meeting, in accordance with the quorum and majority requirements for an amendment of the statutes. New shares shall be awarded to members in proportion to their shares in the previous capital.

The nominal value of shares may be increased by consolidating the shares issued. Where such an increase necessitates a call for supplementary payments from the members under provisions laid down in the statutes, the decision shall be taken by the general meeting in accordance with the quorum and majority requirements for the amendment of the statutes. The nominal value of shares may be reduced by subdividing the shares issued. In accordance with the statutes and with the agreement either of the general meeting or of the management or administrative organ, shares may be assigned or sold to a member or to anyone acquiring membership.

The SCE may not subscribe for its own shares, purchase them or accept them as security, either directly or through a person acting in his/her own name but on behalf of the SCE. The SCE's shares may, however, be accepted as security in the ordinary transactions of SCE credit institutions.

Art. 5 of the Regulation № 1435/2003 on the statutes of the SCE shall mean both the instrument of incorporation and, when they are the subject of a separate document, the statutes of the SCE. The founder members shall draw up the statutes of the SCE in accordance with the provisions for the formation of cooperative societies laid down by the law of the Member State in which the SCE has its registered office. The statutes shall be in writing and signed by the founder members. The law for the precautionary

supervision applicable in the Member State in which the SCE has its registered office to public limited-liability companies during the phase of the constitution shall apply by analogy to the control of the constitution of the SCE.

The statutes of the SCE shall include at least: the name of the SCE preceded or followed by the abbreviation “SCE” and, where appropriate, the word “limited”; a statement of the objects; the names of the natural persons and the names of the entities which are founder members of the SCE, indicating their objects and registered offices in the latter case; the address of the SCE’s registered office; the conditions and procedures for the admission, expulsion and resignation of members; the rights and obligations of members, and the different categories of member, if any, and the rights and obligations of members in each category; the nominal value of the subscribed shares, the amount of the subscribed capital, and an indication that the capital is variable; specific rules concerning the amount to be allocated from the surplus, where appropriate, to the legal reserve; the powers and responsibilities of the members of each of the governing organs; provisions governing the appointment and removal of the members of the governing organs; the majority and quorum requirements; the duration of the existence of the society, where this is of limited duration.

The registered office of the SCE shall be located within the Community, in the same Member State as its head office. A Member State may, in addition, impose on SCEs registered in its territory the obligation of locating the head office and the registered office in the same place (art. 6).

According to Art. 11 every SCE shall be registered in the Member State in which it has its registered office in a register designated by the law of that Member State in accordance with the law applicable to public limited-liability companies. The SCE may not be registered unless an agreement on arrangements for employee involvement pursuant to Art. 4 of the Directive 2003/72/EC has been concluded, or a decision pursuant to Art. 3 (6) of the Directive has been taken, or the period for negotiations pursuant to Art. 5 of the Directive has expired without an agreement having been concluded. In order for the SCE established by way of merger to be registered in a Member State which has made use of the option referred to in art. 7(3) of Directive 2003/72/EC, either an agreement pursuant to Article 4 of the Directive must have been concluded on the arrangements for employee involvement, including participation, or none of the participating cooperatives must have been governed by participation rules before registration of the SCE.

The statutes of the SCE must not conflict at any time with the arrangements for employee involvement which have been so determined. Where such new arrangements determined pursuant to Directive 2003/72/EC conflict with the existing statutes, the statutes shall be amended to the extent necessary. In this case, a Member State may

provide that the management organ or the administrative organ of the SCE shall be entitled to amend the statutes without any further decision from the general meeting. The law applicable, in the Member State where the SCE has its registered office, to public limited liability companies concerning disclosure requirements of documents and particulars shall apply by analogy to that SCE.

Publication of documents and particulars concerning the SCE which must be made public under this Regulation shall be effected in the manner laid down in the laws of the Member State applicable to public limited liability companies in which the SCE has its registered office.

The national rules adopted pursuant to Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State shall apply to branches of the SCE opened in a Member State other than that in which it has its registered office. However, Member States may provide for derogations from the national provisions implementing that Directive to take account of the specific features of cooperatives.

Notice of the SCE's registration and of the deletion of such a registration shall be published for information purposes in the "Official Journal of the European Union" after publication. That notice shall state the name, number, date and place of registration of the SCE, the date and place of publication and the title of publication, the registered office of the SCE and its sector of activity. The particulars shall be forwarded to the Office for Official Publications of the European Communities within one month of the publication.

6.3.4. New forms of European legal persons

European institutions and bodies propose several new legal forms of European legal persons. Each corporate legal form should be able to conduct its business while preserving its own *modus operandi*. Consequently, competition law cannot be based on a single, uniform model of entrepreneurship and must avoid discriminatory behaviour and value good practice at the national level. It is not a matter of establishing privileges but of promoting equitable competition law.

The Small Business Act (SBA) is an overarching framework for the EU policy on Small and Medium Enterprises (SMEs). It aims to improve the approach to entrepreneurship in Europe, simplify the regulatory and policy environment for SMEs, and remove the remaining barriers to their development.

The owners of listed enterprises are their registered shareholders. The shareholders buy and sell their shares on the public stock markets. Unlisted enterprises can be large or small but their shares (or participation shares or other stock), by definition, are not

quoted on the stock market. Nonetheless, in many cases unlisted enterprises are working towards a listing, especially if venture capital or private investors are involved. Even private SMEs can use stock market quotation when increasing their capital to fund business expansion.

6.3.4.1. Societas Unius Personae (SUP)

A *Societas unius personae* (SUP; single-person company) is a legal form for a single-member private limited liability company proposed by the European Commission.

The 12th Directive passed in 1989 keeps aloof from the EU directives on associations. This Directive obliged MSs to admit partnership with only one subject of civil law (physical or any other body corporate). In contrast to previous ones this directive contains just seven substantial assets and that is why it is an excellent pattern of market directives that the Treaty of Amsterdam urged to use more actively in the EU law. Based on the instruction about small and middle-sized enterprises approved by the Council in 1986 the 12th Directive provided an opportunity to establish single-member companies from January 1th, 1992. The main reason for passing this directive was the necessity to provide the EU private entrepreneurs with opportunities to limit their responsibility in commercial relationship.

However, Directive 89/667/EC was repealed by Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies.

A private limited liability company may be a single-member company from the time of its formation, or may become one because its shares have come to be held by a single shareholder.

The Commission attached great importance to simplifying and clarifying Community law so as to make it clearer and more accessible to the ordinary citizen, thus giving him new opportunities and the chance to make use of the specific rights it gives him. This aim cannot be achieved so long as numerous provisions that have been amended several times, often quite substantially, remain scattered, so that they must be sought partly in the original instrument and partly in later amending ones. Considerable research work, comparing many different instruments, is thus needed to identify the current rules. For this reason a codification of rules that have frequently been amended is also essential if Community law is to be clear and transparent.

6.3.4.2. European Mutual Society

Examples of cooperative entrepreneurship may be found in most sectors of activity. This type of entrepreneurship is characterised by a form of organisation based

essentially on the pooling of purchasing capacity, sales capacity and labour forces in order to meet the economic needs of the members of cooperatives.

‘A cooperative is an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise’ (The Cooperative Charter 1995).

Despite the fact that the legal definition of ‘cooperative society’ may embrace different situations in different Member States, legal practitioners recognise that cooperatives are organised under the ‘*intuitu personal*’ principle.

At EU level, cooperative societies are recognised under Article 48 of the TEC. The European Commission has a unit responsible for ‘crafts, small businesses, cooperatives and mutuals’, which pays particular attention to this type of society. The Council has recently adopted the Statute for a European Cooperative Society and the Directive supplementing the Statute with regard to the involvement of employees.

Depending on their ownership, enterprises of general interest can be public limited companies or joint ventures and can even take the legal form of a private enterprise. They can be multinational, national, or local, although most operate in the local or regional sphere. Their activities tend to focus on providing services of general interest, such as public transport, energy, water, waste management, communications, social services, healthcare, education, etc. Nevertheless, these enterprises can also be involved in commercial activities, provided that they comply with the directive on transparency (93/84/EEC). Where they operate in the general interest, their profits are re-invested in regional and local activities, thus making a major contribution to social, economic and regional cohesion. Enterprises that provide services of general interest are, as essential service providers, key players in boosting the economy in general, investing in key sectors that act as levers for the rest of the economy (electricity, telecommunications and their infrastructure, transport, etc.).

The Commission starts the work on approving European statute for European mutual societies. In the specific case of cooperatives it is obviously difficult to define a concept of shareholders’ equity that can be generally and indiscriminately applied, which could have negative and destructive effects on entrepreneurial diversity.

Documents and literature

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6.4. The review of national company law of EU States

Austria

Austrian company law is regulated by the Civil Code, the Act on Cooperatives 1869, the Act on shares 1965, the Act on specific civil rules for companies 1997, the Act on Limited Liability Companies 1906, the Act on the Court Register 1993, the Trade, Commerce and Industry Regulation Act 1994 and other regulations.

The legal status of the EEIG is regulated by the Act on the Implementation of Council Regulation on the establishment of a European Economic Interest Grouping and changes in the Company Register Act, the judicial officer of the law and court fees Act 1995.

The legal status of SE is regulated by the Act – the Total Legislation for the European Company Statute 2004.

Belgium

Belgian company law is regulated by the Company Code 1999 (hereinafter CompC), the Act of Non-profit Associations 1921, and other provisions.

An activity of an EEIG is based on the Act of 12 July 1989 laying down various measures pursuant to Regulation (EEC) № 2137/85 of 25 July 1985 on the establishment of a European Economic Interest Grouping, the Act of 17 July 1989 on economic interest groups, art. 839-873 CompC.

The legal status of a SE is regulated by the Royal Decree of 1 September, 2004, art. 439, 744 and f. of the CompC, etc.

Croatia

Company law in Croatia is governed by the Companies Act 1993, the Court Register Act 1995, the Act on the Takeover of Joint Stock Companies 2007, and other provisions.

The act regulates different types of business forms and contains rules on groups of companies, mergers, divisions, transformations of companies and the legal status of foreign companies. The Companies Act was last amended in 2003-2013 to reflect recent developments in EU company law.

The disclosure requirements, validity of obligations and grounds for nullity for public and private limited liability companies are regulated by the Court Register Act 1995, the Companies Act and the Accounting Act 2007.

EEIGs and SEs are regulated by the Act on Introducing the Societas Europaea and European Economic Interest Company 2007. The Act made significant amendments to the Companies Act and the Takeover Act. Most of the provisions of these acts came into force immediately, but some provisions came into force on the day of Croatian accession to EU (art. 47 Regulation 2157/02). This Act introduces these two legal entity forms into the Croatian legal system, but its application has been postponed until Croatia achieves full membership of the EU.

Czech Republic

The company law of the Czech Republic is regulated by the Civil Code 2012 and other acts. For example, the function of the state-owned enterprises is regulated by the Act on the state-owned enterprises 1997. The activity of European legal persons in the Czech Republic is regulated by the Act on the European companies 2004 and the Act on the EEIG 2004.

The issues of the education and activities of commercial companies are regulated by the Civil Code (hereinafter CiC). The company (obchodní společnost) is a legal

entity established in order to do business, if the EU law or the law do not provide otherwise. Thus, the limited liability companies and joint stock companies can be created for the other purposes.

Denmark

The main document about the formation and the activity of legal persons in Denmark is the Act on public and private limited companies 2009 (the Danish Companies Act). This Act is a joint law covering both the Danish Public Companies Act and the Danish Private Companies Act.

Germany

The main documents regulating the establishment and operation of enterprises in Germany are the German Civil Act (hereinafter GSU) 1896 (as amended 2012) and the German Trade Code (hereinafter TC) 1897 (as amended 2011).

The GSU regulates private law relations on the territory of the Federal Republic of Germany; the TC is the main source of commercial law which regulates relations between merchants. A merchant (Kaufmann) means a natural or legal person, registered with the commercial register and engaged in one of the commercial activities of the TC – purchase and sale of goods, handling and processing of goods for other persons, insurance on a reimbursable basis, banking operations, the transportation of passengers and goods and etc.

The GSU applies subsidiarily (if there are no relevant rules of commercial law) in trade relations. The TC contains provisions about some of the organizational-legal forms of enterprises (open trade company, limited partnership and other), regulates the issues of decision making and accountability in societies and establishes additional requirements in relation to insurance companies, credit institutions and associations.

The operation of the legal persons in Germany is regulated by special acts (“On Societies with Limited Liability” 1892 (as amended 2008), “On Joint Stock Companies” 1956 (as amended 2008), “On the Supervision of Insurance Companies”, 1901 (as amended 1991) and others). European JSC (die Genossenschaft) is regulated by the Act “On Communities” 1889 (as amended 2006).

In 2006 in Germany important changes were made in registration activities. In particular, the Acts “On Electronic Commercial Register and the Register of Cooperatives and Business Registration”, “On the Modernization Law LLC and Combating Violations” were adopted. According to these acts all registration information is kept in separate Companies Register (Unternehmensregister).

Estonia

The status of legal persons in Estonia is regulated by the Commercial Code 1995, the General Part of the Civil Code Act 2002, the Law of Obligations Act 2001, the Register of Economic Activities Act 2004 etc.

A European Economic Interest Grouping. In Estonia there is the Council Regulation (EEC) № 2137/85 “European Economic Interest Grouping” Implementation Act 2000. The EEIG is subject to the provisions of the Constitution and other national acts, regulation must be assumed if the domestic law or the ruling provides an opportunity to regulate certain areas under national law. The legal status of the EEIG is covered by the ComC.

