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USTAVNI PROTEKCIONIZAM I NACIONALNI IDENTITET

Sažetak

Cilj je ovog rada istražiti odnos između nacionalnih mjera kojima države članice Europske unije ograničavaju tržišne slobode i Ugovornog jamstva nacionalnog identiteta iz čl. 4(2) UEU. Problem bi se mogao sažeti na slijedeći način. Široka definicija nacionalnog identiteta negativno utječe na jednaku primjenu i učinkovitost prava EU. S druge strane, uska definicija odriče čl. 4(2) korisni učinak. U pokušaju pronalaženja optimalnog dosega ove norme, prikazati ću njenu funkciju i značaj u praksi Europskog suda, te raspraviti pitanje je li stupanjem na snagu Ugovora iz Lisabona došlo do kakvih promjena.

S tim ciljem na umu, najprije ću pokšati razjasniti koncept nacionalnog identiteta i, preciznije, nacionalnog ustavnog identiteta. Drugo, prodiskutirati ću praksu Europskog suda prije stupanja na snagu Ugovora iz Lisabona i sugerirati da se ona razvila tijekom tri razlučive evolucijske faze. U prvoj fazi Europski sud je koncept nacionalnog identiteta primjenjivao implicitno, u drugoj je fazi razvio doktrinu margine diskrecije, dok je u trećoj fazi počeo diferencirano primjenjivati različiti intenzitet sudbenog nadzora. U trećem dijelu razmotriti ću je li nakon stupanja na

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* Jean Monnet Chair, Sveučilište u Zagrebu – Pravni fakultet. Engleska verzija ovog rada objavljena je u Vol. 7 ***CYELP*** (2011)

snagu Ugovora iz Lisabona došlo do važnijih zaokreta u praksi Europskog suda, te ću sugerirati da se njegov opći interpretativni pristup nije značajnije promijenio. U četvrtom, završnom dijelu, vratiti ću se problemu diferenciranog pristupa nacionalnim zahtjevima za priznavanjem nacionalnog ustavnog identiteta, te zaključiti da je u praksi Europskog suda došlo do bifurkacije, odnosno, do razlikovanja situacija u kojima Europski sud prepušta odluku nacionalnim sudovima ili parlamentima od situacija u kojima Europski sud zahtjev nacionalnog identiteta razumije kao tek jedno od mogućih opravdanja nacionalnih (moguće protekcionističkih) mjera kojima države članice ograničavaju tržišne slobode. Odatle i naslov ovog rada – ustavni protekcionizam – kojime sam pokušao izraziti bit navedenog razlikovanja između jezgre sadržaja nacionalnog identiteta i pokušaja njegovog prizivanja u protekcionističke svrhe.

ŠTO JE TO NACIONALNI IDENTITET?

Kako je primjetio nezavisni odvjetnik Maduro, nacionalni identitet čini dio prava Europske unije od samoga početka.[1] Jamstvo nacionalnog identiteta prisutno je u temeljnim ugovorima od stupanja na snagu Ugovora iz Maastrichta koji je u čl. F(1) UEU propisivao da Unija "... poštuje nacionalne identitete svojih država članica čiji su sustavi vlasti utemeljeni na načelima demokracije." Ova je odredba naknadno renumerirana i reformulirana, te je postala čl. 6(3) Ugovora iz Amsterdama koji je propisivao, tek ukratko, da "Unija mora poštivati nacionalne identitete svojih država članica."

Čl. I-5 Ugovora o Ustavu za Europu[2] ponovno je reformulirao odredbu o nacionalnom identitetu, te joj dao izričaj koji je kasnije doslovce prepisan u čl. 4(2) UEU temeljem Ugovora iz Lisabona. Navedena odredba glasi:

"Unija poštuje jednakost država članica pred Ugovorima, kao i njihove nacionalne identitete, koji su neodvojivo povezani s njihovim temeljnim političkim i ustavnim strukturama, uključujući regionalnu i lokalnu samoupravu. Ona poštuje njihove temeljne državne funkcije, uključujući osiguranje teritorijalne cjelovitosti države, očuvanje javnog poretka i zaštitu nacionalne sigurnosti. Nacionalna sigurnost posebice ostaje isključiva odgovornost svake države članice."[3]

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[1] Mišljenje n.o. Madura u predmetu C-213/07, ***Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias***, (2008) ECR I-9999, § 31 Mišljenja.

[2] U Hrvatskoj preveden i objavljen u izdanju HAZU, 2006. godine.

[3] Hrvatski prijevod dostupan na http://ccvista.taiex.be/download.asp

Kada se usporedi s ranijim ugovornim izričajima nacionalnog identiteta, čl. 4(2) govori o "... temeljnim političkim i ustavnim strukturama, uključujući regionalnu i lokalnu samoupravu", dok je raniji tekst općenito upućivao na nacionalne identitete. Čini se da dodana vrijednost novog izričaja, koji se pripisuje g. Henningu Christophersonu, predsjedavajućem Radne skupine V, Europskog konventa, leži u izričitom navođenju nacionalnog ustavnog identiteta, što god taj pojam značio.[4] Na neki način taj izričaj koji je sadržan već u čl. I-5 Ugovora o ustavu za Europu predodredio je i sadržaj čl. 4(2) UEU.

Rječnik Merriam Webster određuje identitet kao "... istost u svemu što čini objektivnu realnost neke stvari" i "... stanje bivanja istim s nečim što se opisuje ili tvrdi." Ukratko, identitet se može opisati kao stanje bivanja istim s nekom drugom stvari, te u isto vrijeme različitim od svega ostaloga. Riječ "nacionalni" odnosi se na nacionalne države članice Europske unije. Riječ "poštuje" i izraz "koji su neodvojivo povezani s njihovim temeljnim političkim i ustavnim strukturama" znači da regulatorne ovlasti država članica moraju uživati imunitet od mogućeg zadiranja prava Europske unije. Ukupno uzevši, čini se da izričaj čl. 4(2) TEU štiti pravo država članica i njihovih građana[5] da, neovisno od prava EU, odrede bitne elemente svog ustavnog i političkog poretka koji ih čini jedinstvenima i istovremeno različitima od bilo koje druge

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[4] Europsksa konvencija koja je pripremila tekst Ustavnog ugovora raspravljala je o većem broju prijedloga o tome što bi valjalo izričito navesti kao dio nacionalnog identiteta. Prijedlozi su uključivali: "constitutional and political structures including regional and local self-government and the legal status of churches and religious bodies" (Altmeier), kao i "… language, national citizenship, military service, the educational systems, the welfare-systems including the public health systems, the system for personal taxation, the right of abortion…". Vidi The European Convention, The Secretariat, Working Group V, Working Document 28, paper of the Chairman Mr. Henning Christophersen, on priority issues regarding complementary competence (circulated at the last meeting of WG V on 6 September 2002), Brussels 24. September 2002. Von Bogdandy i Schill nazivaju klauzulu nacionalnog identiteta po predsjedatelju radne skupine – Klauzula Christophersen. A. von Bogdandy and S. Schill, Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, 48 ***Common Mkt. L. Rev*** (2011) 1417

[5] Von Bogdandy i Schill razlikuju objektivno i subjektivno shvaćanje nacionalnog identiteta. Prvo se temelji na objektivnim kriterijima poput zajedničkog jezika, povijesti i politiičkih institucija, dok je drugo određeno "voljom pojedinaca da pripadaju zajednici." Von Bogdandy i Schill, ***supra***, bilješka 2 na str. 1430. Praksa Europskog suda koja se temelji na čl. 4(2) UEU čini se da štiti objektivni nacionalni identitet kako ga definira nacionalno pravo i nacionalne institucije. Kada bi se interpretacija proširila na subjektivni aspect, izbor pojedinca da pripada nekoj zajednici postao bi subjektivnim pravom zaštićenim pravom EU.

države članice, kao i od Europske unije u cjelini. Takvi bitni elementi tvore specifični sadržaj pojma ***nacionalni ustavni identitet***.

ČL. 4(2) UFEU I VRIJEDNOSTI IZ ČL. 2 TEU

Jedan dio nacionalnog identiteta država članica konstruira se nasuprot ostatku svijeta. Naime, činjenicom da je neka država u članstvu EU diferencira je od svih država koje to nisu,[6] te članstvo u EU postaje dijelom nacionalnog identiteta takve države.[7] U normativnom smislu, prihvaćanje određenih vrjednosti koje su specifične za EU pridonosi jedinstvenosti nacionalnih identiteta država članica. Upravo zbog članstva u EU uzima se da nacionalni identiteti država članica sadrže vrijednosti navedene u čl. 2 UEU, a to su vrijednosti na kojima se EU temelji. Kako ta odredba propisuje:

"Unija se temelji na vrijednostima poštovanja ljudskog dostojanstva, slobode, demokracije, jednakosti, vladavine prava i poštovanja ljudskih prava, uključujući i prava pripadnika manjina. Te su vrijednosti zajedničke državama članicama u društvu u kojem prevladavaju pluralizam, nediskriminacija, tolerancija, pravda, solidarnost i ravnopravnost žena i muškaraca."

Poštivanje navedenih vrijednosti je nužni uvjet za članstvo u EU, a jednom kada država postane članicom, njihovo poštivanje smatra se oborivom presumpcijom koja se može osporavati isključivo temeljem postupka propisanog čl. 7 UEU. Može se reći da čl. 2 definira one elemente nacionalnog identiteta koji su istovremeno postulirani članstvom u EU i bez kojih niti države članice, niti Unija ne mogu biti legitimne.

Ipak, koncept nacionalnog identiteta je širi od vrijednosti zapisanih u čl. 2 UEU. Elementi nacionalnog identiteta, uključujući i ustavni identitet, poput, temeljnih ustavnih i političkih struktura, teritorijalna cjelovitost, javni poredak i nacionalna sigurnost, konstruiraju se neovisno o EU na nacionalnoj razini. Drugim riječima, nije nužno da se nacionalni identitet i Europske vrjednosti preklapaju. Ipak, normativni je zahtjev članstva u EU da čak i oni elementi nacionalnog identiteta koji se konstruiraju neovisno o i bez obzira na kontekst Europske unije, moraju biti u skladu s vrijednostima iz čl. 2 UEU. U odsustvu tog zahtjeva, kako nas uči povijest XX. stoljeća, temeljene

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[6] Pojam "otherness" važan je u konstrukciji identiteta. Vidi npr. Wojciech Sadurski, ***European Constitutional Identity?*** EUI Woriking Papers, LAW No. 2006/33, na str. 7-8.

[7] Von Bogdandy i Schill, ***supra***, bilješka 2 na str. 1426

nacionalne političke i ustavne strukture mogle bi se iskoristiti za ostvarivanje raznih moralno problematičnih ciljeva. Imajući rečeno na umu moglo bi se zaključiti da se u okvirima članstva u EU ne tolerira bilo kakav nacionalni identitet, već samo onakav koji je u funkciji promicanja vrjednosti na kojima se EU temelji, ili takav koj je, u najmanju ruku, u odnosu na te vrjednosti neutralan.

Drugim riječima, ustavni okvir EU razlikuje između eksplicitnog "dobrog" i potisnutog "lošeg" nacionalnog identiteta, pri čemu prvi zaslužuje zaštitu, a drugi ne. [8] To je, na kraju bilo implicitno već u čl. F(1) Ugovora iz Maastrichta koji je vezao poštivanje nacionalnog identiteta s poštivanjem načela demokracije od strane država članica.

NACIONALNI IDENTITET I DRUGE VRIJEDNOSTI ZAŠTIĆENE UGOVORIMA

Temeljni ugovori poznaju i druge zaštićene vrjednosti, poput onih zajamčenih u Dijelu I, Glava II, čl. 9 i 10 UFEU. Te odredbe sadrže vrijednosti koje se moraju poštivati pri stvaranju i provedbi politika EU i uključuju jamstva visoke razine zaposlenosti, prikladne socijalne zaštite, borbu protiv socijalnog isključivanja, visoku razinu obrazovanja, zaštitu ljudskih prava i borbu protiv diskriminacije utemeljene na spolu, etničkom porijeklu, vjeri, invaliditetu, dobi ili spolnoj orjentaciji. Funkcija tih jamstava je nejasna. Vrjednosti koje su njima zajamčene mogu stvoriti ograničenja za stvaranje nadnacionalnih politika, a većina od navedenih uživa ustavnu zaštitu na nacionalnoj razini i, moguće, tvori dio nacionalnog ustavnog identiteta. [9]

Preostaje pitanje može li pozivanje na čl. 9 i 10 UFEU proširiti regulatornu diskreciju država članica i promijeniti ravnotežu između prava EU i nacionalnog prava.

Nezavisni odvjetnik Cruz Villalon u svom Mišljenju u predmetu ***Palhota***[10] zastupao je shvaćanje da bi Europski sud trebao državama članicama priznati širu diskreciju kada idu za ostvarivanjem neke od vrijednosti koje su

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[8] Moglo bi se tvrditi da norma ustavnog prava koja biračko pravo dodjeljuje samo muškarcima ne bi bila zaštićena Čl. 4(2) budući da je suprotna vrijednosti jednakosti zaštićene čl. 2 UEU.

[9] Vidi npr. predmet C-271/08 ***Commission v Germany***, § 43 presude u kojemu ES navodi da je pravo na radničku participaciju zaštićeno njemačkim Ustavom ali, bez obzira na to, mora se koristiti u skladu s pravom EU.

[10] Vidi Mišljenje n.o. Cruz Villalona u predmetu C-505/08 ***Palhota*** §§ 51-53.

navedene u čl. 9 UFEU, kao što su visoka razina zaposlenosti, socijalna jamstva, borba protiv društvene isključenosti, i visoka razina obrazovanja, i zaštite zdravlja. Sukladno tome, osobito važni razlozi javnog interesa (***mandatory requirements***) koji opravdavaju odstupanje od tržišnih sloboda ne bi se više interpretirali usko. Primjerice, socijalna zaštita radnika trebala bi biti uzeta u obzir pri provedbi testa proporcionalnosti kojime bi se prosuđivalo jesu li nacionalne mjere koje ograničavaju slobodu kretanja usluga opravdane. Tako bi države članice imale pravo zadržati svoja vlastita shvaćanja socijalne politike kojom se, navodno, pruža prikladna socijalna zaštita, te bi na taj način mogle suziti područje primjene tržišnih sloboda. U biti, to nije različito od tvrdnje da visoka razina socijalne zaštite čini dio nacionalnog identiteta države što, ponovno, opravdava odstupanje od tržišnih sloboda.

U predmetu ***Palhota*** postavilo se pitanje može li nacionalna mjera koja poslodavcu s poslovnim nastanom u jednoj državi članici koji odašilje radnike na područje druge države članice propisuje obavezu da pošalje prethodnu izjavu o odašiljanju radnika, biti opravdana u kontekstu slobode kretanja usluga. Provodeći test proporcionalnoste Europski sud upustio se u analizu prikladnosti i nužnosti nacionalne mjere, te je utvrdio da postoji manje restriktivna alternativa koja bi se sastojala u

"… prethodnom izvješćivanju lokalnih vlasti o prisustvu jednog ili više izaslanih radnika, očekivanom trajanju njihove prisutnosti, te o pružanju usluga koje opravdava njihovu prisutnost." [11]

Dok bi prijelog nezavisnog odvjetnika državi članici dopustio da izabere između jednako učinkovitih mjera i primjeni onu koja bolje ostvaruje cilj zaštite radnika, Europski sud je ostao pri tradicionalnom testu najmanje restriktivne alternative, tj. alternative koja je najmanje restriktivna za slobodu kretanja usluga.

Palhota je prvi[12] post-Lisabonski slučaj u kojemu je nezavisni odvjetnik, neuspješno, pokušao sugerirati drugačiji pristup odnosa tržišnih sloboda i nacionalnog prava. Europski sud nastavio je svoju raniju praksu prema kojoj se u takvim situacijama primjenjuje puni test porporcionalnosti, čak i kada se

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[11] ***Palhota***, § 51.

[12] Sličan prijedlog da bi nacionalnim sudovima trebalo ostaviti veću diskreciju n.o. Cruz Villalon je iznio a Europski sud ignorirao i u procesnom kontekstu. Vidi predmet C-173/09 ***Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa***, još neobjavljen.

države članice pozivaju na opravdanja koja se temelje na vrijednostima o kojima govore čl. 9 i 10 UFEU. U stvari, nakon stupanja Lisabonskog ugovora na snagu Europski sud je čak i pojačao intenzitet nadzora tražeći da nacionalno zakonodavstvo koje, navodno, ide za zaštitom visoke razine zdravlja, mora biti primjenjivano na konzistentan i sustavan način.[13]

NACIONALNI IDENTITET I REGULATORNE NADLEŽNOSTI

Pravo EU ograničava regulatornu autonomiju država članica i u području nadležnosti država članica i u području nadležnosti EU. Isto vrijedi za jamstvo nacionalnog identiteta iz čl. 4(2) UEU.

Kao prvo, budući da je strukturalno smješteno u čl. 4 UEU, jamstvo nacionalnog identiteta čini dio općeg sustava suradnje između Unije i država članica. Preciznije gledano, čl. 4 UEU propisuje nekoliko različitih jamstava koja valja gledati u kontekstu čl. 5 UEU.

Prvi paragraf čl. 4 UEU je pravilo o nadležnosti.[14] On propisuje rezidualne ovlasti država članica i na taj način dopunjava načelo dodjeljenih ovlasti koje je propisano u čl. 5(1) UEU. Unija se temelji na načelu dodjeljenih ovlasti, a one koje nisu dodjeljene EU ostaju državama članicama. U tom svjetlu postaje jasno da se, što se tiče nadležnosti, jamstvo nacionalnog identiteta odnosi na ovlasti koje su dodjeljene EU, ali da nije na njih ograničeno. U svojoj regulatornoj dimenziji čl. 4(2) UEU valja shvatiti kao pravilo koje ograničava primjenu dodjeljenih ovlasti ukoliko bi primjena tih ovlasti utjecala na nacionalni identitet država članica. Isto bi, vjerovatno, vrijedilo i u situacijama gdje bi korištenje ovlasti od strane EU "... imalo izvorno za svoj cilj popravljanje uvjeta za uspostavljanje i funkcioniranje unutarnjeg tržišta..." u smislu § 86 presude u predmetu ***Tobacco Advertising***.[15]

Dodatno, ukoliko se jamstvo nacionalnog identiteta razlikuje od načela supsidijarnosti i proporcionalnosti koja su propisana čl. 5(3) i (4) UEU, tada

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[13] Spojeni predmeti C-570/07 and C-571/07 ***José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios*** (C-570/07) and ***Principado de Asturias*** (C-571/07), § 94, još neobjavljen. Vidi Gjermund Mathisen, Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement, 47 ***CML Rev***., (2010) 1021.

[14] Čl. 4(1) UEU: "In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States."

[15] Predmet C-376/98 ***Federal Republic of Germany v European Parliament and Council of the European Union*** (2000) ECR I-8419.

ono ne može biti podvrgnuto nadzoru nacionalnih parlamentata temeljem Protokola o primjeni načela supsidijarnosti i proporcionalnosti. Prihvatljiva interpretacija bila bi da je jamstvo nacionalnog identiteta valja biti primjenjivo čak i u slučajevima kada je neki zakonski prijedlog već prošao kontrolu nacionalnih parlamenata, tj. usprkos činjenici da je u skladu s načelom supsidijarnosti.

Alternativno, moglo bi se tvrditi da, s obzirom da konstrukcija nacionalnog identiteta pripada državama članicama, ono čini sastavni dio načela supsidijarnosti. Posljedica takvog pristupa bila bi da, jednom nakon što nacionalni parlamenti nisu imali prigovora na neki akt iz perspektive supsidijarnosti, postoji pretpostavka da je norma o kojoj je riječ u skladu sa zahtjevima nacionalnog ustavnog identiteta. U parlamentarnoj praksi država članica za sada nema potvrde ni za jedan od dva navedena pristupa.

Dodatno, čl. 4(2) UEU također igra ulogu u području isključivih nadležnosti država članica. Iako bi se moglo očekivati da je u tom području to jamstvo nesporno već i zbog same naravi isključivih nadležnosti država članica, to ipak nije slučaj. Naime, postoji dobro ustaljena praksa Europskog suda koja govori da čak i u područjima isključivih nadležnosti država članica, poput uređenja građanskog statusa[16] ili visokog obrazovanja,[17] takva isključiva nadležnost ne smije biti iskorištena suprotno pravu EU.

Najnoviju potvrdu takve prakse nalazimo u predmetu ***Rottman*** u vezi s pravnim uređenjem nacionalnog državljanstva.[18] U tom je predmetu, kojega su i nacionalni sud koji je uputio prethodno pitanje i nezavisni odvjetnik, shvatili kao predmet u kojemu se odlučuje o nacionalnom identitetu,

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[16] Predmet C-267/06 ***Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*** (2007) ECR I-1757, § 55: "… civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination."; predmet C-372/04 ***Watts*** (2006) ECR I-4325, § 92, i predmet C-444/05 ***Stamatelaki*** (2007) ECR I-3185, § 23, predmet 120/78 ***Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*** (1979) ECR 649, § 8, predmet C-76/05 ***Schwarz and Gootjes-Schwarz*** (2007) ECR I-6849, § 70, spojeni predmeti C-11/06 and C-12/06 ***Morgan and Bucher*** (2007) ECR I-9161, § 24. Novije, predmet C-73/08, ***Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française***, § 28.

[17] ***Bressol***, ***supra*** bilješka 16

[18] Predmet C-135/08, ***Janko Rottman v Freistaat Bayern***, (2010) ECR I-1449.

Europski sud je priznao regulatornu nadležnost države članice ali je bez obzira na to potvrdio svoju ustaljenu praksu temeljem koje su države članice vezane pravom EU čak i u području svoje isključive nadležnosti.[19] Temeljem te prakse postaje jasno da pozivanje na čl. 4(2) u području isključive nadležnosti država članica ima istu funkciju kao i u drugim područjima nadležnosti.

Obaveza država članica da poštuju pravo EU prisutna je i u području nacionalnog procesnog prava gdje se obično uzima da države članice uživaju nacionalnu procesnu autonomiju koja je ograničena tek načelima učinkovitosti i ekvivalencije. Ipak, kako ističe Bobek, takva nacionalna procesna autonomija u stvarnosti ne postoji, budući da je i nacionalno procesno pravo podvrgnuto sudbenom nadzoru Europskog suda.[20] Nedvojbeno, tvrdnje da određene karakteristike nacionalnog procesnog prava predstavljaju dio nacionalnog identiteta podjednako su osuđene na propast[21] što potvrđuje i presuda Europskog suda u predmetu ***Elchinov.***[22]

Postoji više presuda Europskog suda koje su razmatrale koncept nacionalnog identiteta, a koje su bile smještene u područje isključive nadležnosti država članica. U njima je Europski sud odlučivao o pravu na život, ljudskom dostojanstvu, državljanstvu školskih nastavnika, državljanstvu notara, republikanskom obliku vladavine, korištenju nacionalnog jezika, građanskom statusu, te pravnom uređenju postupka pred ustavnim sudom. Upravo u području isključive nadležnosti zahtjevi za priznavanjem nacionalnog ustavnog identiteta bili su više izraženi, te se može očekivati da će se usklađivanje između tržišnih sloboda i zahtjeva nacionalnog identiteta

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[19] ***Rottman***, ***supra***, bilješka 18, § 41: "Nevertheless, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter…" and § 45: "Thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law…".

[20] Michal Bobek, Why There Is No Principle Of "Procedural Autonomy" of the Member States, forthcoming in Bruno de Witte and Hans Micklitz (eds), ***The European Court of Justice and the Autonomy of the Member States***, (Antwerp, Intersentia 2011).

[21] Ipak, Europski sud pokazuje spremnost dopustiti marginu diskrecije na implicitan način. Vidi predmet C□291/09 ***Francesco Guarnieri & Cie***, još neobjavljen, gdje je Europski sud zauzeo shvaćanje da je norma nacionalnog prava "…purely procedural and its purpose is not to regulate trade in goods." Vidi § 16 of the judgment. Sukladno tome, učinak nacionalne procesne norme bio je "too uncertain and indirect."

[22] Elchinov, supra bilješka 12.

odvijati u uvjetima koje su 2008. godine naznačili Roman Herzog i Lüder Gerken,[23] pišući povodom sporne presude Europskog suda u predmetu ***Mangold***.[24] Problem se može opisati na slijedeći način: ili će Europski sud početi ograničavati svoju praksu, ili će nacionalni ustavni sudovi morati početi ozbiljnije pristupati zaštiti nacionalnog ustavnog identiteta.

NACIONALNI IDENTITET PRIJE UGOVORA IZ LISABONA

Može se reći da je praksa Europskog suda o nacionalnom identitetu prije stupanja na snagu Ugovora iz Lisabona evoluirala u tri faze. U prvoj fazi, nacionalni identitet nije bio prepoznat kao samostalna kategorija, već implicitno, u situacijama kada su države članice inzistirale na primjeni nacionalnih standarda zaštite temeljnih prava. Druga faza uslijedila je u ranim devedesetima i karakterizira je razvoj koncepta margine diskrecije. Treća pred-lisabonska faza rezultirala je priznanjem da nacionalni ustavni identitet nije apsolutan. Ta treća faza najavila je kasniju diferencijaciju nacionalnih ustavnih pravila u dvije kategorije: temeljnih ustavnih odredbi koje "zaslužuju" da o njima odlučuju nacionalni sudovi, te ostalih ustavnih odredbi prema kojima Europski sud postupa kao prema običnim nacionalnim opravdanjima nacionalnih mjera kojima se ograničavaju tržišne slobode.

Rana praksa Europskog suda o nacionalnom identitetu

Praksa Europskog suda o nacionalnom ustavnom identitetu je bogata. Vjerovatno su najpoznatiji slučajevi koji su razvili dijalog između Europskog suda s jedne, te njemačkog (predmeti ***Solange I, Solange II*** i ***Maastricht***) [25] i talijanskog (predmet ***Frontini***)[26] ustavnog suda, s druge strane. Talijanski

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[23] Roman Herzog and Lüder Gerken, ***Stop the European Court of Justice***, Zentrum für Europäische Politik, Freiburg, 2008. Izvorno objavljeno u Frankfurter Algemeine Zeitung 8. rujna 2008. Vidi EUObserver, 11. rujna 2008., na http://euobserver.com/9/26714, posjećeno 8. kolovoza 2011. Ključni argument je ovaj: "...both labor market policy and social policy are still core competences of the Member States. However, this case clearly demonstrates to what extent EU regulation and EU jurisdiction nevertheless interfere in the governing of these core competences."

[24] Predmet C-144/04 ***Werner Mangold v Rüdiger Helm***, (2005) ECR I-9981.

[25] ***Solange I***, BVerfGE 37, 271; ***Solange II***, BVerfGE 73, 339; ***Maastricht***, BVerfGE 89, 155.

[26] Corte Costituzionale, Predmet no. 183/73, ***Frontini v. Ministero delle Finanze***, in Andrew Oppenheimer, ***The Relationship between European Community Law and National Law: The Cases*** (eds), Cambridge University Press, 2005.; Marta Cartabia, ***Nuovi sviluppi nelle 'competenze comunitarie' della Corte costituzionale, nota a sentenza n. 232 del 1989***, in Giurisprudenza costituzionale, 1989, 1012.

ustavni sud razvio je doktrinu "***controlimiti***" koja govori da transfer suverenosti na nadnacionalne institucije ne može biti neograničen, te da ne smije "... kršiti temeljna načela Ustava ili neotuđiva ljudska prava." Ova je doktrina poznata i pod imenom "***Frontini***".

Njemačka i talijanska reakcija bila je izazvana tada nastajućom doktrinom nadređenosti koja je nakon što ju je Europski sud oglasio u predmetu ***Costa v. ENEL*** [27] još jasnije formulirana u predetu ***Internationale Handelsgesellschaft*** gdje je Europski sud odlučio:

"... valjanost mjere prava Zajednice ili njeni učinci u državama članicama, ne mogu biti narušeni tvrdnjama da je ta mjera suprotna bilo temeljnim pravima kako su formulirana ustavom te države, bilo načelima nacionalne ustavne strukture."[28]

Europski sud nastavio je ovu liniju prakse i u slijedećim presudama. Primjerice, u slučaju belgijske flamanske vlade,[29] flamanska je vlada pokušala opravdati diskriminaciju pozivajući se na nepostojanje regulatorne nadležnosti koja, prema Belgijskom ustavu pripada saveznoj vladi. Europski sud odbacio je taj argument rekavši da:

"… država članica ne može se pozivati na odredbe, praksu ili situacije koje postoje u nacionalnom pravnom poretku, uključujući i one koje proizlaze iz ustavnog ustrojstva te države, kako bi opravdale propust da ispune obaveze koje nastaju temeljem prava Zajednice."[30]

Nezavisna odvjetnica Sharpston ispravno je ukazala na čl. 27 Bečke konvencije o pravu ugovora iz 1969. godine koja određuje da se "... stranka ne može pozivati na odredbe svog unutarnjeg prava kao opravdanje za neispunjenje ugovornih obaveza."[31] Danas je široko prihvaćeno da se Bečka

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[27] BVerfGE 37, 271, 2 BvL 52/71.

[28] Predmet 11/70 ***Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*** (1970) ECR 1125.

[29] Predmet C-212/06 ***Government of Communauté française and Gouvernement Wallon v Gouvernement flamand*** (2008) ECR I-1683.

[30] ***Id.*** § 58. Vidi i predmet C-87/02 ***Commission v Italy*** (2004) ECR I□5975, § 38; Predmet 69/81 ***Commission v Belgium*** (1982) ECR 163, § 5; Predmet C-323/96 ***Commission v Belgium*** (1998) ECR I-5063, § 42; Predmet C-236/99 ***Commission v Belgium*** (2000) ECR I-5657, § 23, and Predmet C-111/00 ***Commission v Austria*** (2001) ECR I-7555, § 12.

[31] Vidi bilješku 57 u Mišljenju n.o. Sharpston u predmetu C-212/06.

konvencija odnosi i na nacionalno ustavno pravo.[32] Ipak, njemačko inzistiranje na visokim standardima zaštite temeljnih prava dovelo je do razvoja važne prakse Europskog suda te, konačno, do prihvaćanja Povelje temeljnih prava Europske unije.

Druga faza: margina diskrecije

U određenim područjima prava EU države članice uživaju marginu diskrecije. U takvim područjima države članice mogu opravdati derogacije od prava EU ukoliko dokažu da je to opravdano nekim legitimnim regulatornim ciljem.[33]

Kako bi opravdale neki regulatorni cilj, države članice mogu se pozivati na različite interese koje definiraju same, a koji ne moraju biti zajednički drugim državama članicama. Takvi interesi ne smiju biti suprotni vrijednostima EU i moraju položiti test proporcionalnosti.

Za potrebe ove rasprave čini se korisnim razlikovati dvije različite vrste diskrecije. S jedne strane, imamo diskreciju kojom se države članice koriste kada provode pravo EU, osobito direktive. Takvom diskrecijom koristi se zakonodavna grana vlasti[34] ili nacionalni sudovi kada interpretiraju

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[32] U pogledu nacionalnog ustavnog prava André de Hoogh upozorava na povijest nastanka čl. 27 Bečke konvencije koja "… confirms that the reference to internal law comprises the constitution of a State party. In fact, the amendment proposed by Pakistan initially claimed "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith, and no party may invoke the provisions of its constitution or its laws as an excuse for its failure to perform this duty" (Vienna Conference, Documents, p. 145; adopted: 55 in favor, none against, 30 abstentions (Vienna Conference, First Session, p. 158)). Though certain hesitations may be observed on the part of the participants in the Vienna Conference in 1968-1969 to support the resulting provision (adopted: 73 in favour, 2 against, 24 abstentions; Vienna Conference, Second Session, p. 54), as to this particular point, the provision did find favor and only two States (Venezuela and Iran) expressed their opposition suggesting the primacy of their constitutional law over treaties. Two States (Venezuela and Guatemala) specifically attached reservations on this point, against which objections have been raised by certain other States…". Vidi André de Hoogh, ***The Relationship between National Law and International Law in the Report of the Georgia Fact-Finding Mission***, at www.ejiltalk.org.

[33] U područjima koja nisu u dosegu prava EU ne može se govoriti o diskreciji, ali države članice i ondje imaju obavezu uzimati u obzir pravo EU.

