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Glavni i odgovorni urednik
Radovan D. VUKADINOVIĆ

Udruženje za evropsko pravo, Kragujevac

Izdavač

Udruženje za evropsko pravo

34000 Kragujevac

Glavni i odgovorni urednik: Radovan D. Vukadinović

e-mail: radevuk2010@gmail.com

Urednici: Jelena Vukadinović Marković i Jovan Vujičić

Sekretar: Mirjana Glintić

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PROŠIRENJE EVROPSKE UNIJE U VAKUUMU BEZIDEJNOSTI – POVODOM JEDNOG DOKUMENTA KOMISIJE EVROPSKE UNIJE

APSTRAKT

U članku analiziramo odnos između Evropske unije i Srbije u svetlu novih inicijativa za prevazilaženje zastoja u procesu uključivanja država nečlanica u procese evropskih integracija. Prvo razmatramo vezu između Moneovog uniformnog metoda integracije i sistemske krize koja je u Uniji ogoljena 2009. godine. Nakon toga, kroz analizu slučaja Srbije ukazujemo na temeljno izmenjenu funkciju politike proširenja EU. Potom rasvetljavamo novine u metodologiji procesa pridruživanja EU koje je na incijativu predsednika Francuske predložila Evropska komisija. Konačno, pokazujemo zašto takav predlog predstavlja priliku za oslobađanje odnosa između Srbije i Evropske unije preteškog tereta krute jednoobrazne forme koja je od pre jedne decenije otvoreno zaratila sa neuhvatljivim životom evropskih naroda.

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[*] Redovni profesor Fakulteta političkih nauka u Beogradu.

[**] Vanredni profesor Fakulteta političkih nauka u Beogradu. Rad je primljen 17. maja 2020, a odobren 01. jula 2020. godine.

Ključne reči: Evropska unija, kriza, Srbija, pridruživanje, *Mone* metod, diferencirana integracija.

1. Evropska integracija u ključu depolitizacije

Od vremena Francuske revolucije politički subjekt u evropskim državama postaje narod koji se od tada do danas uvek iznova probija kroz gustu šumu unutrašnjih razjedinjenosti, nemira i pobuna u potrazi za formom svoje kolektivne egzistencije. Ta potraga, koja uključuje pitanje smisla, nikada se ne završava. Ne postoji pronađeni odgovor otporan na sve izazove istorije. Nema forme koja bi mogla jednom za svagda da obuhvati sve sfere neuhvatljivog života evropskih društava. Pa ipak, država kao organizaciona forma uvek nastoji da se udalji od nepredvidljivog, nepostojanog života ljudi koji u njoj žive. "Forma-Država se autonomizuje, razvija svoju sopstvenu logiku (dominacija, totalizacija, aproprijacija u ime Jednog) sve do tačke kada u svojoj aroganciji zaboravi izvor iz kog potiče, sve dok se ne okrene protiv života naroda i izbriše sve njegove manifestacije koje ne ulaze u njenu sopstvenu perspektivu."[1]

U decenijama materijalnog blagostanja u Evropi posle Drugog svetskog rata Moneov (*Jean Monnet*) metod evropskih integracija izgledao je kao rešenje stare zagonetke: kako evropske države trajno zaštititi od preispitivanja sveta i odnosa među ljudima koje se odvija u sferi političkog. Odvojiti državu-formu od konfliktnog života društva, podela, revolucija, buna, ratova, to je bio osnovni cilj očeva osnivača EU.[2]

Prepustiti proces integracije odlučivanju *demosa* i njegovih organizacija, koje reagujući na život i njegove nesagledive zahteve slobodno eksperimentišu različitim modelima međudržavne saradnje, izgledalo je kao prevelik rizik u krizom i ratom opustošenoj Evropi. Da su ga očevi osnivači prihvatili, evropski narodi i njihove političke vođe spontano bi učvršćivali i slabili svoje jedinstvo; slobodno bi ulazili u političke pustolovine zajedničkog uređivanja određenih oblasti društvenog života i iz njih se svojom voljom povlačili; obogaćeni iskustvom, eksperimentisali bi sa nadnacionalnim institucijama; prema odluci demosa, kao nikad do kraja umirenog političkog subjekta, prenosili bi na

[1] Miguel Abensour, *La Démocratie contre l'État. Marx et le moment machiavélien*, Presses Universitaires de France, Paris, 1997, pp. 106-107.

[2] Vid. u: Bojan Kovačević, *Europe's Hidden Federalism. Federal Experiances of European Integration*, Routledge, London and New York, 2017, pp. 101-161.

evropski nivo vlasti nadležnosti ili ih vraćali državama članicama. Time bi ostao sačuvan prostor slobode za izgradnju najrazličitijih formi zajedništva između evropskih država. Proces integracije uključio bi moćnike i plebs, bogate i siromašne, univerzitetske profesore, umetnike, novinare. Svi oni morali bi preuzeti odgovornost za nepredvidljive posledice svog delovanja u sferi političkog.[3]

Moneov metod, međutim, gurnuo je Evropu u suprotnom smeru: strukturno ograničiti prostor spontanosti, eksperimenata, otpočinjanja, inovacije u stvarima političkog. Politička odluka demosa i njegovih predstavnika o carinama, subvencijama, javnim nabavkama, slobodi kretanja i nastanjivanja, valuti, zamenjena je uniformnim nadnacionalnim normama.[4] Tako je evropska upravljačka struktura u nastanku uspešno odvojena od kulturnih, istorijskih, socijalnih i ekonomskih različitosti naroda. Država-forma koja već vekovima nastoji da se odvoji od meteža uzavrelog života društva pronašla je u tehnokratskim arhitektama Unije istorijski novog i pouzdanog saveznika.

Sami evropski narodi vremenom su odustajali od autonomne potrage za oblikom svoje kolektivne egzistencije. Intelektualne i političke elite njihovih država poverovale su da je put političkog preispitivanja temelja zajedničkog življenja, *vivre ensemble,* završen i da je čarobna formula konačno pronađena. Demos, subjekt političkog, rođen u olujama Francuske revolucije, pretvorio se u nemoćnog a zadovoljnog posmatrača. Nekadašnji svojeglavi subjekt revolucija, pobuna, ratova i ustavnih eksperimenata preobražen je u pasivni objekat. Prihvativši integraciju kao dokaz iluzornosti daljeg traganja za smislom u sferi političkog, svi su se odrekli odgovornosti za uređivanje zajedničkog života - građani, političari, profesori, intelektualci, istraživači, novinari. Vladavinu nepredvidljivim, dinamičnim, iracionalnim, pobunjenim ili poslušnim ljudima zamenilo je vladanje pasivnim posmatračima. Živo rezonovanje javnosti o

[3] Pod političkim (fr. *le politique*) podrazumevamo proces utemeljivanja zajedničkog bivstvovanja ljudi "*etre ensemble*". Ono označava samu suštinu ljudske zajednice. Političko (fr. *le politique*) treba razlikovati od politike (*la politique*) koja se odnosi na poseban sektor društvene aktivnosti poput parlamentarnih izbora, formiranja vlade, njene kontrole, javnog mnjenja, donošenja i primene zakonodavnih akata itd. O razlici između političkog i politike vid. detaljno u studiji Marcel Gauchet, *La condition politique*, Éditions Gallimard, Paris, 2005.

[4] Vid. u: Giandomenico Majone, *Europe as the would be world power*, Cambridge University Press, 2009, pp. 72-99.

političkim stvarima u državi zamenjeno je pasivnim prihvatanjem merodavih odluka na nivou Evropske zajednice i Evropske unije.[5]

U vremenu materijalnog prosperiteta proces proširenja EU na nove članice u stopu je sledio logiku Moneovog metoda integracije. Podrazumevao je prihvatanje bezličnih pravila u najrazličitijim oblastima javnog života. Bio je uslovljen i pretvaranjem nacionalnih elita u dobro podešene šrafove evropskog upravljačkog mehanizma. Jednom kada se ti uslovi ispune države su mogle očekivati pristupanje Evropskoj uniji. Rizik i neizvesnost bili su proterani sa tehnokratskog puta naroda ka "svetloj evropskoj budućnosti". Predvidljivost je postala odlučujuće obeležje procesa usmerenog na uspavljivanje, zauzdavanje i neutralisanje onoga političkog u državama kandidatima.

2. Kraj jedne epohe integracije i ulazak u istorijski *interregnum*

Evropski projekat suočio se sa egzistencijalnom krizom u trenutku svog najvećeg uspeha. Okidač je bio nekontrolisani rast javnog duga u nekim državama članicama. Paradoksalno, ispostavilo se da stvarni uzrok krize leži upravo u velikom uspehu metoda Mone - u brisanju prostora za političko eksperimentisanje.[6] Naime, ekonomske nedaće koje su pogodile Grčku, Italiju, Španiju i Portugal iziskivale su promenu, inovacije u oblastima fiskalne i monetarne politike. Međutim, prethodni koraci na putu integracije ukinuli su mogućnost za otpočinjanje, inovaciju, rizik i preuzimanje odgovornosti u slobodnom određivanju plata i penzija, inflacije, kamatnih stopa, carinskih ili necarinskih barijera. Normiranje života u EU otišlo je predaleko. Forma se skoro u potpunosti odvojila od života obezglavljenog društva. Istovremeno, Moneov metod je odluku o povratku na prethodni stupanj integracije učinio preskupom upravo za države sa najvećim ekonomskim problemima, poput Grčke i Italije.[7] Evropski narodi kao nekadašnji neprikosnoveni subjekti političkog našli su se na podu vezanih ruku i nogu. Da u tom bednom položaju dobiju još i povez preko očiju pobrinule su se njihove akademske elite predugo uljuljkane izdašnim

[5] Vid. u: Claus Offe, Ulrich Preuss, *Citizens in Europe – Essays on Democracy, Constitutionalism and European Integration*, ECPR Press, Colchester, 2016, pp. 455-477.

[6] Između mnogobrojnih studija o toj temi vid. npr. u Giandomenico Majone, "The general crisis of the European Union A genetic approach", in: John Erik Fossum, Augustin Jose Menendez (eds.), *The European Union in crises or the European Union as Crises?*, *Arena Report*, No 2/14, 2014.

[7] Vid. u Fritz W. Scharpf, No Exit from the Euro-Rescuing Trap?, *Max-Planck-Institut für Gesellschaftsforschung*, Discussion paper, 14 (4), 2014.

evropskim istraživačkim stipendijama i slepom verom da je proces integracije cilj po sebi.

Upravljači su se sa krizom suočili na jedini preostao način u okolnostima krutih pravila kojima je premrežena nadnacionalna zajednica u nastanku – kršenjem tih istih pravila. Na odluku o novom paralegalnom fiskalnom ugovoru (2012-2014) najviše je uticala Namačka kao najmoćnija država članica. Tu odluku su sproveli različiti šrafovi upravljačkog mehanizma na evropskom i nacionalnom nivou. Ona je oslobodila monetarnu uniju i njene članice od pretnje bankrota, haosa i dezintegracije. Doduše, tom odlukom prekršeni su osnivački ugovori i nacionalni ustavi, a Unija je uvedena u neproglašeno vanredno stanje.[8]

Antikrizne mere uvele su Evropsku uniju u buru skrivenih ustavnih preobražaja. Unija je počela da gubi neka svoja ključna obeležja a dobija nova. Demokratija nikada nije krasila politički sistem EU. To, međutim, nije bilo presudno za njegov razvoj i funkcionisanje budući da je taj poredak zadovoljavao druga dva uslova "dobre vlade"; prvo, imao je odličan *out-put* kada je reč o deklarisanim svrhama integracije – mir, blagostanje, bezbednost; drugo, atribut dobrovoljnosti krasio je kod država članica i ulazak i ostanak u "sistemu". Svaki državni poredak obeležava neki oblik i stepen prinude. Legitimnost te prinude, međutim, zasniva se na demokratskom karakteru država koje ga poseduju. Prisustvo i stepen demokratije unutar nekog državnog poretka srazmeran je njegovoj legitimnosti, tj. prihvatljivosti u narodu. Nasuprot ovome, kriza i njen način rešavanja, a posebno njeno trajanje i životno uobičajavanje, učinili su Uniju prinudnim poretkom bez demokratije.

Niz uvedenih antikriznih mera u EU (od 2010. nadalje) može se ocenjivati sa različitih stanovišta – političko-svrsishodnog, ekonomsko-racionalnog, pravno-proceduralnog, moralno-socijalnog i dr. Bez obzira na ovakve različite pristupe,

[8] Vid. u Christian Joerges, "Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration", *EUI Working Papers, Law 2013/09*, European University Institute, Department of Law, 2013. Vid. takođe u Ernst Wolfgang Böckenförde, "Kennt die europäische Not kein Gebot? Die Webfehler der EU und die Notwendigkeit einer neuen politischen Entscheidung", *Neue Züricher Zeitung*, 21 June 2010, uzeto sa: *http://www.nzz.ch/nachrichten/kultur/literatur_und_kunst/kennt_die_europaeische_not_kein_gebot_1.6182412.html*. Vredan pomena u ovom kontekstu je i zbornik *Kriza Evropske unije* (prir. Slobodan Samardžić i Ivana Radić Milosavljević), Službeni glasnik Beograd, 2013.

generalni izgled Evropske unije znatno se razlikuje od onog od pre decenije i po.[9] Došlo je do velikih unutrašnjih razlikovanja koja se objektivno mogu držati pod kontrolom samo pojačanim mehanizmima prinude. Recimo, razlikovanje između država poverilaca i država dužnika drži se u režimu tzv. evropskog semestra koji nije ni proceduralno prozračan a kamoli demokratski. Razlikovanje između bogatog severa i siromašnog juga ogleda se u vidu dubokih sporova u vezi sa, recimo, narednim budžetom (2021-27), i to povodom njegove prihodne i rashodne strane. Nadalje, prisutno je razlikovanje između moćnih i nemoćnih, kreatora i primalaca strateških odluka, u pogledu pristupa uskim, nevidljivim krugovima u kojima se pripremaju antikrizne odluke, i tako dalje.

Posmatranje ovih fenomena u novijem načinu delovanja kriznog sistema, i posebno njegov *perpetuum mobile* kao opažajni efekat dugotrajnosti krize, vodi zaključku da je Unija stala na kamen nepredviđenog i nenameravanog ishoda sa kojeg se ne vidi put napred. Ne postoji, naime, ni najmanji znak pripreme za pokretanje postupka rasprave i usaglašavanja u vezi sa reformom sistema. U ovu konstataciju nas uverava jedini do sada relevantan politički pokušaj te vrste, dokument Komisije "Razmišljanja i strategija za EU 27 do 2025".[10] Od tada je, naime, prošlo tri godine a da se u međuvremenu niko nije ni osvrnuo na ovaj dokument. Drugačije i ne može biti u jednom poretku koji se sada oslanja na antikrizni mehanizam, koji prerasta u trajni mehanizam upravljanja javnim poslovima. Efekat mera kojima je uvedeno neproglašeno vanredno stanje nije vremenski ograničen, jer faktičko vanredno stanje nema ko da ukine.

3. Izostanak strateških prioriteta Unije usled krize

Prosto je neverovatno da se u okolnostima ovakvih promena ne menja politika proširenja Evropske unije.[11] Ne samo da je to sistemski nelogično s obzirom na tešku krizu sistema, nego i imajući u vidu učestale izjave uticajnih zvaničnika EU

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[9] Vid. u Slobodan Samardžić, *Evropska unija: sistem u krizi*, Izdavačka knjižarnica Zorana Stojanovića, Sremski Karlovci, Novi Sad, 2016, str. 48-76.

[10] Tome se može pridodati i Rimska deklaracija usvojena povodom obeležavanja šezdeset godina Evropske ekonomske zajednice (25. mart 2017) i, konačno, konkretizacija dokumenta Komisije u izlaganju tadašnjeg predsednika Komisije Žan-Kloda Junkera "Stanje Unije" (13. septembar iste godine).

[11] Vid. zasad poslednju strategiju proširenja EU, "A credible enlargement perspective for and enhanced EU engagement with the Western Balkans", European Commission, Strasbourg, 6.2.2018, COM(2018) 65 final, zvaničan vebsajt EU *https://europa.eu/european-union/index_en*.

prema kojima ona u nepoznatom dugom vremenu ne može da se širi. Štaviše, ne samo da na dnevnom redu EU nije njeno proširenje, nego se postavilo pitanje da li je ona uopšte održiva u današnjem institucionalnom aranžmanu.[12] Rešenje ovog paradoksa – da se sve menja sem politike proširenja – nalazi se u faktičkoj promeni funkcije politike proširenja.

Najpre, ta politika više nema onu čvrstu integracionu dimenziju gde je proširenje Unije u svojoj osnovi širenje integracione matrice u prostor, prema novim državama kandidatima. Ovu prvobitnu funkciju proširenja zamenila je nova, geopolitička, koja umesto internog integracionog razloga uvodi eksterni bezbednosni u skladu sa novom dinamikom moći u svetskim razmerama i potrebi čvršćeg svrstavanja u zapadni sistem tzv. kolektivne bezbednosti.

S tim u vezi, kao drugo obeležje promene funkcije proširenja EU koje direktno sledi iz prvog, ova politika treba da zadrži zemlje tzv. zapadnog Balkana u orbiti zapadne bezbednosne kontrole. S obzirom da ova politika koincidira sa unutrašnjom krizom EU koja objektivno limitira punopravno članstvo bilo koje države regiona, Uniji preostaje da u novonastalim uslovima formalno ne menja perspektivu članstva.[13] Ta perspektiva sada postaje puki činilac privlačenja i motivacije vladajućih političkih garnitura i njoj inklinirajućih kulturnih elita u tim zemljama.

U svojoj sadržini, ova politika postala je transmisioni kaiš šire geopolitičke strategije. Perspektiva članstva, koja se gubi u nesagledivoj budućnosti, ima smisla samo u preventivnom delovanju podstaknutom strahom da države tzv. zapadnog Balkana u nedostatku realne politike pristupanja Uniji ne okrenu svoj pogled ka geostrateški konkurentskim destinacijama. Ne samo da su se one realno pojavile, nego je ta činjenica postala referentna za novu vrstu (i fazu) nadmetanja začinjenu konfliktnim potencijalom. U takvim realnim okolnostima

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[12] Najdirektnije je ovo pitanje postavio francuski predsednik Emanuel Makron (*Emmanuel Macron*) na svetskom forumu u Davosu januara 2018: "Evropa treba da nađe novu ambiciju. Nisam naivan. Nikada nećemo izgraditi nešto tako kao što je ambicija 27. Ideja je da se Francuska, Nemačka i severna Evropa prestroje. Oni koji su ambiciozniji treba da krenu u zbližavanje." Preuzeto iz: Address by Prez Emmanuel Macron at Davos, *https://in.ambafrance.org/Address-by-Prez-Emmanuel-Macron-at-Davos*.

[13] Vid. u: Slobodan Samardžić, Bojan Kovačević, "Evropska unija pred promenama – imperija ili diferencirana integracija: sa posebnim osvrtom na slučaj Srbije", u: Radmila Nakarada, Dragan Živojinović (ur.), *Srbija u evropskom i globalnom kontekstu*, Fakultet političkih nauka, Univerzitet u Beogradu, Beograd, 2012.

tzv. zapadni Balkan više ne predstavlja prostor doglednog proširenja EU iz Solunske agende (2003), već postaje, kako jedan uticajni nemački autor to slikovito formuliše, "neutralna zona između dva poretka velikog prostora" koju treba zadržati pod kontrolom Unije.[14] U tom smislu, *izglede pristupanja* treba zadržati kao najjače motivaciono sredstvo za političku klasu, kulturni pogon i najšire slojeve stanovništva u očekivanju životnog standarda Evroske unije.

Ovaj *modus novum* politike proširenja držao je vodu nešto više od decenije.[15] U tom periodu sa stanovišta krajnjeg cilja – punopravno članstvo u EU – dinamika pregovaranja o pristupanju delovala je kao tapkanje u mestu. Kako su se pregovaračka poglavlja otvarala tako je perspektiva članstva bivala realno sve dalja. Tehnički gledano, Srbija nije ispunjavala uslove za zatvaranje ni onih otvorenih poglavlja, kojih je sada nešto više od polovine (od ukupno 35). Ovo naročito važi za kontrolna poglavlja 23 i 24, koja nisu mogla da se reformišu ni inherentno ni kao merila za druga poglavlja. Sa druge strane, poglavlje br. 35, koje nosi bezazleni naziv "Ostala pitanja", tiče se ni manje ni više nego odricanja države od jednog dela svoje teritorije, što je uslov koji je pod demokratskim pretpostavkama, kao opštem merilu napretka, nemoguće ostvariti. Da stvar bude još složenija, i ovo poglavlje ima status merila za sva ostala poglavlja.[16]

Ovu stvarnost, međutim, već duže vreme nadkriljuje šira stvarnost nemogućnosti Unije da se dalje širi usled svojih unutrašnjih problema. Ta vremenski neograničena i strukturno uslovljena faktička situacija ugrožava efekte intenzivne evrointegracijske propagande kao politike bez alternative i "jedine ideološke igre u gradu". Svest o tome, asocirana sa novom liderskom ambicijom u EU podstakla je priču o *novoj metodologiji pristupanja*.

4. Unija u sopstvenim nedoumicama

Politika proširenja ostala je, dakle, ista samo u izjavama i nekih funkcionera Evropske unije, njenim zvaničnim dokumentima i javnim istupima političkih elita u državama kandidatima. U stvarnosti procesa integracije, pak, odigrala se

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[14] Vid. Herfried Münkler, *Macht in der Mitte - die Aufgabe Deutschland in Europa*, Köreber-Stiftung, Hamburg, 2015, pp. 157-158.

[15] U Srbiji njegovo praktično započinjanje može se smestiti u trenutak potpisivanja Sporazuma o stabilizaciji i pridruživanju sa Evropskom unijom maja 2008. godine.

[16] Vid. Opšta pozicija Evropske unije – Pregovarački okvir za pristupne pregovore sa Republikom Srbijom, čl. 23, na zvaničnom sajtu Vlade Srbije.

velika promena. Upravljačka logika, koja je uspela da zadrži unutrašnju stabilnost sistema, preneta je i na odnos Unije prema državama u statusu kandidata za članstvo. Predvidljvost je iščezla. Odluka koja krši prethodno data obećanja, sporazume, dogovore, našla se na mestu jasnih i merljivih kriterijuma za članstvo. U drugi plan otišla je objektivna provera usaglašenosti normiranja života u državama kandidatima sa evropskim modelom.

U redovnim godišnjim izveštajima o napretku u procesu pristupanja, preovlađuje jezička figura "ima napretka, ali ne dovoljno", koja ovu vrstu dokumenta lišava ozbiljnosti objektivne analize činjeničnog stanja u državi kandidatu. Pisci ovih izveštaja imaju, naime, novi zadatak: da ostave utisak procesualnosti koja vodi cilju (članstvu), ali i da stave do znanja da se cilju ne treba nadati za nedogledno vreme. Ova političko-psihološka igra ne deluje kao da je bez osnova samo stoga što državama kandidatima (i potencijalnim kandidatima) ne ide za rukom da praktično negiraju onu primedbu "...ali ne dovoljno". Svi znamo da nam države nisu uređene i ne treba da se ljutimo na izveštače i njihove nalogodavce. Za ove poslednje, pak, glavni problem može biti kada bi neko odgovoran u državi kandidatu postavio pitanje: a šta bi bilo kada bismo ispunili uslove? Ili, mnogo realnije pitanje: možemo li da promenimo modus saradnje koji bi bio realniji za tekući period *interregnum-a* buduću da on proishodi iz vaših unutrašnjih problema a ne naših, već poznatih? Iako i dalje neupitna, spremnost političara sa spoljne periferije Unije da preuzmu ulogu domaćih čuvara spoljnog nadnacionalnog upravljačkog mehanizma postala je ipak nedovoljna. Odluka o prijemu novih članica oslobođena je nekadašnjih stega jasnih pravila i merljivih rezultata reformi. Postala je arbitrarna, despotska, zavisna od puke volje pobednika izbora u jakim državama članicama. Lišeni slobode da uređuju život svojih društava, politički predstavnici građana EU poletno su prigrabili slobodu odlučivanja o sudbini naroda na spoljnoj periferiji. Godine, međutim, neumitno prolaze a sve je prisutnija realnost "tampon zone" koja treba da ostvari zvaničnu politiku proširenja Unije tako što će je sadržinski sasvim izmeniti.

Korak sa novom stvarnošću procesa integracije prvi je uhvatio predsednik Francuske Emanuel Makron. Komisija je u njegovo ime i u ime ostalih članica EU jednom dala obećanje narodu Makedonije da će ga vratiti na stazu pristupanja EU ukoliko njegovi politički predstavnici promene ime svoje države. Onda je Makron odlučio da to obećanje prekrši. Vladar može prekršiti prava staleža i obećanja data strancima ukoliko to promenjene prilike zahtevaju, napisaće pre

mnogo vekova Makronov zemljak Žan Boden (*Jean Bodin*). Ko utvrđuje da li su prilike zaista nove? Vladar sam, odgovara Boden. To što ga u tome ništa ne može ograničiti čini ga suverenim.[17] Iako nemoćan da logiku suverenosti sledi u sopstvenoj zemlji uzdrmanoj pobunom "žutih prsluka" (*gilet jaunes*), Makron je tumačeći promenjene prilike u svetu došao do zaključka da nesređeno makedonsko društvo Uniji u ovom trenutku ne treba. Slično tumačenje proishodiće i predlogom reforme čitavog procesa proširenja koji će u inicijalni dokument pretočiti Evropska komisija.[18] Naime, ove države se ne mogu naprosto odbaciti iz jasnih geostrateških razloga, ali se ne mogu ni ostaviti da vise u "tampon zoni". Pretpostavka je da one suštinski nemaju pravo na sopstveni izbor. S druge strane, međutim, mora im se ponuditi bar reformisana agenda tekuće politike proširenja/pristupanja, budući da postojeća već izaziva sumnje i nedoumice i najvernijih posvećenika evropske integracije tzv. zapadnog Balkana.

5. Dokument koji najavljuje carstvo proizvoljnosti

Najpre, dokument se drži starog jezika o *pristupanju* iako EU ne daje bilo kakve izglede za svoje *proširenje*, što bi trebalo da bude ista stvar suprotnog pravca u odnosu na pristupanje. U političkom rečniku EU koji se koristi za zemlje "zapadnog Balkana" pristupanje je čarobna reč iz koje EU na magičan način izvodi svoju "verodostojnost". Kada bi se ova jezička magla razvejala, recimo da se umesto pristupanja koristio realnosti primeren izraz – *pridruživanje*, moglo bi se poverovati da je Unija spremna na reformu ovog procesa, i u tom svetlu bi i neka nova rešenja iz dokumenta izgledala realnije. Ovako, za sve one koji odnosima EU i zemljama ovog regiona pristupaju *sine ira et studio* jasno je da je na delu nešto što zvaničnim jezikom nije označeno, ali je mnogo bliže stvarnosti – *pristupanje bez članstva*.

Tekst predloga preplavljen je rečima "poverenje" (*more credibility*), "predvidljivost" (*predictability*), "perspektiva članstva za one koji pokažu da to

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[17] Vid. deseto poglavlje Bodenove prve knjige o Republici, pod naslovom "Prave oznake suverenosti" Jean Bodin, *Šest knjiga o Republici*, Politička kultura, Zagreb, 2002, str. 53-68.

[18] Vid. dokument Enhancing the accession process - A credible EU perspective for the Western Balkans, European Commission, Brussels, 5.2.2020, zvanični vebsajt Evropske unije, *https://europa.eu/european-union/index_en*. O dokumentu će stav iznositi sve institucije EU a konačnu odluku doneće Evropski savet u maju 2020. Ovu satnicu poremetila je pandemija virusa Kovid 19. Ta činjenica, međutim, ne utiče na našu analizu ovog inicijalno ambicioznog dokumenta.

zaslužuju" (*merit-based prospect of full EU membership*). U zvaničnim dokumentima Evropske unije oduvek se sreću nazivi za ono čega još uvek nema ali bi moglo biti stvoreno, poput evropskog identiteta, evropskih vrednosti, građana, demokratije itd. U ovom slučaju, pak, reč je o nečemu čega je nekad bilo ali ga danas više nema, jasne veze između ispunjenosti objektivnih kriterijuma za članstvo i samog članstva u EU. Pored inovacija kojima ćemo se posvetiti u narednom delu, predlog donosi i ozbiljniju novinu koja Makronovom decizionističkom obrtu daje formalnu oblandu. Otvara se mogućnost da politički predstavnici svake od država članica pomnije nadgledaju reformske korake država kandidata. Izgubljena sloboda političke odluke u okviru njihovih država vratiće se upravljačkim elitama Hrvatske, Letonije, Holandije ili Češke u području odnosa sa zemljama kandidatima.

Posledice ove mogućnosti mogu biti sledeće: ulogu koju je na sebe u slučaju Makedonije preuzeo Makron moći će od sada sve učestalije da preuzimaju i svi ostali predsednici država i vlada. U zavisnosti od sopstvenog tumačenja promenjenosti prilika u Uniji i državi kandidatu, oni će moći da stvar vraćaju na početak, pregovore prekidaju pa ih opet nastavljaju, ubrzavaju ili usporavaju. Politički subjekt, ponižen u sopstvenoj državi članici EU, nemoćan da autonomno odredi starosnu granicu odlaska u penziju građana ili izdatke za školstvo i zdravstvo, ponašaće se utoliko kapricioznije, nepredvidljivije i bahatije u jedinom prostoru slobodnog delovanja koji je uspeo da zadrži, u prostoru politike proširenja EU. Tako se može desiti da neka od članica odluči da je Srbiju ili Crnu Goru potrebno primiti u EU po ubrzanom postupku. Možda to odluče i sve ostale. Možda se pak usprotive jedna ili dve manje države i čitava stvar se zakoči. A možda se članice EU odluče da proces proširenja zamrznu za narednih pedeset godina. Odluka je, dakle, nepovratno odletela u sferu despotske arbitrarnosti, a njene posledice se odvojile od racionalnog sagledavanja budućnosti građana na spoljnoj periferiji EU.

6. Nešto kao reformisana ponuda

Dokument koji je predstavila Evropska komisija daleko je od svoje završne forme, ali i kao takav može da podstakne javnu raspravu u Srbiji, zemlji u kojoj je "put u EU" zvanična politika o kojoj nikada nije bila povedena javna rasprava, bar u krugu poznavalaca. U samom tekstu nema mnogo toga podsticajnog u nekom reformskom pogledu, ali i u onome što predstavlja promenu može se naći razlog za širu tematsku raspravu. Ako pred sobom položimo razumevanje stanja stvari u vezi sa pristupanjem Srbije u EU, možemo s punim pravom da razmišljamo o alternativnom putu ne "u EU" nego "sa EU".