A European Company. In Estonia there is the EU Council Regulation (EC) № 2157/2001 on “European Company (SE)” Implementation Act 2004. The SE shall be subject to this Act and other national regulations must be adopted if the domestic law or the ruling provide an opportunity to regulate certain areas under national law.

Finland

Finnish company law is based on the Act on Limited liability companies 2006, the Restructuring of Enterprises Act 1993, the Securities Markets Act 2012, the Cooperatives Act 2013, the Trade Register Act 1979 etc.

France

French company law is based on the Commercial Code, the Civil Code, the Monetary and Financial Code, etc.

The activity of the EEIGs (Groupements européens d'intérêt économique) is regulated by the Act № 89-377 of 13 June 1989 on European economic interest groups and amending Ordinance № 67-821 of 23 September 1967 on the economic interest groups.

The Societas Europaea (SE) was introduced into French law by Act 2005, called the Societas Europaea or SE.

Hungary

The primary act in Hungarian company law is the Act IV of 2006 on Business Associations (Companies Act). The activity of Hungarian companies is also regulated by the Act V of 2013 on the Civil Code of Hungary. The provisions of the CiC apply in respect of the financial and personal relations of business associations and their members (shareholders) not regulated by the CA. The procedures on founding companies are primarily governed by Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings (Company Procedures Act).

The activity of the EEIG (Európai gazdasági egyesülés) in Hungary is defined by the Act XLIX of 2003.

The legal status of SE (Európai Részvénytársaság, ERT) is regulated by the Act of XLV on the European company 2004.

Ireland

The legal status of legal persons in Ireland is regulated by the Companies Acts 2014, the Limited Partnerships Act 1907, Investment funds, companies and miscellaneous provisions Act 2006 etc.

The activity of an EEIG in Ireland is defined by the European Communities (European Economic Interest Groupings) Regulations, 191/1989.

The legal status of Societas Europaea (SE) in Ireland is regulated by the European Communities (European Public Limited Liability Company) Regulations 2007 (Statutory Instrument No. 21/2007).

Italy

The legal status of legal persons in Italy is regulated by a large number of acts. The most important of them are: Civil Code and the Decree of the President of Italy № 361/2000.

The activity of the EEIG is regulated by the Legislative Decree of 23 July 1991, n. 240 – Rules for the application of Council Regulation n. 85/2137 / EEC on the establishment of a European Economic Interest Group – EEIG, pursuant to art. 17 of the Act of 29 December 1990, n. 428 1991.

The legal status of SE is defined by the Legislative Decree of 19 August 2005, N 188 – the Implementation of Directive 2001/86/EC supplementing the Statute of the European Company.

Malta

The legal status of legal persons in Malta is regulated by the Companies Act 1995, Commercial Code, the Trading Licenses Act 2002, the Cooperative Societies Act 2002, etc. Shipping Companies may elect to be regulated by the CA – in default such shipping companies are regulated by the Merchant Shipping (Shipping Organisations – Private Companies) Regulation 2004.

The activity of EEIGs is regulated by the Companies Act (European Economic Interest Grouping) Regulations 2004.

The legal status of the Societas Europaea is defined by the Employee Involvement (European Company) Regulations 2004.

Lithuania

The legal status of legal persons in Lithuania is regulated by Civil Code 2000, the Companies Act 2000 etc.

The activity of the EEIGs is regulated by the Act amending the Act on Companies of the Republic of Lithuania 2003.

The legal status of the SEs is defined by the Act on European Companies 2003.

The Netherlands

The concept “legal entity” is determined by the Civil Code of the Netherlands. The activity and the legal status of SEs and EEIGs are regulated by the CiC and EU-documents.

Poland

The legal status of legal entities in Poland is determined by: a) the system of statutory instruments; b) the license system; c) specific requirements concerning some legal entities (joint-stock companies, limited liability companies, trade unions etc.).

Under the Code of Trade Companies 2000 (hereinafter referred to as the Code) in Poland legal entities are classified according to their ownership. They are: a) legal entities owned by the state (the treasury, state-owned companies); b) legal entities owned by the local government (the municipal powers, districts, provinces); c) legal entities owned by private individuals and companies. European companies also operate in the form of a limited liability company. Their status is determined in the Guideline 2005/56 the EU «On Transborder Consolidation of Business Associations, Based on Pooling of Capitals», on October 26, 2005.

Slovenia

The main normative acts regulating the relations in business are the CiC 2007 and the Act on the Commercial Companies 2006.

Spain

The legal status of legal persons in Spain is regulated by a large number of acts. The most important of them are: the Civil Code, the Code of Commerce, the Royal Legislative Decree 1564/1989, Royal Legislative Decree 1/2010 (the Corporate Enterprises Act), Business Registry Regulations 1996 etc.

The Royal Legislative Decree 1564/1989 approves the consolidated text of the Joint Stock Companies Act. This Decree stems from the authorisation set out in the

seventh final provision of Act 3/2009 of 3 April on structural changes in companies, enabling the Government to proceed, within twelve months, to consolidate the legislation listed in that provision in a single text, under the title the Corporate Enterprises Act.

The Royal Legislative Decree 1/2010 approving the consolidated text of the Corporate Enterprises Act. The consolidated text includes: a) the contents of Book II, Title I, Chapter 4 of the CCom on limited liability companies; b) Royal Legislative Decree 1564/1989, approving the consolidated text of the Joint Stock Companies Act; c) Limited liability company Act 2/1995; d) Title X of Securities Exchange Act 24/1988 on listed joint stock companies.

A European Economic Interest Grouping is regulated by the Act 12/1991 of 29 April on Economic Interest Groupings.

A European Company in Spain is governed by Act 19/2005. It has the aim to implement this specific mandate for European companies in Spain.

Sweden

Sweden does not have a Civil Code. As early as in 1734 the Swedish Parliament approved a new enactment for the Realm of Sweden. This act, which is actually a collection of codes, was confirmed by the Swedish king on January 23, 1736 and has been applied ever since. It is called the Act of 1734. One of the most used law collections published annually, the Norstedt Law Book, has used the layout of the Act of 1734 by trying to sort in new enactments under the old codes. The Act of 1734 was divided into a number of codes. Through the years certain new codes have been included in the old system, the last one being the Environmental Code of 1998. Today 13 codes will be found in the Norstedt Law Book.

The Company Names Act of 1974 contains provisions governing the including of company names in the register.

The United Kingdom

On 1 October 2009 the implementation of a new Companies Act 2006, which superseded the CA 1985, was fully completed in the United Kingdom.

The key provisions introduced by this Act are:

- (a) The Act codifies certain existing common law principles, such as those relating to directors' duties;
- (b) It implements the relevant European Union Directives;
- (c) It applies a single company law regime across the United Kingdom, replacing the two separate systems for Great Britain and Northern Ireland.

The activity of an EEIGs and Societas Europaea is regulated by the Companies Act 2006 and the relevant legislation:

- i) Statutory Instrument 2014/2382 “The European Economic Interest Grouping and European Public Limited Company (Amendment) Regulations” 2014;
- ii) European Public Limited – Company (Amendment) Regulations 2009 (Statutory Instrument No 2009/2400);
- iii) European Public Limited-Liability Company Regulations 2004 (Statutory Instrument No. 2004/2326); d) Statutory Instrument 1989/638.

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CHAPTER 7. THE EUROPEAN COMPETITION LAW

As the result of studying the material of this chapter students must:

Know:

- basic provisions of the market competition policy;
- conceptual basics of competition law;
- basic sources of competition law;
- principles of competition law;
- main spheres of competition;
- institutions regulating competition;
- consequences of the infringement of the competition law;
- judicial practice and procedures of dispute settlements in the competition sphere;
- the WTO law regulation of the competition;

Be able to:

- identify the violation of competition law;
- qualify the actions of the violation of competition law;
- search corresponding legal means;
- apply laws of competition for the assessment of the situation of the violation of competition law;

Acquire:

- skills of analysis of the legal documents in the sphere of competition law;
- skills of application of the legal documents in the sphere of competition law for practical purposes;

Understand:

- the meaning of the terms used in competition law;
- economic and legal basis of the competition rules;
- the role of the lawyer in competition protection;

Examine:

- the features of competition protection in the sphere of external economics.

7.1. EU Competition Law: an overview

7.1.1. EU Competition Law: introduction

The basis of the legal regulation of economic relations in the EU is four freedoms of the common market: freedom of movement of goods, services, persons and capital. Along with these substantial freedoms determining the EU as an integration organization there are other freedoms establishing the market economy in Europe, for example, the freedom of market competition.

It is characteristic for integration process to put the legal regulation on the supranational level. European competition law takes its origin in the 1960s. Along with that, the aims of competition policy are left immutable: establishment of the system of fair competition on the market; the approximation of the national legislation of the Member States; increase in the competitiveness of production.

EU Competition law is one of the most important sections of the EU legal systems, since fair competition is a substantial premise for the common market.

Peculiarity of competition law of the EU is its extraterritorial character. Its legal effect exceeds the boundaries of the EU and encompasses the states outside the union. It takes part in the situation when a legal entity registered out of Europe fixes the prices, or achieves dominant position on the market. However, there is a problem of implementing the Commission's decisions addressed to the non-European legal entities.

7.1.2. The EU laws in the sphere of competition

The main purpose in the sphere of competition protection is the creation of the conditions for functioning of the common internal market. In this regard the principle of compatibility with internal market was laid in the competition law of the EU.

According to Art. 3.3 of the TEU, the common market was established for the achievement of economic and social aims. According to Art. 26.2 of the TFEU, the internal market involves the area without internal frontiers in which the free movement of goods, persons, services and capital is possible.

Aspiration for the establishment of the common market determined the harmonization of the competition law, which is fulfilled at the level of primary law and secondary law by the adoption of directives and regulations.

The sources of this branch of law are the TEEC 1957, the Treaty of Maastricht 1992; the Amsterdam Treaty 1997; the Nice Treaty 2001; the TFEU 2007; Documents of the EU Institutions (regulations of the Council and directives of the Commission, decisions of the ECJ etc.).

The legal basement for the system of European competition law was filled by the TEEC of 25 March 1957. The concrete provisions on the EU competition were pro-

vided in Art. 101 and 102 of the TFEU. The chapter “Rules of Competition” in the TFEU is aimed at preventing illegal restriction of the competition in order to support effective competition.

Rules of competition law incorporated in the treaties were further developed in a range of prescriptions of the Council of the EU. The most important are Regulation № 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty; Regulation № 19/65/EEC of 2 March of the Council on application of Art. 85 (3) of the Treaty to certain categories of agreements and concerted practices (nowadays – art. 101); Regulation № 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

The regulations and directives establish the following: a) provisions on fines and periodical penalty payments, b) the concrete rules of implementation of the provisions of the Treaty, providing the effective supervision and simplification of administration; c) spheres of the implementation of the provisions; d) interrelation between national laws and provisions of the regulations.

Rules of the protection of competition also originated in art. 3 (g) of the Treaty of Nice, which provides for the activities of the Community for the establishment of the system of prevention of the violation in the internal market. Article 4 stipulates that coordination of economic policy of the Member States in the internal market and determination of common purposes shall be led in accordance with the principle of the opened market economy and free competition. After the signing of the Treaty of Nice, the EU competition law in 2002 underwent some reforms. Particularly, the new Regulation of 1 May 2004 replaced the first provisions of the Regulation № 17.

Other three documents, two of which were published in 2001, should be added to the listed sources of the EU Competition law.

First, one of these documents is the Green book on the consumer protection in the EU, which is dedicated to problems of protection of consumers due to commercial activities of the legal entities.

Second, the prescription on the promotion of the goods on the market, developed on the basis of the Green book of the commercial communications on the internal market 1996. It is aimed at preventing monopoly position of the legal entities.

Third, the Green book published by the Commission in 2005 with the title Claims for damages caused by violation of the antimonopoly legislation of the EU.

Currently the main source of the EU competition law is the TFEU (Art. 3 (16), 37, 101-109, 207), which contains primary rules of competition and prohibitions of their violations.

Finally, the ECJ practice on the matters of the market competition protection, being the precedent for the adoption of the decision in the legal matters, forms the source of the EU competition law.

ECJ controls the compliance of the Decisions of the Commission with TFEU, and can modify them. The corresponding judicial acts are adopted in the cases of consideration of complaints on the Decisions of the EU Commission, which fulfills controlling and coordinating functions in this field.

Therefore, the market competition policy in the EU is directed to: the support of the opened and common market; ensuring balanced competition; protection of the fair competition; achievement of the social aims; strengthening the competitiveness of the EU producers.

7.1.3. Implementation of the international legal rules of competition in the EU law

In accordance with Uruguay round of the WTO, the new legal rules in field of anti-dumping regulation were adopted in the EU (Council Regulations № 384/96, № 905/98, Council Regulations making amendments № 2238/2000, 1972/2002, 461/2004 and 2117/2005) and compensatory measures (Council Regulation № 2026/97, Council Regulations making amendments № 1973/2002 and 461/2004). Concerning the rules of imposition of countervailing duties, there is Regulation № 2026/97 on protection against subsidized imports from the third countries, which practically reproduces the provisions of the WTO code of subsidies. These regulations provide the legal basis for the application of compensatory duties as the means against subsidies, in other words, unfair practice from the point of governmental support of production, export and transition of the commodities produced in the free circulation in the EU and causing the damage for the EU. Implementation of the protective measures is established in Regulation № 3285/94 as one of the procedures of import control of goods in the EU. Through these legal provisions the EU implemented international treaties adopted in the frame of GATT: the Agreement on implementation of Article VI of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures.