[34] Vidi npr. spojene predmete C-482/01 i C-493/01 ***Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg***, (2004) ECR 5257, § 114; predmet C□271/91 ***Marshall*** (1993) ECR I□4367, § 37, i spojeni predmeti C-397/01 to C-403/01 ***Bernhard Pfeiffer***, and others § 105

nacionalno pravo.[35] Situacija poznata iz predmeta ***Van Duyn*** gdje je državna uprava morala interpretirati koncept javnog interesa također pripada u ovu vrstu. Ta vrsta diskrecije ne daje državama članicama dopusnicu za odstupanje od prava EU već, upravo suprotno, diskreciju da interpretiraju nacionalno pravo u skladu s pravom EU i na taj način pronađu interpretaciju koja pravu EU najbolje pristaje.[36]

Druga vrsta diskrecije ima ustavnu važnost i odnosi se na potencijalno suprotstavljene nacionalne i europske vrijednosti. U slučaju kada se norma prava EU i norma nacionalnog prava razlikuju, jedna mora ustuknuti pred drugom. U takvim situacijama i EU i država članica ističu normativni zahtjev da europsko, odnosno, nacionalno pravilo, ili vrednota, kontrolira situaciju. Kada dva pravila ili vrednote koegzistiraju bez neposrednog rješenja koje ima prednost, možemo govoriti margini diskrecije.

Europski sud do sada je priznavao marginu diskrecije na izričit i na implicitan način. Primjere izričite margine diskrecije nalazimo u predmetima ***Schmidberger***[37] i ***Omega***.[38] Primjere implicitnog priznavanja margine diskrecije nalazimo u predmetima ***SPUC v. Grogan*** [39] i ***Melki and Abdeli***.[40]

Implicitnu marginu diskrecije najbolje ilustrira predmet ***SPUC v. Grogan*** gdje je Europski sud morao razriješiti napetost između nacionalne ustavne norme koja definira pravo na život i norme prava EU koja jamči slobodu kretanja usluga. Kako je dobro poznato, ta je napetost rješena na način da je Europski sud odlučio da sporna situacija ne ulazi u doseg prava EU. Važnost presude u ovom predmetu je u tome što naglašava dobro poznatu činjenicu da nacionalne ustavne norme mogu izbjeći nadzor Europskog suda ukoliko su

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[35] Predmet C-208/05 ***ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit***, (2007) ECR I-181, §§ 68 i 69. Europski sud dopustio je diskreciju nacionalnog suda da interpretira nacionalno pravo u skladu s pravom EU.

[36] Predmet 41/74 ***Yvonne van Duyn v Home Office***, (1974) ECR 1337, § 18; Predmet 30/77, ***Régina v Pierre Bouchereau***, § 34, (1977) ECR 1999.

[37] Predmet C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, (2003) ECR I-5659.

[38] Predmet C-36/02, ***Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn***, (2004) ECR I-9609.

[39] Predmet C-159/90, ***The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*** (1991) ECR 4685.

[40] Spojeni predmeti C-188/10 and C-189/10 ***Aziz Melki and Sélim Abdeli,*** još neobjavljeno.

izvan dosega prava EU. Ipak, nedugo nakon presude, Irska je uspjela u Ugovor iz Maastrichta unijeti posebni protokol temeljem kojega:

"Ništa u Ugovoru o Europskoj uniji ili u Ugovorima o osnivanju Europskih zajednica... ... ne utječe na primjenu čl. 40.3.3. Ustava Irske u Irskoj."[41]

Ovaj Protokol ima značaj ustavnog amandmana čija je svrha spriječiti situacije u kojima bi se problem iz predmeta ***Grogan*** mogao pojaviti u ekonomskom kontekstu u kojemu napetost između nacionalnog ustava i prava EU ne bi mogla biti razrješena odlukom koja se temelji na funkcionalnim kriterijima.

Doista, pravila o nadležnosti i dosegu prava EU mogu osloboditi Europski sud od donošenja osjetljivih odluka koje utječu na nacionalno ustavno pravo, poput upravo opisane situacije, ili one iz predmeta ***Attila Vajnaj*** gdje se radilo o mađarskoj zabrani javnog isticanja komunističkih simbola.[42] Razumljivo je da bi zabrana crvene zvjezde mogla činiti dio mađarskog post-komunističkog identiteta koji se konstruira nasuprot negativnom povjesnom iskustvu, ali ne-ekonomska narav sporne aktivnosti ostavila je predmet izvan dosega prava EU.

Kako vidimo, implicitna margina diskrecije je jurisdikcijske naravi i Europski sud je kontrolira definirajući funkcionalne koncepte poput "ekonomske aktivnosti", "poduzetnika", "javne vlasti" ili "čisto unutarnje situacije."

Stvar je složenija kada se sukob ne može razriješiti jurisdikcijskim sredstvima. U takvim situacijama jedna vrijednost mora pretegnuti nad drugom. Europski sud se suočio s takvim situacijama u predmetima ***Schmidberger***, ***Omega*** and ***Küçükdeveçi***.[43] U takvim se situacijama primjenjuje sljedeće opće pravilo: jednom kada se situacija nalazi u dosegu prava EU, pravna norma ili opće načelo prava mogu imati prekluzivne učinke na nacionalno pravo, bilo izravno temeljem ugovora, bilo temeljem norme sekundarnog prava EU. Upravo u takvom slučaju koncept nacionalnog identiteta može naći primjenu i ograničiti prekluzivne učinke prava EU. Drugim riječima, ukoliko jamstvo nacionalnog identiteta ima ikakvu svrhu, ona će se očitovati upravo u takvim situacijama. ***Hic Rhodus, hic salta***!

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[41] Protocol annexed to the Treaty on European Union and to the Treaties establishing the European Communities.

[42] Predmet C-328/04 ***Criminal proceedings against Attila Vajnai***, (2005) ECR I-8577.

[43] Predmet C-555/07 ***Seda Küçükdeveçi v Swedex GmbH & Co. KG.***, (2010) ECR I-365.

Tri upravo navedena slučaja međusobno se razlikuju s obzirom na zaštićenu nacionalnu vrijednost. U predmetu ***Schmidberger*** radilo se o slobodi okupljanja kao temeljnom pravu, u predmetu ***Omega*** o ljudskom dostojanstvu kao o temeljnoj ustavnoj vrijednosti, a u predmetu ***Küçükdeveçi*** o instrumentu socijalne politike.[44] Štoviše, dok je sloboda okupljanja sloboda koju poznaju kako EU tako i sve države članice, ljudsko dostojanstvo je u relevantno vrijeme, prije stupanja na snagu Povelje temeljnih prava EU,[45] bilo specifično pravo zajamčeno ustavom SR Njemačke koje je bilo kompatibilno s vrijednostima EU,[46] ali nije bilo izričito zajamčeno u ustavima drugih država članica. Slično se može reći za mjere socijalne politike pri donošenju kojih države članice temeljem Ugovora uživaju široku marginu diskrecije. Jesu li ove razlike relevantne za određivanje širine margine diskrecije?

U sva tri navedena slučaja Europski sud inzistirao je na postojanju legitimnog cilja u nacionalnom zakonodavstvu.[47] Tako dugo dok je takav cilj suprotstavljen nekoj tržišnoj slobodi, uvjet njegove legitimnosti je sukladnost sa širim referentnim okvirom, odnosno, s općim načelima prava EU. U dva od tri navedena slučaja upravo je to bio slučaj, te su nacionalne mjere bile sukladne ili, u najmanju ruku, nisu bile suprotne s općim načelima prava EU.[48] U predmetu ***Küçükdeveçi***, nacionalna mjera bila je u skladu s ciljevima socijalne politike koje predviđa Direktiva 2000/78,[49] ali ne i u skladu s općenitijim referentnim pravilom – općim načelom zabrane diskriminacije. Drugim riječima, u slučaju kada norma nacionalnog prav nije sukladna s općim načelom prava EU, nacionalna norma mora biti izuzeta iz primjene.

Ukoliko čl. 4(2) UEU ima zube, oni će doći do izražaja u situacijama kada neki element nacionalnog identiteta ne koincidira sa širim referentnim okvirom EU. Znajući da je zaštita temeljnih prava dio i nacionalnog i europskog identiteta, niti ***Schmidberger*** niti ***Omega*** nisu bili takvi slučajevi. Nije to bio niti ***Küçükdeveçi,*** ali zbog drugih razloga. Politika je varijabilni sadržaj nacionalne vlasti, a isto vrijedi i za socijalnu politiku. Izvršna grana vlasti ima diskreciju

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[44] ***Id.***, § 36.

[45] Povelja jamči ljudsko dostojanstvo u čl. 1.

[46] ***Omega***, § 34.

[47] ***Schmidberger*** §§ 79 i 80; ***Küçükdeveçi*** § 36; Omega § 35.

[48] ***Schmidberger*** §§ 71-73; ***Omega*** § 34.

[49] ***Küçükdeveçi*** § 36; vidi čl. 6(1) Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

formulirati i provoditi politike i zbog tog razloga ne može se staviti znak jednakosti između politike i nacionalnog ustavnog identiteta. Pravo EU ne propisuje nikakav određeni smjer u kojemu bi države članice morale formirati svoje socijalne politike i ne miješa se u izbor država članica da se odrede kao države blagostanja. Istinski sukob između prava EU i nacionalnog ustavnog identiteta nastao bi samo ukoliko bi pravo EU zadiralo u temeljni ustavni izbor države članice, primjerice, da se konstituira u određenim društveno-ekonomskim ili političkim okvirima.[50]

Da zaključim. Razdoblje u kojemu je došlo do oblikovanja koncepta nacionalnog identiteta nije urodilo preciznim određenjem tog pojma niti razrješenjem napetosti između jamstva nacionalnog identiteta i tržišnih sloboda na unutarnjem tržištu EU.

Treća faza: diferencijacija ustavnih normi

Do semantičkog vezivanja pojma nacionalnog identiteta uz ustavni identitet država članica dolazi tek nakon potpisivanja propalog Ustavnog ugovora. Ta je semantika dobila normativni karakter tek stupanjem na snagu Ugovora iz Lisabona.

Usporedno s inkorporacijom koncepta ustavnog identiteta u UEU počela je sazrijevati i spoznaja da ne čini baš svaka nacionalna ustavna norma sastavni dio nacionalnog ustavnog identiteta. Tako je u predmetu ***Michaniki*** n.o. Maduro[51] zastupao shvaćanje da osporavano pravilo grčkog ustava valja shvatiti kao dio nacionalnog identiteta, dok je Europski sud zauzeo tradicionalno shvaćanje i podvrgnuo to pravilo testu proporcionalnosti.[52] Legitimnost nacionalne ustavne norme ovisila je o mjeri u kojoj ona ide za ostvarivanjem transparentnosti i jednakog postupanja, a te su vrednote zajedničke i Grčkoj i Europskoj uniji.

Ovakav pristup Europskog suda naveo je Besselinka na zaključak da "... trivijalne odredbe nacionalnog ustavnog prava – one koje ne čine dio nacionalnog ustavnog identiteta država članica – nemaju prioritet (nad pravom EU, op. SR), te prevladava uobičajena doktrina ***Costa***, koja utvrđuje

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[50] Moglo bi se tvrditi da bi takav sukob nastupio ukoliko bi država članica odlučila napustiti tržišno gospodarstvo što je uvjet za članstvo u EU.

[51] ***Michaniki***, ***supra***, bilješka 1, § 33.

[52] Vidi Vasiliki Kosta, Case C-213/07, ***Michaniki AE v. Ethniko Simvoulio Radiotileorasis, Ipourgos Epikratias***, 5 Eur. Const. L. Rev., (2009) 501.

prvenstvo izravno učinkovitih pravila prava EU."[53] Von Bogdandy i Schill zauzimaju slično shvaćanje te smatraju da su relevantne samo "fundamentalne strukture država članica."[54] Ukoliko je takva interpretacija ispravna, tada je funkcija čl. 4(2) stvaranje referentnog okvira koji Europskom sudu služi za razlikovanje bitnih od nebitnih elemenata nacionalnih ustava. Takvo razlikovanje iziskivalo bi različiti intenzitet sudbenog nadzora. U slučaju nebitnih elemenata, Europski sud provodio bi test proporcionalnosti temeljem kojega pozivanje na nacionalni identitet ne bi predstavljalo automatsko opravdanje za ograničenje tržišnih sloboda. Pod uvjetom da je regulatorni cilj legitiman, nacionalna mjera morala bi još uvijek biti prikladna i nužna, bez obzira može li se smatrati dijelom nacionalnog identiteta ili ne.[55] Države članice uživale bi marginu diskrecije samo u mjeri u kojoj se takve nacionalne mjere mogu pomiriti sa širim referentnim okvirom prava EU.[56] U slučaju bitnih elemenata, Europski sud bi prepustio donošenje odluke nacionalnim regulatornim ili sudbenim vlastima, provodeći test proporcionalnosti sam ili prepuštajući ga nacionalnim sudovima.

U prilog takvom shvaćanju govori činjenica da je do sada Europski sud radije dopuštao marginu prosudbe u predmetima koji su se ticali jamstava temeljnih prava i nacionalnih ustavnih vrednota,[57] nego u slučajevima koji su se ticali "običnog" nacionalnog prava, pa čak i kada je riječ o dobro utvrđenim načelima građanskog prava.[58]

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[53] To je navelo Besselinka da zaključi da: "… more trivial provisions of national constitutional law – those which do not form part of the constitutional identity of the Member State – are not granted such priority, and the normal Costa doctrine of the priority of directly effective EU law prevails." Leonard F. M. Besselink, National and constitutional identity before and after Lisbon, ***6 Utrecht L. Rev.,*** 3 (2010) 36, 49.

[54] Von Bogdandy and Schill, ***supra***, bilješka 2 na str. 1431.

[55] Schmidberger, §§ 82-87; Kücükdeveçi § 37; Omega § 36.

[56] U predmetu ***Küçükdeveçi*** (§ 38) Europski sud ponovio je svoje shvaćanje da države članice imaju široku diskreciju u formiranju socijalne politike. U predmetu ***Schmidberger*** (§ 89) široka diskrecija dopuštena je nacionalnim tijelima u postizanju ravnoteže između temeljnog prava i tržišne slobode. U predmetu ***Omega*** (§ 31) državi je također ostavljena široka diskrecija.

[57] Za najnoviju praksu vidi C-256/11 ***Dereci and others***, još neobjavljeno u ECR. Vidi osobito §§ 71-74.

[58] U predmetu ***Traghetti del Mediterraneo*** Europski sud isključio je mogućnost primjene nacionalnog prava koje ograničava odgovornost države za štetu zbog povrede prava EU kada štetu prouzroči nacionalni sud zadnje instance. I u takvom slučaju nacionalno pravo koje ograničava odgovornost za štetu mora biti izuzeto iz primjene.

N.o. Maduro je i sam implicitno priznao u § 33 svog Mišljenja u predmetu ***Michaniki***, da neke ustavne norme jesu zaštićene jamstvom iz čl. 4(2) UEU, a neke nisu.[59] Istu misao iznijela je i n.o. Kokkot u ***UGT-Rioja***,[60] gdje je interpretirala shvaćanje Europskog suda o ravnoteži između poštivanja nacionalnih ustavnih načela i poštivanja prava EU.[61] Prema njenom shvaćanju, dok Europski sud poštuje lokalnu autonomiju kako je definira nacionalni ustav,

"… države članice ne smiju se sakrivati iza svog ustavnog poretka kako bi zaobišle zabranu potpora propisanu čl. 87 EZ, temeljem čisto formalnog transfera zakonodavnih ovlasti."[62]

Europski sud ostavio je da o tome odluči nacionalni sud.[63]

Europski sud je već 1996. godine u predmetu ***Commission v. Luxembourg***,[64] priznao nacionalni identitet kao legitiman cilj, ali ga je podvrgnuo testu proporcionalnosti.[65] Sukladno tome, država članica ne može se pozivati na nacionalni identitet kako bi odstupila od tržišnih sloboda, tako dugo dok postoji manje restriktivna alternativa za ostvarivanje istog regulatornog cilja. Tezu o diferencijaciji ustavnih pravila podupire i presuda iz ožujka 2010. godine u predmetu ***Rottman***.[66] U toj je presudi Europski sud sugerirao da bi:

Predmet C-173/03, ***Traghetti del Mediterraneo SpA v Repubblica Italiana*** (2006) ECR I-5177, § 46.

[59] Vidi § 33 Mišljenja: "It is, nevertheless, necessary to point out that that respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules." Izričaj "all national constitutional rules" implicira da postoje i takve ustavne norme koje automatski dovode do samoograničenja Europskog suda.

[60] Spojeni predmeti C-428/06 to C-434/06 ***Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others*** (2008) ECR I-6747, §§ 56-57.

[61] Nezavisni odvjetnik pozvao se na predmet C-88/03 ***Portuguese Republic v Commission of the European Communities*** (2006) ECR I-7115.

[62] ***Id***., § 57.

[63] ***UGT-Rioja***, ***supra***, bilješka 60, § 144.

[64] Predmet C-473/93 ***Commission v Luxembourg*** (1996) ECR I-3207, § 35.

[65] ***Id***.

[66] Predmet C-135/08, ***Janko Rottman, supra*** bilješka 18, § 25.

"… učinak pretpostavke da u pravu EU postoji obaveza uzdržavati se od oduzimanja državljanstva ostvarenog prijevarom, bio udarac u srce suverenosti država članica." [67]

U svom Mišljenju u predmetu ***Rottman*** n.o. Maduro predložio je da ovlast oduzeti državljanstvo predstavlja "bitni element" nacionalnog identiteta države članice, budući da to utječe na sastav nacionalnog političkog tijela.

Sukladno tome, činiti nacionalno državljanstvo ovisnim o građanstvu EU bilo bi suprotno čl. 6(3) UEU (sada čl. 4(2) UEU). To slijedi, međutim, ne samo iz odredbe o nacionalnom identitetu, već iz same arhitekture građanstva EU koje je izričito učinjeno sekundarnim u odnosu na nacionalno državljanstvo. Tako je Europski sud zanemario argumente nezavisnog odvjetnika i odlučio slučaj na osnovi prekluzivnih učinaka prava EU.[68]

U još novijoj praksi jamstvo nacionalnog identiteta isticano je u tzv. "bilježničkim slučajevima" u kojima je Europski sud donio presudu u svibnju 2011.[69] Argument kojega je isticalo Veliko Vojvodstvo bio je da je korištenje luksemburškog jezika:

"… nužno u obavljanju bilježničkih aktivnosti, a uvjet državljanstva ide za osiguravanjem poštivanje povijesti, kulture, tradicije i nacionalnog identiteta Luxembourga, u smislu čl. 6(3) UEU."[70]

Europski sud nije bio impresioniran ovakvom argumentacijom te se pozvao na svoju raniju praksu temeljem koje nacionalni identitet može "... biti zaštićen na drugi način osim općim isključivanjem državljana drugih država članica."[71] Zanimljivo, Europski sud je u § 124 presude citirao čl. 4(2) UEU u varijanti iz Lisabona, ali se oslonio na razloge koje je naveo u svojoj presudi iz 2006. godine, što daje naslutiti da u novoj praksi neće biti značajnih interpretativnih odstupanja u odnosu na interpretacije Ugovora iz Maastrichta, Amsterdama i Nice. Sve u svemu, države članice su se u pred-lisabonskoj eri pozivale na jamstvo nacionalnog identiteta s ograničenim uspjehom.

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[67] ***Id.***, § 32.

[68] ***Id.***, § 41. Europski sud ostavio je provedbu testa proporcionalnosti nacionalnom sudu (§ 55).

[69] Predmeti C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08 i C-52/08 ***Commission v Belgium, France, Luxembourg, Austria, Germany, Greece and Portugal***.

[70] Predmet C-52/08 ***Commission v Luxembourg***, § 72.

[71] ***Id.***, § 124.

S jedne strane, države članice bile su uspješne u pogledu onoga što nazivam implicitnom marginom prosudbe, tj. u slučajevima kada je Europski sud odlučio da nije nadležan donijeti odluku. Tako je Europski sud otklanjajući nadležnost izbjegao odlučiti o nacionalnim vrednotama. Ipak, u materijalnom pogledu, opravdanje utemeljeno na nacionalnom identitetu bilo je manje uspješno. U slučajevima konflikta između nacionalnog identiteta i tržišnih sloboda Europski sud provodio je test proporcionalnosti, ponašajući se prema nacionalnom identitetu kao i prema svakom drugom javnom interesu.

NACIONALNI IDENTITET I UGOVOR IZ LISABONA

Kako sam naveo u uvodnom dijelu, odredba o nacionalnom identitetu bila je najprije uvedena kao dio čl. I-5 Ustavnog ugovora, da bi kasnije bila prihvaćena kao čl. 4(2) UEU.

Dok je prvi ugovorom propisani izričaj definirao taj koncept tek u osnovnim crtama, čl. I-5 UU i čl. 4(2) UEU dodali su nešto jasnoće, definirajući ga kao "temeljne političke i ustavne strukture." Gledajući zakonodavnu povijest Europske konvencije koja je izvorno formulirala tekst te odredbe, nalazimo da je Radna skupina V (komplementarne nadležnosti) u svom završnom izvješću Europskoj konvenciji[72] naglasila da "... ta odredba nije derogacijska klauzula" i da "... države članice i dalje imaju obavezu poštivati odredbe Ugovora." Radna skupina pojasnila je svrhu odredbe koja je "... da Unija u korištenju svojih nadležnosti, ima obavezu poštivati nacionalni identitet država članica", što je podvrgnuto interpretaciji Europskog suda koji je "... konačni interpret te odredbe, u slučaju da političke institucije prekorače razumnu marginu prosudbe."[73]

Dodatno, novo formulirani čl. 4(3) UEU uveo je uravnoteženiji pristup obavezi lojalne suradnje. Prema novom tekstu:

"u skladu s načelom iskrene suradnje Unija i države članice moraju, u potpunosti poštujući jedni druge, pomagati jedni drugima u izvrđavanju zadaća koje proizlaze iz Ugovora."

Ovo nije potpuno isto što je propisivao raniji čl. 10 UEZ prema kojemu su adresati lojalne suradnje bile samo države članice. Bogata praksa utemeljena na čl. 10 UEZ dala je toj odredbi moć stvoriti posve konkretne obaveze država

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[72] CONV 375/02 REV1 WG V 14, Brussels, 4 November 2002.

[73] ***Id.*** str. 11

članica, poput obaveze interpretacije u skladu s pravom EU, [74] ili obaveze naknade štete zbog povrede prava EU.[75] Sada, po prvi puta, obaveza lojalne suradnje postaje recipročna, odnosno, istovremeno obvezuje i EU i države članice.

Čitajući §§ (2) i (3) čl. 4. UEU zajedno, postavljaju se dva pitanja. Prvo, u kojoj mjeri ove odredbe, uzete zajedno, mogu biti interpretirane na način da stvarju obavezu za EU da interpretira nacionalno pravo uzimajući u obzir nacionalni identitet te, drugo, u kojoj mjeri one ovlašćuju države članice da odstupe od prava EU pozivajući se na nacionalni identitet.

Post-lisabonska praksa Europskog suda

Pojmom nacionalnog identiteta Europski sud bavio se u dva novija predmeta koja su odlučena nakon stupanja na snagu Lisabonskog ugovora. Presuda u predmetu ***Sayn Wittgenstein*** donesena je 22. prosinca 2010,[76] a u predmetu ***Runevič-Vardyn*** 12. svibnja 2011.[77] U oba slučaja radilo se o napetosti između nacionalnog ustavnog identiteta s jedne i slobodi kretanja zajamčenoj čl. 21 UFEU, te pravu na privatnost,[78] s druge strane.

U predmetu ***Sayn-Wittgenstein*** jedna austrijska državljanka rođena u Austriji i posvojena od strane njemačkog državljanina isticala je zahtjev da joj nacionalni sud prizna pravo na upis u austrijske matične knjige njene plemićke titule (Fürstin von Sayn-Wittgenstein) koju je stekla posvojenjem. Budući da je radila u trgovini nekretninama, isticala je kako bi nemogućnost da se koristi svojom plemićkom titulom negativno utjecalo na njenu slobodu pružanja usluga.

Kako je pred Europskim sudom isticala austrijska vlada, dopuštenje za upis plemićke titule bilo bi u suprotnosti "... s temeljnim vrijednostima austrijskog

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[74] Predmet 14/83 ***Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen***, (1984) ECR 1891.

[75] Spojeni predmeti C-6/90 and C-9/90 ***Andrea Francovich and Danila Bonifaci and others v Italian Republic*** (1991) ECR I-5357.

[76] Predmet C-208/09 ***Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien***, još neobjavljeno.

[77] Predmet C-391/09 ***Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others***, još neobjavljeno.

[78] Kako je zajamčeno temeljem Čl. 7 Povelje temeljnih prava EU (dalje u tekstu: Povelja) i čl. 8. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda (dalje u tekstu: Konvencija).

pravnog poretka, posebice s načelom jednakog postupanja koje je zajamčeno čl. 7 Saveznog ustava i provedeno Zakonom o zabrani plemstva."[79] Europski sud priznao je da nacionalni identitet može biti uzet u obzir pri provođenju testa proporcionalnosti ali je istovremeno pojasnio da jamstvo nacionalnog identiteta valja shvatiti kao jedno od opravdanja koja se temelje na javnom interesu[80] koje, u skladu s ranijom praksom[81] valja interpretirati restriktivno, kao "istinsku i dovoljno ozbiljnu prijetnju jednom od temeljnih interesa društva."[82]

Dodatno, Europski sud dopustio je marginu prosudbe u skladu sa svojim ranijim shvaćanjem izraženim u § 31 presude u predmetu ***Omega***. Na kraju, u § 93, Europski sud proveo je test proporcionalnosti i zaključio da je Austrija djelovala proporcionalno i išla za ostvarivanjem legitimnog ustavnog cilja. Europski sud pozvao se i na pravo na privatnost zaštićeno Poveljom i Konvencijom, ali nije dodatno obrazložio taj aspekt slučaja.

U predmetu ***Runevič-Vardyn*** radilo se o ženi koja je željela da se njeno prezime izmjeni u skladu sa slovima koja ne postoje u Litavskoj abecedi.[83] Europski sud najprije je u § 66 naglasio da "... osobno ime i prezime tvore sastavni dio njenog identiteta i privatnog života" zaštićenog i Poveljom i Konvencijom, te je nastavio s konstatacijom da se jamstvo slobode kretanja iz čl. 21 TFEU. Zaštita nacionalnog jezika kao dio nacionalnog identiteta jest zaštićena vrijednost koju EU mora poštivati (§ 86) te, sukladno tome, nacionalni identitet valja staviti u ravnotežu sa slobodom kretanja i pravom na privatni život.

Govoreći o odnosu slobode kretanja i nacionalnog identiteta Europski sud slijedio je svoju argumentaciju razvijenu u predmetu ***Sayn-Wittgenstein***. Ukoliko je u dosegu čl. 21, nacionalna restrikcija slobode kretanja može biti opravdana ukoliko položi test proporcionalnosti. Međutim, za razliku od te

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[79] Sayn-Wittgenstein § 76.

[80] ***Id.*** §§ 83-84.

[81] Predmet C-36/02 ***Omega*** (2004) ECR I-9609, § 30, and Predmet C-33/07 ***Jipa*** (2008) ECR I-5157, § 23.

[82] Sayn-Wittgenstein § 86.

[83] Kako se vidi iz § 22 odluke, ime 'Malgožata Runevič', trebalo se promijeniti u 'Małgorzata Runiewicz' a na vjenčanom listu iz 'Malgožata Runevič-Vardyn', u 'Małgorzata Runiewicz-Wardyn'.

presude gdje je Europski sud sam proveo test proporcionalnosti, u ovome je slučaju to prepustio nacionalnom sudu.[84]

Razmatrajući odnos indivdualnih prava i nacionalnog identiteta Europski sud prepustio je nacionalnom sudu da utvrdi izaziva li nacionalna norma koja priječi izmjenu osobnog imena u relevantnim dokumentima "...ozbiljan problem za pojedinca i/ili njezinu obitelj na administrativnoj, profesionalnoj i privatnoj razini." Sukladno tome, nacionalni sud morati će odlučiti je li između suprotstavljenih interesa ostvarena pravična ravnoteža.[85]

Kako vidimo, u oba slučaja Europski sud je jamstvo nacionalnog identiteta interpretirao restriktivno i bilo je podvrgnuto testu proporcionalnosti. Preostaje pitanje zbog čega je u prvom slučaju test proporcionalnosti proveo sam Europski sud, dok je tu zadaću u drugom slučaju prepustio nacionalnom sudu. Odgovor vjerovatno počiva u činjenici da je republikanski oblik vladavine apsolutno zajamčen nacionalnim ustavom, te nije za očekivati da bi nacionalni sud dao prednost slobodi kretanja. S druge strane, jezik doista predstavlja dio nacionalnog identiteta, ali nije nezamislivo da bi nacionalni sud dopustio određene iznimke u pogledu osobnih imena. U oba slučaja Europski sud prepustio je nacionalnom sudu da presudi o ravnoteži između temeljnog prava i nacionalnog ustavnog identiteta. Zaključak koji iz ova dva slučaja proizlazi jest da će Europski sud ili sam priznati nacionalni ustavni identitet, ili odluku o tome prepustiti nacionalnom sudu.

Oba analizirana slučaja došli su pred Europski sud u postupku prethodnog pitanja. U takvom postupku Europski sud doista ima izbor hoće li test proporcionalnosti provesti sam ili će ga prepustiti nacionalnom sudu. U postupku zbog povrede prava EU (infrakcijski postupak temeljem čl. 258 i 259 UFEU), Europski sud nema na raspolaganju takav izbor. U toj vrsti postupka ukoliko Europski sud ne odluči sam o nekom pitanju, konačna odluka počiva na nacionalnom zakonodavcu. Prepustiti odluku nacionalnom zakonodavcu ujedno znači i presuditi protiv podnositelja zahtjeva, tj. protiv

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[84] ***Runevič-Vardyn***, § 83: "In the event that the national court finds that the refusal to amend the joint surname of the applicants in the main proceedings constitutes a restriction of Article 21 TFEU, it should be noted that, according to settled case-law, a restriction on the freedom of movement of persons can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions (vidi, inter alia, Grunkin and Paul , § 29, i Sayn-Wittgenstein , § 81)." Upitno je u kojoj mjeri će sudovi u sustavima rimske pravne tradicije biti spremni interpretirati zakonski tekst.

[85] Runevič-Vardyn, § 91.

Komisije ili druge države članice. Drugim riječima, suzdržanost Europskog suda vodi nužno pobjedi jedne od stranaka u sporu. Kako Europski sud pristupa nacionalnom identitetu u takvoj kategoriji predmeta?

Pozivanje na nacionalni identitet zabilježeno je u predmetima koje je komisija vodila protiv Luxembourga gdje se ta država pozivala na to opravdanje u kontekstu iznimke javne službe (čl. 51 UFEU).[86] U tim je slučajevima Europski sud primjenio kriterij najmanje restriktivne alternative.[87] U oba slučaja, baš kao i u ***Sayn-Wittgenstein*** i ***Runevič-Vardyn*** nacionalni identitet uzet je kao legitimni cilj koji, kao iznimka od slobode kretanja, mora biti interpretiran restriktivno i podvrgnut testu proporcionalnosti. Pri tome je važno primjetiti da su oba slučaja odlučena prije stupanja na snagu Ugovora iz Lisabona i da se u njima radilo o iznimci javne službe, što je područje prava u kojemu Europski sud inzistira na jedinstvenoj primjeni prava. Iznimka javne službe ne samo da se mora interpretirati restriktivno, već mora imati:

"… jednaku interpretaciju i primjenu u čitavoj Zajednici i stoga ne može biti potpuno prepuštena diskreciji država članica." Member States."[88]

Europski sud još uvijek primjenjuje usku interpretaciju iznimke javne službe, čak i u svjetlu argumenata koji se pozivaju na nacionalni identitet. Predmeti koji su pred Europski sud dolazili u postupku prethodnih pitanja također slijede tu praksu. [89] Čini se da takvo shvaćanje podupire Besselinkovu teoriju da iako je ustavni identitet inherentno nacionalni pojam, on u stvari predstavlja koncept prava EU.[90] Drugim riječima, čl. 4(2) UEU učinio je diskurs o odnosu prava EU i nacionalnog ustavnog prava dijelom europskog ustavnog prava. Lako je složiti se s onime što ističu Von Bogdandy i Schill: "...

