

# ELTE LAW JOURNAL

2018/1

ELTE LJ



**ELTE**  **LAW**  
EÖTVÖS LORÁND UNIVERSITY

# ELTE LAW JOURNAL

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2018/1  
ELTE LJ

Budapest, 2018



ELTE Law Journal, published twice a year under the auspices of ELTE Faculty of Law since 2013

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Recommended abbreviation for citations: ELTE LJ

**ISSN 2064 4965**

**Editorial work** • Eötvös University Press

18 Királyi Pál Street, Budapest, H-1053, Hungary



**EÖTVÖS  
UNIVERSITY  
PRESS**

[www.eotvoskiado.hu](http://www.eotvoskiado.hu)



Executive Publisher: András Hunyady, Eötvös University Press

Layout: Tibor Anders

Cover: Ildikó Csele Kmotrik

Printed by: Multiszolg Bt.

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# Contents

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## SYMPOSIUM

*Alexander Balthasar*

Foreword to the ELI-SIG Papers.....7

*Alexander Balthasar*

Alternative Dispute Resolution in Administrative Law: A Major Step Forward to Enhance Citizens' Satisfaction or Rather a Trojan Horse for the Rule of Law? .....9

*Marc Clement*

Breach of the Right to Good Administration: So What? .....19

*Anna Simonati*

Administrative Transparency Through Access to Documents and Data in Italy: Lights and Shadows of a Principle in Transformation .....29

*Bruno Reynaud de Sousa*

Migration, the Sahel and the Mediterranean Basin: Which Scenario for the EU27 by 2025? .....47

## ARTICLES

*Sára Fekete*

Preserving Intra-Corporate Mobility Between the UK and the EU After Brexit .....73

*Biljana Grbić*

The Liberalisation of the Serbian Electricity and Gas Markets .....87

*Tomáš Mach*

Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims .....105

*Emőd Veress*

Some Remarks on Shareholders' Agreements in the Context of Hungarian Law .....123

## LECTURES

*Klaus Rennert*

Administration, Administrative Jurisdiction and Separation of Powers .....147



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# Symposium

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## Foreword to the ELI-SIG Papers

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In June 2017 and in June 2018, the then newly formed ‘Administrative Law Study and Interest Group’ of the European Law Institute (ELI) met in Budapest, at Andrásy University, for two conferences. The main idea was – as it is in general the remit of ELI – to meet colleagues from all parts of Europe (several local universities, AUB, ELTE and CEU, included) and to discuss in such an inspiring climate matters of common interest. Whereas the first conference had a somewhat general focus (starting with ‘generalialia and fundamentalialia’ and then tackling such a classical topic as ‘the right to good administration’ as well as various fields of ‘administration in action’, ranging from mutual recognition to the impact of independent agencies, from access to documents to environmental law and to such a burning issue as migration, the second one centred on the Commission’s White Paper on the Future of Europe [COM(2017) 2025 of 1 March 2017] and its possible impact on administrative law.

Moreover, the conferences gave the opportunity to visit the Kúria (2017) and the Hungarian Constitutional Court (2018) and thus to make direct contact with the presidents of these courts, Péter Darák and Tamás Sulyok, respectively. On the other hand, we also had, as a participant in the second conference, a member of the European Political Strategy Center of the European Commission and thus actually first-hand information on the most recent ideas and developments in our field.

Whereas it is, therefore, quite true that the principal purpose of these two conferences was to build bridges and to exchange thoughts, I am very grateful that vice dean Pál Sonnevend of the ELTE Law Faculty – in his capacity as co-organiser of these conferences – offered the additional opportunity to publish a fully-fledged written version of the presentation in this journal. You will therefore find four contributions assembled in this issue – some more are still in the pipeline.

I do hope that you will enjoy reading and I would be glad if you could be motivated by this to join ELI in general and our group in particular – our Europe needs scientific cooperation and enhanced mutual understanding, perhaps today even more than in former decades.

*Alexander Balthasar*

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# Alternative Dispute Resolution in Administrative Law: A Major Step Forward to Enhance Citizens' Satisfaction or Rather a Trojan Horse for the Rule of Law?\*

## I 'Alternative to What' and Why Do We Need It at All?

The term 'ADR' seems to have been coined, some decades ago, in the context of *US private law court proceedings*;<sup>1</sup> hence, it originally reflects the *dissatisfaction* of US society of that time (judges included) with *this type* of proceedings;<sup>2</sup> however, the concept also spread over to other parts of the world and also to other fields of law,<sup>3</sup> such as *administrative law*, the

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\*\* This paper was originally presented in English at a conference held at the Masaryk University Brno in April 2016 and subsequently published in Czech (Alternativn  řešení spor  ve spr vn m pr vu – v znamn  krok vpřed pro v tší spokojenost občan , nebo trojsk  k n pro pr vní st t?) in Soňa Skulov , Luk š Pot sil et al. (eds), *Prostředky ochrany subjektivn ch pr v ve veřejn  správě – jejich syst m a efektivnost* (Beck 2017), 419 ff.

<sup>1</sup> Cf Carrie Menkel-Meadow, Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal' in Regulating Dispute Resolution, in Felix Steffek, Hannes Unberath, Hazel Genn, Reinhard Greger, Carrie Menkel-Meadow (eds), *ADR and Access to Justice at the Crossroads* (Hart 2013, Oxford), 419ff, 422; Elena Nosyreva, 'Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation' Annual survey of International & Comparative Law 2001, 7ff, 8f. See now the definition given in Sec 651 (a) of the US Code as amended by the Alternative Dispute Resolution Act of 1998: '... an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration...'

<sup>2</sup> See Menkel-Meadow (n 1) 422. Nevertheless, the essence of ADR seems to be deeply rooted not only in US history, but already in mediaeval English common law tradition, see Michael McManus, Brianna Silverstein, 'Brief History of Alternative Dispute Resolution in the United States' (2011) 1 (3) *Cadmus* 100-105; cf also Nosyreva (n 1) 11, cf, however, also infra n 10 for the impact of *Canon Law* on the development of arbitration in England.

<sup>3</sup> With regard to *penal law* it seems that one has to distinguish between  
(i) the classical 'plea bargaining' which developed already in the early 19<sup>th</sup> century in the US and has gained nowadays overwhelming importance there (cf. George Fisher, *Plea Bargaining's Triumph. A History of Plea Bargaining in America* (SUP 2003, Stanford), but also Paul Craig Roberts, 'Die nackte Haut zum Kadi tragen' <<https://www.freitag.de/autoren/der-freitag/die-nackte-haut-zum-kadi-tragen>> accessed 2 April 2019.  
(ii) forms of genuine 'ADR' like the 'Tausgleich' (paragraph 204 of the Austrian Penal Law Procedures Act [StPO]) which developed much later than (i).

topic on which we now focus.<sup>4</sup> *This finding, however, far from being obvious, causes bewilderment in two respects:*

(i) Isn't 'access to court' one of the essential features of the 'rule of law', and, therefore, enshrined in all our high-ranking human/fundamental rights documents – at the global and continental level (Article 8 UDHR; Article 14 ICCPR; Article 6 ECHR; Article 47 EUCFR)?

*So: if there are any shortcomings in existing procedural law or practice – why not thinking of amending the shortcomings within the court's procedure rather than seeking an external alternative?*<sup>5</sup>

(ii) Even seeking for 'alternatives' to court proceedings could be justified with regard to US private law court proceedings, is there sufficient commonality to seek 'alternatives' with regard to *European administrative law* proceedings as well?

What is more, the term of 'ADR in *Administrative Law*' seems to be *ambiguous*:

When looking into the US Administrative Dispute Resolutions Act of 1996,<sup>6</sup> we see that the means mentioned there ('any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombudsman, or any combination thereof')<sup>7</sup> are meant already as an *alternative to 'administrative proceedings'* which 'have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes'.<sup>8</sup>

Apparently, however, 'ADR' may also be understood in a narrower sense, focusing not primarily on 'alternatives' to the proceedings led by an administrative authority, but rather *to*

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<sup>4</sup> Cf the Recommendation of the Committee of Ministers of the *Council of Europe* Rec (2001)9 on alternatives to litigation between administrative authorities and private parties and, apart from Nosyreva (n 1), Aldo Sandulli, 'L'arbitrato nel codice del processo amministrativo' (2013) 2 *Giornale di diritto amministrativo* and the contributions assembled in Dacian Dragos, Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014), *parte pro toto*, the following literature: Polonca Kovač, 'Mediation and Settlement in Administrative Matters in Slovenia' (2010) 10 (3) *Hrvatska Javna Uprava* 743ff; Salvija Kavalnè, 'Mediation in Disputes between Public Authorities and Private Parties: Comparative Aspects' (2011) 18 (1) *Jurisprudencija* 251ff; Gatis Litvins, 'Alternative Methods of Judicial Protection and Dispute Resolution in Administrative Law' (2013) *spec edn*, 1 *European Scientific Journal* 371ff; Gregory Garde, 'Alternative Dispute Resolutions – Can it work for Administrative Law' (of 26. 2. 2014, <<http://www.austlii.edu.au/au/journals/VicJSchol/2014/2.pdf>> accessed 2 April 2019). Just for clarification: for the purpose of this presentation, neither Investor-State Disputes nor relationships between public bodies are considered to be covered by the term 'administrative law' and are therefore left aside.

<sup>5</sup> One answer could, of course, be that communication between human rights lawyers and practitioners of procedural law is suboptimal, to the extent that, in the view of the judicial review remains a *dream* whereas the latter have come to consider it rather as a nightmare, a *trauma*...

<sup>6</sup> Pub. Law 104–320; below: ADRA.

<sup>7</sup> § 571 (3) of the US Code, as amended by the ADRA of 1996. Note the slight differences between this definition and that applied for private law procedures (cf *supra* n 1).

<sup>8</sup> Section 2 (2) of the ADRA of 1996.

*the proceedings of an administrative law court* and, thus, also considering ‘administrative appeals’, besides ‘mediation’ and ‘ombudsman’, as part of ‘ADR’.<sup>9</sup>

In order to assess the need for ‘ADR’ in ‘Administrative Law’ properly, covering *both* meanings we have, therefore,

(i) to look first at the role *courts* play in *private* law, taking also into account divergences between Anglo-Saxon and European (continental) tradition;

(ii) it is only afterwards that we are able to assess whether the reasons that are valid to justify ‘alternatives’ in private law may also be invoked in the field of administrative law, the structure of which, as is well-known, cannot be fully equated to that of private law. In addition, we will also have to deal with alternatives to the proceedings of an administrative *authority of first instance*.

## II ADR and the General Role of Courts in Private Law

### 1 The Fundamental Principles: Subsidiarity and Judicial Self-restraint

Acting in the sphere of private law is, with only a few limitations, acting by virtue of one’s *private autonomy*; hence,

(i) the *settling of disputes* between the parties concerned also remains, at least in principle, within their ambit of private autonomy, still following the overarching paradigm of private law, i.e. the *model of contract*. The State and its courts have come into play mainly only in a *subsidiary* manner, i.e. if the parties did not find a peaceful way to solve their dispute among themselves, due to the progressive prohibition of taking the (enforcement of the) law into one’s own hands.

(ii) at least in the original concept, the main focus of state courts in private law cases was just to provide an *formal alternative to a private feud*, not so much to establish *material ‘justice’* by ‘investigating the real facts’ (i.e. ‘the truth’), nor a specific care whether each party was likewise capable of making use of its procedural rights in a sufficiently effective manner.

### 2 The Mitigations of the Original Judicial Self-restraint in Continental Law

It has to be said, however that, at least *on the European continent*, this original concept has already undergone successive and considerable changes (at least mitigations) for *centuries* with regard to the procedural role of the *court*:

<sup>9</sup> See for such an understanding (i) Dacian Dragos, Bogdana Neamtu, ‘From the Editors: The Story of a Comparative Interdisciplinary Research Project’ in (n 4) V; (ii) Brian J Preston, ‘The Use of Alternative Dispute Resolution in Administrative Disputes. A Paper presented to the Symposium on Guarantee of the Right to Access to the Administrative Jurisdiction’ on the Occasion of the 10<sup>th</sup> Anniversary of the Supreme Administrative Court of Thailand’ (9. 3. 2011; available under: <[http://www.lec.justice.nsw.gov.au/Documents/preston\\_use%20of%20alternative%20dispute%20resolution%20in%20administrative%20disputes.pdf](http://www.lec.justice.nsw.gov.au/Documents/preston_use%20of%20alternative%20dispute%20resolution%20in%20administrative%20disputes.pdf)> accessed 2 April 2019), referring to the Australian use of the term.

Already since medieval times, we notice the influence of the ecclesiastical ('canonical') procedure (building on the '*cognitio extra ordinem*' and the '*cognitio summaria*' of the ancient Roman Empire), where the duty of the judge to investigate *ex officio* was strengthened and the time-consuming formalism was significantly reduced.<sup>10</sup>

With regard to the public interest (both in speedier proceedings and in substance), some issues of private law were subsequently conferred to *administrative* authorities, at least for a *provisional judgement*; as a consequence, the principles of administrative proceedings (in particular: a reasonable investigation of 'the truth' *ex officio*) started to apply to these private law cases as well.<sup>11</sup>

Closely related to these issues are those matters (mainly in the field of family law)<sup>12</sup> where a non-contested procedure has to be applied by private law courts.

Finally, with regard to Austria, I would like to mention that we had an in-depth reform of private law proceedings at the end of 19<sup>th</sup> century,<sup>13</sup> which aimed to reduce most of the inherited formalism<sup>14</sup> and which, therefore, could in turn serve as a model for the (still much simpler) codification of our general administrative proceedings some 25 years later<sup>15</sup> (and nowadays it is exactly this codification which governs, only slightly adapted, the proceedings of our recently established administrative courts, too<sup>16</sup>).

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<sup>10</sup> Cf e.g. Olivier Descamps, aux origines de la procédure sommaire: *Remarques sur la constitution Saepe contingit*, and David von Mayenburg, Die Rolle des kanonischen Rechts bei der Entwicklung des officium iudicis als rechtliche Handhabe in Untertanenkonflikten, both in Yves Mauten, Orazio Condorelli, Franck Roumy, Mathias Schmoeckel (eds), *Der Einfluss der Kanonistik auf die europäische Rechtskultur* Bd. 4. Prozessrecht (Böhlau 2014, Köln – Weimar – Wien) 45ff, and 113ff, in particular until p. 126. In contrast, Canon Law in *England* did not so much influence procedures *in court* but *arbitration* as the major *alternative*, see Anthony Musson, 'The Influence of the Canon Law on the Administration of Justice in Late Medieval England', in the same volume, 325ff, in particular 326–334.

<sup>11</sup> Cf, with regard to Austria, already *Maria Theresia's* decision of 30. 1. 1751 [see Alexander Balthasar, Die unabhängigen Verwaltungssenate. Verwaltungsbehörden und/oder Verwaltungsgerichte? (Manz 2000, Wien) 71, fn 301]. Cf further Article 118 (3) of the Austrian Federal Constitution (B-VG) where the *municipalities* are conferred with the task of establishing 'öffentliche Einrichtungen zur außergerichtlichen Vermittlung von Streitigkeiten' (public bodies for the settlement of disputes outside the courts). In contrast, the most recent Austrian Federal Act on ADR (Federal Law Gazette – BGBl I 2015/105, implementing Directive 2013/11/EU) is considered to be part of private law.

<sup>12</sup> These issues seem to have formed part (at least in Austria before 1848), of the competences of feudal landlords [see Balthasar (n 11) 71, fn 300].

<sup>13</sup> Imperial Law Gazette – RGBl 1895/113.

<sup>14</sup> See e.g. Walter Rechberger, 'Die Ideen Franz Kleins und ihre Bedeutung für die Entwicklung des Zivilprozessrechts in Europa' (2008) 25 *Ritsumeikan Law Review* 101ff.

<sup>15</sup> BGBl 1925/273ff.

<sup>16</sup> Cf in particular paragraph 17 of the *Verwaltungsgerichtsverfahrensgesetz*, – VwGVG, BGBl I 2013/33 and paragraph 62 of the *Verwaltungsgerichtshofgesetz* – VwGG, BGBl 1985 (current version).

### 3 Remaining Reasons for Seeking Other ‘Alternatives’

While the subsequent reforms just mentioned may have decreased the need on the continent to look for ADR in the field of private law, it is nevertheless – to the extent that ‘private autonomy’ is allowed to rule private law cases – still perfectly legitimate for the parties to *agree conjointly on tailor-made dispute resolution tools* (mainly to arbitration, but also to mediation), allowing the autonomous selection

- of appropriate judges<sup>17</sup>
- of the applicable law (substantive as well as procedural)
- of the legal effects of the ruling.

The main drawback (at least of genuine arbitration) is, however, that significant *imbalances between the parties* concerned are very likely to affect the quality of the result directly, so that external supervision by state courts will be needed at least to ensure that the fundamental conjoint agreement was actually concluded by both sides in a sufficiently voluntary manner.<sup>18</sup>

## III ADR and Administrative Law

### 1 The Vertical Relationship

#### a) *The fundamental principle: judicial review of the legality of administrative acts*

It is quite obvious that the role of a *court* acting in the field of *administrative* law is quite *different* to that in *private* law, due to the fact that the role of an administrative *authority* differs substantially from that of a *private party*:

<sup>17</sup> There might be many reasons to prefer an autonomous selection of judges:

(i) As to *quality*, most state jurisdiction systems provide three or even more stages of courts, the most qualified judges being found only at the top of the hierarchy; in addition, specific knowledge is not always available within the deciding court of a sufficient quality. Parties could therefore agree to nominate a panel of top judges already at first instance but this would reduce the options for appeal.

(ii) As to *quantity*: more often than not a considerable backlog of cases impedes speedy decisions to incoming cases. A court of arbitration appointed by the parties concerned may start to deal with the case without any delay.

(iii) As to *balance of composition*, while the composition of a state court chamber is up to court organisation and, in all events, limited to judges appointed in that specific state, an arbitration panel may be composed of judges of different nationalities, thus reflecting better, in particular with regard to international cases, the complexity of the case; in addition, also other balances (gender, religion, ...) might be considered as felt appropriate.

<sup>18</sup> Cf in this regard in particular the quite recent judgements of German civil law courts (of first instance and at the appeals stage) in the *Pechstein* case, where a previous judgement rendered by the Court of Arbitration for Sport (CAS) was considered void for want of free consent of the athlete (see interim judgement of the Appeals Court Munich of 15. 1. 2015 – U 1110 / 14 Kart).

At least to the extent that an administrative authority is bound by the *principle of legality*,<sup>19</sup> it may still be allowed *some discretion*, but it *lacks* the full amount of *private autonomy*.<sup>20</sup>

Hence, given the overarching paradigm of administrative law being the *decision imposed unilaterally* by the administrative authority on the parties concerned,<sup>21</sup> according to ‘the law’<sup>22</sup>, neither the principle of ‘subsidiarity’ nor the principle of ‘judicial self-restraint’ can – with regard to the role of the administrative court – have the same meaning as in the field of private law;<sup>23</sup> rather, the scope of application of both principles is, by the very nature of fact, substantially reduced, because the yardstick of the *judicial review* (‘the law’) is *not at the parties’ disposal*.

### *b) The remaining field of application of ADR with regard to administrative courts/authorities I: mediation or arbitration*

It is, therefore, hard to see how – with regard to a dispute between the administrative authority and the parties concerned<sup>24</sup> – tools such as mediation or arbitration could play a major role as an alternative to the formal proceedings of the authority/the court – as long as ‘the law’ as the ultimate yardstick is to be preserved.<sup>25</sup>

However:

– ‘Mediation’ can be most welcome with regard to *improving communication*, in particular by providing ‘translation’ in both directions, thus helping to convince the authority, as well as

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<sup>19</sup> Note that this principle has been inserted in the horizontal provision of the EUCFR containing the limitations for fundamental rights (Article 52 [1]: ‘any limitation ... must be provided for by law’), following the model of the ECHR (cf Articles 5 [1], 8 [2], 9 [2], 10 [2], 11 [2]; cf also Articles 2 [1], 6 [1], 7 [1] conv cit).

<sup>20</sup> This limitation is nowadays considered also to apply when a public body acts within the framework of private law, cf Alexander Balthasar, ‘Wer ist künftig zur Sicherung der Gesetzmäßigkeit der gesamten öffentlichen Verwaltung berufen?’ (2014) 22 (1) JRP 38 ff, 61, and the (Austrian) case-law and references cited there in fn 202.

<sup>21</sup> Due to the principle of legality applying to all kinds of State action, the vertical paradigm *prevails even in prima facie horizontal relationships* such as public law contracts between the State (represented by an authority) and an subordinate individual; the more so, the stricter the legality principle is construed. That is the main reason that the form of administrative contracts flourishes more in Germany than in Austria, cf Harald Eberhard, *Der verwaltungsrechtliche Vertrag. Ein Beitrag zur Handlungsformenlehre* (Springer 2005, Wien – New York) 130.

<sup>22</sup> Following on from the previous footnote, this proposition applies too when the form of the ‘decision’ is a ‘contract’ (of public or of private law); that is why Article IV-7 (1) of the ‘ReNEUAL Model Rules on EU Administrative Procedure’ <<http://www.reneual.eu/>> states that most provisions on single-case-decision making should apply ‘*mutatis mutandis*’ also for concluding contracts.

<sup>23</sup> Up to now, not even elements of veritable ‘*plea bargaining*’, well-known in US penal law (see supra n 3) seem to have been introduced in administrative law (maybe with the exception of tax law, where agreements between the tax authority and the tax payer are very conceivable).

<sup>24</sup> See, however, for the horizontal relationship infra lit C.

<sup>25</sup> This assessment seems to be backed by the Rec(2001)9 (which remains rather vague and general with regard to the possible ‘scope of alternative means’, cf point I/2 of the Appendix), as well as by most of the doctrine cited supra in n 4.

the parties concerned, already at an early stage of the proceedings that a *specific interpretation* of the law will, most probably, be the most reasonable from all perspectives.<sup>26</sup>

– While it seems rather strange that an administrative authority should be allowed to escape from the ordinary judicial review by an agreement concluded by itself with the parties concerned<sup>27</sup>, the *legislator* could very well *offer alternatives* – as does indeed the Austrian Federal Constitution, in principle, when enabling the legislator to provide judicial review against administrative decisions by private law courts rather than by the newly established administrative courts.<sup>28</sup> With the code of private law procedure in turn allowing state courts' jurisdiction to be replaced by arbitration (even by courts of arbitration based outside the State's territory), one could indeed wonder whether the legislation now enables a complaint against an Austrian administrative authority to be lodged even at a foreign court of arbitration.<sup>29</sup>

### c) *The remaining field of application of ADR with regard to administrative courts/authorities II: qualified mediation, including ombudsmen*

As the French term for 'ombudsman' – '*médiateur*' – shows 'mediation' in the meaning just outlined above (in subsection 2) can, in principle, also be performed by an ombudsman (general or specialised). Ombudsmen are particularly qualified to enhance public confidence in the proper performance of the duties of administrative authorities (and, in principle, also of courts).<sup>30</sup>

Some Ombudsmen – among them the EU Ombudsman and the Dutch Ombudsman – show a remarkable interest in developing an *additional set of norms* besides the positive

<sup>26</sup> In a way this has always been the task of *advocates*; unfortunately, however, experience shows that many advocates have a tendency to aggravate and prolong the conflict instead of contributing to find a reasonable solution already at an early stage. That seems to be why the British system still upholds the separation of tasks between 'solicitors' (chosen by the parties) and 'barristers' (who have the exclusive privilege of communicating directly with the court).

<sup>27</sup> Apparently, however, exactly this option seems to have been inserted quite recently into the Italian Code of administrative procedures (cf its Article 12 as amended by Decreto legislativo, 15/11/2011 n° 195, G.U. 23/11/2011); the efficacy of this new provision is, however, still very limited, cf Sandulli (n 4) 205ff. Cf also, with regard to Germany, Kaspar Möller, *Echte Schiedsgerichtsbarkeit im Verwaltungsrecht. Eine Studie zu Rechtsrahmen und Kontrolle nichtstaatlicher Streitentscheidung im Verwaltungsrecht* (Duncker & Humblot 2014, Berlin), in particular 134ff.

<sup>28</sup> Article 94 (2) B-VG.

<sup>29</sup> Cf paragraph 17 (4) of the Federal Anti-Doping Act, explicitly allowing the athlete to contest decisions of the national Anti-Doping Tribunal (which might be considered as an administrative tribunal!) before the CAS.

<sup>30</sup> Note that the Swedish Parliamentary Ombudsman (the model from which all other European ombudsmen stem) is in a way a general supervisory authority, ensuring that the law (made by Parliament) is observed as diligently by administrative authorities (needed because central government as well as regional executives lack the competence to interfere in individual cases led by – in this regard – independent administrative authorities) as by the courts.



legislation related to the concept of ‘Good Governance/Good Administration.’<sup>31</sup> From a ‘rule of law’ perspective, such an approach is most justified when it would turn out that this ‘additional set of norms’ is, in essence, derived from *general principles of law* (such as the principle of proportionality, principle of equal treatment, respect for human dignity, fair trial, etc.), which indeed rank at the top of the hierarchy of law but had been neglected by the specific positive legislation. In this case, ombudsmen might *supplement constitutional courts* in particular where they still are missing.

*d) The remaining field of application of ADR with regard to administrative courts/authorities III: contesting general administrative norms?*

Individual administrative decisions are, more often than not, based not only on ordinary legislation made and passed by Parliament but also on administrative acts of general application, in which the parties of the individual proceedings had not been involved. When it turns out during the individual proceedings that the parties object more to the norm of general application than the individual decision based on it, there should be appropriate legal remedies available to deal with such complaints; if not, it is not only highly probable but also justified from the ‘rule of law’ aspect that parties seek to disregard that norm of general application they considered to be ‘unjust’ – even by invoking ADR tools of whatever kind.

## 2 Administrative Appeals

Appeals to an administrative authority may be considered as an alternative to judicial review if ‘ADR’ is understood in a narrow sense (see supra section I).

Coming from a country that just abolished its longstanding tradition of administrative appeals (completed by access to one single Administrative Court of highest quality), due to constant and reiterated pressure from Western Europe<sup>32</sup> where the mantra for decades had been to facilitate access to court, I am least prepared to deny the advantages of administrative remedies which have to be exhausted before a complaint to a court may be lodged, in particular:

- Availability of specialised knowledge of a high level
- Uniformity of application of the law<sup>33</sup>
- Affordability for the private parties concerned

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<sup>31</sup> For the EU Ombudsman, see his European Code of Good Administrative Behaviour ex 2001, even now exceeding what some years later had been enshrined at primary law level in Article 41 EUCFR; for the Dutch concept cf Philip Langbroek, Milan Remac, Paulien Willemsen, ‘The Dutch System of Dispute Resolution in Administrative Law’ in Dragos, Neamtu (n 4) 113ff, 132f (‘mainly an ethical category’).

<sup>32</sup> See in more detail Friederike Bundschuh-Rieseneder, Alexander Balthasar, ‘Administrative Justice in Austria in the Stage of Transition: From Administrative Appeals to Administrative Courts or the Final Stage of ‘Tribunalization’ of Administrative Disputes’ in Dragos, Neamtu (n 4) 209ff.

<sup>33</sup> This is a fundamental requirement of the principle of equal treatment, which can, by the very nature of fact, not be fulfilled to the same extent when jurisdiction is conferred upon a multitude of independent judges (see, e.g., Magdalena Pöschl, *Gleichheit vor dem Gesetz* (Springer 2008, Wien – New York).

These advantages have, however, to be outweighed against the advantages of prompt access to a court, in particular:

- Independence of the judge from political influence
- Qualification to refer to the CJEU.

### 3 The Horizontal Relationship

When we remember that administrative law has assumed considerable tasks belonging originally and in substance to private law (see supra section II 2), it is, at least in principle, perfectly conceivable to reverse that development. Consequently, administrative law would then require, as a precondition for administrative authority starting the core assessment from a purely public interest perspective, that all the private parties concerned had mutually agreed on the private law points related to the public law issue.

With regard to only these private law parts ‘embedded’ in the administrative law case, it would then be also perfectly conceivable to apply again the full range of private law instruments – and, among them, mediation or arbitration as well, in the full meaning of these terms – to these parts of ‘Administrative Law’<sup>34</sup>.

## IV Evaluation

When we try now, after that *tour d’horizon*, to sum up, we might find that things didn’t change much compared with the first, provisional assessment we started from in section 1:

ADR is indeed deeply rooted in the context of private law, and the use we can make of it in the context of administrative law as well is most appropriate when the specific structure resembles private law most closely (III 1 b and III 3).

We did, however, also find that the term ‘ADR’ may serve merely as an indicator of deficiencies of quite a different kind, be they of the quality of legal protection provided by administrative courts compared with the traditional efficacy of administrative supervisory authorities (III 2), or related to countries that still lack a detailed system for constitutional complaints (III 1 c and d).

My personal conclusion is, therefore, a rather sceptical one: let us resist the attempt to cure the alleged shortcomings of the implementation of administrative law by a simple transposition of well-sounding concepts of quite a different origin instead of finding tailor-made solutions for what we should really consider, after a sober and thorough analysis, to be serious deficiencies.

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<sup>34</sup> Cf, however, that the Austrian General Administrative Procedures Code (AVG) has always contained a provision that, in a public hearing, the authority should find a fair settlement of any dispute between private parties [paragraph 43 (5), formerly (6): ‘Stehen einander zwei oder mehrere Parteien mit einander widersprechenden Ansprüchen gegenüber, so hat der Verhandlungsleiter auf das Zustandekommen eines Ausgleichs dieser Ansprüche mit den öffentlichen und den von anderen Beteiligten geltend gemachten Interessen hinzuwirken’].



## Breach of the Right to Good Administration: So What?

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The right to good administration is now enshrined in Article 41<sup>1</sup> of the Charter of Fundamental Rights of the European Union. It is undisputable that this right is not limited to EU institutions but covers all aspects of the European Union law: as regard the institutions, Article 41 is directly applicable to them<sup>2</sup> and as regard the application of EU law by Member States, the general principle of good administration is equivalent in substance to the content of article 41.<sup>3</sup>

As a consequence, a reference to a standard for administrative action and production of administrative decisions is clearly set by the CJEU. We would like to examine the concrete effect of these standards as regard the consequences that the national and EU courts have to draw in the event of a breach of these requirements. We submit that, according to CJEU case-law, a breach of right to good administration doesn't lead to automatic annulment of the decision that was challenged and that this position may lead to substantial legal difficulties of interpretation for national courts.

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<sup>1</sup> Article 41 of EU Charter of Fundamental Rights: '

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.'

<sup>2</sup> See for instance C-141/12 and C-372/12, 17 July 2014 YS paragraph 67: 'It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (see, to that effect, the judgment in *Cicala*, C-482/10, EU:C:2011:868, paragraph 28). Consequently, an applicant for a resident permit cannot derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application.'

<sup>3</sup> See same case paragraph 68: 'It is true that the right to good administration, enshrined in that provision, reflects a general principle of EU law (judgment in *HN*, C-604/12, EU:C:2014:302, paragraph 49). However, by their questions in the present cases, the referring courts are not seeking an interpretation of that general principle, but ask whether Article 41 of the Charter may, in itself, apply to the Member States of the European Union.'

## I No Automatic Annulment of Decision in the Event of Breach of the Right to Good Administration

In several recent decisions, the CJEU stated clearly that the breach of one of the various rights composing the right to good administration in the administrative procedure does not automatically makes the decision itself illegal:

C-383/13 10 September 2013 *G. and R.*

40 To make such a finding of unlawfulness, the national court must – where it considers that a procedural irregularity affecting the right to be heard has occurred – assess whether, in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end.

C-129/13 3 July 2014 *Kamino International Logistics BV*

79 According to European Union law, an infringement of the rights of the defence, in particular the right to be heard, results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different.

The approach of the CJEU is a pragmatic one: the right to good administration is a procedural right and a breach would only have an effect if it has a direct consequence on the outcome. This is a pure teleological reasoning, which is a legal technique of interpretation which is very frequently used by the EU Court.

It should be noticed that, in the C-129/13 judgment, the right to be heard, which is an element of the right to good administration, is explicitly linked with the rights of the defence. More precisely, the right to be heard is fully considered to be part of the rights of the defence<sup>4</sup> and the CJEU logically refers not only to Article 41 of the Charter but also to Article 47 and 48 of the Charter, which cover all aspects of the right to fair trial. Articles 47 and 48 are the equivalent of Article 6 and Article 13 of the European Charter of Human Rights. Therefore, given the importance of the rights of the defence, one could be surprised to see that the breach of these rights is of so little consequence. If a right is to be considered as a fundamental right, it would logically lead to the annulment of the decision in the case of breaching this right without further discussions. However, it does not seem to be so automatically. In other words,

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<sup>4</sup> C-249/13 11 December 2014, Boudjlida, paragraph 31: ‘The right to be heard in all proceedings is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) of the Charter provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken (the judgments in *Kamino International Logistics*, EU:C:2014:2041, paragraph 29, and *Mukarubega*, EU:C:2014:2336, paragraph 43).’

does this mean that a breach of a fundamental right is not always severe enough to lead to illegality of a decision that is adopted in violation of this right?

Indeed, the position of the CJEU does not appear to be based on a general consensus and has led to different views from the Advocates General.<sup>5</sup> The reasoning that is opposed to the CJEU case-law is based on the question that, if the right to good administration is part of the fundamental rights and in particular is to be included in the rights of the defence, how is it possible to bargain with this fundamental right?

At this stage, an ambiguity is to be clarified. The CJEU makes a substantial difference between administrative procedure and judicial procedure. If the right to good administration is to be included in the more general set of the rights of the defence, it does not mean that the rights of defence are automatically violated in the event of breach of these rights during the administrative procedure. This could be interpreted as referring to the fact that, during the judicial procedure, the rights of the defence could potentially compensate the breach during the administrative procedure. This means that the right of the defence is to be evaluated globally, from the administrative procedure leading to a decision to the final judicial decision. A mere breach of one step in the administrative procedure does not contaminate the whole procedure if some further steps could compensate the breach. Or, to put it in different words, the lack of contradictory debates during the administrative phase has no effect on the outcome of the judicial procedure as long as the judicial procedure is based on contradictory exchanges between parties.

This differentiation between administrative and judicial procedure is most likely to be a crucial argument in favour of mitigating the effects of flaws in administrative procedures, taking into account that national procedures could be more stringent than the minimum standards proposed at EU level. It should also be stressed that, at first glance, the judge evaluates the legality of the administrative decision and does not prolong, at the judicial stage, the administrative action. It should however be acknowledged that, on this point, administrative justice cultures in Europe probably differ widely and the separation between administrative and judicial action is not always so strict. For instance, in Sweden, first instance courts are delivering environmental consent for industrial plants and are indeed on this specific point playing the role of administrator. In this specific case, there is indeed no clear border line between pure administrative procedure and judicial procedure but this situation is an exception. Countries with autonomous administrative jurisdictions (France, Germany, Italy, Sweden etc.) have historically justified the development of administrative justice by the need for specific procedures when the State's authority is involved. It is understandable that, in this context, the judicial procedure can accommodate a capacity to preserve the public

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<sup>5</sup> See for instance Advocate General M. Wathelet in C-383/13 G. and R.: 'I propose therefore that the Court should answer the question referred to the effect that infringement by the national administrative authority of the general principle of respect for the rights of the defence (in the present case, of the right to be heard, as provided for in Article 41(2)(a) of the Charter) (...) means that the measure must be annulled and that the person concerned must be released immediately (...).'

general interest by avoiding pure procedural annulments of administrative decisions. All these cultural differences are highly important and a detailed evaluation would require an in-depth analysis of each national legal system. For the purpose of our demonstration, it suffices to note that there is no Chinese wall between administrative and judicial procedures in Europe.

However, it should also be taken into account that the arguments in favour of differentiated treatments of public authorities are less and less tolerated by citizens.

Another aspect related to the development of this flexible EU case-law is its impact with regard to decisions taken by national authorities on the basis of EU law. In this context, national courts are generally in charge of applying EU law in combination with national procedural rules, as EU law provides in most cases a framework with some possibilities of adaptation to the national context. The case-law of the CJEU states a clear position as regard an infringement of procedural rights: it does not necessary lead to the annulment of a decision. However, this clear position may also be combined with another clear option of the CJEU case-law: the Court also states explicitly that the exact effect of a breach of procedural rules is to be governed by national law as long as the effectiveness principle is not affected.<sup>6</sup> This approach developed in C-129/13 preliminary reference creates an additional ambiguity. What does the effectiveness of EU law mean? One could consider that the effectiveness of EU law lies in material law – such as ensuring the effectiveness of competition rules or avoiding state-aid. One could also see effectiveness as preserving the rule of law the fundamental rights and principles, such as the rights of the defence.