Previously mentioned regulations differ mainly in the rules of the fee calculation; questions considering damage and rules of procedure are governed identically. Sometimes anti-dumping and compensation measures overlap. In this situation in accordance with art. VI GATT, EU regulations prohibit implementation of both of these measures to the same commodity. In practice the EU, as a rule, applies measures of anti-dumping protection in such cases. These regulations encompass import of all commodities except textiles, for which deliveries are regulated by a separate regulation, and agricultural products are subject to quantitative restrictions in the framework of the EU common agricultural policy (CAP).

These rules extend to third countries import except Albania, countries of the Commonwealth of Independent States (CIS) and some Asian countries (Northern Korea,

China, Mongolia and Vietnam), in relation to which there are special rules in force, established by bilateral treaties within the scope of Regulation № 519/94. The EU actively uses the entire arsenal of measures to protect the domestic market, although their number varied some years. In recent years the EU has almost abandoned the introduction of new special protection measures, although some previously entered ones remain.

The EU Member State has to inform the Commission of all the cases where there is an unfavorable trend for imports into the EU market and may require the introduction of measures to control imports in the future. Along with that consultations with the Commission can be initiated by both the country and the Commission itself. For such consultations, a special Advisory Committee consisting of representatives of individual EU countries and the representative of the Commission as Chairman is appointed.

7.1.4. Spheres of the market competition in the EU

In addition to traditional areas of private law, the market areas of competition in the EU are transport, energy, postal services and telecommunications. The admission of private companies to this area characterizes the process of liberalization of economic activities. Liberalization implies increased competition in the relevant sectors of the economy, and requires no additional regulation, as public services should be publicly available to consumers. Public services are regulated by the rules of Art. 86 of the Treaty of Nice.

An important market area of competition is advertising, which is regulated by Directive 84/450/EEC on comparative and misleading advertising passed in 1984. In accordance with Art. 7 and Art. 2 (2) of the Directive, advertising which can deceive the expectations of the consumer, mislead him, as well as adversely affect the commercial activities of the recipients of advertising, is not permitted.

There were also adopted several directives on advertisement on the market of media-services. Particularly, there are Directives № 89/552/EC and 97/36/EC on television advertising, Directive № 89/552/EC on Television broadcasting and Directive № 93/98/EC on legal protection of data bases.

Regulation of INTERNET advertising in relation to electronic Commerce is based on Directive 2000/31/EC. This Regulation provides a certain method of transmitting advertising messages as a guarantee against unfair advertising.

Of particular note is the Directive № 2005/29/EC of the European Parliament and of the Council against unfair commercial practices. The Directive provides for the establishment in the EU of a single legal mechanism of prevention of the unfair commercial activities in the form of misleading advertising, comparative advertising, advertising a particular product group, advertising on TV, on the Internet and through

other media. However, the scope of this Directive is limited. It applies only to the relationship between businesses and consumers.

7.1.5. The EU regulatory institutions in the sphere of market competition

The EU regulatory institutions in the sphere of market competition are the European Commission, the European Parliament, the Council of the EU, and the ECJ.

The central place among these bodies belongs to the Commission, which has the function of monitoring the application of the principles and rules restricting monopolistic practices (Art. 81 and 82 of the TFEU, Regulations № 1/2003, № 139/2004).

The competence of the Commission is to assess the planned deals involving companies of several countries – the EU members, as well as the documents on the establishment of joint enterprises, which pursue the aim of the concentration of production. Upon review of these projects, the Commission has the right to authorize the implementation of the related transactions, to establish the conditions for their implementation, as well as to impose a ban on them in the event of non-compliance with the principles of the common market.

It should be noted that the Commission is largely preventive in nature and deals with the investigation of cases of alleged violations of competition law on the claim of a State or on its own initiative in cooperation with the competent authorities of the Member States.

A part of the Commission is the Directorate-General (DG) for Competition, which defines competition policy at the level of EU institutions. Ongoing work of the Directorate is carried out in four main areas: measures against anti-competitive behavior of enterprises, production control, concentration, control of natural monopolies and public sector companies, state aid control.

According to the established facts of violation of Competition Law, the Commission formulates proposals to the Council of the EU and national authorities to halt monopolistic practices. Among the authorities responsible for competition policies in the EU there are law-making bodies, namely the European Parliament and the Council of the EU, while the ECJ performs a law enforcement function.

The regulatory competence was shared between EU authorities and national competition authorities and courts. National enforcement bodies are divided into specialized and non-specialized. Specialized ones are the antitrust authorities, unspecialized ones are police and the courts.

The functions of the European Parliament in the field of competition regulation define its general tasks and powers. Thus, this institution shall discuss in open session the annual general report submitted to it by the European Commission (Art. 200 of

the Rome Treaty), it may make inquiries to the European Commission, to which it is obliged to provide answers (Art. 140 of the Rome Treaty, the European Parliament Rules of Procedure, Art. 42-44), it serves as an advisory body for the adoption of appropriate regulations and guidelines (Art. 103 TFEU, Art. 192 of the Rome Treaty). Thus, the European Parliament performs controlling and monitoring functions in the regulation of competition.

The Council adopts legal acts – regulations and directives – in the field of market competition (Art. 202 of the Rome Treaty; Art. 103 of the TFEU). Among them, the most important are the following: Regulation № 17 of February 6, 1962 – the first regulation on the application of Art. 85 and 86 of the Treaty on the Community; Regulation № 4064/89 of 21 December 1989 on the control of concentration activities of enterprises; Regulation on the application of Art. 81 (now Art. 101 of the TFEU) and Article 82 (now Art. 102 of the TFEU).

The ECJ settles disputes in the field of competition and monitors compliance of the decisions of the Commission with the provisions of the TFEU (Art. 220, 230 of the Rome Treaty, Art. 108 of the TFEU). There are several examples of cases in which the decisions of the Commission were contested: “Enichem Anie v. Commission” and “Shell v. Commission”. In these cases the ECJ defined the concept of “establishment”, which wasn’t adjusted in the EU legislation, to fill the gaps essential for the regulation of competition.

In the case of “Consten and Grundig v. Commission” the ECJ invalidated the provision of a German company’s exclusive rights to distribute Grundig company products on the French market.

7.1.6. Legal measures of the protection of the market competition in the EU

In the EU law there are four main measures for the protection of competition:

1. The prohibition of cartel agreements. In accordance with Art. 101 of the TFEU, all agreements between undertakings, decisions by associations of enterprises and concerted practices are prohibited. The conditions for the application of Art. 101(1) are: a) the negative impact of the collusion on trade between Member States; b) restriction and distortion of competition, if they are the purpose of the collusion and of its consequences.

The main criteria for the negative effects are the restrictions of trade flows in the domestic market and the negative impact on trade between Member States.

The objectives of anticompetitive agreements are identified by analyzing the contents of horizontal agreements (between producers) and vertical ones (between producers and distributors).

Horizontal agreements are the most common form of monopolistic practices, and are concluded between enterprises which are at the same level of commodity production and marketing. Examples of such arrangements are the agreements between producers of steel or energy. The subject of the horizontal agreements (cartels) is usually price-fixing, limiting the volume of production, the section of the markets, etc. The consequences of cartel agreements have negative impact on economic development, leading to higher prices, they restrict production and deter innovation.

Vertical agreements are concluded between enterprises at different levels of commodity production and marketing. Examples may be vertically integrated chemical companies, community companies producing complex things, dealer sales network. Vertical agreements generally do not distort competition, and are welcomed in many states as enhancing process efficiency.

According to the opinion of the Commission, horizontal agreements are of greater threat to competition than vertical ones.

In relation to companies which enter into cartel agreements, the “leniency policy” is being applied, the essence of which is that the company has informed the European Commission about its involvement in the cartel, is exempted from fines or gets a reduction in the fines received. This practice is very successful in helping to deal with anti-competitive behavior in the market.

2. The prohibition of abuse of a dominant position. Article 102 of the TFEU prohibits companies to abuse their dominant position. The abuse can be a direct or an indirect fixing of unfair purchasing or selling prices or unfair trading conditions; reducing the volume of production, marketing and technical development to the prejudice of consumers; applying unequal conditions for similar transactions with other trading parties; contracts with the consent of other parties with additional obligations, which by their nature or according to commercial custom, are not relevant to the subject matter of the contract. The subject of the violation can be a single or several enterprises. Several companies often jointly occupy a dominant position, in this case we mean a group of legally independent but economically related companies (group of companies).

A dominant position on the market is proved by identifying the relative share of the monopoly on the market, by establishing the existence of a contractual relationship with the monopoly’s potential competitors; a special system of relationships with customers and suppliers that does not meet the principles of fair competition in the relevant market. When determining a dominant position on the market, the financial capacity of a monopolist, lack of competition, the presence of a potential dependence on third-party monopoly are taken into account.

In accordance with the interpretation of the ECJ (the interpretation given in the Vgl. Chiquita-Bananen essential facilities doctrine), in case a company dominates the market, it has the ability to use independent market strategies, that is, the entity has the ability to promote uncontrolled competition. The EU Commission may assign penalties for the violation of Article 102. However, abuse of dominant position is prohibited in cases where it can cause harm to trade between Member States. Therefore, the facts of abuse are determined by the law of the State.

3. Control of companies merger.

The Treaty establishing the EEC did not mention the merger regulation. Only in 1989 Regulation № 4064/89 was adopted by the Council (EEC), defining the powers of EU institutions in the field of control of mergers business operations. In 2004 a new document – the Council Regulation (EC) N. 139/2004 came into force.

The entire competence on the subject was given to the European Commission, whose decisions can be appealed to the Tribunal of First Instance with a possible appeal to the Court of Justice of the European Union.

Based on Regulation 139/2004 on merger control business enterprises, the control of the merger is carried out by the European Commission. Merger of enterprises refers to the union of two or more independent companies, as well as taking control of one company over another. The Regulation is designed to stimulate the process of creating large commercial companies with international capital structure. The rules of the Regulation are applicable to mergers which are relevant for the whole Union. Its main purpose is to implement the ownership control of the companies, which involves a breach of the competition rules.

The criteria under which the merger of enterprises is subject to the control of the Commission are as follows: total annual turnover in the global market of over 5 billion euros or an annual turnover of at least two companies in the EU single market of over 250 million euros. At the same time from under the control of the EU are excluded businesses more 2/3 of the annual turnover of which in the EU market accounted for one state of the EU.

The novelty of the regulations in 2004 was the position that the rules were to be applied in a number of cases, in particular if the aggregate of annual turnover of the enterprises on the world market exceeds 2.5 billion euros or if the turnover of the enterprises in each of at least three of the EU Member States is more than 100 million euros.

Merger of enterprises falling under the criteria listed above is subject to control by the Commission for compliance with the requirements of the common market. The main factor influencing the Commission's decision is, according to the regulations,

strengthening of a dominant position on the market which can greatly impede free competition.

All plans of mergers which are subject to EU regulations on mergers should be presented to the Commission, which can make one of three decisions: that the merger is not subject to regulation or the merger does not pose a serious threat to the competition and can be found to comply with the principles of the EU, internal market or the merger raises serious doubts. In the latter case, the proceedings are initiated, which could lead to the prohibition of the merger or what happens more often, to the establishment of significant restrictions and requirements in relation to the companies involved in the merger.

The EU Commission has developed a theory of the extraterritorial effects of the Regulation, according to which a notice should be submitted to the Commission on transactions, as well as their co-ordination should be carried out by the Commission in respect of any concentration having a Community dimension, exceeding the thresholds set by the Rules of the regulations.

For example, the Commission decided on the establishment of conditions for the execution of transactions in cases Boeing/McDonnell Douglas, World/Com/ MCI and the United Airlines/US Airways. Practically, this means that business entities intending to carry out concentration and having a certain amount of turnover in the world and the EU are required to submit advance notice of the transaction and to obtain the Commission's agreement on it.

The Commission may also impose a ban on transactions of companies located outside the EU, as it was in the cases of Gencor/Lonrho, WorldCom/Sprint and Electric/Honeywell. Considering Electric/Honeywell case, the Commission imposed a ban on a merger between the two US companies, the resolution on which had already been issued by the competent authorities of the United States.

Mergers like equal cooperation while preserving the legal independence of the company without the establishment of a single control is recognized as lawful. All plans of mergers which are subject to EU regulations on mergers must first be submitted to the Commission, which may make one of three decisions: that the merger is not subject to regulation or the merger does not pose a serious threat to the competition and can be found to comply with the principles of the EU internal market or the merger raises serious doubts.

In the latter case, the proceedings are initiated, which could lead then to the prohibition of the merger or to the establishment of significant restrictions and requirements in relation to the companies involved in the merger, which happens more often.

4. Control of state aid. The state aid implies the measures taken by State parties independently of each other, in order to achieve national, social or other purposes. At

the same time, States provide enterprises or other persons with advantages in order to encourage them to carry out actions aimed to achieve these objectives. Articles 107-109 of the Treaty of Lisbon define the general rules for monitoring the implementation of state aid, which are developed in regulations and EU directives. The more detailed information on the rules of state aid is set out in the consolidated version of the “Regulation on the provision of state aid to small and medium-sized enterprises”, published by the European Commission in 2009, as well as in the “Handbook on the rules of state aid”, published by the European Commission in 2008. General rules for the implementation of the state aid control are laid down in Art. 107, 108 and 109 of the TFEU, and were further developed in the EU regulations and directives.

A fundamental condition for the state aid is its provision to economic sectors and regions in the case of urgent need, under certain conditions, and to make them competitive. The main provisions of the state aid to businesses are set out in Art. 107-109 of the TFEU. The Commission was granted exclusive authority to monitor compliance with the ban on the provision of the state aid, as well as the authority to oblige the Member States, in the case of violation of the ban, to stop illegal activities and to reimburse the sums that have been illegally paid to the beneficiaries under the aid scheme without coordination with the Commission.

