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THE PRINCIPLE OF PROPORTIONALITY AS JUSTIFICATION TEST ON THE GROUNDS OF ART. 52 I CFR

Abstract

In different jurisdictions the principle of proportionality is newly invented or its application intensified through constitutionalization, jurisdiction and legal methodology. Its impact on judgments on fundamental rights has revealed remarkable judgments since the Treaty of Lisbon entered into force. The variety of views and approaches has evoked enthusiastic and sceptical views on the broader application of this prinicple with regard to balancing colliding rights. Through Lisbon the EU has made a rather clear statement. Due to art. 52 I CFR (Charter of Fundamental Rights) proportionality may be deemed as backbone of justification, as heart of the whole charta.[1] *It is qualified as one of the guiding horizontal principles, the major legal figure or essence of examination of*

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[1] Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 GRC para 1.

justification.[2] *No other rule of the charter was such intensively amended by the European Constitutional Convention.*[3]

Proportionality as general principle of law is an integral part of the EU as legal community. But as expression of justification the requirements are specifically directed to fundamental rights. What is the logic of proportionality? How should essential elements of proportionality be applied? Which scrutiny of judicial application may be caused thereby? Answers may differ due to the understanding of each legal system or culture on international level, the level of the EU as well as in the member states. But art. 52 III, IV CFR requires a coherence among the ECHR, EU primary law and member state laws.[4] *The application of proportionality on fundamental rights will show its practical significance, convergencies and divergencies. Hence, proportionality is of impact on legal discipline, confidence and justice. Moreover, the change of scrutiny of judicial application determines the correlations among state powers. As far as courts intensify the application of proportionality this may influence, limit or govern legislation and execution. Due to its history and constitutional development over the second half of the last century and from the beginning of this century in the coherent, cooperative context of art. 52 CFR the jurisdiction and legal literature in Germany may be of epistemological value.*

Keywords: Art. 52 CFR, general principles of law, proportionality logic, justification test, fundamental rights, legal positivism, constitutionalization, law, legitimate objective, appropriateness, proportionality in a narrow sense, proper

[2] Th. von Danwitz in P. J. Tettinger/K. Stern, *Kölner Kommentar zur Europäischen Grundrechtecharta*, 2006 München, Art. 52 para 1; V. Trestnjak/E. Beysen, *EuR 2012*, 265, Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung; M. Borowsky in J. Meyer, *Charta der Grundrechte der Europäischen Union*, 2014 Baden-Baden, 786; D. Ehlers (ed.) *Europäische Grundrechte und Grundfreiheiten*, 2014 Berlin, 570.

[3] Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 GRC para 1.

[4] K. Stern/D. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 30, 38ff.; S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.100ff., 52.150ff.; Z. Meskic/D. Samardzic in South East European Law School, *Promotion of Scientific Research and Education in European Integration and Policy*, 2014 Skopje, 59ff., From unrelated to cooperative triple protection of human rights in the EU.

balancing, scrutiny of judicial application, prerogative, discretion, legal discipline, confidence, methodology, dogmatic.

A. Legal Character of Proportionality

I. General Principle of Law as Ground of the Justification Test

The intense discourse on proportionality illustrates the increasing importance, the need to cope with this principle and apply it.[5] General principles of law are by their nature of constituting significance and challenging.[6] The practical significance of the proportionality test for justification may hardly be overestimated.[7] As part of justification it is a real hurdle of legality, more as restriction on interference to fundamental rights, than a general principle to balance interests somehow.[8] As justification test proportionality is a manifestation of proportionality as general principle and an autonomous obligation of this principle.[9] Therefore, it is of crucial importance to capture the spirit and functions of fundamental rights and proportionality and the correlations among these principles which are naturally linked and dependent on each other. This understanding is supportive for the interpretation of proportionality when applied on fundamental rights.

Fundamental rights are recognised as general principles of law supported by the idea of universality as well as normative approaches to such rights.[10] Before the

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[5] Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, München 2016, Art 52. GRCh, para 71; M. Klatt/M. Meister, *JuS 2014*, 194, Der Grundsatz der Verhältnismäßigkeit; D. Grimm, *University of Torronto Law Journal 2007*, 383ff., Proportionality in Canadian and German Constitutional Jurisprudence.

[6] Z. Meskic/D. Samardzic, *Pravo Evropske Unije I*, 2012 Sarajevo, 39ff., 226ff.

[7] M. Klatt/M. Meister, *JuS 2014*, 193, Der Grundsatz der Verhältnismäßigkeit.

[8] R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Anh. 1 Einführung GR-Charta Art. 52 para 1; J. Saurer, *Der Staat 2010*, 4ff., Die Globalisierung des Verhältnismäßigkeistgrundsatzes.

[9] H. D. Jarass, *EU GRC*, München 2016, Art. 52 para 35; D. Edward/R. Lane, *European Union Law*, 2016 Cheltenham, 6.101ff.

[10] U. Haltern, EU II, 2017 Tübingen, 585ff.; M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Art. 1 para 2, 6; D. Edward/R. Lane, *European Union Law*, 2016 Cheltenham, 6.105ff.; K. Stern in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 184.

CFR entered into force their qualification as general principles was a driver of their effects in primary law.[11] Independent of positive law there is a conviction of fundamental rights constituting an *acqui communautaire*.[12] The CJEU early started to interpret fundamental rights as general prinicples of law.[13] As reference the Court initially used the traditions of the member states. A mile stone was the case *Stauder*[14] in which the court by one sentence clarified that the state cannot act against general principles of law to which fundamental rights belong. Means of state authorities restricting fundamental rights have to conform to written and unwritten primary law.

Proportionality is also a general principle of law, both in EU and member state law.[15] The broad acceptance shows the correlations of primary and member state law.[16] Often it is derived from the principle of rule of law or fundamental rights.[17] Due to its practical significance and intense impact proportionality is described as ubiquitous or general scale of values.[18] As justification test proportionality in

[11] M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 2.

[12] H.-J. Cremer in Ch. Grabenwarter, *Enzyklopädie Europarecht II*, 2014 Baden-Baden, § 1 para 20; P. Häberle, *IEV (Institut für Europäische Verfassungswissenschaften) Online Nr. 3/2009*, "Verfassungskultur" als Kategorie und Forschungsfeld der Verfassungswissenschaften, 3; D. Samardzic/Z. Meskic in South East European Law School, *Rule of Law, Human Rights and European Union*, 2012 Skopje, 11f., Principle "Rule of Law" Or "Rechtsstaatlichkeit" as Basis for Human Rights Protection in European Union Law.

[13] S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.15ff.; H.-J. Cremer in Ch. Grabenwarter, *Enzyklopädie Europarecht II*, 2014 Baden-Baden, § 1 para 9ff.

[14] CJEU, 29/69, *Stauder*, 1969, 419; H.-J. Blanke in H.-J. Blanke/S. Mangiameli, *TEU*, 289f., 2013 Heidelberg, The Protection of Fundamental Rights in Europe.

[15] K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 4ff., 120; H. D. Jarass, *EU GRC*, München 2016, Art. 52 para 35; Z. Meskic/D. Samardzic, *Pravo Evropske Unije I*, 2012 Sarajevo, 74.

[16] I. Pernice in Ch. Calliess, *Verfassungswandel im europäischen Staaten- und Verfassungsverbund*, 2007 Tübingen, 69, Theorie und Praxis des Europäischen Verfassunsgverbundes; S. Schmahl in R. Schulze/M. Zuleeg/S. Kadelbach, *Europarecht*, 2014 Baden-Baden, § 6 para 2ff.

[17] A. von Arnauld, *JZ 2000*, 276ff., Die normtheoretische Begründung des Verhältnismäßigkeitsgrundsatzes; P. Häberle/M. Kotzur, *Europäische Verfassungslehre*, 2016 Baden-Baden, 674ff.

[18] M. Klatt/M. Meister, *JuS 2014*, 193, Der Grundsatz der Verhältnismäßigkeit; M. Klatt/M. Meister, *Der Staat 2015*, 159, Verhältnismäßigkeit als universelles Verfassungsprinzip.

the spirit of art. 52 I CFR constitutes a hurdle for interferences to fundamental rights. It is seen as the main mechanism for controlling the limitation of charter rights.[19] It has to be examined as restriction on limitations.[20] In this understanding proportionality has to be seen from a technical point of view as justification test.[21] Due to this picture of justification as *limitation on limitation* the terminology of *Schranken-Schranke-Rechtfertigung* (Germ.) was invented in Germany.[22]

Maybe the CFR was partially underestimated, but its effects are enormous.[23] The application through the CJEU has noticeably changed since the CFR entered into force by the Lisbon treaty.[24] It is not by chance that in the meanwhile we see a globalization of the principle of proportionality through constitutionalization and judicial application.[25] Proportionality is deemed as structural element of global

[19] S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.50.

[20] R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Anh. 1 Einführung GR-Charta Art. 52 para 1.

[21] S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.65ff.; Ch. Hillgruber in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 201 para 51ff.

[22] H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 30ff., 64ff.; R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Anh. 1 Einführung GR-Charta Art. 52 para 1; K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 46, 111ff.; U. Haltern, *EU II*, 2017 Tübingen, 599ff., 616; Ch. Hillgruber in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 201.

[23] U. Haltern, *EU II*, 2017 Tübingen, 618ff.; H.-J. Blanke in H.-J. Blanke/S. Mangiameli, *The European Union after Lisbon*, 159ff., The Protection of Fundamental Rights in Europe.

[24] W. Schroeder, *EuZW 2011*, 462ff., Neues zur Grundrechtskontrolle in der Europäischen Union; W. Weiß, *EuZW 2013*, 287ff., Grundrechtschutz durch den EuGH: Tendenzen seit Lissabon; D. Sarmiento, *CMLR 2013*, 1267ff., Who is afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe.

[25] M. Klatt, *Die praktische Konkordanz von Kompetenzen*, 2014 Tübingen, 26ff.; P. Häberle, *IEV (Institut für Europäische Verfassungswissenschaften) Online Nr. 3/2009*, "Verfassungskultur" als Kategorie und Forschungsfeld der Verfassungswissenschaften; J. Saurer, *Der Staat 2010*, 3ff., Die Globalisierung des Verhältnismäßigkeistgrundsatzes; B. Schneiders, *Die Grundrechte der EU und die EMRK*, 2010 Baden-Baden, 203ff.; M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 6ff.; K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 9ff.; D. Grimm, *University of Torronto Law Journal 2007*, 383ff., Proportionality in Canadian and German Constitutional Jurisprudence.

constitutionalization.[26] Although we may see an international reception of proportionality, this does not mean that a universal legal dogmatic is established.[27] Codification and jurisdiction do not automatically accept or design one dogmatic, but it is hardly possible to assure a justification logic without any dogmatic.[28] Different views exist on how to apply such a test.[29] Hence, proportionality is a rather challenging general principle of law.[30]

II. Multidimensional Development and Enhancement of Proportionality

Legal Positivism and Constitutionalization

Before Lisbon proportionality from the perspective of positive law was very much associated with questions on competencies among the EU and its member states. Proportionality was in focus as general principle of law to govern vertical questions among the EU and its member states.[31] In the context of vertical competencies or political interests its effects are different from a justification logic on fundamental rights. Besides its economic goals an ever closer Union had to answer related questions. It is difficult to imagine such an Union without being a legal community. On the contrary, a legal system state of the art is a precondition and framework for the other activities of the EU. Hence, also before the codification of the CFR the EU was deemed as community of fundamental rights, but with other priorities from the beginning of its integration on.[32] The economic normativity in primary law was used as supportive way. Fundamental freedoms partially were deemed as fundamental rights functionally providing a

[26] M. Klatt/M. Meister, *JuS 2014*, 193, Der Grundsatz der Verhältnismäßigkeit.

[27] Ph. Reimer, *Der Staat 2013*, 53ff., "… UND MACHET ZU JÜNGERN ALLE VÖLKER"?; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte.

[28] U. Haltern, *EU I*, 2017 Tübingen, 11ff.

[29] J. Saurer, *Der Staat 2010*, 13ff., Die Globalisierung des Verhältnismäßigkeistgrundsatzes.

[30] F. Becker, *NVwZ 2015*, 1336, Grundrechtlcihe Grenzen staatlicher Überwachung zur Gefahrenabwehr.

[31] Z. Meskic/D. Samardzic, *Pravo Evropske Unije I*, 2012 Sarajevo, 61, 62ff.

[32] M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 1; K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 1ff.; D. Samardzic/Z. Meskic in South East European Law School, *Rule of Law, Human Rights and European Union*, 2012 Skopje, 14f., Principle "Rule of Law" Or "Rechtsstaatlichkeit" as Basis for Human Rights Protection in European Union Law.

compensatory protection.[33] But this could not have been a substitute for a codified catalogue of fundamental rights. During that time the integrative capacity of the CJEU could not have been overstated. Its proceeding on the grounds of art. 19 TEU may be in this respect characterized as constitutional design competency.[34] This has evoked the characterization of the court as driver of integration.

Germany with its history may serve as example of change.[35] The acceptance of proportionality has not arosen by chance. Proportionality is closely linked to the fundamental rights and the work of the constitutional courts.[36] After the Second World War fundamental rights constituted the first chapter of the German Basic Law. Human dignity was put as untouchable right into art. 1 of this law and art. 1 III obliges all state powers by fundamental rights. Procedurally justiciability by courts is the expression of protecting general principles of law effectively under the independence of courts. These guarantees are strongly represented by the German Constitutional Court, which has enhanced the understanding of fundamental rights in the light of proportionality. Additionally functions of fundamental rights were extended from traditional rights of defense against policy actions to positive obligations or guarantees. These obligations refelect the current understanding of functions of fundamental rights and are at the same time a way to cope with profound dogmatic challenges such as horizontal effects. Alltogether this shows that the significance and development of proportionality is very much linked to the change of society and technology to be captured by the scope of fundamental rights.[37] In this context the new power of fundamental rights is described as normativity of such rights requiring a balance of colliding rights of the highest, equal ranking. This is critical as far as the logic is not

[33] K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 2.

[34] M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 2.

[35] K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 17f.; K. Stern in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 185; D. Grimm, *University of Torronto Law Journal 2007*, 384f., Proportionality in Canadian and German Constitutional Jurisprudence.

[36] J. Saurer, *Der Staat 2010*, 5ff., Die Globalisierung des Verhältnismäßigkeistgrundsatzes.

[37] M. Klatt/M. Meister, *Der Staat 2015*, 162ff., Verhältnismäßigkeit als universelles Verfassungsprinzip.

consistent and coherent or even not applied. One of the critical aspects of balancing is to overload single elements of proportionality with normative assessments not reflecting the different characters and purposes of proportionality.[38]

III. EU Since Lisbon

a) Legal Ground of Proportionality for Fundamental Rights

The CFR entered into force 2009 by the Lisbon Treaty. The charter expresses the identity of the Union as a European community of fundamental rights.[39] At this stage of integration the CFR may be seen as further enhancement of the EU as legal community. After the genuine idea of a constitutional treaty was refused in two of the member states of the EU, the CFR was codified separately, but of equal primary ranking as the TEU and TFEU (art. 6 I TEU).[40] Regarding proportionality art. 52 I CFR as general provision for fundamental rights is of superior guidance.[41] The wording of sections I-IV of art. 52 CFR is as follows:

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

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[38] D. Grimm, *University of Torronto Law Journal 2007*, 393ff., Proportionality in Canadian and German Constitutional Jurisprudence.

[39] M. Kotzur, *EuGRZ 2011*, 105ff., Der Schutz personenbezogener Daten in der europäischen Grundrechtsgemeinschaft; U. Haltern, *EU II*, 2017 Tübingen, 3ff.

[40] K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 9ff.

[41] S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52; A. Dashwood/M. Dougan/B. Rodger/E. Spaventa/D. Wyatt, *European Union Law*, 359ff., 383ff.; P. Häberle/M. Kotzur, *Europäische Verfassungslehre*, 2016 Baden-Baden, 614f.; H.-J. Blanke in H.-J. Blanke/S. Manigiameli, *The European Union after Lisbon*, 2012 Heidelberg, 168ff.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

b) Legal Ground by Positive Law

According to art. 52 I 1 CFR limitations must be provided for by law. A law in this spirit has to conform to the rule of law, but is questionable to what degree a democratic legitimation is needed.[42] This traditionally is given in case of laws passing the parliament as directly democratically legitimated body. In EU terms legal acts in the spirit of art. 289 III TFEU are included. Acts pursuant to art. 290 and 291 TFEU are adopted by the Commission as executive body. In this respect simple acts on the basis of art. 291 TFEU are deemed as insufficient.[43] The stronger the interference is, the stricter the criterion of certainity has to be applied.[44] Finally the question of sufficient democratic legitimation depends on the significance of regulations for fundamental rights. The doctrine of essential content demands that essential legal acts are adopted through the legislative procedure stipulated in the constitution or analogue in primary law.[45] Grabenwarter/Pabel speak of tracebility (Germ. *Rückführbarkeit*).[46] Accordingly, the interference to a fundamental right must not be directly based on a directly democratically legitimized law, but traceable to a normative basis supported by a parliamentary law. The idea is to achieve an anchoring of essential laws through

[42] H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 34ff.; Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 GRC para 61f.; Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 143.

[43] Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 GRC para 62.

[44] *Ibid*.

[45] P. Lerche in D. Merten/H.-J. Papier, *Handbuch der Grundrechte III*, § 62, Vorbehalt des Gesetzes und Wesentlichkeitstheorie; for the overall understanding of democratic legitimation in the EU Ch. Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon*, 2010 Tübingen, 163ff., 288ff.

[46] Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 143.

preferably direct democratic legitimation. The broad scope of interpretation may be illustrated by the exapmle of agreements. Even agreements among member states are deemed as sufficient legal basis for interference to fundamental rights: "In the present case, it is undisputed that the limitation of the *ne bis in idem* principle must be considered as being provided for by law, within the meaning of Article 52(1) of the Charter, since it arises from Article 54 CISA".[47]

Another challenging criterion of art. 52 I CFR is the addition of rights and freedoms of others. Such rights and freedoms have to be of primary ranking related to the understanding of rights and freedoms in the spirit of art. 52 CFR. It is not sufficient to refer to national laws or rights exclusively with no relation to the charter.[48] Hence, it is a question of the character and quality of a rule. Due to the principle of equality laws cannot be discriminatory. The scope of a law may be narrowed to rather specifific addressees, but there is no room to sanction individuals intentionally. From the perspecitve of the addressees in particular a rule has to be clear and precise as an expression of the principle of legal certainity.[49] An addressee must be able to foresee or understand what is required and the legal consequences thereof.

c) New Level of Consistency, Coherence and Cooperation Through the CFR

Although art. 52 I CFR is deemed as a rather abstract norm, in general, positive law compels jurisdiction to methodologically related interpretation and sharpness.[50] On the grounds of the essentials and purposes of art. 52 CFR a more consistent and coherent dogmatic may be applied. The multidimensionality of EU law is openly anchored in art. 6 TEU. This article together with art. 52 III, IV CFR requires a coherent application of law through the jurisdictions.[51] These

[47] CJEU, C-129/14, *Spasic*, 2014, para 57.

[48] H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 47.

[49] D. Edward/R. Lane, *European Union Law*, 2016 Cheltenham, 6.134ff.; Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 144; H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 32.

[50] M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 3.

[51] K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 36; U. Haltern, *EU II*, 2017 Tübingen, 634ff., 705ff.; Z. Meskic/D. Samardzic in South East European Law School, *Promotion of Scientific Research and Education in European Integration and*

provisions support a multidimensional, universal understanding of human rights challenging related laws and jurisdictions.[52] In this context proportionality as general clause has to be interpreted coherently for all fundamental rights. Member state law is challenging through its differences in 28 jurisdictions. Nevertheless, there is consensus on distinct fundamental principles, rights and methods. The international law perspective is given through the ECHR. The ECHR provides benefits as legal source of interpretation as well as through the case law of the ECtHR. The ECtHR is more experienced in the application of human rights, while the CJEU looks back on a shorter history of codified fundamental rights. According to art. 6 II TEU it is still a mandatory goal to assess the ECHR.[53] Currently, the oppinion of the CJEU on the accession to the ECtHR has thwarted this process.[54]

B. Logic of Proportionality as Justification Test

I. Four Step Distinction of Proportionality in the Spirit of art. 52 I CFR

Art. 52 I CFR is of rather broad and abstract nature. Only three basic elements of justification are now provided by law: legal basis, the essence of rights and proportionality. Nevertheless, this is an opportunity and obligation to support legal application. Legal methodology may be used to assure the logic and scales of proportionality. Partially, the CFR is deemed as innovative as well as, more enhanced than the ECHR.[55] In the spirit of its purposes it may be an invitation for

Policy, 2014 Skopje, 59ff., From unrelated to cooperative triple protection of human rights in the EU.

[52] S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.100ff., 52.150ff.; M. Klatt, *Die praktische Konkordanz von Kompetenzen*, 2014 Tübingen, 2ff., 118ff.; D. Engel, *Der Beitritt der Europäischen Union zur EMRK*, 2015 Tübingen, 15ff; Z. Meskic/D. Samardzic in South East European Law School, *Promotion of Scientific Research and Education in European Integration and Policy*, 2014 Skopje, 59ff., From unrelated to cooperative triple protection of human rights in the EU.

[53] K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 154ff.; D. Engel, *Der Beitritt der Europäischen Union zur EMRK*, 2015 Tübingen.

[54] U. Haltern, *EU II*, 2017 Tübingen, 736ff., 705ff.; Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 22ff., 29f.; D. Engel, *Der Beitritt der Europäischen Union zur EMRK*, 2015 Tübingen, 313ff.

[55] M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 6; U. Haltern, *EU I*, 2017 Tübingen, 11ff.

methodological enhancement, state of the art or at least coherent.[56] A part of this enhancement process is the case law of the CJEU and the jurisdiction of its member states. The CJEU was a promoter of fundamental rights already before Lisbon. It seems as if the CJEU now on the basis of the CFR promotes the dogmatic of fundamental rights, not always consistently, but applying a stricter mean of proportionality and promoting a higher protection level of fundamental rights.[57] In this context proportionality requires a justification logic, with a coherent structure of elements building a justification test.[58]

There is a consensus on essential elements of proportionality, although terminology is rather differing or even confusing through interchangeable or unclear use.[59] The ECtHR does not want to confess to one structure, but often reviews the essential elements implicitly *en bloc*.[60] Nevertheless, in the case law of the CJEU essential elements may be identified. Appropriateness, necessity and proportionality in a narrow sense build a three step test,[61] but through integration of the legitimate objective, the structure converges to a four step test. The legitimate objective serves as reference point for the other elements, as far as the legitimate objective should not be part of the core proportionality test it may be examined as initiator prior to proportionality.

The CJEU prematurely started to clarify the sigificance of proportionality and a few of its essential elements: In its case *Schräder* the court said: "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, measures imposing financial charges on economic operators are lawful provided that the measures

[56] K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 36.

[57] Recently in particular on the field of data protection for instance CJEU, C-293/12, *Digital Rights Ireland*, 2014; CJEU, C-203/15, *Tele2 Sverige*, 2016.

[58] S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.65ff.; K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen, para 36ff.

[59] K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen, para 118; U. J. Schröder, *Ad Legendum 4/2015*, 330, Der Verhältnismäßigkeitsgrundsatz; Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 145.

[60] Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 145.

[61] H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 37-42; K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen, para 48-54.

are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued".[62]

Later on the court enhances this understanding by pronouncing the relations of the means used to be proportionate to objectives. The court does not limit proportionality any more only to appropriateness and necessity but speaks of disproportionality and reasonableness: "However, it is well-established in the case-law of the Court that restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights".[63]

In the meanwhile the CJEU repeats its formulas such as: "As regards the principle of proportionality, it follows from the case-law of the Court that the measures laid down by national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation; when there is a choice between several appropriate measures, recourse must be had to the least onerous among them, and the disadvantages caused must not be disproportionate to the aims pursued …".[64]

II. Scales of Proportionality

a) Legitimate Objective

The proportionality test has to be referenced to a legitimate objective.[65] Pursuant to art. 52 I 2 limitations may only be made if they meet objectives of general interests recognized by the Union or the need to protect the rights and freedoms

[62] CJEU, 265/87, *Schräder*, 1989 para 21.

[63] CJEU, C-292/97, *Karlsson*, 2000 para 45.

[64] CJEU, C-528/13, *Leger*, 2015 para 58.

[65] E. Pache, *EuR 2001*, 488, Die Europäische Grundrechtecharta – ein Rückschritt für den Grundrechtsschutz in Europa?; Th. von Danwitz in P. J. Tettinger/K. Stern, *Kölner Kommentar zur Europäischen Grundrechtecharta*, 2006 München, Art. 52 GRC para 24; Ch. Hillgruber in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 201 para 54ff.

of others. Such interests are not limited to art. 3 TEU, although this provision serves as pool of main objectives in the TEU.[66] Very different objectives and rights may serve as legitimate objective.[67] It is the reference point for the proportionality test and the counter point to the fundamental rights concerned. Essentially the examination of proportionality is an expression of, on the one hand, the legitimate objective and intensity of limitation and on the other hand the concerned fundamental rights.[68] Within the test of proportionality in a narrow sense such colliding rights and interests have to be balanced, finally. The wide range of objectives provoked Peers/Prechal to claim "Indeed, it is limitless, particulary as compared to the prohibition on restricting EU market freedoms on economic grounds".[69]

The scrutiny of judicial application on the legitimate objective is not very strict. In its case *Sky Österreich* the court simply stated: "The safeguarding of the freedoms protected under Article 11 of the Charter undoubtedly constitutes a legitimate aim in the general interest".[70] Art. 11 CFR is of constituting importance for a democracy. Remarkably, it is not only an individual right, but at the same time a general interest representing the cummulation of a right of several people.[71]

In its case *Schecke Eifert* the court pointed out the significance of transparency: "… publication of the names of the beneficiaries of aid from … and of the amounts which they receive from those Funds is intended to [enhance] transparency regarding the use of Community funds … and [improve] the sound financial management of these funds, in particular by reinforcing public control of the

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[66] R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Anh. 1 Einführung GR-Charta Art. 52 para 1.

[67] S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.46ff.; Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 145f.; concrete examples Th. Marauhn/J. Thorn in O. Dörr/R. Grote/Th. Marauhn, EMRK/GG, 2013 Tübingen, 943ff.

[68] M. Kenntner, *ZRP 2000*, 424, Die Schrankenbestimmungen der EU-Grundrechtecharta – Grundrechte ohne Schutzwirkung?.

[69] S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52.50.

[70] CJEU, C-283/11, *Sky Österreich*, 2013 para 52.

[71] About a dichotomy of individual and collective rights H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 47.

money used".[72] Then the court refered to the legal grounds of transparency: "The principle of transparency is stated in Articles 1 TEU and 10 TEU and in Article 15 TFEU. It enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system".[73] Thereby the courts showed that general principles of law may serve as legitimate objectives.

b) Appropriateness

Appropriateness may be derived from the wording of art. 52 I 2 CFR "*… and genuinely meet objectives …*".[74] It is enough that a mean is able to promote a legitimate objective or to provide a contribution.[75] If several objectives are pursued it is sufficient to promote one of the objectives. In order to prove this standard, even a plausible argumentation is sufficient and in line with the precautionary principle known from fundamental freedoms, in case of doubt about the promotional effect, the more conservative assumption has to be chosen.[76] But such an argumentation has to be in accordance with the current level of scientific knowledge, and has to be coherent and consistent.[77] This means that state authorities shall avoid opposing, weakening effects or refrain from other promoting means.

The CJEU often demands that the mean is not manifestly inappropriate: "*… that the Community legislature must be allowed a broad discretion in an area such as that in issue in the present case, which involves political, economic and social choices on its part, and in which it is called on to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking*

[72] CJEU, C-92/09 and C-93/09, *Schecke Eifert,* 2010 para 67.

[73] CJEU, C-92/09 and C-93/09, *Schecke Eifert,* 2010 para 68.

[74] M. Holoubek/G. Lienbacher (ed.) *GRC*, 2014 Wien, Art. 52 para 16; overall Ch. Hillgruber in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 201 para 60ff.

[75] H. D. Jarass, *EU GRC*, München 2016, Art. 52 para 37; M. Holoubek/G. Lienbacher (ed.) *GRC*, Wien 2014, Art. 52 para 16, Art. 8 para 33; H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 37f.

[76] H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 48.

[77] H. D. Jarass, *EU GRC*, München 2016, Art. 52 para 37f.; H. Krämer in K. Stern/M. Sachs, *GRC*, 2016 München, Art. 52 para 48.

to pursue".[78] Here the court indicated the broad discretion in particular the legislator enjoys. Legislator's discretion may lower the scrutinity of judicial application on proportionality.

In its decision *Schaible* the CJEU detailed (over seven paragraphs) examined the appropriateness. The court analyzed the used mean and its effects in the context of the facts. Two paragraphs out of this decision prove the aforesaid: "*As regards the obligation to keep a register for each holding, it should be pointed out, …, that the data recorded by the identifier must be entered in a document which can be rapidly updated and, upon request, easily accessed by the competent authorities. Accordingly, that system allows the place of origin of each animal to be established as well as the various places through which an animal has passed. In the event of epizootic disease, that information is fundamental to carry out accurate epidemiological studies, identify dangerous contacts that are liable to spread the disease and, consequently, enable the competent authorities to take the necessary measures to prevent the spread of such contagious disease. … reinforcement of controls on movements of ovine and caprine animals …, movements of sheep largely contributed to the spread of foot-and-mouth disease in certain parts of the European Union during the outbreak of foot-and-mouth disease in 2001*".[79]

Nevertheless, it is remarkable that the court mixed up the terminology of appropriateness with suitability. This again shows that in case of doubt the content must be crucial, not the wording. The conclusion of the court in *Schaible* is: "*As regards the allegations concerning the technical flaws of the identification system, even if the percentage of the means of electronic identification attached to animals which are lost or become defective can reach the level indicated by Mr Schaible, such malfunctions cannot, in themselves, demonstrate that the system concerned is, as a whole, unsuitable*".[80]

On the contrary to *Schaible* the CJEU without a detailed analysis in its case *Schecke Eifert* simply stated: "*By reinforcing public control of the use of the money from …, the publication required by the provisions whose validity is contested contributes to the appropriate use of public funds by the administration*".[81] In the case *Sky Österreich* the CJEU in one paragraph states: "*Similarly, Article 15(6) of Directive 2010/13 is*

[78] CJEU, C-453/03, *ABNA*, 2005 para 69.

[79] CJEU, C-101/12, *Schaible*, 2013 para 40.

[80] *Ibid*., para 41.

[81] CJEU, C-92/09 and C-93/09, *Schecke Eifert,* 2010 para 69.

appropriate for the purpose of ensuring that the objective pursued is achieved. That provision puts any broadcaster in a position to be able to make short news reports and thus to inform the general public of events of high interest to it which are marketed on an exclusive basis, by guaranteeing those broadcasters access to those events".[82] In contrast to the often more detailed examination of necessity these cases on appropriateness show that appropriateness forms a lower obstacle. The requirements on necessity are more complex and challenging.

c) Necessity Test

Necessity broadly is recognized as an integral part of proportionality and has to be examined as next step subsequent to appropriateness and before proportionality in a narrow sense.[83] The necessity test requires the search for alternative means.[84] It can be at large a fact based, empirical or scientific test because it is not a simple weighing. This more technical understanding provoked the thesis that necessity may dogmatically be the most secure part of proportionality.[85] Actually necessity may be deemed as essentially fact oriented, empirical or scientific examination as far as normative assessments are separated.

However, space for normative assesments is given through the use of criteria such as disproportionate, reasonable, similiar or the consideration of effects on other subjects or interests. It is also not deemed as proportional if an alternative mean has stronger impact on third parties or general interests than the mean used.[86] This second essential part of the necessity formula requires that a milder mean could have been used to achieve the same success but is less invasive for fundamental rights.[87] This normative formula indicates that it is open to

[82] CJEU, C-283/11, *Sky Österreich*, 2013 para 52.

[83] M. Holoubek/G. Lienbacher (ed.), *GRC*, 2014 Wien, Art. 52 para 16, Art. 8 para 33; Ch. Ladenburger in Calliess/Ruffert, *EUV/AEUV*, München 2016, Art 52. GRC para 49; H. D. Jarass, *EU GRC*, 2016 München, Art. 8 para 14.

[84] Ch. Ladenburger in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art 52. GRCh para 49; H. D. Jarass, *EU GRC*, 2016 München, Art. 8 para 14.

[85] Ch. Möllers, *NJW 2005*, 1975, Wandel der Grundrechtsjudikatur, Eine Analyse der Rechtsprechung des Ersten Senats des BVerfG.

[86] H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 39.

[87] H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 39; Ph. Reimer, *Der Staat 2013*, 33, "… UND MACHET ZU JÜNGERN ALLE VÖLKER"?; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte.

normative assessment. There is no exact definition to which degree an alternative mean has to be as successful as the used one and which adverse effects on other subjects an alternative mean may cause. There is no universal dogmatic on necessity. Different views and intensity of examination may lead to gradually or finally different results. A worthwile case may be the judgment *Spasic* in the legal area of freedom, security and justice: "*As regards whether the execution condition is necessary to meet the objective of general interest of preventing, in the area of freedom, security and justice, the impunity of persons definitively convicted and sentenced in one EU Member State, it must be noted that, as the Commission pointed out in its written observations and at the hearing, there are numerous instruments at the EU level intended to facilitate cooperation between the Member States in criminal law matters. … Where appropriate, such direct consultations may lead,…. However, such instruments of mutual assistance do not lay down an execution condition similar to that of Article 54 CISA and, accordingly, are not capable of fully achieving the objective pursued. … While it is true that those mechanisms are capable of facilitating the execution of decisions within the European Union, their use is nevertheless subject to various conditions and depends, in the end, on a decision of the Member State in which the court that delivered a decision on a definitive sentence is located, since that Member State is not obliged under EU law to ensure the effective execution of … It follows that the execution condition laid down in Article 54 CISA does not go beyond what is necessary to prevent, in a cross-border context, the impunity of persons definitively convicted and sentenced in the European Union.*"[88]

In *Sky Österreich* the CJEU easily tested the first half of the necessity formula. The court identified a milder mean to achieve the legitimate objective. However, the court did not deem this mean as effective as the mean used by the state authorities. Hence, the second part of the formula was not given: "*However, it is apparent that less restrictive legislation would not achieve the objective pursued by Article 15(6) of Directive 2010/13 as effectively as the application of that provision*".[89]

Necessity makes the logic of proportionality evident. Each element has an own character, more investigative or more determined by normative assessment. Hence, different elements may be treated differently.[90] But if the more technical

[88] CJEU, C-129/14, *Spasic*, 2014, para 65-72.