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[86] Predmet C-473/93 ***Commission v. Luxembourg*** (1996) ECR I- 3207 i predmet C-51/08 ***Commission v. Luxembourg.***

[87] Predmet C-473/93 ***Commission v. Luxembourg*** (1996) ECR I- 3207, § 35; Predmet C-51/08 ***Commission v. Luxembourg***, § 124.

[88] Predmet C-405/01 ***Colegio de Oficiales de la Marina Mercante Española*** (2003) ECR I□10391. § 38. Vidi i predmet 152/73 ***Giovanni Maria Sotgiu v Deutsche Bundespost*** (1974) ECR 153, § 5, and Predmet 149/79 ***Commission v Belgium*** (1980) ECR 3881, §§ 12 i 18.

[89] Za noviju praksu vidi npr. spojene predmete C- C-372/09 and C-373/***09 Josep Peñarroja Fa***, judgment of March 17, 2011, još neobjavljeno. Za raniju praksu vidi npr. predmet C-42/92 ***Adrianus Thijssen v Controledienst voor de verzekeringen*** (1993) ECR I-4047.

[90] Leonard F. M. Besselink, National and constitutional identity before and after Lisbon, 6 ***Utrecht L. Rev***., 3 (2010) 36, 37.

postoji zajednički europski diskurs o tom najosjetljivijem pitanju."[91] Ipak, još uvijek ostaje nejasno tko ima zadnju riječ. Kako bi rekao Paul Feyerabend, nerješena i potencijalno nerješiva zagonetka počiva u činjenici da se europski ustavni diskurs ne odvija u formi "vođene razmjene."[92]

Doista, Europski sud nije nadležan interpretirati nacionalno pravo, a još manje nacionalno ustavno pravo.[93] S druge strane, nacionalni sudovi nisu nadležni interpretirati čl. 4(2) UEU. Besselink sugerira rješenje prema kojemu nacionalni ustavni sudovi moraju biti prvi koji će definirati sadržaj nacionalnog ustavnog identiteta, dok će Europski sud odrediti značenje relevantnog prava EU. Nema sumnje da se nacionalni identitet prvenstveno[94] konstruira na nacionalnoj razini, ne samo pravno, već i činjenično.[95] Ipak, ta činjenica ne čini nacionalni identitet apsolutnim. Kada bi to bio slučaj, jamstvo iz čl. 4(2) UEU moglo bi biti primjenjeno temeljem jednostavne tvrdnje da neka vrijednost tvori dio nacionalnog identiteta, u kojem slučaju bi Europski sud morao sam sebe ograničiti u interpretaciji. Drugim riječima, takvo rješenje bi stvorilo imunitet za nacionalno pravo te ga pravo EU ne bi moglo nadjačati što, očito, nije slučaj.

Do sada postoje tek slabe naznake da je Europski sud spreman odluku o nacionalnom identitetu prepustiti državama članicama. Takav je bio slučaj u predmetu ***Runevič-Vardyn***, gdje je Europski sud ostavio nacionalnom sudu da

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[91] Von Bogdandy i Schill, ***supra***, bilješka 2 na str. 1441.

[92] Prema Feyerabendu, vođena razmjena je takav oblik komunikacije u kojoj "... neki ili svi sudionici prihvaćaju dobro utvrđenu tradiciju i prihvaćaju samo one reakcije koje odgovaraju njenim standardima." Paul Feyerabend, ***Science in a Free Society*** (1978) NLB London, na str. 29 (preveo autor).

[93] ***Id***, na str. 44.

[94] Iris Marion Young je pokazala da dominantna kultura može nametnuti identitet manjinskim društvenim skupinama i na taj način stvoriti fenomen dvostrukog identiteta. See Iris Marion Young, ***Justice and Politics of Interest***. Stoga se ne čini nezamislivim da bi nacionalni identitet mogao biti konstruiran od strane vanjskih aktera.

[95] Za isti argument vidi Mišljenje n.o. Madura u predmetu C-53/04 ***Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate***, (2006) ECR I-7213, § 40: "Doubtless the national authorities, in particular the constitutional courts, should be given the responsibility to define the nature of the specific national features that could justify such a difference in treatment. Those authorities are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect." Europski sud ignorirao je taj argument.

temeljna prava stavi u ravnotežu s nacionalnim ustavnim identitetom. Raniji primjer nalazimo u predmetu ***UGT-Rioja*** o kojemu je već bilo riječi.[96]

Može li se iz navedene prakse naslutiti signal koji upućuje na budući pristup Europskog suda? Europski sud i inače ima praksu ostavljati nacionalnim sudovima da utvrde relevantne činjenice i da takav činjenični nalaz stave u ravnotežu s relevantnim nacionalnim regulatornim interesom. Lijep primjer takve prakse nalazimo u predmetu ***Familiapress***[97] gdje je sloboda tiska i raznolikost tiska stajala na putu primjeni nacionalnih i europskih pravila o tržišnoj utakmici. Stoga presuda u predmetu ***Runevič-Vardyn*** više izgleda kao nastavak ranije prakse nego kao promjena kursa.

Reakcija država članica

Kako vidimo, Europski sud čvrsto stoji na shvaćanju da jamstvo nacionalnog identiteta ne može spriječiti primjenu prava EU, čak i u slučaju sukoba s nacionalnim ustavnim pravilima. Ukoliko nacionalni identitet prevlada, to će se desiti samo zbog toga što je Europski sud u konkretnom slučaju zaključio da treba uspostaviti takvu ravnotežu između prava EU i nacionalnog interesa. Isto pravilo (temeljem kojega se države ne mogu pozivati na svoja ustavna pravila kako bi opravdale svoj propust da ispune obaveze preuzete međunarodnim ugovorom) koje se temelji na Bečkoj konvenciji o pravu međunarodnih ugovora, vrijedi i u pravu EU.[98]

Bez obzira na to, rasprava o ustavnom identitetu postala je omiljenom temom u pravnim poretcima nekih država članica. Zanimljivo, bitka o nadređenosti

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[96] ***Supra***, bilješka 60, § 144: " It is for the national court, which alone has jurisdiction to identify the national law applicable and to interpret it, as well as to apply Community law to the cases before it, to determine whether the Historical Territories and the Autonomous Community of the Basque Country have such autonomy, which, if so, would have the result that the laws adopted within the limits of the areas of competence granted to those infra-State bodies by the Constitution and the other provisions of Spanish law are not of a selective nature within the meaning of the concept of State aid as referred to in Article 87(1) EC."

[97] Predmet C-368/95 ***Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*** (1997) ECR I-03689

[98] Dobar primjer da nacionalni ustav ne može opravdati neprovedbu directive nalazimo u predmetu C-323/***97Commission v Belgium*** (1998) ECR I-4281, § 8: "The Court has consistently held that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (vidi, Predmet C-107/96 Commission v Spain (1997) ECR I-3193, § 10).

prava EU nacionalnom ustavnom pravu vodi se na polju procesnog a ne na polju materijalnog prava. Na taj način pitanje "koje pravno pravilo ima prednost" transformiralo se u pitanje "tko odlučuje", odnosno, još bolje, "tko ima zadnju riječ."

Francuska

Vjerovatno je prejednostavno pripisati renesansu nacionalnog ustavnog identiteta novom izričaju Ustavnog ugovora i njegovoj kasnijoj ugradnji u Ugovor iz lisabona. U biti, uloga Francuske, koja je nedavno uzdigla ideju nacionalnog ustavnog identiteta na razinu ustavnog načela, u vrijeme kada se o toj odredbi raspravljalo u okviru Europske konvencije, bila je skromna. Kako se vidi iz dokumenata Sekretarijata Europske konvencije,[99] predloženi amandmani na do tada postojeću definiciju nacionalnog identiteta predlagali su:

"… da nacionalni identitet uključuje, koliko je to prikladno ustavne strukture/ ustrojstvo javne vlasti na lokanoj i regionalnoj razini/izbor jezika/lokalnu autonomiju/status crkvi."

Francuski doprinos ovom prijedlogu bio je zanemariv.[100] Usprkos tome Michel Troper sugerira da je francuska ustavna doktrina bila izravno inspirirana konceptom ustavnog identiteta kako ga je definirao Ustavni ugovor i kasnije Ugovor iz Lisabona.[101] Čini se da je francuska ustavna reforma od 1. ožujka 2010. godine bila motivirana namjerom da se francuski

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[99] Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, CONV 574/1/03 REV 1, Brussels 26 February 2003 (04.03).

[100] Kako proizlazi iz Sažetka kojega je pripremio Sekretarijat, amandmane su predložili: "Mr Michel + 5 Belgian members of the Convention + observers + Lopes + Hübner + Einem + Kiljunen + Vanhanen + Cushnahan + Olesky + Tiilikainen + Peltomäki + Costa + 3 Portuguese + Santer + 2 Luxembourgers + Lequiller + Frendo + Bonde + 8 members of the Convention + Wittbrodt + Fogler + Brok + 12 EPP members of the Convention + Katiforis + Serracino-Inglott (+ Inguanez) + Chabert (observer) + 5 members of the Convention (observers). Bilješka 96.

[101] M. Troper, ***Sovereignty and Laicité***, 30 Cardozo L. Rev. 6 (2009) 2561, 2573. Josso navodi kako prije ove odluke Ustavnog vijeća nije bilo nikakvih drugih iskaza o bilo kakvim specifičnim elementima nacionalnog ustavnog identiteta. S. Josso, ***Le caractère social de la République, principe inhérent à l'identité constitutionnelle de la France***, report to the Paris Congress of Association française de droit constitutionnel, na str. 5. Vidi http://www.droitconstitutionnel.org/congresParis/comC1/JossoTXT.pdf, posjećena 14 kolovoza 2011.

ustav izolira od mogućnosti da mu pravo EU bude nadređeno.[102] Troper tu misao izražava na jasan način. Budući da pravo EU ima prednost nad nacionalnim ustavnim pravom,

"… francuski sud koji želi izbjeći priznanje nadređenosti eruopskog prava mora koristiti neki drugi argument od onoga da je neko načelo francuskog prava propisano ustavom. Na tom mjestu ustavni identitet ulazi u igru."[103]

Doktrinu ustavnog identiteta prihvatilo je i Ustavno vijeće koje je 2006. godine prihvatilo shvaćanje temeljem kojega: "... provedba direktive ne može kršiti pravilo ili načelo koje je inherentno francuskom ustavnom identitetu, osim u slučaju da na to pristane ustavotvorna vlast."[104]

Literatura na temu ustavnog reforme u Francuskoj je sve brojnija.[105] Kako bih izbjegao diskusiju koja se vodi na drugom mjestu, želio bih tek istaknuti da su njeni glavni učinci, a posebice učinci novo uvedene apstraktne kontrole ustavnosti i "prioritetnog prethodnog pitanja" Ustavnom vijeću suprotni dobro utvrđenoj praksi Europskog suda. Prvo, ukoliko Ustavno vijeće oglasi zakon neustavnim zbog toga što je suprotan pravu EU, redovni sud više nema mogućnost izuzeti ga iz primjene kao niti uputiti prethodno pitanje Europskom sudu prije nego što se o tome izjasni Ustavno vijeće.

Odgovor Europskog suda uslijedio je u predmetu ***Melki and Abdeli***[106] koji, očekivano, slijedi raniju praksu. Europski sud potrudio se detaljno obrazložiti

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[102] Vidi B. Kostadinov, Prethodna pitanja ustavnosti u nacionalnom pravu i pravo EU, in T. Ćapeta, I. Goldner Lang and S. Rodin (eds.), ***Prethodni postupak u pravu Europske unije***, Narodne novine, Zagreb 2011. Kostadinov citira Valérie Bernaud, Marthe Fatin-Rouge Stéfanini, La réforme du contrôle de constitutionnalité une nouvelle fois en question? Réflexion autour des articles 61-1 et 62 de la Constitution proposé par le comité Balladur, ***Revue francaise de Droit constitutionel***, no hors-série, 2008., str. 190.

[103] Troper, ***supra***, bilješka 101 na str. 2572 (preveo SR)

[104] Odluka Ustavnog vijeća br. 2006-540DC, July 27, 2006, J.O. "[L]a transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti." U takvom slučaju neustavno bi bilo nacionalno pravo koje provodi direktivu.

[105] Vidi F. Fabbrini, Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation, ***German Law Journal***, Vol. 09 No. 10 (2008) 1297; S. Rodin, Back to Square One - the Past, the Present and the Future of the Simmenthal Mandate, Beneyto and Pernice (eds.) ***Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts***, Nomos 2011.

[106] Spojeni predmeti C-188/10 and C-189/10 ***Aziz Melki and Sélim Abdeli,*** not yet reported. Za detaljniju raspravu, vidi S. Rodin, ***supra bilješka*** 105.

koje zahtjeve nacionalna interlokutorna kontrola ustavnosti mora ispuniti kako bi bila sukladna pravu EU. Kako je pojasnio u § 57 presude, čl. 268 UFEU isključuje nacionalno zakonodavstvo koje propisuje interlokutornu kontrolu ustavnosti ukoliko taj postupak sprečava:

"… sve druge nacionalne sudove da se koriste svojim pravom ili da ispune svoju obavezu upućivanja pitanja Europskom sudu na prethodni postupak."

Na taj način Europski sud je očuvao sudski dijalog s redovnim sudovima i učinio pravna shvaćanja Ustavnog vijeća prihvaćena u interlokutornom postupku irelevantnima iz perspektive nadređenosti prava EU.[107] Glavni problem francuskog pristupa bio je u tome što je preširoko definirao područje zaštite ustavnog identiteta, te je propuštena prilika da se definira njegova zaštićena jezgra.

Njemačka

Njemačka ima dugu povijest dijaloga s Europskim sudom. Savezni ustavni sud pokrenuo je evoluciju zaštite ljudskih prava u EU inzistirajući na standardima zaštite koji su materijalno usporedivi s onima koje jamči Temeljni zakon. Ipak, Savezni ustavni sud nikada nije uputio prethodno pitanje Europskom sudu. Umjesto toga svoj utjecaj ostvaruje koristeći se svojim položajem suda koji ima posljednju riječ u europskom sudskom dijalogu. Naime, čak i kada Europski sud donese odluku o interpretaciji prava EU, Savezni ustavni sud je u poziciji da odlučuje o nacionalnom ustavnom pravu te da na taj nači zaštiti nacionalni ustavni identitet.

U predmetu ***Maastricht*** iz 1992. godine[108] Savezni ustavni sud primjenio je dva moćna pravna sredstva. Prvo od njih bilo je jamstvo bitnog sadržaja temeljnih prava temeljem kojega Savezni ustavni sud djeluje kao čuvar jezgre temeljnih prava. To je propisano čl. 19(2) zajedno s čl. 79(3) Temeljnog zakona koji sadrži tzv. "klauzulu vječnosti". Drugo sredstvo bila je doktrina ***ultra vires***, temeljem koje Savezni ustavni sud može nadzirati primjenu i uskratiti

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[107] Valja primjetiti da presuda u predmetu ***Melki and Abdeli***, slično presudi u predmetu ***Elchinov***, podupire praksu ustanovljenu u predmetu ***Rheinmühlen***, temeljem koje sud koji upućuje prethodno pitanje nije vezan pravnim shvaćanjem nacionalnog žalbenog suda. To predstavlja važan procesni element doktrine nadređenosti prava EU nacionalnom pravu. Vidi predmet 146/73 ***Rheinmühlen-Düsseldorf*** (1974) ECR 139. Isto proizlazi i iz predmeta C-210/06 Cartesio Oktató és Szolgáltató bt. (2008) ECR I-09641, §§ 93-98.

[108] BVerfGE 89, 155.

primjenu aktima EU koji, prema njegovom shvaćanju, prelaze granice nadležnosti EU.[109]

Kako je Savezni ustavni sud rekao u odluci ***Lisabon***, ustavni identitet zajamčen je čl. 79(3) Temeljnog zakona i "... ustavotvorna vlast nije dala predstavnicima i tijelima naroda mandat da se tog ustavnog identiteta odreknu."[110] Kako je Savezni ustavni sud pojasnio:

"Obaveza koja se temelji na pravu EU, da se poštuje ustavotvorna vlast država članica kao gospodarica ugovora odgovara neprenosivom ustavnom identitetu (čl. 79.3 of the Temeljnog zakona), koji u tom pogledu nije otvoren za integraciju. U granicama svojih nadležnosti, Savezni ustavni sud mora nadzirati, kada je to nužno, poštuju li se ta načela."[111]

Slijedi da bi bilo koji akt EU koji bi zadirao u nacionalni ustavni identitet bio ***ultra*** vires i stoga neprimjenjiv u SR Njemačkoj,[112] što nadzire Savezni ustavni sud. [113]

U srpnju 2010. godine, odlučujući u predmetu ***Honeywell***,[114] Savezni ustavni sud znatno je suzio doktrinu ***ultra vires.*** Prema toj odluci, prije nego što neki akt EU može biti podvrgnut kontroli na temelju doktrine ***ultra vires***, Europski sud mora imati mogućnost da odluči u toj stvari, bilo u postupku za poništenje akta, bilo u postupku prethodnog pitanja. Provodeći ustavni nadzor Savezni ustavni sud može proglasiti neki akt EU ***ultra vires***, ali:

"… akt EU mora biti manifestno suprotan njenim nadležnostima, te mora biti iznimno značajan u strukturi nadležnosti između država članica i Unije u

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[109] The BVerfG je ovu doktrinu primjenio u BVerfGE 58, 1 (30-31); 75, 223 (235, 242); 89, 155 (188), i u predmetu Lisabon, BVerfG, 2 BvE 2/08 of 30.6.2009. Vidi M. Mahlmann, The Politics of Constitutional Identity and its Legal Frame—the Ultra Vires Decision of the German Federal Constitutional Court, 12 ***German L. J***. 11 (2010) 1407.

[110] ***Lisabon***, § 218.

[111] ***Lisabon***, § 235.

[112] ***Lisabon***, § 241.

[113] ***Lisabon***, § 240.

[114] BVerfG, 2 BvR 2661/06 of 6.7.2010. Vidi C. Möllers, Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, Honeywell, ***7 Eur. Const. L. Rev*** (2011) 161.

vezi s načelom dodijeljenih ovalasti i u vezi s obvezujućom snagom akta koji je podvrgnut načelu vladavine prava."[115]

Iako Savezni ustavni sud nikada do sada nije uputio prethodno pitanje Europskom sudu § 60 odluke u predmetu ***Honeywell*** upućuje da je spreman to činiti. Ne manje važno, nacionalni sudovi imaju ustavnu obavezu upućivati prethodna pitanja Europskom sudu, a propust da to učine može dovesti do povrede ustavnog prava na zakonitog suca koje je zajamčeno čl. 101(1) Temeljnog zakona. [116]

Ukratko, Savezni ustavni sud vezao je njemački ustavni identitet uz vječni i apsolutno kruti ustavni status temeljnih prava i uz njihovu Temeljnim zakonom (čl. 79(3)) zaštićenu jezgru. Na taj je način osigurao zadnju riječ u slučajevima koji se tiču temeljnih prava, ali je istovremeno ostavio dovoljno prostora Europskom sudu da odluči o interpretaciji i valjanosti prava EU. Savezni ustavni sud integrirao je svoju doktrinu u načelo iskrene suradnje propisano čl. 4(3) UEU, te je zadržao svoju doktrinu međusudske suradnje, kao i doktrinu interpretacije u skladu s pravom EU.[117] Savezni ustavni sud u potpunosti je svjestan shvaćanja Europskog suda prema kojemu nacionalni identitet može opravdati odstupanje od tržištnih sloboda samo ukoliko ne može biti zaštićen ni na koji drugi način, [118] te je stoga osigurao svoj položaj kao zaštitnika nacionalnog ustavnog identiteta samo u situacijama u kojima "temeljne političke strukture" ne mogu biti zaštićene nekom drugom mjerom.[119]

ZAKLJUČAK

Identiteti država članica stariji su od Osnivačkih ugovora i postoje bez obzira na pravo EU. Štoviše, upravo kako osobni ili grupni identitet nastavlja svoje postojanje u različitim oblicima ustrojstva vlasti, nacionalni identiteti će postojati i razvijati se bez obzira o budućem obliku i sadržaju Europske unije. U tom smislu čl. 4(2) ponavlja samu po sebi razumljivu činjenicu da

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[115] ***Honeywell***, §§ 60, 61.

[116] ***Honeywell***, §§ 88-90.

[117] ***Lisabon*** § 240.

[118] Predmet C-473/93 ***Commission v Luxembourg*** (1996) ECR I-3207, § 35; Predmet C-52/08 ***Commission v Luxembourg***, § 124.

[119] ***Lisabon*** § 240.

nacionalni identiteti postoje. Preostaje odgovoriti na pitanje koje su pravne posljedice takvog priznanja nacionalnih identiteta.

Ugovor iz Lisabona nije značajno utjecao na praksu Europskog suda o nacionalnom identitetu. I prije njegova stupanja na snagu 1. prosinca 2009. godine, Europski sud imao je razvijenu interpretativnu strategiju kako da se postavi prema zahtjevima država članica koji su se temeljili na nacionalnim ustavima. Kako sam pokazao, pred-lisabonska praksa može se grupirati u tri evolutivne faze. Njen rezultat bila je doktrina margine diskrecije, te shvaćanje da nacionalni identitet ne može biti apsolutan. Europski sud je također utvrdio razliku između nacionalnih zahtjeva manje važnosti (NZMV), prema kojima postupa kao i prema svim ostalim opravdanjima koja se temelje na javnom interesu i nacionalnih zahtjeva koji dovode do samoograničavanja Europskog suda u korist nacionalnih sudskih ili regulatornih tijela (NZVV). Može se zaključiti da, kada je uspješan, zahtjev koji se temelji na nacionalnom identitetu čini isticani regulatorni cilj legitimnim ***per se*** što u slučaju NZMV rezultira primjenom testa najmanje restriktivne alternative, a u slučaju NZVV do samoograničavanja Europskog suda.

Ugovor iz Lisabona donio je više jasnoće u koncept nacionalnog identiteta. To je bio prvi ugovor koji je pojasnio da se pojam nacionalnog identiteta veže uz nacionalne ustavne i političke strukture. Na određeni način, Ugovor iz Lisabona je relativizirao pravilo Bečke konvencije o pravu međunarodnih ugovora koje propisuje da se države ne mogu pozivati na svoje unutarnje pravo kako bi opravdale povredu ugovora. Lisabonski ugovor, naime, dopušta određenu diskreciju državama članicama. Međutim, ostaje pitanje, što je sve prihvatljivo kao zahtjev nacionalnog identiteta? Je li to, kao što sugerira Besselink, koncept prava EU, ili postoji mnogo nacionalnih koncepata koje valja poštivati? Prihvatljiv, tentativni, odgovor mogao bi biti da zahtjev koji se poziva na nacionalni ustavni identitet mora biti utemeljen na krutoj ustavnoj normi, vrednoti ili ustavnom izboru. Nije dovoljno da se radi o pukom političkom izboru ili dodjeli vlasti nekom nacionalnom tijelu, već takav zahtjev mora biti bitan za prepoznavanje nacionalnog ustavnog poretka kao takvog, te kao različitog od svih drugih ustavnih poredaka.

Razdoblje nakon stupanja na snagu Ugovora iz Lisabona donijelo je razvoj i na nacionalnoj i na europskoj razini. Francuska i Njemačka počele su se češće oslanjati na ustavni identitet, osporavajući tvrdnju da je riječ o konceptu prava EU.

Europski sud zadržao je svoje shvaćanje javnog interesa, te ga primjenjuje zajedno s testom najmanje restriktivne alternative. Temeljem tog pristupa, nacionalni identitet ne može opravdati ograničenje tržišnih sloboda ukoliko

postoji drugi, manje restriktivan način za njegovu zaštitu. Dobar primjer ovog pristupa nalazimo u postupcima koje je Komisija vodila protiv Luxembourga.

Međutim, u najmanje dva slučaja koji su odlučeni nakon stupanja Ugovora iz Lisabona na snagu, Europski sud zauzeo je drugačiji pristup i pokazao spremnost da prizna nacionalni identitet. Zašto je u ***Sayn-Wittgenstein*** i ***Runevič-Vardyn***, Europski sud postupio drugačije?

U prvome od njih, radilo se o temeljnom ustavnom izboru, odnosno, o republikanskom obliku vladavine. U drugome, radilo se o priznanju da je nacionalni sud u boljoj situaciji da provede test proporcionalnosti. Ovakav pristup, valja naglasiti, nije uvjetovan stupanjem na snagu Ugovora iz Lisabona, već slijedi pred-lisabonsku logiku koju je moguće zapaziti već u predmetu ***UGT-Rioja*** iz 2008. godine. [120] Dobro, može se tvrditi da je ista norma o ustavnom identitetu bila prisutna u tekstu odbačenog Ustavnog ugovora već i 2008. godine, te da je anticipirala Čl. 4(2) Ugovora iz Lisabona. Ipak, ostaje nejasnim je li prepuštanje odluke nacionalnom sudu motivirano željom da mu se prepusti odluka o vrijednosnom izboru, ili praktičnim razlozima, tj. prepuštanjem da nacionalni sud utvrdi relevantne činjenice, što je Europski sud znao činiti i ranije, primjerice u predmetu ***Familiapress***.[121]

Drugi trend koji se može zapaziti u praksi Europskog suda je njegova smanjena spremnost da popusti zahtjevima nacionalnog identiteta u slučajevima kada postoji dobro utvrđena praksa i potreba za jedinstvenom interpretacijom prava EU.[122]

S druge strane, značajni razvoj uslijedio je u nekim državama članicama, osobito u Francuskoj i Njemačkoj. Francuska je provela ustavnu reformu koja je rezultirala Kelsenovim modelom interlokutarne kontrole ustavnosti. Novi mehanizam uveden je kao pokušaj da se Ustavnom vijeću ojača utjecaj u europskoj areni, te da se, moguće, spriječe sukobi francuskog prava i prava EU, prije nego što oni uopće dospiju do Europskog suda u formi prethodnog pitanja. Fokusirajući se na procesnu dimenziju interlokutorne kontrole ustavnosti novouvedeni mehanizam usmjerio je francusko pravo prema neizbježnom sukobu s dobro utvrđenom praksom Europskog suda o

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[120] UGT-Rioja, ***supra***, bilješka 60.

[121] Familiapress, ***supra***, bilješka 97.

[122] Predmet C-405/01 Colegio de Oficiales de la Marina Mercante Española, supra, bilješka 88.

prethodnom postupku,[123] a da pri tome nije uspio definirati materijalni sadržaj jezgre francuskog ustavnog identiteta koji bi se mogao isticati temeljem čl. 4(2) UEU.

Njemački pristup čini se trezvenijim. Temelji se na načelu suradnje i jasno definirane jezgre ustavnog identiteta. Odnos s pravom EU razumije se kao odnos suradnje, a uloga Saveznog ustavnog suda je komplementarna i supsidijarna. Nacionalni ustavni identitet je zaštićen ali i suzdržan, što dopušta Saveznom ustavnom sudu da u kritičnim slučajevima ima zadnju riječ, bez nepotrebnih sukoba u slučajevima manje važnosti.

Čl. 4(2) UEU stvorio je potencijal za uspostavljanje nove ravnoteže između zahtjeva nacionalnog identiteta i tržišnih sloboda, a čl. 4(3) UEU redefinirao je obavezu iskrene suradnje koja je sada recipročna a ne više jednostrana za države članice. To može značiti da države članice imaju slobodu definirati jezgru nacionalnog ustavnog identiteta dok Europski sud zadržava ovlast interpretirati širi normativni okvir unutar kojega se nacionalni identitet manifestira u EU. Preširoka interpretacija nacionalnog identiteta ima potencijal blokiranja ili čak preokretanja kursa europske integracije, pretvarajući nacionalni ustavni identitet u ustavni protekcionizam. S druge strane, preuska interpretacija lišila bi čl. 4(2) njegovog korisnog učinka.

Uloga čl. 4(2) UEU je dvostruka. Kao pravilo o nadležnosti, ta norma propisuje granice nadležnosti EU, čak i u slučajevima kada bi regulacija bila dopuštena. Kao interpretativno pravilo ona upućuje Europski sud i nacionalne sudove kako interpretirati odnos između prava EU i nacionalnog prava.

Danas države članice temeljem Čl. 2 UEU imaju obavezu ne interpretirati nacionalni identitet suprotno temeljnim pravilima, načelima i vrijednostima EU. S druge strane, Europski sud, u granicama svoje nadležnosti, odlučuje u kojoj mjeri Ugovore valja interpretirati na način da se državama članicama ostavi margina prosudbe u slučajevima koji se tiču nacionalnog identiteta, a u kojim slučajevima zahtjeve nacionalnog identiteta valja interpretirati kao obična opravdanja utemeljena na javnom interesu.

Nacionalni ustavni sudovi zadržavaju pravo odlučivati o primjeni nacionalnog ustavnog prava i nakon što Europski sud donese odluku i to

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[123] Predmet 146/73 ***Rheinmühlen-Düsseldorf*** (1974) ECR 139; u novije vrijeme vidi predmet C-210/06 ***Cartesio Oktató és Szolgáltató bt.*** (2008) ECR I-09641, §§ 93-98.

može dovesti do napetosti između nacionalnog ustavnog prava i prava EU. Izravnom sukobu, do sada, ipak još nismo svjedočili.

Siniša Rodin*

NATIONAL IDENTITY AND MARKET FREEDOMS AFTER THE TREATY OF LISBON

Summary

The aim of this paper is to explore the balance between market freedoms and national regulatory autonomy following the entry into force of the Treaty of Lisbon, particularly in the light of the rephrased national identity guarantee under Article 4(2) TEU. The paper will discuss whether the newly established obligation of the European Union to respect the national identities of its Member States has any consequences in the case law of the European Court of Justice. Arguably, defining the proper scope of application of the national identity guarantee is relevant to the application of EU law, since it disturbs the previously established balance between European and national law. If defined too broadly, it can undermine the uniform application and effectiveness of EU law. If defined too narrowly, it would be devoid of any useful effect.

With this objective in mind, I will first clarify the concept of national identity and, more specifically, national constitutional identity. Second, I will discuss the case law of the ECJ preceding the entry into force of the Treaty of Lisbon. In this part, I will suggest that the development of national identity law before the Treaty of Lisbon went through three evolutionary phases: a phase of early and implicit national identity law; a phase in which the ECJ developed the margin of discretion doctrine; and a phase in which the ECJ started to differentiate national constitutional rules and accord them different levels of scrutiny. In the third part, I will explore whether there have been significant developments in the national identity case law of the ECJ after the entry into force of the Treaty of Lisbon, and suggest that the general approach of the ECJ has not significantly changed. I will also argue that the main developments related to Article 4(2) TEU have

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not taken place before the ECJ, but in national arenas, notably in France and Germany. In the fourth and final part, I will return to the issue of the differentiation of national identity claims and conclude that one category is understood by the ECJ as an ordinary justification of national measures restricting one of the market freedoms, while the other category of claims prompts the ECJ to defer to national authorities.

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FROM *VAN GEND EN LOOS* TO *MANFREDI*: DEVELOPING THE RIGHT TO COMPENSATION AMONG INDIVIDUALS UNDER EU LAW

Abstract

The article analyses the development of a right to compensation operating among individuals under EU law. In particular, the discussion focuses on a series of judgments of the European Court of Justice over a period of four decades, which culminated in the Court's findings in the seminal Courage (2001) and Manfredi (2006) judgments. These judgments show the emanation of a right to damages as a (somewhat) logical "offshoot" of the more general principle of effectiveness of EU law, with the Court motivated by a willingness to introduce the principle of ubi ius ibi remedium as a rule of the EU's supranational legal order.

Keywords: European Court of Justice, compensation, damages, EU law, competition, effectiveness.

Ključne reči: Evropski sud pravde, naknada štete, odšteta, pravo EU, konkurencija, delotvorna primena.

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1. INTRODUCTION

In its seminal (and somewhat controversial) judgment in ***Courage***, the European Court of Justice famously held:

The full effectiveness of Article [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[1]

Five years later, in ***Manfredi***, it reiterated this position [2] and held that, as a result:

It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101] EC.[3]

The core of the controversy, at the time of the ***Courage*** judgment and, to a smaller extent, to this day, lies in the idea that there exists a 'Community' (now, post-Lisbon Treaty-Union or EU law ***right to damages***, which somehow follows from the direct effect of Article 101.[4] Opposed to this view lies the concept of 'national procedural autonomy' (also sometimes termed 'national judicial autonomy') which, according to its proponents, states that, while EU law lays down substantive rights and obligations for its subjects, the elaboration of rules of liability, procedure and remedies falls within the sphere of national law.[5]

In practice, the contrast between the two positions is not black and white, with some authors supporting, simultaneously, the existence of both a 'Community right to damages' and 'national procedural autonomy.'[6] Indeed,

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[1] Case C-453/99, ***Courage v. Crehan*** [2001] ECR I-6297, para. 26.