In the meaning of Article 107 “aid” is “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods. The main criteria for determination of the compatibility of state aid on the common market are: a) the selectivity of state aid, and b) the provision of Member States with the benefits of misconduct from a commercial point of view, and c) the involvement of public funds; g) the result of state aid is distorting competition; d) state aid has an effect on trade within the EU.

Assignment of the assistance is possible only by the decision of the Commission. The refusal of the Commission can be overcome only by a unanimous decision of the EU Council in emergency situations. In terms of control the Commission is given the large margin of appreciation on the application of sanctions for violation of the rules for granting state aid.

However, in some cases, state aid is inevitable. Hence, the exceptions to the general rule are provided. These exceptions are targeted, i.e. the purposes, for which the state aid shall be allocated, are directly specified.

There are two types of the state aid:

1) unconditional (aid directed for these purposes, is always considered compatible with the competition rules). The unconditional aid is the type of assistance which does

not have a direct impact on the market, or the compensation for damage caused by natural disasters;

2) conditional (in this case it is very important to estimate the risk of damage to the functioning of the common market). Conditionally permitted aid generally contains the assistance which aims to align individual lagging areas or sectors of the economy, as well as assistance in the development of culture.

For these types of aid there is the prerequisite that the aid should not have a negative impact on competition in the market or should be supported by a reasonable balance between the interests of the market and society. Conditionally permitted aid can be provided only after the permission of the Commission.

Currently the main areas of State aid are: climate change and environmental protection; research, development and innovation; restructuring firms in a difficult situation; assistance to small and medium-sized enterprises; measures to combat unemployment; training; risky investments; services of general economic interest.

To obtain the approval of the European Commission on state aid on any of these areas it will also be required to provide evidence identified by the Commission in the “framework regulations”, “guidelines” and “exceptional common explanations.” It extends the functionality of very limited treaties and EU directives. There is a threshold below which aid may be granted (“minimal assistance” – up to 200 thousand euros for three years.).

7.1.7. Violations of the competition rules

The following main violations of competition rules are recognized: concerted practice, restrictive business practices, abuse of rights, the monopolization of markets through economic concentration, dumping and subsidies.

These activities are illegal methods of struggle for the market, and their general concept is unfair competition.

Concerted practice is embodied in agreements between undertakings, decisions of their associations and the implementation of agreed actions in the common market or in a substantial part of it, which can cause damage to trade between Member States. The object of the concerted practice is the prevention, restriction or distortion of competition within the common economic space. This practice is referred to as negative integration (collusion). Collusion may occur in three forms:

- a) a contract between enterprises;
- b) decisions by associations of undertakings;
- c) restrictive practices.

This kind of practice is recognized as incompatible with the common market. As a result, any agreement or decision on such practices is recognized as null.

Section 1, Art. 85 of the Treaty of Rome prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The above cited list is not exhaustive and, therefore, the Commission and the EU courts can recognize other types of anti-competitive agreements, decisions and actions. Thus, quite often agreements without the contract form are recognized as anti-competitive.

According to the case of *ACF Chemiefirman NV v. Commission* (1970), the parties entered into the contract to set prices and quotas on quinine. The contract extended to the country which was not part of the EEC. In addition, the parties entered into a written “gentleman’s agreement” covered by the contract for the overall market. This agreement, along with written and oral contracts of the parties, was recognized by the Commission as an agreement in the sense of Art. 85.

The provisions of Art. 85 are deemed to be violated in cases where agreements, decisions and concerted practices of enterprises meet three requirements: a) there is collusion in some form between enterprises; b) the arrangement may harm the trade of the member countries of the Treaty of Rome; c) the arrangement has the purpose or effect of restricting competition within the EU.

In particular, the question of the trade damage within the EEC arose in the case *Consten and Grundig v. Commission*, the decision on which was delivered by the Court in 1966. According to the materials of the case, the German company “Grundig” reached an agreement with the French company “Constant” that the latter will be the exclusive intermediary (exclusive dealer), the first in France. “Grundig” agreed not to supply its products to anyone else in France, and “Constant” agreed not to sell

products competing to “Grundig”, but promote the sale of “Grundig” products, to provide after-sales service, make predictions of sales, etc.

As the Court pointed out, “the contract between” Grundig “and” Constant “, on the one hand, does not allow enterprises other than “Grundig” import products of “Grundig” into France, and, on the other hand, prohibits the “Constant” to export these products in “other Common market countries”, which undoubtedly causes trade damage between Member States.”

7.2. Restrictive trade practice

There are “horizontal” (between entities of the same level) and “vertical” (between subjects at different levels) agreements.

7.2.1. Horizontal agreements

Horizontal agreements in the EU, according to R. Wish, can be divided into three types:

a) The cartel agreements. Thus, in the case of Roofing Felt Cartel (1986), the Commission concluded that the nine members (two of which were not members of a trade association) of the cartel agreed to fix prices. However, the participants who were not members of a trade association later alleged that they did not intend to fulfill the agreement and joined the cartel merely because of the threat of the application of sanctions to them. In justification of their behavior they led evidence that their actions on the market did not fulfill an agreement to fix prices. Despite this, the Commission has recognized the fact of cartel collusion.

b) Agreements on oligopolistic product markets. Examples are the case 40/73 Suiker Unie (1975), 89/85 deal Wood Pulp, Musique Diffusion Française v. Commission (1983) Pioneer business, etc.

c) Cooperative agreements which require concerted actions of enterprises. “In particular, the ECJ judgment in Dyestuffs (1969) defined it as “a form of coordination between undertakings which, without reaching the stage where an agreement is appropriately named, replaces the risks posed by competition”. In that case the Court found three cases of price increases, which have been” agreed”.

Evidence of this was the meeting of dyes manufacturers, as well as some indirect evidences of collusion. In one case, six out of 10 companies, which provided 85 %

of the total Common market demand for dyes, in the same evening, sent by telex the direction on the price increase to their subsidiaries in Italy. However, they often used the same expression for the transmission of detailed instructions.

Concerted action is considered as an offense only when it has the effect of not short-term but long-term price increases. That was in 1985, in a decision by the EU Commission on WoodPulp case.

For each of the allocated types of agreements there is its own set of prohibitions and exceptions.

7.2.2. Vertical agreements

The “vertical” agreements are commonly understood as agreements between non-competing business entities. It is above all the contracts between economic agents that occupy different places in the commercial process. An example of such an arrangement is the agreement on the exclusive distributorship rights.

The main sources of the rules governing vertical agreements are as follows: Commission Regulation No. 330/2010 of 20 April 2010 on the application of Article 101 (3) TFEU to categories of vertical agreements and concerted practices, and Guidelines on vertical restraints, which is an annex to Regulation 330/2010.

The difficulty in assessing the “vertical” agreements is the necessity to distinguish the constraints imposed by the agreement on the market behavior of its members from the restrictions of competition in the commodity market, which may result from implementation of the agreement. The authentication of these two types of restrictions leads to the interpretation of any “vertical” agreements with elements of limitations as prohibited per se.

As for the agreements between the non-competing business entities, the European Commission considers the maximum limit of 15 percent of the total market share of the participants as an indication of insignificance of such an agreement.

The Commission Acts define the formal requirements to agreements and to their participants, according to which the parties of anti-competitive agreements are not subject to punishment (although the agreement itself may be prohibited by the European Commission). The most important general exceptions in the European law are:

- Total exemption for “vertical” agreements;
- Total exemption for “vertical” agreements concluded by manufacturers and sellers of new vehicles, manufacturers and sellers of spare parts for cars, as well as companies engaged in the repair and maintenance of vehicles sold;
- The general exemption for “horizontal” specialization agreements;
- The general exemption for technology transfer agreements, aviation transportation services agreements in the sphere of the insurance services.

The European Commission started to create a general exception in 1993. Earlier, in the period from 1962 to 1987, general exceptions had been issued by the Council of EEC; the Council had approved an exception for agreements in the agricultural sector, in the land transport sector, maritime transport, as well as in respect of certain aspects of the agreements in the air transport sector.

Limiting vertical agreements are:

- *agreements on resale price maintenance*, according to which the retail price is fixed by the manufacturer or the upper and lower limits of the price are imposed;
- *exclusive allocation arrangements*, in accordance with which the distribution company (distributors) gets the exclusive right to work in this area or with certain types of clients, or with certain products.
- *exclusive lease agreements*, according to which the downstream firms are prohibited from doing business with competing manufacturers or distributors, competitors;
- *agreements on constrained sale*, according to which trade-broking firms are required to purchase goods imposed on consumer, in order to buy the selected item. An extreme example of this kind of agreement is “the obtrusion of the assortment of the commodities”;
- *imposing volume of purchases*, according to which trade and intermediary firms are required to purchase a certain minimum amount of a commodity.

This list is not exhaustive. Agreement between firms at different stages of the process chain or production cycle can be very complex and involve a large number of mutual guarantees and commitments.

As a general rule (para. 1, Art. 1 of Regulation 330/2010), the definition of the vertical agreement falls within an agency agreement with an agent that produces its own product, and by force of circumstances, he should be excluded from the scope of the antitrust restrictions on the basis of para. 1, Art. 2 of the Regulation. However, this exception to the vertical agreement is not valid if there is at least one of the conditions of roughly restricting competition (Art. 4 of the Regulation 330/2010), for example, a prohibition for an agent to set their own selling price of the goods, etc.

Thus, there is a situation, when the usual conditions of the agency agreement are considered contrary to competition law in the EU. As a result, the agency agreement cannot be recognized as such. Thus, in the decision *Re Austin Rover Group/Unipart* (1987) a contract between the principal and the agent, when the latter acted both as an agent and as a distributor for the same principal, was not recognized as an agency agreement.

In decisions on *Re Pittsburgh Corning Europe* (1973), *Re Airpage* (1991) and the *Suiker Unie v. EC Commission* (1976), the determining factor was the dual role of

the agent. In situations where a person acts as an agent for companies engaged in the production and marketing of their own products, and as a distributor for other companies, the contract on the first relationship was not recognized as the agency agreement.

7.2.3. Unlawful agreements

In accordance with the decision taken in 1980 in the UN document “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of restrictive business practices”, the following definition of restrictive business practices was formed: it is “an act or behavior of enterprises which, through the abuse of a dominant position on the market or the acquisition of the position and abuse of restricted access to markets or otherwise unduly restrain competition, having or likely to have a negative impact on international trade ... or which through formal, informal written or oral agreements or arrangements among enterprises have the same impact”.

The definition of *abuse of dominant position* was given by the ECJ in the judgment on *Hoffmann-La Roche v. Commission*. The Court pointed out that the concept of abuse is objective and is associated with the behavior of companies with dominant position, which must be such that the very presence of this company in the market leads to a weakening of competition. This behavior is characterized by actions other than those that companies take in normal competition, and leads to difficulty of maintaining the competition or prevents its development. Such actions should be in the causal link with the presence of a dominant position. The subjective aspect of the behavior of the company does not matter, that is whether the abuse occurred intentionally or due to neglect of the interests of competitors or consumers. Normally, an abuse of a dominant position means a ban to export to customers products purchased from a dominant enterprise.

Thus, in *Eurofix – Banco v Hilti* Hilti one of the acknowledged abuses was pressure on distributors of this company in the Netherlands, which was expressed in their refusal to supply Hilti products in the UK.

In accordance with Art. 101 of the TFEU, the following types of agreements should be banned:

- a) which directly or indirectly fix purchase or selling prices or any other trading conditions;
- b) which limit or control production, markets, technical development, or investment;
- c) which share markets or sources of supply;
- d) which apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

e) which make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

As noted in academic literature, the evidence of restrictive practices is difficult to establish. The proof of its existence is a contract between the companies, but the concept of a “contract” shall be construed broadly and may include both simple presence at the meeting of the company’s management, as well as a preliminary report on price changes.

The *abuse of the right* means the action of legal persons beyond the rights belonging to them in the context of a dominant position within the common market or in a substantial part of it. Article 86 of the Rome Treaty states that: “Any abuse by one or more undertakings of now dominant position in the common market or in a substantial part of it shall be prohibited as incompatible with the Common Market, as it may cause damage to trade between Member States.”

According to Art. 102 TFEU, any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist of:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Thus, it is not prohibited to hold a dominant position, but the abuse of a dominant position is prohibited. The legal settlement of this issue has been envisioned, in particular, in one of the founding acts of the EU – the Treaty of Amsterdam, and in certain recommendations of the EU Council and EU Commission.

One of the largest cases of abuse of dominant position is associated with the company Tetra Pak. Tetra Pak, a company based in Switzerland, is the largest supplier of packaging for beverages (milk, juices). In 1989 the Norwegian company Elopak filed a complaint to the Commission on the grounds of violation of Article 86 of the Treaty

of Rome. Elopak is a competitor of Tetra Pak packages on the market for fresh liquids. Meanwhile, Tetra Pak dominated the market for aseptic sector (aseptic packaging machines that produce sterilization boxes and fill them with liquid and aseptic carton) with a share of 90 % – 95 %. The only competitor in this sector was a company PKL (5 % – 10 % of the market). Technological barriers and other economic barriers in this market are very high. Tetra Pak may behave almost independently from any competitive control and, therefore, be regarded as the dominant company in the aseptic market data. Tetra Pak had a variety of strategies to preserve their strong influence, such as the exclusion of competitors by establishing a commitment to use only Tetra Pak boxes on Tetra Pak machines; increasing the price of boxes for fresh liquids; price discrimination, i.e. the price differences ranging in size from 50 to 100 % for the boxes and up to 400 % for machines in trade between Member States. In 1990, the Commission recognized the actions referred to as abuse of a dominant position in the market and decided to impose a fine of 75 million ECU on the Tetra Pak company.