[89] CJEU, C-283/11, *Sky Österreich*, 2013 para 55.

[90] Nevertheless regarding for instance the jurisdiction of the ECtHR: Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 147; regarding the CJEU S. Schmahl in R. Schulze/M. Zuleeg/S. Kadelbach, *Europarecht*, 2014 Baden-Baden, § 6 para 43.

and more assessing elements are merged, effects of methodology may be restricted. The boarder towards proportionality in a narrow sense should be clear in the light of the aforesaid because necessity is a rather objective examination such as a technical review. Necessity may be rather difficult to be distinguished from proportionality in a narrow sense if balancing or normative assessment is done within the frame of necessity.[91] Unavoidable normative assessments have to be made, but should be based on comprehensible explanation and transparent evidence.

d) Proportionality in a Narrow Sense

aa)Proper Balancing

For the ECtHR proportionality is besides necessity very much a question of fair balance.[92] "*It is well-established case-law that … must be construed in the light of the principle laid down in the first sentence of the Article …. Consequently, an interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights …. The search for this balance is reflected in the structure of Article …: there must be a reasonable relationship of proportionality between the means employed and the aim pursued …. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question …*". [93]

But it is astonishing that this rather important element of proportionality often is examined rather cursory by the ECtHR: "*The Court's task accordingly consists in ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other: With regard to Mr Boujlifa's*

[91] B. Rustenberg, *Der grundrechtliche Gewährleistungsgehalt*, 2009 Tübingen, 223f.; Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art 52. GRC para 69; D. Grimm, *University of Torronto Law Journal 2007*, 393ff., Proportionality in Canadian and German Constitutional Jurisprudence.

[92] Th. Marauhn/K. Mehrhof in O. Dörr/R. Grote/Th. Marauhn, *EMRK GG*, 2013 Tübingen, 405; J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, 2009 Leiden, 31ff.

[93] ECtHR, 12033/86, *Fredin/Sweden,* para 51.

ties, the Court observes that he arrived in France at the age of 5 and has lived there since 1967…, when he was serving a prison sentence in Switzerland. He received his education in France, he worked there for a short period and his parents and his eight brothers and sisters live there …. On the other hand, it seems that he did not show any desire to acquire French nationality at the time when he was entitled to do so. The Court notes that the offences committed (armed robbery and robbery), by their seriousness and the severity of the penalties they attracted, constituted a particularly serious violation of the security of persons and property and of public order. It considers that in the instant case the requirements of public order outweighed the personal considerations which prompted the application. Having regard to the foregoing, the Court considers that the making of the order for the applicant's deportation cannot be regarded as disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8."[94]

The CJEU also speaks of fair or appropriate balance.[95] Often the element of proportionality in a narrow sense is not identifiable due to mutual examination of the elements of necessity and proportionality in a narrow sense.[96] This is curious due to the impact of proportionality in a narrow sense.[97] With regard to the fundamental general principles of law and the CFR a more consistent methodology on balancing as well as the scrutiny of judicial application may be supportive.

In its case *Sky Österreich* the CJEU reviews different rights, facts and arguments in proportion: "*In that regard, it should be noted that the European Union legislature was required to strike a balance between the freedom to conduct a business, on the one hand, and the fundamental freedom of citizens of the European Union to receive information and the freedom and pluralism of the media, on the other. … By establishing requirements*

[94] ECtHR, 25404/94, *Boujlifa/France*, para 43.

[95] CJEU, C-92/09 and C-93/09, *Schecke Eifert,* 2010 para 77, 86; CJEU, C-283/11, *Sky Österreich*, 2013 para. 58, 60; CJEU, C-468/10 and C-469/10, *ASNEF*, 2011 para 43, 47f.; S. Peers/S. Prechal in S. Peers/T. Hervey/J. Kenner/A. Ward, *The EU Charter of Fundamental Rights*, 2014 Oxford, Art. 52, 52.70ff.; H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 41; M. Borowsky in J. Meyer, *Charta der Grundrechte der Europäischen Union*, 2014 Baden-Baden, 786f; Th. Kingreen in Ch. Callliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 para 65.

[96] Th. Kingreen, in Ch. Calliess/M. Ruffert, *EUV/AEUV*, München 2016, Art 52. GRC para 71; H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 36.

[97] F. Müller/R. Christensen, *Juristische Methodik*, 2012 Berlin, para 372ff.; Ch. Hillgruber in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 201 para 78ff.; Th. Schwabenbauer, *Heimliche Grundrechtseingriffe*, 2013 Tübingen, 215ff.; G. Britz, *Einzellfallgerechtigkeit versus Generalisierung*, 2008 Tübingen, 164ff.

relating to the use of extracts from the signal, the European Union legislature has ensured that the extent of the interference with the freedom to conduct a business and the possible economic benefit which broadcasters might draw from making a short news report are confined within precise limits. … Article 15(5) of Directive 2010/13 provides that short news reports on the event being exclusively retransmitted may not be produced for any kind of television programme, but only for general news programmes. Thus, the use of extracts from the signal in programmes serving entertainment purposes, which have a much greater economic impact than general news programmes, is ruled out, …. In addition, …, the Member States are required to define the modalities and conditions regarding the provision of extracts from the signal used by taking due account of exclusive broadcasting rights. In that regard, … those extracts must, inter alia, be short and that their maximum length should not exceed ninety seconds. Similarly, the Member States are required to define the time limits regarding the transmission of those extracts. Finally, broadcasters producing a brief news report must, …, identify the source of the short extracts used in their reports, which is likely to have a positive effect in terms of publicity for the holder of the exclusive broadcasting rights at issue. Moreover, … does not prevent holders of exclusive broadcasting rights from charging for the use of their rights. … it should be noted that the marketing on an exclusive basis of events of high interest to the public is, …, increasing and may significantly restrict the access of the general public to information relating to those events. … In the light, first, of the importance of safeguarding the fundamental freedom to … the European Union legislature was entitled to adopt rules such as those laid down in Article …, which limit the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom."[98]. Here the CJEU started with the main rights concerned weighing business interests vs. rights on information and pluralism of media. The court used different arguments to strengthen its opinion such as duration of broadcast, economical benefits, rights to charge, place of broadcast, duty to reveal the source, public interest, limits, modalities and conditions specified by the legislators of member states. Finally, the CJEU deems it as proportionate that the EU legislator balanced and gave priorities to right of access to information over contractual freedom.

[98] CJEU, C-283/11, *Sky Österreich*, 2013 para 59, 62-66.

bb) Methods on Proper Balancing

The broad scope of balancing by nature causes insecurities or positively expressed opportunities.[99] It is not easy or possible to use a standardized set of methods for proper balancing. The case *Sky Österreich* is a more positive example from the case law of the CJEU. Often the CJEU is criticized for its unprecise, inconsistent proceeding, although, much of this criticism comes from the past.[100] But this criticism has to be taken seriously, especially if simple methods such as methodology on finding and explaining judicial results is possible.[101] An examination pragmatically or *en bloc* makes it difficult to identify or allocate every fact, argument and proof to a certain legal requirement or element of examination.[102] From the legal point of view the methodology of the court may be qualified as cursory judicial examination and being to inconsistent, incoherent or at least rather liberally applied.[103] Thereby, the court evokes confusion on legal discipline, confidence or justice.

Balancing is part of the proportionality test, but not everything is balancing. A balancing of everything, inconsistently, incoherently or out of legal methodology

[99] M. Klatt/J. Schmidt in M. Klatt, *Prinzipientheorie und Theorie der Abwägung*, 2013 Tübingen, 1ff., Abwägung unter Unsicherheit; M. Breckwoldt/M. Kleiber in M. Klatt, *Prinzipientheorie und Theorie der Abwägung*, 2013 Tübingen, 1ff., Grundrechtskombinationen; H.-J. Koch, *Methoden zum Recht*, 2010 Baden-Baden, 55ff., Die Begründung von Grundrechtsinterpretationen (refer also EuGRZ 1986, 345ff.).

[100] U. Kischel, *EuR 2000*, 395ff., Die Kontrolle der Verhältnismäßigkeit durch den EuGH; W. Pauly, *EuR 1998*, 242ff., 259f., Strukturfragen des unionsrechtlichen Grundrechtsschutzes; K. Ritgen, *ZRP 2000*, 372ff., Grundrechtschutz in der Europäischen Union; E. Pache, *EuR 2001*, 487f., Die Europäische Grundrechtecharta – ein Rückschritt für den Grundrechtsschutz in Europa?

[101] U. Haltern, *EU II*, 2017 Tübingen, 39; both critisizing and referring to positive approaches of the CJEU F. Müller/R. Christensen, *Juristische Methodik*, 2012 Berlin, para 372ff.

[102] Th. von Danwitz in P. J. Tettinger/K. Stern, *Kölner Kommentar zur Europäischen Grundrechtecharta*, 2016 München, Art. 52 para 17ff.; E. Pache, *EuR 2001*, 487f., Die Europäische Grundrechtecharta – ein Rückschritt für den Grundrechtsschutz in Europa?; S. Magiera, *DÖV 2000*, 1022, Die Grundrechtecharta der Europäischen Union; R. de Lange/S. Prechal/R. J. G. M. Widdershoven, *Europeanisation of Public Law*, 2007 Amsterdam, 148; D. Ehlers (ed.) *Europäische Grundrechte und Grundfreiheiten*, 2014 Berlin, 572; F. Müller/R. Christensen, *Juristische Methodik*, 2012 Berlin, para 372ff.

[103] Th. Oppermann/C. D. Classen/M. Nettesheim, *Europarecht*, 2016 München, 275 para 25; D. Ehlers (ed.) *Europäische Grundrechte und Grundfreiheiten*, 2014 Berlin, 572; U. Haltern, *EU II*, 2017 Tübingen, 3ff., 27ff.

evokes criticism on proportionality.[104] Proportionality may also be sceptically seen as weighing of subjective views causing lacks of objectivity. But the question is not if courts or other people decide objectively – people are for sure subjects, the question is how is proportionality embedded in primary law and legal logic. For balancing rights it is crucial to understand the underlying legal dogmatic which is not provided by positive law, but indicated in art. 52 I CFR.[105] Rationality is an approach to be more in line with clarity and logic of general principles of law.[106] Proportionality may be interpreted as an expression of the rule of law, of human dignity or the combination of other fundamental rights.[107] In any case, the dogmatic of proportionality may only serve as scales of proportionality if it is formed on legal grounds, on the general principles of law and legal methodology.[108] The CFR as positive law provides a constitutional context for the application of a legal dogmatic on primary law.[109] At least in the spirit of coherence, the common sense in the member states on legal methodology should be assured.[110]

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[104] M. Klatt/M. Meister, *Der Staat 2015*, 169, Verhältnismäßigkeit als universelles Verfassungsprinzip; D. Grimm, *University of Torronto Law Journal 2007*, 393ff., Proportionality in Canadian and German Constitutional Jurisprudence.

[105] Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 GRC para 1; N. Petersen, *Verhältnismäßigkeit als Rationalitätskontrolle*, 2015 Tübingen, 111ff.; M. Wiebracke, *ZJS 2/2013*, 152, Der Verhältnismäßigkeitsgrundsatz; J. Meyer-Ladewig/M. Nettesheim in J. Meyer-Ladewig/M. Nettesheim/S. von Raumer, *EMRK*, 2017 Baden-Baden, Art. 8 para 113.

[106] M. Breckwoldt/M. Kleiber in M. Klatt, *Prinzipientheorie und Theorie der Abwägung*, 2013 Tübingen, 1ff., Grundrechtskombinationen.

[107] A. von Arnauld, *JZ 2000*, 276ff., Die normtheoretische Begründung des Verhältnismäßigkeitsgrundsatzes; P. Häberle/M. Kotzur, *Europäische Verfassungslehre*, 2016 Baden-Baden, 674ff.

[108] Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, 2016 München, Art. 52 para 65.

[109] P. Häberle, *IEV (Institut für Europäische Verfassungswissenschaften) Online Nr. 3/2009*, "Verfassungskultur" als Kategorie und Forschungsfeld der Verfassungswissenschaften, 3.

[110] M. Kotzur in R. Geiger/D.-E. Kahn/M. Kotzur, *EUV/AEUV*, 2017 München, Einführung GR-Charta Anh 1 Art. 1 para 9; K. Stern/A. Hamacher in K. Stern/M. Sachs, *GRC*, 2016 München, Einführung und Grundlagen para 36.

cc) Proportions of Means Towards Objectives

The proportionality test assures the viability of the principle of rule of law.[111] *Aristotle* already indicated that every legal issue is a question of proportions.[112] Proportionality dogmatically gets its strength from the distinction of its single elements verifying the used means towards legitimate objectives. The legitimate objective as reference point of examination has to be clear and precise. Every element of proportionality has to be examined seperately towards this objective.[113] It is not a free balancing of interests. Every single element has its own value. This value is reduced if elements are unnecessarily undistinguished. Sometimes it may be favourable to increase the power of one element by using the support of other elements, principles, rights or arguments. But this endangers principles such as legal certainity, confidence or justice. If proportionality is a simple, free balancing than proportionality would not be needed as independent test. It can be prooved that elements such as appropriateness or necessity may be examined on empirical or scientific basis state of the art without overloading these elements with normative assessments.

The legal technique of proportionality is based on its logical sequences of elements within an overall systematic and coherence.[114] Rights firstly may be examined generally and secondly each individual case treated individually.[115] The abstract testing of rights should be independent and followed by a test in each individual case. Rights may get another weight or intensity in a specific case. At the end balancing it is only a consequence of legal reasoning.[116] Often

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111 V. Trestnjak/E. Beysen, *EuR 2012*, 265ff., Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung.

112 H.-J. Cremer in O. Dörr/R. Grote/T. Marauhn, *EMRK GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, 2013 Tübingen, 217 para 66ff.

113 Bundesverfassungsgericht, 1 BvR 256/08 of 2 March 2010, para 320.

114 Th. Kingreen in Ch. Calliess/M. Ruffert, *EUV/AEUV*, München 2016, Art 52. GRCh, para 68.

115 A. Wehlau/N. Lutzhöft, *EuZW 2012*, 48f., Grundrechte-Charta und Grundrechts-Checkliste – eine dogmatische Selbstverpflichtung der EU-Organe; for instance concretely on the legitimate objecive within the frame of proportionality S. Kluckert, *JuS 2015*, 116ff., Die Gewichtung von öffentlichen Interessen im Rahmen der Verhältnismäßigkeitsprüfung; Ch. Bumke/A. Voßkuhle, *Casebook Verfassungsrecht*, 2013 Tübingen, para 148.

116 Ph. Reimer, *Der Staat 2013*, 33, "… UND MACHET ZU JÜNGERN ALLE VÖLKER"?; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte.

balancing is used to criticize proportionality while proportionality is often used as knockout argument to blur clarity and preciseness.[117] An overall logic and a more distinguished clear methodology may help to reveal the power of each element of proportionality, although balancing may be finally needed. The internal structure with its logic has to be distinguished from the external factors with their impact.[118]

dd) Proportionaly Test Embedded In Primary Law, Its General Principles And Recognised Legal Methodology

Balancing by people hardly can be assessed as purely objective. People, including judges, are by nature subjective. But this does not mean to support personal opinions, decisionism or conceptual jurisprudence.[119] For example the principle of proportionality is framed and strengthened by the principle of legal certainty.[120] In its recent cases on data protection the CJEU requires clearly, precisely defined regulations to assure a strict necessity in the spirit of proportionality. Thereby the court links the principle of proportionality with the principles of legal certainty.[121] Balancing is determined by positive law and general principles of law. There is no antagonism between law and methodology. Hence, rationality or logic is needed and neutrality is a virtue.[122] Facts and arguments have to be foremostly heuristically evaluated and then applied

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[117] M. Klatt/Moritz M., *JuS 2014*, 195f., Der Grundsatz der Verhältnismäßigkeit; F. Becker, *NVwZ 2015*, 1336f., Grundrechtliche Grenzen staatlicher Überwachung zur Gefahrenabwehr; Ph. Reimer, *Der Staat 2013*, 37, "… UND MACHET ZU JÜNGERN ALLE VÖLKER"?; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte.

[118] M. Klatt/M. Meister, *JuS 2014*, 198, Der Grundsatz der Verhältnismäßigkeit.

[119] Ph. Reimer, *Der Staat 2013*, 34ff., "… UND MACHET ZU JÜNGERN ALLE VÖLKER"?; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte.

[120] Refer comments on legal certainty on the grounds of art. 52 I CFR H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 27; F. Becker, *NVwZ 2015*, 1336f., Grundrechtliche Grenzen staatlicher Überwachung zur Gefahrenabwehr.

[121] F. Becker, *NVwZ 2015*, 1336f., Grundrechtliche Grenzen staatlicher Überwachung zur Gefahrenabwehr.

[122] U. J. Schröder, *Ad Legendum 4/2015*, 327, Der Verhältnismäßigkeitsgrundsatz; M. Wiebracke, *ZJS 2/2013*, 149f., Der Verhältnismäßigkeitsgrundsatz; N. Petersen, *Verhältnismäßigkeit als Rationalitätskontrolle*, 2015 Tübingen.

through law and principles.[123] The external structure is not congruent with the internal structure of proportionality or a substitute.[124]

ee) Judicial Review Perspective

Depending on the understanding of fundamental rights the review perspective may differ. The ECtHR examines proportionality more focused on the perspective of the subject under the concrete circumstances.[125] This more subjective approach is rather reminiscent of the individual approach to fundamental rights of the German Constitutional Court. The German court is strongly driven by the idea of subjective rights with human dignity as overall value.[126] The CJEU examines fundamental rights more abstract from an objective point of view.[127] To achieve an overall balance the Court focuses on general interests and effects. This may be seen as a more objective than subjective approach, but proportionality in the spirit of art. 52 I CFR has to be interpreted from the individual point of view of fundamental rights, not only as a general prinicple limiting legislative acts.[128] This point of view dogmatically makes a difference. Finally, the degree of subjectivity and objectivity depends on the characteristics and functions of rights concerned as well as the facts and circumstances of each single case. A crucial role for finding the right balance takes the legal theory and dogmatic with its methods of interpretation. By

[123] Ph. Reimer, *Der Staat 2013*, 48, "… UND MACHET ZU JÜNGERN ALLE VÖLKER"?; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte.

[124] M. Klatt/M. Meister, *Der Staat 2015*, 172, 175, 182, Verhältnismäßigkeit als universelles Verfassungsprinzip.

[125] ECtHR, 5029/71, *Klass/Germany*, para 59.

[126] Th. von Danwitz, *EWS 2003*, 394, Der Grundsatz der Verhältnismäßigkeit im Gemeinschaftsrecht.

[127] Th. von Danwitz, *EWS 2003*, 396, 401, Der Grundsatz der Verhältnismäßigkeit im Gemeinschaftsrecht; D. Ehlers (ed.) *Europäische Grundrechte und Grundfreiheiten*, 2014 Berlin, 572.

[128] D. Ehlers (ed.) *Europäische Grundrechte und Grundfreiheiten*, 2014 Berlin, 572; M. Borowsky in J. Meyer, *Charta der Grundrechte der Europäischen Union*, 2014 Baden-Baden, 786; J. Meyer-Ladewig/M. Nettesheim in J. Meyer-Ladewig/M. Nettesheim/S. von Raumer, *EMRK*, 2017 Baden-Baden, Art. 8 para 113.

general weighing it is difficult to achieve legal expectations, certainity or confidence in line with the rule of law.[129]

ff) Preservation and Promotion of the Optimum Effectiveness of Each Right

Finally balancing in the spirit of practical concordance may lead to more proportionate results.[130] Balancing in a simple understanding may mean that one right prevails another right. This can lead to a total overweight in a relationship of 51% to 49%. Furthermore this may be interpreted as if the inferior right is not relevant any more. Both interpretations are hardly conform to the principles of the rule of law and democracy with its idea of protection of minorities and respect towards opposition. In case of colliding rights of equal, highest ranking from a constitutional point of view concerned rights must preserve their value. Concerned rights still have to remain their optimal effectivity. This means that the prevailing right has to accept limits of preponderance. As far as this spirit is respected balancing assures respectful correlations among all rights, whether superior or inferior. Thereby the argument of inconsumerability of principles or rights is relativized.

gg) Scrutiny of Judicial Application

The scrutiny of judicial applications depends on the characteristics and functions of fundamental rights as well as on the degree of limitation with its legitimate objectives.[131] These correlations are the proportions captured by proportionality and proportionality is embedded in the frame of the other general principles of law. Separation of powers and democratic legitimation demand respect towards the other state powers. The CJEU in particular towards the legislator admits a

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[129] A. Dashwood/M. Dougan/B. Rodger/E. Spaventa/D. Wyatt, *European Union Law*, 2011 Oxford, 328ff.

[130] K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 1995 Heidelberg, para 72; M. Klatt/M. Meister, *JuS 2014*, 194, Der Grundsatz der Verhältnismäßigkeit; W. Schroeder, *Das Gemeinschaftsrechtsystem*, 2002 Tübingen, 281ff.; Ph. Reimer, *Der Staat 2013*, 35, "… UND MACHET ZU JÜNGERN ALLE VÖLKER"?; Von "universellen Verfassungsprinzipien" und der Weltmacht der Prinzipientheorie der Grundrechte; refer on the understanding of practical concordance and its links to fundamental rights M. Klatt, *Die praktische Konkordanz von Kompetenzen*, 2014 Tübingen.

[131] H. D. Jarass, *EU GRC*, 2016 München, Art. 52 para 45ff.; Ch. Hillgruber in J. Isensee/P. Kirchhof, *Hanbuch des Staatsrechts IX*, 2011 München, § 201 para 66ff.

right of prerogation or discretion. The legislator has to forsee rather different circumstances to adopt regulations. This kind of flexibility is needed more than in the area of executive powers. Executive authorities often apply laws in a concrete situation with practical knowledge, higher experience through their profession or more sufficient support. Hence, the court stated: "*It should be pointed out, with regard to judicial review of the validity of the provisions of a regulation, that the Court, when it assesses the proportionality of the measures implemented by those provisions, has accepted that the legislature of the European Union, in the exercise of the powers conferred on it, must be allowed a broad discretion in areas which involve, on its part, political, economic and social choices and in which it is called upon to undertake complex assessments …*".[132] *Furthermore, the court openly emphasize the political role of the legislator: "In the area of agriculture, the European Union legislature enjoys, inter alia, such a broad discretion, corresponding to the political responsibilities given to it by Articles 40 TFEU to 43 TFEU. Consequently, review by the Court is limited to verifying whether that legislature has manifestly exceeded the limits of its discretion …*".[133]

But it is of great support that the court in the subsequent paragraphs clarified that discretion does not create legal vacuums: "*Indeed, even though it has such a discretion, the European Union legislature must base its choice on objective criteria and, in assessing the burdens associated with various possible measures, it must examine whether the objectives pursued by the measure chosen are such as to justify even substantial negative consequences for certain economic operators …*".[134] This understanding is driven by by the idea of logic and duty to realization of ideas.[135] In comparison the ECtHR in the area of fundamental rights uses the term margin of appreciation.[136] Some people think that such a margin modificates proportionality, while others think that the margin effects the scrutiny of judicial application.[137] According to the case law of the ECtHR the impression may appear that a judicial review of a margin is excluded. But as shown up by the

[132] CJEU, C-101/12, *Schaible*, 2013 para 47.

[133] *Ibid*., para 48.

[134] *Ibid*., para 49.

[135] Ch. Bumke/A. Voßkuhle, *Casebook Verfassungsrecht*, 2013 Tübingen, para 155ff.

[136] J. Meyer-Ladewig/M. Nettesheim in J. Meyer-Ladewig/M. Nettesheim/S. von Raumer, *EMRK*, 2017 Baden-Baden, Einl. para 27.

[137] Ch. Grabenwarter/K. Pabel, *EMRK*, 2016 München, 149ff.; Th. Marauhn/J. Thorn in O. Dörr/R. Grote/Th. Marauhn, *EMRK/GG*, 2013 Tübingen, 947ff.

CJEU facts and objective criteria may be always reviewed irrespective of legislative freedoms or political assessments.

Regarding the scales of judicial review the CJEU admits that a review cannot be used retrospectively as pointer. Assessment of decisions of state authorities have to be done from their angle in the authentic situation at the respective time: "*However, it should be pointed out that the validity of a European Union measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted and cannot depend on retrospective assessments of its efficacy. Where the European Union legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question …*".[138]

C. Resumee

The CFR and its general clause art. 52 I may be deemed as state of the art among fundamental right codifications. It is a clear confession towards the protection of fundamental rights and general principles of law such as proportionality. The legal and methodological needs of application show that it is a challange among different laws and jurisdictions. As indicated art. 52 I, III, IV form multidimensional challanges, but this is also true for art. 51 or 53 CFR or single fundamental rights such as data protection (art. 8 CFR) which determine all our lifes. The practical significance both of the CFR and proportionality may have been partially underestimated, but the huge impact on other laws is given. In the spirit of coherence and the needs caused through the collision of laws jurisdictions are pressured to cooperate and work on legal methodology. The variance of European law cannot be resolved by silo education or views. Constitutionalization and methodology are only expressions of tendencies taking place. It is a huge invitation in times of globalization to use the power of single elements of proportionality and its logic. The opposite, a reactive patchwork, arbitrary or purely pragmatic judgements may have adverse effects on legal discipline, confidence or justice. The origin for examination of interference to fundamental rights now clearly is art. 52 I CFR. Nevertheless, art. 52 I CFR does not determine a certain legal proceeding. Fair or proper balancing is not strongly enough framed by and structured through proportionality. This demands a

[138] CJEU, C-101/12, *Schaible*, 2013 para 50.

stronger application of the logic of proportionality. Even, if the scales of proportionality may be adapted to different legal systems or cultures, a logic, consistency and coherence cannot be shifted away.

Overall the CJEU has been a promoter of the idea of proportionality to enhance the protection of fundamental rights. The CJEU seems to take the functional role of a European fundamental rights court. Since the CFR has entered into force the CJEU has enhanced the structure of proportionality and intensified the scrutiny of judicial application. The recent judgements on data protection since Lisbon prove the potentials of the CFR as well as the duty to assure a coherence among different laws and jurisdictions. Nevertheless, the newly achieved scrutiny evokes fundamental questions in the correlation among different general principles of law and state powers. The strengthening of fundamental rights and the rule of law naturally leads to a dialectic towards the democratically legitimated legilsator and the executive powers.

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DA LI JE POTREBNO MENJATI USTAV REPUBLIKE SRBIJE USLED PRISTUPANJA EVROPSKOJ UNIJI?**

Apstrakt

Republika Srbija se nalazi u procesu pregovora o pristupanju Evropskoj uniji. Imajući u vidu da države članice moraju da obezbede potpunu i pravilnu primenu pravnih tekovina Evropske unije na svojoj teritoriji od momenta pristupanja, javlja se potreba da i Ustav Republike Srbije bude izmenjen kako bi ova obaveza bila ispunjena.

Ustav Republike Srbije u članu 194 predviđa da je Ustav najviši pravni akt Republike Srbije. Potvrđeni međunarodni ugovori i opšteprihvaćena pravila međunarodnog prava deo su pravnog poretka Republike Srbije. Potvrđeni međunarodni ugovori ne smeju biti u suprotnosti sa Ustavom.

Ugovor o pristupanju Evropskoj uniji kao i obaveze koje proističu iz članstva moraju biti u skladu sa Ustavom Srbije kako bi Ugovor o pristupanju mogao biti ratifikovan i kako bi mogao stupiti na snagu. Sve ovo nije moguće ukoliko se ne

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** Rad je nastao u okviru istraživačkih aktivnosti Evropskog pokreta, zbog čega analiza pored zaključaka sadrži i preporuke organizacijama civilnog društva za predstojeću reviziju Ustava Srbije.

promeni Ustav Republike Srbije, budući da je jasno da određene obaveze koje će proizaći iz pristupanja EU nisu u skladu sa sadašnjim Ustavom. Budući da su obaveze poznate, jasno je da će Ustav morati da pretrpi izmene.

Postoje dva osnovna tipa promena koje su neophodne:

Prvi su promene koje su morale da učine skoro sve države članice EU prilikom ili nakon pristupanja. Među njih spadaju uvođenje takozvane "integrativne klauzule" koja obezbeđuje da odluke organa EU kao i pravo EU koje oni stvaraju, može da važi neposredno na teritoriji Republike Srbije i da ima nadređenu snagu u odnosu na domaće zakonodavstvo, kao i obaveze koje proističu iz političkog ustrojstava EU, tj. obaveze proizašle iz korpusa prava tzv. "evropskog građanstva" prvenstveno misleći na aktivno i pasivno biračko pravo građana EU, nedržavljana Republike Srbije u Srbiji.

Drugi tip promena su promene koje su potrebne zbog osobenosti postojećeg ustavnog poretka Republike Srbije. Tu se misli na promene koje su planirane u domenu obezbeđivanja nezavisnosti pravosuđa, definisanih akcionim planom za pregovaračko poglavlje 23 Pravosuđe i osnovna prava. Tu bi takođe spadale i moguće promene Ustava Srbije koje bi nastale kako bi se ojačalo ostvarivanje prava nacionalnih manjina na teritoriji Republike Srbije ili koje bi nastale kao rezultat dijaloga na najvišem nivou o normalizaciji odnosa Beograda i Prištine, a za koje nije nužno da će i nastati.

Analiza ukazuje da će Ustav morati da se menja bar dva puta i da je neophodno održavanje referenduma o pristupanju Srbije EU što je Vlada već istakla na otvranju pristupnih pregovora 2014. godine. Analiza daje preporuke civilnom društvu na koji način da se uključi u promene Ustava, istovremeno ukazujući da će organizovana podrška civilnog društva biti od velike važnosti za mobilizaciju javnosti za izlazak na referendum o tako važnoj i dalekosežnoj odluci, kao što je pristupanje Republike Srbije Evropskoj uniji.

Ključne reči: Ustav, promena, pristupanje, Evropska unija, pregovori.

1. Uvod

Republika Srbija se nalazi u procesu pregovora o pristupanju Evropskoj uniji (EU). Da bi postala država članica EU, Republika Srbija mora da ispuni kriterijume koji se očekuju od svake države članice, tzv. Kriterijume iz Kopenhagena. Treći kriterijum iz Kopenhagena predviđa obavezu da država bude sposobna da ispunjava obaveze iz članstva, tj. da njeno zakonodavstvo bude usklađeno sa pravnim tekovinama EU (*EU acquis*).

Usklađivanje sa pravnim tekovinama EU, pored usklađivanja sa odredbama primarnog i sekundarnog zakonodavstva EU, podrazumeva preuzimanje principa na kojima se zasniva EU, uobličenih u presudama Suda pravde Evropske unije.

Tokom decenija rada, jurisprudencija Suda pravde Evropske unije je definisala dosta principa od kojih je za predmet ove analize najbitniji princip nadređenosti (supremacije) prava EU nad pravima država članica. Sam princip nadređenosti prava EU nad propisima država članica nije toliko sporan sa stanovišta država članica, jer većina država na svetu priznaje da međunarodni ugovori imaju jaču snagu od domaćeg zakonodavstva. Ustavne konsekvence ovog principa su nastale onog trenutka kad je Sud pravde EU u svojoj presudi *Internationale Handelsgesellschaft* iz 1970. godine[1] potvrdio da države članice ne mogu derogirati obaveze nastale iz članstva u EU kasnijim donošenjem pravnih normi, čak ni ako su one ustavnog karaktera. Ovim je Sud pravde utvrdio da odredbe ustava države članice moraju biti u skladu sa obavezama koje proističu iz članstva EU.

Usled ovakvog stava Suda pravde EU, a imajući u vidu da države članice moraju da obezbede potpunu i pravilnu primenu pravnih tekovina EU od momenta pristupanja, jasno je da država koja pristupa EU mora obezbediti da odredbe njenog ustava ne budu u suprotnosti sa obavezama koje stupanjem u članstvo EU preuzima.

Republika Srbija po pitanju promene Ustava u toku procesa pristupanja EU nije usamljen primer. Analizirajući iskustva država koje su pristupile EU u periodu 2004-2013, mogu se utvrditi dve vrste promena ustava koje se vrše u državama u procesu pristupanja.

Prva vrsta promena je skoro istovetna u svim državama koje su pristupale, budući da ona proističe iz samog ustrojstva EU kao organizacije, a mora se izvršiti da bi država mogla da funkcioniše u okviru EU, poput pitanja poveravanja određenih ovlašćenja za donošenje odluka Evropskoj uniji i pitanja proistekla iz korpusa prava tzv. "evropskog građanstva".

Druga vrsta promena je individualizovana za svaku državu ponaosob, uzrokovana određenom specifičnošću njenog ustavnog uređenja koja nije kompatibilna sa obavezama koje proističu iz članstva u EU. U oba slučaja, država

[1] Slučaj C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, (1970), ECR 1125.

kandidat mora uskladiti svoj ustav sa obavezama iz članstva, kako bi mogla da završi pregovore o pristupanju.

Ugovor o pristupanju Evropskoj uniji, kao i obaveze koje proističu iz članstva moraju biti u skladu sa Ustavom Srbije, kako bi Ugovor o pristupanju mogao biti potvrđen i kako bi mogao stupiti na snagu. Ustav Republike Srbije u članu 194 predviđa da je Ustav najviši pravni akt Republike Srbije. Potvrđeni međunarodni ugovori i opšteprihvaćena pravila međunarodnog prava deo su pravnog poretka Republike Srbije. Potvrđeni međunarodni ugovori ne smeju biti u suprotnosti sa Ustavom.