[2] Cases C-295 to C-298/04, ***Manfredi et al. v. Lloyd Adriatico et al.*** [2006] ECR I-6619, para. 60.

[3] ***Ibid.***, para. 61.

[4] Probably the first author to expose this idea ***in extenso***: A. P. Komninos, 'New Prospects for Private Enforcement of EC Competition Law: ***Courage v. Crehan*** and the Community Right to Damages', ***CMLRev.*** 39 (2002): 447.

[5] See point 2.4. below.

[6] A. P. Komninos, ***EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*** (Oxford: Hart, 2008), Part III; D. Chalmers et al., ***European Union Law*** (Cambridge: CUP, 2006), 390–408 and 968–971.

the Court itself has referred to the latter concept, in a judgment subsequent to ***Courage***.[7] As will be seen below, the conundrum arises from different interpretations of this concept: while there can be no doubt that national law applies, in a subsidiary fashion, to fill the gaps in legal protection left by the (incomplete) EU legal system, legitimate questions may arise with regard to how these gaps may be filled by EU itself, in the absence of specific legislation.

The ***Courage*** and ***Manfredi*** judgments in particular pose a host of questions that are highly pertinent for a fuller understanding of the nature of EU law. First and foremost, is there, indeed, an EU law right to damages based on direct effect of Treaty provisions? Second, if such a right exists, is it embedded in previous case law of the Court, or did the the Court of Justice suddenly 'invent' it in ***Courage***? Third, assuming that there is a right to damages which is well-founded in the case law, can that right be distinguished from the right to damages operating against Member States and EU institutions? These and other, related questions are the subject of the present article.

2. FROM DIRECT EFFECT TO REMEDIES FOR INDIVIDUALS

2.1. Direct effect

The idea that individuals should have a right to compensation for breach of Articles 101 and 102 is premised on the principle of (horizontal) direct effect, which applies to some EU law norms.[8]

Direct effect, under EU law, is built on a well-known concept of public international law commonly referred to as the 'self-executing norm.'[9] Under this concept, if a norm contained in an international treaty is sufficiently precise and unconditional and is legally perfect, in the sense that it does not require further implementing legislation, it may be applied directly in the

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[7] Case C–201/02 ***The Queen ex parte Delena Wells v. Secretary of State for Transport, Local Government and the Regions*** [2004] ECR I–723, para. 70.

[8] See, generally, P. Craig & G. De Búrca, ***EU Law: Text, Cases and Materials,*** 3rd edn (Oxford: OUP, 2003), Ch. 5.

[9] On the divergence between the Court's judgment and the status quo in international law at the time, see B. De Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in ***The Evolution of EU Law,*** ed. P. Craig & G. De Búrca (Oxford: OUP, 1999), 181.

municipal legal order, with no need for additional state measures.[10] It should be stressed that, under public international law, the self-executing nature of a norm entails the ***possibility*** of a municipal legal order applying it directly. There is no (international) ***obligation*** to do so, as the modalities for the enforcement of international treaty obligations depend on the laws of the individual state.

In its landmark 1963 judgment in ***Van Gend en Loos***,[11] the Court of Justice deviated from the international norm and held (against the wishes of all three Member States intervening in the proceedings) that the Union (then Community) represents a 'new legal order', which bestows rights and obligations not only on states but on 'peoples' and which has 'institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.'[12] It also referred to 'the task assigned to the Court of Justice under Article [267], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, [which] confirms that the States have acknowledged that [EU] law has an authority which can be invoked by their nationals before those courts and tribunals.' Accordingly, the direct effect of sufficiently precise and unconditional norms of EU law (in that case, Article 25 of the Treaty – now Article 30), could not be denied on the basis of national law and the Court of Justice had competence to determine whether or not EU norms had direct effect.

The arguments of the Court were, for the most part, novel interpretations of the Treaty, which, arguably, had no direct basis in its text (or the will of at least one half of the signatories). In response to the Member States' argument to the effect that their obligations under EU law would be sufficiently well-enforced by the Commission and other Member States through the public

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[10] See e.g., Advisory Opinion on the Jurisdiction of the Courts of Danzig, of 3 Mar. 1928, PCIJ, Ser. B, No. 15. The Court of Justice in Case 26/62, ***NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*** [1963] ECR 3, [1963] Eng. Spec. Ed. 1. followed a non-controversial definition in that case, stating that a directly effective provision must contain:

A clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of States which would make its implementation conditional upon a positive legislative measure enacted under national law.

[11] See previous note.

[12] ***Ibid.***

enforcement procedures of Articles 258 and 259,[13] the Court laid out one practical argument for the necessity of having direct effect as a matter of EU law:

A restriction of the guarantees against an infringement of Article [30] by Member States to the procedures under Article [258] and [259] would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles [258] and [259] to the diligence of the Commission and of the Member States.[14]

More so, perhaps, than in any other judgment of the Court, the second part of this quote accentuates the role of the 'private attorney general' in boosting the overall level of detection and punishment of infringements of EU law. It also represents the twofold source of the justification for private enforcement in the EU: the vindication of individual rights on the one hand and greater effectiveness of EU law on the other.[15] In the words of Craig:

If the burden of pursuing claims becomes too great then the Commission will have relatively less time to, for example, devise legislation, which is one of its main tasks under the Treaty. Private actions, rendered possible by the concept of direct effect, complement the enforcement role of the Commission by sanctioning claims brought by individuals in their own capacity. Another way of putting the same point is that direct effect creates a large number of 'private attorney-generals', who operate not only to vindicate their own private rights, but also to ensure that the norms of the...Treaty are correctly applied by the Member States.[16]

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[13] Under Art. 258, if the Commission finds that a Member State has failed to fulfil its Treaty obligations, it issues a reasoned opinion and allows the Member State to submit observations. If the Member State fails to comply within the time limit specified by the Commission, the Commission can bring proceedings before the Court of Justice. Under Art. 259, a Member State can bring proceedings before the Court against another Member States, after receiving a reasoned opinion of the Commission on the issue.

[14] See n.10 above.

[15] Whether this is, indeed, a twofold source is debatable, as will be seen below.

[16] P. P. Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law', ***Oxford Journal of Legal Studies*** 12 (1992): 453, at 455.

One vital aspect of direct effect is, therefore, its substantial capacity to make EU law more widely observed in practice, by filling in a gap in the detection and enforcement of infringements. Another fundamental aspect is its equally substantial capacity to generate individual rights and thus legitimize, as it were, the 'expansion' of EU law into national systems of judicial protection.[17]

Indeed, the referring national court in ***Van Gend en Loos*** pointed out that, under Dutch constitutional law, provisions of international agreements can only have direct effect if they confer rights on individuals. It is more likely than not that the Court of Justice picked up on this 'rights theme' and felt that its findings would be more easily accepted by the Member States if 'individual rights' were found to emanate from Article 30 of the Treaty.[18] As will be seen below, the Court has been far from oblivious to the legitimizing power of individual rights in its subsequent case law.

2.2. Primacy

The direct effect of EU law would be of little significance in practice, had the Court not issued another seminal ruling, one year after ***Van Gend en Loos***, in ***Costa***.[19] Once more, it deviated from the public international law norm and interpreted EU law in such a way that the latter prevailed not only over national norms adopted prior to the coming into force of the Treaty, but also over norms adopted subsequently.

Starting from the premise that 'the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves,'[20] it found that 'the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions,'[21] so that 'the executive force of the Treaty cannot vary from one State to another in deference to subsequent domestic laws.'[22]

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[17] The word 'expansion' is placed in quotation marks here because its use connotes, in and of itself, a conceptualisation of the EU legal order as operating under some form of 'national procedural autonomy'. This conceptualization is discussed below, at point 2.4.

[18] T. Eilmansberger, 'The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link', ***CMLRev.*** 41 (2004): 1199, at 1202–1203.

[19] Case 6/64, ***Flaminio Costa v. E.N.E.L.*** [1964] Eng. Spec. Ed. 585.

[20] ***Ibid***.

[21] ***Ibid***.

[22] ***Ibid***.

One could lament, as in ***Van Gend en Loos***, the existence of self-justifying premises in this judgment and the absence of a higher premise to draw from. Once again, it is, in reality, the very ***existence*** of the Treaty that shapes its relationship with national law, the argument being that, since the Member States chose to sign the Treaty, they must do whatever it takes to ensure its effective application.

As a principle of interpretation, primacy stands in clear opposition to the then prevailing general principle, applied in monist and quasi-monist states, which is that, even if an international norm becomes effective directly in the national legal order, a subsequent unilateral legislative measure could still supersede that norm, under the principle of ***lex posterior derogat legi priori***.[23] In combination with direct effect, the doctrine of primacy thus ensured that EU law not only became the 'law of the land' in the Member States; it became, rather, the 'higher law of the land,' in a manner that is found, generally, in federal states,[24] thus obtaining a 'constitutional' or 'quasi-constitutional' status.

In this respect, it must be noted that the commonly used term 'supremacy' may be misleading in this context. German legal writing makes a clear (and helpful) distinction between ***Anwendugsvorrang*** on the one hand and ***Geltungsvorrang*** on the other.[25] In the words of Prechal:

The former is the expression of priority of application. The latter term refers to the idea of hierarchy of rules within a legal system and is closely linked to the question of what is the validating norm of all rules in the legal system concerned. One of the more practical effects is that in case of incompatibility, the higher norm invalidates the norm of lower ranking. This is indeed a far more drastic consequence than priority in application.[26]

This interpretation finds support not only in the constitutional case law and doctrine of Germany but also France, Poland and Spain (and, arguably, the

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[23] J. H. H. Weiler, ***The Constitution of Europe: 'Do the New Clothes have an Emperor?' and Other Essays on European Integration*** (Cambridge: CUP, 1999), 21.

[24] ***Ibid.***, 22.

[25] S. Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union', in ***The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate***, ed. C. Barnard (Oxford: OUP 2007), 35–69, at 51.

[26] ***Ibid***.

UK),[27] it also finds indirect support in older Court of Justice case law. Indeed, the Court has always phrased the ***disapplication*** of national law as precisely that. At no point did it indicate that national norms that conflict with EU law would be ***null*** or ***void***, with the obvious and explicit exception of Article 101(2) of the Treaty, which refers, however, to norms adopted among individuals. Arguably, had it done so, it would have inferred that national laws somehow depend for their validity on EU law-which is manifestly not the case. More recently, when it was confronted with the issue directly, the Court left it to the national legal systems to decide the exact effects of the incompatibility of a national norm of general application with EU law, stating that EU law merely requires that such norms be set aside.[28]

Be all that as it may, when read in conjunction, direct effect and primacy represent a formidable engine for eliciting (or generating?) individual rights: if EU law enjoys 'primacy' in its relationship with conflicting national law and if it is capable of being relied on directly by individuals, then the Member States' laws could be circumvented entirely, when it comes to regulating relations between Member States and individuals, as well as among individuals. Simultaneously, therefore, EU law could assert itself as both master and servant of the individual, a role traditionally reserved for the legal systems of nation states.

2.3. Horizontal direct effect

Although, strictly speaking, the judgment in ***Van Gend en Loos*** was concerned with what subsequently came to be known as 'vertical direct effect', that is, the direct effect of provisions in relations between an individual and a Member State, the Court also sowed the seeds of (the more relevant for the present purposes) 'horizontal direct effect' by stating:

The fact that Articles [258 and 259] enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations

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[27] For the first four Member States, see Prechal, n. 25 above, 51–52. The position as regards the UK is derived from the reactions to the ***Factortame*** judgment of the Court, whereafter the so-called parliamentary sovereignty (the principle that Parliament can adopt any laws whatever, without possibility of constitutional review by reference to a higher legal norm) was trumped as regards the UK's obligations under EU law, but only as a result of and to the extent commanded by a national statute regulating that country's accession to the EU. See the discussion below, point 2.5.

[28] Cases C-10 to 22/97, ***Ministero delle finanze v. IN.CO.GE*** [1998] ECR I-6307, para. 28; also cited to this effect by Prechal, n. 25 above, 53.

does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court, ***any more than the fact*** that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, ***in actions between individuals*** before a national court, of ***pleading infringements of these obligations***.[29]

The notion of horizontal direct effect was cemented eleven years later, in ***BRT***,[30] when the Court of Justice had to determine whether a national court should be considered as a national authority and thus subject to the duty under Article 9 of Regulation 17/62[31] to stay proceedings launched before it under Articles 101/102 in the face of a Commission decision to initiate proceedings with regard to the same alleged infringement. The Court ruled that the national court was not bound to stay its proceedings not only because it was not a national authority for the purposes of the Regulation but, more generally, because:

The competence of [national courts] to apply the provisions of [EU] law, particularly in the case of such disputes, derives from the direct effect of those provisions.

As the prohibitions of Articles [101(1)] and [102] tend by their very nature to produce direct effects in relations between individuals, these articles create direct rights in respect of the individuals concerned which the national courts must safeguard.

To deny, by virtue of the aforementioned Article 9, the national courts' jurisdiction to afford this safeguard, would mean ***depriving individuals of rights which they hold under the Treaty itself***.[32]

Here the Court effectively sanctioned the 'expansion' of EU law from 'public' to 'private' law, by imposing the duty on national courts to apply Treaty provisions in relations between individuals.[33] It was clear, long before that

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[29] ***Van Gend en Loos***, n. 10 above (emphasis added).

[30] Case 127/73 ***BRT v. SABAM*** [1974] ECR 51.

[31] Council Regulation (EEC) 17/62, First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ Eng. Spec. Ed. 81.

[32] ***BRT v. SABAM***, n. 30 above, paras 15–17 (emphasis added).

[33] The mid-1970s also revealed the ability of Treaty provisions to generate 'individual rights' in the face of the legislative lethargy of the Member States acting in the Council. In Case 2/74 ***Reyners v. Belgium*** [1974] ECR 631 and Case 43/75, ***Defrenne v. Societe anonyme belge de navigation aerienne Sabena*** [1976] ECR 455, the Court found Treaty provisions to be directly

judgment, that ***some*** national courts already considered that Article 101 ***could*** be applied directly between individuals under ***national*** law.[34] Following ***BRT***, the 'could' became a 'must,' as a matter of ***EU*** law. In addition, what was also confirmed is that, in case of conflict, the direct effect of these norms prevails over any secondary EU legislation.

Nevertheless, to state, in the abstract, that an individual enjoys a certain right is not saying very much, if that individual is incapable of exercising that right in practice. It is all very well for the Court to say that, under the Treaty, one should enjoy, say, 'freedom of establishment'.[35] The mere declaration of a 'freedom' or a 'right' is a dead letter unless its holder can obtain an effective ***remedy***. This is, perhaps, why the Court did not stop at merely asserting the existence of individual rights but went further and required that they be effectively protected by the Member States.

2.4. No new remedies?

In the context of determining how far EU law goes in setting out remedies and procedure for the protecting EU rights, the Court famously held, in ***Rewe-Zentralfinanz***:[36]

Applying the principle of cooperation laid down in Article [4(3)] of the [EU] Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of [EU] law.

Accordingly, ***in the absence of [EU] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [EU] law***, it

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effective in the absence of implementing directives that should have been enacted but were not. In examining the freedom of establishment under Art. 49 and the principle of equal pay for equal work between men and women, the Court distilled those parts of the EU law rights that could be relied on by individuals directly, in cases of an obvious infringement, while leaving to secondary legislation the regulation of less clear-cut cases and the enactment of positive measures to remove national and sex discrimination.

[34] See e.g., the Art. 267 (formerly 234) reference in Case 56/65, ***Société Technique Minière v. Maschinenbau Ulm*** [1966] ECR Eng. Spec. Ed 235.

[35] As set out in Art. 49 TFEU and the implementing legislation.

[36] Case 33/76, ***Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer fur das Saarland*** [1976] ECR 1989.

being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.

Where necessary, Articles [122] to [124] and [268] of the Treaty enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the common market.

In the absence of such measures of harmonization the right conferred by [EU] law must be exercised before the national courts in accordance with the conditions laid down by national rules.

The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.[37]

This formula has been repeated, in essentially unaltered form, in numerous subsequent judgments of the Court from that time until the present day, including ***Courage*** and ***Manfredi***.[38] The alleged principle of 'national judicial autonomy' (discussed below) would hold, in particular on the basis of the phrases in italics above, that the Treaty, as interpreted by the Court, had somehow 'left' the competence to adopt rules on remedies and procedure to national law, while EU law remained competent only to adopt substantive rules.[39]

Four years after ***Rewe-Zentralfinanz***, the Court held, in ***Rewe-Handelsgesellschaft Nord***: [40]

Although the Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Court of Justice***, it was not intended to create new remedies in the national courts to ensure the observance of [EU] law other than those already laid down by national law.*** On the other hand the system of legal protection established by the Treaty, as set out in Article [267] in particular, implies that it must be possible for every type of action provided for by national law to be available for the purpose of

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[37] ***Ibid.,*** para. 5 (emphasis added).

[38] ***Courage***, n. 1 above, para. 29 and ***Manfredi***, n. 2 above, para. 62.

[39] With the exception, of course, of procedural and remedial rules in cases of EU liability, where the Court of Justice has exclusive jurisdiction, as under Arts 268 and 270.

[40] Case 158/80, ***Rewe-Handelsgesellschaft Nord v. Hauptzollamt Kiel*** [1981] ECR 1805.

ensuring observance of [EU] provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law.[41]

Some authors have termed the above passage a 'no new remedies' principle (although with some doubt as to its validity),[42] which would hold that national courts are not required to create remedies that do not otherwise exist in their legal systems in order to give effect to rights bestowed upon individuals under EU law.

Of the two principles set out in ***Rewe-Zentralfinanz***, one at least seems uncontroversial: certainly, if EU law is taken seriously by the Member States and if it enjoys precedence over national law, national remedies and procedures that are applied to EU law infringements must be at least the same as or better than remedies and procedures applied to infringements of national law ('principle of equivalence').

The meaning and content of the second principle is elusive. The idea that national law should not make it impossible to enforce EU law rights seems innocuous enough. The wording of the Court in ***Rewe-Zentralfinanz*** states, however, that this should not be '***impossible in practice***.' In other words, what seems to be at stake here is more than a mere requirement not to adopt rules that directly preclude the protection of EU rights.

Indeed, in ***Rewe-Zentralfinanz*** and in subsequent case law, the Court has interpreted the duty of sincere co-operation, set out in Article 4(3) of the EU Treaty post-Lisbon (formerly Article 10 of the EC Treaty), as requiring the Member States to take positive steps to ensure the effective enforcement of EU law before their domestic courts.[43] The criterion of 'non-impossibility' then becomes a much wider and almost infinitely flexible criterion of 'effectiveness' of national remedies and procedures. As a consequence, the tentative 'no new remedies' principle also becomes highly questionable, when one considers the scope of remedies subsequently imposed by the Court on national jurisdictions.

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[41] ***Ibid.,*** para. 44.

[42] P. Craig & G. De Búrca, ***EU Law: Text, Cases and Materials,*** 3rd edn (Oxford: OUP, 2003), p. 232.

[43] See the discussion of ***Francovich*** and ***Brasserie du Pêcheur*** at point 3.2. below.

2.5. Towards 'new' remedies

A judgment that drives the previous point home is ***Simmenthal***,[44] laid down three years ***before Rewe-Handelsgesellschaft Nord***. In that case, an Italian court of first instance asked the Court of Justice whether, in the face of incompatibility of a national legislative provision with EU law, it must wait for legislative amendment or a finding of unconstitutionality by the Italian Constitutional Court or whether, on the contrary, it could proceed to disapply the provision in question itself in the case before it. Notwithstanding the existence of the above-mentioned national constitutional procedures, the Court of Justice held:

The effectiveness of [the EU law provisions in question] would be impaired if the national court were prevented from forthwith applying [EU] law in accordance with the Decision or the case-law of the court.

It follows from the foregoing that ***every national court must, in a case within its jurisdiction, apply [EU] law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [EU] rule.***

Accordingly ***any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of [EU] 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 legislative provisions which might prevent [EU] rules from having full force and effect are incompatible with those requirements which are the very essence of [EU] law.[45]

Building on the fundamental premise of ***Costa*** that, in the event of conflict, EU law prevails over national law, the Court used the need to ensure the effectiveness of EU law to decide how ***exactly*** such a conflict should be resolved by national courts.

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[44] Case 106/77, ***Amministrazione delle finanze dello Stato v. Simmenthal*** [1978] 629. The Art. 234 (now 267) reference proceeded nonetheless, as the Court will only consider a reference to be withdrawn when this is done by the referring court or if it is quashed by a superior court: ***ibid.,*** para. 10. In this case, there was an appeal pending against a ruling of the referring court, so, presumably, it was in its interest to have the issue resolved, so as not to suffer an overruling at the appellate level.

[45] ***Ibid.,*** paras 20–22 (emphasis added).

The requirement imposed on national courts goes clearly beyond 'equivalence:' the national court is, in fact, asked to accord far superior treatment to EU law claims than it would accord to national law claims, as a national law that infringes the Italian Constitution could only be set aside by the Parliament or the Constitutional Court and ***not*** by a court of first instance. Furthermore, it can hardly be said that the Italian system made it ***impossible*** to exercise a EU law right: one had to await legislative amendment or a judgment of the Constitutional Court abrogating or annulling the national law. It is with this judgment that the distinction between impossibility and 'impossibility in practice' becomes clear. The former term would refer, if anything, to a formal, absolute impossibility, while the latter would refer to impossibility in a realistic, material sense.

Indeed, the ***Simmenthal*** judgment set out both a rule of ***substance***, stating that national rules of ***any kind*** (whether substantive, procedural or remedial) must give way to the requirement of effectiveness of EU law and a rule of ***procedure***, stating that all national courts competent to hear the substance of a dispute are also competent to disapply national provisions incompatible with EU law. Arguably, the Court had also laid down a basic form of particular legal remedy that did not exist in the national legal system in question before – the setting aside of national legislation by a court of first instance in the case before it.[46]

The position established in ***Simmenthal*** was confirmed decisively in ***Factortame***,[47] where several Spanish fishing companies brought proceedings before courts in the UK to have the operation of an act of Parliament suspended, on the grounds of infringement of Articles 49 and 55 (TFEU) and the (subsequently repealed) ex Article 7 of the (EEC) Treaty.

Traditionally, in the UK, it is an axiomatic rule of the national constitutional order that no court can stop the operation of a duly enacted act of Parliament, either permanently or temporarily (the doctrine of parliamentary

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[46] Some authors have termed the setting aside of legislation as a 'general remedy' consequent on primacy and direct effect: W. Van Gerven, 'Of Rights, Remedies and Procedures', ***CMLRev.*** 37 (2000): 501, at 503. Without dwelling on the need for a distinction between 'general' and 'specific remedies,' such a remedy could be framed as a ***negative injunction***, that is, a judicial order to refrain from doing something, in this case, enforcing a national law norm that infringes EU law.

[47] Case C-213/89, ***R v. Sec. of State for Transport***, ex parte ***Factortame*** [1990] ECR I-2433.

sovereignty).[48] In referring the case to the Court of Justice, the House of Lords was of the opinion that the national legislation runs counter to EU law but found that it cannot suspend its operation due to the above-mentioned rule. In its reply, the Court of Justice held simply (yet with very deep repercussions for the UK constitutional system):

[EU] law must be interpreted as meaning that a national court which, in a case before it concerning [EU] law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.[49]

The Court's disregard of national constitutional law was not altogether surprising,[50] considering that it had never limited its doctrine of primacy of EU law in ***Costa*** to national norms of ***sub-constitutional*** rank. In addition, reasoning on the basis of ***Simmenthal***, if Italian courts could be empowered to set aside Italian legislation on the basis of incompatibility with EU law, there is, from a EU law viewpoint, no reason why courts in the UK should not be equally empowered. Quite the contrary: the equal empowerment of courts among the Member States serves to ensure that the 'executive force' of EU law, referred to by the Court of Justice in ***Costa***, be uniform throughout the EU.

Factortame established a EU law power to grant interim relief in favour of individuals against national legislation that infringes EU law. The '***Factortame*** injunction' is a very specific remedy whose procedural operation is regulated, to a significant extent, by EU law which, under the principle in ***Simmenthal***, very specifically states that not only appellate or supreme courts, but also courts of first instance may apply it, in each and every case they deem necessary for the purpose of protecting EU law rights. Viewed in light of the

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[48] See, e.g., A. W. Bradley & K. D. Ewing, ***Constitutional and Administrative Law*** (Harlow: Pearson, 2003), 52–71.

[49] ***Ibid.,*** para. 23 and the operative part of the judgment.

[50] Nonetheless, this simple phrase has raised such commotion among UK constitution lawyers as was not seen in living memory. Arguments were developed by numerous commentators that would enable to fit this 'new' rule with the UK's age-old principle of parliamentary sovereignty, whereby Parliament could legislate on any matter whatever as it sees fit, without fear of judicial sanction. See, generally, A. W. Bradley & K. D. Ewing, ***Constitutional and Administrative Law,*** 13th edn (Harlow: Pearson Education, 2003), 134–144.

judgment in ***Zuckerfabrik***,[51] issued two years earlier, where the Court laid down ***exact criteria*** for granting an injunction against a national measure adopted in furtherance of yet contrary to EU law,[52] one can hardly doubt, as a matter of principle, the notion that EU law can and does lay down rules of procedure and remedies.[53]

3. TOWARDS A RIGHT TO COMPENSATION

3.1. Restitution/compensation: the beginning

In ***San Giorgio***,[54] the plaintiff sought to reclaim taxes that were levied by Italy in an unlawful manner. The situation was somewhat similar to that addressed in EU secondary legislation dealing with unlawful withholding of funds under EU measures, yet not actually covered by it.[55] Although there was no opposition from the Italian State to the general notion that charges unlawfully levied should be repaid, Italian law required that the claimant produce documentary evidence proving that he did not 'pass-on' the unlawfully levied amount to his customers.[56] This requirement was non-discriminatory, as it applied both to claims under EU law and to claims under Italian law.[57]

In finding the national law requirement of documentary proof incompatible with EU law,[58] on the grounds of making protection of EU rights excessively difficult in practice, the Court also made a statement of wider import:

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[51] Cases C-143/88 and C-92/89, ***Zuckerfabrik Suderdithmarschen v. Hauptzollamt Itzehoe and Zuckerfabrik Soest v. Hauptzollamt Paderborn*** [1991] ECR I-415.

[52] ***Ibid.,*** paras 23–27.

[53] It should also be noted that, more recently, in Case C-198/01, ***Consorzio industrie fiammiferi v. Autorità garante della concorrenza e del mercato*** [2003] ECR I-8055, the Court confirmed the applicability of the ***Simmenthal/Factortame*** principles in the context of application of EU competition law by an administrative authority (see, esp. para. 58 of the judgment).

[54] Case 199/82, ***Amministrazione delle Finanze dello Stato v. SpA San Giorgio*** [1983] ECR 3595.

[55] Council Regulation (EEC) 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, [1979] OJ L175/1.

[56] For a discussion of the problem of 'pass-on', see the discussion in V. Milutinović, ***The 'Right to Damages' under EU Competition Law: From*** Courage v. Crehan ***to the White Paper and Beyond*** (The Hague, Kluwer Law International, 2010), at point 9.2.

[57] ***San Giorgio***, n. 54 above, para. 16.

[58] ***Ibid.,*** paras 14–15.

…entitlement to the repayment of charges levied by a Member State contrary to the rules of [EU] law is a ***consequence of, and an adjunct to, the rights conferred on individuals*** by the [EU] provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes.[59]

This statement was not strictly necessary for the disposal of the case. Italy had recognized its own prima facie liability, subject to a requirement of documentary evidence of no pass-on by the claimant. The Court could have stopped at finding that this particular evidentiary burden harmed the effectiveness of EU law. It went further, however, in order to construct the restitution of unlawfully levied charges as a 'consequence of, and an adjunct to' individual rights derived from the Treaty and thus firmly as a matter of EU law.[60]

In view of the previous existence of EU secondary law commanding repayment in the event of unlawful levying for the benefit of the EU and of the recognition of the principle ***as a matter of national law*** in some or all Member States, this development may seem trivial at first glance. At second glance, however, it represents the first time the Court has declared, under the Treaty, the existence of a EU law right to reparation against Member States – albeit in the form of restitution for unjust enrichment.[61]

The Court's pronouncement of restitution of unlawfully levied taxes as a requirement of EU law could be justified as being the logical corollary of public law censure of unlawful conduct my Member States. ***Arguendo***, the Court was merely ensuring that no one should be allowed to benefit from his own wrongdoing. Under EU law, this principle operates both in favour of and, in certain cases, against individuals.[62]

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[59] ***Ibid.,*** para. 12 (emphasis added).

[60] For the significance of this development for private enforcement of EU competition law, see Milutinović, n. 56 above, Ch. 8.

[61] The importance of the distinction between the concepts of damage and unjust enrichment is discussed in detail in Milutinović, n. 56 above, at point 8.2.4.

[62] Just as Member States are prohibited from becoming unjustly enriched from proceeds collected or withheld in infringement of EU law, thus the Commission may by decision order that a Member State require the repayment of unlawful state aid by an undertaking: Case 70/72, ***Commission v. Germany*** (***'Kohlgesetz'***) [1973] ECR 813, para. 13. Recently, the Court has held that, where a national court has ignored a Commission decision prohibiting a state aid, the ***res judicata*** effect of such a judgment cannot be used to prevent repayment: Case C-119/05, ***Ministero dell'Industria, del Commercio e dell'Artigianato v.***

The issue becomes somewhat more complicated, however, when the Member State receives no (tangible) benefit as a result of its own unlawful act. Until the Court's seminal judgment in ***Francovich*** in 1991, there seemed to be no rule under EU law that would compel Member States to compensate individuals for damage sustained as a result of the Member State's breach of EU law if such compensation was not available under national law and in the absence of unjust enrichment. It is at that point that EU law made the vital transition from merely ensuring compliance by Member States to setting out a positive right to compensation for individuals.

3.2. Compensation in full view

In ***Francovich***,[63] a number of former employees of insolvent undertakings in Italy claimed compensation from that Member State, on account of its failure to implement Directive 80/987.[64] The Directive required the Member States to, ***inter alia***, put in place a system guaranteeing that workers will not be deprived of wages as a result of the insolvency of their employer.[65] This obligation was found to be capable of having direct effect. Nevertheless, in the absence of implementation, Member States could not be asked to become guarantors themselves, so that liability to individuals could not be based on direct effect. The Court thus refused to infer an obligation of the Member States to shoulder directly the financial burden of the system set out therein.

Instead, the Court went on to examine whether there is a ***general principle of liability*** of Member States for breach of EU law:

The full effectiveness of [EU] rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of [EU] law for which a Member State can be held responsible.

The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of [EU] rules is

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Lucchini SpA [2007] ECR I-6199 para. 63. See, generally, Notice from the Commission: ***Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid*** [2007] OJ C272/4.

[63] Cases C-6 and 9/90, ***Francovich and Bonifaci v. Italy*** [1991] ECR I-5357.

[64] Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] OJ L 283/23.

[65] ***Ibid.,*** Arts 3(2) and 4(2) and paras 15–16 of the judgment, n. 63 above.

subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by [EU] law.

It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of [EU] law for which the State can be held responsible is inherent in the system of the Treaty.

A further basis for the obligation of Member States to make good such loss and damage is to be found in ***Article [10] of the Treaty***, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under [EU] law. Among these is the ***obligation to nullify the unlawful consequences of a breach of [EU] law*** (see, in relation to the analogous provision of Article 86 of the ECSC Treaty, the judgment in Case 6/60 Humblet v Belgium [1960] ECR 559).

It follows from all the foregoing that ***it is a principle of [EU] law that the Member States are obliged to make good loss and damage caused to individuals by breaches of [EU] law for which they can be held responsible.***[66]

The Court seems to have reached beyond the bounds of the Treaty and into a universal principle of law of ***ubi ius ibi remedium*** that is, that for every right there should be an appropriate remedy.[67] This does not, however, fully account for its actual findings. The right in ***Francovich*** was already subject to a public law remedy, under Articles 258 and 259 of the Treaty. That remedy had, in fact, been exercised by the Commission and the Court had entered a judgment against Italy accordingly.[68]

Essentially, by fashioning a right to compensation, the Court extended the scope of the ***ius*** that requires a ***remedium*** from the EU to the individual. Indeed, what the Court seems to be referring to is a principle of compensation for damage resulting from harmful conduct, often referred to as the principle

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[66] ***Ibid.,*** paras 33–37 (emphasis added).