Dakle, sve dok se "EU ne reformiše" (E. Makron) bilo bi blisko zdravom razumu da Srbija ne sledi prethodno trasiran put u EU, jer njegova destinacija se izgubila u realnom vremenu i prostoru. Umesto toga, bilo bi bolje da blisko sarađuje sa EU, uključujući i integracione dimenzije te saradnje u oblastima u kojima je to od interesa za obe strane i intenzitetom koji se drži načela najvećeg mogućeg stepena saradnje. Postavlja se pitanje, da li se dokument Komisije može tumačiti i na ovaj način? Ili, još konkretnije, da li se ovaj dokument može razumeti iz perspektive *diferenciranog pridruživanja*?

Iz ovog ugla, najveću pažnju privlači novitet šest skupova konkretnih oblasti. Njih je šest – Osnovne oblasti, Unutrašnje tržište, Konkurencija i uključivi razvoj, Zeleni program i održiva povezanost, Resursi, poljoprivreda i kohezija, Spoljni odnosi – i unutar svakog od skupova svrstane su posebne oblasti koje ponekad nemaju međusobno bliske funkcionalne veze. Naglasak je na predlogu da se pregovaraju cele skupine, najverovatnije fazno, ali nije isključeno i uporedno, i da su sve podjednako izložene postupcima uslovljavanja, praćenja, ocenjivanja, nagrađivanja i kažnjavanja. Ono što je ovde moguće zamisliti kao novo jeste napredovanje pojedinih oblasti u odnosu na druge, imajući u vidu i njihovo funkcionalno uključivanje u sistem EU, računajući tu i ravnopravno (sa drugim državama članicama) korišćenje brojnih unutrašnjih fondova. To što uz ovo nije predviđeno da predstavnici recimo Srbije u najvišoj fazi uključenja neke oblasti učestvuju i u odgovarajućoj politici (donošenje odluka), govori da je ovde reč o najvišoj fazi pridruživanja a ne pristupanja Uniji. I to je sasvim u redu, ali otvaraju se dodatna pitanja.

Najpre, da li je moguće da država kandidat (Srbija) optira za neke skupove oblasti a ne za sve, polazeći ne samo od svojih prioriteta nego i od svoje strateške politike? Ako to nije moguće u oblasti pravosuđa i osnovnih prava (u okviru prvog skupa) stoga što je reč o sveprožimajućem uslovu koji ima ulogu opšteg merila, da li je to moguće u nekom od preostalih skupova? Recimo, u šestom skupu - Spoljni odnosi, u oblasti odbrane gde Srbija praktikuje vojnu neutralnost. Ili, nadalje, da u nekoj skupini ide do kraja moguće integrisanosti, a u nekoj samo do nekog nivoa?[19] Da li bi Srbija, recimo, mogla da prihvati samo Prvi energetski paket Unije, a ne i preostala dva? Da li bi mogla, s obzirom da Unija ne može da je primi u članstvo, da samostalno subvencioniše poljoprivrednu proizvodnju, ili

[19] Kao što je to unutar Unije dopušteno državama članicama; recimo, Danska je prihvatila prethodne uslove monetarne unije ali ne i evro.

da povrati bar minimalnu carinsku zaštitu na uvoz poljoprivrednih proizvoda iz Unije? Da li bi mogla, dok ne uđe na zajedničko tržište – što je gotovo nemoguća misija, da očuva svoje povoljne trgovinske sporazume sa drugim zemljama i grupama zemalja?

Odgovor na ova i slična pitanja zavisi od rešenja načelnog sloja problema – da li će se Unija čvrsto držati svoje politike kvazi-proširenja (za države kandidate - pristupanje bez članstva), ili će dopustiti mogućnost neprinudnog pridruživanja. Sudeći po nekim naglascima iz Uvoda dokumenta, gde se politika proširenja za "Zapadni Balkan" zasniva na "geostrateškoj investiciji u stabilnu, jaku i ujedinjenu Uniju", države kandidati teško će se osloboditi zagrljaja ove vrste.

Ali, ako Srbija odluči da stvari posmatra sa stanovišta svojih interesa, i ako bi njihovo ostvarivanje ubuduće sledilo logiku diferenciranog pridruživanja, Srbija bi sva ova pitanja morala da otvori pred samom EU. Time bi potvrdila da vodi računa o svom razvoju i svojoj budućnosti. Istovremeno, time bi pomogla i samoj Uniji da dođe do optimalnog modela svog odnosa sa državama kandidatima u predstojećem vremenu sopstvene reforme.

7. Zaključak

U ovom članku mi tvrdimo da Makronovo obznanjivanje decizionističkog zaokreta u politici proširenja za Srbiju predstavlja priliku, Makijavelijevu *occasione*. Takva prilika rađa se u situaciji kada stari poredak i ideja na kojoj on počiva više ne predstavljaju pouzdanog vodiča kroz ponovo probuđeni život zajednice. Za razliku od država članica EU, posebno onih pripadnica monetarne unije najviše pogođenih krizom javnog duga, srpski narod je zadržao širok prostor slobode za političko delovanje. Politički subjekt, *demos,* nije se još uvek odrekao potrage za sopstvenom formom kolektivne egzistencije. Pitanje smisla nije odlutalo iz sfere političkog. Iako je proces normiranja društvenog života prema evropskim pravilima otišao veoma daleko, nije izgubljena mogućnost preispitivanja tih pravila i njihovog upodobljavanja sopstvenim interesima. Utoliko mi shvatamo predlog Komisije Evropske unije kao priliku za uspostavljanje nove vrste odnosa između Srbije i EU. Naizgled paradoksalno, zahvaljujući uslovljavanju članstva Srbije u EU zahtevima koji se teško mogu ostvariti bez većih društvenih lomova, poput onog o priznanju nezavisnosti Kosova i Metohije, prostor slobode za odluku o obliku i stepenu saradnje zadržale su i EU i Srbija.

Predsednik Francuske, dakle, nosi zaslugu zbog toga što je podigao tehnokratsku zavesu sa pozornice za eksperimente, inovacije, otpočinjanje i političku

kreativnost u oblikovanju odnosa između nadnacionalne zajednice u nastanku i država na njenoj periferiji. Vodeće političke partije u Srbiji, nevladine organizacije i sistemski mediji ogorčeno su dočekali Makronovu odluku o zaustavljanju pridruživanja Severne Makedonije i reformisanju metodologije proširenja. U javnoj sferi preovladalo je osećanje izneverenosti, razočaranosti, ljutnje.[20] Najeksponiranije ličnosti političkog života grčevito su se uhvatile za onu zavesu kako bi je sprečili da se podigne. "Mi idemo u Evropu pa čak i ako nas predsednik Francuske ne želi!" čuo se poklič sa raznih tribina organizovanih u Srbiji neposredno nakon što je Makron izneo svoj predlog. Koliko god oni snažno vukli, međutim, zavesa se ipak diže. Ostaje prazan politički prostor slobode, pozornica koju sada ponovo treba ispuniti znanjem, vizijom, maštovitošću i zdravim razumom, ali pre svega odgovornošću za sudbinu zajednice izmučene ratovima, sankcijama i iluzijama.

Današnje neuke vođe naroda i njihovi neznanjem uspavani i sebičnim interesima vođeni ideološki pokrovitelji iz nevladinog sektora, ostali su zbunjeni svojom ulogom mogućeg režisera. Nisu joj dorasli. Navikli su da predstavu režira neko drugi. Ukoliko se oni sami u tom novom poslu zaista i oprobaju, na pozornici se može očekivati rasulo, haos i na kraju otvoreno nasilje kao sredstvo za održanje korumpiranog poretka. Zadatak intelektualne elite jeste da to preduhitri tako što će sama iskoračiti iz udobne pozicije gledalaca. Izaći na binu i ponovo preuzeti odgovornost za Grad, koje su se jednom odrekli omamljeni snom o evropskom putu, to je zadatak profesora srpskih univerziteta. Pozorišna predstava oslobođena dogmi, pored odgovornosti iziskuje i političku dovitljivost, lukavost, oprez, osmišljavanje alternativa, znanje, maštovitost i talenat svih onih koji se odluče da u njoj učestvuju. Osloboditi putem otvorene javne rasprave sve sfere društvenog života prekrivene nekada korisnim a nekada besmislenim i štetnim evropskim pravilima; otvoriti prostor za otpočinjanje novog kako bi se sačuvalo ono staro što se kroz vekove zajedničkog života prenosi, još uvek nas drži na okupu i čini politički samosvesnim narodom - to predstavlja najvažniji zadatak vremena posvećen ovoj temi.

[20] Vid. npr. ton i sadržaj izlaganja učesnika skupa iz organizacije "Srbija 21" na kojem je 23.11.2019. donesena "Deklaracija o političkoj budućnosti moderne evropske Srbije", *https://www.danas.rs/politika/potpisana-deklaracija-o-politickoj-buducnosti-moderne-evropske-srbije/.*

Slobodan Samardžić*
Bojan Kovačević**

THE EU ENLARGEMENT PROCESS IN THE VACUUM OF IDEAS DEFICIT – WITH REGARD TO A EUROPEAN COMMISSION'S DOCUMENT

ABSTRACT

In this paper we analyse the relation between the EU and Serbia in the light of new initiatives for overcoming the death lock of the EU enlargement process. First, we deal with the link between the Monnet uniform method of integration and the EU's systemic crisis that has been revealed in 2009. Then, by analysing the case of Serbia we show how the EU enlargement policy's function has been fundamentally changed. Third, we enlighten the novelties in the methodology of the enlargement process proposed by the European commission as a response to an initiative of the President of France. Finally, we argue that this proposal should be seen as a chance for liberating the EU-Serbia relation from the too heavy burden of uniform form that has entered into conflict with life of European peoples a decade ago.

Keywords: European Union, crisis, Serbia, accession process, Monnet method, differentiated integration

* PhD, Professor at the Faculty of Political Sciences, University of Belgrade.

** PhD, Associate Professor at the Faculty of Political Sciences, University of Belgrade.

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Lazar Radic Boskovic*

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THE BLANKET PROHIBITION OF DISCLOSURE OF CORPORATE STATEMENTS CONTAINED IN ARTICLE 6(1) OF THE DIRECTIVE FOR ACTIONS FOR ANTITRUST DAMAGES: PROPORTIONAL SAFEGUARD OF PUBLIC ENFORCEMENT OR INSURMOUNTABLE BURDEN FOR CLAIMANTS?**

ABSTRACT

The present paper will examine whether the blanket prohibition of disclosure of corporate statements contained in Article 6(1) of Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union is necessary to safeguard the attractiveness of the Commission's leniency programme or whether it represents an insurmountable burden for claimants that will in the long run severely hamper the private enforcement of EU Competition law (a most unfortunate outcome considering the main objective of the Directive is precisely the opposite). On the one hand, excessive protection of leniency applicants' clemency submissions may lead to useless litigation and

* LLM Amsterdam (UVA), European University Institute, PhD candidate, *lazar.radic@eui.eu*.

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ultimately render the private enforcement of competition law in the EU pointless, as claimants are denied (purportedly) essential evidence for building stout damages cases. On the other hand, a more permissive approach towards the disclosure of such information may cripple the public enforcement of Competition law by discouraging cartelists to come forward in the first place. Given the fact that follow-on claims constitute a lion's share of current actions for antitrust damages brought in the EU, such a result would almost certainly have catastrophic consequences for individuals' right to compensation for the harm caused by infringements of Article 101 of the Treaty on the Functioning of the European Union as recognised by the European Court of Justice in the Courage and Crehan and Manfredi and others judgments. We conclude that the Commission seems to be privileging immunity recipients at the cost of injured parties by imposing remedies that are too far reaching for the protection of the effectiveness of the leniency programmes, especially taking into consideration the lack of conclusive evidence proving that disclosure of corporate statements would discourage potential leniency applicants from collaborating with the competition authorities in the first place. In light of this, we contend that a case-by-case approach such as the one envisaged by the European Court of Justice in Pfleiderer is more adequate to strike the balance between the injured parties' right to redress and the effectiveness of the leniency programmes – at least for the time being. The topic is especially relevant today, given the Commission's duty to review the Directive by December 27 2020, as follows from Article 20 thereof.

Keywords: EU, antitrust damage, private enforcement, right to compensation, prohibition of disclosure of corporate statements.

> *Propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process, which provide the best constructive interpretation of the community's legal practice. Lawyers are invited to search for an answer in legal materials using reasons and imagination to determine the best way to interpret legal data. It is therefore possible for lawyers to confront fresh and challenging issues as a matter of principle, and this is what law as integrity demands of him.*
>
> R. Dworkin, *Law's Empire* (1986)

Introduction

In 2013 the European Union Commission (hereinafter 'the Commission') put forth a draft proposal on certain rules governing actions for damages under national

law for infringements of the competition law provisions of the Member States and of the European Union[1] ('the Directive'). In the Commission's own words, the directive aims at facilitating damage claims by injured parties in civil actions for antitrust damages without hindering or in any way adversely affecting the hitherto successful public enforcement of European Union ('EU') Competition law.[2] Yet a closer examination of certain precepts contained in the directive suggests that such a balance may in fact be difficult to strike in practice. In this sense, Article 6(1) of the directive prohibits the disclosure of corporate statements to private plaintiffs in actions for damages resulting from breaches of competition law (henceforth referred to simply as 'actions for antitrust damages').[3] As some commentators have denounced, this precept may prove problematic in the light of the importance attached to corporate statements in the process of proving causation and quantifying the harm inflicted by cartels, by virtue of which forbidding claimants access to such documents may well be tantamount to condemning the private enforcement of EU Competition law to an early grave.[4] This would in turn imperil the right of cartel victims to obtain full compensation for the harm suffered as a result of infringements of Article 101 of the Treaty on the Functioning of the European Union ('TFEU'),[5] as established in the seminal *Courage and Crehan*[6] and *Manfredi and others*[7] rulings of the

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[1] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2013/0185 (COD).

[2] See the explanatory memorandum of the Directive; Public enforcement of competition law is taken to mean the application of the EU competition rules by the Commission and national competition authorities ('NCAs'). On the other hand, private enforcement of competition law is taken to mean the exercise of the rights arising from the direct effect of articles 101 and 102 TFEU by individuals, which can be enforced by national courts. This is the definition offered by the Commission in the explanatory memorandum of the directive and the one we will follow throughout the present work.

[3] 'Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence: leniency corporate statements; and settlement submissions.'

For the purpose of the present work, we shall focus only on leniency corporate statements.

[4] See, for instance, Albert Sánchez Graells, 'Why is competition law so special? Or how leniency will kill private damages actions', available at: *http://howtocrackanut.blogspot.co.uk/2013/02/why-is-competition-law-so-special-or.html*. 'Maybe it is better to accelerate the process and not wait for leniency protection to (slowly) kill private actions. Let's just bury them and avoid unnecessary litigation'.

[5] Consolidated version of the Treaty on the Functioning of the European Union, C 326/49. 26.10.2012.

[6] Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

European Court of Justice ('ECJ').[8] In addition, such an outright ban on the disclosure of corporate statements could amount to a disproportionate curtailment of the right to an effective remedy and a fair trial enshrined in Article 47 of the Charter of Fundamental Rights of the European Union[9] ('The Charter'), as well as a breach of the principle of proportionality contained in Article 19 of the Treaty on European Union ('TEU').[10] On the other hand, it has been argued that cartelists may be dissuaded from whistle-blowing where there is a possibility that the self-incriminating evidence contained in the corporate statement might be used against them in subsequent civil proceedings, leaving them worse off than if they had not come forward and in an altogether more precarious position than their co-conspirators. Considering the fact that nearly 90% of cartels are uncovered following a leniency application[11] and given that follow-on claims[12] constitute a lion's share of actions for damages brought in the EU, such a result would surely have catastrophic consequences for the still very much nascent private enforcement of EU Competition law. However, it would appear that the exception to the general rule of the joint and several responsibility of the infringers for the harm caused by a cartel operating in favour of the immunity recipient contained in Article 11(2) of the Directive, whereby his liability is limited to the damage caused to his direct and indirect purchasers unless claimants prove they cannot obtain full compensation from the other defendants, significantly alleviates this concern. This precept, which was introduced as an amendment by the European Parliament, seems to privilege immunity recipients at the cost of injured parties as it limits the claimants' choices upon seeking compensation for the harm suffered and imposes the additional burden of having to prove that redress cannot be obtained from the other infringers. Coupled with the aforementioned absolute ban on the disclosure of corporate statements, Article 11(2) may be the final nail in the

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[7] Joined Cases C-295 to 298/04 *Manfredi* [2006] ECR I-6619.

[8] Para. 26 of *Courage and Crehan*.

[9] Charter of Fundamental Rights of the European Union (2010/C 83/02).

[10] The Charter became legally binding on the EU institutions and on national governments in 2009 with the entry into force of the Treaty of Lisbon. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. 2007/C 306/01.

[11] See Section 1.2.

[12] Follow-on claims are those which are brought after the establishment of a Competition law infringement by the NCAs or the Commission. The present work will focus exclusively on follow-on damages claims. Stand-alone claims shall therefore not be discussed.

coffin of the right to obtain full compensation for the harm caused by anticompetitive conduct.

In view of the above situation, the present contribution will attempt to shed light on the question of whether, and if so to what extent, the blanket prohibition of disclosure of information contained in corporate statements contemplated in Article 6(1) of the Directive is likely to constitute an impediment to the effective redress of antitrust damages victims and a hurdle to private enforcement of EU Competition law.[13] While the focus will be on Article 6(1), the interplay of said precept with Article 11(2) of the Directive will be touched upon, albeit shortly given the brevity of the present work. For the purpose of clarity and coherence, the organization of the paper will be as follows. (i) Part one will aim to provide a concise overview of the context in which Article 6(1) is set to operate in and a background to the ensuing debate. To this end, three issues shall be briefly discussed: (a) the traditional preponderance of public over private enforcement of EU Competition law, (b) the paramount importance of leniency programmes for the success of public, and consequently private, enforcement and (c) the rise of private enforcement of EU Competition law as a result of a (relatively) recent heightened awareness of its importance. (ii) Part two will assess the main arguments for and against a hard-and-fast rule prohibiting the disclosure of information contained in leniency submissions drawing on the ECJ's case-law. (iii) Part three will examine possible trade-offs and alternative solutions to the issue of disclosure of leniency material and discuss the combined effect of Articles 6(1) and 11(2) on the claimants' right to be fully compensated for the damage suffered as a consequence of an infringement of Article 101 TFEU and (iv) part four will conclude on the arguments adduced thus far.

1. The legal context surrounding the adoption of Article 6(1) of the Directive

In order to assess the potential impact of Article 6(1) of the Directive and understand the rationale behind the imposition of a blanket prohibition against the disclosure of corporate statements in actions for antitrust damages, it is appropriate to survey the legal climate surrounding its adoption.

[13] In the present work 'Private Enforcement of EU Competition rules' will refer exclusively to actions for damages. However, it must be underlined that, strictly speaking, private enforcement also encompasses actions for nullity or actions for injunctive relief. These actions will not be discussed.

1.1. Preponderance of Public enforcement of Competition law in the EU

In contrast with the United States, where approximately 90% of antitrust damages cases are filed by private attorneys,[14] the enforcement of Competition law in Europe has traditionally relied heavily on public authorities.[15] Indeed, public enforcement has long been defended as the superior method for fulfilling the main functions of competition law by many authoritative European commentators such as Wouter Wils and Wernhard Moeschel, who have mostly focused on the aspects of deterrence, punishment,[16] clarification and development[17] of antitrust prohibitions.[18] However, the understanding of these

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[14] A. Renda, J. Peysner, A. J. Riley, B. J. Rodger, J. Van Den Bergh, S. Keske, R. Pardolesi, E. L. Camilli, P. Caprile, 'Making antitrust damages actions more effective in the EU: Welfare impact and potential scenarios', (2007) Report for the European Commission DG COMP/2006/A3/012. Hereinafter 'CEPS report', p. 67.

[15] Alberto Saavedra, 'The relationship between the leniency programme and private actions for damages at EU level' (2010), *Revista de Concorrencia e Regulacao*, 2010. Available at: *http://www.ssrn.com/abstract=2292575*; In fact, the role of civil actions for damages in European antitrust enforcement has been so negligible that the Ashurst report (Study on the conditions of claims for damages in case of infringement of EC competition rules, 2004, available at *http://www.ec.europa.eu*) described them as 'painting a picture of complete underdevelopment and astonishing diversity'. Admittedly, the situation has changed considerably in the ten years since that report was published, although to this day private enforcement remains far from equal to its public counterpart. To this end, see para. 41 of the opinion of Advocate General ('AG') Mazak in Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2010].

[16] It has been argued that public enforcement is more suited for punishing infringers as it strives to impose optimum fines, in contrast with private actions for damages. See Wils at n. 21.

[17] Their content is clarified through decisions and judgments as well as through guidelines, see for example Decision 98/531 EC of the European Commission of 11 March 1998 in Case IV/34.073 *Van den Bergh Foods v Commission,* [1998] OJ L246/1 and Judgment of the EC Court of First Instance (now General Court) of 23 October 2003 in Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II- 4653, and Decision of the European Commission of 26 August 1999 in Case IV/36.384 FENIN and judgment of the Court of Justice of 11 July 2006 in Case C-205/03 P *FENIN v Commission* [2006] ECR I- 6295; see also Article 10 of Regulation 1/2003 as well as the European Commission's Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases, [2004] OJ C101/78; See also for instance the European Commission's Guidelines on vertical restraints, [2000] OJ C291/1, and Guidelines on the applicability of Article 81 EC to horizontal co-operation agreements, [2001] OJ C3/2. As cited by Wouter Wils in 'The Relationship Between Public Antitrust Enforcement and Private Actions For Damages' (2008), *World Competition*, Vol. 32, No. 1. Available at: *http://www.ssrn.com/abstract=1296458*.

[18] See, for instance, Wernhard Moeschel, 'Should Private Enforcement of Competition Law Be Strengthened?'. Available at: *http://www.unisaarland.de/fak1/fr12/csle/activities/cnpe06/abstracts/Moeschel-private_abs.pdf*. 'The Public enforcement by competition authorities has three advantages (reliance on state power,

functions has gradually shifted as a result of the Commission's modernisation of competition law initiative[19] and, most importantly, the ECJ's growing line of jurisprudence calling for the enhancement of actions for antitrust damages initiated with the landmark *Courage and Crehan* ruling. As a consequence of the establishment therein of compensation as a necessary element for the attainment of the *effet utile* of Articles 101 and 102 TFEU, the aforementioned views have become somewhat outdated. Nevertheless and as shall hopefully be made clear throughout this contribution, these opinions continue to permeate the European antitrust debate to a significant extent and more importantly, serve as a basis for many of the arguments supporting Article 6(1) of the Directive as it stands at the time of writing. In any event, no public enforcement tool has been nearly as successful in fighting cartels as the leniency programmes.

1.2. Leniency programmes as essential public enforcement tools in the fight against cartels

Since their introduction in the EU in 1996, leniency programmes[20] have become an essential tool in the fight against hard-core cartels[21] across the Union.[22] In fact, almost 90% of cartel infringements are discovered through leniency applications.[23] Today, leniency programmes constitute the hallmark of public enforcement and are considered essential in terms of deterrence[24] and

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lower costs and less danger of abuse). (…) Private enforcement of competition law can claim a few, rather weak, advantages.'; also, Wouter Wils, 'Should private antitrust enforcement be encouraged in Europe?' (2008), *World Competition: Law and Economics Review*, Vol. 26, No. 3, 2003.

[19] See, in general, Jules Stuyck, 'Modernisation of European competition law: the commission's proposal for a new regulation implementing articles 81 and 82 EC; proceedings of the 2001 Competition Law Conference of the Leuven Centre for a Common Law of Europe' (2002), Antwerp, Intersentia.

[20] For a definition of 'leniency' see paragraph 1 of the ECN Model Leniency Programme. See also paragraph 37 of the Commission Notice on cooperation within the Network of Competition Authorities.

[21] 'Hard-Core' cartel conduct has been defined by the organization for Economic Cooperation and Development (OECD) as: '[A]n anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.' (OECD, 1998).

[22] See, in general, CEPS Report, p. 499.

[23] Tine Carmeliet, 'How lenient is the European leniency system? An overview of current (disincentives) to blow the whistle' (2012), *Jura Falconis* Jg. 48, 2011 - 2012, nummer 3.

[24] See n. 15.

destabilization of cartels.[25] As stated clearly and concisely in the note by the United Nations Conference on Trade and Development ('UNCTAD') secretariat: '*[Hard-core] cartels are considered by many to be the most egregious competition law offence. Leniency programmes are the most effective tool today for detecting cartels and obtaining evidence to prove their existence and effects.*'[26] It is also important to highlight that, while strictly speaking a public enforcement device, the benefits generated by leniency programmes are also reaped by antitrust victims.[27] Indeed, considering the fact that the vast majority of actions for antitrust damages are brought following a finding of infringement by a competition authority, effective public enforcement is essential for the successful compensation of competition law infringement victims. This holds especially true in light of the rule contained in Article 9 of the Directive, which establishes that the findings of infringements by competition authorities constitute irrefutable proof of an infringement in subsequent civil actions for damages, thereby significantly lightening the burden of proof of claimants.[28]

It follows from the above that any enfeeblement of the leniency programme(s), whether real or imagined, is likely to be met with strong opposition from the Commission, the NCAs and authoritative commentators from academia, legal practice and industry alike.[29] In this sense, the rise of private enforcement of

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[25] Jeroen Hinloopen, Adriaan R. Soetevent, 'Laboratory evidence on the effectiveness of corporate leniency programs' (2008), *RAND Journal of Economics*, vol. 39, No. 2, Summer 2008, pp. 607-616.

[26] United Nations Conference on Trade and Development, 'The Use of Leniency Programmes as a Tool for the Enforcement of Competition Law against Hardcore Cartels in Developing Countries', Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva 8-12 November 2010, Item 6(a) of the provisional agenda.

[27] See, for instance, the statement of Andreas Mundt, President of the Bundeskartellamt: 'If the leniency programme does not function properly, significantly fewer cartels will be uncovered. This would not only hamper the punishment of the perpetrators, but also the compensation of the victims'.

[28] Whereas an infringement found by a final decision of the court's domestic competition authority (or review court) is deemed to be irrefutably established, a final decision of a competition authority in one member State is not fully binding on the court in another member State but constitutes *prima facie* evidence of an infringement. See Skadden, 'European Parliament approves proposed Directive on private antitrust damages actions', available at: *http://www.skadden.com/sites/default/files/publications/European_Parliament_Approves_Proposed_Directive_on_Private_Antitrust_Damages_Actions.pdf*.

[29] See, for instance, the comments to the Commission's Green Paper and White Paper on actions for damages for antitrust infringements, which shall be discussed in more detail in section two.

Competition law in the EU, and especially the culmination of the ECJ's pro-compensation line of jurisprudence in *Pfeilderer*[30] has had mixed responses.

1.3. The rise of private enforcement of Competition law in the EU

The Commission's interest in bolstering the private enforcement of EU Competition law was sparked by a line of jurisprudence initiated by the seminal *Courage and Crehan* ruling, where the ECJ famously held that compensation of cartel victims is essential in ensuring the *effet utile* of Article 101(1) TFEU.[31] The Court's reasoning was subsequently acknowledged by the Commission, as is evidenced by the 2005 Green Paper[32] which sought to open up a discussion on the removal of practical obstacles for the bringing of more (successful) actions for antitrust damages.[33] The Green Paper, published together with a Staff working paper (jointly referred to henceforth as 'the Green Paper', unless otherwise specified), underlined the importance of facilitating antitrust damages claims both for ensuring the full effectiveness of Article 101(1) TFEU as well as for strengthening competition law enforcement across the Union.

Manfredi and others, rendered in 2006 by the ECJ, came as a confirmation of *Courage and Crehan* as well as a nod to the themes raised in the Green Paper. Two years after the ECJ delivered its judgment in *Manfredi*, the Commission published its White Paper on actions for damages[34] with a double purpose: ensuring the full compensation of antitrust victims while at the same time preserving strong public enforcement.[35] In 2013 and after almost a decade of deliberations, a directive on actions for antitrust damages - which echoed the majority of the proposals put forward in the White Paper - was finally published. On April 17, 2014, the European Parliament overwhelmingly approved it, albeit amending Articles 6 and 11.[36] In the same way as its predecessor, the Directive aims at

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[30] C-360/09 *Pfleiderer AG v. Bundeskartellamt* [2010].

[31] Para. 26.

[32] Commission Green Paper – Damages actions for breach of EC antitrust rules. COM (2005) 672, 19.12.2005.

[33] Eddy De Smijter, Constanza Stropp, Donnacadh Woods, 'Green Paper on damages for actions for breach of the EC antitrust rules' (2006), *Competition Policy Newsletter*, n. 1, spring 2006; See also recital seven of the Staff Working Paper.

[34] Commission White Paper on Damages Actions for Breach of the EC antitrust rules. COM (2008) 165, 2.4.2008.

[35] See Section 1.2 of the Explanatory Memorandum of the White Paper.

[36] See Press Release, FAQ and Memo at: *http://ec.europa.eu/competition/antitrust/actionsdamages/proposed_directive_en.html*.

optimising the interaction between the public and private enforcement of competition law and ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they have suffered.[37] Recent ECJ rulings, such as *Pfleiderer* and *Donau Chemie*,[38] together with a number of judgments rendered by national courts[39] have further emphasised the importance of ensuring the effective exercise of actions for damages of antitrust infringements. In *Pfleiderer*, the ECJ held that national courts should weigh the respective interests in favour of disclosure of the information and in favour of the protection of the information provided voluntarily by the applicant for leniency,[40] which was later confirmed in *Donau Chemie*.[41] The Court thus rejected any *per se* ruling regarding the disclosure of corporate statements, contending that any rigid rule in this respect would be liable to undermine the effective application of Article 101 TFEU.[42] This case-law has in turn been coupled with a growing support and wide-spread awareness of the benefits of actions for damages for Competition law enforcement. In this respect, Lande and Davis have posited that private enforcement may be capable of correcting some of the shortcomings of public enforcement, such as budgetary constraints, lack of awareness of industry conditions and the political motivation behind administrative (non) enforcement.[43] Further, follow-on actions have been found to contribute to more effective deterrence by increasing the probability of detection and adding (or substituting, in the case of immunity recipients) damages awards to the potential fines imposed by public enforcers.[44] However,

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[37] See section 1.2 of the Explanatory Memorandum thereof.

[38] Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, ECLI:EU:C:2013:366.

[39] *National Grid v ABB & Others* [2012] EWHC 869. Case No: HC08C03243.

[40] Para. 30 of the judgment.

[41] Para. 31 of the judgment.

[42] *Ibid*.

[43] Lande and Davis, *Interim Report* (2006); In this respect, see also the CEPS report, p. 57: '[T]he imperfect information and limited resources available to public authorities are the main grounds for envisaging a role for private Attorney Generals in enforcing antitrust rules.'; Other authors, such as Priest and Klein, have also held that advantages of private enforcement over public enforcement include informational advantages, proximity to the violation and also increased legal certainty over the intricacies of antitrust law. George L. Priest, Benjamin Klein, 'The Selection of Disputes for Litigation' (1984), *The Journal of Legal Studies*, Vol. 13, n. 1 (Jan., 1984), pp. 1-55.

