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# ČLANCI I RASPRAVE

Dr Bosa Nenadić*

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## EVROPSKO USMERENJE NOVOG USTAVA REPUBLIKE SRBIJE[1]

***Ključne reči: ustav, Republika Srbija, evropsko usmerenje, integraciona klauzula, neposredna primena, međunarodno pravo, Evropska unija.***

## 1. NEKOLIKO OPŠTIH NAPOMENA O USTAVU REPUBLIKE SRBIJE OD 2006. GODINE

Krajem 2006. godine Republika Srbija dobila je novi Ustav, posle skoro šest godina rasprava i pokušaja postizanja "zahtevne" većine i visokog stepena saglasnosti u srpskom parlamentu neophodne za donošenje, odnosno promenu najvišeg zakona zemlje. Izuzetnu čvrstinu i njome uslovljenu dugovečnost prethodnog Ustava obezbeđivala je i stroga procedura njegove promene.[2]

* Predsednica Ustavnog suda Republike Srbije.

[1] Rad je prezentovan na IX Congres International de droit Constitutionnel Europeen et Compaare, Regensburg, 29-30 juin, 2007.

[2] O tom vid. opširnije S.Vučetić, The new Constitution of Serbia, SURVEY - REPUBLIC OF SERBIA, No. 4. 2006. str. 23. i d. i R. Marković, Predgovor: ***Ustav Republike Srbije od 2006. godine - Kritički pogled***, objavljen uz tekst Ustava, IPD Justinijan, Beograd, 2006. godine, str. 10. i d.

Razloga za donošenje novog Ustava bilo je mnogo, od onih političkih do državno-pravnih. No, bliže ulaženje u ove razloge, a posebno u političke ciljeve parlamentarnih stranaka, koje su se posle višegodišnjeg sporenja (o potrebi donošenja novog Ustava, njegovoj sadržini, pa i postupku usvajanja) u vrlo kratkom roku usaglasile o tekstu Ustava prihvatajući ga jednoglasno u Narodnoj skupštini, prevazilazi predmet ovog priloga.[3] Naravno, zbog velikih programskih i ideoloških razlika među vodećim parlamentarnim strankama, a pod pritiskom veoma nepovoljnih međunarodnih prilika po Srbiju (vezanih i za rešavanje budućeg statusa Kosova, okončanje saradnje sa Međunarodnim sudom u Hagu i dr.), bio je nužan niz krupnih kompromisa i međusobnih ustupaka da bi se došlo do usaglašenog teksta Ustava. To je svakako umanjilo njegov kvalitet, ali je njegovo donošenje ocenjeno kao korak napred ka Evropi.[4]

Nakon sprovedenog referenduma u Crnoj Gori (21. maja 2006. godine) i prestanka državne zajednice Srbije i Crne Gore, Republika Srbija je, nakon 88 godina dugog statusa države članice ponovo "uspostavila" status samostalne i suverene države. Samo se po sebi razume, da promena statusa jedne države, neminovno zahteva i promenu njenog ustava. No, ovo pravilo nije potvrđivano kada je u pitanju Ustav Srbije iz 1990. godine. Ovaj Ustav ostajao je "nedirnut" uprkos svim promenama u statusu Srbije koje su usledile nakon raspada bivše jugoslovenske federacije. Nastavljajući "život" u dvočlanoj saveznoj državi, a potom u državnoj zajednici, Srbija nije menjala svoj Ustav uprkos izričitim odredbama Ustava SRJ (od 1992. godine), odnosno Ustavne povelje državne zajednice Srbije i Crne Gore (od 2003. godine), koje su to nalagale, odnosno zahtevale. Tek je stupanjem na snagu novog Ustava, koji je svečano proglašen 8. novembra 2006. godine, prestao da važi Ustav Srbije od 1990. godine, koji je, kao takav, važio u Srbiji kao federalnoj jedinici SFRJ, odnosno federalnoj jedinici SRJ, potom u Srbiji kao državi članici državne zajednice Srbija i Crna Gora i, na kraju, oko pola godine i u Srbiji kao samostalnoj državi. Ova činjenica najbolje govori o stvarnoj ulozi ustava na našim prostorima u prethodnim godinama.

Rasprava o tome šta je sve novo doneo Ustav Srbije od 2006. godine i koliko je on «kao pravno ostvarenje zaista nov», u čemu je ostao "identičan" Ustavu koji mu je prethodio, koje su sve nomotehničke manjkavosti teksta Ustava (koje će mu svojim brojem i sadržinom svakako otežavati "život") nije namera ovog

[3] Za tekst Predloga ustava na sednici Narodne skupštine 30. septembra 2006. godine, glasali su svi prisutni narodni poslanici (njih 242. od 250.). Građani su tekst Ustava potvrdili potom na referendumu 29. i 30. oktobra 2006. godine, većinom od 53, 04% glasova od ukupnog broja birača upisanih u birački spisak.

[4] S. Vučetić, ***op. cit***., str. 24.

rada. Predmet naše pažnje biće samo ona rešenja Ustava koja su od značaja za kontekst evropskih integracija Srbije.

## 2. OPŠTI OSVRT NA EVROPSKO USMERENJE SRBIJE (I CRNE GORE) IZRAŽENO U USTAVNOJ POVELJI OD 2003. GODINE

Predstavljanje ustavnih obeležja savremene Republike Srbije, koja se odnose na njenu orijentaciju ka evropskim integracijama, ne bi bilo potpuno bez kratkog osvrta na opredeljenje državne zajednice Srbije i Crne Gore u tom pogledu. To opredeljenje koje je u Srbiji jasno ispoljeno nakon političkih promena 2000. godine, svoj normativni izraz našlo je u brojnim odredbama Ustavne povelje državne zajednice Srbija i Crna Gora od 2003. godine (u daljem tekstu: Ustavna povelja). Osvrt na te odredbe čini nam se važnim iz dva razloga: ***prvo,*** što je Srbija bila članica te državne zajednice koja je imala jasnu i nedvosmisleno izraženu političku orijentaciju zapisanu izričito i u njenom ustavnom aktu kada su u pitanju evropske integracije, a posebno Evropska unija; ***drugo,*** što je država Srbija, nakon prestanka te zajednice, postala njen pravni sledbenik na međunarodnom planu.

Ustav Republike Srbije od 1990. godine, kao ustav federalne jedinice, nije imao odredbe o međunarodnim odnosima Republike Srbije,[5] jer je u vreme njegovog donošenja to pitanje bilo predmet uređivanja tada važećeg Ustava SFRJ, a potom Ustava SRJ od 1992. godine. Po preuređenju Savezne Republike Jugoslavije, odnosno konstituisanju državne zajednice Srbija i Crna Gora (februara 2003. godine), u najvišem pravnom aktu ove zajednice – Ustavnoj povelji, bile su sadržane brojne odredbe od značaja za ostvarivanje međunarodnih odnosa Srbije i Crne Gore i njenih država članica. To su bile odredbe o: ciljevima državne zajednice na međunarodnom planu; nadležnosti organa državne zajednice, odnosno država članica u međunarodnim odnosima; postupku odlučivanja o članstvu Srbije i Crne Gore u međunarodnim organizacijama i pravima i obavezama koje proističu iz tog članstva; nadležnostima za zaključivanje, izvršavanje i ratifikaciju međunarodnih ugovora, odnosno međunarodnih sporazuma; odnosu međunarodnog i unutrašnjeg prava; ustavnosudskoj kontroli saglasnosti nacionalnog zakonodavstva sa potvrđenim i objavljenim međunarodnim ugovorima, itd.

[5] Ustav Republike Srbije od 1990. godine samo je u odredbi člana 73. tačka 7. pominjao međunarodne ugovore, tako što je Ustavom bilo utvrđeno da Narodna skupština "ratifikuje međunarodne ugovore".

Izričito izražavanje evropskog usmerenja državne zajednice Srbije i Crne Gore, na prvi pogled "po malo i prenaglašeno",[6] našlo je u Ustavnoj povelji svoje mesto među osnovnim ciljevima ove zajednice. Tako je u članu 3. Ustavne povelje bilo utvrđeno da je cilj državne zajednice Srbija i Crna Gora "uključivanje u evropske strukture, a naročito u Evropsku uniju", a potom i "usklađivanje propisa i prakse sa evropskim i međunarodnim standardima". Principi i standardi Evropske unije bili su utvrđivani i kao "model" za međusobne odnose Srbije i Crne Gore u državnoj zajednici. Ovakvo visoko mesto evropskih integracija i Evropske unije u ustavnoj strukturi vrednosti i ciljeva Srbije i Crne Gore govorilo je jasno "o privrženosti tvoraca Ustavne povelje novoj strateškoj orijentaciji" ispoljenoj nakon političkih promena u Srbiji (i Crnoj Gori). Ustavnom poveljom potom je bilo utvrđeno i da se zakonodavno uređivanje određenih odnosa ima izvršiti "u skladu sa standardima Evropske unije". Skupština Srbije i Crne Gore bila je ovlašćena da, uz prethodnu saglasnost država članica, donosi zakone i druge akte "o članstvu Srbije i Crne Gore, kao subjekta međunarodnog prava u međunarodnim organizacijama i o pravima i obavezama koje proističu iz tog članstva". Za "pregovaranje i kordinaciju implementacije međunarodnih sporazuma, uključujući ugovorne odnose sa Evropskom unijom i kordinaciju odnosa s međunarodnim ekonomskim i finansijskim institucijama"[7] bio je odgovoran ministar za međunarodne ekonomske odnose. Dakle, u pomenutim odredbama Ustavne povelje, pored jasne političke orijentacije i opredeljenja za uključivanje u evropske strukture, odnosno Evropsku uniju, bio je sadržan i nesporan ustavni osnov za proces pridruživanja i pristupanja Srbije i Crne Gore Evropskoj uniji.

Pored navedenog, dve bitne ustavne pretpostavke za ostvarivanje evropske usmerenosti Srbije i Crne Gore bile su sadržane u odredbama člana 10. i 16. Ustavne povelje, koje su na opšti način opredeljivale mesto međunarodnih ugovora u ustavnopravnom sistemu Srbije i Crne Gore i njenih država članica. Tako je članom 16. Ustavne povelje bilo utvrđeno da "ratifikovani međunarodni ugovori i opšteprihvaćena pravila međunarodnog prava ***imaju primat*** nad pravom Srbije i Crne Gore i pravom država članica". Primat međunarodnih ugovora nad unutrašnjim pravom podrazumeva dve stvari: ***prvo,*** "prvenstvo u primeni ugovorne odredbe u slučaju nesklada sa unutrašnjim pravom; ***drugo,*** "nadzakonsku pravnu snagu" ratifikovanih

[6] Tako su, u članu 3. Ustavne povelje državne zajednice Srbija i Crna Gora od 4. februara 2003. godine, bili taksativno utvrđeni ciljevi državne zajednice. Od ukupno šest ciljeva, tri su bila ona u kojima se izričito izražavalo evropsko usmerenje Srbije i Crne Gore.

[7] R. Etinski, Od srpskog i crnogorskog prava prema evropskom pravu, Zbornik radova ***''Pravni sistem Republike Srbije - usaglašavanje sa pravom Evropske unije***", Pravni fakultet Niš, 2005. godine, str. 357. i dalje.

međunarodnih ugovora u Srbiji i Crnoj Gori i njenim državama članicama, odnosno da su zakoni, drugi propisi i opšti akti doneti u Srbiji i Crnoj Gori i njenim državama članicama u hijerarhiji pravnih akata bili ispod potvrđenih međunarodnih ugovora, te da su sa ovim ugovorima imali biti u skladu. Neki autori su tvrdili da su norme međunarodnog prava u Srbiji i Crnoj Gori, po Ustavnoj povelji imale primat i nad ustavnim aktima.[8] Sledeća bitna odredba Ustavne povelje jeste odredba člana 10, u kojoj je bio sadržan ***princip o neposrednoj primeni međunarodnih ugovora*** u oblasti ***sloboda i prava.*** S obzirom na evropsko usmerenje Srbije i Crne Gore, moglo bi se reći, da je ovo rešenje istovremeno bilo i "preusko i preširoko".[9] Preusko, jer je neposrednu primenu međunarodnog prava ograničavalo samo na ***odredbe*** međunarodnih ugovora o ljudskim i manjinskim pravima, dok je isključivalo neposrednu primenu svih drugih međunarodnih ugovora i opšteprihvaćenih pravila međunarodnog prava. Tako je ovo rešenje svojom sadržinom ipak moglo biti prepreka, odnosno smetnja procesu stabilizacije i pridruživanja Srbije i Crne Gore Evropskoj uniji, jer je isključivalo neposrednu primenu odredaba ugovora koji bi bili zaključivani sa Evropskom unijom (van domena ljudskih sloboda i prava). S druge strane, ono je bilo preširoko, jer se odnosilo na sve odredbe međunarodnih ugovora o ljudskim i manjinskim pravima, a mnoge od odredaba ovih međunarodnih ugovora, nisu po svojoj prirodi, odnosno strukturi i sadržini podobne za neposrednu primenu[10].

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[8] Vid. M. Milojević, Ustavna nadležnost za zaključivanje i izvršavanje međunarodnih ugovora, Zbornik radova, "***Ustavno pitanje u Srbiji***", Pravni fakultet, Niš, 2004. godine, str. 223. i. dalje.

[9] R. Etinski, ***op. cit***., str. 359.

[10] Primera radi i neke veoma bitne odredbe Evropske konvencije, kao što su pojedine odredbe člana 6. Konvencije o pravu na pravično suđenje, ili pak o pravu na delotvoran pravni lek, nisu takve da bi mogle biti neposredno primenjene. Sasvim je jasno da se npr. odredba člana 13. Konvencije, po kojoj "svako kome su povređena prava i slobode predviđene u ovoj Konvenciji ima pravo na delotvoran pravni lek pred nacionalnim vlastima," nije neposredno primenjiva i da Konvencija ovom odredbom u suštini nameće obavezu državi članici da u domaćem zakonodavstvu obazbedi delotvoran pravni lek. Naime, "iz ove odredbe pojedinac ne može da derivira neko konkretno pravno sredstvo" kojim će pred nadležnim državnim organom Republike Srbije štititi svoje pravo ili slobodu (R. Etinski). To delotvorno pravno sredstvo građanima Srbije mora se obezbediti u "nacionalnom pravu", odnosno u Ustavu i zakonima Srbije kojima se uređuju postupci pred sudovima i drugim državnim organima, odnosno organizacijama koje vrše javna ovlašćenja, a pred kojima građani ostvaruju ili štite svoja prava, odnosno pravne interese. Vid. o tome opširnije B. Nenadić, Mesto Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda u pravnom sistemu Republike Srbije, Zbornik radova ***''Primjena Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda u praksi ustavnih sudova***", Podgorica, 2006. godine, str. 23 - 45.

## 3. USTAVNOPRAVNI OKVIRI OD ZNAČAJA ZA MEĐUNARODNE ODNOSE SRBIJE U PERIODU OD PRESTANKA DRŽAVNE ZAJEDNICE DO DONOŠENJA USTAVA 2006. GODINE

Nakon prestanka državne zajednice Srbija i Crna Gora (u daljem tekstu: Državna zajednica) pa do donošenja novog Ustava Srbije bilo je otvarano i pitanje postojanja ustavnopravnih pretpostavki za nastavak započetog procesa približavanja Srbije Evropskoj uniji, kao i pitanje mesta međunarodnih ugovora u pravnom poretku Srbije, a posebno Evropske konvencije o zaštiti ljudskih sloboda i prava. Ova pitanja pokretana su s pozivom na činjenicu da tada važeći Ustav Srbije, nije sadržao odredbe o međunarodnim odnosima Srbije i njenom članstvu u međunarodnim organizacijama, niti odredbe o mestu međunarodnog prava u pravnom sistemu države Srbije. Ukazivano je i da sama Evropska konvenicija ne sadrži nikakve izričite obaveze na osnovu koje bi njene norme bile neposredno primenjivane u nacionalnom pravu, te da članice Konvencije primenu njome zajamčenih prava mogu obezbediti na više načina. Međutim, pri otvaranju navedenih dilema previđalo se ono što je nesporno proizilazilo i iz ***Odluke o obavezama državnih organa Republike Srbije u ostvarivanju nadležnosti Republike Srbije kao sledbenika državne zajednice Srbija i Crna Gora,*** koju je 5. juna 2006. godine donela Narodna skupština Republike Srbije.[11] U ovoj odluci Narodna skupština konstatovala je: "da je Republika Srbija u skladu sa polaznim osnovama za preuređenje odnosa Srbije i Crne Gore ("Beogradski sporazum") i članom 60. Ustavne povelje državne zajednice Srbija i Crna Gora ***postala sledbenik državne zajednice i u celosti nasledila njen međunarodno pravni subjektivitet i međunarodne dokumente",*** te da se "pravni poredak Republike Srbije usklađuje sa principima na kojima se zasnivaju pravni poreci razvijenih demokratskih država, kao i sa ***odgovarajućim aktima međunarodne zajednice".***

Polazeći od navedenog, pravno sledbeništvo Republike Srbije na međunarodnom planu, značilo je, ne samo njeno članstvo u međunarodnim organizacijama, već i mogućnost nastavljnja započetog procesa približavanja Srbije Evropskoj uniji - procesa u kome je ona i do tada uveliko učestvovala, do duše kao država članica. Kada je u pitanju primena međunarodnog prava i izvršavanje preuzetih međunarodnih obaveza, pravno sledbeništvo Srbije značilo je: ***prvo,*** da su svi ratifikovani međunarodni akti (multilateralni i bilateralni) koji su obavezivali državnu zajednicu Srbiju i Crnu Goru, nastavili

[11] Vid. Odluku o obavezama državnih organa Republike Srbije u ostvarivanju nadležnosti Republike Srbije kao sledbenika državne zajednice Srbija i Crna Gora ("Službeni glasnik RS", broj 48/2006).

da obavezuju i Republiku Srbiju kao samostalnu državu; ***drugo,*** da su ratifikovani međunarodni ugovori već postali sastavni deo pravnog poretka Republike Srbije; ***treće,*** da je "pravo", odnosno "da su zakoni i drugi propisi" Republike Srbije morali biti usaglašeni sa tim aktima. Otvoreno je bilo i pitanje, kako postupiti u slučaju «sukoba» normi međunarodnog i unutrašnjeg prava, koja je norma tada bila "starija", odnosno imala primat i da li se norma ratifikovanog međunarodnog ugovora u oblasti sloboda i prava u Republici Srbiji mogla neposredno primeniti ili ne. Ovo pitanje ticalo se, kao što je već pomenuto, pre svega, primene Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, koja je u odnosu na Srbiju (i Crnu Goru) stupila na snagu, odnosno počela pravno da deluje ***3. januara 2004. godine***. Po našem viđenju, u odgovoru na ovo pitanje imalo se postupati na način kako se postupalo u Državnoj zajednici (kao celini ali i u svakoj njenoj državi članici) nakon stupanja na snagu Ustavne povelje, odnosno na način kako je to bilo utvrđeno u odredbama čl. 10. i 16. Ustavne povelje. Ovo, pre svega, iz razloga koji su već pomenuti, ali i zbog činjenice što su pomenute odredbe Ustavne povelje koje su opredeljivale odnos međunarodnog i nacionalnog prava neposredno primenjivane nešto više od tri godine i na teritoriji Srbije, ili bolje rečeno, što su u tom periodu ove odredbe proizvodile pravno dejstvo i u pravnom poretku Srbije. Vraćanje na stanje pre donošenja Ustavne povelje u ovom segmentu, značilo bi «vraćanje unazad». S obzirom na sadržinu Evropske konvencije, ali i drugih međunarodnih ugovora koji su obavezivali Republiku Srbiju u oblasti sloboda i prava, to bi imalo za posledicu «umanjenje dostignutog nivoa ljudskih prava» u nas, što bi bilo suprotno opšteprihvaćenim načelima i principima međunarodnog prava, a to ne bi bilo ni primereno statusu koji je Republika Srbija stekla na temelju člana 60. Ustavne povelje, kao sledbenik državne zajednice Srbija i Crna Gora. Naime, kao nosilac kontinuiteta na međunarodnom planu Republika Srbija je stekla ne samo pravo članstva u međunarodnim organizacijama (pa time i u Savetu Evorpe), već je nasledila i obavezu poštovanja akata međunarodnog prava koji su doneti u okviru tih organizacija, i to upravo na onaj način kako je to činjeno i u državi prethodnici, odnosno Državnoj zajednici.

## 4. ODNOS USTAVA SAVREMENE SRBIJE PREMA EVROPSKIM INTEGRACIJAMA

S obzirom na pomenuta rešenja Ustavne povelje i u njoj jasno izraženu političku orijentaciju Srbije u pogledu evropskih integracija, s pravom se

postavlja pitanje da li je u novom Ustavu Srbije utvrđen i odgovarajući pravni okvir za ostvarivanje tog opredeljenja.

Važeći Ustav Srbije, za razliku od Ustavne povelje, nema odredaba u kojima se izričito izražava opredeljenje Srbije ka evropskim integracijama, niti se izričito pominje Evropska unija. Međutim, to ne znači da Ustav ne sadrži odredbe koje pružaju pravni osnov za učešće Srbije u evropskim strukturama, odnosno odredbe koje jasno utvrđuju principe koji su od značaja za odnose Republike Srbije sa međunarodnim organizacijama i za dejstva akata i odluka tih organizacija u njenom pravnom poretku. Već u članu 1. Ustava, u kojem se utvrđuju temeljni principi na kojima se zasniva ustavni sistem države Srbije, ustavotvorac na određen način izražava "privrženost" Republike Srbije evropskim principima i vrednostima. Naime, definišući državu Srbiju, Ustav je utvrdio da je Srbija "država srpskog naroda i svih građana koji u njoj žive, zasnovana na vladavini prava i socijalnoj pravdi, načelima građanske demokratije, ljudskim i manjinskim pravima i slobodama i ***pripadnosti evropskim principima i vrednostima".*** Pored toga, među osnovnim načelima Ustava ( član 16), našla su se i ustavna jemstva na kojima se imaju temeljiti međunarodni odnosi Republike Srbije, kao i odredbe kojima je opredeljeno mesto međunarodnog prava u pravnom poretku zemlje. Tako iz člana 16. Ustava porizlazi: ***prvo,*** da spoljna politika Republike Srbije počiva na opštepriznatim principima i pravilima međunarodnog prava: ***drugo,*** da su opšteprihvaćena pravila međunarodnog prava i potvrđeni međunarodni ugovori ***sastavni deo*** jedinstvenog pravnog poretka Republike Srbije; ***treće***, da se opšteprihvaćena pravila međunarodnog prava i potvrđeni međunarodni ugovori ***neposredno primenjuju*** (znači svi međunarodni ugovori - a ne samo oni koji se odnose na slobode i prava);[12] ***četvrto***, da potvrđeni međunarodni ugovori ***moraju biti u skladu*** s Ustavom. I u delu Ustava posvećenom ***"Ustavnosti i zakonitosti,"***odnosno u odredbama člana 194. Ustava koji nosi naziv "Hijerarhija domaćih i međunarodnih opštih pravnih akata" stoji da su potvrđeni međunarodni ugovori i opšteprihvaćena pravila međunarodnog prava deo pravnog poretka Republike Srbije, te da potvrđeni međunarodni ugovori "ne smeju biti u suprotnosti s Ustavom", a da zakoni i drugi opšti akti u Republici

12 S obzirom na rešenja u članu 16. Ustava, nesporno je da se, u pogledu primene međunarodnog prava, Ustav Srbije u osnovi opredelio za tzv. monističku koncepciju, mada u stvarnosti nema čistih koncepcija. Naime, činjenica je da se ni monistički ni dualistički pristup u praksi savremenih evropskih država ne sprovodi kozistentno, već te države u pogledu različitih izvora međunarodnog prava najčešće primenjuju pojedine elemente obeju koncepcija. O ovim koncepcijama vidi detaljno Daniel P. O Connell, The Relationship Betveen International Law and Municipal Law, 48 ***Geo. L.J.*** (1960), 431. et seq.

Srbiji "ne smeju biti u suprotnosti sa potvrđenim međunarodnim ugovorima i opšteprihvaćenim pravilima međunarodnog prava".[13]

Dakle, ustavotvorac je u odredbi o neposrednoj primeni međunarodnog prava i o "nadzakonskoj snazi međunarodnih ugovora" eksplicitan. Unoseći odredbe o neposrednoj primeni opšteprihvaćenih pravila međunarodnog prava i potvrđenih međunarodnih ugovora, Ustav je otklonio već pomenutu "manjkavost Ustavne povelje" koja je neposrednu primenu međunarodnog prava vezivala samo "za odredbe međunarodnih ugovora o ljudskim i manjinskim pravima i građanskim slobodama". Ova ustavna rešenja su bitne pravne pretpostavke za ostvarivanje prava i obaveza Republike Srbije kao članice Saveta Evrope, (pre svega u pogledu primene i izvršavanja Evropske konvencije i odluka Evropskog suda za ljudska prava), a potom i za ostvarivanje evropske orijentacije Republike Srbije na putu ka članstvu u Evropskoj uniji. Uz to, ova ustavna rešenja olakšaće potonju primenu prava Evropske unije, ali i primenu doktrine Suda evropskih zajednica "o nadređenosti, neposrednoj primeni i neposrednom dejstvu Evropskog prava u zemljama članicama", kao i o neposrednoj primeni odredaba ugovora koje Evropska unija zaključuje sa zemljama koje nisu njene države članice.

Kako bi se u stvarnosti obezbedio mir i harmonija između pravnih akata u pravnom sistemu Srbije, a posebno skladan odnos između unutrašnjeg i međunarodnog prava, Ustavom je kontrola tih odnosa poverena Ustavnom sudu. Tako će, Ustavni sud, pored ostalog u okviru svoje nadležnosti, saglasno članu 167. stav 1. tač. 1. i 2. Ustava nadzirati i : (1) "saglasnost zakona i drugih opštih akata sa Ustavom, opšteprihvaćenim pravilima međunarodnog prava i potvrđenim međunarodnim ugovrima"; (2) "saglasnost potvrđenih međunarodnih ugovora s Ustavom". Ove odredbe u suštini slede rešenja sadržana u već pomenutim odredbama Ustava o mestu međunarodnih ugovora (čl. 16. i 194), pa je sasvim logično da se u nadležnosti Ustavnog suda Srbije, kao čuvara ustavnosti i zakonitosti i garanta zaštite osnovnih ljudskih sloboda i prava, utvrde i rešenja koja će ovom Sudu omogućiti ostvarivanje njegove ustavne uloge. Ostvarivanje nadležnosti ovog suda da odlučuje o usklađenosti "prava", tj. "zakonodavstva" Republike Srbije sa potvrđenim i objavljenim međunarodnim ugovoroma, Ustavom nije biliže uređivano. No,

13 Ukazujemo da postoji određena neujednačenost rešenja utvrđenih u odredbama čl. 16. i 194. Ustava o odnosu međunaronog i unutrašnjeg prava, a koja može izazivati određene dileme i sporenja u praksi, kako pri zaključivanju tako i pri izvršavanju međunarodnih ugovora, ali i u postupku ocene njihove međusobne usklađenosti pred Ustavnim sudom Srbije. Vid. o tome opširnije B. Nenadić, Organizacija i nadležnosti Ustavnog suda - u svetlu novog Ustava Republike Srbije, ***Pravni informator***, Beograd, 2007. godine, broj 3, str. 5. i d.

mišljenja smo da se ova pitanja mogu urediti i zakonom o Ustavnom sudu, te da ta zakonska rešenja za svoju polaznu osnovu mogu imati ona rešenja Ustava koja se odnose na ocenu usklađenosti zakona i drugih propisa s Ustavom (kako u pogledu postupka odlučivanja, tako i u pogledu odluka Suda i njihovog dejstva). Naime, ovde se u suštini radi o "istovetnoj vrsti posla" - kontroli usaglašenosti pravnih akata niže pravne snage sa aktima više pravne snage.

I dok u ostvarivanju nadležnosti Ustavnog suda da vrši kontrolu (ocenu) usklađenosti domaćeg zakonodavstva sa opšteprihvaćenim pravilima međunarodnog prava i međunarodnim ugovorima ne bi trebalo da se javljaju posebne teškoće, takvu ocenu za sada ne bi mogli dati u pogledu ostvarivanja nadležnosti Ustavnog suda da ceni "ustavnost" potvrđenih međunarodnih ugovora. Naime, u vezi s ovom nadležnošću Ustavnog suda, otvara se jedna krupna dilema: kada to zapravo Ustavni sud može (i treba) da vrši kontrolu saglasnosti jednog međunarodnog ugovora s Ustavom. Da li je to samo kontarola ***a posteriori,*** što bi iz jezičkog značenja odredbe člana 167. stav 1. tačka 2. Ustava proizlazilo ili ta kontrola može biti i kontrola ***a priori***. Kada je reč o ovom vidu ustavnosudske kontrole, mora se imati u vidu pravna priroda i karakter međunarodnih ugovora kao pravnih akata, te da nam je dobro znano da se odredbe međunarodnih ugovora "mogu menjati i ukidati samo na način i pod uslovima koji su njima utvrđeni ili saglasno opštim pravilima međunarodnog prava". Otuda se, kao važno, postavlja i pitanje kakav bi karakter i dejstvo imale odluke Ustavnog suda donete u ovom sporu, s obzirom na to da su odluke Ustavnog suda «opšteobavezne, izvršne i konačne», tj. da li bi ove odluke dejstvovale na odredbe međunarodnih ugovora ili na odredbe Ustava. Iz Ustava sledi da bi se i u ovom slučaju radilo o odluci Ustavnog suda kojom bi se utvrdila nesaglasnost nižeg akta u pravnom poretku Republike Srbije - u ovom slučaju potvrđenog međunarodnog ugovora, sa višim pravnim aktom - u ovom slučaju Ustavom. Međutim, po našem mišljenju, to ne mora (i ne može) da znači da bi odluka Ustavnog suda u ovoj vrsti spora mogla ukinuti pravna pravila, odnosno pojedine odredbe međunarodnih ugovora, niti da bi ta odluka mogla da menja međunarodne obaveze koje je Republika Srbija preuzela. U suprotnom, takve odluke vodile bi međunarodnoj odgovornosti države Srbije. Međutim, sasvim je drugo pitanje da li bi takva odluka Ustavnog suda mogla sprečiti primenu neustavnih odredaba međunarodnog ugovora u unutrašnjem pravnom poretku Republike Srbije.

U vezi sa pomenutom nadležnošću Ustavnog suda nameće se i pitanje da li se ova ustavnosudska kontrola u suštini odnosi samo na kontrolu zakona o potvrđivanju, odnosno ratifikaciji međunarodnog ugovora (a što se, iz jezičkog značenja navedene ustavne norme teško može zaključiti). Međutim, ukoliko bi preovladalo takvo stanovište (uz sve rezerve), i u tom slučaju bi se nametnulo

novo pitanje - da li bi Ustavni sud pri tom cenio samo formalnu ili pak formalnu i materijalnu ustavnost zakona o potvrđivanju međunarodnog ugovora.[14] I dok ocena formalne ustavnosti ovog zakona ne bi u suštini izazivala veće probleme, to se ne bi moglo reći za materijalnu ocenu ustavnosti. Ukoliko bi cenio njegovu materijalnu ustavnost, to bi značilo da bi Sud morao ući u ocenu i odredaba međunarodnog ugovora, jer u našoj zakonodavnoj praksi međunarodni ugovor u nomotehničkom pogledu, čini sastavni deo zakona o njegovom potvrđivanju, odnosno ratifikaciji.

U Ustavu nema posebnih odredaba o tome ko i kada može pokrenuti postupak ustavnosudske ocene saglasnosti međunarodnog ugovora s Ustavom, pod kojim uslovima, kako teče postupak ocene, a posebno kakvo je dejstvo odluke Ustavnog suda i sl. Realizovanje ove nadležnosti Ustavnog suda traži i odgovarajuća posebna postupovna pravila prilagođena karakteru Ustavom utvrđenog odnosa između Ustava i potvrđenih međunarodnih ugovora, kao i prirodi i karakteru međunarodnih ugovora. Naime, ovaj postupak bi u osnovi mogao da teče sledstveno postupovnim pravilima o oceni ustavnosti bilo kog zakona, ali uz nužne specifičnosti ustanovljene prevashodno u pogledu dejstva odluka Suda u ovom sporu. Uređivanje ovih pitanja Ustav je prepustio zakonodavcu.

Bilo bi svrsishodno da se prethodna kontrola ustavnosti međunarodnih ugovora i u praksi Ustavnog suda Srbije "prihvati", tim pre što u Ustavu ne postoje nepremostive prepreke za takvo delanje Suda. Naprotiv, mišljenja smo, da se bez bilo kakvih ustavnopravnih smetnji, zakon o potvrđivanju međunarodnih ugovora, kao i svaki drugi zakon može podvrći kontroli ustavnosti ***a priori***. Tako realizovana nadležnost Ustavnog suda bila bi u skladu sa prirodom odnosa koji se na međunarodnom planu uspostavljaju između suverenih država, odnosno karakterom i prirodom međunarodnih ugovora.

Kada su u pitanju ***ljudske slobode i prava*** novi Ustav Srbije uneo je značajne garancije i jemstva. Pomenućemo samo ona ustavna rešenja koja svojom sadržinom predstavljaju temeljne odredbe koje treba da obezbede ispunjenje evropskih standarda u domenu ljudskih sloboda i prava - standarde koji se podrazumevaju u zemljama članicama Saveta Evrope, a napose od strane onih zemalja koje su kandidati za članstvo u Evropskoj uniji. Ustav je tako u veoma velikom broju odredaba[15] zajamčio (utvrdio): ***prvo***, veoma široku i vrlo detaljnu

14 Prema usvojenom stanovištu bivšeg Saveznog ustavnog suda (SFRJ), ustavni sud u ovom sporu, ne odlučuje o ustavnosti - neustavnosti međunarodnog ugovora, već formalno pravno o ustavnosti ili neustavnosti zakona kojim je taj ugovor ratifikovan, odnosno potvrđen.