7.2.4. International cartel

Monopolization of the market by means of economic concentration is mainly carried out in the form of mergers and acquisitions. In the context of globalization, companies can integrate in order to limit or eliminate competition in the market. In this regard, the control of economic concentration depends highly on the EU's antitrust practice.

At present the main legal acts of the Commission that regulate economic concentration in the EU are Regulation № 139/2004 on the control of concentrations of enterprises and Regulation № 802/2004 devoted to procedural matters. The Commission also adopts documents containing explanations on the issues of legal regulation in the sphere of control over economic concentration in the EU.

The general definition of the term “concentration” is contained in para. 1, Art. 3 of the Rules for the Control of concentration of enterprises № 139/2004. A concentration shall be deemed to arise where a change of control on a lasting basis results from: a) the merger of two or more previously independent undertakings or parts of undertakings, b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

This definition applies to mergers, divisions, acquisitions of shares or assets, and certain types of joint ventures. The answer to whether the interrelated transactions are the issue, by its nature and whether they lead to a single economic concentration, is given by the European Commission.

7.2.5. *Exclusive purchase agreement*

Exclusive purchase agreement used to be defined as an agreement to the effect that a buyer will refrain from purchasing from the seller's competitors to a significant degree. Many important Commission and Court decisions address the cumulative effects of a combination of tying and exclusive agreements. The decisions mentioned include *Delimitis* (Case C-234/89), *Danish Fur Traders* (Case T-61/89), *Schoeller* (Case T-9/93) etc.

According to provisions of article 101(1(a)) TFEU, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: directly or indirectly fix purchase or selling prices or any other trading conditions are prohibited. In fact, article 101(1(a)) comprises a prohibition of an exclusive purchasing agreement.

The first case where the Court examined the structure of the market and the position of the parties in an exclusive purchasing agreement was *Soicete La Technique Miniere* in 1966 (Case 56/65). The Court argued that "In considering whether and agreement has as its object the interference with competition within the Common market it is necessary first to consider the precise purpose of the agreement in the economic context in which it is to be applied. The interference with competition referred to in Art. 101(1) of the TFEU must result from all or some of the clauses of the agreement itself. Where the analysis of the mentioned clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered, and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition must be understood within the actual context in which it would occur in the absence of the agreement in dispute."

The *Delimitis* decision alters the legal background regarding both tying and exclusive purchasing agreements. The EC court on reference from a German Court ruled that in the analyzed case Exclusive Purchasing Block Exemption did not apply. The court also stated that the agreement would not affect trade between Member States if there was a "real possibility for national or foreign supplier to supply the reseller with beers from other member states." The Court ruled that if exclusive purchasing agreements do not have the object of restricting competition Art. 81(1) (ex Art. 85) applies if the following two conditions are met:

Difficulty for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of specific products in premises for the sale and consumption of such products.

The agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.

Case law up to 1999 was reexamined and the Commission's new approach on all vertical restraints was adopted by publishing EC Regulation 2790/1999.

The new Block Exemption replaced three Block Exemptions which existed earlier: regulations for exclusive distribution (Commission Regulation № 1983/83), exclusive purchasing (Commission Regulation № 194/83) and financing (Commission Regulation № 4087/88). Regulation № 2790/1999 includes one block exemption covering all vertical agreements in distribution systems, except the sale of motor vehicles.

Now, as is stated in the preamble of the above mentioned Commission Regulation № 330/2010 "Commission Regulation (EC) № 2790/1999 of 22 December 1999 on the application of Art. 81(3) of the Treaty to categories of vertical agreements and concerted practices," a category of vertical agreements which the Commission regarded as normally satisfying the conditions laid down in Art. 101(3) of the Treaty is defined. In view of the overall positive experience with the application of that Regulation, which expires on 31 May 2010, and taking into account further experience acquired since its adoption, it is appropriate to adopt a new block exemption regulation."

Provisions of the Regulations No 330/2010 comprise all new approaches on vertical agreements within the EU single market and were considered in paragraph 7.2.2.

7.3. Competition Policy

7.3.1. Free Competition

Free competition is a key element of an open market economy. It stimulates economic performance and offers consumers a broader choice of better-quality products and services and at more competitive prices.

European Union competition policy ensures that competition is not distorted in the internal market by ensuring that similar rules apply to all companies operating within it. Title VII, chapter 1 of the Treaty on the Functioning of the European Union lays down the basis for Community rules on competition.

State aid is prohibited under the Treaty, although exceptions exist because such aid may be justified by, for example, services of general economic interest. It must be demonstrated that they do not distort competition in such a way as to be contrary to the public interest.

A market where there is free competition is a market on which mutually independent businesses engage in the same activity and contend to attract consumers. In other

words, each business is subject to competitive pressure from the others. Effective competition thus gives businesses a level playing field but also confers many benefits on consumers (lower prices, better quality, wider choice, etc.).

European competition policy is intended to ensure free and fair competition in the European Union. EU rules on competition (Art. 101 to 109 of the TFEU) are based on 5 main principles:

1) prohibition of concerted practices and agreements and of abuse of a dominant position liable to affect competition within the common market (antitrust rules);

2) preventive supervision of mergers with a European dimension (i.e. to ensure that the significant size of the proposed merged operation in the EU market would not result in restricting competition;

3) supervision of aid granted by EU countries which threatens to distort competition by favouring certain undertakings or the production of certain goods;

4) liberalisation of sectors previously controlled by public monopolies, such as telecommunications, transport or energy;

5) cooperation with competition authorities outside the EU.

The European Commission and the national competition authorities enforce EU competition rules. Cooperation between them, within the European Competition Network (ECN), ensures effective and consistent application of the rules.

The EU has strict rules protecting free competition. Under these rules, certain practices are prohibited. If companies infringe the EU's competition rules, they could end up being fined as much as 10 % of their annual worldwide turnover. In some EU countries individual managers of offending firms may face serious penalties, including imprisonment. For example, in 2014, the Commission fined French pharmaceutical company Servier and 5 other producers of generic medicines almost €430 million for concluding a series of deals to protect Servier's bestselling blood pressure medicine, perindopril, from price competition from other generics in the EU.

The Commission has also investigated cartels in the market for financial derivatives, priced by reference to certain benchmark rates (EURIBOR (EIRD), JPY Libor, European TIBOR (YIRD) and Swiss franc Libor (CHIRD)).

It has taken several decisions in these cases over the past few years, against banks such as Barclays, Deutsche Bank, RBS, Société Générale, UBS, Citigroup and JP-Morgan. Fines totalled about €1.8 billion (some banks had their fines reduced for cooperating with the investigation and agreeing to settle).

EU competition rules apply directly in all EU countries. These rules apply not only to businesses but to all organisations engaged in economic activity (such as trade associations, industry groupings, etc).

Illegal contracts and agreements are known as cartels. They can take many forms, and need not be officially approved by the companies involved. The most common examples of these practices are:

- 1) Price fixing;
- 2) Market sharing;
- 3) Agreement on customer allocation;
- 4) Agreement on production limitation.

There are distribution agreements between suppliers and re-sellers where, for example, the price charged to customers is imposed by the supplier.

Some agreements are not prohibited if they can be justified as benefiting consumers and the economy as a whole. One example is agreements on research & development and technology transfer. These cases are covered by the Block Exemption Regulations.

Abuse of a dominant position means that if company has a large market share, it holds a dominant position and must take particular care not to: 1) charge unreasonably high prices which would exploit customers; 2) charge unrealistically low prices which may drive competitors out of the market; 3) discriminate between customers; 4) force certain trading conditions on its business partners.

7.3.2. Competition Policy

Competition Policy aims at ensuring that competition in the marketplace is not restricted in a way that is detrimental to society.

Before the opening up of borders to intra-Community trade and competition, prices in some sectors in most countries were artificially maintained at a level that allowed marginal undertakings to survive. The consumer bore the cost of protecting non-profitable businesses. In other sectors, unprofitable businesses were supported by aids of all kinds, and it was therefore the taxpayer that kept them alive. Hence, both consumers and taxpayers had a great interest in seeing the unprofitable undertakings disappear from the market thanks to the fair play of competition. This common interest of the citizens of the MSs is a major driving force of the multinational integration process.

National rules alone cannot ensure competition in a common market. They must be completed by European rules to cover the cases which affect trade between the Member States and where, therefore, there is Union competence. In contrast to national competition policies, the common competition policy has a market integration objective. It must ensure the unity of the common market by preventing undertakings from dividing it up amongst themselves by means of protective agreements. It must obviate the monopolisation of certain markets by preventing major companies from abusing their dominant position to impose their conditions or to buy out their competitors. Lastly, it must prevent governments from distorting the rules of the game by means of aids to private sector undertakings or discrimination in favour of public undertakings.

Competition puts businesses under constant pressure to offer the best possible range of goods at the best possible prices, because if they don't, consumers have the choice to buy elsewhere. In a free market, business should be a competitive game with consumers as the beneficiaries.

Sometimes companies try to limit competition. To preserve well-functioning product markets, authorities like the Commission must prevent or correct anti-competitive behaviour. To achieve this, the Commission monitors:

1) agreements between companies that restrict competition – cartels or other unfair arrangements in which companies agree to avoid competing with each other and try to set their own rules. Companies can distort competition by cooperating with competitors, fixing prices or dividing the market up so that each one has a monopoly in part of the market. Anti-competitive agreements can be open or secret (e.g. cartels). They may be written down (either as an “agreement between companies” or in the decisions or rules of professional associations) or be less formal arrangements.

2) abuse of a dominant position – where a major player tries to squeeze competitors out of the market. A company can restrict competition if it is in a position of strength on a given market. A dominant position is not in itself anti-competitive, but if the company exploits this position to eliminate competition, it is considered to have abused it.

3) mergers (and other formal agreements whereby companies join forces permanently or temporarily) – legitimate provided they expand markets and benefit consumers. Competition authorities make sure that, when companies join forces, the market balance will not be upset in ways that could distort competition or create a dominant position that could be abused. Before merging or forming associations, big companies must ask the Commission for authorisation, providing the information it needs to reach a decision.

4) *efforts to open markets up to competition* (liberalisation) – in areas such as transport, energy, postal services and telecommunications. Many of these sectors used to be controlled by state-run monopolies and it is essential to ensure that liberalisation is done in a way that does not give an unfair advantage to these old monopolies. Some essential services – energy, telecommunications, transport, water and post – are still controlled by public authorities rather than private companies in some countries. The Commission encourages governments to open these services (“services of general economic interest” or SGEIs) up to competition – so consumers can enjoy fairer prices and better quality service – while ensuring that the services remain available to all, even in parts of the countries where they are not profitable. EU countries can entrust specific public service functions to a company, conferring on it duties, specific rights and financial compensation which must comply with state aid rules. EU countries must distinguish between parts of a service that can be opened up to competition (e.g., internet access) and parts of a service that form a network (e.g. cables). Networks are unique to a given territory and must be shared equitably between the competing companies which use it.

5) *financial support (state aid) for companies* from EU governments – allowed provided it does not distort fair and effective competition between companies in EU countries or harm the economy. Sometimes government authorities spend public money supporting local industries or individual companies. This gives them an unfair advantage over similar sectors in other EU countries. In other words, it damages competition and distorts trade. It is the Commission’s job to prevent this, allowing government support only if it is genuinely in the wider public interest – if it aims to benefit society or the economy as a whole. The Commission’s role in applying EU rules on government support for business (state aid) is regulated by Article 108 of the TFEU.

6) *cooperation with national competition authorities in EU countries* (who are also responsible for enforcing aspects of EU competition law) – to ensure that EU competition law is applied in the same way across the EU. All EU countries have national competition authorities with the power to enforce EU competition law. They can stop agreements and practices that restrict competition and fine companies that break EU competition law.

These authorities and the Commission exchange useful information on implementing EU competition rules through the European competition network.

This network makes it easier to identify which authority should be dealing with particular issues, and which others could provide assistance.

Competition policy is about applying rules to make sure businesses and companies compete fairly with each other. This encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality.

1) Low prices for all: the simplest way for a company to gain a high market share is to offer a better price. In a competitive market, prices are pushed down. Not only is this good for consumers – when more people can afford to buy products, it encourages businesses to produce and boosts the economy in general.

2) Better quality: Competition also encourages businesses to improve the quality of goods and services they sell – to attract more customers and expand market share. Quality can mean various things: products that last longer or work better, better after-sales or technical support or friendlier and better service.

3) More choice: In a competitive market, businesses will try to make their products different from the rest. This results in greater choice – so consumers can select the product that offers the right balance between price and quality.

4) Innovation: To deliver this choice, and produce better products, businesses need to be innovative – in their product concepts, design, production techniques, services etc.

5) Better competitors in global markets: Competition within the EU helps make European companies stronger outside the EU too – and able to hold their own against global competitors.

EU powers are exercised in accordance with the functional competence of competition policy:

European Parliament. Competition policy is not subject to the co-decision procedure. There are 2 committees dealing specifically with matters concerning competition policy and consumer welfare:

European Parliament ECON committee (*economic and monetary affairs*). Remit includes the economic and monetary policies of the Union, and among others rules on competition and government support for businesses (state aid).

European Parliament IMCO committee (internal market and consumer protection). Remit includes identifying and removing potential obstacles to the functioning of the EU single market and *promoting and protecting* the economic interests of consumers.

European Council. The European Council, together with the European Parliament, plays an important role in *approving the Competition Commissioner* nominated by national governments and the Commission President. Together with the European Parliament, the Council approves EU laws on consumer protection and competition

law. For competition matters, the relevant ministers from each EU country meet in what is called the «Competitiveness Council».

European Commission. The European Commission ensures the correct application of EU competition rules. This involves mainly monitoring and, where necessary, blocking: anticompetitive agreements (and hardcore cartels in particular); abuses by companies of dominant market positions; mergers and acquisitions; government support.