[44] CEPS Report, p. 63; See also the consultation document published by the OFT, '[a] more effective private actions system would increase the incentives of businesses to comply with competition law, since the potential incidence and magnitude of any financial liability to a competition authority and/or claimant will increase. As these financial risks increase, so does (or should)

far from adopting a private v. public approach, the majority of authors agree that the most effective way to enforce Competition law is through a system effectively integrating private and public enforcement. In this sense, Martini and Rovesti found that social welfare increases if both private and public agents can start an investigation,[45] while McAfee suggested that mixed public and private enforcement yield a superior result to either functioning in isolation.[46] Based on *inter alia* the work of McAfee, H.P Mialon and S.H Mialon,[47] the CEPS report concluded that as a result of the improvement in the possibility of detection of illegal conduct, the accuracy of fact-finding and deterrence, effective (not simply 'enhanced') private enforcement is likely to lead to an increase in the competitiveness of markets, a reduction in the potential for strategic abuse of antitrust laws and to greater compensation.[48] In this respect and according to the same report, enhanced private enforcement is expected to lead to a yearly recovery by claimants ranging between €5.7 billion and €23.3 billion,[49] while at the same time bringing about yearly social benefits as high as 1% GDP or €117 billion.[50]

In light of all the above, it is safe to say that the private enforcement of competition law has enjoyed a (re)birth in the past decade. However, such a revitalisation has come at a time when the effectiveness of the leniency programmes, and therefore also public enforcement, appears almost undisputed. Against this backdrop, many authoritative commentators, stakeholders and perhaps most importantly, the Commission itself, are extremely wary of any potential negative spill-over effects arising from a surge in actions for antitrust damages. One of the focal points of discussion in this sense has been the question of the (non) discoverability of leniency material to the claimants in actions for

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the interest of those ultimately responsible for the governance of the business (especially supervisory boards and non-executive directors) or for supporting the business (including, for example, financiers and investor groups). In this way public enforcement and private actions are complementary.' As cited in the CEPS report.

[45] Gianmaria Martini, Cinzia Rovesti, 'Antitrust Policy and Price Collusion: Public Agencies vs Delegation' (2004), *Recherches Économiques de Louvain - Louvain Economic Review*, 70(2), 2004.

[46] R. Preston McAfee, Hugo M. Mialon, Sue H. Mialon, 'Private Antitrust Litigation: Procompetitive or Anticompetitive' (2005), available at: *www.justice.gov/atr/public/hearings/single_firm/docs/220040.pdf*.

[47] R. Preston McAfee, H. P. Mialon, S. H. Mialon, 'Private v. Public Antitrust Enforcement: a Strategic Analysis', *Emory Law and Economics*, Research Paper No. 05-20.

[48] CEPS Report, pp. 67 and 70.

[49] *Ibid*., p. 168.

[50] *Ibid*., p. 165.

antitrust damages. The following section will attempt to shed some light on this increasingly contentious question.

2. Article 6(1): Proportional safeguard of public enforcement or insurmountable burden for claimants?

Article 6(1) of the Directive imposes an obligation on Member States to ensure that national courts cannot order the disclosure of leniency corporate statements during an action for antitrust damages. While some commentators have received this blanket-prohibition with open arms, claiming that it is necessary for the safekeeping of the effectiveness of leniency programmes in the EU, others have wondered whether such a hard-and-fast rule will ultimately defeat the purpose of the Directive by denying claimants access to evidence that is essential for building a viable antitrust damages case. Within the context of this debate, the present segment will attempt to assess (a) what the real evidentiary value of the information contained in the leniency application is for plaintiffs and to what extent such information can be obtained through other, non-confidential, means, (b) whether the disclosure of the aforementioned documents truly jeopardises the effectiveness of leniency programmes in the EU by acting as a disincentive to potential leniency applicants (c) and finally, whether a blanket prohibition on the disclosure of corporate statements such as the one contained in Article 6(1) of the Directive is in line of the right to effective redress enshrined in Article 47 of the Charter, the principle of proportionality contained in Article 5 TEU and the principle of effectiveness contemplated in Article 19 TEU.

2.1. Disclosure of leniency applications: dire necessity or capricious whim?

Informational asymmetries *inter partes* in actions for antitrust damages and the evidential hurdles faced by claimants therein were already identified by the Commission as primary obstacles for bringing successful actions for antitrust damages in its Green Paper.[51] The present segment will aim to ascertain whether the blanket prohibition against the discoverability of leniency material contained in Article 6(1) of the Directive can potentially be too burdensome for claimants - to the extent that it bars them from obtaining full compensation-, or if on the other hand it can be overcome through the use of other, non confidential,

[51] Concerning the Green Paper, see section 2.1 thereof; with regards to the Commission's most recent admission of the aforementioned obstacles, see the explanatory memorandum of the directive, n. 6. In this sense: '[T]he Commission identified, in its Green Paper on damages actions for breach of the EC antitrust rules (…), the main obstacles to a more effective system of antitrust damages actions. Today those same obstacles continue to exist in a large majority of Member States. They relate to (i) obtaining the evidence to prove a case'.

evidential means without representing a disproportionate cost that would discourage injured parties from seeking redress for the harm suffered.

Within the context of the Directive and in light of Articles 9[52] and 16(1)[53] thereof, a claimant in an antitrust damages case is obliged to prove two elements: causation and quantification of damages. Causation requires that the causal link between the collusive behavior of the defendant(s) and the harm suffered by the claimant be uninterrupted. However, as Woods, Sinclair and Ashton point out, it can be complicated to attribute loss to the defendant's behavior rather than to other factors such as the claimant's own business strategy, as illustrated in *Hendry*.[54] In stark contrast with many 'classical' private damages cases, one of the main problems faced by claimants in attempting to establish causation is the typically complex, and highly variable, environment of many private antitrust cases.[55] In addition, while legal standards for proving quantification are generally lower[56] and allow for crude approximations, causation is scrutinized thoroughly, to the extent that in most jurisdictions it must be established with a 99.9% probability.[57] Proving causation can therefore constitute an important barrier for claimants in actions for antitrust damages, especially taking into account the fact that cartelists typically hold much more information about the infringement.[58] Furthermore, even if causality is proven, evidence of the actual loss is required in order to bring a successful antitrust damages case. This hypothetical assessment, which is very fact sensitive and invokes complex and specific economic and competition law issues, has been recognised by the Commission as a major difficulty for claimants in antitrust damages actions.[59] The question is whether

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[52] Article 9 of the Directive establishes that where there is already a final infringement decision by a national competition authority or by a review court, national courts ruling in actions for damages under Article 101 or 102 TFEU cannot take decisions running counter to such finding of infringement.

[53] Article 16(1) establishes a presumption of harm operates in the case of a cartel infringement.

[54] D. Woods, A. Sinclair, D. Ashton, 'Private enforcement of Community competition law: modernisation and the road ahead' (2004), *Competition Policy Newsletter*, n. 2.

[55] Hans A. Abele, George E. Kodek, Guido K. Schaefer, 'Proving causation in private antitrust cases' (2011), *Journal of Competition Law & Economics*, 7(4), 847-869.

[56] *Ibid*., p. 2.

[57] *Ibid*., pp. 1-3.

[58] *Ibid*., p. 5.

[59] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union. 2013/C 167/07. Para. 3.

access to corporate statements can aid claimants in overcoming these evidential obstacles.

In contrast to pre-existing documents, corporate statements are created with the sole purpose of applying for leniency. In this respect, they can often be very valuable as they must generally contain a detailed description of the cartel conduct; including its aims, activities and functioning, the product involved, geographic coverage, duration, volumes affected by the cartel, dates, locations, participants and all other relevant explanations in connection with the evidence provided.[60] Certain passages from such documents can prove invaluable in determining what the price would have been in a hypothetical competitive market had the cartel not taken place (the 'but-for' test),[61] a necessary step in establishing the extent of the harm suffered by the injured parties. In this respect, the ECJ contended in *Donau Chemie* that access to leniency material could be 'the only opportunity [injured parties] have to obtain the evidence on which to base their claim for compensation'.[62] It is, however, complicated to make a far reaching claim concerning the evidential value of corporate statements, especially considering the fact that the information contained in non-confidential documents may overlap with that held in corporate statements. Indeed, the post-*Pfleiderer* case-law of national courts suggests that the extent to which corporate statements are necessary to substantiate an antitrust damages case largely depends on the facts of the case, the type of cartel[63] as well as on the existence, or lack thereof, of non-confidential documents, their quality and availability.

There are admittedly other elements which can prove useful in building a successful damages claim. For instance, the Directive allows for the disclosure of the evidence and statements collected during the course of the investigation as well as any documents specifically prepared for the purpose of public enforcement proceedings, such as the statement of objections and responses or requests for information and their corresponding responses.[64] However, these other documents may prove difficult to identify without the indications of their existence in corporate statements.[65] This is especially relevant taking into consideration the fact that the parties seeking disclosure must motivate their

[60] ECN Model Leniency Programme, para. 20.

[61] *Donau Chemie*, paras 48-49.

[62] *Ibid*., para. 39.

[63] Kuijper, Pfleiderer AG/Bundeskartellamt, *Markt & Mededinging*, 2011 (5).

[64] Article 6(2) and (3) of the Directive. See also Article 5 *Ibid*.

[65] M. G. Nielen, 'Leniency material…', pp. 13-14.

requests and be specific in identifying the files in question, as national judges may deny disclosure when they believe the request is too broad.[66] In this regard, leniency material can help bridge the gap between the missing evidence, which may prove critical in substantiating a successful civil claim for antitrust damages.[67] For instance, where the leniency applicant is also the defendant cartelist in a follow on claim, corporate statements could shed light on the link between the breach and the damage.[68] Moreover, while the contents of a corporate statement are relatively predictable considering that they have to abide by the minimum standards set in the Commission's Leniency Notice, the extent to which the other, discoverable categories of documents may prove useful in substantiating an antitrust damages claim varies enormously depending on the their length, level of detail, type of evidence and even format.[69]

Consequently, the irregularity in the relative evidential value of the different categories of evidence means that several scenarios are possible. On the one hand, it might well be that the information contained in the white/grey-listed documents is enough to substantiate an antitrust damages case.[70] For example, the Amtsgericht Bonn, the requesting Court in *Pfleiderer*, reversed its initial ruling and denied Pfleiderer access to leniency materials arguing, *inter alia*, that the claimants could use the findings of the competition authority as well as other elements in the investigation file to demonstrate that they had suffered harm as a consequence of a civil wrong.[71] In such a case, the disclosure of corporate statements would admittedly not be necessary. On the other, however, there have been situations in which corporate leniency statements - or at least some of its parts - have been deemed to constitute the *only* viable means of proof of the causality and extent of the harm caused by a cartel, either because alternative sources did not exist or because they were disproportionately difficult to obtain. For instance, in *National Grid*, the English High Court considered that the claimant did not have other reasonable means available to obtain the information it needed to make its case given that there was limited documentary evidence of the cartel, and that that which was available was often unclear and opaque (e.g.

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[66] See Recitals 14 and 15 of the Directive. See Article 2 (b) and 3 (d) of the Directive.

[67] *Ibid*., p. 11.

[68] M. G. Nielen, 'Leniency material...', p. 16.

[69] Kristina Nordlander, Marc Abenhaïm, 'The discoverability…', p. 7.

[70] Asimakis Komninos, 'Relationship between public…'.

[71] Similarly, in the *Rubber Chemicals* litigation, the US court concluded that the withheld documents (corporate leniency statement) were not relevant to the litigation and that they could easily be obtained by other means. Paras 1082-83.

employee statements).[72] It therefore ordered the disclosure of certain relevant passages of the confidential version of the Decision to be disclosed.[73] In such cases, a blanket ban on the disclosure of leniency material may effectively frustrate the right of victims of anticompetitive conduct to obtain redress for the harm suffered. Conversely, a case-by-case approach allows for a proportionality test in determining whether or not to order disclosure which can accommodate both the right to full compensation of the injured parties and the necessity to safeguard the effectiveness of the leniency programmes. As argued by Roth J. in *National Grid*, this test could take into account two factors, namely (i) the availability of information from other sources; and (ii) the relevance of the leniency materials to the dispute.[74] However, does disclosure of corporate statements jeopardise the effectiveness of leniency programmes by discouraging cartelists from blowing the whistle?

2.2. Disclosure as a disincentive to potential leniency applicants

The Commission and the NCAs have consistently maintained that full-blown disclosure of leniency material in civil actions for antitrust damages may discourage potential leniency applicants from coming forward with information on an ongoing cartel.[75] In the Commission's view, the uncertainty arising from the possibility of disclosure of leniency submissions will purportedly make the prospect of collaboration less enticing for potential applicants and thus significantly undermine the effectiveness of the leniency programmes, which would in turn have dire consequences for the enforcement of competition law across the EU.[76] Accordingly, the Commission has intervened through *amicus curiae* briefs stating its policy on the non-discoverability of corporate leniency statements on several occasions, such as in the *Vitamins* case,[77] the *Methionine*[78] litigation and before the Supreme Court in the *Intel v. AMD* case.[79] Furthermore,

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[72] Para. 50 of the judgment.

[73] Para. 58 of the judgment.

[74] *National Grid*, para. 39.

[75] See, for instance, the Resolution of the European Competition Network (23 May 2012): 'As far as possible under the applicable laws in their respective jurisdictions and without unduly restricting the right to civil damages, competition authorities take the joint position that leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of leniency programmes'.

[76] See Section 1.2 of the Explanatory Memorandum of the Directive.

[77] No. 99-197 (TFH) MDL No. 1285 (April 4, 2002).

[78] No. C-99-3491 CRB (JCS) DL No. 1311.

[79] *IntelCorp v. Advanced Micro Devices Inc.*, 124 S. Ct. 2466 (2004).

the Commission also made its stance abundantly clear in its Green Paper,[80] White Paper[81] and Explanatory Memorandum of the Directive.[82]

It is indeed fathomable *prima facie* that faced with the possibility of the self-incriminating information submitted in a leniency application being used against them in subsequent actions for antitrust damages, potential whistleblowers hesitate to collaborate with the competition authorities given that the evidence produced may make them an easy target for claimants and ultimately expose them to a higher civil liability than their co-conspirators.[83] This would narrow the distance between the collaborative and the non-collaborative or collusive payoff, thereby weakening the allure of seeking leniency. This argument has enjoyed widespread support. For instance, in an opinion submitted as a response to the Commission's Green Paper the American Bar Association ('ABA') held that given the importance of leniency programmes in uncovering and efficiently investigating cartel activity, the burden of disclosure clearly outweighs the benefits.[84] Likewise, in the *Methionine Antitrust Litigation*, disclosure was denied to prevent the 'chilling effect'[85] on participation in the (then) EC leniency programme.[86] Other - if not the majority - submissions to the Green paper and White paper followed a similar logic. For instance, Clifford Chance,[87] the Council of Bars and Law Societies of Europe ('CCBE'),[88] the Dutch Bar Association,[89]

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[80] See Section 2.7 of the Green Paper.

[81] See Section 2.9 of the White Paper. For the underlying reasons see Chapter 10, section B. 1 of the Staff Working Paper.

[82] See Section 1.2 of the Explanatory Memorandum. 'In the absence of legally binding action at the EU level, the effectiveness of the leniency programmes - which constitute a very important instrument in the public enforcement of the EU competition rules - could thus be seriously undermined by the risk of disclosure of certain documents in damages actions before national courts.'

[83] See para. 38 of the opinion of AG Mazák.

[84] P. 39 of the Opinion. Similarly, Allen & Overy posited in its opinion that 'The harm that may be caused to the leniency programme by permitting voluntary disclosure of corporate leniency statements outweighs the evidential benefits that may be gained in litigation before national courts'.

[85] The 'chilling effect' refers to the possibility that leniency applicants will include.

[86] *Methionine Antitrust Litigation*, Master File No. C99-3491. Report of Spacial Master (N. D. Cal. June 17, 2002).

[87] P. 5 of the comment to the Green Paper. 'We agree […] that the leniency application should be protected.'

[88] P. 6 of the comment to the White Paper. 'The CCBE is in agreement with the wish to protect the leniency applicant's statements as expressed in the White Paper.'

EuroCommerce,[90] Freshfields Bruckhaus Deringer[91] and a myriad others[92] supported the Commission's proposal of an outright ban on the disclosure of corporate statements and settlement submissions for the aforementioned reasons.

The possibility that disclosure of leniency material to claimants in antitrust damages cases would act as a disincentive to potential leniency applicants was also recognised by the ECJ, thereby adding to its credibility - and resonance. Hence, in *Pfleiderer* the Court argued that even if the national competition authorities were to grant the leniency applicant exemption in whole or in part from fines, the view could reasonably be taken that a person involved in an infringement of competition law, faced with the possibility of such disclosure, would be deterred from taking the opportunity offered by the leniency programmes.[93] Likewise, Advocate General ('AG') Mazák emphasised in his opinion to *Pfleiderer* that it is not necessary that disclosure be definite for such a negative spill-over effect to materialize. On the contrary, the mere possibility of discoverability is enough for the infringers to think twice before coming forward with information on a cartel. In addition, the AG held that disclosure of corporate statements and/or settlement submissions entails the risk that the applicant(s) would be put in a worse position than those cartel members which have not cooperated with the competition authorities, thereby undermining the effectiveness of the leniency programmes.[94] On a different note, the AG argued that an undertaking which cooperates with the Commission in accordance with the terms of the Leniency notice derives a legitimate expectation that the information contained in its corporate statement will not be disclosed to third

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[89] P. 5 of the comment to the White Paper. 'The Committees agree that adequate protection against disclosure in private actions for damages must be ensured for corporate statements submmited by a leniency applicant in order to avoid placing the applicant in a less favourable situation than its co-infringers. Such protection should indeed apply to all corporate statements submitted by all applicants for leniency, regardless of whether an application for leniency is accepted, is rejected or leads to no decision by the competition authority.'

[90] P. 6 of the comment on the White Paper. 'In order to avoid undermining [leniency] programmes, we support the suggestion of the Commission to apply the same level of protection to all corporate statements by all applicants, regardless of whether the application for leniency is accepted, rejected or leads to no decision by the competition authority.'

[91] P. 10 of the comment on the White Paper. 'We fully support the Commission's proposals to ensure that leniency programmes remain attractive in the face of private actions and to ensure that leniency applications, whether successful or not, are protected from disclosure.'

[92] See, for example, the submissions of Linklaters (Green Paper) and Hogan Lovells (Green Paper).

[93] Paras 26 and 27 of the judgment.

[94] Paras 12 and 17 of the opinion of AG Mazák.

parties.[95] However, this argument doesn't appear to hold water given that the Commission's Leniency notice is a non-binding instrument[96] and that it clearly states that the grant of leniency cannot protect an undertaking from the civil law consequences of its infringement.[97] In any event, the AG's view on the importance of transparency in the context of a successful antitrust enforcement system is supported by the International Competition Network ('ICN'), which found that the key elements of an effective leniency programme are significant sanctions, a high risk of detection and *certainty*.[98] Indeed, undertakings generally ask their lawyers to evaluate the net benefits of cooperation, a task which thrives from predictability.[99] Furthermore, the Court confirmed its reasoning concerning the danger posed by excessively liberal disclosure rules in *Pfleiderer* in the recent

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[95] Para 32 of the opinion of AG Mazák. See also points 6, 7 and 33 of the Leniency Notice. See also point 29 of the ECN Model Leniency Programme. See also point 29 of the ECN Model Leniency Programme (cited in footnote 8). According to point 6 of the Leniency Notice, these voluntary presentations which are known as corporate statements 'have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article [101 TFEU] in cartel cases and thus its subsequent or parallel effective private enforcement.' See also point 47 of the Explanatory Notes to the ECN Model Leniency Programme which provides that '[t]he ECN members are strong proponents of effective civil proceedings for damages against cartel participants. However, they consider it inappropriate that undertakings which cooperate with them in revealing cartels should be placed in a worse position in respect of civil damage claims than cartel members that refuse to cooperate. The discovery in civil damage proceedings of statements which have been made specifically to a [competition authority 'CA'] in the context of its leniency programme risks creating this very result and, by dissuading cooperation in the CAs' leniency programmes, could undermine the effectiveness of the CAs' fight against cartels. Such a result could also have a negative impact on the fight against cartels in other jurisdictions. The risk that an applicant becomes subject to a discovery order depends to some extent on the affected territories and the nature of the cartel in which it has participated …'. As cited by AG Mazák in n. 41.

[96] Para 26 of the opinion of AG Mazák. See also the reasoning of Roth J. in *National Grid*, where he denied that undertakings had a legitimate expectation that their leniency submissions would not be disclosed.

[97] Recital 39 of the Leniency Notice.

[98] International Competition Network, 'Anti-Cartel enforcement manual' (2009), Chapter 2, Drafting and implementing an effective leniency policy. Section 2.3. Available at: *internationalcompetitionnetwork.org*.

[99] Marc Hansen, Gary Spratling, Ayman Guirguis, 'Leniency Programmes and Incentives: Is there room for improvement?', *ICN Cartel Workshop: Bruges*, October 2011, p. 24.

Donau Chemie judgment.[100] Nonetheless and as shall be shown below, such a danger was not conceived as being absolute, nor necessarily overriding the claimant's right to obtain full compensation. Finally, it should be added that the arguments adduced hitherto have also been embraced by many authoritative commentators, who have considered that only an absolute protection for corporate statements and settlement submissions is capable of striking an adequate balance between the need to preserve the attractiveness of leniency programmes and the right to obtain full compensation of the victims of anticompetitive conduct.[101]

While it is clear that leniency programmes are an essential tool in the fight against hard-core cartels, and that neither consumers, competitors nor victims[102] of competition law infringements would benefit from their enfeeblement, it is less clear that the possibility of disclosure of the information contained in leniency applications would necessarily lead to such an outcome. Indeed, much of the criticism levied in this respect is grounded on the assumption that the discoverability of leniency applications to claimants would invariably discourage leniency applications. Nonetheless, there is room for skepticism.[103] The fact that leniency applicants are eligible for immunity or a significant reduction of administrative fines cannot be overlooked, and should be computed into the assessment of the risk-reward equation faced by prospective collaborators (the so-called 'net benefit analysis'). In this respect, a successful leniency applicant already benefits from reduced fines from the regulator.[104] Consequently, the exposure to actions for damages should not be seen in isolation of the other, very substantial, advantages borne of co-operation. Hence, while in *National Grid* the English High Court admitted that disclosure of leniency material may have some

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[100] Para. 42 of the judgment.

[101] See, for instance, Stephen Mavroghenis, Elvira Aliende Rodriguez, 'Cartels and Leniency' (2014), *European Antitrust Review*.

[102] In this respect, see Joaquin Almunia, 'New challenges in merger and antitrust', speech of September 2011, SPEECH 11/581. 'The Commission is determined to defend its leniency programme and those of its ECN partners… [L]et us not forget that damage claims often follow the decision of a competition authority; as a consequence, if the authority has an effective leniency programme, it will be easier for a victim of a cartel to obtain reparation.'

[103] For example, Pablo González de Zárate Catón claims to be 'skeptical about the official truth regarding the deterrent effect arising from the disclosure of leniency materials'. Further, he adds that while these arguments may be true, they needn't be true *per se*. See 'Disclosure of Leniency Materials: Building…', p. 13.

[104] See the opinion of Allen & Overy to the White Paper. 'We do not believe that a successful leniency applicant should have its obligation for disclosure (…) restricted. Such an applicant has already benefited from its action through reduced fines from the regulator.'

deterrent effect on potential leniency applicants, it ultimately did not accept that, in the case of a serious, long-running cartel with potential exposure to high fines, a concern about later disclosure of leniency material would be sufficient to influence the immunity applicant in not blowing the whistle.[105] In line with this, according to the ICN report on the Interaction of Public and Private Enforcement in Cartel Cases, most non-governmental advisors ('NGAs') experienced that, while the risk of potential follow-on claims may be seen as a disincentive in applying for leniency, the benefits of a leniency application outweigh the potential risk of a follow-on damage claim.[106] Likewise, some commentators have suggested that the lack of US-style treble damages combined with the level of fines imposed on infringers points to the possibility that cartelists might be more afraid of fines than of damages claims.[107] In similar fashion, Allen & Overy argued in the comment to the Green Paper that the impact of the facilitation of damages actions on the willingness to apply for leniency should not be exaggerated. In this sense, they remarkably pointed out that the rules favouring disclosure of leniency statements may discourage undertakings from coming out first in cases where there is no reason to expect that a procedure that eventually results in the establishment of an infringement will be opened. Nevertheless, in those cases in which a procedure is either imminent or has already been initiated, individual cartelists still stand to gain a lot from whistle blowing as they are likely to face a reduced fine, or none at all. In addition to eschewing considerable monetary fines, in some jurisdictions successful leniency applicants enjoy criminal immunity, which may even comprise the threat of jail.[108] Not surprisingly, this was identified by NGAs as a key incentive in seeking leniency.[109] In addition, undertakings may derive other, less tangible, advantages

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[105] See also the Freshfield Bruckhaus Deringer briefing 'English High Court orders disclosure of leniency materials' (2012), available at: *http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/32945.pdf*.

[106] P. 43 of the report.

[107] Pablo González de Zárate Catón, 'Disclosure of Leniency Materials: A Bridge Between Public and Private Enforcement of Antitrust Law' (2013), available at: *coleurope.eu*.

[108] *Ibid*. For example, in the Marine Hose cartel three businessmen were sentenced to imprisonment and disqualified as directors in the UK. See United Kingdom Office of Fair Trading press release 72/08 of 11 June 2008, and European Commission press release IP/09/137 of 28 January 2009. With regards to the possibility of criminal immunity, see section 1.8 of the OFT's detailed guidance on the principle and process of applications for leniency and no-action in cartel cases. July 2013. OFT1495. '[The UK leniency system guarantees […] criminal immunity for all cooperating current and former employees and directors in cases where the applicant informs the OFT of cartel activity that it was not previously investigating.'

[109] See, in general, part III of the ICN Report.

from applying for leniency such as moral rewards.[110] In this regard, Wils argues that corporate managers are not necessarily just maximisers of profit and that they may feel a moral responsibility to act within the law, something which could trump their interest calculus.[111]

In light of the foregoing, it is difficult to say whether the possibility of disclosure of leniency material is indeed a powerful enough counter-incentive for seeking to co-operate with competition authorities to undermine the efficiency of the enforcement of competition law. On the one hand, it is undeniable that undertakings weigh the benefits and the drawbacks of collaboration carefully, an assessment wherein the possibility of follow-on damages claims clearly belongs to the latter category. On the other however, leniency applicants - especially first movers - stand to gain generous advantages from coming forward; this includes both immunity (or reduction) from administrative fines as well as the possibility of avoiding criminal sanctions, which also encompasses prison sentences in the (still few) jurisdictions that allow for the imposition of such remedies in the case of competition law infringements.[112] Apart from avoiding substantial financial setbacks, leniency recipients can expect to gain an immediate and generous cash-flow advantage *vis-à-vis* their co-conspirators, who we mustn't forget do not cease to be competitors. In this respect, some authors have gone one step further and contended that undertakings may blow the whistle to cause a financial loss to its competitors.[113] Other frequent arguments claiming that the possibility of disclosure of corporate statements will act as a disincentive to potential collaborators should also be taken with a pinch of salt. In this sense, in regard to the often invoked question of uncertainty,[114] it should be highlighted that doubt

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[110] See Wouter Wils, 'Relationship between…'. See also C.D Stone, 'Sentencing the corporation', *Boston University Law Review* 71 (1991): 383 at 389. As Wils observes, psychological research suggests that normative commitment is generally an important factor explaining compliance with the law; see T.R Tyler, 'Why People Obey the Law' (Yale University Press, 1990).

[111] *Ibid*. (Wils), p. 7. 'The public punishment of those who violate the antitrust rules also has moral effects, in that it sends a message to the spontaneously law-abiding, reinforcing their commitment to respect the antitrust rules.'

[112] For instance, the UK, see Enterprise Act 2002. In this respect, while it is true that the ECN Model Leniency Programme only concerns corporate leniency, it strongly encourages the protection of directors and employees from individual sanctions. See para. 15 of the ECN Model Leniency Programme.

[113] Pablo González de Zárate Catón, 'Disclosure of Leniency Materials: A Bridge Between Public and Private Enforcement of Antitrust Law' (2013), available at: *coleurope.eu*.

[114] See the opinion of AG Mazák in *Pfleiderer*, para. 38; See also Bonn Local Court Decision of 18 January 2012 in Case No. 51 Gs53/09 (*Pfleiderer*). The main argument is that cartelists will be deterred from applying for leniency as they will not be sure whether the information they put

regarding the possibility of disclosure of leniency material existed even prior to *Pfleiderer*, but that did not stop undertakings from blowing the whistle.[115] Moreover, it should be observed that there has not been a decline in leniency applications since that judgment, which would suggest that the possibility of leniency material being disclosed to claimants in antitrust damages cases is not perceived by undertakings as being such a powerful counter-incentive for applying for leniency after all.[116] Similarly and concerning the possibility of the leniency recipient facing higher damages claims than his co-infringers, the allocation of civil liability amongst the tortfeasors may also play an important – if not decisive - role in undertakings' willingness to apply for leniency.[117] In this respect, Article 11(2) of the Directive establishes that leniency recipients shall be liable to injured parties other than their direct and indirect purchasers only when such injured parties show that they are unable to obtain full compensation from the other infringers. This provision, which acts as a safeguard against the threat of the cooperating undertaking - whose information allowed the follow-on claim to be brought in the first place - bearing the brunt of the damages action, may be key in maintaining the allure of the leniency programmes by dissipating what may perhaps be the chief concern of potential leniency applicants: being targeted by claimants for the totality of the damage caused by the cartel (*See Section 3*).[118]

All things considered, whether the potential benefits of applying for leniency outweigh the drawbacks, thereby making collaboration the rational choice, will ultimately depend on a set of highly variable factors. As stated by the General Court in *ENBW*, the deterrent effect of disclosure depends on a number of elements, such as *inter alia* the amount of damages that cartel victims will obtain before a national court.[119] For instance, as outlined by the English High Court in *National Grid*, in the case of long-running hard-core cartels, seeking leniency remains enticing as it is unlikely that civil damages claims will dwarf the exposure to high fines. It follows from this that the opposite may be true in those cases in which by co-operating undertakings expose themselves to more substantial damages claims than fines. Nonetheless, even under such circumstances, filing a leniency application is still an attractive option where

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forth to the competition authorities shall be subsequently disclosed to claimants in actions for antitrust damages, exposing them to civil damages.

[115] Pablo González de Zárate Catón, 'Disclosure of leniency material…', p. 17.