15 Više od jedne trećine od ukupnog broja članova Ustava (Ustav inače ima ukupno 206 članova) posvećeno je ljudskim slobodama i pravima. To je pre svega učinjeno u odredbama čl. 18. do

lepezu ljudskih sloboda i prava, uz posebne garancije prava pripadnika nacionalnih manjina[16]; ***drugo,*** neposrednu primenu odredaba Ustava o ljudskim slobodama i pravima, ali i "neposrednu primenu ljudskih i manjinskih prava zajemčenih opšteprihvaćenim pravilima međunarodnog prava, potvrđenim međunarodnim ugovorima i zakonima;" ***treće,*** da se odredbe o ljudskim i manjinskim pravima "imaju tumačiti u korist unapređenja vrednosti demokratskog društva, saglasno važećim međunarodnim standardima ljudskih i manjinskih prava, kao i praksi međunarodnih institucija koje nadziru njihovo sprovođenje;" ***četvrto,*** da svako ima pravo na sudsku zaštitu ako mu je povređeno ili uskraćeno neko ljudsko ili manjinsko pravo zajamčeno Ustavom, kao i pravo na uklanjanje posledica koje su povredom nastale; ***peto,*** da svako ima pravo da se žalbom obrati Ustavnom sudu kada mu se "pojedinačnim aktom ili radnjom" državnih organa ili organizacija kojima su poverena javna ovlašćenja povređuju ili uskraćuju ljudska ili manjinska prava i slobode zajamčene Ustavom, ako su iscrpljena ili nisu predviđena druga pravna sredstva za njihovu zaštitu"; ***šesto,*** da građani imaju "pravo da se obrate međunarodnim institucijama radi zaštite svojih sloboda i prava zajamčenih Ustavom". Ne umanjujući značaj ustavnih rešenja koja se odnose na prava i slobode, ne može se prenebregnuti činjenica da su pojedine odredbe nomotehnički tako izražene, odnosno formulisane da zbog svoje evazivnosti, nepreciznosti ili pak nepotpunosti zahtevaju tumačenje i izazivaju sporenja o njihovom pravom značenju, što sve može uticati na njihovu primenu.

Sledstveno navedenom, u ostvarivanju zaštite ljudskih sloboda i prava nadležni organi Srbije, a posebno sudovi i Ustavni sud, će ubuduće i te kako morati dobro "zagledati" ne samo u Ustav Srbije, već i u Evropsku konvenciju o zaštiti ljudskih prava i osnovnih sloboda, kao i praksu i stanovišta Evropskog suda za ljudska prava, a potom naravno i u evropsko pravo i stavove i praksu Suda evropskih zajednica. Otuda je i sasvim osnovano što je ustavotvorac izričito utvrdio ulogu ***sudstva i tužilaštva*** u primeni međunarodnog prava, nezavisno od toga što odredbe čl. 16. i 18. Ustava o neposrednoj primeni potvrđenih međunarodnih ugovora obavezuju sve organe Republike Srbije. Naime, zbog uloge pravosuđa u zaštiti osnovnih ljudskih sloboda i prava,

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81. Drugog dela Ustava koji nosi naziv "***Ljudska i manjinska prava i slobode***". Pored toga, pojedina prava i slobode i njihova jemstva utvrđene su i u više drugih odredaba Ustava, počev od odredaba sadržanih u «Osnovnim načelima»pa nadalje.

16 Stoga se tvrdi da novi Ustav Srbije sadrži sva prava koja jemči ne samo Evropska konvencija, već i drugi međunarodni ugovori i drugi dokumenti u oblasti sloboda i prava. Jedni u ovom vide značajan kvalitet novog Ustava Srbije, dok drugi smatraju da je takvo uređivanje bilo bespotrebno, s obzirom na odredbu člana 18. Ustava, po kojoj se u Republici Srbiji "neposredno primenjuju ljudska i manjinska prava zajemčena opšteprihvaćenim pravilima međunarodnog prava, potvrđenim međunarodnim ugovorima.»

ustavotvorac je posebno utvrdio da sudovi, kao "samostalni i nezavisni organi" sude, ne samo na osnovu Ustava i zakona, već isto tako i na temelju "opšteprihvaćenih pravila međunarodnog prava i potvrđenih međunarodnih ugovora" (član 142. stav 2), odnosno da se "sudske odluke zasnivaju na Ustavu, zakonu, ***potvrđenom međunarodnom ugovoru...*** " (član 145. stav 2). Kada je u pitanju vršenje tužilačke funkcije, u odredbama člana 156. stav 2. Ustava, stoji da javno tužilaštvo vrši svoju funkciju na osnovu "Ustava, zakona i ***potvrđenog međunarodnog ugovora".***

Važno pitanje za delovanje državnih organa Srbije u odnosima koje ona uspostavlja sa evropskim institucijama, pa i za njihovo delovanje u postupku zaključivanja i izvršavanja ugovora koje država Srbija bude zaključivala sa Evropskom unijom, jeste i pitanje njihove ustavne nadležnosti, odnosno ovlašćenja za zaključivanje, potvrđivanje i izvršavanje međunarodnih ugovora, uključujući i one ugovore na temelju kojih Srbija stiče članstvo u određenim međunarodnim organizacijama i zajednicama. Republika Srbija je, po članu 97. stav 1. tačka 1. Ustava, nadležna da uređuje i obezbeđuje "suverenost Republike Srbije, njen međunarodni položaj i odnose sa drugim državama i međunarodnim organizacijama," dok je članom 99. Ustava predviđeno da je Narodna skupština ta koja "potvrđuje međunarodne ugovore kad je zakonom predviđena obaveza njihovog potvrđivanja". Takođe, u članu 108. stavu 2. Ustava utvrđeno je da Narodna skupština može raspisati referendum o pitanjima iz svoje nadležnosti, ali je izričito utvrđeno da "predmet referenduma" ne mogu biti "obaveze koje proizilaze iz međunarodnih ugovora". Prema članu 123. Ustava Vlada Republike Srbije "utvrđuje i vodi politiku" zemlje, a to znači i unutrašnju i spoljnu politiku. Iz iznetog proizlazi da je Vlada, sa svojim ministarstvima, onaj organ Republike Srbije koji je nadležan i odgovoran za pregovaranje i zaključivanje međunarodnih ugovora, a time i onih ugovora koje Srbija bude zaključivala u postupku približavanja Evropskoj uniji. Sledstveno tome i u odredbi člana 25. Zakona o ministarstvima (od 2007. godine)[17] utvrđeno je da "ministarstva u okviru svog delokruga ostvaruju međunarodnu saradnju i staraju se o njenom unapređivanju i obezbeđuju usklađivanje propisa sa prvom Evropske unije".

Dakle, iz svega iznetog sledi da su ustavnopravne pretpostavke za nesmetan proces pridruživanja Republike Srbije Evropskoj uniji sadržane u njenom Ustavu. No, podeljenost na političkoj sceni Srbije i njena otežana međunarodna pozicija (pitanje nerešenog statusa Autonomne Pokrajine Kosovo i Metohija), onemogućava potpunu i bezuslovnu usredsređenost političkih aktera i organa

17 Zakon o ministarstvima ("Službeni glasnik RS", broj 43/07).

vlasti Srbije na optimalno unutrašnje prilagođavanje zahtevima evropskih integracija. Ugovor o stabilizaciji i pridruživanju je jedan veoma složen i obiman ugovor, te Srbija kao buduća potpisnica ovog ugovora koja želi da stekne status pridruženog člana Evropske unije, mora da obavi veliki broj poslova. Među te poslove, za nas pravnike jako važne, spada i usklađivanje zakonodavstva Srbije sa pravom Evropske unije. U tom cilju i u Poslovniku Narodne skupštine utvrđena je obaveza za "predlagače zakona", da po pravilu, moraju navesti u obrazloženju zakona ne samo ustavni osnov, već i osnov u zakonodavstvu Evropske unije i opšteprihvaćenim pravilima međunarodnog prava."[18] Postojanje ove poslovničke obaveze, kao i posebno obrazovanog Odbora za evropske integracije u Narodnoj skupštini,[19] dodatna je garancija implementiranja evropskih principa i vrednosti u unutrašnji pravni poredak Republike Srbije, koji svojom strukturom i sadržinom, a ne samo tekstom pozitivno pravnih akata, mora biti u suštinskom smislu usaglašen sa pravom Evropske unije, odnosno prožet njegovim principima i načelima.

Naravno, evropskom Srbijom se ne postaje samo unošenjem u ustavne i zakonske tekstove normativnih i drugih rešenja koja poznaje savremeno evropsko pravo, već pre svega, obezbeđivanjem u unutrašnjem pravnom poretku Srbije delotvornih pravnih mehanizama i razvijenih i efikasnih institucija za ostvarivanje i zaštitu osnovnih vrednosti na kojima se temelje demokratski sistemi. Od malog značaja će biti odredbe novog Ustava koje proklamuju privrženost Srbije evropskim vrednostima i principima, odnosno nadzakonsku snagu i neposrednu primenu međunarodnih ugovora, ako se ne stvore uslovi, odnosno nužne pretpostavke za njihovo izvršavanje, tj. ako se odredbe ovih akata u realnosti ne budu ostvarivale zbog odsustva efikasnih pravnih mehanizama i razvijenih demokratskih institucija u pravnom poretku Srbije.

18 Vid. član 136. stav 3. Poslovnika Narodne skupštine Republike Srbije ("Službeni glasnik RS", broj 56/05). Takođe, u Narodnoj skupštini (9. novembra 2005. godine) otvoreno je "Odelenje za usklađivanje propisa sa zakonodavstvom Evropske unije i preporukama Saveta Evrope".

19 U članu 69. Poslovnika utvrđeno je da ovaj Odbor "razmatra predlog zakona, drugih propisa i opštih akata sa stanovišta njihove prilagođenosti propisima Evropske unije i savetima Evrope". Osim toga, Odbor razmatra i "planove, programe, izveštaje i informacije o postupku stabilizacije i pridruživanja Evropskoj uniji, prati realizaciju strategije pridruživanja i predlaže mere i pokreće inicijative za ubrzavanje realizacije strategije pridruživanja u okviru nadležnosti Narodne skupštine, predlaže mere za uspostavljanje opšteg, nacionalnog sporazuma o strategiji pridruživanja evropskim integracijama i razvija međunarodnu saradnju sa odborima parlamenata drugih zemalja u cilju boljeg razumevanja procesa pridruživanja i integracije u Evropsku uniju".

## 5. USTAV SRBIJE I "INTEGRACIONA" KLAUZULA

Pristupanje Evropskoj uniji donosi državi koja joj pristupa, suštinski drugačiji položaj od onog koji proističe iz učlanjenja u neku klasičnu međunarodnu organizaciju. Činom pristupanja Evropskoj uniji (koja je danas bliža složenoj državi nego klasičnoj međunarodnoj organizaciji) država članica se odriče "ekskluzivnog vršenja nekih svojih suverenih prava", odnosno nadležnosti koja postaju isključiva kompetencija Unije, dok vršenje nekih nadležnosti deli sa Unijom. Ozbiljnost ovog čina zahteva posebno ustavno ovlašćenje za njegovo preduzimanje. Ovo ovlašćenje je u savremenim evropskim državama - članicama Evropske unije, po pravilu ***materia constitutionis***, tj. pitanje koje se utvrđuje i formuliše u ustavu u obliku tzv. "integracione klauzule". Analiza ustavne prakse država članica Unije pokazuje da su one postupale različito u pogledu pripreme ustavnog osnova za pristupanje evropskim zajednicama, odnosno Evropskoj uniji, zavisno od sopstvene (nacionalne) ustavne tradicije ali i od karaktera i stepena evropske integracije.

Na pitanje da li u Ustavu Srbije postoji ustavni osnov koji dopušta prenošenje nadležnosti države Srbije na regionalne, nadnacionalne ili međunarodne organizacije i zajednice, odnosno da li nadležni organi Srbije u Ustavu imaju ovlašćenje da odluče da prenesu "deo nadležnosti Republike Srbije na pomenute institucije", teško se može dati jednoznačan odgovor. U Ustavu Srbije nema izričitog rešenja o tome može li se deo nadležnosti Republike Srbije delegirati i koji je to državni organ vlastan da odluči o punopravnom članstvu Srbije u međunarodnoj strukturi kakva je Evropska unija - članstvu koje, kao što je već rečeno, pored ostalog, podrazumeva i da se "deo nadležnosti države članice delegira na njene organe i institucije", odnosno da se "deo suvereniteta država članica prenese na Uniju", a potom da pravo Evropske unije bude neposredno primenjivano na teritoriji države članice, a odluke njenih institucija poštovane i izvršavane.

Nepostojanje izričite «integracione» klauzule u Ustavu Srbije, kao što smo već konstatovali, ne čini prepreku u procesu stabilizacije i pridruživanja Srbije Evropskoj uniji. Odredbe Ustava koje uređuju međunarodne odnose Republike Srbije, nadležnosti njenih organa i primenu međunarodnog prava svojom celinom omogućavaju u ustavnom smislu proces pridruživanja Srbije Evropskoj uniji. Međutim, drugo je pitanje da li je moguće da Srbija pristupi u punopravno članstvo Evropske unije, bez revizije njenog Ustava, a ako ne može da li bi se o unošenju "integracione" klauzule odlučivalo samo u Narodnoj skupštini ili i na referendumu. Naime, nije sporno da Ustav Srbije ne sadrži izričito "integracionu" klauzulu, odnosno rešenje u kome se utvrđuje ustavni osnov za mogućnost prenosa pojedinih nadležnosti Republike Srbije na

međunarodne i nadnacionalne organizacije. Ali, ima mišljenja da se pomenuta odredba čl. 97. tačka 1, Ustava, prema kojoj je Republika Srbija nadležna da uređuje i obezbeđuje "njen međunarodni položaj i odnose sa drugim državama i međunarodnim organizacijama" može smatrati "mogućim pravnim osnovom za prenos određenih nadležnosti organa Republike Srbije na međunarodne ili supranacionalne organizacije," mada bi postojanje eksplicitne odredbe u Ustavu bilo poželjno.[20] Mi stojimo na stanovištu, da bi, po prirodi stvari, zbog svog značaja "integrativna" klauzula trebalo da bude izričito sadržana u Ustavu. Svaka promena Ustava Srbije podleže proceduri koja je utvrđena u samom Ustavu. U zavisnosti o kom pitanju se radi, Ustavom su predviđene dve procedure za usvajanje ustavne promene. Narodna Skupština usvaja akte o promeni Ustava dvotrećinskom većinom od ukunog broja narodnih poslanika, s tim što Skupština može odlučiti da taj akt i građani potvrde na republičkom referendumu (tzv. fakultativni ustavotvorni referendum). Međutim, na temelju člana 203. stav 7. Ustava Narodna skupština je dužna da akt o promeni ustava stavi na republički referendum radi potvrđivanja, ako se promena Ustava odnosi na: "preambulu Ustava, načela Ustava, ljudska i manjinska prava i slobode, uređenje vlasti, proglašenje ratnog i vanrednog stanja, odstupanje od ljudskih i manjinskih prava u vanrednom i ratnom stanju i postupak za promenu Ustava" (tzv. obavezni ustavni referendum). Kada se akt o promeni ustava stavi na potvrđivanje, građani se na referendumu izjašnjavaju najkasnije u roku od 60 dana od dana usvajanja akta o promeni Ustava, a promena Ustava je usvojena ako je za promenu na referendumu glasala većina izašlih birača.

S obzirom na opštost odredbe član 203. stav 7. Ustava nije sasvim jasno da li bi se ustavne promene, kojima bi se omogućilo prenošenje, odnosno delegiranje "dela nadležnosti Republike Srbije na međunarodne organizacije, odnosno Evropsku uniju", iznosile na referendum ili ne. Odgovor na to pitanje uveliko bi zavisio od sadržine tzv. "integracione" klauzule, odnosno njenog mesta u ustavnom tekstu. Ako bi se vršila dopuna neke od odredaba navedenih u članu 203. stav 7. Ustava, tada bi promena Ustava kojom bi se unosila tzv. integraciona klauzula obavezno iznosila na referendum (npr. ako bi se ta klauzula unela u načela Ustava ili pak u odredbe o uređenju vlasti, odnosno u odredbe o pojedinim organima te vlasti (pre svega mislimo na Narodnu skupštinu), a ako bi se dopuna odnosila na neke druge odredbe van onih navedenih u članu 203. stav 7. Ustava, referendum ne bi bio obavezan ( npr. ako bi se ova klauzula unela kroz dopunu odredbe člana 97. Ustava u kojoj su

20 Cf. Opinion on the Constitution of Serbia, Adopted by the Venice Commission at its 70th plenary session (Venice, 17-18 March 2007.) sur le site internet: http://www.venice.coe.int/docs2007/CDL-AD (2007)004-e.asp

taksativno utvrđene nadležnost Republike Srbije, za šta po našem mišljenju ima osnova). Međutim, s obzirom na utvrđenu većinu potrebnu za prihvatanje ustavne promene na referendumu (većina izašlih birača), to referendum nije više tako krupna prepreka stupanju na snagu ustavne promene (kao po ustavu od 1990. godine) koja bi prethodno bila usvojena dvotrećinskom većinom u Narodnoj skupštini.

Pošto je Republika Srbija pravno, ekonomski i vremenski još "na putu" kandidovanja za prijem u Evropsku uniju, u procesu koji prethodi tom činu realno je očekivati i reviziju njenog Ustava. Kada će se i da li će se konkretno pristupiti i izričitom unošenju "integracione" klauzule u tekst Ustava, ili će se njena suština nadomestiti tumačenjem pomenutih odredaba člana 97. Ustava, svakako će zavisiti i od uspešnosti ispunjavanja uslova predviđenih od strane Evropske unije, i s tim u vezi dobijanja izgleda u uspešnost integracije.

## 6. PRIMENA MEĐUNARODNOG PRAVA U DOSADAŠNJOJ PRAKSI USTAVNOG SUDA SRBIJE - VAŽAN ZALOG EVROPSKOJ BUDUĆNOSTI SRBIJE

U svojoj praksi Ustavni sud Srbije je i pre donošenja Ustava od 2006.godine, primenjivao pojedine odredbe međunarodnih ugovora, a pre svega, onih iz domena ljudskih sloboda i prava (npr. odredbe međunarodnih akata o građanskim i političkim pravima, odnosno ekonomskim i socijalnim pravima, a posebno odredbe Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda i dr). To je Sud činio prevashodno, prilikom odlučivanja u sporovima apstraktne kontrole ustavnosti pojedinih zakona. Pri tome, Sud nije vršio ocenu usklađenosti konkretnog zakona isključivo (samo) u odnosu na međunarodni ugovor, već je Sud određene zakone ocenjivao istovremeno u odnosu na Ustav Srbije i u odnosu na potvrđene međunarodne ugovore. Tako je Ustavni sud Srbije u nekoliko svojih odluka u kojima je utvrdio nesaglasnost određenih odredaba zakona s Ustavom, ocenio da te odredbe zakona nisu u skladu ni sa odredbama Ustava ali ni sa odredbama Evropske konvencije, odnosno sa određenim "međunarodnim standardima". Pri tome, u izreci konkretne odluke Ustavni sud nije utvrđivao nesaglasnost zakona sa međunarodnim ugovorima, već je u obrazloženju odluke izražavao stav ili ocenu da osporene odredbe zakona, odnosno zakon u celini nije u skladu ne samo sa Ustavom, već ni sa

pojedinim odredbama međunarodnih ugovora ili pak s opšteprihvaćenim pravilima međunarodnog prava.[21]

Mada u vreme postojanja državne zajednice, odnosno Suda Srbije i Crne Gore, Ustavni sud Srbije nije bio nadležan da ocenjuje usklađenost prava Republike Srbije sa potvrđenim međunarodnim ugovorima i sporazumima, treba konstatovati da se ovaj sud i u tom periodu, u obrazloženju nekoliko svojih odluka pozivao i na odredbe međunarodnih ugovora i na opšteprihvaćena pravila međunarodnog prava. Ta rešenja Ustavni sud je imao u vidu naročito prilikom interpretacije i tumačenja osnovnih načela i principa Ustava (vladavine prava, podele vlasti, nezavisnosti sudstva, itd.), a potom odredaba o slobodama i pravima. Tako su odredbe Evropske konvencije ili bolje reći načela i principi utvrđeni Konvencijom, kao i praksa i stavovi Evropskog suda za ljudska prava, služili Ustavnom sudu Srbije kao "dodatne alatke" u zauzimanju stavova po određenim spornim ustavnopravnim pitanjima. U pojedinim odlukama koje je donosio Ustavni sud u vršenju apstraktne kontrole ustavnosti zakona, Sud je odredbe Ustava interpretirao (tumačio) upravo na način kako je to utvrđeno u odredbama Konvencije, odnosno kako je pojedine odredbe Konvencije u praksi tumačio Evropski sud za ljudska prava. Bilo je slučajeva u kojima bi se odluke Ustavnog suda "teže obrazlagale" da se Sud pri tumačenju Ustava Republike Srbije i utvrđivanju svog stava, odnosno odlučivanja o spornim ustavnopravnim pitanjima nije "poslužio" i načelima i principima utvrđenim u Konvenciji.

Treba konstatovati i to, da je Ustavni sud Srbije u praksi imao u vidu pojedine principe i načela Evropske konvencije i pre njene ratifikacije od strane Državne zajednice, ali tada, kao «opšta načela koja priznaju civilizovani narodi» (V.

21 Videti primera radi odluke Suda: Odluku broj IU-232/03 od 18. marta 2004. godine, u kojoj je Sud odlučivao o ustavnosti člana 70. Zakona o izmenama i dopunama Zakona o sudijama, kojim je, po oceni Suda, bio umanjen dostignuti nivo samostalnosti i nezavisnosti sudova; Odluku broj IU-110/04. od 15. jula 2004. godine, u kojoj je Sud odlučivao o ustavnosti čl. 8. i 13. Zakona o izmenama i dopunama Zakona o izboru narodnih poslanika, odnosno o odredbama kojima su ustanovljene posebne mere u cilju obezbeđivanja rodne (polne) ravnopravnosti i zastupljenosti predstavnika nacionalnih manjina u Narodnoj skupštini; Rešenje broj IU-201/04. od 7. oktobra 2004. godine, kojim je Sud odlučivao o ustavnosti odredbe člana 2. stav 4. Zakona o okupljanju građana, a koja se odnosila na način ostvarivanja slobode okupljanja; Odluku broj IU-193/04. od 28. septembra 2006. godine, u kojoj je Sud odlučivao o ustavnosti odredbe člana 28. Zakona o izmenama i dopunama Zakona o javnom tužilaštvu, kojom su bila ograničena prava po osnovu rada zamenicima javnog tužioca koji nisu bili ponovo izabrani.

Dimitirijević), odnosno kao opšteprihvaćena pravila međunarodnog prava koja priznaju savremene evropske države. [22]

Svoje stanovište o međunarodnim ugovorima kao aktima "nadzakonske" pravne snage u našem pravnom sistemu, Ustavni sud je izrazio i u više pisama upućenih Narodnoj skupštini. Tako je Ustavni sud, saglasno članu 62. Zakona o postupku pred Ustavnim sudom i pravnom dejstvu njegovih odluka,[23] ukazivao Skupštini da je u važećem zakonodavstvu Republike Srbije izostalo uređivanje pojedinih pitanja, te da su u našem pravnom poretku prisutne određene pravne praznine koje bi zakonodavac trebalo da "popuni" polazeći i od međunarodnih i evropskih standarda u tim oblastima. To je Ustavni sud učinio i u svojim pismima koja je u periodu od marta 2003. do 2006. uputio Narodnoj skupštini, a koja su se odnosila na: slobodne izbore i zaštitu izbornog prava; pravo na delotvorno pravno sredstvo; pravo na pravično suđenje; pravo na suđenje u razumnom roku; ravnopravnost polova i dr.

Dakle, kratko rečeno, Ustavni sud Srbije je u poslednjih nekoliko godina prilikom donošenja odluka o ustavnosti pojedinih zakona polazio i od pravila međunarodnog prava, a posebno Evropske konvencije. Ove odluke Suda, svojom sadržinom doprinosile su, pre svega, utemeljenju vladavine prava u Republici Srbiji, afirmaciji principa podele vlasti, nezavisnosti sudstva i tužilaštva i potpunijoj zaštiti osnovnih ljudskih sloboda i prava. Ako je suditi po odnosu Ustavnog suda Srbije prema primeni Evropske konvencije i drugih međunarodnih ugovora, može se reći da je ovaj sud bio "prijateljski nastrojen" prema evropskim principima i vrednostima, i da se nije pokazao kao "konzervativni čuvar" nacionalnog suvereniteta.

I na kraju, čini nam se važnim ukazati na dilemu koja je nastala po prestanku Državne zajednice, a u vezi sa ostvarivanjem ustavnosudske kontrole

22 Videti tako: Rešenje broj IU-166/03, od 5. maja 2003. godine, kojim je Sud utvrdio meru obustave izvršenja pojedinačnih akata i radnji koje su preduzete na osnovu čl. 15.v, 15.g, i 15.d. Zakona o organizaciji i nadležnosti državnih organa u suzbijanju organizovanog kriminala; Odluku broj IU-214/02. od 4. novembra 2003. godine, kojom je Sud odlučivao o ustavnosti i zakonitosti Uredbe o organizovanju i ostvarivanju verske nastave i nastave alternativnog predmeta u osnovnoj i srednjoj školi; Rešenje broj IU-480/03. od 29. decembra 2003. godine, kojim je Sud odlučivao o ustavnosti odredaba člana 81. i 82. Zakona o uređenju sudova, i pri tom doneo privremenu meru s pozivom na Ustav Srbije, ali i uz ocenu da je spornim odredbama Zakona povređena i odredbe Konvencije o pravu na delotvorni pravni lek.

23 Vid. član 62. Zakona o postupku pred Ustavnim sudom i pravnom dejstvu njegovih odluka ("Službeni glasnik RS", broj 32/91), u kome je utvrđeno da Ustavni sud "obaveštava Narodnu skupštinu o stanju i problemima o ostvarivanju ustavnosti i zakonitosti u Republici, daje mišljenje i ukazuje na potrebu donošenja i izmenu zakona i preduzima druge mere radi zaštite ustavnosti i zakonitosti".

nadležnosti međunarodnog i domaćeg prava. Ustavni sud Srbije tada se susreo sa pitanjem, da li je Sud nadležan za rešavanje sporova u kojima se traži ocena saglasnosti unutrašnjeg zakonodavstva sa međunarodnim ugovorima, i da li u donošenju svojih odluka ovaj sud može neposredno primeniti odredbe međunarodnog ugovora, s obzirom da Ustavom Srbije ova nadležnost Suda, nije bila utvrđena. Povodom ovih dilema naše stanovište je bilo da je, nakon prestanka Državne zajednice i njenih institucija, Ustavni sud Srbije bio nadležan da vrši ocenu usklađenosti domaćeg zakonodavstva sa međunarodnim ugovorima, te da se pomenuti međunarodni ugovori mogu neposredno primenjivati. Pri zauzimanju ovog stanovišta pošli smo od toga da je mesto međunarodnih ugovora u pravnom sistemu Republike Srbije bilo određeno odredbama čl. 10. i 16. Ustavne povelje, te da nakon prestanka Državne zajednice, država Srbija kao njen pravni sledbenik mesto međunarodnih ugovora u svom ustavnopravnom sistemu nije menjala. Naprotiv, pomenutom Odlukom od 5. juna 2006. godine Narodna skupština je "zatečeno" mesto međunarodnih ugovora u pravnom poretku Republike Srbije, po našoj oceni, i potvrdila. Kako je Ustavom Srbije (član 1.) vladavina prava bila utvrđena kao jedna od tri osnovne vrednosti na kojima se zasnivao ustavni sistem Srbije, a stavom 5. člana 9. Ustava "zaštita ustavnosti i zakonitosti" bila izrekom poverena Ustavnom sudu, to je Ustavni sud bio nadležan i da ceni ne samo usklađenost drugih propisa i opštih akata sa međunarodnim ugovorom, odnosno zakonom o ratifikaciji međunarodnih ugovora, već i usklađenost zakona Republike Srbije sa međunarodnim ugovorima. U zemlji koja se temelji na principu vladavine prava (koja podrazumeva i usklađenost akata u pravnom poretku zemlje), ta kontrola se od strane Ustavnog suda nije mogla isključiti jer je pravni poredak Republike Srbije bio jedinstven i činili su ga kako domaći, tako i međunarodni izvori prava. Svaki od tih izvora morao je imati svoje mesto u hijerarhiji pravnih akata, pa tako i potvrđeni međunarodni ugovori. O usklađenosti akata u pravnom poretku Republike Srbije, u kome niži pravni akti moraju biti usklađeni s višim pravnim aktima, po Ustavu brinuo se Ustavni sud.

## 7. UMESTO ZAKLJUČKA

S obzirom na sadržinu rešenja savremenog Ustava Republike Srbije, nije sporno da Ustav pruža dovoljan pravni osnov nadležnim organima države Srbije za vođenje pregovora i zaključivanje sporazuma o stabilizaciji i pridruživanju Evropskoj uniji, a potom i ustavni osnov za ispunjenje obaveza iz tog ugovora, kao i drugih ugovora koje Republika Srbija bude zaključivala sa Evropskom unijom u ovom procesu. U tom pogledu posebno su važne one odredbe Ustava

koje utvrđuju mesto međunarodnih ugovora u pravnom sistemu Srbije i njihovu neposrednu primenu. U pravnom poretku Republike Srbije ***de constitutione lata*** potvrđeni međunarodni ugovori predstavljaju deo jedinstvenog pravnog poretka Republike Srbije, u kome je Ustav "najviši pravni akt", a odmah iza Ustava, po pravnoj snazi, su potvrđeni međunarodni ugovori, sa kojima moraju biti usaglašeni svi zakoni i drugi opšti akti doneti u Republici.

Pored navedenog, odredbe svih međunarodnih ugovora koji obavezuju Republiku Srbiju, po Ustavu se imaju neposredno primenjivati od strane svih organa vlasti-zakonodavne, izvršne i sudske. Naravno, i uporedna praksa potvrđuje da se neposredno mogu primeniti samo one odredbe međunarodnih ugovora koje nisu uslovljene u pogledu izvršenja ili dejstva usvajanjem ili postojanjem bilo kakvog drugog pravnog akta države Srbije. To su zapravo one odredbe međunarodnih ugovora koje su (kako to kaže i Sud evropskih zajednica) "pravno potpune", odnosno "pravno perfektne i sposobne" da proizvedu direktno dejstvo.

Bez obzira na početne teškoće koje objektivno postoje kada se u jednoj zemlji otpočne sa neposrednom primenom brojnih međunarodnih ugovora (za razliku od ranijeg perioda kada su primenjivani samo oni međunarodni ugovori koji su "implementirani" u domaće zakonodavstvo), uvidom u odluke redovnih sudova, a posebno Ustavnog sud Srbije, pouzdano se može konstatovati, da se ovi organi ni do sada nisu ustezali kada je u pitanju neposredna primena pojedinih odredaba međunarodnih ugovora, kao i opšteprihvaćenih pravila međunarodnog prava. Nesporno je da se brojni međunarodni ugovori, odnosno brojne odredbe ovih akata iz nomotehničkih razloga ne mogu primenjivati neposredno, nego je nužna njihova implementacija u unutrašnji pravni poredak. Uz to, pitanje izvršavanja i neposredne primene odredaba međunarodnih ugovora u određenoj zemlji, kao i izvršavanje preuzetih obaveza koje proizlaze iz njenog članstva u međunarodnim i nadnacionalnim organizacijama, nije jedino stvar ustavne proklamacije, niti pak samo pitanje formulacije i sadržine svake pojedine odredbe tih ugovora, niti pak odnosa pojedinih nacionalnih institucija prema obavezama koje proizilaze iz navedenog članstva, već uveliko i stvar "snage" i "mogućnosti" države da u potpunosti obezbedi izvršavanje preuzetih obaveza.