Međutim, Republika Srbija neće biti u mogućnosti da završi pristupne pregovore i potpiše Ugovor o pristupanju, ukoliko pre toga ne uskladi Ustav sa obavezama iz članstva, ili se, ako to po prirodi izmene nije moguće pre potpisivanja Ugovora, ne obaveže da će to uraditi do momenta stupanja u članstvo. Ove kasnije izmene se vrše u periodu između završetka pregovora, odnosno potpisivanja Ugovora o pristupanju EU i samog datuma stupanja u članstvo. Taj period inače ostavlja dovoljno vremena za sve završne aktivnosti dogovorene u toku pregovora, a pre svega za potvrđivanje Ugovora o pristupanju u Srbiji i svim članicama EU, budući da od zatvaranja poslednjeg poglavlja, tj. završetka pregovora, do datuma pristupanja EU obično prođe oko dve godine.

U ovom trenutku je jasno da određene obaveze koje će proizaći iz pristupanja EU nisu u skladu sa Ustavom, a budući da su obaveze iz članstva u EU poznate, jasno je da će Ustav morati da pretrpi izmene u jednom trenutku.

Cilj analize je ukazivanje na neophodne promene Ustava, sa jedne strane, i na potencijalne promene Ustava, sa druge strane, u procesu pristupanja EU.

Predmet analize su promene Ustava uzrokovane procesom pristupanja EU, dok je generalno pitanje potrebnih izmena Ustava obrađeno u ranijim analizama Evropskog pokreta u Srbiji.[2] Imajući u vidu da su pregovori u relativno ranoj fazi, moguće je da će se tokom pregovora pojaviti još neko pitanje koje će zahtevati intervenciju na Ustavu, pri čemu je analiza zasnovana na saznanjima dostupnim u trenutku izrade.

Predstojeće izmene Ustava usled pristupanja EU podeljene su u četiri grupe:

[2] Generalno pitanje potrebnih izmena Ustava obrađeno je u ranijim analizama Evropskog pokreta u Srbiji, dostupno na sajtu Evropskog pokreta u Srbiji: *www.emins.org*.

Redovne, uobičajene promene ustava neophodne u procesu pristupanja EU:

a) Izmene proistekle iz potrebe da se reguliše pitanje poveravanja vršenja dela suverenih prava Evropskoj uniji, kao i da se reguliše odnos EU i domaćeg prava (tzv. integrativna klauzula),
b) Izmene potrebne kako bi se u Srbiji obezbedila potpuna primena prava proisteklih iz domena "evropskog građanstva",

promene uslovljene specifičnostima Republike Srbije, a koje se već pominju u dokumentima nastalim u pristupnim pregovorima:

a) Izmene potrebne kako bi se obezbedila potpuna nezavisnost pravosuđa, a za koju je u dosadašnjem toku pristupnih pregovora ocenjeno da treba da bude dodatno ojačana,
b) Moguće izmene kako bi se ojačalo ostvarivanje prava nacionalnih manjina na teritoriji Republike Srbije.

Posebnu kategoriju pitanja o kojima treba voditi računa predstavljaju moguće izmene Ustava nastale kao posledica dijaloga na visokom nivou o normalizaciji odnosa Beograda i Prištine, budući da, u skladu sa Pregovaračkim okvirom EU za vođenje pregovora sa Republikom Srbijom, dijalog treba da dovede do "*sveobuhvatne normalizacije odnosa između Srbije i Kosova, u formi pravno obavezujućeg sporazuma do kraja pristupnih pregovora Republike Srbije*".[3] U ovom trenutku se ne može sa sigurnošću reći da li će ove izmene Ustava biti neophodne.

Analiza, takođe, razmatra i dinamiku promene Ustava i pitanje referenduma o pristupanju Srbije EU.

2. Integrativna klauzula

Pristupanjem EU, Republika Srbija prihvata da organi EU donose pravno obavezujuće akte zakonske snage koji će se neposredno primenjivati na njenoj teritoriji. Republika Srbija će u donošenju ovih akata učestvovati kao i svaka druga država članica EU. Takođe, pravni poredak EU zahteva da pravne tekovine EU imaju jaču pravnu snagu u odnosu na domaće pravne akte.

[3] Tačka 23 Pregovaračkog okvira EU. Pregovarački okvir je dostupan na sajtu Kancelarije za evropske integracije: *www.seio.gov.rs*.

Član 98 Ustava nedvosmisleno utvrđuje da je Narodna skupština najviše predstavničko telo i nosilac ustavotvorne i zakonodavne vlasti u Republici Srbiji. Definišući nadležnosti Narodne skupštine Ustav propisuje u članu 99. stav 7, da Narodna skupština "*...donosi zakone i druge opšte akte iz nadležnosti Republike Srbije*". Ovakve odredbe vrlo jasno i bez mogućnosti za bilo kakve dileme ili tumačenja određuju ko može donositi zakone u Republici Srbiji. To može da radi samo Narodna skupština. Samim tim, ova dva člana ne ostavljaju prostora da bilo ko drugi može da donese zakon/akt zakonske snage koji će se primenjivati na teritoriji Republike Srbije i biti obavezujući za njene građane.

Pristupanjem EU, država članica prihvata da na njenoj teritoriji važe i primenjuju se akti, koji imaju snagu zakona (prim. aut. *uredbe*, eng. *regulations)*, a koje nije doneo njen parlament i koji nisu potvrđeni aktom parlamenta, niti su u domaći pravni sistem uvedeni bilo kojim drugim pravnim aktom.[4] Ovakva situacija upravo čini EU organizacijom koja se razlikuje od svih drugih međunarodnih organizacija koje postoje, tj. čini je naddržavnom tvorevinom. Potpisivanjem i ratifikacijom Ugovora o pristupanju EU, Srbija će prihvatiti da, u skladu sa procedurama propisanim u Ugovoru o Evropskoj uniji (UEU) i Ugovoru o funkcionisanju Evropske unije (UFEU), i u okviru nadležnosti koje su poverene EU, propise koji imaju snagu zakona na teritoriji Republike Srbije, donose i organi EU.[5] Naravno, te propise bi donosili organi EU u kojima bi učestvovali i predstavnici Republike Srbije.

Stupanjem u članstvo EU, država prihvata principe nadređenosti prava EU nad domaćim pravom, budući da je to princip koji je utvrdio Sud pravde EU. Imajući u vidu postojanje jasne hijerarhije normi definisane Ustavom[6] i princip nadređenosti prava EU, neophodno je da se Ustavom jasno utvrdi odnos dva pravna poretka, koji treba jedinstveno da funkcionišu u Republici Srbiji nakon pristupanja. Utvrđivanjem njihovog odnosa samim Ustavom bile bi izbegnute mnoge dileme u samoj primeni prava EU u Republici Srbiji, pogotovo u prvim godinama pristupanja, dok se domaći sistem ne privikne na novo okruženje.

Dakle, samom integrativnom klauzulom se reguliše pitanje vršenja suverenih prava u koje spada donošenje akata zakonske snage, koji će važiti u Srbiji nakon

[4] U smislu člana 99.4. Ustava Republike Srbije: "Narodna skupština: ... 4. potvrđuje međunarodne ugovore kad je zakonom predviđena obaveza njihovog potvrđivanja".

[5] Član 2.2 Ugovora o funkcionisanju Evropske unije.

[6] Član 194 Ustava Republike Srbije.

pristupanja, a koje će donositi institucije EU u čijem radu će i Srbija učestvovati. Zajednički imenitelj za većinu ustavnih rešenja ovog pitanja u članicama EU jeste da se govori o prenosu/poveravanju *vršenja dela suverenih prava*. Dakle, nije reč o prenosu samih suverenih prava kao takvih, već *dela njihovog vršenja.* [7] Ovim se obezbeđuje suverenitet države, budući da ona i dalje ostaje nosilac suvereniteta, čiji je deo prava vršenja poverila EU. Referendum u Velikoj Britaniji o izlasku iz EU, održan u junu 2016. godine dodatno potvrđuje ovaj stav, jer će izlaskom iz EU, Britanija povratiti sva prava koja je poverila EU.[8] Takođe, integrativnom klauzulom treba utvrditi i činjenicu da pravne tekovine EU imaju nadređeni status u odnosu da domaći pravni poredak, kako bi se izbegla različita shvatanja ovog odnosa u kasnijem periodu.

Integrativna klauzula treba da bude uvrštena iza člana 16 Ustava (Međunarodni odnosi), kao novi član 16a, budući da će regulisati pitanje ulaska Republike Srbije u članstvo EU i pitanje suvereniteta Republike Srbije u okviru EU.

Integrativna klauzula bi bila sledeće sadržine:

"*U skladu sa Ugovorom o pristupanju koji je potvrdila Narodna skupština dvotrećinskom većinom svojih članova, Republika Srbija može poveriti* (alternativno*: preneti*) *vršenje dela svojih suverenih prava međunarodnoj organizaciji stvorenoj od država koje su slobodno izabrale da zajednički vrše neka od svojih suverenih prava*, *a koja je zasnovana na poštovanju ljudskih prava i osnovnih sloboda, demokratije i principa vladavine prava* (opcioni dodatak*: …i može ući u odbrambene saveze sa državama koje se zasnivaju na tim vrednostima*).

Pre potvrđivanja Ugovora o pristupaju, Narodna skupština će raspisati referendum. Predlog će biti usvojen ako se za njega izjasni većina od izašlih građana Republike Srbije. Rezultat će biti obavezujući za Narodnu skupštinu.

Pravni akti usvojeni u okviru međunarodnih organizacija kojima je Republika Srbija poverila (alternativno*: prenela*) *vršenje dela svojih suverenih prava će biti primenjivani u Republici Srbiji u skladu sa pravnim uređenjem tih organizacija.* (alternativno*: će imati veću pravnu snagu u odnosu na domaće opšte pravne akte*).

[7] Ustav Slovenije u članu 3a govori o **prenosu**, a Ustav Hrvatske u članu 143.2 o **poveravanju** vršenje dela svojih suverenih prava. Član 2 Ugovora o funkcionisanju Evropske unije navodi da se Ugovorom o Evropskoj uniji **prenose** (eng. *confer*) nadležnosti određenog tipa.

[8] Član 50 Ugovora o Evropskoj uniji definiše proceduru izlaska države iz članstva u EU.

U procesu usvajanja pravnih akata i odluka u međunarodnim organizacijama kojima je Republika Srbija poverila (alternativno*: prenela*) *vršenje dela svojih suverenih prava, Vlada će bez odlaganja informisati Narodnu skupštinu o predlozima tih akata i odluka, kao i o svojim aktivnostima.*

Odnos Narodne skupštine i Vlade po pitanjima iz prethodnog stava će biti regulisan zakonom koji će odobriti dvotrećinska većina članova Narodne skupštine." [9]

Sama integrativna klauzula može biti iskorišćena i za definisanje dodatnih pitanja od značaja za pristupanje odnosno buduće članstvo, poput:

a) Većine (proste ili kvalifikovane) potrebne u Narodnoj skupštini za ratifikaciju Ugovora o pristupanju EU,[10]
b) Održavanja referenduma o ulasku u EU,
c) Zatim odnosa Vlade i Narodne skupštine nakon pristupanja EU u vođenju evropskih poslova i slično.

U Sloveniji su npr. integrativnom klauzulom sadržanom u članu 3a Ustava, pored propisivanja uslova za ulazak u EU propisani i kriterijumi za ulazak Slovenije u NATO.

Sve su ovo elementi o kojima treba voditi računa prilikom definisanja ove klauzule, neophodne Srbiji kako bi mogla da postane članica EU.

Sadržina integrativne klauzule značajna je sa stanovišta regulisanja odnosa sa EU, ali i sa stanovišta rasprave o očuvanju/gubitku suvereniteta nakon ulaska u članstvo EU. Početak rasprave o pitanju očuvanja/gubitku suvereniteta kasni i neophodno je u što kraćem vremenskom periodu otvoriti debatu među relevantnim stručnjacima u vezi sa ovim pitanjem. Sa druge strane važno je, što pre, u periodu u kom ne postoji izborni ciklus (parlamentarnih ili predsedničkih izbora) pokrenuti stručnu raspravu o pitanju sadržine i obuhvatu same integrativne klauzule. Imajući u vidu negativna iskustva sa usvajanjem Ustava 2006. godine, ova rasprava mora biti široka i dugotrajna, obuhvatajući predstavnike Vlade, sudije Ustavnog suda, predstavnike akademske zajednice i organizacije civilnog društva.

[9] Kao uzor je poslužila integrativna klauzula Ustava Slovenije.

[10] Član 105 Ustava Republike Srbije propisuje da o potvrđivanju međunarodnih ugovora Narodna skupština odlučuje većinom svih glasova narodnih poslanika.

3. Izmene potrebne kako bi se u Srbiji obezbedila potpuna primena prava proisteklih iz domena tzv. "evropskog građanstva"

Član 52 Ustava reguliše izborno pravo u Republici Srbiji. Ovim članom je regulisano da svaki punoletan, poslovno sposoban državljanin Republike Srbije ima pravo da bira i da bude biran. Dakle, kao što je to uobičajeno, glasačko pravo, aktivno i pasivno, rezervisano je za državljane Republike Srbije. Ova norma je jasna i nedvosmislena, neostavljajući pri tom bilo kakav prostor za tumačenje ko ima pravo glasa na izborima u Republici Srbiji.

Sa jedne strane, ulaskom Republike Srbije u EU, građani Republike Srbije će dobiti pravo da biraju svoje predstavnike i da budu birani u Evropskom parlamentu, čime se prava građana Srbije šire. Sa druge strane, ulaskom u EU, Srbija preuzima na sebe da obezbedi prava koja EU, kao organizacija, dodeljuje svojim "građanima". "Građani EU" su svi državljani svih država članica EU, bez obzira da li žive u državi čiji su državljani. Prava koja proističu iz korpusa "građanstva EU" uživaju svi državljani država članica EU, povrh prava koja imaju po osnovu samog državljanstva. Ova prava predstavljaju određeni dodatak, koji dodeljuje i garantuje sama EU.[11]

Sama prava iz domena "građanstva EU" obuhvataju između ostalog i davanje pasivnog i aktivnog biračkog prava "građanima EU" na izborima za Evropski parlament i na lokalnim izborima u državi u kojoj imaju zakonsko prebivalište, na osnovu člana 22 UEU. Republika Srbija će pristupanjem preuzeti obavezu da "građanima EU" dodeli ista prava koja uživaju i državljani Republike Srbije na ovim izborima. Naravno, jasno je da će, nakon pristupanja Republike Srbije EU, svi državljani Republike Srbije koji imaju zakonito prebivalište u bilo kojoj državi članici EU dobiti ista ova prava. Brojnost državljana Republike Srbije koji legalno žive u članicama EU govori o značaju ovog prava za Republiku Srbiju i njene državljane.

Dakle, ovde imamo dva različita tipa izbora za koje Republika Srbija na svojoj teritoriji treba da obezbedi aktivno i pasivno biračko pravo "građanima EU" koji

[11] Korpus prava "evropskog građanstva", pored biračkog prava obuhvata i zabranu diskriminacije po osnovu državljanstva na teritoriji EU, slobodu kretanja i prebivanja, obezbeđivanje diplomatske i konzularne zaštite u predstavništvu bilo koje države članice EU izvan EU, pravo peticije Evropskom parlamentu i žalbe Evropskom ombudsmanu, komunikacija sa institucijama EU na jednom od službenih jezika EU, pravo pristupa dokumentima Evropskog parlamenta, Komisije i Saveta, pod određenim uslovima, kao i na pravo zapošljavanja u službama EU.

nisu državljani Republike Srbije, a koji imaju zakonito prebivalište na teritoriji Republike Srbije. Reč je o izborima za Evropski parlament i o lokalnim izborima.

Bitno je podvući da izbori za državne organe (Narodnu skupštinu i predsednika Republike) ostaju rezervisani za državljane Republike Srbije.

U toku pristupnih pregovora Republika Srbija će morati da uskladi svoje zakonodavstvo sa dva propisa EU doneta na osnovu člana 22 UEU, a koji regulišu ova pitanja, i to sa:

a) Direktivom Saveta 93/109/EZ od 6. decembra 1993. godine (sa kasnijim izmenama i dopunama), kojom se detaljno uređuje ostvarivanje prava glasa i prava da se bude biran na izborima za Evropski parlament za građane EU s prebivalištem u državi članici čiji nisu državljani,
i
b) Direktivom Saveta 94/80/EZ od 19. decembra 1994. godine (sa kasnijim izmenama i dopunama) o detaljnom utvrđivanju ostvarivanja aktivnog i pasivnog biračkog prava građana Unije s prebivalištem u državi članici čiji državljani nisu na lokalnim izborima.

Da bi se obezbedilo aktivno i pasivno biračko pravo na izborima za Evropski parlament, kako državljanima Republike Srbije tako i "građanima EU", potrebno je doneti zakon kojim bi ovo pitanje bilo regulisano, budući da se radi o potpuno novoj materiji i novom pravu za državljane Srbije. Iako je prvi momenat kad državljani Republike Srbije mogu učestvovati na izborima za Evropski parlament 2024. godina, ovaj zakon će morati da bude ranije donet kako bi se mogli završiti pregovori. Što se lokalnih izbora tiče potrebno će biti izmeniti Zakon o lokalnim izborima kojim je ova materija u Republici Srbiji uređena.

Kako bi pomenuti zakoni mogli biti usvojeni, potrebno je obezbediti ustavni osnov za njihovo donošenje, usled čega je evidentno da član 52 Ustava mora biti dopunjen.

Izmena Ustava kojom bi se omogućilo aktivno i pasivno biračko pravo građanima EU, mogla bi biti učinjena dodavanjem novog stava 2 u postojeći član 52 Ustava koji bi onda glasio:

1) "Svaki punoletan, poslovno sposoban državljanin Republike Srbije ima pravo da bira i da bude biran.

2) *Pravo da bira i da bude biran na izborima za Evropski parlament i na lokalnim izborima će imati i građani Evropske unije u skladu sa zakonom i pravnim tekovinama EU.*

3) Izborno pravo je opšte i jednako, izbori su slobodni i neposredni, a glasanje je tajno i lično.

4) Izborno pravo uživa pravnu zaštitu u skladu sa zakonom."

Ova promena je neosporna, tako da nije potrebno voditi posebnu javnu raspravu o njoj, već u okviru generalne debate o pristupanju EU na kraju pregovora treba diskutovati i o ovoj temi, kako bi bilo pronađeno najoptimalnije rešenje.

4. Izmene potrebne kako bi se obezbedila potpuna nezavisnost pravosuđa

Venecijanska komisija Saveta Evrope je u svom mišljenju iz 2007. godine o Ustavu Republike Srbije iz 2006. godine iznela niz zamerki na račun ustrojstva sudske grane vlasti u Republici Srbiji i pre svega na obezbeđivanje nezavisnosti sudstva od zakonodavne i izvršne grane vlasti.

Ove ocene, iako je donela komisija Saveta Evrope, našle su svoje mesto u stavovima Evropske komisije iznetim u Izveštaju sa skrininga za poglavlje 23 Pravosuđe i osnovna prava. U izveštaju se navodi da Srbija treba da uradi temeljnu analizu postojećih rešenja, odnosno mogućih izmena i dopuna Ustava, vodeći računa o preporukama Venecijanske komisije i evropskim standardima, da bi obezbedila nezavisnost i odgovornost pravosuđa. Izmene bi trebalo da obuhvate između ostalog pitanja zapošljavanja sudija, predsednika sudova i tužilaca, njihovog odabira, imenovanja, prebacivanja i uklanjanja sa funkcija, uloge i sastava Visokog saveta sudstva i Državnog veća tužilaca, kao i ulogu Narodne skupštine u postupku izbora nosilaca pravosudnih funkcija.

Ukratko, cilj ovih promena jeste da se u potpunosti eliminiše uticaj izvršne i zakonodavne grane vlasti na sudstvo i obezbedi njegova potpuna nezavisnost. Najveće zamerke su postavljene prvenstveno na član 147 koji reguliše da Narodna skupština bira sudije koji prvi put stupaju na dužnost, zatim član 153 koji reguliše da Narodna skupština bira i članove Visokog saveta sudstva, koji je nadležan da predlaže sudije koje bira Narodna skupština i član 164 koji reguliše da Narodna skupština bira i članove Državnog veća tužilaca.

Kao merilo za otvaranje Poglavlja 23 Pravosuđe i osnovna prava, EU je odredila da Republika Srbija treba da usvoji Akcioni plan kojim će biti utvrđen plan aktivnosti na otklanjanju nedostataka uočenih tokom skrininga.

Vlada Republike Srbije je 23. oktobra 2015. godine usvojila Akcioni plan za Poglavlje 23 i dostavila ga EU.[12] Akcionim planom Vlada je predvidela odgovor na ovakve primedbe iznete u izveštaju sa skrininga.

U delu Akcionog plana 1.1.1. Nezavisnost, predviđen je ceo set mera usmerenih na ispravljanje uočenih nedostataka, a koji zahtevaju izmenu Ustava Republike Srbije. Mere su usmerene na izradu teksta izmena Ustava, vođenje javne rasprave tim povodom i na njihovo slanje Venecijanskoj komisiji na mišljenje. Sve ove aktivnosti su predviđene za 2016. godinu.

Konačni cilj utvrđen Akcionim planom je da potrebne izmene Ustava budu usvojene do kraja 2017. godine. Nakon toga bi se pristupilo usklađivanju svih potrebnih pravosudnih zakona, novim ustavnim rešenjima.

Iz ovog akcionog plana jasno proističe namera da se pitanje nezavisnosti sudstva reši u skladu sa preporukama Venecijanske komisije i sa ocenama iznetim u izveštaju sa skrininga već na početku pristupnih pregovora.

Budući da je Vladinim planom predviđena javna debata na ovu temu, civilno društvo i akademska zajednica, kao i sve druge zainteresovane strane treba da uzmu aktivno učešće u predviđenoj raspravi.

5. Moguće izmene kako bi se ojačalo ostvarivanje prava nacionalnih manjina na teritoriji Republike Srbije

Iako ustavni poredak Republike Srbije garantuje prava nacionalnih manjina u skladu sa svim važećim međunarodnim i evropskim standardima i dokumentima, a u nekim delovima čak i ide iznad zahtevane zaštite nacionalnih manjina prema ovim dokumentima, ostvarivanje utvrđenih prava zahteva određena unapređenja.

U tom cilju, Vlada Srbije je 3. marta 2016. godine usvojila Akcioni plan za ostvarivanje prava nacionalnih manjina u Republici Srbiji.[13] Ovaj dokument predstavlja realizaciju aktivnosti predviđene Akcionim planom za Poglavlje 23 u delu osnovnih prava. Ovim Akcionim planom je predviđeno da se razmotri unapređivanje ustavnih garancija za primenu prava nacionalnih manjina. Moguće izmene Ustava su predviđene na dva mesta u Akcionom planu.

[12] Akcioni plan za Poglavlje 23 dostupan je na sajtu Ministarstva pravde: *www.mpravde.gov.rs*.

[13] Akcioni plan za ostvarivanje prava nacionalnih manjina u Republici Srbiji dostupan je na sajtu Ministarstva za državnu upravu i lokalnu samoupravu: *www.mduls.gov.rs*.

Na prvom mestu, u delu Akcionog plana koji se tiče obezbeđivanja ostvarivanja prava i sloboda pripadnika nacionalnih manjina pod jednakim uslovima, razvijanje tolerancije i sprečavanje diskriminacije u tački 2.8 je predviđeno da će biti razmotrene potrebe za izmenama odgovarajućih odredbi Ustava kako bi se ojačala primena afirmativnih mera usmerenih na unapređenje ravnopravnosti pripadnika nacionalnih manjina, odnosno kako bi se uklonile moguće nejasnoće u samom Ustavu po ovom pitanju. Venecijanska komisija je takođe u svom mišljenju postavila pitanje da li su ove odredbe (čl. 76 Ustava) dovoljno jasne i precizne. Ukoliko bi bilo ocenjeno da postoji potreba za izmenom Ustava u ovom delu, Akcioni plan predviđa njihovo usvajanje zajedno sa planiranim izmenama Ustava u sklopu reforme pravosuđa, krajem 2017. godine.

Takođe u delu Akcionog plana usmerenog na razvoj efikasnih mehanizama demokratskog učešća nacionalnih manjina u političkom procesu, tačkom 7.1. predviđeno je sprovođenje uporednopravne analize praksi država članica EU u regionu u cilju identifikacije najboljih praksi i odgovarajućeg modela učešća nacionalnih manjina u izbornom procesu i adekvatne zastupljenosti nacionalnih manjina u predstavničkim telima na republičkom, pokrajinskom i lokalnom nivou. Tačkom 7.2 je predviđeno da će na osnovu analize i uporednopravne prakse biti identifikovani potencijalni modeli demokratske participacije nacionalnih manjina, uključujući i brojčano manje nacionalne manjine u izbornom procesu kojima se garantuje adekvatna zastupljenost nacionalnih manjina u predstavničkim telima na republičkom, pokrajinskom i lokalnom nivou, vodeći računa o sprečavanju potencijalne zloupotrebe fleksibilnijih odredaba o strankama nacionalnih manjina. Predviđeno je da analize budu urađene tokom 2016. godine. Ako se pokaže da je promena potrebna da bi se ispunio zadati cilj, ova analiza može biti osnova za izmenu Ustava, budući da će biti upućena Akcionoj grupi za reformu političkog sistema Narodne skupštine Republike Srbije.

Ukoliko analize pokažu da je potrebno menjati Ustav u ovom domenu, potrebno je da Vlada organizuje sveobuhvatnu javnu raspravu gde bi sve zainteresovane strane trebalo da uzmu aktivno učešće u raspravi.

6. Izmene Ustava kao posledica dijaloga na visokom nivou o normalizaciji odnosa Beograda i Prištine

Godine 2012. otvoren je dijalog na visokom nivou o normalizaciji odnosa Beograda i Prištine. Ovaj dijalog se već četiri godine odvija pod koordinacijom Visoke predstavnice Evropske unije za spoljnu i bezbednosnu politiku. Dijalog je

rezultirao postizanjem Prvog sporazuma o principima koji regulišu normalizaciju odnosa aprila 2013. godine.

Nakon postizanja ovog sporazuma, dijalog je nastavljen i raspravlja se o stavljanju novih tema na dnevni red. U ovom trenutku nije moguće reći kojom dinamikom će teći dijalog, koje teme će biti pokretane i kako će one biti regulisane, budući da na to utiče mnogo faktora koje je nemoguće predvideti u ovom trenutku.

Veza između dijaloga sa Prištinom i pristupnih pregovora sa EU je uspostavljena u Poglavlju 35 Ostala pitanja u okviru kog se prati dijalog sa Prištinom. Ovo rešenje predstavlja novitet u pristupnim pregovorima sa EU. Budući da ne postoje pravne tekovine EU u Poglavlju 35, Republika Srbija ne može da pravi planove usklađivanja. Zbog toga je Poglavlje 35 otvoreno za pregovore 14. decembra 2015. godine bez podnošenja pregovaračke pozicije Republike Srbije. Bitno je istaći da pregovori u okviru Poglavlja 35 predstavljaju isključivo mehanizam za praćenje i ocenu implementacije sporazuma koji su prethodno već postignuti u dijalogu o normalizaciji i da se u okviru Poglavlja 35 ne vode pregovori o Kosovu sa EU.

Sam Pregovarački okviru EU, predstavljen na Prvoj međuvladinoj konferenciji o pristupanju, 21. januara 2014. godine u tački 23 navodi:

"23. *Napredak pregovora zavisiće od napretka koji Srbija ostvari u pripremama za članstvo, a u okviru ekonomske i socijalne konvergencije. Ovaj napredak naročito će se meriti na osnovu sledećih zahteva:*

…

- *Kontinuirano angažovanje Srbije, u skladu sa uslovima Procesa stabilizacije i pridruživanja, u cilju vidljivog i održivog unapređenja odnosa sa Kosovom*[*]*. Ovaj proces će obezbediti da obe strane mogu da nastave svojim evropskim putem, izbegavajući da jedna drugu blokiraju u ovim naporima, i treba postepeno, do kraja pristupnih pregovora sa Srbijom, da dovede do sveobuhvatne normalizacije odnosa između Srbije i Kosova, u formi pravno obavezujućeg sporazuma u nameri da će obe strane biti u stanju da u potpunosti ostvaruju svoja prava i ispunjavaju svoje obaveze.*".

Bitno je napomenuti da u ovom trenutku ne postoje jasne odrednice šta svi uključeni u dijalog smatraju pod formulacijom "*sveobuhvatna normalizacija odnosa*

[*] Ovo označavanje ne dovodi u pitanje stavove o statusu i u skladu je sa Rezolucijom SB UN 1244/99 i Mišljenjem MSP-a o proglašenju nezavisnosti Kosova.

Srbije i Kosova", kao i da će to biti jedna od ključnih tačaka u pregovorima, a koju u ovom trenutku nije moguće sagledati. Sam Pregovarački okvir predviđa postizanje "*pravno obavezujućeg sporazuma*" koji će biti dogovoren kao rezultat dijaloga. Tek će ishod dijaloga, kao i oblik i sadržina tog "*pravno obavezujućeg sporazuma*" dati nedvosmisleni odgovor na pitanje da li će biti potrebno menjati i sam Ustav kako bi rezultati dijaloga našli svoje mesto u ustavnom poretku Republike Srbije.

7. Dinamika izmena Ustava

Iz prethodne rasprave jasno proističe da će Republika Srbija u toku pristupnih pregovora menjati Ustav makar dva puta.

Prva promena je već prema Akcionom planu za Poglavlje 23 planirana za 2017. godinu, kako bi se ostvarile ustavne pretpostavke za obezbeđivanje nezavisnosti sudstva u skladu sa preporukama Venecijanske komisije i prihvaćenim standardima u Evropi. Bez ove promene dalji napredak u pregovorima u Poglavlju 23 bi bio doveden u pitanje, a samim tim i celokupan tok pregovora o pristupanju bi mogao biti usporen. Takođe, Posebni akcioni plan za ostvarivanje prava nacionalnih manjina predviđa razmatranje promena Ustava, gde bi eventualne izmene bile usvajane u paketu sa izmenom vezanom za obezbeđivanje nezavisnosti pravosuđa.

Druga promena Ustava će uslediti na kraju pregovora, tj. nakon potpisivanja Ugovora o pristupanju Republike Srbije EU, kada budu bili poznati svi parametri pod kojima Republika Srbija stupa u članstvo EU. Tada bi u Ustav trebalo da budu unete integrativna klauzula i izmene vezane za omogućavanje uživanja prava koja potiču iz korpusa "evropskog građanstva". Ove dve izmene su neminovne, a po prirodi stvari se vrše na kraju samog pregovaračkog procesa, tj. nakon potpisivanja Ugovora o pristupanju EU, a pre njegovog potvrđivanja u Narodnoj skupštini.

Takođe, u tom trenutku će biti poznato i šta će doneti "*sveobuhvatna normalizacija odnosa između Srbije i Kosova*[*]*, u formi pravno obavezujućeg sporazuma*" koja se pominje u Pregovaračkom okviru EU i da li će i kakve implikacije taj sporazum

[*] Ovo označavanje ne dovodi u pitanje stavove o statusu i u skladu je sa Rezolucijom SB UN 1244/99 i Mišljenjem MSP-a o proglašenju nezavisnosti Kosova.

imati po Ustav. Momenat eventualne promene Ustava kao rezultata dijaloga za sada je takođe nepoznanica.

8. Pitanje referenduma o pristupanju Republike Srbije Evropskoj uniji

Analiza pokazuje da je po sadašnjem Ustavu jasno utvrđeno da će građani Republike Srbije morati na referendumu da odluče da li će Republika Srbija postati članica EU ili ne.

Ovakav stav proističe iz člana 203 Ustava koji u stavu 6 kaže:

"*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****, proglašavanje ratnog i vanrednog stanja, odstupanje od ljudskih i manjinskih prava u vanrednom i ratnom stanju ili postupak za promenu Ustava.*"

Budući da će omogućavanje primene pravnih tekovina EU na teritoriji Republike Srbije zahtevati promenu odredbi o uređenju vlasti u Republici Srbiji, tj. derogiraće obim člana 98 koji poverava zakonodavnu vlast isključivo Narodnoj skupštini, smatramo da će promena Ustava kojom će biti uvedena integrativna klauzula zahtevati referendum.

Vlada Srbije je na Prvoj međuvladinoj konferenciji 21. januara 2014. godine u tački 35 Uvodne izjave Republike Srbije, predstavljene tom prilikom,[14] iznela svoj stav da će konačnu odluku o pristupanju Republike Srbije EU, po potpisivanju Ugovora o pristupanju Republike Srbije EU, dati građani Republike Srbije na referendumu.

Ovom izjavom, osim što je jasno izražen stav Vlade da će na kraju pregovora biti održan referendum o pristupanju Republike Srbije EU, jasno je određen i trenutak kad će referendum biti održan, tj. da referendum treba održati u periodu nakon potpisivanja Ugovora o pristupanju EU, a pre nego što Narodna skupština potvrdi potpisani Ugovor.

Optimalno bi bilo da se građani Srbije na referendumu izjasne i o samom tekstu izmena Ustava koje treba da budu donete da bi Srbija mogla da postane članica

[14] Uvodna izjava Republike Srbije, predstavljena na Prvoj međuvladinoj konferenciji o pristupanju Republike Srbije Evropskoj uniji, održane 21. januara 2014. godine dostupna je na sajtu Kancelarije za evropske integracije: *www.seio.gov.rs*.