[116] *Ibid*.

[117] M. G. Nielen, 'Leniency material unveiled…', p. 21.

[118] However, there might be a better solution in this regard. See section 3.1.

[119] Case T-344/08 *EnBW*, para. 125.

there is sufficient reason to believe that a public investigation is imminent, or where there is suspicion that a co-conspirator might approach a competition authority first - a well-founded doubt considering the destabilizing effect of leniency programmes.[120] It is likely that a cartelist would then choose to, as Roth J. put it in *National Grid*, mitigate their exposure to Commission fines through participation in the leniency programme.[121] Consequently, the possibility of disclosure of leniency material to claimants in actions for antitrust damages is only one of a number of elements which are decisive in an undertakings risk-reward assessment when deciding whether to apply for leniency. Moreover, there is no conclusive proof suggesting that it is the most important one either. It would therefore appear that the Commission might have overreacted in imposing a hard-and-fast rule against disclosure of corporate statements in actions for antitrust damages, especially taking into account the fact that there are alternative means for safekeeping the attractiveness of the leniency programmes without unduly harming the right of innocent victims to obtain full compensation for the injury suffered (*see Section 3*). Further, such a hard-and-fast rule may very well run counter to primary EU law.

2.3. Questions of substantive law: Is Article 6(1) of the Directive contrary to primary EU law?

Article 6(1) of the Directive raises some concerns with regards to its (in) compatibility with Article 47(1) of the Charter of Fundamental Rights and Article 19 TEU. In addition, the blanket prohibition against the disclosure of corporate statements contained therein may be disproportionate in pursuing its purpose.

2.3.1. Article 47(1) of the Charter of Fundamental Rights of the EU and the principle of proportionality

Article 47(1) of the Charter has the same legal value as the EU Treaties pursuant to Article 6(1) TEU.[122] In *DEB* the ECJ interpreted the words 'everyone has the right to an effective remedy' in Article 47(1) as not excluding undertakings.[123]

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[120] Jeroen Hinloopen, Adriaan R. Soetevent, 'Laboratory evidence on the effectiveness of corporate leniency programs' (2008), *RAND Journal of Economics*, vol. 39, no. 2, pp. 607-616.

[121] *National Grid*, para. 37.

[122] 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

[123] Case C-279/09 *DEB Deutsche Energiehandels - und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, paras 37-40 and 52.

Hence, claimants in antitrust actions for damages, whether individuals or undertakings, fall within the scope of the protection of Article 47(1) of the Charter. In light of this, it has been argued that the strict prohibition of disclosure of corporate statements falls foul of the right to a fair trial and an effective remedy enshrined in Article 47(1) as interpreted in conjunction with Article 51(1) of the Charter on Fundamental Rights of the EU and in light of Article 6(1) of the European Convention on Human Rights, insofar as it makes the right to compensation excessively difficult or practically impossible.[124] As has been contended in *Section 2.1*, denial of disclosure of corporate statements could, in certain circumstances, frustrate the right to full compensation. Furthermore, AG Mazák has stated in *Pfleiderer* that the denial of access to leniency material in the absence of an overriding legitimate reason could amount to a breach of the right to an effective remedy and a violation of Article 101 TFEU itself[125] seeing as how (i) Article 101 TFEU contains the right of cartel victims to compensation of their damages as a consequence of the cartel; (ii) this right is guaranteed by primary EU law within the meaning of Article 47(1); (iii) a denial of access to leniency material - in the absence of overriding reasons - violates the right to compensation; (iv) and frustrates the right of effective access to justice of the follow-on litigant.[126] This begs the question of what constitutes an overriding reason that could countervail the claimant's right to an effective remedy and a fair trial.

Article 52 of the Charter establishes that limitations to the right to a fair trial and an effective remedy may be made subject to the principle of proportionality only if they are necessary and genuinely meet objectives of general interest recognised by the Union. While the preservation of the attractiveness and effectiveness of the leniency programmes may well constitute such an overriding reason of general interest, as contended by AG Mazak,[127] that does not exempt it from having to respect the principle of proportionality. This principle, which is laid down in Article 5 TEU, requires that measures taken by the Union be suitable and necessary to attain the aim pursued. In this regard, it is highly doubtful whether Article 6(1) of the Directive fulfills such requirements. Firstly, it is not at all clear that a blanket prohibition against disclosure of corporate leniency statements is

[124] The right to an effective remedy before a tribunal and a fair trial to everybody whose rights and freedoms guaranteed by the law of the Union are violated provided for in Article 47 of the Chater corresponds to Articles 13 and 6(1) of the Convention.

[125] See para. 3 of the opinion of AG Mazák in *Pfleiderer*.

[126] M. G. Nielen (2013).

[127] Para. 38 of the opinion of AG Mazák.

suitable for maintaining the attractiveness of the leniency programmes, as there is no evidence that the possibility of disclosure of such documents will lead to a pitfall in leniency applications. In fact and despite the Commission's insistence to the contrary, no such thing has happened since the ECJ specifically ruled on the possibility of disclosure in *Pfleiderer*. Secondly, even if it were proven that disclosure of corporate statements to claimants in civil proceedings is likely to hamper the enforcement of competition law in the EU, the precept is not necessary in light of there being less restrictive means of safekeeping the effectiveness of the leniency programmes without unduly compromising the well-established right of injured parties to obtain full compensation for the harm suffered as a consequence of an infringement of Article 101 TFEU (*See section 3*). According to Article 5 of the Protocol on the application of the principles of subsidiarity and proportionality,[128] the Commission is under the obligation to justify its draft legislative acts with regards to proportionality. However, no such justification is to be found in the Commission's Directive. Instead, the Commission simply assumes that undertakings may be deterred from co-operating in the context of a leniency programme if disclosure of documents they solely produce to this end were to expose them to civil liability under worse conditions than the co-infringers that do not co-operate with competition authorities.[129] This argumentation falls short of the Commission's duty to justify the proportionality of its legislative proposal for at least two reasons. Firstly, it ignores the wide range of factors undertakings take into account when weighing the benefits and drawbacks of applying for leniency. In this regard, even if an immunity recipient were exposed to higher damages than his co-conspirators, he may ultimately be left in a better position by virtue of the administrative fines eschewed by coming forward. Secondly, and very importantly, as already discussed Article 11(2) of the Directive limits the immunity recipient's liability for the damage caused by the cartel significantly, making him less likely to be left in a worse position than his non collaborating co-cartelists.

In light of the above, Article 6(1) of the Directive appears to be contrary to Article 47(1) of the Charter as it curtails the right of victims of competition law infringements to obtain full compensation for the harm[130] suffered by absolutely denying them access to documents which may be necessary to successfully bring

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[128] Protocol (No 2) on the application of the principles of subsidiarity and proportionality. Annex to the Treaty on the European Union.

[129] Recital 19 of the Directive.

[130] Following the reasoning of AG Jääskinen leniency material can be understood as being crucial where (adequate) proof of the infringement and loss cannot be obtained other than by accessing the leniency file. See Opinion of AG Jääskinen in *Donau Chemie*, para. 50.

an antitrust damages case. Furthermore, the outright ban on the disclosure of corporate statements is not proportionate, as it is neither suitable to achieve the aim pursued nor necessary.

2.3.2. Article 19 TEU: The Principle of Effectiveness

The ECJ held in *Donau Chemie* that an absolute protection of certain documents in civil proceedings of antitrust damages is incompatible with the principle of effectiveness contained in Article 19 TEU, as injured parties may need to be given access to documents in the possession of cartelists or competition authorities in order to be able to effectively claim compensation.[131] Taking a step further, the Court stated that any rigid *per se* rule concerning the (non) discoverability of leniency material would violate the principle of effectiveness.[132] Similarly, the European Parliament opined that absolute protection of leniency material would run counter to the main judgments in *Pfleiderer* and *Donau Chemie*, 'as it would violate the principle of effectiveness regarding the right to compensation'.[133] This is further exacerbated by the fact that the prohibition laid down in Article 6(1) of the Directive does not provide for any exceptions.[134]

In reply to the above, proponents of the confidentiality of corporate statements and settlement submissions have argued that in *Donau Chemie* the ECJ ruled against the background of the absence of EU rules governing the disclosure of leniency material in civil actions for antitrust damages.[135] Consequently, the judgment is purportedly authoritative only insofar as there are no EU rules on that issue, a situation that would change with the passing of the Directive. Nonetheless, this argument is unconvincing given the fact that the primary law principle of effectiveness binds not only the EU judiciary, but also the EU

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[131] Para. 32.

[132] Para. 33.

[133] Committee on Economic and Monetary affairs, 3 October 2013, Draft Report on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, PE 516.968v01-00, p. 23.

[134] Kapp, 'Grundsatz der Einzelabwägung sticht Gesetzgebungskompetenz aus' BB 2013, 1556, 1556; Kersting, 'Anmerkung zu EuGH, Urteil vom 6.6.2013 - C-536/11 Donau Chemie JZ 2013, 737, 738. As cited in Christian Kersting.

[135] See, for instance, Kristina Nordlander, Marc Abenhaïm, 'The 'Discoverability' of Leniency Documents and the Directive on Damages Actions for Antitrust infringements'.

legislator.[136] On a different note, it has also been posited that whereas *Donau Chemie* concerned a prohibition under national legislation referred to all documents held on a competition authority's file, Article 6(1) is not preventing access to the *entire* file, but only to certain documents contained therein (the so-called 'black list').[137] In this respect, it should be noted that the distinction between leniency statements and pre-existing documents made in the Directive - which was originally suggested by AG Mazák in *Pfleiderer* - has not been taken up by the ECJ.[138] *A contrario*, in both *Pfleiderer* and *Donau Chemie* the ECJ addressed all leniency documents, without any differentiation.[139]

In consequence, Article 6(1) of the Directive runs counter to the principle of effectiveness laid down in Article 19 of the TEU as it makes the right to compensation practically impossible or excessively difficult in those cases in which the information contained in the leniency material is essential to substantiate a claim for antitrust damages and cannot be obtained through other means without incurring in disproportionate costs.[140]

2.3.3. The Transparency Regulation: leaving the door open for disclosure

Where the plaintiffs in actions for antitrust damages have sought to obtain access to corporate statements through Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents ('Transparency

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[136] Christian Kersting, 'Removing the tension between public and private enforcement: Disclosure and privileges for successful leniency applicants' (2014), *Journal of European Competition Law & Practice*, 2014, Vol. 5, No. 1.

[137] The so-called black list refers to the material that cannot be disclosed under the Directive. Namely, corporate statements and leniency submissions. However, for the purpose of this work, only the former are relevant. See Article 6(1) of the Directive.

[138] Christian Kersting, 'Removing the tension...', p. 2.

[139] *Pfleiderer*, para. 32; *Donau Chemie*, para. 49.

[140] Christian Kersting reaches the same solution. 'The Member States cannot be forced by secondary law to introduce the very measures which primary law forbids them to introduce.' For an opposing view, see Kristina Nordlander and Marc Abenhaïm. 'The principle of effectiveness is certainly an appropriate benchmark in devising EU legislation on this issue. However, effectiveness, as defined and applied in *Pfleiderer* and *Donau Chemie*, cannot really act as a requirement that would constrain the choices of the EU legislature (…). The sole function of the principle of effectiveness, which the Court recalled [in *Pfleiderer*, para. 30], is to limit the national procedural autonomy in the absence of express EU legislation. Accordingly, that principle only applies when and to the extent that no EU legislation governs the procedural rule at issue.'

Regulation'),[141] the General Court ('GC') has mostly not been impressed by the Commission's argument that the disclosure of those documents would deter undertakings from seeking leniency in the future. On the contrary, the GC has consistently required the Commission to undertake a 'concrete, individual assessment' of the requested documents to ascertain whether access would 'specifically and actually undermine the protected interest', and has accordingly overturned its decisions denying access when it has failed to do so.[142] The case-law of the GC relating to the Transparency Regulation is relevant for two reasons. Firstly, it leaves a door open for claimants in actions for antitrust damages to seek access to corporate statements in spite of Article 6(1) of the Directive.[143] Secondly, it puts forward good arguments that can be transposed by analogy to the context of Article 6(1) of the Directive. In this regard and notwithstanding legal differences between the right of access to the file in a proceeding under the Transparency Regulation and access under Article 101 TFEU or national legislation, both channels lead to a comparable situation from a functional point of view as they allow the interested parties to obtain documents submitted to the Commission by the undertaking concerned.[144] Hence, the GC has ruled that the Commission cannot merely invoke hypothetical negative spill-over effects to justify the non-disclosure of leniency material to third parties; In the Court's view, such an approach would allow the Commission to circumvent the Transparency Regulation by invoking a hypothetical future result.[145] Similarly, Article 6(1) of the Directive lets the Commission deny the disclosure of leniency corporate statements through the same unfounded supposition. However, as stated in *section 2.3*, such a far reaching measure appears disproportionate unless justified with regards to its suitability and necessity. On a different note, the GC has also put forth reasonable arguments that, while also not binding on the legislator, may be useful in resolving the tension between the

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[141] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

[142] See *Verein fus Konsumentinformation v Commission of the European Communities* (T-2/03) [2005] E.C.R II-1121; 4 C.M.L.R.21; See also Ingrid Vandenborre, 'The Confidentiality of EU Commission Cartel Records in Civil Litigation: The ball is in the EU Court' (2011), *European Competition Law Review*, available at: *http://www.skadden.com/sites/default/files/publications/Publications2384_0.pdf*.

[143] This is due to the fact that the Transparency Regulation implements Article 15(3) TFEU and Article 42 of the Charter which provide for the citizens' right of access to documents of EU institutions. Hence, applicants may seek the annulment of the Commission's rejection of a transparency request under Article 263 TFEU.

[144] *ENBW*, para. 89.

[145] Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims*, para. 44.

injured parties' right to obtain full compensation and the necessity to safeguard the effectiveness of the leniency programmes. In this respect, the GC held that the interest of a company which took part in a cartel in avoiding actions for damages does not constitute an interest deserving protection, having regard, in particular, to the fact that any individual has the right to claim damages for loss caused by a cartel.[146] Additionally, the GC also outlined the importance of private enforcement, stating that leniency programmes are not the only means of ensuring compliance with EU competition law and that actions for damages can also make a significant contribution in this respect.[147]

3. Alternatives to Article 6(1) of the Directive

The main argument for the introduction of a blanket prohibition against the disclosure of corporate leniency statements to claimants in actions for antitrust damages is that (only) such a provision safeguards the attractiveness and effectiveness of the leniency programmes. In this sense, Article 6(1) of the Directive is a solution to the conundrum concerning the tension between the injured parties' right to obtain full compensation and the interest of preserving the attractiveness of the leniency programmes, albeit a disproportionate one. Indeed, Article 6(1) doesn't stand neither the suitability nor the necessity test. The purpose of this section is to demonstrate that, even if the Commission proved the pernicious effect of disclosure on cartelists' willingness to apply for leniency (which it has not at the time of writing), there are other mechanisms that are capable of protecting the attractiveness and effectiveness of the leniency programmes without unduly restricting the injured parties' right to obtain full compensation for the harm suffered as a consequence of an infringement of Article 101 TFEU.

3.1. The Hungarian solution

One of the chief concerns regarding the disclosure of leniency materials to claimants in actions for antitrust damages is the possibility that leniency recipients may be put in a worse position than their co-infringers.[148] Indeed, collaborators cannot deny their involvement in the cartel and are furthermore unlikely to challenge the Commission's infringement decision, which makes

[146] *Ibid*., para. 49.

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

[148] See, *inter alia*, CEPS report, p. 500.

them ideal targets for the allegedly injured parties in subsequent civil claims.[149] One way to alleviate this tension is by adjusting the allocation of civil liability amongst the co-infringers.[150] In this sense, the Hungarian Competition act completely excludes liability of the immunity recipient, even for claims by his direct and indirect purchasers (in contrast with Article 11(2) of the Directive).[151] This does not dramatically affect the right to damages by injured parties, since they can still claim compensation for the whole of the damage against the other cartel members, who would remain jointly and severally liable.[152] However, in order to guarantee full compensation of the victims, the total exclusion of liability would not apply in the (exceptional) case of insolvency of one or more of the cartel members.[153] While this proposition has its drawbacks, such as the danger of under-deterrence as competition law infringers are let 'off the hook' from both administrative sanctions and civil damages,[154] it has the important advantage of effectively eliminating the disincentive of potential leniency applicants to seek to collaborate with competition authorities by extending some benefits of the leniency programmes to civil actions while at the same time safeguarding the *effet utile* or Article 101(1) TFEU, as claimants in actions for antitrust damages are not denied potentially essential evidence for building their case. As an added benefit, it increases the retributive gap between the immunity recipient and the other cartel members, thus contributing to destabilising cartels.[155] However, it should

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[149] F. Bulst, 'Of arms and Armour - The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law', *Bucerius Law Journal*, 2008, vol. 2, available at: *http://ssrn.com/abstract=1162811*; See also Assimakis P. Komninos, (2011) 'Successful leniency applicants deserve extra protection because of the likelihood of being sued in follow-on actions, due to the general practice of not appealing against the Commission's infringement decisions'.

[150] Alberto Saavedra, 'The Relationship Between The Leniency Programme and Private Actions For Damages At The EU Level' (2010), *Revista de Concorrência e Regulação*, 2010. Available at SSRN: *http://ssrn.com/abstract=2292575.*

[151] See Hungarian Competition Authority, The Competition Act, consolidated version effective as of 1 June 2009, available at: *http://www.gvh.hu/domain2/files/modules/module25/104249F32220B9.pdf.*

[152] Assimakis Komninos, 'Relationship between public…'.

[153] *Ibid*. As Komninos points out, 'In such a case, the claimants would have to sue first the other cartel members and, in case of insolvency, they could bring a new actions against the immunity recipient for the part of the harm that is attributable to him'.

[154] Anna Piechota, 'Private enforcement of EU competition law: recent development, problems and prospects' (2011), available at: *http://www.ipwi.uj.edu.pl/pliki/prace/Praca%20magisterska%20-%20Anna%20Piechota_1317147471.pdf*. The author wonders whether it is too generous to limit the civil liability of immunity recipients. P. 65.

[155] A. E. Beumer, A. Karpetas, 'The disclosure of files and documents in EU cartel cases: Fairytale or reality?', *European Competition Journal*, 2012, April 2012, Vol. 8, Issue 1, p 123.

be mentioned that a proposal such as this is subject to the national procedural autonomy of the member States, as civil procedure rules are still their competence.

3.2. Article 11(2) of the Directive: A problematic privilege

As has already been stated, Article 11(2) of the Directive acts as a safety mechanism to ensure that successful leniency applicants are not made the prime targets of claimants in actions for antitrust damages by limiting their liability to the harm caused to their direct and indirect purchasers or providers, unless victims cannot obtain compensation from the other defendants. As Christian Kersting points out, while it does make sense to privilege successful leniency applicants with regard to their civil liability, it is problematic to do so at the expense of injured parties.[156] The main issue with Article 11(2) is that it imposes a hefty burden on claimants to prove that they cannot obtain compensation from the other cartelists, rendering their right to full compensation less effective.[157] The solution, however, might be relatively straight-forward. Instead of privileging immunity recipients in relation to the injured parties, they should be privileged in relation to their co-infringers.[158] Cartelists who receive immunity should therefore be jointly and severally liable for all the damage caused by the cartel but they should be allowed to claim full compensation for damages paid to injured parties from the other cartel members.[159] In the case of leniency recipients, the rule could be tailored to provide for a partial reduction, in relation to their co-infringers, of the damages to be paid to the victims in accordance with the leniency received.[160]

This proposal has several benefits. Firstly, the possibility of disclosure of corporate statements would not be a deterrent to potential leniency applicants, since they would ultimately be immune from civil liability.[161] Consequently, the decision of whether to order disclosure or not could be 'safely' left to national courts, in conformity with the judgments of the ECJ in *Pfleiderer* and *Donau Chemie*, Article 47 of the Charter and Article 19 TEU. Secondly, private enforcement would not run the risk of dying an early death as victims would

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156 Christian Kersting, 'Removing the tension...'.

157 *Ibid*., p. 3.

158 *Ibid*.

159 *Ibid*.

160 See, in general, Christian Kersting, 'Perspektiven der privaten Rechtsdurchsetzung im kartellrecht', *ZWeR* 2008, 252, 266 *et seq*.

161 *Ibid*.

receive the information necessary to claim damages. Thirdly, claimants would not need to struggle to prove that they cannot obtain compensation from the non-collaborating defendants.

3.3. Corporate statements as an obligation of (all) infringing undertakings

If the disclosure of corporate statements is permitted, claimants in actions for antitrust damages may rationally choose to seek the totality of damages from immunity recipients using the self-incriminating information contained therein to substantiate their case. In this respect, the leniency applicant risks becoming a 'sitting duck' for any damages claims and could, in theory, bear liability for the whole amount of the loss suffered by a whole range of purchasers. Nonetheless, if *all* infringing undertakings were legally obliged to produce corporate statements, claimants would cease to have an incentive to specifically target the immunity recipient, and would instead go against the cartelist with the 'deepest pockets'. This would effectively eliminate the 'first mover disadvantage', allowing the safe disclosure of corporate leniency statements in civil proceedings.

3.4. Own proposal: Increasing the collaborative pay-off by hardening sanctions

As has already been stated in section 2.2, in deciding whether to apply for leniency undertakings carefully weigh the costs and the benefits of collaboration. One way to improve the collaborative pay-off is to enhance the benefits gained through seeking leniency by, for instance, allowing for the possibility of contribution in the terms of Article 11(2) of the Directive or by creating a 'pecking order' similar to the one provided for by the Hungarian Competition Act. In contrast, hardening the metaphorical 'stick' by increasing the fines imposed for infringements of competition law can yield similar results. Such a solution is not only legally viable within the frame of the EU, it moreover enjoys widespread support amongst authoritative commentators.[162]

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[162] See, among others, Wils, 'Does the effective enforcement of Articles 81 and 82 EC require not only fines on undertakings but also individual penalties, in particular imprisonment?', paper presented in Florence, 1-2 June 2001, later published in Ehlermann C. -D., Atanasiu I. (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford and Portland, Oregon, 411-452; William Kolasky, 'Criminalizing Cartel Activity: Lessons from the U.S Experience'. Available at <*https://www.coleurope.eu/sites/default/files/uploads/event/kolasky_-_criminalizing_cartel_activity_8-04.pdf*>; Gregory C. Shaffer, Nathaniel H. Nesbitt, Spencer Weber Waller, 'Criminalizing Cartels: A Global Trend' (2011), *Sedona Conference Journal*, Vol. 12, 2011.

In this sense, Wils has posited that taking into account average cartel duration, the probability of being caught[163] and average cartel-induced price increases, the minimum fine required to effectively deter undertakings from engaging in collusive behavior would be around 150% of the annual turnover in the products concerned by the violation.[164] However, Article 23(2) of Regulation 1/2003 caps fines on undertakings at 10% of their total turnover in the preceding business year. Even so, the vast majority of fines levied are in the range of 0-0.99% of annual turnover (60.92%), with only roughly 10% near the 10% mark.[165] Consequently, it comes as no surprise that in 67% of price-fixing cases in the EU, the gain from the anti-competitive behavior outweighs the expected punishment.[166] In this context, two possibilities arise: (i) Increasing administrative fines imposed on competition law infringers or (ii) providing for criminal sanctions, including custodial sentences.

Adjusting the fines to the levels required for optimal deterrence may have detrimental spill-over effects; it may cause most undertakings to go bankrupt, or incur crippling losses, due to an inability to pay.[167] In light of this and as I have argued elsewhere,[168] criminal sanctions including prison sentences may be the

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[163] John Connor's 'guesstimate' is that the probability of a cartel being discovered is only between 10 and 20%. John Connor, 'Optimal deterrence and private international cartels' (2007), available at <*http://www. ssrn.com/abstract=1103598*>. Wils agrees with these numbers. Other findings have deemed Wils' estimation too conservative. For instance, Senior Economic Counsel of the US Department of Justice Antitrust Division, Gregory J. Werden holds that the fine would need to be slightly above twice the participants' annual turnover within the relevant market. See Gregory Werden, 'Sanctioning Cartel Activity: Let the Punishment Fit the Crime', (2009) available at: *http://www.justice.gov/atr/public/articles/240611.htm*.

[164] See Wils, n. 165.

[165] Yuliya Bolotova, John M. Connor, 'Cartel Sanctions: An Empirical Analysis' (April 2008). Available at SSRN: *http://ssrn.com/abstract=1116421* or *http://dx.doi.org/10.2139/ssrn.1116421*. The study focused on the relationship between fines and overcharges, finding that the former were in general not enough to even compensate for damage caused by cartels through overcharging.

[166] Florian Simuda, 'Cartel Overcharges and the deterrent effect of EU competition law' (2010). '[T]he current existing EU guidelines on the method of setting fines are insufficient for effective cartel deterrence.' Available at: *http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf*.

[167] See *inter alia* Douglas H. Ginsburg, Joshua D. Wright, *Competition Policy International*, Vol. 6, No. 2, pp. 3-39, Autumn 2010, George Mason University Law and Economics Research Paper Series. Wils also claims that even liquidating the assets of the firms concerned would often be unlikely to generate enough revenue to pay the optimally deterrent fine(s).

[168] L. Radic, 'The wolf must die in his own skin: A case for custodial sentences against individuals in cartel cases in the EU' (2014). *https://www.academia.edu/8301783/The_Wolfe_must_die_in_his_own_skin_A_case_for_custodial_sentences_against_individuals_in_cartel_cases_in_the_EU*.

way forward in competition law enforcement. For the purpose of the present work, it is important to underline the high deterrent effect of custodial sentences *vis-à-vis* pecuniary fines. In this respect and as William Kolasky has famously remarked, nothing catches a corporate executive's attention quite as effectively as the threat that he might have to serve jail time.[169] As pointed out by Gurgen Hakopian, the institution of a criminal law framework at the level of EU institutions would require a Treaty amendment of either Article 83 TFEU or Article 103(2) (a) TFEU.[170] Alternatively, the harmonization of criminal competition law enforcement in the Member States could be achieved though Article 83(2) TFEU.[171]

It follows from the foregoing that the imposition of heftier fines on colluding undertakings or the introduction of custodial sentences on individual cartelists would significantly improve the incentives to seek leniency by increasing the distance between the collaborative and non-collaborative payoffs. Under such circumstances, the exposure to civil liability would almost certainly never outweigh the benefit gained from whistle blowing, thus making the discoverability of leniency material practically a non-issue for undertakings faced with the choice of whether to approach a competition authority. In addition, apart from respecting the principle of effectiveness and the right to a fair trial, thereby avoiding the risk of undermining the private enforcement of competition law, this proposal has the distinct benefit of increasing deterrence; a most welcome outcome for both public and private enforcement of EU competition law.

Conclusion

While the safekeeping of the effectiveness of leniency programmes may well be a good reason to restrict injured parties' right to obtain full compensation as a consequence of an infringement of Article 101 TFEU, Article 6(1) in tandem with Article 11(2) of the Directive puts forward far reaching solutions to unproven problems. Indeed, the Commission has failed to produce any evidence of the alleged detrimental effect of the disclosure of corporate statements to claimants in actions for antitrust damages on the effectiveness of leniency programmes, and

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[169] William Kolasky, 'Criminalizing Cartel Activity: Lessons from the U.S Experience'. available at <*https://www.coleurope.eu/sites/default/files/uploads/event/kolasky_-_criminalizing_cartel_activity_8-04.pdf*>.

[170] Gurgen Hakopian, 'Criminalization of EU Competition Law enforcement - A possibility after Lisbon?' 2010, *CLR*, Vol. 7, issue 1, pp. 157-173.

[171] *Ibid*.

has instead relied almost exclusively on suppositions and (pessimistic) hypothetical would-be scenarios. It would appear that these arguments are grounded on the traditional notion of preponderance of public over private enforcement and a looming sense of panic that the disclosure of such documents would jeopardise the hitherto successful public enforcement of competition law, rather than on their respective merits. On the other side of the fence, the exact evidential value of corporate statements for claimants in the midst of actions for antitrust damages remains an elusive question, and appears highly dependent on a number of variable factors. However, there are reasonable grounds to contend that the information contained therein may be essential in substantiating an action for antitrust damages in certain circumstances. In this respect, by stating that a hard-and-fast rule against disclosure of corporate statements is contrary to the principle of effectiveness, the ECJ has at least recognized the possibility that such documents may be necessary in obtaining full compensation, something which was subsequently confirmed in practice by the English High Court. Furthermore, the Directive imposes a stringent requirement on claimants to specify the documents sought for disclosure, which may prove problematic on account of them not being aware of the existence of such files. Corporate statements can bridge this gap, as they generally contain an explanation of the evidence submitted. Additionally, the insistence of the Commission – and that of the array of stakeholders adopting similar positions - on prohibiting disclosure suggests that such documents can indeed be very useful in substantiating actions for antitrust damages. Consequently, for the time being and until the Commission produces concrete evidence of the pernicious effect of disclosure on the attractiveness and effectiveness of leniency programmes, a balancing test such as the one envisioned by the ECJ in *Pfleiderer* is a more appropriate approach to the much feared, yet still unproven, tension between disclosure of corporate statements and effective public enforcement.

Otherwise, there is no reason to further complicate the claimants' already burdensome task of proving causation and quantification and impose unnecessary obstacles on the well established right to obtain full compensation for the damage suffered as a consequence of an infringement of Article 101 TFEU. Indeed, too much is at stake to adopt far reaching solutions to unproven problems.

Lazar Radić Bošković*

REZIME

BLANKETNA ZABRANA OBJAVLJIVANJA KORPORATIVNIH IZJAVA IZ ČLANA 6(1) DIREKTIVE O TUŽBAMA ZA KARTELNU ŠTETU

U radu je analizirano pitanje da li je opšta zabrana objavljivanja korporativnih izveštaja sadržana u članu 6(1) Direktive 2014/104 o određenim pravilima koja regulišu tužbe za naknadu štete prema nacionalnom zakonodavstvu zbog kršenja odredbi prava konkurencije u državama članicama Evropske unije neophodna za zaštitu privlačnosti programa Komisije za kažnjavanje ili predstavlja nepremostivi teret za podnosioce zahteva koji će dugoročno ozbiljno ometati privatno sprovođenje EU prava konkurencije (što je najnesrećniji ishod s obzirom da je osnovni cilj Direktive upravo suprotno). S jedne strane, preterana zaštita zahteva za pomilovanje podnosilaca prijava za izuzeće može dovesti do beskorisnih parnica i na kraju dovesti do besmislene privatne primene EU prava konkurencije, jer se podnosiocima zahteva (navodno) uskraćuju bitni dokazi za izgradnju čvrstih slučajeva odštete. S druge strane, dopušteniji pristup objavljivanju takvih informacija može osakatiti javnu primenu prava konkurencije tako što će odvratiti karteliste da se prvi predstave. Uzimajući u obzir činjenicu da naknadni zahtevi predstavljaju lavovski deo trenutnih tužbi za kartelnu štetu u EU, takav rezultat bi skoro sigurno imao katastrofalne posledice za pravo pojedinaca na nadoknadu štete nastale povredom člana 101 Ugovora o funkcionisanju Evropske unije, kako je priznao Evropski sud u presudama *Courage*, *Crehan i Manfredi* i drugim. Čini se da Komisija daje prednost imunitetu na račun interesa oštećenih lica nametanjem pravnih lekova koji su suviše daleko od zaštite delotvornosti programa oslobađanja od kazne, posebno uzimajući u obzir nedostatak konačnih dokaza da bi obelodanjivanje korporativnih izjava obeshrabrilo potencijalne podnosioce zahteva za izuzeće od saradnje sa organima za konkurenciju. U svetlu ovoga, tvrdimo da, za postizanje ravnoteže između prava oštećenih na naknadu štete i efikasnosti programa za smanjenje kazne, svaki slučaj treba posmatrati posebno, kao u predmetu *Pfleiderer* - bar za sada. Ova tema je danas posebno relevantna, imajući u vidu obavezu Komisije da preispita Direktivu do 27. decembra 2020. godine, kao što sledi iz člana 20. Direktive.