[67] Komninos, n. 6 above, 148 and Van Gerven, n. 46 above, at 511.

[68] It could be argued, perhaps, that, since the Treaty as it stood at the time did not provide for financial penalties against Member States in cases of non-compliance with EU law, a pecuniary remedy for the benefit of individuals was necessary to ensure deterrence. Nevertheless, seventeen years after the judgment and fourteen years after the coming into force of the Maastricht Treaty – which did introduce such penalties – ***Francovich*** remains good law.

of ***neminem laedere***,[69] generally accepted in civil law legal systems. If that is, indeed, the case, the Court has created a universal civil obligation in EU law, which, to this day, has no civil code or other comprehensive civil law of its own.

Beyond this general obligation, the Court proceeded to lay down the conditions of liability under EU law:

The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on [EU] law.[70]

The Court was thus set on a course of establishing a ***system of liability*** for infringements of EU law. It maintained this course in ***Brasserie du Pêcheur***,[71] where it essentially upheld the principles of ***Francovich*** in the context of claims for damages for breach of directly effective EU law through incompatible national legislation of general application. The Court rejected the arguments of some Member States namely, that ***Francovich*** merely filled a lacuna in legal protection and that, in the case of breach of directly effective Treaty provisions, Member States enjoyed freedom of action, within the limits of the ***Rewe-Zentralfinanz*** equivalence/effectiveness criteria.[72] On the contrary, the existence of the right to damages is:

All the more so in the event of infringement of a right directly conferred by a [EU law] provision upon which individuals are entitled to rely before the national courts. In that event, ***the right to reparation is the necessary corollary of***

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[69] Cf. Art. 1382 of the French Civil Code; Art. 2043 of the Italian Civil Code; the problems incumbent on this principle are discussed in Milutinović, n. 56 above, at point 5.2.2.

[70] ***Francovich***, n. 63 above, paras 38–41. These conditions have been continuously upheld by the Court ever since, e.g., more recently, in Case C-244/01 ***Köbler v. Austria*** [2003] ECR I-10239, para. 51.

[71] Cases C-46 and 48/93, ***Brasserie du Pêcheur v. Germany and R v. Sec. of State for Transport ex parte Factortame*** [1996] ECR I-1029.

[72] ***Ibid.,*** para. 18.

the direct effect of the [EU law] provision whose breach caused the damage sustained.[73]

As the Treaties do not contain an explicit provision setting out Member State liability and as the Court has the most broadly defined task, under Article 19(1) of the EU Treaty (formerly Article 220 EC), of ensuring that, in the interpretation and application of the Treaties the law is observed,' the Court chose to model Member State liability explicitly on that of the EU, as set out in Article 340(2) (formerly Article 288(2) EC) for, indeed:

The principle of the non-contractual liability of the [EU]…is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused. That provision also reflects the obligation on public authorities to make good damage caused in the performance of their duties.[74]

…the second paragraph of Article [340] of the Treaty refers, as regards the non-contractual liability of the [EU], to the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of [EU] law.

… the conditions under which the State may incur liability for damage caused to individuals by a breach of [EU] law cannot, in the absence of particular justification, differ from those governing the liability of the [EU] in like circumstances. The protection of the rights which individuals derive from [EU] law cannot vary depending on whether a national authority or a [EU] authority is responsible for the damage.[75]

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[73] ***Brasserie***, n. 71 above, para. 22 (emphasis added).

[74] ***Ibid.,*** para. 29.

[75] ***Ibid.,*** paras 41–42. It is not immediately clear why the EU and the Member States should be placed on an equal footing in the absence of a Treaty provision to that effect. The approach of the Court is rather instrumentalist and it views the problem from the perspective of effective protection of EU law rights. Clearly, it would be unacceptable for the Member States that the EU should receive more lenient treatment in terms of liability for breach of EU law. If the pendulum of leniency were to swing in the opposite direction, however, however, the only way to do this would have been to leave the Member States to their own (national law) devices. This would create the possibility for unequal protection of EU law rights among the Member States which, if Member States chose to be lenient on themselves, could lead to ineffective enforcement.

In terms of conditions of liability, the Court has held that, in cases where a Member State enjoys a wide discretion in adopting the impugned legislation:

[EU] law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals the breach must be sufficiently serious and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[76]

As is immediately apparent, the Court added the requirement of 'sufficient seriousness' to the concept of a breach of a superior rule of law elicited in ***Francovich***. The Court explained, however, that:

On any view, a breach of EU law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.[77]

This was manifestly the case in ***Francovich***, where, at the time the preliminary reference was made, the Court had long since ruled against Italy for the same infringement, in Article 258 (ex Article 226 EC) proceedings brought by the Commission. The 'sufficiently serious' criterion remains significant in this context, however, as it may be queried whether it could be applied to acts of individuals.[78]

3.3. Towards a right to compensation operating between individuals

While ***Brasserie du Pêcheur*** was pending before the Court, Advocate General Van Gerven issued his opinion in ***Banks***,[79] a case concerning actions for damages under Articles 101 and 102 (TFEU) and the (now defunct) Articles 60, 65 and 66 of the European Coal and Steal Community Treaty (the ECSC competition rules) and . In reply to the question whether a right to damages emanates from the EU competition rules, he found:

The general basis established by the Court in the Francovich judgment for State liability also applies where an individual infringes a provision of [EU] law to which

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[76] ***Ibid.***, para. 51.

[77] ***Ibid.***, para. 57.

[78] See the discussion in Milutinović, n. 56 above, points 4.3.2. and 5.3.3.

[79] Case C-128/92, H. J. Banks & Co. v. British Coal Corporation ('Banks') [1994] ECR I-1209.

he is subject, thereby causing loss and damage to another individual. The situation then falls within the terms stated by the Court in paragraph 31 of the Francovich judgment (and even earlier in Van Gend en Loos), namely breach of a right which an individual derives from an obligation imposed by [EU] law on another individual. Once again, the full effect of [EU] law would be impaired if the former individual or undertaking did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of [EU] law - all the more so, evidently, if a directly effective provision of [EU] law is infringed…[80]

The Advocate General advocated, essentially, the further extension of both the rule on availability of compensation and the conditions of liability to individuals, with the exception of the condition of 'sufficiently serious breach', which he found to be solely applicable to the EU and to the Member States.[81] The Court did not address the issue in its judgment, as it found that only the ECSC competition rules and not Articles 101 and 102 were applicable in that case and that the former did not enjoy direct effect.

It was not for almost another decade that the Court could face this issue head on. In the interim, however, it issued an important but rarely cited judgment in ***GT-Link***.[82] There, the Court was asked whether a victim of an overpricing abuse, within the meaning of Article 102, could claim the surcharge from an undertaking performing services of a general interest.[83] The Court found, in that case, that the undertaking may well be a provider of services of general economic interest for the purposes of Article 106(1). Even so, its pricing policy could not be justified under Article 106(2) as indispensable for the purposes of providing the said services. Thus:

Entitlement to repayment of charges levied by a Member State in breach of the rules of [EU] law is a consequence of, and an adjunct to, the rights conferred on individuals by the [EU] provisions prohibiting such charges. The Member State is therefore in principle required to repay charges levied in breach of [EU] law, except where it is established that the person required to

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[80] ***Ibid.***, para. 43 (emphasis added).

[81] ***Ibid.***, para. 53; see the discussion of this distinction in Milutinović, n. 56 above, at point 4.3.2.

[82] Case C-242/95, GT-Link A/S v. De Danske Statsbaner (DSB) [1997] ECR I-4449.

[83] In that case, a public undertaking in Denmark owned a seaport and applied discriminatory pricing in docking fees that favoured its own vessels and those of its usual trading partners. The practice was sanctioned by Danish law.

pay such charges has actually passed them on to other persons (Comateb, paragraph 21, and cases cited therein).

The same reasoning applies in any event where duties are levied by a public undertaking which is responsible to the Danish Ministry of Transport and whose budget is governed by the Budget Law….

It should be emphasized, however, that traders may not be prevented from applying to the courts having jurisdiction, in accordance with the appropriate procedures of national law, and subject to the conditions laid down in Joined Cases C-46/93 and C-48/93 Brasserie du Pecheur and Factortame [1996] ECR I-1029, for reparation of loss caused by the levying of charges not due, irrespective of whether those charges have been passed on (Comateb, paragraph 34).

In the light of those considerations the answer to the seventh question must be that persons or undertakings on whom duties incompatible with Article [106(1)] in conjunction with Article [102] of the Treaty have been imposed by a public undertaking which is responsible to a national ministry and whose budget is governed by the Budget Law are in principle entitled to repayment of the duty unduly paid.[84]

The Court transposed, essentially, the EU law right to repayment of unlawfully collected taxes (from ***San Giorgio*** and, more recently, ***Comateb***,[85] which was cited by the Court) into the field of competition law. As it was, in all likelihood, aware of the implications of this judgment, it hastened to include the qualification 'public undertaking which is responsible to a national ministry and whose budget is governed by the Budget Law' in its identification of the entity liable in restitution. Despite the ostensible state regulation element, it must be noted that Article 106(2) did not apply to the infringement in this case, so this qualification was irrelevant under the circumstances. Accordingly, there are no grounds on which this judgment could be distinguished in future cases where restitution might be sought against an undertaking ***not*** performing services of a general economic interest under Article 102.[86]

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[84] ***Ibid.,*** paras 58–61.

[85] ***San Giorgio***, n. 54 above, para. 12 and ***Comateb***, n. 84 above, para. 20.

[86] Indeed, for the present purposes, ***GT Link*** merely represents a situation of an undertaking abusing its dominant position through excessive pricing and the Court saying that the undertaking's customers have a right to repayment of the excess amounts. As such, the

What is somewhat confusing about the Court's findings is that, while it claimed that the right to repayment of unlawfully levied charges arose from the ***San Giorgio/Comateb*** case law, the enforcement of that right was subject to national law and the conditions laid down in ***Brasserie du Pêcheur***. This finding is peculiar because, in the case of liability of the Member States, ***San Giorgio/Comateb*** principles predate ***Francovich/Brasserie du Pêcheur*** and do not list the cumulative criteria laid down by the Court in the latter. In particular, it seems evident that liability in ***restitution***, as a matter of EU law, is not premised on any criterion of fault, not least a 'sufficiently serious breach.' Equally, a causal link between infringement and damage need not be proven, save where it is arguable that the plaintiff has passed on the unlawfully levied amount.[87]

4. COURAGE AND MANFREDI

4.1. Courage

It was seen, in the previous section, how a EU right to restitution for unjust enrichment was developed by the Court of Justice in the ***San Giorgio/Comateb*** / ***GT-Link*** line of cases, while an EU right to damages was developed in ***Francovich/Brasserie du Pêcheur***. The first line of cases was built around the idea of restitution of payments unlawfully received by the Member State, while the second line emerged from the idea of compensating actual damage / loss of profits resulting from the acts of a Member State. It was not until the judgment of the Court of Justice in ***Courage***, however, that it became clear that individuals had the right to claim damages from other individuals under EU law.

When the issue finally came to be decided by the ***Courage*** Court without the confusing element of state involvement that was present in ***San Giorgio/Comateb/GT-Link***, the Court did not rely on that line of (restitution) case law but seems, instead, to have relied on a concept of compensation.

Courage was an Article 267 (formerly Article 234 EC) reference from the English Court of Appeal. In the context of a beer supply / tenancy agreement between a brewer and a publican, where the agreement infringed Article 101,

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principle enunciated in the judgment should apply, ***mutatis mutandis***, to any abuse under Art. 102 that involves an unlawful overcharge.

[87] The (as yet not entirely clear) distinction between restitution and compensation under EU law is discussed in Milutinović, n. 56 above, Ch. 8.

one questioned raised by the latter court was whether the English doctrine of ***in pari delicto potior est conditio defenditis*** could be used to defeat the publican's damages claim. Under this doctrine, if both parties are 'at equal fault', the plaintiff cannot claim damages from the defendant. It would seem that, under English law, the publican was 'at equal fault' with the brewer and his claim could not therefore stand.[88]

The Court began, rather safely, with the ***Van Gend en Loos/Costa*** argument – recalling that the Treaty has created its own legal order, whose subjects are not only the EU and the Member States but also their nationals and which provides rights and obligations for all of these subjects.[89] It then proceeded to emphasize the vital 'constitutional' role played by Article 101:

According to Article [3(1)(g) EC—now modified in Article 3(1)(b) TFEU], Article [101] of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the [EU] and, in particular, for the functioning of the internal market (judgment in Case C-126/97 ***Eco Swiss*** [1999] ECR I-3055, paragraph 36).

Indeed, the importance of such a provision led the framers of the Treaty to provide expressly, in Article [101(2)] of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void….

That principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article [101(1)] are met and so long as the agreement concerned does not justify the grant of an exemption under Article [101(3)] of the Treaty….[90]

Then, however, the Court threaded on much thinner ice:

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[88] In the US, the Supreme Court famously rejected the applicability of the Common Law doctrine (whose general validity it also questioned) in the context of claims for antitrust damages: ***Perma Life Mufflers Inc. et al. v. International Parts Corp. et al.*** 392 U.S. 234 (1968), at 137–139. Indeed, according to the Supreme Court: 'The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favour of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.' ***Ibid.***, at 139.

[89] ***Courage***, n. 1 above, para. 19.

[90] ***Ibid.,*** paras 19–22.

it should be borne in mind that the Court has held that Article [101(1)] of the Treaty and Article [102 TFEU]… produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard….

It follows from the foregoing considerations that any individual can rely on a breach of Article [101(1)] of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.

As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of [EU] law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see ***inter alia*** the judgments in Case 106/77 ***Simmenthal*** [1978] ECR 629, paragraph 16, and in Case C-213/89 ***Factortame*** [1990] ECR I-2433, paragraph 19).

The full effectiveness of Article [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

Indeed, ***the existence of such a right*** strengthens the working of the EU competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [EU].

There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.

However, in the absence of [EU] rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [EU] law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they

do not render practically impossible or excessively difficult the exercise of rights conferred by [EU] law (principle of effectiveness)….[91]

It is evident that ***Courage*** follows the line adopted in ***Brasserie du Pêcheur***, insomuch as it makes an explicit link between direct effect and the subjective right to reparation. What the Court did ***not*** do and as at least one author pointed out, is to follow the '***Brasserie du Pêcheur*** orthodoxy' to its logical conclusion, which would be to lay down the ***conditions*** for non-contractual liability in a taxative manner (i.e., sufficiently serious breach of a superior rule of law for the protection of individuals, damage and causation). [92] This is not to say, however, that such conditions cannot be deduced from its other judgments.[93]

Indeed, it is submitted the omission of conditions of liability was not a purposeful omission. Rather, to lay down these conditions would be to stray too far outside of the scope of the reference from the English Court of Appeal. Already, the Court answered more than it was asked when it said that it should be 'open to any individual' to claim compensation under Article 101, whereas the question before the Court was merely whether ***a person prima facie subject to the English in pari delicto rule*** could be precluded from claiming damages solely on the basis of the latter.

The Court sought to set out a general principle of EU law that was not strictly necessary for the disposal of the case at hand. The issue of whether liability would exist and how it should be determined ***after*** the disapplication of the ***in pari delicto*** rule was not really contentious for the English court, save to the extent that methods alternative to ***in pari delicto*** could be applied in order to take into account the fact that the plaintiff was himself a party to an unlawful agreement within the meaning of Article 101. In that connection, the Court did proceed to lay down some EU law principles:

The Court has held that [EU] law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by [EU] law does not entail the unjust enrichment of those who enjoy them….

Similarly, provided that the principles of equivalence and effectiveness are respected…, [EU] law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of

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[91] ***Ibid.,*** paras 23–29 (emphasis added).

[92] Komninos, n. 4 above, at 469–470 (emphasis in the original).

[93] See the discussion in Milutinović, n. 56 above, Chs 5 and 6.

competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past (see Case 39/72 ***Commission*** v ***Italy*** [1973] ECR 101, paragraph 10), ***a litigant should not profit from his own unlawful conduct***, where this is proven.

…the ***matters to be taken into account by the competent national court include the economic and legal context in which the parties find themselves*** and, as the United Kingdom Government rightly points out***, the respective bargaining power and conduct of the two parties to the contract***.

In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.[94]

In effect, the Court elicited a EU law notion of inequality of bargaining power and (partially) regulated the mitigation of liability. It therefore took a leap further toward defining a perfect EU law ***civil obligation***. Indeed, although it did not transpose the ***Francovich/Brasserie du Pêcheur*** list of conditions into the liability of individuals, it may have done something equally or more important.

4.2. Manfredi

In ***Manfredi***,[95] the Court heard a preliminary reference from an Italian small claims court, regarding claims for damages launched by users of car insurance, against a cartel of insurance companies that effectively eliminated price competition in premiums for third-party liability. At the time of the proceedings, some authors and a section of the Italian Court of Cassation held the view that, under Italian competition law, consumers were not entitled to claim compensation for loss resulting from an infringement of the Italian competition rules, which were otherwise identical to EU rules in terms of their substance (minus the requirement of effect on inter-state trade).[96] The

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[94] ***Courage***, n. 1 above, paras 30–33 (emphasis added).

[95] ***Manfredi***, n. 2 above.

[96] The purported rule is not referred to as such in the judgment but is, rather, evidenced in the phrasing of the reference. By the time the Court had issued its judgment, however, the

referring court asked, essentially, whether consumers could claim under EU law.[97] The Court held, in reply:

The full effectiveness of Article [101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article [101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (***Courage and Crehan***, cited above, paragraph 26).

It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101 TFEU].[98]

While maintaining its ***Rewe-Zentralfinanz*** 'in the absence of EU rules' stance,[99] the Court clarified the ***Courage*** right to compensation by introducing the requirement of a 'causal relationship' between the damage suffered and the infringement. The Court also seized the opportunity to lay down some rules on limitation periods:

A national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended.

In such a situation, where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual

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United Sections of the Court of Cassation issued a judgment declaring that such a rule did not, indeed, exist; see: ***Corte di Cassazione***, ***Sezione I civile,*** Sentenza 9 dicembre 2002, n. 17475.

[97] ***Manfredi***, n. 2 above, paras 20 and 21, questions 2 and 3, respectively; the actual words used by the national court were:

Is Article [101 TFEU] to be interpreted as meaning that it entitles third parties who have a relevant legal interest to rely on the invalidity of an agreement or practice prohibited by that [EU] provision and claim damages for the harm suffered where there is a causal relationship between the agreement or concerted practice and the harm?

[98] ***Ibid.***, paras 60–61.

[99] ***Ibid.***, para. 62.

who has suffered harm after the expiry of the limitation period to bring an action.[100]

The Court pointed the attention of the national court to the problem of continuous infringements that may go unpunished if time limits do not take this continuity into account. Although the assessment of the national rule with EU law is ultimately left to the national court, that assessment should take place under rather strict EU law parameters.

The inclusion of limitation periods on the Court's effectiveness 'watch list' in this context is not surprising: indeed, it is consistent with previous interventions in the area of state liability.[101] Another area where intervention has been known to occur is that of the availability of damages that exceed actual damage to the plaintiff.[102] In this connection, the Court found:

It follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (***damnum emergens***) but also for loss of profit (***lucrum cessans***) plus interest.

Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of [EU] law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible…

As to the payment of interest, the Court pointed out in paragraph 31 of Case C-271/91 ***Marshall*** [1993] ECR I-4367 that an award made in accordance with the applicable national rules constitutes an essential component of compensation.

It follows that,…in the absence of [EU] rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice

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[100] ***Ibid.,*** paras 78–79.

[101] Case 271/91, ***Marshall v. Southampton and South-West Hampshire Area Health Authority*** ('Marshall II') [1993] ECR I-4367, paras 31–32.

[102] See, inter alia, ***San Giorgio*** [1983] ECR 3595, n. 54 above; Case C-192/95 to 218/95, ***Société Comateb et al. v. Directeur général des douanes et droits indirects*** [1997] ECR I-165 and Case 68/79, ***Hans Just I/S v. Danish Ministry for Fiscal Affairs*** [1980] ECR 501.

prohibited under Article [101 TFEU], provided that the principles of equivalence and effectiveness are observed.

…in accordance with the principle of equivalence, if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the [EU] competition rules, it must also be possible to award such damages in actions founded on [EU] rules. However, [EU] law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by [EU law] does not entail the unjust enrichment of those who enjoy them.[103]

This passage makes it apparent that the Court views 'effectiveness' as a minimal requirement and not as an imperative to ***maximize*** 'effectiveness'. Thus, while ***damnum emergens***, ***lucrum cessans*** and interest are guaranteed to the successful plaintiff under EU law, the resolution of the issue of punitive damages is deferred to the moral precepts of the Member States, who may or may not find it appropriate to grant damages that exceed the actual damage suffered by a victim of anticompetitive conduct.[104]

4.3. Muňoz

In the intervening period between ***Courage*** and ***Manfredi***, another important case was decided by the Court in the field of horizontal direct effect: ***Muňoz***.[105] In that case, the Court was asked whether Regulations 1035/72 and 2200/96 on the quality standards of fruit were capable of enforcement in civil proceedings between individuals. Article 3(1) (of both regulations), the provision in question, prohibited traders from displaying products or

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[103] ***Ibid.,*** paras 95–99.

[104] In this respect, it must be noted that some authors have argued, with convincing figures, that pre-judgment interest (which exists in all the Member States but not in the US) and treble damages (which exist in the US) are interchangeable for the purposes of deterrence of unlawful conduct and thus, by logical extension, the effective enforcement of a norm such as Arts 101 and 102 TFEU: C. A. Jones, 'A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US', in ***European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law***, ed. C.-D. Ehlermann & I. Atanasiu (Oxford: Hart, 2003), 95, at 103–105. It must be noted, however, that the Court's deferral to national choices in this matter applies, as with all national rules on liability and remedies in this field, ***in the absence of EU rules***.

[105] Case C-253/00, ***Muñoz v. Frumar*** [2002] ECR. I-7289; See S. Drake, 'Scope of ***Courage*** and the Principle of "Individual Liability" for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice', ***European Law Review*** 31 (2006): 841, at 859–862.

offering them for sale within the EU unless they comply with the quality standards set out in the directive.[106] As to its applicability in civil proceedings, the Court held:

The full effectiveness of the rules on quality standards and, in particular, the practical effect of the obligation laid down by Article 3(1) of both Regulations No 1035/72 and Regulation No 2200/96 imply that it must be possible to enforce that obligation by means of civil proceedings instituted by a trader against a competitor.[107]

The Court did not specifically refer to claims for damages. The reasoning does, however, follow along the 'effectiveness' line pursued by the Court from ***Van Gend en Loos*** through to ***Courage*** and it reiterates familiar arguments in favour of private enforcement, that is, the strengthening of effective application of the rules themselves and the supplementary role to public enforcement, deterrence of unlawful practices which are difficult to detect. It may well be that this judgment indicates a willingness of the Court to extend the principle in ***Courage*** to directly applicable provisions of Regulations. Although there is, as yet, no direct precedent on this point, it is submitted that this view is logical and that there is, in principle, nothing that would prevent the Court from doing so, as all of the arguments mentioned by the Court in favour of a EU right to damages under Articles 101 and 102 can be restated identically in the case of other directly applicable provisions of EU law, including Regulations.

5. CONCLUSION

Starting in the mid-1960s, the Court of Justice progressively laid down a body of case law that proceeded from the right of individuals to rely directly on provisions of the Treaty to a right to claim damages and restitution from the Member States. In the process, the primacy of EU law over conflicting national law, coupled with the obligation for national courts to disapply national law automatically in the case before them was established and this served as an additional generator of individual rights based on the Treaty. By the late 1990s, the Court had also established a right to restitution operating

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[106] Regulation (EEC) No. 1035/72 of the Council of 18 May 1972 on the common organization of the market in fruit and vegetables [1972] OJ L 118/1; Council Regulation (EC) No. 2200/96 of 28 Oct. 1996 on the common organization of the market in fruit and vegetables [1996] OJ L 297/1.

[107] N. 105 above, para. 30.

among individuals under the competition rules, albeit in the (ostensible) context of undertakings performing a service of a general economic interest.

Although no direct line can be drawn from ***Van Gend en Loos*** to ***Courage*** and ***Manfredi***, in terms of progressive development of the case law, the same fundamental principle underlies all of the relevant judgments of the Court: the idea of effective enforcement of EU law before national courts. This principle is powerful as much as (or perhaps because) it is utterly vague: there is no consistent method of determining with any degree of precision, ***ex ante***, which type of legal remedy may turn out to be indispensable for the effective enforcement of EU law. The Court has been more pragmatic than systematic in this respect, proceeding on a case-by-case basis.

The application of the principle of effectiveness has, however, spawned, another principle which, unlike effectiveness itself, is characteristic of (and familiar to) national legal orders: the principle of ***ubi ius ibi remedium***. The only conclusion that can be made with reasonable certainty, therefore, is that, where national law would leave victims of an infringement of EU law without a remedy-the Court of Justice ***may*** be willing to intervene. This intervention depends, in turn, on the interpretation of another vague concept namely, practical (as opposed to formal) impossibility of protecting a right before a national court. In this respect, perhaps, ***Simmenthal*** may prove much more important than ***Courage*** in the long run: it is precisely on the determination of the level of inconvenience imposed by national law on the victim of an infringement that the question of whether an EU law remedy should be introduced ultimately hinges. As was shown in this article, however, there can no longer be any question as regards the possibility of EU law introducing 'new' remedies. Not only has the Court of Justice left this possibility open in terms of EU ***legislation***, from its first relevant judgment in ***Rewe-Zentralfinanz***, it has, single-handedly, introduced several new remedies ***judicially***, in order to fill gaps-real or perceived-in the enforcement of EU law.

Veljko Milutinović*

OD PRESUDE *VAN GEND EN LOOS* DO PRESUDE *MANFREDI*: POGLED NA RAZVOJ PRAVA NA NAKNADU ŠTETE IZMEĐU POJEDINACA U PRAVU EU

Rezime

U svojoj, reklo bi se, istorijskoj presudi u predmetu Courage (2001.) Evropski sud pravde je prvi put izričito ustanovio da tadašnje komunitarno pravo (danas, posle Lisabonskog ugovora, pravo Evropske unije ili pravo EU), sadrži, samo po sebi i bez obzira na norme nacionalnog prava, pravo na naknadu štete koje funkcioniše horizontalno, između pojedinaca, na osnovu kršenja direktno primenjivih normi prava EU. Presudom Manfredi (2006.), načela istaknuta u Courage su dalje definisana, razvijena i proširena, te je pravu na naknadu štete, u širem smislu, pripojeno i pravo na zateznu kamatu, kao i na obavezu Država članica EU da imaju razumne rokove zastarevanja, koji bi omogućili delotvoran postupak za naknadu štete.

Presude Courage i Manfredi su bile i ostale kontroverzne, stoga što mnogi autori zastupaju tezu da, u pravu EU, postoji tzv. "autonomija nacionalnog prava", tj. tobožnje načelo koje drži da, dok pravo EU propisuje norme ponašanja u apstraktnom smislu, pitanja postupka i pravnih lekova ostaju, na neki način, u eksluzivnom, "autonomnom" domenu Država članica. Serija presuda Evropskog suda pravde, od najčuvenije presude Van Gend en Loos (1963.), u kojoj je Sud ustanovio evropsku verziju načela direktne primenjivosti, ukazuje, međutim, na to da Sud nikada nije povukao jasnu crtu između "domena" prava EU sa jedne strane i "domena" nacionalnog prava, sa druge strane. Naprotiv, kroz razvoj načela "delotvorne primene" (effectiveness) prava EU, Sud je ostavio mogućnost isključenja gotovo bilo koje norme nacionalnog prava i, u nekim slučajevima, njenu zamenu normom prava EU, kada god je takvo rešenje bilo potrebno da bi se pojedincu omogućilo da "delotvorno" zaštiti prava koja mu garantuje EU.

Ipak, logički (is)korak koji je napravio Sud prelazeći sa opšteg načela da pravo EU mora biti "delotvorno" primenjeno pred sudovima Država članica na konkretna pravila potrebna za "delotvornu" primenu (između ostalog, pravo na naknadu štete koje proizilazi is "samog prava EU") nije potpuno jasan. Stoga se može reći, u nastojanju da se objasni ovaj fenomen, da je Sud

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bio motivisan namerom da, bar što se tiče naknade štete, "uvede" načelo ubi ius ibi remedium kao posebnu normu prava EU-bez konkretnog izvora u Rimskom ili kasnijim Ugovorima.

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DEFINING THE LIMITS OF EU EASTERN ENLARGEMENT: FATIGUE, VALUES OR 'ABSORPTION CAPACITY'?

Abstract

After the successful completion of the 2004/07 'mega enlargement', the spread of peace, democracy and prosperity on the European continent via EU enlargement seems to be speedily approaching its limits. Despite more interested candidates and initially promising socio-economic development trends among both the new and old EU members, only a few small countries from the Western Balkans have any real chance of joining the EU in the near future.

Looking at the main causes of the emergence of enlargement fatigue in the 'old' EU member states and its negative impacts on the continuation of EU eastern enlargement after 2004/07, this paper argues that the limits of EU eastern enlargement are set by both prevailing political attitudes founded on various grounds in the leading EU member states and by the rationally defined objective capacity of the EU's institutions to absorb the new member states.

Keywords: ***EU Eastern enlargement, enlargement fatigue, objective limits, rational and other explanations, absorption capacity of EU institutions***

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The positive impact of the eastern enlargement of the European Union for the success of post-communist political and economic transition is a historical fact that has been recognised in a large body of literature for some time (Grabbe, 2006; Pridham, 2005; Vachudova, 2005). Twenty years after the collapse of East European communism, it is obvious that the transition from communist dictatorship to multi-party democracy and from a command economy to a market economy has been successful almost exclusively in those ex-communist countries which were able to link their political and socio-economic reforms to association with the EU and the accession process from the very beginning of their post-communist development. While eight East Central European and Baltic states succeeded in solidly building and consolidating the functioning of institutions of multi-party democracy and the market economy during the 1990s and early 2000s and were therefore awarded with European Union membership as of 1 May 2004, among the other post-communist European states only three "late transitionists" from South-Eastern Europe were able to similarly follow this successful path. Bulgaria and Romania were admitted to the EU in 2007 and together with Croatia, whose accession into the EU in 2013 has been recently confirmed by the decisions of the European Council (European Council, 2011), they continue to speedily introduce market reforms with some problems in consolidating the institutions of democracy, especially regarding the spread of corruption and the involvement of organised crime in the functioning of government institutions. By contrast, the remaining countries of the so-called "Western Balkans" which all have signed associated treaties with the EU[1] and (with the exception of Bosnia and Herzegovina) have recently submitted their application for EU membership are either still waiting to open accession negotiations (as is the case with FYR Macedonia and Montenegro) or even to get full candidate status (Table 2); the rest are officially recognised only as 'potential candidates'. The future of non-Baltic post-Soviet states, none of

[1] The so-called Stabilisation and Association Agreements (SAA), which were basically similar to Europe Agreements on primarily asymmetrical economic/trade concessions signed with the countries of the 2004/2007 Enlargement in the early 1990s, but contained additional requirements regarding the stabilisation, reconciliation and mutual cooperation among the post-Yugoslav states in accordance with the Stabilisation and Association Process (SAP), which the EU launched after the end of civil wars in Croatia and B-H and the signing of the Dayton Peace Accord in 1995.

which have ever been seriously considered for getting the status of an associated (even less so an accession) country to the EU looks even gloomier. They have not only been significantly less successful in post-communist political and economic transition than any of their western ex-communist counterparts, but they started to reverse the direction of change especially regarding political (anti-)reform and increased authoritarianism over the last several years.

Such a positive correlation between eastern enlargement of the European Union and success in post-communist reform has also been largely beneficial for the 'old' EU member states and their people. Despite the unquestionable importance of some 'non-materialist' motives, especially highlighted in constructivist and functionalist explanations of the factors that were behind the EU's eastern enlargement (Sedelmeier, 2005; Schimmelfennig et al. 2006; Schimmelfennig, 2001 and 2002) a strong rationalist component has always been in the foreground of the very idea of European integration and EU enlargement policy (Litner, 1999; Nungent, 2004). Inviting and allowing their former opponents from the communist east to 'join the club' after completing the required accession criteria, Western Europeans hoped to achieve some economic gains but even more importantly extend and secure a 'zone of peace and political stability' further from their borders in the east (Zielonka 2006, Petrovic, 2004). The historical evidence shows that the process of EU eastern enlargement thus far has almost completely met the expectations of both sides of the former Iron Curtain.