EU, kao i o samom Ugovoru o pristupanju Republike Srbije Evropskoj uniji. U tom slučaju bi, pod uslovom da građani na referendumu prihvate izmene Ustava i Ugovor o pristupanju, prvo izmene Ustava stupile na snagu, omogućavajući Narodnoj skupštini da potvrdi Ugovor o pristupanju, u skladu sa procedurom definisanom izmenama Ustava. U svakom slučaju, jasno je da će građani Srbije imati priliku da se na referendumu nedvosmisleno izjasne da li su "*za*" ili "*protiv*" članstva Republike Srbije u Evropskoj uniji. Kako bi građani bili informisani o čemu se izjašnjavaju na referendumu, neophodno je da Vlada i dalje kontinuirano predstavlja javnosti o čemu se pregovara. Time bi se obezbedila i adekvatna obaveštenost građana i stvorili uslovi za visoku izlaznost građana na referendumu, izbegavajući hrvatski scenario kad je većina građana bojkotovala referendum o članstvu u EU, budući da je na referendum izašlo 43,51% birača.[15] Značajnu ulogu u informisanju građana, kao i u javnoj debati po pitanju članstva u EU imaju i organizacije građanskog društva, koje su uključene u praćenje pristupnih pregovora.

9. Zaključci i preporuke

Analiza pokazuje da će u toku pristupanja Republika Srbija morati najmanje dva puta da izmeni Ustav kako bi mogla postati članica EU. Prilikom svih izmena Ustava, potrebno je održavanje najšire javne rasprave koje bi zvanično pokrenula Vlada, kako bi se obezbedio legitimitet tih izmena i celog procesa pristupanja EU, izbegavajući time negativna iskustva sa usvajanjem Ustava 2006. godine. Sa druge strane, potrebno je da zainteresovana javnost intenzivno uzme učešće u debatama nakon što ih Vlada pokrene.

Potrebno je u Ustav uneti integrativnu klauzulu čime bi se regulisala sledeća pitanja značajna za proces pristupanja Republike Srbije EU: poveravanje određenih prava EU; odnos domaćeg i evropskog pravnog sistema; potrebna većina za potvrđivanje Ugovora o pristupanju u Narodnoj skupštini; odnos Vlade i Narodne skupštine nakon ulaska Srbije u članstvo EU. Klauzula bi bila uneta uvođenjem novog člana 16a u Ustav. Javna rasprava na ovu temu je neophodna kako bi se razvejale nedoumice oko pitanja očuvanja suvereniteta

[15] Podaci dostupni na sajtu Ministarstva spoljnih poslova i evropskih integracija Republike Hrvatske: *http://www.mvep.hr*.

nakon pristupanja EU i kroz debatu došlo do optimalnih rešenja ustavnih formulacija. Osim toga, debatom zainteresovanih aktera i stručne javnosti bi se utvrdilo da li bi ova klauzula bila korišćena i za regulisanje pitanja ulaska Republike Srbije u odbrambene saveze. Debatu o ovom pitanju treba pokrenuti što pre, po mogućstvu izvan izbornih ciklusa.

Potrebno je Ustavom omogućiti aktivno i pasivno biračko pravi "građana EU" na izborima za Evropski parlament i na lokalnim izborima u Srbiji, tj. dati ustavni osnov za donošenje odgovarujućih zakona. To bi trebalo biti obavljeno predloženim usvajanjem izmene člana 52 Ustava.

Akcioni plan za otvaranje Poglavlja 23 Pravosuđe i osnovna prava predviđa izmenu Ustava u cilju obezbeđivanja nezavisnosti pravosuđa krajem 2017. godine. Civilno društvo treba da prati aktivnosti Vlade na ovom polju i da se aktivno uključi u javnu debatu na tu temu kad je Vlada pokrene.

Sa druge strane, moguće je da će biti potrebne izmene Ustava kako bi se ojačalo ostvarivanje prava nacionalnih manjina na teritoriji Republike Srbije. U ovom trenutku nije moguće dati nedvosmisleni odgovor na pitanje da li će biti potrebno menjati Ustav kako bi rezultati dijaloga na visokom nivou o normalizaciji odnosa Beograda i Prištine našli svoje mesto u ustavnom poretku Republike Srbije. Budući da se radi o potencijalnim izmenama Ustava, civilno društvo treba da prati aktivnosti na ovom polju i da se u slučaju potrebe za izmenama Ustava u ovom domenu, aktivno uključi u javnu debatu na tu temu.

Analiza takođe pokazuje da Ustav zahteva da građani na referendumu odluče da li će prihvatiti izmene Ustava neophodne da bi Srbija postala članica EU. O potrebi održavanja referenduma Vlada je već zauzela svoj stav budući da je na prvoj Međuvladinoj konferenciji 21. januara 2014. godine potvrdila da će konačnu odluku o pristupanju Republike Srbije EU, po potpisivanju Ugovora o pristupanju Republike Srbije EU, dati građani Republike Srbije na referendumu. Kad bude bio raspisan referendum o ulasku Republike Srbije u članstvo EU, organizacije civilnog društva treba da se aktivno uključe u podršku referendumu i promovišu članstvo Srbije u EU, da bi što više građana izašlo na referendum (kako se ne bi desio hrvatski scenario male izlaznosti) i podržalo članstvo Srbije u EU. Organizovana podrška civilnog društva će biti od velike važnosti za mobilizaciju javnosti za izlazak na referendum o tako važnoj i dalekosežnoj odluci, kao što je pristupanje Republike Srbije Evropskoj uniji.

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POREZ KAO INTEGRALNI DEO DRŽAVNE POMOĆI U PRAVU KONKURENCIJE EVROPSKE UNIJE**

Apstrakt

S obzirom da je državna pomoć prenos sredstava iz državnih izvora preduzećima, a porez vrsta javnog prihoda, to i po logici i po prirodi stvari preduzeća plaćanjem poreza, odnosno prenosom svojih finansijskih sredstava državi, ne mogu steći ekonomsku prednost nad konkurentima. Zato se porez, barem na prvi pogled, teško može podvesti pod pravila o kontroli državne pomoći. Da je, međutim, i tako nešto moguće, vidljivo je iz sudske prakse Evropske unije. Pod kojim uslovima dopuštenost poreza može zavisiti od dopuštenosti državne pomoći pokazano je putem razmatranja presuda Suda pravde u slučajevima Streekgewest i Casino France and others.

Ključne reči: porez, državna pomoć, Evropska unija, pravo konkurencije, sudska praksa.

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1. Uvod

Poreska državna pomoć je jedan od najzastupljenijih vidova državne pomoći. Oko 30% od ukupne državne pomoći dodeli se u vidu poreske državne pomoći. Ali poreska državna pomoć i porez kao državna pomoć nisu jedna te ista pojava. Pod poreskom državnom pomoći podrazumevaju se selektivne poreske olakšice i poreska oslobođenja, kao i drugi vidovi selektivnih poreskih podsticaja kojima se država lišava prihoda koji joj po zakonu pripadaju. S druge strane porez, odnosno prenos novčanih sredstava državi, kao državna pomoć gotovo je nezamisliv. I pored toga, postoje slučajevi kada se pravo kontrole državne pomoći primenjuje i na poreze. Koji su to slučajevi, predmet je ovog rada.

Rad je podeljen na tri celine. U prvom delu razmatraju se pojam i vrste poreza sa naglaskom na podelu poreza na direktne i indirektne, te opšte i namenske. U drugom delu se obrađuje pojam zabranjene državne pomoći. U trećem delu se daje pregled sudskih odluka kojima se utvrđuju uslovi pod kojima se porez može smatrati integralnim delom državne pomoći.

2. Pojam i vrste poreza

Porez je oblik javnog prihoda. U pitanju je jedna od najznačajnijih dažbina, imajući u vidu procentualno učešće prihoda prikupljenih po osnovu poreza u ukupnim javnim prihodima i BDP-u.[1] Naplatu poreza od subjekata pod njenom poreskom vlašću, najčešće u novčanom obliku i pod pretnjom prinudnog izvršenja, vrši država, ne pružajući niti se obavezujući na protivuslugu koja bi **neposredno** služila kao ekvivalent izvršenom plaćanju.

Porezi, isto kao i drugi javni prihodi, služe finansiranju javnih rashoda za potrebe odbrane, bezbednosti, pravosuđa, obrazovnog sistema, zdravstva i drugih potreba od opšteg interesa bez kojih savremena država i društvo ne bi mogli funkcionisati. Osim fiskalnih, porezima se ostvaruju i drugi ciljevi kao što su ekonomski i socijalni. Imajući to u vidu, država putem poreza sprovodi "jedan vid intervencije u društvenom životu."[2] Intervencija se sastoji u preraspodeli nacionalnog dohotka odnosno prelivanju sredstava iz vlasništva jedne grupe

[1] H. Hrustić, *Javne finansije i poresko pravo*, Beograd 2006, str. 55.

[2] M. Matejić, Nefiskalni ciljevi poreza u savremenoj teoriji i praksi u: *Zbornik radova Pravno – ekonomskog fakulteta u Nišu II* (Popović, S., ur.), Niš 1963, str. 98.

građana u vlasništvo druge grupe građana. Naime, putem javnih rashoda, poreski prihodi naplaćeni od jednih, uplaćuju se drugim pravnim subjektima.[3]

Porezi se mogu klasifikovati po brojnim kriterijumima.[4] Tako razlikujemo objektne i subjektne,[5] analitičke i sintetičke,[6] pretpostavljene i faktičke,[7] *ad valorem* i specifične,[8] fundirane i nefundirane,[9] redovne i vanredne, periodične i povremene, centralne i lokalne. Za ovaj rad, međutim, od najvećeg značaja je podela poreza na direktne i indirektne i opšte i namenske.

Podela na direktne i indirektne vrši se prema kriterijumu prevaljivosti poreza. Ako se poreski teret može prevaliti na neko drugo lice onda je to indirektan porez. "Prevaljivanje poreza vrši se preko cene, tako što se iznos poreza uključuje u prodajnu cenu proizvoda ili usluge."[10]

Po tzv. francuskoj definiciji, "neposredni porezi su oni koji terete privrednu sposobnost obveznika pogađajući neposredno njihovo bogatstvo ili prihode; posredni, međutim, naplaćuju se u vezi sa radnjama proizvodnje, potrošnje ili razmene dobara."[11] Tako u direktne poreze spadaju: porezi na imovinu, prihode i upotrebu dobara (npr. motorna vozila, vatreno oružje i dr.), dok bi indirektni porezi bili: porezi na promet, obuhvatajući PDV, kao i porez na prenos apsolutnih prava.[12]

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[3] *Ibid*.

[4] O klasifikaciji poreza vidi više: D. Popović, *Poresko pravo,* Beograd 2008, str. 66-86.

[5] Podela na objektne i subjektne zasniva se na kriterijumu da li se pri oporezivanju vodi računa o ličnim prilikama poreskog obveznika i njegovoj ekonomskoj snazi.

[6] Podela na analitičke i sintetičke vrši se prema tome da li se oporezuje samo jedan element poreske situacije (npr. samo poslovni prostor (a ne celokupna imovina) ili samo prihod od kapitala, a ne i od rada) ili porez obuhvata celinu neke poreske situacije.

[7] Podela na pretpostavljene i faktičke se vrši prema načinu na koji se utvrđuje poreska osnovica.

[8] *Ad valorem* porezi su porezi kod kojih se poreska osnovica iskazuje u novčanim jedinicama, a poreska obaveza utvrđuje u procentu od tako utvrđene osnovice, dok je osnovica specifičnih poreza neka merna jedinica (npr. komad), a poreska obaveza se utvrđuje u apsolutnom novčanom iznosu po datoj mernoj jedinici.

[9] U zavisnosti od toga da li su prihodi koji se oporezuju stečeni ličnim naporom ili ulaganjem kapitala (renta, dividenda, kamate, zakupnina).

[10] H. Hrustić, *op. cit.,* str. 58.

[11] J. Lovčević, *Institucije javnih finansija*, Beograd 1991, str. 112, u ovom radu prema: D. Popović, *op. cit.*, str. 68.

[12] Akcize i carine su takođe indirektnog karaktera.

S obzirom da su od ključnog značaja za slobodu prometa roba i usluga i funkcionisanje jedinstvenog tržišta, u Evropskoj uniji su posredni porezi (PDV i akcize) na osnovu ovlašćenja izričito propisanog čl. 113 UFEU, podvrgnuti harmonizaciji.[13] Kad su u pitanju direktni porezi, međutim, situacija je drugačija. Nadležnost za regulisanje direktnih poreza pripada državama članicama.[14] Doduše, poreski suverenitet država članica u vezi sa regulisanjem direktnih poreza ograničen je obavezom država članica da odredbama nacionalnih zakona o direktnom oporezivanju ne narušavaju ostvarenje osnovnih sloboda unutrašnjeg tržišta, kao ni funkcionisanje konkurencije na njemu.

Podela poreza na opšte i namenske zasniva se na tome da li se prihod od poreza koristi za finansiranje tačno određenog javnog rashoda (npr. izgradnja nekog infrastrukturnog objekta) ili se uplaćuje u budžet formirajući masu budžetskih sredstava iz koje se javni rashodi finansiraju redosledom uređenim u okviru budžetskog sistema. Namenski porezi mogu biti privremeni ili trajni u zavisnosti od projekta koji se finansira. Uvođenje namenskih poreza kritikuje se jer se za svaki namenski porez mora formirati poseban fond što može povećati režijske troškove, a u svakom slučaju otežava koordinaciju u finansiranju javnih potreba. S druge strane, otpor uvođenju i naplati poreza u svesti poreskih obveznika manji je ako se tačno zna za šta se naplaćena sredstva koriste. Takođe, stepen sigurnosti u finansiranju javne potrebe obezbeđene namenskim porezom je viši. Kao lokalni javni prihodi, samodoprinosi se odlikuju obeležjima namenskih poreza.

[13] S obzirom da je Evropska unija carinska unija, na osnovu čl. 28 i 30 UFEU državama članicama je zabranjeno da u međusobnom prometu uvode i naplaćuju uvozne i izvozne carine i druge dažbine kojima bi se postizao isti efekat kao carinama.

[14] Zbog toga u oblasti direktnog oporezivanja organi vlasti Evropske unije retko kad izdaju direktive. Izuzetak su Direktiva Saveta o zajedničkom sistemu oporezivanja koji se odnosi na spajanja, podele, prenos imovine i zamene akcija društava iz različitih država članica te na prenos sedišta SE (*Societas Europa* - prim. aut.) i SCE (*European Cooperative Society* – prim. aut.) iz jedne države članice u drugu br. 133/2009 od 19. oktobra 2009, OJ L 310 od 25. novembra 2009. godine i Direktiva Saveta o zajedničkom sistemu oporezivanja koji se odnosi na matična društva i društva kćeri iz različitih država članica br. 96/2011 od 30. novembra 2011. godine, OJ L 345 od 29. decembra 2011. godine. Pored ovih direktiva, iz oblasti direktnog oporezivanja zaključena je 1990. godine tzv. Arbitražna konvencija (Konvencija o izbegavanju dvostrukog oporezivanja u vezi sa usklađivanjem dobiti povezanih društava br. 463/1990 OJ L 225 od 20. avgusta 1990. godine).

3. Pojam državne pomoći u pravu konkurencije Evropske unije

U interakciji države sa preduzećima i drugim tržišnim učesnicima, možemo razlikovati dve situacije. U prvoj situaciji država u razmeni stiče ekonomski ekvivalentnu vrednost za sredstva koja su u bilo kojoj formi preneta preduzeću i to ne konstituiše državnu pomoć. U drugoj situaciji država ne stiče za uzvrat ekonomski ekvivalentnu vrednost, ali zato postiže ciljeve ekonomske ili socijalne politike. U toj situaciji, bilo koji vid državne podrške preduzećima koji bi ih podsticao na ponašanje koje inače ne bi bilo spontano generisano na tržištu, konstituiše državnu pomoć. Državnom pomoći se tako veštački, tj. mimo delovanja tržišnih zakonitosti, i to preferiranjem jednih na uštrb drugih, menja odnos snaga privrednih subjekata koji međusobno konkurišu, pa je državna pomoć "među najznačajnijim preprekama slobodne konkurencije."[15] Zato je državna pomoć zabranjena. Zabrana je propisana članom 107(1) Ugovora o funkcionisanju Evropske unije (u daljem tekstu: UFEU).[16]

Međutim, "zabrana državne pomoći niti je apsolutna niti bezuslovna."[17] Prvo, državna pomoć može biti zabranjena jedino ako su kumulativno ispunjeni uslovi propisani članom 107(1) UFEU: a) preduzeće stiče ekonomsku korist, b) stečena ekonomska korist je državnog porekla, c) dodeljivanje pomoći je selektivno, d) narušava se konkurencija ili barem postoji takva pretnja i e) šteti se trgovini među državama članicama. Drugo, čak i kada su navedeni uslovi ispunjeni, državna pomoć neće biti zabranjena ako je kompatibilna ili uslovno kompatibilna sa unutrašnjim tržištem.[18] Kompatibilna sa unutrašnjim tržištem je: a) pomoć socijalnog karaktera data individualnim potrošačima, ako se to čini bez diskriminacije u odnosu na poreklo robe, b) pomoć koja se daje za naknadu šteta nastalih usled prirodnih nepogoda ili drugih izuzetnih događaja i c) pomoć data privredi određenih područja SR Nemačke na koje je uticala podela Nemačke, u

[15] W. Schön, Taxation and State Aid in the European Union, *Common Market Law Review* br. 36/1999, str. 911.

[16] Nespojiva je sa unutrašnjim tržištem svaka pomoć dodeljena od strane države članice ili iz državnih izvora, kojom se, nezavisno od oblika u kojem se dodeljuje, konkurencija narušava ili postoji takva pretnja, favorizovanjem pojedinih preduzeća ili proizvodnje pojedinih roba, u meri u kojoj je štetna za trgovinu među državama članicama.

[17] L. M. P. Borrego, State Aid Law and Taxation, *Bocconi Legal Papers* br. 7/2016, str. 119.

[18] "Bez obzira na generalnu zabranu dodele državne pomoći, ostavljena je mogućnost da se ona odobri, pod određenim uslovima." (S. Domazet, Državna pomoć i poreska mišljenja u pravu Evropske unije, *Pravni život* br. 12/2006, str. 343)

meri u kojoj je potrebna da bi se nadoknadile ekonomske posledice prouzrokovane podelom. Uslovno kompatibilna državna pomoć je: a) pomoć za unapređenje ekonomskog razvoja područja na kojima je životni standard izuzetno nizak ili u kojima postoji znatna nezaposlenost; b) pomoć za unapređenje važnih projekata od zajedničkog evropskog interesa ili za otklanjanje znatnog poremećaja u privrednom životu neke države članice; c) pomoć za unapređenje razvoja određenih privrednih delatnosti ili određenih privrednih grana, ako se time ne menjaju uslovi poslovanja u meri u kojoj je to suprotno zajedničkim interesima; d) pomoć namenjena unapređenju kulture i očuvanju baštine, kada ona ne utiče na uslove razmene i konkurencije u Uniji u meri koja bi bila suprotna zajedničkim interesima i e) druge vrste pomoći koje Savet odredi svojom odlukom koju donosi na predlog Komisije.[19]

Uslovi za zabranu državne pomoći razrađeni su u Obaveštenju Komisije o pojmu državne pomoći iz člana 107 stava 1 Ugovora o funkcionisanju Evropske unije (dalje u tekstu: Obaveštenje).[20]

3.1. Ostvarivanje ekonomske koristi

Prema Obaveštenju, da bi državna pomoć bila zabranjena, primalac državne pomoći mora steći prednost koju ne bi mogao ostvariti poslujući pod uobičajenim tržišnim uslovima. Ovaj uslov je ispunjen ako je primalac ekonomske podrške preduzeće i ako je prednost stečena državnom intervencijom.[21] Preduzeće je svaki subjekt prava koji obavlja privrednu delatnost, bez obzira na pravni status i način finansiranja. Osim privrednih društava i javnih preduzeća, preduzećem u smislu prava kontrole državne pomoći smatraju se i sportski klubovi, kao i druga udruženja, odnosno svi pravni subjekti koji nude robe i pružaju usluge na tržištu. Nije bitno što mogu biti registrovani kao neprofitne organizacije. Ovo zbog toga što je jedini pravno relevantan kriterijum: obavljaju li privrednu delatnost ili ne,

[19] U okviru UFEU, državnoj pomoći posvećen je i član 108 kojim se propisuju nadležnosti Komisije i Saveta u kontroli državne pomoć. Ovim odredbama, "Komisija je snabdevena regulatornim instrumentom koji joj omogućava da spreči i eliminiše promene uslova takmičenja na tržištu uzrokovane javnom intervencijom." (P. Rossi, State aid and preferential tax regimes for financial holdings The Luxembourg's Exempt 1929 Holding case, *Competition Policy Newspaper* br. 3/2006, str. 68)

[20] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C 262/2016, OJ EU of 19th July 2016, p. 1.

[21] "Prednost postoji kad god se finansijska situacija preduzeća poboljša kao rezultat intervencije države." (Obaveštenje, tač. 67)

pri čemu se pod privrednom delatnošću podrazumeva prodaja roba i pružanje usluga na tržištu. U tom smislu i subjekti javne vlasti se mogu smatrati preduzećima sve dok obavljaju privrednu delatnost koja se može odvojiti od vršenja javnih ovlašćenja. To *argumentum a contrario* znači da subjekti javne vlasti ostaju izvan primene pravila o kontroli državne pomoći ako se privredna delatnost koju obavljaju ne može odvojiti od vršenja javnih ovlašćenja.[22]

Za pravo kontrole državne pomoći su irelevantni uzrok ili cilj državne intervencije. To znači da se procena da li je preduzeće ostvarilo ekonomsku korist ili ne, procenjuje objektivno i to tako što se upoređuje finansijska situacija preduzeća nakon ostvarivanja ekonomske koristi sa finansijskom situacijom u kojoj bi bilo da ekonomsku korist nije ostvarilo. Takođe, u skladu sa objektivnim karakterom kontrole državne pomoći je i to što ostvarivanje ekonomske koristi postoji bez obzira što je preduzeće ne može odbiti ili izbeći. Isto važi i u slučaju da je prednost za preduzeće nastala tek naknadno.[23]

Ekonomska korist može biti data na različite načine.[24] Pri tome, ne samo da se državnom pomoći smatra dodela tzv. pozitivne podrške (tj. transfer sredstava iz državnih izvora preduzeću), nego se i smanjenje ekonomskog opterećenja preduzeća smatra državnom pomoći.[25] "Npr. ako država plaća deo troškova zaposlenog u preduzeću, ona time to preduzeće oslobađa troškova koji su sastavni deo obavljanja privredne delatnosti. Prednost postoji i kada subjekti

[22] Primeri takvih delatnosti su delatnosti: vojske i policije; bezbednosti i kontrole leta; kontrole i bezbednosti pomorskog saobraćaja; sprečavanja zagađivanja; organizacije, finansiranja i izvršavanja zatvorskih kazni; razvoja i revitalizacije javnog zemljišta i prikupljanja podataka za upotrebu u javne svrhe na osnovu zakonske obaveze koju preduzeća imaju u vezi sa objavljivanjem takvih podataka.

[23] R. Luja, State Aid Benchmarking and Tax Rulings: Can We Keep it Simple?, Working paper Max Planck/UCL Conference *Taxation and EU State Aid Law*, Brussels, 5th November 2015, odeljak 3.3.

[24] Ne postoji spisak u kojem su nabrojani svi oblici državne pomoći (I. Nikolic, EU State Aid and National Taxation: Moving towards Harmonization, *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2158729* (24.01.2017), str. 7).

[25] Porez je trošak, pa se snižavanje poreske obaveze ili oslobađanje od plaćanja poreza može smatrati državnom pomoći.

javne vlasti plaćaju dodatak na zaradu zaposlenih u preduzeću, čak i ako preduzeće nije na tako nešto zakonom obavezano."[26]

Osim što može biti direktna (bilo da je "pozitivna" ili "negativna"), prednost ostvarena državnom pomoći može biti i indirektna kada, osim onih pravnih subjekata kojima je dodeljena, ekonomsku korist ostvaruju i druga preduzeća. U vezi sa indirektnom državnom pomoći potrebno je biti oprezan zbog toga što sekundarni privredni efekti državne pomoći postoje uvek. Međutim, o indirektnoj prednosti biće govora onda kada je državna pomoć programski tako oblikovana da se njeni sekundarni efekti prenose na preduzeća ili grupe preduzeća čiji je identitet moguće utvrditi.

3.2. Dodela pomoći od strane države ili državnim sredstvima

Državna sredstva su sva sredstva javnog sektora, bez obzira na nivo,[27] uključujući i sredstva javnih preduzeća. Pod državnim sredstvima se u pojedinim situacijama mogu smatrati i sredstva privatnih subjekata prava.[28] Prenos državnih sredstava postoji i ako je za raspolaganje sredstvima zajednički ovlašćeno nekoliko država članica (npr. *European Stability Mechanism* – ESM). Sredstva koja se dobijaju od Unije (tzv. strukturnih fondova), Evropske investicione banke, Evropskog investicionog fonda ili međunarodnih finansijskih institucija, smatraju se državnim sredstvima ako nacionalna tela imaju diskreciono ovlašćenje da odlučuju o usmeravanju tih sredstava, a posebno o odabiru korisnika. U suprotnom, ova sredstva se ne smatraju državnim.

No čak i kad se ekonomska korist ostvaruje državnim sredstvima, da bi se takva vrsta finansijske podrške smatrala državnom pomoći neophodno je da bude pripisiva državi. Ekonomska korist je uvek pripisiva državi kad je dodeljuje organ državne vlasti, čak i kad se radi o samostalnom pravnom licu. Isto važi i

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[26] Obaveštenje, tač. 68. U pitanju su presude: C-241/94 od 26. septembra 1996, Francuska protiv Komisije, C-5/01 od 12. decembra 2002, Belgija protiv Komisije i T 565/08 *Corsica Ferries France SAS v. Commisssion*.

[27] Mere usvojene od strane decentralizovanih, federalnih, regionalnih ili drugih javnopravnih subjekata nižih nivoa državne organizacije tretiraju se jednako kao mere savezne ili centralne vlasti (C. Panayi, State Aid and Tax: the Third Way?, *International Tax Review* br. 6-7/ 2004, str. 291) bez obzira na stepen autonomije.

[28] Kada bivaju podvrgnuta kontroli javne vlasti pre prenosa korisnicima i u slučaju subvencija finansiranih parafiskalnim naknadama ili obaveznim doprinosima koje je uvela država i kojima se upravlja u skladu sa državnim propisima.

kada organ državne vlasti ekonomsku korist dodeljuje posredstvom nekog drugog privatno- ili javno-pravnog subjekta. Što se tiče javnih preduzeća, činjenica da pomoć dodeljuje javno preduzeće nije sama po sebi dovoljna da bi se smatralo da je mera pripisiva državi. U slučajevima javnih preduzeća, pripisivost prenosa državi utvrđuje se na osnovu sledećih činjenica: da li je javno preduzeće moglo doneti spornu odluku bez zahteva organa državne vlasti, kakva je organizaciona povezanost javnog preduzeća i organa državne vlasti, da li je javno preduzeće postupalo po opštim pravnim aktima, koliki je stepen integrisanosti javnog preduzeća u sistem javne uprave, kakva je priroda delatnosti javnog preduzeća, kakav je pravni status javnog preduzeća (podleže li javnom pravu ili pravu privrednih društava), koliki je stepen nadzora koji vrše organi javne vlasti i dr.

Ekonomska korist se ne smatra pripisivom državi ako je država članica morala predvideti poresko oslobođenje ili nižu poresku stopu kako bi postupila u skladu sa direktivama i drugim izvorima prava Evropske unije.[29]

3.3. Selektivnost

Državna pomoć je zabranjena samo onda kada je selektivna, a selektivna je kada se dodeljuje samo nekim preduzećima ili za proizvodnju samo nekih roba. To što je tih preduzeća mnogo, što čine čitavu privrednu granu ili više njih, ne čini državnu meru opštom. Meru dodele državne pomoći ne čini opštom ni to što je mera (npr. oslobođenje od plaćanja akcize na dizel za grejanje staklenika) namenjena neodređenom broju neidentifikovanih preduzeća kojima će se dodeljivati po unapred objektivno određenim kriterijumima, ako nije jednako dostupna svim preduzećima u državi. S druge strane, činjenica da nisu svi ostvarili ekonomsku korist ili barem ne u jednakoj meri, ne čini ekonomski podsticaj, koji je efektivno dostupan svima, selektivnim. No i kad mera ekonomskog podsticaja objektivno jeste opšta, propisivanje diskrecionih ovlašćenja organa uprave u njenom izvršenju čini je selektivnom.[30] Smatra se da

[29] R. Luja, Defining the Scope of State Aid: How Tax Cases affect the State Aid Framework, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470462* (02.06.2017), str. 5. Pomenuti autor se poziva na sledeće slučajeve: T-351/02 *Deutsche Bahn* [2006] ECR II-1047, tač. 102 – oslobađanje od plaćanja akciza na gorivo za komercijalne letove i C-460/07 *Puffer* [2009] ECR I-3251, tač. 69-71 – povraćaj PDV-a.

[30] "Čak i očigledno univerzalno pravilo može biti selektivno ako postoji diskrecija u njegovoj primeni." (C. Panayi, State Aid and Tax: the Third Way?, *International Tax Review* br. 6-7/ 2004, str. 291)

su diskreciona ovlašćenja naročito široko propisana onda kada ispunjenje kriterijuma za dobijanje koristi ne znači automatski i ostvarivanje prava. To su slučajevi kada su kriterijumi za dodelu pomoći propisani suviše apstraktno, pa nadležni organ odlučuje kome će dodeliti pomoć i u kom obimu. U slučaju diskrecionih ovlašćenja, opšta mera se smatra selektivnom samim tim što organi uprave ovakvim ovlašćenjima raspolažu, bez obzira da li su ih koristili u praksi ili ne.

Selektivnost može biti materijalna i regionalna, a materijalna selektivnost može biti individualna i granska.[31] Materijalna selektivnost može biti *de iure* i *de facto*. U slučaju *de facto* selektivnosti, uslovi i prepreke su u pravnom propisu tako određeni da ih realno mogu ostvariti odnosno prevazići samo neka preduzeća. Što se tiče regionalne selektivnosti ona je do sada u sudskoj praksi određena jedino u odnosu na poresku državnu pomoć. No pošto je regionalna selektivnost - selektivnost opšteg tipa, pravila koja se odnose na poresku državnu pomoć shodno se primenjuju i na druge vrste državne pomoći.[32]

3.4. Narušavanje konkurencije

"Pružanje finansijske podrške od strane države jednom preduzeću remeti konkurenciju između tog preduzeća i njegovih konkurenata koji takvu podršku nisu primili."[33] Da bi ovaj uslov bio ispunjen nije neophodno da je konkurencija stvarno narušena. Dovoljno je da postoji pretnja da će konkurencija biti narušena. Ova pretnja uvek postoji kada se u odnosu na konkurente tržišni položaj primaoca državne pomoći poboljšava. Tržišni položaj primaoca državne pomoći poboljšava se ne samo onda kada ovaj stekne ili proširi tržišni udeo, već i kad mu

[31] U literaturi se navodi i selektivnost prema veličini preduzeća (*size-related selectivity* – R. Luja, *Tax Related Difficulties of State Aid Rules*, Discussion Paper European Association of Tax Law Professors, Helsinki 2007 Conference, *http://ssrn.com/abstract=1081568* (02.06.2017), str. 3.

[32] Regionalna selektivnost ne postoji ako je poreska nadležnost u državi tako podeljena da organi vlasti uže teritorijalne jedinice po zakonu imaju potpunu autonomiju u propisivanju visine poreske stope na toj teritoriji, nezavisno od središnje državne uprave. Međutim, u slučaju da je podela poreske nadležnosti asimetrična potrebno je utvrditi da li je uža teritorijalna jedinica dovoljno autonomna u odnosu na centralnu vlast. U tom smislu, da se državna pomoć ne bi smatrala regionalno selektivnom, neophodno je da su kumulativno ispunjeni uslovi institucionalne, proceduralne i privredne i finansijske autonomije datog regiona.

[33] D. Popović, G. Ilić-Popov, O pojmu poreske državne pomoći u pravu Evropske unije i uticaju na srpsko pravo, *Strani pravni život* br. 2/2015, str. 27.

državna pomoć služi da zadrži tržišnu poziciju koju bez državne pomoći ne bi mogao zadržati.

Za razliku od definicije restriktivnih sporazuma, definicija zabranjene državne pomoći ne sadrži kao uslov da povreda konkurencije bude znatna.[34]

Verovatnoća narušavanja konkurencije ne može biti samo hipotetička.

Posebna pravila važe za slučaj pružanja usluga od strane preduzeća koje uživa zakonski monopol. Zakonski monopol postoji kada je pružanje usluge zakonom ili podzakonskim opštim aktom rezervisano za imenovano preduzeće, pri čemu je svim drugim privrednim subjektima zabranjeno pružanje takvih usluga (čak ni za zadovoljavanje preostale potražnje).[35] Dakle, u slučaju poveravanja pružanja usluga preduzeću koje uživa zakonski monopol, smatra se da konkurencija nije narušena ako su kumulativno ispunjeni sledeći uslovi:

- pružanje usluge podleže zakonskom monopolu utvrđenom u skladu sa zakonodavstvom Evropske unije,
- zakonskim monopolom je isključena konkurencija ne samo na tržištu nego i za tržište, što znači da se njime isključuje mogućnost da se neko takmiči za poziciju isključivog pružaoca usluge,
- uslugom se ne konkuriše drugim uslugama i
- isključeno je unakrsno subvencionisanje troškova – ako je preduzeće koje pruža ove usluge aktivno na drugom tržištu, bilo geografskom, bilo tržištu proizvoda.[36]

3.5. Učinak na trgovinu između zemalja članica Evropske unije

Slično kao i u slučaju narušavanja konkurencije, nije neophodno utvrditi kakav je učinak državne pomoći na trgovinu između država članica EU, već samo može li se državnom pomoći uticati na tu trgovinu. Ova mogućnost postoji kada se zbog

[34] Obaveštenje, tač. 189. Isto važi i za učinak na trgovinu između zemalja članica Evropske unije. Naime prema tački 192 Obaveštenja: "relativno mali iznos pomoći ili relativno mala veličina preduzeća primaoca pomoći nisu sami po sebi razlog za isključenje uticaja na trgovinu među državama članicama".