Ključne reči: EU, kartelna šteta, privatna primena, pravo na naknadu štete, otkrivanje podataka.

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* Doktorand na European University Institute.

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Anita Petrović*

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ZAŠTITA PUTNIKA PRIJE SKLAPANJA UGOVORA O PAKET ARANŽMANU

APSTRAKT

Zaštita potrošača vrlo je dinamična pravna oblast što se na nivou EU vidi po učestalom usvajanju novih pravnih rješenja prilagođenih potrebama i interesima potrošača i razvoju tržišta. Slijedom toga jedan od segmenata regulacije jeste i turističko tržište, odnosno tržište usluga putovanja uređeno novom Direktivom (EU) 2015/2302 o putovanjima u paket aranžmanima i povezanim putnim aranžmanima. Direktiva ne koristi pojam potrošač, već putnik, ali time nije izašla iz okvira potrošačkog acquisa, što se uostalom vidi iz njezinog cilja, sadržaja i mehanizama zaštite. Cilj rada je upoznati naučnu i stručnu javnost sa usvajanjem nove Direktive 2015/2302, motivima koji su to potakli, te ključnim novinama u personalnom i predmetnom polju primjene. Posebno poglavlje posvećeno je obavezi predugovornog informiranja, gdje autorica analizira predugovorne informacije, zahtjev transparentnosti i obavezujući karakter informacija, jer ova jednostrana obaveza u europskom potrošačkom pravu prepoznata je kao instrument uspostavljanja ugovorne ravnoteže.

Ključne riječi: Direktiva 2015/2302, putnik, usluga putovanja, paket aranžman, predugovorno informiranje.

* Dr. sc. Vanredni profesor na Pravnom fakultetu Univerziteta u Tuzli, *anita.petrovic@untz.ba*. Rad je primljen 20 maja 2020. Rad je odobren 6. juna 2020.

1. Uvod

Još jedan segment u oblasti prava zaštite potrošača uređen je novim pravnim instrumentom. Riječ je o uslugama putovanja u paket aranžmanima, koje su do usvajanja Direktive (EU) 2015/2302 Europskog parlamenta i Vijeća o putovanjima u paket aranžmanima i povezanim putnim aranžmanima[1] (dalje: Direktiva 2015/2302), bile uređene Direktivom Vijeća 90/314/EEZ o putovanjima, odmorima i kružnim putovanjima u paket aranžmanima.[2] Primjena nove Direktive o paket aranžmanima u državama članicama EU započela je od 1.7.2018. godine, njome se u značajnoj mjeri modernizira Direktiva 90/314/EEZ, koja je važila do tog datuma. Direktiva 2015/2302 donosi preciznije i opširnije definicije, nova pravila zaštite, ali prvenstveno proširuje predmetno polje primjene obuhvaćajući dvije vrste ugovora, ugovor o paket aranžmanu i povezani putni aranžman. Promatrajući Direktivu 2015/2302 u smislu trendova koji dominiraju u pravu zaštite potrošača, nesporno je da kao i ostale direktive maksimalne harmonizacije, ne zaostaje po volumenu (broju točaka preambule i odredbi), te tehničkoj i pravnoj složenosti pojmova. Po opsegu i složenosti može se usporediti primjerice sa Direktivom 2011/83/EU o pravima potrošača, kojoj je bila namijenjena uloga kodifikacije potrošačkog prava sistematiziranog u općem i posebnom dijelu, no zanemarujući ovu joj nesuđenu ulogu, ona je ipak zamijenila dvije i dopunila dvije direktive, dok Direktiva 2015/2302 opoziva jednu direktivu. Usporedbe radi, Direktiva 90/314/EEZ imala je 22 točke preambule i 10 članova, dok nova direktiva ima 54 točke preambule i 31 član, pa je opravdano očekivati da se višestruko poboljšao i položaj potrošača, jer su obuhvaćeni novi oblici paket aranžmana, koji su do sada bili izostavljeni ili, pak, u "sivoj zoni" regulacije.[3]

Iz perspektive europskog zakonodavca, Direktiva 2015/2302 predstavlja dio mozaika potrošačkog *acquis*a, koji se polako popunjava i slika je vidljiva, ali isto tako postoji mogućnost da mozaik, a time i slika nikada ne budu završeni. Razlog tome je što se nastavilo sa sektorskim pristupom harmonizaciji, i bez obzira što su direktive maksimalne harmonizacije međusobno konzistentne u osnovnim pojmovima i konceptima, ipak i dalje jedna direktiva uređuje samo jedno pravno

[1] Direktiva (EU) 2015/2302 Europskog parlamenta i Vijeća od 25.11.2015. o putovanjima u paket aranžmanima i povezanim putnim aranžmanima, o izmjeni Uredbe (EZ) br. 2006/2004 i Direktive 2011/83/EU Europskog parlamenta i Vijeća te o stavljanju van snage Direktive Vijeća 90/314/EEZ, OJ 2015, L 326/1.

[2] Direktiva Vijeća 90/314/EEZ od 13.6.1990. o putovanjima, odmorima i kružnim putovanjima u paket aranžmanima, OJ 1990, L 158.

[3] Vid. t. 2. preambule Direktive 2015/2302.

pitanje, a izostavljen je potpun i sistemski pristup uređenju ugovornih odnosa potrošača. Princip, jedna direktiva jedno pravno pitanje, u ovom slučaju jedan ugovor kao predmet regulacije, prenosi se često i na nacionalne nivoe, koji svaki put postaju bogatiji za novi zakon iz oblasti zaštite potrošača. Direktiva 2015/2302, za razliku od svoje prethodnice, instrument je ciljane maksimalne harmonizacije.[4] U njezinoj preambuli nalazi se dosta argumenata za uvođenje maksimalne harmonizacije, a neki od njih su otklanjanje prepreka koje proizlaze iz neusklađenosti nacionalnih propisa, unapređenje prekograničnog poslovanja, te izgradnja stvarnog unutarnjeg tržišta u ovoj oblasti. No, ono što slijedi nakon transponiranja Direktive 2015/2302 jeste zamrzavanje ovog pravnog područja u državama članicama, a sve eventulane promjene moraju dolaziti od strane unijskog zakonodavca.[5]

Važna novina jeste i proširenje predmetnog polja primjene Direktive 2015/2302, pored modificiranja i proširenja definicije paket aranžmana, koja sada obuhvaća tzv. dinamične ili naručene paket aranžmane, što će u nastavku biti detaljnije analizirano, obuhvaćeni su i povezani putni aranžmani. Mnoga rješenja iz Direktive 90/314/EEZ više nisu odgovarala digitalnom dobu, jer se tržište usluga putovanja iz realnog, temeljenog uglavnom na odštampanim brošurama izloženim u poslovnicama turističkih agencija u kojim su već pripremljene ponude paketa usluga putovanja, premjestilo u *online* okruženje. Potrošači, putnici postali su aktivni u traženju i kupovini usluga putovanja putem interneta i kombiniranju odmora po mjeri, međutim mnoge od tih kombinacija usluga putovanja, koje su ličile na klasične paket aranžmane, pa čak i oglašavane tako, to nisu bile. Potrošači nisu bili pravno zaštićeni, jer se radilo o paket aranžmanima koji nisu ispunjavali sve pravne pretpostavke iz Direktive 90/314/EEZ, a često toga nisu bili ni svjesni. Predmet rada usmjeren je i na obavezu predugovornog informiranja, odnosno odredbe smještene u Poglavlje II *Obaveza predugovornog informiranja i sadržaj ugovora o putovanju u paket aranžmanu* (čl. 5-6). Direktiva 2015/2302 nastavlja trend osnaživanja potrošača putem obaveze predugovornog informiranja, formalnih zahtjeva vezano za informiranje i zahtjeva transparentnosti, kao najznačajnijih mehanizama uspostavljanja ugovornog ekvilibrijuma između trgovca i putnika. Iz tog razloga analizirat će se koje novine

[4] Čl. 4. Direktive 2015/2302 sadrži klauzulu ciljane maksimalne harmonizacije, što znači da države članice su obavezne određene odredbe transponirati onako kako glase, dok im je istovremeno ostavljen manevarski prostor da određene odredbe transponiraju na način kako im odgovara (npr. čl. 2. st. 2, čl. 12. st. 5, čl. 13. st. 1, čl. 14. st. 4).

[5] Vid. A. Petrović, Nova pravna regulativa turističkih paket aranžmana, *Revija za pravo i ekonomiju*, 1/2019, 253-255.

u određenim aspektima sklapanja ugovora o paket aranžmanu donosi Direktiva 2015/2302 u odnosu na svoju prethodnicu.

2. Ugovorne strane – putnik i trgovac

Za razliku od ukinute Direktive 90/314/EEZ, koja je koristila specijalizirani pojam "potrošač" prilagođen turističkoj djelatnosti, a pri tome zaštitu pružala svim osobama koje koriste usluge putovanja u paket aranžmanu, i potrošačima i profesionalcima,[6] Direktiva 2015/2302 pravi terminološki otklon. Zaštitu i dalje osigurava najširem krugu osoba, s tom razlikom što se ne ograničava više na pojam potrošač, već se opredjeljuje za pojam "putnik". I kod Direktive 90/314/EEZ bila je nevažna svrha putovanja – po čemu je i bila izuzetak među potrošačkim direktivama, turistička, poslovna ili kombinirana, odnosno bilo je nevažno radi li se o turisti ili putniku, jer svaki turist je putnik, ali svaki putnik nije istovremeno i turist, a ovaj pristup je zadržan i dalje.

Promjenom naziva subjekta zaštite, Direktiva 2015/2302 nije iskoračila iz potrošačkog *acquis*a,[7] već kako se to objašnjava u t. 7. preambule nije uvijek jednostavno razlikovati potrošače od predstavnika malih poduzeća ili osoba koje putovanja povezana sa svojom poslovnom ili profesionalnom djelatnošću rezerviraju istim kanalima za rezervacije kao i potrošači. Takvim je putnicima često potrebna slična razina zaštite, kao i potrošačima, koji imaju taj status u smislu prava EU. Imajući navedeno u vidu putnik je zapravo poseban korisnik različitih turističkih usluga kao što su npr. usluge prijevoza, smještaja, iznajmljivanja vozila, zatim ugostiteljske, sportske, rekreativne, zdravstvene, zabavne i druge usluge, kada su te usluge ponuđene ili kupljene kao dio paket aranžmana. Prema čl. 3. t. 6. Direktive 2015/2302 "putnik" je svaka osoba koja želi sklopiti ugovor u okviru područja primjene ove Direktive ili koja ima pravo putovati na temelju ugovora sklopljenog u okviru područja primjene ove Direktive. Iz definicije putnika je jasno da svrha sklapanja ugovora nije relevantna, zaštita obuhvaća osobe na poslovnim putovanjima, uključujući osobe koje se bave slobodnim zanimanjima ili samozaposlene osobe ili druge fizičke osobe, pod uvjetom da takve osobe ne kupuju paket aranžman na temelju općeg sporazuma za organiziranje poslovnih putovanja sklopljenog s putničkom

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[6] Vid. V. Radović, Pojam potrošača kod ugovora o organizovanju putovanja, *Jačanje zaštite potrošača u Srbiji*, (ur.) Bourgoigne, T., Jovanić, T., Beograd, 2013, 126-128.

[7] Direktiva 2015/2302 slijedi principe osiguranja visoke razine zaštite potrošača i stvaranja stvarnog unutarnjeg potrošačkog tržišta, potrošač mada više nije legislativni pojam za označavanje suprotne ugovorne strane, ipak je subjekt kojem je namijenjena sva zaštita, što je vidljivo iz brojnih točaka preambule. Opći cilj direktive jeste pridonijeti boljem funkcioniranju unutarnjeg tržišta u sektoru putovanja u paket aranžmanima i postići visoku razinu zaštite potrošača.

agencijom. Za razliku od ranije direktive, koja je zaštitu potrošača protezala i na B2B ugovore npr. zaštitom potrošača je bio obuhvaćen poslodavac, koji bi ugovorio službeno putovanje za svoje zaposlenike na temelju općeg sporazuma s putničkom agencijom, Direktiva 2015/2302 ne slijedi taj put, obrazlažući da u navedenoj situaciji poduzetnicima nije potrebna zaštita, koja je namijenjena potrošačima.[8]

Suprotna ugovorna strana je trgovac. Direktiva 2015/2302 i ovdje donosi određene promjene uvodeći po prvi put pojam "trgovac" kao opći pojam, koji obuhvaća širok spektar subjekata, koji djeluju od nastanka pa sve do ispunjenja usluge paket aranžmana, po čemu se Direktiva 2015/2302 izjednačila sa drugim potrošačkim direktivama. Novi sveobuhvatni pojam trgovac obuhvaća i organizatora i prodavca i davatelja usluge putovanja, sve ovisno o vrsti putnog aranžmana i uloge koju imaju u procesu kombiniranja usluga.[9] Svakog od ovih subjekata Direktiva 2015/2302 posebno definira koristeći bilo pozitivan, bilo negativan pristup. Prema čl. 3. t. 7. "trgovac" znači svaka fizička ili svaka pravna osoba, neovisno o tome je li u privatnom ili javnom vlasništvu, koja u vezi s ugovorima obuhvaćenima ovom Direktivom djeluje, između ostalog i putem drugih osoba koje djeluju u njezino ime ili za njezin račun, u svrhe povezane sa svojom trgovačkom, poslovnom, obrtničkom ili profesionalnom djelatnošću, bilo da djeluje u svojstvu organizatora, prodavca, trgovca koji omogućuje povezani putni aranžman ili kao davatelj usluge putovanja. "Organizator" je trgovac koji izravno ili putem drugog trgovca odnosno zajedno s drugim trgovcem kombinira i prodaje ili nudi na prodaju paket aranžmane ili trgovac koji dostavlja podatke o putniku drugom trgovcu u skladu s t 2. (b) v. (povezani postupak *online* rezerviranja).[10] "Prodavac" je definiran negativno, to je trgovac koji nije organizator, a koji prodaje ili nudi na prodaju paket aranžmane koje kombinira organizator.[11]

Direktiva je jasna, organizator i prodavac moraju biti trgovci, to znači da djeluju u okviru svoje poslovne ili komercijalne djelatnosti, čime su otklonjene ranije

[8] Tač. 7. preambule Direktive 2015/2302.

[9] Direktiva 90/314/EEZ koristila je dva pojma, organizator i prodavac, za razliku od ostalih potrošačkih direktiva koje su koristile pojam trgovac. "Organizator" je osoba koja, ne samo povremeno, organizira paket aranžmane i prodaje ih, ili ih nudi na prodaju bilo izravno ili posredstvom prodavca (čl. 2. tač. 2). "Prodavac" je osoba koja prodaje ili nudi na prodaju paket aranžman koji je sastavio organizator (čl. 2. tač. 3.).

[10] Čl. 3. tač. 8. Direktive 2015/2302.

[11] Čl. 3. tač. 9. Direktive 2015/2302.

nejasnoće.[12] S obzirom na prirodu usluge paket aranžmana kao trgovci, odnosno organizatori paketa javljaju se turističke agencije. Davatelji i korisnici usluga rijetko su u neposrednom kontaktu prije korištenja usluga, pa su turističke agencije spona između davatelja i korisnika usluga prije faktičkog korištenja usluga.[13] Usluge paket aranžmana, u pravilu su pružale jedino agencije turoperatori, kao grosističke turističke agencije, kojima je predmet poslovanja organiziranje putovanja, a distribuciju svojih aranžmana pretežito obavljaju posredstvom mnogobrojnih drugih turističkih agencija, detaljističkog karaktera (neizravna distribucija), ali mogu i sami, neposredno sklapati s klijentima ugovore o paket aranžmanima (izravna distribucija).[14] U ulozi prodavca, shodno Direktivi 2015/2302, nalaze se turističke agencije, koje uz proviziju nude ili prodaju tuđe paket aranžmane, dakle one koje je sastavio organizator. Hoće li u konkretnom slučaju trgovac biti organizator, pa odatle i odgovarati za ispunjenje cjelokupnog paket aranžmana, ovisi o njegovoj aktivnoj ulozi u sastavljanju paketa, a ne o tome kako je registrirao svoju poslovnu djelatnost.[15] Više nije bitno "tko organizira", već "šta se organizira",[16] pa se u ulozi organizatora može naći i pojedinačni davatelj usluge putovanja npr. prijevoznik ili hotelijer, ako se paket usluga kombinira putem povezanog postupka *online* rezerviranja. Organizator rijetko kada da sam pruža usluge iz paket aranžmana, već se u tu svrhu služi trećim licima, drugim trgovcima i davateljima usluga, operatorima kao npr. putnički prijevoznici, hotelijeri, ugostitelji i dr., međutim, samo organizator odgovara za pravilno i uredno ispunjenje cjelokupnog paket aranžmana. Trgovcu, obično poslovnici turističke agencije ili *online* turističkoj agenciji, trebalo bi omogućiti djelovanje u svojstvu običnog prodavca ili posrednika, te ga osloboditi od odgovornosti kao organizatora samo u slučajevima kada u svojstvu organizatora paket aranžmana djeluje drugi trgovac.[17]

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[12] M. Barun, Legal effects of the application of EU Directive 2015/2302 on package travel and linked travel arrangements, 31st International Scientific Conference on Economic and Social Development "Legal Challenges of Modern World", Split, September 2016, 311.

[13] V. Gorenc, A. Pešutić, Razgraničenje organizatora i posrednika putovanja, *Zbornik Pravnog fakulteta Zagreb*, 56, Posebni broj (2006), 20.

[14] *Ibid*., 23.

[15] T. 22. preambule Direktive 2015/2302.

[16] V. Machado, The Directive 2015/2302: New challenges to the package travel and tourism law concepts, in V. Franceschelli, F. Morandi, C. Torres (ed.), *The New Package Travel Directive*, Eshte/Inatel, 2017, 394.

[17] *Ibid*.

3. Motivi reforme i usvajanja Direktive 2015/2302

Imajući u vidu vremensku distancu od 25 godina između ukinute i nove direktive, lako se složiti da je bilo vrijeme da se dogodi promjena. Direktiva 90/314/EEZ je odgovarala 90-tim i početku 20-tih godina kada su organizatori sastavljali paket aranžmane bez sudjelovanja putnika i iste tradicionalnim kanalima distribucije nudili na tržištu. Putničke agencije su unaprijed kombinirale najmanje dvije različite vrste usluge putovanja u paket aranžman i iste putem odštampanih materijala-brošura, ili drugih formi oglašavanja nudile potencijalnim putnicima, a ugovori su se sklapali u poslovnim prostorijama agencije uz fizičko prisustvo ugovarača. No, onog trenutka kada je internet ušao u domove potrošača i postao opći medij komunikacije, što je praćeno i ekspanzijom subjekata koji posluju *online* i posreduju između putnika i davatelja usluga putovanja (npr. *Booking.com*, *Trivago.com*, *Expedia.com* i dr.), a potrošačima omogućena kupovina usluga poput prijevoza, boravka, najma auta i sl. iz vlastitog doma, postalo je jasno da Direktiva 90/314/EEZ više ne odgovara zahtjevima vremena. Razvojem interneta i popularnosti novih načina na koje potrošači uplaćuju svoj odmor, primjenjivost Direktive 90/314/EEZ na sve te nove proizvode u području usluga putovanja postala je neizvjesna.[18]

Unaprijed pripremljeni ili klasični paket aranžmani, uređeni Direktivom 90/314/EEZ, sve manje su zadovoljavali potrebe putnika. To je potvrdilo i istraživanje, prema kojem opada broj putnika koji se odlučuju na kupovinu unaprijed pripremljenog paket aranžmana, a s druge strane, povećao se broj onih koji svoje odmore i putovanja samostalno organiziraju putem *online* rezervacija različitih usluga putovanja.[19] Pojeftinjenje avio prijevoza pojavom niskobudžetnih prijevoznika, razvoj i dostupnost interneta kao medija kojim se oglašavaju, rezerviraju i prodaju usluge putovanja utjecali su na to da potrošači sve češće odabiru i kombiniraju usluge putovanja više različitih davatelja i tako kreiraju odmor ili putovanje po mjeri. Usluge putovanja najpopularnija su kategorija proizvoda koja se kupuje putem interneta.[20]

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[18] Radni dokument Komisije, Sažetak procjene učinaka Prijedloga direktive europskog parlamenta i vijeća o putovanjima u paket aranžmanima i potpomognutim putnim aranžmanima, o izmjeni Uredbe (EZ) br. 2006/2004 i Direktive 2011/83/EU te o stavljanju izvan snage Direktive 90/314/EEZ, SWD (2013) 264 final, Bruxelles, 9.7.2013, 2. (dalje: Procjena učinaka Prijedloga direktive).

[19] Flash Eurobarometer 414, Preferences of Europeans towards tourism, March 2015, 4. Dostupno na: *http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_414_en.pdf*.

[20] Procjena učinaka Prijedloga direktive, 4.

Na tržištu usluga putovanja pojavili su se novi *dinamični* (*kombinirani, naručeni*) *paket aranžmani*,[21] koji su se odlikovali po tome da je turistička agencija sada po zahtjevu ili narudžbi putnika, shodno dakle njegovim specifičnim potrebama i željama, kreirala paket različitih vrsta usluga putovanja, za koji je putnik plaćao ukupnu cijenu. Pored u poslovnici agencije, putnici su različite vrste usluge putovanja mogli kombinirati i *online*, dakle putem *web* stranice agencije, jer im je bilo omogućeno da tijekom postupka rezerviranja slobodno biraju usluge, koje će agencija spojiti i pružiti kao paket aranžman. Međutim, i za ove paket aranžmane nije bilo jasno ulaze li u polje primjene Direktive 90/314/EZ, bez obzira na pozitivno izjašnjenje Suda EU u predmetu *Club Tour*,[22] a to je bila nesigurnost za putnike, jer nisu bili pravno zaštićeni. Na tržištu su tako postojali "zaštićeni" unaprijed pripremljeni paket aranžmani i "nezaštićeni" dinamični ili kombinirani paket aranžmani. S obzirom na broj subjekata koji se mogu naći nasuprot putnika, odnosno koliko trgovaca sudjeluje u kreiranju paket aranžmana kao pravne cjeline dinamični paket aranžmani mogu se podijeliti na: a) *paket aranžmane "jednog trgovca"*, b) *paket aranžmane "više trgovaca"*, te *potpomognute putne aranžmane*.[23] Dinamični paket aranžmani u 2011. godini činili su 23% tržišta usluga putovanja ili oko 118 mil. putovanja godišnje.[24]

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[21] Poslovna praksa je oblikovala različite oblike dinamičnih paket aranžmana, međutim uslijed nejasnog i neujednačenog pravnog okvira, jer novi oblici nisu eksplicite ulazili u polje primjene Direktive 90/314/EEZ, to su potrošači u praksi trpili negativne posljedice i štetu, što je analizirano u sveobuhvatnoj Studiji o šteti koju trpe potrošači u području dinamičnih paket aranžmana. Istraživanjem je utvrđeno da je šteta, koju trpe korisnici dinamičnih paket aranžmana u 27 država članica EU procijenjena na više od 1 milijarde EUR neto (nakon naknade štete). Problemi u vezi s ovim paket aranžmanima učestaliji su i u prosjeku štetniji, nego problemi povezani s unaprijed utvrđenim paket aranžmanima. Većina potrošača je pogrešno smatrala da im i kod dinamičnih paket aranžmana pripada zaštita npr. pravo na povrat isplaćene cijene, pravo na repatrijaciju i dr., za slučaj insolventnosti i stečaja nekog od davatelja usluga putovanja. Study on Consumer Detriment in the Area of Dynamic Packages, London Economics, November 2009, Dostupno na: *https://londoneconomics.co.uk/wp-content/uploads/2011/09/28-Study-on-Consumer-Detriment-in-the-area-of-Dynamic-Packages.pdf*.

[22] Ovdje je značajna odluka Suda EU u slučaju C-400/00 *Club Tour, Viagens e Turismo SA/Alberto Carlos Lobo Gonçalves Garrido i Club Med Viagens Ld.a*, ECLI:EU:C:2002:272.

[23] Procjena učinaka Prijedloga direktive, 3.

[24] European Commission Communication, Bringing the EU package travel rules into the digital age, COM(2013), 513 fin, 9.7.2013, 5-7. Dostupno na: *https://eur-lex.europa.eu/resource.html?uri=cellar:3e272e02-ea04-11e2-99b0-01aa75ed71a1.0001.01/DOC_1&format=PDF*.

4. Regulacija pojma paket aranžman

Prije analiziranja pojma paket aranžman *de lege lata*, potrebno je istaći da se pod "paketom" podrazumijeva organiziran način nuđenja i prodaje kombinacija usluga putovanja (kao što su usluge prijevoza, smještaja, zabave i dr.) turistima.[25] U navedenom kontekstu pojedinačne usluge putovanja povezane u pravnu i ekonomsku cjelinu čine "paket". Definicija paket aranžmana mijenjala se ovisno o promjenama na turističkom tržištu,[26] a novom direktivom je dobila puno opsežnije i preciznije značenje, čime je ujedno učinjen korak ka pravnoj izvjesnosti. Treba imati u vidu da bilo koja pojedinačna usluga putovanja kada je putnik kupuje kao samostalan proizvod, bez obzira na način kupovine, nije bila predmet regulacije ranije, pa tako nije ni Direktive 2015/2302, već putnik kao potrošač zaštitu uživa na osnovu npr. Direktive 2011/83/EU o pravima potrošača, Direktive 93/13/EEZ o nepoštenim ugovornim odredbama, Direktive 2005/29/EZ o nepoštenoj poslovnoj praksi i dr.

4.1. Ranija definicija paket aranžmana

Kako bi se ukazalo na proširenja pojma paket aranžman potrebno je krenuti od ukinute definicije. Prema čl. 2. t. 1) Direktive 90/314/EEZ pod "paket aranžmanom" podrazumijeva se *unaprijed utvrđena kombinacija najmanje dvije pojedinačne usluge, ako se prodaju ili nude na prodaju po cijeni, koja uključuje razne usluge koje se pružaju u vremenu dužem od dvadeset četiri sata ili uključuju smještaj i noćenje*, a radi se o uslugama a) *prijevoza*, b) *smještaja* i c) *ostalim turističkim uslugama, koje nisu pomoćne usluge prijevoza ili smještaja, a predstavljaju znatan dio paket aranžmana*. Riječ je, dakle, o unaprijed pripremljenoj kombinaciji najmanje dvije različite pojedinačne usluge (a, b ili c), koje se nude na prodaju ili prodaju po ukupnoj ugovorenoj cijeni (paušalna cijena) koja uključuje razne usluge, koje se pružaju u vremenu dužem od dvadeset četiri sata ili kraće ako uključuju smještaj i noćenje.[27] Ostale turističke usluge one pod (c) kao npr. ugostiteljske usluge, izleti, obilazak u pratnji vodiča, iznajmljivanje vozila, *wellness* usluge,

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[25] V. Machado, *op. cit*., 391.

[26] O pravnoj regulaciji ugovora o putovanju, odnosno ugovora o paket aranžmanu u međunarodnim dokumentima vid. J. Marin, Primjena Zakona o pružanju usluga u turizmu - što je novo za pružatelje i korisnike usluga paket-aranžmana i povezanih putnih aranžmana, *Poredbeno pomorsko pravo*, Vol. 58, No. 173, 2019, 155-158.

[27] Paket aranžmani uključuju različite kombinacije pojedinačnih usluga npr. putovanje, boravak i ishrana u hotelu. To može biti putovanje i smještaj u apartmanu, bez ishrane, ili putovanje do i od mjesta za odmor, te izleti, a potrošač je odgovoran za smještaj i ishranu, potom primjerice paket usluga, koji uključuje smještaj i ulaznice za koncert ili utakmicu, bez putovanja i razne druge kombinacije.

ulaznice na razne manifestacije kulturnog, zabavnog, sportskog karaktera i sl., mogu se kombinirati u paket aranžman samo pod pretpostavkom da to nisu pomoćne usluge prijevozu i smještaju (npr. prijevoz od aerodroma do hotela, korištenje bazena u hotelu i sl.) i da čine znatan dio vrijednosti u paket aranžmanu.[28]

Države članice EU su različito transponirale definiciju paket aranžmana uslijed klauzule minimalne harmonizacije. Neke su npr. obuhvatile ugovore koji sadrže samo jednu uslugu, druge su obuhvatile i kombinaciju usluga putovanja koje se pružaju kraće od 24 sata ili ne uključuju noćenje tzv. mali paket aranžmani (npr. prijevoz i obilazak grada bez noćenja-izleti), neke da *ostale turističke usluge* različite od prijevoza i smještaja ne moraju činiti znatan dio paket aranžmana.[29] Upravo ove, i slične razlike, otvorile su mnoga pitanja oko tumačenja nejasnih i nedovoljno određenih pojmova u definiciji paket aranžman, na što je u konačnici odgovor dao i Sud EU. U slučaju *Club Tour* Sud EU je zauzeo stav da pojam paket aranžman treba tumačiti na način da uključuje i putovanja koja je pripremila putnička agencija, na zahtjev i po specifikaciji potrošača ili grupe potrošača.[30] U istoj odluci Sud EU je odlučio da "unaprijed utvrđenu kombinaciju usluga" treba tumačiti tako da obuhvaća i kombinacije turističkih usluga koje su zajedno dogovorili potrošač i putnička agencija najkasnije u trenutku sklapanja ugovora.[31] Na ovaj način relativiziran je jedan od uvjeta iz definicije paket aranžmana, jer prema mišljenju Suda EU ne bi smjelo biti važno kombiniraju li se usluge putovanja prije bilo kakvog kontakta s putnikom ili se to čini na njegov zahtjev. Ista načela trebalo bi primjenjivati neovisno o tome je li rezervacija obavljena u poslovnici agencije ili *online*. Međutim, ostalo je neriješeno pitanje *online* prodaje pojedinačnih usluga putovanja različitih trgovaca, iako potrošač za sve usluge plaća paušalnu cijenu.