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ČLANCI I RASPRAVE

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# EUROPEAN DIRECTION OF THE NEW CONSTITUTION OF THE REPUBLIC OF SERBIA[1]

***Key words: constitution, Republic of Serbia, euroepan approach, integration clause, direct application, international law, European Union.***

## 1. A FEW GENERAL NOTIONS ON THE 2006 CONSTITUTION OF THE REPUBLIC OF SERBIA

By the end of 2006, the Republic of Serbia got a new Constitution, after almost six years worth of discussions and attempts to achieve the "onerous" majority and high level of consent in the Serbian parliament necessary for adoption and/or amendment of the country's top law. Outstanding firmness and related longevity of the previous Constitution was also provided by the strict

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1 IX Congres International de Droit Constitutionnel Europeen et Compare, Regensburg, 29 – 30 June 2007

procedure for its changing.[2] Reasons for the adoption of the new Constitution were numerous, from those political to those relating to legal and issues of the state. However, closer consideration of these reasons, especially those that relate to political goals of parliamentary parties, which had in a very short timeframe, despite several years of disputing (on the need of adopting a new constitution, its contents, and even on the method of its adoption), agreed on the text of the Constitution and passed it unanimously in the National Assembly, truly is outside the scope of this paper.[3] In fact, due to big policy and ideological differences among the leading parliamentary parties, and under pressure of highly unfavourable international circumstances to Serbia (linked also to the resolution of the future status of Kosovo, ending the cooperation with the International Tribunal in the Hague, etc), what was necessary was a whole array of substantial compromises and mutual concessions so that a consensual draft text of the constitution could be obtained. This certainly reduced its overall quality, yet its adoption was assessed as a step forward to Europe.[4]

Subsequent to the referendum in Montenegro (on 21 May 2006) and the dissolution of State Union of Serbia and Montenegro, the Republic of Serbia has been, after 88 years of being in a status of a constituent state, again re-established as an independent and sovereign state. It is understood ***per se*** that a status change of a state invariably prompts a change of its constitution. Yet, this rule was not confirmed when it comes to the 1990 Serbian Constitution. This Constitution remained "unscathed" despite all the status changes that Serbia endured after the break-up of the former Yugoslav Federation. Continuing its existence in the two-member federal state, and later in the state union, Serbia did not change it constitution in spite of explicit provisions of the (1992) Constitution of the FRY and the (2003) Constitutional Charter of the State Union of Serbia and Montenegro requiring it to do so. It was not until the new Constitution took force, being solemnly promulgated on 8 November 2006, that the 1990 Serbian Constitution ceased to be, having been in force in Serbia as a federal republic of the then SFRY, a federal republic of the FRY, then in Serbia

2 See in more detail S. Vučetić, The new Constitution of Serbia, SURVEY - REPUBLIC OF SERBIA, No. 4. 2006. pg. 23. and D. and R. Marković, Predgovor: Ustav Republike Srbije od 2006. godine - Kritički pogled (Preface: the 2006 Constitution of the Republic of Serbia – A Critical View), published with the text of Constitution, IPD Justinijan, Belgrade, 2006, pg. 10. onward.

3 The text of the Draft Constitution was voted for by all attending deputies [members of parliament] (242 of 250 total) on 30 September 2006. The citizens subsequently confirmed the text of the Constitution on a referendum held on 29 and 30 October 2006, by a majority of 53.04% of voters who are eligible to vote.

4 S. Vučetić, op.cit., pg. 24.

as a state member of the State Union of Serbia and Montenegro, and finally, for a half year in Serbia as an independent state. This fact best speaks of the ***de facto*** role of this Constitution in our country in recent years.

The discussion on what the new things that the 2006 Constitution of Serbia has brought and how much of it is "actually a new legal body", in what aspects it remained "identical" to the Constitution it preceded, what the technical shortcomings in its text are (which by their shear number and contents would surely not make its "life" easy) is not the intent of this paper. The focus of our attention will be only on those constitutional resolutions that are significant in the context of Serbia's European integrations.

## 2. GENERAL OUTLOOK OF THE EUROPEAN DIRECTION OF SERBIA (AND MONTENEGRO) EXPRESSED IN THE 2003 CONSTITUTIONAL CHARTER

Presentation of constitutional hallmarks of contemporary Republic of Serbia that relate to its orientation toward European integrations would not be full without a short retrospection on the determination of the State Union of Serbia and Montenegro in this respect. This determination, which was clearly shown after political changes of 2000, found its normative expression in the numerous provisions of the 2003 Constitutional Charter of the State Union of Serbia and Montenegro (hereinafter: the Constitutional Charter). A retrospection on these provisions seemed to us important for two reasons: ***firstly,*** by the fact that Serbia was a member of that state union that had expressed a clear and unambiguous political orientation toward European integrations, and especially toward the European Union, which was explicitly shown in its constitutional document; and ***secondly***, because the state of Serbia, after the dissolution of the Union, became the Union's legal successor on the international stage.

The Constitution of the Republic of Serbia of 1990, as a constitution of a federal constituency, did not contain provisions on international relations of the Republic of Serbia[5], because at the time of its adoption this issue was a matter to be arranged by the then effective Constitution of the SFRY, followed by the 1992 Constitution of the FRY. Upon reconstitution of the Federal Republic of Yugoslavia, i.e. creation of the State Union of Serbia and Montenegro (in February of 2003), the highest legal act of this State Union – its Constitutional

5 The 1990 Constitution of the Republic of Serbia mentioned international treaties only in Article 73, clause 7, by stipulating in it that the National Assembly shall "ratify international treaties".

Charter – contained numerous provisions significant to the realisation of international relations of Serbia and Montenegro and its constituent states. These were provisions on: objectives of the State Union on the international level; competences of the bodies of the State Union, member states, respectively, in international relations; the procedure of decision-making on memberships of Serbia and Montenegro in international organisations and rights and duties that ensue from those memberships; competences for entering into, execution and ratification of international treaties and agreements; the relations between international and internal law; the constitutional control of compliance of national legislation with the confirmed and published international accords, etc.

Explicit expression of the European direction of the State Union of Serbia and Montenegro seems, upon first glance perhaps even "a bit overstated" [6], did in fact find its place in the Constitutional Charter among the basic goals of this Union. Thus, in Article 3 of the Constitutional Charter it was confirmed that the goals of the State Union of Serbia and Montenegro are "accession into European structures, especially the European Union", followed by "harmonisation of regulations and practices with European and international standards". These principles and standards were also confirmed as "models" for the arrangement of mutual internal relations between Serbia and Montenegro within the State Union. Such a high place of European integrations and the European Union in the constitutional structure of values and objectives of Serbia and Montenegro spoke clearly of the "adherence of the makers of the Constitutional Charter to the new strategic orientation", articulated subsequent to the political changes in Serbia (and Montenegro).

Constitutional Charter then established that the legislative regulation of individual relations is to be performed "in accordance with standards upheld in the European Union". The Assembly of Serbia and Montenegro was authorised, with prior consent of member states, to pass laws and other enactments "relating the membership of Serbia and Montenegro, as a subject of international law, in international organisations and also relating the rights and duties that ensue from such memberships". The "negotiations and coordination of implementation of international treaties, including those that relate to the European Union", as well as "the coordination of relations with international

6 Thus Article 3 of the Constitutional Charter of the State Union of Serbia and Montenegro of 4 February 2003 sets a conclusive list of objectives of the State Union. Of the six objectives in total, three were those that explicitly expressed European direction of Serbia and Montenegro.

economic and financial institutions"[7] were the prerogatives of the Minister of International Economic Relations. Therefore, the aforementioned provisions of the Constitutional Charter, apart from clear political orientation and determination for the inclusion into European structures, i.e. the European Union, also contained an undisputable constitutional basis for the process of association and accession of Serbia into the European Union.

Beside what has been stated, two important constitutional postulates for the realisation of Serbia and Montenegro's adopted European determination were contained in the provisions of Articles 10 and 16 of the Constitutional Charter, which in a general manner defined the place of international accords in the legal and constitutional system of Serbia and Montenegro and its member states. Thus Article 16 of the Constitutional Charter established that "ratified international treaties, agreements, and generally accepted rules of international law ***shall have supremacy*** over the law of Serbia and Montenegro and the over the law of (its) member states". The supremacy of international treaties and agreements over internal law is understood to entail two major stipulations: ***firstly,*** "supremacy in application of a provision of a treaty or agreement in case of discord with internal law"; and ***secondly*** "above-statute legal power" of ratified international treaties and agreements within Serbia and Montenegro and its member states, which means that laws and other regulations and general acts passed in either Serbia and Montenegro or its member states were in the hierarchy of legal enactments below the confirmed international treaties and agreements, which also includes a stipulation that they had to be in compliance with such international treaties and agreements. Some authors claimed that the norms of international law, as according to the Constitutional Charter, had supremacy even over the constitutional documents.[8] The next important provision of the Constitutional Charter is the clause of Article 10, which contained the ***principle of direct application of international agreements*** in the area of ***rights and liberties***. Considering the European direction of Serbia and Montenegro, one could say that this solution was at the same time both "too

7 R. Etinski, Od srpskog i crnogorskog prava prema Evropskom pravu (From Serbian and Montenegrin law toward European Law), Compendium of papers "***Pravni sistem Republike Srbije – usaglašavanje sa pravom Evropske Unije" ("Legal System of the Republic of Serbia – Harmonisation with the Law of the European Union***"), Pravni fakultet Niš (Faculty of Law in Niš), Niš, 2005, p. 357. et seq.

8 See M. Milojević, Ustavna nadležnost za zaključivanje i izvršavanje međunarodnih ugovora, (Constitutional Competence for Concluding and Executing International Treaties) Compendium of papers "***Ustavno pitanje u Srbiji" ("Constitutional Question in Serbia***"), Faculty of Law in Niš, Niš, 2004, p. 223 et seq.

narrow and to wide".[9] Too narrow because it limited the direct application of international law only to the provisions of international treaties on human and minority rights, whereas it excluded direct application of other international treaties and generally accepted rules of international law. Thus, the contents of this solution still might have been an obstacle, or a predicament to the process of stabilisation and association of Serbia and Montenegro with the European Union, because it excluded the direct application of the provisions of agreements that were to be concluded with the European Union (outside the domain of human rights and liberties). On the other hand, it was also too wide, because it referred to all the provisions of international agreements on human and minority rights, whereas many of the provisions of these international agreements are not by their nature, i.e. structure, and composition, suitable for direct application[10].

## 3. CONSTITUTIONAL FRAMEWORK IMPORTANT TO INTERNATIONAL RELATIONS IN THE PERIOD BETWEEN THE DISSOLUTION OF THE STATE UNION AND THE ADOPTION OF THE 2006 CONSTITUTION

Subsequent to the dissolution of the State Union of Serbia and Montenegro (hereinafter: the State Union) and until the passing of the new Constitution of Serbia, there had been rising questions on the existence of constitutional prerequisites for the continuation of the initiated process of approximation of

9 R. Etinski, ***op. cit***., p. 359.

10 For example, even some very important provisions of the European Convention, such as certain provisions of Article 6 of the Convention on the right to fair trial, or on the right on effective legal remedy, are not such that they could be directly applied. It is quite clear that e.g. provision 13 of the Convention, according to which "any person whose rights and freedoms envisaged by this Convention have been infringed is entitled to an effective legal remedy before national authorities"' is not directly applicable and that with this provision the Convention essentially imposes an obligation on the member state to provide in its domestic legislation an effective legal remedy. Actually, "from this provision one cannot derive any concrete legal asset" with which that person could protect his or her right or freedom before a competent state body (R. Etinski). Such an effective legal remedy must be provided to the citizens of Serbia within the "national law", i.e. before state bodies that exercise public authority, and before which citizens realise or protect their rights, or legal interests. See more about the topic in B. Nenadic, Mesto Evropske Konvencije za zaštitu ljudskih prava i osnovnih sloboda u pravnom sistemu Republike Srbije (The Place of the European Convention for the Protection of Human Rights and Basic Freedoms in the Legal System of the Republic of Serbia), Compendium of Papers "***Primjena Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda u praksi ustavnih sudova" (Application of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Practice of Constitutional Courts***), Podgorica, 2006, pp. 23 - 45.

Serbia to the European Union, as well as questions on the place of international agreements in Serbia's legal order, especially relating the European Convention for the Protection of Human Rights and Fundamental Freedoms. These questions were raised by invocation to the fact that the then-in-force Serbian Constitution did not contain provisions on international relations of Serbia and its membership in international organisations as it did not contain references to the place of international law in the legal system of the state of Serbia. It had been pointed out that the European Convention itself does not contain any expressed cogent obligations based on which its norms would be applied directly in the national law, and that the members of the Convention are allowed to provide for the protection of the rights guaranteed by it in any number of ways. However, it remained overlooked what was undoubtedly to be ensuing from the ***Decision on Duties of State Bodies of the Republic of Serbia in the Realisation of Competences of the Republic of Serbia as a Successor to the State Union of Serbia and Montenegro,*** which was adopted on 5 June 2006 by the National Assembly of the Republic of Serbia.[11] In this Decision, the National Assembly accepted that "in accordance with the initial bases for the rearrangement of relations of Serbia and Montenegro ('The Belgrade Agreement') and in accordance with Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro, the Republic of Serbia ***has become the successor to the State Union and has fully succeeded its international legal subjectivity and its international documents",*** and that "the legal order of the Republic of Serbia is to be harmonised with the principles on which legal orders of developed democratic states are based, as well as to the ***corresponding enactments of the international community".***

Starting from what is stated above, Serbia's legal succession on the international level referred to not only its membership in international organisations, but also to the prospect of continuation of the initiated process of approximation of Serbia to the European Union – a process in which it had largely participated thus far too, even if as a member state. When it comes to the application of international law and fulfilment of assumed international obligations, the legal succession of Serbia meant that: ***firstly,*** all ratified international agreements (multilateral and bilateral) that bounded the State Union of Serbia and Montenegro, continued to be binding to the Republic of Serbia as an independent state; ***secondly,*** that the ratified international

11 See the Decision on Obligations of State Bodies of the Republic of Serbia in the Execution of Competences of the Republic of Serbia as the Successor to the State Union of Serbia and Montenegro ("Službeni glasnik RS" no. 48/2006. – Republic of Serbia Official Gazette no. 48/2006).

agreements had already become constituent parts of the legal order of the Republic of Serbia; and ***thirdly,*** that the "law", i.e. "statutes and other regulations" of the Republic of Serbia had to be harmonised with such documents.

A question remained opened as to how to act in case of "conflict" of legal norms in international and national law, which of these norms are to be deemed "older", i.e. have supremacy, as well as a question whether a norm of a ratified international agreement in the area of liberties and rights could be directly applied in the Republic of Serbia, or not. This question above all referred to, as it has been mentioned, to the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which as far as Serbia (and Montenegro) is concerned entered into force, i.e. began to be applied ***on 3 January 2004***. As according to our view, an answer to this question had to be dealt with in the same manner in which it had been dealt with in the State Union (as a whole and in either of it member states) after coming into force of the Constitutional Charter, i.e. in a manner which had been defined in provisions of Articles 10 and 16 of the Constitutional Charter. This is, above all, for reasons already mentioned, but also due to the fact that the said provisions of the Constitutional Charter that determined the relation between the international and national law had already been directly applied for more than three years on the territory of Serbia as well, or put more aptly, because during this period these provisions had already produced legal effect in the legal order of Serbia. Reverting to the state before adoption of the Constitutional Charter would in this segment be read as "going back". Considering the contents of the European Convention, and other international agreements that were binding to the Republic of Serbia in the sphere of rights and liberties, this would result in "diminishment of the achieved level of human rights" in our country, which would be contrary to the generally accepted tenets and principles of international law, and would not be appropriate to the status that the Republic of Serbia had acquired previously on grounds of Article of the Constitutional Charter, as a successor to the State Union of Serbia and Montenegro. As a matter of fact, as a bearer of continuity on the international level, the Republic of Serbia has acquired not only a right of membership in international organisations (including the Council of Europe), but it also inherited the obligation to respect the enactments of international law that were passed within these organisations in the exact same way that it had to respect them in the predecessor state, i.e. the State Union.

## 4. RELATIONSHIP BETWEEN THE CONSTITUTION OF MODERN SERBIA AND EUROPEAN INTEGRATIONS

Considering the abovementioned solutions of the Constitutional Charter and the clear political orientation of Serbia regarding European integrations expressed in it, we can rightfully ask a question whether the new Serbian Constitution also establishes a corresponding legal framework for the realisation of such determination to go toward Europe.

The standing Constitution of Serbia, as opposed to the Constitutional Charter, does not contain provisions that explicitly state the determination of Serbia to go forth with European integrations, nor is there an explicit mention of the European Union. However, this does not mean that the Constitution does not contain provisions that offer legal bases for Serbia's participation in European structures, or provisions that clearly establish principles that are significant to Serbia's relations with international organisations and significant to the effects of legal acts and decisions of these organisations in its legal order. Not later than Article 1 of the Constitution, which establishes the keystone tenets on which the constitutional system of the state of Serbia is to be based, the Constitution's makers do, in a way, express a certain "adherence" of the Republic of Serbia to European principles and values. In consequence, by defining the state of Serbia, the Constitution stipulates that Serbia is "a state of the Serbian people and all citizens who live in it, grounded in the rule of law and social justice, tenets of citizens' democracy, human and minority rights and liberties and a state that ***subscribes to European principles and values***".

Apart from this, found among the basic tenets of the Constitution (Article 16), are also the constitutional covenants on which the international relations of the Republic of Serbia are to be based, as well as provisions that determine the place of international law in the legal order of the country. Thus, ensuing from Article 16 is: ***firstly,*** that foreign policy of the Republic of Serbia rests on generally accepted principles and rules of international law; ***secondly,*** that the generally accepted rules of international law and confirmed international treaties are ***constituent parts*** of the overall legal order of the Republic of Serbia; ***thirdly***, that the generally accepted rules of international laws and confirmed international agreements are to be ***directly applied*** (i.e. all international treaties – not only those that relate to rights and liberties);[12] ***fourthly,*** that the confirmed international agreements ***must be in compliance*** with the Constitution.

12 Considering the solutions contained in Article 16 of the Constitution, it is evident that, regarding the application of international law, the Constitution of Serbia has basically opted

Furthermore, the part of the Constitution dedicated to "Constitutionality and Legality", i.e. provisions of Article 194 of the Constitution that is entitled "Hierarchy of Domestic and International General Legal Acts" state that ratified international treaties and generally accepted rule of international law are part of the legal order of the Republic of Serbia, and that ratified international treaties "may not be in conflict with the Constitution, and also that laws and other general acts in the Republic of Serbia "may not be in conflict with ratified international treaties and generally accepted rules of international law".[13]

Therefore, makers of the Constitution are explicit in their provision on the immediate application of international law and in the "above-law power of international treaties". By introducing provisions on the direct application of generally accepted rules of international law and ratified international treaties, the Constitution redressed the already mentioned "shortcomings of the Constitutional Charter" that linked the direct application of international law only to "provisions of international treaties on human and minority rights and civil freedoms". These constitutional stipulations are significant legal prerequisites for the realisation of rights and duties of the Republic of Serbia, as a member of the Council of Europe (primarily regarding the application and execution of the European Convention and of the decisions of the European Court of Human Rights), as well as for the realisation of the European orientation of the Republic of Serbia on its road to full membership in the European Union. With that, these constitutional solutions will facilitate the subsequent application of EU law, but also the application of the doctrine of the Court of Justice of the European Communities on the "supremacy, direct application and immediate effect of European Law in Member States", as well

for the so-called monistic concept, even though in reality there are never clear-cut concepts as such. As a mater of fact, the fact remains that neither monistic nor dualistic approach in the practice of contemporary European states is applied consistently, but rather that these states most frequently use certain elements that belong to both of these concepts when it comes to various sources of international law. On these concepts see in detail in Daniel P. O Connell, The Relationship Between International Law and Municipal Law, 48 ***Geo. L.J.*** (1960), 431. et seq.

13 We direct attention to the fact that there exist certain misbalances between solutions contained in provisions of Arts. 16 and 194 of the Constitution, which deal with the relationship between the international and national law, misbalances which can cause certain dilemmas and contention when applied in practice, both at concluding and at execution of international treaties, but also in the process of assessment of their mutual conformity before the Constitutional Court of the Republic of Serbia. See in more detail about this issue in B. Nenadić, Organizacija i nadležnosti Ustavnog suda – u svetlu novog Ustava Republike Srbije (Organisation and competences of the Constitutional Court – in the Light of the new Constitution of the Republic of Serbia), ***Pravni informator***, Belgrade, 2007, no. 3, pg. 5. et seq.

as the direct application of provisions of treaties that the European Union enters into with countries that are not its member states.

So as to equip in reality for peace and harmony between legal acts in the legal system of Serbia, and especially for balanced relations between national and international law, the Constitution confers control and monitoring of these relations to the Constitutional Court. Thus, the Constitutional Court, apart from other items in its itinerary, shall, pursuant to Article 167, paragraph 1, clause 1 and 2 of the Constitution, supervise also: (1) "compliance of [Serbia's] laws and other general legal acts with the Constitution, generally accepted rules of international law and ratified international treaties"; (2) "compliance of ratified international treaties with the Constitution". In essence, these provisions follow the solutions contained in already mentioned Constitution's clauses on the place of international treaties (Articles 16 and 194), so it is quite logical to also enlist among the powers of the Constitutional Court, in its role of the keeper of constitutionality and legality and of the guarantor of protection of basic human rights and freedoms, the solutions that would empower the Court to perform its constitutional role. Exercise of authority of this Court to decide on compliance of "law", i.e. "legislation" of the Republic of Serbia with ratified and confirmed international treaties is not closely regulated by the Constitution. However, we are of the opinion that these issues may also be arranged by a law on the Constitutional Court, and that such legislation can find its bases to be those solutions of the Constitution that relate to the assessment of compliance of laws and other regulations with the Constitution (both in respect to the Court's decision-making process and in respect to its decisions and their effect). In point of fact, the issue here is of essentially the "identical order of business" – control of compliance of legal acts of lower legal power with those of higher legal power.

Whereas the execution of Constitutional Court's authority to exercise control (assessment) of compliance of domestic legislation with the generally accepted rules of international law and with international treaties should not experience any particular difficulties, such a prediction would not be standing as of yet in respect of execution of Court's authority to assess the "constitutionality" of confirmed international treaties. In consequences, in relation to this authority of the Constitutional Court, a large dilemma presents itself: when in deed the Constitutional Court can (and should) exercise control of compliance of an international court with the Constitution. Is this only control ***a posteriori,*** which could be inferred from the provision of Article 167, paragraph 1, clause 2 of the Constitution, or could this control also be ***a priori?*** When the issue is of this aspect of constitutional court control one must bear in mind the legal nature and character of international treaties as legal acts, and we are full aware that

provisions of international treaties "can be changed and rescinded only in the manner and under conditions that are established within them or pursuant to general rules of international law". There from we deduce an important question as to the character and the effect that the decisions of the Constitutional Court would have in such a dispute, considering that the decisions of the Constitutional Court are “generally binding, enforceable, and final”, relating to whether such decisions would be effective to the provisions of international treaties ***or*** to the provisions of the Constitution. It ensues from the Constitution that in this case too the issue would be of a decision of the Constitutional Court which would establish a discordance of a lower act in the legal order of the Republic of Serbia - in this case a confirmed international treaty, with a higher legal act - in this case the Constitution. Nevertheless, in our opinion this does not necessarily and (cannot) mean that a decision of the Constitutional Court in this kind of dispute would be able to rescind legal rules or certain provisions of international treaties, nor that such a decision could change international obligations that the Republic of Serbia took upon itself. In the opposite case, such decisions would lead to international liability of the state of Serbia. However, it is entirely a matter for itself whether such a decision could prevent application of unconstitutional provisions of an international treaty in internal legal order of the Republic of Serbia.

Regarding the said competence of the Constitutional Court one question emerges as to whether this Constitutional Court’s control essentially relates only to the control of the specific law that confirms, i.e. ratifies an international treaty (which could hardly be concluded from the linguistic meaning of the mentioned constitutional norm). Nonetheless, should such a viewpoint prevail anyway (with all the reserves), even in that case a new question would impose itself – would the Constitutional Court in that situation appreciate only the formal or rather both formal and material constitutionality of a law on confirmation of an international treaty.[14] Whereas an assessment of the formal constitutionality of such a law would not in essence cause any major problems, this is far from being true for the assessment of material constitutionality. If it were to assess its material constitutionality, the Court would also have to delve into assessing the provisions of the related international treaty, because in our legislative practice an international treaty in technical sense is a constituent part of the law on its confirmation, i.e. ratification.

14 As according to the adopted view of the former Federal Constitutional Court (of the SFRY), in this matter the Constitutional Court does not decide on the constitutionality – or lack thereof – of an international treaty, but rather, in formal legal sense, it decides on the constitutionality or lack thereof of the law that ratifies, i.e. confirms such a treaty.

The Constitution contains no special provisions on who can, and when, instigate a procedure of constitutional court assessment of compliance of an international treaty with the Constitution, on what terms it may be initiated, how the procedure is to run, and especially what the effect of the Constitutional Court's decision would be, etc. Exercise of this authority of the Constitutional Court requires suitable special procedural rules adapted to the character of the constitutionally laid out relationship between the Constitution and the confirmed international treaties, in addition to the nature and character of international treaties. Granted, such procedure could indeed run pursuant to procedural rules that ordain assessment of constitutionality of any law, but with necessary specificities established primarily in respect of the effect of the decisions of the Court in such proceedings. Regulation of these issues the Constitution surrendered to the lawmaker.

It would be sensible to "accept" the preceding control of constitutionality of international treaties in the practice of the Constitutional Court of Serbia too, moreover as the Constitution holds no unbridgeable obstacles for such attitude of the Court. On the contrary, we feel that without any constitutional hindrances a law on confirmation of an international treaty, just as any other law, may be submitted to control of constitutionality ***a priori.*** A Constitutional Court's competence executed in such a manner would be in concordance with the nature of relations that are established on the international level between sovereign states, i.e. with the character and the nature of international treaties.

When it comes to fundamental ***human rights and freedoms,*** the new Constitution of Serbia has brought significant guarantees and warranties. We shall mention only those constitutional stipulations that by their contents represents foundational provisions that are supposed to provide fulfilment of European standards in the domain human rights and freedoms – standards that are understood to be universal in Council of Europe member states, and especially in those states that are candidates for the membership in the European Union. Thus, in a large number of provisions the Constitution has guaranteed (set): ***firstly,*** a very wide and highly detailed spectre of human rights and freedoms, with special guarantees for the rights of persons belonging to national minorities[15]; ***secondly,*** an immediate application of provisions of the

15 Therefore, the claim is that the new Constitution of Serbia contains all rights guaranteed not only by the European Convention, but also by other international treaties and other documents in the area of rights and freedoms. Some see in this a significant quality of the new Constitution of Serbia, whereas others feel that such stipulations were needless, considering the provision of Article 18 of the Constitution, which states that the Republic of Serbia "directly applies human and minority rights guaranteed by generally accepted rules of international law, confirmed by international treaties".

Constitution relating human rights and freedoms, but also an "immediate application of human and minority rights guaranteed by generally accepted rules of international law, confirmed by international agreements and laws"; ***thirdly,*** that the provisions on human and minority rights "are to be interpreted in favour of advancement of values of democratic society, pursuant to currently valid international standards of human and minority rights, in addition to the practice of international institutions that monitor their realisation"; ***fourthly,*** that any person shall have a right to judicial protection should his or her constitutionally guaranteed human or minority right be breached or withheld from him or her, as well as any right to redress consequences that were incurred by the breach; ***fifthly,*** that anyone shall have the right to address the Constitutional Court by appeal when a state body or organisation to which public authorities are conferred has, "by a individual legal act or deed", breached or denied his or her human or minority right(s) and/or freedom(s) guaranteed by the Constitution if other legal remedies for their protection have been exhausted or are non-existent"; ***sixthly***, that the citizens are "entitled to address international institutions for the protection of their freedoms and rights guaranteed by the Constitution". Without downplaying the significance of constitutional solutions that relate to rights and freedoms, one cannot circumvent the fact that certain provisions are in the technical sense so stated, i.e. formulated, that due to their evasiveness, imprecision or sometimes incompleteness they require construal and can cause dispute about their legal meaning, which all may exacerbate their real world application.

Pursuant to what has been stated, in the realisation of protection of human rights and freedoms the competent state bodies of Serbia, and especially the judiciary system and the Constitutional Court, will, in the future, have to look "long and hard" not only into Serbia's Constitution, but also into the European Convention for the Protection of Human Rights and Fundamental Freedoms and the opinions of the European Court for Human Rights, and farther, of course, into the Acquis Communautaire and the opinions and practices of the Court of the European Communities. Coming from there, it is quite reasonable that the constitution drafters explicitly arranged for the role of ***the judiciary and prosecutorial bodies*** in the application of international law, irrespective of the fact that provisions of Arts. 16 and 18 of the Constitution on the direct application of confirmed international treaties are binding for all state bodies of the Republic of Serbia. In actuality, due to the role of the judiciary in the protection of fundamental human freedoms and rights, the drafters of the constitution separately ordained that the courts, "as independent and autonomous bodies", shall adjudicate not only on the basis of the Constitution and the laws, but also on grounds of "generally accepted rules of international law and confirmed

international treaties" (Article 142, paragraph 2), i.e. "that the court decisions shall be based on the Constitution, law, ***confirmed international treaty…"*** (Article 145, paragraph 2). When it comes to exercise of prosecutorial function, provisions of Article 156, paragraph 2 of the Constitution state that public prosecutor's office shall exercise it function based on "the Constitution, laws, and confirmed international treaties".

An important question for the operation of state bodies of Serbia in relations that it establishes with European institution, and also for their conduct in the procedure of conclusion and execution of treaties that the state of Serbia is expected to conclude with the European Union, is the question of their constitutional competence, i.e. authority for the conclusion, confirmation and execution of international treaties, including those treaties based on which Serbia is to acquire membership in certain international organisations and communities. The Republic of Serbia is, according to Article 97, paragraph 1 of the Constitution, competent to arrange and provide "sovereignty … of the Republic of Serbia, its international position and relations with other states and international organisations", whereas Article 99 of the Constitution envisages that the National Assembly is the body that "confirms international treaties when the law prescribes the obligation of their confirmation". Furthermore, Article 108, paragraph 2 of the Constitution affirms that the National Assembly may initiate a referendum on issues that comprise its body of competence, but explicitly states that a "topic of referendum" may not be "obligations that stem from international treaties". According to Article 123 of the Constitution, the Executive Government of the Republic of Serbia "establishes and carries out the policy" of the county, which encompasses both internal and external policy. From what has been stated ensues that the Executive Government, with its Ministries, is the body of the Republic of Serbia in charge and accountable for the negotiations and conclusion of international treaties, including those treaties that Serbia would conclude in the process of approximation to the European Union. Concordantly, the provision of Article 25 of the Law on Ministries (of 2007)[16] stipulates that "Ministries within their scope realise international cooperation and pay heed to its improvement and provide harmonisation of regulations with the law of the European Union".

Therefore, from everything stated above we can deduce that constitutional-legal presumptions for an unhindered process of association of the Republic of Serbia into the European Union are contained in its Constitution. Nonetheless, division existing on the political scene of Serbia and its aggravated international positions (due to the issue of unsolved status of Autonomous

16 Law on Ministries ("Republic of Serbia Official Gazette", no. 43/07).

Province of Kosovo and Metohija), prevent full and unconditional attentiveness of political actors and Serbia's state bodies on the optimal internal adaptation to the requirements of European integrations. The Stabilisation and Association Agreement is a very complex and voluminous treaty, making Serbia, as a future signatory to such a treaty that wants to acquire the status of an associated member of the European Union, obligated to perform a large number of tasks. Among these tasks, very important to us lawyers, belong the harmonisations of Serbia's legislation with Acquis Communautaire. With that aim in mind, the Rules of Procedure of the National Assembly set an obligation to sponsor of a draft law to state in the justification of the draft bill not only the constitutional basis, but a basis in the legislation of the European Union and the generally accepted rules of international law".[17] Existence of this administrative obligation, as well as the existence of specially formed Board for European Integrations in the National Assembly,[18] is an additional guarantee of implementation of European principles and values in the internal legal order of the Republic of Serbia, which must also by its structure and contents, and not only by the text of positive legal acts, be in essence harmonious with EU law, i.e. it must be infused with its principles and tenets.

Of course, Serbian does not become European just by entering into constitutional and legal texts normative and other stipulations that modern European law uses and acknowledges, but, above all, by providing to the internal legal system of Serbia practicable legal mechanisms and developed and efficient institutions for the realisation and protection of the basic values on which democratic political systems are founded. Of little value will be provisions of the new Constitution that proclaim attachment of Serbia to European values and principles, i.e. above-law power and direct application of international treaties, if conditions, namely necessary prerequisites are not created for their execution, i.e. if provisions of these legal acts are not realised

17 See Article 136, paragraph 3 of the Rules of Procedure of the Republic of Serbia National Assembly ("Republic of Serbia Official Gazette", no. 56/05). Furthermore, in the National Assembly a "Department for the Harmonisation of Regulations with Legislation of the EU and Recommendations of the Council of Europe" was opened on 9 November 2005.

18 Article 69 of the Rules of Procedure stipulate that this Board "deliberates a draft law, other regulation or general act from the viewpoint of their compliance with the EU and Council of Europe regulations. Beside this, the Board deliberates on "plans, programs, reports and information on the process of stabilisation and association to the EU, tracks the realisation of the strategy of association within the scope of duty of the National Assembly, proposes measures for the establishment of a general, national consensus on the strategy of association to European integrations and develops international cooperation with the boards of parliaments of other countries in an aim of better understanding of processes of association and integration into the European Union".

in reality due to the lack of efficient legal mechanisms and developed democratic institutions in the legal order of Serbia.

## 5. CONSTITUTION OF SERBIA AND "INTEGRATION" CLAUSE

Accession to the European Union offers to the state that accedes an essentially different position than the one that comes with membership in classical international organisations. With the act of accession to the European Union (which is today more similar to a complex state than a classical international organisation) a member state revokes "exclusive exercise of some of it sovereign rights" or authorities that become exclusive competences of the Union, whereas exercise of some competences it shares with the Union. The seriousness of such an act requires separate constitutional authorisation for its undertaking. Such authorisation in modern European states – members of the European Union - is, as a rule, ***materia constitutionis***, i.e. an issue that is arranged for and formulated in the constitution in the form of the so-called "integration clause". An analysis of the constitutional practice of EU member states shows that they acted differently relating the preparation of their constitutional foundations for the accession to European Communities, European Union, respectively, depending on their own (national) constitutional tradition, but also on the character and degree of the factual European integration.