To do this, the Commission has a wide range of inspection and enforcement powers, e.g. to investigate businesses, hold hearings and grant exemptions. Governments also have a duty to notify in advance any planned support for business (state aid).

Nonetheless, some of its enforcement functions have been undertaken by Member States since 2004 under the «modernization» process (Regulation 1/2003). This allows national competition authorities and national courts to apply and enforce Art. 101 (ex Art. 81 of the TEC) and 102 (ex Art. 82 TEC) of the TFEU.

In implementing all aspects of competition policy, the Commission takes into account the interest of consumers.

European Court of Justice. The Court of Justice is the main European judicial body ensuring uniform interpretation and application of competition law across the EU. Often unheralded, the Court's many landmark rulings over the years have had a significant effect on the daily lives of Europeans, helping re-establish workable competition on EU markets that has delivered a wider choice of better-quality products/services at lower prices.

Competition cases are now heard by the EU's General Court (previously «Court of First Instance»), with appeals going to the Court of Justice. National courts can (and sometimes must) refer cases to the Court of Justice for clarification on how EU competition law is to be interpreted on a specific issue.

European Central Bank. The European Central Bank is consulted regularly on all competition issues related to the financial sector.

Court of Auditors. The Court of Auditors monitors the proper collection and legal spending of the EU budget (European taxpayers' money) on EU policies. It has the authority to audit fines imposed on companies found liable for anti-competitive behaviour in cases brought by the Commission. The money paid in fines goes back into the EU budget.

European Social and Economic Committee. A body through which trade unions, employers' associations and other groups representing civil society express their opinion on EU issues, contributing to the decision-making process. It has a section dealing specifically with competition policy and consumer welfare issues (Single Market Production and Consumption (INT) section).

7.4. Anti-dumping regulation

7.4.1. The definition of dumping

According to the classic definition, dumping is the price discrimination between different geographical markets or, in other words, the sale of imported goods at a price below the normal. Legal nature of dumping is revealed in article VI of the GATT, which provides the following definition of dumping: “introduction of the products of one country into the commerce of another country at less than the normal value of the products, which causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry”.

The most common reasons for dumping are winning new foreign markets to expand sales; the presence of exclusive products in the importing country; the crisis of overproduction in the importing country; undervalued currency, low labor costs, low commodity prices and transportation; closed national market of the exporter; government subsidies.

According to Art. 2.7 of the Anti-Dumping Code (the WTO Agreement on the application of Art. VI GATT 1994) and Art. 1 of the EU Regulation № 2331/96, the object of dumping is the commodity whose price on importation into the importing country is below the comparable price in normal trade turnover for the like product intended for consumption in the exporting country. This is considered to be the same product, similar to it in every respect, or if such a product does not exist, other items, although dissimilar to be considered in all respects, but with the features similar to the features of the like product.

The signs of dumping are as follows:

- 1) the existence of a dumping margin, i.e. exceeding the normal value of the product in relation to the price at which it is exported;
- 2) actually proven material damage or threat of material injury to a domestic industry;
- 3) the existence of a causal link between the fact that the sales are at dumped prices and the injury.

Types of dumping

Permanent dumping characterizes the long-term trend of monopolistic firms to maximize profits by selling goods at higher prices on the domestic market, compared with the world market.

Sporadic dumping is an episodic sale of products on the world market at a lower price than on the domestic one. Most often, this dumping is a consequence of over-production and the desire to prevent the decrease of the prices in the domestic market.

Predatory dumping means temporary sale of goods on foreign markets below the cost. The purpose of this dumping is usually to eliminate competitors in business, after which there occurs a significant increase in prices, which gives companies the opportunity to realize their monopolistic power in the form of monopoly excessed profits.

7.4.2. Formation of the EU anti-dumping legislation

The first statutory regulations of antidumping laws were adopted in 1968 and since then they have repeatedly changed. The last significant revision took place in 1996 to reflect the new GATT rules.

An important step in the development of anti-dumping legislation was the adoption of the Agreement of 1994 on Implementation of Article VI of the GATT in the framework of the Uruguay Round, which defined the basic mechanisms of initiation and conduct of anti-dumping investigations and anti-dumping measures. Within the framework of this Agreement, the rules existing before the EU were replaced by the new Antidumping Regulations, which came into force on 1 January 1995. This regulation, in turn, was amended by Regulation № 384/96 of 02.12.1996 and Decision № ECSC/2277/96, which regulates the import of coal and steel, adopted on 2 December 1996.

These documents establish that EU expenditure on the use of anti-dumping measures should not exceed the benefits derived from such measures, i.e. application of the measures should not harm the interests of the EU. The EU countries with non-market economies can establish a special procedure for the introduction of anti-dumping measures. With regard to the items, the scope of these regulations includes all products except agricultural, for which market protection is carried out using special countervailing duties that have the character of customs duties and are being regulated by the provisions of the EU Common Agricultural Policy. Strict time limits are imposed in the legislation on the investigation of the case and making a decision, to address actions quickly and effectively.

7.4.3. Anti-dumping procedures

Anti-dumping procedures are carried out in the EU in the framework of the EU's common commercial policy (Articles 131-134 TEU). Being a member of the WTO, the EU implemented provisions on combating dumping, enshrined in Art. VI of the

GATT 1994 and the Agreement on the application of Art. VI of the GATT 1994 (Anti-dumping Code) into the legal order of the Community.

The main special act of the EU in this area is the Regulation № 384/96 of 22.12.1995 on the protection against dumped imports from countries which are not members of the European Community (basic anti-dumping Regulation), with amendments of the Regulation № 2331/96 of 02.12.1996, Regulation № 1972/2002 of 05.11.2002, the Regulation № 461/2004 of 08.03.2004, the Regulation № 2117/2005 of 12.21.2005.

The basic anti-dumping Regulation establishes the procedures for determination of dumping, for the anti-dumping investigation and for the imposition of anti-dumping duties.

In accordance with para. 1.2 of the Regulation, goods are considered to be dumping goods if their export price for supply in the EU is below the comparable price for the like product in the ordinary course of trade, established for the exporting country.

One of the key concepts of anti-dumping regulation is the “normal price”, which is defined as the price paid currently or payable in the ordinary course of trade for the same product in the exporting country or country of origin.

Anti-dumping rules in the EU include the material elements of the definition of dumping and norms establishing the procedure for levying anti-dumping duties on goods imported to the EU.

Competences on the application of anti-dumping measures belong to the EU authorities. The EU Member States do not have the right to independently open anti-dumping investigations, to participate in them and take appropriate action.

The EU Commission has the leading role in the anti-dumping regulation. The Commission initiates consultation, decides to initiate criminal proceedings and conduct anti-dumping investigations. In certain circumstances, the Commission may temporarily impose anti-dumping duties, impose obligations on foreign exporters and stop the proceedings. It also has the right to amend, supplement and submit anti-dumping legislation of the EU for final review by the EU Council.

The EU Council adopts two types of anti-dumping regulations: regulations governing the conduct of the investigation, collection of anti-dumping duties and other issues, and the decision on the imposition of provisional and definitive anti-dumping duties.

EU Member States are involved in anti-dumping procedures in the framework of the Advisory (Anti-Dumping) Committee. The Antidumping Committee shall consult the Chairman of the Committee on the initiative or at the request of a representative of EU Member State. The main function of the Anti-Dumping Committee is to develop a form of mitigation solutions when considering a particular case. The EU Commission shall consult with the Committee before making the decision. Consultations are

held on the establishment of the fact of damage, the causal link between dumping and injury, the use of anti-dumping measures, the methods of calculating the difference between the normal and the dumping price.

Antidumping process involves four basic steps: Initiation of anti-dumping investigation; Carrying out anti-dumping investigation; Decision on the results of the anti-dumping investigation; Review of the anti-dumping measures.

7.4.4. Initiation of the anti-dumping investigation

Filing a complaint to the European Commission is a necessary condition of the initiation of the anti-dumping investigation. The complaint must be supported by representatives of the relevant industries and it shall be receivable, unless the share of its supporting European producers account for not less than 25 % of the total production of the similar or directly competitive product.

Generally anti-dumping complaints are submitted by European trade associations. Associations can be created only for the purpose of filing a complaint. Thus, the investigation concerning imports of carbamide-ammonia mixture from Algeria, Belarus, Lithuania, Russia, Slovakia, Ukraine was initiated by the European Fertilizer Manufacturers Association, acting on behalf of almost 70 % producers of the product.

EU Member States also have the right to appeal to the Commission with a demand to investigate providing that they have a reason to believe that the EU industry is being damaged, and that statements by representatives of the respective industries have not been reported. On the same basis, the Commission may initiate an investigation on its own.

The statement may be withdrawn at any time, and the anti-dumping process may be completed, unless the Commission decides that the termination of the process is contrary to the interests of the EU.

Once a complaint is received, the Commission is considering the grounds for investigation. Anti-dumping investigation cannot be initiated against countries whose share of imports of the products is less than 1 % of the EU market. In case of an accusation of dumping against several countries, the investigation begins, if the total share of imports exceeds 3 %. These requirements are stricter than those established in art. 9.3 of the Agreement on the application of Article 6 of the GATT 1994, where the corresponding figures were 3 % and 7 %.

Under Art. 5.9 of the Regulation № 384/96, after taking a decision to initiate an anti-dumping procedure the Commission is obliged to publish a notice in the Official Journal of the European Communities; to submit a report to the Council; to notify the measures taken and the parties concerned to begin an investigation within 45 days from the date of submission of the application.

7.4.5. Conducting the anti-dumping investigation

The investigation procedure is provided for by Art. 6 of the Regulation № 384/96. The period of the investigation must not be longer than a year. In exceptional cases, this period may be extended for another 3 months.

The investigation begins with the public notification to all interested parties, which, in turn, must inform the Commission about their participation in the investigation within the prescribed period. There are several forms of investigation.

Survey. Exporters that were accused of dumping and that announced their intention to cooperate in the ongoing investigation receive special profiles, in which they have to provide data on the enterprise producing goods, statistical data on sales in the EU, to provide a list of companies which cooperate with the commodity producer with access to the EU market. If such data are not given within 30 days starting from the date of receipt of the questionnaire (Art. 6.1 of the Regulation № 384/96), the investigation is based on the information contained in the complaint or information received from other interested parties. Thus, in 1997, when the investigation in respect of seamless pipes from Russia was started, the Russian exporters concerned sent questionnaires later, besides they were filled incorrectly. In this situation, the price of goods was calculated on the basis of data received from the exporters from the Czech Republic. As a result, a temporary anti-dumping duty in respect of Russian pipes exceeded the prescribed fee for pipes from the Czech Republic by more than 6 times, because the costs of production of those goods in the Czech Republic were higher.

Meetings and hearings. Meetings are organized by the EU Commission for stakeholders and opponents. If necessary, the meeting may be confidential. Art. 6.6 of Regulation № 384/96 allows the possibility of failure of the meetings, which do not affect the outcome of the case. During the meetings, the Commission must hear the participants of the anti-dumping investigation, and provide them with the necessary information. In 1979 the EU Court in case of Timex ball bearings pointed out that the right to be heard is a fundamental right of all parties-participants.

Establishment of the fact of dumping. The fact of the dumping is established by the comparison of the normal price of the exported goods and the import prices for supply in the EU. Factors affecting the comparability of prices are defined in Art. 2 of the Regulation № 384/96. Dumping margin is the difference between the normal price and the import price, reduced by taking into account the correction factor. If the magnitude of the dumping margin is variable, para. 2.11 allows the use of its average value. Dumping margin is calculated for each exporter accused of dumping, as well as for all who participated in the investigation of one of the exporters of the country. In accordance with Art. 2.8, 2.9 of Regulation 384/96, the import price is considered as the price specified in the sales contract, according to which the goods are delivered

to the internal EU market. In cases where the price cannot be established, or it is not credible, the EU Commission models import price itself.

In accordance with Art. 2.1 of the Regulation № 384/96, the price for the similar goods intended for consumption in the domestic market of the exporting country or for goods sold by the state – exporter to the third countries is considered as the normal price. If the price cannot be fixed by using the above methods, then the figure of total costs of production, delivery and distribution of goods (Art. 2.5, 2.6 of the Regulations № 384/96) is accepted as a normal price.

Damage establishment. In Art. 3.1 of the Regulation № 384/96 the damage is meant as cause or threat of an injury to the EU industry, as well as financial difficulties in the development of a new industry. The Agreement on the application of Art. VI of the GATT states that the mere fact of the existence of dumping does not constitute grounds for the application of anti-dumping measures. Such measures are applicable only in the case where the dumping is threatening to cause material damage to a particular industry or actually slow down the formation of the industry. It is also necessary for the damage to be substantial, and its definition should be based on a study of all the factors affecting the provision of production to be protected.

The damage is established on the basis of: firstly, the study volume of dumped imports in absolute or relative terms; secondly, the study of its impact on the prices of similar products on the EU internal market. They also make analysis of such factors as the decline in sales, profits, output, market share, productivity, return on investment, cash flow, increasing inventories, decline in employment, wages, decline in investment attractiveness of growth and others.

Along with the direct infliction of material damage, a threat of material injury could be considered as a basis for the application of anti-dumping measures. A change of circumstances that creates a situation in which the dumping will cause real damage to property is considered as a threat.

This change must include all of the following factors: the significant growth of dumped imports; the exporter has sufficient capacity to increase exports; a sharp drop in prices for imported goods, which leads to increased demand for imported goods; significant reserves of goods in respect of which the investigation is conducted.

Moreover, the establishment of a causal link between the dumping and the fact of the damage must be compulsory.