The CJEU approach of the breach of right to good administration is therefore not straightforward and the way to combine national and European procedural case-law is only the first issue to tackle for its implementation.

## **II A Pragmatic Approach Which Leads to Serious Difficulties**

A serious problem in the implementation of EU case-law lies in the burden of proof. It is well-established that rules governing burden of proof are crucial in determining the outcome of a case. The current case-law of the CJEU tends to rely only on the teleological argument: would the decision be different if administrative procedural rights had not been broken? However, it is clear that, depending on who has to demonstrate the absence of effect on the administrative decision, the balance between the parties is completely different. The CJEU rightly excludes to imposing on the complainant the need to prove that the decision would have been different without the breach. Obviously, demanding that complainant prove the effect would not make sense, since the administration could always argue that, being the one who took the decision, it is certain that the decision was not affected by the breach!

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<sup>6</sup> C-129/13 3 July 2014 Kamino International Logistics BV paragraph 77: 'None the less, while the Member States may allow the exercise of the rights of the defence under the same rules as those governing internal situations, those rules must comply with European Union law and, in particular, must not undermine the effectiveness of the Customs Code (G and R, EU:C:2013:533, paragraph 36).'

C-141/08 1 October 2005 *Foshan Shunde Yongjian Housewares & Hardware Co. Ltd* paragraph 94

Moreover, according to the case law of the Court of Justice, the appellant cannot be required to show that the Commission's decision would have been different in content but *simply that such a possibility cannot be totally ruled out*, since it would have been better able to defend itself had there been no procedural error (see *Thyssen Stahl v Commission*, paragraph 31 and the case law cited).

But what does it mean 'that such a possibility cannot be totally ruled out'? Taken literally, the expression leads to an impossible proof for the administration. It would only save the administrative decisions in cases where the breach is 'external' to the decision process itself or where the appellant does not indicate what information he would be able to provide to the administration. However, one should also emphasise that the wording of the Court stresses the procedural aspect by referring to the capacity for the person to defend themselves. In practice, an appellant just claiming that, by not being heard in the administrative procedure, was not in a position to try to convince the administration would potentially fall under this category.<sup>7</sup> This is equivalent to the hearing in courts: one can never exclude that, by pleading, the judges could change their minds!

There is obviously a remaining tension between the teleological approach, which only looks at the result of the process, and an approach that highlights the role of the procedure: the CJEU case-law does not completely forget procedure. The C-141/08 case is an illustration of this tension. One can consider that at least there is an obligation for the appellant to demonstrate that he had some arguments to present. This could be seen as dialectic reasoning in the evidential process: the appellant has to provide some indications that the hearing would be a serious opportunity to defend the case. This first step would establish a presumption of usefulness for the hearing and the administration would have to react and oppose this presumption.

However, at this stage, these observations are not fully supported by the limited case-law of the CJEU on the topic and one should only conclude that there is still a need from clarification from the Court of Justice.

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<sup>7</sup> See in particular the interesting discussion of the role of oral hearings in the opinion of Advocate General Wahl under case C-154/14 P: '79. In my view, there is a difference between considering whether a party might have been able to better defend itself, on the one hand, had it been given access to the entire case file and, on the other hand, had it been granted an in camera hearing. While the significance of unlawfully withheld documents can be appraised ex post, (39) that of an in camera hearing cannot: it is impossible to be entirely certain of what actually takes place during such meetings. There is also nothing to prevent a party from submitting other relevant confidential information to the Commission during such a meeting that has not been alluded to beforehand. Hence, if there is a right to an in camera hearing before the Commission, and if an oral hearing is held only once – as in the case under consideration – then the party who was entitled yet deprived thereof, cannot be considered to have been heard at all. (40) In the interest of justice being seen to done, I am thoroughly unconvinced by the idea of validating a pre-emptive reasoning denying an in camera hearing because it could not possibly have helped that party.'



### III Access to Justice and Individual Decision

More generally, the issue of access to the Court of Justice for individual decisions remains difficult. The Treaty on the Functioning of the EU in its Article 263 states that:

‘Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of *direct and individual concern* to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.’

This wording is similar to that stated in the initial Treaty (1957) as regard individual decisions. The Lisbon Treaty has however released the condition of ‘individual concern’ for actions against regulatory acts. As regard administrative decisions, standing is granted only in the case of an act addressed to the person or that the act has a direct and individual effect on the person.

The EU case-law has very often referred to this condition of ‘direct and individual concern’ for not granting access to the Court to individuals.<sup>8</sup> The so-called *Plaumann* test reads the notion of individual concern in a relatively narrow way by imposing specific qualities on the applicant. Moreover, despite several attempts from many applicants, the *Plaumann* case-law has been regularly recalled by the Court, including in very recent decisions.<sup>9</sup>

It should be noted that this case-law is far from being easily mastered by national courts needless to say that it is complex for applicants to understand as well. For instance, a Dutch Council of State preliminary reference in 2014 reads as follows:

(1) Must the fourth paragraph of Article 263 TFEU be interpreted as meaning that operators of installations to which, as from the beginning of 2013, the emissions-trading rules laid down in Directive 2003/87 have been applicable, with the exception of operators of the installations referred to in Article 10a(3) of that directive and of newcomers, could undoubtedly have brought an action before the General Court seeking the annulment of Decision 2013/448, in so far as the uniform cross-sectoral correction factor is determined by that decision?

This preliminary reference highlights a very technical but very important point. It is well-known that the EU court system is not limited to EU Courts but includes national judges. National judges are recognised as main instruments for the implementation of EU law. It is clear that the development of EU law in virtually all domains of law leads to the need to control its application efficiently. National judges are therefore essential components in the design of

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<sup>8</sup> In judgment of 15 July 1963 *Plaumann/Commission*, 25/62 the Court interprets strictly the conditions for admissibility of a case as they are stated in the Treaty: ‘persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.’

<sup>9</sup> See for instance the opinion of Advocate General Kokott 12 November 2015 for joined cases C-191/14 and C-192/14

a comprehensive EU judicial system. The key procedural element of this dialogue between national Court and the EU Courts is the preliminary rulings mechanism.

However, an applicant does not have the choice of filing a case in the EU General Court or at national level. Action in national courts would only be admissible if no access to the EU General Court is granted.<sup>10</sup> The test is based on the evaluation of the absence of doubt that the applicant could challenge the decision in EU courts. In the absence of doubt, the national court should declare the application inadmissible. This absence of doubt criterion is not extremely easy to manage precisely due to the fact that the *Plaumann* test creates uncertainty as regard the admissibility: the rule seems to be ‘no access to EU Courts,’ with an exception in very specific cases where the decision at stake would have a side effect which was not foreseen at the time of the adoption of the act, as was the case, for instance, in the *Cordorniu* decision.<sup>11</sup>

This complexity leads to difficulties in the context of hybrid decisions, i.e. decisions which are a combination of national and EU decisions. For instance, decisions related to reimbursement of EU funds may find their source in a decision from the European Commission to invite the Member State to demand reimbursement of funding granted to a project, for instance in the case of ineligibility of expenses. In this hypothesis, the crucial question for challenging the decision of the Member States is to determine if there was some autonomy for the national authority<sup>12</sup> and if the European Commission decision could have been challenged in EU Courts. The case-law of the EU Court tends to deny the possibility to challenge the decision of the European Commission, considering it as a preparatory act and not as a full decision.<sup>13</sup> The EU case-law also does not easily recognise a direct effect of the decision of the European Commission, as it does not exclude a possibility for Member States to compensate the loss of the recipient of funds.<sup>14</sup>

<sup>10</sup> See for a recent decision C-663/13 5 March 2015 *Banco Privado Português and Massa Insolvente do Banco Privado Português* paragraph 28: ‘In this respect, it must be recalled that, in its judgment in *TWD Textilwerke Deggendorf* (EU:C:1994:90, paragraph 17), the Court held that it is not possible for a recipient of State aid forming the subject-matter of a Commission decision which is directly addressed solely to the Member State of that recipient, who could undoubtedly have challenged that decision and who allowed the mandatory time-limit laid down in this regard in the sixth paragraph of Article 263 TFEU to pass, effectively to call into question the lawfulness of that decision before the national courts (see, also, judgments in *Nachi Europe*, C-239/99, EU:C:2001:101, paragraph 30, and in *Lucchini*, C-119/05, EU:C:2007:434, paragraph 55). The Court has taken the view that to find otherwise would enable the recipient of the aid to overcome the definitive nature which a decision necessarily assumes, by virtue of the principle of legal certainty, once the time-limit laid down for bringing proceedings has passed (judgment in *Nachi Europe*, EU:C:2001:101, paragraph 30 and the case-law cited).’

<sup>11</sup> C-309/89 18 May 1994 *Codorniu SA*.

<sup>12</sup> According to EU case-law, no autonomy is to be granted to national authorities in this context, see arrêt C-383/06 13 March 2008 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*.

<sup>13</sup> See for instance T-314/04 et T414/04 14 December 2006 *Germany v Commission* or T-29/03 13 July 2004 *Comunidad Autónoma de Andalucía c. Commission*.

<sup>14</sup> C-417/04 P 2 May 2006 *Regione Siciliana c/Commission*.

To sum up, it is far from being obvious that there is ‘undoubtedly’ a possibility to challenge the decision of EU institutions at EU level. This mechanism works like a trap for claimants: if they choose the EU Court path they risk being inadmissible, even in cases where *prima facie* they could be not obviously not excluded from the provisions of Article 263, and if they choose the national courts path, the courts could oppose the fact that they have not challenged the European decision.<sup>15</sup>

The narrow admissibility criteria of the *Plaumann* test is therefore a key factor, seriously mitigating the capacity to challenge EU decisions that have huge consequences for European citizens and companies. It should be mentioned that the Aarhus Convention Compliance Committee has explicitly indicated that this admissibility policy is not in compliance with the provisions of the Aarhus Convention.<sup>16</sup> The difficult discussions between the EU institutions and NGOs should be a good opportunity to reconsider access to EU justice for citizens.

This situation is most likely one of the factors explaining the lack of coherence and clarity in the EU case-law: combined with the complexity of each case, the number of cases brought to courts related to these situations, is not high enough. The contrast is huge between the very well developed case-law at national level as regard procedural rules with scarcity of these at CJEU level.

## IV A Way Forward?

It could be seen as presumptuous to call for a change in the EU case-law. However, if one would take the right to good administration seriously, access to justice and judicial review of the EU administrative decision are key dimensions of the rule of law. It is not satisfactory that the main way to enforce good administrative behaviour by EU institutions is the action of the EU Ombudsman. As a matter of fact, the office of the European Ombudsman is today playing the central role for EU administrative decision review. Recommendations of the Ombudsman are not without effect and its decisions include all aspects of a case, such as financial compensation or implementation of EU Courts’ decisions.

However, the Ombudsman would in any case not be able to restore legality: its role is to play the role of a mediator in order to find a friendly solution. In the complex situations which were identified above, such as reimbursement of EU funding, the ombudsman would have limited impact.

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<sup>15</sup> See French Council of State decision 23 July 2014 Commune de Vendranges n°364466: ‘Considering that it follows from the case-law of the Court of Justice of the European Union that a decision of the European Commission asking a Member State to recover Community aid unduly granted is binding on the authorities and the national courts when its validity was not disputed within the time-limits before the Union’s courts by the aid recipient.’ In this recent decision, the French Council of State do not discuss the potential limits of admissibility that the recipient may face.

<sup>16</sup> See ACCC/C/2008/32 part I and part II on the website of the Aarhus Convention.

There is obviously a need to reassess the access to justice and judicial review of EU administrative decisions in the light of the substantial development of EU law. Similar standards are to be applied at national level and EU level as regard judicial review<sup>17</sup> and it is not possible to maintain confusion as regard the admissibility of application in EU courts.

It is also crucial to clarify the exact standards to be applied as regard breaches of rights to good administration. The current case-law of the CJEU tends to emphasise the teleological approach. It is fully understandable from a pragmatic point of view and one should avoid developing procedural complexity, which could paralyse administrative action. This is partially the approach taken in French administrative law with the famous *Danthonny* case<sup>18</sup>. However, this case-law combines the teleological approach and an identification of procedural guarantees, which are preserved whatever the teleological approach would give. One can already see a step in this direction in the ECJ case-law with the *Altrip* case,<sup>19</sup> where a reference to protection of guarantees is explicitly provided. It remains to be seen if the *Altrip* case is to be understood as specifically targeting environmental law issues or is of a more general nature.

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<sup>17</sup> It should be stressed that the CJEU is very demanding as regard access to justice in the context of Aarhus Convention in the context of Member States duties see C-240/09 8 March 2011 *Lesoochránárske zoskupenie VLK* paragraph 49: 'Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.'

<sup>18</sup> French Council of State 23 December 2011 *Danthonny* n°335033: 'Whereas these provisions regarding irregularities committed when an organisation is consulted, state a rule which takes inspiration from the principle according to which, although administrative measures must be taken according to the forms and in compliance with the procedures laid down by the laws and the regulations, an error affecting the course of a prior administrative procedure, followed on a mandatory or optional basis, the decision taken is only considered illegal if the evidence proves that it was likely, in this case, to have an influence on the decision taken or that it deprived the interested parties of a safeguard; whereas the application of this principle is not excluded in the case that a mandatory procedure has been overlooked, provided that such an omission does not result in the competence of the author of the measure being affected;' (translation as provided by the French Council of State website).

<sup>19</sup> C-72/12 7 novembre 2013 *Gemeinde Altrip*: 'Subparagraph (b) of Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not precluding national courts from refusing to recognise impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of all the documents submitted to it, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337.'



# Administrative Transparency Through Access to Documents and Data in Italy: Lights and Shadows of a Principle in Transformation

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## I Transparency and the Italian Legislator: An Evolution Toward Polysemy

Recently, the Italian legislator has introduced new rules on the transparency of administrative action (Law No. 190/2012 and Legislative Decree No. 33/2013, reformed by Legislative Decree No. 97/2016). The main purpose of the statutes is to prevent and combat corruption. In this perspective, the duty of administration to publish documents and data has been greatly enlarged. The relationship between authorities and private people is changing, not only in practice but also in the perception of the legislator, and the fair management of information used in the public interest has become a basic value. This idea of transparency has been progressively accepted by scholars, by the administrative courts and by the rule-makers.

In the general statute on administrative procedures (Law 241/1990), transparency is clearly indicated among the basic principles of administrative action but a definition of this concept is not given; therefore, it is reasonable to think that the traditional one has been tacitly accepted. According to the traditional idea,<sup>1</sup> transparency compels authorities to allow private individuals to be aware of the former's activities during the procedure and to check the results when the final decision has been emitted.<sup>2</sup> In this vision, transparency is strictly connected to good administration and efficiency; its purpose is to ensure the correct comprehension of activities performed in the public interest.<sup>3</sup> It does not necessarily compel authorities to disclose all acts and documents. On the contrary, transparency could even require some 'dark zones' (in order to protect public law secrets and the private right of privacy) to be

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<sup>1</sup> See: Filippo Turati, *Atti del Parlamento Italiano. Camera dei Deputati, sess. 1904–1908: 22962*. (17.6.1908); Henri Chardon, *L'administration de la France. Les fonctionnaires, du gouvernement, le ministère de la Justice*. (Perrin 1908, Paris).

<sup>2</sup> See: Giuseppe Abbamonte, *La funzione amministrativa tra riservatezza e trasparenza. Introduzione al tema* (Giuffrè 1989, Milano) Quad. reg.: 977–994; Gregorio Arena, 'Trasparenza amministrativa' in Sabino Cassese (ed), *Dizionario di diritto pubblico* (Giuffrè 2006, Milan) 5945–5955.

<sup>3</sup> See: Gregorio Arena (ed), *La funzione di comunicazione nelle pubbliche amministrazioni* (Maggioli 2001, Rimini); Annamaria Bonomo, *Informazione e pubbliche amministrazioni. Dall'accesso ai documenti alla disponibilità delle informazioni* (Carocci 2012, Bari).

maintained.<sup>4</sup> a totally glass house may perhaps be too fragile and too expensive. As such, public knowledge of administrative documents must be the normal rule and secrets must be an exception, in order to grant real democracy and transparency: however, transparency and publicity (or total openness) are not synonyms.<sup>5</sup>

Nevertheless, in the latest reforms, a new legal concept of transparency was born, and it is quite different from the one previously accepted by scholars, the administrative courts and – even if implicitly – by the legislator.<sup>6</sup> Actually, the recent rules expressly make reference to Law 241/1990; therefore, it is reasonable to think that the traditional idea of transparency has been maintained, which is confirmed by the fact that Legislative Decree No. 33 also refers to the right of access to administrative documents as an instrument for transparency.

However, the 2013 decree offers a general notion of transparency as well, even if the specific purpose of such rules is to prevent and fight corruption in the administration and this is clearly a narrow perspective.

According to the original formulation of art. 1 (which was reformed in 2016), transparency was intended as total accessibility of information on the organisation and activities of public authorities (and of private subjects involved in the fulfilment of public interest), in order to encourage widespread checks on the pursuit of institutional duties and on the use of public resources.<sup>7</sup> In practice, the duty to publish documents and data was not as wide as it may seem. This ‘new’ principle of transparency, in fact, essentially worked only through the publication of specific groups of documents, information and data on the institutional websites.<sup>8</sup> Everyone had (and still has) a right to direct and immediate access to the websites, without any authentication and identification. If the duty of compulsory publication is not respected by the administration without delay, anyone may ask for it to comply with the obligation and obtain so-called civic access to elements that it is legally obliged to publish.<sup>9</sup>

Originally, each authority also had a discretionary power to publish on-line other documents or information not containing personal data, but this power was in practice never

<sup>4</sup> See Marcello Clarich, ‘Trasparenza e protezione dei dati personali nell’azione amministrativa’ (2004) 3 (12) *Foro amministrativo* T.A.R. 3885–3897.

<sup>5</sup> See Massimo Occhiena, ‘I principi di pubblicità e trasparenza’ in Mauro Renna, Fabio Saitta (eds), *Studi sui principi del diritto amministrativo* (Giuffrè 2011, Milan) 141–148.

<sup>6</sup> See: Enrico Carloni, ‘La “casa di vetro” e le riforme. Modelli e paradossi della trasparenza amministrativa’ (2009) 3 *Diritto pubblico* 779–812; Benedetto Ponti et al., *Nuova trasparenza amministrativa e libertà di accesso alle informazioni* (Maggioli 2016, Santarcangelo di Romagna); Mario Savino, ‘La nuova disciplina della trasparenza amministrativa’ (2013) 33 *Giornale di diritto amministrativo* 795–805.

<sup>7</sup> See Marco Bombardelli, ‘Fra sospetto e partecipazione: la duplice declinazione del principio di trasparenza’ (2013) 3–4 *Istituzioni del Federalismo* 657–685.

<sup>8</sup> See: Antonio Contieri, ‘Trasparenza e accesso civico’ (2014) 9–10 *Nuove autonomie* 563–576; Esposito Vincenzo et al., ‘Il diritto sociale alla trasparenza tra il diritto di accesso ed il diritto civico’ <<http://www.filodiritto.com/articoli/2013/07/il-diritto-sociale-alla-trasparenza-tra-il-diritto-di-accesso-e-l-accesso-civico/>> accessed May 2017; Diana Urania Galetta, ‘Transparency and Access to Public Sector Information in Italy: a Proper Revolution?’ (2014) 2 *Italian Journal of Public Law* 212–240; Gianluca Gardini, ‘Il codice della trasparenza: un primo passo verso il diritto all’informazione amministrativa?’ (2014) 8–9 *Giornale di diritto amministrativo* 875–891.

<sup>9</sup> See art. 5, Legislative Decree No. 33/2013.

used, because of the constant expense clause in the Decree.<sup>10</sup> Finally, it was erased in 2016, when the legislator introduced a new kind of civic access (so called ‘generalised’ civic access), which allows private parties to obtain disclosure beyond the borders of compulsory publication.

An interesting element of the 2013 Legislative Decree concerns the indication of promoting higher levels of transparency as a strategic area for the definition of general and specific goals. First, it is clear that publicity/publication is just one possible tool for achieving substantial transparency (as such, the two principles are not the same). Second, in this context, transparency is not only manifested in its relationship with the publication of acts and documents, but also, for instance, with simplifying the language used by the authorities in their communications with citizens.

In fact, a definition of publication has been given in Legislative Decree No. 33, since its adoption in 2013, besides the definition of transparency. Publication is intended as publication in the authorities’ websites of information, documents and data regarding their organisation and activities. However, according to the decree, online publication is compulsory only for those groups of acts/documents/data which are indicated by the legislator. The result is a sort of tautological effect: only the information that is public according to the statutes must be published online on the authority’s website and be accessible to anyone (not only to the stakeholders who are the authors of a request). This is interesting from the point of view of the nature of the legal position of the person who aims at obtaining the document or the information: in this case, in fact, that position is certainly strong (a full right) and there is no discretionary administrative power. However, at the same time, the rule according to which total publication is alternative to the ‘traditional’ right of access to documents (and when the document is public, which means that it has been published, the right is assumed to have been granted automatically) stays alive in law 241/1990.

As already pointed out, Legislative Decree No. 33/2013 was reformed by Legislative Decree No. 97/2016. An important change has to do with the legal notion of transparency.<sup>11</sup> At present, it not only requires public action to be made available to citizens according to the rules in force, but is also explicitly connected with the protection of the rights of individuals and with promoting participation by private parties in the administrative procedures.<sup>12</sup> Today more than ever, transparency is becoming a polysemic notion in Italy.<sup>13</sup> There are at least two notions of administrative transparency, which are different from the point of view of their

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<sup>10</sup> In fact, the Decree compelled – and still compels – the administration to implement it without incurring new expenses; this rule was materially incompatible with actions requiring complicated evaluations of the need for partial anonymisation of personal data, which of course requires time and money to be spent in order to obtain the desired result. See Savino (n 6) 795–805.

<sup>11</sup> See Mario R. Spasiano, *Riflessioni in tema di trasparenza anche alla luce del diritto di accesso civico* (2015) 1 *Nuove Autonomie* 63–80.

<sup>12</sup> See art. 1, Legislative Decree No. 33/2013, as emended in 2016.

<sup>13</sup> See Anna Simonati, *La trasparenza amministrativa e il legislatore: un caso di entropia normativa?* (2013) 21 (4) *Diritto amministrativo* 749–788.



content and from the point of view of their purpose. The ‘new’ concept is defined after the 2013 and the 2016 reforms in general terms, but the legislator expressly keeps the ‘traditional’ concept alive.

## II The Right(s) of Administrative Access

### 1 Preliminary Remarks

The ‘traditional’ right of access to administrative documents ruled in Law No. 241/1990 allows private parties to read or take a copy of administrative documents, in order to defend their own legal position; as a consequence of the aim of self-protection, the request must give reasons and, when the documents contains secret information or confidential/sensitive data on third subjects, the reason given in the application is the basis for the competent authority to make a comparison between the counter-interests.

After the 2013 and the 2016 reforms, such a right of access survived. Now, it works together with the two kinds of civic access.<sup>14</sup> The first, introduced by Legislative Decree No. 33/2013 in its original formulation, allows everyone to know directly, without being compelled to give reasons for the request, documents, data and information that must be published in the websites of authorities.<sup>15</sup> According to the second, besides the *ex lege* publication of documents, data and information, anyone has a right to know the content of administrative documents and data (without being compelled to give reasons for the request), with the exception of those containing secrets to be kept in the public interest or to defend private and highly confidential data.

Even if the case law in principle does not put in doubt that the three rights of access have different characteristics,<sup>16</sup> the distinction between them is not simple<sup>17</sup> and the boundaries have to be indicated very carefully.

<sup>14</sup> See art. 5 and art. 5 bis, Legislative Decree No. 33/2013, as emended in 2016.

<sup>15</sup> See: Marina Binda, ‘Accesso civico e accesso disciplinato dalla legge n. 241 del 1990. Commento a d.lg. 14 marzo 2013, n. 33; l. 7 agosto 1990, n. 241’ (2014) 4 *Temi romana* 47–56; Valerio Torano, ‘Il diritto di accesso civico come azione popolare’ (2013) Vol. (4) *Diritto amministrativo* 789–840; Stefano Toschei, ‘Accesso civico e accesso ai documenti amministrativi: due volti del nuovo sistema amministrativo’ (2013) 3 *Comuni d’Italia* 9–23.

<sup>16</sup> See for example: Cons. St., VI, 20.11.2013, No. 5515, TAR Lombardia, Milan, IV, 30.10.2014, No. 2587; TAR Lombardia, Milan, IV, 11.12.2014, No. 3027; TAR Campania, Naples, VI, 3.3.2016, No. 1165; TAR Abruzzo, L’Aquila, I, 30.7.2015, No. 597. See also Toschei (n 15) 9. However, sometimes the courts held that the statutory introduction of the 2013 right of civic access has materially strengthened the traditional access to documents: see, for instance, TAR Piedmont, Turin, I, 8.1.2014, No. 9. See also TAR Umbria, I, 16.2.2015, No. 69 and TAR Abruzzo, I, 16.4.2015, No. 288; TAR Lombardia, Brescia, I, 4.3.2015, No. 360, and TAR Abruzzo, I, 16.4.2015, No. 288. The text of all the case-law mentioned in the paper is available (unfortunately, in Italian), in <https://www.giustizia-amministrativa.it>.

<sup>17</sup> In fact, the applicant for access sometimes prefers not to make clear which kind of access he/she aims at obtaining, by expressing the request in a very broad way. However, according to the most correct line, an application that does not make clear what kind of access it refers to should be considered (both by the administration and, later, by the courts) as inadmissible. See so, for instance: TAR Lazio, Latina, I, 9.12.2014, No. 1046; Cons. St., V, 12.5.2016,

The comparison is further complicated in light of the peculiar role given in this field to administrative courts. In fact, according to the Code of Administrative Judicial Review (Legislative Decree 2.7.2010, No. 104), the same judicial remedy works with reference to the breach of the duties of on-line publication and to overcome an administrative denial of ‘traditional’ access to documents.<sup>18</sup> The judicial procedure is special and it is based on short deadlines for the private parties to act during the procedure and for the court to issue its decision and on the wide powers of the administrative court. In fact, the courts may order documents to be presented to the applicant (for the ‘traditional’ access) or to be published (in the case of civic access), also indicating how specifically to do that (art. 116.4, Legislative Decree No. 104/2010). This legislative choice does not take into account the numerous differences between the three kinds of right of access; besides, it gives the administrative courts an efficient tool for the protection of the applicant’s interest, while the position of the parties with opposing interests is, in the perspective of judicial review, much weaker (which is partially compensated by the provision for the possibility, open to them too, to apply to an ADR authority).

## 2 The Recipients and the Authors of the Request

The first basis of comparison between the various kinds of access concerns the subjects involved.

From the point of view of indicating the recipients of the request, the situation is quite similar in the three cases, because in all of them not only public authorities, in strict sense, but also private subjects acting in the fulfilment of public interest may be the interlocutors of the applicant. However, this is the result of a normative evolution.

In fact, in the case of the right of access to documents, the legislator has progressively adapted the rules in force<sup>19</sup> in light of the case law, which had clearly gone in an extensive direction from a substantive point of view. According to such a perspective, the request for access may be directed to formally private subjects whose mission is (at least partially) to

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No. 1876; Cons. St., V, 12.5.2016, No. 1877; Cons. St., V, 12.5.2016, No. 1878; Cons. St., V, 12.5.2016, No. 1881; Cons. St., V, 12.5.2016, No. 1891. It also true that, sometimes, a sort of osmotic relationship between ‘traditional’ and civic access was indicated. In such cases, when there was a pertinent rule in Decree No. 33/2013, the courts ordered the administration to publish the document on-line on the website, even if the applicant had asked for ‘traditional’ access to it: see so, for instance, Cons. St., VI, 24.02.2014, No. 865 and *Idem*, V, 11.2.2014, No. 64. This is quite dangerous, because the result obtained by the applicant is different from the one that he/she aimed at and there could be no correspondence between what was asked for and the answer given by the court in the decision; besides, when the compulsory on-line publication of data is not complete, such a decision may not be totally satisfactory for the applicant, who aimed at knowing (through the ‘traditional’ access) the full content of the document.

<sup>18</sup> See art. 5.5, Legislative Decree No. 33/2013 in its original formulation; after the reform in 2016, the same rule is contained in art. 5.7. of the Decree.

<sup>19</sup> Which was done by Law No. 265/1999 and by Law No. 15/2005.

pursue a public interest.<sup>20</sup> A similar change happened with reference to the rights of civic access: after having assumed a restrictive formulation in the original text of Legislative Decree No. 33, art. 2 bis (reformed in 2016) it now comprises all public authorities,<sup>21</sup> the great majority of public companies and (formally) private bodies with an economic dimension larger than a minimum size, the activities of which are financed or controlled by public authorities or are connected with the pursuit of public (national or E.U.) interests.

Authors of the request for access are always private parties, even if the conditions required are different: the protection of an individual interest in light of Law No. 241/1990; a breach by administration of its duty to publish on line in the case of civic access; and just the exercise of the right to know in the case of 'generalised' access.

Public authorities, in their mutual relationship, are presumed to act in compliance with the principle of loyal cooperation, which means that they are supposed to exchange the data and information they possess in a fair manner. However, sometimes this principle does not actually work and an authority simply refuses to send the requested data or information to the other authority. Consequently, a narrow but interesting case law<sup>22</sup> has developed an opinion, according to which public subjects may also ask for access to documents following the ordinary rules contained in Law No. 241/1990. This is an evident effort to allow public subjects to use the judicial protection tools which are at the disposal of private parties as well whenever the principle of fairness in mutual relationships between authorities has been concretely breached.

### 3 Object and Purpose of the Right(s) of Access

The differences between the three kinds of access are evident with reference to the object of the right.

The object of the 'traditional' right of access is existing documents,<sup>23</sup> and not directly data or information. Consequently, the recipient of the request must not produce *ad hoc* documents in answer to the applicant. This is of course an effect of the principle of efficiency of administrative action, the corollary of which is economy.

<sup>20</sup> In the recent case law, see for instance *ex multis*: Cons. St., AP, 28.6.2016, No. 13; Cons. Stato, IV, 28.1.2016, No. 326; Cons. Stato, V, 26.6.2015, No. 3226; Cons. Stato, IV, 11.4.2014, No. 1768; Cons. St., V, 15.7.2013, No. 3852; Cons. St., III, 27.5.2013, No. 2894; Cons. St., VI, 10.5.2013, No. 2566; Cons. Stato, VI, 2.5.2012, No. 2516; Cons. Stato, VI, 12.3.2012, No. 1403; Cons. St., VI, 17.1.2011, No. 235; Cons. Stato, IV, 27.1.2011, No. 619; Cons. Stato, VI, 9.8.2011, No. 4741; Cons. St., IV, 12.3.2010, No. 1470; Cons. Stato, VI, 19.1.2010, No. 189.

<sup>21</sup> In the perspective of practical implementation, it is interesting to note that, in the 2016 reform, the importance of the specific characteristics of the different kinds of public subjects was carefully taken into account. The consequence of such sensitivity is particularly evident for local entities (primarily the numerous small Italian municipalities), which often have weak financial and structural resources. Hence, on line disclosure works for them in a simplified way (art. 3.1 *ter*; Legislative Decree No. 33/2013) and such obligation became legally binding not immediately but after one year since the entry into force of Decree No. 97/2016 (art. 42.2).

<sup>22</sup> See especially Cons. Stato, V, 27.5.2011, No. 3190; Cons. Stato, VI, 9.3.2011, No. 1492 and Cons. Stato, VI, 15.3.2007, No. 1257.

<sup>23</sup> See art. 22.4, Law No. 241/1990.

Civic access was introduced in 2013 with a much wider scope, documents, data and information. The acceptance of broad openness was not seen as an excessive complication because the field of implementing this kind of access is rather narrow, comprising only compulsory public elements (which tend to exclude discretionary evaluations by the competent authority).<sup>24</sup>

Things have become less simple with the entrance into force of the 2016 reform. According to the current formulation of art. 5.2 of Legislative Decree No. 33/2013, the 'new' civic access seems to concern only documents and data, apart from those that are legally to be published in the institutional websites. Consequently, information (that is 'elaborated' data) seems not to be part of the implementation area of the new civic access. However, the same art. 5 continues by explaining that all the kinds of civic access may be requested with reference to documents, data or information. In my opinion, this rule makes the narrower formulation of the definition indicated immediately before to be not legally binding; therefore, in practice information could also be the object of a request for 'generalised' civic access.

Another important difference relates to the purpose of the various kinds of access.

The 'traditional' right of access to documents is a tool for the protection of individual interests; hence, applications made with the aim of generally monitoring administrative behaviour are not admissible.<sup>25</sup> The common aim of both forms of civic access, instead, is facilitating a general check by citizens on administrative action.<sup>26</sup> The applicant for access to documents must give reasons and indicate the specific legal interest that, through such access, he/she wants to defend,<sup>27</sup> while the request for civic access must never give reasons.<sup>28</sup>

#### 4 Limitations to the Right(s) of Access

Things are particularly intricate with reference to limitations to access.

In this field, there is no substantive problem with the right of civic access introduced in 2013. In fact, such right of access concerns a 'closed' list of administrative acts, the total or partial disclosure of which – by publication in the institutional website – is directly imposed by a rule in force. It is actually implementation that makes things more complicated, especially when personal data is involved in the compulsorily public document or information, which

<sup>24</sup> Traditionally, the case law follows a restrictive interpretation of the rules providing for cases of compulsory publication (TAR Emilia Romagna, Parma, I, 23.10.2014, No. 377, and TAR Puglia, Bari, III, 16.9.2016, No. 1253) and they may not be extensively interpreted and implemented (TAR Emilia Romagna, Parma, I, 23.10.2014, No. 377), even if it makes clear that they are expression of a general principle of transparency of administrative action (TAR Lombardia, Brescia, I, 4.3.2015, No. 360). In the doctrine, see Francesco Manganaro, 'Trasparenza e obblighi di pubblicazione' (2014) 3 Nuove Autonomie 553–562; Paola Marsocci, 'Gli obblighi di diffusione delle informazioni e il d. lgs. 33/2013 nell'interpretazione del modello costituzionale di amministrazione' (2013) 2–3 Istituzioni del Federalismo 687–724.

<sup>25</sup> See art. 24.3, Law No. 241/1990.

<sup>26</sup> See art. 5.2, Legislative Decree No. 33/2013.

<sup>27</sup> See art. 25.2, Law No. 241/1990.

<sup>28</sup> See art. 5.3, Legislative Decree No. 33/2013.

requires a careful evaluation by the competent subject. Of course, in light of the statutes in force, disclosure of sensitive data is always forbidden and, according to the principle of necessity of data processing, administration should never publish confidential personal data when it is not strictly needed. Therefore, case-by-case decisions must be made often.

Exceptions are instead expressly listed for both access to documents and generalised access. At first sight, they are quite similar: some of them are in the public interest, other aim at defending the right of privacy of third parties. Limitations in the public national interest substantially coincide: security, combating crime, international relationships, economic and financial stability. These interests are often protected by legal secrecy; hence, administrative power in this field is not strong.

The rules are significantly different however when the purpose is the protection of private rights.

According to Law No. 241/1990,<sup>29</sup> the right of privacy of third private parties has to be compared with the personal position to be defended through access, and access prevails when it is strictly necessary in order to defend the applicant's individual position. According to Legislative Decree No. 33, civic access may be denied when it is justified to comply with the statute on personal data processing, or else to grant freedom and secrecy of correspondence and economic private interests; hence, civic access is not allowed if disclosure is concretely harmful.<sup>30</sup>

The different perspective is evident and so is the inversion of the point of view. In the case of access to documents, when sensitive or highly confidential information of third parties is involved, the applicant must give reasons for the request, in order to show that his/her interest may be satisfied only through the knowledge of the requested documents. In the case of generalised access, access is instead presumed to be allowed, but it must be excluded when disclosure is probably materially harmful for the owner of the information. Decision-making in this field is particularly difficult, especially because (as already noted) the request for generalised access itself must not give reasons and consequently making a comparison between the private interests is almost impossible for the administration. As such, the circulation of joint guidelines by the National Anti-Corruption Authority and the National Data Protection Authority is going to be extremely useful.

Anyway, on the basis of method (so to say) the same solution may also help in managing both the 'traditional' and generalised rights of access properly: it is partial disclosure, which allows the applicant to know just some data, without disclosure of the information, the communication or publication of which would be harmful to a protected interest.

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<sup>29</sup> See art. 24.6.d), Law No. 241/1990.

<sup>30</sup> See art. 5 bis, Legislative Decree No. 33/2013.