The question whether the Constitution of Serbia contains a constitutional base that allows concession of competences of the state of Serbia onto regional, supranational or international organisations and communities, i.e. whether competent bodies of Serbia can find in the Constitution authorisation to decide to transfer "a portion of competences of the Republic of Serbia onto the aforesaid institutions" can hardly be answered categorically. The Constitution of Serbia does not possess an expressed solution on whether a portion of competences of the Republic of Serbia may be delegated and what state body would be empowered to decide on the full membership of Serbia in an international body such as the European Union - a membership that, as it has been said, apart from other issues, implies also that "a portion of competences of the state is to be delegated onto its (Union's) bodies and institutions", i.e. that "a portion of sovereignty of members states is to be transferred onto the Union", followed by a direct application of the EU law on the territory of the member state and the decisions of Union's institutions respected and implemented.

Inexistence of expressed "international" clause in the Constitution of Serbia, as we have already noticed, does not present an obstacle in the proves of stabilisation and association of Serbia to the European Union. Provisions of the

Constitution that arrange international relations of the Republic of Serbia, the competences of its state bodies and the application of international do, taken in their entirety, enable the process of association of Serbia to the European Union constitution-wise. However, it is a different issue altogether whether it is possible for Serbia to accede into full membership in the European Union without a revision of its Constitution; if not, then whether the introduction of an "integration" clause would be an issue to be decided only by the National Assembly or by popular referendum as well. To explain, it is clear that the Constitution of Serbia does not contain an expressed “integration” clause, i.e. a solution which would determine the constitutional basis for the possibility of transfer of individual competences of the Republic of Serbia onto international and supranational organisations.

Yet, there exist views that the already mentioned provision of Article 97, paragraph 1 of the Constitution, according to which the Republic of Serbia is competent to arrange and provide for “its international positions and relations with other states and international organisations” can be considered "possible legal grounds for the transfer of individual competences of the state bodies of the Republic of Serbia onto international or supranational organisations”, even though existence of an explicit provision in the Constitution ordaining so would be desirable.[19] We stand on the position that, by the nature of things, and due to its importance, and "international" clause should be explicitly contained in the Constitution. Each change of the Serbian Constitution is subject to a procedure prescribed in the Constitution itself. Depending on what the issue is, the Constitution envisages two different procedures for the passing of constitutional amendments. The National Assembly adopts acts amending Constitution by a two-third majority in the overall number of seats, granted that the Parliament may decide that such an act must be confirmed by the citizens on a station-wide referendum (the so-called facultative constitutional referendum). Nevertheless, on grounds of Article 203, paragraph 7 of the Constitution, the National Assembly ***must*** put the act on amendment of the Constitution to national referendum for confirmation should the change in the Constitution relate to: “Preamble to the Constitution, the principles of the Constitution, human and minority rights and freedoms, the structure of power, proclamation of the state of war and the state of emergency, deviation from human and minority rights and freedoms in states of emergency and war and the procedure for the change of the Constitution itself” (so-called “mandatory constitutional referendum”). When an act on amendment to the Constitution is put for confirmation, the citizens state

19 Cf. Opinion on the Constitution of Serbia, Adopted by the Venice Commission at its 70th plenary session (Venice, 17-18 March 2007.) It can bee seen at the Internet: http://www.venice.coe.int/docs2007/CDL-AD (2007)004-e.asp

their views within 60 days of the adoption of the act on amendment to the Constitution, and the amendment to the Constitution is adopted if simple majority of the turnout voted for the change.

Considering the general scope of the provision, Article 203, paragraph 7 of the Constitution is not quite clear on whether constitutional changes that would enable transfer, i.e. delegation of "portion of competences of the Republic of Serbia onto international organisations, i.e. the European Union" would have to be put to referendum or not. The answer to that question would largely depend on the contents of the so-called "integration" clause, i.e. its position in the text of the constitution. If a supplement was to be performed of any of the provisions listed in Article 203, paragraph 7, then the change of the Constitution that was to introduce the so-called integration clause would invariably be put to referendum (e.g. should such a clause be incorporated into the principles of the Constitution, or into the provisions on arrangement of branches of power, or into the provision on individual bodies of these branches – we above all refer to the National Assembly). On the other hand, if the supplement was to relate to provisions other than those listed in Article 203, paragraph 7 of the Constitution, the referendum would not be compulsory (e.g. if such clause was to be entered through a supplement to the provision of Article 97 of the Constitution that specifically ordain the competences of the Republic of Serbia, which in our opinion is a fully founded possibility). However, in view of the ordained majority needed for the acceptance of a constitutional amendment on the referendum, (majority of the turnout), the referendum is not such a big obstacle to the enactment of a constitutional amendment (as it was according to the 1990 Constitution), which had already been adopted in the National Assembly by a qualified (two-third) majority.

Since the Republic of Serbia is still legally, economically and temporally still "on the road" to candidacy for the reception into the European Union, the process that precedes this act is realistic to include a revision of its Constitution. When and whether the explicit concrete incorporation of the "integration" clause into the Constitution is to be done, or whether its essence would be compensated by interpretation of the aforementioned provisions of Article 97 of the Constitution, surely will depend also on the level of successfulness in meeting the conditions set by the European Union and the related increase of changes for the successfulness of the integration.

## 6. APPLICATION OF INTERNATIONAL LAW IN HITHERTO PRACTICE OF THE CONSTITUTIONAL COURT – AN IMPORTANT ATTAINMENT IN THE EUROPEAN FUTURE OF SERBIA

In its practice, the Constitutional Court of Serbia had, even before adoption of the 2006 Constitution, applied certain provisions of international agreements, and before all, those that arrange the domain of human freedoms and rights (e.g. provisions of international legal acts on civil and political rights, i.e. economical and social rights, and especially the provisions of the European Convention for the Protection of Human Rights and Basic Freedoms, et al). That is what the Court had been doing prevalently, when deciding in disputes relating abstract control of constitutionality of individual laws. At that, the Court had not perform an assessment of conformity of a concrete law (only) based on an international treaty, but the Court rather assessed certain laws simultaneously in relation to the Constitution of Serbia and in relation to the confirmed international treaties. Thus the Constitutional Court of Serbia did establish an incongruence of certain provisions of laws with the Constitution, or established that the provisions of laws were neither in conformity with the provisions of the Constitution nor with the provisions of the European Convention, i.e. with certain "international standards". At that, in the disposition of the said decision the Constitutional Court did not assess unconformity of a law with international treaties, but rather expressed a view or assessment in the rationale of the decision that that a law in full or perhaps only contested provisions of a law are not in compliance not only with the Constitution but also with certain provisions of international treaties or with some of the generally accepted rules of international law.[20]

Even though that in the time of existence of State Union, i.e. in the time of existence of the Court of Serbia and Montenegro, the Constitutional Court of

20 See for example decisions of the Court: Decision no. IU-232/03 of 18 March 2004, in which the Court was deciding on the constitutionality of Article 70 of the Law on Supplements and Amendments to the Law on Judges, which, by assessment of the Court, diminished the achieved level of autonomy and independence of the courts; Decision no. IU-110/04. of 15 July 2004, in which the Court decided on the constitutionality of Article 8 and 13 of the Law on Amendments and Supplements of the Law on Election of Deputies, i.e. on provisions that establish special measures aimed at providing gender equality and representation of minorities in the National Assembly; Decision no. IU-201/04. of 7 October 2004, with which the Court decided on the constitutionality of the provision of Article 2, paragraph 4 of the Law on Peaceful Assembly of Citizens, which referred to the manner in which the citizens can exercise their freedom to peacefully assemble; Decision no. IU-193/04. of 28 September 2006, with which the Court decided on the constitutionality of the provision of Article 28 of the Law on Amendments and Supplements to the Law on Public Prosecutor's Office, which limited labour rights to assistant prosecutors who had not been re-elected.

Serbia was not in charge of assessing conformity of the law of the Republic of Serbia with confirmed international treaties and agreements, one must take notice of the fact that this Court did, in this period too, invoke, in the rationales of several of its decisions, provisions of international treaties and generally accepted rules of international law. These solutions were taken into consideration by the Constitutional Court especially when interpreting and construing the basic tenets and principles of the Constitution (the rule of law, separation of powers, independence of the court, etc.) Thus the provisions of the European Convention, or better yet the tenets and principles established by the Convention, as well as the practice and standpoints of the European Courts of Human Rights, did serve to the Constitutional Court of Serbia as "additional tools" in taking its views on individual constitutional issues of dispute. In certain decisions adopted by the Constitutional Court in exercise of its abstract control of constitutionality of laws, the Court construed (interpreted) the provisions of the Constitution in a manner established in the provisions of the Convention, i.e. in the same way in which certain provisions of the Convention have been interpreted in practice by the European Court of Human Rights. There had also been cases in which the decisions of the Constitutional Court would have been "harder to defend" if the Court had not, in construing the Constitution of the Republic of Serbia and establishment of its position, i.e. in deliberations on its position in contested constitutional issues, "served itself" also to the tenets and principles contained in the Convention.

One should also underline that the Constitutional Court of the Republic of Serbia had taken born in mind some of the tenets and principles of the European Convention even before its official ratification by the State Union, but then they were considered as "general tenets recognised by civilised nations" (V. Dimitrijević), i.e. as generally accepted rules of international law that are recognised by modern European states. [21]

21 See thus: Decision no. IU-166/03, of 5 May 2003, with which the Court ordered a measure of cease and desistence of execution of individual acts and actions that were undertaken on grounds of Article 15b, 15 g and 15 d of the Law on Organisation and Competences of State Bodies in the Suppression of Organised Crime; Decision number IУ-214/02. of 4 November 2003, with which the Court decided on the constitutionality and legality of the Decree on organisation and realisation of religious schooling and schooling in alternative subject in elementary and secondary schools; Decision number IУ-480/03. of 29 December 2003, with which the Court decided on the constitutionality of provisions of Article 81 and 82 of the Law on Arrangement of Courts, at which it passed a temporary measure invoking the Constitution of Serbia, together with an assessment that the contentious provisions of the Law breach the provisions of the Convention relating the right to an effective legal remedy.

Its standpoint on international treaties as acts of "above-law" legal force in our legal system, the Constitutional Court has expressed in several letters addressed to the National Assembly. Thus the Constitutional Court, pursuant to Article 62 of the Law on the Procedure before the Constitutional Court and the Legal Effect of Its Decisions[22], pointed out to the Assembly that the current positive legislation of the Republic of Serbia is lacking arrangement of certain issues and that our legal order shows evidence of legal voids that the legislators ought to "fill" by guiding themselves with international and European standards in these areas. This is what the Constitutional Court did in its letters to the National Assembly in the period between March 2003 and 2006, and which referred to: free election and protection of election rights; right to an effective legal instrument; right to fair trial; right to speedy trial; gender equality, and other issues.

Therefore, in short, the Constitutional Court of Serbia has in several recent years been starting its considerations by also exploiting the rules of international law, and especially those of the European Convention. These decisions of the Court have by their content contributed, above all, to the strengthening of the rule of law in the Republic of Serbia, to the affirmation of principle of separation of power, independence of the judiciary and prosecutorial bodies and the fuller protection of fundamental human rights and freedoms. If we are to judge according to the stance that the Constitutional Court of Serbia has been taking toward the application of the European Convention and other international treaties, one may say that this Court has been "friendly" toward European principles and values, and that it did not projected itself as a "conservative keeper" of the national sovereignty.

Finally, we feel it is important to point out to the dilemma that has arisen since the dissolution of the State Union and relates to realisation of constitutional court's control of jurisdiction of international and domestic law. At these instances, the Constitutional Court met with a question whether it was competent to solve disputes in which an assessment was asked of conformity of internal law with international treaties, and with the question whether in deliberations of its decisions this Court may directly apply the provisions of an international treaty, considering that the Serbian Constitution does not envisages

[22] See Article 62 of the Law on Procedure before the Constitutional Court and Legal Effect of Its Decisions" ("Službeni Glasnik RS" no. 32/91 ("Republic of Serbia Official Gazette", no. 32/91), which stipulates that the Constitutional Court "shall inform the National Assembly of the status and problems in the realisation of constitutionality and legality in the Republic, issue opinions and direct attention to the needs for passing and amending of laws and undertakes other measures for the protection of constitutionality and legality".

this competence for the Constitutional Court. Regarding these dilemmas, our viewpoint was that, after dissolution of the State Union and its institutions, the Constitutional Court of Serbia was competent to assess compliance of domestic legislation with international treaties and that the said international treaties may be applied directly. When taking this standpoint, we started from the fact that the place of international treaties in the legal system of the Republic of Serbia is determined in Articles 10 and 16 of the Constitutional Charter, and that subsequent to the dissolution of the State Union, the state of Serbia, as its legal successor, did not change the position of international treaties in its legal system. On the contrary, by the aforesaid Decision of June 5, 2006, the National Assembly, in our opinion, indeed confirmed the "found" state and position of international treaties in the legal order of the Republic of Serbia. As the Constitution of Serbia (Article 1) established the rule of law as one of the three fundamental values on which the constitutional system of Serbia is based, and as paragraph 5 of Article 9 of the Constitution "the protection of constitutionality and legality" was explicitly conferred to the Constitutional Court, the Constitutional Court was authorised to assess not only conformity of other regulations and general acts with an international treaty, but also the congruence of the laws of the Republic of Serbia with international treaties. In a country that is based on the principle of the rule of law (which invariably implies mutual conformity of legal acts in the country's legal order), such control by the Constitutional Court could not have been excluded because the legal order of the Republic of Serbia was uniform and was consisting of both domestic and international sources of law. Each of these sources had to have had its place in the hierarchy of legal acts, which goes for international treaties, too. The conformity of acts in the legal order of the Republic of Serbia, in which lower legal acts must be in conformity with the higher legal acts was a constitutional prerogative of the Constitutional Court.

## 7. IN LIEU OF CONCLUSION

Considering the contents of the solutions of the modern Constitution of the Republic of Serbia, it is not contentious that the Constitution offers a sufficient legal foundation to the competent bodies of the state of Serbia for the running of negotiations and conclusion of the EU Stabilisation and Association Agreement, followed by a constitutional grounds for the realisation of obligations of that agreement, as well as other agreements that the Republic of Serbia is to enter into with the European Union in this process. In this sense, especially important are those provisions of the Constitution that establish the place of international treaties in the legal system of Serbia and their direct

application. In the legal order of the Republic of Serbia ***de constitutione lata*** confirmed international treaties do represent a portion of the united legal order of the Republic of Serbia, in which the Constitution is the "supreme legal act", and immediately following the Constitution, in legal power, are confirmed (ratified) international treaties, with which all laws and other general acts passed in the Republic must conform.

Apart from that, provisions of all international treaties that are binding to the Republic of Serbia are, by Constitution, to be applied directly by all branches of state government – legislative, executive and judicial. Of course, comparative practice also confirms that directly applying can be only those provisions of international treaties that are not conditioned in relation to their execution or their effect with adoption or by existence of any other legal act of the state of Serbia. This are in fact those provisions of international treaties that are (as the Court of European Communities puts it) "legally complete", i.e. "legally perfect and capable" to produce a legal effect.

Regardless of the beginning difficulties that objectively exist when one country starts with a direct application of numerous international treaties (unlike an earlier period when only those international treaties were applied that are implemented into the domestic legislation), by an insight into the decisions of regular courts, and especially of the Constitutional Court of Serbia, one could reliably conclude that even so far these bodies did not eschew when it comes to direct application of some of the provisions of international treaties, as well as generally accepted rules of international law.

It is indubitable that numerous international treaties, i.e. numerous provisions of these legal acts cannot be directly applied due to technical textual reasons, but that they necessitate an implementation into the internal legal order. Aside from that, the question of execution and direct application of the provisions of international treaties in a certain country, as well as the application of assumed obligations that ensue from its membership in international and supranational organisations, is not only an issue of constitutional proclamation, nor only an issue of shear formulation and contents of each individual provision of these treaties, nor, also, only a question of a stance that individual national institutions take toward obligations that ensue from said membership, but largely an issue of "strength" and "capability" of the state to fully provide for the realisation of assumed obligations.

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# NATIONALE IDENTITÄT UND SUPRANATIONALE HOMOGENITÄT 1

## INTRODUCTION

An der wohlverdienten Ehrung für ***Roland Bieber*** beteilige ich mich gerne. Sie gilt einer wichtigen Stimme zur europäischen Einigung, mit der ich mich öfters ausgetauscht habe. ***Biebers*** beruflicher Lebenslauf berührt mich verwandtschaftlich. Wie er über das Europäische Parlament haben mich Jahre beruflicher Praxis in der Europa-Abteilung des damals Bonner Bundeswirtschaftsministeriums unter ***Ludwig Erhard*** und ***Karl Schiller*** zur europäischen Integration und zum Europarecht geführt, bevor sich die Chance bot, diese Interessen an einer Juristischen Fakultät wissenschaftlich fortzuführen und zu vertiefen.[2] Diese Art des Werdeganges erscheint mir bis heute persönlich befriedigend und der akademischen Forschung und Lehre zuträglich. ***Biebers*** reiches Werk legt hiervon beredtes Zeugnis ab. Bei der eigenen Arbeit am Lehrbuch des Europarechts griff ich zu kaum einem anderen Parallelwerk so gerne und häufig wie zur von ***Bieber*** besonders geprägten „Europäischen Union", um mich des eigenen Standpunktes zu

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1 From: Festschrift für Bieber, 2000, s. 393 ff.

2 T. Oppermann, Erinnerungen an das Bundeswirtschaftsministerium und seine Europa-Abteilung in den sechziger Jahren (1995), in: ***Jus Europaeum. Beiträge zur europäischen Einigung*** (Hrsg. Classen / Nettesheim / Graf Vitzthum), 2006, S. 128 ff.

vergewissern.[3] Wahrscheinlich war es die besondere Mischung aus präziser juristischer Dogmatik unter Einbeziehung der Brüsseler und Luxemburger Praxis und europapolitischem Ausblick, die mich anzog.

Dabei ist ***Roland Bieber*** alles andere als ein Autor, der sich mit der Paraphrase des aktuellen Geschehens innerhalb der Gemeinschaft und Union begnügt. Immer wieder wendet er sich Grundfragen der europäischen Einigung zu und sucht aus ihnen Erkenntnis für den Stand der Integration zu gewinnen und in ihre Zukunft zu schauen. So mögen ihn die folgenden Überlegungen interessieren, die sich um wesentliche Voraussetzungen bemühen, deren die Europäische Union heute mehr denn je zu dauerhafter Stabilität bedarf.

## A. WAS HÄLT GROSSE REICHE ZUSAMMEN ?

### I. „Grenzenlose" Erweiterung der Europäischen Union ?

Die europäische Gemeinschaft und Union lebt seit ihren Anfängen in einem ***Spannungsverhältnis***.[4]

Einerseits bedeuten EG/EU den Versuch, mit Hilfe eines vorrangigen Rechts eine auf Dauer angelegte intensive Integrationsgemeinschaft zu begründen, die zur Verwirklichung einer immer engeren Union der Völker Europas führen soll (Art. 1 Abs. 2 EUV). Inzwischen hat sich die Erkenntnis durchgesetzt, dass es sich bei diesem „***Staatenverbund***" für alle absehbare Zukunft nicht um einen Europäischen Bundesstaat handelt, sondern um eine neuartige Form enger zwischenstaatlicher Verbindung, die weder staatlicher noch klassisch-völkerrechtlicher Natur ist.[5] Die Beziehungen zwischen den EU-Mitgliedern erinnern allerdings in vielen Ausprägungen eher an innerstaatliche als an

3 Roland Bieber/Astrid Epinay/ Marcel Haag, ***Die Europäische Union***, 6. Aufl.2005; Thomas Oppermann, Europarecht, 3. Aufl. 2005

4 Der Einfachheit halber wird hier lediglich von Europäischer Gemeinschaft und/oder Union gesprochen und die weiteren Aufgliederungen beiseite gelassen.

5 Näher Thomas Oppermann (Anm. 3), § 12 (Wesen der Europäischen Union) m.w.N.. Ob man von Union, Gemeinschaft oder mit dem deutschen Bundesverfassungsgericht (BVerfGE 89, 155 (188) von einem Staatenverbund spricht, ist amtlich durch die Verträge vorgegeben und im übrigen eine Geschmacksfrage. Wesentlich ist lediglich, dass der Begriff sich von der klassischen Dichotomie Bundesstaat/Staatenbund als ein Tertium abhebt. So auch Paul Kirchhof, Die rechtliche Struktur der EU als Staatenverbund, in : v. Bogdandy (Hrsg.), ***Europäisches Verfassungsrecht***, 2003, S. 893 ff. Zur besonderen Rechtsqualität der EU Jürgen Schwarze, Das Konzept des Europäischen Gemeinschaftsrechts, in : Horn/Baur/Stern (Hrsg.), 40 ***Jahre Römische Verträge***, 1998, S. 29 ff.

internationale Bande. Gelegentlich werden sie daher als „staatsähnlich" bezeichnet.

Andererseits charakterisiert sich die Europäische Union seit ihren Anfängen als Gemeinschaft in den fünfziger Jahren durch die ***Vorläufigkeit ihrer Grenzen***. Immer wieder wurde das „Unvollendete" des Einigungswerkes feierlich hervorgehoben. ***Robert Schuman*** benannte am 9. Mai 1950 seinen Vorschlag zur Gründung der Europäischen Gemeinschaft für Kohle und Stahl „erste konkrete Etappe einer europäischen Föderation". Die Präambel des EWG-Vertrages richtete am 25. März 1957 die „Aufforderung an die anderen Völker Europas", sich den Bestrebungen zum Zusammenschluß ihrer Wirtschaftskraft anzuschließen. Nach der großen Wende von 1989 spricht die Präambel des Unionsvertrages vom 9.2.1992 bereits von der „historischen Bedeutung der Überwindung der Teilung des europäischen Kontinents." Interessanterweise beruft sich die Präambel des EU-Verfassungsentwurfes vom 29.10.2004 erstmals auf ein „nach schmerzlichen Erfahrungen nunmehr geeintes Europa". Gleichwohl soll auch die Union von 25 Mitgliedstaaten nach Art. I-1 (2) EV weiterhin „allen europäischen Staaten" offen stehen, die sich zu ihren Werten bekennen.

Bekanntlich ist es nicht bei Worten geblieben. Das „karolingische" Europa der sechs Gründerstaaten von 1952/1958 erweiterte sich 1973 nach Norden um Dänemark, Großbritannien und Irland , 1981/1986 im Süden um Griechenland und die iberische Halbinsel. Mit der sogenannten „EFTA-Erweiterung" um Finnland, Österreich und Schweden griff die EU 1995 erstmals nach Osten aus. Einen „Sprung" besonderer Größenordnung bedeutete schließlich 2004 der Beitritt von acht postkommunistischen Staaten in Mittelosteuropa sowie Maltas und Zyperns. Mit der bereits perfekten Einbeziehung Bulgariens und Rumäniens entsteht eine Union von 27 Mitgliedstaaten. Bei einer Verwirklichung der bereits erteilten weiteren Versprechen gegenüber den Staaten auf dem Balkan und der Türkei wäre eine „Groß-EU" von weit über 30 Mitgliedern zu erwarten. Offen bleibt, ob die Ostgrenze der Union bei Brest-Litowsk oder eines Tages östlich von Minsk und Kiew liegen soll.

Die Spannung zwischen einer immer engeren und immer weiteren Union hat heute eine ***kritische Dimension*** erreicht. Es ist offenkundig geworden, dass die Forderung aus politischen Sonntagsreden, Vertiefung der Integration und ihre Erweiterung müssten Hand in Hand gehen, in der Praxis der EU keinen Widerhall gefunden hat.

***Die Erweiterung hat der Vertiefung den Rang abgelaufen.*** Die Tätigkeit der Union hat sich unter den komplizierten Regelungen des Nizza-Vertrages von 2001

immer mehr verlangsamt. Dem Anlauf zu einer „Verfassungsgebung" 2002-2004 lag die Erkenntnis zugrunde, dass die 25er-Union einer neuen Legitimation und vereinfachter Strukturen bedürfe, um wieder attraktiv und handlungsfähig zu werden. Das Inkrafttreten des Verfassungsentwurfs vom 29.10. 2004, welcher diesen Zielen gewidmet war, ist jedoch seit den gescheiterten Referenden in Frankreich und in den Niederlanden 2005 auf unbestimmte Zeit verschoben. Unter den Motiven für die unvermittelt aufgebrochene „Euroskepsis", der Bürger, die sich keineswegs auf die beiden Länder beschränkt, stand die gefühlsmäßige Ablehnung einer immer weitergehenden Vergrößerung der Union mit an vorderer Stelle.[6] Sollten weitere Beitritte die einzigen „Erfolge" der EU in den kommenden Jahren bleiben, lässt sich absehen, dass die Kohäsion innerhalb der Gemeinschaft weiter nachlässt.

## II. Homogenität als Voraussetzung übernationaler Verfasstheit

Große Reiche mit Hunderten von Millionen Bürgern sind unter den heutigen Bedingungen technologisch ungemein gesteigerter „Erreichbarkeit" möglich. China, Indien oder die USA sind Beispiele. Hier handelt es sich sogar um Bundesstaaten beziehungsweise bei China gegenwärtig um einen Einparteienstaat. Die Fähigkeit dieser Sub- oder Teilkontinente, eine dauerhafte staatliche Zusammengehörigkeit zu bilden, gründet sich auf tatsächliche Voraussetzungen. Als Erstes fällt im Falle von China und Indien eine jahrhundertelange gemeinsame Geschichte ins Auge. Ungeachtet immer wieder aufflackernder Bürgerkriege schufen die chinesischen Kaiserdynastien oder die indischen Moguln über lange Zeiten eigene Reiche. Im Falle der USA ergab sich das bundesstaatlich moderierte Zusammengehöri-gkeitsgefühl aus der gemeinsamen Erfahrung der Einwanderung und des „Zuges nach Westen" ebenso wie aus dem Erlebnis des erfolgreichen Sezessionskrieges gegen England.[7] Eine weitere wichtige Voraussetzung der Staatlichkeit war in diesen großen Räumen ungeachtet teilweise unterschiedlicher Ethnien und Religionen die Existenz einer ***vorherrschenden Sprache***, Mandarin in China, Hindi ( neuerdings zusammen mit Englisch) in Indien und die Entscheidung für das Englische im Zusammenhang mit der Schaffung der US-Verfassung 1787. Zusammen mit anderen Faktoren erscheint es damit zulässig, von einer

6 Thomas Oppermann, Der Europäische Verfassungsvertrag – Legenden und Tatsachen, ***Festschrift Jürgen Meyer***, 2006, S. 281 ff.

7 Joseph J. Ellis, Sie schufen Amerika, 2002; zu Europa H.A. Winkler, ***Was hält Europa zusammen*** ? 2005.

chinesischen, indischen und sogar amerikanischen Nation („e pluribus unum") als Grundlage ihrer Staatlichkeit zu sprechen. Anders ausgedrückt : in diesen großen Räumen herrschte ***hinreichende gesellschaftliche Homogenität*** als Voraussetzung eines grundsätzlichen Einverständnisses der Bürger, in einem gemeinsamen Staatswesen leben zu wollen.

In der ***Staatstheorie*** ist die Homogenität aller Mitglieder als eine wesentliche Voraussetzung von Bundesstaatlichkeit öfters erkannt worden. ***Carl Schmitt*** hat das Kriterium der „substanziellen Gleichartigkeit" der Gliedstaaten in der „Verfassungslehre" bereits in der Weimarer Zeit herausgearbeitet. In seiner Folge entwickelte ***Ernst-Wolfgang Böckenförde*** die Vorstellung einer inneren „relativen Homogenität", deren der säkularisierte plurale Verfassungsstaat als Vorbedingung seiner dauerhaften Verfasstheit bedürfe.[8]

Die ***Europäische Union*** ist zwar kein Bundesstaat und wird es, je weiter sie den Kreis ihrer Mitglieder spannt, niemals werden. Als wenn es noch eines eindeutigen Nachweises bedürfte, sieht der Entwurf für eine EU-Verfassung von 2004 nunmehr ein ausdrückliches Autrittsrecht der EU-Staaten vor (Art. I-60 EV). Angesichts ihrer engen „staatsähnlichen" Verbundenheit auf unbegrenzte Zeit (Art. 51 EUV, Art. IV- 446 EV) stellt sich der Union gleichwohl die Frage, inwieweit auch für ihre Mitglieder ein Homogenitätsgebot gilt.

## III. Identität und Homogenität – eine definitorische Zwischenbemerkung

Je mehr die EU ihre supranationale Rechtsetzung ausdehnte und sich gleichzeitig erweiterte, umso häufiger wird von der Notwendigkeit der Achtung der ***„nationalen Identität"*** ihrer Mitgliedstaaten durch die Union gesprochen (Art. 6 Abs. 3 EUV). Es handelt sich um einen Abwehrbegriff, mit dem Grenzen des Zugriffs eines vermeintlichen Brüsseler „Superstaates" markiert werden sollen.[9] Der EU-Verfassungsentwurf hat in Art. I-5 EV erstmals den Versuch einer näheren Bestimmung der nationalen Identität unternommen. Danach handelt es sich um die grundlegende politische und

8 Carl Schmitt, ***Verfassungslehre*** (1928), Nachdruck 1954, S. 370 ff.; Ernst-Wolfgang Böckenförde, ***Staat, Nation, Europa***, 1999.

9 Albert Bleckmann, Die Wahrung der „nationalen Identität" im Unions-Vertrag, JZ 1997, S. 265 ff.; Korioth/v.Bogdandy, Europäische und nationale Identität, ***VVDStRL*** 63 (2203), S. 117 ff.; zur Ausformulierung in Art. I-5 (1) EV Callies/Ruffert, ***Verfassung der Europäischen Union. Kommentar der Grundlagenbestimmungen***, 2006, S. 76 ff.

verfassungsrechtliche Struktur der Mitgliedstaaten einschließlich der regionalen und kommunalen Selbstverwaltung. Die Union achtet demgemäß die grundlegenden Funktionen des Staates wie die Wahrung der territorialen Unversehrtheit, die Aufrechterhaltung der öffentlichen Ordnung und der Schutz der nationalen Sicherheit. Aus Art. I-5 EV wird unmissverständlich deutlich, dass essentielle staatliche Aufgaben nicht Sache der Union sein sollen. Mit anderen Worten wird ihr damit die Entwicklung zum Bundesstaat verfassungsmäßig verwehrt.

Wenn man die spezifische „Dichte" staatlicher Beziehungen mit der nationalen Identität umschreibt, spricht nichts dagegen, in einer besonderen europäischen Begrifflichkeit ***„Homogenität"*** als eine eigene Kategorie tatsächlicher Voraussetzungen für eine „staatsähnliche" supranationale Union zu verstehen. So gesehen stellt Homogenität an den Zusammenhalt der Mitglieder der Union zwar geringere Anforderungen als sie die nationale Identität für die Strukturen eines Einheits- oder Bundesstaates ins Auge fasst. Auch hier geht es jedoch um Mindestvoraussetzungen für die notwendige „Nähe" und definitive Verbundenheit zwischen den Mitgliedern einer überstaatlichen Gemeinschaft, die mehr sein will als die klassische internationale Organisation des Völkerrechts. Daher werden zum guten Teil gleiche oder ähnliche Elemente angesprochen, wie sie für staatliche Zusammenschlüsse als unabdingbar erkannt werden.

## B . HOMOGENITÄT DER EUROPÄISCHEN UNION ?

### I. Der Test der klassischen Staatselemente

Legt man die Sonde der klassischen drei Staatsvoraussetzungen an die Europäische Union, wird ihr ***„Zwittercharakter"*** zwischen Bundesstaat und Staatenbund erkennbar.

#### 1. Gebiet („Räumlicher Geltungsbereich")

Staatliche und ebenso supranationale Zusammenschlüsse bedürfen gleichermaßen eines sinnvoll zusammenhängenden ***Gebietes***. In diesem Zusammenhang ist unerheblich, dass die EU keine umfassende Gebietshoheit über ein staatliches Territorium ausübt, sondern lediglich im Sinne des für die Gemeinschaft fundamentalen Grundsatzes der beschränkten Einzelzu-

ständigkeit einen „räumlichen Geltungsbereich" der Verträge (Art. 299 EGV bzw. Art. IV-440 EV) kennt. In ihm entfaltet sich die Unionsgewalt in dem Ausmaß, den die Verträge ihr zuweisen.

Das Europa der Union, die „kleine Landzunge Asiens" (***Friedrich August v.d.Heydte)***, wird jedenfalls seit Jahrhunderten als hauptsächlicher Teil einer geographischen Einheit verstanden, innerhalb deren sich eine wechselvolle gemeinsame Geschichte vollzogen hat und vollzieht. Nach Norden, Westen und Süden wird dieses Europa unzweideutig durch Seegrenzen markiert.[10] Lediglich nach Osten bleibt die geographische Begrenzung Europas schwierig und wird in gewissem Sinne willkürlich festgelegt (z.B. „bis zum Ural").

Für die Europäische Union bestehen somit keine sonderlichen Schwierigkeiten, sich geographisch ähnlich wie ein Staatswesen zu definieren.

## 2. Volk/Bevölkerung („Die Europäer")

Seit der Ära der Nationalstaaten herrscht weitgehend Einigkeit, dass ein ***„Staatsvolk"*** zentrale Voraussetzung für ein staatliches Gebilde ist. Im Falle der europäischen Nationalstaaten spielt seit dem 19. Jahrhundert dabei eine gewisse ethnische Verbundenheit eine wichtige Rolle, die sich vor allem in einer gemeinsamen Sprache ausdrückt. Die Einigung Italiens und Deutschlands vor anderthalb Jahrhunderten liefert hierfür ebenso Beispiele wie umgekehrt der Zerfall der österreichisch-ungarischen Doppelmona-rchie 1918 oder Jugoslawiens in den neunziger Jahren des 20. Jahrhunderts.