However, recent developments indicate that the spread of peace, democracy and prosperity on the European continent via EU enlargement is speedily approaching its limits, which do not coincide with the geographical borders of Europe and the proposition of the Treaty of Rome (which has not been amended by subsequent treaties) that "any European state may apply to become a member of Community [i.e. Union]"[2]. The following discussion in the first section of this paper will show how the politically and institutionally set limits of the EU's ***absorption capacity*** (for new members) have in recent years effectively defined the limits of EU enlargement to the east. In the second section the scope and applicability of the two dominant approaches are examined in defining the ***objective*** limits to EU enlargement, which are mostly identical to the hardly measurable capacity of the EU institutions and

[2] The Treaty establishing the European Economic Community, Rome 1957, art. 237.

policies to function well after any new enlargement(s). Section three concludes that even if the political conditions and collective will were very different than they are today to allow the future EU borders to stretch to the geographical end of Europe at the Urals, the objective limits to enlargement would hardly allow for such an expansion.

1. THE EMERGENCE OF ***ENLARGEMENT FATIGUE*** AND ITS FIRST IMPLICATIONS

Sometime between the completion of the 2004 enlargement and the admission of Romania and Bulgaria in 2007, especially after the failed referenda on the EU constitution in France and the Netherlands in May and June 2005 and the EU Council's decision to open negotiations for accession with Turkey in October 2005, the wider intellectual public, some political circles and media in the old EU member states started to question the rationale for rapid EU enlargement (from 15 members before 2004 to 27 in 2007) and began to loudly oppose any further EU enlargement to the east (Phinnemore, 2006). Grounding their fears partly in some 'traditional' Western media stereotypes (Todorova, 1997; Hatzopoulos, 2003) and structural theories on deep and longstanding socio-political, economic, cultural and even 'civilisational' differences between the European West and East (Huntington, 1993/1996) and partly on the legitimate question of whether the EU institutions will be able to continue to effectively function with such a rapid increase of its membership rather than in the post-2004 enlargement development trends, they argued that for the sake of its future progress and internal stability the EU simply could not afford the accession of any more 'weak' ex-communist states. Fairly 'Westernised' and economically-advanced Croatia is considered to be the 'only possible exception' in this regard (Seroka, 2008).

Finding themselves between such pressures and the uncertainty of waiting for the adoption of its new constitutional treaty which will enable "its institutions and decision-making processes [to] remain effective…in a Union of more than 27 Member States" (EU Commission 2006, 20-21) EU (member states') leaders decided to discourage any further applications for accession, despite the generally positive and promising development trends among both the new and old EU members from 2004 until the eruption of the world economic crisis in 2008 (Table 1). The European Council meeting of June 2006 requested the EU Commission re-assess the importance of the EU's so-called

absorption capacity as an accession criterion[3] and submit a detailed report (Petrovic, 2009, Emerson et al, 2006). In its response, the Commission had formulated a more rigorous tool for negotiating the adoption and implementation of acquis chapters by the end of the year in order to "ensur[e] that the candidate countries are ready to take on the obligations of membership when they join by fulfilling the rigorous conditions set" and hence become more ***easily absorbable*** for the EU (EU Commission 2006, 15). This new (i.e. tougher) approach to the negotiations together with the already increased number of chapters for negotiations (now 35 instead of the 31 for the 12 countries of the 2004/07 enlargement) has affected not only Croatia and Turkey, the only two candidates who currently have opened negotiations for accession with the EU, but also all potential EU candidates from the Western Balkans which are still waiting to open their negotiations.

While Croatia and Turkey have now (until mid 2011) had longer accession negotiation talks with the EU (since October 2005) than any accessory state of the 2004 and 2007 enlargement[4], the insistence on a tougher pre-accession approach in recent years has further slowed down an already delayed progress in EU accession for the remaining 'late post-communist reformers' from the Western Balkans. Although their 'European perspective' and 'EU future' were promised by the EU on several occasions almost a decade ago in the early 2000s - most notably by the adoption of the "Thessaloniki Agenda" of June 2003[5] - none of the latter, including FYR Macedonia, which has been an officially recognised EU membership candidate already for six years (since December 2005), has yet set a date for opening accession negotiations with the EU. Moreover, following the experience of Croatia's progress in association and accession, their own completed steps in this regard thus far (see Table 2) and the objectively required time for the completion of other necessary steps in the EU accession process (Grabbe, 2010), only Macedonia (if it gets Greece's approval regarding its country name) and possibly

[3] Although it was included in the original Copenhagen accession criteria, this criterion did not play any significant role in the timing of the 2004 and 2007 enlargement processes.

[4] The accessory states who joined the EU in 2004 negotiated their accession from 1998 (Latvia, Lithuania and Slovakia only from 2000) to December 2002, while Bulgaria and Romania did this during the period 2000-2004.

[5] EU General Affairs and External Relations Council, 2003. For more details see also Petrovic 2009 and Pipan 2004.

Montenegro of the remaining Western Balkan states can hope to open accession negotiations before 2013.

Table 1

Average annual real GDP growth and unemployment rates

	2003		2005		2006		2007		2008	
	GDP	Unm	GDP	Unm	GDP	Unm	GDP	Unm	GDP	Unm
Germany	-0.2	8.3	0.8	10.7	3.2	9.8	2.5	8.4	1.3	7.3
France	1.1	9.0	1.9	9.3	2.2	9.2	2.4	8.4	0.2	7.8
Italy	0.0	8.4	0.7	7.7	2.0	6.8	1.6	6.1	-1.3	6.7
UK	2.8	5.0	2.2	4.8	2.9	5.4	2.6	5.3	0.5	5.6
Netherland	0.3	3.7	2.0	4.7	3.4	3.9	3.6	3.2	2.0	2.8
EU-15	0.8	8.6	1.7	8.9	3.0	8.3	2.7	7.4	0.5	7.1
Czech Rep.	3.6	7.8	6.3	7.9	6.8	7.2	6.1	5.3	2.5	4.4
Hungary	4.3	5.9	3.5	7.2	4.0	7.5	1.0	7.4	0.6	7.8
Poland	3.9	19.7	3.6	17.8	6.2	13.9	6.8	9.6	5.0	7.1
Slovakia	4.8	17.6	6.7	16.3	8.5	13.4	10.6	11.1	6.2	9.5
Slovenia	2.8	6.7	4.5	6.5	5.8	6.0	6.8	4.9	3.5	4.4
Estonia	7.6	10.0	9.4	7.9	10.0	5.9	7.2	4.7	1.3	5.5
Latvia	7.2	10.5	10.6	8.9	12.2	6.8	10.0	6.0	-4.2	7.5
Lithuania	10.2	12.5	7.8	8.3	7.8	5.6	9.8	4.3	2.8	5.8
Bulgaria	5.0	13.7	6.2	10.1	6.3	9.0	6.2	6.9	6.0	5.6
Romania	5.2	7.0	4.2	7.2	7.9	7.3	6.3	6.4	7.3	4.4
Croatia	5.0	14.2	4.2	12.7	4.7	11.2	5.5	9.6	2.4	8.4
Turkey	5.3	-	8.4	9.2	6.9	8.7	4.7	8.8	0.9	9.7
Macedonia	2.8	-	4.1	-	4.0	-	5.9	-	4.9	-

Source: Eurostat, 2010.

Although it cannot be considered as the most important or crucial factor, the recent adoption of a tougher EU approach to accession negotiations was

definitely not neutral in tracing the very slow progress of these states in their accession to the EU and consequently the recent deceleration of their progress in post-communist reform (especially democratisation, see Table 2). In fact, in addition to an initially established special set of pre-accession conditions related to overcoming the negative consequences of the 1990s wars in Croatia, Bosnia and Kosovo[6], it was another element of EU conditionality imposed on the current candidates (and potential candidates) for EU membership from the Western Balkans which their ex-communist counterparts from Central Europe, the Baltics and the 'Eastern Balkans' did not need to fulfil. Taking this into consideration, together with their later start with post-communist reform and the closely related issue of their problematic internal political stability (which negatively and most directly impacts on the consolidation of the domestic institutions of democracy)[7], the promised 'EU future' of the Western Balkan states several years ago now looks farther away than ever before. Nevertheless, the accession of all the Western Balkan states into the EU sooner or later still seems 'hardly avoidable'. The most important reasons for this are more related to the relatively small size of these states and the ease (i.e. low cost) of their absorption rather than the promises of the EU leaders to "stick to [their] existing commitments" (Oli Rehn, 2006).[8] For similar reasons which will be discussed in more detail in the third section of this paper, further EU expansion to the east into the region of post-communist non-Baltic Soviet states continues to be highly hypothetical, despite the undisputable European geographic location of these countries.

2. ARE THERE ANY OBJECTIVE LIMITS TO EU (EASTERN) ENLARGEMENT?

Although the post-2004 enlargement scepticism and ***enlargement fatigue*** were mostly initiated with fears which were not confirmed by later development

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[6] Especially regarding cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague.

[7] This is dominantly impacted by the prolonged ethnic and national disputes regarding the statehood of Bosnia-Herzegovina, FYR Macedonia and most recently Serbia and Kosovo, which despite strong EU involvement and leverage continues to destabilise the political scene in related countries and the region as a whole (for more detail see Petrovic, 2004 and 2009; Hayden, 2005; Vankovska, 2007, Panagiotou, 2008 and Sahin, 2009).

[8] See also European Council, Presidency Conclusions, 2006a and 2008.

trends,[9]they have helped formulate a legitimate question of whether the EU can really afford to expand so much to include in its membership all of the countries which are geographically located in Europe (as stated in the Treaty of Rome) without jeopardising the satisfaction of basic political and socio-economic motives for its foundation and functioning. While there are pretty convincing arguments that this question is highly hypothetical when considering a dynamic and quite long time horizon (of at least the next 20-30 years) in which possible future enlargements may occur and in which EU institutional capacity may also expand enough to absorb all potential candidates (Emerson et al., 2006), others claim that the capacity of the European Union for further enlargements has already been exhausted. Hence, the abovementioned structural/constructivist explanations, which insist on the importance of the similarities of longstanding social structures, values and norms (Huntington, 1996; White et al, 2005) and on these grounds have defined EU 'responsibility' and its actions as an organisation and a "community building agency" (Schimmelfennig, Sedelmeier 2002, 510) towards its eastern neighbours of the same 'collective identity' (Sedelmeier, 2006; Schimmelfennig, 2002) provide a quite straightforward answer to the above question:

EU eastern enlargement is limited to the admission of those countries of the former Eastern European bloc which share the same values, norms and identity (especially regarding political democracy, the market economy, respect for the rule of law and cultural/religious habits and norms) as the Western 'old' EU member states. The limits of EU eastern enlargement were more or less already reached with the 2004 enlargement, and possibly only Croatia, the only remining non-EU country of 'Western Civilisation' (Huntington, 1996; Seroka, 2008) should be allowed to become the final member of the Union.

However, despite the undeniable importance of some 'autonomous' actions of the EU as an institution (or "international organisation", Schimmelfennig, Sedelmeier, 2002) which cannot be explained by purely rational motives,[10]

[9]As discussed in the previous section, these fears regarding socio-economic stability and prosperity in the old EU member states were primarily present in some political circles, media and the broader public rather than among the political leaders of EU member states and EU officials.

[10] As is, for instance, the decision to accept some countries which did not fully complete the required conditions (Phinnemore, 2010) as well as the above explained tightened conditions for accession after 2006.

such defined limits of EU enlargement have failed the test of empirical accuracy thus far. While the very foundation of the EU (i.e. its predecessor the EEC), which can be considered as its "initial enlargement", was accomplished at a time when a 'common organisation' did not exist which could have autonomously "pushed things" and when the most dominant 'common value' shared between the two major founding members – France and Germany – was nothing other than a century-long history of mutual political animosity and confrontation (see e.g. Litner, 1999), the Union has already enlarged beyond the borders of "Western civilisation". Furthermore, since the accession of Bulgaria and Romania (two countries of "non-Western civilisation") in 2007, the Union has not shown any especially new weaknesses in its functioning.[11] The identification of the limits to new EU enlargement(s) that would go beyond a "pure geographic consideration" contended in the Treaty of Rome, should be therefore primarily sought in rational explanations. These define the motives for EU enlargement as basically being the same as those which were behind the EU's foundation in 1957 (Litner, 1999) and which are most generally related to the improvement of member states' and their people's collective and individual socio-economic and political wellbeing (compare Zielonka, 2006, esp. pp. 49-54). Accordingly, the limits of EU enlargement are determined by the ability of both the EU as an organisation and its existing member states to continue to successfully satisfy people's needs to improve their wellbeing after any new enlargement.

The experience of the 2004 / 07 EU enlargement (and all previous enlargement rounds) regarding the successful satisfaction of the motives for Union enlargement can neither be judged as being anything other than positive thus far, nor can it be used as an indication that the EU of today is close to its enlargement limits. If eastern enlargement of the European Union has been the best, if not (as the experience of those less successful shows) the only effective way of receiving the necessary financial assistance and expert advice for governments of the European post-communist states who pursued economic and socio-political reform, it has also been confirmed as the most successful EU "external relations tool" (Phinnimore, 2006, p.7), "foreign policy" (Schimmelfenning, 2008, p. 918) and "policy instrument and…conflict

[11] It should be noted that recent socio-economic problems in the EU's member states are primarily related to the emergence of the world economic crisis in 2008 which have nothing in common with EU enlargement. Despite some worrying negative trends in the Baltic states and Hungary, the current economic weaknesses are exclusively related to the old member states – such as Greece, Portugal, Ireland, Italy.

prevention mechanism" (Tzaifikis, 2007, p. 59), which has brought significant benefits to the "old" member states and their citizens' wellbeing. By allowing and assisting the former communist "easterners" to "join the club" under the conditions of full compliance with the Western-designed criteria regarding the establishment of functioning institutions of democracy and a market economy (and some other less substantial criteria), West Europeans expected economic benefits in opening and penetrating new markets but even more importantly the political assurance that the previous Cold War division of the continent would not be possible to re-establish (at least not on the same geographic lines on which it had been drawn between 1945 and 1989) and endanger their wellbeing. Through its direct and deep involvement in the institutional (re)building of the candidate states, EU enlargement - rather than membership in any other Western (Euro-Atlantic) integration, including NATO, which all former easterners quickly joined after they got rid of communism[12] - was by far the most important tool to deliver this assurance.

While political stability and security on the continent by definition proportionally increases with the accession of any new member state (which fully complies with the required conditions) and as such cannot impose any (rational) limits to EU enlargement, the internal socio-political stability within individual EU member states and economic wellbeing of their citizens theoretically may be threatened by the increase of the number of membership states. Although the fears and doubts about general macroeconomic trends and the capacity of EU markets (especially the labour market) to absorb new members have not materialised after the 2004/07 enlargement round (Table 1; see also Emerson et al., 2006 and Boetcher, 2009), this does not mean that under certain circumstances the accession of economically less-developed countries into the EU cannot cause - at least in the short to medium term - imbalances in the markets in the 'old' member states and an unequal distribution of economic benefits and costs among them (Nunget, 2004).[13]

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[12] Since the requirements for membership were relatively modest, most post-communist states from the Euro-Asian region became members of organisations such as the Council of Europe, the OSCE, the IMF, the World Bank and the WTO just a few years after the collapse of communist party rule. All those mentioned above who have since become members of the EU had previously been admitted to NATO.

[13] These are primarily related to a potential 'flood' of the labour markets in the 'old' member states with the 'cheap' workforce from the less-developed new members. Although this did not happen on a general scale, some countries (especially the UK and Ireland) who decided not to use the possibility of retaining 7-year restrictions and opened their markets from the very beginning to workers from the countries which joined the EU in 2004, have

However, the ability or "capacity" of EU ***institutions*** to adjust to the enlarged number of member states, i.e. to continue making "effective and accountable [decisions]" (EU Commission, 2006, p.20), especially those regarding common EU policies and their financing through the EU budget,[14] appears to be a potentially bigger challenge.

The capacity of the EU as a whole and especially its institutions "to function well" has already been empirically challenged with the rapid increase of EU membership during the 2004/07 enlargement process and a parallel increase in the number of tasks and complexity in the functioning of EU institutions, which were originally designed for a "smaller Union". Being aware of this, the EU and its ("old") member states' leaders have tried to find a more suitable institutional arrangement for a rapidly enlarging Union since almost the very beginning of the 2004 enlargement process.[15] While the adoption of the Nice Treaty in 2000 was considered as a temporary solution, the EU Constitution - which was rejected by French and Dutch citizens at referenda in May and June 2005 respectively - was offered as a longstanding institutional arrangement. It is not surprising that this rejection was, as earlier discussed, one of the major reasons for the emergence of ***enlargement fatigue*** after the 2004 enlargement and the introduction of the EU's ***absorption capacity*** as the main criterion for the increased toughness of the accession conditions for new applicants. Although the current experience has confirmed EU ***absorption capacity*** as a theoretical and politically subjective rather than empirically measurable and objective category, the necessity for a redesign of EU institutions in a more federalist way, especially regarding the reduced number of direct member states' representation in them and the increased presence of qualified majority voting (instead of the previously dominated unanimity) in their decision-making processes cannot be defined other than as a real objective consequence of the "very enlarged" EU of 27+ members. This itself is ***objective*** enough to raise the question (at least among those

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faced certain imbalances due to the large increase of the cheaper labour force from Central Europe, especially from the largest entrant Poland (which had a high level of domestic unemployment - see Table 1).

[14] As 'key policy policy areas' on which the EU Commission has 'promised' to "provide substantial assessments of the impacts of accession" in the above cited document were listed "the movement of persons, border management, agriculture, cohesion policy…transport…energy policy and foreign and security policy"(EU Commission, 2006, p. 21).

[15] A detailed overview of these attempts is given in Poole, 2003.

member states and EU politicians who have not ever been especially supportive of the idea of a "federative EUrope") of whether the EU for exclusively rationalist reasons will ever be able to enlarge to the geographic borders of Europe.

3. HOW FAR EXACTLY TO THE EAST?

As the findings presented in the previous section have shown, the only rationally defined objective limits that can prevent the EU from expanding up to the geographical borders of the continent can be found in the capacity of its institution to continue to function well after enlargement(s). Although the capacity of EU institutions ***to continue to function well, i.e. increase the wellbeing of its citizens*** can potentially increase along with new enlargements (as thus far has most dramatically happened after the 2004/07 enlargement), the fact that this institutional capacity increase can be achieved more or less exclusively by increasing the federative components in the character of the functioning of these institutions has already caused some problems (or at least tensions) among the EU's and its member states' leaders and officials.[16] Despite the more or less uninterrupted continuation of the "daily routine of the EU's decision making process" (Emerson et al., 2006, 15) the very uncertainty regarding the adoption of the (new) EU Constitution and some of its proposals was one of the major reasons which led the EU officials to not only tighten the criteria for new membership candidates, but even to stop with any new enlargements after the constitution was rejected in the French and Dutch referendums.[17] Although the uncertainty regarding the EU's

[16] The Irish government, for instance, decided to call for a second national referendum on the adoption of the Lisbon Treaty (after it was rejected in the first referendum held in June 2008) only after the Council of the European Union agreed to adopt guarantees that the number of the members of the European Commission (Commissioners) will not be reduced as originally proposed in the Treaty, but will continue to include one representative of each member states and also that the Treaty would not infringe on the Irish national sovereignty in the areas of taxation, family issues and state neutrality (see European Council Presidency Conclusions, Brussels, 18-19 June, 2009).

[17] So, after the EU Commission had made the decision to recommend the accession of Bulgaria and Romania on 1 January 2007, the Commission's President Barroso openly announced that this would also be the last enlargement for the time being: "We are not in a position to further integrate Europe without further institutional reform. There are limits to our absorptive capacity" (International Herald Tribune, 26 September 2006). Furthermore, the French and German governments had officially declared a freeze on new enlargement until the adoption of the new (i.e. Lisbon) treaty on the EU's institutional pre-composition (see e.g. Vucheva, 2009).

'institutional vacuum' has been mostly overcome by the adoption of the Lisbon Treaty or "revised EU constitution" in late 2009, this positive development has been more or less annulled with the emergence of the word economic crisis in 2008 and its impact on the EU's member states. Regardless of the objectively increased capacity of the Union by this treaty to further enlarge, the political climate in its leading member states in this regard is still sombre and has not changed much since the emergence of ***enlargement fatigue*** in the mid-2000s.

While political leaders and the people of Croatia are still celebrating the EU's decision of June 2011 to accept this post-Yugoslav state as its 28th member and the 11th from formerly communist Eastern Europe in 2013, the EU's leading politicians and officials continue to effectively discourage new and potential applicants for EU membership. Pressured by the extending duration of the global economic crisis and the serious threat of the financial collapse of at least half a dozen (old) EU member states, EU leaders have continued with enlargement 'policy' based on the combination of a pre-Lisbon introduced set of restrictive policy measures with an optimistic 'pro-enlargement' rhetoric. As a direct consequence, even the 'done deal' of the inclusion of all the (Western) Balkan states into the Union after ten years of negotiations and the gradual fulfilment of the imposed conditions for EU (pre)accession, seems today to be a very long way off despite some encouraging steps undertaken immediately after the adoption of the Lisbon Treaty in late 2009.[18] Furthermore, the occasionally very intensive discussions during the 1990s and in the early 2000s on potential further EU expansion to the east in the region of the non-Baltic post-Soviet states have more or less completely ceased in recent years. Even Ukraine, whose governments had persistently demanded to be considered at least as a potential candidate for EU membership long before the 'Orange Revolution' of December 2004-January 2005 (Petrovic, 2004), seems to have lost any hope for this to happen. The loss of the pro-EUropean parties in its latest elections is a logical consequence of this development in addition to mistakes in domestic politics and mutual divisions among these parties.

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[18] The introduction of a visa-free regime between the EU and Serbia, Macedonia and Montenegro, the unfreezing of the Stabilisation and Association Agreement with Serbia and the official submission of Serbia's (and earlier Albania's) application for EU membership (see Table 2).

Regardless of the current negative attitudes towards further enlargement of the EU which have been further strengthened with the outbreak of the Eurozone crisis in 2011 and the long delay in the accession process of the countries in question, it can be expected that in the relatively 'longer medium term' of 5-8 years all the Western Balkan states may join the Union. As earlier stated, the most important reasons for this "optimism" are not related to the ***strong commitment*** of EU political leaders to keep their promises on the EU future of these states and the issuing of occasional reassurances in this regard, which however have not been repeated at the highest level (i.e. in the form of the European Council's Presidency Conclusions) between June 2008 and June 2011,[19] but are primarily due to the very small size of all these states.[20] In spite of some risks regarding the prolonged internal political instability of these states and their more or less interrupted democratisation in most recent years (Table 2)[21] the awareness of the political and intellectual elite in the core EU member states that due to their small size, the accession of these states cannot be (even in a short run) any serious burden for the economies of the current EU-27 - even less so for the functioning of common EU institutions - should play a decisive role in this regard. The gains which the current members of the Union will get after the inclusion of 19 million Western Balkan inhabitants (and a combined territory size which is 15% smaller than Romania) especially regarding the improving prospects for lasting peaceful and politically stable development on the continent as a whole will undoubtedly be much higher than the costs of either having them "in the club" or leaving them "out".

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[19] When it was finally again expressed in June 2011 when accompanying the Council's decision on the accession of Croatia, the EU's commitment for accession of the remaining Western Balkan states sounded less optimistic and convincing than the previous ones. While in its meeting in June 2008 the European Council has stated that "[It] reaffirms its full support for the European perspective of the Western Balkans…[which states] should achieve candidate status, according to their own merits, with EU membership as the ultimate goal" in June 2011 it stated ***only that [***The conclusion of the accession negotiations with Croatia] bring a new momentum to the European perspective of the Western Balkans, provided these countries continue on the path of reform" (European Council, June 2008, point 52 and European Council, June 2011, point 32).

[20] After the exclusion of Croatia, whose accession to the EU has been confirmed, the combined population living in all 5 (or 6 if Kosovo is counted as independent) remaining Western Balkan states is some 19 million, which is 3 million less than the current population of Romania or 4 times less than that of Turkey.

[21] For which, however, the EU also bears a certain responsibility (Petrovic, 2009; Grabbe, 2010).

Table 2 Progress in post-communist reform and SAP

Country	Democracy*		Economic Transition*		SA Agreement	Applicat. for EU Members.	Official Candidate Status
	2005	2010	2005	2010			
Albania	4.04	3.93	2.9	3.1	YES (12/06/2006, in force since 1/04/09)	YES (28/04/2009)	NO
Bosnia-Herzegovina	4.18	4.25	2.6	2.8	YES (16/06/08)	NO	NO
Croatia	3.75	3.71	3.4	3.5	YES (29/10/2001, in force since 1/02/05)	YES (20/02/2003)	YES (18/06/2004, Acc. Negotiations: Oct 2005 to June 2011)
FYR Macedonia	3.89	3.79	3.0	3.3	YES (9/04/2001, inforce since 1/04/04)	YES (22/03/2004)	YES (16/12/2005) ***
Montenegro	3.79	3.79	2.6	2.9	YES (15/10/2007, in forcesince 1/05/10)	YES (15/12/2008)	YES (17/12/2010) ***
Serbia	3.75	3.71	2.6	2.9	YES (29/04/2008) **	YES (22/12/2009)	NO
Romania	3.39	3.46	3.2	3.5	1993 (Eu Agr)	1995	Member (1/01/07)
Bulgaria	3.18	3.04	3.4	3.6	1993 (Eu Agr)	1995	Member (1/01/07)

* Freedom House Nations in Transit "Democratisation score" (1 being the highest; 7 being the lowest), and the simple average of EBRD transition indicators (4+ or 4.3 denotes a standard and performance comparable to advanced industrial economies; 1 denotes little or no change from a "rigid centrally planned economy").

** frozen pending Serbian cooperation with the ICTY from 29/04/2008 to 7/12/2009

*** Accession negotiations are still waiting to be opened.

However, on the same grounds, the accessions of Turkey as an official but for many a 'doubtful' candidate[22] and the European post-Soviet states, which are currently not being considered for accession but which have 'the right' to apply once their political leaders express such a desire and once they have met necessary criteria, are much less certain even in the long term and under different political circumstances than nowadays. The reasons for this are not in the different ('inadequately European') cultural backgrounds and values or 'proven' anti-democratic tradition and impossibility of adoption of European norms and standards in these countries and by their peoples as argued by the protagonists and supporters of structuralist/constructivist explanations of the limits of EU enlargement.[23] The actual reason is once again related to the countries' size and the limited capacity of EU institutions, especially the common policies to absorb (even in the long term) very large countries like Turkey and especially Russia. While the EU future of Moldova, Belarus, and even Ukraine and Turkey can be imaginable in the long term and under very different political circumstances, the dream of the EU/EEC founding fathers to stretch it "from the Atlantic to the Urals" and include a country which is several times larger than the area of the current EU-27 will probably always stay a dream.

4. CONCLUSION

While the subjective limits of the eastern enlargement of the European Union are defined by the prevailing political attitudes for the time being that have been established as a result of the interaction of various rational and non-rational factors, the objective limits of EU eastern enlargement are defined by the capacity of EU institutions and policies to 'absorb' new candidates. As the eastern borders of Europe in the Urals are located in a country which is several times the area of the current EU-27, it is almost impossible to imagine that the European Union could ever stretch "from the Atlantic to the Urals" as

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[22] In addition to strong opposition of an important part of the wide public and many conservative politicians and parties all around the current EU member states, French President Nicolas Sarkozy has repeatedly expressed his opposition to Turkish entry into the EU and promised that if it 'became a serious issue while he was president he would call a referendum' (EU business, 24 April, 2008 http://www.eubusiness.com/news-eu/1209068222.76) , while German Chancellor Merkel has continued to prefer 'privileged partnership' rather than full EU membership for Turkey (Pop, 2009; Mara, 2011).

[23] For a more detailed critique of the argument on the significant cultural/civilisational differences between modern Russia and most other 'non-European' post-Soviet states on one side and the rest of Europe on the other see e.g. Robert Bideleux, 2009.

dreamed by its founding fathers, even if the political will on both sides was much more in favour of that than it is today.

Some type of a privileged or strategic partnership which has been proposed by German Chancellor Merkel for solving the "question of Turkish candidacy" – "everything but membership" - could possibly be a tool for establishing a long lasting and prosperous EU relationship with Russia even at a time when it would be different than today and be able or willing to fully satisfy EU accession conditions. Only then, without the conditions of long-lasting competition and confrontation with the "Russian Bear", will the above noted small and relatively small countries between Russia and the current eastern borders of the Union have some real chance to apply for EU membership and allow the continent as a whole to enjoy real peace and political stability.

Dr Milenko Petrović*

KAKO DEFINISATI GRANICE ŠIRENJA EU NA ISTOK: "ZAMOROM PROŠIRENJA", JEDNAKIM VREDNOSTIMA I NORMAMA ILI "APSORPCIONIM KAPACITETOM"?

Rezime

Uprkos pozitivnim rezultatima u pružanju neophodne pomoći za sprovodjenje demokratskih i tržišnih reformi u zemljama bivše "socijalističke Evrope" i unapredjenju političke stabilnosti i mira na kontinetu u celini, proširenje Evropske unije se približilo svojim krajnjim istočnim granicama. Ukazujuci na osnovne uzroke i različite teorijske interpretacije pojave tzv. „zamora (od novih) proširenja" [enlargement fatigue] u ključnim zemljama EU posle uspešnog okončanja „mega-proširenja" 2004/07, ovaj rad iznosi osnovni argument da su granice daljeg širenja Unije na istok definisane kombinovanim delovanjem subjektivnih i objektivnih faktora. Dok se, na raznim, racionalnim i ne-racionalnim faktorima zasnovana dominantna politička opredeljenja i vizije u ključnim članicam Unije pojavljuju kao osnovne subjektivne determinante daljeg širenja EU, objektivne granice buduceg proširenja EU na istok su

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prvenstveno odredjene racionalno definisanim objektivnim kapacitetom njenih institucija da 'apsorbuje' nove članove.

Ključne reči: Granice širenja EU, "zamor od proširenja", objektivne granice proširenja, racionalna i druga objašnjenja, absorpcioni kapacitet institucija Evropske Unije.

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PREDLOG UREDBE O NASLEĐIVANJU - KORAK NAPRED U PROCESU KODIFIKACIJE MEĐUNARODNOG PRIVATNOG PRAVA EU

Apstrakt

U ovom radu autor posvećuje pažnju aktivnostima organa EU u kreiranju novih kolizionih pravila i pravila o određivanju međunarodne nadležnosti i priznanju i izvršenju odluka u materiji nasleđivanja. Centralno mesto zauzima Predlog Uredbe o nasleđivanju koji je EK objavila 2009. godine. Autor se najpre upušta u objašnjavanje pravnog osnova za donošenje Uredbe, a zatim razmatra njenu strukturu, predmet regulisanja, kao i polje njene primene. Na kraju, autor obrađuje osnovne kolizionopravne principe na kojima počiva ovaj akt, označavajući ih kao ključne za određenje politike Zajednice u rešavanju vrlo kompleksnog problema nasleđivanja sa stranim elementom.

Ključne reči: zakonodavna aktivnost EU u materiji nasleđivanja sa elementom inostranosti; struktura i polje primene Uredbe o nasleđivanju; princip jedinstvene zaostavštine; redovno boravište ostavioca; autonomija volje.

1. UVODNA RAZMATRANJA

U oktobru 2009. godine Evropska Komisija je objavila Predlog uredbe o nadležnosti, merodavnom pravu, priznanju i izvršenju odluka i autentičnih

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isprava u materiji nasleđivanja i o evropskom sertifikatu o nasleđu (u daljem tekstu Uredba o nasleđivanju).[1] Cilj donošenja ovog instrumenta je da se na evropskom nivou unifikuju i pojednostave pravila o nasleđivanju sa stranim elementom, da se poveća pravna izvesnost i sigurnost u ovoj oblasti i da se pruže delotvornije garancije za prava naslednika i drugih lica koja su povezana sa ostaviocem.