## 5 The Procedural Rules: Some Relevant Elements

From the point of view of procedure, management of the ‘ordinary’ civic access is quite simple. In fact, it is nothing more than the consequence of the breach of rules compelling the total or partial on-line publication of documents, information or data.

Once more, similarities are especially evident in the rules on the right of access to documents and the generalised access.

The first common element is the administrative duty to give reasons for the decision on the request, especially when it is negative. However, this rule works a little differently in the two cases. In fact, Law No. 241/1990<sup>31</sup> provides for a hypothesis of tacit denial, which of course reduces the strength of the motivational duty. No similar exceptions to the duty are admitted in the Legislative Decree No. 33/2013, which, on the contrary, requires administrative decisions on civic access to be expressed in every case.<sup>32</sup>

The second common element is the compulsory involvement in the procedure of the owners of confidential data, who must be put in the position of expressing their view on disclosure. The intensity of their role is however different in the two cases. In the system of the right of access to administrative documents, they can produce a written contribution, which the administration must consider before taking its decision.<sup>33</sup> According to Decree No. 33, their legal position is stronger because, if faced with their opposition, access by the third party is postponed, in order to allow them to activate an administrative appeal or an application for judicial review without delay.<sup>34</sup> The deeper attention to parties with opposing interests is clear also in light of the rules on ADR tools: while in the system of the right of access to administrative documents such instruments may be activated only by the applicant who has been denied, they are available to all parties involved in the controversies on generalised access.<sup>35</sup>

### III The Right(s) of Access and the ‘Digital First’ Principle: Open Issues

An element of administrative action that directly impacts the management of the rights of access has to do with digitalisation. The use of informatic tools should be a source of simplification and so it is generally considered in the national and the supra-national systems. Hence,

<sup>31</sup> See art. 25.3, Law No. 241/1990.

<sup>32</sup> See art. 5.6, Legislative Decree No. 33/2013. However, see also *infra*, 4., where it is pointed out that, in its, 2016 guidelines, the Anti-Corruption Authority hold that the duty to give reasons for denial of generalised access does not work when secrecy relates even to the existence of the required information.

<sup>33</sup> This rule is contained not directly in Law No. 241/1990, but in the executive regulation: see art. 3, Decree of the President of the Republic No. 184/2006.

<sup>34</sup> See art. 5.5, Legislative Decree No. 33/2013.

<sup>35</sup> See art. 5.5-9, Legislative Decree No. 33/2013.

in Italy the strong attention to the contribution of technology to grant more effective administrative transparency<sup>36</sup> has been recently expressed in Law 7.8.2015, No. 124. This statute refers to a general principle – *digital first* – to be implemented by specific legislation as a key rule for administrative action.<sup>37</sup> According to this principle, in order to assure transparency in the public interest, the administrative action should primarily take place through digital procedures. Digitalisation is presumed to improve the quality of governance and to make participation by private parties easier. The same idea is clearly shared in the 2013 and 2016 reforms on civic access, which is intended as a strong communication tool between administration and the citizens through institutional websites and the electronic disclosure of documents, information and data.

Nonetheless, such an approach opens new questions, especially about the link between transparency, efficiency and public ethics. It is necessary to keep in mind, in fact, that in Italy there is a low level of digital literacy. At present, it would be anachronistic to require that the whole population owns the technical tools and is able to use them properly in order to participate in the administrative procedures.<sup>38</sup>

As was already pointed out, in its traditional physiognomy, transparency is a fundamental element of public performance and it goes beyond publicity; moreover, it must be granted with the same intensity to all citizens, intended in its widest sense. In light of all these elements, one could infer that, to really implement transparency through access, the administrative authorities should not only create an accessible institutional website, but also put free internet terminals (with a printer) at the disposal of their citizens. Besides, public servants, to assist and provide technical guidance to them, should continuously attend the terminals. Such a duty seems to be the direct consequence of the introduction of the *digital first* rule as a basic principle for administrative action and it corresponds to public ethics taken seriously. Nonetheless, as economy of administrative action must also be taken seriously, this proposal is of course just rhetorical.

Anyway, the implementation problems connected with the *digital first* principle may perhaps be reduced by proposing that the rules in force be interpreted in a way that partially contrasts with their current text but is at the same time compatible with the ‘spirit’ of the principle of good and fair administration. The issue relates to the possible right of citizens to

<sup>36</sup> See: Fiammetta Borgia, ‘Riflessioni sull’accesso ad Internet come diritto umano’ (2010) 65 (3) *La comunità internazionale* 395–414; Pasquale Costanzo, ‘Miti e realtà dell’accesso ad internet (una prospettiva costituzionalistica)’ (2012) 8 November, *Consulta online* 14; Lorenzo Cuocolo, ‘La qualificazione giuridica dell’accesso a Internet, tra retoriche globali e dimensione sociale’ (2012) 2–3 *Politica del diritto* 263–287; Tommaso E. Frosini, ‘The internet access as a fundamental right’ (2013) 25 *Federalismi.it* 7; P. Passaglia, ‘Diritto di accesso ad internet e giustizia costituzionale. Una (preliminare) indagine comparata’ (2011) *Consulta online* 37.

<sup>37</sup> See: Enrico Carloni, ‘Tendenze recenti e nuovi principi della digitalizzazione pubblica’ (2015) 2 *Giornale di diritto amministrativo* 148–157; Carmela Leone, ‘Il principio ‘digital first’: obblighi e diritti in capo all’amministrazione e a tutela del cittadino. Note a margine dell’art. 1 della legge 124 del 2015’ (2016) 6 *GiustAmm.it* 8.

<sup>38</sup> Of course, the scientific debate about the nature of the right to the internet as a personal fundamental right has also a basic role in a legal discourse on this issue: see Borgia (n 36) 395–414 and Frosini (n 36) 7.

request, at the same time and with reference to the same documents, ‘traditional’ and civic access. The rules in force suggest a negative answer, at least when the compulsory on-line publication concerns the whole content of the act. In fact, according to art. 26.3 of Law No. 241/1990, if a document has been completely published, the right of access by citizens is fully satisfied and it cannot be asked for again.<sup>39</sup> The case law is now instead oriented to a positive answer, whenever the applicant has a relevant legal interest in light of both the 1990 Law and the 2013 Decree.<sup>40</sup> This solution may help at the moment, as a sort of interim ‘positive action’ measure, in overcoming the problems connected with the implementation of the *digital first* principle, which may have counterproductive results in systems such as the Italian one, where the general level of digital literacy is still low.<sup>41</sup>

Moreover, a possible danger connected with a widespread implementation of the *digital first* principle has to do with openness of administrative action. In fact, if administrative procedures are primarily conducted on-line, the low level of digital literacy will probably discourage participation by an important segment of the stakeholders. This may cause a lack of possibly useful inputs for the competent authority, with consequent serious damage to the public interest.

Another link between the *digital first* principle and public ethics concerns the relationship with open data. According to Legislative Decree No. 33/2013, on-line publication of documents and information in the websites of the authorities is compatible with the possibility of free use of data, with the only duty to indicate the official source. Notwithstanding this, the Italian Data Protection Authority has held that personal data may be ‘open’ only if it is not confidential (or even sensitive, of course) and its use does not cause damage to the right of privacy of the person to whom it refers. Therefore, an *ex ante* careful choice among the various kinds of documents and data to be published in the institutional website is necessary.

#### **IV The Right(s) of Access and the Guidelines of the National Data Protection Authority and Anti-Corruption Authority**

The Italian legal system may be integrated with guidelines issued by independent authorities, which are an answer to the need for quick and flexible rules. The various kinds of guidelines are quite different from one another and discussion is open regarding their definition, either as a new sort of normative act (globally indicated as secondary level sources of law) or as administrative acts with general content, addressed to the group of stakeholders in the specific

<sup>39</sup> In the administrative case law, this rule is constantly implemented. See, for instance: Cons. St., IV, 10.1.2012, No. 25; Idem, VI, 16.12.1998, No. 1683; TAR Puglia, Lecce, II, 17.09.2009, No. 2121; TAR Basilicata, Potenza, I, 25.6.2008, No. 315; TAR Liguria, Genova, I, 14.12.2007, No. 2063; TAR Lazio, Rome, I, 08.2.1996, No. 177.

<sup>40</sup> See, for instance, TAR Campania, Naples, VI, 5.11.2014, No. 5671.

<sup>41</sup> From this point of view, the case law, according to which it is a duty of the private party to prove that the digital link indicated by the authority to reach the desired information did not work at that moment (which is often very hard), is certainly not ‘citizen-friendly’. See, for instance, TAR Sardinia, II, 23.4.2015, No. 719.



field. In both cases, they may be considered as the most advanced paradigm of administrative lawfulness, which in Italy has become much more flexible in recent years than it used to be. At the same time, they must be very carefully considered, because they allow public authorities – which are not democratically legitimated and are often linked to groups of private subjects, who have economically and socially strong interests – to create generally binding rules. This could be in contrast with the basic corollaries of the principle of good administration, such as impartiality.

In the field of the right(s) of access, the Data Protection Authority and the National Anti-Corruption Authority are requested to indicate, after a participatory procedure, the groups of information that must be just partially published, in compliance with the principles of proportionality and simplification.<sup>42</sup> The same authorities issue guidelines, to make clear the borders of the limitations to civic access.<sup>43</sup> The Anti-Corruption Authority, with the strong cooperation of the Data Protection Authority, therefore, produced Act No. 1309 of 28.12.2016.<sup>44</sup> This is, in the field of transparency and administrative access, the latest (and probably the most important) example of guidelines.

However, other guidelines on similar subjects had been produced before.

In 2011, the Data Protection Authority<sup>45</sup> produced its guidelines for the Processing of Personal Data Contained in Documents and Records by Public Bodies in Connection with Web-Based Communication and Dissemination.<sup>46</sup> In the 2011 guidelines, definitions of *transparency*, *publicity* and *access* are proposed. In particular, according to the guidelines, *transparency* means the availability of administrative records and documents containing personal data on institutional websites, in order to ensure widespread knowledge so as to enable the public supervision of administrative action; *publicity* means online availability, intended to inform about administrative actions as related to fairness and legitimacy principles, as well as to ensure that administrative decisions are legally enforced where necessary; *access* means availability of administrative records and documents on institutional websites for specific entities, so as to facilitate participation in administrative action. Such definitions are expressly proposed ‘without prejudice to specific definitions set out in special rules’ and only in the perspective of ‘the appropriate implementation’ of the guidelines themselves. This shows

<sup>42</sup> See art. 3, Legislative Decree No. 33/2013, as reformed in 2016.

<sup>43</sup> See art. 5 bis.6, Legislative Decree No. 33/2013, as reformed in 2016.

<sup>44</sup> The guidelines are published (unfortunately, in Italian), in <<http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anadocs/Attivita/Atti/determinazioni/2016/1309/del.1309.2016.de.t.LNfoia.pdf>> accessed 5<sup>th</sup> April 2019 – Among the scholars, see: E. Furioli, ‘L’accesso civico „generalizzato“, alla luce delle Linee Guida ANAC’ (2017) 4 GiustAmm.it 21; M. Lucca, ‘Il diritto di accesso civico, generalizzato e documentale alla luce delle Linee guida ANAC n. 1309/2016’ (2016) 1–3 Comuni d’Italia 26–40.

<sup>45</sup> See G. Di Cosimo, ‘Sul ricorso alle linee guida da parte del Garante per la privacy (About the use of Guidelines by the Italian data Protection Authority)’ (2016) 31 Giornale di storia costituzionale 169–172.

<sup>46</sup> The guidelines (Act. No. 88, 2.3.2011) are published in Italian in <<http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1793203>>; the highlights in English are available in <<http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1803707>> accessed 5<sup>th</sup> April 2019.

a strong awareness, first, of the polysemy of the legal terms<sup>47</sup> and, second, of the difficult relationship between the guidelines and the (other) legal sources. In the same guidelines, then, great attention is paid also to addressing the exercise of discretionary power. When, in the rules in force, there is no indication of the specific elements of publication (such as, for instance, the length of the mandatory disclosure period), each authority decides in light of the principles of proportionality and indispensability of data processing.

Another interesting interpretative contribution was given by the guidelines issued by the Data Protection Authority in 2014 (Act No. 243, 15.5.2014), about on-line processing by public subjects for publicity and transparency purposes.<sup>48</sup> The Authority states that a deep discretionary evaluation is requested, in order to decide whether non-aggregated data is to be published on each website. Such on-line publication is allowed only if strictly necessary (according to the general rules)<sup>49</sup> and excluding personal data regarding sex and health. A relevant specification contained in the guidelines has to do with the aim of the rules requiring the data publication. The specific rules contained in Legislative Decree No. 33 (for instance, with reference to the term of the obligation to on line publication), in this view, can only be applied if the purpose of legislative publication is the protection of administrative transparency, not if the legal purpose is anything else.<sup>50</sup> This is very interesting, because such a distinction is not mentioned at all in the primary sources of law. The 2014 guidelines therefore show an effort to interpret the rules beyond their original scope as well. Of course, such a tendency opens the problem of the possible binding force of the guidelines themselves. In my opinion, the guidelines work as an interpretative contribution and they can ‘fill in the blanks’ of the statute with which they are connected, only if the statute itself so provides and the interpretative contribution in the guidelines is compatible with the content of the rules.

In the 2016 guidelines, the National Anti-Corruption Authority, together with the Data Protection Authority, followed what one might call a cautious approach. Faced with significant doubts about the implementation of the ‘new’ generalised access, the Authorities often just address the open questions and offer general references for their proper solution, without directly indicating them. For instance, there is an effort to guide the administration in implementing the various kinds of access, by proposing a complex terminology. The ‘traditional’ right of access ruled in Law No. 241/1990 is called *documental access*; access to compulsorily public documents, provided for since 2013, is called *civic access*, while the ‘new’ civic access introduced by Legislative Decree No. 97/2016 is referred to as *generalised access*. It is made clear that civic access has a narrower scope than generalised access, while documental access

<sup>47</sup> See: Bombardelli (n 7) 657–685; Simonati (n 13) 749–788.

<sup>48</sup> The guidelines are published (unfortunately, in Italian), in <<http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/3134436>> accessed 5 April 2019.

<sup>49</sup> See art. 8 and art. 11.1.d, Legislative Decree No 196/2003.

<sup>50</sup> An interesting example contained in the Guidelines (see pp. 10–11 and 13) concerns wedding banns, the publication of which clearly aims primarily at combatting polygamy and has nothing to do with administrative transparency.

has the narrowest object but allows a deeper knowledge of the content of the documents. Moreover, the guidelines invite the individual authorities to issue specific regulations, and to explain the rules in force and indicate best practices.

About the possible effect of an administrative decision to accept a request for the ‘new’ civic access, some general suggestions aim at helping to solve the deepest doubts. Considering the legislative text,<sup>51</sup> one could infer that, when the request for generalised civic access is accepted the knowledge of the document or information must be open to anyone. These rules, which seem to be very auspicious for a widespread implementation of administrative transparency, will on the contrary perhaps induce authorities to be severely restrictive in allowing the ‘new’ civic access or at least to limit it to applicants only. In the guidelines, it is made clear that the administration may always protect the (public) interest in the economy of its action, in accordance with the relevant E.U. case law.<sup>52</sup> The necessary balance of all the relevant (public and private) interests allows the competent authorities to choose the best solution in light of the characteristics of the single case, in order to implement as widely as possible the principle of administrative transparency. Besides, the guidelines note that the rules, according to which the administrative decision on the request for generalised access must be expressed and it must give reasons, may be clearly dangerous and counterproductive. This can happen whenever access is denied in order to prevent the disclosure of secret or confidential data, especially when even their existence is unknown to the public. Therefore, an important exception to the administrative duty to give reasons for the decision is indicated, whenever giving reasons would reveal confidential information on public activity or on the counter-interested parties.

The third example of the ‘indirect approach’ of the 2016 guidelines in solving the open problems connected with the implementation of the rights of access relates to the limits to the ‘new’ civic access. Also from this point of view, the guidelines do not contain specific indications, but they offer some useful explanations. In particular, they distinguish between absolute and relative exceptions to generalised access. The former work when a rule of law strictly prohibits access to protect fundamental public interests (let’s think of state secrets and other secrets, as provided for in specific pieces of legislation) or private rights (let’s think of the right of privacy regarding sensitive data). The latter work when a specific evaluation by the administration, in light of the characteristics of the single case, shows that disclosure of documents, data or information could be concretely harmful to fundamental public interests (public security and defence; international relations; monetary and current policies; public

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<sup>51</sup> According to art. 3, Legislative Decree No. 33/2013 (as amended in 2016, all the documents and data which are the object of civic access are public (which means *must* be made public), here comprised the ones which are compulsorily to be published. Moreover, art. 7 of the 2013 Decree holds that all the documents, information and data that have been the object of civic access (in both its forms, one could infer considering the text in force) must be published online in open access and can be re-used with no broader limitations than the duty to mention their source and to use them properly.

<sup>52</sup> In fact, in the guidelines, Court of first instance, First chamber, extended composition, Judgment of 13.4.2005, Verein für Konsumenteninformation/Commission is mentioned (see 4.2.).

order, prevention of and combating crime) or private interests (protection of personal data, freedom and secrecy of correspondence and protection of economic and commercial interests). In such cases, a careful decision-making process by the competent authority is necessary, in light of the specificities of the single case; it seems to be very similar to the exercise of discretionary power. In particular, when private confidential data is concerned, generalised access should probably be forbidden when the data is sensitive or concerns the fundamental rights of individuals (such as genetic data or detailed economic information). The expressed legislative reference to *concrete* damage is important, because it requires the administration to choose a proportionate solution in any event, which also means that postponed or partial disclosure must be normally preferred to total denial. Partial disclosure in particular may be the proper solution, whenever personal confidential (but not sensitive) data is concerned.

It is also useful to point out that, according to the 2016 guidelines, there are important differences between groups of counter-interested parties. Individuals tend to be wholly protected, in light both of the rules on personal data processing and of the rules on the defense of the right of privacy. The rules contained in Legislative Decree No. 196/2003 on personal data processing do not concern, however, subjects other than private individuals. Therefore, legal persons and associations are surely protected, but only in relation to their right to freedom and secrecy of correspondence and in relation to their economic and commercial interests.

The guidelines analysed represent the starting point for other interpretative acts, which show the effort by administrations to solve the problems arising from the coexistence of the various kinds of access. In particular, a circular was released in 2017 by the Department of Public Service,<sup>53</sup> in order to help the individual authorities in their practical activities. In the circular, the principle of reasonableness seems to be key concept. Generalised access is indicated as the expression of a general right of information; therefore, administration is required to reduce as much as possible the exercise of the power of denial. Hence, when access is requested without any specification of its legal title, it should be considered as generalised access; besides, the request should be considered inadmissible only if it does not make clear its fundamental elements. In a practical perspective, the circular contains some suggestions about so called 'pro-active' access: according to it, administration should publish in the institutional websites those documents and data that (at least) three different subjects have asked for them to be published during the latest year. At the same time, however, denial of access is possible whenever satisfying the request would compel the administration to an excessive effort (which happens, for instance, if the same request is repeatedly presented by the same subject).

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<sup>53</sup> See Ministero per la semplificazione e la pubblica amministrazione, Accesso civico generalizzato (FOIA). Circolare applicativa, 30.5.2017, No. 2, in <<http://www.funzionepubblica.gov.it/articolo/dipartimento/01-06-2017/circolare-n-2-2017-attuazione-delle-norme-sull%E2%80%99accesso-civico>> accessed 5 April 2019.

## V Final Remarks

A synthetic analysis of the contemporary Italian legal system shows that pluralism is the main characteristic of both the principle of transparency and administrative access as a tool to grant transparency. The reasons for this phenomenon are to be found primarily in the progressive complication of administrative action, which depends on the multiplication of its tasks and field of intervention and on the introduction of technological instruments to fulfil its competencies.

From one point of view, this clearly could be a positive side of the system, because it determines a multiplication of the legal tools for administrative transparency at the disposal of citizens. However, in practice, the same factor is a point of weakness: the coexistence of the right of access to administrative documents and the 2013 civic access had already created serious implementation problems, which are quite evident in the recent case law; the addition of generalised access has complicated things further, especially in light of the statutory indication of limitations to it, that it is not really exhaustive and leaves a wide space for discretionary power. As practitioners often point out, at present the citizens are rather confused and they don't know exactly which kind of access they have to ask for.

The concept of transparency has been changing in recent years, especially when it has been legally connected with the need for accountability and to reveal corruption. Nevertheless, polysemy is maybe unavoidable, because it is also an effect of the influence of supra-national law,<sup>54</sup> where there is not just one accepted notion of the right of access, or at least the accepted notions have different nuances.

In the EU system, both in art. 15 TFEU and in art. 41-42 of the Charter of Fundamental Rights, access is provided for not only as a fundamental right of European citizens but also as an executive tool of the principle of transparency, which is intended as an instrument to allow democratic control of administrative action. Hence, the conceptual basis of access primarily lays on the aim of protecting the public interest.<sup>55</sup> At the same time, in the ECHR case law, the right of access to administrative activities is often considered as an expression of freedom of information, protected in art. 10 of the European Convention for the protection of human rights and fundamental freedoms.<sup>56</sup> This shows that, in the view of the European Court, even

<sup>54</sup> See Mario Savino, 'The Right to Open Public Administrations in Europe: Emerging Legal Standards (2010)' <<http://www.oecd-ilibrary.org/fr/governance/sigma-papers20786581>> accessed May 2017.

<sup>55</sup> See: D. Curtin, P. Leino-Sandberg, *Openness, Transparency and the Right of Access to Documents in the EU. In-depth analysis for the PETI committee* (European University Institute 2016, Badia Fiesolana); D. Curtin, J. Mendes, 'Art. 42 – Right of Access to Documents' in Steve Peers, Tamara Hervej, Jeff Kenner, Angela Ward, *The EU Charter of Fundamental Rights* (Nomos 2014, Baden-Baden) 1142–1163.

<sup>56</sup> For instance, in the recent ECHR case law, see: *Társaság a Szabadságjogokért v Hungary*, 14.4.2009; *Youth Initiative for Human Rights v Serbia*, 25.6.2013; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria*, 28.11.2013; *Roşianu v Romania*, 24.6.2014; Grand Chamber, 8.11.2016. Among the scholars, see Lucy Maxwell, 'Access to Information in Order to Speak Freely: is this a right under the European Convention?' (19.1.2017) <<http://ohrh.law.ox.ac.uk/access-to-information-in-order-to-speak-freely-is-this-a-right-under-the-european-convention>> accessed 28 August 2017.

if the involvement of public interest is clear as well, access primarily still works as the expression of individual interests, with a direct link to fundamental rights. Furthermore, Italian Law No. 190/2012 (which, as already indicated, is the origin of the acceptance of the ‘modern’ idea of transparency in the national system) is itself the effect of compliance with the supranational rules. In fact, it is the implementation act at the national level, among other things, of the UN Convention against corruption (31.10.2003)<sup>57</sup>. Therefore, one could infer that, in the supranational legal orders, the accepted concepts of administrative access are quite different and tend to aim at different priorities. While in the EU attention is paid in particular to the public interest in fair administration, the Court for the Protection of Fundamental Freedoms rather takes the exercise of access into the field of individual rights protection; at the UN level, the link between transparency and highlighting corruption (which is at the heart of the recent introduction in Italy of civic access and of generalised access rights) is strongly perceived.

Moreover, it is clear that not only are publicity and transparency not synonyms, but also openness/publicity (even on-line publicity) is not able in itself to assure real transparency.

It is maybe a challenge for the administrative law scholars to show that the ‘traditional’ idea of transparency is different from the ‘new’ one, not only because of its content, but also because of its fundamental nature. The ‘new’ principle of transparency is satisfied when documents, information or data are published or communicated to the interested parties; the ‘traditional’ principle of transparency not necessarily has to do with the results of administrative action, but properly with administrative action (procedures and final measures) as a whole. This specificity is perhaps not useless and must be maintained, because administrative action has peculiar characteristics, which are often different from those of the other public law activities (the rule-making and the judicial ones). So, we could say that transparency may work at two different levels: as a ‘concrete’ rule of law according with the legislator’s will, but also (and maybe primarily) as a general principle of good governance, even apart from the production of specific statutes.

The original perception of the concept of transparency allows some elements that are not included in the modern legislative notion to be kept in mind. A basic factor concerns the quality of public communication, as even a document that has been fully published is not really transparent if it is written using language that is not comprehensible to the citizens. Replacing the ‘traditional’ principle of transparency as an expression of good governance with the ‘new’ one would be simplistic and wrong; it would produce a severe loss of significance and legal implications. Legislative reforms may effectively change the borders of specific legal tools, but it should not be assumed that, so doing, they are also able to affect basic concepts and principles. Despite the normative definition in force, one may infer that transparency in Italy still is what it used to be: the sum of comprehensibility and checkability of administrative

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<sup>57</sup> In the text of the Convention (which was ratified in Italy with Law No. 116/2009), there is a clear and direct link between administrative transparency and contrast of corruption: see art. 5.1., art. 7.1(a) and 7.4, art. 9, art. 10.1, art. 13.1(a). About the right of access, see art. 10 and art. 13 of the Convention.

action. The core of such a principle should therefore be in clarity and accountability; disclosure of documents, data and information certainly is an element of the mechanism of transparency, but they do not necessarily overlap with it. The co-existence of the three rights of access is blatant proof of this. In the contemporary transforming society, seeking a balance between the various souls of administrative access is a challenge for scholars and practitioners.

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Bruno Reynaud de Sousa\*

## **Migration, the Sahel and the Mediterranean Basin: Which Scenario for the EU27 by 2025?\***

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### **Abstract**

In choosing to focus on the situation in the Mediterranean region over the past four years, the present paper aims to assess how the Commission's White Paper on the 'Future of Europe' confronts the reality of economic migration in the wider context of the Sahel region and the Mediterranean basin. Taking the shortcomings of the EU engagement in the Mediterranean embodied by Operation Sophia/EUNAVFOR Med as an example, the present paper debates the value of a scenario 4½, based on the White Paper's scenario 4 and 5 regarding *Schengen, migration & security* and *foreign policy & defence*. Most especially, the present paper reaffirms that economic migration is a *global issue* providing an opportunity for the EU to play a decisive role in the development of global administration, thus enriching the discussion on Global Administrative Law in connection with the origins and impact of global governance. In this regard, unilateral actions by key EU Member-States pose a serious risk of undermining the relevance of EU Law and Public International Law toward the management of economic migration. Looking at the foreseen impact for Administrative Law, the paper advocates the need to perhaps revisit the distinct types of barriers to external influences that national Administrative Law regimes have, for example when applying International Law instruments, and to consider the increasing influence that International Law has upon the way in which competences are exercised by public administrations in EU Member-States – especially as States resort to national Constitutional Law as a last line of defence against ECJ rulings.

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\*\* The present paper is based on the contribution entitled 'Mission failure: an assessment of EUNAVFOR MED' for presentation at the ELI Administrative Law SIG Conference.



## I Introduction

In the beginning of the 19th century, Katsushika Hokusai, a Japanese artist, created the world-famous work – ‘The Great Wave off Kanawaga’ – depicting an overwhelming wave menacing small, helpless boats. Such is the way the current migration trends towards Europe are often depicted, the degree of helplessness of EU Member States’ national administrations varying from country to country.

The world today is one of paradox and volatility. At a time of great technological innovation and economic prosperity, the scale of human tragedy is equally staggering. The year 2017 has been record-setting for the world economy: the Dow Jones grew from 19,735 points in January to over 24,750 points by year end, registering a drop to around 23,900 points in the first three months of 2018.

Conversely, we witness some of the biggest humanitarian tragedies of all time: the UNHCR registered the highest levels of displacement on record with an unprecedented 65.6 million displaced people around the world, 22.5 million refugees (5.5 million from Syria alone) of whom only 189.300 were resettled in 2016.<sup>1</sup> Crucially, estimates point to 465,000 people killed during the 6 years of armed conflict in Syria.<sup>2</sup> Although the world is not black and white, these circumstances are perceived as coming together to create a very clear division; a World of Order and a World of Disorder.<sup>3</sup>

Europe has traditionally been perceived around the World as a value-based community of law. For the thousands of migrants travelling thousands of kilometres on foot and by sea, Europe is a beacon, a symbol of hope in the World of Order. At a time when the US government moved forward with several restrictions on the entry of third country nationals, the EU can be said to represent, at least for those migrants, the ‘shining city upon on a hill’ that US President Ronald Regan once spoke about.

Nonetheless, *migration* is a contentious topic within the EU and the debate is characterised by at least two main points. The first concerns ascertaining the way in which EU Law is imperilled by EU Member States’ individual actions and/or collective actions (or lack of them). A second point is that EU Member States share a set of reasons behind the adoption of such actions: the assertion of national sovereignty (and the securitization<sup>4</sup>

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<sup>1</sup> UNHCR, *Figures at a glance*, available at <<http://www.unhcr.org/figures-at-a-glance.html>> accessed 1 June 2017.

<sup>2</sup> Reuters, *Syrian war monitor says 465,000 killed in six years of fighting*, available at <<https://www.reuters.com/article/us-mideast-crisis-syria-casualties/syrian-war-monitor-says-465000-killed-in-six-years-of-fighting-idUSKBN16K1Q1>> accessed 4 April 2019.

<sup>3</sup> T. L. Friedman, *Thank you for being late: an optimist’s guide to thriving in the age of accelerations* (Farrar, Straus and Giroux 2016, New York).

<sup>4</sup> By securitization I refer to the process whereby ‘issues become securitized when leaders (whether political, societal, or intellectual) begin to talk about them – and to gain the ear of the public and the state – in terms of existential threats against some valued referent object [...] the issue [raises] above normal politics and into the realm of ‘panic politics’ where departures from the rules of normal politics justify secrecy, additional executive powers, and activities that would otherwise be illegal.’ See B. Buzan, ‘Rethinking Security after the Cold War’ (1997) 32 (1) *Cooperation and Conflict*, 5–28, 13–14. A more recent critique of the concept sees securitization as a process of translation of

thereof), economic protectionism and fragmentation of social/national cohesion. Such actions have the potential to imperil the perception of the EU as a rule-based community committed to the respect of International Law.

Critical security studies theory underlines, *inter alia*, a very important idea: security hinges upon perceptions.<sup>5</sup> Presently, the migration debate is still intertwined with the wider debate on EU Member State solidarity, being framed as the prime example of an impending cohesion crisis in the EU. The fact that the current migration discourse or rhetoric resorts to different hydraulic engineering concepts skews public perceptions of the other ('the migrant') as a harbinger or a messenger of misfortune – 'den Boten des Unglücks' in the words of Bertolt Brecht in the poem 'Die Landschaft des Exils'<sup>6</sup>.

For the past four years, the world has seen how the Mediterranean Sea was transformed into a mass grave for almost 16,000 anonymous individuals – men, women and children – who lost their lives between 2014 and 2018 in an escape from scenes of either misery or violence – sometimes both. Notwithstanding the most recent efforts by the UN's High Commissioner for Refugees (UNHCR), the international community has experienced increasing difficulties in dealing with the current challenges posed by human mobility in the context of globalisation in regions of Africa and the Middle.<sup>7</sup>

As regards the role of Public International Law, the present paper will consider two aspects. On the one hand, it is evident that the *individual* has gained increased relevance in international relations, especially since 2001. However, it is equally certain that the individual still appears as a partial passive subject of International Law, in some cases dependent upon the State or mediated by the State. On the other hand, regarding the *State*, a double tendency needs to be considered: an increasing number of Southern and Northern States that objectively present (i) an inadequate correlation between internal demands and internal resources, while at the same time (ii) being overwhelmed by increasing pressures of varying nature (e. g., social, economic)<sup>8</sup>. In addition, most States have been increasingly confronted with the consequences of events that are externally caused – extreme weather events or globalisation-linked economic tribulations – placing additional pressure on decreasing State resources. More poignantly we may conclude that we have been for a while alternating between '*a globalization of crises and a globalization of powerlessness*'<sup>9</sup>.

In brief, there is an increasing number of States that are lacking in resources and, at the same time, that are exogenous as to the impacts they suffer. Different authors employ different

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so-called 'pre-existing narratives' (or threat images) to the local context of a particular State. See H. Stritzel, *Security in translation: securitization theory and the localization of threat* (Palgrave Macmillan 2014, Basingstoke).

<sup>5</sup> K. Krause, M. C. Williams, *Critical security studies: concepts and cases* (University of Minnesota Press 1997, Minneapolis).

<sup>6</sup> B. Brecht, J. Willett, R. Manheim, E. Fried, *Poems, 1913–1956* (Methuen 1987, London – New York).

<sup>7</sup> S. Ali, D. Hartmann, *Migration, incorporation, and change in an interconnected world* (Routledge 2015, New York).

<sup>8</sup> A. Moreira, *Memórias do Outono Ocidental: um século sem bússola* (Almedina 2013, Coimbra).

<sup>9</sup> P. Lamy, N. Gnesotto, *Où va le monde?* (Odile Jacob 2017, Paris).

concepts to describe States displaying such an imbalance: ‘failing State’<sup>10</sup>; ‘collapsed State’<sup>11</sup>; State displaying a ‘lack of effective government’<sup>12</sup>; ‘failed State’<sup>13</sup>; *gescheiterter Staat*<sup>14</sup>; *État défaillant*<sup>15</sup>; *Estados fallidos*<sup>16</sup>; or even ‘fragile States’<sup>17</sup>.

A few States of the Sahel and the central Mediterranean region currently display the severe imbalances as described – especially Libya.<sup>18</sup> The current circumstances in the wider Sahel region are a cause of great concern at EU and NATO levels. EU Member States’ actions to address the challenges posed by state fragility in the region and the way in which these actions intersect with the human mobility (migrant) challenge in the Mediterranean lead to one striking conclusion: EU borders no longer *end* at Ceuta, Melilla and the coast lines of Lampedusa or the Greek Islands; EU borders have *de facto* extended further South and East, well beyond the historical limits of the Roman Empire’s *Limes Africanus* and *Limes Arabicus* (as until 395 A.D.).

In the past, EU Member States could afford the luxury of not cooperating in migration management matters, mainly due to the physical distance from the migrants’ countries of origin. Nowadays, the phenomenon of globalisation has increased opportunities for human mobility – specifically since organized crime harnesses the ‘power of flows’ that Friedman describes<sup>19</sup> – in essence eliminating the physical distance that existed in the past: arrivals via the central Mediterranean route in the period from January 2014 to November 2017 total almost 600,000 men, women and children.<sup>20</sup>

The evident absence of an effective government in Libya, the dire situation in Syria in the wake of the internal conflict and the wider insecurity context in the Sahel region (mainly in Mali and the Central African Republic), have led EU Member States multilaterally, bilaterally and directly into the Sahel region and the Mediterranean Sea.

<sup>10</sup> G. B. Helman, S. R. Ratner, ‘Saving Failed States’ (1992–1993) 89 (Winter), *Foreign Policy* 3–20.

<sup>11</sup> I. W. Zartman, ‘Introduction: Posing the problem of state collapse’ in I. W. Zartman (ed), *Collapsed states: the disintegration and restoration of legitimate authority* (L. Rienner Publishers 1995, Boulder).

<sup>12</sup> D. Thürer, M. Herdegen, G. Hohloch – Deutsche Gesellschaft Für Völkerrecht Tagung, *Der Wegfall effektiver Staatsgewalt: The Failed State = The breakdown of effective government* (C.F. Müller 1996, Heidelberg).

<sup>13</sup> R. I. Rotberg, ‘The Failure and Collapse of Nation-States: Breakdown, Prevention, and Repair’ in R. I. Rotberg (ed), *When states fail: causes and consequences* (Princeton University Press 2004, Princeton, N. J.).

<sup>14</sup> R. Geiß, ‘Failed States’ *Die normative Erfassung gescheiterter Staaten* (Duncker & Humblot 2005, Berlin).

<sup>15</sup> G. Cahin, ‘L’État défaillant en droit international: quel régime pour quelle notion?’ in O. Corten (ed), *Droit du Pouvoir, Pouvoir du Droit: Mélanges offerts à Jean Salmon* (Bruylant 2007, Bruxelles).

<sup>16</sup> M. Pérez-Gonzalez, ‘Conflictos armados y posconflicto’ in W. Brito, J. P. Losa (eds), *Conflitos armados, gestão pós-conflitual e reconstrução* (Scientia Iuridica – Andavira Editorial 2011, Santiago de Compostela).

<sup>17</sup> L. Brock, H.-H. Holm, G. Sørensen, M. Stohl, *Fragile states: violence and the failure of intervention* (Polity 2012, Cambridge).

<sup>18</sup> ‘Libyan state weakness has been a key factor underlying the exceptional rate of irregular migration on the central Mediterranean route in recent years.’ – see, UK, House of Lords, European Union Committee, 14<sup>th</sup> Report of Session 2015–16, *Operation Sophia, the EU’s naval mission in the Mediterranean: an impossible challenge*, §101.