Das ethnische Argument darf nicht übersteigert werden. Das „Plebiscite de tous les jours" ***(Ernest Renan)*** französischen Nationalbewußtseins oder die Entstehung einer amerikanischen Nation unter dem Motto "e pluribus unum" zeigen die Möglichkeit ***multiethnischer Staaten***. Innerhalb verschiedener Mitgliedstaaten der EU bedeutet in jüngerer Zeit die Einwanderung großen Stils aus anderen Kulturkreisen wie aus Nordafrika oder der Türkei eine neuartige Herausforderung für die Homogenität der bisherigen Staatsvölker, die man durch Maßnahmen der „Integration" zu bewältigen hofft.

10 Kleinere Besonderheiten, wie die Nichtzugehörigkeit Norwegens und der Schweiz zur EU und die noch nicht eingelöste Beitrittsperspektive verschiedener Balkanstaaten können bei dieser allgemeinen geographischen Betrachtung unberücksichtigt bleiben. Näher Oppermann (Anm. 3), S. 65 ff. – Der Begriff « europäischer Staat » in Art. 49 EUV ist seinerseits geographisch zu verstehen. Ein Beitrittsantrag Marokkos wurde 1987 aus diesen Gründen von Brüssel nicht beschieden.

Hinsichtlich der Europäischen Union als Ganzes kann von einer ***„Nation Europa"*** nicht gesprochen werden.[11] Die Existenz der zahlreichen europäischen Nationalitäten von England bis Italien oder von Spanien bis Polen mit einer jeweils eigenen Sprache und Geschichte ist der hauptsächliche Hinderungsgrund für die Schaffung eines Europäischen Bundesstaates. Im ***Europäischen Parlament*** erweist sich die Herstellung egalitärer europäischer Demokratie nach dem Prinzip „One man, one vote" politisch als nicht möglich. Es fehlt der gemeinsame europäische Demos. Stattdessen beharrt jeder, auch der kleinste Mitgliedstaat, auf einer parlamentarischen Repräsentation in Straßburg. Das Europäische Parlament ist nach dem Prinzip der „degressiven Proportionalität" zusammengesetzt.[12] Danach erhalten die kleinsten Mitgliedstaaten wie Luxemburg, Malta und Zypern einen „Mindestsockel" von 5-6 Abgeordneten. Auch andere kleinere Mitgliedstaaten werden zu Lasten der größeren begünstigt. Bei einer strikten Proportionalität stünden beispielsweise Deutschland ungefähr 130 Abgeordnete statt 99 zu, während Irland lediglich über 6 Sitze statt 15 verfügen würde und Luxemburg, Malta und Zypern nicht im Parlament vertreten wären. Bei jedem weiteren Beitritt arbeitet die degressive Proportionalität zu Lasten der bevölkerungsreicheren Mitglieder. Ein imaginäres Europäisches Parlament des Jahres 2015, dem die Türkei angehörte, könnte etwa 70 türkische, 50 deutsche, 40 französische Abgeordnete u.s.w. enthalten. Würden die Beschlüsse dieses Parlaments im Empfinden der Unionsbürger über eine gemeinsame demokratische Legitimation verfügen ? In gewissem Maße stellt sich diese Problematik bereits heute in der 27er-Union.

Auch wenn es eine „Nation Europa" nicht gibt, kann man in einem abgeschwächten Sinne von ***„den Europäern"*** sprechen. Von außen betrachtet werden die durch zwei Jahrtausende gemeinsam erlebter Geschichte verbundenen Menschen aus den romanischen, germanischen und westslawischen Ethnien Europas oftmals als eine zusammengehörige und sich von der Außenwelt unterscheidende Bevölkerung angesehen. Aber auch in der eigenen Wahrnehmung tragen die noch zu besprechenden gemeinsamen historischen und geistigen Erfahrungen in diesem Raum zu einer Art „Naheverhältnis" der Europäer bei. Die Zusammenfassung dieser Bevölkerung als „Unionsbürger" (Art. 17 ff. EGV) in Ergänzung der nationalen Staatsangehörigkeiten im Sinne ihrer Ausstattung mit bestimmten gemeinsamen Rechten

11 Claus Dieter Classen, Europäische Integration und demokratische Legitimation, AöR 1994, S. 238 ff. ; A. Augustin, ***Das Volk der Europäischen Union***, 2000.

12 Roland Bieber, Struktur und Befugnisse des Europäischen Parlaments, in : Hdb. ***Der Europäischen Integration***, 2. Aufl. 1996, S. 148 ff.. ; Thomas Oppermann (Anm. 3). S. 84 f.

greift daher auf reale Zusammengehörigkeiten zurück und ist kein willkürliches juristisches Dekret.[13]

Auch die ***Sprachenvielfalt*** der Europäischen Union mit über 20 grundsätzlich gleichberechtigten Amtssprachen lässt erkennen, dass es sich hier um nahestehende Nationalitäten, aber nicht um eine einheitliche Nation handelt.[14] Staaten mit eigener Identität bedürfen nach aller Erfahrung einer oder allenfalls ganz weniger (Beispiel Schweiz) gemeinsamer Sprachen, um die notwendige unmittelbare Kommunikation zwischen den Bürgern und damit ein starkes Zusammengehörigkeitsgefühl zu ermöglichen. Im EU-Staatenverbund wird mittels hoher Investitionen in die technologischen u.ä. Möglichkeiten moderner Kommunikation sowie durch gezielte Erlernung von Fremdsprachen versucht, soviel mündliche und schriftliche Verständigung zu schaffen, wie sie zur Aufrechterhaltung einer engen überstaatlichen Gemeinschaft erforderlich ist. [15]

## 3. Staatsgewalt und Gemeinschaftsgewalt

Europäische Gemeinschaft und Union besitzen nicht die „Souveränität" einer Staatsgewalt im Sinne virtuell nicht begrenzter verfassungsmäßiger und letztlich politischer Macht. Vor allem am fundamentalen Prinzip der begrenzten Einzelermächtigung (Art. 5 EUV, Art. 5 EGV, Art. I-11 EV) zeigt sich der qualitative Unterschied zur staatlichen Plenitudo Potestatis.[16] Die Mitgliedstaaten bleiben „Herren der Verträge". Die Gemeinschaftstätigkeit ist auf die ihr ausdrücklich (einschließlich der „Abrundungskompetenz" des Art. 308 EGV, Art. I-18 EV) verliehenen Aktionsmöglichkeiten begrenzt. Dabei ist sie nur „Rechtsgemeinschaft" d.h. sie verfügt kaum über Zwangsgewalt polizeilicher, militärischer oder auch nur justizieller Art.[17]

Andererseits unterscheidet sich die supranationale Union in ihrer autonomen und mit vorrangiger (nunmehr ausdrücklich Art. I-6 EV) und unmittelbarer Verbindlichkeit sowohl gegenüber den Mitgliedstaaten als auch den Bürgern ausgestatteten Rechtsetzungsgewalt von völkerrechtlichen Organisationen. Die EU verfügt über bestimmte Fragmente staatsähnlicher Befugnisse. Mit

13 Stefan Kadelbach, Unionsbürgerschaft, in : v. Bogdandy (Hrsg.), ***Europäisches Verfassungsrecht***, 2003, S. 539 ff.

14 Wolfgang Kahl, Sprache und europäische Identität, ***VVDStRL*** 65 (2006), S. 439 ff.

15 Thomas Oppermann, Reform der EU-Sprachenregelung, ***NJW*** 2001, S. 2663 ff.

16 Statt vieler Hans-Werner Rengeling, Die Kompetenzen der EU, ***FS Badura***, 2004, S. 1135 ff. ; Peter Badura, Verfassung und Verfassungsrecht in Europa, ***AöR*** 2006, S. 423 ff.

17 Manfred Zuleeg, Die Europäische Gemeinschaft als Rechtsgemeinschaft, ***NJW*** 1994, S. 545 ff.

Recht ist gesagt worden, dass die Mitgliedstaaten unter dem Gesichtspunkt der Rechtstreue nicht nur „Herren", sondern gleichzeitg „Diener" der Union sind (***Ulrich Everling)***.

Insgesamt muß die Europäische Union bei den klassischen Staatselementen wie Gebiet, Volk, Staatsgewalt – den „harten" Faktoren der Homogenität – gewisse Abstriche im Vergleich zu den nationalen Identitäten hinnehmen. Gleichwohl stellt sie in der Dichte und Nähe ihrer supranationalen Existenz eine ***neuartige Verbindungsform*** der Staaten und Bürger dar, die ihresgleichen sucht. Diese Gemeinsamkeiten werden noch deutlicher, wenn man die im weitesten Sinne geistigen Voraussetzungen europäischer Verbundenheit in die Betrachtung einbezieht.

## II. Europäische Geschichte und Kultur

Europa erweist sich mehr noch als nach abstrakten staatstheoretischen Kategorien im historisch-kulturellen Sinne als ein sichtbar ***zusammenge-höriger Raum.***

### 1. Gemeinsame europäische Geschichte

Zur überstaatlichen Homogenität Europas gehört jenseits aller internen Konflikte und kriegerischen Auseinandersetzungen eine ***gemeinsame europäische Geschichte***.[18] Im Imperium Romanum der Kaiserzeit und später im „karolingischen" Europa waren bereits im ersten Jahrtausend unserer Zeitrechnung zeitweilig weite Teile der 15er-EU von 1995 politisch-militärisch zusammengefasst worden. Die Kaiser des Heiligen Römischen Reiches erhoben im Mittelalter in der Auseinandersetzung mit ähnlich ausgreifenden Ansprüchen des Papsttums hegemoniale Ansprüche in weiten Teilen Europas. In den Kriegen zwischen den nach der Renaissance souverän und absolut gewordenen europäischen Staaten ging es bis zum napoleonisch kurzfristig beherrschten Europa immer wieder um die Vorherrschaft über den Kontinent. Heilige Allianz und Europäisches Konzert blieben während der nationalstaatlichen Einigungen im 19. Jahrhundert übernationale Organisationsformen, bis nach den Katastrophen der beiden Weltkriege die moderne europäische Einigungsbewegung anhob.

18 Michael Stolleis, ***Europa-seine historischen Wurzeln und seine künftige Verfassung***, 1997

## 2. „Christliches Abendland" und Aufklärung

Die politische Zusammengehörigkeit des Kontinents hatte von Anfang an viel mit der aus griechisch/römisch/jüdischen Wurzeln entstandenen christlichen – ursprünglich katholischen – Religion zu tun.[19] Selbst nach der blutigen Spaltung durch den Protestantismus blieb das Christentum westeuropäischer Prägung ein Element europäischer Gemeinsamkeit , das sich von der Orthodoxie des Ostens ebenso unterschied, wie es sich im Kampf gegen den Islam in Spanien und vor Wien bewährte. „Europa hört dort auf, wo das westliche Christentum aufhört und Orthodoxie und Islam beginnen (Samuel Huntington)."[20] Auch die Ablehnung und Überwindung von Religiosität in säkular-ethischem Humanismus und Laizismus seit der ***Aufklärung*** des 18. Jahrhunderts entstand als ein europäisches Phänomen, welches zur Alternative der Religion wurde.[21]

## 3. Geistige Ausprägungen

In enger Verbindung mit Staat und Religion haben sich große geistige Strömungen

seit Jahrhunderten über die nationalen Grenzen hinweg europaweit verwirklicht und sind in der Öffentlichkeit als solche aufgenommen worden.[22] Das galt und gilt für ***Literatur, Theater*** (Homer, Vergil, Dante, Shakespeare, Molière, Goethe, Thomas Mann u.a.m.) und neuerdings Film ebenso wie für die religiös inspirierte ***Musik*** von Bach und Händel oder die große Oper eines Verdi sowie Wagner. Die romanischen und gothischen Kathedralen sind über den Kontinent ebenso verstreut wie die späteren ***Bauten*** von Renaissance, Barock und Klassik bis zur neuen Sachlichkeit.

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19 Gerhard Robbers, Europarecht und Kirchen, ***HdbStKiR der BRD***, I, 1994, S. 315 ff.

20 Samuel Huntington, Kampf der Kulturen, 1996, S. 256. Wie immer, sind solche « großen Worte » cum grano salis zu verstehen. Das orthodoxe Griechenland, die « Wiege Europas », ist ebenso ein natürlicher Teil der EU, wie diese voraussichtlich andere orthodoxe oder muslimische Staaten begrenzter Größenordnung auf dem Balkan « verkraften » könnte.

21 Der jahrhundertealte Gegensatz zwischen Christentum und Laizismus flackerte im Europäischen Verfassungskonvent 2002-2003 noch einmal auf, als eine ausdrückliche Bezugnahme auf Gott in der Präambel des Verfassungsentwurfes nicht möglich war und stattdessen auf das « religiöse Erbe » Europas verwiesen wurde. Dazu Thomas Oppermann, Valéry Giscard d'Estaing – Vater der Europäischen Verfassung, ***FS Delbrück***, 2005, S. 519 ff.

22 T.C.W. Blanning, Das Alte Europa 1660-1789. ***Kultur der Macht und Macht der Kultur***, 2006.

Die Rezeption des römischen Rechts, die Erklärung und Ausbreitung der Menschenrechte und die Entstehung verfassungsgebundener Demokratie seit 1789 fanden - in gewissen Zeitversetzungen - zuerst in Europa statt.[23] Diese ***gemeineuropäischen Rechtsentwicklungen*** stellen heute die eigentliche Grundlage für akzeptanzfähige Lösungen der EU-Rechtsangleichung dar.

### 4. Europa als Wertegemeinschaft

Zusammen gesehen kann man von einem gemeinsamen geistigen Fundament Europas sprechen, dessen Erscheinungsformen noch weiter ausdeutungsfähig sind. Diesen „Mix" mag man als ***europäische Homogenität*** bezeichnen, welche der supranationalen Gemeinschaft festen Untergrund gibt. Mit einem geläufigen Ausdruck sind es die politischen, religiös/humanistischen und kulturellen Werte, nach denen die Europäische Union als ***„Wertegemeinschaft"*** oder „Werteverbund" definiert wird.[24] Art. 6 EUV und besonders ausführlich Art. I-2 des EU-Verfassungsentwurfs benennen hierfür vor allem Freiheit, Demokratie, Achtung der Menschenrechte sowie die Rechtstaatlichkeit.[25] Ähnlich sprach bereits 1949 die Satzung des Europarates (Präambel, Abs. 2) von den „geistigen und sittlichen Werten, die das gemeinsame Erbe ihrer Völker sind". Vor allen rechtlichen Konstruktionen ist dieses Substrat die eigentliche Voraussetzung für die Sinnhaftigkeit und und mögliche Dauer des europäischen Einigungswerkes.

## C. GRENZEN DER HOMOGENITÄT – GRENZEN DER EUROPÄISCHEN UNION ?

Im Vorangehenden war unausgesprochen von einem bestimmten Teil des geographischen Kontinents die Rede, wenn „Europa" genannt wurde. Man kann in der Tat das ***Europa der homogenen Wertegemeinschaft*** als eine wichtige

23 Bellamo, ***Europäische Rechtseinheit – Grundlagen und System des Jus Commune***, 2005. Peter Häberle. ***Europäische Verfassungslehre***, 4. Aufl. 2006, S. 104 ff. nennt dies die « Europäische Rechtskultur ».

24 Statt vieler : Roland Bieber, La protection des valeurs de l'Union Européenne, in : Institut suisse de droit comparé (Hrsg.), ***L'intégration européenne : historique et perspectives***, 2002, S. 95 ff. ; Christian Calliess, Europa als Wertegemeinschaft, JZ 2004, S. 1033 ff.

25 Die Menschenrechte werden öfters als ein Kernstück der « europäischen Identität » angesehen, Wolfgang Graf Vizththum, Die Identität Europas, ***EuR*** 2002, S. 1 ff. Eine schriftstellerische Sammlung und Deutung der europäischen Werte bei Peter Prange, Werte. ***Von Plato bis Pop – Alles, was uns verbindet***, 2006.

Antwort auf die Frage nach den Grenzen der Union im Osten und Südosten begreifen, die nach dem „großen Sprung" der Osterweiterung 2004/2007 von 15 auf 25 und 27 Mitgliedstaaten immer häufiger gestellt wird.[26]

## I. Vom Staatenverbund zum Staatenbund ?

Seit der Aufnahme von zehn neuen Mitgliedern 2004, welche die Union ab 2007 mit Bulgarien und Rumänien auf insgesamt 27 Mitgliedstaaten erweitert, wird immer deutlicher sichtbar, dass die EU vor einem ***Scheidewege*** steht. Die in Maastricht 1992, Amsterdam 1997 und Nizza 2001 dreimal revidierte Vertragsverfassung der Gemeinschaft und Union ist selbst für Spezialisten immer unübersichtlicher und komplizierter geworden. Dem Unionsbürger erscheint Brüssel ferner denn je. Die europäische Rechtsetzung verlangsamt sich unter den Nizza-Strukturen. Das vorläufige Scheitern der Ratifikation der EU-Verfassung 2005 in Frankreich und den Niederlanden hat die Zukunft der europäischen Einigung verdunkelt. 2007 steht im Zeichen der Halbjahrhundertfeiern der Römischen Verträge. Werden sie zum neuen Aufbruchsignal oder zu einer Art Abgesang der Integration ? Die bekannte Finalitätsfrage stellt sich für die Union in neuer Form.

Die weitere Zukunft der „Groß-EU" vermag man sich im Wesentlichen in ***zweierlei Richtung*** vorzustellen. Entscheidendes dürfte vom endgültigen Schicksal des Verfassungsentwurfes abhängen. Ohne das Gelingen eines der vielen erörterten „Rettungsversuche" bleibt mangels durchgreifender Institutionenreform die Handlungsfähigkeit der 27er-Union auf Dauer wesentlich geschwächt.[27] Das braucht kein Ende der europäischen Einigung zu bedeuten, wohl aber eine schleichende Abnahme der inneren Kohäsion der EU. Das Funktionieren der Regeln der engen Integrationsgemeinschaft würde im prekären Zusammenspiel von „Mammut-Organen" mehr und mehr in Frage gestellt und die normative Kraft des supranationalen Rechtes nähme ab.[28] Der supranationale Staatenverbund stünde in der Gefahr des Immobilismus oder des allmählichen Abgleitens in einen rechtlich oder faktisch stärker völkerrechtlich geprägten ***Staatenbund*** („zweiter Europarat").

Im Falle einer derartigen Entwicklung träte die Notwendigkeit innerer Homogenität der Union zurück. Zusätzliche Erweiterungen bis zu Euphrat und

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26 Sander/Vlad (Hrsg.), ***Quo vadis, Europa? Europas Verfassung und künftige Erweiterungen***, 2006

27 Geerlings, Der Fortgang des Europäischen Verfassungsprozesses, ***RuP*** 2006, S. 23 ff.

28 Thomas Oppermann, Zur normativen Kraft des Europarechts in einer sich erweiternden " Groß-EU", ***JZ*** 2005, S. 1017 ff.

Tigris und vor die Tore Russlands würden möglich und fügten sich in die gelockerten Verhältnisse ohne grundsätzliche Probleme ein. Mit den Vorstellungen der Gründervater und ihrer Nachfolger über ein kraftvoll supranational „vereintes Europa", von dem u.a. die Präambel des deutschen Grundgesetzes spricht, hätte eine solche ***Mega-Union*** freilich nur noch wenig gemein. Es stünde dahin, ob ein solcher „zweiter Europarat" in der globalisierten Welt von heute Europa den ihm zustehenden Rang zu sichern vermöchte. Manche rückwärtsgewandten Kräfte, etwa in Großbritannien, Polen oder in Tschechien, könnten mit einer derartigen Entwicklung gut leben, die ihren Wünschen nach einer großen Freihandelszone ohne weitergehende politische Ambitionen entspräche.

## II. Oder Besinnung auf die Grenzen einer homogenen Gemeinschaft ?

Soll der „europäische Traum" von einem zwar nicht bundesstaatlich, aber dauerhaft überstaatlich („staatsähnlich") geeinten Europa nicht zu Ende gehen, ist es an der Zeit, dass die Europäische Union ihre Handlungsfähigkeit mit einer ihrer Größe gemäßen Verfassung wiederherstellt und sich gleichzeitig auf die ***endgültigen Grenzen der Union*** besinnt. Viel spricht dafür, dass nur ein innerlich homogenes Europa zu dem Maß an dauerhaftem „Zusammenwachsen" fähig ist, welches der Integrationsprozeß seinen Mitgliedern abverlangt. Nach außen setzt Homogenität Abgrenzungen voraus, die gleichwohl keine „abschottende" Ausgrenzung gegenüber den Nachbarn zu sein braucht.

Nach mancherlei Anzeichen hat politische Besinnung innerhalb der EU über ihre „natürlichen Grenzen" begonnen. Dazu gehört die lange versäumte ernsthafte Diskussion über die ***„Aufnahmefähigkeit"*** der EU im Sinne des Vierten, von den Staats- und Regierungschefs der Union in Kopenhagen 1993 aufgestellten Kriteriums, wonach Beitritte ihre Grenze an der „Fähigkeit der Union finden, neue Mitglieder aufzunehmen und zugleich die Stoßkraft der europäischen Integration zu erhalten."[29] Ebenso wichtig ist in diesem Zusammenhang die von der Kommission angestoßene und inzwischen in Art. I-57 des Verfassungsentwurfes aufgenommene Konzeption einer ***„Nachbarschaftspolitik"*** der EU mit Staaten, die der Union räumlich und bis zu einem gewissen Grade soziokulturell nahe stehen, denen jedoch keine

29 Text : Bulletin der Bundesregierung 1993, S. 629 ff.

Beitrittsperspektive eröffnet werden soll.[30] Mit ihnen sollen durch Abkommen und eine verstetigte Kooperationspolitik freundschaftliche Beziehungen geschaffen und dort Frieden, Stabilität und Wohlstand gefördert werden. Eine Union, die in Erkenntnis der eigenen geschichtlichen, politisch-verfassungsmäßigen und kulturellen Homogenität ihre Grenzen gezogen hat, dürfte am ehesten in der Lage sein, ihren Nachbarn als hilfsbereiter und verlässlicher Partner gegenüberzutreten. Mehr als ein lockeres Konglomerat, das sich ohne Gewissheit seiner selbst in immer weitergehender Ausdehnung verliert.

30 Waldemar Hummer, Nachbarschaftspolitik vor und nach dem Verfassungsvertrag, ***Integr***. 2005, S. 233 ff.

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# THE FREE MOVEMENT OF GOODS POLICY V. NATIONAL PATENT RIGHTS

Abstract

***From the approach of the European Court of Justice and its reasoning displayed above several points can be made, concerning the impact of the free movement of goods principle upon national patent rights:***

***Any action taken by a patent holder before a national court stemmed from his patent to pursue the cross-border movement of patented goods shall be sustained as long as it is conducted within the specific subject matter of patent rights.***

***The action in the national court to prevent the free trade, which exceeds beyond the scope of the patent's specific subject matter, shall be treated as a measure having equivalent effect to the quantitative restrictions on imports between Member States, thus prohibited by Article 28.***

***Article 28 is directly applicable, hence it can be relied upon by a defendant to a patent infringement action; the Article, therefore, overrides the national patent rights unless a claimant shows that the defendant's conduct is covered by the specific subject matter of the patent.***

***The specific subject matter of patent rights is limited by the European Court of Justice to the right of first sale of patented goods undertaken by a patent holder "either directly or by the grant of licences to third parties";[1] any further***

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1 Centrafarm BV v. Sterling Drug Inc. [Quoted from S. Weatherill, ***Cases and Materials on EC Law*** (London, Blackstone Press Limited, 2001) p. 548].

***attempt of a patentee to control and restrain the circulation of such goods within the Common Market is not covered by the specific subject matter, therefore it shall not be upheld by a national court (Community-wide exhaustion of patent rights).***

***Article 28, thus, has its overriding effect where national law would otherwise empower the right-owner to prevent parallel importation;[2] apart from that, national patent law in each State alone determine the content and scope of the patent rights together with procedures and conditions for obtaining them "until there is a relevant harmonization Directive, or a Community right becomes a complete substitute."[3]***

***The appreciated scope of an exclusive patent licence is regulated by the Competition rules of the Treaty (Articles 81 and 82) prescribed to deal with private undertakings; the competition policy towards national patent rights is compatible with the free movement of goods policy (see the findings over the Maize Seed case covered within previous chapter).***

***Note also that the Community-wide exhaustion of patent rights is confined to regulate cross-border movement of commodities within the Common Market (including the EEA). It does not apply to circulation of patented goods between non-member states and the EU. Except industrial producers, consumers and parallel importers as vagaries of the conflict with the EU amid, here the issue is rather more complex, as different context, players and policies are involved; the issue is to be tackled with grate consideration given to different and opposing interests that might occur within the World Trade Organization (WTO).[4] So far, however, the European industrial producers have pleaded for rule of non-exhaustion at the external boundaries of the Common Market corroborating the case by the fact that it could encourage the sett-up of production and transfer of technology into the cheaper developing countries. Otherwise, the prospect would be hampered by consequent parallel importation from there. In addition, the EU would probably refrain from introducing international exhaustion unless it can secure a reciprocal move from other foreign trading partners.***

***However, for the purposes of this work it is enough to stress that in principle unless "an effective rule of Community law on the matter is adopted, the applicable rule is determined by the law of the country of import."[5]***

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2 W. Cornish & D. Llewelyn, ***Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights***, (London, Sweet & Maxwell, 2003.) para. 18-03.

3 ***Ibid***.

4 However, Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO -TRIPS agreement) avoid addressing the issue of exhaustion of intellectual property rights, unless it can be deemed that it is covered by national treatment or most favored-nation treatment provisions (***Ibid***. para. 1-58)

5 ***Ibid***.

***Ključne reči: prava intelektualne svojine, slobodan promet robe, komunitarno pravo, autorska i srofna prava.***

***Key words: intellectual property rights, free movement of goods, community law, copyrights and related rights.***

## INTRODUCTION

The goal of intellectual property rights (IPR) is protection of economic application of ideas and information that are of commercial value. There are several classes of IPR, of which most notable are copyrights and related rights, patent rights, and trademarks, and accordingly each of them has its own distinct subject-matter and purpose. Nonetheless, what they have in common is that all of them are concerned with determining ***types of conduct which may not be pursued without the consent of right-owner***[6], thus they are dealt with by a broad analogy to property rights in tangible movables.

However, the aim of IPR is not to protect the actual possession in law by the possessor of intellectual property (IP), as in reality its holder is ***anyone who has a knowledge or unmolested access to come into the knowledge of such property***[7]**.** Ideas and information are disseminated through means of communication and consequently each consumer is their possessor whether they desire it or not. Such diffusion the law is not able to control, nor would it be appreciated to do so. What it, actually, aims at is to establish the ***system of bans***, in order to prevent others, but the legal proprietor of IP, to economically utilize upon it.[8] Thus if one cannot inhibit the possession of IP, it can preclude its ***commercial use.*** As a result intellectual property rights are ***essentially negative***, meaning that they represent the authority of the right-owner to stop others from exploiting them. In other words, the right-holder is exclusively authorized to manufacture and to place into circulation goods or to perform services through which IP is materialized.[9]

The underlying objective is to shield and incite the creative effort and investment in capital and work by entrepreneurs, whom would be demoralized to do so, if they would be left to watch imitators ***yielding without sowing*** upon their accomplishments and thus to reward and encourage innovation. In other

6 W. Cornish & D. Llewelyn, ***Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights***, (London, Sweet & Maxwell, 2003.) para. 1-01.
7 S. Marković, ***Pravo intelektualne svojine*** (Belgrade, Nomos, 2000) p. 23.
8 ***Ibid***.
9 ***Ibid.***, p. 26

words, the protection of IP is one of prerequisites for economical, cultural and technological development of each society.

Everything aforementioned refers especially to patent rights. Patents, as a type of IPR provide temporary protection to inventions, ***i.e.*** technological improvements, great and small (short-term patents), that are previously unrevealed (condition of novelty), under condition that they possess sufficient level of inventiveness and economical applicability. Likewise, other intellectual property rights patent supplies the right-holder with the ***exclusive right (exclusivity)*** to economically exploit (to manufacture and sell) its invention and at the same time exclude the others, ***i.e.*** competition in doing the same, within the term of its duration. Thereby, the patent gives to its right-holder capability to control the competition, as it prevents others from encompassing any form of the protected invention in their products and services. What differentiates patent rights from other sorts of IPR is the capacity of excessive market powers in hands of their proprietors that diminishes rivals in direct competition due to the advantages provided by their protected inventions.[10] The market power is bigger as the invention is more inventive. To be more specific, if the invention represents major technological breakthrough in certain area it will make the competition obsolete. That means that the patent owing to its exclusivity can provide the patentee with a monopoly, which intimidates competition and might distort workable competition.

National character of the IPR, and thus of patent rights, is their second crucial feature. Although, universal by their nature, nevertheless, intellectual property rights mainly derive under national law. Despite this, there is substantial number of multilateral agreements in existence, that cover different issues of IPR. Yet, all of them are confined only to condition, supplement and/or indirectly approximate national laws. They do not, however, create comprehensive supranational regime of IP and do not facilitate its protection. The same, more or less, stands for the patent protection. In reality, this means that if a patent-holder has protected his invention under law of Serbia & Montenegro this does not mean that he can rely upon it in Hungary. Before he would be able to do so, he must previously obtain the patent from Hungarian patent-granting authorities, save that his invention fulfils all the demands set by the Hungarian law. But, once a third party, independent from the right-holder tries to export commodities in which the alleged invention is

10 For example, unlike patent rights, trademarks "do not by themselves have the capacity to prevent a competitor from entering any market with his own products or services; they merely prevent him from annexing the protected mark in order to facilitate his market entry." [W. Cornish, ***op.cit.***, para. 1-07].

materialized from Hungary into Serbia & Montenegro, in order to market them there, the patent-holder is entitled to invoke his exclusive rights under the local law and prevent their exportation and marketeering. This is so due to the ***principle of territoriality*** of patent law that arises from mentioned national character of IPR. As a result "***the right in each country is determined by the law of that country and it is independent of equivalent rights governing the same subject-matter in other countries and neither stands or falls with them."***[11] This also means that ***"the right only affects activities undertaken by others within the geographical territory for which it is granted."***[12]

Therefore, ***exclusivity*** of the patent rights followed by their ***territorial character*** endows the proprietor with respective market powers that enables him to control commercial activities of his direct competitors within the market by using them as an instrument for preventing others to produce, distribute and sell protected goods and services in direct competition. Together they make ***geographical exclusivity,*** the quality, which has its separate importance when it is exercised in international trade, as it makes the patent (as well as other IPR) as private right equally effective in limiting cross-border movement of commodities and services as some administrative measures imposed by state. In other words the patent protection is liable to create cross-border barriers to free flow of goods and services. Moreover, splitting of rights through licencing of IPR between the right holders for different territories (i.e. countries), as a method of economical utilisation of said geographical exclusivity, is additional tool to control competition, though on the international scale.

However, this is exactly what the European integration[13] has been striving (and still strives) to eliminate. Throughout its genesis (from establishment of the Common Market in 60's and 70's which evolved into the Internal Market in 80s' and 90s' till now, when it emerges into the Single Market), the process was underpinned by the cross-border factor mobility and freedom to compete as its cornerstones and fundamental rights. Clearly, deployment of national IPR rules comes into conflict with the basic policies run by the European Community law.

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11 W. Cornish & D. Llewelyn, ***op. cit.***, para. 1-30

12 ***Ibid.***

13 This amorphous term tries, from historical point of view, to unite in one all stages of development of what we call today European Union. Also, the reader should be aware that the principles of free movement and the rules of competition applies equally to the relations within the European Economic Area (EEA) and thus everything that will be discussed under this paper.

The IPR, and hence the patent, operate mainly as a ***form of legal exclusivity*** towards the free enterprise market of each national state. Nevertheless, ever since the effects of their character have been tolerated by nations insofar that they have been in accordance with their actual public interest. Plainly, it is the permanent game of balancing between the two legitimate expectations, fair competition and free factor mobility, on the one hand and rights to protect intellectual property on the other. Here we deal with a unique supranational political and economical entity with its own analogous "free enterprise market" and with its new autonomous conceptions of "public interest". Thus, it is the same "ball game", but on a whole new level, and with some "new players" in. Therefore, alike national states the European Union (EU) have been forced to struggle in order to find the perfect balance between national intellectual property rules and its quintessential objectives-above all, establishment of the Common Market.[14]

Nonetheless, ***the ultimate art in shaping of IP policy lies in securing outcomes that are proportionate to the aim of that protection.***[15] The purpose of this paper is to cast some light on how this was done within the European integration, in respect to patent rights.[16]

## SOURCES OF CONFLICT

Common markets presuppose custom unions enhanced with free factor mobility across national member frontiers, i.e. capital, labour, goods and services. The EU together with its predecessors is an example. Yet it is somewhat complex, as it was foreseen that it would become a complete economic union with a strong political flavour. This demands substantial unification of monetary and fiscal policies of national members. To that end the EU is, therefore, endowed with supranational central authorities that overlook the process.[17]

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14 Although, concepts such as "common market", "internal market" and "single market" represent different progressive stages of the European integration development, for the purposes of the work it will be used on equal terms. Also it will relate to the territory covered by EEA (EU + Iceland, Liechtenstein and Norway).

15 W. Cornish & D. Llewelyn, ***op. cit.***, para. 1-01

16 Given the enormous scope of the Competition law of EU disproportionate to the ambit of the paper the author will concentrate on relation between national patent protection and EU free movement of goods policy and yet touch upon the competition rules when they refer to the main topic.