[35] Činjenica da je pružanje usluge povereno samo jednom privrednom subjektu ne znači da taj privredni subjekat uživa zakonski monopol.

[36] Da bi se to postiglo zahteva se korišćenje odvojenih računa, pravilno raspoređivanje troškova i prihoda, te staranje da se javno finansiranje u vezi sa pružanjem usluga podvrgnutih zakonskom monopolu ne upotrebljava u korist drugih aktivnosti.

pomoći koju je država članica dodelila preduzeću njegov tržišni položaj poboljšava u odnosu na konkurente u trgovini unutar Evropske unije.[37] Pri tome nije neophodno da je primalac državne pomoći učesnik prekogranične trgovine.[38] Time što je njegov tržišni položaj ojačan, ulazak na to tržište konkurentima iz drugih država članica biće otežan. Čak i državna pomoć za obavljanje usluga regionalnog ili lokalnog karaktera može uticati na trgovinu između država članica ako te usluge efektivno, dakle ne samo hipotetički, mogu obavljati privredni subjekti sa sedištem u drugim državama članicama.[39] Slično tome, ni mali iznos pomoći, kao ni činjenica da je primalac pomoći malo preduzeće ne isključuju, sami po sebi, mogućnost uticaja na trgovinu između država članica.[40] Konačno, učinak na trgovinu između država članica moguć je i onda kada primalac državne pomoći celokupnu proizvodnju ili njen veći deo izvozi izvan Unije.[41]

Iako učinak na trgovinu između država članica ne može da bude hipotetički, radi njegovog utvrđenja nije neophodno definisati relevantno tržište i detaljno istražiti uticaj mere na konkurentski položaj korisnika državne pomoći i njegovih konkurenata.

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[37] Ovo ukazuje na blisku povezanost prethodnog i ovog uslova zbog kojeg se u sudskoj praksi njihovo postojanje često zajedno ispituje.

[38] Joined cases C-393/04 and C-41/05 *Air Liquide Industries Belgium SA v. Ville de Seraing and Province de Liege* [2006] ECR I-05293, tač. 35.

[39] Komisija je lokalni karakter državne pomoći bez uticaja na trgovinu između država članica utvrdila u slučajevima državne podrške: objektima za sport i slobodne aktivnosti poput bazena ili teretana, događajima i institucijama (kao što su npr. muzeji) iz oblasti kulture, bolnicama i drugim objektima, informativnim medijima, kongresnom centru, platformi za razmenu informacija i umrežavanje za direktno rešavanje problema nezaposlenosti i društvenih konflikata, malim aerodromima i žičarama. U svakom od ovih slučajeva je ispunjen uslov prema kojem je zadovoljavanje potreba ograničeno na lokalno stanovništvo, bez mogućnosti privlačenja korisnika usluga ili posetilaca iz drugih zemalja članica Evropske unije.

[40] *Air Liquide Industries Belgium SA*, tač. 36.

[41] D. Popović, G. Ilić-Popov, *op. cit.*, str. 38.

4. Porez kao integralni deo državne pomoći

Državna pomoć je načelno zabranjena bez obzira na oblik u kojem se dodeljuje.[42] Obično su subvencije prva asocijacija na državnu pomoć, ali to mogu biti i povoljni krediti, beskamatni zajmovi, garancije i dr. Međutim, iako je direktno finansiranje preduzeća dokazano efikasno, ono je previše grubo i očigledno sredstvo državne pomoći, pa su države članice pažnju usmerile na elegantnije vidove državne pomoći odnosno "negativne" koristi kao što su: poreski podsticaji, oprost dugova i dr. No bez obzira na oblik u kojem se pomoć daje, bio on aktivan ili pasivan, ako se državna pomoć definiše kao ekonomska podrška data iz državnih izvora pojedinim privrednim granama, preduzećima ili regionima, porez se u koncept državne pomoći nekako ne uklapa. Porez smo definisali kao novčano davanje državi, a državnu pomoć kao finansijsku pomoć koju država daje bilo transferišući sredstva preduzeću, bilo lišavajući se prihoda. Porezi i državna pomoć su jednostavno suprotnih usmerenja, pa naplata poreza, po pravilu, ne može predstavljati državnu pomoć. Ipak, izuzetno, zakonitost poreza može biti uslovljena zakonitošću državne pomoći.

4.1. Slučaj *Streekgewest*

Slučaj *Streekgewest*[43] je povezan sa propustima u procesu notifikacije nove državne pomoći. Naime, Holandija je 1992. godine započela proceduru usvajanja Zakona o porezu radi zaštite životne sredine, pa je o tom Zakonu obavestila Komisiju, koja je 25. novembra iste godine odgovorila holandskoj vladi da nema primedaba na tekst Zakona. Zakon je usvojen, ali u izmenjenom obliku o čemu je holandska vlada obavestila Komisiju decembra meseca 1993. godine. Komisija 29. marta 1994. godine donosi odluku da su izmene u skladu sa komunitarnim pravom kontrole državne pomoći. Sledeća izmena Zakona dostavljena je poslanicima 13. oktobra 1994. godine. Njome su predviđene jedna stalna i dve privremene izmene. Ovim izmenama je iznos poreza uvećan sa 28,50 na 29,20 guldena po toni smeća uz mogućnost povraćaja poreza za pulpu od stare hartije ispranu od mastila i otpad od reciklirane plastike. Komisija je o izmenama, tj. tzv. doterivanjima Zakona obaveštena 27. oktobra 1994. godine. Komisija 25. novembra 2014. godine zahteva dopunu i pojašnjenje notifikacije, što holandska

[42] T. Kaye, The Gentle Art of Corporate Seduction: Tax Incentives in the United States and the European Union, *Kansas Law Review* vol. 57/2008 (*http://ssrn.com/abstract=1314440*, 25.01.2017), str. 101.

[43] C-174/02 *Streekgewest Westelijk Noord-Brabant v. Staatssecretaris van Financien* [2005] ECR I-00085.

vlada čini 20. decembra 1994. dodajući da se izmenama Zakona uvodi i privremeno oslobođenje od plaćanja poreza na iskopanu jalovinu (*dredging spoil*) koju je moguće prečistiti (*purifiable*). Pre no što se Komisija izjasnila o izmenama Zakona one su usvojene 21. decembra 1994, da bi 1. januara 1995. stupile na snagu. Komisija 25. januara 1995. godine obaveštava holandsku vladu da uvedene mere smatra nezakonitim, da bi u pismu od 3. jula 1995. godine izrazila mišljenje kako su izmene kompatibilne sa unutrašnjim tržištem. To praktično znači da su se izmene zakona sve do leta 1995. smatrale nezakonitim i kao takve bez pravnog dejstva. Upravo u ovom periodu međuopštinsko telo za odnošenje i reciklažu otpada *Streekgewest* uplatilo je na ime poreza na smeće skoro pola miliona guldena. Smatrajući da je obaveza zbog povrede tada čl. 93(3) Ugovora o Evropskoj Zajednici (sada 108(3) UFEU) nepostojeća, *Streekgewest* je zatražio povraćaj uplaćenog poreza. Poreski inspektor je zahev odbio. *Streekgewest* je podneo žalbu Okružnom apelacionom sudu koji je zahtev delimično uvažio dodeljujući podnosiocu žalbe na ime refundacije oko osamdeset hiljada guldena. Na tu odluku Vrhovnom sudu Holandije žalbu podnose i državni sekretar (*Staatssecretaris*) za finansije i *Streekgewest*. Vrhovni sud zastaje sa postupkom i upućuje Sudu pravde Evropske unije prethodno pitanje. Postavljeno je ukupno šest pitanja. Drugo i treće (najznačajnija za predmet našeg istraživanja) tiču se okolnosti u kojima postoji dovoljna povezanost između poreza i državne pomoći (a koja se pomoć sastoji od oslobođenja od plaćanja poreza), naročito imajući u vidu da je povećanje poreza izvršeno kako bi se nadoknadilo smanjenje javnih prihoda usled poreskog oslobođenja. Sud pravde Evropske unije odgovorio je da se na poreze pravila o kontroli državne pomoći ne primenjuju osim kada su ovi integralni deo predmetne mere.[44] Porezi se smatraju integralnim delom mere državne pomoći onda kada između poreza i mere državne pomoći postoji nužna namenska veza (*hypothecation*). Nužna namenska veza postoji onda kada se mera državne pomoći finansira iz prihoda ostvarenih naplatom poreza, pri čemu iznos državne pomoći direktno zavisi od visine prihoda ostvarenog naplatom poreza.[45] Osvrnuvši se na konkretan slučaj Sud je zaključio da Zakon, prvo, ne sadrži odredbu o tome da je porez namenjen finansiranju poreskih oslobođenja i drugo, da primena i obim poreskog oslobođenja ne zavise od ostvarenih prihoda po osnovu predmetnog poreza.[46]

[44] *Ibid*., tač. 25.

[45] *Ibid*., tač. 26.

[46] *Ibid*., tač. 28.

4.2. Slučaj *Casino France and others*

U slučaju *Casino France and others*[47] posebnim zakonom je 1972. godine uveden porez (*Taxe d'aide au commerce et a l'artisant* – TACA) radi finansiranja specijalne kompenzatorne pomoći koja se isplaćivala samozaposlenim trgovcima i zanatlijama. Obveznici poreza su bili trgovci na malo s površinom prodajnog prostora od preko 400m^2 i godišnjim prometom od preko 460.000 evra. Porez se nije uplaćivao u budžet, već ga je prikupljao Nezavisni nacionalni fond za osiguranje starijih preduzetnika u proizvodnim i trgovačkim delatnostima (tzv. *Organic*).

Od 1981. godine sredstva prikupljena po osnovu ovog poreza namenjena su isplati otpremnina trgovcima i zanatlijama koji su najmanje 15 godina bili osigurani po programu osiguranja starijih samozaposlenih lica, koji su stariji od 60 godina i trajno prestaju sa obavljanjem delatnosti. Iznos otpremnine je na osnovu Uredbe iz 1982. godine određivao lokalni komitet uzimajući u obzir sve relevantne faktore koji su od značaja za procenu imovnog stanja svakog pojedinog osiguranika. Pri određivanju visine otpremnine, lokalni komitet nije bio potpuno slobodan, već se morao kretati u okviru granica propisanih Uredbom iz 1996. godine (izmenjenom radi konverzije franaka u evre 2001. godine) i to za gazdinstva od 3.140 do 18.820 evra, a za pojedince od 2.020 do 12.100 evra.

Pošto je *TACA* vremenom postao vrlo izdašan usled razvoja trgovine na malo u Francuskoj, višak prihoda je usmeravan u: 1. osnovne programe penzijskog i invalidskog osiguranja preduzetnika u zanatstvu i trgovini (čime je rukovodio *National Old Age Insurance Fund for Craftsmen* - Cancava), 2. Interventni fond za podršku zanatstvu i trgovini (Fisac) i 3. Trgovinski fond distributera goriva (CPDC).

Pravni postupci u ovoj pravnoj stvari počinju 2001. godine kada svaki od tužilaca ponaosob podnosi tužbu protiv *Organic*-a zahtevajući od Tribunala za socijalno osiguranje u Sent Etjenu povraćaj novca uplaćenog po osnovu *TACA* tokom 1999. i 2000. godine. Tužbu su zasnivali na tvrdnji da *TACA* predstavlja nezakonitu

[47] Joined cases C-266/04 to C-270/04, C-276/04 and C-321/4 to C325/04 *Distribution Casino France SAS (formerly Nazairdis SAS), Jaceli SA, Komogo SA, Tout pour la maison SARL, Bricorama France SAS, Societe Casino France, Dechrist Holding SA v. Caise nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salarie des professions industrielles et commerciales (Organic)* [2005] ECR I-09481.

državnu pomoć jer je uveden protivno čl. 88(3) Ugovora o Evropskoj zajednici (sada 108(3) UFEU). Tribunal 2003. godine odbija tužbene zahteve i tužioci se žale Apelacionom sudu u Lionu. Apelacioni sud u Lionu odlučuje da zastane sa postupkom radi obraćanja Sudu pravde Evropske unije. Kao i u slučaju *Streekgewest*, Sud pravde Evropske unije, u odgovoru na prethodno pitanje, ponavlja da porezi ne potpadaju pod primenu prava kontrole državne pomoći sem u slučajevima kada predstavljaju metod finansiranja državne pomoći na takav način da postaju njen integralni deo.[48] Ako je porez integralni deo državne pomoći onda bi pravna posledica nezakonitosti državne pomoći bila nezakonitost poreza kao metoda njenog finansiranja. U konkretnom slučaju Sud pravde Evropske unije razmatrao je da li je *TACA* nezakonit imajući u vidu selektivnost po pitanju poreskih obveznika i selektivnost po pitanju korisnika državne pomoći. Što se tiče selektivnosti po pitanju obveznika poreza, tužioci su isticali da su plaćanja poreza protivzakonito oslobođeni mali trgovci na malo. Sud je odgovorio da posebna povezanost poreza i mere državne pomoći postoji onda kada su prihodi od poreza namenjeni finansiranju mere državne pomoći, što nije ni u kakvoj vezi sa selektivnim određenjem poreskih obveznika. Pošto se oslobođenje od plaćanja poreza ne finansira sredstvima prikupljenim plaćanjem tog istog poreza, *TACA* nije po tom osnovu integralni deo državne pomoći.

Što se tiče namene *TACA*, Sud je istakao da se *TACA* može smatrati integralnim delom mere državne pomoći jedino onda kada bi visina državne pomoći zavisila od visine naplaćenih prihoda po osnovu tog poreza. Međutim, u konkretnom slučaju visina otpremnina se određuje primenom diskrecionih ovlašćenja nadležnog subjekta javne vlasti u propisanim okvirima. Pomoć bi bila zabranjena ako bi se povećavala srazmerno povećanju prihoda od dažbine. U ovom slučaju takva povezanost ne postoji. Zbog odsustva suštinske povezanosti poreza i isplate otpremnina, zaključeno je da se eventualna nezakonitost isplate otpremnina ne odražava na nezakonitost poreza.[49]

[48] *Casino France and others*, tač. 34.

[49] U ovom slučaju je pravno relevantna i činjenica da *Organic* kao javnopravni subjekt deluje u oblasti socijalnog osiguranja po principima solidarnosti pa se ne može podvesti pod čl. 107(1) UFEU.

5. Zaključak

Posledica državne pomoći je umanjenje budžeta, a posledica naplate poreza njegovo uvećanje, pa se porez, po pravilu, ne smatra državnom pomoći. Izuzetno, porez će biti podveden pod primenu pravila o kontroli državne pomoći ako čini njen integralni deo. Da bi porez bio integralni deo državne pomoći, neophodno je da su kumulativno ispunjena dva uslova. Prvo, prihodi od poreza moraju na osnovu pravnog propisa (*under the relevant national rules*) biti namenjeni finansiranju državne pomoći. I drugo, visina i obim državne pomoći moraju biti zavisni od visine prihoda ostvarenog naplatom poreza. Tek u tom slučaju se nezakonitost državne pomoći može odražavati na nezakonitost poreza kao metoda njenog finansiranja.

The Tax as an Integral Part of State Aid in the European Union Competition Law

Summary

State aid is any economic benefit that undertaking receives directly or indirectly through State resources in the absence of normal market conditions. As opposed, taxes are public revenues. Since they are not public but business costs, according to ECJ judgment in Streekgewest case, taxes regularly do not fall under European Union State aid Law provisions. Only exceptionally taxes might be the subject of State Aid scrutiny if they form an integral part of a State aid measure. A tax form an integral part of State aid measure if it is hypothecated to the State aid measure under the relevant national rules. A tax is hypothecated to the State aid measure if both tax constitutes the method of State aid financing and the amount of revenue levied from the tax has a direct impact on the amount of the aid.

Keywords: tax, state aid, European Union, Competition Law, case law.

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PRILOZI - CONTRIBUTIONS

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THE MANDATORY TRANSPARENCY REGISTER INITIATIVE – TOWARDS A BETTER GOVERNANCE OF LOBBYING IN THE EU?

Abstract

Lobbying practice is undoubtedly an important part of the decision-making process in the EU and due to that multiple measures are taken in order to create the adequate legal framework to ensure transparency and accountability of the lobbyist's actions. In view of the author's intention of assessing the development of the rules governing lobbying as well as the prospects and challenges of the potential transfer to the mandatory register, the scope, disclosure levels and enforcement mechanisms of the lobbying rules introduced so far at the EU level will be compared and analyzed. Even though these rules gradually became more coherent, providing greater transparency and improving the EU lobbying framework, the voluntary character continued to be threat for full transparency and consequently accountability of non-registrants and because of this the newest initiative aims at mandatory registration of those trying to influence the

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EU institution and policy-making, including the Council for the first time. First challenge concerning the proposed measure, which is discussed, is the issue of the legal basis for legislation and in case of absence of such base, an inter-institutional agreement as a potential appropriate alternative will be examined. Finally, since the mandatory registration would have a significant impact on lobbyists, the content of the existing rules will probably require some adjustments potentially resulting in a narrower scope of the register, more detailed disclosure and stronger enforcement that could lead to a better governance of the EU lobbying, following the example of the USA federal framework.

K**eywords**: lobbying, transparency, register, regulation.

I Introduction

Lobbying is a dynamic phenomenon which is to the different extent part of every decision-making process[1] and recently has been object of many reforms, especially in Europe.[2] Since the lobbying significantly depends on political and institutional environment, the European Union due to its complexity constitutes a special ground for interest representation.[3] The integration process has created a unique decision-making procedure with a significant influence on the national legislation of MS.[4] This results in the vast number of lobbyists operating in Brussels. Statistically, the accurate estimation of lobbyists engaged in the EU policy-making and policy implementation is a challenge itself, nevertheless, according to the estimation of Corporate Europe Observatory there are around

[1] H. Hauser, European Union Lobbying Post-Lisbon: An Economic Analysis (2011) 29(2) *Berkeley Journal of International Law* 680, 682 <*http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1411&context=bjil*> accessed 24 February 2015.

[2] C. Holman and W. Luneburg, Lobbying and transparency: A comparative analysis of regulatory reform (2012) 1(1) *Interest Groups & Advocacy* 74, 77 <*http://www.palgrave-journals.com/iga/journal/v1/n1/full/iga20124a.html*> accessed 14 March 2015.

[3] J. Greenwood, *Interest representation in the European Union* (Palgrave Macmilian, Basingstoke, 2003) 29.

[4] M. A. Balosin, *The evolution of lobbying in the European Union - Is EU lobbying important for the European Public Space?* (Lambert Academic Publishing, Saarbrücken, 2013) 5; V. Miller, How much legislation comes from Europe? (*Research paper 10/62*, House of Commons Library, 2010) 1 <*http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP10-62*> accessed 2 August 2015.

30,000 lobbyists in Brussels, comprising a billion euros worth industry.[5] Simultaneously with the increase of lobbyists operating in the European capital, the EU institutions recognize the need for a regulatory framework in order to ensure transparency, public scrutiny and trust in policy-making. The control system in place at this moment is on a voluntary basis and due to that carries a risk of being disproportionate in comparison to the above-mentioned size and influence of the industry.

The main focus of this article will not be the "art of lobbying",[6] but the law of lobbying and gradual development of the regulation of interest representation towards greater transparency, openness and accountability as ultimate objectives and democratic standards of good administration that the EU itself has considered important for lobbying regulation.[7] The special attention will be devoted to the initiative for a mandatory Transparency Register, which has been already considered on the several occasions at the EU level but it is now finally put high on the political agenda. In order to come to the conclusion whether this step could positively affect EU lobbying framework, the starting point will be the brief presentation of the historical development of EU lobbying regulation. Furthermore, the current voluntary system will be discussed in comparison to envisioned rules in light of their scope, level of disclosure, incentives and sanctioning system in order to assess evolution of the lobbying framework and identify its potential shortcomings. Additionally, the legal issues regarding potential transfer to the mandatory regime and uniform rules for the lobbyists who intend to influence the EU institutions, in particular European Commission (hereinafter: COM), European Parliament (hereinafter: EP) and the Council will be analyzed. Namely, the issue of legal basis, the potential and envisioned scope and content of mandatory framework will be examined with the special consideration of USA federal lobbying rules. Firstly, in order to properly understand the legal issues, the philosophy behind lobbying practice will be explained to the extent necessary.

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[5] I. Traynor, 30,000 lobbyists and counting: is Brussels under corporate sway? *The Guardian* (London, 8 May 2015) <*http://www.theguardian.com/world/2014/may/08/lobbyists-european-parliament-brussels-corporate*> accessed 10 December 2014.

[6] R. Van Schendelen, *The art of lobbying the EU: more Machiavelli in Brussels* (Amsterdam University Press, Amsterdam, 2013).

[7] European Parliament Legal Service, "Re: Possibility and modalities of mandatory registration of lobbyists" (Legal opinion) SJ-0662\13, 5 November 2013, (on file with author) [34].

The methodology of this article is primarily a legal analysis of relevant rules on the basis of the previous EU experience, various empirical researches conducted by different authors and examples of the good practices. However, due to the fact that lobbying requires the interdisciplinary approach since it combines legal and political aspects, political science literature on lobbying practice will be consulted. Additionally, in order to examine and recommend potential directions of development of the lobbying rules at the EU level, the comparative method will be applied in close relation to the USA federal system.

II Lobbying – a Sophisticated Game?

In order to understand the legal issues of lobbying regulation and monitoring, in the first place it is important to determine what is lobbying and how it is conducted along the policy cycle.[8] Defining the notion of lobbying is generally a complex issue and sometimes even controversial since there is a high diversity of actors and methods, making the task of creating one universal definition a challenge itself. Considering that there are many available theoretical definitions, only as a starting point in this article, lobbying will be defined as "an attempted or successful influencing of legislative-administrative decisions made by public authorities through the use of interested representatives".[9] Even though this definition is complementary to the legal definition used by the EU, it should be noted that legal definitions, differ considerably and should be custom-made since they are influenced by factors such as a particular political system and the aim of concerned regulation.[10]

The aim of the article is not the estimation of the pros and cons of lobbying as a phenomenon or its justification, instead the interest representation will be assessed legally as already existing practice. However, in order to understand how interest representation at the EU level works, especially since lobbying the

[8] D. Coen, Business lobbying in the European Union, in D. Coen and J. Richardson (eds.), *Lobbying the European Union: Institutions, actors, and issues* (Oxford University Press, Oxford, 2009) 146.

[9] Hauser (n 1) 682.

[10] M. Sady, The Legal Determinants of Lobbying in the United States and European Union (2012) 1(11) *Cracow University of Economics Discussion Papers*, 3, 14 <*http://uek.krakow.pl/files/common/dwm/stair-discussion-papers/CUEDP_011_SADY.pdf*> accessed 7 August 2015.

EU is a "moving target",[11] the different approaches to the main legislative EU institutions will be briefly explained.

1. Lobbying the European Commission

The COM became the primary target after the Single European Act (hereinafter: SEA)[12] due to its central role in policy initiation, formulation and implementation as well as its multiple access points.[13] Another very important incentive for lobbyist to follow this path is the fact that COM is "known to be approachable", partly because of its obligation to carry out broad consultations according to the Article 11 (3) TEU.[14] On the other hand, the COM's limited human and financial resources, which can be relatively disproportionate to its responsibilities in some policy areas,[15] can benefit from communication with entities which are able to provide technical policy input and details on feasibility.[16] The typical way in which contact and communication is performed *vis-à-vis* the COM are participation in the consultative committees, expert groups, issue-related events, direct lobbying through written communication and policy documents, informal meeting and phone calls.[17]

2. Lobbying the European Parliament

The lobbying activities towards the EP increased in 1979 with the first direct elections of the representatives and even more after the introduction of the co-decision procedure, elevating the EP to the same level as the Council.[18] Channels

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[11] The Brussels office s.a, Lobbying the EU – a practical guide to EU decision-making (Brussels, 2009) 30.

[12] eLabEurope - HEC-NYU Regulatory Policy Clinic, *The EU Transparency Register in 2014 and beyond* (Policy Report, 2014) 2 <*http://elabeurope.eu/transparency-register-review/*> accessed 25 Jun 2015.

[13] N. Nugent, *The Government and Politics of the European Union* (7th edn., Palgrave Macmillan, Basingstoke, 2010, 250.

[14] *Ibid*.

[15] K. Joos, *Lobbying in the new Europe, Successful representation of interests after the Treaty of Lisbon* (WILEY-VCH, Weinheim, 2011) 102; The Brussels office s.a, (n 11) 40; Greenwood (n 3) 180.

[16] Greenwood (n 3) 46; W. Chalmers, Trading information for access: informational lobbying strategies and interest group access to the European Union (2012) 20(1) *Journal of European Policy* 39, 49; S. Mazey and J. Richardson, Effective business lobbying in Brussels (1993) 5(4) *European Business Journal* 14, 16.

[17] Nugent (n 13) 250.

[18] Joos, (n 15) 109.

of interest communications focus mostly on MEPs, in particular, the rapporteur and shadow rapporteur, but also on members of relevant committees, political parties and intergroups. Other available routes include administrative staff and assistants, the secretariats of political groups or the EP's research services.[19] In the process of lobbying the EP as a directly elected institution, information about compressing public opinion and social impacts are frequently added,[20] linking the specific issue with wider public good via broader social or economic alliances.[21]

3. Lobbying the Council

The impression is that the Council receives less attention from lobbyists despite its crucial role in legislative procedure since it leaves little room for a direct approach.[22] It owns its reputation of the least accessible EU institution to several organisational reasons such as confidentiality of meetings, variety of configurations and lack of willingness or hesitation to make itself available for regulated or intensive interest representation.[23] However, the Council as the "guardian of national interests"[24] could be accessed through national routes via bottom-up process more easily.[25] However, there are still relevant entry points for interest representation including the Committee of Permanent Representatives of the Member States (hereinafter: COREPER), Ministers and civil servants, the Secretariat and the Presidency.[26]

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[19] W. Lehmann, The European Parliament, in D. Coen and J. Richardson (eds.), *Lobbying the European Union: Institutions, actors, and issues* (Oxford University Press, Oxford, 2009) 52; The Brussels office s.a (n 11) 48-54.

[20] D. Coen and J. Richardson, Learning to lobby the European Union: 20 years of change in D. Coen and J. Richardson (eds.), *Lobbying the European Union: Institutions, actors, and issues* (Oxford University Press, Oxford, 2009) 9; Greenwood (n 3) 46; Chalmers (n 16) 49.

[21] Coen and Richardson (n 20) 10.

[22] Nugent (n 13) 249.

[23] *Ibid*.; Mazey and Richardson, (n 16) 17.

[24] The Brussels office s.a (n 11) 50.

[25] Joos (n 15) 99.

[26] The Brussels office s.a (n 11) 61.

4. The Significance of Lobbying Diversity for its Regulation

Overall, it can be concluded from this brief presentation that the supply of the information to the decision-makers is a legitimate instrument. However, lobbying in practice depends on many factors, for example: issue at stake, national or European perspective, access point, procedural phase, size of the lobbyist, resources and ability to produce adequate information.[27] Legally, on the other hand, the above-mentioned specificities and variables are important elements when it comes to the determination of the directions of lobbying regulation. Namely, different organisational structure of the EU institutions, level of the openness and general attitude towards external inputs and their different role in decision-making should be reflected through regulation making at the same time the adoption of the uniform rules at the EU level and their implementation a challenge which keeps reoccurring through the process of development of the EU rules, as it will be pointed out in this article.

III The EU Entered the Lobby of Lobbying Regulation Palace

1. Why Regulate?

The lobbying regulation aims at building trust in the policy-making, ensuring level-playing field and accuracy of the provided information on the mutual benefit, giving citizens the possibility to know about lobbyists' interactions with the decision-makers.[28] In that the respect, when it comes to the legitimacy of lobbying and its role in decision-making, the central normative issues are transparency and accountability.[29]

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[27] H. Klüver, Informational Lobbying in the European Union: The Effects of Organizational Characteristics (2012) 23(3) *West European Politics* 491, 502; P. Bouwen, A Comparative Study of Business Lobbying in the European Parliament, the European Commission and the Council of Ministers *(MPIFG Discussion Paper* 02/7, 2007) 10-11 <*http://www.mpifg.de/pu/mpifg_dp/dp02-7.pdf*> accessed 4 February 2015.

[28] V. R Johnson, Regulating Lobbying: Law, Ethics, and Public policy (2006) 16(1) *Cornell Journal of Law and Public Policy* 1, 13-16 <*http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1103&context=cjlpp*> accessed 4 August 2015.

[29] S. Smismans, Regulating Interest Groups Participation in the European Union: Changing Paradigms between Transparency and Representation (2014) 39(4) *European Law Review* 470, 472.

However, the question whether the particular regulation will indeed produce desired effects in practice can be answered definitely once it is enforced. Nonetheless, there are certain empirically confirmed advantages of the regulatory approach to lobbying identified worldwide. Firstly, in the USA the major developments of the lobbying framework in the mid-70s and 90s were caused by scandals, which reinforced the theory that in this case transparency and accountability are ensured by strong lobbying legislation.[30] Additionally, the Council of Europe, which itself has an accreditation system, considers the regulation of lobbying as one way to combat potential negative impacts of lobbying, particularly the accountability and transparency concerns.[31] Furthermore, the OECD also underlined that "effective rules and guidelines for transparency and integrity in lobbying should be an integral part of the wider policy and regulatory framework that sets the standards for good public governance".[32]

On the other hand, the lobbying regulation might create an unnecessary administrative burden or a barrier for the citizens to approach their representatives.[33] From the economic point of view, lobbying regulation produces costs for lobbyists and public authorities in charge of implementation,[34] which is usually used as a justification not to introduce any rules or for a low-regulation.[35] Finally, the absence of lobbying regulation is also justified by the limited lobbying amount within the particular jurisdiction, sufficiency of lobbying self-regulation and by stakeholders' or political opposition.[36] The two former are no longer applicable at the EU level, due to the high concentration of lobbyists and the fact that idea of self-regulation was abounded as insufficient at

[30] R. Chari, J. Hogan and G. Murphy, *Regulating Lobbying: a global comparison* (Manchester University Press, Manchester, 2010) 113.

[31] European Commission for democracy through law (Venice Commission), "Report on Role of Extra-institutional Actors in Democratic Systems (Lobbying)" CDL-AD(2013)0119, 22 March 2013, 13.

[32] OECD, "Recommendation of the Council on Principles for Transparency and Integrity in Lobbying" C(2010)16, 18 February 2010, [7] <*http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=256&InstrumentPID=%20250*> accessed 25 March 2015.

[33] Chari, Hogan and Murphy (n 30) 144.

[34] *Ibid*. 130.

[35] Venice Commission, Report on Role of Extra-institutional Actors in Democratic Systems (n 31) 15.

[36] Chari, Hogan and Murphy (n 30) 139-140.

certain point. However, political support, especially from the Council, is a constant challenge.

All of this leads only to *a priori* conclusion that regulation of lobbying has the potential to enhance transparency and accountability. Nevertheless, there are examples of a slow start after the adoption of lobbying rules, even in some Member States (hereinafter: MS).[37]

2. History of the EU Lobbying Regulation

Even though interest groups have been part of the EU policy-making since the beginning of the integration, they relatively recently were structurally incorporated into the EU policy formulation.[38] However, the EP and COM had quite different approaches, adapted to their special roles in the decision-making.[39]

a) Lobbying Rules Introduced by the European Commission

The COM's effort started in 1992 with the Communication called "An Open and Structured Dialogue between the Commission and Special Interest Groups" which contained a non-binding list of minimum requirements for lobbyists' behavior that will become a leitmotif and foundation for all the subsequent rules.[40] The Communication strongly encouraged lobbyists to develop their own codes.[41]

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[37] J. Greenwood and J. Dreger, The Transparency Register: A European vanguard of strong lobby regulation? (2013) 2(2) *Interests Group & Advocacy* 139, 155.

[38] D. Obradovic, Good Governance Requirement Concerning the Participation of the Interest groups in EU Consultations, in D. Coen and J. Richardson (eds.), *Lobbying the European Union: Institutions, actors, and issues* (Oxford University Press, Oxford, 2009) 299; D. Obradovic and J. M Alonso Vizcaino, Good Governance Requirement Concerning the Participation of the Interest groups in EU Consultations (2006) 43 *Common Market Law Review* 1049, 1049.

[39] Greenwood (n 3) 72-73.

[40] Commission (EC), "An Open and Structured Dialogue between the Commission and Special Interest Groups" (Communication) SEC (92) 2272 final, 2 December 1992.

[41] E. Bony, Lobbying the EU: the search for the ground rules [1994] 3 *European Trends -Key Issues and Development for Business* 73, 76.

Later, at the beginning of 2000 the COM issued the Communication "European governance - A white paper" (hereinafter: EGWP)[42] and in the implementation phase of the EGWP, the COM through the Communication[43] formalised consultations with civil groups by adopting minimum standards including clear and concise communication, inclusion of all relevant parties, the awareness-raising publicity and adequate communication channels, sufficient time for planning and replies, acknowledgment of receipt of contribution and the publication of consultation results on the website.[44] Furthermore, the COM upgraded its existing database of interest groups by establishing an optional register named "the Consultation, the European Commission and Civil Society".[45]

Additionally, these non-binding rules were complemented with the self-regulation in order to ensure the effectiveness without discouraging engagement of external interests.[46] This resulted in two voluntary codes of conducts administrated by Society of European Affairs Professionals (SEAP) and European Public Consultancies Association (ESPAC) which were similar in character and scope.[47] In principle, these suffered from serious shortcomings, since none of these covered the majority of active lobbyists in Brussels, leaving under the radar players such as in-house lobbyists or those occasionally engaging in lobbying activities, especially law firms and think-tanks,[48] nor they addressed the issue of transparency towards general public[49] or established complaint mechanisms.[50]

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[42] Commission (EC), "European governance - A white paper" (Communication) COM(2001) 428 final, 25 July 2001, 1-2.