Nesporno je da svrha putovanja nije bila uvjet pravne zaštite, pa su tako ulazila i putovanja u poslovne svrhe, jer neposlovne, privatne svrhe su se svakako podrazumijevale. Na ovom tragu ostaje i Direktiva 2015/2302. Npr. u presudi

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[28] O pojmu paket aranžman vid. I. Tot, Paket-aranžman i potpomognuti putni aranžman, *Zbornik Pravnog fakulteta Sveučilišta Rijeka*, v. 36, br. 1 (2015), 493 i dalje; Dž. Radončić, Analiza transpozicije Direktive 90/314 u zakonodavstva Bosne i Hercegovine, Republike Hrvatske i Republike Srbije, *Anali Pravnog fakulteta Univerziteta u Zenici*, 8/2008, 243 i dalje.

[29] H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers (ed.), *EC Consumer Law Compendium, The Consumer Acquis and its transposition in the Member State*, Sellier, Munich, 2008, 238 *et seq*. (dalje: *EC Compendium*).

[30] C-400/00 *Club Tour*, par. 11, 12.

[31] *Ibid*., par. 17, 18.

AFS Finland[32] Sud EU je odlučio da međunarodna razmjena studenata u svrhu obrazovanja, u trajanju od oko šest mjeseci ili godine, tijekom koje je student smješten besplatno u porodici domaćina kao da je njezin član nije paket aranžman u smislu Direktive 90/314/EEZ, jer se smještaj u porodicu ne može smatrati *smještajem* u smislu čl. 2. t. 1. sl. b). Isto tako, ovaj tip smještaja, kao i posjeta obrazovnim ustanovama u zemlji domaćinu ne može se podvesti ni pod *ostale turističke usluge* u smislu čl. 2. t. 1. sl. c). Kako pravila Direktive 90/314/EEZ putnicima nisu pružala zaštitu koja im je bila potrebna pri kupovini novih kombinacija usluga putovanja,[33] kao što je npr. *online* povezivanje pojedinačnih usluga različitih davatelja u jedan proizvod (dinamični paket aranžmani), to je uvedena nova sveobuhvatna definicija paket aranžmana.

4.2. Nova ekstenzivna definicija paket aranžmana

Predmetnim poljem primjene Direktive 2015/2302 obuhvaćeni su: a) prethodno pripremljeni (ili tradicionalni) paket aranžmani (*pre-arranged packages*) o kojima je već bilo riječi; b) prilagođeni (ili dinamični, kombinirani) paket aranžmani (*customised packages*), gdje npr. putnik izabire različite usluge putovanja sa jedne prodajne točke bilo *offline* ili *online*; c) povezani (ili potpomognuti) putni aranžmani (*linked travel arrangements*), gdje putnik npr. rezervira let na jednoj *web* stranici, koja ga zatim upućuje na drugu stranicu na kojoj može rezervirati hotel, s tim da druga rezervacija mora biti obavljena unutar 24 sata, ili, pak, situacija gdje putnik kupuje usluge putovanja na jednoj prodajnoj točki, ali kroz odvojene postupke rezervacija.

Prvi put predmetom regulacije Direktive 2015/2302 postaje *povezani putni aranžman*, sada kao uređen ugovor na tržištu putovanja, sa jasno određenim obavezama i odgovornostima trgovca prema putniku. Ova usluga nije bila regulirana Direktivom 90/314/EEZ, pa ni korisnici nisu uživali zaštitu kao kod paket aranžmana, već su ugovorni odnosi uređivani pretežno općim uvjetima poslovanja agencija. Povezani putni aranžman definiran je u čl. 3. t. 5. Direktive 2015/2302, gdje se naglašava da, iako postoji kombinacija različitih pojedinačnih usluga putovanja kupljenih za potrebe istog putovanja ili odmora, ipak se ne radi o paket aranžmanu, jer postoje i drugi uvjeti, koji služe za razlikovanje dva

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[32] Case C-237/97 *AFS Intercultural Programs Finland ry* [1999] ECR 1999 I-00825, par. 28-33.

[33] Npr. 67% građana EU pogrešno je smatralo da im pri kupovini "novih paket aranžmana" pripada zaštita potrošača. S druge strane, ovi kupci su bili puno izloženiji problemima u odnosu na korisnike klasičnih unaprijed pripremljenih paket aranžmana. Ako bi nastao problem prosječan trošak za kupca iznosio bi skoro 600 EUR, dok za tradicionalne paket aranžmane taj je trošak bio manji od 200 EUR. Ukupni gubitak za kupce "novih paket aranžmana" u EU bio je veći od 1 milijarde EUR godišnje. Communication 2013, 7.

ugovora. Povezani putni aranžman jeste alternativni poslovni model u odnosu na paket aranžman, koji je također oblik dinamičnog putnog aranžmana u kojem sudjeluje više davatelja usluga, razlika je u tome što svaki od njih odgovara za pravilno izvršenje ugovora o usluzi putovanja koju pruža, dok kod paket aranžmana za pravilno izvršenje svih usluga putovanja odgovara jedan trgovac kao organizator. Analiziranje pojma povezani putni aranžman u velikoj mjeri bi nas udaljilo od predmeta rada, tako da to ostavljamo za buduće istraživanje.

Promjena koncepta paket aranžman najbolje se može sagledati analiziranjem definicije iz čl. 3. t. 2. Direktive 2015/2302 prema kojoj "paket aranžman" podrazumijeva *kombinaciju najmanje dvije različite vrste usluga putovanja za potrebe istog putovanja ili odmora ako:*

a) te usluge kombinira jedan trgovac, između ostalog na zahtjev ili u skladu s izborom putnika, prije nego što je sklopljen jedinstveni ugovor o svim uslugama; ili

b) neovisno o tome jesu li sklopljeni zasebni ugovori s pojedinačnim davateljima usluga putovanja, ako se te usluge:

i. kupuju na jednoj prodajnoj točki i ako su odabrane prije nego što je putnik pristao platiti;

ii. nude, prodaju ili naplaćuju po paušalnoj ili ukupnoj cijeni;

iii. oglašavaju ili prodaju pod nazivom "paket aranžman" ili pod sličnim nazivom;

iv. kombiniraju nakon sklapanja ugovora kojim trgovac putniku daje pravo da bira između različitih vrsta usluga putovanja; ili

v. kupuju od pojedinačnih trgovaca putem povezanih postupaka online rezerviranja kada trgovac s kojim je sklopljen prvi ugovor dostavlja ime putnika, podatke o plaćanju i adresu e-pošte drugom trgovcu ili trgovcima, a ugovor s drugim trgovcem ili trgovcima sklopljen je najkasnije 24 sata nakon potvrde rezervacije prve usluge putovanja.

Kombinacija usluga putovanja kada se najviše jednu vrstu usluga putovanja, kako je navedeno u t. 1. t. (a), (b) i (c), kombinira s jednom ili više turističkih usluga, kako je navedeno u t. 1. t. (d), nije paket aranžman ako zadnje navedene usluge:

(a) ne čine znatan dio vrijednosti kombinacije, nisu oglašavane kao bitno obilježje kombinacije niti na neki drugi način predstavljaju bitno obilježje kombinacije; ili

(b) su odabrane i kupljene tek nakon što je počelo izvršenje usluge putovanja, kako je navedeno u t. 1. t. (a), (b) ili (c).

Radi boljeg razumijevanja ovako opsežne i složene definicije paket aranžmana istu ćemo analizirati u segmentima.[34] Na prvom mjestu paket aranžman i dalje podrazumijeva *kombinaciju najmanje dvije različite vrste usluga putovanja*[35] *za potrebe istog putovanja ili odmora*. Pojedinačne usluge putovanja predstavljaju jezgro paket aranžmana (kao i povezanog putnog aranžmana) jer upravo te različite usluge omogućavaju kreiranje novog, izvedenog i složenijeg proizvoda kao što je paket. Više različitih vrsta usluga putovanja spaja se u jedinstven pravni proizvod, a za čije pravilno izvršenje odgovornost snosi organizator.[36] Nakon ove generalne formulacije o kombinaciji više vrsta usluga putovanja, slijede *pretpostavke pod a) i b)* na osnovu kojih se određuje kada se kombinacija može smatrati paket aranžmanom, a kada to ipak ne može (posljednja alineja definicije). S obzirom na slobodu kombiniranja različitih vrsta usluga putovanja postalo je nebitno da li su usluge unaprijed pripremljene (sastavljene) bez sudjelovanja putnika, ili ih je trgovac pripremao prema zahtjevu ili izboru putnika, nakon čega se sklapa

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[34] Detaljnije o elementima definicije paket aranžmana vid. J. Marin, *op. cit.*, 165-170.

[35] Pod "uslugom putovanja" podrazumijeva se: a) prijevoz putnika, b) smještaj koji nije neodvojiv dio prijevoza putnika i nije u boravišne svrhe, c) iznajmljivanje auta i drugih motornih vozila, d) bilo koja druga turistička usluga koja nije neodvojivi dio usluge putovanja u smislu točaka (a), (b) ili (c), čl. 3. t. 1. Direktive 2015/2302. Ova definicija je u odnosu na onu iz Direktive 90/314/EEZ proširena uvođenjem nove usluge putovanja i to iznajmljivanje auta i drugih motornih vozila.

Pojam prijevoz podrazumijeva sve oblike pogodne za transport putnika bez obzira na prijevozno sredstvo npr. autobusni, željeznički, avio, brodski prijevoz, kao i kombinacije istih. Pojam smještaj iz t. b) definiran je sa dva negativna kumulativna uvjeta, na način da smještaj nije sastavni dio usluge prijevoza putnika, bez obzira o kojem prijevoznom sredstvu se radi (npr. mogućnost noćenja u kupeu vlaka, broda i dr. ne može se smatrati smještajem u smislu Direktive, osim noćenja na kruzerima koji se smatra smještajem u smislu Direktive), i da nije u boravišne svrhe (npr. smještaj u boravišne svrhe, između ostalog za dugotrajne tečajeve stranog jezika, ne bi trebalo smatrati smještajem u smislu ove Direktive). Pod ostalim turističkim uslugama iz t. d) ne bi trebalo smatrati turističke usluge koje su sastavni dio neke druge usluge putovanja (prijevoza, smještaja, *rent a car*), koja je nesumnjivo glavna usluga. Ilustracije radi usluge putovanja iz t. d) su npr. ulaznice za koncerte, sportske događaje, izlete, zabavne parkove, razgledanje s vodičem, propusnice za skijališta, iznajmljivanje sportske opreme, *wellness* i sl. Pod ostalim turističkim uslugama iz t. d) ne smatra se prijevoz prtljage u okviru prijevoza putnika, manje usluge prijevoza, kao što su prijevoz putnika kao dio razgledavanja s vodičem ili transferi između hotela i aerodroma ili željezničke stanice, obroci, piće i čišćenje u okviru smještaja, ili pristup objektima na istoj lokaciji poput bazena, saune, prostora za *wellness* ili teretane za goste hotela. Financijske usluge poput putnih osiguranja ne bi također trebalo smatrati uslugama putovanja. Vid. t. 17. preambule Direktive 2015/2302.

[36] T. 8. preambule Direktive 2015/2302.

jedinstven ugovor za sve usluge - *pretpostavka pod a)*. Ovdje se zapravo radi o modalitetu klasičnog paket aranžmana, budući da se sklapa jedan ugovor s jednim trgovcem za sve usluge putovanja, koje se time objedinjuju u jednu uslugu - paket aranžman, s tom razlikom što se više ne mora raditi o unaprijed utvrđenoj kombinaciji usluga, dok je Direktiva 90/314/EEZ to izričito tražila.

Nadalje, u *pretpostavci pod b)* paket aranžman postoji i onda kada nije sklopljen jedan ugovor za sve usluge putovanja, kao u prethodnoj situaciji, već je sklopljeno više pojedinačnih ugovora bilo sa trgovcem, bilo sa različitim davateljima usluga putovanja, ali samo ako te kombinacije usluga ispunjavaju jedan od pet alternativnih kriterija. Ovih pet *objektivnih alternativnih kriterija*[37] uvedeno je iz razloga otklanjanja nejasnoća koje su postojale na tržištu, a odnosile su se na pitanje mogu li se određene usluge putovanja s obzirom na način na koji se nude, oglašavaju, rezerviraju, prodaju, naplaćuju i sl., smatrati paket aranžmanom ili ne? Putnici su često bili u zabludi pogrešno smatrajući da im pripada zaštita propisana Direktivom 90/314/EEZ, jer su bili uvjerenja da kupuju klasični paket aranžman, dok u poslovnoj praksi ti novi proizvodi slični paket aranžmanima (dinamični paket aranžmani), pa čak i oglašavani i prodavani pod tim nazivom, to nisu bili. U nekim od ovih alternativnih kriterijima mogu se prepoznati elementi iz ranije definicije paket aranžmana, tako primjerice da bi se radilo o paket aranžmanu, potrebno je da za sve usluge putovanja, koje nude ili prodaju različiti davatelji i za koje se sklapa više odvojenih ugovora, putnik na kraju ipak plaća *jedinstvenu ugovorenu ili paušalnu cijenu*. Sljedeći alternativni kriterij jeste da su različite vrste usluga putovanja kupljene na jednoj *prodajnoj točki*,[38] a te su usluge odabrane prije nego što ih putnik pristane platiti, odnosno u okviru istog postupka rezerviranja (*booking process*). Ovaj kriterij podrazumijeva primjerice situaciju kada putnik na istoj *web* stranici trgovca npr. *Booking.com* rezervira za potrebe ljetovanja apartman, prijevoz avionom i ulaznice za koncert (atrakcije), sve pojedinačne usluge su odabrane tokom istog postupka *online* rezerviranja, čime je kreiran paket aranžman, prije nego li putnik pristane platit rezervirane usluge. Pri tome je nebitno kada će usluge biti stvarno i plaćene. Još jedan od alternativnih kriterija za postojanje paket aranžmana jeste taj da se usluge putovanja *oglašavaju ili prodaju* pod nazivom "paket aranžman" ili pod sličnim nazivom koji ukazuje na blisku povezanost između različitih usluga putovanja npr. "kombinirana

[37] T. 10. preambule Direktive 2015/2302.

[38] "Prodajna točka" znači svaki maloprodajni objekt, bilo nekretnina ili pokretnina, ili internetska stranica za maloprodaju ili sličan *online* sistem za prodaju, između ostalog kad se internetske stranice za maloprodaju ili online sistemi za prodaju putnicima predstavljaju kao jedinstven sistem, uključujući telefonsku službu. Čl. 3. t. 15. Direktive 2015/2302.

ponuda", "sve uključeno u cijenu" ili "aranžman u koji je sve uključeno" i sl.[39] Paket aranžmanom prema četvrtom alternativnom kriteriju smatra se i slučaj kada se usluge putovanja kombiniraju nakon sklapanja ugovora kojim trgovac putniku daje pravo da bira usluge putovanja, npr. to su paket aranžmani koji se nude kao poklon-paketi, gdje trgovac dozvoljava putniku da po svom izboru kombinira različite usluge putovanja nakon što je sklopljen ugovor o putovanju u paket aranžmanu.[40] Prema posljednjem, petom, alternativnom kriteriju paket aranžmanom smatra se i kombinacija različitih vrsta usluga putovanja, koje se kupuju od različitih trgovaca putem *povezenih postupaka online rezerviranja*, kada prvi trgovac s kojim je zaključen ugovor o nekoj usluzi putovanja, prosljeđuje podatke putnika i to njegovo ime, *mail* adresu i broj kartice drugom trgovcu ili trgovcima, a drugi ugovor je sklopljen najkasnije 24 sata nakon potvrde rezervacije prve usluge putovanja.[41] Za nastanak tzv. *click-through* paket aranžmana bitna je upravo činjenica da jedan trgovac prosljeđuje lične podatke putnika drugom trgovcu, pa ih putnik ne mora ponovno unositi kada želi zaključiti ugovor o drugoj usluzi putovanja s novim trgovcem.

Posljednji dio definicije paket aranžmana negativno je određen u smislu pod kojim pretpostavkama kombinacija više vrsta usluga putovanja neće se smatrati paket aranžmanom. Shodno tome, kombinacija više vrsta usluga putovanja kada se najviše jedna usluga putovanja kao što je a) *prijevoz*, b) *smještaj* ili c)

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[39] T. 10. preambule Direktive 2015/2302.

[40] T. 11. preambule Direktive 2015/2302.

[41] *Ibid*. U kontekstu povezanih postupaka rezerviranja značajan je i stav Suda EU u slučaju C-478/12 *Armin Maletic, Marianne Maletic v. lastminute.com GmbH, TUI Österreich GmbH*, ECLI:EU:C:2013:735. Supružnici Maletic sa prebivalištem u Austriji rezervirali su i platili na *web* stranici *lastminute.com* putovanje u Egipat u paket-aranžmanu po cijeni od 1.858€ u razdoblju od 10-24.1.2012. Na svojoj *web* stranici društvo *lastminute.com*, sa sjedištem u Münchenu naznačilo je da djeluje kao putnički agent te da putovanje organizira TUI, društvo sa sjedištem u Beču. Rezervacija tužitelja odnosila se na hotel *Jaz Makadi Golf & Spa* u Hurghadi. Rezervaciju je potvrdio *lastminute.com* te ju je proslijedio TUI-ju. Zatim su supružnici Maletic od TUI-ja dobili "potvrdu/račun" dana 5.1.2012, koji je uz podatke o putovanju preuzete iz rezervacije *lastminute.com* spominjao ime drugog hotela *Jaz Makadi Star Resort Spa*, Hurghada. Tek po dolasku u Hurghadu tužitelji su primijetili pogrešku u vezi sa hotelom te su platili dodatak na cijenu od 1.036€ kako bi se mogli smjestiti u hotel koji su izvorno rezervirali na *web* stranici *lastminute.com*. Sud EU je u par. 29. zaključio da čak i ako bi se jednokratna radnja poput rezervacije kojom su supružnici Maletic rezervirali i platili putovanje u paket-aranžmanu na *web* stranici *lastminute.com* mogla razdvojiti na dva različita ugovorna odnosa, s jedne strane s *lastminute.com online* putničkom agencijom i s druge strane s TUI-jem kao organizatorom putovanja, ovaj drugi ugovorni odnos ne može se ocijeniti kao "isključivo domaći" jer je zbog činjenice da je ostvaren posredstvom putničke agencije iz druge države članice neodvojivo povezan s prvim ugovornim odnosom.

iznajmljivanje vozila, kombinira s jednom ili više d) *drugih turističkih usluga*, nije paket aranžman ako *druge turističke usluge*: a) ne čine znatan dio vrijednosti kombinacije usluga, odnosno nisu oglašavane kao bitno obilježje kombinacije, niti na neki drugi način predstavljaju bitno obilježje kombinacije; ili b) ako su *druge turističke usluge* odabrane i kupljene tek nakon što je počelo pružanje usluge putovanja prijevoza, smještaja ili iznajmljivanja vozila. Tako npr. neće se raditi o paket aranžmanu ako se uz uslugu boravka u apartmanu kombinira *druga turistička usluga*, npr. obilazak grada u pratnji vodiča, zato što u ovoj kombinaciji druga turistička usluga po svojoj vrijednosti ne čini znatan dio vrijednosti kombinacije usluga. Kako bi se izbjegle nedoumice što se smatra *znatnim dijelom vrijednosti* i tako je li riječ o paket aranžmanu, dato je pojašnjenje da udio drugih turističkih usluga u vrijednosti kombinacije usluga treba iznositi 25% ili više[42] (kriterij pod a). No, u slučaju npr. kada se nakon dolaska putnika u hotel, gdje je smještaj rezerviran kao pojedinačna usluga, druge turističke usluge naknadno dodaju, neće se raditi o paket aranžmanu (kriterij pod b). U ovakvim situacijama treba biti oprezan jer može doći do zaobilaženja Direktive na način da organizatori ili prodavci putniku unaprijed ponude izbor dodatnih turističkih usluga, a potom mu sklapanje ugovora za te usluge ponude tek nakon što je počelo izvršenje prve usluge putovanja.[43] Kombinacija samo dviju *drugih turističkih usluga*, bez da se one kombiniraju s uslugom prijevoza, smještaja ili iznajmljivanja vozila nije paket aranžman.[44]

Svi prethodno opisani slučajevi su modaliteti dinamičnih ili kombiniranih paket aranžmana, koji su sada dobili pravnu regulaciju i zaštitu. Važno je naznačiti da paket aranžman ne zahtijeva sklapanje jedinstvenog ugovora za kombinaciju različitih vrsta usluga putovanja sa jednim trgovcem, već se za kombinaciju različitih vrsta usluga putovanja može sklopiti više pojedinačnih ugovora sa različitim trgovcima ili davateljima usluga, ako ta kombinacija usluga putovanja zadovoljava neki od gore navedenih alternativnih kriterija. U čl. 3. t. 3. Direktiva 2015/2302 definira "ugovor o putovanju u paket aranžmanu" kao ugovor o paket aranžmanu kao cjelini ili, ako se paket aranžman pruža u okviru zasebnih ugovora, svi ugovori koji obuhvaćaju usluge putovanja uključene u paket aranžman. Navedno znači da se paket aranžman može realizirati izvršenjem

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[42] T. 18. preambule Direktive 2015/2302. Radit će se o paket aranžmanu, ako se npr. uz prijevoz kombinira ulaznica za utakmicu kao druga turistička usluga, jer vrijednost potonje može premašiti vrijednost prve usluge, ili utakmica u odnosu na prijevoz predstavlja bitno obilježje kombinacije, odnosno glavnu uslugu u toj kombinaciji, ili je kao takva oglašavana iako je vrijednost ulaznice za utakmicu ispod 25% vrijednosti u odnosu na vrijednost prijevoza.

[43] *Ibid*.

[44] I. Tot, *op. cit*., 503.

jednog ugovora, ali isto tako izvršenjem više zasebnih ugovora. Glavno obilježje paket aranžmana je to što jedan trgovac kao organizator odgovara za pravilno izvršenja usluga paket aranžmana kao cjeline.

Ranija direktiva kao jedan od uvjeta da bi se radilo o paket aranžmanu tražila je da se prethodno pripremljena kombinacija usluga putovanja pruža u vremenu dužem od 24 sata ili kraće ako uključuje uslugu smještaja sa noćenjem. Države članice su različito transponirale ovaj kriterij iz definicije paket aranžmana, a Direktiva 2015/2302 ga je izostavila. To ipak ne znači da se Direktiva 2015/2302 primjenjuje na sve paket aranžmane, u čl. 2. st. 2. propisana su isključenja iz predmetnog polja primjene. Tako isključeni su paket aranžmani koji traju kraće od 24 sata i ne uključuju noćenje, npr. jednodnevni izleti, jer su to kratka putovanja, pa je i potreba za zaštitom putnika manja, ujedno se izbjegava nepotrebno opterećenje za trgovce. Isti razlog isključenja odnosi se na paket aranžmane koji se povremeno i na neprofitnoj osnovi nude ili omogućuju i to samo ograničenoj skupini putnika. Npr. to su paket aranžmani koje humanitarne organizacije, sportski klubovi ili škole organiziraju za svoje članove ne više od nekoliko puta godišnje i to bez da ih nude javno.[45] I kao treće isključenje navode se poslovni putni aranžmani, ali samo oni koji su kupljeni na temelju okvirnog sporazuma s trgovcem specijaliziranim za organiziranje poslovnih putovanja.

5. Obaveza predugovornog informiranja putnika

Obaveza predugovornog informiranja zauzima značajno mjesto u Direktivi 2015/2302, kao što je to imala i u ranijoj direktivi, jer obje sadrže detaljne liste informacija o kojima putnik treba biti upoznat prije ugovornog obvezivanja. Iz prethodne pažljive analize definicije paket aranžmana jasno je da se radi o kompleksnoj kombinaciji (paketu) usluga putovanja, svaka pojedinačna usluga već je pravni proizvod za sebe, a spojene daju novi, složeniji. Zbog čega je važno da putnik, prije nego zaključi ugovor o paket aranžmanu bude obaviješten o svim elementima ugovora. Obaveza predugovornog informiranja već duže vrijeme je u fokusu interesiranja pravne nauke, iz razloga što je kao normativna paradigma postala jedno od obilježja potrošačkog prava,[46] a nema naznaka da bi se nešto u skorije vrijeme moglo promijeniti, čemu svjedoči i Direktiva 2015/2302. Efikasnost obaveze informiranja preispituje se s aspekta prosječnog potrošača, u smislu da li, i ako da, u kojoj mjeri doprinosi donošenju autonomne informirane odluke i osnaživanju potrošača, što vodi uspostavljanju objektivne

[45] T. 19. preambule Direktive 2015/2302.

[46] P. Mankowski, Information and Formal Requirements in EC Private Law, *European Review of Private Law*, 6/2005, 780-796.

ugovorne ravnoteže između trgovca i potrošača.[47] S druge strane, efikasnost obaveze informiranja ovisi o tome u kojoj mjeri i na koji način trgovci zaista ispunjavaju ovu obavezu.

5.1. Predugovorne informacije

Direktiva 2015/2302 u čl. 5. uređuje imperativnu obavezu predugovornog informiranja i propisuje koje informacije, kada i na koji način moraju biti pružene putniku. Ovo su informacijski zahtjevi, koji uključuju listu detaljnih informacija, zatim način i vrijeme kada informacije trebaju biti pružene, vodeći računa o zahtjevu transparentnosti. Predugovorno informiranje je jednostrana obaveza trgovca, a uloga je da se putnicima pruži jasnija slika i omogući bolja upućenost pri biranju između različitih vrsta paket aranžmana. Ako se usporede informacijski zahtjevi iz stare i nove direktive, jasno je da Direktiva 2015/2302 strože i opsežnije uređuje obavezu predugovornog informiranja.[48] U vrijeme Direktive 90/314/EEZ za oglašavanje paket aranžmana koristili su se uglavnom štampani reklamni materijali (brošure), dok danas je to internet oglašavanje, pa je i obaveza predugovornog informiranja prilagođena novom mediju.

Čl. 5. st. 1. Direktive 2015/2302 propisano je da prije nego što se putnik obaveže ugovorom ili obavezujućom ponudom na sklapanje ugovora o putovanju u paket aranžmanu, organizator je dužan putniku pružiti informacije koje su relevantne za paket aranžman, a odnose se na:

a) *glavne karakteristike usluga putovanja* - što uključuje sljedeće informacije: i. odredište/a putovanja, plan putovanja i razdoblja boravka, ako je uključen smještaj, onda i broj noćenja; ii. prijevozno sredstvo i njegove karakteristike, uključujući (ako je to moguće) točno mjesto i vrijeme polaska i povratka, te povremena zaustavljanja; iii. lokacija te glavne karakteristike smještaja, uključujući kategoriju prema pravilima zemlje odredišta; iv. plan ishrane; v. izleti ili druge usluge uključene u ukupnu ugovorenu cijenu paket aranžmana; vi. pruža li se putniku neka od usluga putovanja u okviru grupe, te približna veličina grupe; vii. jezik na kojem se pružaju druge turističke usluge, ako je to relevantno; viii. informacija da li je paket aranžman generalno prikladan za osobe sa smanjenom pokretljivošću, te na zahtjev putnika detaljne informacije o prikladnosti s obzirom na njegove potrebe;

b) firmu i geografsku adresu organizatora, broj telefona i email adresu;

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[47] Vid. M. Schaub, How to Make the Best of Mandatory Information Requirements in Consumer Law, *European Review of Private Law*, 1/2017, 28-30.

[48] Čl. 3. Direktive 90/314/EEZ.

c) *ukupnu cijenu paket aranžmana* u koju su uključeni porezi i sve dodatne naknade, takse i troškovi;

d) *način plaćanja*, uključujući avansno plaćanje, ili financijske garancije koje putnik treba platiti ili osigurati;

e) *najmanji broj osoba potreban za realizaciju paket aranžmana* i rok za mogući raskid ugovora ako taj broj ne bude ispunjen;

f) *opće informacije o putnim ispravama i vizama*, uključujući približno vrijeme potrebno za pribavljanje viza te informacije o zdravstvenim formalnostima zemlje odredišta;[49]

g) informacije o raskidu ugovora od strane putnika prije početka paket aranžmana;

h) *informacije o osiguranju* i vrstama pokrivenih rizika.

Za slučaj da se paket aranžman prodaje putem prodavca (prodavac nije organizator, on samo prodaje ili nudi na prodaju pakete koje je kombinirao organizator) i prodavac je obavezan putniku pružiti sve predugovorne informacije,[50] uključujući i svoje kontakt podatke (firma, adresa, telefon, *mail* adresa). To znači da će iste predugovorne informacije putnik dobiti dva puta, od organizatora i prodavca, dok prema ranijoj direktivi brošuru sa svim informacijama potrošaču je dostavljao ili organizator ili prodavac. U t. 24. preambule Direktive 2015/2302 naglašava se da u odnosu na paket aranžmane prodavci, zajedno s organizatorom, trebali bi biti odgovorni za pružanje predugovornih informacija. Kako bi se olakšala komunikacija, posebice u prekograničnim slučajevima, putnici bi trebali moći stupiti u kontakt s organizatorom i putem prodavca kod kojeg su kupili paket aranžman.

Kako bi se pojednostavilo i olakšalo ispunjenje obaveze predugovornog informiranja, trgovcima su na raspolaganju standardni informacijski obrasci, koji se daju u prilogu direktiva. Obrazac sadrži standardne predugovorne informacije, koje se moraju objaviti i staviti na raspolaganje putniku prije sklapanja ugovora, pa i Direktiva 2015/2302 u uvodnom dijelu čl. 5. st. 3. upućuje na obrazac iz Priloga I. dio A ili dio B.[51] U obrascu su sažeta najznačajnija prava

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[49] U t. 28. preambule Direktive 2015/2302 se navodi da informacije o približnom vremenu potrebnom za dobijanje vize mogu se pružiti u obliku upućivanja na službene informacije zemlje odredišta, npr. link koji upućuje na *web* stranicu ambasade te zemlje.

[50] Uvodni dio čl. 5. st. 3. Direktive 2015/2302.