17 S. Weatherill, ***op. cit.***, p. 169.

Accordingly, the magnitude of the integration, of which the core is the common market, implies that number of measures need to be adopted in order to unify or at least approximate national laws for it to function. "As far as intellectual property rights are concerned, it has been usual to work towards the unified law for the whole territory."[18] In the absence of such unification, the geographical exclusivity of national intellectual property laws and variations between the different legislative systems are capable of partitioning the internal market of the Community. Thus, there was a strong case for creating a ***Community-wide right*** as a mean "to eliminate differences of national law which may have a consequential effect on the free flow of goods within the internal market".[19]

However, reaching the common ground in relation to IPR, especially concerning industrial property rights, has always been a rather complex business, as national states tend to be protective of the interests of their own industries. Even though, they were part of economical integration that strived to establish internal market this remark was equally adequate in relation to Member States of European integration. Member States have been raising the question about the legal grounds for the legal intervention of the Community in this matter, often enough; there are no express authorities under the Treaty of Rome[20] or upon the constitutional arrangements which have amended it and added to the European Union.[21] The result was the lack of communitarian legislation upon which relevant institutions could turn, when resolving ***the conflict between the free movement of goods and competition policy***, as milestones of the Common Market, on the one hand, ***and national protection of IP*** on the other.

In order to fill the legal gaps and handle the conflict, the European Court of Justice (the Court) and the Commission of the European Community (under its competences in administrating the Competition Law) were, therefore, left alone

18 W. Cornish & D. Llewelyn, ***op. ci***t., para. 1-50.

19 ***Ibid***. para. 1-28.

20 The Treaty Establishing European Economic Community 1957. which has been amended several times (The Single European Act 1985, The Treaty on European Union 1992, The Amsterdam Treaty 1997, The Nice Treaty 2001).

21 The regulations on Community intellectual property rights and directives for the harmonization of national rights are being adopted pursuant non-specific provisions of Article 308 (regulations) and 95 (directives). Nevertheless, the states questioned, several times, before the European Court of Justice, the competence of the EC to adopt the measures in the field of IP, relying upon Article 295 that states the following: Treaty shall in no way prejudice the rules in Member States governing the system of property ownership. Although, the scope of this provision is not yet clear, nevertheless the Court refused to employ it [W. Cornish & D. Llewelyn, ***op. cit.***, para. 1-28]

to derive the rules directly through "creative" interpretation of the Treaty of Rome (the Treaty) provisions.

The two crucial aspects of the Treaty are directly linked to this matter: one is elimination of restrictions upon free movement of goods between Member States, and second is establishment of a system to prevent distortions of competition in interstate trade. Articles 28-30 (free movement of goods) regulate the first feature, and it is the main concern of this paper, and the second is covered by Articles 81-86 (competition)[22] and will be touched upon where needed.

The Treaty itself, however, provides no simple answer:

Article 28

***Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.***

Accordingly, Article 28 strives to eliminate ***quantitive restrictions*** "as measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit"[23] and all ***measures having equivalent effect***, "which amounts to all trading rules enacted by Mamber States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."[24] Therefore, Article 28 is a quintessential instrument for the creation and maintenance of the Common Market in which free circulation of good is ensured. It precludes the isolation of national markets and thereby induces efficient and functional competition irrespective of the existence of national frontiers.[25] It seems that it pleads for national IPR to be deemed as unlawful barrier to the trade.

However, Article 30 and Article 295 may suggest otherwise.

Article 30

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22 Both sets of provisions are directly enforceable, meaning, they constitute rights and corresponding obligations in individuals as well as in Member States, which may be enforced or pleaded in defence in litigation before national courts [W. Cornish & D. Llewelyn, ***Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights***, (London, Sweet & Maxwell, 2003) para. 1-50]. Basic distinction between the two, is that former deals with acts of States, and the latter with acts of private undertakings.

23 Geddo v Ente [1973] 865, [quoted from: S. Weatherill, ***op. c it.***, p. 241].

24 Procureur du Roi v Dassonville [1974] ECR 837, ***Ibid.*** p. 245.

25 ***Ibid.***

The provisions of Articles 28 and 29[26] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ***public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or*** the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 295

***Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.***

Article 30 introduces exemption from the principle prescribed by Article 28, by allowing for national territorial protections of intellectual property rights to be regarded as lawful barriers to the free trade, unless they "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." Furthermore, Article 295 supposedly reserves the "system of property ownership" for Member States.

The solution that would satisfy both legitimate expectations (free trade and unrestricted cross-border movement of goods, on the one hand, and the right to protect the intellectual property, on the other) is to be uncovered within the triangle of quoted provisions. Thereby, it is all left to proficiency of "judicial assessment of competing interests".[27] Following chapter will try to elucidate the Courts approach to the issue.

## THE APPROACH OF THE EUROPEAN COURT OF JUSTICE

Beneath, above described theoretical dissension between conflicting policies demands there is a real undergoing strife between the bearers of each, i.e. intellectual property right holders and parallel importers. While Article 28 embraces the interests of the latter, Article 30 endorses the rights of the former.

"Parallel importation" is a phenomenon in international trade which is the result of price differentials for the same goods between markets in different countries. In short, it is an undertaking of an independent entrepreneur to buy in a low-cost country in order to sell in a high-cost country, from obvious

26 Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited by Member states.

27 S. Weatherill, ***op. cit.***, p. 241

reasons. The problem occurs when those goods are protected by IPR; the right holder naturally wants to prevent the middleman's activity to resale at a profit by invoking his exclusive rights and thus eliminate what he regards as unauthorized direct competition. Except preserving its "ability to discriminate in his pricing between different territories"[28], the proprietor of IP has some further reasons for restraining parallel importing. In order to procure his products in new territories and explore and conquest new markets the right holder can introduce various strategies. For example, to achieve optimum in profit by cutting costs of introducing production and distribution of protected goods in country other than his home, the proprietor might prefer to assign his exclusive rights to a local licensee or distributor to do it instead. In return, for the sake of his investments, by acceding into position of right holder (for example, patentee, or trademark proprietor) in a given market the local licensee or distributor would like to be able to exclude the competition in his territory too. The same would desire some transnational corporation for its national subsidiaries through which it operates business in different countries, as each may be given exclusive rights in IP[29] (splitting of rights process). Therefore, inability of the right holder to exercise its exclusive rights to exclude competition in some territory, or to offer such exclusive rights to another, hampers his prospects to compete and yield upon its investments.

However, the EU has aspired to curb the excessive practices that discriminate one group of consumers from the other by triggering price differentials[30] in the Common Market. The parallel importation represents "an adjustment mechanism driving towards price uniformity"[31]; in addition it conduces to satisfaction of internal market and consumer's demands in protected goods. The Community, hence, considers the practice important to achievement of the internal market and supports the activity of parallel importers wherever possible.[32]

Accordingly, a difficult task was set before the Court to resolve, as it has been striving, ever since, to protect the purpose of the Common Market and yet not to hamper legitimate aims of national protection of IP. As the former cannot

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28 W. Cornish & D. Llewelyn, ***Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights***, (London, Sweet & Maxwell, 2003) para. 1-48.

29 ***Ibid***. para. 1-48, 1-58, 18-02.

30 The phenomenon, however, is triggered by other factors too, such as fluctuation in currency exchange rates, government prices control in certain sectors (pharmaceuticals notably), the cost of establishment new products in particular parts of the market or variations in quality of products between different markets, etc. (***Ibid***. 18-02).

31 ***Ibid***. 18-02.

32 ***Ibid***.

entirely override the latter, and ***vice versa***, the real knob left before the Court to disentangle is to which extent the territorial exclusivity of IPR is proportionate to its objectives and therefore acceptable against fundamental communitarian goals.

The Court's solution, in attempt to conciliate the antagonistic demands, is based upon a distinction between the ***existence*** of national IPR and their ***exercise.*** Hence**,** "it cannot question their existence, but it will control their exercise"[33]. Thereby, the Court implies that whilst the national intellectual property right itself cannot be deemed as to be contrary to the Treaty, yet their application has to be confined for to be in accordance with it. [34] In other words, by this method Luxembourg avoids possibly unpleasant outcomes of Article 295.

The Court curbs the ***exercise*** of IPR through the conception of the ***specific subject matter***. Accordingly, the right holder can invoke his intellectual property rights, to restrain the cross-boarder movement of protected goods, until they are exercised within their substance, i.e. within the specific subject matter, contents of which is upon the Court to assert. Therefore, only within that scope, free trade can be restricted through the exercise of IPR by its proprietor and anything beyond that would be seen as an excessive use of the right.

In defining the specific subject matter for each class of IPR the European Court of Justice leans upon a universal ***exhaustion of right doctrine*** that it derives from national legal systems and adjusts to communitarian legal order.

As a general concept, ***exhaustion of rights rule provides that IPR cannot be deployed to control the subsequent marketeering of protected commodities after first sale is committed by the right-owner or with his consent.*** As far as the patent law is concerned, this institute is explicitly formulated in laws of a rather small number of countries[35]. Yet, as the institute it exists literally from the genesis of this branch of intellectual property law. "Actually it is a result of teleological interpretations of patent law provisions, thus it is a product of legal doctrine and case law."[36] It serves as a criterion for resolving collisions between two different legal authorities over certain protected good that together arise from

33 S. Weatherill, ***op. cit***., p. 547

34 The method of interpretation based upon dichotomy between existence and exercise of intellectual property law is similar to one practiced within the international private law. Namely, when asserting applicability of applicable foreign law provision in domestic legal system against lex fori public order, the local court is supposed to appreciate whether its legal effects are in accord or in discord with the local order public, not its content.

35 Belgium, France, Spain [S. M. Marković, ***Patentno pravo*** (Beograd, Nomos, 1997) p. 300].

36 ***Ibid***.

intellectual property on the one hand and property ownership on the other.[37] According to above definition the purpose of the institute is to prevent an excessive use of IPR as a mean to restrain trade and competition. "But often, this is confined to first sales within the territory covered by the right - it amounts to a principle of domestic, rather than international, exhaustion. Accordingly, national rights that are subject to such limitation can still be used to prevent the importation of goods sold abroad by the national right-owner or goods which come from an associated enterprise."[38] Confining the effects of the institute to domestic territory leads to the discrimination of entrepreneurs from elsewhere in the internal market. There the IPR policy comes into the conflict with another fundamental communitarian principle, ***non-discrimination.***[39] Another problem is that the scope of the rule varies, from country to country and from subject-matter to subject-matter and in some cases the reverse approach might occur.[40]

Therefore, the European Court of Justice, extracted, somewhat, general idea that is most common to national conceptions, and morphed it into the ***community-wide exhaustion of right*** concept suitable for the internal market. The solution is more or less blind for internal national boundaries within the Common Market; alike the Court itself strives to be whenever the proper internal market functioning is challenged. Furthermore, once it grew into the communitarian rule, the national exhaustion rules became irrelevant.[41] In

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37 ***Ibid***.

38 W. Cornish & D. Llewelyn, ***op. cit***., para. 1-49

39 Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited (Article 12, the Treaty Establishing the European Community). See also Article 30 above.

40 The British traditionally adopted a principle of non-exhaustion in the case of patent law, which means that any subsequent uses and sales require the patentee's licence. This approach is in discord with one generally accepted in the field and with solution adopted by the Court.

41 Generally it is known the legislation or other written sources of law are not always able to give answers to every question that comes before the courts. On the other hand if the courts are competent to resolve such legal questions, they cannot refuse the legal protection on the basis that the issue is not regulated by existing legislation. If this is the case, the courts are entitled to recourse to general principles of law in order to decide it. ***Regula pro lege, si deficit lex***. Accordingly, the European Court has developed a doctrine that rules of Community law may be derived, not only from treaties and legislation, but also from the general principles of law [T.C. Hartley, ***The Foundations of European Community Law***, (New York, Oxford, 1998), p. 130].

The functional source of the principles arises either from the Community Treaties or from the legal systems of the Member States. However, whatever the factual origin of the principle, it is applied by the European Court as a principle of Community law, not national law (***ibid***. p. 131).

The general source that gives rise to the approach of the Court is Article 220{164}of the Treaty which states: "The Court of Justice shall ensure that in the interpretation and application of this

summary, in the same way that the national courts protect integrity of national markets, the European Court of Justice protects integrity of the communitarian market.

The principle works in several ways; legally, by its "lacuna-filling role" within the Community law it substitutes and overrides the national rules of exhaustion with the single communitarian. Technically, it overcomes the time gap while awaiting for the Community legislation to be passed in the field that will set the common rules for all the "players". In fact it creates boundaries to the area where national rules of IPR can be freely exercised to the detriment of the free flow of goods policy within the EU with the European Economic Area adhered.

Although, the method briefly explained above, could be contested as "too creative" as it allegedly trespasses into the legislative competences, it is the very same pattern of teleological interpretation which led to determining of the ***principle of the precedence of Community law***[42], that is ***supremacy***.[43] Thereby, the solution is not driven by legal scrutiny but rather by the "or else" argument, i.e. by the fear that alternative solution would lead to the eventual erosion of the Common Market.

However, through analyses of communitarian case law, the following chapter will try to evaluate on how the approach of the Court reflects upon the patent law.

## CASE LAW

Like it was already stressed above, the geographical exclusivity of patent rights enables the patentee to exercise its legal monopoly so to deny access to the national market to protected goods of any competitor from elsewhere if their undertaking can be regarded as unauthorized. As a result, the patentee from

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Treaty the law is observed". It is widely accepted that the word "law" must be understood as to refer to something over and above the Treaty itself (***ibid***. p. 131). As a result, it arises that the Court is ordered to apply the general principles of law when it is appropriate.

It should not, however, be thought that the Court always makes express reference to general principles whenever it propounds new rules of law. Sometimes it simply states a rule without any express indication of its source; it may give a justification based on policy or the general requirements of the Community legal system. However, if the formal source for such rules were required, it could always be found either on the basis of a wide interpretation of a written text or on the basis of the general principles (***ibid***. p. 132).

42 Amministrazione delle Finanze v Simmenthal [1978] ECR 629 [S. Weatherill, ***op. cit***., p. 84.]

43 Doctrine introduced in Costa v ENEL [1964] ECR 585.

country Impo (the patent holder's country) can block exportations of patented goods from country Expo and their subsequent marketeering in the country Impo, relying upon its exclusive right to manufacture and sell such goods. The right-holder is entitled to do so even if the importer has a patent granted for the identical invention in the country Expo or, moreover, notwithstanding the fact that a parallel importer might have acquired the goods that eventually originate from the patentee or from its associates.[44] The geographical exclusivity, thereby, runs contrary to the Community objective of economic integration.

In order to defuse a clear rift between Article 28 and Articles 30 and 295 the Court established the specific subject matter doctrine. The best way to grasp it is to study the "textbook" cases through which it was shaped. Each case analyzed below will consider particular issue regarding the patent law.

Centrafarm BV v. Sterling Drug Inc. [1974] E.C.R. 1147, (parallel patents)

In the ***Sterling Drug*** case, the Court used the opportunity "to patent" its ***existence-exercise*** method, described above, in order to delimit the scope of the national patent protection.

"Sterling Drug held parallel patents in several Member States for certain pharmaceuticals, including the drug NEGRAM. The products protected by those patents were lawfully marketed in those Member States either by Sterling Drug or by undertakings to which Sterling Drug had granted licences. Centrafarm, a third party, bought up stocks of NEGRAM in the UK and exported them to the Netherlands. There, they were able to make a substantial profit, because the cost of NEGRAM on the Dutch market was far higher than its cost in UK. Sterling Drug initiated patent infringement proceedings to prevent NEGRAM being marketed in the Netherlands by Centrafarm. Centrafarm argued that they had a right under Community law to export the drug from one Member State to another, given that Sterling Drug had consented to the marketing of the product in both States. The Dutch court referred questions about the relevance of Community law to Luxembourg (the European Court of Justice seat - author's remark)".[45]

44 This is a most usual case when a national legal system restricts the application of the principle to rather domestic than international exhaustion.

45 S. Weatherill, ***op. cit.***, p. 548.

Bearing in mind that it was dealing with ***property,*** the European Court of Justice avoided taking stand explicitly upon ***an arbitrary discrimination or a disguised restriction on trade*** exemptions posited by Article 30 fearing that it might have been trespassing into the special preserve prescribed by Article 295.[46] Instead, it relied upon dichotomy between existence and exercise of industrial and commercial property rights by stating that ***it is clear from [Article 30], in particular its second sentence, as well as from the context, that whilst the Treaty does not affect the existence of right recognised by the legislation of a Member State in matters of industrial and commercial property, yet the exercise of these rights may nevertheless, depending on the circumstances, be affected by the prohibitions of the Treaty[47]***.

Therefore, the Court held that derogations from free movement policy rendering from Article 30 can be made only ***where such derogations are justified for the purpose of safeguarding rights which constitute the specific subject-matter of this property,[48]*** and then it defined the ***specific subject matter of patent rights*** as:

***the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties as well as the right to oppose infringements.***[49]

Accordingly, the definition of specific subject matter delimits the area within which the free trade can be restricted through the exercise of the national patent rights. Therefore, its real contents concern the scope of exhaustion. Furthermore, the Court additionally specified the range of its application in relation to the free movement of goods policy:

Whereas an obstacle to the free movement of goods of this kind may be justified on the ground of protection of industrial property where such protection is invoked against a product coming from a Member State where it is not patentable and has been manufactured by third parties without the consent of the patentee and in cases where there exist patents the original proprietors of which are ***legally and economically independent*** (bolded by author), a derogation from the principle of the free movement of goods is not, however, justified where the product has been put onto the market in a legal manner, by

46 W. Cornish & D. Llewelyn, ***op. cit***., para. 18-05. Note, also that as the British law accepted the domestic principle of non-exhaustion in the field of patent rights, the parallel importer from elsewhere in the Community was legally in the same position as a domestic distributor and therefore not discriminated against.

47 Sterling Drug ibid. p. 549

48 Centrafarm BV v. Sterling Drug Inc. [quoted from W. Cornish & D. Llewelyn, ***op. cit.,*** p. 18-05]

49Centrafarm BV v. Sterling Drug Inc. [Quoted from S. Weatherill, ***op.cit***., p. 548]

the patentee himself or with his consent, in the Member State from which it has been imported, in particular in the case of a proprietor of parallel patents.[50]

In other words, the industrial property rights and thus the national patent protection are efficient against direct competition of manufacturers and their distributors that are independent (***legally and economically***) from the right holder. On the other hand, it cannot be invoked against parallel importers whom acquired the patented goods that had, previously, been put by patentee ***into circulation for the first time, either directly or by the grant of licences to third parties***. For them the patent rights are considered to be exhausted. Moreover, the wording of the Court's decision suggests that the patent right is equally exhausted to patentee when patented products are first marketed by a person ***connected with the patent holder through a*** corporate grouping, manufacturing licence, distribution agreement, etc.[51]

In the end, the Court underscored that ***the exercise, by the patentee, of the right which he enjoys under the legislation of a Member State to prohibit the sale, in the State, of a product protected by the patent which has been marketed in another Member State by the patentee or with his consent is incompatible with the rules of the EEC Treaty concerning the free movement of goods within the Common Market,*** owing to the fact that otherwise ***he would be able to partition off national markets and thereby restrict trade between Member States, in a situation where no such restriction was necessary to guarantee the essence of the exclusive rights flowing from the parallel patents.***[52]

Given the circumstances, the decision implies that the exercise of the patent right, stemming from national legislation to restrain the sale, can be considered as a ***measure having equivalent effect***[53] to the ***quantitative restrictions*** prohibited by Article 28. Although, Article 28 is aimed at the Member State's intervention, the Court holds that a patent infringement action before a national court by patentee, founded upon a national patent law, can be considered as an emanation of the State through the private initiative. To be more specific, it may be deemed as an application of a trading rule enacted by a Member State capable of hindering intra-Community trade ***indirectly.*** Thereby it could be caught by the said provision. Accordingly, "the application of the Article 28 prohibition is dependent on the ***effects*** of the measure" and hence "bites where a national rule is shown to have an effect prejudicial to the integration of the

50 Centrafarm BV v. Sterling Drug Inc. ***ibid***. p. 549

51 Note, that in the Sterling Drug case, the NEGRAM drugs were being marketed either by Sterling Drug or through its subsidiaries.

52 Centrafarm BV v. Sterling Drug Inc. ***ibid***. p. 549

53 Defined by the Court as all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade {Procureur du Roi v. Dasssonville (case 8/74) [1974] E.C.R 837, quoted from S. Weatherill, ***op. cit***., p. 245}.

markets of the Member States."[54] Therefore, under certain conditions, invoking the national patent right before the national court so to prohibit cross-border movement of patented goods, is deemed as manifestation of the restrictive effect of national trade rule on inter-State trade.

The Fact that Sterling Drug had consented marketing of the protected products by a member of the group (subsidiary) in the Member State qualified the exercise of the patent rights through infringement action as a measure having equivalent effect. In other words consent to the undertaking in the UK exhausted its patent rights in the Netherlands. As a result Centrafarm was availed under Community law to freely export and sell the NEGRAM on the Dutch market and profit from the higher prices there. The emphasis are on ***"consented marketing"***, thus any further attempt of a patentee to control subsequent marketing in the Common Market is beyond the specific subject matter, hence prohibited by Article 28 as a measure having equivalent effect.

However, while shaping up the Community-wide principle of exhaustion the Court did not deduce any explicit justification grounded upon a comparative study in order to find the common denominator between the different legal systems. If it had tried to do so then it would have noticed that the Benelux legal system accepts "at least some degree of international exhaustion"[55], and, by contrast, the British patent system embraces principle of non-exhaustion.[56] Hence, the fact is that the position in Member States is not uniform; in addition it differs from one type of IP to another.[57] Thereby, if the Court was to endorse each solution that derives from any applicable national law to a case, the position of interested players, under same circumstances but in different parts of the internal market would vary.[58] That would make it hard for entrepreneurs to plan their business conducts within the Common Market due to unpredictability of the applicable law. Equally, it would impede the economic interpenetration and undermine free trade within the internal market.

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54 ***Ibid***. p. 244.

55 W. Cornish & D. Llewelyn, ***op. cit***., para. 17-119 (footnote no. 79).

56 ***Ibid***. para. 1-49, 6-16.

57 ***Ibid***. para. 18-05.

58 Hypothetically speaking, if the parallel importing took place in UK from the Netherlands, given that applicable British patent law generally accepts principle of non-exhaustion, the local court would uphold Sterling Drug's position. Vice versa, if the parallel importing took place in Holland from the UK, the local court would uphold the stand of Centrafarm due to the principle of international exhaustion embraced by applicable Dutch law. In the end, if the undertaking took place in some other country, that combines principle of exhaustion limited in scope for national territory and principle of non-exhaustion for importation coming from elsewhere, the local court would sustain Sterling Drug's stance.

Therefore, in order to eliminate legal uncertainty as a result of the variations between the different legislative systems on the subject, the Court in ***Sterling Drug*** adopted a pragmatic approach by setting a unified communitarian rule:

The national patent rights are inexorably exhausted towards patented goods once they are marketed for the first time by the right holder or with his consent within the Common Market.

***Sterling Drug***, without indecision, favours activities of parallel importers and free trade and reins patent holders and national patent protection in return. In the succeeding case, The European Court of Justice reiterated its stance, ignoring different circumstances.

Merck v. Stephar [1981] E.C.R. 2063, (unprotected and protected market)

Here, it was the case of the patent holder operating in an unprotected and protected market. Namely, Merck marketed certain drug in Italy that was not protected by a patent there, but did have the patent for it in the Netherlands. Moreover, pharmaceuticals were not even patentable under the Italian legal system at the time. Anyhow, the parallel importer (Stephar) acquired the drugs in Italy and exported to the Netherlands. Even though, Merck had not been able to profit from patent protection in Italy, "the fact that it had itself undertaken the marketing there was treated as exhausting the Dutch patent right".[59]

The approach was often doubted by commentators as it raised the question whether would right holders, refrain from crossing the border eager to protect their home markets; first in order to avoid communitarian exhaustion of their national patent rights[60]; secondly, to avoid depriving themselves of the benefit of the enhanced value of the product within home markets[61]. If that would be the case, that may deprive consumers from elsewhere in the Common Market of a new and desirable product, and moreover it could undermine the economical justification of the Court's approach, which is to eliminate undesirable price differentials for the same product between Member States.[62]

From the legal point of view, the first concern appears superfluous, as it can be deemed that once patented goods have been put on the market in any part of

59 W. Cornish & D. Llewelyn, ***op. cit***., para. 18-04.
60 S. Weatherill, ***op. cit***., p. 549.
61 W. Cornish & D. Llewelyn, ***op. cit***., para. 18-07.
62 ***Ibid***. para. 18-02.

the Community including the home market, by the patentee or with his consent, the national patent right will be considered exhausted to them. Although, so far there is no established case law to support such view[63], nevertheless it is a solution that is accepted within the Community Patent Convention 1975[64] (CPC) (see the following case), which has not been put into effect yet, but it is utterly based upon the Court's positions.[65] Moreover, the solution would be logical outcome of the Court's treatment of the Common Market as "an area without internal frontiers"[66]. In addition, it should be noted, that ***Sterling Drug*** implies the same, as from the parallel patent holder's viewpoint, each Member State in which he obtained the patent right is "the home court" for him and yet consensual marketing in one triggers the exhaustion of his rights in another.

Still, from the economical point of view, the ***Merck*** decision could make it hard for the patentee to market in cheaper markets, since to do so threatens to reduce the home markets price of patented products due to parallel importers' activities.

Nonetheless, the Court adhered to ***Merck*** by refusing to alert its position in the succeeding case, in spite of being encouraged by its Advocate General, Mr. Fenelly to reconsider it.[67] Hence, the reason that the right holder had no equivalent right available in Country Expo from which to extract a benefit had no any relevance to the application of the communitarian principle. What mattered to the Court was the fact that the patent holder had conducted "the consented marketing" in one Member State, and thus triggered the exhaustion of its patent rights in another.

Hence, "national patent infringement proceedings brought against reimports will be defeated by reliance on Article 28, as ***Sterling Drug*** and ***Merck*** discovered".[68]

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63 Presumably because the patent infringement procedures occur where economic interests of patent holders are endangered, that is when the parallel importation of patented goods from cheaper markets deters their market powers on domestic market.

64 The Convention for the European Patent for the Common Market (Official Journal 1976, L 17, p.1).

65 W. Cornish & D. Llewelyn, ***op. cit.***, para. 6-16. Note, that the same approach was accepted by Community Trade Mark Regulation 40/94/EC.

66 The Treaty Establishing The European Community, Article 14 (2).

67 Merck and others v. Primecrown Ltd [1996] E.C.R I-6285.

68 S. Weatherill, ***Cases and Materials on EC Law*** (London, Blackstone Press Limited, 2001) p. 550.

What is not entirely clear is the precise meaning of the consensual marketing conception. What does that purport? What is its scope? The following case refers to this.

***Pharmon BV v. Hoechst AG [1985] E.C.R. 2281 (compulsory licence)***

Hoechst, a German company held patents on the drug, "Frusemide", in several Member States, including Holland and the United Kingdom. Despite holding the patent, Hoechst had never manufactured it in the UK, nor it consented the manufacture or marketing to others. Nevertheless, the drug had been manufactured in the UK, by DDSA as a result of the grant of a compulsory licence under UK legislation to manufacture and sell "Frusemide" in the UK, albeit under condition that a royalty is paid to the right holder and subject to a prohibition against export. When batches of "Frusemide" produced by DDSA in the UK reached the Dutch market, where Pharmon, a local company, wished to sell them, Hoecht sought to rely upon its Dutch patent to exclude the goods. Pharmon, on the other hand, claimed the right under Art. 28 to sell the British drug in Holland by holding that it could be asserted, in a view of ***consensual registration*** of the patent in the UK by Hoecht, ***that the nature of a compulsory licence is no appreciably different from that of a licence freely granted***[69]. Thereby it may be deemed that the decision of the national authorities replaced the consent of the patent proprietor and thus***, in any event, the exhaustion of patent rights is also applicable where the product has been marketed in the Member State where the compulsory licence was granted***.[70]

However, the European Court of Justice avoided upholding such, rather, bold reasoning.[71] It stood up to the exhaustion of right principle as it set in previous cases and inferred that it cannot be deemed that patentee impliedly consented to the operation of the third party to whom the competent authorities of a Member State granted the compulsory licence, simply because of his consensual patent registration in the Member State. The Court corroborated its stand by maintaining that ***such a measure*** (bolded by author) ***deprives the patent proprietor of his right to determine freely the conditions under which he markets his***

69 Ibid. [quoted from S. Weatherill, ***op.cit***., p. 550]
70 ***Ibid***.
71 However, it should be stressed that exhaustion of right under national law could arrive when the patented goods are put into circulation by a third party, without consent of the right holder, save that the undertaking is not illegal. This could be the case of either the right of the prior user, or due to compulsory licence [S.M. Markovic, ***Patentno pravo***, (Beograd, Nomos, 1997) p. 302].

***products***.[72] Then, it reiterated the definition of the subject-matter of the patent right and deduced that it is ***necessary to allow the patent proprietor to prevent the importation and marketing of products manufactured under a compulsory licence in order to protect the substance of his exclusive right under his patent.***[73]

Furthermore, the Court decided to ignore the conditions to which the authorities subjected the grant of compulsory patent, by holding that in a view of the application of Community law to the national legislation in question is irrelevant ***whether a prohibition on exportation is attached to the compulsory licence, whether that licence fixes royalties payable to the patentee or whether the patentee has accepted or refused such royalties.***[74]

Clearly, the Court refuses to confuse the ***consensual registration*** of the patent right with the ***consensual marketing,*** and, therefore, to hold it as fact that triggers exhaustion of the patent right. Hence, "the Court view of ***consent*** in this case is narrow it favours the right holder; it weakens free trade. Hoechst had not given such consent, which distinguished its conduct from that of Sterling Drug."[75] Furthermore, had the Court in ***Merck*** decided otherwise, not only would it have substituted a free and voluntary exercise of an industrial property right with a public measure ridden by a public interest and coercion, together that would have been a factual extension of a legal effect of a measure adopted by a public authority of one country over legal order in another via application of Community law, which would have been reasonably unacceptable.

This view is in accordance with the provisions of CPC too, which ***has not yet come into force, nevertheless expresses the position of the Member states in that respect***.[76] CPC insists for patent rights to be exhausted, patented goods must have been, previously, "put on the market ***in any part of the EC*** by the patentee or with his ***express consent*** (bolded by author)."[77] Furthermore, it holds that "if the ownership of national patents for the same invention has been divided up among patentees ***economically associated*** (bolded by author), so that a different legal person must license the initial sale in the different countries, the rights will still be treated as exhausted."[78] That brings us back to ***Sterling Drug***, where the Court insisted that in order to be successful, patent infringement

72 ***Ibid***. p. 552
73 ***Ibid***.
74 ***Ibid***.
75 S. Weatherill, ***op. cit***., 2001) p. 552
76 Pharmon, ***Ibid***. p. 551
77 W. Cornish & D. Llewelyn, ***op. cit***., para. 6-16.
78 ***Ibid***.

proceedings must be triggered against importers whom acquired ***a product coming from a Member State where it is not patentable and has been manufactured by third parties without the consent of the patentee and in cases where there exist patents the original proprietors of which are*** legally and economically independent.[79] Otherwise, communitarian doctrine of exhaustion "takes effect not only upon release of relevant goods in one Member State by the right-owner itself, by equally where there is any legal or economic connection between the first marketer and the right-holder."[80]

Thus, what we can generate from cases cited above is the following:

***The national patent rights are inexorably exhausted towards patented goods once they are marketed for the first time by the right holder or with his consent within the Common Market.***

***The consent of the right holder has to be express. The fact of economical association between the patentees works as a sort of legal presumption to the express consent.***

However, another fact, which distinguishes ***Pharmon*** from ***Sterling Drug*** and ***Merck***, is that here the Court was dealing with ***direct exports***, and yet it considered the case as a parallel importation.[81] This raises an important question. Had Hoechst voluntarily granted the licence to manufacture and marketing "Frusemide" to DDSA, would it have been entitled to prohibit its direct exports relying upon the national patent right?

### *Nungesser v. EC Comission [1982] E.C.R. 2015 (exclusive licence, licensor-licensee relation)*

The ***Pharmon*** decision could suggest that as the compulsory licence granted in Country Expo did not avail DDSA and its distributor of freedom to undertake the export of protected product into Country Impo than, ***argumentum a contrario***, the consented patent licence granted by Hoechst would do so. But what if Hoechst, as a licensor, had reserved the exclusivity in Dutch market to itself and prohibited to DDSA, as a licensee, to manufacture and sell over there.

79 Centrafarm BV v Sterling Drug Inc. [Quoted from S. Weatherill, Cases and Materials on EC Law (London, Blackstone Press Limited, 2001) p. 548]

80 Cornish & D. Llewelyn, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, (London, Sweet & Maxwell, 2003.) para. 1-58.

81 Pharmon was the local distributor, not the parallel importer, i.e. it did not acquire the patented goods in the UK so to sell it in the Netherlands. DDSA exported the goods directly onto Dutch market [W. Cornish & D. Llewelyn, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, (London, Sweet & Maxwell, 2003.) para. 18-07]

Could then DDSA rely upon Article 28 to override such a prohibition?[82] In other words, ***are the exclusive licences to reserve territories liable to restrict trade within the Common Market, and if they are to which extent?***

Plainly, there is no simple answer to this respect, as it crosses over the area "all reserved" for fundamental freedom of contract. Since Article 28 deals with acts of Member States, it is not entitled to regulate private arrangements between contracting parties. Thereby, in above-mentioned circumstances, DDSA would have not been able to invoke Article 28 against Hoechst.[83] Still, that does not clear out the case for preserving exclusivity. Such deliberations of private entities to fortify the area of their interests are potent to create divisions within the Common Market and restrict competition. Therefore, they are regulated by Competition law, i.e. by Articles 81 and 82 (85 and 86, pre-Amsterdam) of the Treaty.