One of the features of the anti-dumping legislation in the EU is the requirement for the imposition of anti-dumping duties in the interests of the EU. However, there are examples where the European Commission has put consumers' interests above the interests of the industry. Illustrative must be the case of photo albums from South Korea and Hong Kong, which were not produced in sufficient quantities to meet customer

requests. Despite the low level of prices for this product, which indicates the dumping, the Commission did not apply the anti-dumping duties.

A special feature is the application of the rule of a “lesser duty”. According to this rule, the anti-dumping duty may be less than the difference between the normal price and the dumping of the goods if the amount of the fee is sufficient to eliminate the damage caused by the dumping.

Before deciding on the results of the investigation, Art. 7 of the Regulation № 384/96 provides the possibility of provisional measures. The conditions of application of these measures are: the observance of the investigation procedure, the preliminary conclusion of the European Commission on the grounds and the need for a definitive anti-dumping measures. Temporary measures are being taken in the form of provisional anti-dumping duties, which must be fixed not less than 60 days and not more than 9 months from the starting date of the anti-dumping investigation.

7.4.6. Decisions on the results of the anti-dumping investigation

There are three types of decisions on the results of the anti-dumping investigation.

Firstly, it is the decision to discontinue the investigation. The reason for it is the absence or insufficiency of the evidence of the fact of dumping, injury and causal link between them. Thus, in 2000 the European association of manufacturers of lighters withdrew its charges of dumping prices of lighters against the Chinese companies Dongfang and Wenzhou, as the investigation showed that the cost of the manufacture of Chinese lighters was really low and consistent with the level of prices, as was announced by Chinese exporters in Europe.

The base may be a significant amount of dumping. In accordance with Art. 5.7 of the Regulation № 384/96, the minimum threshold dumping margin required for the adoption of anti-dumping measures is 2 % of the import price; the minimum amount of dumping supplies is 1 % of the total imports of the product.

Other reasons are a significant amount of damage and the expiration of the period of investigation.

An analysis of the practice shows that approximately 40 % of anti-dumping investigations are terminated without taking any measures.

The second type of decision is the introduction of anti-dumping duties. The procedure is provided by Art. 9 of the Regulation number 384/96.

The third type of decision is to accept the obligation on prices, proposed by the exporter, who participated in the investigation (Art. 8 of the Regulation № 384/96). The essence of this obligation is the review of the prices of goods imported into the EU market, and securing it to the level that would prevent damage to the EU industry. The obligation should be accepted on a voluntary basis on the basis of pre-trial de-

tention of the EU Commission to establish the fact of dumping, injury and causal link between them. The reality of performance of the obligation must be confirmed, and the exporter is liable for its breach. At the request of the exporter or an agreed decision of the EU Commission and the Anti-Dumping Committee in the absence of objections from the Council of the EU investigation can also be continued after the adoption of the relevant obligation by the exporter. With a negative result of the investigation the obligation must be annulled.

The obligations need not be accepted (Art. 8.3 of the Regulation № 384/96): if the acceptance is recognized as impractical; if the number of actual or potential exporters is too big; for other reasons, including reasons of general policy.

The amount of the anti-dumping fee is established by the EU Commission depending on the magnitude of the dumping margin. The fee may be set as a percentage of the price of imported goods, or as the difference between the price and the minimum selling price in the EU internal market.

Anti-dumping duties are calculated separately for each importer or manufacturer of the goods who participated in the investigation or did not participate in the investigation, but provided the necessary information in accordance with Art. 9.5 of the Regulation № 384/96. For exporters, for whom the anti-dumping duty is not specified, there is a single fee. The fee cannot exceed the weighted average dumping margin. For non-market economies the single value of anti-dumping duty is set.

Anti-dumping duties are in force for five years (Art. 11 of the Regulation № 384/96), after that the duties should be rescinded. However, to counteract dumping which continues to damage, after a review of anti-dumping procedure the effect of duty may be extended for a period not exceeding 5 years starting from the date of the revision.

There may be the retroactive collection of anti-dumping duty for a period of not more than 90 days before a final decision on the case (but not earlier than from the beginning of the investigation) provided that: the exporter knew or should have known that dumping is taking place and the damage caused by him, but continued massed export for a short period of time; exporter had violated its obligation to prices.

Article 11.2 of the Regulation № 384/96 allows early termination of the anti-dumping measures, if the interested party proves that the fact of dumping no longer exists, and there is no damage.

7.4.7. Revision of anti-dumping measures

Revision of the EU Commission

In accordance with Art. 11 of the Regulation № 384/96 a proposal to revise should be sent to the EU Commission by agents which have the right to demand anti-dump-

ing investigation no later than 3 months before the expiry of anti-dumping duty. There are several types of revisions.

1. “Final revision” opens at the initiative of the EU Commission or on request on behalf of EU producers. Anti-dumping measure shall remain in force during the revision.

2. Revision in the “changed circumstances” is raised when the request contains sufficient evidence that there is no necessity of continuous application of the measures. In the process of the revision the EU Commission should determine whether the circumstances have changed significantly in regard to dumping and damage. This revision may take place on condition that the term has expired no less than 1 year from the date of imposition of definitive anti-dumping duty.

3. Revision of the “new exporters” has the purpose to determine an individual margin of dumping for new exporters who did not deliver the goods, on which was an anti-dumping duty was imposed during the investigation period.

4. Revision of the “absorption” and “bypass” begins at the request of the association of the EU producers and the EU Commission, in case the exporter avoids anti-dumping duties (for example, by the importation of goods through third country), or if the exporter has sharply reduced export prices and the anti-dumping duty does not prevent the damage.

The review should be completed within 12 months (but no later than 18 months) from the date of the initiation of the procedure. Acting measures after the revision can be canceled, saved or refined.

Revision of the Court

Documents against dumping can be appealed in the ECJ. The main ones are: a) the decision of the EU Commission on the opening of the process; b) a decision of the European Commission about not opening the process; the decision of the European Commission to impose provisional anti-dumping duties; of the Council Regulation on the imposition of definitive anti-dumping duties; of the Council Regulation on the collection of provisional anti-dumping duties; a decision of the European Commission on the completion of the process without the use of protective measures; a decision of the European Commission on the completion of the investigation in connection with the adoption of the commitments; decisions on revisions; decision to return the overpaid amounts of anti-dumping duties. These legal acts may be appealed to the EU Court within 2 months.

The fundamental issue of the trial is to determine persons entitled to file an action and the performance of a party to the case for the anti-dumping procedure. Claims are usually submitted by manufacturers and exporters. However, an action may be filed by the importer. Thus the lawsuit was filed by a French company after the introduction of provisional anti-dumping duties on magnesium imported from Russia in 1994.

The question on the possibility of reviewing acts of the EU Commission, and the Council on anti-dumping cases was first considered by the Court of Justice in the case of Ball Bearings in 1979. In this case, the Council Regulations provide for the collection of provisional anti-dumping duties which were imposed on the products of four Japanese companies. The problem was that the procedure was completed with the adoption of commitments to increase export prices of exporting companies, and definitive duties were imposed, and the time was not included in this case. The Court of Justice came to the conclusion that the Regulation affects the rights of a group of persons, and due to this fact shall be reviewed on the basis of the Treaty of Rome art.173.

In another case (*Alusuisse Italia SpA v. Council*) an Italian importer of orthoxylene requested to impose anti-dumping duty on imports of US-origin goods on the basis of Art. 173. But the Italian importer did not entered into relationship with the United States exporters, and the Court found that in this case the anti-dumping duty was a measure of general application, and thus cannot be revised.

7.4.8. Terms of use of compensatory measures

Compensatory measures are applied to the subsidized imports. The term “subsidy” is enshrined in the WTO Agreement on Subsidies and Countervailing Measures, and all subsidies to the WTO are divided into 3 main categories: 1) prohibited (directed at import substitution, or directly related to the export of the results); 2) specific subsidies, i.e. financial support provided by one or a group of business, industry or group of industries, a certain region for a certain period of time (these subsidies are the subject of countervailing investigations since they create unequal conditions of competition for the enterprise/industry/region); 3) acceptable, general subsidies, bearing the “horizontal” nature that is available without exception to all businesses/sectors/regions on equal grounds. Such measures are not the subject of countervailing investigations since they do not provide benefits to individual subjects of the market.

With the exception of prohibited subsidies other types of subsidies, as well as dumping, are not prohibited practice. They become a subject of an investigation with the possibility of “distorting” effects on the competition. These measures are also introduced for a period of not more than 5 years with an option to be renewed at the end of the review. The action of compensatory measures should be discontinued in case of termination of subsidies. Thus, the termination of subsidies actually means the

termination of the advantages provided by grant recipients, or even steps called “useful effect” cessation of subsidies, instead of termination, for example, of the actions stipulated by the legislative act which provided for a subsidy.

Compensatory measures are used in the form of countervailing duties, which are set at a rate equal to the size of the provided subsidies per unit of goods, either in the form of price commitments which are actually agreements between the authority of the investigation and the foreign manufacturer / exporter for the supply of goods at a price not below a certain level, when such imports will not cause damage to domestic manufacturers.

Compensatory measures are used much less often due to the complexity of anti-dumping investigation procedures, which requires substantial justification. They also have a political character, as part of the investigation actually assesses manufacturers-exporters of the exporting country and its government which provides financial support. (In the case of anti-dumping investigation the object of “criticism” is only the company that is the manufacturer-exporter.)

More sophisticated and complex is the method of calculating the amount of the subsidy, and, accordingly, the countries that use countervailing measures are more vulnerable to challenge the measures. So, according to statistics, from 2006 to 2008, the EU initiated only 2 new investigations and 11 reviews. As of 2008, 8 measures were used by the EU, of which six were in India, with a maximum value of 53.3 %.

It is clear that the scale of the measures varies significantly both in geographical scope and in the spheres of production. In EU law the application of these measures is enshrined in the Regulation No 2026/97 on protection against subsidized imports from third countries, which reproduces the provisions of the Code on Subsidies of the WTO. The Regulation allows using countervailing measures to counteract the subsidies as unfair from the point of view of state support for the production, export and transportation of products, which are released for free circulation in the EU and involve damage to the EU. Except for the provisions defining subsidies, compensated subsidies and their calculation rules, the procedure for investigations into the subsidy is similar to the anti-dumping procedure: to introduce the measures necessary to determine the damage claimed by the EU producers concerned, the investigation, the decision by the EU institutions, which may be temporary and definitive safeguard measures.

Four conditions are required for determination of the subsidies in respect of which responses can be entered: a) the fact of granting state aid or price support; b) the specific nature of the subsidies; c) the subsidy should bring its benefits to the recipient (assessment of benefits is carried out in parallel with the evaluation of the grant); d) there should be no grounds precluding the application of protective measures.

Regulation № 2026/97 on protection against subsidized imports from third countries provides an open list of actions that are treated as financial assistance. These include: direct transfer of funds; exemption from taxes and fees; the provision of goods and services to the manufacturer (exporter) on preferential terms; carrying out the above actions by a private foundation (now) which is authorized and funded by the state; price support and the support of return.

On the basis of the WTO rule, the Regulation also contains a definition of subsidies which are not subject to dispute and therefore, the payment: non-specific subsidies and the so-called “permitted” subsidies, namely the support of research activities, regional development and environmental protection.

The size of reimbursable subsidy is calculated based on the size of the benefits acquired by the recipient, and is calculated per unit of the product exported to the EU. The methods used by the Commission to calculate the size of the subsidy depend on the type of subsidy (public procurement of goods and services, grants, loans, etc.). The time frames for calculating the subsidies are limited, as a rule, they take into account the last financial year of the enterprise of the recipient.

The procedure for the introduction of countervailing duties is similar to the procedure for the adoption of protective measures against dumping decisions and provides for the use of both temporary and definitive duties.

The legal framework reflects the fundamental provisions of the WTO instruments and infrastructure of the anti-dumping proceedings at the same time taking into account the specificity and diversity of the European market.

7.5. Restriction on competition

7.5.1. Monopoly

A monopoly is a market where there is only one seller. This may be because there are barriers which prevent other firms from entering the market or because there is a natural monopoly as the MES of production means that only one undertaking can operate profitably on the market.

Theory predicts that as the firm is not constrained by any competitors it will price as high as possible. The monopoly price will be above the competitive market price. However, the price that the monopolist charges is still affected by demand and is constrained to some extent by products from outside the market. As the price rises some customers will not purchase the product but will use their resources to purchase something else instead. The firm usually faces a downward-sloping demand curve, so the higher the price it charges the lower the demand for its product.

If a monopolist sells just one unit it may receive a very high price for that unit but that price is unlikely to cover its costs. The monopolist will therefore wish to sell

more units but in order to do so it must lower the price in order to attract customers with lower reservation prices. Unless the monopolist can price discriminate between customers, the monopolist must lower the price on all units, not just the extra ones.

The producer's marginal revenue is the extra amount the monopolist obtains from selling the extra unit, but because it involves lowering the price across the board the marginal revenue is less than the selling price. This means that the monopolist will sell units only up to the point at which the marginal revenue equals the marginal cost. A monopolist's marginal revenue is below the market price. This in turn means that the quantity supplied of the product will be less than that which would be supplied on a competitive market. Thus prices are higher than those resulting on a competitive market and output is restricted.

According to this theory, therefore, the main distinction between perfect competition and pure monopoly is that the monopolist's price exceeds marginal cost, while the competitor's price equals marginal cost. This monopoly pricing leads to a transfer of wealth from consumer to producer. It is for this reason that firms operating on a competitive market may wish to emulate the effect of monopoly by colluding, for example, to set their prices at above the competitive level and by reducing output.

From an efficiency point of view the transfer of wealth to the monopolist may be material. The behavior does not, however, simply lead to a redistribution of income but also results in the misallocation in resources and a deadweight loss. It is this loss to efficiency as a whole that is of greatest concern.