<sup>19</sup> Friedman (n 3).

<sup>20</sup> UNHCR, <<https://data2.unhcr.org/en/documents/download/61295>> accessed 4 April 2019.

## II The EU and Migration: Encampment, Cooperation and Outsourcing

At EU and State-level, the number and the simultaneous nature of current crises require an ability to look at multiple sets of problems simultaneously in a context where (i) what is a priority today may cease to be one six months later, and (ii) public perceptions are very volatile.

Human mobility has increased in the 21st century due to a confluence of different factors:<sup>21</sup> 1) increased connectivity and access to information; 2) increased State fragility; 3) increased opportunities for mobility as transnational criminal networks harness the power of 21st century information and capital flows; 4) pressured EU States are no longer able to rely on natural borders and distance to avoid taking fundamental decisions regarding the effectiveness of existing International Law instruments to address the issue of economic migrants, while at the same time the number of forcibly displaced persons worldwide is at an all-time high of 65.6 million and the number of refugees has increased exponentially in the wake of the protracted armed conflict in Syria (5.5 million refugees). According to Betts and Collier this context exposes clearly all the shortcomings of what they call a 'dysfunctional refugee system'<sup>22</sup>.

Setting aside the period that followed WWII, migration is not a new topic for Europe. Since the 1960s, several European States have authorized temporary migration for labour-related reasons, however without granting migrants the right to seek naturalisation.<sup>23</sup> In addition, this practice gained a different relevance following the emergence of the Schengen area in 1985.<sup>24</sup> Nonetheless, such practice relates mainly to intra-EU migration.

No one would dispute the fact that, in recent years, the EU has been dealing with increasing challenges linked to the wider phenomena of human mobility and urbanisation. In global terms, human mobility has one defining characteristic: it is directed from the global South to the global North: further to what is happening at Mediterranean latitudes, increasing human mobility is also happening in the Americas, originating in States located in South and Central America.<sup>25</sup> Here the people moving from South to North are either escaping situations of economic collapse (e.g. Venezuela), or rampant violence perpetrated by organised crime groups that the sovereign State is unable to contain.

In the past decade, the EU has seen increased internal migration mainly due to the economic and financial crisis of 2007-2008, as southern EU citizens sought jobs in northern EU countries.<sup>26</sup> These renewed Southern European migration flows (coupled with central

<sup>21</sup> A. Betts, P. Collier, *Refuge: transforming a broken refugee system* (Allen Lane, an imprint of Penguin Books 2017, London).

<sup>22</sup> Ibid.

<sup>23</sup> M. H. Fisher, *Migration: a world history* (Oxford University Press 2014, Oxford – New York, USA).

<sup>24</sup> A. Razin, E. Sadka, *Migration states and welfare states: why is America different from Europe?* (Palgrave Macmillan 2014, New York, NY).

<sup>25</sup> J. E. Dominguez-Mujica, *Global change and human mobility* (Springer 2016, Berlin – Heidelberg – New York, NY).

<sup>26</sup> J.-M. Lafleur, *South-North migration of EU citizens in times of crisis* (Springer 2016, New York, NY – Berlin – Heidelberg).

European migration flows) have, most recently, fuelled the questioning of some aspects of the freedom of movement within the EU – a right of every EU citizen – and the wider debate on European solidarity. At the same time, arrivals to the EU of third country nationals have soared in a context of tribulations in the EU’s neighbourhood, focusing attention on the Canary Islands, the central Mediterranean and the Aegean Sea regions.<sup>27</sup>

Regional systems, such as the Dublin Regulation,<sup>28</sup> are being placed under additional pressure due to new factors influencing human mobility: there are environmental disturbances and violence below the level of armed conflict, coupled with a double tendency of increasingly fragile States at a time of increased opportunities for human mobility fuelled by technology that increases human interactions. Overwhelming numbers of arrivals and of deaths, such as those registered in 2016 (390,432 arrivals and 5,143 deaths)<sup>29</sup> coupled with additional conflicting pressures from civil society – towards welcoming or rejecting migrants – removed the political margin for long-term or even debate on solutions that might address the root cause(s).

When considering the present topic, there are two interrelated concepts: State (and regional) security and State fragility. The points of origin of most migrants in the Central Mediterranean route are States displaying fragility at distinct levels; governmental; economic and societal. Whereas the notion of ‘failed States’ is disputed in International Law, there is wide acceptance of the fact that certain States display a varying degree of ‘fragility’. Paraphrasing Tolstoy, *all strong States are alike, each fragile State is fragile in its own way*: massive disorganised violence, pandemics or endemic diseases with high mortality rates or that leave many disabled, crystalized intra-state conflict, famine, prolonged droughts, the ‘breakdown of effective government’<sup>30</sup> – among other factors, the combination of which contributes to a circumstance of *State fragility*.

In the post-WWII world, armed violence had an organised character that is no longer identifiable in the 21st century. From the beginning of the 1990s onwards, armed violence started occurring more frequently in a horizontal context of *individual against individual*, going beyond the phenomenon of violence by the State against the individual – what Mary Kaldor called ‘new wars’<sup>31</sup>. The changing character of violence – part of the wider question of the international subjectivity of the individual – required the international community to

<sup>27</sup> P. Bevelander, B. Petersson, *Crisis and migration: implications of the Eurozone for perceptions, politics, and policies of migration* (Nordic Academic Press 2014, Lund, Sweden).

<sup>28</sup> See, Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, repealed by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, JO L 180 de 29.6.2013, p. 31–59.

<sup>29</sup> IOM, *Migration Flows – Europe* <<http://migration.iom.int/europe/>> accessed 4 April 2019.

<sup>30</sup> Thüerer, Herdegen, Hohloch (n 12).

<sup>31</sup> M. Kaldor, *New & old wars* (Polity 2006, Cambridge).

devise ways to engage in scenarios where several non-state actors had violent interactions in the framework of a new type of armed conflict, of an internal or intra-State character (e.g. the 1992 UN intervention in Somalia).

As stated above, although there are many internal and external factors contributing to State fragility, little doubt remains that, for economic migrants, this is the main driver, whereas for refugees, it will be armed conflict. Wider contexts resulting from a combination of violence and misery therefore trigger what Betts and Collier identify as a ‘flight-for-survival’ need, as the only possible response to a ‘forced displacement challenge’ faced by many individuals living in the fragile States of the Sahel and beyond.<sup>32</sup> Upon assuming a new role as a migrant, the individual thus becomes trapped in a continuous cycle of retention and escape, from which death frequently represents the only way out – fleeing one place and risking life to arrive at another, from where to flee again.

Crucially, time runs slowly between phases and all migrants experience a long hiatus at some point when moving: encampment. The average time spent by individuals at a UNHCR camp currently stands at 17 years.<sup>33</sup> In fact, encampment has been the main response by the international community to massive displacements of individuals in the Middle East going back sixty years– only recently has the UNHCR started the debate on alternatives to ‘camps’<sup>34</sup> – at a time when an entire service industry has been building up around encampments (from telecommunications to biometric scanners<sup>35</sup>).

Recourse to legal mechanisms directed at outsourcing migrant management, both at EU and State level and independently of each other, has had a visible outcome despite undermining the application of International Law. Statistics point towards a significant decrease in arrivals in Europe during 2017. With sea arrivals totalling 362,753 in 2016, following an astonishing 2015, when over one million arrivals were recorded, this year is on track to registering less than 170,000 arrivals – the lowest number recorded since 2014.

In the legal and judicial fields, EU action in the framework of the internal management of migration takes place essentially on three fronts:<sup>36</sup> prevention (e.g., immigration controls); criminalisation (at EU level and at State level); and risk management after entry into EU territory (expulsion of aliens and transfer of migrants, pursuant to Directive 2001/40/EC and Regulation 343/2003, respectively<sup>37</sup>). Encampment has thus also become one of the main

<sup>32</sup> Betts, Collier (n 21).

<sup>33</sup> UNHCR, *Resolve conflicts or face surge in life-long refugees worldwide, warns UNHCR Special Envoy*, 20 June 2014, available at <<http://www.unhcr.org/afr/news/press/2014/6/53a42f6d9/resolve-conflicts-face-surge-life-long-refugees-worldwide-warns-unhcr-special.html>> accessed 4 April 2019.

<sup>34</sup> UNHCR, <<http://www.unhcr.org/alternatives-to-camps.html>> accessed 4 April 2019.

<sup>35</sup> See, UN, *WFP Introduces Iris Scan Technology To Provide Food Assistance To Syrian Refugees In Zaatari*, 06 October 2016, available at <<https://www.wfp.org/news/news-release/wfp-introduces-innovative-iris-scan-technology-provide-food-assistance-syrian-refu>> accessed 4 April 2019.

<sup>36</sup> V. Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer 2015, Londres).

<sup>37</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member

elements of the strategy directed at controlling the migrant influx. Predicated on public administration and administrative law, diverse types of migration detention facilities<sup>38</sup> have been established in some EU Member States.

Overwhelmed by the high number of individuals seeking access to administrative justice, the risk is already there of public administration promoting the use of detention beyond the limits imposed by general principles of law. For an example, one may turn to France's *centres de rétention administrative* (administrative retention centres) and the conclusions of recent report by the French Senate stating that administrative retention should be applied only when other coercive measures (confinement to residence or placement in an open centre) are not possible ('Preposition n°10' of the report), while dedicating the entire chapter III to the improvement of living conditions of those in administrative retention centres.<sup>39</sup>

Besides encampment, EU Member States have adopted other responses. First, at EU-level, EU Member States have launched several ESDP operations, namely EUNAVFOR MED (later named Operation Sophia), coupled with an increased presence by Frontex and the European Border and Coast Guard.<sup>40</sup> Second, at individual EU Member State level, different countries have reasserted their sovereignty by: building border fences (Hungary, 2015); linking migrant admission into the country with proof of financial self-sufficiency (Denmark, 2016); introducing restrictions to fundamental rights and freedoms on grounds of national security

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States by a third-country national, repealed by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, JO L 180 de 29.6.2013, p. 31–59. Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. Commission Implementing Regulation (EU) N° 118/2014 of 30 January 2014 amending Regulation (EC) N° 1560/2003 laying down detailed rules for the application of Council Regulation (EC) N° 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece. Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

<sup>38</sup> 'Whether a place where those held in the course of migration proceedings is a place of detention depends on whether the individuals held there are free to leave it at will or not. If not, irrespective of whether the facilities are labelled "shelters", "guest houses", "transit centres", "migrant stations" or anything else, these constitute places of deprivation of liberty and all the safeguards applicable to those held in detention must be fully respected.' – see, UN, Doc. A/HRC/39/45, *Report of the Working Group on Arbitrary Detention*, par. 45.

<sup>39</sup> On the need to restrict the administrative retention practice, see French Republic, *Sénat, Rapport d'Information fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) sur les centres de rétention administrative*, Par Mme Éliane ASSASSI et M. François-Noël BUFFET, *Sénateurs*, n.° 773.

<sup>40</sup> Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

(Germany, 2017); and enhancing cooperation in civilian-military training and migration controls with an encampment component (Italy–Libya agreement of 2017).

When looking at EU cooperation with Africa in the field of peace, security and development, the EU has a proven track record. First, regarding humanitarian aid policies, the EU acts, for example, through the European Commission’s Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO), which for 2016 had a total budget of EUR 1.889 billion<sup>41</sup> – moreover, ‘during 2016, the EU and its Member States remained the world’s largest provider of development funding, contributing more than half of the official development assistance (ODA) globally [...] the European Commission alone disbursed over EUR 10.3 billion in ODA on behalf of the EU (...)’<sup>42</sup>.

Second, looking at more direct or kinetic EU actions, several civilian and military operations have been launched during the past fifteen years: operation ‘Artemis1 (2003); the operations in the Democratic Republic of Congo, namely ‘EUSEC’<sup>43</sup> (2005), ‘EUFOR Congo’ (2006), ‘EUPOL Kinshasa’ (2005), and ‘EUPOL’<sup>44</sup> (2007); the civilian-military mission in support of the African Union mission ‘AMIS II’, in Darfur<sup>45</sup> (2005); ‘EU SSR’ in Guinea-Bissau<sup>46</sup> (2008); ‘EUFOR’, in Chad and the Central African Republic<sup>47</sup> (2008); operation ‘Atalanta’<sup>48</sup> (2008); and, finally, ‘EUTM Somalia’ (2010) – to name a few.

From all the missions referenced, the ‘EUFOR’ military operation in Chad and the Central African Republic is an example of the operational complementarity between the EU and the UN. In effect, launching this ‘transition operation’ enabled the UN’s mission (MINURCAT) to be implemented, while the European Council’s authorisation preceded by Resolution 1778 (2007) of the UN Security Council, making specific reference to previous contacts between the EU and the UN.<sup>49</sup>

<sup>41</sup> COM(2017) 662 final.

<sup>42</sup> EU, *2017 Annual report on the implementation of the European Union’s instruments for financing external actions in 2016*, available at: <[https://ec.europa.eu/europeaid/2017-annual-report-implementation-european-unions-instruments-financing-external-actions-2016\\_en](https://ec.europa.eu/europeaid/2017-annual-report-implementation-european-unions-instruments-financing-external-actions-2016_en)>, accessed 4 April 2019.

<sup>43</sup> Council Joint Action 2006/303/CFSP of 25 April 2006 amending and extending Joint Action 2005/355/CFSP on the European Union mission to provide advice and assistance for security sector reform in the Democratic Republic of the Congo (DRC).

<sup>44</sup> Council Joint Action 2007/405/CFSP of 12 June 2007 on the European Union police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo).

<sup>45</sup> Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan.

<sup>46</sup> Council Joint Action 2008/112/CFSP of 12 February 2008 on the European Union mission in support of security sector reform in the Republic of Guinea-Bissau (EU SSR GUINEA-BISSAU).

<sup>47</sup> Council Joint Action 2009/795/CFSP of 19 October 2009 repealing Joint Action 2007/677/CFSP on the European Union military operation in the Republic of Chad and in the Central African Republic; UN, S/RES/1778 (25SET2007).

<sup>48</sup> Council Decision (CFSP) 2016/2082 of 28 November 2016 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.

<sup>49</sup> UN, S/RES/1778 (25SET2007) 1–3.



Half-way through 2012, the EU was managing twelve active missions in the framework of the CFSP, three military missions and nine civilian missions. However, it is worth noting that, further to the missions indicated, the EU had already foreseen the launch of three additional CFSP missions in Africa.

The EUAVSEC South Sudan<sup>50</sup> civilian mission of 2012 focused on training and support with the objective of improving the security at Juba airport against external threats. It had a training and advisory component, consisting of work between EU experts, local airport authorities and the Sudanese Ministry of Transport toward preparing legislation in the field of airport security.

The 'EUCAP Nestor' mission (2012)<sup>51</sup> is also worth highlighting given the number of countries it encompassed and the wide scope of the mission's mandate. The main objective was reinforcing the maritime security capabilities of a group of countries in the Horn of Africa region: Djibouti (where the mission's HQ was located), Kenya, Seychelles, Somalia and Tanzania. Fitting into the EU's comprehensive approach, the mission had a training component (mainly for judges, civilian police and coast-guards), as well as a judicial system support component.

Also noteworthy from 2012 was 'EUCAP Sahel Niger'<sup>52</sup>, a civilian mission aimed at reinforcing national capabilities for fighting terrorism and organised crime in the Sahel region through training and advising security forces.

Finally, one should mention two additional CFSP engagements in Africa prepared in 2012. The first was 'EUBAM Libya' (2013)<sup>53</sup>, an assistance mission in the fields of security and border management, launched in coordination with the UN's mission ('UNSMIL'<sup>54</sup>); The second was 'EUTM Mali' (2013)<sup>55</sup>, a mission aimed at training Mali's armed forces and linked with the presence of 'AFISMA', a stabilisation force in that state (2012) led by ECOWAS, the Economic Community of West African States, under a UNSC mandate.<sup>56</sup>

In assessing one of the busiest years for EU engagement in Africa, one of the main conclusions was that launching multiple missions with similar objectives requires strong internal coordination efforts at EU level, especially to avoid instances of duplication. Hence,

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<sup>50</sup> Council Decision 2012/312/CFSP of 18 June 2012 on the European Union Aviation Security CSDP Mission in South Sudan (EUAVSEC-South Sudan).

<sup>51</sup> Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP NESTOR).

<sup>52</sup> EU Council Conclusions (23JUL2012).

<sup>53</sup> Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya).

<sup>54</sup> UN, S/RES/2040 (12MAR2012).

<sup>55</sup> Council Decision (EU) 2017/971 of 8 June 2017 determining the planning and conduct arrangements for EU non-executive military CSDP missions and amending Decisions 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces, 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian armed forces (EUTM Mali) and (CFSP) 2016/610 on a European Union CSDP military training mission in the Central African Republic (EUTM RCA).

<sup>56</sup> UN, S/RES/2056 (5JUL2012), S/RES/2085, (20DEC2012), S/RES/2100, (25APR2013).

irrespective of the aforementioned all being EU ‘crisis management’ missions, there were issues present regarding overlapping tasks (for example in the field of fighting terrorism). Following the amazing year of 2012, the EU launched EUCAP SAHEL Mali in 2014 and then, in 2015, the EU launched EUNAVFOR MED – these engagements run in parallel with initiatives such as the ‘G5 Sahel’<sup>57</sup>.

Further to these efforts, another trend has emerged: outsourcing or externalization. Much like the Roman Empire’s treaties of friendship, the EU is now engaging bilaterally selected States – namely countries of transit – for migration management objectives, such as redirecting and/or retaining migrants in facilities or locations in third-countries. The main example of this externalization practice is the EU-Turkey Statement of 18 March 2016, preceded by the launch in 2015 of the EU Emergency Trust Fund for Africa (with an initial allocation of EUR 1.88 billion) and followed in June 2016 by the establishment of a new Partnership Framework with third countries under the European Agenda on Migration.<sup>58</sup>

These developments beckon a comparison with the Roman Empire’s borders, where we see that the EU’s borders have *de facto* extended further South and East, beyond the limits of the Roman Empire’s *Limes Africanus* and *Limes Arabicus* (as until 395 A.D.). Furthermore, what used to be the *Limes Tripolitanus* can now be said to have largely become a failed space where lawlessness enables trading in human beings, among other atrocities; a space where entire states can become so-called ‘borderlands’<sup>59</sup>.

Therefore, to better consider the scenarios proposed by the Commission’s White Paper on the future of Europe, one should be mindful that the EU seems to be pursuing a three-pronged strategy: first, outsourcing or externalisation, often supporting third countries’ public administrations with the management of migrants, with consequences at the level of the effective application of International Law;<sup>60</sup> second, and in close connection with the former, we have cooperation, (i) at the technical-military level or technical-police level, with training missions aimed at building up the security sectors of selected states, and (ii) maintaining a leading role in the disbursement of development aid; third, encampment, both in selected transit countries and within EU Member States, coupled with elements of deterrence, nonetheless on a smaller scale than actors such as the UN (namely the UNHCR<sup>61</sup>).

<sup>57</sup> This is a group encompassing Niger, Burkina Faso, Chad, Mali and Mauritania that envisaged EU support for a multinational battalion-scale force operating in the Sahel region.

<sup>58</sup> COM/2016/0385 final.

<sup>59</sup> M. Ambrosini, *Irregular immigration in southern Europe: actors, dynamics and governance* (Springer 2017, New York, NY – Berlin – Heidelberg).

<sup>60</sup> Bill Frelick, Ian M. Kysel, J. Podkul, ‘Migration Controls on the Rights of Asylum Seekers and Other Migrants’ (2016) 4 *Journal on Migration and Human Security* 190–220.

<sup>61</sup> For a solid analysis of how encampment is used as a strategy around the world see Betts, Collier (n 21).

### III The EU's Naval Engagement in the Central Mediterranean: EUNAVFOR MED/Operation Sophia

Pursuant to the Conclusions of the EU Council special meeting in April 23, 2015, four priorities were established to deal with the situation in the Mediterranean at the time: fighting traffickers; strengthening the EU's presence at sea; preventing illegal migration flows; and reinforcing solidarity and responsibility within the EU. In addition, there was the possibility of launching an operation in the framework of CFSP.<sup>62</sup>

In the framework of Council Decision (CFSP) 2015/778, of 18 May 2015, the decision was made to launch an EU military operation in the south of the Mediterranean (EUNAVFOR MED) to contribute toward 'the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean'<sup>63</sup> to be carried out in 'in sequential phases, and in accordance with the requirements of International Law'<sup>64</sup>, namely taking into account the positions adopted by the UN Security Council and the Libyan internationally recognized governmental authorities.

From the onset, the mandate of EUNAVFOR MED was framed in law enforcement terms, taking aim at human smuggling and trafficking. To this end, article 1 of Council Decision (CFSP) 2015/778 of 18 May states: 'The Union shall conduct a military crisis management operation contributing to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean (EUNAVFOR MED), achieved by undertaking systematic efforts to identify, capture and dispose of vessels and assets used or suspected of being used by smugglers or traffickers, in accordance with applicable International Law, including UNCLOS and any UN Security Council Resolution.'<sup>65</sup>

To this end, the mandate of EUNAVFOR MED (later renamed Operation Sophia) foresaw three sequential phases (see article 2 of the mandate) described as: '(1) In Phase 1, the mission will "support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with International Law.' (2) In Phase 2, Operation Sophia is tasked to 'conduct boarding, search, seizure and diversion of vessels suspected of being used for human smuggling or trafficking'. Phase 2 has two stages: Phase 2A, when the mission acts on the high seas; and Phase 2B, when the mission acts on the 'high seas or in the territorial and internal waters' of the coastal state. Phase 2B will be conducted 'in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned', which in this case is Libya. (3) In Phase 3, the mission – again in accordance with any applicable UN Security Council (UNSC) Resolution or consent by the Libyan government – will: 'take all necessary measures against a vessel and related assets, including

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<sup>62</sup> EU, Press Release, n. 204/15 of 23/04/2015.

<sup>63</sup> Art. 1, n. 1, Council Decision (CFSP) 2015/778.

<sup>64</sup> Art. 2, n. 2, Council Decision (CFSP) 2015/778.

<sup>65</sup> EU, Council Decision 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) (OJ L122, 19 May 2015).

through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking, in the territory of that State, under the conditions set out in that Resolution or consent.’

One of the main problems with this engagement relates to conducting maritime interception missions in waters under Libyan sovereignty. While the applicable UNCLOS regime establishes the principle of exclusion of jurisdiction in favour of the coastal state in relation with the territorial sea and inner waters, and in favour of a vessel’s flag State – this in addition to UN Charter article 2/4 – it is true that Libya has displayed an absence of effective government. In this regard, there is only one successful example of a military naval operation aimed at fighting lawlessness at sea in the absence of effective government in the coastal state, Operation Atalanta in Somalia.

At the onset of EUNAVFOR MED the legal challenges were manifold and differed in scope. In the field of Public International Law, doubts were there regarding the UN Security Council resolutions and whether or not a formal request for intervention formulated by the (recognized) Libyan Government (the Government of National Accord as per UNSC Resolution 2259 of 23DEC2015) existed. However, Resolution 2259 did not allow for actions within the waters under Libyan sovereignty and did not alter the terms of previous Resolutions (mainly UNSC Resolution 2240). Drawing a parallel with the case of Somalia, it is worth noting that UNSC Resolutions adopted under Chapter VII of the UN Charter were all preceded by a manifestation of will (a written letter) of the Transitional Federal Government. Specifically looking at phase 3 of the mandate, the use of ‘all necessary measures’ could possibly translate into the use of force in Libyan territory, thus increasing the overall risk of the engagement. As with combating Somalian pirates, the adaptability of non-state actors’ tactics increases the overall uncertainty and volatility of the engagement: more pressure on one route (e.g., the Eastern route in part due to the EU-Turkey Agreement) might result in more crossings using another route (e.g., the central Mediterranean route, which in 2015 registered 150,000 people, the majority departing from Libya).

In the field of Criminal Law, uncertainty was there regarding the arrest, prosecution and proceedings against individuals taking part in human trafficking or smuggling activities, given that the Libyan judicial system was inoperative at the time. Further legal challenges would emerge regarding a decision by the Libyan government to waive its right to prosecute/act against national citizens suspected of crimes, and with regard to ensuring respect for the ECHR. Additional questions concerned evidence collection on criminal activity in a theatre of operations where non-state actors operated freely, coupled with the uncertainty surrounding the Libyan justice system<sup>66</sup>.

How then to assess the impact of EUNAVFOR MED/Operation Sophia? The UK House of Lords 2016 report on EUNAVFOR MED/Operation Sophia provides a striking conclusion: ‘The intentions and objectives set out for Operation Sophia exceed what can realistically be

<sup>66</sup> UK, House of Lords, cit., §80-82.

achieved. A mission acting only on the high seas is not able to disrupt smuggling networks, which thrive on the political and security vacuum in Libya and extend through Africa<sup>67</sup>. This is to say that, as a denial-of-business-model operation, Sophia turned out to be a very good search and rescue mission – which was not its initial mandate – ending up ‘doing more or less the same thing that previous operations by Italy and Europe did prior to its establishment’<sup>68</sup>, mainly Italy’s operation *Mare Nostrum* and Frontex’s *Operation Triton*.

To sum up, on the one hand, there was a decrease in the number of fatalities at sea, as the traffickers’ freedom to act was restricted. However, the tactics changed: as (safer) wooden boats were destroyed, the use of rubber dinghies increased;<sup>69</sup> crucially, although arrests were made in connection with human trafficking networks, the suspects were mostly low-level facilitators.<sup>70</sup>

In addition, a few key questions remain unanswered from the onset of the engagement. First, although there was a visible short-term added value, what would have been the long-term value of this EU engagement? The fact that the mission was focused on the sea led to the (erroneous) perception by other actors (mainly NGOs) and the EU citizens of EUNAVFOR MED as a search and rescue operation<sup>71</sup> (much more so following the name change, aimed at echoing the birth of a child from a rescued mother aboard the German frigate ‘Schleswig-Holstein’). This perception contributed to – in part – focusing the legal discussion on the Law of the Sea, specifically on territorial waters, maritime search and rescue duties, and sovereignty under International Law. In this way, the real problem of a ‘broken refugee system’ was deprived of much-needed attention.

In addition, the desired end state by the EU is not yet clearly defined: while some countries are clearly concerned with stemming the migrant flow, other seem equally or more concerned with the long-term objective of securing the Sahel. In these terms, the objective of making the central Mediterranean route less appealing for traffickers seemed, with hindsight, insufficient.

To conclude, the continued engagement of the EU in Africa had a boost in 2016 with the launch of EUTM RCA in the Central African Republic. As of May 2018, there are eight active EU missions in Africa, the majority of which deployed in the Sahel region and the central Mediterranean region: EUCAP SOMALIA, EUTM SOMALIA, EUNAVFOR Atalanta, EUBAM Libya, EUTM RCA, EUCAP SAHEL Niger, EUCAP Sahel Mali, EUTM Mali, and EUNAVFOR MED. These EU engagements provide a welcome overlap and complementarity with the EU Member States’ engagements. One EU Member State is worthy of recognition and praise for strong efforts in this regard: France (together with Portugal) has ensured a much needed and effective presence in the Central African Republic (launching the military operation *Sangaris*, 2013–2016) and in Mali, Niger and Chad in the framework of the on-going

<sup>67</sup> UK, House of Lords, cit., §67.

<sup>68</sup> UK, House of Lords, cit., §63.

<sup>69</sup> UK, House of Lords, cit., §63-64.

<sup>70</sup> UK, House of Lords, cit., p. 23.

<sup>71</sup> UK, House of Lords, cit., p. 23.

military operation *Barkhane*<sup>72</sup> launched 2014. This operation followed operation *Serval* that was launched in mid-2013 at the request of the Malian government.

#### **IV The EU as a Rule-based Community: What Role for Public International Law?**

Is International Law relevant to the management of the influx of EU-bound economic migrants departing from the Western and Central Mediterranean routes? The simple short answer is yes. However, in this section I will argue that (i) fundamental Public International Law instruments are less relevant than they could be, and (ii) that fundamental Public International Law instruments risk becoming increasingly less relevant toward the management of economic migrants.

One recent characterisation of the International Law regime and the system affording protection to refugees argues that individuals are offered ‘a false choice between three dismal options: encampment, urban destitution, or perilous journeys’, this being a key characteristic of the ‘dysfunctional refugee system’<sup>73</sup> in place today.

On the one hand, this is in part because the admission and expulsion of third country nationals is still under the purview of the State. On the other hand, so-called economic migrants are not considered in the framework of the 1951 Refugee Convention. Notwithstanding the many advances in International Law regarding the international subjectivity of the individual – such as in the fields of human rights or international responsibility – when the individual is an economic migrant then he is chiefly at the mercy of the sovereign State’s policies regarding immigration and the way they translate into law.

The 1951 Convention follows the premise of Article 14 of the 1948 Universal Declaration on Human Rights that ‘everyone has the right to seek and enjoy in other countries asylum from persecution.’ Therefore the 1951 Convention predicates the circumstance of persecution as the justification for granting admission to a specific category of individual – the refugee – into a given State where he/she is entitled to a special set of rights and enjoys special protection under International Law.

Other relevant Articles of the 1951 Convention are: Article 31, regarding the non-application of criminal sanctions to refugees by reason of irregular entry or stay, and non-application of restrictions to refugees’ freedom of movement beyond necessary; Article 32, limiting the right of expulsion of the host State to reasons of national security and public order; and, Article 33, regarding *non-refoulement*.

The 1967 Protocol Relating to the Status of Refugees (Article I, § 2) widens the application of the 1951 Convention to situations other than post-WWII. Regarding the Eastern Mediterranean route, it is worth pointing out that while Turkey is part of both the 1951

<sup>72</sup> See <<https://www.defense.gouv.fr/english/operations/barkhane/dispositif>> accessed 4 April 2019.

<sup>73</sup> Betts, Collier (n 21) 56.

Convention and the 1967 Protocol, this State limits the scope of applicability of the legal regime (i) to persons who have become refugees as a result of events occurring in Europe, and (ii) by the introduction of a reservation clause ‘to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey’<sup>74</sup>. In effect, rejecting the application of an international minimum standard, and thus raising the issue of the full application of the ‘safe third country’ criteria (see below).

A sizeable number of migrant deaths occur at sea along the central Mediterranean route. For the period from 2014 to 2018 (May 2018)<sup>75</sup>, data from the International Organization for Migrations (IOM) sets the total number of deaths in the three main routes (Western, Central and Eastern Mediterranean) at about 15,984 anonymous individuals – men, women and children – out of which 13,860 deaths occurred along the central Mediterranean route.<sup>76</sup>

Different international legal instruments foresee and refer to a *duty to render assistance*. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) foresees on Article 98 the duty to ‘render assistance to any person found at sea in danger of being lost’ and the duty of every coastal State to ‘promote the establishment, operation and maintenance of an adequate and effective search and rescue service’. Previously, Regulation 33 of the 1974 International Convention for the Safety of Life at Sea (SOLAS) referred to obligations and procedures in distress situations, whereas the 1979 International Convention on Maritime Search and Rescue (SAR) referred to the establishment of search and rescue regions and the development of national search and rescue services to support efficient search and rescue operations. Hence, even though the large majority of accident victims in the central Mediterranean are risking their lives by sailing in ships without nationality (unregistered and not flying any State flag, in accordance with UNCLOS article 91), and in some instances not even seaworthy (engine or wind powered) craft, every other State – as per UNCLOS article 98 – has the obligation to ‘require the master of a ship flying its flag, in so far as he can do so without danger to the ship, crew or the passengers’ to render assistance to persons in need of it.

Further legal questions that intersect the issue chiefly concern the fact that legal concepts (mainly *refugee*, *asylum seeker*, *returned refugee*, *internally displaced person*, *returned IDP*, *stateless person*) intersect with non-legal concepts (mainly *economic migrant*, but also *ecological migrant*)<sup>77</sup>. The essential distinction for the purposes of the present paper is between the concept of *refugee* (and *asylum seeker*) and the concept of (economic) *migrant*. Whereas the first one is escaping a circumstance of total insecurity characterised by

<sup>74</sup> 1967 Protocol to the 1951 Convention, *Declarations and Reservations*, Turkey, available at <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=V-5&chapter=5&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5&lang=en#EndDec)> accessed 4 April 2019.

<sup>75</sup> IOM, *Deaths by Route*, available at: <<https://missingmigrants.iom.int/region/mediterranean>> accessed 4 April 2019.

<sup>76</sup> IOM, *ibid.*

<sup>77</sup> R. Plender, *Issues in international migration law* (Brill – Nijhoff 2015, Leiden).

immediate or constant threats to life, the economic migrant is moving on from a wider insecurity circumstance, better understandable with reference to the concept of human security.<sup>78</sup> In other terms, although both individuals see the EU as a beacon light of hope, the refugee's primary objective is safety, whereas the economic migrant's primary objective is certainty and stability. This distinction, in turn, is crucial for public perceptions of migration and the way in which national governments and public administrations act.

In considering the broad topic of human mobility,<sup>79</sup> Article 13 of UN General Assembly Resolution 217 A (III) (Universal Declaration of Human Rights) of 10 December 1948, affirms every individual's right to 'leave any country, including his own, and to return to his country', while Article 14 states that 'everyone has the right to seek and enjoy in other countries asylum from persecution'. Conversely, the admission and expulsion of third country nationals remains, overall, a matter under the purview of the State. So, although the 1948 UN Universal Declaration of Human Rights refers an individual's 'right to leave any country, including his own, and to return to his country' (Article 13), and whereas the freedom of movement of workers is enshrined in Article 45 TFEU, the fact of the matter is that International Law does not foresee a right to entry for immigration purposes.

State powers in matters of admission and expulsion of third country nationals are derived directly from State sovereignty and not from any rule of International Law. In other words, the admission of third country nationals is an internal jurisdiction matter for the State, and national public authorities may exercise a discretionary choice essentially between three options (i) not to admit the entry of aliens, or (ii) to admit certain aliens and not others, and/or (iii) to impose conditions for entry of aliens into the territory of the State. Furthermore, legal restrictions to the economic activity of third country nationals may flow from a State's national economic policies: for example, as to the acquisition of real or movable property or undertaking certain professional activities.

In similar terms, the State has discretionary powers regarding the expulsion of third country nationals, as the right to expel is an inherent State right flowing directly from State sovereignty. Nevertheless, there are limitations flowing from International Law: (i) the State must exercise the power to expel a third country national in accordance with the principle of good faith; and (ii) resorting to the concept of 'public order'<sup>80</sup> as a basis for expulsion must be in line with human rights standards.

The treatment of third country nationals is a contentious International Law topic, intersecting the economic migrant issue. The controversy stems largely from a difference in State posture: while some States support the argument that an international minimum standard exists, other States accept only the existence of a national standard regarding the

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<sup>78</sup> Betts, Collier (n 21).

<sup>79</sup> G. C. Bruno, I. Caruso, B. Venditto, *Human mobility: migration from a European and African viewpoint* (Rubbettino 2013, Soveria Mannelli).

<sup>80</sup> C. Eagleton, 'International Law and „Public Order“' (1939) 33 *The American Journal of International Law* 545–549.



treatment of third country nationals by a State. The support given to both positions presents a main difficulty to ascertaining the rules of International Law in this matter.

Irrespective of the position adhered to, there is general agreement that International Law is not the Alpha and Omega as regards the oversight of the treatment of aliens by national public administrations. On the one hand, according to both standards, there is the acceptance of limitations regarding the expropriation of third country nationals. On the other hand, concerning other areas, national public administrations may make use of power at their exclusive discretion.

The 2014 ILC Draft Articles on Expulsion of Aliens are a further element to consider in this section. Whereas the right of a State to expel a third country national is recognised, Article 3 of the Draft Articles clearly points to limitations flowing from human rights norms and other International Law norms. Looking at related concepts, while ‘constructive expulsion’<sup>81</sup> seems of doubtful relevance for the issue of economic migrants, the concept of ‘disguised expulsion’ is worth pointing out. Prohibited by Article 10 of the 2014 ILC Draft Articles, ‘disguised expulsion’ is defined as ‘the forcible departure of an alien from a State resulting indirectly from an action or omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intending to provoke the departure of aliens from its territory other than in accordance with the law.’ The departure must therefore be the intended outcome of an omission or an action by the State.

Overall, there are, of course, limitations to the use a State may make of the inherent right to admit and to expel third country nationals, mainly the general principle of good faith in International Law, and International Law rules relating to human rights.