[43] Commission (EC), "Towards a reinforced culture of consultation and dialogue: General Principles and minimum standards for consultation of interested parties by the Commission" (Communication) COM (202)704 final, 11 December 2002.

[44] Obradovic and Alonso Vizcaino (n 38) 1049, 1055.

[45] Greenwood (n 3) 72.

[46] *Ibid*. 70.

[47] *Ibid*.

[48] *Ibid*.

[49] Obradovic and Alonso Vizcaino (n 38) 1068.

[50] Greenwood (n 3) 70.

b) Lobbying Rules Introduced by the European Parliament

The first serious attempt of the EP to regulate lobbying was in 1991,[51] but it was unsuccessful since the consensus could not be reached on the matter of definition of interest groups and discloser of financial interests, thus, along with the pressure of the following EP elections, the proposal was not even discussed at the plenary.[52] The second attempt in 1997 was more successful. The rapporteur Glyn Ford proposed as a solution in his report to simply avoid the above-mentioned definitional conflicts.[53] The lobbyists were described as "private, public or non-governmental bodies which can provide parliament with the knowledge and specific expertise in numerous economic, social, environmental and scientific areas" without mentioning their aim to influence the outcome of decision-making process or trying to clearly define who could be targeted by lobbying activity.[54] The EP's Rules of Procedure were amended in order to grant interest representatives a one-year pass in exchange for the acceptance of a ten-point code of conduct and registration making the EP the first EU institution which established an accreditation system in order to promote professional lobbying.[55] Even though this system was, legally speaking, also voluntary, in its effects it was often characterized by the EP as a *de facto* obligatory system.[56] Practically, this would be the case only when lobbyists wanted to have physical access to the EP's buildings, on the contrary, this did not prevent persons who are not registered to accede to MEPs or other officials outside the EP's premises or on case by case basis.[57]

Regarding the content of the above-mentioned rules, the Register of Accredited Lobbyists provided public alphabetical list of names of badge-holders as individuals and organisations they represent without further distinction of

[51] European Parliament, "Lobbying in the European Union: current rules and practices" (2003) Working Paper AFCO 104 EN, 36<*http://www.europarl.europa.eu/RegData/etudes/etudes/join/2003/329438/DG-4-AFCO_ET(2003)329438_EN.pdf*> accessed 15 May 2015.

[52] *Ibid*. 37.

[53] *Ibid*. 37.

[54] Chari, Hogan and Murphy (n 30) 52.

[55] European Parliament, Lobbying in the European Union: current rules and practices (n 51) 37.

[56] European Parliament Legal service, "Possibility and modalities of mandatory register of lobbyists" (Legal Opinion) SJ-0012\10, 25 March 2010, (on the file with the author) [7].

[57] *Ibid*.

different groups of lobbyists, detail about objectives, clients and financial information.[58] The EP's Code of conduct imposed several duties for lobbyists, namely, stating the represented interest, refraining from obtaining information dishonestly and claiming any formal relation with the EP in any dealing with third parties or circulating for profit copies of documents obtained from the EP to third parties as well as respecting internal rules, especially Staff Regulation when recruiting former MEPs.[59]

3. The European Transparency Initiative

Overall, the explained initial phase was itself a development and as an adaptation period, its main contribution was a preparation of lobbyists for the gradual introduction of more systematic rules.

The milestone of lobbying regulation was the European Transparency Initiative (hereinafter: ETI), launched on 5 November 2005. The COM's Vice-president, Siim Kallas during the announcement of the ETI highlighted the influence of the apparently 15,000 lobbyists in Brussels underlining that the problem was not the lobbying itself but the lack of adequate regulation, resulting in too deficient transparency in comparison to lobbyists' impact on policy-making.[60]

The suggested solution was a voluntary online registration system for all interest groups who wished to be consulted on the EU initiatives.[61] There were no privileges attached to registration, the proposed system was based on incentives, primarily, automatic notification about consultations in those areas indicated as lobbyist's specific interests.[62] Additionally, there are other advantages, such as boosted reputation and certain recognition of representativeness for specific, sector since the contributions from the non-registrants would be treated as of the

[58] European Parliament, Lobbying in the European Union: current rules and practices (n 51) 37 and Legal Opinion SJ-0012\10 (n 56) [13].

[59] R. Chari and G. Murphy, *Examining and Assessing the Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany* (Report, Department of the Environment, Heritage and Local Government, Dublin, 2007) 47, 48 <*http://www.environ.ie/en/Publications/LocalGovernment/Administration/FileDownLoad,14572,en.pdf* > accessed 28 July 2015.

[60] Balosin (n 4) 132.

[61] Commission, "European Transparency Initiative" (Green Paper) COM(2006) 194 final, 3 May 2006, 8.

[62] *Ibid*.

private individuals.[63] However, many considered that incentives were insufficiently strong to be the driving force behind the voluntary register, especially with such a high share of the Brussels-based lobbyists that follow the COM's activities on a daily basis anyway.[64]

According to the envisioned solution, upon the registration, the applicants needed to provide more information in comparison to the EP's register, in particular: who they represent, what is their mission and how they are funded as well as to subscribe to a code of conduct.[65] The COM correctly considered that declaration of relevant budget figures and breakdown on major clients and funding was proportionate and necessary for identification and assessment of the decisive forces behind lobbying activity, but it left the accurate calculation to the lobbyists.[66] The financial disclosure requirements were adapted to specific categories of registrants to reflect their nature.[67] The major problem with this approach is that the players themselves decide to which group they belong, what they consider as the interest representation expenses and how lobby expenditures or revenues are calculated and due to this arbitrariness reliability and comparability of otherwise very useful financial information are undermined.[68]

At the end of the process, the COM issued the Communication announcing the launch of the Register which officially started on 23 June 2008.[69] There were several exemptions, namely of the activities concerning the legal and other professional advice; activities of social partners and the activities in response to the COM direct request.[70] The subjects to registration were instead of individuals

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[63] M. Godowska, Democratic Dilemmas and the Regulation of Lobbying – the European Transparency Initiative and the Register for Lobbyists [2011] 14 *Yearbook of Polish European Studies*, Centre for Europe University of Warsaw 181, 190.

[64] Commission (EC), "The Follow up to the Green Paper European Transparency Initiative" (Communication) COM(2007) 127 final, 21 March 2007, 4.

[65] Commission, European Transparency Initiative (n 61) 8.

[66] Commission, The Follow up to the Green Paper European Transparency Initiative (n 64) 4.

[67] Obradovic (n 38) 308.

[68] W. Dinan, The Battle for Lobbying Transparency, in H. Burley *et al*. (eds.), *Bursting the Brussels Bubble* (ALTER-EU, Brussels, 2010) 145.

[69] Commission (EC), "ETI - A framework for relations with interest representatives (Register and Code of Conduct)" (Communication) COM(2008) 323 final, 27 May 2008.

[70] *Ibid*. 3.

as in EP's register, entities regardless of their legal status who are engaged in the interest representation with the exception of the local, regional, national and international public authorities.[71] Otherwise, rules governing the lobbyist's behavior resembled a lot to the EP's rules requiring beyond that provision of "the unbiased, complete, up-to-date and not misleading information to the best of lobbyist's knowledge".[72]

The exclusive self-regulation of lobbyists was no longer seen as a viable option since it would be difficult for the COM to outsource the responsibility for the implementation and monitoring of its code of conduct to external bodies.[73] Nevertheless, the registrants were still left with choice to comply alternatively with a comparable professional code, provided that they agree to hand it over to the COM on its request.[74] However, this polyphony was not followed with necessary rules on the functioning and coordination of these parallel systems.

Finally, the COM was entitled to apply corrective measure in case it established one or more violations of these rules.[75] If the infringement was found, the COM could impose temporary suspension from the Register for a set period or until the correction, as well as exclusion from its register for severe and persistent failures.[76]

In the past the EU policy-making and interaction with the interest representatives was depending sufficiently successfully on the trust policy and "naming and shaming" mechanism to constrain those who sought to abuse their insider status, but with increase of the number of lobbyists the informal regulatory system became less capable of ensuring effective monitoring and sanctioning.[77] The established system has been criticized from the start for being insufficient to ensure neither the high level of transparency nor the equal access to the COM and was perceived more as the beginning of the long journey to proper regulation.[78] Overall, despite the lack of details about operationalisation,

[71] *Ibid*.

[72] *Ibid*. 7.

[73] *Ibid*. 5.

[74] *Ibid*. 4.

[75] *Ibid*.

[76] Commission, ETI - A framework for relations with interest representatives (n 69) 5.

[77] Balosin (n 4) 137.

[78] Godowska (n 63) 196.

this was a very valuable step, especially for building the political support.[79] At this stage of development, the attention was drawn to the potential inter-institutional collaboration on lobbying regulation and creation of the COM's and the EP's joint register and code of conduct as one stop shop and an additional incentive for registration.[80]

IV The Positive Lobbying Framework in the EU - It is up to Lobbyist?

1. The Joint Transparency Register

The implementation of the COM's voluntary system faced certain challenges. Beside a slow-paced increase of registrants, the qualitative assessment showed that significant number of entries were inaccurate or had highly tenuous links with EU lobbying.[81] The monitoring system was relying on the limited official resources equivalent to just part of time of one Secretariat's employee and largely on external watchdogs and media.[82] The good example of external supervision was the famous case involving, apparently, one of the biggest lobbyists in Brussels, the European Chemical Industry Council (CEFIC) which declared an absurdly low figure, less than 50,000€ spent on EU lobbying and as a consequence of subsequent complaints it was temporarily suspended from the register for 2 months.[83] Even though this brought attention to the quality of the entries, it also manifested the insufficiency of sanctions and incentives, namely punishment in practice was more a reward, relieving those not listed in the register from reporting they key clients and generated revenues, leaving them completely out of any effective control.[84]

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[79] J. Greenwood, The lobby regulation element of the European Transparency Initiative: Between liberal and deliberative models of democracy [2011] 9 *Comparative European Politics* 317, 323-324.

[80] Commission, The Follow up to the Green Paper European Transparency Initiative (n 64) 6.

[81] J. Greenwood, *Interest representation in the European Unio*n (Palgrave Macmillan, Basingstoke, 2011) 60.

[82] *Ibid*. 61.

[83] W. Dinan, The Battle for Lobbying Transparency, in H. Burley *et al*. (eds.), *Bursting the Brussels Bubble* (ALTER-EU, Brussels, 2010) 145.

[84] O. Grimm, Transparenz und Lobbyismus *Die Presse* (Vienna, 21 July 2009) <*http://diepresse.com/home/meinung/kommentare/496840/Transparenz-und-Lobbyismus?direct=496847&_vl_backlink=/home/politik/eu/496847/index.do&selChannel=&from=articlemore*> accessed 3 August 2015.

In order to improve the existing registers, the High-Level Working Group was composed of the COM's and the EP's representatives. Even though the EP strongly argued for the mandatory framework to be agreed between the Council, COM and itself, since the Council did not join negotiations despite the reiterated invitations, the Working Group proposed a new common voluntary scheme for the EP and the COM, which was introduced through the Inter-institutional Agreement[85] (hereinafter: IIA).[86]

The scope of the Joint Transparency Register (hereinafter: JTR) was determined by the general definition of lobbying activity which was on the trace of the older COM's definition developed in the ETI, but it was followed by extensive *exampli causa* list of covered activities leaving less space for doubts and interpretation.[87] This was a step in a right direction since previously many denied being engaged in activities "carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions".[88] This time lobbying explicitly and irrespectively of the "channel or medium of communication used" included: contacting Members, officials or other staff of the EU institutions; preparing, circulating and communicating letters, information material or discussion papers and position papers; organizing events, meetings or promotional activities and social events or conferences, invitations to which have been sent to Members, officials or other staff of the EU institutions; voluntary contributions and participation in formal consultations.[89] These clarifications did not change the broad-based nature of registration, quite the contrary, all organisations and self-employed individuals, including academia, research institutions and representatives of sub-territorial public authorities, even networks, platforms or other forms of collective activity which had no legal status or legal personality but are source of organized

[85] Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policymaking and policy implementation OJ L 191/29, 22 July 2011.

[86] High-level Working Group on a Common Register and Code of Conduct for Lobbyists, "Joint statement regarding the progress achieved to date", 22 April 2009, 2 <*http://www.aalep.eu/sites/default/files/documents/Towards%20a%20Common%20Lobbyists'%20Register%20EC-EP.pdf*> accessed 21 March 2015.

[87] Balosin (n 4) 5.

[88] Agreement between the European Parliament and the European Commission OJ L 191/29 (n 85) [7].

[89] *Ibid*.

influence engaged in these activities were expected to register.[90] Furthermore, the activities excluded from the register's scope are also clarified, especially provision of legal and other professional advice.[91]

Although the JTR through registration of both, organisations and self-employed individuals, combined two prior approaches, it leaned more towards the COM's legacy by focusing on lobbying entities.[92] Registration of lobbyists as individuals, which was applied in case of the EP, could be more transparent solution because the public has the information about who is the person that lobby and is due to that responsible to comply with rules, but, on the other hand, it lacks the information concerning concrete interest represented and needs to be complemented by extensive reporting about clients. For example, according to the USA federal rules, lobbyist is an individual who needs to register either individually or, if one or more employees of organisations are lobbyists, by organisation on behalf of them.[93] On the other hand, organisations can be very complex entities, especially associations, which can blur lobbying activities of their constituencies. However, the problem is that this might be the only possibility in case of low specialization within the organisations, which is a possible scenario in the EU since the lobbying as a profession is still developing.[94] In general, the EU system is conditioned by its voluntary character, therefore the registrants are actual addressees of the provided incentives.

As a positive novelty, upon registration, the registrant should provide more details about their area of interest than before, including main legislative proposals covered by the lobbying activity in the preceding year.[95] In addition to this, all registrants should also declare amount and source of funding received from EU institutions.[96] Lastly, more elaborate rules on financial discloser required that professional consultants and law firms, besides the lobbying turnover, also provide the relative weight attached to their clients according to

[90] *Ibid*. [14].

[91] *Ibid*. [10].

[92] Greenwood and Dreger (n 37) 144.

[93] The lobbying Disclosure Act 1995 (USA) Sec. 4 (a) (1)-(2).

[94] Klüver (n 27) 505.

[95] Agreement between the European Parliament and the European Commission OJ L 191/29 (n 85) Annex II.

[96] *Ibid*.

the determined grid.[97] In spite of the possible resistance of clients, this could be beneficial, not only for those who are lobbied because they have more information about who contacts them, but also for general public to see real dimensions of lobbying, which otherwise could be exaggerated or undermined.

The Code of conduct annexed to IIA was basically a compilation of already existing EP's and COM's codes. The enforcement of the rules and a common complaint procedure was competence of the JTR Secretariat (hereinafter: JTRS) as team of officials from the EP's DG EPRS and the COM's Secretariat General operating under the coordination of the COM's Head of the Transparency Unit.[98]

The JTRS could in case of the upheld complaint impose measures ranging from temporary suspension pending the steps to address the problem to other stronger measure including the long-term suspension and removal from the JTR.[99] A persistent non-compliance with the code without change of behavior resulted in one year removal, while the serious, deliberate non-compliance led to two years removal, both also triggering the withdrawal of the EP access badge and ban on registration for the set period of time.[100]

Nevertheless, it is challenging to apply these rules since they are broad and based on legal standard such as "persistent or serious non-compliance", leaving unanswered the question whether the particular code's clause, such as "prohibition of obtaining information dishonestly", is a "serious breach" whereas, according to wording of provision, only one proven infringement would be enough for removal or it falls in the category of the "persistent non-compliance", which is repetitive and continuous?

Since the system is only as strong as its enforcement, there are some weak points as well as advantages of this institutional arrangement. Namely, from the perspective of public confidence in the lobbying process it would probably be a better solution to have an independent body in charge of the compliance

[97] *Ibid*.

[98] Secretaries General of the European Parliament and the European Commission, "Annual Report on the operations of the Transparency Register 2013", 2013, 6 <*http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=ANNUAL_REPORT*> accessed 27 July 2015.

[99] *Ibid*.

[100] *Ibid*.

monitoring while the existing system has some degree of impartiality.[101] On the other hand, it is certainly beneficial that control authority is familiar with the lobbying in practice.[102] However, the JTRS needs permanent and fully dedicated staff instead of a fluid structure made up of a team of officials from the EP and the COM, which meets on a weekly basis with apparently only the equivalent of four full-time staff mobilised at any one time to carry out its duties.[103] Furthermore, the available sanctions and their limitation only to suspension or removal from the register, which is on voluntary basis, is the biggest weakness of this system and was already identified along with two possible solutions, which were not just yet applied in this phase of development of the EU lobbying framework. Namely, there is the option either to have the mandatory registration, which would be prerequisite for lobbying or to have really strong incentives, which could compensate the legal order. In case of the voluntary system introducing stricter sanctions as a *prima facie* solution would have only counter effect, because the lobbyists would be motivated to stay out of the sight since the price would be simply too high for them. So far the only sanction that creates a realistic obstacle for lobbyists is the withdrawal of the EP's access pass as a consequence of the removal from JTR which is predicted only for the most serious breaches and not often imposed in practice.[104] In order to enhance the accountability and transparency, without introducing the additional sanctions, the voluntary scheme could be upgraded by greater visibility of the fact that the particular sanction is imposed, especially in case of the deliberate violation, since the sanctions anyway rely heavily on the importance of the good reputation for registrants.

2. The New Rules in Force from January 2015

During the review process in 2013 further steps were undertaken in order to eliminate the identified deficiencies and provide additional registration incentives. As a result, starting from 1 January 2015 the modified system was

[101] Homan and Luneburg (n 2) 101.

[102] Chari, Hogan and Murphy (n 30) 159.

[103] Secretaries General of the European Parliament and the European Commission, "Annual Report on the operations of the Transparency Register 2013", 2013, 6-8 <*http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=ANNUAL_REPORT*> accessed 27 July 2015.

[104] For statistics see*:* Annual Report on the operations of the Transparency Register 2013 (n 103) 6.

introduced by the new IIA. The scope of the register and covered activities are for the most part only specified and reorganized in more logical manner, introducing the definition of the direct influencing as "a direct contact or communication with the EU institutions or other action following up on such activities" and indirect influencing "through the use of intermediate vectors such as media, public opinion, conferences or social events, targeting the EU institutions".[105] This distinction does not trigger a different set of applicable rules, but it clarifies the already far-reaching definition. How exactly comprehensive is definition of lobbying, illustrates the inclusion of special sub-section for event-organising entities regardless of their profit or nonprofit character, interest-related media or research oriented entities linked to private profit-making interests as well as ad-hoc coalitions and temporary structures with profit-making membership.[106]

The minimum response of the law firms justified by the indecipherable nature of the lawyer-client relationship resulted in more detailed rules and an additional exception under the provision of legal and other professional advice.[107] Namely, analysis and studies preparation for clients "on the potential impact of any legislative or regulatory changes with regard to their legal position or field of activity" are not considered as lobbying, even though they could be marginal and otherwise considered as the first step of a lobbying strategy, which normally would fall under the scope of the JTR.[108] This apparently more favorable attitude towards law firms, aiming at greater registration and better understanding of the covered activities, could, if not applied uniformly, raise some issues in future regarding the transfer to the mandatory register, because it might exclude part of law firm's lobbying from disclosure requirements.[109]

Additionally, in order to encourage the adherence of the Council which has participated in the JTRS meetings as an observer since June 2012,[110] the

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[105] Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, OJ L 277/11, 19 September 2014, [7], [9].

[106] *Ibid*. Annex I.

[107] eLabEurope, The EU Transparency Register in 2014 and beyond (n 12) 4.

[108] *Ibid*.

[109] *Ibid*.

[110] Secretaries General of the European Parliament and the European Commission, "Annual Report on the operations of the Transparency Register 2014", 2014, 7. <*http://www.europarl.europa.eu/pdf/divers/ar_201pdf4*> accessed 30 July 2015.

exemption of MS's and third country's governments, intergovernmental public organisations and their diplomatic missions from the JTR was emphasized and followed by a new exclusion of activities aimed at MS structures including also permanent representations to the EU as ineligible for the registration, which could have an impact on the establishment of a mandatory register. [111]

Regarding financial disclosure, the same adjustments are still made for specific categories of lobbyists but as an improvement all registrants shall provide now estimation of the annual costs related to activities covered by the register.[112] Despite the criticism of previous arrangements of brackets for annual turnover for representation activities (i.e. turnovers in euro: 1. 0-499,999; 2. 500,000-1,000,000; 3. >1,000,000) for being less favorable for organisations with a lower turnover since they were giving more specific information than the organisations with the highest turnover; an additional category of overall turnover of up to 99,999 € was introduced, instead of extension of the list to ranges beyond the current limit of 1,000,000 €,[113] as it was argued in the past.[114] The same logic is implemented in case of disclosure of revenues received from clients by introducing 11 new categories which are very indicative and transparency-oriented, provided that the numbers are accurate and controlled.[115] However, this piece of information is very sensitive, especially for clients who could due to that be motivated under the voluntary system to avoid providing it by choosing a non-registrant.

The Code of Conduct has undergone some technical changes, but it is still outlined in a broad manner,[116] although slightly clearer. The change is also introduced in respect to the JTRS competence, it actually decides about sanction now, while the concerned registrant has a possibility to redress the measure before the Secretaries-General of the EP and of the COM as a quasi-second

[111] List of measures and elements to take into account in the event of a review of the Transparency Register (n 195); Agreement between the European Parliament and the European Commission OJ L 277/11 (n 105) [11].

[112] *Ibid*.

[113] *Ibid*.

[114] Commission (EU), "European Transparency Initiative: the register of interest representatives, one year after" COM(2009) 612 final (Communication), 28 October 2009, 7.

[115] Agreement between the European Parliament and the European Commission OJ L 277/11 (n 105) Annex II.

[116] eLabEurope, The EU Transparency Register in 2014 and beyond (n 23) 6.

instance making the system more efficient, without jeopardizing registrant's right.[117]

The sanction system is not substantially improved, continuing to rely on one or two years removal from the register and formal withdrawal of the EP access badge as the most severe retribution which could be imposed in case of the repeated inappropriate behavior, the serious non-compliance and, as positive novelty, the repeated and deliberate non-cooperation with JTRS, which should encourage the resolution of the issue in a collaborative manner.[118] In order to give more substantial meaning to these terms, the EP's report for the first time depicts the acceptable and non-acceptable lobbying techniques, clarifying otherwise broad notion of the "inappropriate behavior". The given examples of such a behavior include: an interference in the private sphere or personal life of decision-makers (e.g. by sending gifts to a decision-maker's home address) or performance, or any active promotion, of activities in the communication with the EU institutions and their Members or staff which are liable to impair the functionality of the EU institutions' communication systems, particularly anonymously performed activities, failing to declare the represented interests or clients, employing "front groups" and lastly, offering or granting financial support or in terms of staff or material to MEPs or their assistants.[119] These improvements can be helpful in overcoming some of the mentioned shortcomings and indirectly seal some loopholes. What is even more important, the effects will be multiplied and transmitted on the COM on the basis of the common system and joint competence of JTRS, despite their interpretative nature and the fact that these provisions are not in the IIA.

In general, despite of certain useful changes, especially regarding the financial disclosure and clarification of the scope, the voluntary character as the main issue is inherited from the past. Unless the new incentives prove to be strong enough, "the naming and shaming" approach could rather be an incentive not to register in the first place.[120]

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[117] Agreement between the European Parliament and the European Commission OJ L 277/11 (n 105) [12]-[15].

[118] *Ibid*.

[119] European Parliament decision of 15 April 2014 on the modification of the interinstitutional agreement on the Transparency Register 2014/2010(ACI), 15 April 2014 [10].

[120] eLabEurope, The EU Transparency Register in 2014 and beyond (n 12) 5.

3. The Evolution of the EU Lobbying Regulation

Overall, the evolution of the EU lobbying framework through the adoption of the more detailed rules is evident. Accordingly, the Centre for Public Integrity Index, which is based on the statutory definition of a lobbyist, frequency and quality of disclosure and enforcement of regulation, categorized the EU lobbying framework in the early stage of development, before JTR, as low-regulation systems.[121] The elements of this category could have been identified at the EU level in the initial phase, namely, existence of the rule on individual registration with a weak online system including some paperwork without mentioning of the cooling-of period, requiring only few details without disclosure of the lobbyist's spending, where the lists of lobbyist are available to the public but not all details are necessarily collected or given as well as insufficient enforcement capabilities.[122] However, current rules in force at the EU level go beyond this and they are closer to the medium-regulation systems which are characterized by: tighter rules on individual registration, for example lobbyists must generally state the subject matter and institution to be lobbied, definition also includes lobbying aimed at executive powers, the regulation demands, though not necessarily complete, disclosure of and limits on individual spending but there are clear loopholes, such as free consultancy given by lobbyist, lack of regulation for the employer's spending reports, generally there is system of online registration which is accessible to the public and frequently updated, but spending disclosure are not in the public domain, theoretically, a state agency can conduct the mandatory reviews although it will infrequently prosecute violations, and lastly the cooling-of period is included.[123] As it can be noticed, the EU lobbying framework goes even further when it comes to transparency, since there is no in principle limiting public access to the information contained in the register, including even the complete spending disclosures of those who register voluntarily. It can be concluded that defining the problem is behind us and that focus is on the implementation of solutions in order to make lobbying transparency (*de facto)* obligatory.[124]

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[121] Chari, Hogan and Murphy (n 30) 105.

[122] *Ibid*.

[123] *Ibid*. 106.

[124] Balosin (n 4) 136.

V Why not Mandatory Register?

The mandatory system has been the ultimate goal for the EP, which repeatedly called for mandatory register through the secondary legislation.[125] On the other hand, the COM argued for more natural and gradual development of lobbying regulation. Even during ETI the COM, striving to cover a broad assortment of stakeholders by its register, assumed that mandatory register would require legislation implying narrower definition of lobbying, which could create loopholes and uneven playing field.[126] In this initial phase of lobbying regulation, the voluntary system offered lobbyists legitimacy and the recognition as a profession, which the COM was ready to trust before considering the possibility of more binding rules.[127] The transfer to the mandatory system from the COM's perspective would depend on success of the voluntary system. One possible way of measuring the achievement is through estimated number of registrants.[128] Although this as the determining criteria of success is objective and easy to follow, it can be misleading since it is also important who the registrants are and how existing rules are enforced. The approximation of the number of registrant to alleged number of individual lobbyists in Brussels ranging between 15,000 to 30,000 is hard to estimate since the JTR does not provide for registration of individual lobbyists within the organisation, instead, it requires only the indication of number of registrant's employees involved in lobbying. The certain estimation shows that roughly three-quarters of relevant business-related organisations and 60 % of NGOs have already signed in the JTR.[129] The simple comparison of the current 11,313 JTR[130] registrants with, for example, 5,952 registrants as of 31 October 2013 shows a significant increase.[131] However, the

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125 EuroActive.com. "EU lobbyists register to become mandatory until 2017" <*http://www.euractiv.com/sections/public-affairs/eu-lobbyist-register-become-mandatory-2017-301581*> accessed 23 March 2015.

126 Chari, Hogan and Murphy (n 30) 57.

127 *Ibid*. 56.

128 Obradovic (n 38) 306.

129 Greenwood and Dreger (n 37) 159.

130 Transparency Register Website, Statistics as of 26 Jun 2017 <*http://ec.europa.eu/transparencyregister/public/homePage.do*> accessed 26 June 2017.

131 Secretaries General of the European Parliament and the European Commission, "Annual Report on the operations of the Transparency Register 2013", 2013, 4 <*http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=ANNUAL_REPORT*> accessed 27 July 2015.

demystification of reality of "the money and influence peddling" is conditioned upon uniform registration and disclosure across sectors and among actors.[132] Nevertheless, there are many unregistered groups that are known for lobbying the EU institutions, especially among law firms and think tanks, while, on the other hand, many entries are unreliable or implausible and under-reported leaving the space for further advancements of the system.[133] The mandatory registration might be able to solve the first part of the problem while the second part depends on the content and the scope of adopted rules.

1. Legal base for Mandatory Register

In order to reach the mandatory system several legal challenges need to be overcome. The first very complex question to be answered is whether the adequate legal base for such legal act is provided, bearing in mind the aim and content of the envisioned measures.[134] The debate started when the EP in its Resolution of 8 May 2008 argued for the mandatory register under the presumption of the legal basis provided by the Treaty of Lisbon without specifying concrete provision.[135]

It seem that this particular issue has not been yet overcome and despite the fact that several option were discussed, only the Article 352 (ex-Article 308) as a direct legal basis could be used if this action by the Union should prove "necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties and the Treaties have not provided the necessary powers".[136] The Article 352 in comparison to previous formulation introduces change, potentially limiting its scope of the application by the reference to the existing framework of the policies defined in the Treaties, opening the question

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[132] Homan and Luneburg (n 2) 99.

[133] ALTER-EU, "New and Improved? Why the EU lobbying register still fails to deliver", January 2015, 3 <*http://www.altereu.org/sites/default/files/documents/Why%20EU%20Lobby%20Register%20still%20fails%20to%20deliver%20-%20web%20version_0.pdf*> accessed 27 March 2015.

[134] Case C- 62/88 *Helenic Republic v. Council* [1990] ECR 1-01527 [13]

[135] M. Krajewski, "Legal Study – Legal Framework for a Mandatory EU Lobby Register and Regulation", 2013, 4 <*http://alter-eu.org/sites/default/files/documents/1806%20legal%20framework%20for%20mandatory%20EU%20lobby%20register.pdf*> accessed 30 July 2015.

[136] European Parliament Legal service, "Possibility and modalities of mandatory register of lobbyists" (Legal Opinion) SJ-0012\10, 25 March 2010, (on the file with the author) [32].

of the interpretation, since issue of lobbying is not a separate EU policy.[137] Even if this proves to be flexible enough to be applied in this context, potentially going beyond the literal interpretation, by relying on the similar practice of the ECJ towards the former Article 308, implementation of the idea would require lengthy procedure with the Council's unanimity and the consent of the EP but also the involvement of the national parliaments.[138] In this case, the wider context and political climate play crucial role, namely the Council was not for a very long time willing even to participate in negotiations for the voluntary system and the MS are entering the unfamiliar grounds since most of them do not have any kind of lobbying register while mandatory registration currently exists only in some MS, namely Austria, Lithuania, Poland, Slovenia, Ireland and UK.[139] So it is very challenging to establish firm positions about how EU lobbying regulation should be formulated based on national experiences as well as from the MS perspective.

As a consequence, embracing all difficulties regarding the adequate legal base, the EP asked the COM to include in potential forthcoming comprehensive reform of the Treaties an amendment of Article 298 TFEU or any other appropriate specific legal basis allowing a mandatory register to be set up in accordance with the ordinary legislative procedure, but in the meanwhile it called on the COM to prepare the legislative proposal for mandatory registration based on Article 352 by the end of 2016.[140]

In that regard, the initiative towards mandatory register is brought by the new president of the COM, Mr. Juncker, announcing, as a part of his strategy, the commitment "to enhance transparency when it comes to contact with stakeholders and lobbyists" by proposing on the basis of previously used Article 295 a new binding IIA to the EP and the Council to create mandatory register for three institutions which is already included in the COM Working program for

[137] Legal Opinion SJ-0012\10 (n 136) [40].

[138] *Ibid*. [42].

[139] PER.GOV.IE <*http://www.per.gov.ie/en/regulation-of-lobbying/*> accessed 12 March 2016 and European Parliament Research Service, "Lobbying Regulation in EU Member States" (Table) <*http://epthinktank.eu/2014/12/04/eu-transparency-register/transparency_table1/*> accessed 28 March 2015.

[140] European Parliament decision of 15 April 2014 on the modification of the interinstitutional agreement on the Transparency Register (n 206) [2]-[6].

2015[141].[142] Concretely, the EP, the Council and COM "shall cooperate with each other and by common agreement make arrangements for their cooperation" and according to Article 295 (2) "to that end they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature".[143] This as an alternative to legislation is based on the institutions' right to self-organisation and is underpinned by the obligation of the EU institutions to conduct their work openly and promote good governance and participation on the basis of Article 15 TFEU.[144]

The possibility for a IIA to have the binding effect is formalized with entering into the force of Treaty of Lisbon although the nature and the extent of such legal effect still seems to be unclear, particularly whether IIA as any agreement has binding effect for the parties (*inter pares*) or goes further and it also can have such legal effect on third parties.[145] The matter is highly relevant since the content of the IIA regarding obligations and possible sanctions imposed on lobbyists depends on the interpretation. Previously, this issue was brought before the ECJ in context of the external relations in the "FAO case" where taking into account the terms of the agreement, the effects were assessed on case by case basis and the intention of the two institutions to enter into a binding commitment towards each other.[146] Nonetheless, the question of such effect on external actors is not definitely resolved, but it is evident that the primary aim of the Article 295 is to

[141] Commission, "Working program for 2015" COM(2014) 910 final, 16 December 2014, Annex I <*http://ec.europa.eu/atwork/pdf/cwp_2015_new_initiatives_en.pdf*> accessed 27 March 2015.

[142] J.-C. Juncker, "A New Start for Europe: My agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission", 5 July 2014, 11 <*http://www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf*> accessed 2 August 2015.

[143] TFEU Art 295.

[144] Legal Opinion SJ-0012\10 (n 136) [47]

[145] N. Ferreira, The European Parliament's Practice in the Adoption of International Trade Agreements: The Creation of Institutional Parallelism to the Unilateral Dimension? (2015) *MCEL Master Working Paper* 2015/2, 26-27 <*http://www.maastrichtuniversity.nl/web/Institutes/MCEL/Publications1/MasterWorkingPapers.htm*> accessed 7August 2015.