Potreba da se oblast nasleđivanja reguliše na nivou EU je nužna posledica stanja koje u njoj vlada, kako u faktičkom, tako i u pravnom smislu. Naime, proširenje EU i slobode na kojima se ona zasniva, dovele su do toga da su i ljudi i kapital mnogo mobilniji. Tako je sve više onih koji se zbog posla ili iz drugih razloga sele iz svoje u drugu državu članicu. Pored postojeće, oni stiču i novu imovinu, pa je vrlo čest slučaj da neko ko umre, ostavi za sobom imovinu ili članove porodice u različitim državama, što naslednopravni slučaj pretvara u međunarodni.[2] Za naslednike i sva druga lica koja su povezana sa umrlim tada mogu nastati brojne teškoće. Naime, koliziona pravila sadržana u zakonima o međunarodnom privatnom pravu država članica sadrže različite tačke vezivanja koje upućuju na primenu različitih naslednih prava. Ako se ima u vidu da se materijalna nasledna prava država članica bitno razlikuju oko mnogih značajnih pitanja, što i ne čudi s obzirom da se radi o oblasti prava na koju tradicija i kultura bitno utiču, onda je jasno da za eventualne naslednike nije sve jedno koje će se i koliko prava primeniti. S druge strane, organi nadležni za raspravljanje zaostavštine nisu isti u svim zemljama članicama, a ni sudske odluke i autentične isprave, donete u materiji nasleđivanja se ne priznaju automatski u svim državama članicama. Dakle, imovina koja pripada istoj zaostavštini, a koja se nalazi u različitim državama, može biti podvrgnuta različitim pravima i biti u nadležnosti različitih organa. Ovakvo stanje stvara pravnu nesigurnost za sve koji su povezani sa nasleđivanjem, ponekad zahteva duže vreme da se dođe do nasledstva i povećava troškove eventualnih naslednika.

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[1] 14722/09, COM (2009) 154 final.

[2] Prema podacima objavljenim u: EUROPA – Press Releases- Simplification of regulation on international succession, Brussels, 14.10.2009. http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/447&format=HTML&aged=0&language=EN&guiLanguage=en, na prostoru EU ima oko 4,5 miliona naslednih predmeta godišnje, od čega oko 10% slučajeva čini nasleđivanje sa sranim elementom, što znači da godišnje ima oko 450 000 slučajeva prekograničnog nasleđivanja, čija vrednost dostiže 123 milijarde eura.

Da bi se izbegle sve praktične teškoće i da bi se obezbedila pravna sigurnost i izvesnost građana u oblasti nasleđivanja, bilo je neophodno stvoriti zajednička, unificirana pravila o sukobu zakona, nadležnosti i priznanju i izvršenju odluka. Ovo tim pre što najveći broj uredbi koje je Zajednica donela u građanskim i trgovačkim stvarima sa stranim elementom, počev od Briselske konvencije iz 1968. godine, izričito isključuje nasleđivanje iz svog polja primene .[3]

Predložena Uredba o nasleđivanju predstavlja, bez sumnje, vrlo ambiciozan poduhvat budući da na sveobuhvatan način (to znači iz ugla sva tri klasična pitanja međunarodnog privatnog prava) uređuje problem nasleđivanja sa stranim elementom. U tom smislu se može okarakterisati i kao vrlo značajan korak u kodifikaciji evropskog međunarodnog privatnog prava.

U ovom radu naša pažnja je usmerena na nekoliko pitanja. Najpre će biti reči o pravnom osnovu Uredbe i aktivnostima organa EU koje su prethodile njenom donošenju. Zatim će biti razmotrena struktura Uredbe iz koje se vidi šta je sve predmet njenog regulisanja, kao i polje njene primene. Na kraju, kao najznačajnije, biće razmotrene one stvari za koje smatramo da su ključne za određenje politike Zajednice u rešavanju vrlo kompleksnog problema nasleđivanja sa stranim elementom.

2. PRAVNI OSNOV UREDBE I ZAKONODAVNE AKTIVNOSTI ORGANA EU

Pravni osnov za donošenje Uredbe u materiji nasleđivanja su čl. 61. i čl. 65. Ugovora o osnivanju Zajednice. Članom 61. Ugovora, kao cilj Zajednice postavljeno je progresivno uspostavljanje zajedničkog prostora slobode, sigurnosti i pravde. Za uspostavljanje takvog prostora Zajednica mora usvajati mere u oblasti pravosudne saradnje u građanskim stvarima sa prekograničnim dejstvom u meri u kojoj je to neophodno za ispravno

[3] Vid. čl.1(2)(b) Rimske konvencije o merodavnom pravu za ugovorne odnose iz 1980; čl. 1(2)(a) Uredbe o nadležnosti i priznanju i izvršenju sudskih odluka u u građanskim i trgovačkim stvarima (Brisel I uredbe) iz 2001; čl.2(2)(a) Uredbe kojom se uvodi evropski nalog za izvršenje nespornih zahteva iz 2004; čl. 1(2)(b) Uredbe o merodavnom pravu za vanugovornu odgovornost iz 2007. (Rim II uredba); čl. 2(2)(b) Uredbe o uvođenju evropskog postupka za tužbe male vrednosti iz 2007; čl. 1(2)(c) Uredbe o merodavnom pravu za ugovorne obligacije (Rim I uredba) iz 2008; čl.1(3)(f) Uredbe o nadležnosti i priznanju i izvršenju sudskih odluka u bračnim stvarima i stvarima roditeljske odgovornosti.

funkcionisanje unutrašnjeg tržišta.[4] Prema čl. 65. Ugovora ove mere uključuju unapređenje i pojednostavljenje priznanja i izvršenja odluka u građanskim i trgovačkim stvarima, uključujući i odluke vansudskih organa, kao i unapređenje kompatibilnosti pravila koja se primenjuju u državama članicama, a odnose se na sukob zakona i međunarodnu sudsku nadležnost.

Zakonodavna aktivnost EU u oblasti nasleđivanja sa stranim elementom traje više od deset godina kroz sukcesivne programe koji se sprovode u oblasti slobode, sigurnosti i pravde. Naime, potreba za usvajanjem uredbe u oblasti nasleđivanja, kao sveobuhvatnog zakonodavnog akta Zajednice, izražena je još 1998. godine u Bečkom akcionom planu,[5] kada je ovo pitanje određeno kao jedan od prioriteta. Nasleđivanje sa stranim elementom je viđeno kao jedan od glavnih interesa građana Evrope: njihove nade da se pojednostave formalnosti, da se poveća pravna i poreska sigurnost i da se brže i sa manje troškova rešava pitanje nasleđivanja. Ista potreba ponovljena je u posebnom programu Evropskog parlamenta, tzv. "Haškom programu" iz 2004. godine, u kome je izričito naglašeno da do 2011. godine treba usvojiti uredbu o nasleđivanju kojom će biti regulisana pitanja sukoba zakona, nadležnosti, međusobnog priznanja i izvršenja odluka u ovoj oblasti, evropski sertifikat o nasleđivanju, kao i mehanizam koji će omogućiti da se sa sigurnošću zna da li je rezident EU ostavio testament za slučaj svoje smrti.[6] U tu svrhu, u martu 2005. godine Komisija je objavila Zelenu knjigu (***Green Paper***)[7] kojom je otvorila proces vrlo širokih konsultacija i rasprava o zakonskom i testamentalnom nasleđivanju sa stranim elementom. Evropska Komisija je ovim dokumentom pozvala sve relevantne stručne i akademske krugove da svojim komentarima, predlozima i odgovorima na ključna pitanja vezana za merodavno pravo, nadležnost, priznanje i izvršenje odluka itd. doprinesu postupku iznalaženja što boljih rešenja i stvaranju jednog sveobuhvatnog instrumenta koji treba da pruži efikasne odgovore na sve praktične probleme sa kojima se susreću evropski građani u slučajevima nasleđivanja sa inostranim elementom.

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[4] Recital 1.

[5] The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of Freedom, Security and Justice of 3 December 1998, OJ C 19, 23.1.1999.

[6] "The Hague Programme: strengthening freedom, security and justice in the European Union" je usvojen od strane Evropskog Saveta na sednici održanoj u Briselu 4. i 5. novembra 2004. godine. Videti recital (5) Predloga uredbe.

[7] COM (2005) 65 final

Kao što je već rečeno, u oktobru 2009. godine, Evropska Komisija je objavila Predlog uredbe o nadležnosti, merodavnom pravu, priznanju i izvršenju odluka i autentičnih isprava u materiji nasleđivanja i o evropskom sertifikatu o nasleđu. Za ovu uredbu će važiti redovna zakonodavna procedura.[8]

U pripremi Predloga uredbe o nasleđivanju Komisija je rešenja oslanjala na rešenja već postojećih uredbi, ali i na ideje i rešenja Haških konvencija koje su donete u oblasti nasleđivanja. Tako su odredbe o nadležnosti (I poglavlje), kao i odredbe o priznanju i izvršenju odluka (IV poglavlje), u velikoj meri formulisane u skladu sa odredbama Brisel I, a delimično i Brisel IIbis uredbe. Ideje za rešenje problema merodavnog prava (III poglavlje) potekle su prevashodno iz Haške konvencije o merodavnom pravu za nasleđivanje imovine umrlih lica iz 1989. godine, a za evropski sertifikat o nasleđivanju izvor inspiracije bila je, u izvesnoj meri, Haška konvencije o međunarodnom upravljanju zaostavštinom umrlih lica iz 1973. godine.

3. STRUKTURA I POLJE PRIMENE

Važeća struktura Predloga uredbe o nasleđivanju obuhvata sedam poglavlja kojima prethodi 36 recitala. Recitali su, bez sumnje, od velike važnosti jer pojašnjavaju pravne osnove i ciljeve donošenja Uredbe, sadržaj pojedinih pojmova, motive i razloge pojedinih rešenja, te kontekst same Uredbe. Poglavlja su postavljena sledećim redom: 1) polje primene i definicije (čl. 1-2.), 2) nadležnost (čl.3-15.), 3) merodavno pravo (čl. 16-28.), 4) priznanje i izvršenje odluka (čl. 29-33.), 5) autentični instrumenti (čl.34-35.), 6) evropski sertifikat o nasleđivanju (čl. 36-44.) i 7) opšte, prelazne i završne odredbe (čl. 45-51.). Kao što se može primetiti, odredbe Uredbe su raspoređene prema ustaljenom ustrojstvu ove vrste instrumenata. Odredbe prvog poglavlja utvrđuju pravne odnose na koje se Uredba primenjuje, pravne odnose na koje se ona ne primenjuje i definišu ključne pojmove koji se u Uredbi koriste. Odredbe drugog, trećeg i četvrtog poglavlja su raspoređene tako da prate faktički sled stvari. One najpre određuju koji je organ nadležan da vodi postupak u naslednopravnim stvarima, zatim koje će pravo biti merodavno za nasleđivanje, kao i po kom režimu će odluke suda jedne države ugovornice biti priznate i izvršene u drugoj državi ugovornici. Peto i šesto poglavlje regulišu nasledne isprave, dok se u sedmom poglavlju određuje od

[8] Redovna zakonodavna procedura odgovara pre-Lisabonskoj proceduri , dakle onoj koja je sprovođena u skladu sa Amsterdamskim Ugovorom, a to znači da Savet donosi odluke kvalifikovanom većinom i da je za donošenja mera potrebna saglasnost Saveta i Parlamenta.

kog vremenskog trenutka se Uredba primenjuje, te na koji način ona utiče na postojeće propise i međunarodne konvencije koje su države članice prethodno zaključile.

Polje primene Predloga uredbe je višestruko jer se ovaj pravni akt, kao uostalom i svaki izvor prava, vezuje za određenu teritoriju, odnose koje reguliše, vreme od kada važi, kao i lica na koja se odnosi. U tom smislu možemo govoriti o teritorijalnom, stvarnom (sadržinskom), vremenskom i personalnom polju primene ili domašaju Uredbe o nasleđivanju. Sve aspekte ovog pitanja reguliše sam Predlog uredbe na neposredan ili posredan način. No, pre nego što razmotrimo svako od ovih pitanja želimo da ukažemo na to da se Uredba, iako to izričito nigde ne navodi, primenjuje na zakonsko i testamentarno nasleđivanje sa ***stranim elementom***, a ne na nasleđivanje koje je čisto domaće.

U teritorijalnom smislu (***ratione teritorii***) Predlogom je predviđeno da se Uredba primenjuje na području svih država članica izuzev Danske i eventualno Ujedinjenog Kraljevstva i Irske. O ovome se na posredan način može zaključiti iz čl. 1(2) Uredbe i recitala 36) Uredbe.[9] Naime, u skladu sa čl. 1. i 2. Protokola o položaju Danske, dodatom Ugovoru o Evropskoj uniji i Ugovoru o osnivanju Evropske zajednice, Danska ***a priori*** ne učestvuje u usvajanju ove Uredbe te s toga nije obavezna da je primenjuje. S druge strane, Ujedinjeno Kraljevstvo i Irska, na osnovu čl. 1. i 2. Protokola o položaju ovih zemalja dodatom Ugovoru o Evropskoj uniji i Ugovoru o osnivanju Evropske zajednice, mogu da se priključe i da učestvuju (***opt*** in) u prvoj fazi donošenja ove vrste dokumenata, a to su formalni pregovori, kao i u usvajanju i primeni ovog dokumenta. Ukoliko one to ne učine, doneta uredba ih ne obavezuje i na njih se ne primenjuje. Međutim, ostaje mogućnost da ove zemlje ipak pristupe ovom dokumentu u kasnijoj fazi, posle njenog usvajanja. Na osnovu izveštaja Odbora za Evropsku uniju Doma Lordova, Vlada je odlučila da Ujedinjeno Kraljevstvo u prvoj fazi ne učestvuje u formalnim pregovorima, već da bude angažovana u neformalnom smislu, sa namerom da doprinese poboljšanju Predloga. Ukoliko se ovim pregovorima postigne dovoljan napredak, UK ima drugu mogućnost da pristupi ovoj uredbi kada je usvoje sve druge države članice.[10]

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[9] Član 1(2) Predloga definiše šta se, u smislu Uredbe, smatra "državom članicom" i navodi da su to sve države članice osim Danske i (u zagradi) Ujedinjeno Kraljevstvo i Irska..

[10] U pitanju je 6.Izveštaj koji je objavljen 24. marta 2010. godine, a dostupan je na: http://www.parliament.uk u rubrici "reports". Odbor je istakao realne praktične koristi

Polje primene s obzirom na vrstu pravnih odnosa (***ratione materie***) određeno je članom 1 (1) i čl. 2(a) Predloga Uredbe. Prema navedenoj odredbi čl.1(1) ova Uredba se primenjuje na nasleđivanje imovine umrlih lica. Pod ovim se, saglasno čl. 2 (a) podrazumeva svaki oblik prenosa svojine usled smrti nekog lica, bilo po osnovu zakona, testamenta ili ugovora. Generalnom odredbom iz čl.1(1) utvrđeno je da se Uredba ne primenjuje na fiskalna, carinska ili administrativna pitanja, a odredbom čl.1(3) izričito su navedena pitanja koja su isključena iz polja primene ove Uredbe. To su: a) status fizičkih lica, kao i porodični odnosi i odnosi koji imaju slično dejstvo,; b) pravna sposobnost fizičkih lica, ne uzimajući u obzir čl.19(2)(c) i (d); c) nestanak, odsustvo ili pretpostavljena smrt fizičkog lica (proglašenje nestalog lica umrlim u kontekstu prava Srbije); d) pitanja koja se odnose na bračnoimovinski režim kao i imovinski režim koji se primenjuje na odnose za koje se smatra da imaju slično dejstvo kao brak; e) obaveze izdržavanja; f) prava i imovina koji su stečeni ili preneti na zaostavštinu umrlog drugim poslovima, a ne nasleđivanjem, uključujući poklone, kao što je na primer, zajednička svojina sa pravom nadživelog, fond iz koga se obezbeđuje penzija, ugovor o osiguranju i/ili drugi sporazumi slične sadržine; g) pitanja koja potpadaju pod kompanijsko pravo; h) prestanak ili spajanje preduzeća, udruženja i pravnih lica; i) konstituisanje, funkcionisanje ili prestanak trasta i j) pravna priroda stvarnih prava i publicitet ovih prava.

Izričito nabrajanje pitanja koja ostaju van domašaja Uredbe je uobičajena procedura za ovu vrstu instrumenata i njen cilj je da se otkloni svaka dilema u pogledu pitanja koja nisu predmet njenog regulisanja. Međutim, činjenica da odredba čl. 1(1) uopšteno govori o nasleđivanju kao polju primene Uredbe, ne znači da postoji dilema na koja naslednopravna pitanja se ona konkretno primenjuje. Naime, zaključak o tome se može izvesti iz odredaba trećeg poglavlja Uredbe (merodavno pravo) u kome se izričito navode pitanja koja potpadaju pod nasledni statut. Tako, prema čl. 19. (2) Predloga uredbe merodavno pravo za nasleđivanje se primenjuje na sledeća pitanja: a) osnov, vreme i mesto otvaranja nasledstva; b) dostojnost za nasleđivanje naslednika i legatara, uključujući nasledna prava nadživelog bračnog druga, određivanje veličine naslednih delova, odgovornosti koje su naslednicima nametnute od strane ostavioca; c) sposobnost za nasleđivanje; d) posebni razlozi za

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koje će građani EU imati usvajanjem ove uredbe, ali je istakao takođe da postoje teškoće da se pronađu opšte prihvatljiva pravila u ovoj oblasti i postavio određene "crvene linije" koje evropsko zakonodavstvo ne bi trebalo da pređe ako misli da ovaj dokument bude prihvatljiv za UK. Videti str. 8. navedenog izveštaja.

nesposobnost da se raspolaže ili primi zaostavština; e) isključenje iz nasleđa; f) prenos imovine i prava koja čine zaostavštinu na nasledike, uključujući uslove i dejstva prihvata ili odricanja od nasledstva ili legata; g) ovlašćenja naslednika, izvršitelja testamenta i drugih upravitelja nasledstvom, posebno prilikom prodaje imovine i isplate poverioca; h) odgovornost za dugove ostavioca; i) nasledni delovi kojim se može slobodno raspolagati, rezervisani nasledni delovi i druga ograničenja slobode raspolaganja u slučaju smrti uključujući preraspodelu nasledstva od strane suda ili drugog organa u korist rođaka ostavioca; j) obaveza povraćaja ili uračunavanja poklona; k) punovažnost, tumačenje, izmena ili opoziv testamenta izuzev formalne punovažnosti[11] i l) deoba zaostavštine.

Uredba o nasleđivanju je u statusu predloga. Javna rasprava još uvek traje. Prema komentarima predloženih rešenja i konkretnim predlozima za njihovu izmenu ili dopunu, koje su dale značajne institucije kao na primer, Radna grupa za međunarodno nasledno pravo Max-Planck Instituta za uporedno i međunarodno privatno pravo iz Hamburga (u daljem tekstu- ***Max Planck Comments***), može se pretpostaviti da će postojeći tekst pretrpeti određene promene.[12] To je razumljivo ako se ima u vidu da on mora da pronađe kompromis ne samo između različitih sistema prava (***common law*** i ***civil law***), već i kompromis između veoma različitih materijalnih naslednih prava država članica i različitih međunarodnih privatnih prava u ovoj oblasti. Čak i

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[11] Iako odredbom čl.1(3) Predloga Uredbe iz polja primene nije izričito isključeno pitanje ocene formalne punovažnosti testamenta, već je to učinjeno odredbom čl.19., u recitalu 19) Uredbe je izričito navedeno da se Uredba ne primenjuje na ovo pitanje, već da za njega važe pravila Haške konvencije o merodavnom pravu za oblik testamentarnog raspolaganja iz 1961. godine u onim državama članicama koje su ovu konvenciju ratifikovale.

[12] Vid. Max Planck Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, http://www.europarl.europa.eu/document/activities/cont/201005/20100526ATT75035/20100526ATT75035EN.pdf, Version of 26 March 2010 (to be published in Rabels Zeischrift 74 (2010) issue 3). U ovom komentaru je na primer, predloženo da se u odredbi čl. 1(3)(c) o proglašenju nestalog lica umrlim, kojom se ovo pitanje isključuje iz polja primene Uredbe, doda "osim pitanja komorijenata" čime se pitanje istovremene smrti više lica na eksplicitan način unosi u polje primene Uredbe. Isto tako, ova radna grupa predlaže da se iz polja primene Uredbe isključe i pitanja koja se odnose na prava intelektualne svojine, uključujući autorska prava, ukoliko pravo koje je merodavno za ovo pitanje sadrži posebno koliziono pravilo za nasleđivanje.

među državama članicama koje pripadaju istoj familiji prava, razlike u ovoj grani prava postoje, što je i razumljivo ako se ima u vidu da su tradicija i običaji ovih zemalja u velikoj meri određivali fizionomiju ove oblasti prava.

U pogledu vremenskog polja primene Uredbe (***ratione temporis***) treba reći da budući da se radi o uredbi, nije potrebno preuzimanje u nacionalna zakonodavstva, već da će ova uredba biti obavezujuća u celosti i direktno primenljiva u državama članicama od trenutka koji je njom propisan. Prema opštim pravilima o stupanju na snagu propisa Zajednice, ova Uredba stupa na snagu dvadesetog dana od dana objavljivanja u Službenom glasilu Zajednice, što je izričito navedeno u čl. 51. Predloga uredbe, a počinje da se primenjuje, prema istom članu, godinu dana posle stupanja na snagu. Primenjuje se na nasleđivanje lica koja su umrla posle datuma koji se smatra danom kada Uredba počinje da se primenjuje.[13]

Ako je ostavilac odredio merodavno pravo za nasleđivanje svoje imovine pre početka primene Uredbe, prema odredbi čl. 50 (2) Uredbe, takav izbor će se smatrati punovažnim ako ispunjava uslove predviđene čl. 17. Uredbe. Zahtev da uslovi za izbor merodavnog prava budu ispunjeni prema zakonu koji u momentu testamentarnog raspolaganja nije postojao, može stvoriti probleme. Naime, neka nacionalna prava država članica imaju liberalniji režim i testatoru pružaju veću slobodu izbora nego što je to predviđeno Uredbom. Tako se može desiti da su ti uslovi u momentu raspolaganja bili ispunjeni, ali nisu ispunjeni prema propisima Uredbe. Radna grupa sa Max Planck Instituta, sa pravom upozorava da bi bilo nepravično i da bi moglo ugroziti pravnu sigurnost ako bi se ostavilac i njegov testament podvrgli uslovima koji nisu postojali u vreme njegovog raspolaganja. Zato predlaže da ukoliko je izbor merodavnog prava bio punovažan prema režimu mesta kada je učinjen, takav izbor bi trebalo da ostane punovažan čak i ako je u sukobu sa zahtevima propisanim čl. 17. Uredbe, što je u skladu sa maksimom ***in dubio pro validitate***. Isto se odnosi i na ugovor o nasleđivanju, s tim da će izbor merodavnog prava biti punovažan ukoliko odgovara uslovima predviđenim u čl. 18. Uredbe.[14]

U personalnom smislu (***ratione personam***), iako nema izričitih odredbi o tome, može se smatrati da se odredbe Uredbe primenjuju na sva fizička lica (ne i

[13] čl. 50 (1) Predloga Uredbe.

[14] Max Planck Comments, p. 153-154.

pravna) koja se pojavljuju u ulozi ostavioca, a imaju redovno boravište na području EU, bez obzira na njihovo državljanstvo.[15]

4. OPŠTE KARAKTERISTIKE POLITIKE ZAJEDNICE U OBLASTI NASLEĐIVANJA

Iz pitanja postavljenih u Zelenoj knjizi, diskusija relevantnih stručnih i akademskih krugova država članica, kao i iz samog teksta Predloga uredbe o nasleđivanju koji je iz svega ovoga rezultirao, može se zaključiti o politici Zajednice u rešavanju ovog kompleksnog, i za život građana EU, izuzetno značajnog pitanja. Bazirana na ciljevima koje Zajednica želi postići u ovoj oblasti, ova politika se može odrediti kroz nekoliko stvari koje nam se čine ključnim i koje prosto lančano proizilaze jedna iz druge, a to su: 1) sveobuhvatan sadržaj Uredbe; 2) sistem jedinstvene zaostavštine; 3) primena jednog prava; 4) autonomija volje ostavioca; 5) redovno boravište kao kriterijum za uspostavljanje nadležnosti; 6) transfer (delegiranje) nadležnosti.

4.1. Sveobuhvatan sadržaj Uredbe

Cilj Evropskog zakonodavca je da se dođe do jednog sveobuhvatnog instrumenta kojim bi se pokrila sva pitanja od značaja za rešavanje slučajeva nasleđivanja sa stranim elementom. On bi, za razliku od mnogih, već postojećih uredbi, trebalo da dā odgovore na ***sva*** klasična pitanja međunarodnog privatnog prava: sukob zakona, nadležnost suda i priznanje i izvršenje sudskih odluka. Određivanje merodavnog prava je suštinsko pitanje i ako je ono formulisano u jedinstvenim, harmonizovanim pravilima koja se tumače na autonoman način, onda se opravdano može očekivati ostvarenje harmonije odlučivanja organa država članica,[16] koja je opšti cilj svakog evropskog zakonodavnog akta i neophodan uslov ispravnog funkcionisanja unutrašnjeg tržišta. U oblasti međunarodne nadležnosti Komisija je uzela u obzir različite organe i postupke rešavanja naslednopravnih pitanja u državama članicama, pa se ovom uredbom nadležnost suda definiše u širem smislu koji uključuje i nadležnost nesudskih organa.[17] U vezi sa tim je i činjenica da se u oblasti priznanja i izvršenja odluka ovim instrumentom

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[15] Vid. European Economic and Social Committee, Preliminary draft Opinion on the proposal for a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, INT/511, Brussels, 3 March 2010, p. 3.

[16] Vid. Recital (17).

[17] Vid. čl. 2 (2) Predloga uredbe, kao i Recital (11).

garantuje ne samo priznanje i izvršenje sudskih odluka, već i autentičnih isprava donetih od strane drugih organa. Pored ovih klasičnih pitanja međunarodnog privatnog prava, cilj Komisije je da učini još jedan korak dalje i da ovim instrumentom uvede Evropski sertifikat o nasleđivanju kojim bi trebalo da se postignu ciljevi kao što su međusobno priznanje ili delotvoran pristup pravdi.

Jedan ovako sveobuhvatan instrument bi svakako bio od izuzetno velike pomoći, posebno pravnim praktičarima koji rešavaju slučajeve nasleđivanja sa stranim elementom, budući da bi sva pravna pravila imali u jednom dokumentu.

4.2. Sistem jedinstvene zaostavštine

Međunarodno privatno pravo država članica EU poznaje oba pristupa, i monistički i dualistički, u rešavanju problema sukoba zakona u oblasti nasleđivanja.

Monistički pristup je baziran na konceptu jedinstvene zaostavštine što znači da se na celokupnu zaostavštinu ostavioca primenjuje ***jedno*** pravo, bez obzira na to da li tu zaostavštinu čine pokretne ili nepokretne stvari i bez obzira na to da li se njihovi delovi nalaze u različitim državama. Ovaj koncept je inače prihvaćen u velikom broju prava država članica EU,[18] kao i Haškoj konvenciji o merodavnom pravu za nasleđivanje imovine umrlih lica.[19] Prema opštem mišljenju, to jedno pravo treba da bude personalno pravo ostavioca, budući da je ostavilac centralna ličnost u procesu nasleđivanja i veza sa njim je jedina od mogućih veza koja obezbeđuje primenu samo jednog prava.[20] U pogledu pitanja koje je pravo personalno pravo ostavioca,

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[18] Vid. čl. 28 (1) Zakona o međunarodnom privatnom pravu Austrije iz 1978; čl. 24. Zakona o međunarodnom privatnom pravu Estonije; čl.5. Zakona o nasleđivanju Finske; čl. 25 (1) Uvodnog zakona za građanski zakonik Nemačke; čl. 46 (1) Zakona o reformi italijanskog sistema međunarodnog privatnog prava iz 1995; čl. 28. građanskog zakonika Grčke; čl. 36 (1) Uredbe o o međunarodnom privatnom pravu Mađarske; čl.34. Zakona o međunarodnom privatnom pravu Poljske; čl. 62. Građanskog zakonika Portugala; čl. 32 (1) Zakona o međunarodnom privatnom pravu Slovenije; čl. 9 (8) Uvodnog zakona za građanski zakonik Španije; čl. 1 prvog poglavlja Zakona o međunarodnom nasleđivanju Švedske, itd.

[19] Vid. čl.7 (1) Haške konvencije o nasleđivanju imovine umrlih lica.

[20] Veza bi se mogla odrediti i prema naslednicima, ali takvo rešenje može dovesti do primene više prava s obzirom da naslednici mogu pripadati različitim državama. Isto važi i za vezivanje za zaostavštinu. Ova odlučujuća činjenica bi takođe mogla dovesti do primene više prava ukoliko bi se razni delovi zaostavštine nalazili na teritoriji različitih

države članice daju različite odgovore u zavisnosti od toga koju vezu smatraju bitnom, pa ono generalno može biti nacionalno pravo, pravo domicila ili pravo redovnog boravišta ostavioca.

U jednom broju država članica zastupljen je dualistički pristup u određivanju merodavnog prava za nasleđivanje koji se zasniva na konceptu podeljene zaostavštine.[21] Naime, prema ovom sistemu, pravi se razlika između pokretnih i nepokretnih stvari koje čine zaostavštinu pa se one podvrgavaju različitim statutima. Opšti je stav da se merodavno pravo za nepokretnosti vezuje za mesto njihovog nalaženja (***lex rei sitae***), dok se merodavno pravo za pokretne stvari vezuje za ličnost ostavioca (personalni zakon ostavioca). Dualistički pristup očito vodi cepanju imovine ostavioca ukoliko se njeni delovi nalaze u različitim državama. Cepanje zaostavštine, s druge strane, vodi cepanju prava jer je moguće da na jedan naslednopravni slučaj treba primeniti pravo dve ili više država zavisno od toga gde se pojedini njeni delovi nalaze. Ovo svakako nije poželjno ni za samog ostavioca, niti za buduće naslednike. Za ostavioca nije dobro jer raspolaganje svoje imovine treba da prilagodi različitim pravnim sistemima, odnosno različitim zakonima o nasleđivanju, što svakako predstavlja uvećan utrošak novca.[22] S druge strane, ovo cepanje može dovesti do sukoba u pogledu dela zaostavštine kojim ostavilac može slobodno da raspolaže i dela koji čini nužni deo. Primena različitih naslednih prava na koje upućuju kolizione norme, a naročito različitih standarda u zaštiti članova porodice, mogu dovesti do toga da se ne ispuni volja testatora ili da određeni naslednici budu lišeni očekivanog dela zaostavštine. Primer ovakve situacije, koji se u standardnim udžbenicima najčešće navodi, je sledeći: testator ima dve nepokretnosti iste vrednosti u dve različite države, na primer, vilu u Parizu i penthaus u Londonu; ako testator zavešta vilu u Parizu ćerki, a penthaus u Londonu sinu, onda sin, kao nužni naslednik prema francuskom pravu, može da se žali što njegovo pravo na nužni deo nije uzeto u obzir; s druge strane, ćerka u

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država.Više: T. Varadi, B. Bordaš, G. Knežević, V. Pavić, ***Međunarodno privatno pravo***, Beograd 2007, str. 340.

[21] Vid. Čl. 78 (1) (2) Zakona o međunarodnom privatnom pravu Belgije; čl. 89 (1) i (2) Zakona o međunarodnom privatnom pravu Bugarske; čl. 1.62(1) Građanskog zakonika Litvanije; čl. 66. Zakona o međunarodnom privatnom pravu Rumunije; čl. 3(2) francuskog Građanskog zakonika; čl. 3(2) Građanskog zakonika Luksemburga; za englesko pravo videti: J. H. C. Morris, ***The Conflict of Laws*** London, 2000. str. 425-426.

[22] Vid. A. Dutta, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation**,** ***Rabels Zeitschrift für ausländisches und internationales privatrecht, Band*** 73 (2009), p. 555.

Engleskoj samo pod određenim okolnostima može da zahteva finansijsku proviziju iz očeve imovine koja se nalazi u Londonu, a koja je zaveštana njenom bratu.[23] Ovi praktični problemi koji mogu nastati u (ne)koordinaciji različitih merodavnih prava, najčešće se navodi kao veliki nedostatak dualističkog pristupa.