Recalling the conclusion that the current refugee regime is ‘dysfunctional’<sup>82</sup>, the relevance of International Law towards managing the wider *economic migrants*’ phenomenon is displayed by a recent trend, individuals resorting to regional protection mechanisms such as the ECHR. Juxtaposing the 1948 Declaration to the regional protection afforded by the 1950 ECHR, it is worth noting the 1948 Declaration’s overall degree of general abstraction characterising the articles’ wording, allowing at times for contradictory interpretations of it. In other terms, the 1950 ECHR regime foresees a mechanism for applying and implementing the respective legal norms, thus allowing diverse interpretations of them to be apparent in practice by means of ECtHR case law. The fact that an individual was able to, ultimately, resort to the ECtHR in search of redress was an extraordinary innovation introduced by the ECHR.

Focusing on economic migrants, it seems that the ECHR has been gaining relevance as the case law is on *non-refoulement* and the prohibition of collective expulsion is increasing. Convictions of EU Member States by the ECtHR on grounds of violation of the prohibition of collective expulsion (ECHR, Protocol n. 4)<sup>83</sup> symbolise a trend by individuals towards

<sup>81</sup> *International Technical Products Corp. v Iran* (1985) or *Yeager v Iran* (1987) 17 Iran – U.S.C.T.R. 92 at 106.

<sup>82</sup> Betts, Collier (n 21).

<sup>83</sup> ECtHR, *Hirsi Jamaa and Other v Italy* (Application no. 27765/09) [ECHR Article 3 of the Convention and Article 4 of Protocol No. 4]; *N.D. v Spain* and *N.T. v Spain* (nos. 8675/15 and 8697/1), where the Court held, unanimously, that there had been a violation of Article 4 of Protocol No. 4.

seeking regional human rights protection mechanisms, as *economic migrants* not protected by traditional International Law mechanisms such as the 1951 Refugee Convention and the 1967 Protocol. Finally, recalling the considerations above on administrative retention centres, the relevance of International Law is further evidenced in ECtHR case law based on violations of Article 3 of ECHR: in five different cases the ECtHR considered that national detention practices do, in certain circumstances, violate the ECHR, convicting France in cases relating to the detention of children for purposes of deportation.<sup>84</sup>

How should the EU then position itself, looking forward to 2025? First, EU Member States should be mindful that International Law should be understood as being in continuous mutation, resulting not only from the interaction between diverse sources, but also from small actions by great powers. A recent blow to the international system was the decision by the United States to end participation in the Global Compact on Migration on the grounds that there are 'numerous provisions that are inconsistent with U.S. immigration policy and the Trump Administration's immigration principles'<sup>85</sup>. This is most unfortunate, especially given that the New York Declaration for Refugees and Migrants is a political declaration aiming at achieving international consensus in 2018 towards a global compact on refugees, and, a global compact for safe, orderly and regular migration,<sup>86</sup> therefore aiming to reinforce the existing International Law framework.

Perhaps in a move toward reinforcing International Law, there are scholars who wonder in what way the responsibility to protect doctrine might be applied to render assistance to overwhelmed EU Member States.<sup>87</sup> At present time, short-term solutions – chiefly, enlisting the cooperation of State and non-State actors – are having a significant short-term impact: migrant arrivals to the EU have decreased from 390,432 in 2016 and 186,768 in 2017, to an impressive number of 33,205 in 2018 (updated as of 23 May 2018)<sup>88</sup>. Worryingly, as EU Member States are no longer severely pressured by overwhelming numbers of arrivals, emboldened unilateral actions by key EU transit countries risk undermining the international legal framework and the Union's cohesion.

The argument can, thus, be made that externalising the management of migration seems to contribute toward a wider trend of weakening belief in International Law regarding State practice in certain domains (mainly the use of force and human rights). More specifically,

<sup>84</sup> ECtHR cases: *A.B. and Others v France* (Application no. 11593/12) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016; *A.M. and Others v France* (Application no. 24587/12) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016; *R.C. and V.C. v France* (Application no. 76491/14) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016; *R.K. and Others v France* (Application no. 68264/14) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016; and, *R.M. and Others v France* (Application no. 33201/11) [ECHR Articles 3, 5 §§ 1 e 4, 8], 12JUL2016.

<sup>85</sup> US Mission to the UN, *United States Ends Participation in Global Compact on Migration*, December 2, 2017. <<https://usun.state.gov/remarks/8197>> accessed 4 April 2019.

<sup>86</sup> UN, A/RES/71/1, § 21.

<sup>87</sup> A. Balthasar, 'Internationaler Schutz im Wandel – vom II. Weltkrieg über den Ost-West-Konflikt zum Nord-Süd-Konflikt' (2017) 24 *Journal für Rechtspolitik* 214–239.

<sup>88</sup> IOM, *Migration Flows – Europe*, available at <<http://migration.iom.int/europe/>> accessed 4 April 2019.

policy options such as the EU-Turkey agreement or bilateral engagements by EU Member-States with countries in the Sahel region coupled with other legal and policy options, ‘including stricter definitions of refugee, interdictions to entrance, interceptions, offshore processing, and application of “safe third country” rules’<sup>89</sup>, in part result in a weakening of the protection provided by International Law (specifically, refugee status). With explicit reference to the safe third country criteria,<sup>90</sup> some authors speak of a ‘nominal adherence to these criteria has often been deemed sufficient, even when there are evident gaps between formal acceptance of principles and their realization in practice’<sup>91</sup>.

Finally, the migration challenge summons a revision of the distinct types of barriers to external influences that national Administrative Law regimes have; for example, when applying International Law instruments. Here this quote by Paul Craig is especially poignant:

It is the increased vertical interaction between the national, EU and global levels that prompts courts to react and think hard about the terms on which they are willing to accept ‘external’ norms. To be sure, there is a sense in which courts have been doing this for hundreds of years, as attested to by the developed jurisprudence concerning the relationship between national and International Law. There is nonetheless little doubt that sensibilities have been heightened by the creation of the EU and the ECHR, both of which demand of contracting states a degree of acceptance over and beyond what is demanded by most international treaties. There is equally little doubt that the tensions have become more acute because of increased globalization, which has the consequence that many rules that bind at national level de jure or de facto emanate from international and transnational bodies.<sup>92</sup>

From a wider perspective, the humanisation of International Law<sup>93</sup> seems to be at odds with the sovereign State. Faced with globalisation and a fundamental threat to its internal affairs posed by overwhelming numbers of individuals – whose hopeful expectations no Western State is capable of confounding in a globalised world – the State is reverting to its traditional role as the most relevant International Law subject, characterised by assertions of national sovereignty.

Looking to 2025, the question then becomes how should the EU27 seek to address the migration challenge at a time when – for national governments of exogenous States – sovereignty is most effectively displayed by controlling who and what may enter the territory of the State?

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<sup>89</sup> Ambrosini (n 59) 67.

<sup>90</sup> This concept was foreseen in Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, repealed by Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, JO L 180 de 29.6.2013, p. 60–95.

<sup>91</sup> B. Frelick, I. M. Kysel, J. Podkul, ‘Migration Controls on the Rights of Asylum Seekers and Other Migrants’ (2016) 4 *Journal on Migration and Human Security* 190–220, p. 196.

<sup>92</sup> P. P. Craig, *UK, EU and global administrative law: foundations and challenges* (Cambridge University Press 2015, Cambridge, UK) 9.

<sup>93</sup> A. Peters, *Beyond human rights: the legal status of the individual in international law* (Cambridge University Press 2016, Cambridge, UK).

## V Conclusion: Which Scenario for the EU27 by 2025?

International Law instruments, much like the fairy in J. M. Barrie's *Peter Pan*, depend upon belief translated into State practice – or *death*. Should International Law increasingly be perceived as less effective, divisions caused by unilateral action are sure to undermine the European Union, which is beset by the exit of the United Kingdom and the isolationism of the United States.

Looking towards the medium-term, there is a chance of a 'Tinkerbell syndrome' befalling International Law regimes relevant towards the management of (economic) migrants. As the previous section attempts to demonstrate, a new light is being cast on the larger issue of the international subjectivity of the individual. In this regard, it is worth noting a series of unilateral actions taken by certain key States, mainly the US withdrawal from the Global Compact on Migration; Italy's active cooperation with non-State actors in Libya; and a number of EU Member States' hostile posture towards external migrants (e. g. denouncing the refugee quota system), as well as intra-EU migrants (questioning the pillar of EU integration that is the freedom of movement of workers).

In briefly assessing the contemporary international order, three defining characteristics seem to set the period ranging from end of 2010 (marking the beginning of the so-called *Arab Spring*) until the end of 2017 apart from other periods in modern history: (i) the number of crises in the world has never been so high; (ii) current crises take place simultaneously, and (iii) the duration of such crises extending throughout years (v. g., the situation in Syria goes back to 2011, or the Ebola outbreak in West Africa of 2014–2016). Consequently, it is not only the State, but also the sub-State level that suffers impacts to different degrees of events to which they did not give cause to. Importantly, climate change will constitute a major security and development challenge, as '[e]nvironmental degradation will continue to provoke humanitarian disasters, including desertification and floods of increasing magnitude' affecting the Sahel, as '[h]umanitarian crises due to water scarcity and related food and health emergencies, some affecting millions of people, may become recurrent, particularly in some parts of Africa'<sup>94</sup>.

The sense that State is increasingly unable to control the flows of globalisation<sup>95</sup> emerges a trend broadly identified by the European Commission's White Paper. To increase societal resilience, distinct levels of EU Member States' public administrations (at central level and local level) will be forced to deal with the impact of events originating in other regions of the world. Tellingly, the topic of economic migrants confirms how different cities of EU Member States are confronted with complex situations that strain local resources, clearly demonstrating

<sup>94</sup> EUISS, *Global trends 2030 – Citizens in an interconnected and polycentric world* (European Union Institute for Security Studies 2011, Paris) 6.

<sup>95</sup> J. Bergé, 'La circulation totale au-delà du contrôle : hypothèse de risque invisible' (2017) 2 *Risques Études et Observations* 40–54.

the current phenomenon of *glocalization*<sup>96</sup> – i. e., an intersection of the global level with the local level.

The short-term effects of the EU's short-term strategy of engaging with countries of origin and countries of transit in the Sahel region and beyond will not last – especially concerning the central Mediterranean region. The European Strategy and Policy Analysis System (ESPAS) report entitled 'Global Trends to 2030' highlights turbulence and chaos in the EU's neighbourhoods as a main challenge for the Union, while identifying that 'Europe will continue to be a destination country for migrants from the neighbourhood'<sup>97</sup>.

Most interestingly, in similar terms to Betts and Collier, the report stresses that the 'global humanitarian system shows signs of reaching a breaking point'<sup>98</sup>, thus increasing the likelihood of further migration pressures. Looking at the consequences of globalisation in Africa, the report further highlights that: '[t]he tendency of globalisation to shut out some countries (such as Congo), and even some large regions (such as the Sahel), is a major threat and a source of weakness for the international system'<sup>99</sup>. Another key trend analysis document estimates the world's population of migrants to approach 300 million by 2030, while also predicting that migration patterns will 'become increasingly "circular", so that migrants will maintain ties with their countries of origin, while strengthening transnational movements'<sup>100</sup>.

Therefore, while scenario 5 of the Commission's White Paper would seem the most appropriate, one must conclude that it is, currently, unfeasible. No one would dispute the fact that great benefits would come from implementing part of scenario 5, namely cooperation on border management, asylum policies and counterterrorism. However, looking at the other policy options, 'speaking with one voice on all foreign policy issues' seems out of reach, while 'creating a European Defence Union' – PESCO, if successfully implemented, is limited to military capability conservation and development – seems to have a lower added value towards the management of economic migrants. Even if we limit the policy issues to the 'management of economic migrants', and even if limiting analysis to a group of Mediterranean basin EU Member States, devising a common approach seems an increasingly difficult challenge in the wake of the Italian elections and the uncertainty regarding a future government.

So, in order to successfully manage economic migrants, the EU cannot do *more with less*. Recalling the assessment of Operation Sophia, the House of Lords Report stated that: 'While Operation Sophia plays a role in gathering intelligence and in search and rescue, this is not sufficient to justify a Common Security and Defence Policy mission.'<sup>101</sup> Crucially, to guarantee

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<sup>96</sup> G. Ritzke, Z. Atalay, *Readings in globalization: key concepts and major debates* (Wiley-Blackwell 2010, Chichester, West Sussex, U.K. – Malden, MA).

<sup>97</sup> ESPAS, *Global Trends to 2030: Can the EU meet the challenges ahead?* (ESPAS 2014, Brussels) 16.

<sup>98</sup> *Ibid.*, 69.

<sup>99</sup> *Ibid.*, 42.

<sup>100</sup> EUISS (n 94) p. 45.

<sup>101</sup> UK, House of Lords, *cit.*, §100.

an acceptable level of security in the Sahel region and the central Mediterranean region, the EU will be required to do *more with more*.

In this regard, recalling the way in which the 2030 trends document do not seem really reflected in the Commission's White Paper, the case is there for a Scenario 4 ½ – for Schengen, migration & security, and foreign policy & defence – that would have the EU cooperating more on border management and counterterrorism and engaging further on ESDP operations aimed at supporting EUMS efforts already underway, thus downgrading the two most difficult policy measures. Crucially, the EU 27 would have to agree to maintain the leading role in development aid, too.

Another important aspect of a Scenario 4½ is the continued pursuit of the Commission's policy of working toward forging agreements with weakly secure states in the Sahel region. EU Member States should then move towards granting more financial support destined to improving the implementation of such agreements on the ground.

Development aid policy is essential for a successful implementation of Scenario 4½ and the EU should continue to play the leading role in ODA disbursement. As a comparison, the UNHCR's budget for 2017 was US 3.9 billion,<sup>102</sup> a number far below the financial requirement for 2019 of US 7.3 billion, 40% of which is set to be absorbed by UNHCR's five largest operations in 2018 (in order Iraq, Lebanon, Turkey, Syria and Uganda)<sup>103</sup>. In 2017, only Denmark, Luxembourg, Norway, Sweden and Britain met the United Nations' target of official development assistance (ODA) spending of 0.7% of national income on development aid.<sup>104</sup>

Finally, looking at Administrative Law, it seems clear that, irrespective of the Commission's White Paper scenario for the EU27 by 2025, further transfers of powers from national public administration to EU authorities are on the horizon. The management of economic migrants being a global topic, one might consider what impacts it should have on International Law in order to address the phenomenon of global governance. If one considers that the flows of globalisation often and increasingly clash with public authority controls, the problems posed by the growing ineffectiveness of State control might perhaps be debated with recourse to Global Administrative Law theory – and *international public law*.<sup>105</sup>

<sup>102</sup> UN, *Contributions to UNHCR – 2017 as at 14 February 2018, in US dollar*, available at <<http://www.unhcr.org/partners/donors/5954c4257/contributions-unhcr-budget-year-2017.html>> accessed 4 April 2019.

<sup>103</sup> UN, *UNHCR's 2018-2019 Financial Requirements*, <[http://reporting.unhcr.org/sites/default/files/ga2018/pdf/Chapter\\_Financial.pdf](http://reporting.unhcr.org/sites/default/files/ga2018/pdf/Chapter_Financial.pdf)> accessed 4 April 2019.

<sup>104</sup> OECD, *Development finance data*, available at <<http://www.oecd.org/dac/financing-sustainable-development/development-finance-data/>> accessed 4 April 2019.

<sup>105</sup> A. v. Bogdandy, M. Goldman, I. Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 *European Journal of International Law* 115–145.



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# Articles

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# Preserving Intra-Corporate Mobility Between the UK and the EU After Brexit\*\*

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## I Introduction

In their White Paper published on 12 July 2018,<sup>1</sup> the UK Government outlined their proposal for the conditions under which they envisaged the future relationship between the United Kingdom and the European Union. One of the most controversial areas in the final text of the White Paper is the regulation of the future cooperation with the EU in the field of free provision of services.<sup>2</sup>

Services are the fastest growing sector of the global economy today and account for two thirds of global output, one third of global employment and nearly 20% of global trade. In this

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\*\* The article is based on the author's presentation held during the 1st International Forum of the ELI Hungarian Hub at the University Eötvös Loránd, Faculty of Law (Budapest) on 14 September 2018.

<sup>1</sup> HM Government: The future relationship between the United Kingdom and the European Union – White Paper (published 12 July 2018; last updated 17 July 2018), <[www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union](http://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union)> accessed 10 November 2018.

<sup>2</sup> In the event of leaving the European Union, the effect on free movement of services will depend on what agreement is put in place. The Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, endorsed on 25 November 2018 together with the Withdrawal Agreement, does contain provisions on trade in services and investment in services and non-services sector (Section III), allowing in principle a level of liberalisation in trade in services well beyond the Parties' WTO commitments and building on recent Union Free Trade Agreements (<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/759021/25\\_November\\_Political\\_Declaration\\_setting\\_out\\_the\\_framework\\_for\\_the\\_future\\_relationship\\_between\\_the\\_European\\_Union\\_and\\_the\\_United\\_Kingdom\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom_.pdf)>; accessed 13 December 2018). Should the Withdrawal Agreement and Political Declaration be rejected by the UK Parliament (an option still open at the time of the present article), four options seems to be available to the United Kingdom: 1. becoming a member of the European Free Trade Agreement (EFTA) and then joining the European Economic Area (EEA), gaining a position similar to Iceland, Liechtenstein and Norway; 2. joining the EFTA and then have a series of bilateral agreements with the EU, similarly to Switzerland; 3. entering into a customs union with the EU, with cross-border provision of services regulated under the World Trade Organisation's (WTO) General Agreement on Trade in Services (GATS); 4. in case of 'no-deal' to rely solely on WTO GATS arrangements. See: Catherine Barnard, Amy Ludlow, 'Free movement of services, migration and Brexit' <https://www.repository.cam.ac.uk/bitstream/handle/1810/266327/Brexit%20and%20services%20v5.pdf?sequence=5> accessed 13 December 2018.

growing environment, the EU being currently the UK's largest trading partner, while the UK playing a key role as the 'EU's gatekeeper' for financial and commercial relations coming from the USA, Canada, and other trading partners from past and current British Overseas Territories justify the UK's and the EU's common intention to strike the best deal in this field.

As one of the main motors of the Brexit referendum was the British population's fears related to (internal) free movement, to loss of jobs and shrinking of life standards,<sup>3</sup> it is interesting to read the UK Government's proposal on the regulation of the movement of workers within the framework of the provision of services post-Brexit.

This article aims at reviewing the UK Government's proposal regarding the regulation of provision of services under 'mode 4', but also at highlighting whether and how the current EU law already in place (e.g. 2014/66/EU Directive on European Intra-Corporate Transfer) could continue to facilitate cooperation between the EU and its soon to be former Member State.

## II Regulating Intra-Corporate Mobility in General

One of the ways to provide services in another country is to send independent professionals or employees of the service supplier for a temporary period of time, to perform certain work activities on behalf of the service supplier. These natural persons – in the EU terminology often referred to as 'posted workers' for EU nationals and 'ICTs' or 'intra-corporate transferees' for non-EU nationals – do not integrate into the labour market of the host member state, as they typically remain subject to their home employment contract and social security system.

One of the main agreement of international scope is the General Agreement on Trade and Services (GATS), a treaty of the World Trade Organization (WTO) that entered into force in January 1995 as a result of the Uruguay Round negotiations. The treaty was created to extend the multilateral trading system to the service sector, in order to remove trade barriers between their signatory members.<sup>4</sup>

Under the GATS, services can be traded internationally in four different ways:<sup>5</sup>

- Cross-border supply (Mode 1) – the supply of a service from the territory of one Member into the territory of any other Member;
- Consumption abroad (Mode 2) – the supply of a service in the territory of one Member to the service consumer of any other Member;
- Commercial presence (Mode 3) – the supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member;

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<sup>3</sup> Éva Gellérné Lukács, 'European Labour Authority – The guardian of posting within the EU?' (2018) 1 Hungarian Labour Law E-Journal 4, <[http://hllj.hu/letolt/2018\\_1\\_a/A\\_01\\_GellerneLukacs\\_hllj\\_2018\\_1.pdf](http://hllj.hu/letolt/2018_1_a/A_01_GellerneLukacs_hllj_2018_1.pdf)> accessed 4 November 2018.

<sup>4</sup> 164 members since 29 July 2016, based on the WTO records. <[www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)> accessed 8 November 2018.

<sup>5</sup> General Agreement on Trade in Services (GATS) (entered into force 1 January 1995) art 1.

– Presence of natural persons (Mode 4) – the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

Although GATS Mode 4 is often perceived as a form of labour migration, it may also be conceptualised as an instrument of multilateral trade liberalisation.<sup>6</sup> Under Mode 4, a service is supplied by a service supplier of a WTO Member in the territory of another WTO Member through the presence of natural persons. In order to benefit from Mode 4, the natural persons and their employer must all originate in a WTO Member.

While the WTO GATS agreement itself does not provide a detailed regulation of the provision of services under Mode 4, the movement of natural persons who are service suppliers of a Member, or employed by a service supplier of a Member under the GATS Agreement, is further addressed by the GATS Annex on Movement of Natural Persons Supplying Services (the MNP Annex), which provides some clarification on the scope of Mode 4. According to the MNP Annex:

3. [...] Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.<sup>7</sup>

Although the GATS does not set any time limits for the supply of a service under Mode 4 and the WTO Members remain free to regulate the issue as they choose, the MNP Annex clearly highlights that the natural persons entering the territory of another Member shall be allowed to do so only temporarily, to supply the services covered by a specific commitment, and shall not seek access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.<sup>8</sup>

Recognising that free trade in services and facilitation of foreign direct investment is much more effective when there exists some form of movement of people so that service providers and recipients, as well as investors, are able to travel freely to do business, various international trade agreements exist in parallel to the WTO-GATS, establishing rules for

<sup>6</sup> Johanna Jacobsson, 'GATS Mode 4 and labour mobility: The Significance of Employment Market Access' in E. Fornalé, M. Panizzon, G. Zurcher (eds), *The Palgrave Handbook of International Labour Migration* (Palgrave Macmillan 2015, Basingstoke) 61.

<sup>7</sup> The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

<sup>8</sup> WTO GATS MNP Annex para 2.

temporary entry and the presence of natural persons for business purposes. The primary purpose of free trade agreements, however, is to facilitate trade in goods and services and promote investment among trading partners, and not the regulation of mobility rights in general, as these would fall under the sovereign rules of the negotiating parties.

A similar principle of provision of services through the presence of natural persons is enshrined in the Treaty on the Functioning of the European Union, when regulating the freedom of provision of services within the EU:<sup>9</sup>

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

At EU level, the conditions of provision of services through the deployment of personnel are further regulated in detail in various pieces of secondary legislation, most notably:

- Directive 96/71/EC concerning the posting of workers in the framework of the provision of services;<sup>10</sup>
- Directive 67/2014/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation');<sup>11</sup>
- Directive 66/2014/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.<sup>12</sup>

Similarly to the WTO GATS Mode 4 provisions, both 'primary' directives – 'Posting of Workers' Directive 96/71/EC and 'ICT' Directive 66/2014/EU – define the conditions under which a service provider may engage the temporary migration of personnel to perform their activity; these employees are deployed to the host Member State to fulfil a specific objective, and are obliged to return to their home employer once this objective is attained, without seeking access to the employment market of the host Member State, nor to apply for citizenship, residence or employment on a permanent basis.

Since the commitments undertaken under GATS or bilateral agreements do not cover conditions of entry, stay and work, these directives complement and facilitate the application of those commitments, without affecting either the agreements concluded by the European

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<sup>9</sup> *Treaty on the Functioning of the European Union*, Title IV, Chapter III, art.57 (OJ C 326, 26.10.2012, p. 47–390).

<sup>10</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997.

<sup>11</sup> Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159, 28.5.2014.

<sup>12</sup> Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157, 27.5.2014.

Union with third countries or the laws of Member States concerning the access to their territory of third-country providers of services.

### III The United Kingdom and ICTs – The Importance of Reaching an Agreement

Reaching an agreement in the field of provision of services is paramount for the UK. Even the UK Government admits that the EU is currently the UK's largest trading partner, with an export of goods and services reaching 48% of the UK's total trade with all countries. Currently, the flow of services is secured through the Single Market and the Customs Union; outside the Single Market, the UK and the EU will have to agree on the level of interaction that the UK has with the EU's institutions and structures. The basis of such an agreement will be the GATS – General Agreement on Trade in Services, unless a specific trade agreement is arranged between the UK and the EU.

While the regulation of the provision of services under Modes 1–2–3 is essential, it may be interesting to reflect on the eventual perception post-Brexit of Mode 4, requiring the movement of persons (independent professionals or employees of a service supplier) as part of the provision of services.

Relative to the other three modes of supply, available estimates suggest that the trade through Mode 4 remains a very small component of overall trade in services, accounting for between 1 and 2 per cent of the total.<sup>13</sup> In the EU, these proportions are even lower: in 2015, there were around 1,9 million postings in the EU comprising 0.65% of the labour force in the EU28<sup>14</sup> (or 0,2–0,3% counted on the basis of full-time equivalent)<sup>15</sup>. Nevertheless, the fear of social dumping continues to grow and attitudes remain more negative to low-wage trade in services when it involves posted workers than to low-wage trade in goods.<sup>16</sup>

In the UK, the influx of workers posted from the EU is relatively low, although the UK has not implemented the notification requirements deriving from the Enforcement Directive and so it is difficult to assess the number of employees actually posted from the EU to the UK – according to the European Commission's data, in 2016 the UK received 57.226 employees from the EU, mainly from France (21.1%), Germany (19.5%), Spain (18.3%) and Poland

<sup>13</sup> WTO International Trade Statistics 2005 <[www.wto.org/english/res\\_e/statis\\_e/its2005\\_e/its2005\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2005_e/its2005_e.pdf)> accessed 10 November 2018.

<sup>14</sup> Uuriintuya Batsaikhan, 'EU posted workers: separating fact and fiction. August 2017' <<http://bruegel.org/2017/08/eu-posted-workers-separatingfact-and-fiction/>> accessed 4 November 2018.

<sup>15</sup> Zsolt Darvas, 'Could revising the posted workers directive improve social conditions? August 2017.' <[http://bruegel.org/wp-content/uploads/2017/08/Darvas\\_2017-01-31\\_EP\\_Posting\\_workers-1.pdf](http://bruegel.org/wp-content/uploads/2017/08/Darvas_2017-01-31_EP_Posting_workers-1.pdf)> accessed 4 November 2018.

<sup>16</sup> Lars Calmfors, Girts Dimdins, Marie Gustaffson Sendén, Henry Montgomery, Ulrika Stavlöt, 'Why do people dislike low-wage trade competition with posted workers in the service sector?' (2013) 47 *The Journal of Socio-Economics* 82–93 <[www.sciencedirect.com/science/article/pii/S105353571300125X](http://www.sciencedirect.com/science/article/pii/S105353571300125X)> accessed 4 November 2018.

(9.5%).<sup>17</sup> The UK is also one of the middle-ranking sender countries, posting approx. 49,210 employees to the EU on a yearly basis – approx. the same number as the Czech Republic and Romania. Although there are no current statistical numbers reviewing the situation of posted workers in the UK, a survey conducted by the UK's Office for National Statistics from 2008 indicated that the biggest number of workers were occupied in the sectors of real estate renting & business activity (38,179), financial intermediation (22,773), manufacturing (22,560) and health & social work (13,012).<sup>18</sup> Post-Brexit, all these posted workers will be considered as employees of a service supplier providing services under Mode 4 of the GATS agreement, unless otherwise agreed by the UK and the EU.

#### **IV The UK Government's Proposal on ICTs**

Although the UK would halt access to the free exchange of services with the EU, and end free movement of people once it leaves the Single Market in 29 March 2019 (or 31 December 2020, if a transitional period is agreed), the UK Government has proposed exceptional treatment of establishments seeking to continue providing cross border services through a legal presence and deployment of personnel (posted workers and ICTs).

The UK Government's proposal to maintain the provision of services through the deployment of personnel – as outlined in the White Paper – is to negotiate a new UK-EU post-Brexit Free Trade Agreement, based mainly on the already existing WTO's General Agreement on Trade in Services (GATS), but also reflecting 'the UK's and the EU's deep history, close ties, and unique starting point'<sup>19</sup>. In the ideal scenario according to the UK, the future relationship between the UK and the EU in the field of intra-corporate transfers would resemble those recently negotiated between the EU and Canada, and forming part of an enhanced Comprehensive Economic and Trade Agreement.

In the White Paper, the UK Government clearly outlines a vision of facilitated mobility of workers between the UK and the EU to support the UK's service-based economy, as well as the cross-border provision of professional services, of which the EU is also a beneficiary.

As presented in the White Paper, the UK Government is resolved to continue facilitating the provision of services on WTO-GATS terms, including an enhanced Mode 4:<sup>20</sup>

- supporting businesses to provide services and to move their talented people;
- allowing citizens to travel freely, without a visa, for tourism and temporary business activity;
- facilitating mobility for students and young people, enabling them to continue to benefit from world leading universities and the cultural experiences the UK and the EU have to offer;

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<sup>17</sup> <[www.europarl.europa.eu/infographic/posted-workers/index\\_en.html?country=uk#receivedworkers](http://www.europarl.europa.eu/infographic/posted-workers/index_en.html?country=uk#receivedworkers)> accessed 14 August 2018.

<sup>18</sup> <[www.eurofound.europa.eu/publications/report/2010/uk-posted-workers](http://www.eurofound.europa.eu/publications/report/2010/uk-posted-workers)> accessed 14 August 2018.

<sup>19</sup> HM Government White Paper.

<sup>20</sup> HM Government White Paper, 33.

- as streamlined as possible, to ensure smooth passage for legitimate travel while strengthening the security of the UK's borders; and
- providing for other defined mobility provisions, including arrangements to ensure that UK citizens living in the EU, in future, continue to benefit from their pension entitlements and associated healthcare.

The UK's proposal for the economic partnership would:<sup>21</sup>

1. include new arrangements on services and investment that provide regulatory flexibility, recognising that the UK and the EU will not have current levels of access to each other's markets, with new arrangements on financial services that preserve the mutual benefits of integrated markets and protect financial stability, noting that these could not replicate the EU's passporting regimes;
2. end free movement, giving the UK back control over how many people come to live in the UK.

The UK's proposal builds on the principles of international trade and the precedents of existing EU trade agreements, and reflects its unique starting point. It would include:<sup>22</sup>

- general provisions that minimise the introduction of discriminatory and non-discriminatory barriers to establishment, investment and the cross-border provision of services, with barriers only permitted where agreed upfront;
- a system for the mutual recognition of professional qualifications, enabling professionals to provide services across the UK and EU;
- additional, mutually beneficial arrangements for professional and business services; and
- a new economic and regulatory arrangement for financial services.

In addition to the general services provisions, the UK proposes supplementary provisions for professional and business services, for example, permitting joint practice between UK and EU lawyers, and continued joint UK-EU ownership of accounting firms. The supplementary provisions would not replicate Single Market membership, and professional and business service providers would have rights in the UK and the EU which differ from current arrangements.<sup>23</sup>

The Government's White Paper on the future relationship between the United Kingdom and the European Union, published in July 2018, has been criticised by both sides of the political spectrum: Tories argued that May's plans to strike an association agreement, matching EU rules on goods and collecting some external customs tariffs, was too soft and 'a bad deal for Britain'<sup>24</sup>, while the Labour party is missing a strong emphasis on retaining the benefits of the Single Market and the Customs Union – which are essential for maintaining industries, jobs and businesses in Britain.<sup>25</sup>

<sup>21</sup> HM Government White Paper, 14, para 7.

<sup>22</sup> HM Government White Paper, 25, para 49.

<sup>23</sup> HM Government White Paper, 28, para 57.

<sup>24</sup> <[www.theguardian.com/politics/2018/jul/12/mays-white-paper-a-bad-deal-for-britain-claim-tory-brexiteers](http://www.theguardian.com/politics/2018/jul/12/mays-white-paper-a-bad-deal-for-britain-claim-tory-brexiteers)> accessed 4 April 2019.

<sup>25</sup> <<https://labour.org.uk/manifesto/negotiating-brexiteers/>> accessed 4 April 2019.



In fact, while the UK Government would establish a new free trade area and maintain a common rulebook for goods and agri-foods,<sup>26</sup> they would end the application of the other three key freedoms of the EU – services, capital and people. In these fields, the preference would be to achieve a ‘CETA plus plus plus’ trade agreement – with similar trade objectives to those recently negotiated between Canada and the EU,<sup>27</sup> but enhanced to reflect markets that are already very much more integrated.<sup>28</sup>

## V CETA Plus Plus Plus – The Dream Option?

Compared to the WTO-GATS, the CETA agreement negotiated between the EU and Canada reduces red tape for businesses and self-employed people and facilitates the temporary movement of labour between the EU and Canada in two ways: by smoothing the process for business migration categories and by enhancing mutual recognition of professional qualifications.<sup>29</sup>

The EU-Canada agreement creates a legal framework to facilitate the entry and stay of key personnel (business visitors for investment purposes, investors and intra-corporate transferees), contractual service providers, independent professionals and short term business travellers, as well as the negotiation and adoption of mutual recognition agreements, to allow EU and Canadian professionals to practice outside of their home country without taking any additional tests or professional training – a goal envisaged also by the UK Government in the country’s future relationship with the EU.<sup>30</sup>

Chapter 10 of the CETA removes the requirement for a Labour Market Impact Assessment for three categories of EU foreign nationals entering Canada for business purposes:<sup>31</sup>

1. Key personnel, including intra-corporate (company) transferees, investors and business visitors for investment purposes;
2. Contractual service suppliers and independent professionals; and
3. Short-term business visitors.

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<sup>26</sup> HM Government White Paper, 14.

<sup>27</sup> *Canada–European Union Comprehensive Economic and Trade Agreement (CETA)* (signed on 30 October 2016; entered into force on 21 September 2017).

<sup>28</sup> House of Commons – Exiting the European Union Committee: The future UK–EU relationship, Fourth Report of Session 2017–2019, 2.

<sup>29</sup> Andraea Ghimis, ‘Is CETA a Model for EU-UK Business Migration Post-Brexit?’ September 2017 <[www.fragomen.com/insights/blog/ceta-model-eu-uk-business-migration-post-brexit](http://www.fragomen.com/insights/blog/ceta-model-eu-uk-business-migration-post-brexit)> accessed 4 November 2018.

<sup>30</sup> UK Government White Paper, Ch. 1.3.2, 27.

<sup>31</sup> Christopher McHardy, ‘New International Mobility Program Options under Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA), May 2018’ <[www.mccarthy.ca/en/insights/blogs/mccarthy-tetrault-employer-advisor/new-international-mobility-program-options-under-canada-european-union-eu-comprehensive-economic-and-trade-agreement-ceta](http://www.mccarthy.ca/en/insights/blogs/mccarthy-tetrault-employer-advisor/new-international-mobility-program-options-under-canada-european-union-eu-comprehensive-economic-and-trade-agreement-ceta)> accessed 4 November 2018.

As the current literature suggests, despite the facilitation of mobility of key personnel in conjunction with the provision of services, *overall* the CETA in its current form would not satisfy the UK's needs to continue the exchange of services with the EU in a seamless manner<sup>32</sup>:

– *Strict limits to movement of people are drawn by listing categories of persons who can temporarily move to a contracting state.*<sup>33</sup> CETA only tackles temporary migration directly linked to the free provision of services. This would limit the EU-UK movement of people for business purposes to certain categories of people (investors, intra-corporate transferees (ICTs), business travellers, independent professionals).

– *Temporariness of mobility rights.* Time limits for stay in a host state differ depending on the categories of persons described above: a maximum 3 years for ICTs, maximum 90 days for business travellers, while the UK seems to be keen on facilitating the temporary mobility of scientists and researchers and investors, as well as students and young graduates.<sup>34</sup>

– *Limits to mobility to those activities covered by the international trade agreement.*<sup>35</sup> Following the CETA model, mobility of personnel would be granted only to a very closely defined group of personnel, while sectors such as health care, public education, culture and other social services may be excluded from mobility rights if they are not covered by the trade agreement.

– *Subsistence / introduction of administrative requirements in support of mobility rights.* Labour mobility regimes under free trade agreements, unlike in the EU, allow the application of host state immigration law; therefore, if a state has a visa regime *vis-à-vis* its trading partner, it is not obliged to establish visa-free entry for its trading partner's nationals. The CETA follows this established practice, however it seems to be in contrast with the UK Government's wish to agree on reciprocal arrangements with the EU that are as streamlined as possible to ensure smooth passage for legitimate travel;<sup>36</sup>

– *Lack of regulation of long-term mobility.* Unlike free movement provisions under EU law, mobility rights under international trade agreements do not cover rights to residence, social rights or employment on a permanent basis.<sup>37</sup> The CETA does not address long-term work-related migration, although the UK Government's White Paper expressly indicates that it would only support short-term business visits and temporary intra-corporate transfers, while ending the free movement of workers.<sup>38</sup>

Even the recently negotiated Economic Partnership Agreement between the EU and Japan, signed on 17 July 2018, mirrors the CETA in the sense that its applicability is restricted

<sup>32</sup> Ghimis (n 29).