[146] Case C-25/94 *Commission of the European Communities v Council of the European Union (FAO)* [1996] ECR I-01469 [49].

facilitate the cooperation between the EU institutions supporting the narrower interpretation.[147]

However, taking into account all the mentioned difficulties, the COM took the alternative road to greater transparency, and on 1 March 2016 started a 12-week two-part public consultation on the Transparency Register, inviting stakeholder views on a future mandatory system for all EU institutions.[148] After the public debate and drafting, on 28 September 2016 the COM put on the Proposal for the IIA on a mandatory Transparency Register (hereinafter: Proposal) covering all three EU institutions.[149]

In the following part, the IIA will be discussed further in the context of its proposed scope and content of concrete rules, bearing in mind the proclaimed goal. In respect to this debate, the USA federal lobbying framework, as one of the most elaborated in the world, will be assessed in finding balanced solution for the EU, since the lack of transparency is not for the most part among shortcomings of the USA system.[150] The USA has the longest history of lobbying regulation which was developed gradually in several phases starting with few relevant provisions in the Utilities Holding Company Act from 1935, which were advanced in more general rules through the Legislative Reorganization Act and Federal Regulation Lobbying Act of 1946 (hereinafter: FRLA).[151] Currently, after the significant reform caused by the serious scandals, the USA federal system is based on the Lobbying Disclosure Act of 1995 (hereinafter: LDA) which was amendment and supplemented by the Lobbying Transparency and Accountability Act of 2006 and the Honest Leadership and Open Government Act of 2007.[152] Before going into details, it is important to take into account that,

[147] Legal Opinion SJ-0012\10 (n 136) [48].

[148] Commission, Press release 1 March 2016 <*http://europa.eu/rapid/press-release_IP-16-462_en.htm*> accessed on 25 March 2017.

[149] Commission, "Proposal for a Interinstitutional Agreement on a mandatory Transparency Register", COM (2016)627 final *http://ec.europa.eu/info/content/proposal-mandatory-transparency-register_en#how_to_submit* accessed on 26 March 2017.

[150] Homan and Luneburg (n 2) 76.

[151] R. Chari and G. Murphy, *Examining and Assessing the Regulation of Lobbyists in Canada, the USA, the EU institutions, and Germany* (Report, Department of the Environment, Heritage and Local Government, Dublin, 2007) 31-33.

[152] C. Holman, Obama and K Street: Lobbying reform in the USA, in H. Burley *et al*. (eds), *Bursting the Brussels Bubble* (ALTER-EU Brussels,, 2010) 127-128.

even though the USA and the EU share similarities,[153] there are fundamental differences among the regulatory systems caused by the historical importance of the interest groups, particularly in elections, and scandal visibility, which both have longer tradition in the USA, as well as all the specificities of the EU *sui generis* nature.[154] Different legal approaches are also reflection of different lobbying styles caused by the dissimilar political systems, while Washington lobbying style is usually characterized as direct and aggressive, the Brussels lobbying is softer and consensus-oriented.[155]

2. Content of the Mandatory Rules

The first dilemma arising from the transfer to the mandatory system is the scope of its application and whether the definition of the lobbyist needs to be more precise in comparison to one applied for the voluntary system?[156] Currently, lobbying definition and due to that the scope of the JTR is "status-based" and without restriction, for example to a particular process, phase or the type, degree and frequency of lobbying activities.[157] Beside explicit exceptions, everyone "engaged in activities carried with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions" is deemed to be a lobbyist in its entirety.[158] To the contrary, the USA in the past tried to impose lobbying minimum entitled for registration and experienced a problem since the FRLA required anyone whose "principle purpose" was to influence the passage or defeat of legislation in Congress to register, relying on subjectively determined threshold.[159] Nowadays, in the USA the "principle purpose" is objectively quantified in regard to each

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[153] Ch. Mahoney, *Brussels versus the beltway: advocacy in the United States and the European Union*, (Georgetown University Press, Washington, 2008) 207.

[154] Chari, Hogan and Murphy (n 30) 113.

[155] C. Woll, The brash and the soft-spoken: Lobbying styles in a transatlantic comparison (2012) 1(2) *Interest Groups and Advocacy* 193, 202, 203, 209. <*http://www.mpifg.de/pu/mpifg_ja/IGA_1_2012_Woll.pdf*> accessed 30 July 2015.

[156] Legal Opinion SJ-0662\13 (n 7) [24].

[157] M. Nettesheim, "Interest representatives' obligation to register in the Transparency Register: EU competences and commitments to fundamental rights" (In-Depth Analysis), Directorate General for Internal Policies Policy Department C: Citizens' Right and Constitutional Affairs, 2015, 12-13.

[158] *Ibid*.

[159] Holman (n 152) 125.

client, therefore lobbyist means "any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a six month period".[160] Even though it might seem that USA approach compromises transparency, otherwise, it would be unreasonable and overburdening for those engaged in lobbying in a smaller amount due to serious reporting demands. The key notion of this system is the "lobbying contact" which means any oral or written communication to a covered executive or legislative branch official that is made on behalf of a client with regard to: the formulation, modification or adoption as well as administration or execution of the enumerated acts and the nomination or confirmation of a person for a certain positions.[161] This term constitutes the core of the lobbying activities together with the efforts in support of such lobbying contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, as well as coordination with the lobbying activities of others.[162] In spite of the great significance of the outside lobbying in the USA, which is partially caused by the different democratic accountability of policy-makers and direct electoral consequences,[163] in comparison to similar way of indirect lobbying in the EU,[164] the USA definition is narrower than EU definition, excluding for example the grassroots lobbying.[165] Unlike the EU system, the link to the officials is decisive, even the ancillary activities imply the eventual contact, while in the EU even without a direct

[160] Lobbying Disclosure Act of 1995 (USA) Sec 3 (10).

[161] *Ibid*. Sec 3 (8) A.

[162] *Ibid*. Sec 3 (7).

[163] K. M. Goldstein, *Interests Groups, Lobbying, and Participation in America* (Cambridge University Press, Cambridge, 2003) 4.

[164] Mahoney (n 153) 3.

[165] L. Mihut, Lobbying in the United States and the European Union: New Developments in Lobbying Regulation' (2008) 8(2) *Romanian Journal of European Affairs*, 2 <*http://poseidon01.ssrn.com/delivery.php?ID=513103103009120007099097087093111074097042014048023025121115066117001098113096064124027012010041026121034090071019112112121008017009044015049098025114077080017066026085015005120120083085094096093001112079126018027115123070107090024124115085017105&EXT=pdf&TYPE=2*> accessed 31 July 2015; J. Maskell, "Lobbying Law and Ethic Rules Changes in 110th Congress" (Report for the Congress) RL34166, Congressional Research Service, 17 September 2007, 2 <*https://file.wikileaks.org/file/crs/RL34166.pdf*> accessed 6 August 2015.

contact with a decision-maker, lobbying is possible via media and public opinion as long as it aims to influence the EU policy-making. For instance, the LDA exempts "speech, article, publication or other material that is distributed and made available to the public" as examples of the protection of freedom of speech, while in the EU the use of the media as an intermediary can be characterized as lobbying activity.[166]

Comparing the voluntary rules in force with the new definition in Article 3 of the Proposal, the main impression is that there is no substantial difference regarding activities covered by the rules and prescribed exception, other then technical adjustments and reorganization. Furthermore, it seems that some important provisions are omitted, such as those defining ways of direct and indirect lobbying. However, the step in right direction is the fact that now it is determined that activities, in order to go under the scope of the register, can be directed towards any officials of three institution, covering all categories of staff, not just, for example, high appointed functionary. Additionally, the exception regarding the provision of legal advice is now considerably smaller, carving out those controversial elements which were criticized above. Interestingly, it seems that new rules now treat slightly differently MS in comparison to third states and their public authorities.

The EU existing approach to definition of lobbying activities, which is now only slightly modified, could be problematic in case of mandatory system, since even a minor and single or *ad hoc* activity that falls within its broad definition of lobbying triggers the registration.[167] The minimum threshold which is quantifiable could prevent the disproportional and unnecessary burden.[168]

On the other hand, the issue of the indirect lobbying raises the question of the meaning of the term "mandatory register" and whether the obligation to register will be *condition sine qua non* only the communication and direct contacts with the decision-makers. Provided this is the case, the control and sanctioning of those engaged in the indirect lobbying would be a challenge under the regime of the IIA, especially in the respect of the non-Brussels based lobbyists, indirectly

[166] The Lobbying Disclosure Act, 1995 (USA) Sec 3. (8) B iii).

[167] The Joint Transparency Register Secretariat (JTRS), "Transparency Register Implementing Guidelines", 21 January 2015, 6 <*file:///C:/Users/Administrator/Downloads/guidelines_en%20(4).pdf*> accessed 26 March 2015.

[168] Holman and Luneburg (n 2) 100.

affected by the EU legislation, for example international NGOs, associations or research centers. Since the desired outcome is the enhanced transparency of contact of the COM, the EPs and the Council with lobbyists in context of legislative procedure,[169] it could be argued that it would not be necessary then to include activities that are already public and open to scrutiny.

Regarding this issue, in Article 5 of the Proposal it is for the first time stated that certain interaction with the EP, the COM and Council that are conditional upon registration. This provision being a back bone of the new rules is, as a matter of fact, the result of individual action that the EP and the COM have already voluntary implemented regarding their top officials.[170] It is obvious that commitments regarding the Council are very limited, since the main, and practically the only, conditional interaction refers to meetings between interest representatives and the Ambassador of the current or forthcoming Presidency of the Council of the EU, as well as their deputies in the Committee of the Permanent Representatives of the Governments of the Member States to the European Union, the Council's Secretary-General and Directors-General.

Furthermore, since it takes two for lobbying, the reference to non-exhaustive list of potential targets, as in USA system,[171] would be helpful and needed, especially in case of the Council where it might be difficult to pinpoint which part could be covered, since the current rules exclude the lobbying aimed at MS's government services and their diplomatic missions, excluding the Permanent Representatives fully and irrespectively of their role in COREPER.[172] The COM's Proposal did not change the setting, even though it predicted in the Article 13 that MS may, on a

[169] Jean-Claude Juncker (n 142) 11.

[170] Commission Decision of 25.11.2014 on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals C(2014) 9051 final, 25 November 2014, Art 1; EuroActive.com, "EU lobbyists register to become mandatory until 2017", 17 April 2015 <*http://www.euractiv.com/sections/public-affairs/eu-lobbyist-register-become-mandatory-2017-301581*> accessed 23 March 2015 and European Parliament decision of 15 April 2014 on the modification of the interinstitutional agreement on the Transparency Register 2014/2010(ACI), 15 April 2014, [15]

[171] The Lobbying Disclosure Act of 1995 (USA) Sec 3 (3)-(4).

[172] General Secretariat of the Council, "The Joint Transparency Register − Overview of the main developments during the participation of the GSC in the Joint Transparency Register as an observer and report on the review of the Register" 17208/13, 5 December 2013, [5], and Agreement between the European Parliament and the European Commission OJ L 277/11 (n 197) [19].

voluntary basis, notify the JTS that they wish to make certain interactions of interest representatives with their permanent representations to the EU conditional upon registration in the Transparency Register. This could have as a result the exclusion of a considerable amount of lobbying activity because one of the access points for lobbyists to approach the Council is the COREPER due to its preparatory role and the strategic position "vertically placed between the experts and the ministers and horizontally situated with the cross-Council policy responsibilities".[173] Unless there are national rules of MS, which govern the lobbying activity directed towards Permanent Representatives, mandatory register applied elsewhere could create in this case the loophole, leaving this particular niche unregulated. Consequently, register's scope could be limited to the Council's General Secretariat or the rotating Presidency.[174]

The central issue, when it comes to transparency, is the amount of required information upon registration and subsequently. The USA federal regulation focuses on clients, requiring extensive amount of information regarding each client including the statement of the general issue areas in which the lobbyist expects to engage in lobbying activities on behalf of the client as well as specific issues that have already been addressed or are likely to be addressed in lobbying activities.[175] The EU could follow the USA example since one of the current weaknesses of the EU system, despite the imposed requirement, is the lack of relevant information in real time on the main EU initiatives, policies and legislative files currently followed by the registrants, because there is only obligation to annually renew the entry.[176] Additionally, besides the guidelines, the detailed binding rules should provide more consistency regarding the provision of the information since there are significant differences among registrants in practice today, while some declare specific regulations, many also use too general statements or acronyms. Furthermore, in the USA, the quarterly

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[173] J. Lewis, The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union (2005) 59(4) *International Organization* 937, 945 <*http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=346231&fileId=S0020818305050320*> accessed 31 July 2015.

[174] N. Copeland, "Review of the European Transparency Register" (Library Briefing) 130538REV1, Library of European Parliament, 18 June 2013, 4 <*http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130538/LDM_BRI(2013)130538_REV1_EN.pdf*> accessed 6 August 2015.

[175] The Lobbying Disclosure Act of 1995 (USA) Sec 4 (3), (4), (5).

[176] JTRS, Transparency Register Implementing Guidelines (n 167) 5.

reporting is obligatory and includes information about income earned by commercial lobbyist or the expenses in case of in-house lobbyists, the list of lobbying activities in each area and naming specific issues, which House of Congress or federal agency was contacted, even though there is no obligation to mention the lobbied officials.[177] Currently neither at the EU level the information about targeted decision-maker is not provided, nevertheless in the EU system there are already rules which require that some official, such as the COM's Members, publish information about meetings held with external interest representatives as well as the practice of the some EP's rapporteurs to include the legislative footprint,[178] therefore the introduction of this piece of information in reports would not jeopardize the integrity of the lobbied person, but could bring more transparency and elevated this practice from occasional to mandatory. Furthermore, inclusion of the list of the represented interests, the specific issues as wall as related financial information in the reports without revealing the lobbying strategy, could be justified for the purpose of efficient control conducted by competent authority and public.[179] In order to minimize the burden upon the registrants without compromising the fulfillment of the regulatory goal, the report should be limited to the most important dynamic matters and be probably less frequent than in the USA. Additionally, in connection with the EU internal rules on revolving door, besides the introduction of this prohibition in the Code of conduct, the identification of former EU positions held by lobbyist upon registration could reduce the negative connotations regarding this practice and enhance transparency revealing the actual instead of the speculated gravity of the problem, as it is the case at the USA federal level.[180]

However, the new rules in the Proposal do not contain major changes regarding the disclosure issue, only the disclosure of the financial information, is now divided in significantly more grids, and due to that provide more precise information. Interesting positive novelty is that now online registration does not necessarily lead to automatic registration, since in the Article 6. 3) and 4) of the Proposal, it is stated that Applicants may be requested to present supporting

[177] Holman and Luneburg (n 2) 84.

[178] Transparency International EU, "EU legislative Footprint - What´s the real influence of lobbying?" 2015, 9-10 <*http://www.transparencyinternational.eu/wp-content/uploads/2015/03/The-EU-Legislative-Footprint.pdf*> accessed 6 August 2015.

[179] Holman and Luneburg (n 2) 100.

[180] The Honest Leadership and Open Government Act of 2007 (USA).

documents demonstrating their eligibility and the accuracy of the information submitted, and that Applicants are entered into the register as registrants once their eligibility has been established and the registration is considered to satisfy the provisions of Annex II regarding information to be provided.[181]

The efficiency of the system is very dependent on the enforcement and sanctioning mechanisms. In case of the USA the implementation of the rules is not vested in one independent body, but in two legislative offices, namely the Secretary of Senate and Clerk of the House of Representative, who are competent to review, verify and where necessary inquire entries in order to ensure the accuracy, completeness and timeliness of registration and reports without competence of investigative authority to conduct general audits.[182] Many argue that the fact that monitoring compliance is left to the officers directly employed by Congress is a significant handicap of the enforcement of LDA and propose as a solution an independent agency instead of those who are lobbied.[183] However, even though at this point the envisioned EU solution is not in line with this idea, it could be a good moment to take this direction within the EU, because the coordination of three different actors could be too complicated, provided that the rules in the new IIA do not impose fundamentally different approaches towards different EU institutions, in particular, the Council. This option in the past was declined by the COM on the grounds that this would blur the lines of its accountability for the relation with the interest groups.[184] Undoubtedly, the mandatory system will require more staff if possible permanently and exclusively devoted to proper functioning of the mandatory register,[185] and due to that the Proposal in Article 11 regulates resources, making all three institutions responsible for the ensuring of human, administrative and financial support.

When it comes to sanctions, in case the violation of the LDA is discovered the competent authorities need to notify the US Attorney for the District of Columbia who has the sole power to seek court sanctions for violations.[186] Sanctions for

[181] Commission, "Proposal for a Interinstitutional Agreement on a mandatory Transparency Register" (n 149).

[182] Holman and Luneburg (n 2) 85.

[183] *Ibid*. 101.

[184] Greenwood and Dreger (n 37) 144.

[185] *Ibid*.

[186] Holman and Luneburg (n 2) 85.

knowingly failing to correct a defective filing within 60 days after notice of such a defect or to comply with any other provision, may be subject to a civil fine of not more than $200,000 whereas in case of knowingly and corruptly failing to comply with any provision of LDA, lobbyists may be imprisoned for not more than 5 years or fined under the title 18 of the US Code.[187] While the prison is usually avoided by negotiated undisclosed financial settlements, the financial sanctions play the important part, for example in 2013 a judgment of $200,000 against a consulting firm for violations of the LDA was adopted. [188]

In comparison to the voluntary system, the mandatory character of the registration requires stronger sanctions than those already existing at the EU level. Theoretically, there are several measures considered in the USA federal framework which could be applied alternatively or cumulatively, including the pecuniary fine, prohibition or restriction of lobbying activity and imprisonment. Nevertheless, their implementation in the EU system could be problematic due to *sui generis* nature of the EU. Namely, the criminal procedure and the imprisonment are precluded since the EU generally does not have the jurisdiction in the criminal matters. The furthest it goes regarding the regulation of criminal sanctions is in light of the cooperation and harmonization of the rules where certain offences and potential sanctions could be indicated, as for example in case of requirement for the MS to impose criminal penalties on persons committing environmental offences.[189] Accordingly, the ECJ in case C-176/03 *Commission v. Council* took the view that criminal law as such is not a separate EU policy and the EU action in criminal matters may be based only on implicit powers associated with a specific legal basis and only at sectoral level on condition that there is a clear need to combat serious shortcomings in the implementation of the Union's objectives and to ensure the full effectiveness of the EU policy.[190] Furthermore, the implementation of these measures is the exclusive competence of the MS and the Treaties do not transfer on the EU the

[187] eLabEurope, The EU Transparency Register in 2014 and beyond (n 12) 14.

[188] *Ibid*.

[189] Directive of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law OJ L 328/28, 6 December 2008, Art 3; Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law OJ L 29/55, 5 February 2015, Art 5.

[190] Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 *Commission v Council*) COM(2005) 583 final/2, 24 November 2005, [7]; TFEU Art 83.

competence to itself conduct the criminal prosecution making this particular sanction inapplicable at the EU level.

To the contrary, the EU and its institutions are authorized in certain circumstances by the EU law to impose fines on entities, as an illustration, the COM in case of the infringement of the antitrust rules.[191] Nevertheless, bearing in mind the limited binding effect of the IIA already discussed, the pecuniary sanction could not be foreseen through an IIA, since the institutions are not authorized to impose obligations and sanction directly *vis-à-vis* third parties on basis of their right of internal self-organisation.[192] Consequently, this type of "sanction-based regime" would probably require legislation, namely Regulation or Directive.[193]

In order to compensate this shortcoming the imposition of the lobbying ban for non-registrant as a sanction is taken into consideration.[194] The mandatory register could take current incentives a step further, prohibiting the enjoyment of these advantages in principle instead of only partial restriction in the case of non-registrants. The IIA seems to be an appropriate instrument for taking this "privileged access" approach.[195] Nevertheless, measures of this nature could also have some negative connotations as it was the case in the USA. Namely, in the USA, the legitimacy of lobbying activity is guaranteed by I Amendment obliging the Congress to respect the freedom of speech and of the press, as well as "right to petition the Government for a redress of grievance".[196] As a consequence, the possibility of prohibiting lobbyist to engage in communications with the public office holders for a certain period of time was abounded due to its unconstitutionality.[197] Therefore, the LDA focuses on disclosure and

[191] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, Art 23.

[192] Legal Opinion SJ-0012\10 (n 136) [29].

[193] Commission, "Roadmap on Establishment of a mandatory Transparency Register for interest representatives", February 2015, 2 <*http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2015_sg_010_transparencyr_04022015_updated_fvp_en.pdf*> accessed 30 July 2015.

[194] Legal Opinion SJ-0012\10 (n 136) [29].

[195] Roadmap on Establishment of a mandatory Transparency Register (n 193) 2.

[196] Holman and Luneburg (n 2) 78, 80.

[197] *Ibid*. 85.

transparency to avoid the restrictions or prohibitions which would violate the citizens' rights.[198]

Similarly, the EU could also face certain obstacles regarding this, since according to the Proposal Annex IV 10. 1. the Secretariat can impose suspension of individual or multiple types of interaction available to the registrant for a period between 15 days and 1 year; as well as removal of the registration from the register for a period between 15 days and 2 years. Even though these are already known measures they now for the first time have restricting effect. Therefore, it is the question of the proportionality whether the temporary prohibition of direct lobbying activity in case of serious breach of rules could go against protected rights, access to the EU institutions and participation in decision-making.[199] According to principle of proportionality and the Article 5 TEU, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties and it is applied by the ECJ when it "balances legislative and administrative measures against private interests, individual rights and fundamental freedoms".[200]

The COM expressed its indicative view that such "privileged accessed" regime respects proportionality principle.[201] Indeed, the main objectives of increasing transparency and fostering trust of citizens and stakeholders in the EU decision-making process[202] could be achieved through mandatory registration based on privileged access since general public could get a complete information about all those involved in policy-making, their resources and expenses which could improve understanding and accountability as well as prevent corruption by creating possibility to react in timely manner in case of inappropriate behavior.[203] Additionally, from the lobbyist's viewpoint this could bring a level-playing

[198] Maskell (n 165) 2.

[199] M. Nettesheim, "Interest representatives' obligation to register in the Transparency Register: EU competences and commitments to fundamental rights" (In-Depth Analysis), Directorate General for Internal Policies Policy Department C: Citizens' Right and Constitutional Affairs, 2015, 8.

[200] T.-I. Harbo, The Function of the Proportionality Principle in EU Law, (2010) 16(2) *European Law Journal* 158, 164, 171 <*http://www.jus.uio.no/ifp/om/aktuelt/arrangementer/2010/vedlegg/harbo.pdf*> accessed 6 August 2015.

[201] Roadmap on Establishment of a mandatory Transparency Register (n 193) 3.

[202] *Ibid*. 2.

[203] Nettesheim (n 199) 8; Holman and Luneburg (n 2) 78.

field[204] while politicians as a lobbied party could also benefit from the important piece of information regarding the authorship and motives behind a communication.[205]

However, the COM also correctly notices that the final answer to the question of proportionality equally depends on the specific configuration of the obligations and the sanctions imposed in case of violation.[206] The potential restrictive effects upon Articles 11 TEU and 15 TFEU as well as fundamental freedoms and rights contained in the Charter of Fundamental Rights, namely freedom of expression and information (Article 11) or freedom to engage in work and conduct business (Article 15, 16) and right to privacy (Article 7), although these are not absolute rights, require justification.[207]

The ECJ assesses the issue of proportionality on case by case basis and in *Fedesa* case[208] the ECJ firstly stated the principle point that a regulation or prohibition for an economic activity is subject to conditions that it is appropriate and necessary and when choosing between several measures recourse must be to the least onerous one, after, the ECJ nevertheless applied less demanding standard "concluding that legality of the measure could be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue".[209] Consequently, there is possibility that the mandatory registration will be able to pass this test depending on the concrete and finale content, scope and the wording of the rules.[210]

Furthermore, in case that this kind of lobbying restriction is foreseen for non-registrants and that suspension from the register is imposed as a sanction in particular case of the non-compliance, as a consequence of the mandatory register, this could produce the legal effects *vis-à-vis* third parties which is susceptible to juridical review allowing any natural or legal person to institute

[204] Chari, Hogan and Murphy (n 30) 131-132.

[205] Nettesheim (n 199) 8.

[206] Roadmap on Establishment of a mandatory Transparency Register (n 193.) 3.

[207] Nettesheim (n 199) 25-30.

[208] Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* (CFI, 13 November 1990) [14].

[209] Harbo (n 200) 177.

[210] Nettesheim (n 199) 26-27.

proceedings against the act addressed to that person.[211] The Proposal equipped the registrant who was subject to these measures with the possibility to lodge a reasonable request for a review of the Secretariat decision to the Management Board which consist of the Secretaries-General of the three institutions. Registrant that is not satisfied with decision may now by the words of the Proposal submit an application to the Court of Justice. Based on this, the addressee of the concerned suctions would be entitled to lodge an action for annulment before General Court.[212] Nevertheless, the EU Ombudsman as the only option which has been available so far would continue to be a complementary path.

Taking into account the legal challenges identified above, especially the fact that an IIA might not be capable to directly impose legally binding obligation on third parties, the potential solution could be this *de facto* mandatory system based on strong incentive such as privileged access that can motivate lobbyists on the basis of cost-benefit assessment to opt for obligations instead of a free ride.[213] The obligation imposed through internal rules on lobbied not to interact in relation to their EU engagements with non-registrants, including also contacts outside of the official premises of the EU institutions, is the solution worth considering.[214]

VI Conclusions

Ever since the question of lobbying regulation was raised for the first time in the 1990s and the idea of registration of external actors involved in policy-making embraced, it continued to occupy the EU political arena. The impression is that lobbying regulation in the EU developed in several directions and on several levels.

Firstly, at the EU level efforts of the individual EU institutions to regulate access and to structure consultation process paved the way for future initiatives and inspired similar actions at the national level of MS. The EP's and COM's parallel systems reflected the complexity of the EU institutional framework but were seen only as a temporary solution. Creating JTR from the outset has positively affected

[211] TFEU Art 263.

[212] TFEU Art 256.

[213] R. Patz, Reviewing the EU Transparency Register: How to register EU lobbying?, *Transparency International* <*http://www.transparencyinternational.eu/2013/10/reviewing-the-eu-transparency-register-how-to-regulate-eu-lobbying/*> accessed 25 March 2015.

[214] eLabEurope, The EU Transparency Register in 2014 and beyond (n 12) 7.

the lobbying framework not only from the technical and efficiency perspective, since it enabled more coherent rules and implementation, but more importantly, bearing in mind the ultimate goal, it brought stronger incentives which multiplied the entries in the voluntary register and enabled easier public scrutiny. On the other hand, although the Council plays the important role in the lobbying chain, it has not yet been part of any of the arrangements which had as their aim regulation of interest representation. In spite of the fact that JTR as such is not limited only to lobbyist's action towards the EP and the COM, designated staff of these institutions is at the moment in charge of its implementation without any counterpart in the Council and due to that it can be concluded that Council is a missing piece necessary for the complete regulation.

Secondly, when it comes to scope and content of the rules it is evident that they become more sophisticated in time in order to address the issues and shortcomings identified in practice. Initial rules of the EP and the COM were less ambitious and specific, using broad definitions and leaving a lot of room for interpretation and self-regulation. This was result of several factors, in particular, the EU was stepping on unfamiliar grounds trying to regulate phenomenon fluid as lobbying while the trend of lobbying regulation just started to develop even on international level and as a consequence the EU needed to learn from its own mistakes. Later, as it was already explained, rules gradually evolved through the more precise definition of their aim, scope and exceptions, comprehensive disclosure and joint incentives of the EP and COM to accelerate the registration. Nevertheless, despite the fact that the registrants are required to declare upon registration a great amount of information in the name of transparency, which does not fall significantly behind some of the most regulated systems, there is still space for improvements when it comes to performance of such obligations and the constant control of their accuracy. Furthermore, even if all required pieces of information are provided, the system in place does not secure timely information necessary for the assessment by interested parties, especially general public, but this could be achieved through regular reporting.

Last but not least, the fact that issue of lobbying is despite the pessimistic predictions longer than two decades "on air" and that we are now speaking about potential mandatory register in Brussels louder than ever, is the greatest development. The assessment of the mandatory register initiative shows that it could have multiple positive effects on lobbyists, the general public and the lobbied. It could overcome some deficiencies which voluntary system attempted but could not resolve, by closing loopholes. Namely, although the EU system is

in some segments very detailed and advanced resembling significantly to the USA federal system, there are fundamental grounds missing, allowing lobbyists to bypass all of them, which negatively affects transparency of the whole process.

However, the establishment of the mandatory system is a tremendous challenge not only politically or financially but also legally very complex issue. Capturing a fluid nature of the lobbying activity and finding the balance of the right amount of required information capable of ensuring transparency and accountability without putting too much burden on stakeholders or jeopardizing participation is a constant struggle. Through the process of creating its own lobbying framework, the EU should continue to pay attention to developments of the USA federal rules, especially regarding the amount of the disclosure, since the USA is more experienced when it comes to the issue of transparency which the EU is trying to tackle.

Overall, under the current setup of the EU objectives seeking for the greater transparency, the mandatory register is the next step which complements efforts that the EU has undertaken so far. Even though the most straightforward solution would be a legislative act enabling pecuniary fines instead of lobbying restriction, the effect of mandatory registration could be achieved through the IIA as a second best solution, provided that in the case of the most serious violation of the rules the registrant concerned is denied of privileged access to the decision-maker without unnecessarily affecting principle of the proportionality and the rights and freedoms guaranteed in the EU. Under those circumstances, the mandatory system would have the far-reaching consequences for the lobbyist and due to that in comparison to the voluntary system the scope should be narrower, enforcement mechanism and sanctions stronger and supervisors specialized. Overall, based on the previous experience of the EU institutions and taking into account the USA federal lobbying framework, it seems that the mandatory register could lead to better, more transparent governance of the EU lobbying than the voluntary system currently in place.

The Mandatory Transparency Register Initiative – Towards a Better Governance of Lobbying in the EU?

Summary

The lobbying practice in the EU nowadays has established itself as a legitimate part of decision-making process with the significant influence on the regulatory outcome. Consequently, the need for its regulatory framework cannot go unnoticed anymore. In the beginning, the EP and the COM tried by the separate measures and incentives, on voluntary base, to implement some rules and create order in interaction with the lobbyists. First important steps were Codes of conduct, stating desirable behavior of the lobbyists and the voluntary register, containing the list of entities engaged in interest representation, with the limited details on financial resources and clients. Furthermore, the EP and the COM built on these grounds the online voluntary Joint Transparency Register, which is basically still in force. The main shortcomings of this system, which the EU is trying to combat right now, are the voluntary nature and the fact that at this moment the Council is not part of the equation. As a consequence, the system in place leaves space for manipulation, and due to that, there are unregistered groups and individuals that are known for lobbying the EU institutions. This has tremendous negative effect on the transparency and the mandatory registration, without which there is no interaction with the COM, the EP and the Council, could improve the situation. However, the transfer to mandatory register is facing certain legal and political obstacles, therefore it is matter of balancing, since the non-registrants would be denied of privileged access to the decision-maker. Bearing in mind the above-mentioned, it seems that the definition of the covered activities should be narrower, enforcement mechanism and sanctions stronger with the specialized supervision.

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ŽIVO SLOVO NA PAPIRU: NEZAVISNI ORGANI U PROCESU REVIZIJE USTAVA**

1. Uvod

Uprkos potencijalu da obeleži konačni prekid sa tradicijom donošenja Ustava bez konsultacija javnosti i šireg društvenog konsenzusa, Ustav Republike Srbije iz 2006. godine donet je u ishitrenoj atmosferi koja je nepopravljivo umanjila njegov legitimitet. Nakon ubrzane pripreme, kratkih pregovora partijskih struktura i potpunog izostanka javne i parlamentarne rasprave, poslanici Narodne skupštine Republike Srbije (u daljem tekstu: *Skupštine*) usvojili su predlog novog Ustava, koji su umesto nadležnog parlamentarnog Odbora za ustavna pitanja i zakonodavstvo sastavili predstavnici uskog kruga najznačajnijih stranaka.[1] Pored

* Istraživački forum Evropskog pokreta u Srbiji.

** Rad je nastao u okviru projekta *Promene ustava na putu ka EU* koji finansijski podržava ambasada Kraljevine Holandije u Srbiji u okviru MATRA programa Ministarstva spoljnih poslova Kraljevine Holandije.

[1] Videti Ustav na prekretnici: Izveštaj o ustavnoj praksi, nedostacima Ustava i načinima njegovog poboljšanja, (Komitet pravnika za ljudska prava – YUCOM: Beograd, 2011), str. 8-10; i V. Džamić, Neophodnost promene Ustava Republike Srbije: položaj i značaj Narodne skupštine, (Istraživački forum Evropskog pokreta u Srbiji: Beograd, 2014), str. 2.

problema legitimiteta, višestruki razlozi podstakli su stručnjake i javnost da ubrzo pokrenu pitanje revizije Ustava, počev od nedostataka u sadržaju Ustava i nezadovoljstva nedoslednim ustavnim rešenjima, pa do neophodnih izmena u okviru procesa pristupanja Srbije Evropskoj uniji (EU). U okviru procesa pristupanja EU, revizija Ustava predstavlja jedan od neophodnih preduslova za ratifikaciju i stupanje na snagu Ugovora o pristupanju EU i obaveza koje proističu iz članstva, a time i nužan korak za napredak Srbije ka članstvu u EU.[2] S obzirom na to da je promena važećeg Ustava danas izvesna, predstojeći proces Ustavne revizije treba iskoristiti za unapređenje ustavnih rešenja kojima se pravno-političko uređenje države može znatno poboljšati. Među njima je i definisanje položaja i uticaja nezavisnih organa kao jedne od ključnih komponenti stabilnog i efikasnog demokratskog sistema, razvijenog na principima vladavine prava i dobre uprave.