"In its decisions of the 1970s on patent licences, the Commission's starting point was that undertakings to ensure the exclusivity of territories were restrictive of competition in the sense of Art. 81(1) of the Treaty of Rome, since they necessarily involved a surrender of freedom."[84] Furthermore, the Commission "considered that the ultimate objective of unifying the internal market justified treating a licence to manufacture in one country of the Community as a licence to sell in all."[85]

However, in the ***Maize Seed*** decision[86], the European Court of Justice, as a power entitled to supervise the Commission's administration of these rules, constituted the ***via media*** solution. The Court differentiated exclusive licences that are solely aimed to regulate the contractual relationship between the licensor and licensee, ***whereby the owner*** (licensor - remark of author) ***merely undertakes not to grant other licences in respect of the same territory and not to***

82 And otherwise, had the DDSA, as a licensee preserved exclusivity of UK market via exclusive licence towards Hoechst would have Hoechst been able to export directly leaned upon Article 28?

83 In reality, DDSA would not even have the interest to do so as a contracting party. This is due to a fact that as a licensor and a licensee, the companies would have a natural urge to avoid the direct competition of each other on the given market. Hence they would rather strive to divide their areas of interest.

84 . Cornish & D. Llewelyn, ***Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights***, (London, Sweet & Maxwell, 2003.) para. 7-34.

85 ***Ibid***.

86 Nungesser v EC Comission [1982] E.C.R. 2015. The holder of a parallel patent in Germany for a new plant variety in a new form of maize seed, a French research organization INRA, had granted an exclusive manufacturing and sales licence for that country, to Nungesser, a German company. The Commission held that the exclusive licence is void against Article 81 by its very nature, thus Nungesser appealed to the Court in order to annul the decision.

***compete himself with the licensee on that territory***[87] (open exclusivity), from exclusive licences that purport the absolute territorial protection ***under which the parties to the contract propose,.....,***[strive] ***to eliminate all competition from third parties, such as parallel importers or licensees for other territories***[88] and therefore tend to extend the effects of an agreement to third parties whom are not bound to it.

Luxembourg concluded the following:

***Having regard to the specific nature of products in question,.....,the grant of an open exclusive licence, that is to say a licence which does not affect the position of third parties such as parallel importers and licensees for other territories, is not in itself incompatible with Article 85(1)*** (Article 81(1) post-Amsterdam - author's remark) ***of the Treaty.***[89]

On the other hand, ***the Court has consistently held,....., that absolute territorial protection granted to a licensee in order to enable parallel imports to be controlled and prevented, results in the artificial maintenance of separate national markets, contrary to the Treaty.***[90]

It follows, that the permissibility of open exclusive licences against Article 81(1), is to be assessed upon prevailing circumstances of certain market. Thereby regarding ***the specific nature of products in question***, the exclusive licence is liable to be exempted from prohibition save it ***does not affect the position of third parties***. On the other hand, if the arrangement imposes absolute territorial protection, so to inhibit parallel importation, it will be bad under Competition law without excuse, as it creates "artificial" divisions in the single European market.

It was recognized long ago that the technology contained within some invention has a distinct market value from that of a protected product alone. The patent powers the invention so to become a kind of an intangible good. The exclusive licences are the legal means for such "good" to be marketed. As a consequence by virtues of patent law the competition is enhanced from the level of commodities to the level of technologies.[91] The accent is, therefore, on competition between technologies so is the ratio of this decision.

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87 ***Ibid***. [Quoted from S. Weatherill, Cases and Materials on EC Law (London, Blackstone Press Limited, 2001) p. 426].
88 ***Ibid***.
89 ***Ibid***. p. 427
90 ***Ibid***.
91 S. M. Marković, ***Patentno pravo*** (Belgrade, Nomos, 1997) p. 36, 37.

Here, the Court was dealing with the licensor's legitimate interest of ***introducing new technology*** in another market through exclusive licensing. In return, it was confronted by the licensee's legitimate fear of possible direct competition from the licensor and other licensees in the market. In addition, consumers, namely the farmers, had their share of interest that needed to be protected, which was to come into possession of new technical knowledge. Hence, the arrangement that was seemingly restrictive of competition in this case had some ***countervailing effects.*** By enabling penetration into the market of another Member State to the licensor and reserving territorial exclusivity for the licensee, the exclusive licence provided dissemination of a new technology. Moreover, instead of restraining, in a way the exclusive licence induced the competition between technologies, the new one and existing ones. The Court did not fail to recognize it; therefore, instead of entirely suppressing such initiatives of entrepreneurs, it decided to uphold them as ***desirable deals.*** It held the practice legitimate, especially if it was the only mean of promoting the competition and technology transfer and allowed consumers, in return, a fair share of the resulting benefits. Had the Court decided otherwise, "the competition would be prejudiced by the licensor's inability to offer exclusive rights" subject to the licensee's apprehension from the direct competition of other licensees.[92] Consequently, the German farmers deprived of easy and cheap access to the new technology, would be discriminated against the French. Therefore, if the agreement itself is not ridden to distort competition, some ***reasonable restraints*** shall be appreciated insofar that they are confined to minister some desirable aims. The restraints shall be thus tolerated only if they are indispensable for attainment of such aims; "unduly tight and lengthy restrictions will not escape the prohibition in this way".[93] The Court hence will not countenance licence that seeks absolute territorial protection i.e. that suppresses parallel trade. Transmitted into another line of observation, it follows that, whereas exclusive licences are tolerated when they assure the competition at the level of technologies, they are persecuted when they restrict competition at the wholesale level.

However, the Maize Seed decision needs to be observed from another aspect. Even though, contracts in general are not capable to bound and impose burdens upon third parties, due to the ***inter partes*** principle, there are still some types of contracts that are exceptions. It is thoroughly accepted that the exclusive licence of patent rights is one of the kind; it is an act that transfers exclusive rights, where a licensee accedes into the position previously held by a

92 W. Cornish & D. Llewelyn, ***Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights***, (London, Sweet & Maxwell, 2003.) para. 7-34.

93 S. Weatherill, ***Cases and Materials on EC Law*** (London, Blackstone Press Limited, 2001) p. 427.

licensor in respect of the exclusive rights to commercially use invention within the specified territory. Thereby, the licensee is supplied with both positive and negative authorities; they operate ***erga omnes,*** i.e. affect the position of third parties, including the licensor.[94] The authorities arise from the exclusive nature of right conveyed by the arrangement. The elaboration of the ***Maize Seed*** decision is, apparently, in discord with generally accepted legal nature of the exclusive licence contracts.

Yet, it is the general principle of the law that the assignor (licensor) cannot transfer more authorities on assignee (licensee) than it actually posses; the effect of the exclusive licence to the third parties position is proportionate to the substance of the right transferred by it. From this principle arises that contracting parties cannot exceed the substance of the patent right by contracting will. ***Sterling Drug*** curbs its substance by the specific subject matter conception, which limits effects of the patent right solely to restrict the unauthorized direct exportation, whilst keeping them inefficient against parallel importers. Thereof the licensor is in no position to endow licensee with such capacity. Therefore, notwithstanding the inconsequent wording, the mentioned effects of the ***Maize Seed*** decision are in accord with the substance of the patent right defined in ***Sterling Drug***. In other words, ***Maize Seed*** preserves the ***erga omnes*** effect of the exclusive licence within the specific subject matter of patent rights delimited by ***Sterling Drug***. The two decisions complement each other.

However, the ***Maize Seed*** decision is not entirely clear about exclusivity between different territorial licensees. From cited above it appears that ***Maize Seed*** verges on more to the stance that exclusive licences are not liable to affect "licensees for other territories". Nevertheless, Article 1 of a Block Exemption[95] for Technology Transfer[96], a regulation formulated by the Commission in 1996 and mainly based upon ***Maize Seed*** conception, exempts the licensee's undertaking not to manufacture or to engage actively in selling in the territory of another licensee.[97] The same, more or less, arises from the latest Regulation, adopted in 2004, which substituted formerly mentioned.[98] The regulations, therefore,

94 S. M. Marković, ***op. cit***., p. 318, 319.

95 Block Exemption specifies conditions under which a licence need not be individually justified before the Commission if it pursues the provision.

96 Reg. (EC) 1996/240, O.J. L31/1996.

97 W. Cornish & D. Llewelyn, ***op. cit***., para. 7-35.

98 Reg. (EC) 2004/772, O.J. L123/2004. Fundamental difference in relation to the Regulation in 1996 is that in order to simplify the regulatory framework the new Regulation moved away from the approach of listing exempted clauses; instead it prescribes the general exemption of "technology transfer agreements", while explicitly outlining the list of so called hardcore

recognize the positive effects of the exclusive licence towards the licensees for other territories. Nonetheless, they do not regulate analogous undertaking of the licensor; that is to say, undertaking of the licensor to prevent the licensees for other territories to engage directly in the licensee's exclusive territory.

In our opinion, the licensee does not need such guarantee from the licensor, anyway, as it is a power already contained within the exclusive licence; that is an authority, which is constituted by the agreement in favour of the licensee and stems from the patent right. Like it was already stressed above, via exclusive licence "a licensee accedes into the position previously held by a licensor in respect of the exclusive rights to commercially use invention within the specified territory." The licensee is thus entitled to restrict direct exports of patented goods undertaken by licensees for other territories relying upon the authorities conveyed to him by the exclusive license. Otherwise, the licence would not be so exclusive. Nonetheless, the exclusive licensee is not availed with the power to restrict activities of parallel importers.

Plainly, in relation to the free movement of goods policy, ***the exclusive licence, in so far it constitutes desirable deal, is liable to restrict unauthorized direct export, whilst it is always inefficient against the parallel importation.***

In more general terms conceived, ***exclusive patent licences are capable to restrict free trade, save that they pass two tests:***

***- their intended effects on third parties must not exceed those appreciated by the specific subject matter of the patent right;***

***- they must not infringe the competition rules of the Common Market.***

Attempts to restrict direct exports are liable to pass first test, still they can fail on second due to prevailing circumstances of each case. Agreements that promote

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restrictions, which are prohibited. Furthermore, this Regulation has introduced new ramification discerning situations "where the undertakings party to the agreement are competing undertakings" from those where they are not. As a result, exclusive licences to ensure the exclusivity of territories are generally prohibited to undertakings from the first rank if they are engaged in a "reciprocal agreement"; defined as "a technology transfer agreement where two undertakings grant each other, in the same or separate contracts, a patent licence, a know-how licence, a software copyright licence or a mixed patent, know-how or software copyright licence and where licences concern competing technologies or can be used for the production of competing products." The undertaking of the licensor not to license technology to another licensee in a particular territory is, nevertheless, preserved to them.

In relation to the exclusive territorial licences, the position "non competitors" and competing undertakings engaged in "non-reciprocal agreement" is more or less unchanged from that of previous Regulation. (All quoted from: http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32004R0772:EN:HTML, 27/04/05).

the competition and technology transfer and allow for a fair share of the resulting benefits to consumers are to be tolerated, unless they do not pose unreasonable restraints on that way. Nonetheless, ***exclusive licences, which attempt to restrict any consequent parallel importation will be automatically void against the Rules of Competition and may lead to penalties.***[99]

## CONCLUSION

Securing outcomes that are proportionate to the aim of protection, a universal wisdom in policy of shaping intellectual property law is a ground zero from which everything starts and ends. The aim of IP policy, as it was already stressed above, is to warrant a fair value for intellectual effort and investment of capital and labour. The underlying logic is that the inventors, devisers, artists, etc. have natural right to yield upon their efforts, not the others. Yet, the outcomes of that policy, in return, are to be valued in relation to purposes of workable competition, not otherwise. To this end, though, the workable competition is a tool and criteria against what is perceived whether the free enterprise market fulfils its role, which is to ensure that macroeconomic goals are being met (economical growth, employment, optimal utilization of productive recourses and potentials, stable prices and elimination of price differential etc.).[100] The free enterprise market is based upon freedom of entrepreneurship, free competition and free factor mobility. Therefore, the "fair value" of IP protection is to be judged in relation to these goals and elements.

The same is true in the context of the European integration. In absence of communitarian legislation, however, it has been for the European Court of Justice to draw the line between the fair and unfair scope of intellectual property rights under regime of the Common Market. The Court has done so, by acting in a manner that any national court would do when the integrity of national market is in question. Thus, in order to overcome territoriality of intellectual property law, it introduced the Communitarian-wide exhaustion of intellectual property rights rule that ignores national borders within the Common Market. The principle mainly favours the free trade and limits intellectual property rights. In other words it precludes isolation of national markets by means of IPR to the cross-border circulation of protected goods that originate from a right holder. Still, the principle preserves ability of the right holder to control direct competition. In the domain of patent rights that means

99 W. Cornish & D. Llewelyn, ***Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights***, (London, Sweet & Maxwell, 2003.) para. 1-58.

100 S. M. Marković, ***Patentno pravo*** (Belgrade, Nomos, 1997) p. 35, 36.

that the rule does not prevent the patent holder to use the patent as an instrument to prevent circulation of goods previously produced unauthorized, notwithstanding whether it was done through direct exports or parallel importation. In other words the communitarian rule of exhaustion does not preclude patent rights to be an instrument to control competition on the level of technologies. Nevertheless, it does not tolerate suppression of independent distributors either.

From the legal point of view the right holder is in the analogous position to the one that he was in the most national markets. After he had had first release of patented goods or had consented that, he would not be able to control their subsequent circulation within the national market. Still he could prevent their reimports from elsewhere. Now, ***mutatis mutandis,*** it is the same only that now the "national market" is rather communitarian and "from elsewhere" counts for everything coming outside the European Economic Area.

However, despite successfully bypassing national patent law systems, the catch-all communitarian rule, nevertheless, fails to unify them or at least approximate. As a result, national laws are left to vary in scope and procedures, which itself leaves substantial amount of legal uncertainty to the players within the internal market. Therefore the appropriate directive (approximation) and regulation (unification) are needed to rectify these setbacks to the Common Market.

Finally it should be noted that the scope of "exhaustion" rule is not free from doubts. For example, formula is clear when it regulates relationships between patentee (licensor) and licensee in the view of economical ties relevance for the policy. Still, it is not clear whether licensees for the different territories are to be deemed as economically connected when the only tie between them is the common licensor?[101]

101 In Ideal Standard case which concerns trademarks, the Court concluded that the trademark licensees for different territories, in the given circumstances, are not to be treated as economically connected, despite the "common origin" of their licence. Therefore exclusive licensee for one territory is liable to prevent flow of protected goods that originates from licensees for other territories or from the parallel importer who acquires them from the latter. Nevertheless, it should be noted that interpretation of the Community-wide exhaustion rule is to be done in accordance with the specific subject matter which can vary from one type to another of intellectual property. As a result, the trademarks protect the origin of products bearing protected sign.

Yet, if the exhaustion rule is to be more restrictive to the patent licensees that could foster the conjoint usage of different types of intellectual property as the business strategy to restrict competition. Consequently, the competition rules would have to deal with such practices.

This lives us to the conclusion one and a half centuries old, that "intellectual property is subject-matter too complex to be fashioned out of case law."[102]

However, there is the hidden paradox of the rule as the Ideal Standard suggests that the original holder of intellectual property has less authority than his licensees (IHT v Ideal Standard [1994] 1 E.C.R. 2789).

102 Cornish & D. Llewelyn, i, (London, Sweet & Maxwell, 2003.) para. 18-13.

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# SUBJEKTI INSIDER DEALING-A I NJIHOVA ODGOVORNOST U PRAVU EU

## 1. POJAM INSIDERA

Utvrđivanje kruga lica koja se smatraju licima čije učešće u poslovima na finansijskom tržištu narušava poverenje investitora, s obzirom na neravnopravne uslove zaključivanja posla, jeste jedno od ključnih pitanja insider dealinga.[1] Utvrditi koliko daleko treba da doseže taj krug, bilo je jedno od najinspirativnijih pitanja u ovoj oblasti sredinom prošlog veka. Donošenjem Uputstva 89/592/EEC[2] poznatom pod nazivom ***Insider Dealing Directive*** (u daljem tekstu koristićemo skraćenicu IDD) u okviru Evropske unije odnosno tadašnje Evropske ekonomske zajednice posle mnogo godina usaglašavanja, otvorio se put ka stvaranju ujednačenog definisanja položaja insidera.

Veliki broj zemalja je po donošenju ovog Uputstva po prvi put regulisao pitanje insider-a (među kojima je i Srbija) dok je manji broj njih svoju postojeću regulativu harmonizovao. Ubrzo je ocenjeno da u uslovima stalnog razvoja povezanog finasijskog tržišta IDD ne može adekvatno da odgovori na nove

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1 Detaljniji osvrt na pitanje utvrđivanja kruga lica vidi: Arsić, Z., Insider trading, ***Pravo i privreda***, Beograd ,br.1-2/96 str. 9,10.

2 Counsil Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing,OJL334,18/11/1989

pojavne oblike zloupotreba na tržištu. Dat je predlog za donošenje nove Direktive koja je usvojena 2003 godine i regulisala je dva oblika zloupotrebe Insider dealing i market abuse – zloupotrebu tržišta. (Directive 2003/6/EC) poznatu pod nazivom ***Market Abuse Directive*** ( u daljem tekstu ***MAD***).[3]

Cilj ovog rada je da utvrdi sličnost i razlike pravnog regulisanja insider-a u evropskim Uputstvima. Upoređenje definisanja kruga insidera, zabranjenih radnji i propisanih sankcija ima za cilj da se utvrdi sličnost i razlike kao i tendencije u regulisanju pitanja insider dealinga.

## 1.1. Pojam insider-a u IDD

IDD je razlikovala primarne i sekundarne insider-e, pri čemu se u grupi primarnih insider-a njihovo grupisanje podelilo u tri podgrupe.[4]

U prvu grupu primarnih insider-a uvedena su lica za koje se smatralo da raspolažu privilegovanim informacijama s obzirom na funkciju koju obavljaju u društvu izdavaoca. To su ukratko, članovi upravnog i nadzornog odbora.

U drugu grupu uključena su lica koja učestvuju u osnovnom kapitalu društva izdavaoca, dakle, akcionari društva. Prema IDD visina udela kojom se učestvuje u kapitalu društva nije mera koja određuje akcionara kao insider-a.[5]

U treću grupu ulazila su lica koja su za privilegovane informacije saznala prilikom objavljivanja svojih radnih zadataka i profesija. Ovim licima smatraju se službenici kompanije kao i svi zaposleni u njoj. Pored ovih lica u ovu kategoriju ulaze i ona koja su izvan kompanije, ali po prirodi svoje profesije dolaze u kontakt sa podacima izdavaoca i imaju različite informacije. To su najčešće računovođe, advokati, revizori bankari a ponekad i novinari.

Prema IDD, primarni insider može biti i pravno lice, pri čemu su pravila zabrane upućena na fizička lica u društvu koja su učestvovala u donošenju odluka o kupovini ili prodaji hartija za račun tog pravnog lica.[6]

Pored grupe primarnih insider-a postojali su i sekundarni insider-i. To su lica koja su u posedu odnosno za koja se smatra da su u posedu privilegovanih

3 Directive 2003/6 EC of European Parliament and Council of 28 January on Insider Dealing and Market Manipulation ( market abuse) OJ 096/ 12.04.2003

4 Član 2 (1) IDD

5 Prema prihvaćenom stavu smatra se da lica koja poseduju manje od 10 % akcija ne raspolažu privilegovanim informacijama ,što je najčešće izražavano u stavovima SAD

6 Član 2 (2) IDD

informacija (***full knowledge***) a do tih informacija su na direktan ili indirektan način došli od primarnih insider-a (tzv. tippees). Ali i svako lice koje je informaciju na drugi način steklo, a ne od primarnih insider-a, uključeno je u lanac zabrane zloupotrebe privilegovanih informacija.

## 1.2. Pojam insider-a prema MAD

Pojam insider-a je na poseban način određen novim Uputstvom EU (Directive 2003/6/EC) poznatom pod nazivom ***Market Abuse Directive*** (u daljem tekstu koristićemo skraćenicu MAD).

Za razliku od IDD, u novoj direktivi (MAD) podela lica koja raspolažu privilegovanim informacijama na primarne i sekundarne insider-e je u suštini nestala. Zabrana raspolaganja privilegovanim informacijama odnosi se jednako na sva lica bez obzira u koju bi se grupu mogla razvrstati.

U do tada tradicionalnu grupu pravih, dakle, primarnih insider-a MAD je uneo novine tako što ih je na širi način definisao.

Članom 2. MAD stavom 2. zabranu datu u stavu 1. primenio je posebno na lica

a) koja raspolažu privilegovanim informacijama s obzirom na to da imaju svojstvo člana upravnog ili nadzornog odbora kod emitenta
b) koja raspolažu privilegovanim informacijama s obzirom na svoj status koji stiču posedovanjem dela kapitala emitenta,
c) koja raspolažu povlašćenim informacijama s obzirom da do njih mogu doći obavljajući svoje radne zadatke , u vršenju svoje profesije ili u vršenju svoje funkcije
d) počinioci krivičnih dela

Tačka 2 člana 2 ovaj krug lica proširuje i na pravna lica[7] kao i kod ranije datog rešenja ova zabrana se odnosi na fizička lica unutar pravnog lica koja su učestvovala u donošenju odluka koje se odnose na transakcije za račun tog pravnog lica. Interesantno je da je u pravu Velike Britanije, ***Criminal Justice Act***

7 To mogu biti revizorske kuće,društva koja se bave veštačenjima , udružene advokatske kancelarije , konsultantska društva isl.

regulisao ovu zabranu i ona se primenjivala samo na fizička lica, međutim sad se zabrana automatski primenjuje i na pravno lice.[8]

Član 4. MAD je srušio barijeru između primarnih i sekundarnih insider-a i doveo ih u ravnopravan položaj. Za razliku od ranije ustanovljene ***full knowledge,*** dakle, pune svesti koja je važila za sekundarne insider-e u pogledu odgovornosti za raspolaganje privilegovanom informacijom, novo Uputstvo je pooštrilo odgovornost sekundarnih insider-a i izjednačilo je sa odgovornošću primarnih. U članu 4. određuje se da je dovoljno za odgovornost da je lice znalo ili čak moralo znati da se radi o privilegovanoj informaciji. Takođe, za razliku od ranije naglašenog značaja izvora informacije za sekundarne insider-e ( direktno ili indirektno stečenih od primarnog insider-a) sada izvor saznanja informacija uopšte nije bitan. Dakle, zabrani podležu jednako sve dotadašnje grupe (primarni i sekundarni insider-i) što znači da je stepen borbe protiv neravnopravnog položaja učesnika na tržištu podignut na novi, viši nivo.

Uprkos vidljivim naporima da se unapredi i precizira tačan krug lica odgovornih za raspolaganje privilegovanim informacijama pojedina pitanja ostala su nerazjašnjena. Naročito, pitanje pretpostavke o poznavanju privilegovanih informacija koje je vezano i za pitanje odgovornosti pojedinih lica. Ono dotiče pitanje da li se radi o apsolutnoj ili o relativnoj pretpostavci, odnosno da li pretpostavka znanja informacija jednako može da se primeni na sve grupe insider-a.[9] Odgovornost insidera odnosno pojedinih grupa lica u koje su razvrstani vezano je i za postojanje pretpostavke znanja o privilegovanim informacijama. Tako se razvrstavanjem članova uprave i nadzornog odbora u posebnu grupu insidera, dolazi do zaključka da se na njih odnosi presumpcija znanja o informacijama i da snose teret dokazivanja suprotnog.[10]

Da li se ovo pravilo dokazivanja treba primeniti i na ostale grupe insider-a, na primer na akcionare. Pitanja nisu jasno razrešena ali bi svakako trebalo prihvatiti da je pretpostavka znanja privilegovanih informacija povezana sa upravljačkom strukturom i trebala bi biti oboriva. Međutim, kad su u pitanju

8 V. član S.52 CJA i komentar dat u J.Welch, Panier M,Comparative Implementation of EU Directives (I)- Insider dealing and Market abuse , The British Institute of internacional and Comparative law , London, 2005 str.17.

9 V. Čulinovič –Herc, Zluoporabe na tržištu vrijednosnih papira- nova europska smjernica i Zakon o tržištu vrijednosnih papira , Zbornik Pravnog fakulteta Svjeučilišta u Rijeci, broj 2 / 2004 , str 760.

10 U francuskom pravu nije moguće da menadžer dokaže da nije raspolagao privilegovanom informacijom.Vidi Gaillard / Pignel, Les operations d'inities dans la Communaute economique europeenne, R.T.d.E.,1990, 337

akcionari, onda je pretpostavka znanja privilegovane informacije svakako u srazmeri sa visinom udela koji poseduju.[11]

## 2. ZABRANJENE RADNJE

IDD, kao što smo ranije naglasili, pravi razliku između primarnih i sekundarnih insider-a i na toj osnovi je propisana lista zabranjenih radnji koje su zajedničke za sve insider-e i gradaciju između prve i druge grupe. Ključno pitanje u definisanju zabranjenih radnji je stav insider-a prema radnji koju preduzima.

IDD zabranjuje svakom insider-u da se koristi prednostima poznavanja povlašćenih informacija i generalno to se pravilo primenjuje na primarne i sekundarne insider-e.

Uvođenje izraza « korišćenje prednosti « ukazuje da je moguće primeniti zabranjene radnje na sve oblike insider dealinga. Zabrana se primenjuje pod uslovom da je insider imao punu svest o prirodi informacije ( ***Full Knowlledge of the facts***) što nadalje znači da bi standard ( ***full knowlledge***) bio zadovoljen uvek kada postoji svest o tome da se posao zaključuje na osnovu informacije koja ima karakter privilegovane.

Zabranjene radnje odnose se na kupovinu i prodaju na osnovu privilegovanih informacija. Pri tome jednako je tretirana kupovina i prodaja u svoje ime i za svoj račun i kupovina u ime i za račun trećeg lica. Takođe je nebitna činjenica da li se kupovina ili prodaja odnosi na hartije jednog ili više emitenata. Da bi transakcija bila pod udarom zabrana dovoljno je da se odvija putem posrednika profesionalaca.[12]

Članom 3 IDD utrvđene su zabranjene radnje za primarne insidere i to:

-zabrana iznošenja privilegovane informacije trećim licima, osim u slučaju da je iznošenje informacija načinjeno u okviru normalnog obima obavljanja njihovih radnih zadataka, profesije ili dužnosti.[13]

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11 V. Čulinovič- Herc, INSIDER TRADING – europska direktiva i njezina implementacija u njemačko i hrvatsko zakonodavstvo, Zbornik Pravnog fakulteta u Zagrebu broj 3 / 2000,.str.317

12 Član 2 (3) IDD

13 Uvođenje mogućnosti oslobođenja od zabrane iznošenja privilegovanih informacija ukoliko su one učinjene u okviru normalnog obavljanja radnih obaveza unelo je potpunu zabunu. Utvrditi granicu između normalnog obavljanja dužnosti i evetualnog prekoračenja

-zabrana davanja saveta trećim licima za kupovinu i prodaju hartija od vrednosti ukoliko bi se savet zasnivao na privilegovanoj informaciji. Pored toga zahteva se da su hartije od vrednosti uključene na organizovano tržište države članice.

U novoj direktivi MAD iz 2003 godine u pogledu zabranjenih radnji svakom insideru ( primarnom i sekundarnom ) koji ima privilegovanu informaciju zabranjuje se korišćenje te informacije, odnosno da na osnovu te informacije neposredno ili posredno, stiče ili otuđuje, ili pokuša steći ili otuđiti finansijski instrument na koji se ta informacija odnosi, bilo za svoj račun ili za račun trećeg lica[14]. U odnosu na rešenje u IDD potpuno je izostavljeno «korišćenje prednosti» i postojanje svesti da se radi o privilegovanoj informaciji. Dovoljno je da su znali ili morali znati da se radi o privilegovanoj informaciji.

U pogledu određenja zabranjenih radnji prošireno je ***polje primene*** sa hartija od vrednosti na finansijske instrumente.[15]Zabranjene radnje odnose se ne samo na transakcije hartijama od vrednosti nego i različitim finansijskim i robnim derivatima i udelima u investicionim fondovima.

Član 3. MAD dao je potpunije navode šta sve čini zabranjenu radnju:

1. iznošenje privilegovane informacije drugim licima, osim ako do iznošenja dođe u okviru normalnog obavljanja svojih radnih zadataka, profesije ili dužnosti
2. davanje preporuka drugim licima, savetovanje, ili podsticanje drugih da na osnovu privilegovane informacije stiču ili otuđe finansijski instrument na koji se informacija odnosi.

U odnosu na ranije data rešenja u novoj direktivi nisu primetne bitne razlike u odnosu na zabranjene radnje. Jedino što razlikuje dotadašnje od novog definisanja radnji su tehnički preciznije formulisani izrazi ( npr. umesto “third party” uveden je “ izraz other person” i sl.).

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tog nivoa stvara nepremostive razlike u mogućnosti rimene u različitim zakonodavstvima, tako da se vrlo brzo ovaj standard pokazao neuspelim i neostvarivim.

14 Član 2 MAD

15 U članu 1 tačka 2 IDD određuje se pojam hartija od vrednosti na koje se odnose privilegovane informacije. Proizlazi da se pored hartija od vrednosti u užem smislu (akcije, dužničke hartije, hartije koji su ekvivalenti akcijama i dužničkim hartijama, ugovori i prava po tim ugovorima) ove privilegovane informacije odnose i na prenosive opcije, kao i na tzv. Fixed term financial instruments. Zajedničko za sve finansijske instrumente je da su uključeni na uređeno tržište koje je pod kontrolom ovlašćenih organa i koje je direktno ili indirektno dostupno javnosti.

## 3. IZUZECI OD ZABRANE

Krug lica koja su ograničena zabranjenim radnjama u slučaju raspolaganja privilegovanim informacijama je utvrđen, i kao što smo videli, prilično široko postavljen. Međutim, u oba Uputstva istaknuti su izuzeci kod kojih je moguće vršenje « zabranjenih radnji».

To je prvenstveno izuzetak koji se odnosi na državu, kao učesnika na finasijskom tržištu radi zaštite ekonomskih interesa i suvereniteta samih država i izuzetak se odnosi na lica koja moraju da razotkriju privilegovanu informaciju u okviru normalnog obavljanja radnih zadataka ili funkcija.

Prvi izuzetak bio je regulisan članom 2(4) IDD koji izuzima primenu pravila o zabrani transakcije koju sprovodi država u cilju sprovođenja monetarne politike, kao i transakcije od strane centralnih banka ili drugih organa koji imaju ovlašćenja da postupaju u ime države, a sve u cilju sprovođenja monetarne politike. Države imaju mogućnost da prošire ovaj navedeni izuzetak i na svoje teritorijalne jedinice i slične organe lokalne vlasti u slučaju da se radi o upravljanju njihovim javnim dugom.

Istovetno rešenje zadržalo je i novo Uputstvo (MAD) u članu 7. Izuzimanje od zabrane je novim Uputstvom u članu 2 stav 3 prošireno i na transakcije kojima se stiču ili otuđuju finansijski instrumenti ako se te transakcije preduzimaju radi izvršenja dospele obaveze koja proizlazi iz ugovora koji je zaključen pre nego što je lice saznalo odnosno došlo do saznanja o povlašćenim informacijama.

Drugi izuzetak odnosi se na dopuštenost iznošenja privilegovanih informacija tokom normalnog obavljanja radnih zadataka ili funkcija. U rešenjima oba Uputstva[16] naglašen je izuzetak primene zabrane za lica koja razotkriju privilegovanu informaciju u toku normalnog obavljanja radnih zadataka, profesije ili funkcija. Osnovni problem kod uvođenja ovog izuzetka je tumačenje pravnog standarda «normalno obavljanje « (normal exercise). Da li tumačenje može da se zadrži na samo konkretno izvršenim obavezama kod vršenja radnih zadataka ili ga treba postaviti tako široko da obuhvati sva ponašanja koja bi značila ispravno funkcionisanje društva u celini.[17]

Kako problem tumačenja navedenog pravnog standarda nije našao odgovor, pružena je mogućnost zaštite u slučaju namernog ali i nenamernog

16 Član IDD i Član 3 MAD

17 ASSMAN,H-D, The Impact of Insider Trading Rules on Company Law; navedeno prema Čulinović –Herc,.***op.cit.***, str. 762.

razotkrivanja privilegovane informacije u toku normalnog obavljanja radnih zadataka. Član 6 stav 3 MAD predviđa da se u slučaju namernog otkrivanja privilegovane informacije ona mora u potpunosti i na valjan način objaviti javnosti istovremeno sa njenim razotkrivanjem, odnosno hitno kod nenamernih slučajeva. Kada je informaciju dobilo lice koje je obavezano na čuvanje tajne, emitent nema obavezu objavljivanja.

## 4. OBAVEZA OBJAVLJIVANJA PRIVILEGOVANIH INFORMACIJA

IDD propisuje preventivne mere u sprečavanju insider dealinga. Ove mere podrazumevaju obavezu izdavaoca da stalno i u pravo vreme vrše objavljivanje informacija. Ove informacije podrazumevaju sve informacije koje se tiču značajnijih promena unutar društva koje bi mogle imati cenovni uticaj na hartije kojima se trguje na berzi. U slučaju da bi ove informacije njihovim objavljivanjem ugrozile legitimne interese društva, na njegov zahtev nadležno telo moglo bi osloboditi izadavaoca navedene obaveze.