<sup>33</sup> Catherine Barnard, Emilija Leinarte, 'Labour mobility under international trade agreements, October 2018' <<http://ukandeu.ac.uk/explainers/labour-mobility-under-international-trade-agreements/>> accessed 4 November 2018.

<sup>34</sup> HM Government White Paper, 33.

<sup>35</sup> Barnard, Leinarte (n 33).

<sup>36</sup> HM Government White Paper, 33.

<sup>37</sup> Barnard, Leinarte (n 33).

<sup>38</sup> HM Government White Paper, 33.

only to the key personnel required for the provision of services (business visitors for establishment purposes, intra-corporate transferees [managers and specialists, but *not* trainees], investors, contractual service suppliers, independent professionals and short-term business visitors)<sup>39</sup>, and the persons thus posted to the EU or to Japan still need to comply with the immigration laws and regulations applicable to the entry and temporary stay in the destination country, even if the parties will facilitate and expedite the entry of workers within the framework of the provision of services.<sup>40</sup>

It is interesting to note that, even in this most recent example of a trade agreement negotiated by the EU on behalf of the Member States, the provisions on mobility adopted by the EU Commission and the Council are quite generic, and the entry and temporary requirements for each Member State are outlined in separate Annexes (Annex 8-B-III to Annex 8-B-V) and include different scenarios for the various Member States. Consequently, it is unlikely that, post-Brexit, UK nationals will be favoured with uniform treatment across the EU-27, but will probably adapt to the immigration requirements already in place in each Member State for third country nationals.

## **VI EU ICT Directive – A Possible Lifebuoy in the Brexit Tempest?**

The July 2018 White Paper was born in an environment when – eight months ahead of Brexit Day – the UK Government was still optimistic that they would be able to negotiate reciprocal arrangements with the European Union, favouring the mobility of people for the provision of services, while retaining a sovereign choice in a defined number of areas and remaining consistent with the end of free movement.<sup>41</sup> Although the EU welcomed the UK Government's proposal for an 'enhanced Ukraine-style' association agreement, which opens towards a 'soft Brexit' and makes significant concessions on the authority of the CJEU and cooperation on a wide range of issues, including a 'strong security partnership', the UK Government's was warned on numerous occasions by different EU stakeholders, in response to its White Paper, that it will not be allowed to 'cherry-pick' the most beneficial aspects of single market access,<sup>42</sup> such as requiring access to the Single Market for the provision of goods and capital, but not the free movement of services or people, nor the payment of any financial contribution towards the EU.

The Withdrawal Agreement and Political Declaration endorsed by the UK Government and EU leaders at a special meeting of the European Council on 25 November 2018 sets the scene for the Parties to develop an ambitious, wide-ranging and balanced comprehensive economic partnership, encompassing a free trade area as well as wider sectoral cooperation,

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<sup>39</sup> EU-Japan Economic Partnership Agreement (signed on 17 July 2018; not yet in force), art. 8.20, para. 2.

<sup>40</sup> EU-Japan Economic Partnership Agreement, art. 8.22, para. 1–2.

<sup>41</sup> HM Government White Paper, 32.

<sup>42</sup> Former EU negotiator Michel Barnier on 6 December 2016 in Brussels; German Chancellor Angela Merkel on 16 February 2018 in Berlin; EU Council President Donald Tusk on 7 March 2018 in Luxembourg; EU Parliament's Resolution on the framework of the future EU-UK relationship (14 March 2018).

facilitating trade and investment between the Parties while respecting the integrity of the Union's Single Market and the Customs Union as well as the UK's internal market. The unpopularity of the Withdrawal Agreement among the Cabinet and the UK Members of Parliament<sup>43</sup> however still keeps open the option of a 'no-deal scenario' as we approach the end of the negotiation period.

In the event of the rejection of the Withdrawal Agreement by the UK Parliament and, consequently, a potential 'no-deal Brexit' scenario, it may be worth reviewing the pieces of legislation already in place that could complement the provisions of the WTO-GATS on intra-corporate mobility and further facilitate the mobility of personnel.

Exiting the EU, the United Kingdom would no longer be subject to the Posting of Workers Directive, in the sense that it applies to 'undertakings *established in a Member State* which, in the framework of the transnational provision of services, post workers [...] to the territory of a Member State'<sup>44</sup>. Nevertheless, post Brexit the United Kingdom could become a beneficiary of the provisions of the EU ICT directive, as it may be applicable to UK nationals posted to the EU within the framework of the provision of services if considered third-country nationals, even though this piece of legislation has not been adopted by the UK.<sup>45</sup>

Similarly to the WTO-GATS, the EU ICT Directive facilitates the cross-border transfer of key personnel from third countries with the intent of fostering the exchange of new skills and knowledge while promoting innovation and enhanced economic opportunities for the host entities, thus advancing the knowledge-based economy in the Union while fostering investment flows across the Union.<sup>46</sup> The definition of the key personnel – intra-corporate transferees – encompasses managers, specialists and trainee employees, built on specific commitments of the WTO-GATS and bilateral trade agreements.<sup>47</sup>

Since the WTO-GATS does not regulate the conditions of entry, stay and work, the EU ICT Directive creates a new permit type, complementing and facilitating the (long and short-term) cross-border mobility of personnel within the European Union.<sup>48</sup> A further benefit compared to the WTO-GATS and other international trade agreements is that the scope of the intra-corporate transfers covered by the EU ICT Directive is broader than that implied by trade commitments, as the transfers do not necessarily take place within the services sector and may originate in a third country which is not party to a trade agreement.<sup>49</sup>

<sup>43</sup> On 4 December 2018 the House of Commons voted in favour of a motion finding Ministers in contempt for their failure to publish full legal advice concerning the EU Withdrawal Agreement. <<https://www.parliament.uk/business/news/2018/december/contempt-motion-on-publishing-of-legal-advice/>> accessed 13 December 2018.

<sup>44</sup> Art. 1 para 1 of the Posting of Workers Directive; highlights by the author.

<sup>45</sup> Recital 47 in the preamble of the EU ICT Directive: 'In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive, and are not bound by or subject to its application.'

<sup>46</sup> Recital 6 of the EU ICT Directive.

<sup>47</sup> Recital 13 of the EU ICT Directive.

<sup>48</sup> With the exception of the UK, Ireland and Denmark (Recital 47–48 of the EU ICT Directive).

<sup>49</sup> Recital 13 of the EU ICT Directive.

The main benefit of the EU ICT Permit – compared to the national ICT regimes already in place in each Member State – is its scope, regulating both long- and short-term transfers of highly-skilled third-country nationals to the EU, setting up a flexible mobility scheme allowing the conversion of an EU ICT Permit acquired in one Member State into an equivalent work and residence title in another Member State, reducing (ideally) the administrative burdens and processing times.

There are several aspects of the EU ICT Directive, however, that would significantly change the way UK-based undertakings – used to the benefits of the free movement rights enjoyed by EU nationals – could post their employees to the EU for temporary assignments:

– *Strict limits to the categories of persons who can benefit from the EU ICT Permit option.*

The EU ICT Directive only applies to third-country nationals employed in the position of ‘manager’, ‘specialist’ or ‘trainee employee’ in their home country, possessing the professional qualifications and experience needed in the host country, and the seniority in employment (at least 3–12 months for managers and specialists, 3–6 months for trainee employees) guaranteeing their ties with the home employer undertaking.<sup>50</sup> Lower skilled employees or new hires will not be able to be transferred under the EU ICT scheme.

– *Temporariness of mobility rights.* Time limits for stay in a host state differ depending on the categories of persons described above: the main EU ICT Permit may be obtained for a maximum 3 years for managers and specialists, maximum 1 year for trainee employees, while intra-EU mobility is further limited depending on the duration of the transfer to an additional EU Member State: short-term mobility is limited to up to 90 days in any 180-day period per Member State; long-term mobility to a second Member State cannot exceed the time spent in the Member State issuing the main permit.<sup>51</sup>

– *Limits to mobility to the activities covered by the international trade agreement.* The EU ICT directive does not apply to third-country nationals participating in a research project, or who are self-employed, or admitted as full-time students and undergoing a short-term supervised practical training as part of their studies.<sup>52</sup>

– *Procedural differences between EU Member States.* Intra-corporate mobility being regulated at EU level in the form of a directive, the EU Member States enjoy a broad margin of discretion when achieving the results outlined in the directive, often originating slightly different application processes in each jurisdiction. The same applies to the EU ICT Directive, where it is possible to identify different approaches to intra-EU mobility across the European Union.<sup>53</sup>

Overall, the application of the EU ICT permit to highly skilled employees employed in the UK and critical to operations in the European Union will be an available option that could efficiently complement the WTO-GATS rules in the event of a ‘no-deal scenario’, introducing

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<sup>50</sup> Art 5 of the EU ICT Directive.

<sup>51</sup> Art 12, 13, 21 of the EU ICT Directive.

<sup>52</sup> Art 2 of the EU ICT Directive.

<sup>53</sup> Deloitte ICT Permit Study – Facilitating EU mobility for third-country nationals, June 2018. <[www2.deloitte.com/global/en/pages/tax/articles/2018-eu-intra-corporate-transferees-study.html](http://www2.deloitte.com/global/en/pages/tax/articles/2018-eu-intra-corporate-transferees-study.html)> accessed 4 November 2018.

a labour mobility regime allowing key personnel to perform their activities (not only provision of services) across multiple jurisdictions. Nevertheless, UK undertakings will face a radical change to their accustomed environment, involving increased administrative burdens and costs, which seems to be in conflict with the UK Government's expectations.

## VII Conclusions

The House of Commons previously acknowledged that providing services on WTO-GATS terms alone – including under Mode 4 – would be particularly damaging to the UK economy,<sup>54</sup> contrary to the Prime Minister's previous position that 'no deal for Britain is better than a bad deal for Britain'<sup>55</sup>.

While trading on WTO terms would satisfy some of the stated UK red lines – no free movement, no CJEU, freedom to follow an independent trade policy – it would also introduce tariffs on goods and restriction on movement of key personnel to perform the services. In fact, the WTO-GATS provisions would only allow the provision of services through the presence of natural persons of the EU in the territory of the UK (or vice versa) for a limited category of workers (mostly those with a high level of training and expertise), meeting the pre-employment and seniority conditions, and active in the field of provision of services – consequently, excluding persons working in non-service sectors, e.g., agriculture and manufacturing.

Additionally, it should also be taken into consideration that the WTO-GATS may only facilitate the provision of services from a work authorisation, but not from a residence authorisation perspective, entailing the necessity to apply for visas and other entry and residence permits for the workers posted to the trade partner's territory, which would significantly raise the lead time required to 'land' workers in the destination country, as well as the costs associated with these assignments.

Trading on WTO-GATS terms would also not allow the long-standing relationship between the UK and the EU to be taken into consideration, nor would it allow a special regime at the Northern Ireland-Ireland border due to the Most Favoured Nation rule, whereby a preferential treatment for one trading partner has to be offered to others, unless it is as part of a free trade deal.<sup>56</sup> The UK will therefore be constrained to negotiate a series of bilateral arrangements with the EU to safeguard the preferential treatment of the Irish border, and include all worker categories currently working in the UK and posted from the UK to the EU in sectors other than the pure provision of services.

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<sup>54</sup> House of Commons, 5.

<sup>55</sup> Lancaster House speech (17 January 2017).

<sup>56</sup> Julia Nielson, Daria Taglioni, 'A quick guide to the GATS and Mode 4; OECD – WORLD BANK – IOM Seminar on Trade and Migration Geneva, Palais des Nations, 12-14 November 2003' 5. <[www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/Trade\\_2004\\_04051004/related%20docs/quick\\_guide.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/Trade_2004_04051004/related%20docs/quick_guide.pdf)> accessed 4 November 2018.

The EU ICT directive, already implemented in the majority of EU nationals, could offer a competitive solution complementing the provisions of the WTO-GATS related to mobility under 'Mode 4', offering a combined residence and work permit to the UK employees (and their families) who qualify. The eligibility conditions outlined by the EU ICT directive, however, remain quite strict, and would definitely limit the mobility of personnel between the United Kingdom and the European Union.

## **The Liberalisation of the Serbian Electricity and Gas Markets\*\***

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Taking the goals of energy market liberalisation as a starting point, namely security of supply, promotion of energy efficiency, use of renewable energy sources and increasing consumers' well-being by reducing electricity and gas prices, this article aims to research the process of liberalising the energy market and reach an answer on the question of what will benefit Serbia's electricity and gas sectors most, whether that be remaining in the arms of government or becoming fully liberalised, allowing state-owned energy incumbents to be privatised and private companies to become owners of the production, transmission, distribution and supply operations. On one hand, there are requirements from the European Union for opening the energy sector to competition and market principles, which need to be respected by Serbia, as a candidate country; on the other hand, energy incumbents owned by the state still provide electricity, gas and heat energy. This article will identify the positive and negative effects of a liberalisation policy in undeveloped countries and will outline the regulatory tools that increase competitiveness in the market.

The article comprises four chapters. The first chapter provides a general overview of the process of liberalising the energy markets, emphasising some crucial aspects of this process. The second chapter addresses how the European Union may influence the opening of energy markets, by continually developing European energy policy and through the rules of competition law. The third chapter explains how Serbia implements the European energy policy, highlighting its achievements in the production, supply and transmission operations in the electricity and gas markets, as well the level of applying competition law tools in the energy sector. It will also introduce the Energy Community, a regional organisation that facilitates the implementation of EU energy legislation in South-East Europe and the Black Sea countries. Finally, the fourth chapter provides a conclusion on the effects of liberalisation in undeveloped energy markets, such as Serbia, and on the legal mechanisms that need to be revisited in the Energy Community legal framework to bring about the desired effects of liberalising the energy market.

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\*\* The article is based on the author's MA thesis 'European energy law and its extension to third countries, with specific regard to Serbia', defended in July 2018, as a part of the final exam of the ELTE master program in European and International Business Law.



## I Introduction

Traditionally, electricity has been treated as a commodity that must be available to all consumers in adequate quantities, regardless of the price. A state was responsible for ensuring that consumers are supplied with electricity at a price lower than the cost of production.

Liberalising the electricity and gas sectors deregulates them and removes their monopoly status. Publicly owned incumbents enjoyed sole ownerships of all the production and supply facilities, as well as all transmission and distribution networks. Private investors were unable to enter the market and consumers were unable to choose their own suppliers. It can also be said that liberalisation policies intend to withdraw state influence over the energy incumbents.

From the start of the 1980s to the present, worldwide energy sectors have been subject to significant reforms, characterised by the following factors:

- 1) Restructuring monopoly companies that had operated all energy functions, into competitive companies, by separating the energy functions from each other,
- 2) Opening markets for production and supply and ensuring fair and equal third party access,
- 3) Privatising state property.

To privatise state-owned companies, transition countries must fulfil certain preconditions, such as to proceed with turning energy incumbents into corporations, to reform the legal systems, to restructure energy companies, to establish regulatory bodies that would monitor energy markets, and to develop wholesale markets. However, the privatisation of state-owned undertakings is a last resort action and not the usual means of reforming energy markets.

Production and supply are competitive functions and should be open to multiple competitors. In contrast, transmission networks are natural monopolies, usually performed by one or a small number of companies.<sup>1</sup> The Serbian Energy Law Act also envisioned transmission and distribution systems as activities of general interest regulated by law while viewing electricity generation and supply as needing to perform in accordance with market principles.<sup>2</sup>

Transmission and distribution operators need to provide open access to networks, which should be regulated to ensure equality, non-discrimination for all market participants and economic efficiencies. In the event that these networks become fully liberalised, meaning that multiple transmission operators are in place and that prices for access to the infrastructure are set by market principles, the largest companies would be able to offer the lowest prices for access to the network, thereby excluding competitors from the market. Also, in an unregulated market, a company with no competition can set monopolised prices and act to satisfy its own interest, giving little to no attention to public interests such as high quality, uninterrupted service and lower prices.

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<sup>1</sup> For example, the German power system, which is one of the most complex and developed in Europe, has four big companies that perform transmission operation, while around 1000 companies generate and supply electricity.

<sup>2</sup> Energy Law Act ('Official Gazette of the Republic of Serbia' No. 145/14) (Energy Law Act 2014) art 16.

Unlike transmission systems, which usually remain under the state umbrella due to their strategic importance, the privatisation of distribution systems is not an uncommon feature. A benefit of privatising distribution systems is the reduction of technical and commercial losses. Private ownership can then influence the decrease of technical losses through investments while commercial losses may be reduced by increased motivation for better collection of debts.

The transmission networks of Southeast Europe (SEE) countries are still fully in direct or indirect state ownership to ensure non-discriminatory third-party access and security of supply. On the other hand, the distribution companies in some countries (Albania, Bulgaria, Romania, Macedonia and Montenegro) have been separated from dominant market players and have been sold to strategic investors.<sup>3</sup>

In the event of perfect competition, the interaction of many buyers and sellers theoretically creates a market price that is equal to the cost of the production of the last unit sold. This is an economically efficient solution. The goal of deregulation is the structuring of a competitive market with an adequate number of customers in order to eliminate the market power of companies to determine prices significantly higher than production costs.<sup>4</sup>

Developing and transitional countries, however, set prices for services of public interest, such as electricity, below the cost of generation in order to maintaining citizens' current standards of living, which are still at a low level. Deregulating electricity prices and their formation according to the market mechanisms of demand and supply would result in increased household bills. For example, electricity prices for household consumers across the EU increased by 25.9%, while industrial prices increased by 3.7% over the period from 2008 to 2017.<sup>5</sup> Not only deregulation influences the rate of price increases, but the household expenditure may also reflect generators' costs of investing in renewable energy sources.

In addition, due to the higher prices that liberalisation can bring, large customers do not want the free market to remove their cheap energy. In such cases, factories would have to close or move to other countries due to increased expenses. States are also interested in retaining large companies in their territories by providing them with favourable conditions for doing business.

A fully liberalised sector is one with tariffs that reflect the costs of production and that provide adequate incentives for efficiency improvements, the involve the private sector, provide well-regulated third parties with access to networks and have developed a competitive energy generation industry. Energy sectors with such characteristics should anticipate improvements in quality of service, a reduction in price differences between countries and the option for each customer to choose a supplier.

<sup>3</sup> Nela Vlahinić, 'The Effects of Privatization in Electricity Sector: The Case of Southeast European Countries' in G. G. Sander, L. Tichy (eds), *Öffentliche Daseinsvorsorge in Deutschland und Ostmitteleuropa zwischen Daseinsvorsorge und Wettbewerb* (Verlag Dr Kovac 2011, Stuttgart, 121–137) 132.

<sup>4</sup> Ivan Tominov, 'Liberalization of electricity market, is it meeting expectations' (2008) 57 *Energija* 256–299, 265.

<sup>5</sup> Agency for the cooperation of Energy Regulators, *Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2017 – Electricity and Gas Retail Markets Volume* para 17.

## II How EU Policy Influences the Liberalization of the Energy Market

The main avenue of the European Commission (Commission) for opening energy markets to competition and market mechanisms consists of enhancing energy sector policies. The Commission has been upgrading its regulatory policies towards the internal energy market for 20 years and counting.

To achieve the goals established in Article 194 of the Treaty on Functioning of the European Union (TFEU), designed to ensure the functions of internal energy markets and the security of energy supply in the Union and to promote energy efficiency, energy savings, the development of new and renewable sources of energy and promotion of interconnectivity between energy networks, the EU has developed a detailed energy policy encompassing the First, Second and Third Energy Packages.<sup>6</sup> The latest output of the EU is the Clean Energy for All Europeans package, which will partially repeal the Third Energy Package, mostly in the field of electricity.<sup>7</sup>

For creating an efficient internal energy market in electricity and gas sectors within the territories of Member States, the following measures have been established by energy legislation:

- 1) Opening the production of electricity to new generation capacity,
- 2) Securing free access to transmission networks by third parties, under equal, non-discriminatory conditions,

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<sup>6</sup> The First and Second Energy Package consist of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L 27/20; Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L 204/1; Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L 176/37; Directive 2003/55/EC concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L 176/57; Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity [2003] OJ L 176/1. Third Energy Package consists of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L 211/1; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L 211/15 (Electricity Regulation); Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L 211/36 ( Gas Regulation); Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L 211/55 (Electricity Directive); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211/94 (Gas Directive).

<sup>7</sup> 'Clean Energy for all European package' <<https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/clean-energy-all-europeans>> accessed 28 December 2018.

- 3) Unbundling the operations of transmission and distribution from production and supply within existing, vertically integrated undertakings,
- 4) Forming an independent regulatory body, empowered to monitor energy markets;
- 5) Providing a secure energy supply, environmental protection and consumer protection, and
- 6) Providing cross-border integration.

The Third Energy Package prescribes three unbundling models for electricity and gas transmission system operators (TSOs) which are designed to prevent any conflict of interest among the management of companies that provide energy services. These models are Ownership Unbundling (OU) as the primary model and the Independent Transmission Operator (ITO) and Independent System Operator (ISO) as alternative models.

The alternative models may be considered as less disruptive unbundling approaches, by which companies retain ownership of all corporate assets while needing to create or designate a separate legal entity for managing the transmission assets autonomously. Ownership unbundling is a more aggressive approach, forcing companies to sell their transmission or generation assets. Thus, ownership unbundling may be perceived as a form of pressuring energy sector companies to demerge their assets.<sup>8</sup>

Electricity and Gas Regulations prescribe that third-party access services shall be offered on a non-discriminatory basis to all network users, shall be firm and interruptible, and shall be available on both a long and short-term basis.<sup>9</sup> This concept of third-party access to essential facilities is one of the main instruments for opening an internal energy market to competition. Owners of energy infrastructure have to contract with suppliers to allow network usage and energy flow. The Commission classifies disputes arising from the breach of third-party access rights in the context of possible abuse of dominant position.<sup>10</sup>

Thus, it should be emphasised that, in addition to development of the regulatory framework, the Commission, by the application of competition law, fosters the liberalisation of internal energy markets by prohibiting mergers between energy incumbents with great market power and by investigating the anti-monopolistic behaviours of dominant energy companies. For example, the Commission forced energy companies to sell their generation capacities, and by that means it achieved its unbundling aims, preventing strong market concentration. In addition, it prohibited mergers between energy incumbents, which prevented the strengthening of companies with dominant positions in the market.<sup>11</sup>

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<sup>8</sup> Stefan Bogner, Stephan M. Gasser, Margarethe Rammerstorfer, 'Mergers and acquisitions in European and North American energy markets: empirical analysis of legal and ownership unbundling' (2015) 11 *Journal of Competition Law & Economics* 935–954, 936.

<sup>9</sup> Electricity Directive and Gas Directive (n 6), art 32.

<sup>10</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/1, art 102.

<sup>11</sup> For example, E.ON, German electricity incumbent had opposed to the Commission's proposal on introducing an ownership unbundling regime in Third legislative package, but however soon after, in November 2008 the Commission accepted the commitments offered by E.ON on divestiture on generation capacities. For example, in 2004 the Commission prohibited the acquisition of GDP, Portugal's gas incumbent by EDP, Portugal's electricity incumbent through its wholly owned subsidiary, ENI.

The liberalised market can bring a reduction of prices only if enough participants compete among themselves, by delivering better quality services at competitive prices.

### III Serbia

The energy sector reform in Serbia started in 2004, much later than it did in Member States, with the adoption of the first Energy Law,<sup>12</sup> which incorporated the requirements of the first two energy packages and began the process of liberalising the Serbian electricity and gas markets. The Energy Law 2014 currently in force has implemented liberalisation rules in the electricity and gas sectors as envisioned by the Third Energy Package.

For both the electricity and gas markets, the two responsible bodies are the Ministry of Mining and Energy of the Republic of Serbia (the policy-making body) and the Energy Agency of the Republic of Serbia (AERS). AERS is an independent, regulatory body established in 2005, with the main task of supervising the Serbian energy market.<sup>13</sup>

The Republic of Serbia has assumed the obligation of implementing the EU energy acquis through two paths:

- 1) The process of stabilisation and association as defined in the Agreement on Stabilization and Association (ASA), and
- 2) The Energy Community legal framework, such as being one of the Contracting Parties to the Treaty to establish an Energy Community (EnCT).<sup>14</sup>

#### 1 The Stabilization and Association Agreement

The EU established the process of stabilisation and association for the countries of the Western Balkans, aiming to stabilise the entire region by creating stronger political and economic relationships between countries that share the same perspective on EU membership.

Serbia received the status of a candidate for EU membership in 2013 and began negotiations about membership on 21 January 2014. These negotiations represent a process in which future Member States adjust their current systems to the legal, economic and social frameworks of the EU, aiming to adopt European values and standards.

The accession negotiations are divided into 35 Negotiating Chapters. Each Chapter represents a model of *acquis communautaire*, which must be adopted in different fields. An energy field is regulated in Chapter 15. The energy acquis consists of rules and policies, most notably regarding competition and State aid (including in the coal sector), the internal energy market (opening up the electricity and gas markets and promoting renewable energy sources), energy efficiency, nuclear energy, nuclear safety, and radiation protection.

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<sup>12</sup> Energy Law Act ('Official Gazette of the Republic of Serbia' No. 84/04) (Energy Law Act 2004).

<sup>13</sup> *Ibid*, art 10–15.

<sup>14</sup> *Treaty establishing Energy Community* [2006] OJ L 198/18 (Energy Community Treaty).

The Serbian energy sector was the subject of bilateral and explanatory screening processes, which were completed in June 2014. The results of these screening processes showed that Serbia, at that time, was insufficiently prepared for negotiations on this Chapter.<sup>15</sup> So far, the negotiation process for Chapter 15 has not commenced.

## 2 The Energy Community

The second road for implementing the EU energy rules in Serbia is the Energy Community, a regional organisation established in October 2005 in Athens, Greece, when the EnCT was signed by nine countries<sup>16</sup> on the one hand and the EU, on the other hand.<sup>17</sup> The Contracting Parties committed to developing adequate regulatory frameworks in line with the EnCT's *acquis communautaire*, with the aim to reforming and enhancing their energy sectors.

The idea underpinning the EnCT is the creation of the Regional Energy Market (REM) for SEE countries, which would later be integrated into the EU internal energy market. By implementing the EnCT, the SEE countries are set to become part of the EU internal energy market, even before accession to the EU. So far, only three founding members (Bulgaria, Croatia and Romania) have joined the EU, while the extension of the Energy Community went beyond the Balkan countries and made the Energy Community a powerful international policy instrument. Currently, the Contracting Parties of the Energy Community are Albania, Bosnia and Herzegovina, Kosovo,<sup>18</sup> the Former Yugoslav Republic of Macedonia, Georgia, Moldova, Montenegro, Serbia and Ukraine. In addition, fourteen EU Member States, which surround the Contracting Parties, enjoy the status of Participants, and three enjoy the status of Observers.<sup>19</sup> However, there are ongoing discussions that are contrary to the initial idea. They entertain the possibility that the new Contracting Parties might not consider joining the Energy Community as the first step towards EU accession, but may make this decision a permanent means of cooperating with the EU, without ever becoming full-fledged members.<sup>20</sup>

The institutional setting of the Energy Community supports the process of implementing EU energy policies within the Contracting Parties' national legal systems. The Ministerial Council is the highest decision making body in the Energy Community, composed of ministers

<sup>15</sup> European Commission, *Screening Report Serbia, Chapter 15 – Energy* (2014) 27 (Screening Report Serbia).

<sup>16</sup> The Energy Community was founded by Albania, Bulgaria, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Romania, Serbia and The United Nations Interim Administration Mission in Kosovo pursuant to the United Nations Security Council Resolution 1244.

<sup>17</sup> Council Decision 2006/500/EC of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty [2006] OJ L 198/15.

<sup>18</sup> This designation is without prejudice to positions on status and is in line with UNSC1244 and the ICJ Opinion on the Kosovo Declaration on Independence.

<sup>19</sup> Participants: Austria, Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece, Hungary, Italy, the Netherlands, Romania, Slovakia, Slovenia, and the UK; Observers: Georgia, Norway and Turkey.

<sup>20</sup> Leigh Hancher, Adrien de Hauteclouque, Małgorzata Sadowska, 'Report on Vienna Forum on European Energy Law' (2015) 6 Renewable Energy Law and Policy Review III–IX, IV.

responsible for the energy sectors of the Contracting Parties and two representatives of the EU.<sup>21</sup> The Permanent High Level Group (PHLG) prepares the meetings of the Ministerial Council.<sup>22</sup> The Energy Community Regulatory Board (ECRB) is the independent regional body of energy regulators in the Energy Community and beyond.<sup>23</sup> The Fora embody the broadest discussion platforms within the Energy Community, where discussions on ongoing and future legal, regulatory and practical developments occur. There are Electricity, Gas and Oil Fora.<sup>24</sup> The Energy Community Secretariat (the Secretariat) serves as the only permanently acting institution of the Energy Community, with the main task of supporting the day-to-day activities of the Energy Community and monitoring the implementation of the EnCT.<sup>25</sup> Moreover, it may initiate a case of non-compliance by a Party with EnCT in line with procedural rules for dispute settlement (DSR).<sup>26</sup>

The dispute settlement rules of the Energy Community resemble the EU infringement procedural rules that Article 258 TFEU prescribes. The procedure has three stages. The first is a preliminary procedure, beginning with an Opening Letter, sent by the Secretariat to a Party who failed to comply with the EnCT's obligations or with the decision addressed to it within the required period. The Secretariat is the counterpart of the Commission, empowered to safeguard the application of the EnCT. The first phase resembles the informal dialogue that the Commission, through the EU pilot, conducts with Member States on non-compliance with EU law and it aims to resolve a problem without moving on to further corrective steps. If the Secretariat is not satisfied with the answer it receives or receives no answer, it may then send a Reasoned Opinion to a Party, which represents the initiation of a formal infringement procedure. The final step of the Secretariat is to submit a Reasoned Request to the Ministerial Council, seeking to bring a decision on the breach of obligations under EnCT.<sup>27</sup> Most cases opened by an Opening Letter are closed in a preliminary procedure before they are referred to the Ministerial Council.<sup>28</sup>

Even though the dispute settlement procedure was developed based on infringement procedure rules, the major difference between Article 90 of the EnCT and Article 258 of the TFEU is that the infringement procedure in the Energy Community does not result in a decision by a court. Instead, the deciding authority in disputes about the compliance of a Party with the Energy Community law is the Ministerial Council, a body consisting of the politicians'

<sup>21</sup> Energy Community Treaty (n 14) art 47–52, 89–93.

<sup>22</sup> Energy Community Treaty (n 14) art 53.

<sup>23</sup> Energy Community Treaty (n 14) art 58.

<sup>24</sup> Energy Community Treaty (n 14) art 63.

<sup>25</sup> Energy Community Treaty (n 14) art 67.

<sup>26</sup> Procedural Act 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on Rules of Procedure for dispute settlement under the Treaty, art 11–19 (Procedural Act).

<sup>27</sup> *Ibid*, art 13–14.

<sup>28</sup> Rozeta Karova 'The disputes settlement system of the Energy Community, Testing its effectiveness in The Energy Community. A new energy governance system' in Dirk Buschle, Kim Talus (eds), *The Energy Community, A New Energy Governance System* (Intersentia 2015, Cambridge 32–42).

government ministers responsible for energy from each Party and of two EU representatives, usually being the European Commissioner for Energy and a high-level representative of the Presidency of the Council of the European Union.<sup>29</sup> The Ministerial Council may determine that a Party violated its obligations under the EnCT. In cases of serious and persistent breaches, the Ministerial Council may suspend certain rights of the Party concerned. In particular, it may suspend voting rights and the right to participate in meetings, but it may not impose monetary sanctions, which would be a more effective method for enforcement.<sup>30</sup>

Some authors<sup>31</sup> find that the decision-making phase of this procedure corresponds with Article 7 of the Treaty of the European Union, by which the European Council may determine the existence of a serious and persistent breach by a Member State and may decide to suspend certain rights deriving from the application of the Treaties to the Member State. Moreover, critics are directed to the fact that those who can become a subject of the dispute, being Contracting Parties themselves, are actually empowered to decide on the breach and the sanction, since the decision making body, the Ministerial Council, consists of ministers from each Contracting Party charged with managing energy.

Experts recommend that dispute procedural rules need to be revised, in order to remove the negotiating nature of this process and to provide an appropriate decision-making body and mechanism for pressing the Parties to comply with their obligation. To this end, they have proposed creating a court that resembles the court of the European Economic Area (EFTA Court).<sup>32</sup>

### 3 Electricity Market in Serbia

The state-owned public enterprise *Elektroprivreda Srbije* (Electric Power Industry of Serbia, or EPS) has dominated the Serbian electricity market, performing all electricity activities until 2005, including generation, transmission, distribution and supply. In 2005, EPS reorganised and formed a new public enterprise, called '*Elektromreža Srbije*' (Electric Networks of Serbia, EMS), tasked with managing the electricity transmission system. In 2016, the legal identity of EMS transitioned from a public enterprise to a joint stock company with one shareholder, the Republic of Serbia. EPS continues to generate, distribute and supply electricity today.

However, EPS is not the only company that generates and supplies electricity. The opening of the production and supply market began 1 January 2014, the day the Energy Law

<sup>29</sup> Composition of the Ministerial Council <<https://www.energy-community.org/aboutus/institutions/MC.html>> accessed 20 May 2018.

<sup>30</sup> Energy Community Treaty (n 14), art 90–93.

<sup>31</sup> Dirk Buschle, 'The enforcement of European energy law outside the European Union Does the Energy Community live up the expectations?' (2016) 6 (1) European Energy Journal <[https://www.energy-community.org/dam/jcr:c9f03062-7963-4f6e-8179-2f4f6ff1656a/%20EEJ\\_Buschle\\_enforcement\\_EU\\_energy\\_la.pdf](https://www.energy-community.org/dam/jcr:c9f03062-7963-4f6e-8179-2f4f6ff1656a/%20EEJ_Buschle_enforcement_EU_energy_la.pdf)> accessed 13 May 2018.

<sup>32</sup> The High Level Reflection Group of the Energy Community, 'Report An Energy Community for the Future' <[https://www.ceas-serbia.org/images/2015-i-pre/Energy\\_Community\\_HLRG\\_Report.pdf](https://www.ceas-serbia.org/images/2015-i-pre/Energy_Community_HLRG_Report.pdf)> accessed 20 May 2018.



went into force. Since then, more than four thousand medium-to high-voltage consumers (comprising 43% of total consumption) lost their automatic right to public supply and had to find a supplier on the market. Twenty-two companies currently hold licences for generating electricity and sixty-four companies hold licences to supply electricity.<sup>33</sup>

Since 1 January 2015, households and small consumers now have the choice (and not an obligation) not only to choose an electricity supplier from the open market,<sup>34</sup> but also to return to a regulated, guaranteed supply in the event that the supplier they have chosen fails to satisfy their expectations.<sup>35</sup> All other final customers must choose a supply contract within the parameters of market conditions, with the available option of switching to another supplier free of charge. In 2016 the non-regulated market in Serbia accounted for 43.3% of total end-user electricity consumption,<sup>36</sup> while one-hundred percent of households are subject to regulated prices.

The guaranteed supply of electricity to households and small consumers is provided under regulated tariffs, which are set below market price levels. Removing this ‘social component’ from the electricity price, however, which protects citizens’ living standards, would yield significantly more funds, which could then be invested into technological developments and ‘green energy’. To achieve an appropriate level of economic balance, it is necessary to plan for a constant increase, in real terms, of the regulated electricity price so that these investment goals could be reached in a relatively short period of time (such as two to three years).<sup>37</sup>

Eliminating state influence over electricity price regulations will result initially in an increase in production costs, especially in those industry areas most dependent on electricity. Nevertheless, this should motivate the increased application of energy efficiency measures and a more efficient consumption management approach, using other energy sources as a replacement and even constructing new electricity generation facilities of their own.

In relation to the new sources for generation of electricity, foreign capital has entered the Serbian electricity market through companies that produce electricity from RES: biomass, wood, wind, solar and hydro energy, etc. Serbia has set mandatory national goals for sharing renewable energy in gross final consumption, being 27% by 2020, starting from a level of 21.2% in 2009.<sup>38</sup> To develop an electricity generation market and to achieve ‘clean energy’ goals, the

<sup>33</sup> License Register of Agency of Energy of the Republic of Serbia, <[https://www.aers.rs/Index.asp?l=2&a=535.3&ted=&ed=&id\\_ed=&tp=Zanpra&id=&idag=&tid=&lid=&sid=1](https://www.aers.rs/Index.asp?l=2&a=535.3&ted=&ed=&id_ed=&tp=Zanpra&id=&idag=&tid=&lid=&sid=1)> accessed 18 July 2018.