[51] U dijelu A je obrazac gdje se na početku, uokvirena nalazi izjava o tome da je kombinacija usluga paket aranžman, da je organizator odgovoran za ispunjenje paketa, kao i njegova odgovornost

koja putnicima pruža Direktiva 2015/2302, a već na početku obrasca, nalazi se posebno istaknuta izjava trgovca o pravnoj prirodi usluge koju nudi ili prodaje. Prije nego se, dakle, upusti u detaljno predugovorno informiranje potencijalnih putnika, trgovac je prethodno obavezan informirati sve posjetitelje *web* stranice o tome koje usluge im nudi, paket aranžmane ili povezane putne aranžmane. Zbog velike sličnosti sa paket aranžmanima, a ipak nižeg nivoa zaštite koju uživaju putnici, trgovci su obavezni na jasan i lako uočljiv način, prije nego što putnik pristane platiti, navesti nude li im paket aranžman ili povezani putni aranžman, te pružiti informacije o odgovarajućoj razini zaštite. Od država članica se očekuje da vode računa o istinitosti izjava trgovca o pravnoj prirodi proizvoda iz područja usluga putovanja koje nude putnicima.[52] Zbog velike sličnosti upravo jasna i transparentna izjava trgovaca ključna je putnicima za razlikovanje ova dva turistička proizvoda, a time se ujedno postiže i veći stupanj transparentnosti na tržištu.[53]

Za paket aranžmane, koji se sastoje od više vrsta usluga putovanja, koje se kupuju od različitih davatelja usluga putem povezanih postupaka *online* rezerviranja, svaki je davatelj usluge dužan pružiti putniku informacije od a) do h), ako je to relevantno za uslugu koju pruža. Istovremeno s ovom obavezom davatelja usluge, organizator (prvi davatelj s kojim je sklopljen ugovor o nekoj usluzi, koji prosljeđuje lične podatke o putniku drugom davatelju) je također dužan putniku pružiti standardne informacije putem obrasca iz Priloga I. dio C.[54] To znači da bi organizator mogao ispuniti svoju obavezu informiranja putem obrasca, on treba biti upućen u sadržaj ugovora o usluzi putovanja, koji je putnik sklopio sa drugim davateljem. Standardni obrasci, koji se koriste za predugovorno informiranje (dio A, dio B, dio C) prilagođeni su načinu komunikacije, odnosno sklapanja ugovora, ovisno o tome da li se ugovor o paket aranžmanu sklapa putem sredstava daljinske komunikacije, u poslovnici ili

za slučaj insolventnosti, dok za sve ostale informacije o najvažnijim pravima iz Direktive 2015/2302 putnik se upućuje linkom na *web* stranicu trgovca.

U dijelu B je obrazac sa svim prethodno navedenim elementima koje organizator, a prema potrebi i prodavac, pružaju putniku ako je ugovor o paket aranžmanu sklopljen telefonom (izjava o pravnoj prirodi usluge, rezime najznačajnijih prava), uključujući i informacije od a) do h).

[52] T. 16. preambule Direktive 2015/2302.

[53] Putnici koji koriste povezane putne aranžmane ne uživaju sva ona prava koja imaju putnici u paket aranžmanu, opseg prava im je sveden na predugovorno informiranje, te ograničenu zaštitu u slučaju insolventnosti. Vid. Aneks II Direktive 2015/2302. Osim toga t. 48. preambule upućuje na izmjenu Direktive 2011/83/EU o pravima potrošača, koja se i dalje primjenjuje na pojedinačne usluge putovanja, koje su dio povezanog putnog aranžmana.

[54] Čl. 5. st. 2. Direktive 2015/2302.

putem drugih kanala distribucije. Npr. ako se ugovor sklapa *online* tada se i predugovorne informacije pružaju upućivanjem na *web* stranicu trgovca, za slučaj da je to telefonom tada se i predugovorne informacije saopćavaju putniku usmeno telefonom, ako se ugovor sklapa u prisustvu ugovornih strana u poslovnici predugovorne informacije se daju u pisanom obliku.

5.2. Zahtjev transparentnosti

Zahtjev transparentnosti neodvojiv je element obaveze informiranja, jer upućuje na koji način informacije trebaju biti pružene putniku kako bi imao koristi od njih. Sve potrošačke direktive nameću trgovcima dužnost transparentnog informiranja s jednim ciljem, a to je da bi potrošači mogli donositi informirane odluke prije ugovornog obvezivanja. U čl. 5. st. 3. Direktiva 2015/2302 propisuje da sve predugovorne informacije relevantne za paket aranžman moraju se pružiti na jasan, razumljiv i lako uočljiv način. Kada se te informacije pružaju u pisanom obliku, one moraju biti čitljive.

Načelo ili zahtjev transparentnosti objedinjuje najmanje tri aspekta: *predstavljanje informacija* – informacije trebaju biti prezentirane na način da ih potrošač nije mogao ne uočiti prije sklapanja ugovora; *razumljivost informacija* – informacije trebaju biti formulirane na način da potrošač može razumjeti šta mu informacije prenose; *jezik informacija* – informacije se trebaju pružiti na jeziku kojim je potrošač ovladao (materinji jezik).[55] Zahtjev transparentnosti posebno dolazi do izražaja kada su informacije o bitnim aspektima ugovora po svom karakteru pravno, ekonomski i tehnički složene. U tom slučaju informacije je potrebno svesti na "jezik" koji prosječan potrošač razumije, u protivnom nije zadovoljeno načelo transparentnosti. Da bi ispunio zahtjev transparentnosti organizator bi trebao uzeti u obzir način na koji putnici čitaju i procesuiraju informacije, te sredstvo putem kojeg se nudi ili prodaje usluga, kako bi putnici prije rezerviranja ili plaćanja usluge bili svjesni svih relevantnih podataka. Ugovor o paket aranžmanu je mješoviti ugovor, koji sadrži elemente drugih teretnih ugovora, kao i veliki broj drugih potrošačkih ugovora koji se koriste u pravnom životu, to je standardni ugovor sačinjen od unaprijed pripremljenih standardnih klauzula. Transparentno prezentiranje informacija znači i da one nisu zamaskirane u općim uvjetima i tako nevidljive, kao i da se vodi računa o veličini slova, rasporedu informacija, isticanju značajnijih i sl. Kako se paket aranžmani danas pretežno rezerviraju i kupuju *online*, to je trgovcima puno lakše na *web* stranici prezentirati

[55] M. Loos, Double Dutch - On the role of the transparency requirement with regard to the language in which standard contract terms for B2C-contracts must be drafted, *Journal of European Consumer and Market Law*, 2/2017, 54.

informacije na način da neke od njih budu manje ili više uočljivije od drugih (*trader-friendly web-design*).[56] To je npr. slučaj kada su neke bitne informacije postavljene na samom dnu stranice ili kada poseban link upućuje na drugu *web* stranicu na kojoj se nalaze preostale informacije. Načelo transparentnosti u predugovornoj fazi omogućava usporedivost ponuda usluga paketa različitih trgovaca i izbor najpovoljnije, jer standardne informacije, koje su pružene putem informativnog obrasca trebaju biti razumljive i jasne za prosječnog putnika. Predugovorne informacije iz čl. 5. Direktive 2015/2302 od a) do h) mogu se smatrati bitnim informacijama, jednako kako je Sud EU u slučaju *Ving Sverige*[57] odlučio da su to informacije iz čl. 3. Direktive 90/314/EEZ, te stoga moraju biti prezentirane već prilikom poziva na kupovinu tj. oglašavanja proizvoda ili usluga, ako to nije slučaj radi se o zavaravajućem izostavljanju.[58]

5.3. Koncept ranjivog putnika

Zanimljivo je primijetiti da Direktiva 2015/2302, među rijetkim potrošačkim direktivama – izuzetak predstavlja Direktive 2005/29/EZ o nepoštenoj poslovnoj praksi, obraća pažnju na "ranjivog potrošača", u ovom slučaju "ranjivog putnika".[59] Ranjivi potrošač nalazi se nasuprot "prosječnog potrošača", to je koncept koji je kreiran i razvijen od strane Suda EU, a normativno našao se jedino u Direktivi 2005/29/EZ. Prosječan potrošač je potrošač koji je dobro informiran, dovoljno racionalan i pažljiv.[60] To je standard ponašanja u europskom potrošačkom pravu i svu pravnu zaštitu uživa samo takav potrošač. Istovremeno prosječan potrošač je visok pravni standard, koji u obzir ne uzima individualna svojstva pojedinačnog potrošača, dok s druge strane većina potrošača u stvarnosti je ispod tog nivoa.[61] Od prosječnog potrošača se očekuje da čita i razumije predugovorne informacije, sve dok su one pružene na jasan, razumljiv i lako uočljiv način i ne mogu potrošača dovesti u zabludu.[62] Potrošači, koji ne obraćaju pažnju na pružene informacije, ne čitaju ih niti ulažu dovoljno napora

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[56] M. Schaub, *op. cit*., 41.

[57] Slučaj C-122/10 *Konsumentombudsmannen v Ving Sverige AB*, ECLI:EU:C:2011:299, par. 25.

[58] Čl. 7. st. 4. i 5. Direktive 2005/29/EZ o nepoštenoj poslovnoj praksi, te čl. 29. Direktive 2015/2302. Vid. M. Loos, Precontractual information obligations for package travel contracts, *Journal of European Consumer and Market Law*, 3/2016, 127.

[59] J. Luzak, Vulnerable Travellers in the Digital Age, *Journal of European Consumer and Market Law*, 3/2016, 130.

[60] Vid. t. 18. preambule i čl. 4. Direktive 2005/29/EZ o nepoštenoj poslovnoj praksi.

[61] A. Petrović, E. Bikić, *Pravo zaštite potrošača: Obaveza informiranja i pravo na odustanak*, Pravni fakultet Univerziteta u Tuzli, Tuzla, 2018, 113-118.

[62] J. Luzak, *op. cit*., 131-132.

da ih razumiju, prema ovom standardu ne uživaju zaštitu, bez obzira na individualna svojstva koja ih određuju i čine ranjivim (npr. pismenost, dob, zdravstveno stanje, lakovjernost i dr.).

Direktiva 2015/2302 u t. 25. preambule navodi da prilikom pružanja predugovornih informacija trgovac bi trebao uzeti u obzir specifične potrebe putnika, koji su posebno ranjivi zbog svoje dobi ili fizičke slabosti, a koje je trgovac mogao razumno predvidjeti. Osim ovog općeg apela iz preambule, Direktiva 2015/2302 ne sadrži konkretne odredbe, niti nameće konkretne dužnosti trgovcima, izuzev u čl. 5. st. 1. t. a) viii gdje na zahtjev putnika trgovac je obavezan pružiti informaciju je li paket aranžman pogodan za osobe ograničene pokretljivosti. Osim ove informacije, trgovci nisu dužni u obzir uzimati posebna svojstva ni potrebe putnika zbog kojih bi određeni putnici bili posebno ranjivi, pa time i izuzeti iz kategorije prosječnog potrošača.[63] Direktiva 2015/2302 je na pomalo simboličan način ukazala na potrebu dodatne zaštite putnika, koji ulaze u skupinu ranjivih (maloljetnici, starije osobe, invalidne osobe i sl.). Time je priznato da jednak nivo zaštite ne odgovara svima, jer nekima je opravdano potrebno više. Ali, s druge strane, izostala je svaka normativna razrada ove intencije, nisu utvrđeni objektivni kriteriji na osnovu kojih bi se testirala ranjivost, na način da li je npr. obaveza informiranja ispunjena na transparentan način (kako zahtjeva čl. 5. st. 3.) imajući u vidu posebna svojstva i potrebe putnika. Drugim riječima, ostaje na Sudu EU da u buduće razradi ovaj koncept, isto kao što je detaljno razvio koncept prosječnog potrošača.

5.4. Obavezujući karakter predugovornih informacija

Predugovorne informacije imaju obavezujući karakter s obzirom da determiniraju sadržaj ugovora. Iz tog razloga je važno da putnik, prije nego pristupi ugovoru o putovanju u paket aranžmanu (jer se u pravilu radi o standardnom ugovoru), prethodno se upozna sa svim bitnim aspektima ugovora, pa tek onda informirano odluči želi li sklopiti ugovor ili ne. Predugovorne informacije iz čl. 5. st. 1. Direktive 2015/2302 i to: a) *informacije o glavnim karakteristikama usluga putovanja*, c) *ukupnoj cijeni paket aranžmana*, d) *načinu plaćanja cijene*, e) *najmanjem broju putnika potrebnog za realizaciju paketa* i g) *informacije o raskidu ugovora od strane putnika*, *čine sastavni dio ugovora o putovanju u paket aranžmanu i ne smiju se mijenjati osim ako se ugovorne strane o tome izričito drugačije dogovore*. Organizator i, prema potrebi, prodavac, na jasan, razumljiv i lako uočljiv način dostavljaju putniku, prije sklapanja ugovora o putovanju u

[63] *Ibid*., 133-134.

paket aranžmanu, sve izmjene predugovornih informacija (čl. 6. st. 1. Direktive 2015/2302).

U praksi turističkih agencija uobičajeno je postalo da u materijalima za oglašavanje, brošurama navedu samo neke informacije o paket aranžmanu, a za sve preostale informacije putnike upućuju na svoje *web* stranice, što je bilo praktičnije iz više razloga. Brošure kao štampani, i prethodno pripremljeni materijali sadržavale su samo ograničene informacije o bitnim karakteristikama usluga putovanja i indikativnu cijenu paket aranžmana. Zato što bi bilo kakve promjene cijene ili drugih uvjeta pružanja usluga iz paketa značile automatski i potrebu štampanja novih brošura, a time i dodatne troškove za agencije,[64] jer su informacije iz brošure bile obavezujuće za organizatora ili prodavca. Zbog prednosti novih komunikacijskih tehnologija, prvenstveno internet oglašavanja, brošura kao štampani materijal izgubila je značaj sredstva informiranja, a time i normativni značaj koji joj je namijenila Direktiva 90/314/EEZ. Prema Direktivi 90/314/EEZ brošura je morala sadržavati transparentno izraženu cijenu paket aranžmana i listu predugovornih informacija bitnih za ugovor o paket aranžmanu. Informacije iz brošure bile su obavezujuće za organizatora ili prodavca, uz dva izuzetka – ako je potrošač o izmjeni informacija bio jasno obaviješten prije sklapanja ugovora, što je u brošuri moralo biti izričito navedeno, te ako je do izmjena došlo naknadno, nakon što su ugovorne strane o izmjenama postigle dogovor.[65] Prvi izuzetak upravo je i omogućavao lako zaobilaženje obavezujućeg dejstva brošure. Bilo je dovoljno u brošuri navesti da će o svim eventualnim izmjenama uvjeta ugovora putnik biti na vrijeme obaviješten prije njegovog sklapanja, pri tome nije bilo određeno na koji način, to je moglo biti putem *web* stranice, i time brošura i ono što je u njoj bilo navedeno više nije bilo obavezujuće. Osim toga, nije bilo izričito propisano da predugovorne informacije iz brošure čine sastavni dio ugovora o paket aranžmanu.

Direktiva 2015/2302 sada otklanja spomenute nedorečenosti, tako što izričito propisuje da određene predugovorne informacije čine sastavni dio ugovora o putovanju u paket aranžmanu. Naime, ključne informacije, kao što su one o glavnim karakteristikama usluga putovanja ili cijenama, koje se kao dio predugovornih informacija navode u oglasima, na *web* stranicama organizatora ili u brošurama, obavezujuće su za organizatora, osim ako je organizator zadržao pravo izmijeniti te elemente, i osim ako je putnik o tim izmjenama na jasan,

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[64] Directorate General for Internal Policies, Policy Department a: Scientific and Economic Policy, Implementation of the Package Travel Directive, March 2012, 24. Dostupno na: *http://www.europarl.europa.eu/studies*.

[65] Čl. 3. st. 2. Direktive 90/314/EEZ.

razumljiv i lako uočljiv način obaviješten prije sklapanja ugovora o putovanju u paket aranžmanu. Međutim, s obzirom na nove komunikacijske tehnologije koje omogućuju lako ažuriranje, više nema potrebe za utvrđivanjem posebnih pravila za brošure, ali je primjereno osigurati da se putnika obavijesti o izmjenama predugovornih informacija. Pored navedenog, ugovorne strane prilikom sklapanja ugovora o paket aranžmanu uvijek se mogu dogovoriti o izmjeni predugovornih informacija, što znači nije dozvoljeno organizatoru da jednostrano izmijeni objavljene predugovorne informacije i uključi ih u ugovor.[66]

Potpunu novinu u odnosu na Direktivu 90/314/EEZ predstavlja st. 2. čl. 6. Direktive 2015/2302, kojim se uređuje situacija za slučaj da organizator, odnosno prodavac, nisu ispunili sve zahtjeve vezano za predugovorno informiranje o dodatnim naknadama, taksama ili ostalim troškovima, koji ulaze u ukupnu cijenu paket aranžmana, tada putnik neće biti dužan platiti iste. Sa aspekta putnika zasigurno najvažnija informacija jeste informacija o cijeni usluge koju pribavlja, iz tog razloga bitno je da bude upoznat sa svim elementima koji utječu na njezinu visinu (takse, naknade, troškovi). No, ponekad nije moguće unaprijed znati i izračunati sve naknade i troškove koji određuju konačnu cijenu, u toj situaciji putniku je potrebno jasno naznačiti vrste dodatnih troškova koje će možda morati snositi. Ukoliko bi dakle organizator, odnosno prodavac, propustio informirati putnika prije sklapanja ugovora o tim dodatnim elementima koji utječu na cijenu, putnik ih neće biti obavezan ni platiti.

6. Zaključak

Moderniziranje potrošačkog prava u posljednje dvije decenije nije zaobišlo ni turističku djelatnost, čiji dalji razvoj više nije bilo moguće zamisliti bez autonomije putnika da putem interneta odabiru, rezerviraju i sklapaju usluge putovanja u pakete po svojoj mjeri, te da pri tome uživaju maksimalnu zaštitu svojih prava. Usvajanje Direktive 2015/2302 odgovor je na pojavu velikog broja novih turističkih proizvoda i potrebu širenja zaštite potrošača u ovoj oblasti. Mnoga rješenja iz Direktive 90/314/EEZ više nisu odgovarala suvremenom internet dobu, postala su zastarjela i neprimjenjiva, jer je tržište usluga putovanja u odnosu na ono kakvo je bilo 90-tih godina značajno evoluiralo. Direktiva 2015/2302 donosi nova rješenja, prošireno je polje primjene uvođenjem ekstenzivne definicije paket aranžmana ali i, po prvi put, definicije povezani putni aranžman. Pored proširenja opsega primjene, Direktiva (EU) 2015/2302 inovira i druge defincije, od kojih su mnoge postale složenije u pravnom i tehničkom smislu, što će zasigurno otvoriti određena pitanja i nejasnoće kako

[66] T. 26. preambule Direktive 2015/2302.

prilikom transponiranja direktive tako i u primjeni. Direktiva 2015/2302 vrlo opsežno i temeljito uređuje i druga pitanja, kao što je obaveza predugovornog infromiranja, sklapanje i sadržaj ugovora o putovanju u paket aranžmanu, izmjene ugovora prije početka paket aranžmana, izvršenje usluga paket aranžmana, zaštita u slučaju insolventnosti, zahtjevi u vezi sa informiranjem za povezane putne aranžmane, s tim da analiza istih može biti predmet nekih budućih istraživanja, jer uveliko bi premašili zadane okvire ovog rada. Cilj rada bio je upoznati naučnu i stručnu javnost sa usvajanjem nove Direktive 2015/2302, razlozima koji su to potaknuli, te ključnim novinama u personalnom i predmetnom polju primjene. Također, analizirana je obaveza predugovornog informiranja u smislu koje točno informacije, kada i na koji način trebaju biti pružene putnicima, jer ova jednostrana obaveza prepoznata je kao instrument uspostavljanja ugovorne ravnoteže.

Anita Petrović*

Traveller Protection before the Conclusion of the Package Travel Contract

Abstract

Consumer protection is a very dynamic legal area at European Union level as is seen by frequent adoption of new legal solutions tailored to the needs and interests of consumers and the development of the market. Consequently, one of the segments of regulation is the tourism market, ie the travel services market regulated by Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements. Directive 2015/2302 does not use the term consumer, but the traveller, but still remains part of the consumer *acquis*, which is evident from its purpose and protection mechanisms. The aim of this paper is to present to the scientific and professional public the new Directive 2015/2302, the motives for its adoption, and the changes that the Directive brings in the personal and subject area of application. A special chapter is dedicated to the information obligations, where

* PhD, Associate professor at the Faculty of Law, University of Tuzla.

author analyzes pre-contractual information, the principle of transparency, and the binding character of pre-contractual information.

Keywords: Directive 2015/2302, traveller, travel service, package travel, pre-contractual information duty.

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Slavko Đorđević*

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APPLICATION OF RENVOI IN CROSS-BORDER SUCCESSION CASES CONNECTED TO EU MEMBER STATES AND SERBIA – SOME REMARKS FROM EU AND SERBIAN POINT OF VIEW

ABSTRACT

The aim of this paper is to assess the problems of the application of renvoi in cross-border succession cases connected to EU Member States and Serbia, which will be discussed from the perspective of both EU and Serbian private international law. As concerns EU private international law, the study begins with the presentation of the relevant conflict-of-law rules of EU Succession Regulation (ESR), which are primary based on the habitual residence of the deceased and follow the principle of the unity of succession, and continues with the analysis of the renvoi rule of Art. 34 of ESR which provides for the application of the conflict-of-law rules of Serbia as a third State provided Serbian law has been specified as applicable law by the conflict-of-law rules of ESR. When it comes to Serbian private international law, the study analyzes the conflict-of-law rules of Art. 30 of Serbian PIL Act, which are solely based on the nationality of the deceased and follow the principle of the unity of succession, together with the renvoi rule of Art. 6 of Serbian PIL Act, which imposes the application of the conflict-of-law rules of a foreign State (EU Member State) referred to by the rules of Art. 30 of Serbian PIL Act. Finally, in the absence of relevant case law on renvoi issues caused by the divergent conflict-of-law rules of ESR and the Serbian PIL Act, a few hypothetical cases involving such issues,

* Associate Professor, University of Kragujevac Faculty of Law. Paper received: 3rd February 2020. Accepted: 21st February 2020. *slavko@jura.kg.ac.rs*.

created for the purposes of this paper, will be discussed from both the EU and Serbian point of view.

Keywords: EU Succession Regulation; renvoi rule of Art. 34 of EU Succession Regulation; conflict-of-law rules on succession of Serbian PIL Act; renovi rule of Art. 6 of Serbian PIL Act.

1. Introduction

In EU Member States the law applicable to cross-border succession cases is to be determined in accordance with the conflict-of-law rules of Regulation (EU) No 650/2012 of the European Parliament and of the Council of July 4th 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (so called EU Succession Regulation, henceforth: ESR).[1] The general conflict-of-law rule of ESR (Art. 21), which is based on the last habitual residence of the deceased (and supplemented by the escape clause), as well as the most of other conflict-of-law rules contained in ESR, follows the so called principle of the unity of succession, which means that these rules are formulated in such a way that they refer to one single national law as the law applicable to the succession as a whole,[2] irrespective of where the assets of estate are located and whether such law is the law of a Member State or the law of a third State (the principle of universal application).[3] However, Serbia, as a Non-EU (third) State,[4] has its own conflict-of-

[1] *Official Journal of the European Union*, L 201, 27.7.2012, p. 107. Pursuant to Recitals 82 and 83 all Member States, except United Kingdom (which stopped being EU Member State on January 31, 2020), Ireland and Denmark, are bound by Succession Regulation.

[2] See A. Dutta, Vor Artikel 20, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 6-7; D. Solomon, "Die allgemeine Kollisionsnorm (Art. 21, 22 EuErbVO)", in: *Die Europäische Erbrechtsverordnung* (Hrsg. A. Dutta, S. Herrler), C.H.Beck, München, 2014, 20-45; A. Köhler, Teil 1 EuErbVO, in: *Internationales Erbrecht, EuErbVO/IntErbRVG/DurchfVO/Länderberichte* (Hrsg. W. Gierl, A. Köhler, L. Kroiß, H. Wilsch), Baden-Baden, 2020, 18; P. Lagarde, Introduction, in: *EU Regulation on Succession and Wills* (eds U. Bergquist *et. al.*), Otto Schmidt KG, Köln, 2015, para. 21-22; H. Pamboukis, Introductory Remarks on Regulation No 650/2012 of 4 July 2012 on succession, in: *EU Succession Regulation No 650/2012 – A Commentary* (ed. H.P. Pamboukis), Nomiki Bibliothiki – C.H.Beck – Hart – Nomos, Athens, 2017, para. 13 *etc.*

[3] See Art. 20 of ESR.

[4] The term 'third States' contained in ESR embraces not only Non-EU Member States, but also EU Member States which are not bound by ESR (such as Ireland and Denmark; since January 31, 2020 UK is not EU Member State any more). See E. Lein, "Die Erbrechtsverordnung aus Sicht der Drittstaaten", in: *Die Europäische Erbrechtsverordnung* (Hrsg. A. Dutta, S. Herrler), C.H.Beck,

law rules on succession which are contained in Art. 30 of the Act on Resolution of Conflict of Laws with Regulations of Other Countries[5] (so called Serbian PIL Act; henceforth: abbr. SPILA). These rules are based on the nationality of the deceased as a main and sole connecting factor and also follow the principle of the unity of succession.[6] Since the conflict-of-law rules of ESR have nothing in common with those of SPILA, they may come into conflict and make a *renvoi* in cross-border succession cases connected to a Member State and Serbia. From the EU point of view, in cases where the conflict-of-law rules of ESR refer to the law of Serbia as a third State the provisions on *renvoi* of Art. 34 of ESR impose, under certain conditions, that the Member State court seised should apply Serbian conflict-of-law rules, which means *renvoi* can be made in such cases. From the Serbian point of view, the situation is rather similar because the *renovi* is, pursuant to Art. 6 of SPILA, established as a general principle of Serbian private international law:[7] where the conflict-of-law rules of Art. 30 of SPILA refer to the law of a Member State, Serbian courts have to apply the conflict-of-law rules on succession of that Member State, i.e. the conflict-of-law rules of ESR, which may refer back to the Serbian law (as *lex fori*) or forward to the law of another foreign State depending on the circumstances of the case.

Bearing the above in mind, the aim of this paper is to assess the *renvoi* issues in cross-border succession cases connected to EU Member States and Serbia from the point of view of both EU and Serbian private international law. With regard to EU private international law, after the brief presentation of the relevant

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München, 2014, 200-202; A. Dutta, Vorbemerkung zu Artikel 1, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 14-16; A. Köhler, note 2, 30; K. Radoja Knol, Odstupanja od načela jedinstva nasljeđivanja u Uredbi EU-a o nasljeđivanju, *Pravni vijesnik*, Vol. 35, No 2 (2019), 50-51.

[5] *Official Gazette of SFRY*, No. 43/82 and 72/82, *Official Gazette of the Federal Republic of Yugoslavia (FRY)*, No. 46/96 and *Official Gazette of the Republic of Serbia*, No. 46/2006 – other laws.

[6] See more M. Dika, G. Knežević, S. Stojanović, *Komentar Zakona o međunarodnom privatnom i procesnom pravu*, Nomos, Beograd, 1991, 106-107; M. Stanivukovic, P. Đundic, *Međunarodno privatno pravo, posebni deo*, Centar za izdavačku delatnost, Univerzitet u Novom Sadu, Pravni fakultet, Novi Sad, 2008, 196; T. Varadi, B. Bordaš, G. Knežević, V. Pavić, *Međunarodno privatno pravo*, JP "Službeni glasnik", Beograd, 2012, 337; M. Stanivuković, M. Živković, Serbia, in: B. Verschraegen (ed.), *International Encyclopedia of Laws, vol. 2, Private International Law, supp. 21*, Kluwer Law International 2009, 216; S. Djordjevic, Länderbericht Serbien, in: W. Burandt, D. Rojahn (eds.), *Erbrecht*, 2. Aufl., C.H. Beck, München, 2014, 1622; S. Đorđević, Z. Meškić, "The Relations of Bosnia and Herzegovina, Serbia, North Macedonia and Montenegro with EU Member States", in: *European Private International Law and Member State Treaties with Third States - The Case of the European Succession Regulation* (eds A. Dutta, W. Wurmnest), Intersentia, Cambridge – Antwerp – Chicago, 2019, 212.

[7] See S. Đorđević, Z. Meškić, *Međunarodno privatno pravo I, opšti deo*, Kragujevac, 2016, 48.

conflict-of-law rules of ESR, the *renvoi* rule of Art. 34 of ESR will be analyzed. As concerns Serbian private international law, the analysis will primarily cover the conflict-of-law rule on succession of Art. 30(1) of SPILA as well as the *renvoi* rule of Art. 6 of SPILA. Finally, in the absence of relevant case law pertaining to *renvoi* issues caused by the ESR and SPILA conflict-of-law rules, several simplified hypothetical cases will be discussed and analyzed from both the EU and Serbian point of view.

2. EU Succession Regulation (ESR)

2.1. Conflict-of-law rules of ESR

The general conflict-of-law rules on succession are contained in Art. 21 of ESR and they, as mentioned above, strictly follow the principle of the unity of succession.[8] Pursuant to Art. 21(1) of ESR, the law applicable to the succession as a whole is the law of the State in which the deceased was habitual resident at the time of death. Having in mind that the rule of Art. 4 of ESR on general jurisdiction of Member State courts is also based on the last habitual residence of the deceased, it may be concluded that ESR strives to ensure the synchronisation of *ius* and *forum* within EU (so called *Gleichlaufsprinzip*) in most of the succession cases by choosing the same connecting factor for determining both the jurisdiction and the applicable law.[9] However, Art. 21(2) provides for the application of escape clause: where it is clear from all circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State of his/her last habitual residence, the law of that other State shall govern the succession as a whole. It means that escape clause of Art. 21(2) of ESR interrupts the so called *Gleichlaufsprinzip* which is established as a principle by the jurisdiction rule of Art. 4 and conflict-of-law rule of Art. 21(1) of ESR.

The objective conflict-of-laws rules of Art. 21 of ESR may be derogated by the choice of applicable law which is regulated by Art. 22 of ESR. A person may choose as the law applicable to his/her succession as a whole the law of the State of which he is a national at the time of making the choice or at the time of death

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[8] See the commentary of art 21 of ESR in detail A. Dutta, Artikel 21, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 1 *etc*.; D. Solomon, *op. cit*., 21-37; A. Köhler, *op. cit*. note 2, 54 *etc*.

[9] See A. Fuchs, *The new EU Succession Regulation in a nutshell*, ERA Forum 2015, 119-120; F. Eichel, Artikel 4 EuErbVO, in: *JurisPK-BGB*, Band 6 (Hrsg. Herberger, Martinek, Rüßmann, Weth), 7. Aufl., 2014, para. 4-6; A. Köhler, note 2, 18; A. Dutta, Artikel 4, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 2-3; K. Radoja Knol, *op. cit*. note 4, 52.