Nezavisni organi, koji se često nazivaju i *četvrtom granom vlasti*, ne samo da štite građane i njihova prava već istovremeno obezbeđuju snažan mehanizam za delotvornu kontrolu izvršne vlasti. Oni su ključni partneri Skupštine u sprovođenju funkcije kontrole nad izvršnom vlašću i organima uprave, odnosno u kontroli rada organa vlasti i nosilaca javnih ovlašćenja. Efikasan i efektivan rad nezavisnih organa predstavlja neophodan preduslov za obezbeđivanje ravnoteže među nosiocima državne vlasti. Međutim, prethodno istraživanje Evropskog pokreta u Srbiji pokazuje da se nezavisni organi i dalje susreću sa preprekama i nedostacima koji direktno degradiraju njihov položaj i uticaj.[3] Otežavanje delotvornog rada nezavisnih organa utiče na sveukupan rad demokratskih institucija u Srbiji, počev od Skupštine, čiji je rad sveden na puku formalnu ulogu "glasačke mašine" usled koncentracije vlasti u rukama egzekutive i prekomernog uticaja partijskih struktura na poslanike. Obezbeđivanje funkcionalne kontrole rada izvršne vlasti neophodan je preduslov za podelu i ravnotežu vlasti, a samim tim i za obezbeđivanje vladavine prava koja je jedan od ključnih uslova za napredak Srbije u procesu evropskih integracija.

Definisanjem položaja i funkcije nezavisnih organa koja garantuju poštovanje osnovnih prava građana u samom Ustavu stvara se neophodan preduslov za jačanje njihovog položaja, autoriteta i uticaja. Jaki, stabilni i delotvorni nezavisni

[2] Videti V. Međak, Da li je potrebno menjati Ustav Republike Srbije usled pristupanja Evropskoj uniji?, (Istraživački forum Evropskog pokreta u Srbiji: Beograd, 2016).

[3] T. Tepavac, Nezavisna tela i Narodna skupština Republike Srbije: suštinska ili simbolična saradnja? Izveštaj politike, (Beograd: Evropski pokret u Srbiji, 2015).

organi, čija se mišljenja i preporuke poštuju i efektivno primenjuju, ključan su garant zaštite ljudskih i manjinskih prava proklamovanih Ustavom. Ona su istovremeno nužna za uspostavljanje stabilnih i funkcionalnih demokratskih institucija, koje garantuju i poštuju podelu i ravnotežu vlasti. Upravo ovi preduslovi čine temelje vladavine prava, a njihovo ispunjenje ključan je korak za napredak Srbije u procesu evropskih integracija. U tom smislu, i sam poslednji izveštaj Evropske komisije za 2016. godinu ponovo podvlači da "delotvoran nadzor nad egzekutivom mora biti dodatno unapređen", kao i "razumevanje i priznavanje nadležnosti nezavisnih organa".[4]

Ovde vredi napomenuti da značajne razlike među nezavisnim organima u oblastima delovanja i nadležnostima otežavaju njihovo grupno definisanje u Ustavu, poput na primer formalnog definisanja *četvrte grane javne vlasti*. Pa ipak, regulisanjem stabilnog položaja i uloge obezbedili bi se preduslovi nužni za njihovo funkcionisanje. Sa druge strane, grupa nezavisnih organa koja deluje u oblasti zaštite ljudskih prava i borbe protiv diskriminacije nesumnjivo može naći svoje mesto u Ustavu, s obzirom na njihov nezaobilazan značaj u zaštiti zajamčenih prava građana kao i načela vladavine prava kao osnovne pretpostavke Ustava. Imajući to na umu, izveštaj politike usmeren je upravo na ovu grupu nezavisnih organa: *Zaštitnika građana* (u daljem tekstu: *Ombudsman*), *Poverenika za informacije od javnog značaja i zaštitu podataka o ličnosti* (u daljem tekstu: *Poverenik za informacije i zaštitu podataka*) i *Poverenika za zaštitu ravnopravnosti* (u daljem tekstu: *Poverenik za ravnopravnost*).

Cilj ovog izveštaja politike jeste da identifikuje razloge za Ustavnu regulaciju položaja i funkcije ovih nezavisnih organa, potencijalne prednosti i eventualne mane njihovog definisanja Ustavom u odnosu na pravno-politički sistem u Srbiji, kao i da ponudi preporuke za regulisanje položaja i funkcije ovih nezavisnih organa u okviru predstojeće Ustavne revizije. Na tragu iznetih nalaza ovaj izveštaj politike nastoji i da otvori debatu o Ustavnom regulisanju principa na kojima počivaju i rade drugi nezavisni organi.

2. Položaj nezavisnih organa u Srbiji: stabilnost i delotvornost u praksi

U pravno-političkom sistemu Srbije tri nezavisna organa deluju u polju zaštite ljudskih i manjinskih prava i zabrane diskriminacije: *Ombudsman*, *Poverenik za informacije i zaštitu podataka* i *Poverenik za ravnopravnost*. Osim uloge garanta

[4] European Commission's *Country Report Serbia 2016*, pp. 7-8.

zaštite osnovnih prava građana, ove institucije predstavljaju i instrument kontrole organa vlasti. Srbija kao predstavnička demokratija počiva na principima vladavine prava i podele vlasti, u kojoj narod ima svoje predstavnike u Skupštini pred kojima bi Vlada trebala biti odgovorna. Među svojim osnovnim načelima, važeći Ustav određuje da je vladavina prava "osnovna pretpostavka Ustava i počiva na neotuđivim ljudskim pravima" (član 3) i utvrđuje da "uređenje vlasti počiva na podeli vlasti na zakonodavnu, izvršnu i sudsku" a "odnos tri grane vlasti zasniva se na ravnoteži i međusobnoj kontroli" (član 4).[5] U takvom sistemu funkcionalna Skupština i njena efektivna i efikasna saradnja sa nezavisnim organima predstavlja osnovni preduslov za političku i pravnu odgovornost.

Nezavisni organi su dakle partner Skupštine koji dopunjava njenu kontrolnu ulogu, redovno ukazujući na nedostatke u radu državnih organa i organa javne uprave i dajući preporuke za unapređenje njihovog rada kao i kvalteta zakonskih rešenja. Iako institucije *Ombudsmana*, *Poverenika za informacije i zaštitu podataka* i *Poverenika za ravnopravnost* tokom poslednjih godina beleže značajne uspehe i pomake u obezbeđivanju zaštite ljudskih prava i zabrane diskriminacije, praksa pokazuje da i dalje postoje sistemski problemi i ograničenja koja otežavaju njihov rad.[6] Čak i saradnju Skupštine sa nezavisnima organima karakterišu brojni nedostaci, od kašnjenja i nepoštovanja procedura do nedostatka uvažavanja i neprimerenog odnosa prema njihovim predstavnicima koji direktno ugrožavaju kako lični tako i integritet, legitimitet i autoritet ovih institucija. Skupštinske rasprave o izveštajima nezavisnih organa često izostaju, kao i zaključci o njihovim izveštajima koje bi Skupština trebalo da usvoji nakon rasprave u nadležnim skupštinskim odborima.[7]

Ovakva ustaljena kašnjenja, ponovljena i ove godine izostankom plenarnog razmatranja godišnjih izveštaja *Ombudsmana*, *Poverenika za informacije i zaštitu*

[5] Važno je napomenuti da je formulacija ovog člana Ustava problematična, s obzirom da se izraz "međusobna kontrola" može shvatiti kao ovlašćenje na kontrolu sudske grane vlasti od strane zakonodavne i izvršne vlasti, što je u demokratskoj državi nedopustivo. Samim tim, očekuje se izmena ove formulacije u okviru predstojeće Ustavne revizije.

[6] Videti T. Tepavac, Nezavisna tela i Narodna skupština Republike Srbije: suštinska ili simbolična saradnja? Izveštaj politike, (Beograd: Evropski pokret u Srbiji, 2015).

[7] Prema članovima 237-241 Poslovnika Narodne skupštine, relevantni skupštinski odbori dužni su da razmotre izveštaj nezavisnog tela u roku od 30 dana od dana podnošenja izveštaja, donesu zaključke na osnovu izveštaja i podnesu ih skupštini na raspravu i usvajanje na prvoj narednoj plenarnoj sednici.

podataka i *Poverenika za ravnopravnost* za 2015. godinu koji su podneti još u martu 2016. godine, obesmišljavaju svrhu njihove kontrole.[8] Izveštaji nezavisnih organa su njihov ključan instrument, s obzirom na to da u kontekstu ograničenih ovlašćenja njihova delotvornost u velikoj meri zavisi od mogućnosti da njima skrenu pažnju javnosti i parlamenta na žalbe građana.[9] Stoga su zaključci koje Skupština donosi povodom izveštaja nužni za primenu njihovih preporuka, odnosno za otklanjanje nedostataka i unapređenje funkcionisanja državnih organa koje parlament nadzire i kontroliše. Samim tim praksa kašnjenja od strane Skupštine u njihovom usvajanju ozbiljno degradira položaj i uticaj nezavisnih organa i same Skupštine, narušava delotvorno sprovođenje kontrole a time i ravnotežu vlasti.

Nezavisni organi često se susreću i sa neuvažavanjem preporuka i mišljenja na nacrte zakonskih rešenja, a praksu znatnog kašnjenja usvojila je i izvršna vlast prilikom usvajanja preporuka i predloga nezavisnih organa, kao i pri sprovođenju zaključaka koje Skupština donosi na osnovu njihovih izveštaja. Tako na primer Vlada još uvek nije usvojila *Akcioni plan za sprovođenje Strategije zaštite podataka o ličnosti,* koji je trebalo da donese još 2010. godine, niti formirala "posebno radno telo" predviđeno *Strategijom zaštite podataka o ličnosti* koju je usvojila u leto iste godine.[10] Usled višegodišnjeg odlaganja strategija je u međuvremenu zastarela, posebno u pogledu međunarodnih standarda postavljenih u okviru pregovora o pristupanju Srbije EU. Potreba za donošenjem novog *Zakona o zaštiti podataka o ličnosti* prepoznata je još 2014. godine, s obzirom da važeći zakon nije usklađen sa aktuelnim standardim evropskih dokumenata i ne obezbeđuje nesmetano uživanje ovog prava. Vlada nije ispoštovala rok za donošenje novog zakona do kraja 2015. godine, niti uzela u obzir Model koji je

[8] V. Petrov, The Constitution and Regulatory (Independent) Bodies – An Attempt at Defining the Place and the Role of Regulatory Bodies in the Constitutional System, u: *National Assembly of the Republic of Serbia and Independent Bodies : materials from the Conference "National Assembly of the Republic of Serbia and ndependent Bodies", Belgrade, 26-27 November 2009 and an overview of the examples of international practice,* ed. B. Čamernik, J. Manić and B. Ledeničan, (Beograd: UNDP Country OfficeSerbia, 2010), str. 49.

[9] Milenković 2013, str 200.

[10] Rezime Izveštaja o sprovođenju Zakona o slobodnom pristupu informacijama od javnog značaja i Zakona o zaštiti podataka o ličnosti za 2014. godinu, str.6. Sajt Poverenika za informacije od javnog značaja i zaštitu podataka o ličnosti, dostupno na: *http://www.poverenik.rs/sr/izvestaji-poverenika/2048-izvestaj-poverenika-za-2014-godinu.html*.

pripremio Poverenik, kako je sama predvidela Akcionim planom za Poglavlje 23.[11]

Ovakav stav Vlade prema preporukama nezavisnih organa i obavezujućim zaključcima Skupštine nezamislivi su za jednu funkcionalnu demokratsku državu. Štaviše, ustalila se i praksa izostanka odgovornosti za kršenje *Zakona o slobodnom pristupu informacijama*. Problem sa obavezom Vlade da prinudom obezbedi izvršenje rešenja *Poverenika za informacije i zaštitu podataka* kulminirao je tokom 2016. godine u kojoj je Poverenik bio prinuđen da se čak 61 put obrati Vladi koja međutim nijednom nije izvršila tu obavezu.[12] Uz to, aktivnosti države na polju zaštite podataka o ličnosti se "u najvećoj meri svode samo na aktivnosti Poverenika" koje "ne mogu da nadomeste sve ono što bi morali da urade drugi nadležni, pre svega, ministarstva, Vlada i Skupština".[13] Posebno zabrinjava što je javno tužilaštvo, koje bi moralo biti nepristrasno i samostalno od izvršne vlasti, umesto postupanja po krivičnim prijavama koje Poverenik podnosi tokom prošle godine podnelo "više tužbi tražeći poništaj poverenikovih rešenja nego ukupno u 11 prethodnih godina",[14] dok je Povereniku u martu 2017. godine Viši javni tužilac u Beogradu uputio dopis koji "sadrži insinuacije lišene bilo kakvog činjeničnog ili pravnog osnova o tome da je Poverenik navodno počinio nekakvo, nejasno koje krivično delo" i "završava se nečim što se objektivno ne može razumeti drugačije nego kao pretnja".[15]

Ovakav stav prema nezavisnim organima ne samo da praktično "poziva" na kršenje zakona, već direktno podriva kapacitet njihovih sankcija i umanjuje njihovu efektivnost u zaštiti ljudskih i manjinskih prava. Kako bi se prevazišle

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[11] *Nov model Zakona o zaštiti podataka o ličnosti,* saopštenje Poverenika za informacije od javnog značaja i zaštitu podataka o ličnosti, 6.3.2017, dostupno na: *http://www.poverenik.org.rs/yu/saopstenja-i-aktuelnosti/2554-nov-model-zakona-o-zastiti-podataka-o-licnosti.html*.

[12] Izveštaj o sprovođenju Zakona o slobodnom pristupu informacijama od javnog značaja i Zakona o zaštiti podataka o ličnosti u 2016. godini, Beograd, mart 2017. godine, str. 4, dostupan na: *http://www.poverenik.rs/yu/izvetaji-poverenika/2568-izvestaj-poverenika-za-2016-godinu.html*.

[13] R. Šabić, Jedna sumorna godina, *Danas*, 10.12.2016, dostupno na: *http://www.danas.rs/licni_stavovi/licni_stavovi.1148.html?news_id=334212&title=Jedna+sumorna+godina*.

[14] *Isto*.

[15] Saopštenje Poverenika za informacije od javnog značaja i zaštitu podataka o ličnosti, objavljeno 17.03.2017, dostupno na: *http://www.poverenik.rs/yu/saopstenja-i-aktuelnosti/2563-pismo-poverenika-republickom-javnom-tuzilastvu.html*.

prepreke i ograničenja i nezavisnim organima omogućilo da delotvorno obavljaju svoje funkcije, potrebno je sistematski ojačati njihov položaj i uticaj. Nadalje, autoritet i uticaj ovih organa ne može se ojačati bez osnaženog položaja i autoriteta same Skupštine i unapređenja njihove međusobne saradnje. Ustavno definisanje položaja i nadležnosti *Poverenika za informacije i zaštitu podataka* i *Poverenika za ravnopravnost* u okviru procesa Ustavne revizije, praćenog otvorenom javnom debatom i širokim javnim konsenzusom, predstavlja ključan korak u jačanju legitimiteta, autoriteta i uticaja ovih organa.

3. Zašto je potrebno Ustavno definisati nezavisne organe?

Od nezavisnih organa koji deluju u oblasti ljudskih prava Ustavom je regulisana samo institucija *Ombudsmana*, dok je članom 137 predviđeno da se javna ovlašćenja mogu "zakonom poveriti i posebnim organima preko kojih se ostvaruje regulatorna funkcija u pojedinim oblastima ili delatnostima".[16] S obzirom na to da je u evropskim državama uobičajena praksa uspostavljanja i regulisanja nezavisnih organa na nivou zakona, postavlja se pitanje zašto ih je u Srbiji potrebno uspostaviti Ustavom?

Razlog za njihovo Ustavno definisanje leži u obezbeđivanju osnovnih preduslova za delotvoran rad i uticaj ovih organa, koji su u funkcionalnim demokratskim porecima zapadnoevropskih država već uveliko ustaljeni. Koliko nezavisni organi zaista mogu delotvorno pomoći u garanciji zaštite ljudskih prava i sprovođenju nadzora i kontrole nad radom organa vlasti, zavisi od njihove nezavisnosti, ovlašćenja i uticaja koji imaju. Imajući u vidu ograničenja i prepreke sa kojima se sva tri nezavisna organa susreću u praksi, njihovo ustanovljenje Ustavom predstavlja jedan od ključnih koraka u unapređenju njihovog položaja, autoriteta i delotvornosti. Na taj način jačaju se i garancije vrednosti proklamovanih Ustavom, kao važan korak u rešavanju problema deklarativnosti Ustava, odnosno osiguravanja njegove primene kao najvišeg pravnog akta koji normira pravno i političko ustrojstvo države, a svojim građanima garantuje poštovanje vladavine prava i zajedničkih vrednosti.

Iako države zapadne Evrope nemaju ujednačena rešenja za uređenje pravno-političkog okvira delovanja nezavisnih organa, one funkcionišu u znatno drugačijem kontekstu koji podrazumeva stabilne i funkcionalne institucije, postojanje demokratske tradicije i političke kulture. U takvim sistemima poštuje

[16] Ustav Republike Srbije, (Beograd: JP Službeni glasnik, 2006), str. 68.

se nezavisnost, stabilnost i autoritet nezavisnih organa, a njihova mišljenja i preporuke poštuju i efektivno primenjuju u praksi. Samim tim, obezbeđene su garancije zaštite prava građana u praksi kao i funkcionalna podela i ravnoteža vlasti, koje predstavljaju temelje vladavine prava. Sa druge strane, u Srbiji se nastavlja negativan trend pogoršanja demokratije. *Freedom House* u izveštaju o nacijama u tranziciji, Srbiju ocenjuje kao "polu-konsolidovanu demokratiju" sa prosečnom ocenom 3,75 od 7, koja je 2016. godine pala na najniži nivo od 2005. godine.[17] Prema *Indeksu stepena demokratičnosti* Srbija je u 2016. godini ocenjena kao "manjkava" demokratija sa prosečnom ocenom od 6,51, u odnosu na zapadnoevropske demokratije sa prosečnim ocenama između 8 i 10.[18] S obzirom na to da nema univerzalnog "*one size fits all*" rešenja za garanciju preduslova za efikasan i efektivan rad nezavisnih organa usled specifičnosti svake države, potrebno je osmisliti pravno-politički okvir koji bi odgovarao kontekstu Srbije.

Na prvi pogled, u Srbiji se značajnim brojem od čak 70 (od ukupnih 206) članova važećeg Ustava garantuje zaštita ljudskih i manjinskih prava i sloboda, čiji je sadržaj "u najmanju ruku u skladu sa evropskim standardima i u nekim aspektima ide i dalje od njih".[19] Međutim, pozitivne pomake u zaštiti ljudskih prava narušavaju nejasne formulacije pojedinih odredbi koje su ispod evropskih standarda i selektivna primena prava u praksi, uz nedostatak pouzdanih, jasnih i efektivnih garancija koje bi dodatno učvrstile ustavne vrednosti. Istraživanje *Zašto Ustav mora biti promenjen* pokazalo je da su i građani i elita u velikoj meri saglasni u oceni sadržaja Ustava koje treba menjati. Kao jedan od najvećih problema ispitanici podvlače upravo deklarativnost Ustava i nedostatak garancija za vrednosti koje sadrži, među kojima se najčešće navode ljudska prava, uključujući pravo na privatnost, ravnopravnost verskih zajednica, manjina i polova.[20] Institucije *Poverenika za informacije i zaštitu podataka* i *Poverenika za ravnopravnost* predstavljaju garancije za zaštitu ovih prava.

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[17] Nations in Transit, Freedom House, dostupno na: *https://freedomhouse.org/report/nations-transit/2017/serbia*.

[18] The Economist Intelligence Unit's Democracy Index, dostupno na: *https://infographics.economist.com/2017/DemocracyIndex/*. Osim ovog istraživanja, o stepenu (ne)zavisnosti sudstva svedoči i IPI Index of Public Integrity dostupan na: *http://integrity-index.org/*.

[19] Mišljenje Venecijanske komisije o Ustavu Srbije 19.3.2007, 10.

[20] Istraživanje *Zašto je Srbiji potreban novi Ustav?* pokazalo je da "samo 17 odsto građana i 21 odsto političara smatraju da je adektvatno sproveden princip podele vlasti na zakonodavnu, izvršnu i sudsku, ali i oni misle da su garancije nezavisnosti nezavisnih tela nedovoljne". Građani

Takve garancije posebno su važne u kontekstu zabrinjavajuće nefunkcionalnosti Skupštine svedene na formalnu ulogu "glasačke mašine" koja postupa prema volji partijskog rukovodstva i nad kojom Vlada uživa premoć. Način na koji je poslednji u nizu Ustava donet 2006. godine potvrdio je da su se ove prakse u Srbiji ustalile, gradeći fasadu deklarativnom vladavinom prava i simulacijom podele vlasti. Čak i sami poslanici ne smatraju da su postojeći mehanizmi parlamentarne kontrole jaki, niti efikasni, a ulogu Skupštine posmatraju pretežno kroz prizmu svog stranačkog članstva.[21] Prema nedavno sprovedenom istraživanju, poslanici smatraju da imaju znatno manje političkog uticaja od ostalih državnih aktera, uključujući nezavisne organe koje samo 22% poslanika izdvaja kao najbitnije partnere koji bi mogli da doprinesu poboljšanju parlamentarne kontrole. U takvom kontekstu koncentracije vlasti u rukama egzekutive i rizika od preteranog uticaja političkih stranaka od čije "volje i hira" zavisi mandat narodnih poslanika,[22] postojanje i uređenje nezavisnih institucija koje štite prava građana u praksi je prepušteno političkoj volji vladajućih partija i time dovedeno u pitanje.

Iskustva evropskih zemalja govore nam da je za izgradnju autoriteta nezavisnih organa i političke kulture poštovanja njihovih preporuka i mišljenja, koji su uz efikasnu saradnju sa Skupštinom među ključnim preduslovima za njihovu delotvornost, neophodno obezbediti njihovu nezavisnost, kontinuitet i stabilnost. Ustavno definisanje institucija *Poverenika za informacije i zaštitu podataka* i *Poverenika za ravnopravnost* prvi je korak u obezbeđivanju ovih preduslova. Ovaj nužni ali ne i dovoljan korak će olakšati predstojeći dugotrajan proces promene razmišljanja i pristupa prema poštovanju Ustava i predviđenih pravno-političkih okvira, posebno od strane izvršne vlasti.

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prepoznaju i prepreke i ograničenja sa kojima se nezavisni organi susreću u svom radu – "samo 2 odsto građana i 4 odsto predstavnika elite smatraju da je samostalnim državnim organima u potpunosti omogućeno da rade svoj posao (kontrolišu vlast i državnu administraciju)" odnosno "72 odsto predstavnika elite smatra da bi Ustav trebalo da da čvršće garancije poziciji samostalnih državnih organa", dok većina predstavnika elite smatra da treba "sistemski urediti ovu oblast i Ustavom obuhvatiti i druge organe koji se bave sličnim poslovima kao samostalna i nezavisna tela".Jelinčić/Ilić, Zašto je Srbiji potreban novi Ustav? 2013, 61.

[21] Kako parlament kontroliše izvršnu vlast?, Otvoreni Parlament, 2014, str. 7, 12, 13.

[22] Mišljenje o Ustavu Srbije 19.3.2007, 12.

4. Ograničenja i prednosti Ustavnog definisanja nezavisnih organa

Osnov otpora Ustavnom definisanju nezavisnih organa zasniva se na nekoliko bojazni odnosno rezervi. Prva se bazira na pretpostavci da nezavisne kontrolne institucije imaju "tendenciju da razviju vlastitu egzistenciju" te da u slučaju isuviše velikog broja "mogu na kraju da dovedu do zamagljivanja stvarnih odgovornosti",[23] pre svega vlade parlamentu, a zatim i samog parlamenta koji bi trebao efektivno da obavlja svoju kontrolnu funkciju. Naime, ukoliko se odgovornost za kontrolu prenese na nezavisne organe "parlament bi mogao da se oseti rasterećeno od odgovornosti",[24] i stoga najvažniji deo kontrolnih zadataka treba da ostane u rukama Skupštine. Takođe, prisutan je i strah od potencijalnog mešanja kontrolnih funkcija usled kog "na kraju može zavladati veliki nedostatak odgovornosti za sprovođenje ili nesprovođenje kontrole, a može doći i do manipulacije odlukama".[25] Još jedna bojazan bazira se na pretpostavci da bi ustanovljenje nezavisnih kontrolnih organa pokazalo nepoverenje prema samoj Skupštini. Konačno, pojedini kritičari tvrde i da pored Ombudsmana i Državne revizorske institucije, drugi nezavisni organi u Srbiji ne treba da budu Ustavno definisano jer propisi koji se odnose na druge nezavisne organe nisu ustavna pitanja.

Iako razumljive u kontekstu funkcionalnih predstavničkih demokratija, ove bojazni neutemeljene su u pravno-političkom kontekstu Srbije. Pretpostavka da će definisanje nezavisnih organa Ustavom rezultirati smanjenim vršenjem kontrolne funkcije od strane Skupštine, koja bi je u tom slučaju doživela "suvišnom", ili gubitkom poverenja prema Skupštini, paradoksalna je u slučaju institucija *Ombudsmana, Poverenika za informacije i zaštitu podataka* i *Poverenika za ravnopravnost*. Brojni primeri pokazuju da je stepen odgovornosti Skupštine prema delotvornom sprovođenju kontrolne funkcije nad radom izvršnih organa već uveliko alarmantno nizak. Štaviše, "parlament očigledno više nije mesto gde stanuje moć",[26] a ukoliko je još uvek ima ona se svodi na moć partija usmerenu na ispunjavanje sebičnih dnevno-političkih ciljeva.

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[23] Stručni skup Vladavina prava - odgovornost i kontrola vlasti 2009. Izlaganje dr iur. Matijasa Hartviga, str. 22.

[24] *Isto*, str. 33.

[25] *Isto*.

[26] Pajvančić 2013, str. 38.

Svakako je neophodno (po)vratiti elementarni legitimitet Skupštine i njenu funkcionalnost kako bi se zauzdala i kontrolisala izvršna vlast, međutim efikasni i delotvorni nezavisni organi tome mogu samo doprineti. Ovi nezavisni organi imaju svoju kompatibilnu, autentičnu ulogu i u sistemima u kojima Skupština uspešno sprovodi nadzor i kontrolu nad organima izvršne vlasti, nadopunjujući Skupštinu "onim načelima, onim svojim specifikumom koji nije svojstven parlamentu",[27] i čineći tako celovit i delotvoran kontrolni mehanizam kao preduslov ravnoteže vlasti. Takođe, vredi napomenuti da Skupština niti raspolaže dovoljnim kapacitetima, niti treba da ima kapacitete nužne za vršenje funkcija ovih organa, već treba da efikasno i delotvorno sprovodi svoju kontrolnu funkciju.

Sa druge strane, poverenje prema Skupštini već je dovoljno nisko da bi ga Ustavno definisanje nezavisnih organa moglo značajno ugroziti. Brojna istraživanja već godinama ističu visok stepen nepoverenja građana Srbije prema državnim institucijama. Ilustracije radi, rezultati istaživanja javnog mnjenja o stavovima građana prema policiji iz 2016. godine, pokazuju da čak 56 odsto građana nema poverenje u Skupštinu, dok samo 7 odsto građana navodi da ima poptuno poverenje u ovu instituciju.[28] Nasuprot tome raste poverenje građana prema nezavisnim organima, što osim trenda sve intenzivnijeg obraćanja građana i drugih subjekata kako *Ombudsmanu* tako i "mlađim" nezavisnim organima – *Povereniku za informacije i zaštitu podataka*, *Povereniku za ravnopravnost*, dokazuju i istraživanja javnog menjenja. Na primer, istraživanje sprovedeno u junu 2016. godine pokazalo je da bi se u slučaju diskriminacije *Povereniku za ravnopravnost* obratilo 18 odsto građana, u odnosu na 2 odsto u 2013. godini.[29]

Konačno, institucije *Poverenika za informacije i zaštitu podataka* i *Poverenika za ravnopravnost* odnose se na ustavna pitanja, s obzirom da štite Ustavom predviđena prava građana. Slobodan pristup informacijama od javnog značaja, kao preduslov kvalitetnog i delotvornog uživanja ostalih ljudskih prava i sloboda

[27] Stručni skup Vladavina prava - odgovornost i kontrola vlasti 2009, izlaganje Zaštitnika građana Saše Jankovića, str. 34

[28] A. Đan, *Stavovi građana o policiji. Rezultati istraživanja javnog mnjenja,* (Beogradski centar za bezbednosnu politiku: Beograd, septembar 2016), str. 8, dostupno na: *http://bezbednost.org/upload/document/stavovi_gradjana_srbije_o_policiji.pdf*.

[29] Istraživanje "Odnos građana i građanki prema diskriminaciji u Srbiji", sprovedeno od strane agencije Faktor plus tokom juna 2016. u organizaciji Poverenika za zaštitu ravnopravnosti, dostupno na: *http://ravnopravnost.gov.rs/rs/gradjani-veruju-povereniku/*.

i instrument kontrole rada javnih institucija, predviđen je članom 51. Ustava, dok je zabrana diskriminacije bilo koje forme, direktne ili indirektne, na bilo kom osnovu regulisana članom 21. Ustava. Uz to, ne treba zaboraviti da potreba za regulacijom zaštite podataka o ličnosti postaje sve značajnija tema u digitalnoj eri s obzirom da mogućnosti za njihovu zloupotrebu eksponencijalno rastu sa razvojem tehnologije.

Ustavno definisanje institucija *Poverenika za informacije i zaštitu podataka*, i *Poverenika za ravnopravnost*, uz već postojeće ustanovljenje *Ombudsmana*, može doneti samo prednosti pravno-političkom uređenju Srbije, putem jačanja garancija u oblasti zaštite ljudskih prava i borbe protiv diskriminacije sa jedne i kontrole javnih vlasti sa druge strane. Time će se obezbediti preduslovi za sprovođenje principa vladavine prava i podele vlasti u praksi. Dakle, možemo reći da će ustanovljenje ovih nezavisnih organa u Ustavu doprineti:

- jačanju garancija **nezavisnosti** nezavisnih organa od drugih organa vlasti čiji rad nadziru odnosno kontrolišu;
- **kontinuitetu** i **stabilnosti** nezavisnih organa, zaštitom od samovolje izabranih predstavnika vlasti, vladajućih partija i konstalacije odnosa u Skupštini, usled kojih se mogu uskratiti ili modifikovati zakonske osnove kojima su uspostavljeni;
- **uvažavanju** i **poštovanju** njihovih mišljenja i preporuka od strane predstavnika državnih organa, administracije, čime se jača njihova preventivna uloga i doprinosi izgradnji političke kulture građana i javnosti Srbije;
- **razvoju i jačanju kulture ljudskih prava i vladavine prava,** njihovog poštovanja i političke odgovornosti kako predstavnika institucija tako i poslanika, ministara itd.

5. Zaključak i preporuke

Srbija se, vođena nastojanjem da ispuni strateški cilj pristupanja EU, ponovo nalazi u takozvanom ustavnom momentu – trenutku "kada važeći ustav postaje prepreka otvaranju novih perspektiva" odnosno "u kom je snaga potrebe za promenom najveća a značaj dnevno-političke kalkulacije minimalan i u kom ima izgleda da će nova norma najautentičnije i najdalekosežnije odgovoriti na nove potrebe društva".[30] Poučeni propuštenim prilikama sa početka dvehiljaditih, ovaj

[30] Jelinčić, Konstituisanje Srbije 2013, 12.

trenutak moramo iskoristiti na pravi način kako bismo konačno prekinuli tradiciju donošenja ustava lišenih široke javne rasprave i društvenog konsenzusa, unapredili pravno-političko uređenje države i sveobuhvatnim dijalogom uspostavili kvalitativno nove temelje državne i društvene zajednice zasnovane na demokratskim vrednostima.

Ustavno definisanje nezavisnih organa koji deluju u oblasti zaštite ljudskih prava i borbe protiv diskriminacije od nesumnjivog je značaja za unapređenje pravno-političkog sistema Srbije, kao i za njen napredak u procesu pregovora o pristupanju EU. Jačanjem njihove preventivne i kontrolne funkcije obezbeđuju se garancije osnovnih prava i sloboda građana proklamovanih Ustavom, koji predstavljaju jedan od ključnih kriterijuma za državu vladavine prava. Stabilni, efikasni i delotvorni nezavisni organi nezaobilazan su segment jake i delotvorne Skupštine koja kontorliše izvršnu vlast i time obezbeđuje funkcionalnu a ne samo simboličnu ravnotežu vlasti. Važnost ovog pitanja prepoznaju i sami građani, navodeći među razlozima za promenu Ustava da je bez jačanja garancija institucionalne nezavisnosti nezavisnih organa kontrola javnih vlasti teško zamisliva.

U okviru predstojećeg proces Ustavne revizije stoga je neophodno:

- Pored *Ombudsmana* i *Državne revizorske institucije*, Ustavom predvideti ostale nezavisne organe koji doprinose zaštiti ljudskih prava u Srbiji: 1. *Poverenika za informacije i zaštitu podataka* i 2. *Poverenika za ravnopravnost*;
- U okviru široke i inkluzivne javne rasprave o izmenama Ustava, razmotriti mogućnost i adekvatan način regulisanja principa na kojima počivaju i rade drugi nezavisni organi i regulatorna tela u Ustavu.

U cilju osiguranja stvarnog jačanja položaja i uticaja nezavisnih organa, osim navedenih dopuna Ustava potrebno je obezbediti preduslove neophodne da bi Ustavne norme zaživele u praksi. U tom smislu, između ostalog je potrebno pokrenuti javnu raspravu o mogućnostima i potrebi za revizijom i unapređenjem Zakona o Narodnoj skupštini i Poslovnika Narodne skupštine, kako bi se preciznije definisale procedure i obaveze Skupštine i njenih odbora u saradnji sa nezavisnim organima, a posebno u vezi sa razmatranjem i usvajanjem njihovih izveštaja te praćenjem sprovođenja zaključaka Skupštine povodom izveštaja

nezavisnih organa od strane organa izvršne vlasti. Dugoročno gledano, potrebno je kontinuirno podsticati i negovati razvoj političke kulture u državi i društvu.