<sup>34</sup> Energy Law Act 2014 (n 2), art 402.

<sup>35</sup> Energy Law Act 2014 (n 2), art 197.

<sup>36</sup> Commission, ‘Staff working document’ Serbia 2018 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 Communication on EU Enlargement Policy, COM(2018) 450 final, p 67 (Commission Report Serbia 2018).

<sup>37</sup> Ministry of Mining and Energy of the Republic of Serbia, Energy Sector Development Strategy of the Republic of Serbia for the period by 2025 with projections by 2030, (‘Official Gazette of the Republic of Serbia’ No. 101/15), 44.

<sup>38</sup> Screening Report Serbia (n 15), 10.

Serbian legislator included in the Energy Law Act of 2014 obligations for EPS to buy electricity from companies that produce electricity from renewable sources.<sup>39</sup> In this way, Serbia decentralised the electricity generation field; there is no longer one central source of electricity production, but many more. Prior to 2014, only one company in Serbia produced electricity, doing so primarily from coal and water. Today, a total of twenty-two companies produce electricity, mostly from renewable sources. The increased use of renewable sources positively influences decarbonisation and moves the country closer to fulfilling the obligation to produce 27% of electricity from renewable sources. Decentralising electricity production decreases the loss of energy which occurs in transmission through distribution systems because energy travels to consumers on a shorter pathway. On the other hand, the purchase prices for this electricity are prescribed as feed-in tariffs, which function as incentives for production of electricity from renewable sources. Those are partially transferred to end users by EPS, resulting in increased household bills. Evidently, measures for achieving one liberalisation goal influence another liberalisation goal. As such, proper energy planning and balancing is important.

If we recall the EU Commission's achievements in applying the principle of competition to energy market, as mentioned in Chapter II, we may conclude that using the tools of competition law can also foster competitiveness in the Serbian energy market.

So far, the Serbian competition authority has adopted only one decision regarding the electricity sector, finding the abuse of the dominant position by *EPS Distribucija* (EPS Distribution) to be a significant operator on the market for electricity distribution, applying dissimilar business conditions to equivalent transactions with differing undertakings. This disparity resulted in some undertakings being placed in a less favourable position than the position of their competitors.<sup>40</sup> The decision imposed a fine, amounting to about three hundred million dinar (about 3 million euro), but also determined nine measures for the removal of competition infringements and for any other future acts that might restrict, distort or prevent competition by abusing a dominant position.<sup>41</sup>

Along with the national competition authorities, The Secretariat has powers to monitor Energy Community Parties' compliance with the EnCT rules. The Secretariat found that Serbia did not successfully implement an ownership unbundling model concerning the condition of preventing any conflict of interest, since the Government of Serbia directly manages both the transmission operator EMS and the generation, supply and distribution undertaking, EPS<sup>42</sup>. In particular, according to the OU model, a TSO will be deemed independent if an undertaking which acts as a TSO is first the owner of the transmission assets; second, the person or persons who control the TSO must not have direct or indirect

<sup>39</sup> Energy Law Act 2014 (n 2), art 70–78.

<sup>40</sup> Commission for protection of competition of the Republic of Serbia, Decision Number: 5/0-02-563/2016-60 of 23/12/2016, 1–2 (Decision Number: 5/0-02-563/2016-60).

<sup>41</sup> *Ibid*, 22–26.

<sup>42</sup> Law on Public Enterprises ('Official Gazette of the Republic of Serbia' No. 15/2016), art 2.

control over energy subjects that perform other electricity functions, nor should they appoint the members of supervisory boards or serve as board members. Nevertheless, it is permissible that, in the event that a Member State is an owner of both a TSO and energy generation or supply companies, two separate public bodies may control a TSO on the one hand and a generation or supply energy companies on the other hand.<sup>43</sup> Regarding this condition, it is necessary to designate two public entities that will control these energy subjects separately.<sup>44</sup> The formal separation of competences between public bodies constitutes a *sine qua non* for unbundling a state-owned TSO.

The importance of the enforcement methods will be specially outlined in the next subdivision, which examines the openness and state of play of the Serbian gas sector.

#### 4 The Gas Market in Serbia

Two aspects that characterised the Serbian gas market are dependence on gas imported from Russia and the non-alignment of TSOs with the rules on unbundling, which aspects lead to the foreclosure of it.

Serbia imports gas from the Russian Federation via a long-term agreement with the transmission system operator, Public Undertaking ‘Srbijagas’, which accounted for 82% of the total demand in 2018. The remainder is produced by the only domestic producer, the oil and gas company called *Naftna industrija Srbije JSC* (Oil Industry of Serbia, or NIS). NIS is the only Serbian state-owned energy company that was privatised, in 2008, by selling 49% of its capital to the Russian oil company Gazprom Neft.

Consumers of natural gas may choose their supplier freely, choosing from sixty-six licenced suppliers. Likewise, on the electricity market, households may opt for guaranteed supply via tariffs set below market levels and approved by AERS.

Two companies, Srbijagas and Yugorosgaz-Transport LLC, operate the gas transmission system in Serbia.<sup>45</sup> Srbijagas functions as a vertically integrated company owned by the Government, which holds licences for the transmission, distribution and supply of gas. The Serbian government’s action plan from 2016 envisaged the separation of the Srbijagas transmission system from supply by implementing the Independent Transmission Operator (ITO) model as one of the alternative models set in the Gas Directive.

Choosing alternative models for unbundling the transmission system remains a part of this vertically integrated company. However, to safeguard independence, the Gas Directive has imposed a set of detailed obligations, which a competent authority must verify before certification.<sup>46</sup>

<sup>43</sup> Electricity Directive and Gas Directive (n 6), art 9(6).

<sup>44</sup> For example, in the Czech Republic, the Ministry of Industry and Trade is in charge of exercising controlling rights over national TSO (ČEPS), but not over other electricity functions.

<sup>45</sup> Decision on Energy Balance of the Republic of Serbia for 2018 (Official Gazette of the Republic of Serbia No. 119/2017).

<sup>46</sup> Gas Directive (n 6), art 13.

An ITO model raises the possibility of founding a subsidiary that will manage the transmission system independently, while Srbijagas will hold ownership over the network. In 2015, Srbijagas established a new company, Transportgas Srbija, aiming to carry out the activities of an ITO. However, the Secretariat is of the opinion that Transportgas Srbija is only a shell company, incapable of performing any of the functions stipulated in the Energy Law.<sup>47</sup> Due to non-compliance with the unbundling rules, the Ministerial Council, acting on a Reasoned Request of the Secretariat, adopted a decision in case ECS-9/13, October 2016, identifying a serious and persistent breach of EnCT by Serbia.<sup>48</sup>

The second transmission operator is Yugorosgaz-Transport, LLC, a company founded in 2012 by joint stock company Yugorosgaz, which was established by the agreement between Russia and Serbia in 1996 for the development, construction and operation of gas transmission systems in southern Serbia.<sup>49</sup> AERS certified Yugorosgaz-Transport, LLC as an Independent System Operator (ISO) in June 2017. However, the Secretariat did not give a positive opinion on this matter, finding that Yugorosgaz-Transport, LLC failed to establish full independence from production and supply interests in vertically integrated owner Yugorosgaz. In particular, Yugorosgaz, as the owner of the transportation system directly and Gazprom Neft indirectly (through its control over its subsidiary Yugorosgaz), exercises control over Yugorosgaz-Transport and is also active in producing and supplying natural gas.<sup>50</sup>

Most recent news on the gas market in Serbia reports that the construction of the new gas infrastructure, as part of the ‘Turk Stream’ project, is in preparation.

In 2008 Russia commenced the ‘South Stream project’, which consisted of constructing a gas pipeline to enable the flow of natural gas from Russia, through the Black Sea, into Bulgaria, then through Serbia, Hungary and Slovenia, then further to Austria. In December 2014, Russia announced the cancellation of this project. Not long afterwards, in October 2016, Russia and Turkey agreed to a new gas pipeline project called ‘Turk Stream’. The primary aim of this new project is building a gas transport route to Turkey and further onward to South-East and Central Europe, bypassing Ukrainian territory. This Russian-Turkey gas pipeline, which will run through Black Sea, was completed in November 2018. The second stage should be constructed, linking the Bulgarian, Serbian and Hungarian transmission systems.

Gastrans LLC of Serbia is a company established for constructing and transmitting the Serbian element of the Turk Stream project. This entity has recently received an exemption from AERS regarding the rules for unbundling and third-party access. It especially relates to Article 288 of the Energy Law of 2014, which extends Article 36 of Gas Directive, making it possible for national regulatory authorities to grant exemptions for new, major gas infrastructures, upon request, and for a defined period of time, if certain conditions are met.

<sup>47</sup> Implementation: Serbia <<https://www.energy-community.org/implementation/Serbia/GAS.html>> accessed 18 May 2018.

<sup>48</sup> Decision of the Ministerial Council of the Energy Community, D/2016/17/MC-EnC on imposing measures on the Republic of Serbia pursuant to Article 92(1) of the Treaty of 14 October 2016.

<sup>49</sup> Yugorosgaz Transport, Development plan for 2017-2026 of 01/06/2017.

<sup>50</sup> The Secretariat of the Energy Community, Opinion ECS-No.2/17, 9.

These are exemptions from the provisions related to unbundling, third-party access, access to storage and access to upstream pipeline networks.<sup>51</sup>

This rule exempts the obligation of transmission operators to allow third parties access to the network, with the result that opening gas market to competition is lawfully restricted. It is created to encourage investments and to provide investors with a shield against potential risks. European regulators were motivated to strike a balance between free competition and much-needed investments. Indeed, building new gas infrastructure will foster competition, by diversifying sources through eventual import of Romanian and Azeri gas, along with gas from LNG storage in Greece and Turkey, as justified by arguments elaborated in a feasibility study attached to the request for Gastrans exemption.

However, it seems that the Bulgarian-Serbian gas interconnection with Turk Stream will position the Russian gas market to become stronger in Serbia, since the rules of the Gas Directive to liberalise the market (granting access to networking, unbundling, etc.) will be excluded and the largest infrastructure capacity will be reserved for Srbijagas and Gazprom Export LLC (up to 88% according to long-term projections), for 20 years.<sup>52</sup> This exemption is lawful and follows normal practice for new international infrastructure projects.<sup>53</sup> Even so, other infrastructure projects, such as Trans Adriatic Pipeline and Nabucco, have aimed primarily at making gas available from other sources, such as Azeri gas, for delivery to Europe.

The Secretariat will soon issue an opinion on AERS's exemption decision. The opinion will be non-binding, but the decision-making body should respond to this opinion in a serious manner, nonetheless.

In relation to the foreclosure of gas markets, significant progress has been made by the Secretariat's actions towards eliminating the destination clause from the gas supply agreement between Russia and Serbia. The case deals with Gazprom's abuse of its dominant position by including a destination clause, to mandate where gas can be delivered and limiting buyers from reselling excess gas, in the agreement on gas supply established with Serbia. This agreement has resulted in the territorial isolation of Serbia's gas market.

For nearly twenty years, the European Commission has been struggling with Gazprom's anti-competitive behaviour within the EU territory, by concluding agreements that restrict competition and affect trade between Member States.

From 2000 to 2007, the Commission investigated the practices of the three largest suppliers of natural gas to the European market, Russia, Algeria and Nigeria, or Gazprom, Sonatrach and NLNG. These investigations were concluded with settlement decisions.

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<sup>51</sup> Energy Agency of Republic of Serbia, 'Gastrans submitted third party access exemption application to the energy agency' <[https://www.aers.rs/Index.asp?l=2&a=541&ted=&ed=&id\\_ed=&tp=&id=211&idag=&tvid=1&lid=&sid=1](https://www.aers.rs/Index.asp?l=2&a=541&ted=&ed=&id_ed=&tp=&id=211&idag=&tvid=1&lid=&sid=1)> accessed 31 May 2018.

<sup>52</sup> Secretariat invites interested parties to send observations on the exemption decision for the Gastrans natural gas pipeline project <<https://www.energy-community.org/news/Energy-Community-News/2018/10/24.html>> accessed 15 November 2018.

<sup>53</sup> The Commission has granted the exemption from the requirements on third party access, tariff regulation and ownership unbundling rules for the Trans Adriatic Pipeline, OPAL and Nabucco projects.

Gazprom, for instance, committed to excluding destination clauses from existing contracts and to refrain from inserting such clauses in future contracts.<sup>54</sup> However, the Commission has recently adopted a new commitment decision that addresses the same Gazprom's monopolistic behaviour in the territory of Central and Eastern Europe.<sup>55</sup>

Since Serbia is not Member State of the EU, the Commission has no competences to investigate the lawfulness of gas supply in Serbia. However, in case ECS 18/16, the Secretariat determined the 2012 agreement between the government of the Republic of Serbia and the government of the Russian Federation for the supply of natural gas from Russia to Serbia to be anti-competitive, since it asserts that the natural gas is intended for use only in the Serbian market. In response, the Serbian parliament approved the removal of the destination clause and thereby rectified the breach identified. As a result, the Secretariat decided to discontinue Case ECS-18/16.<sup>56</sup>

## IV Conclusion

Adapting transitional nations to the new energy market conditions has proven to be far more difficult than for countries with developed markets. The legislative and regulatory models adopted in developed countries do not transfer well to transitional nations without considering the idiosyncrasies of their individual power systems. In relation to that, the Energy Community recognised the importance of taking into account the specific situation of each Contracting Party when adopting measures concerning the adaptation of the *acquis communautaire*.<sup>57</sup>

There is no guarantee that the free market will automatically bring about efficiency. The social problems that could arise from full liberalisation include a reduction in the number of employees for companies slated for privatisation. To change the legal identity of EPS from a public enterprise to a joint stock company, five thousand employees will need to be released.<sup>58</sup> Moreover, eliminating the guaranteed prices for households while introducing market pricing instead will increase household expenditure and will greatly impact the social stability of a country. The primary goal of continued regulation of some electricity and gas sectors is thus preserving social stability by keeping electricity and gas prices for households at a rate below market prices.

<sup>54</sup> 'Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses' <[http://europa.eu/rapid/press-release\\_IP-03-1345\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-03-1345_en.htm?locale=en)> accessed 20 May 2018.

<sup>55</sup> 'Antitrust: Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets' <[http://europa.eu/rapid/press-release\\_IP-15-4828\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4828_en.htm)> accessed 20 May 2018.

<sup>56</sup> Case ECS-18/16: Serbia / competition <<https://www.energy-community.org/legal/cases/2016/case1816RS.html>> accessed 16 October 2018.

<sup>57</sup> Energy Community Treaty (n 14), art 24.

<sup>58</sup> 'Serbia intends to transform EPS into joint stock company in 2020' <<https://seenews.com/news/serbia-intends-to-transform-eps-into-joint-stock-company-in-2020-621173>> accessed 26 July 2018.

On the flip side, proponents of full liberalisation emphasise that a higher price provides an incentive for reducing energy costs and for investing in the development of new methods of electricity generation. Low electricity prices for household consumers made it difficult for electric companies to make any strategic investments. Hence, the only way to develop the power industry has been through various types of state interventions, such as budget subsidies, state-funded capital investments and state guarantees for loans. Moreover, the demanding goals of the EU concerning clean sustainable energy has forced states to apply measures that, though they are not welcomed by citizens, may provide the funds necessary for modernising infrastructure and technology.

Privatisation can yield improved performance for industries operating in competitive markets, but this advantage is not certain for natural monopolies operating in non-competitive markets. In many developing and transitional countries, privatisation has yielded benefits for their owners only. History demonstrates that transitional countries with high budget deficits and public debt that decided to sell loss-making electricity enterprises suffered from disbenefits such as increased unemployment and higher economic and social costs.<sup>59</sup>

In 2016, representatives of EPS emphasised that EPS privatisation was out of question. For privatisation to occur, EPS must become a joint stock company, requiring it to identify its assets. This is the first step towards posting on a stock exchange. The chairman of the EPS supervisory board also emphasised his belief that profitable state-owned enterprises should not be privatised.<sup>60</sup> Time will tell whether Serbia will find justifiable and profitable reasons to privatise EPS.

At this moment, Serbia has not yet achieved the level of economic development necessary to achieve the full liberalisation of electricity markets in terms of privatisation, leading to efficiencies for all stakeholders. In light of this, it appears that competitiveness and market strengths remains insufficiently developed when the number of effectively unregulated customers and the quantity of the total electricity consumed outside regulated tariffs remains high.<sup>61</sup> That (1) Serbia has preserved an option for households and small consumers to purchase electricity under regulated tariffs and that (2) one-hundred percent of households and small consumers choose this option indicates that the electricity market is not yet capable of delivering benefits to all stakeholders.

Moreover, the 2018 Report of the Commission on Serbia outlines, in a summary of Chapter 15 of the *acquis*, that Serbia is only moderately prepared in the energy sector. Against this backdrop, it is emphasised that a primary task for the coming year is to fully unbundle vertically integrated monopolies while simultaneously developing a competitive gas market.<sup>62</sup>

The goals of the EU energy policy cannot be achieved if the enforcement of this policy remains ineffective. Contrary to the experience within EU electricity and gas markets,

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<sup>59</sup> Vlahinić (n 3) 16.

<sup>60</sup> 'Serbia is not selling EPS' <<https://balkangreenenergynews.com/antic-serbia-is-not-selling-eps/>> accessed 2 August 2018.

<sup>61</sup> Tominov (n 4) 270.

<sup>62</sup> Commission Report Serbia 2018 (n 36) 67.

competition law tools have not been used in sufficient volume to support the opening of the electricity and gas markets in Serbia. The very first aim of market competition is to reduce the prices of energy products, along with improving the quality of service. This effect will not occur if there are no market participants that can compete with their products and services, in terms of quality and price. As elaborated here, the Serbian electricity and gas sectors are still dominated by state-owned companies. Moreover, the rules of the Energy Community's dispute settlement procedure do not provide a mechanism that can force parties to align their performance with the EnCT, especially when the breach is persistent and there is no willingness to adhere to the obligations established by the EnCT. As concluded by the High Level Reflection Group, the sanctions mechanism should be reviewed, because it fails to satisfy the standards of an Energy Community in correspondence with the rule of law.<sup>63</sup> The mechanism for sanctions in an Energy Community, modelled by Article 7 of TEU, is unable to resolve individual breaches and is therefore unsustainable.

In sum, liberalising the energy market represents a complex set of concepts, rules and procedures, which has the aim of bringing welfare for states, industry and consumers. Introducing measures for reaching the goals of clean energy and infrastructure development at the beginning of implementation may have an adverse effect on another liberalisation goal, namely the wellbeing of consumers, in terms of lower prices for electricity and gas. Much work remains for the Serbian economy to achieve a respectable degree of economic stability and social development, enabling the implementation of market principles and making effective competition in the energy market possible. Moreover, adhering to the obligations established by the EU energy policy and creating a proper enforcement mechanism should lead to an efficient and prosperous energy market.

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<sup>63</sup> The High Level Reflection Group of the Energy Community (n 32).





# Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims

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## I Origins of the Doctrine of Legitimate Expectations in English Administrative Law

Legitimate expectations is a doctrine inherent to the English administrative law. It is most commonly defined as a position of a subject of law having

a 'legitimate expectation' that a public body will exercise its discretion in some way [...] may be entitled to the law's protection if that 'expectation' is disappointed.<sup>1</sup>

This doctrine, albeit common in many jurisdictions that originate in the laws of England and Wales, is still subject to development by case-law and is quite a new one. The fact that it has spread across many Anglo-originated jurisdictions is a result of the cross-fertilization of legal science and practice rather than a common colonial heritage, as the term 'legitimate expectations' was arguably first used in the post-colonial era, namely in 1968 by the Court of Appeal in *Schmidt v Secretary of State for Home Affairs*<sup>2</sup> and it was only in 1983 that English courts actually started recognising its existence as part of the grounds for a judicial review of administrative decisions and the conduct of public authorities, giving individuals standing to challenge the legality of decisions of public bodies, namely in *O'Reilly v Mackman*<sup>3</sup> and in particular in the *GCHQ Case (Council of Civil Service Unions v Minister for the Civil Service)*.<sup>4</sup>

The textbook essence of the doctrine of legitimate expectations subsequent to the *GCHQ Case*<sup>5</sup> is that two kinds of legitimate expectation of a private party are to be protected by law, namely legitimate expectation based upon (i) an express promise given on behalf of a public

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<sup>1</sup> F. Ahmed, A. Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73 (1) Cambridge Law Journal 61.

<sup>2</sup> *Schmidt v Secretary of State for Home Affairs* [1968] EWCA Civ 1, [1969] 2 Ch. 149 at 170–171, Court of Appeal (England and Wales).

<sup>3</sup> *O'Reilly v Mackman* [1983] UKHL 1, [1983] 2 A.C. 237, H.L. (UK).

<sup>4</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6, [1985] A.C.

<sup>5</sup> *Ibid.*

authority, or, alternatively (ii) a regular practice that the private party can reasonably expect to continue.<sup>6</sup> A third alternative that might generate legitimate expectations are policies of public authorities, as per the subsequent case of *R. Home Secretary ex parte Khan*.<sup>7</sup>

## II Continental Origins of this Doctrine in Germany and in the European Communities

The doctrine of legitimate expectations emerged in the second half of the 20<sup>th</sup> century on the continent as well. The German *Grundgesetz* (the German post-WWII constitution) contains a provision that elevates the legitimate expectations of an addressee of both legal norms and the conduct of the state (intertwined with the doctrine of *Rechtsstaat*) to fundamental rights, way beyond the mere doctrine of legal security.<sup>8</sup>

A very similar doctrine also emerged in Community Law, in the context of the revocation of administrative decisions. Nolte summarises the doctrine(s) of legitimate expectations, as they emerged in Germany, England, and in (EEC) community law, as follows:

In Community Law, the principle of legitimate expectations developed from cases which concerned the revocation of administrative decisions [citing in his FN no. 33 these cases: Cases 7/56, 3/57 and 7/57, *Alnera* [1957] ECR 83, 117–119; Cases 42/59 and 49/59, *SNUPAT* [1961] ECR 109, 172; Case 14/81, *Alphasteel Ltd* [1982] ECR 749, 764]. In English law, the term comes from a different source: there it is connected with the procedural guarantee of ‘natural justice’, or, to use a more modern term, the duty to act fairly. At least until recently [as of 1994], its procedural origin constrained the development of the concept as a substantive principle of English administrative law. Therefore, as a general rule, a violation of ‘legitimate expectations’ only gives rise to a right to an administrative hearing or possibly a lesser procedural right. In both German and Community law, on the other hand, ‘legitimate expectations’ confer substantive protections. According to section 48(2) of the German Administrative Procedure Act of 1976, for instance, ‘an unlawful administrative decision granting a pecuniary benefit may not be revoked insofar as the beneficiary has relied upon the decision and his expectation, weighted against the public interest in revoking the decision, merits protection. The Court of Justice has confirmed that such a rule is also part of the legal order of the Community.’<sup>9</sup>

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<sup>6</sup> Fraser L.J. and Lord Diplock in the *GCHQ Case*. Summary from Ahmed, Perry (n 1) 65.

<sup>7</sup> *R. v Secretary of State for the Home Department, ex parte Khan* [1984] EWCA Civ 8, [1984] W.L.R. 1337, C.A. (England & Wales). Summary from Ahmed, Perry (n 1) 67.

<sup>8</sup> G. Nolte, ‘General Principles of German and European Administrative Law. A Comparison in Historical Perspective’ (1994) 57 (2) *The Modern Law Review* 195.

<sup>9</sup> *Ibid.*

Nolte also points out, arguing also in his article that the doctrine of legitimate expectations was ‘Made in Germany’,<sup>10</sup> that the German Constitutional Court ruled on the principle of legitimate expectations as early as 1961. Nonetheless, it needs to be pointed out that, in this case, the issue at hand was retroactive legislation and the breach of the doctrine of *Rechtsstaat*, and the related legitimate expectations of the general public in the context of legal certainty. As such, it was a slightly different topic to that of court review of administrative decisions under the laws of England and Wales.<sup>11</sup>

### **III Legitimate Expectations as a Part of the FET Standard in BIT Arbitral Practice – Wherefrom, How Come, and Really?**

The objective of this piece is to analyse the legal nature (i.e., the source) of the principle of *legitimate expectations* in international investor/state arbitration pursuant to bilateral investment treaties (BITs) and other investment protection-related agreements, such as NAFTA. The objective of this piece is also to summarise the current doctrine, if any, of this institution within the FET standard and the precise contours of the institution. In doing so, one needs first to consider the nature of the FET standard.

#### **1 The FET Standard of Treatment Under International Law**

The protection of legitimate expectations is treated by arbitral tribunals as a subheading of the standard of fair and equitable treatment (FET).

The meaning of the FET standard has historically varied depending on the wording of the respective investment treaty. As Panitchpakdi et al. observe, tribunals have varied in interpreting the content of the FET standard under BITs depending on the wordings of the respective BIT FET provisions, namely:<sup>12</sup>

a) FET linked to international law, including the minimum standard of treatment of aliens under customary international law, such as NAFTA Article 1105 or in the Croatia-Oman BIT, Art. 3(2):

Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment in accordance with international law and provisions of this Agreement.

<sup>10</sup> Nolte (n 8) 191. For a similar view, citing also Nolte, see: D. Barak-Erez, ‘The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests’ (2005) 11 (4) *European Public Law* 584.

<sup>11</sup> BverfGE 13, 261. Online at: <<http://sorminiserv.unibe.ch:8080/tools/ainfo.exe?Command=ShowPrintText&Name=bv013261>> accessed 7 August 2017.

<sup>12</sup> S. Panitchpakdi et al., *FAIR AND EQUITABLE TREATMENT UNCTAD Series on Issues in International Investment Agreements II*. UNCTAD/DIAE/IA/2011/5 (United Nations 2012, New York – Geneva) 20–29.

b) Unqualified FET formulation, such as in the Belgium-Luxembourg Economic Union – Tajikistan BIT, Art. 3:

All investments made by investors of one Contracting Party shall enjoy a fair and equitable treatment in the territory of the other Contracting Party.

Accordingly, the tribunals have historically either ventured into analysing the content of the meaning of the term ‘under customary international law’, very often arriving at the minimum standard of treatment of aliens (MST) as the customary standard of treatment and then into discussion of whether FET merely corresponds to MST, or imposes a higher standard;<sup>13</sup> or went along quite a different path and discussed the very content of the principle of FET and the nature thereof, sometimes arguing that it may be vague intentionally to enable such discussion and its broad applicability (Brower)<sup>14</sup> without pigeonholing it into either mere MST or into some new *sui generis* higher standard.

In particular in situations where the respective BIT (such as the above cited Croatia-Oman BIT) describes the FET standard as being ‘accordance with international law’, this has given rise to interpreting the FET as a mere alter ego of the MST. As Panitchpakdi et al. pointed out in 2012, ‘several tribunals have held that the actual content of the unqualified [plainly textually mentioned FET in a BIT] is not materially different from the MST’<sup>15</sup> (citing *Rumeli Telekom v Kazakhstan*,<sup>16</sup> *Biwater Gauff v Tanzania*,<sup>17</sup> *Duke Energy v Ecuador*,<sup>18</sup>

<sup>13</sup> *Pope and Talbot v Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 110.

<sup>14</sup> C.H. Brower, ‘Structure, legitimacy and NAFTA’s investment chapter’ (2003) 36 *Vanderbilt Journal of Transnational Law* 203, FN 163: ‘As stated elsewhere, the reference to ‘fair and equitable treatment’ in Article 1105(1) represents the exemplification of an intentionally vague term, designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty’s object and purpose in particular disputes. See Brower, *Empire Strikes Back*, supra note 2, at 56. See also J.G. Merrills, *International Dispute Settlement* (3rd edn 1998) (‘When an arbitrator is asked by the parties to have regard to equitable considerations ... he ... begins to assume the role of a legislator, creating law for the case in hand.’); U.N. CTR. ON TRANSNATIONAL CORPS., *BILATERAL INVESTMENT TREATIES* 41 (1988) (‘It is in the nature of a very general concept like fair and equitable treatment that there can be no precise definition. What is fair and what is equitable may largely be a matter of interpretation in each individual case.’; Kenneth J. Vandeveld, *United States Investment Treaties* 76 (1992) (‘The phrase is vague and its precise content will have to be defined over time through treaty practice, including perhaps arbitration under the disputes provisions.’); Ian Brownlie, *Legal Status of Natural Resources in International Law*, (Legal status of natural resources in international law 162 Brill – Nijhoff 1979, Leiden – Boston) 253, 287 (‘The point is a simple one: with little or no clear content a direction to apply equitable principles is a conferment of a general discretionary power upon the decision-making body.’); Stephen Vasciannie, ‘The Fair and Equitable Treatment Standard in International Investment Law and Practice’ (1999) 70 (1) *Brit. Y.B. Int’L L.* 99, 142 (‘In practice, ... this approach may also mean giving considerable discretion to the tribunal entrusted with determining whether a breach of the [fair and equitable] standard has occurred, bearing in mind the subjectivity inherent in the notions of fairness and equity.’). Available online at: <<https://www.thefreelibrary.com/Structure,+legitimacy,+and+NAFTA's+investment+chapter.-a099555207>> accessed 10 August 2017.

<sup>15</sup> Panitchpakdi et al. (n 12) 59.

<sup>16</sup> *Rumeli Telekom v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 611.

<sup>17</sup> *Biwater Gauff v Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, para. 592.

<sup>18</sup> *Duke Energy v Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 337.

*Saluka v Czech Republic*,<sup>19</sup> *Azurix v Argentina*,<sup>20</sup> *CMS v Argentine Republic*,<sup>21</sup> and *Occidental v Ecuador*.<sup>22</sup>)

The issue of the precise nature of the FET is, however, still unsettled and will remain so for some time. For instance, in the recent decision in *Philip Morris v Uruguay* of 28 June 2016,<sup>23</sup> the tribunal at first refused to accept that FET was an autonomous standard and in turn concluded that it did not correspond to the traditional MST under international law, but that under the influence of the FET standard the MST had evolved to a new one, one under which treatment of direct foreign investment must be tested, namely:

316. At the outset, the Tribunal notes that the absence of any reference in Article 3(2) of the BIT to ‘treatment in accordance with international law’ or ‘to customary international law or a minimum standard of treatment,’ as provided by some other investment treaties with regard to the *FET standard*, does not mean that the BIT creates an ‘autonomous’ FET standard. [...] In the absence of any additional qualifying language, the reference to FET in Article 3(2) cannot be read as “treatment required by the minimum standard of treatment under international law.

317. As any other treaty provisions, the text of Article 3(2) of the BIT must be interpreted according to the normal canons of treaty interpretation as contained in Articles 31 and 32 of the VCLT. This includes interpretation in accordance with general international law, as stated in Article 31(3)(c) which requires that a treaty be interpreted in the light of ‘[a]ny relevant rules of international law applicable to the relations between the parties.’ The scope and content of FET under Article 3(2) must therefore be determined by reference to the rules of international law, customary international law being part of such rules.

318. As held by *Chemtura v Canada*, ‘such determination cannot overlook the evolution of customary international law, nor the impact of BITs on this evolution.’ The tribunal in that case relied on *Mondev v United States* which held as follows:

*[B]oth the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of ‘fair and equitable treatment’ and ‘full protection and security’ of foreign investments to what those terms – had they been current at the time – might have meant in 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith [...].*

319. In line with the evolution of customary international law, the FET standard has evolved since the time, in 1926, when the *Neer* case, on which the Respondent relies, 429 was decided. The standard is today broader than it was defined in the *Neer* case although its precise content is far from being settled.

<sup>19</sup> *Saluka v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 291.

<sup>20</sup> *Azurix v Argentina*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006, para. 361.

<sup>21</sup> *CMS v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 282–284.

<sup>22</sup> *Occidental v Ecuador*, LCIA Administered Case No. UN 3467, Award, 1 July 2004, para. 190.

<sup>23</sup> *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7, Award, 28 June 2016, paras. 316–319.

Paraphrased, the tribunal in *Philip Morris v Uruguay*<sup>24</sup> essentially concludes that, irrespective of whether or not *FET is defined in the BIT (or any other IIA) by reference to customary international law, it is either way an alter ego of a new standard of MST, way beyond that of Neer*,<sup>25</sup> essentially a MST version 2.0 containing an enlarged pool of rights of investors (aliens), since (customary) law too has evolved since the times of Neer.

Yet what else is MST 2.0 than an evolution from Neer into a general FET, which we merely do not dare to label accordingly?

On the other hand, for instance in a different ICSID case from about the same time relating to a BIT between Costa Rica and Switzerland, which includes the FET protection without any link to general international law when talking of FET, the tribunal explicitly concluded the BIT-based FET standard to be of a particular nature: *Cervin Investissements S.A. v Rhone Investissements S.A. v Costa Rica*<sup>26</sup>:

451. As a preliminary matter and in relation to the argument made by the Claimants about the autonomy of the standard, the Tribunal notes that the fair and equitable treatment provision has been interpreted in relation to customary international law on multiple occasions depending on the context and specific treaty in which it is found, in order to determine if it is a standard that goes beyond customary international law or, if it is part of it. [fn 491: For example, MTD c. Chile (Annex CL-41) §§ 110–112 and Occidental Petroleum Corporation et al. c. Republic of Ecuador, ICSID Case No. ARB / 06/11, Award, July 1, 2004 (*Occidental v Ecuador*) (Annex CL-69), §§ 188–190] By way of example, in the context of Article 1105 of the NAFTA, the contracting parties have interpreted the text of the treaty stating that fair and equitable treatment ‘does not require [...] additional treatment to that required by the minimum standard of treatment of foreigners under customary international law or that goes beyond this.’ [fn 492: Free Trade Commission, Interpretive Note to Certain Provisions of Chapter 11, July 31, 2001] However, Article 1105 of the NAFTA differs clearly from Article 4.1 of the BIT, since the text of the first provision makes an express reference to the ‘minimum standard of treatment’ and ‘international law’, linking the expressions ‘fair and equitable treatment’ and ‘full protection and security’ by the use of the word ‘included.’<sup>27</sup>

<sup>24</sup> *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7, Award, 28 June 2016, paras. 316–319.

<sup>25</sup> *L.F.H. Neer and Pauline Neer (U.S.A.) v United Mexican States*. Award of 15 October 1926, available online at: <[http://legal.un.org/riaa/cases/vol\\_IV/60-66.pdf](http://legal.un.org/riaa/cases/vol_IV/60-66.pdf)> accessed 8 October 2017.

<sup>26</sup> *Cervin Investissements S.A. y Rhone Investissements S.A. v Costa Rica*, ICSID case No. ARB/13/2, award of 7 March 2017, paras 451–454. Online at: <[https://www.italaw.com/sites/default/files/case-documents/italaw\\_9215.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw_9215.pdf)> accessed 8 October 2017.

<sup>27</sup> In original:

451. Como cuestión preliminar y en relación al argumento señalado por las Demandantes sobre la autonomía del estándar, el Tribunal nota que la disposición de trato justo y equitativo ha sido interpretada en relación con el derecho internacional consuetudinario en múltiples ocasiones dependiendo del contexto y tratado específico en el que se encuentra, a fin de determinar si se trata de un estándar que va más allá del derecho internacional consuetudinario o bien, si forma parte de éste. [fn 491: Por ejemplo, MTD c. Chile (Anexo CL-41) §§ 110–112 y Occidental Petroleum Corporation et al. c. República del Ecuador, Caso CIADI No. ARB/06/11, Laudo, 1 de julio de 2004 (*Occidental c. Ecuador*) (Anexo CL-69), §§ 188–190] A manera de ejemplo, en el contexto del Artículo 1105 del TLCAN, las partes contratantes han interpretado el texto del tratado señalando que el trato justo y equitativo ‘no requiere [...] un trato adicional al requerido por el nivel mínimo de trato a los extranjeros propio

453. In view of the foregoing, *the Tribunal sees no reason to equate this obligation with the minimum standard of treatment standard under customary international law. The Tribunal thus agrees with the Parties that the standard of fair and equitable treatment in Article 4.1 refers to an autonomous standard.*

454. It is then necessary to begin the analysis of the standard of fair and equitable treatment applicable in accordance with the general rule of interpretation established in Article 31 of the Vienna Convention on the Law of Treaties ('Vienna Convention'), which states: '[A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

[emphasis added]

The matter will thus surely undergo further discussion in both literature and cases. For the time being, in relation to treaties that do link the FET standard to (general/customary) law, it appears (although the current writer is of a different opinion as to the purpose of such wording) that the current state of the law can be summarised in the words of Dumberry:

In the [...] context of *unqualified* FET clauses (not referring to international law), there are good reasons to interpret the term FET as an *independent* treaty standard that has a distinct and separate meaning from the minimum standard of treatment. Yet, this approach is not convincing in cases (such as in that of NAFTA Article 1105) where the treaty *explicitly* links the FET standard to 'international law'. Moreover, the approach mentioned above is simply not sustainable in situations where the parties to a treaty have expressly stated their intention that the FET standard be considered as a reference to the minimum standard of treatment under custom. This is clearly the case under NAFTA Article 1105. Thus, under the aegis of the Free Trade Commission (FTC), NAFTA parties responded to the three controversial awards that had been rendered in 2000 (Metalcad, S.D.Meyers, and Pope&Talbot) on the scope and meaning of Article 1015. It issued the 'Notes of Interpretation of Certain Chapter 11 Provisions [...] which clarified, *inter alia*, that 'Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as

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del derecho internacional consuetudinario o que vaya más allá de éste' [fn 492: Comisión de Libre Comercio, Nota Interpretativa de Determinadas Disposiciones del Capítulo 11, 31 de julio de 2001] No obstante, el Artículo 1105 del TLCAN se diferencia claramente del Artículo 4.1 del APPRI, dado que el texto de la primera disposición hace una referencia expresa al 'nivel mínimo de trato' y al 'derecho internacional', vinculando las expresiones 'trato justo y equitativo' y 'protección y seguridad plenas' mediante el uso de la palabra 'incluidos'.