7.5.2. Non – competition clause

Article 5 of the Regulation concerns non-compete clauses which, although prohibited, are severable from the agreement. This means that such clauses will be invalid while the remainder of the agreement can benefit from the block exemption. Non competition agreements, prohibited under article 5 of the Regulation, include any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years (a); any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services (b); any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers (c).

The time limit of five years is not applicable in case of non-compete obligation mentioned in paragraph 1(a) where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

Paragraph 3 describes conditions that should be fulfilled in order to apply provisions of paragraph 1(b): the obligation relates to goods or services which compete with the contract goods or services; (b) the obligation is limited to the premises and land from which the buyer has operated during the contract period; (c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer; (d) the duration of the obligation is limited to a period of one year after termination of the agreement.

Taking into account all the abovementioned provisions it should be stated that the following is prohibited: any direct or indirect obligation imposed on members of a selective distribution scheme to sell or not to sell “specified brands” of competing suppliers; a non-competition obligation on the buyer exceeding five years in duration, unless the goods to which the agreement relates are resold by the buyer from premises owned or leased by the supplier, provided that the duration of the non-competition obligation does not exceed the period of occupancy of the premises by the buyer; and non-compete obligations in relation to the “contract” goods of any preceding distribution contracts that extend beyond the duration of the agreement unless they relate to competing goods or services, are limited to the premises and land from which the buyer has operated during the agreement, are indispensable to protect know-how transferred by the supplier under the agreement, and are limited to a period of one year.

7.5.3. Oligopoly

Oligopoly is a market structure lying between perfect competition and monopoly on the spectrum. On an oligopolistic market there are only a few leading firms, so the market is ‘concentrated’. Given their small number they know each other’s identity and recognize that they are affected by the output and pricing decisions of the others. They are not only competitors but rivals too. This mutual awareness may lead on some markets to tacit (that is, understood or implied without being stated) collusion between them. It may also lead them to collude expressly.

However, other oligopolistic markets are characterized by fierce competition. Thus in some markets the price appears to be set above the competitive level and to approximate monopoly pricing, but in others it is not. A wealth of economic literature has been produced setting out economic models of oligopoly to explain why this occurs.

The differences in behavior on these markets also cause problems for those responsible for drafting and applying the competition rules. It is important to note, however, that many markets are oligopolistic and present a major problem for competition authorities.

7.5.4. Oligopsony

A situation with a small group of buyers is called oligopsony. The small group of buyers for a good faces the market supply function of the good. Analogous to a monopoly that realizes a higher price by restricting the quantity it supplies in order to maximize its profit, oligopsonists may obtain a lower purchase price by for example reducing its demand for an intermediary good used as a production factor. The strategic reduction in demand enables the oligopsonists to realize a higher profit. Oligopsony is analogous to a monopoly or oligopoly, provided that the oligopsonist is the final consumer on the market for the good produced with the intermediate good as input. If the oligopsony itself possesses market power the welfare loss will be even larger on both the demand side and the supply side. However oligopsonistic behavior in conditions of monopoly or oligopoly may induce a better market outcome, because the buyer power counterbalances the market power of the monopoly or oligopoly.

7.5.5. Dominant position

Dominant position is mentioned in Art. 102 of the TFEU where any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Provisions of Article 101 of the TFEU stipulate that abuse mentioned in paragraph 1 may, in particular, consist of:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 102 of the TFEU does not prohibit dominant position. The abuse of dominant position is considered to be unlawful. In order to satisfy the criteria of abuse it is necessary to establish that:

a) one or more undertakings;

- b) in a dominant position within the internal market or in a substantial part of it;
- c) has a dominant position which it has abused;
- d) the abuse has affected trade between MSs.

The TFEU does not define any of the above terms. Their meanings have gradually been clarified by the Commission and CJEU.

Case 27/76 defined the concept of dominance within Article 101 of the TFEU. The ECJ defined the concept of dominance as being “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers.” This definition was further explained in Case 85/76 Hoffmann-La Roche, in which the ECJ restated the above-mentioned definition and added that: “. . . such a position does not preclude some competition which it does where there is a monopoly or quasi-monopoly but enables the undertakings which profit by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.”

Accordingly, an undertaking is in a dominant position when it can act independently from its competitors and consumers and thus is not subject to normal competitive forces.

In Case T-219/99 British Airways plc v. Commission, it was stated that a dominant position may exist not only in the supplier market but also in the buyer market. In this case British Airways was found to be in a dominant position as a purchaser of services in the UK from travel agents. The Commission’s Guidance on the enforcement priorities in applying Article 102 TFEU confirms the above definition of dominance. The Commission considers that “an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant”.

7.5.6. Price agreement

According to provisions of Art. 101(1(a)), all agreements between undertakings, decisions by associations of undertakings and concerted practices aimed directly or indirectly at fixing purchase or selling prices or any other trading conditions are prohibited. Prohibition includes horizontal and vertical agreements. Normally, market forces determine the price for a particular product. However, in some circumstances undertakings may decide to interfere with market forces. They may control the price

by raising it, decide to make it lower or stabilize on agreed level, impose minimum or maximum prices etc. The instrument for such actions is agreement between undertakings. It could be performed directly by constituting agreed price or indirectly through granting allowances, providing exclusive credit conditions and other measures. Nowadays price fixing agreements are more popular in vitamin products, in food flavor enhancers, industrial threads etc.

The imposition of a maximum sale price or a recommended price by the supplier is allowed provided that those prices do not amount to fixed or minimum sale prices. In Case 161/84 Pronuptia, the ECJ held that provisions which impair the franchisee's freedom to determine his own prices are restrictive of competition, that is not the case where the franchisor simply provides franchisees with price guidelines, so long as there is no concerted practice between the franchisor and the franchisees or between the franchisees themselves for the actual application of such prices. It is for the national court to determine whether that is indeed the case.

According to position of ECJ in a case C-580/12, in addition to the anticipated benefit from a horizontal price-fixing agreement when sales are made to independent third parties, vertically integrated undertakings may also benefit from such an agreement on the downstream market in processed goods made up of, inter alia, the goods which are the subject of the infringement. This is so for two different reasons: either those undertakings pass on the price increases in the inputs as a result of the infringement in the price of the processed goods, or they do not pass those increases on, which thus effectively grants them a cost advantage in relation to their competitors which obtain those same inputs on the market for the goods which are the subject of the infringement (Guardian Industries and Guardian Europe v Commission).

7.5.7. Advertising malpractice

There is no legal definition of advertising malpractice. However, Directive 2005/29/EC of the European parliament and of the Council of 11 May 2005 (hereinafter 'Unfair Commercial Practices Directive' or UCPD) defined the (business-to-consumer) commercial practices in its Article 2(d): 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers'.

According to article 3 of the Directive, it applies to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product. The Member States remain free to extend the scope of the UCPD or to regulate, in conformity with other EU legislation, other types of relations. They are also free to determine the effect of unfair practices on the validity, formation or effect of a contract, given that the UCPD does not harmonise contract law.

Within the scope of Article 5, which defines unfair commercial practice, it is possible to preclude that advertising malpractice is also prohibited as a type of unfair commercial practice. Article 5 UCPD states that commercial practice shall be unfair if: (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers. Additional criteria to define commercial practice as unfair are given in paragraph 3 of Art. 5 where it is found misleading within the scope of Articles 6 and 7 and aggressive within the scope of Art. 8 and 9.

Article 6 states that commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

(a) the existence or nature of the product;

(b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, aftersale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;

(c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;

(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;

(e) the need for a service, part, replacement or repair;

(f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;

(g) the consumer's rights, including the right to replacement or reimbursement under 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 (1), or the risks he may face.

Paragraph 2 states that commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

(a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;

(b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:

(i) the commitment is not aspirational but is firm and is capable of being verified, and

(ii) the trader indicates in a commercial practice that he is bound by the code.

Annex I to the UCPD contains a list of commercial practices which are to be considered unfair in all circumstances and which are therefore prohibited. The list was drawn up to prevent practices which are by experience considered unfair and to enable enforcers, traders, marketing professionals and customers to identify such practices, thus enhancing legal certainty.

As stated in Recital 17 of the Directive, these are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Art. 5 to 9. In other words, if it can be proved that the trader has carried out the practice in actual fact, national enforcers do not need to apply the material distortion test (i.e. to consider the impact of the practice on the average consumer's economic behaviour) in order to take action and prohibit or penalise the practice.

The implementation of the Directive shows that the Black List has proved to be a useful tool in the hands of enforcers.

Amongst the most used provisions of the Black List are point 5 on 'bait advertising' and point 6 on 'bait and switch', which prevent traders from using particularly attractive offers on products and services in order to attract consumers to their website or shop, or with the intention of selling them another product. This provision has been used, for instance, in the airline transport sector to prevent companies from advertising conditions which they could only guarantee in relation to an unreasonably low number of consumers, taking into account the scale of advertising.

7.5.8. Refusal to bid

Refusal to bid concerns an action within bid rigging which is prohibited under provisions of Article 101 of the TFEU. Article 101(1) of the TFEU prohibits agreements between two or more undertakings, decisions by associations of undertakings, or concerted practices: a) which may affect trade between EU Member States; and b) which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

The EU prohibitions are not absolute. Article 101(3) of the TFEU sets out an exception to Art. 101(1) prohibition which applies where an agreement, although anti-competitive in principle, offers countervailing benefits (such as improving production or distribution or promoting technical or economic progress) that outweigh any harm to competition, provided that consumers receive a fair share of the resulting benefits, that the restriction is indispensable to attaining those benefits, and that the restrictions do not afford the parties the possibility of eliminating competition for a substantial part of the products or services in question.

It is illegal to seek to fix the outcome of a bid or tender process where businesses are invited to submit offers to win a proposed contract. Bid rigging is known in several forms: a) direct liaison between competitors in relation to each bid; b) prior agreement about the percentage or value of contracts that each competitor will win each year; c) cartel arrangements between the parties, such as price fixing or market sharing.

7.5.9. Refusal to sell

Generally a company has no obligation to sell a product or service to indefinite scope of persons. The right to refuse to sell is accepted and is considered to be the corollary of the freedom of contracts. But in terms of antitrust law in several cases it could be considered as contrary to Article 101 of TFEU and it could be recognized as abuse of right.

Article 101 of the TFEU provides that all agreements between undertakings, decisions by undertakings and concerted practices, which affect trade and which have as their object or effect, the prevention, restriction or distortion of competition within the internal market, shall be prohibited. If the refusal to sell would originate from an agreement with another company or if it would be the result of concerted practices with another company, it will constitute antitrust behaviour if it intends to restrict the competition within the internal market.

The right to refuse to sell can also be restricted if the refusing company has obtained a dominant position on the relevant market. Article 102 of the TFEU prohibits the abuse by an undertaking of a dominant position within the internal market or in

a substantial part of it. The right to refuse to sell can be recognized as contrary to the provisions of Art. 102 of the TFEU if the company, which wishes to refuse to sell, has in fact a dominant position.

7.5.10. Voluntary restraint

Voluntary Restraint Agreements (hereinafter VRA) were first instituted as a response to increased steel imports into the United States in the 1960s. From 1961 to 1968, steel imports climbed nearly 600 percent, reaching 16.7 percent of the domestic market by 1968. In response to pressure from the domestic steel industry and from Congress for relief from steel imports, the President negotiated Voluntary Restraint Agreements with Japanese and European steel producers. These producers agreed to restrict steel imports to specified maximum tonnages.

Private VRAs pose a threat to antitrust liability. If a VRA has no congressional sanction and is not entered into with a foreign government (i.e. is not an executive agreement with another country), the agreement is private and therefore subject to antitrust laws. Voluntary Restraint Agreements are actually market allocation agreements, i.e. agreements that restrict imports to a certain percentage of the United States market, which are per se illegal. VRAs, however, are thought to be shielded from antitrust liability by the «foreign sovereign compulsion» defense of the act of state doctrine. If a VRA is entered into by both governments, an exporter can escape antitrust liability if his government requires private party compliance with VRA export limitations. The 1968 VRA with Japan was not formally executed by the Japanese government, thus raising the antitrust claim in *Consumers Union*.

Decision of European Commission 2003/382/EC of 8 December 1999 stated that the parties of voluntary restraint agreement break the provisions of Article 81(1) of the EC Treaty (now 101(1) of the TFEU) which provide, inter alia, for the observance of their respective domestic markets for seamless standard goods stated in the Decision.

ECJ annulled article 1(2) of the Decision but kept the statement that voluntary restraint agreement is contrary to the provisions of art. 81(1) (now 101(1) of the TFEU).

7.5.11. Comparative advertising

Comparative advertising is the subject of Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising. According to article 1 of the Directive, its purpose is to lay down the conditions under which comparative advertising is permitted. Article 2(c) defines comparative advertising as any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor. Article 4 shows conditions where the comparative advertising is permitted:

(a) it is not misleading within the meaning of Articles 2(b), and 8(1) of this Directive or Articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive');

(b) it compares goods or services meeting the same needs or intended for the same purpose;

(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(d) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor;

(e) for products with designation of origin, it relates in each case to products with the same designation

(f) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(g) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;

(h) it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor.

Conclusion

Effective integration of legal regulation of competition is an important factor for a well-functioning common market. This was confirmed in the economic practice of the EU. In the conditions of globalization the EU is committed to the prevention and suppression of activity that takes place outside the EU, and violates the rules of competition set out in the Union. For this purpose a variety of tools to protect the domestic market and the conclusion of international agreements on cooperation are used in this area. The work, which was carried out by EU institutions on this issue, demonstrates its relevance and importance for the functioning of integrated entity.

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