(Art. 22(1) of ESR), and if the person possesses a nationality of several states, he/she may choose the law of any of them (Art. 22(2) of ESR).[10] Such choice of law shall be made expressly in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition (Art. 22(3)). It is obvious that the rules on choice of law of Art. 22 preserve the principle of unity of the succession, although they may interrupt the desirable synchronization of *forum* and *ius*.[11]

In addition, the ESR contains the special conflict-of-law rules for substantive issues of dispositions upon death and agreements as to succession (Art. 24-25) which are also based on the principle of habitual residence (observed at the time of the conclusion of agreement) corrected by escape clause and provided with the possibility of choosing the applicable law in accordance with Art. 22 of ESR,[12] as well as the conflict-of-laws rules for their formal validity (Art. 27) which are in line with those of Hague Testamentary Convention of 1961. There are also the rules on formal validity of acceptance or waiver of the succession (Art. 28), appointment of an administrator of the estate (Art. 29), restrictions of succession in respect of certain assets (Art. 30), adaptation of rights *in rem* (Art. 31), *commorientes* (Art. 32), estate without claimant (Art. 33), as well as the rules on general part of private international law (*renvoi* – Art. 34, public policy – Art. 35, states with two or more legal systems – Art. 36 and 37). In the following subsection the special attention is to be given to the rule on *renvoi* of Art. 34 which addresses the application of the conflict-of-law rules of a third State.

2.2. Renvoi rule of Art. 34 of ESR

The *renvoi* is introduced by the provisions of Art. 34 of ESR aiming to ensure the international harmony of decisions in cross-border succession cases.[13] These provisions read as follows:

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[10] See the commentary of art 22 of ESR in detail A. Dutta, Artikel 22, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 1 *etc.*; D. Solomon, *op. cit*., 37-45; A. Köhler, note 2, 61 *etc.*

[11] However, in case when the chosen law is the law of a Member State, the parties concerned may prorogate the jurisdiction of the courts of that Member State in accordance with Art. 5 of ESR in order to achieve this synchronization.

[12] See in detail A. Köhler, Agreements as to Succession under the New European Private International Law, *Revija za evropsko pravo*, no. 2-3/2015, 25-38; A. Dutta, Artikel 24 und Artikel 25, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015; A. Bonomi, A. Özturk, "Das Statut der Verfügung von Todes wegen (Art. 24 ff. EuErbVO)", in: *Die Europäische Erbrechtsverordnung* (Hrsg. A. Dutta, S. Herrler), C.H.Beck, München, 2014, 47 *etc.*

[13] See Recital 57 of ESR.

"1. The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in the force in that State, including its rules of private international law in so far as those rules makes a *renvoi*:

(a) to the law of a Member State; or

(b) to the law of another third State which would apply its own law.

2. No *renvoi* shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of the Article 28 and Article 30."

Pursuant to the wording of Art. 34(1), the *renvoi* applies only to the cases in which the conflict-of-law rules of ESR refer to the law of a third State as the law applicable to the succession, where the term 'third State' embraces not only Non-EU States but also EU Member States which are not bound by ESR, such as Denmark and Ireland.[14] Further restrictions of *renvoi* are provided by Art. 34(2), which expressly excludes its application with respect to the laws of third States designated by the escape clause rule of Art. 21(2), choice of law rule of Art. 22, the rules on formal validity of dispositions upon death of Art. 27, the rule on validity as to form of a declaration concerning acceptance and waiver of Art. 28(b) as well as by the provision of Art. 30, which regulates the application of special restricting rules of *lex rei sitae* concerning the succession in respect of certain assets. Having this in mind, it can be concluded that *renvoi* is accepted only in the cases where the law of a third State has been determined as the applicable law by general conflict-of-law rule of Art. 21(1) as well as by other conflict-of-law rules referring to this rule (i.e. Art. 24 – dispositions of property upon death, Art. 25 – agreements as to the succession, Art. 28(a) – validity of acceptance or waiver), which means that the first condition for the application of Art. 34 is that the deceased had habitual residence in a third State.[15] It further means that in such cases the jurisdiction of Member State courts can solely be established in accordance with the rules of subsidiary jurisdiction of Art. 10[16] of

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[14] See E. Lein, *op. cit.*, 200-202; A. Dutta, Vorbemerkung zu Artikel 1, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 14-16; A. Köhler, note 2, 30; K. Radoja Knol, *op. cit.*, 50-51.

[15] See A. Köhler, General Private International Law Institutes in the EU Succession Regulation – Some Remarks, *Anali Pravnog fakulteta Univerziteta u Zenici*, 2015, 175; A. Dutta, Artikel 34 EuErbVO, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para 1, 3, 10; A. Davi, Article 34, in: *The EU Succession Regulation - A Commentary* (eds A-L. Caravaca Calvo, A. Davi, H-P. Mansel), Cambridge University Press, Cambridge, 2016, 475, 478.

[16] Pursuant to Art. 10(1) of ESR, where the habitual residence of the deceased at the time of death is located in a third State, the courts of a Member State in which assets of the estate are located

ESR or with the rule of necessity jurisdiction of Art. 11[17] of ESR.[18] In cases in which the jurisdiction of a Member State court is, pursuant to Art. 4 of ESR, established on the basis of the last habitual residence of the deceased, the Member State court seised can apply *renvoi* only with respect to dispositions upon death and agreement as to succession if the deceased had habitual residence in a third State on the day on which the disposition was made or the agreement was concluded.[19] Therefore, it is obvious that practical relevance of *renvoi* is significantly diminished.[20]

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shall have jurisdiction to rule on the succession as a whole in so far as: (a) the deceased had the nationality of that Member State at the time of death; or, failing that, (b) the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed. If the requirements of Art. 10(1) are not fulfilled, the provision of Art. 10(2) enables the court of the Member State in which assets of estate are located to establish the jurisdiction to rule only on these assets. See the commentary of Art. 10 in detail G. Panopoulos, Article 10, in: *EU Succession Regulation No 650/2012 – A Commentary* (ed. H.P. Pamboukis), Nomiki Bibliothiki – C.H.Beck – Hart – Nomos, Athens, 2017, 145 *etc.*; F.M. Buonaiuti, Article 10, in: *The EU Succession Regulation - A Commentary* (eds A-L. Caravaca Calvo, A. Davi, H-P. Mansel), Cambridge University Press, Cambridge, 2016, 186 *etc.*; A. Dutta, Artikel 10, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para 1 *etc.*; F. Eichel, Artikel 10 EuErbVO, in: *JurisPK-BGB*, Band 6 (Hrsg. Herberger, Martinek, Rüßmann, Weth), 7. Aufl. 2014, para. 1 *etc.* See also S. Đorđević, Some Remarks on Prevention and Resolution of Positive Jurisdiction Conflicts Between Croatian (Member State) and Serbian Courts in Cross-border Succession Cases - From Croatian (EU) and Serbian Point of View, *Pravni vjesnik*, No. 2, 2020 (to be published).

[17] Pursuant to Art. 11 of ESR, if the last habitual residence of the deceased was in a third State and the jurisdiction of a Member State court cannot be established under any other jurisdiction rule of ESR, the courts of a Member State may, on an exceptional basis, have necessity jurisdiction to rule on the succession, provided the case has sufficient connection with the Member State court seised and the proceedings cannot be reasonably brought or conducted or would be impossible in a third State to which the case is closely connected. See the commentary of Art. 11 in detail G. Panopoulos, Article 11, in: *EU Succession Regulation No 650/2012 – A Commentary* (ed. H.P. Pamboukis), Nomiki Bibliothiki – C.H.Beck – Hart – Nomos, Athens, 2017, 154 *etc.*; F. Eichel, Artikel 11 EuErbVO, in: *JurisPK-BGB*, Band 6 (Hrsg. Herberger, Martinek, Rüßmann, Weth), 7. Aufl. 2014, para. 1 *etc.*; A. Dutta, Artikel 11, in: *MüKoBGB, EuErbVO*, Band 10, 6. Aufl., C.H.Beck, München, 2015, para. 1 *etc.*; F.M. Buonaiuti, Article 11, in: *The EU Succession Regulation - A Commentary* (eds A-L. Caravaca Calvo, A. Davi, H-P. Mansel), Cambridge University Press, Cambridge, 2016, 199 *etc.*

[18] A. Köhler, note 15, 175; A. Davi, note 15, 476-477; Ch. Tsouka, Article 34, in: *EU Succession Regulation No 650/2012 – A Commentary* (ed. H.P. Pamboukis), Nomiki Bibliothiki – C.H.Beck – Hart – Nomos, Athens, 2017, para. 21.

[19] A. Köhler, note 2, 94.

[20] So A. Köhler, note 15, 175; A. Davi, note 15, 475-476.

Further conditions for the acceptance of *renvoi* are set out in Art. 34(1) lit. (a) and (b) of ESR. Firstly, the conflict-of-law rules of a third State specified by the provisions of ESR shall be applied if they refer to the law of a Member State (Art. 34(1) lit. (a)). Such reference means not only the reference to the law of the Member State court seised (referring back to the *lex fori*), but also the reference to the law of another Member State (referring forward to the law of another Member State). In both of these cases, the substantive law of the Member State referred to shall be applied. Secondly, the conflict-of-law rules of the law of a third State specified by ESR shall also be applied if they refer to the law of another third State, which would apply its own law (Art. 34(1) lit. (b)). In such cases the substantive law of another (second) third State is to be applied, if its conflict-of-law rules accept the reference of the conflict-of-law rules of a (first) third State specified by ESR. Strictly following the wording of Art. 34(1) of ESR, in all other situations the application of the conflict-of-law rules of a third State (*i.e. renvoi*) should be excluded, which means the reference of conflict-of-law rules of ESR is to be of substantive nature.

However, according to some opinions expressed in German literature, the reference of the conflict-of-law rule of the second third State should be followed in two specific situations, although it is contrary to the wording of Art. 34(1) lit. (b) of ESR.[21] The first one is when the conflict-of-law rule of the second third State refers to the law of a Member State, in which case the law of the Member State referred to shall be applied. The authors who support this view argue that this constellation is equivalent to that covered by Art. 34(1) lit. (a) of ESR, which enables more frequent application of the law of a Member State.[22] The second situation covers the cases where the conflict-of-law rule of the second third State refers to the law of the first third State. If this reference is of substantive nature, the substantive law of the first third State is to be applied. However, if the conflict-of-law rule of the second third State refers to the conflict-of-law rules of the first third State, the latter would refer back to the law of the second third State, whose substantive succession law is to be finally applied to the case.[23]

As concerns the cross-border succession cases involving a Member State and Serbia, the provisions on *renvoi* of Art. 34 of ESR come into play if the conflict-of-law rule of Art. 21(1) of ESR (as well as other conflict-of-law rules of ESR referring to Art. 21(1)) refers to the law of Serbia, which will be always the case where the deceased had last habitual residence in Serbia.

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[21] See A. Köhler, note 15, 178; A. Dutta, note 15, para. 5.

[22] *Ibid*.

[23] A. Köhler, note 15, 178-179; A. Köhler, note 2, 98.

3. Conflict-of-law rules on succession and *renvoi* rule in Serbian private international law

3.1. Conflict-of-law rules

The general conflict-of-law rule on succession is contained in Art. 30(1) of SPILA and is (as opposed to Art. 21 of ESR) based on the nationality principle: the law applicable to the succession is the law of the State of which the deceased was a national at the time of his/her death and it governs all substantive issues of intestate and testamentary succession (including the agreements as to the succession, although these are null and void in Serbian inheritance law).[24] Serbian authors unanimously share the opinion that this conflict-of-law rule follows the principle of unity of succession, *i.e. lex successionis* applies to the succession as a whole irrespective of whether the movable or immovable assets of the estate are located in Serbia or in a foreign State.[25] However, having in mind that the Serbian courts, pursuant to the jurisdiction rules of Art. 71-73 of SPILA, rarely have the jurisdiction to rule on the succession as a whole when one or more (especially immovable) assets of the estate are located in a foreign State, it may be noticed that the jurisdiction will be often split between Serbian and foreign courts, which will separately determine *lex successionis* with regard to respective assets of the estate.[26] This means that the principle of the unity of succession cannot be truly achieved in such cases.[27]

In addition, Art. 30(2) of SPILA contains the special conflict-of-law rule on the capacity of a person to make a will, which designates that the law of the State whose nationality the testator possessed at the time of making the will is applicable to this issue. With respect to the formal validity of a will, the applicable law is to be determined by the conflict-of-law rules of Hague

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[24] See T. Varadi *et al*., *op. cit*., 337, 341; S. Đorđević, note 16; M. Dika, G. Knežević, S. Stojanović, *op. cit*., 101-103, 105-107; M. Stanivukovic, P. Đundic, *op. cit*., 196, 198; S. Đorđević, Z. Meškić, note 6, 212.

[25] See *ibid*.; M. Stanivuković, M. Živković, note 6, 216.

[26] S. Đorđević, note 16; about the problems of splitting the jurisdiction in succession matters see S. Đorđević, "O problemima nekoordiniranog raspravljanja zaostavstine jednog lica u razlicitim pravnim porecima", in: *Pravni sistem Srbije i standardi Evropske unije i Saveta Evrope* (ur. S. Bejatović), Pravni fakultet u Kragujevcu, Kragujevac, 2010, 380-398.

[27] See S. Đorđević, Z. Meškić, note 6, 213-214. The principle of unity of succession can be certainly carried out if all immovable and movable assets of the estate are located in Serbia, in which case Serbian courts may have jurisdiction to rule on the whole estate and, pursuant to art 30(1) of Serbian PIL Act, apply a single national law to the succession as a whole (S. Đorđević, note 16).

Testamentary Disposition Convention of 1961, which are implemented in Article 31 of SPILA.[28]

It should be stressed that testator cannot choose the law applicable to the succession in accordance with SPILA. However, the so called 'indirect' choice of law, made in accordance with the private international law of a foreign State referred to by Art. 30(1) of SPILA, could be effective. Namely, if the law of the State of which testator was a national at the time of death contains the rule that empowers the testator to choose applicable law to succession and he/she made such choice, the chosen law shall be applied by virtue of *renvoi* of Art. 6(1) PIL Act.[29] This could happen in the cases where Art. 30(1) of SPILA refers to the law of a Member State bound by ESR, provided that a testator has chosen the applicable law in accordance with Art. 22 of ESR.

3.2. The rule on renvoi of Art. 6 of SPILA

In Serbian private international law the institute of *renvoi* is governed by Art. 6 of SPILA which reads as follows:

"If according to the provisions of this Act the law of a foreign State should be applied, its rules on the choice of applicable law shall be taken into consideration.

If the rules of a foreign State on the choice of the applicable law refer back to the law of Serbia, the law of Serbia shall be applied, without taking into consideration the rules on the choice of the applicable law."

Pursuant to Art. 6(1) of SPILA, if conflict-of-law rule of SPILA refers to the law of a foreign State, the conflict-of-law-rules of that foreign State have to be taken into

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[28] The provision of Art. 31 of SPILA repeats the rules of Arts. 1(1) and 2(1) of the Hague Convention of 1961 and introduces one more alternative conflict-of-law rule (application of lex fori) in accordance with the principle of in favorem testamenti contained in Art. 3 of the Hague Convention (see Đorđević, Meškić, note 6, 213 fn. 5; M. Stanivuković, M. Živković, note 6, 219; M. Dika, G. Knežević, S. Stojanović, *op. cit*., 108–112). Considering the scope of the application of Hague Convention as well as the wording of Art. 31 of SPILA, these rules only apply to wills and joint wills (which are autonomously defined in Art. 4 of Hague Convention), but not to other dispositions of property upon death, such as agreements as to succession. However, their application may be extended to other dispositions of property upon death by way of analogy in accordance with Art 2 of SPILA, which regulates filling the gaps in SPILA (S. Đorđević, *Utvrđivanje i popunjavanje pravnih praznina u Zakonu o rešavanju sukoba zakona sa propisima drugih zemalja*, Kragujevac, 2020, 25-26, 45-46).

[29] See S. Đorđević, Länderbericht Serbien, in: *Internationales Erbrecht, EuErbVO/IntErbRVG/DurchfVO/Länderberichte* (Hrsg. W. Gierl, A. Köhler, L. Kroiß, H. Wilsch), Baden-Baden, 2020, 814.

account. The prevailing opinion in Serbian literature,[30] which is also confirmed in Serbian judicial practice,[31] finds that 'taking into account the conflict-of-law rules of a foreign State' is to be interpreted as an obligation for Serbian courts to apply the conflict-of-law rules of a foreign State referred to by the provisions of SPILA, which means that *renvoi* has been established as a general principle of Serbian private international law (although some exemptions from this principle have been recognized; *e.g. renvoi* is excluded with respect to party autonomy, the conflict-of-law rules that contain alternative and cumulative connecting factors as well as the conflict-of-law rule containing the closest connection as a connecting factor).[32] It also means that Serbian private international law adopts both the reference back to the law of Serbia and the reference forward to the law of another (second, third *etc.*) foreign State.

If the conflict-of-law rules of the law of a foreign State refer back to the law of Serbia, the provision of Art. 6(2) of SPILA clearly imposes the direct application of Serbian substantive law. In addition, Serbian substantive law is to be directly applied not only where the law of a foreign State referred to by SPILA refers back to the law of Serbia, but also where such reference (*i.e.* to the law of Serbia) comes from conflict-of-law rule of any foreign State which appears in the chain of further reference (*i.e.* from the conflict-of-law rule of the second foreign State referred to by the conflict-of-law rule of the first foreign State designated by the rules of SPILA, the conflict-of-law rule of the third foreign State referred to by the conflict-of-law rule of the second foreign State *etc.*).[33]

However, with respect to the reference forward, *i.e.* where the first foreign State designated by the conflict-of-law rule of SPILA refers forward to the law of a second foreign State, which also refers forward to the law of a third foreign State (the reference forward may be hypothetically unlimited) or refers back to the law of a first foreign State, no solution can be found in the provisions of Art. 6 of SPILA. Serbian authors have proposed three different solutions for these

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[30] See and compare S. Đorđević, Z. Meškić, note 7, 48-49; T. Varadi *et al.*, *op. cit.*, 146; M. Stanivuković, M. Živković, *Međunarodno privatno pravo, opšti deo*, Beograd, 2008, 279-281; M. Dika, G. Knežević, S. Stojanović, *op. cit.*, 29.

[31] See Odgovori na pitanja privrednih sudova koji su utvrđeni na sednici Odeljenja za privredne sporove Privrednog apelacionog suda održanoj dana 26.11.2014. i 27.11.2014. godine i na sednici Odeljenja za privredne prestupe i upravno-računske sporove održanoj dana 3.12.2014. godine - Sudska praksa privrednih sudova - Bilten br. 4/2014 (henceforth: Odgovori).

[32] See and compare S. Đorđević, Z. Meškić, note 7, 52-55; M. Stanivuković, M. Živković, note 30, 281; Odgovori, Bilten br. 4/2014.

[33] M. Dika, G. Knežević, S. Stojanović, *op. cit.*, 28; S. Đorđević, Z. Meškić, note 7, 49; M. Stanivuković, M. Živković, note 30, 280-281.

situations. According to the first solution, the so called 'single *renvoi*' should apply in order to end this chain of referrals. It means that in any case in which the conflict-of-law rule of a foreign State referred to by the rules of SPILA refers forward to the law of a second foreign State the substantive law of that second foreign State is to be applied.[34] The second solution introduces the so called 'foreign court theory' in Serbian private international law which is, supposedly, imposed by Art. 9 of SPILA. Namely, the conflict-of-law rules of the law of the first foreign State, including its rule on *renvoi*, have to be, pursuant to Art. 9 of SPILA, applied according to their own sense and terms, *i.e.* in the same manner as they would be applied by the courts of that foreign State.[35] It means that a Serbian court has to put itself in 'the shoes' of the court of a first foreign State and to end the chain of referring forward in accordance with the conflict-of-law rules and the rule on *renvoi* of that foreign State.[36] Finally, according to the third solution, the chain of referring forward is to be ended when the conflict-of-law rule of any foreign State in this chain accepts the reference or refers back to the law of another foreign State which has appeared prior in the chain (*i.e.* the law of a foreign State that is referred to for the second time in the chain of referrals).[37] In our opinion, the third solution should be accepted as a rule because it is in line with the principle of international harmony of decisions. Namely, if the third foreign State refers back to the second foreign State in the chain whose substantive law, pursuant to this solution, is to be applied, it is obvious that the conflict-of-law rules of both the first foreign State and the third foreign State in the chain refer to the application of the law of the second foreign State, which means they agree about its application (*i.e.* between them international harmony of decisions is achieved).[38] Also, where the third foreign State accepts the reference from the second foreign State in the chain, in which case the substantive law of the third foreign State is to be applied, the international harmony of decisions is achieved between these two foreign States because they both agree on the application of substantive law of the third foreign State.

As concerns the cross-border succession cases connected to Serbia and EU Member State, the provisions on *renvoi* of Art. 6 of SPILA come into play if the conflict-of-law rule of Art. 30(1) of SPILA refers to the law of a Member State

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[34] See T. Varadi, *Međunarodno privatno pravo*, Novi Sad, 1990, 77-78.

[35] M. Dika, G. Knežević, S. Stojanović, *op. cit*., 29; T. Varadi *et al*., *op. cit*., 149.

[36] *Ibid*.

[37] See S. Đorđević, Z. Meškić, note 7, 49, and compare with an opinion expressed by M. Stanivuković, M. Živković, note 30, 281.

[38] S. Đorđević, Z. Meškić, note 7, 49-50.

bound by ESR, which is always the case where the deceased was a national of a Member State at the time of death.

4. Analysis of *renvoi* issues in hypothetical succession cases connected to EU Member States and Serbia

Considering that the *renvoi* issues may arise in a number of succession cases connected to EU Member States and Serbia (due to divergent conflict-of-law rules on succession of ESR and SPILA) and that the relevant case law on such cases is still missing, we have created two groups of hypothetical cases of that kind, which will be discussed in this section. The first group of cases will be analyzed from the EU and the second group of cases from Serbian point of view.

4.1. Analysis of hypothetical cases from EU point of view (application of Art. 34 of ESR)

From the EU point of view, the rule on *renvoi* of Art 34 of ESR will be applied in the cases in which Art. 21(1) of ESR refers to the law of Serbia as the law of the third State, whose conflict-of-law rule on succession of Art. 30(1) of SPILA has to be applied (under conditions set out in Art. 34(1) of ESR) by a Member State court seised. Three hypothetical cases of such kind are going to be briefly analyzed.

The facts of the case, which will be first discussed, are as follows: the deceased, a Bulgarian national who had last habitual residence in Serbia, possessed immovable and movable assets in both Bulgaria and Serbia. The law of which State shall the Bulgarian court as a Member State court seised to rule on the immovable and movable assets located in Bulgaria, as well as on movable assets located in Serbia (pursuant to Art. 10(1) lit a of ESR)[39] apply to the succession? In this case the Bulgarian (Member State) court seised determines the law applicable to succession in accordance with the conflict-of-law rule of Art. 21(1) of ESR which refers to the law of Serbia as the law of the deceased's last habitual residence. Considering that Serbia is a third State, the Bulgarian court should examine whether one of the further conditions for accepting *renvoi*, which are set out in the provisions Art. 34(1) lit. (a) and lit. (b) of ESR, are fulfilled. Pursuant to

[39] The Bulgarian court can, under Art. 10(1) lit a of ESR, have jurisdiction to rule on succession as a whole, because the deceased had the nationality of Bulgaria (as a Member State) at the time of death. However, having in mind that Serbian courts have exclusive jurisdiction to rule on succession of immovable assets located in Serbia, the Bulgarian court seised will probably, in accordance with Art. 12 of ESR, decide not to rule on these assets, which means it will limit its succession proceedings to the immovable and movable assets located in Bulgaria as well as to movable assets located in Serbia (about Art. 12 of ESR see more S. Đorđević, note 16).

these provisions (as has been explained above), the *renvoi* is to be accepted if the conflict-of-law rule of the law of Serbia refers (either back or forward) to the law of a Member State (Art. 34(1) lit. (a)) or to the law of another third State which would apply its own law (Art. 34(1) lit. (b)). Since Serbian conflict-of-law rule on succession (Art. 30(1) of SPILA) provides for the application of the law of a State whose nationality the deceased possessed at the time of death, it refers back to the law of Bulgaria as the law of a Member State which applies to the case.

The next case is based on the following facts: the deceased, a Serbian national who had last habitual residence in Serbia, possessed immovable and movable assets in both Bulgaria and Serbia. The question is the same: Which law shall the Bulgarian court seised to rule on the assets located in Bulgaria (pursuant to Art. 10(2) of ESR)[40] apply to the succession of these assets? In this case Art. 21(1) of ESR also refers to the Serbian law whose conflict-of-law rule on succession of Art. 30(1) of SPILA refers neither to the law of a Member State nor to the law of another third State which would apply its own law, but rather accepts the reference from Art. 21(1) of ESR. Since Art. 30(1) of SPILA makes no *renvoi* to the laws specified by Art 34(1) of ESR, it means that the reference of Art. 21(1) of ESR to the Serbian law is of substantive nature – Serbian substantive succession law applies to the case.

Finally, the last case to be discussed in this subsection consists of the following facts: the deceased, a national of Bosnia and Herzegovina (henceforth: BH) who had last habitual residence in Serbia, possessed immovable and movable assets in Croatia and Serbia. Which law shall the Croatian court as a Member State court seised to rule on succession of the assets located in Croatia (in accordance with Art. 10(2) of ESR) apply to the succession? In this case the Croatian court applies Art. 21(1) of ESR, which refers to the law of Serbia, whose conflict-of-law rule of Art. 30(1) of SPILA refers forward to the law of BH, whose nationality the deceased possessed at the time on death. Since the conflict-of-law rule on succession of BH Private International Law Act also provides for the application of the deceased's last *lex nationalis*,[41] it is not hard to conclude that BH as the second third State in the chain accepts the reference from Serbian law, *i.e.* it 'declares' the application of its own law, which means that the condition for

[40] In this case the jurisdiction of Bulgarian court can only be established in accordance with the provision of Art. 10(2) of ESR and covers only the assets located in Bulgaria.

[41] BH PIL Act is the same as SPILA (Serbian PIL Act): Act on Resolution of Conflict of Laws with Regulations of Other Countries, *Official Gazette of SFRY*, Nos. 43/82 and 72/82 and *Official Gazette of Republic of Bosnia and Herzegovina*, No. 2/1992. The general conflict-of-law rule on succession is contained in Art. 30(1) of BH PIL Act and it is the same as that of SPILA.

application of Art 34(1) lit. (b) of ESR is fulfilled. Therefore, in this case the substantive law of BH is to be applied pursuant to Art. 34(1) lit. (b) of ESR.

4.2. Analysis of hypothetical cases from Serbian point of view (application of Art. 6 of SPILA)

From the Serbian point of view, the *renvoi* issues occur in the cases in which Art. 30(1) of SPILA refers to the law of a Member State bound by ESR whose conflict-of-law rules have to be applied by Serbian courts (pursuant to Art. 6 of SPILA). In order to explain how the *renvoi* rule of Art. 6 SPILA 'functions' in such cases, we created the hypothetical case with several variants which reads as follows:

The deceased of Croatian nationality died intestate and left movable and immovable assets located in Serbia. Which law shall the Serbian court, which is pursuant to Art. 72 of SPILA[42] seised to rule on the mentioned assets, apply to the succession if the deceased had last habitual residence in: (a) Serbia; (b) Croatia; (c) Austria; or d) Bosnia and Herzegovina?

In this case the Serbian court determines the law applicable to succession by applying the conflict-of-law rule of Art. 30(1) of SPILA, which refers to the law of Croatia as a Member State law. Considering that Art. 6(1) of SPILA establishes *renvoi* as a general principle of Serbian private international law, the reference to the Croatian law includes its conflict-of-law rules on succession, which are contained in ESR. It means the Serbian court has to apply the conflict-of-law rule of Art. 21(1) of ESR, which refers to the law of the deceased's last habitual residence. In the variant (a) of the case, the deceased had last habitual residence in Serbia, which means that Art. 21(1) of ESR refers back to the law of Serbia, whose substantive law, pursuant to Art. 6(2) of SPILA, is to be applied to the succession. In the variant (b) of the case, the deceased had last habitual residence in Croatia, which means Art. 21(1) of ESR accepts the reference from Art. 30(1) of SPILA and the Croatian substantive law applies to the succession.

In the variant (c) of the case, Art. 21(1) of ESR refers forward to the law of Austria as the law of another Member State. With regard to the reference forward, we support (as stated above) the interpretation of Art 6(1) of SPILA, which claims that the chain of referring forward is 'broken' when the conflict-of-law rule of the second or any further foreign State in this chain accepts the reference or refers

[42] Pursuant to Art. 72(1) of SPILA, Serbian courts have exclusive jurisdiction to rule on immovable assets located in Serbia which belonged to the deceased who was a foreign national. As concerns movable assets that belonged to the deceased of foreign nationality, Serbian courts have, pursuant to Art. 72(2) of SPILA, elective jurisdiction to rule on such assets (see S. Đorđević, Z. Meškić, note 6, 213-214; S. Đorđević, note 16).

back to the law of a foreign State which has prior appeared in the chain (for the second time in the chain of referrals). It means that Serbian courts should follow this autonomous solution for 'breaking' the chain of referrals and ignore the solution of Art. 34(1) of ESR. Therefore, since the deceased had last habitual residence in Austria (another Member State), Art. 21(1) of ESR refers to the law of Austria. Although the referral to the law of another Member State is, from the point of view of ESR, of substantive nature (*i.e.* does not include *renvoi*), the Serbian court will not follow that directly, but will rather apply the conflict-of-law rule of Art. 21(1) of ESR again (which means that the Austrian law accepts the referral from the Croatian law) and come to the same result: the substantive law of Austria shall be applied to the succession as the law of the last habitual residence of the deceased.

Finally, in the variant (d) of the case, in which the deceased had last habitual residence in Bosnia and Herzegovina, Art. 21(1) of ESR refers to the law of BH, whose conflict-of-law rules, following the accepted interpretation of Art. 6(1) of SPILA, apply to the case. Since the Private International Law Act of BH contains the conflict-of-law rule on succession which is the same as that of Art. 30(1) of SPILA (the application of the last *lex nationalis* of the deceased), BH law refers back to the Croatian law, which appears for the second time in the chain of referrals, which means Croatian substantive succession law applies to the case.

5. Concluding remarks

From EU point of view, the foregoing analysis has shown that the provisions on *renvoi* of Art. 34 of ESR are reliable enough to resolve the *renvoi* issues arising in the succession cases connected to EU Member States and Serbia and to provide for predictability. As concerns the Serbian point of view, the difficulties relating to *renvoi* arise because the provisions on *renvoi* of Art. 6 of SPILA contain no solution for the situations in which the conflict-of-law rules of the foreign State referred to by conflict-of law rules of SPILA refer forward to another foreign State. In order to overcome such difficulties we supported the solution (one of the several proposed by Serbian authors) which suggests that the chain of referring forward is to be ended when the conflict-of-law rule of any foreign State in this chain accepts the reference or refers back to the law of another foreign State which has appeared prior in the chain. Following this solution in the analyzed hypothetical succession cases connected to EU Member States and Serbia all *renvoi* issues have been successfully resolved.