Između dva navedena sistema u rešavanju merodavnog prava, Evropski zakonodavac je trebalo da se opredeli za jedan. Čini se da u tom pogledu nije postojala velika dilema. Pošlo se od cilja koji se želeo postići ovom Uredbom, a to su pojednostavljenje pravila o nasleđivanju i povećanje pravne izvesnosti i sigurnosti, pa je opravdano prihvaćen monistički pristup, kao pristup koji može odgovoriti postavljenom cilju. Zaključak o ovome proizilazi iz čl.16. Predloga uredbe, prema kome "...merodavno pravo za nasleđivanje ***u celosti*** je pravo države u kojoj ostavilac ima redovno boravište u momentu svoje smrti".

Opredeljenje za monistički koncept, odnosno koncept primene samo jednog prava na celokupnu zaostavštinu umrlog, u komentarima Predloga uredbe se često vidi kao velika korist za same građane EU koji ne bi trebalo više da vode postupke u više zemalja i ne bi trebalo da trpe veće dodatne troškove i odlaganja, odnosno odugovlačenja u donošenju odluke zbog multipliciranih postupaka i zbog primene više merodavnih prava.[24]

4.3. Primena jednog prava

Neposredna posledica sistema jedinstvene zaostavštine je primena ***jednog*** prava na celokupnu zaostavštinu, bez obzira na prirodu stvari koje je čine i bez obzira na njihovu lokaciju. Tačka vezivanja koja treba da odredi koje je to pravo, oslanja se na ostavioca kao centralnu ličnost u svakoj naslednopravnoj stvari. Međutim, kako se personalne veze ostavioca sa određenom državom baziraju na različitim činjenicama, to se u uporednom međunarodnom privatnom pravu država članica srećemo sa različitim kolizionim normama, te različitim merodavnim pravima za nasleđivanje. U velikom broju država je zadržan princip državljanstva kao tačke vezivanja, pa se na nasleđivanje primenjuje nacionalno pravo ostavioca.[25] Drugu grupu država čine one koje

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[23] ***Ibid.*** p. 556.

[24] Vid. npr. EU Council Secretariat (Factsheet), ***EU succession rules – the Council approves a set of political guidelines,*** od 4. juna 2010., dostupno na: www.consilium.europa.eu

[25] Vid. čl.28(1) u vezi sa čl. 9(1) Zakona o međunarodnom privatnom pravu Austrije; čl. 17. Zakona o međunarodnom privatnom pravu Češke; čl. 25(1) nemačkog Uvodnog zakona

domicil ostavioca smatraju najbližom njegovom vezom sa određenom državom, pa se kao merodavno pravo najčešće primenjuje pravo države u kojoj je bio poslednji domicil ostavioca.[26] Konačno, postoji par država, tačnije to su Bugarska, Finska i Holandija, koje su usvojile poslednje redovno boravište ostavioca kao tačku vezivanja,[27] što odgovara rešenju Haške konvencije o merodavnom pravu za nasleđivanje imovine umrlih lica iz 1989. godine. Kao što se može zapaziti, trenutno stanje pitanja merodavnog prava za nasleđivanje u državama članicama EU je prilično različito. No, ova činjenica ne treba da čudi s obzirom da je odabir tačke vezivanja stvar pravne i zakonodavne politike svake pojedinačne države.

Evropski zakonodavac je morao da odluči za koju će se, od mogućih veznih okolnosti opredeliti pri formulisanju kolizione norme i to je učinio predlažući redovno (oubičajeno) boravište ostavioca u vreme njegove smrti. Ovo opredeljenje je posledica opšteg trenda, kako na međunarodnom nivou, tako i na evropskom nivou. Pokazatelj navedenog trenda na međunarodnom nivou su Haške konvencije koje su usvojene poslednjih godina i u kojima se državljanstvo sve više i sve češće zamenjuje uobičajenim boravištem.[28] Ono što je značajnije, ovaj trend je zastupljen i na nivou evropskog međunarodnog privatnog prava, budući da je u pogledu kolizionih rešenja i nadležnosti sudova uobičajeno boravište postalo značajna, pa i dominantna tačka

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za građanski zakonik; čl. 28. grčkog Građanskog zakonika; čl. 36(1) mađarske Uredbe o međunarodnom privatnom pravu; čl.46(1) italijanskog Zakona o međunarodnom privatnom pravu; čl. 34. poljskog Zakona o međunarodnom privatnom pravu; čl. 62, 31 (1) portugalskog Građanskog zakonika; čl.66(a) rumunskog Zakona o međunarodnom privatnom pravu; čl. 32(1) slovenačkog Zakona o međunarodnom privatnom pravu; čl. 9(1) i (8) španskog Uvodnog zakona za Građanski zakonik; čl. 1(1) prvog poglavlja švedskog Zakona o nasleđivanju sa stranim elementom.

[26] Vid. čl. 78 (1) belgijskog Zakona o međunarodnom privatnom pravu; čl. 24. Zakona o međunarodnom privatnom pravu Estonije; čl. 1.62(1) litvanskog Zakonika; Za Francusku videti Cass.civ. 19.6.1939, Rev. crit. d.i.p. 34 (1939) 480; Cass.civ. 22.12.1970, Rev.crit.d.i.p.61 (1972) 467. Za Luksemburg videti: Trib.Lux. 20.6.1931, Pas.13, p.466. Za Englesku videti: Videti Rule 140 u: Dicey / Morris / Collins, ***The Conflict of Laws,*** (2006). Za Dansku videti: Østre Landrets Dom 30.4.1940, Ugeskrift for Retsvæesen 1940. 857.

[27] Vid. Čl. 89 (1) bugarskog Zakona o međunarodnom privatnom pravu iz 2005; Book 26 Sec.5 finskog Zakona o nasleđivanju; čl. 1 holandskog Zakona o nasleđivanju sa stranim elementom.

[28] Vid. čl. 5(1) i 15(1) Haške konvencije o nadležnosti, merodavnom pravu, priznanju, izvršenju i saradnji u materiji roditeljske odgovornosti i mera za zaštite dece od 19.10.1996; čl. 13(1) i 5(1) Haške konvencije o međunarodnoj zaštiti odraslih osoba od 13.1.2000; čl.3 Haškog protokola o merodavnom pravu za obaveze izdržavanja od 23.11.2007.

vezivanja. Na ovo ukazuje Brisel I uredba,[29] Brisel IIbis uredba,[30] Uredba o izdržavanju,[31] Rim I uredba,[32] kao i Rim II uredba.[33] U pogledu nasleđivanja sa stranim elementom uobičajeno boravište je preporučeno i podržano od strane velikog broja država i organizacija i to kroz odgovore na Zelenu knjigu. U tom smislu su odgovori vlada Nemačke, Finske, Holandije, Litvanije, Švedske, francuskog Kasacionog suda, austrijske i nemačke komore notara, Max Planck Instituta u Hamburgu, Ulrik Huber Instituta itd.[34] Prema mišljenju ovog većinskog stava, upotreba uobičajenog boravišta kao tačke vezivanja će unutar Evrope dalje sinhronizovati nadležnost i merodavno pravo u oblastima koje su manje ili više povezane sa nasleđivanjem i tako doprineti unutrašnjoj harmoniji.[35]

Koliziona norma bazirana na uobičajenom boravištu, a formulisana odredbom čl. 16. Predloga uredbe, predstavlja opšte koliziono pravilo i ono, bez sumnje, obezbeđuje primenu jednog prava. Međutim, treba napomenuti da je odredbom čl.17. Predloga uredbe predviđena i autonomija volje ostavioca kao tačka vezivanja, koja može dovesti do primene nacionalnog prava ostavioca. U svakom slučaju, oba predložena rešenja vode primeni samo jednog prava, što bi trebalo da olakša i pojednostavi rešenje naslednopravnih pitanja svim učesnicima u tom procesu nasleđivanja.

4.4. Autonomija volje ostavioca

Iako međunarodna privatna prava najvećeg broja država članica ne dozvoljavaju budućem ostaviocu, niti njegovim naslednicima, da biraju merodavno pravo po kome će se raspravljati zaostavština, Evropska komisija je smatrala da je ovo pitanje vredno pažnje i da ga treba razmotriti. U tom smislu formulisala je nekoliko značajnih i ključnih pitanja (5-9) u Zelenoj knjizi kao što su: da li treba dozvoliti ostaviocu (i kod zakonskog i kod testamentalnog nasleđivanja) da bira pravo za nasleđivanje, sa ili bez

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[29] Čl. 5(2), čl. 13(3) i čl. 17(3) Uredbe No. 4/2001 (Brisel I).

[30] Čl. 3(1)(a), čl. 8(1), čl.9. čl. 10 i čl. 12(3)(a) Uredbe No. 2201/2003 (Brisel IIbis).

[31] Čl. 3(a) i (b) i čl. 4(1)(a) i (c) (ii) Uredbe No. 4/2009.

[32] Čl. 4(1)(a), (b), (d), (e) i (f), čl. 5 (1) i (2), čl. 6(1), čl.7(2)subpara.2 i čl. 11(2), (3) i (4) Uredbe No. 593/2008. (Rim I).

[33] Čl. 4(2), čl. 5(1)(a) i (1) subpara. 2, čl. 10(2), čl. 11(2), čl. 12(2)(b) Uredbe No. 864/2007 (Rim II).

[34] Više: Max Planck Comments, p. 64.

[35] A.Dutta, ***op. cit***, p. 564.

sporazuma sa verovatnim naslednicima; da li takvu mogućnost treba priznati i naslednicima posle otvaranja nasledstva; ako je odgovor pozitivan, da li mogućnost izbora prava treba ograničiti i da li proceduru izbora treba odrediti itd.[36] Razlog više da se o ovim pitanjima zauzme stav je i činjenica da najnoviji zakoni o međunarodnom privatnom pravu, inspirisani Haškom konvencijom o merodavnom pravu za nasleđivanje imovine umrlih lica iz 1989. godine, dozvoljavaju autonomiju volje u oblasti nasleđivanja.[37]

Zaključak Komisije, donet na osnovu brojnih odgovora relevantnih stručnih i akademskih krugova je da ostaviocu treba priznati autonomiju volje i dozvoliti mu izbor merodavnog prava. Prema odredbi čl.17(1) Predloga uredbe "Lice može za svoju zaostavštinu u celini izabrati kao merodavno pravo države čije državljanstvo ima". Iz navedene formulacije proizilazi nekoliko stvari. Prvo, autonomija volje je priznata i kod zakonskog i kod testamentalnog nasleđivanja, s obzirom da nema nikakvih izričitih ograničenja jednog ili drugog oblika nasleđivanja. Drugo, izabrano pravo se primenjuje na celokupnu zaostavštinu, što znači da nije dozvoljen ***dépecage***. Treće, autonomija volje je ograničena i to samo na nacionalno pravo ostavioca.

Uvođenje autonomije volje u oblast nasleđivanja je viđeno kao moderno koliziono pravilo i kao deo opšteg trenda liberalizacije u međunarodnom privatnom pravu koje sve više i češće priznaje da je pojedinac taj, a ne država, koji najbolje može da odmeri relevantan interes u izboru prava. [38] Međutim, s druge strane, navedeno rešenje buduće Uredbe je viđeno i kao vrlo restriktivno. Otuda su prisutne sugestije da bi granice autonomije volje trebalo razumno proširiti tako da se ostaviocu da veće sloboda izbora, što bi bilo u skladu sa opštim trendom sve veće uloge autonomije volje u međunarodnom privatnom pravu.[39] ***Razumno proširiti*** ne znači dozvoliti neograničenu autonomiju volje, već znači da ostaviocu treba dozvoliti da

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[36] Više: ***Green Paper***, str. 6.

[37] Vid. čl. 5. Haške konvencije o merodavnom pravu za nasleđivanje imovine umrlih lica; čl. 79. Zakona o međunarodnom privatnom pravu Belgije; čl. 1. holandskog Zakona o nasleđivanju sa stranim elementom; Knjiga 26, čl. 6(2) i (3) finskog Zakona o nasleđivanju; čl. 89 (3) bugarskog Zakona o međunarodnom privatnom pravu; čl. 25. Zakona o međunarodnom privatnom pravu Estonije.

[38] J. Basedow, The Recent Development of the Conflict of Laws**,** in:, ***Japanese and European Private International Law in Comparative Perspective*** (ed. Basedow, Baum, Nishitani), 2008, p. 14.

[39] Max Planck Comments, p. 67f.

izabere pravo sa kojim on i njegova imovina imaju razumne i stabilne veze. Poenta ovakvog stava je da se osigura balans između interesa i volje ostavioca s jedne strane, i zaštite legitimnih očekivanja naslednika, posebno onih koji imaju pravo na nužni deo, s druge strane. Dakle, treba proširiti autonomiju volje ostavioca, ali u meri koja ne ugrožava imperativna pravila o zaštiti članova porodice (nužnih naslednika).[40] U tom smislu se predlaže da ostaviocu treba dati mogućnost da pored prava svog državljanstva, izabere i neka druga prava, pri čemu bi svako od njih trebalo da bude u nekoj razumnoj vezi sa ostaviocem ili pak, njegovom imovinom. Ta druga prava bi mogla biti: pravo države čije je državljanstvo ostavilac imao pre nego što je načinio izbor merodavnog prava, pravo prošlog ili sadašnjeg uobičajenog boravišta, pravo koje je merodavno za bračnoimovinski režim, a za nepokretnosti, pravo države u kojoj se one nalaze (***lex rei sitae***). Zastupnici proširenja autonomije volje prave čak, korak dalje i predlažu da ostaviocu treba dozvoliti i mogućnost izbora različitih prava za različite delove svoje imovine, odnosno da treba dozvoliti ***dépecage***.[41]

Nema sumnje da će autonomija volje ostavioca ostati kao rešenje buduće Uredbe, ali u kojoj meri će ona biti ograničena ostaje da se vidi. U svakom slučaju ona bi trebalo da koristi svim onim licima koja žele da rasporede svoju imovinu unapred, posebno ako se ona nalazi u različitim državama ili ako potencijalnih naslednika ima u više država.

4.5. Redovno boravište kao kriterijum za uspostavljanje nadležnosti

Prema odredbi čl. 4. Predloga uredbe, sud države članice na čijoj teritoriji ostavilac ima uobičajeno boravište u vreme smrti, biće nadležan da odlučuje o naslednopravnoj stvari. U pitanju je opšte pravilo o nadležnosti i kako iz njega proizilazi, osnovni kriterijum za uspostavljanje nadležnosti suda je uobičajeno boravište ostavioca u momentu njegove smrti. Navedeno rešenje odgovara rešenju Haške konvencije o merodavnom pravu za nasleđivanje imovine umrlih lica[42] kojom je uspostavljen trend prelaska sa domicila na uobičajeno boravište kao tačke vezivanja.

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[40] Izbegavanje imperativnih propisa je uvek moguće, čak i kod primene opšteg kolizionog pravila, jer ostavilac uvek može namerno steći novo uobičajeno boravište u državi čije pravo dozvoljava punu slobodu raspolaganja za slučaj smrti.

[41] Max Planck Comments, p. 67, 69.

[42] Čl. 3. Haške konvencije.

Predlogom uredbe se ne definiše pojam uobičajenog boravišta, kao što to uostalom ne čini ni Haška konferencija za međunarodno privatno pravo, iako ovaj termin koristi u velikom broju konvencija. Mišljenja o tome da li bi ovaj pojam ipak morao biti definisan Uredbom su podeljena. Prema jednom shvatanju, pošto je neophodno da prava svih država članica imaju isti koncept uobičajenog boravišta, potrebno je postojanje jedne zajedničke definicije, iz koje će biti jasno da svako lice mora imati poslednje uobičajeno boravište pre smrti, čak i ako to lice u momentu smrti ima samo boravište, a ne i uobičajeno boravište u državi u kojoj je umro.[43] Prema drugom shvatanju, ovaj pojam ne bi trebalo definisati jer se i na međunarodnom i na evropskom nivou koriste razni kriterijumi za njegovo određivanje, pa ga uz potrebnu meru fleksibilnosti, treba utvrđivati od slučaja do slučaja.[44] Iz činjenice da se ovaj pojam ne definiše Uredbom, moglo bi se zaključiti da je to učinjeno namerno, kako bi se on shvatio kao fleksibilan pojam, sposoban da se i adaptira praktičnim zahtevima. Međutim, postoji opšta saglasnost da je on više faktički nego pravni pojam (za razliku od domicila) i da nije formalan u smislu upisa u evidenciju nadležnog organa lokalne vlasti, ili dozvole boravka ili nastanjenja, ali da ukazuje na jednu ipak trajniju i sadržajniju vezu jednog lica i određenog mesta (države). U tom smislu, pojam uobičajenog boravišta bi se mogao definisati kao mesto u kome lice redovno boravi duže vreme, bez obzira na nameru da se tu nastani, ali tako da zasniva jednu trajniju vezu sa tim mestom o čemu svedoče činjenice lične, porodične ili poslovne prirode.[45] Dakle, za uobičajeno boravište, za razliku od domicila, nije potrebno da postoji namera lica da trajno ostane u određenom mestu (državi), već je potrebno da postoji navika, regularnost, pravilnost boravka u određenom mestu (državi). Iako je očito da se za određenje uobičajenog boravišta jednog lica moraju uzeti u obzir, i to skupno, različiti kriterijumi (vremensko trajanje boravka u jednoj državi, porodične veze, posedovanje imovine i njena lokacija, profesionalne, društvene i ekonomske veze itd.), ipak se čini da je test za uobičajeno boravište manje zahtevan od testa za

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[43] D. Hayton, Detemination of the Objectively Applicable Law Governing Succession to Deceaseds' Estates, ***DNotl, Les Successionis Internationales dans I'UE,*** 2004, p. 365.

[44] Max Planck Comments, p. 65.

[45] Ima shvatanja da se uobičajeno boravište može definisati i kao "poslednji voljno stečeni centar ličnog, društvenog i ekonomskog života jednog lica". Insistiranje na ***nameri*** lica da u jednom mestu, odnosno državi, stekne uobičajeno boravište, trebalo bi da potencira razliku takvog mesta (države), od onog u kome se jedno lice nalazi na primer, na odsluženju kazne zatvora ili je kao pacijent smešteno u neku od mentalnih ustanova. Vidi: D. Hayton***, op. cit***., p. 365.

domicil, budući da se sud više fokusira na prošlo iskustvo lica, a ne mnogo na buduće namere njegove.

Razlog za izbor uobičajenog boravišta ostavioca, kao kriterijuma za nadležnost, je shvatanje da je razumno očekivati da je to mesto centar interesa ostavioca i da se u tom mestu nalazi pretežni deo njegove imovine. S druge strane, postojanjem jednog veznog faktora izbegli bi se sukobi nadležnosti, a dobili bi se brži i efikasniji postupci i manji troškovi za lica koja su u njih uključena.[46]

4.6. Transfer (delegiranje) nadležnosti

Opšte pravilo o nadležnosti sadržano u članu 4. Predloga uredbe, koje osigurava veliku koncentraciju nadležnosti suda države na čijoj teritoriji je ostavilac imao poslednje uobičajeno boravište, Komisija je učinila fleksibilnijim, uvođenjem mogućnosti transfera (delegiranja) nadležnosti. Naime, prema odredbi čl. 5 (1) Uredbe, ako je ostavilac izabrao pravo po kome će se raspraviti njegova zaostavština, sud koji je inače nadležan prema čl.4.Uredbe, može prekinuti postupak i uputiti stranke da postupak sprovedu pred sudom države čije je pravo izabrano za merodavno, ukoliko to zahteva jedna od stranaka i ukoliko sam sud oceni da je ovaj drugi sud pogodniji da rešava konkretan slučaj. Ideja o transferu nadležnosti nije nova u evropskom zakonodavstvu, s obzirom da sličnu odredbu sadrži Brisel IIbis uredba,[47] ali je svakako korak napred u "smekšavanju" inače vrlo strogih procesnih pravila. To smekšavanje se ogleda u diskrecionom pravu suda koji je inače nadležan, da u određenim okolnostima prenese nadležnost na sud druge države ukoliko smatra da je on pogodniji za rešavanje konkretnog slučaja. Prema objašnjenju koje je Komisija dala u ***Explanatory Memorandum***-u, činjenica da je ostavilac izabrao merodavno pravo ne znači da će sud automatski da izvrši upućivanje na podesniji sud. Nadležni sud treba da uzme u obzir, između ostalog, interese ostavioca, naslednika, legatara i poverilaca, i njihovo uobičajeno boravište što znači da bi ovo pravilo trebalo da vodi sud ka jednom izbalansiranom rešenju.[48]

Pravilo o tranferu nadležnosti predstavlja procesnu mogućnost koja je vrlo bliska anglo-američkom institutu ***forum non conveniens***, koji podrazumeva diskreciono pravo suda da odbije da rešava spor za koji inače poseduje

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[46] EU Succession Rules- The Council Approves a set of Political Guidelines, ***op. cit.***, p. 2.

[47] Vid. čl. 15. Brisel IIbis uredbe.

[48] COM (2009) 154 final, 2009/0157 (COD), Brussels, 14.10.2009, p. 5.

nadležnost ukoliko smatra da će se interesi stranaka, kao i javni interesi, najbolje ostvariti ukoliko se tužilac uputi na drugi, mnogo "podesniji" sud koji je za dati slučaj takođe nadležan.[49] Transfer nadležnosti koji proizilazi iz dredbe čl. 5(1) Uredbe, ima elemente instituta ***forum non conveniens***, ali se sa njim ne može poistovetiti u potpunosti jer je vrlo restriktivan. Naime, transfer je moguć samo u jednoj situaciji: ukoliko je izvršen izbor merodavnog prava za nasleđivanje i ukoliko to pravo pripada državi u kojoj se ne nalazi uobičajeno boravište ostavioca. Tada sud države u kojoj je ostavilac imao uobičajeno boravište u vreme svoje smrti i koji bi po čl.4. bio nadležan, može, na zahtev stranke, i ako to sam oceni, da uputi stranke na sud države čije je pravo izabrano.

Navedeno rešenje se uglavnom vidi kao napredno, jer bi u slučaju transfera nadležnosti postojalo jedinstvo foruma i merodavnog prava, s obzirom da bi sud na koji je preneta nadležnost primenio svoje sopstveno, a ne strano pravo. To bi trebalo da doprinese efikasnijem rešavanju nasledstva, uštedi u vremenu i troškovima stranaka, kao i mogućnosti da se izbegnu pogrešne odluke zbog primene stranog prava.[50] U ovom smislu, a prema mišljenju izraženom u Komentaru Max Plank instituta iz Hamburga, treba napraviti čak korak dalje i fleksibilnost odredbe čl. 5(1) proširiti na još dva slučaja. U prvom slučaju transfer nadležnosti bi trebalo dozvoliti ukoliko sve stranke u postupku imaju uobičajeno boravište u drugoj državi. To će najčešće biti slučaj ako je ostavilac kratko vreme pre svoje smrti živeo u nekoj stranoj državi, dok je njegova porodica ostala u državi njihovog porekla. Ostavilac bi u ovoj situaciji mogao da izabere svoje nacionalno pravo kao merodavno pravo za nasleđivanje i čl. 5(1) bi se direktno primenio. Predlog sa Maks Plank instituta je da se primena čl.5 proširi i na slučaj kada ostavilac nije izvršio izbor nacionalnog prava. Drugi slučaj koji se navodi kao razlog za proširenje dejstva odredbe čl.5(1) odnosi se na nepokretnu zaostavštinu ostavioca, a predlog je da se u ovom slučaju transfer nadležnosti izvrši na sud države u kojoj se ta ili te nepokretnosti nalaze. Objašnjenje je da Predlog uredbe već sadrži odredbu o nadležnosti suda mesta nalaženja nepokretnosti, ali da je ona ograničena samo na pitanja "mera i materijalnog prava koja se tiču prenosa vlasništva" (kao što je upis u zemljišne knjige). Za sva druga pitanja koja se odnose na raspodelu imovine naslednici bi trebalo da vode

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[49] Više o teoriji forum non conveniens: M. Petrović, ***Ograničenje međunarodne sudske nadležnosti – odabrana pitanja***, Kragujevac 2009, str. 15. i sl.

[50] Vid. na primer ***Max Planck Comments***, p. 41. i sl.

postupke u različitim državama što znači da bi sudske odluke morale da se prevode i priznaju u zemlji gde se nepokretnost nalazi. Navedenim predlogom bi se čitav postupak pojednostavio što bi svakako odgovaralo svim strankama u postupku.[51]

Nema sumnje da treba doći do jednostavnijih rešenja koja će olakšati rešavanje svih pitanja nasleđivanja, što je uostalom i cilj Uredbe. U tom smislu su i predlozi i sugestije stručnih i akademskih krugova, a šta će se izmeniti i konačno usvojiti ostaje da se vidi.

Milena Petrović*

SUCCESSION PROPOSAL - ONE STEP FORWARD IN PRPCESS OF CODIFYING PRIVATE INTERNATIONAL LAW IN EUROPEAN UNION

Summary

On 14 October 2009 the Commission brought forward their proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. The proposed Regulation is aimed at unifying and simplifying the rules governing succession, increasing their predictability and providing more effective guarantees for the rights of heirs and/or legatees and other persons linked to the deceased, as well as creditors of the succession. The objectives of the proposal can be met only by way of common rules governing international succession which must be identical in order to guarantee legal certainty and predictability for citizens.

As regards the difficulties facing those involved in a international succession mostly flow from the divergence in substantive rules, procedural rules and conflict rules in the Member States and the succession is excluded from Community rules of private international law adopted so far, there is accordingly a clear need for the adoption of a comprehensive instrument with harmonized European rules.

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[51] ***Ibid.***, p. 42-43.

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The six issues on which the political guidelines focus are: a comprehensive instrument, one single succession, one applicable law, choice of law, habitual residence as connecting factor for jurisdiction and transfer of jurisdiction.

Keywords: EU legislative activities in succession matters; structure and scope of proposed Regulation; one single succession; habitual residence as connecting factor; choice of law.

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Prikaz napisala: doc. dr. Maja Brkan*

Knjiga „Prethodni postupak u pravu Europske unije: suradnja nacionalnih sudova s europskim sudom„ je najnovija knjiga na hrvatskom jeziku koja sadrži priloge priznatih hrvatskih stručnjaka s područja prava EU. Obrađuje različite aspekte prethodnog postupka pred Sudom EU i postavlja ga u širi okvir dijaloga među tim sudom i nacionalnim sudovima. Taj postupak je jedan od najvažnijih mehanizama za razvoj sudskog prava EU jer odluke Suda EU ,izdane u tom postupku, imaju učinak ***erga omnes*** za sve sudove u državama članicama, za sve državne organe i također za sve državljane.

Knjiga sadrži osam poglavlja koja dubinski obrađuju temeljne značajke i različite vrste prethodnog postupka. U prvom poglavlju, autora Mislava Mataije, je sistematično i teoretski predstavljen općeniti pregled tog postupka, drugo poglavlje Melite Carević ima, uz teoretsko objašnjenje

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pojma suda, protiv čijih odluka nema pravnog sredstva ni iznimaka od obvezatnosti za sudove za postavljenjem zahtjeva za prethodnim postupkom, također i praktični aspekt u kojem daje konkretne naputke o tome kako je potrebno postaviti takav zahtjev. U trećem poglavlju, autorice Tamare Ćapete, posebna je pozornost posvećena mogućnosti Suda EU da u okviru prethodnog postupka poništi akt Unije. Pokraj dobre teoretske osnove, dodatna vrijednost tog poglavlja, prije svega, su praktični primjeri na temelju kojih autorica pojašnjava kako dolazi do problema valjanosti sekundarnih akata Unije. Poglavlje o učincima odluka suda EU, autorice Irs Goldner Lang, zasebno obrađuje ***erga omnes*** i ***ratione temporis*** učinke tih odluka tako da čitatelje, osobito suce nacionalnih sudova, upozorava na to da za poštivanje prava EU nije dovoljno čisto poznavanje pravnih propisa, nego je također potrebno kontinuirano praćenje sudske prakse Suda EU.

Nadalje je, po mojem mišljenu, posebno važno poglavlje Tunjice Petraševića o ubrzanom i hitnom postupku prethodnog odlučivanja u kojem jasno pojašnjava razloge za uvođenje tih vrsta postupka, uz što upozorava također na moguće probleme do kojih dovodi uporaba tih postupaka.Vrlo aktualna je također tema o odgovornosti nacionalnih sudova zbog uporabe prava EU, autora Siniše Rodina, u kojem autor obrađuje teoretske pravne temelje za tu odgovornost kao i noviju sudsku praksu Suda EU s tog područja. Tamara Perišin piše o europskom sudskom dijalogu i tu tematiku obrađuje, ne samo iz aspekta dijaloga nacionalnih sudova sa Sudom EU, nego također iz aspekta dijaloga s Europskim sudom za ljudska prava i posebno s nacionalnim ustavnim sudovima. Iz aspekta ustavnog prava je vrlo aktualno zadnje poglavlje Biljane Kostadinov o prethodnim zahtjevima ustavnosti u nacionalnom pravu u vezi s pravom EU.

Pozorno čitanje knjige nam pokazuje da ista ima puno odlika.

Najprije treba istaknuti da su prilozi u knjizi aktualni, kako s teorijskog, tako i s praktičnog aspekta. S jedne strane su na visokoj teorijskoj razini i prikladno uvažavaju postojeću doktrinu na tom području. S aspekta prakse je dobrodošlo da obrađuju noviju sudsku praksu Suda EU na različitim područjima; tako je npr. u većini priloga u analizu uključen spor ***Melki in Abdeli*** (C-188/10 in C-189/10) koji je vrlo važan za odnos između nacionalnih ustavnih sudova i Suda EU. Pohvalni su također praktični primjeri za lakše razumijevanje različitih aspekata prethodnog postupka kao npr. u poglavlju Tamare Ćapete glede ocjene valjanosti u okviru prethodnog postupka.

Nadalje, knjiga obrađuje raznovrsna pitanja prethodnog postupka s mnogih aspekata. Tako npr. poglavlje o prethodnom postupku za zahtjev valjanosti ne obrađuje samo „klasični„ aspekt te teme kao npr. procjenu u odnosu na

akte koje je moguće procijeniti ili učinak valjanosti akata, nego također odnos među ništavnom tužbom i zahtjevom valjanosti u okviru prethodnog odlučivanja, odnosno na doktrinu ***Textilwerke Deggendorf*** (C-188/92).

Također, važno je naglasiti da su autori knjige izabrali kritički i dubinski pristup u svakoj od tema i da knjiga nije samo površno ponavljanje već postojećih priloga na tu temu.Tako npr. Siniša Rodin u svojem prilogu o odgovornosti sudova za kršenje prava EU utemeljeno naglašava da su takvi primjeri u praksi izuzetno rijetki i analizira moguće razloge za to, do usporedivih odluka čemu također u svojem poglavlju pridonosi autorica Iris Goldner Lang. Uz to se autori ne ograničavaju samo na europskopravnu problematiku, nego uključuju i primjere s hrvatskim i inozemnim pravom kako bi prilozima dodali komparativni aspekt. Tako npr. Melita Carević analizira uporabu konkretne teorije glede sudova zadnje instance u hrvatskom pravu, Siniša Rodin u svom prilogu uključuje komparativnu analizu s njemamačkim pravom. Uz to je u prilogu Tamare Perišin uključen također aspekt komparativne analize zaštite temeljnih prava pred Europskim sudom za ljudska prava.

Pozitivno je također da knjiga analizira posebne oblike prethodnog postupka, a to su ubrzani i hitni postupak, koji su u pravu EU novosti i njima u teoriji do sada nije bila posvećena dovoljna pozornost. Posebno važno je da su u tom okviru pojašnjeni praktični uvjeti za postavljanje takvih zahtjeva i da je predstavljena sudska praksa Suda EU s tog podrucja. Iako je sudska praksa nešto novijeg datuma (prilog obrađuje npr. sporove C-195/08 PPU, ***Rinau***; C-296/08 PPU, ***Santesteban Goicoechea***; C-400/10 PPU, ***McB***), no prilog nažalost ne ukljucuje najnoviju sudsku praksu (na primjer spor C-491/10 PPU, ***Aguirre Zarraga*** ili C-61/11 PPU, ***El Dridi***).

Knjiga je vrlo opsežna i dubinski analizira sve aspekte prethodnog postupka pred Sudom EU i zato će biti, s jedne strane nedvojbeno vrlo dobar pomoćni alat nacionalnim sucima pri pokretanju prethodnog postupka, ali i drugim ljudima iz prakse, npr.odvjetinicima pri izradi prijedloga tih zahtjevima sucima.S druge strane je knjiga također teoretski dobro zasnovana tako da će za njom sa zanimanjem posegnuti također i teoretičari.