MAD je uvela značajne izmene u pogledu obaveze objavljivanja informacija od strane javnih društava. Države članice moraju osigurati da izdavaoci finasijskih instrumenata obaveštavaju javnost što je brže moguće (znači u što kraćem roku) o privilegovanim informacijama koje se neposredno odnose na izdavaoca.[18] Potom se zahteva od država članica, da bez obzira na ustanovljene oblike objavljivanja u njihovim zakonima, osiguraju da izdavaoci u primerenom roku objave sve privilegovane informacije koje su predviđene za objavljivanje i na njihovim internet stranama( član 6 stav 2 MAD). Nadalje, obaveza se proširuje i na sva lica koja obavljaju rukovodeće poslove kod izdavaoca ( pa i lica koje su usko s njima povezana) moraju obavestiti nadležni organ o transakcijama koje se odnose na akcije izdavaoca ili na njihove derivate odnosno druge finansijske instrumente koji su povezani sa akcijama izdavaoca, a koje su izvršili za svoj račun. Države članice bi morale osigurati javni pristup informacijama, svim pojedincima, koje se odnose na te transakcije, u što kraćem roku (6/4 MAD).

U direktivi drugog nivoa ( 2003/124/EZ)[19] detaljno se uređuju način i rokovi objavljivanja ovih informacija.

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18 Član 6 Direktive iz 2003 MAD

19 Commission Directive 2003/ 124/ EC of 22 December 2003 implementing Directive 2003 / 6/EC of the European Parliament and of the Counsil as regards the definition and public disclosure of inside information and the defininition of market manipulation, OJ L 339, 24/12/2003

Pored uvedene obaveze objavljivanja data je i mogućnost odlaganja objavljivanja privilegovanih informacija za izdavaoce. Izdavalac može na sopstvenu odgovornost odložiti objavljivanje privilegovanih informacija kako bi zaštitio legitimne interese, pod uslovom, da ne postoji verovatnost da takvo odlaganje dovede u zabludu javnost uz dodatni zahtev da izdavalac osigura očuvanje tajnosti te informacije (Član 6 stav 3 MAD). Razloge koji se mogu smatrati legitimnim veoma iscprnom listom utvrđuje Uputstvo drugog nivoa (član 3 stav 1. 2003/124/EZ). Lista obuhvata legitimne interese grupišući ih za situaciju kada su pregovori u toku i eventualno prevremeno objavljivanje informacija bi moglo da utiče na njihov tok. Posebnu grupu predstavljaju slučajevi kada se donose odluke ili zaključuju pravni poslovi za koje je potrebno dodatno odobrenje ili saglasnost drugih organa izdavaoca.Tu je posebno interesantno utvrditi način zaštite interesa izdavaoca u periodu od donošenja odluke do njenog odobrenja.[20]

Pored navedenih mogućnosti odlaganja objavljivanja, navedeno Uputstvo zahteva da se preduzmu i dodatne mere očuvanja ovih informacija. U tom smislu se može uvesti obaveza za izdavaoce da dostavljaju spiskove lica koja učestvuju u donošenju odluka odnosno koja imaju pristup privilegovnim informacijama. Uvedena je obaveza obaveštavanja nadležnog organa o nameravanom odlaganju objavljivanja privilegovanih informacija. U odnosu na ranije dato rešenje kad je nadležni organ mogao da oslobodi izdavaoce obaveze objavljivanja, sada se izdavaoci ne mogu osloboditi ove obaveze ali mogu tražiti njeno odlaganje.[21]

## 5. SANKCIJE

U rešenjima oba evropska Uputstva nije eksplicitno određen organ nadležan za nadzor nad zabranom trgovine privilegovanim informacijama. IDD u članu 8 ne određuje organ koji će biti nadležan već se to prepušta državama članicama, da same odrede nadzorni organ, s tim da mu moraju dodeliti sva potrebna ovlašćenja za obavljanje funkcije nadzora.

Uputstvo je propisivalo preventivne mere kao oblik rešavanja insider dealinga. One su se sastojale u obavezi izdavaoca za stalnim objavljivanjem informacija a naročito o svim bitnim događajima uz mogućnost oslobođenja od te obaveze u slučaju kad bi objavljivanje pojedine informacije ugrozilo poslovanje i interese izdavaoca.

20 V. Čulinović- Herc, ***op.cit***., str 766
21 Član 6 tačka 3 MAD

Novo Uputstvo MAD određuje kao nadležni organ (organ za implementaciju - komisiju za hartije od vrednosti) kome države članice moraju dodeliti sva ovlašćenja ( član 12 stav 1 MAD). Države članice moraju predvideti pravo žalbe na odluke tog organa (član 15 MAD).

Za razliku od ranijeg rešenja koje je propisivalo preventivne mere u borbi protiv insider dealinga, novo Uputstvo obavezuje države članice da propišu zabranu korišćenja povlašćenih informacija i zabranu manipulisanja tržištem.[22]Pored toga uvode obavezu prijavljivanja, za sva lica uključena u rad sa finansijskim instrumentima, transakcija za koje se opravdano sumnja da mogu biti deo insider dealinga.[23]

Zloupotreba poverljivih informacija je suprotna zahtevima lojalnosti («fidelity») dobrog obavljanja službe (efficency) i pravičnosti (equity).[24] Odgovornost za izvršenu zloupotrebu može biti građanska ( naknada dokazane štete) i krivična.

IDD ne navodi vrste sankcija koje će se primenjivati u slučaju kršenja propisanih pravila zabrana. Državama članicama ostavlja se diskreciono pravo da propišu sankcije i odrede njihove vrste i raspone. IDD jedino postavlja uslov da sankcije koje se propišu budu primerene učinjenom kršenju propisane zabrane.

MAD je takođe na stanovištu da sankcije mogu biti kaznene ukoliko ih predvidi pravo države članice, ali se u tom slučaju moraju predvideti i administrativne kazne. Jedini zahtev je da sankcije koje se predvide moraju biti efikasne, primerene i da imaju dovoljnu snagu da eventualne počinioce odvrate od činjenja dela (član 14 stav 1 MAD). Naime, prema shvatanju Komisije EZ –a : "U načelu je neprihvatljivo da se na povezanom tržištu zabranjeno ponašenje sankcioniše teškom kaznom u jednom pravnom sistemu, blagom kaznom u drugom i nikakvom kaznom u trećoj državi članici. Međutim, potpuna harmonizacija kaznenih sankcija nije predviđena Ugovorom o EZ".[25]

22 Član 2 i 5 MAD
23 Član 6 stav 4 MAD
24 Boyle&Bird, ***Company law***, London,1995, str 480-481
25 Explanatory Memorandum, sec. 1(d), navedeno prema Čulinovič – Herc str. 773.

## 6. ZAKLJUČAK

Regulisanje kruga insidera, zabranjenih radnji i sankcija odredbama datim u Uputstvima EU iz 1989 i 2003 (IDD i MAD) i njihova analiza ukazuju u kom pravcu se izmenilo uređenje oblasti insider dealinga u evropskom pravu.

Određenje kruga insidera dato u IDD rešeno je prihvatanjem dva kruga insidera, primarnih i sekundarnih, te su sledstveno toj podeli regulisane i zabranjene radnje i odgovornost insider-a zavisno od pripadajuće grupe. Novim Uputstvom ( MAD) učinjen je korak dalje u regulisanju ove oblasti. Izjednačen je tretman insidera i nema podele na primarne i sekundarne insider-e. Zabrana raspolaganja privilegovanim informacijama odnosi se jednako na sva lica bez obzira u koju bi se grupu lica mogla razvrstati. I nadalje, kao što smo prikazali, ostaje nerazjašnjeno pitanje pretpostvake o poznavanju privilegovane informacije i za to pitanje vezano pitanje odgovornosti.

Naročiti značaj novog Uputstva ( MAD) koji pokazuje korak napred u regulisanju oblasti insider dealinga jeste obaveza objavljivanja privilegovanih informacija. Uvode se rokovi i novi način objavljivnaja privilegovanih informacija (obaveza objavljivanja na Internet strani emitenta). Veoma značajna novina u odnosu na ranija rešenja je mogućnost samoinicijativnog odlaganja obaveze objavljivanja privilegovanih informacija od strane emitenta.

U delu sankcija, novinu u odnosu na ranije rešenje, predstavlja obavezno uvođenje administrativnih sankcija. Kako krivičnopravne sankcije ne spadaju u nadležnost EU , neki autori[26]smatraju da je ovim pristupom EU došla na ivicu svojih zakonodavnih nadležnosti, naročito naređujući državama članicama da administrativne sankcije moraju biti efikasne, srazmerne i da potencijalne učinioce odvraćaju od činjenja dela. Pored toga kao posebnu primedbu, neki autori, ističu da su mnogi bitni pojmovi uređeni ili će biti uređeni implementirajućim Uputstvima, drugog nivoa, a pri njihovom donošenju zemlje članice nemaju više primarnu ulogu.

Analiza datih rešenja u oblasti insider dealinga u oba Uputstva EU koja regulišu ovu oblast omogućiće lakšu analizu i uočavanje trenda zaštite u oblasti zloupotrebe privilegovanih informacija. Domaće tržište hartija od vrednosti je još uvek nerazvijeno, što je lako uočljivo i iz činjenice da nadležna Komisija za hartije od vrednosti nije ni u jednom svom godišnjem izveštaju zabeležila postojanje zloupotrebe privilegovanih informacija a kamoli

26 Alcock A., Market Abuse, ***The Company Lawyer***, Vol.23 / 2000, str, 150, citirane prema Čulinović _Herc, ***opc cit***., str. 777.

izrekla sankciju za eventualnu zloupotrebu. Sve to ukazuje da postoji aktuelna potreba da se sledi nova EU regulativa u ovoj oblasti.

*Revija za evropsko pravo: IX (2007) 1.*


# PREVODI DOKUMENATA

Radovan D. Vukadinović* str. 109-119.

## UPUTSTVO 2005/89/EZ EVROPSKOG PARLAMENTA I SAVETA

od 18. januara 2006. o merama zaštite sigurnosti snabdevanja električnom energijom i investicija u infrastrukturu (tekst značajan za EVROPSKI ekonomski prostor)

### EVROPSKI PARLAMENT I SAVET EVROPSKE UNIJE,

Uzimajući u obzir Ugovor o osnivanju Evropske zajednice, a posebno njegov član 95.,

Uzimajući u obzir predlog Komisije,

Uzimajući u obzir mišljenje Evropskog ekonomskog i socijalnog saveta[1], nakon savetaovanja sa Odborom regiona, postupajući u skladu sa postupkom predviđenim u članu 251. Ugovora[2], budući da:

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* Direktor Centra za pravo EU, Kragujevac.

1 OJ C 120, 20. 05. 2005, str. 119.

2 Mišljenje Evropskog parlamenta od 5. jula 2005 (nije pubčlikovano u Službenom listu) i Odluku saveta od 1. 12. 2005.

(1) je Uputstvo 2003/54/EZ Evropskog parlamenta i Saveta od 26. juna 2003. o zajedničkim pravilima za unutrašnje tržište električne energije[3] značajno doprinelo stvaranju unutrašnjeg tržišta električne energije. Osiguran visok stepen sigurnosti snabdevanja električnom energijom predstavlja ključni cilj koji treba ostvariti da bi unutrašnje tržište uspešno funkcionisalo, a ovo Uputstvo omogućuje državama članicama uvođenje obaveze javne usluge za elektroenergetske subjekte, ***između ostalog,*** i u pogledu sigurnosti snabdevanja. Takve obaveze javne usluge treba što je moguće preciznije i tačnije definisati i one ne smeju rezultirati stvaranjem većih proizvodnih kapaciteta od onih koji su potrebni za sprečavanja nepredviđenih prekida u distribuciji električne energije krajnjim potrošačima.

(2) se potrebe za električnom energijom obično predviđaju za srednjoročno razdoblje na osnovu scenarija koje izrađuju operatori prenosnog sistema ili druge organizacije koje su ih u stanju izraditi na zahtev države članice.

(3) je za konkurentno jedinstveno tržište električne energije EU nužno potrebna transparentna i nediskriminirajuća politika snabdevanja električnom energijom koja je u skladu sa potrebama takvog tržišta. Nepostojanje takve politike u pojedinim državama članicama ili značajne razlike u politikama pojedinih država članica, dovode do narušavanja tržišne konkurencije. Stoga je utvrđivanje jasnih uloga i odgovornosti nadležnih tela, kao i samih država članica i relevantnih učesnika na tržištu, od presudne važnost za zaštitu sigurnosti snabdevanja električnom energijom i pravilno funkcionisanje unutrašnjeg tržišta, istovremeno izbegavajući stvaranje prepreka za ulazak novih učesnika na tržište, kao što su preduzeća koja se bave proizvodnjom električne energije i snabdevanjem električnom energijom u nekoj državi članici koja su nedavno počela poslovati u toj državi članici, te izbegavajući narušavanje odnosa na unutrašnjem tržištu električne energije ili stvaranje značajnih poteškoća za tržišne učesnike, uključujući preduzeća s malim tržišnim udelima kao što su proizvođači ili snabdevači s vrlom malim udelom na odgovarajućem tržištu Zajednice.

(4) Odluka br. 1229/2003/EZ Evropskog parlamenta i Saveta (1) donosi niz smernica za politiku Zajednice u odnosu na transevropske energetske mreže. Uredba (EZ) br. 1228/2003 Evropskog parlamenta i Saveta od 26. juna 2003. o uslovima pristupa mreži za prekograničnu razmenu električne energije (2) navodi, ***između ostalog,*** opšta načela i detaljna pravila vezana za upravljanje zagušenjima.

3 OJ L 176, 15. 07. 2003. Uputstvo izmenjeno Uputstvom Saveta broj 2004/85/EC OJ L 7. 7. 2004, str. 10.

(5) pri unapređenju upotrebe električne energije proizvedene iz obnovljivih izvora energije treba osigurati raspoloživost srodnih pridruženih kapaciteta, kada je to potrebno zbog tehničkih razloga, u svrhu očuvanja pouzdanosti i sigurnosti mreže.

(6) je, u svrhu ispunjenja obaveza Zajednice vezanih uz zaštitu okoline i smanjenja njene zavisnosti od uvoza energije, važno uzeti u obzir dugoročne efekte porasta potrošnje električne energije.

(7) je od presudne važnosti za razvoj funkcionalnog unutrašnjeg tržišta saradnja između nacionalnih operatora prenosnog sistema na pitanjima koja se tiču sigurnosti mreže, uključujući određivanje prenosnih kapaciteta, pružanje informacija i modelovanje mreže, i takvu saradnju treba dalje poboljšavati. Izostanak koordinacije po pitanjima sigurnosti mreže štetno deluje na uspostavljanje jednakih uslova za tržišnu konkurenciju.

(8) glavna svrha relevantnih tehničkih pravila i preporuka, poput onih iz Pogonskog priručnika Koordinacije za prenos električne energije (UCTE), sličnih pravila i preporuka koje je izradio Nordel, baltičkih Mrežnih pravila i pravila za sisteme Velike Britanije i Irske, je osigurati podršku za tehnički rad međusobno povezane mreže te na taj način doprineti zadovoljenju potrebe za neprekinutim pogonom mreže u slučaju greške u nekoj tački sistema ili tačkama sistema te maksimalno smanjiti troškove otklanjanja takvih poremećaja u snabdevanju.

(9) od operatora prenosnog i distributivnog sistema treba zahtevati pružanje visokog stepena kvaliteta usluga krajnjim potrošačima s aspekta učestalosti i trajanja prekida snabdevanja.

(10) mere koje se mogu primeniti za osiguranje odgovarajućih rezervnih proizvodnih kapaciteta trebaju biti tržišno utemeljene i nediskriminirajuće i mogu uključivati mere kao što su ugovorne garancije i dogovore, opcije za kapacitet i obaveze osiguranja kapaciteta. Te se mere mogu upotpuniti drugim nediskriminirajućim instrumentima, kao što su plaćanja za korišćenje kapaciteta.

(11) u svrhu stavljanja na raspolaganje odgovarajućih prethodnih informacija, države članice su dužne javno objaviti mere koje su preduzele za održavanje ravnoteže između snabdevanja i potražnje kod stvarnih i potencijalnih investitora u proizvodnju i kod potrošača električne energije.

(12) ne dovodeći u pitanje članove 86, 87. i 88. Ugovora, za države članice je važno utvrditi nedvosmislen, odgovarajući i stabilan okvir koji će doprineti sigurnosti snabdevanja električnom energijom i ulaganju u proizvodne

kapacitete i tehnike upravljanja potrošnjom. Takođe je važno provesti odgovarajuće mere za stvaranje regulatornog okvira koji podstiče investicije u nove prenosne interkonekcije, posebno interkonekcije između država članica.

(13) je Evropski savet 15. i 16. marta 2002. u Barseloni dogovorio nivo interkonekcija između država članica. Niski nivoi interkonekcija fragmentiraju tržište i prepreke su razvoju tržišne konkurencije. Postojanje odgovarajućih fizičkih interkonektivnih prenosnih kapaciteta, bilo prekograničnih ili ne, od presudne je važnosti ali nije dovoljan uslov za potpuno delotvornu tržišnu konkurenciju. Zbog interesa krajnjih potrošača odnos između potencijalne koristi od novih projekata interkonekcija i troškova takvih projekata treba biti razumno uravnotežen.

(14) iako je važno odrediti maksimalne raspoložive kapacitete prenosa bez negativnog uticaja na traženu sigurnost rada mreže, takođe je važno osigurati potpunu transparentnost postupka izračunavanja i dodele kapaciteta u prenosnom sistemu. Na taj način se postojeći kapaciteti mogu bolje iskoristiti i tržište ne prima lažne signale o nedostatku kapaciteta, što olakšava stvaranje potpuno konkurentnog unutrašnjeg tržišta kao što je predviđeno Uputstvom 2003/54/EZ.

(15) je operatorima prenosnog i distributivnog sistema potreban primeren i stabilan regulatorni okvir za ulaganja i održavanje i obnovu mreža.

(16) član 4. Uputstva 2003/54/EZ od država članica zahteva da nadziru sigurnost snabdevanja električnom energijom i o tome podnose izveštaj. Taj izveštaj treba da obuhvati kratkoročne, srednjoročne i dugoročne faktore koji su važni za sigurnost snabdevanja, uključujući namere operatora prenosnog sistema vezane uz ulaganje u mrežu. Pri sastavljanju takvog izvještaja od država članica se očekuje pozivanje na već postojeće informacije i procene koje su izradili operatori prenosnog sistema kako pojedinačno tako i zajednički, uključujući i evropski nivo.

(17) su države članice dužne osigurati stvarnu primenu ovog Uputstva.

(18) budući da ciljeve predložene akcije, odnosno sigurno snabdevanje električnom energijom zasnovano na pravičnoj tržišnoj konkurenciji i stvaranje potpuno operativnog unutrašnjeg tržišta električne energije, države članice ne mogu u potpunosti ostvariti, a to se zbog veličine i učinka akcije može bolje postići na nivou Zajednice, Zajednica može usvojiti mere u skladu s načelom subsidijarnosti kao što je navedeno u članu 5. Ugovora. U skladu sa načelom proporcionalnosti prema tom članu, ovo Uputstvo ne ide izvan granica koje su potrebne za postizanje tog cilja.

# DONELI SU OVO UPUTSTVO

## Član 1.

Područje primene

1. Ovo Uputstvo utvrđuje mere kojima je cilj zaštita sigurnosti snabdevanja električnom energijom radi pravilnog funkcionisanja unutrašnjeg tržišta električne energije i osigurava:

(a) odgovarajući nivo proizvodnih kapaciteta;

(b) odgovarajuću ravnotežu između snabdevanja i potražnje; i

(c) odgovarajući nivo interkonekcija između država članica u svrhu razvoja unutrašnjeg tržišta.

2. Ono utvrđuje okvir unutar koga su države članice dužne da definišu transparentnu, stabilnu i nediskriminatornu politiku u pogledu sigurnosti snabdevanja električnom energijom koja je usklađena sa zahtevima konkurentnog unutrašnjeg tržišta električne energije.

## Član 2.

Definicije

U smislu ovog Uputstva primenjuju se definicije iz člana 2. Uputstva 2003/54/EZ. Osim toga, primenjuju se i sledeće definicije:

(a) "regulatorno nadležno telo" su regulatorna tela u državama članicama imenovana u skladu sa članom 23. Uputstva 2003/54/EZ;

(b) "sigurnost snabdevanja električnom energijom" je sposobnost elektroenergetskog sistema za snabdevanje krajnjeg potrošača električnom energijom, na način kako je uređeno ovim Uputstvom;

(c) "pogonska sigurnost mreže" je neprekinuti rad prenosne i, prema potrebi, distribucijske mreže u predvidivim okolnostima;

(d) "ravnoteža između snabdevanja i potrošnje" je zadovoljenje predvidivih potreba potrošača za električnom energijom bez primene mera smanjenja potrošnje.

Član 3.

Opšte odredbe

1. Države članice osiguravaju visok stepen sigurnosti snabdevanja električnom energijom preduzimajući potrebne mere koje olakšavaju stvaranje stabilne klime za ulaganje i definišući uloge i odgovornosti nadležnih tela uključujući, gde je to bitno, regulatorna tela i sve relevantne učesnike na tržištu i objavljujući informacije o tome. Relevantni učesnici na tržištu uključuju, ***između ostalog,*** operatore prenosnog i distributivnog sistema, proizvođače električne energije, snabdevače i krajnje potrošače.

2. Pri primeni mera iz stava 1., države članice uzimaju u obzir sledeće:

(a) značaj osiguranja neprekinutog snabdevanja električnom energijom;

(b) značaj transparentnog i stabilnog regulatornog okvira;

(c) unutrašnje tržište i mogućnost prekogranične saradnje vezano uz sigurnost snabdevanja električnom energijom;

(d) potrebu redovnog održavanja i, po potrebi, obnavljanje prenosnih i distribucijskih mreža u cilju stalnog delotvornog rada mreže;

(e) značaj osiguranja pravilne primene Uputstva 2001/77/EZ Evropskog parlamenta i Saveta od 27. septembra 2001. koja se odnosi na unapređenje upotrebe električne energije iz obnovljivih izvora energije na unutrašnjem tržištu električne energije[4] i Upustva 2004/8/EZ Evropskog parlamenta i Saveta od 11. februara 2004, koje se odnosi na unapređenje kogeneracije zasnovane na tražnji korisne toplote na unutrašnjem energetskom tržištu[5] u onoj meri u kojoj se njihove odredbe odnose na sigurnost snabdevanja električnom energijom;

(f) potrebu za osiguranjem dovoljnih prenosnih i proizvodnih rezervnih kapaciteta za stabilan pogon; i

(g) značaj davanja podsticaja za uspostavljanje likvidnog veleprodajnog tržišta.

3. Pri primeni mera iz stava 1. države članice mogu uzeti u obzir i sledeće:

(a) stepen raznolikosti u proizvodnji električne energije na nacionalnom nivou ili na relevantnom regionalnom nivou;

(b) značaj smanjenja dugoročnog dejstva porasta potrošnje električne energije;

4 OJ L 283, 27.10.2001., str. 33, (1) i Uputstvo kao što je izmenjeno i dopunjeno Aktom o pristupanju iz 2003.

5 OJ L 52, 21. 2. 2004, str. 50.

(c) značaj podsticanja energetske delotvornosti i usvajanja novih tehnologija, posebno tehnologija upravljanja potrošnjom, obnovljivih izvora energije i distribuirane proizvodnje; i

(d) značaj uklanjanja administrativnih prepreka investicijama u infrastrukturu i proizvodne kapacitete.

4. Države članice osiguravaju da sve mere usvojene u skladu sa ovim Uputstvom budu nediskriminirajuće i da ne predstavljaju nerazuman teret učesnicima na tržištu, uključujući nove učesnike i preduzeća s malim tržišnim udelom. Države članice će takođe uzeti u obzir, pre usvajanja takvih mera, uticaj tih mera na cenu električne energije za krajnje potrošače.

5. Pri osiguravanju odgovarajućeg nivoa interkonekcija između država članica, kao što je navedeno u članu 1(1)(c), posebna pažnja će se posvetiti:

(a) specifičnom geografskom položaju svake države članice;

(b) održavanju razumne ravnoteže između troškova izgradnje novih interkonekcija i koristi za krajnjeg potrošača; i

(c) osiguranju najdelotvornijeg korišćenja postojećih interkonekcija.

Član 4.

Pogonska sigurnost mreže

1. (a) Države članice ili njihova nadležna tela osiguravaju da operatori prenosnog sistema utvrde minimalna pogonska pravila i obaveze u pogledu sigurnosti mreže. Pre utvrđivanja tih pravila i obaveza, konsultovaće se sa relevantnim učesnicima u zemljama sa kojima postoje interkonekcije.

(b) nezavisno od prvog podstava tačke (a) države članice mogu zahtevati od operatora prenosnog sistema da dostave takva pravila i obaveze nadležnom telu na odobrenje.

(c) Države članice osiguravaju da operatori prenosnog i, po potrebi, distributivnog sistema udovoljavaju minimumu pogonskih pravila i obaveza u pogledu sigurnosti mreže.

(d) Države članice su dužne da od operatora prenosnog sistema zahtevaju održavanje odgovarajućeg nivoa pogonske sigurnosti mreže. U tu su svrhu operatori prenosnog sistema dužni da održavaju odgovarajući nivo tehničkih prenosnih rezervnih kapaciteta za osiguranje pogonske sigurnosti mreže i da sarađuju sa operatorima prenosnih sistema sa kojima su međusobno povezani.

Predvidive okolnosti u kojima treba održavati sigurnost definisane su pravilima o pogonskoj sigurnosti mreže.

(e) Države članice posebno obezbeđuju da međusobno povezani operatori prenosnog i, po potrebi, distributivnog sistema pravovremeno i efiksano razmenjuju podatke vezane uz vođenje mreža u skladu s minimalnim pogonskim zahtevima. Gde je potrebno, isti zahtevi važe i za operatore prenosnih i distribucijskih sistema koji su povezani s operatorima sistema izvan Zajednice.

2. Države članice ili njihova nadležna tela osiguravaju da operatori prenosnog i, po potrebi, distributivnog sistema utvrde i ispune ciljeve u odnosu na kvalitet snabdevanja i sigurnost mreže. Te ciljeve odobravaju države članice ili njihova nadležna tela koja prate njihovo sprovođenje. Ciljevi trebaju da budu objektivni, transparentni i nediskriminatorni i javno objavljeni.

3. Pri primeni mera iz člana 24. Uputstva 2003/54/EZ i člana 6. Uredbe (EZ) br. 1228/2003, države članice ne vrše diskriminaciju između prekograničnih ugovora i nacionalnih ugovora.

4. Države članice osiguravaju da smanjenje obima snabdevanja u vanrednim situacijama bude zasnovano na unapred utvrđenim kriterijumima upravljanja neravnotežom koje sprovodi operator prenosnog sistema. Sve zaštitne mere primenjuju se u konsultaciji sa ostalim relevantnim operatorima prenosnih sistema, uz poštovanje relevantnih bilateralnih sporazuma uključujući sporazume o razmeni informacija.

Član 5.

Održavanje ravnoteže snabdevanja i potražnje

1. Države članice preduzimaju odgovarajuće mere za održavanje ravnoteže između potražnje za električnom energijom i raspoloživosti proizvodnih kapaciteta. Konkretno, države članice će:

(a) nezavisno od određenih zahteva malih izolovanih sistema, podsticati stvaranje okvira za veleprodajno tržište koje daje odgovarajuće cenovne signale proizvodnji i potrošnji;

(b) zahtevati od operatora prenosnog sistema osiguranje odgovarajućeg nivoa raspoloživih rezervnih proizvodnih kapaciteta za potrebe uravnoteženja i/ili usvajanje tržišno zasnovanih mera sa istim dejstvom.

2. Nezavisno od članova 87. i 88. Ugovora, države članice mogu preduzeti i dodatne mere, uključujući ali ne i ograničavajući se na sledeće:

(a) odredbe kojima se olakšava izgradnja novih proizvodnih kapaciteta i ulazak na tržište novih preduzeća iz delatnosti proizvodnje;

(b) otklanjanje prepreka koje onemogućavaju primenu ugovora o upravljanoj potrošnji;

(c) otklanjanje prepreka koje onemogućavaju sklapanje ugovora sa različitim trajanjem kako za proizvođače tako i za potrošače;

(d) podsticanje usvajanja tehnologija upravljanja potrošnjom u realnom vremenu, kao što su moderni sistemi merenja;

(e) podsticanje mera čuvanja energije;

(f) postupci takmičenja ili postupci s istim dejstvom u smislu transparentnosti i nediskriminacije u skladu sa članom 7(1) Uputstva 2003/54/EZ.

3. Države članice su dužne javno objaviti mere koje se uvode u skladu sa ovim članom i osigurati najšire moguće širenje informacija o istima.

Član 6.

Ulaganja u mrežu

1. Države članice uspostavljaju regulatorni okvir koji:

(a) šalje investicijske signale operatorima prenosnog i distributivnog sistema vezano uz razvoj njihovih mreža u cilju zadovoljenja predvidive potražnje na tržištu; i

(b) podstiče održavanje i po potrebi obnovu njihovih mreža.

2. Nezavisno od Uredbe (EZ) br. 1228/2003, države članice mogu dozvoliti komercijalne investicije u interkonekcije.

Države članice osiguravaju da su odluke o ulaganjima u interkonekcije donete u konsultaciji s relevantnim operatorima prenosnog sistema.

Član 7.

Obaveštavanje

1. Države članice osiguravaju da izveštaj iz člana 4. Uputstva 2003/54/EZ pokriva ukupnu primerenost električnog sistema za snabdevanje trenutne i predviđene potražnje za električnom energijom i obuhvata:

(b) pogonsku sigurnost mreže;

(c) predviđenu ravnotežu između snabdevanja i potražnje u narednom petogodišnjem periodu;

(d) u pogledu sigurnosti snabdevanja električnom energijom u periodu od 5 do 15 godina od datuma predaje izveštaja;

(e) investicijske namere operatora prenosnog sistema u narednih pet ili više kalendarskih godina ili namere neke druge strane čijeg su postojanja svesni, a tiču se osiguranja prekograničnih interkonekcijskih kapaciteta.

2. Države članice ili njihova nadležna tela pripremaju izveštaj u saradnji s operatorima prenosnog sistema. Operatori prenosnog sistema se, po potrebi, savetuju s operatorima susednih prenosnih sistema.

3. Deo izveštaja koji se odnosi na nameru ulaganja u interkonekcijske vodove naveden u stavu 1(d) uzeće u obzir:

(a) načela upravljanja zagušenjima, utvrđena Uredbom (EZ) br. 1228/2003;

(b) postojeće i planirane prenosne vodove;

(c) očekivane obrasce proizvodnje, snabdevanja, prekogranične razmene i potrošnje, dozvoljavajući mere upravljanja potrošnjom, i

(d) regionalne, nacionalne i evropske ciljeve održivog razvoja, uključujući one projekte koji čine deo Osovine prioritetnih projakta uvrštenih u Prilog I Odluke br. 1229/2003/EZ. Države članice osiguravaju da operatori prenosnog sistema pružaju informacije o svojim investicijskim namerama ili namerama neke druge strane čijeg su postojanja svesni, a koje se odnose na osiguranje prekograničnih interkonekcijskih kapaciteta. Države članice mogu takođe zahtevati od operatora prenosnog sistema pružanje informacija o ulaganjima koja su vezana uz izgradnju unutrašnjih vodova koji bitno utiču na osiguranje prekograničnih interkonekcija.

4. Države članice ili njihova nadležna tela osiguravaju da operatorima prenosnog sistema i/ili nadležnim telima bude osiguran potreban pristup relevantnim podacima kada je to važno za sprovođenje ovog zadatka. Osiguraće se tajnost poverljivih informacija.

5. Na osnovu informacija navedenih u stavu 1(d) dobijenih od nadležnih tela, Komisija podnosi izveštaj državama članicama, nadležnim telima i Evropskoj grupi regulatora za električnu energiju i gas koja je osnovana Odlukom Komisije 2003/796/EZ(1) o planiranim ulaganjima i njihovom doprinosu ostvarenju ciljeva navedenih u članu 1(1) .

Ovaj izveštaj se može kombinovati sa izveštajima predviđenim u tački (c) člana 28(1) Uputstva 2003/54/EZ i objavljuje se.

Član 8.

Prenošenje u unutrašnje pravo

1. Države članice će doneti potrebne zakone i druge propise kako bi se uskladile s odredbama ovog Uputstva najkasnije do 24. februara 2008. One će o tome odmah obavestiti Komisiju. Kad države članice budu donosile ove mere, te mere će prilikom njihovog službenog objavljivanja upućivati na ovo Uputstvo ili će se uz njih navesti takvo upućivanje. Načine upućivanja određuju države članice.

2. Države članice će Komisiji dostaviti tekst odredaba nacionalnog prava koje budu donele u oblastima na koje se odnosi ovo Uputstvo do 1. decembra 2007.

Član 9.

Izveštaji

Komisija će nadgledati i revidirati primenu ovog Uputstva i dostaviti Evropskom parlamentu i Savetu izveštaj o napretku do 24. februara 2010.

Član 10.

Stupanje na snagu

Ovo Uputstvo stupa na snagu 20 dana od objavljivanja u Službenom listu Evropske Unije.

Član 11.

Adresati

Ovo Uputstvo je upućeno državama čanicama.

Sastavljeno u Strasburu, 18. januara 2006.

| Za Evropski parlament: | Za Savet: |
|---|---|
| Predsednik | Predsednik |
| J. BORRELL FONTELLES | H. WINKLER |