452. Por el contrario, el Tribunal Arbitral nota que el texto del APPRI no hace referencia alguna al derecho internacional consuetudinario, ni a un 'nivel mínimo de trato'. Esto tiene particular importancia dado que las Partes Contratantes del APPRI pudieron haber referido el estándar incluido en el APPRI expresamente a cualquiera de ellos. La ausencia de estas expresiones confiere un significado particular a la obligación de trato justo y equitativo bajo el APPRI.

453. En vista de lo anterior, *el Tribunal no ve razones para equiparar esta obligación con el estándar de nivel mínimo de trato bajo el derecho internacional consuetudinario. Coincide así con las Partes en que el estándar de trato justo y equitativo del Artículo 4.1 se refiere a un estándar autónomo.*

454. Corresponde entonces comenzar el análisis del estándar de trato justo y equitativo aplicable conforme a la regla general de interpretación establecida en el Artículo 31 de la Convención de Viena sobre el Derecho de los Tratados ('Convención de Viena'), que señala: '[u]n tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de estos y teniendo en cuenta su objeto y fin'



the minimum standard of treatment to be afforded to investments of investors of another Party' and that the concept of FET does 'not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.'<sup>28</sup>

## 2 Protection of Legitimate Expectations and the FET Standard of Treatment

In any event, the UNCTAD Panitchpakdi et al. sequel concludes, gathering from the arbitration decisions, that 'it is possible to single out certain types of improper and discreditable State conduct that would constitute a violation of the [FET] standard. Such relevant concepts include':<sup>29</sup>

- (a) Defeating investors' legitimate expectations (in balance with the host State's right to regulate in the public interest),
- (b) Denial of justice and due process,
- (c) Manifest arbitrariness in decision-making,
- (d) Discrimination,
- (e) Outright abusive treatment.

So, *opinio doctoris* has it that legitimate expectations have made it into the FET (aka MST version 2.0.) standard of treatment of investors/investments. Indeed, authors have concluded that: 'The protection of legitimate expectations is by now firmly rooted in arbitral practice.'<sup>30</sup> This statement is indeed perfectly true. As will also be illustrated below, the invocation of legitimate expectations has been around for quite a while in arbitral practice and has become quite a trendy topic in recent years. But how come?

As we have seen, the doctrine of legitimate expectations is quite new to both continental Europe and, in its alter ego, in England and Wales. How could it have, legally speaking, firmly set roots into arbitral practice? How could MST version 2.0 as shaped by FET in arbitral decisions (that is: by non-subjects of international law elaborating their respective chains of thoughts in awards) become part of (an evolved) customary international law? Where is state practice and *opinion iuris* of state actors – in particular state practice (*usus longevus*)? The current writer is sceptical as to whether there are formally satisfying answers to these theoretical questions.

Similarly sceptical is the current writer about the position articulated by some authors, namely, that the doctrine of legitimate expectations is a general principle of law (recognized by civilized nations) because it be recognized in many municipal legal systems.<sup>31</sup> The reason

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<sup>28</sup> P. Dumberry, 'The Protection of Investor's Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 31 (1) Journal of International Arbitration 49.

<sup>29</sup> Panitchpakdi et al. (n 12) 59.

<sup>30</sup> Ch. Schreuer, U. Kriebaum, 'At What Time Must Legitimate Expectations Exist? IN: Liber Amicorum Thomas Wälde - Law Beyond Conventional Thought' 1 (2012) TDM available online: <[https://www.univie.ac.at/intlaw/pdf/97\\_atwhattime.pdf](https://www.univie.ac.at/intlaw/pdf/97_atwhattime.pdf)> accessed 27 October 2018

<sup>31</sup> Such as in, as Dumberry points out, *Total S.A. v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 128; *International Thunderbird Gaming Corp. v Mexico*, UNCITRAL award, 26 January 2006, separated Opinion of Thomas Wälde, para. 30. See: Dumberry (n 28) 63.

for this scepticism is the recent nature of this doctrine in some municipal legal systems which hardly elevates (somewhat instantly) this institution to the pedestal of a general principle of law.

Similar scepticism has been articulated by other commentators. As Carmody and Carmody point out:

Martins Paporinskis has pointed out how a doctrine of expectations fits poorly within the traditional doctrine of sources of international law. The term 'expectations' is not found in treaties, and likewise, it is difficult to find consistent practice about them as custom. In terms of general principles, Paporinskis notes that expectations are expressly identified only in certain legal systems.

[...] the doctrine of expectations has been heavily criticized by a number of commentators. For instance, [Sornarajah] has observed that prior to 2005, expectations "had not been used in the sense hitherto in international law. Sornarajah goes on to identify the source of legitimate expectations as lying either in good faith or administrative law principles.<sup>32</sup>

If we accept, however, the presumption that MST version 2.0 as shaped by FET does indeed include the doctrine of legitimate expectations then how precisely does this doctrine currently stand in the theory of contemporary international law, pursuant to the rulings in arbitral awards, and how is it applied?

### 3 The Content of the Doctrine of Legitimate Expectations under the FET Standard

As we observed in the introductory paragraphs of this piece, legitimate expectations of an addressee of state power under English administrative law may, pursuant to case law, derive from either:

- (i) an express promise given on behalf of a public authority, or, alternatively
- (ii) a regular practice that the private party can reasonably expect to continue.

as per the *GCHQ Case*<sup>33</sup>; or as per *R. Home Secretary ex parte Khan*<sup>34</sup>:

- (i) policies of public authorities.

The question therefore is both the extent to which these alternatives are reflected as part of the FET standard and the extent to which the institution of legitimate expectations differs on this topic on the plane of international law.

<sup>32</sup> C Carmody, C. Carmody, 'Great Expectations: the Treatment of Expectations in WTO and International Investment law' (2017) 85 Law Publications. Available online: <<http://ir.lib.uwo.ca/lawpub/85>> accessed 8 October 2017.

<sup>33</sup> Panitchpakdi et al. (n 12) 9.

<sup>34</sup> *R. v Secretary of State for the Home Department, ex parte Khan* [1984] EWCA Civ 8, [1984] W.L.R. 1337, C.A. (England & Wales). See also: Summary from Ahmed, Perry (n 1) 67.

In *AWG Group v Argentine*<sup>35</sup> the tribunal observed that

214. The context of the term ‘fair and equitable’ largely depends upon the contents of the treaty in which it is employed. Thus, the term must be interpreted not as three words plucked from the BIT text *but within the context of the various rights and responsibilities, with all their various conditions and limitations, to which the Contracting Parties agreed*. However, conducting such analysis *in abstracto*, namely without addressing specific relations between specific provisions of the BITs, would not take us further than the analysis of the ordinary meaning of the terms ‘fair and equitable’ [emphasis added]

The provisions of the tribunal’s observation in bold can find application by analogy on relations between states and investors. Clearly, if the legitimate expectations principle finds application then any express promise given on behalf of a public authority [alternative *ad* (i)] would give rise to legitimate expectations protected under the FET.<sup>36</sup>

Less clear would be *prima facie* the situation in relation to the two other grounds for invocation of legitimate expectations, namely (ii) a regular practice that the private party can reasonably expect to continue and (iii) policies of public authorities. In particular, the question arises whether the latter can also be understood as legitimate expectations of a legal framework expected to give certainty of unchangeable conditions for an investment. As will be illustrated below, BIT case-law is indeed predominantly concerned (apart from direct promises by states) with the question of legitimate expectations in relation to legislative frameworks.

In *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l v Spain*,<sup>37</sup> the tribunal, whilst confirming the above articulated conclusion that a specific undertaking would

<sup>35</sup> *AWG Group v Argentine*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para. 214.

<sup>36</sup> In *Micula v Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013, para. 668, the tribunal discusses this topic as follows:

668. The Parties agree that, in order to establish a breach of the fair and equitable treatment obligation based on an allegation that Romania undermined the Claimants’ legitimate expectations, the Claimants must establish that (a) Romania made a promise or assurance, (b) the Claimants relied on that promise or assurance as a matter of fact, and (c) such reliance (and expectation) was reasonable.[134] This test is consistent with the elements considered by other international tribunals.[135]

[FN 134 reads: In their final briefs, both Parties refer to the reasonableness of the reliance, although Romania at first had focused on the reasonableness of the expectation. In the Tribunal’s view, both must be reasonable, but in particular the expectation itself.]

[FN 135 reads: For example, the late Prof. Thomas Wälde explained that a claim of legitimate expectations required ‘an expectation of the investor to be caused by and attributed to the government, backed-up by investment relying on such expectation, requiring the legitimacy of the expectation in terms of the competency of the officials responsible for it and the procedure for issuing it and the reasonableness of the investor in relying on the expectation’ (*International Thunderbird v Mexico*, Separate Opinion of Thomas Wälde, 1 December 2005, para 1). It must be noted that Prof. Wälde did not dissent on the standard, but rather on the application of that to the facts of the case).]

<sup>37</sup> *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l v Spain*, ICSID case No. ARB/13/36, award of 4 May 2017, para. 362.

give rise to legitimate expectation, referring to previous cases, namely *Parkerings-Compagniet AS v Lithuania*,<sup>38</sup> *EDF (Services) Ltd. v Romania*,<sup>39</sup> *BG Group Plc. v Argentine Republic*,<sup>40</sup> and *Micula v Romania*<sup>41</sup> limited the public policies practice in relation to current legal framework as follows:

362. Absent explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs. As other tribunals have observed, '[i]n order to adapt to changing economic, political and legal circumstances the State's regulatory powers still remain in place.'<sup>42</sup> "[T]he fair and equitable treatment standard does not give a right to regulatory stability per se. The state has a right to regulate, and investors must expect that the legislation will change,<sup>43</sup> absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability.<sup>44</sup>

Given the particular situation in that case, the tribunal then went on to observe that<sup>45</sup>:

371. Respondent faced a legitimate public policy problem with its tariff deficit, and the Tribunal does not question the appropriateness of Spanish authorities adopting reasonable measures to address the situation. However, in doing so, Spain had to act in a way that respected the obligations it assumed under the ECT, including the obligation to accord fair and equitable treatment to investors. As the tribunal in *ADC v Hungary* observed:

423. [...] while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. [...] [T]he rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.

424. The related point made by the Respondent that by investing in a host State, the investor assumes the 'risk' associated with the State's regulatory regime is equally unacceptable to the Tribunal. It is one thing to say that an investor shall conduct its business in compliance with the host

<sup>38</sup> *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 332.

<sup>39</sup> *EDF (Services) Ltd. v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, paras. 217–218.

<sup>40</sup> *BG Group Plc. v Argentine Republic*, UNCITRAL, Award, 24 December 2007, para. 298.

<sup>41</sup> *Micula v Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013, para. 66.

<sup>42</sup> *BG Group Plc. v Argentine Republic*, UNCITRAL, Award, 24 December 2007, para. 298.

<sup>43</sup> *Micula v Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013, para. 666.

<sup>44</sup> Since the matter being decided by the particular tribunal was one under the ECT, the tribunal then also noted (in the same paragraph of the award) that: 'The question presented here is to what extent treaty protections, and in particular, the obligation to accord investors fair and equitable treatment under the ECT, may be engaged and give rise to a right to compensation as a result of the exercise of a State's acknowledged right to regulate.'

<sup>45</sup> *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Spain*, ICSID case No. ARB/13/36, award of 4 May 2017, para. 362 (available online: <<https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf>> accessed 8 October 2017).

State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it. In the present case, had the Claimants ever envisaged the risk of any possible depriving measures, the Tribunal believes that they took that risk with the legitimate and reasonable expectation that they would receive fair treatment and just compensation and not otherwise. [fn 466]<sup>46</sup>

Finally, citing the awards in *CMS Gas Transmission Co. v Argentina* (both the award<sup>47</sup> and annulment decision upholding this chain of thought),<sup>48</sup> *LGE Energy Corp. v Argentina*,<sup>49</sup> *BG Group Plc. v Argentina*<sup>50</sup> and finally *Parkerings*,<sup>51</sup> the tribunal in *Eiser v Spain*<sup>52</sup> arrived at the following summary in relation to the changes to the legal framework for investors, namely, in the words of the tribunal in *Parkerings*, that '*any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.*'<sup>53</sup> It is submitted by the current writer that the prohibition of unfair, unreasonable and inequitable conduct of states is not confined

<sup>46</sup> FN 466 reads: *ADC Affiliate Ltd. et al. v Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, paras. 423–424.

<sup>47</sup> *CMS Gas Transmission Co. v Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 274.

<sup>48</sup> *CMS Gas Transmission Co. v Argentina*, ICSID Case No. ARB/01/8 (Annulment Proceeding), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentina Republic, 25 September 2007, para. 85.

<sup>49</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 125.

<sup>50</sup> *BG Group Plc. v Argentine Republic, UNCITRAL, Award, 24 December 2007, para. 307.*

<sup>51</sup> *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 332.

<sup>52</sup> *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Spain*, ICSID case No. ARB/13/36, award of 4 May 2017, para 386–387 (available online: [https://www.italaw.com/sites/default/files/case-documents/italaw\\_9050.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw_9050.pdf) accessed 8 October 2017).

<sup>53</sup> The full text of the respective award reads:

386. The CMS tribunal found that the disputed measures at issue 'did in fact entirely transform and alter the legal and business environment under which the investment was decided and made,'<sup>488</sup> leading to a finding that respondent had violated its obligation to extend fair and equitable treatment.<sup>489</sup> Other tribunals assessing Argentina's extensive changes in regulatory regimes and legislation relied upon by investors have similarly found that those changes violated the obligation of fair and equitable treatment:

– *LGE Energy Corp v Argentina*: 'Several tribunals in recent years have interpreted the fair and equitable treatment standard in various investment treaties in light of the same or similar language as the Preamble of the Argentina-US BIT. These tribunals have repeatedly concluded based on the specific language concerning fair and equitable treatment, and in the context of the stated objectives of the various treaties, that the stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment. As such, the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law.'

– *BG Group Plc. v Argentina*: 'Argentina [...] entirely altered the legal and business environment by taking a series of radical measures [...]. In so doing, Argentina violated the principles of stability and predictability inherent to the standard of fair and equitable treatment.'

387. Claimants could not reasonably expect that there would be no change whatsoever in the RD 661/2007 regime over three or four decades. As with any regulated investment, some changes had to be expected over time.<sup>492</sup> However, Article 10(1) of the ECT entitled them to expect that Spain would not drastically and abruptly revise the regime, on which their investment depended, in a way that destroyed its value. But this was the result of RDL 9/2013, Law 24/2013, RD 413/2014 and implementation of the new regime through Ministry

merely to legislative powers but extends to other activities of states *vis-à-vis* investors, in particular to the conduct of the public authorities of the legislative and judicial branches of states as well.

Apart from unfair, unreasonable, and inequitable conduct, or perhaps to some extent within the meaning of unreasonable, a state would be liable for breach of the FET standard also when the state would keep changing the legal framework for the existence of a particular investment, be it out of the chaos of policy decisions or for other reasons beyond the threshold of reasonableness within its sovereign rights to legislate. An example of such situation was described by the tribunal in *PSEG Global v Turkey*:<sup>54</sup>

250. [...] Tribunal also finds that the fair and equitable treatment obligation was seriously breached by what has been described above as the ‘roller-coaster’ effect of the continuing legislative changes. This is particularly the case of the requirements relating, in law or practice, to the continuous change in the conditions governing the corporate status of the Project, and the constant alternation between private law status and administrative concessions that went back and forth. This was also the case, to a more limited extent, of the changes in tax legislation.

The existence of legitimate expectations based upon the mere fact of the existence of municipal law of particular quality/content (as to licences, conditions, taxes, tax breaks, etc.) has been repeatedly been denied in particular in NAFTA. As Dumberry<sup>55</sup> points out

tribunals have repeatedly narrowly qualified the concept of legitimate expectations by requiring, for instance, that the investor’s expectations be based on specific commitments made by the host state to have purposely induced its investment. Tribunals have denied that such expectations can be solely based on the host state’s existing domestic legislation at the time of the investment.

Writing his pieces in 2014, Dumberry argued that this rather orthodox approach is in contrast ‘with more liberal approaches taken by non-NAFTA tribunals’<sup>56</sup> and attributed this to the fact that

the FET standard clause under Article NAFTA 1105 must be analysed under the specific parameters that do not exist under most of the other investment treaties. The specificity of Article 1105 is first and foremost the result of the language contained in the provision whereby the NAFTA Parties must accord a ‘fair and equitable treatment’ *under ‘international law’*. This explicit reference to ‘international law’ contrasts with the vast majority of BITs which contain FET clauses that do not make any reference to ‘international law’.

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implementing Order IET/1045/2014.493 As it was put in Parkerings: ‘any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.’

<sup>54</sup> *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey*, ICSID Case No. ARB/02/5, award of 19 January 2007, para. 250.

<sup>55</sup> Dumberry (n 28) 49.

<sup>56</sup> *Ibid.*

The current writer, whilst observing that the distinction drawn by Dumberry between NAFTA 1105 and ‘other’ BITs corresponds to the classification also mentioned by the UNCTAD Panitchpakdi et al. sequel of 2012, disagrees with the opinion that the majority of ‘other’ – that is non-NAFTA – tribunals would be more liberal in interpreting the nature and content of the FET standard *vis-à-vis* legitimate expectations. Whilst one could argue that the NAFTA cases might be somewhat more coherent in their statements of reasons (given, after all, that they always interpret the same treaty provision and need nowadays, or at least ought to take into consideration the above discussed FTC Note of Interpretation), the above identified recent case-law, such as *Eiser*,<sup>57</sup> making reference to older cases, seems to be quite restrained in opening the sluice of *legitimate expectations* in recent years, even on the plane of the self-standing FET standard, which in the current writer’s view corresponds to the MST 2.0 law standards as it has evolved since *Neer*.

#### 4 Casuistry of Legitimate Expectations under the FET Standard

So what precisely is the current contour of the doctrine of legitimate expectations in the BIT case-law? The answer (for lack of any sound theoretical explanation of the nature of the FET standard as such and the doctrine of legitimate expectations as a part thereof) rests in cases, and cases referring to cases, as a matter of casuistry with some potential to generalise situations described in the respective cases.

This part of this piece is dedicated to a brief overview of the existing casuistry. Deriving conclusions from existing cases, we can arrive at these abstracted categories that give rise to a successful invocation of a breach of the fair and equitable treatment standard under the legitimate expectations doctrine, namely:

(i) *Changing legislative framework beyond reasonable exercise of the state’s sovereign right to legislate: The so called ‘roller-coaster’ effect of continuing legislative changes negatively influencing investors/investments thereunder as per PSEG Global v Turkey.*<sup>58</sup> It is precisely the test of reasonableness and justifications of an economic, social or other nature that may legitimise changes in law/in the conditions under which the investment had been made. The boundaries have been set in these cases and summarized by reference to these cases in *BLUSUN v Italy*.<sup>59</sup>

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<sup>57</sup> *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Spain*, ICSID case No. ARB/13/36, award of 4 May 2017.

<sup>58</sup> *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID Case No. ARB/02/5, award of 19 January 2007, para. 250.

<sup>59</sup> *BLUSUN S.A., JEAN-PIERRE LECORCIER AND MICHAEL STEIN v ITALIAN REPUBLIC*, ICSID Case No. ARB/14/3, Award of 27 December 2016, para. 367 (available online: <<https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf>> accessed 8 October 2017).

367. [T]ribunals have so far declined to sanctify laws as promises. For example, as noted already (above, paragraph 317), the tribunal in *Charanne* was clear:

under international law, in the absence of a specific commitment toward stability, an investor cannot have a legitimate expectation that a regulatory framework such as that at issue in this arbitration is to not be modified at any time to adapt to the needs of the market and to the public interest.<sup>60</sup>

368. The *El Paso* tribunal made a similar distinction, as follows:

Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze.<sup>61</sup>

369. As stated by the tribunal in *Philip Morris v Uruguay*:

It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment. Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.<sup>62</sup>

In *Duke v Ecuador*<sup>63</sup>

the tribunal (relying on *Tecmed*<sup>64</sup> and *Occidental*<sup>65</sup> and *LG&E*<sup>66</sup>) set out correctives for changes to circumstances an investor may have relied upon as follows:

340. The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all

<sup>60</sup> *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*. Case No: 062/2012, award of 21 January 2016, para. 510. Unofficial English Translation by Mena Chambers available here: <<https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf>> Spanish original available here: <<https://www.italaw.com/sites/default/files/case-documents/italaw7047.pdf>> (both accessed 8 October 2017).

<sup>61</sup> *EL PASO ENERGY INTERNATIONAL COMPANY v THE ARGENTINE REPUBLIC*. ICSID Case No. ARB/03/15, award of 31 October 2011, para. 372. Available online: <<https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf>> accessed 8 October 2017.

<sup>62</sup> *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7, Award, 28 June 2016, par. 426.

<sup>63</sup> *Duke Energy Electroquil Partners and Electroquil SA v Ecuador*, ICSID Case No. ARB/04/19, Award, 12 August 2008, para. 340. Available online: <<https://www.italaw.com/sites/default/files/case-documents/ita0256.pdf>> accessed 8 October 2017).

<sup>64</sup> *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, award of 29 May 2003, para. 154.

<sup>65</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, award of 5 October 2017, para. 185.

<sup>66</sup> *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, award of 30 April 2004, para. 127.



circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.

(ii) *Breach of specific commitments beyond 'mere' private law contracts.* These commitments (warranties or terms) must be directed at attacking or keeping the investment on the plane of support of direct foreign investment and should not be confused with mere commitments in, say, a private law contract. So for example, as Potestà<sup>67</sup> points out:

[i]n *Duke v Ecuador*, the tribunal noted that 'Electroquil's expectations under the [power purchase agreement] must be regarded as 'mere' contractual expectations which are not protected under the BIT'.<sup>68</sup> Also the tribunal in *Hamester v Ghana* emphasised 'that the existence of legitimate expectations and the existence of contractual rights are two separate issues'.<sup>69</sup> Citing to *Parkerings* with approval, the tribunal concluded that 'the alleged contract violations could not have amounted to a violation of the FET standard based on a theory of 'legitimate expectations'. *Impregilo v Argentina* stands for the same proposition.<sup>70</sup>

[...]

Thus, the concept of legitimate expectations in these kinds of situations can be accepted as a useful tool to measure the parties' assumptions when they entered into contractual arrangements, provided, however, the unfair or inequitable treatment by the host state is established by reference to additional factors (beyond the mere non-fulfilment of contract) [...]

(iii) *Breach of specific representation.* These representations include representations (warranties or terms) made to attract investors. In *Sempre v Argentine*,<sup>71</sup> the tribunal observed, in relation to both the development of the nature of the FET and of legitimate expectations in particular, as follows:

297. The evolution [of the FET] that has taken place is for the most part the outcome of a case-by-case determination by courts and tribunals, as is evidenced by many investment treaty and NAFTA decisions, including the *Tecmed*, *OEPC* and *Pope & Talbot* cases cited. This shows that, as with the international minimum standard, there has been a fragmentary and gradual development. However, it has been rightly commented that essentially 'the purpose of the clause as used in BIT practice is to fill gaps which may be left by the more specific standards, in order to obtain the level of investor

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<sup>67</sup> Potestà, M. Litimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept. 28 ICSID Review (2013) p. 88–122. Cited via the commentators RSSN profic, pre-print version at <<https://ssrn.com/abstract=2102771>> (PDF, pages 1–41) at p. 17–18.

<sup>68</sup> *Duke Energy Electroquil Partners and Electroquil SA v Ecuador*, ICSID Case No. ARB/04/19, Award, 12 August 2008, para. 358.

<sup>69</sup> *Gustav F W Hamester GmbH & Co KG v Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2008, para. 335.

<sup>70</sup> *Impregilo S.p.A. v Argentina*, ICSID Case No. ARB/07/17, Final award, 21 June 2011, para. 292.

<sup>71</sup> *Sempre Energy International v Argentina*, ICSID Case No. ARB/02/16, award of 28 September 2007, para 297–298, online: <<https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf>> accessed 3 April 2019.

protection intended by the treaties'. The principle of good faith is thus relied on as the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes.

298. The essence of the protection sought was well explained in *Tecmed*, where the tribunal held in the light of the good faith requirement that under international law, the foreign investment must be treated in a manner such that it 'will not affect the basic expectations that were taken into account by foreign investor to make the investment'. This requirement becomes particularly meaningful when the investment has been attracted and induced by means of assurances and representations, as has been established in the jurisprudence that the Claimant has invoked."

## IV Conclusion

The nature of the origin of the doctrine of legitimate expectations remains unclear in terms of the categorisation of sources of norms (from the formal point of view) under international law. In fact, it is quite safe and accurate to conclude that it is a recent invention of arbitrators inspired by some municipal legal orders. There seems to exist no evidence that could support the argument that the doctrine of legitimate expectations would constitute a part of positive customary international law. Nor is there any theoretical framework, given that the doctrine emerged quite recently in some municipal legal systems, which would support this doctrine as a general principle of law (recognized by civilised nations).

Nevertheless, the existence of this doctrine has been firmly rooted in arbitral decisions and (also already in) theory, despite the conceptual lack of clarity of its origin on the plane of international law. It currently constitutes a sub-set doctrine of the FET standard, although the nature of this standard and its precise meaning remains disputed and varies depending on the particular wording of the BIT and the composition of the particular tribunal.

It is probably fair to say that the FET standard's position, including the doctrine of legitimate expectations as a part thereof, will, down the road of time – *vis-à-vis* customary international law – undergo further development. This development will take place under the practical influence of arbitral decisions. One will quite likely see the FET truly becoming general MST version 2.0, including the doctrine of legitimate expectations – even without proper prior state practice and *opinio iuris* in the first place. The time has not yet come, though.

On a different note, irrespective of the doctrine's nature, to summarise briefly the abstracted content of the doctrine of legitimate expectations as it has materially crystallised by now, we can conclude that, under the current state of this doctrine's framework, it materially contains the following categories of circumstances: (i) Changing legislative framework beyond a reasonable exercise of the state's sovereign right to legislate: the so-called 'roller-coaster' effect of continuing legislative changes; (ii) Breach of specific commitments beyond 'mere' private law contracts; and (iii) Breach of specific representation made by those whose conduct is attributable to state(s).



## Some Remarks on Shareholders' Agreements in the Context of Hungarian Law\*\*

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### I On the Concept of a Shareholders' Agreement

In the currently effective Hungarian law, there is no single type of contract that would be regulated under the name of a shareholder agreement or, as it is used in the Hungarian legal literature, a 'syndicate agreement'. This description is still well-known and commonly used: there is a type of contract that is entered into on the basis of the doctrine of the freedom of contract, with varied content but identifiable in its main features, which is thus internally coherent. As per Section 6:59 of the Hungarian Civil Code (*Polgári törvénykönyv*), '(1) The parties shall be free to enter into a contract, and shall be free to choose the other contracting party. (2) The parties shall be free to determine the content of the contract. With their concordant intent, they may depart from the rules of contracts concerning the rights and obligations of the parties, if such derogations are not prohibited by this Act.'

A syndicate or shareholders' agreement is a *cooperative type of legal relationship separated from the articles of association but one which has a strong connection to these articles (a syndetic coordination, 'a group of contracts')*, entered into on the basis of the doctrine of the freedom of contract with the participation of each member or some members of a company, or in some cases, even third parties, in the framework of which the parties undertake obligations related to the foundation, operation or termination of a company, which point beyond the frameworks of the articles of association.

The individual elements of the definition allow the identification of the key elements of the concept of a syndicate agreement:

- there exists a contractual legal relationship, for which the general rules of contracts should be applied, and it also arises from this contractual feature that a shareholders' agreement only has binding effect with regard to the contracting parties;

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\*\* This paper has been written with the support of the National University of Public Service in the framework of the priority project KÖFOP-2.1.2.-VEKOP-15-2016-00001 – Lajos Lőrincz Professorial Program.

- syndicate agreements are on the borderland between *company law and the law of obligations*, because they contain certain rights and obligations related to the foundation, operation or termination of a company, in addition to those that are set out in the articles of association but they are not of an accessory character in their relationship with the articles of association (being accessory is not suitable for describing the relationship between the two contracts, in this case, the use of the ‘group of contracts’ concept is much more accurate);
- the effective law does not specifically identify or regulate syndicate agreements; however, within the restraints of the freedom of contract, they can obviously be validly entered into, and the questions of their validity can only be judged by taking their specific contents into account: a shareholders’ agreement cannot be regarded as invalid in itself;<sup>1</sup>
- a third party may also be a contracting party in a syndicate agreement; what is more, the very company regulated by the shareholders’ agreement can also be one.

Syndicate agreements are usually of a confidential nature; syndicate agreements are not accessible at the court of registry and they do not appear in any public documents.

The name ‘syndicate agreement’ gained ground in Hungarian law as early as in the pre-Second World War period. In other legal systems, some other descriptions are used for it, for example, in English, the name *shareholders’ agreements*, in French, *pacte sociétaire* (appr. company pact), while in Italian *patti parasociali* (appr. pacts ‘besides’ or ‘behind’ the company) are used. In Italian law, however, the concept of syndicate appears for the naming of the individual subtypes of these pacts; for instance in the case of a voting syndicate (*sindacato di voto*).

Shareholders’ agreements, among others, as a consequence of the lack of regulation, show a very diverse picture from a content perspective; each specific contract of this type settles a specific situation: this is why we cannot aim at giving a comprehensive picture when we examine the legal impacts of a shareholders’ agreement. However, these contracts also contain recurring topics which are typically to be settled. The parties may regulate all these topics, or only some questions in the framework of a shareholders’ agreement. It was rightly established in the legal literature that *‘related to shareholders’ agreements, one needs to distinguish between the contractual provisions that refer to a legal relationship under company law (and the sub-relationships thereof, such as the underlying legal relationship, the ownership relations, the relationship of economic organisation and the organisational and representational legal relationship) and those which are related to the legal relationships under company law but which are not of the company law kind (for example, a loan agreement between the member and the company).’*<sup>2</sup>

Shareholders’ agreements play a key role in the coordination of the members’/shareholders’ interests, primarily by establishing the legal framework for the cooperation between them. The question obviously arises that, from this aspect, the articles of association also serve

<sup>1</sup> For a detailed analysis on the validity of shareholders’ agreements, see Veress Emőd, ‘A szindikátusi szerződés ütközése a társasági jogi normákkal és a társasági szerződéssel (The Syndicate Agreement Conflicting with Company Law Regulation and the Articles of Association)’ (2018) 9 Magyar Jog.

<sup>2</sup> Papp Tekla, *Atipikus szerződések (Atypical Contracts)* (Lectum 2009, Szeged) 29.

basically the same purposes and why one needs a shareholders' agreement in such circumstances.

The reasons are multiple:

- Primarily, a shareholders' agreement may contain such requirements the fulfilment of which will only be undertaken by some of the members, i.e. not every member of the company is the subject of the syndicate contract. In the same way, it is also possible that the content of the shareholders' agreement takes on a secret character for the other associate members, i.e. it is only the parties to the shareholders' agreement that are aware of the existence of the contract but not the other members.
- A shareholders' agreement may have a party who is not a member of the company. For example, the members of governing bodies or certain creditors may also be contracting parties in a shareholders' agreement. What is more, in my opinion, the company itself, the operation of which is regulated in the shareholders' agreement, may be a party in the syndicate agreement. When a third party is also a contracting party, a contract that is separated from the articles of association will obviously become necessary.
- The articles of association are subject to the principle of publicity of company data. The data of companies are available to the public in the Companies' Gazette and in electronic databases; even free of charge, while the articles of association are accessible through the courts of registry. However, the secret or confidential character of a shareholders' agreement can be preserved, as this agreement is not submitted to the court of registry.
- A shareholders' agreement many times precedes the establishment of the company. In such a case, the shareholders' agreement may anticipatively define some of the content elements of the future articles of association that are deemed important.
- The articles of association are the basic document of the operation of the company, without which the company cannot exist. However, a shareholders' agreement, although it may be effective during the entire period of the company's operation, can be entered into only for certain periods or for the performance of certain operations, groups of operations, projects, investments, i.e. separated from the life cycle of the company. In the same way, the shareholders' agreement may trigger legal effects after the termination of the company too (e.g. clauses on the prohibition of competition).
- The law applicable to the company from the perspective of international private law is clearly determined (there is no freedom to choose the applicable law in company law). However, in the case of a shareholders' agreement, the freedom of the parties to choose the applicable law is not restricted by any regulation.
- Since a shareholders' agreement is entered into on the basis of the general principles of contract law, the expression of the unanimous will of the parties will be necessary again for its amendment. However, the articles of association can usually be amended according to the majority principle. A shareholders' agreement may thus appear as a special instrument for protecting the minority when the shareholders' agreement cannot be modified without the agreement consent of the minority.

The goal of the Hungarian Civil Code was to regulate company law in a flexible manner, by opening perspectives of so-called ‘dispositivity’ (use of default rules), which have so far been unknown in company law (Section 3:4), in order to reduce the significance of shareholders’ agreements in practice. However, we should realise that the above-mentioned situations and goals continue to justify shareholders’ agreements being entered into. The development of company law in itself does not lead and cannot lead to the reduction of shareholders’ agreements, since the legal and economic interests that generate the conclusion of shareholders’ agreements are not primarily aimed at the contractual correction of company law, but they also serve complex goals that are independent of the quality and dispositive character of company law. Putting it more simply, we can state that company law, which is of outstanding standards and applies a dispositive regulatory method, does not stop the relatively widespread use of shareholders’ agreements either.

A shareholders’ agreement is, however, in a very close and organic relationship with company law; its purpose is basically inseparable from company law. Therefore, the following question inevitably comes up: what kind of effects do the norms of company law exert on shareholders’ agreements? Also, the issue of the relationship and mutual effects between the articles of association and the shareholders’ agreements emerges.<sup>3</sup>

## II The Typology of Shareholders’ Agreements

Shareholders’ agreements can be classified by several different criteria.

- According to the effect of the shareholders’ agreement, one may distinguish between a shareholders’ agreement that is entered into prior to the foundation of the company, which is of the pre-contract type, on the one hand, and a shareholders’ agreement that is effective parallel to the effectiveness of the articles of association, which may even survive the articles of association, as the case may be, one which regulates the operation and termination of the company, on the other hand.
- According to the content of the shareholders’ agreement, one may distinguish between a shareholders’ agreement that prepares the foundation of the company, on the one hand, and the contract that affects the operation of the company, on the other hand. These two types of contractual content may appear at the same time in the case of a shareholders’ agreement entered into before the foundation of the company; however, the first type of content, which refers to the foundation, is of course missing from the shareholders’ agreement concluded during the operation of the company.
- As regards the classification according to the legal effects exerted by the shareholders’ agreement, we may distinguish between a shareholders’ agreement that generates rights exclusively for the members of the shareholders’ agreement, on the one hand, and a syndicate that creates authorisations also for the shareholders’ company, which does not participate in

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<sup>3</sup> Veress (n 1) 510–519.

the shareholders' agreement, on the other hand (in such a case, the legal mechanism to be applied is a contract for the benefit of the third party, since the company itself may also request the performance of the contract by the members of the syndicate).

- By the legal relationships regulated by shareholders' agreements, a shareholders' agreement may be one regulating a syndicate of a purely company law nature, of miscellaneous branches of law and of a purely different branch of law (for example, only competition law or labour law).
- We can distinguish between an organisational shareholders' agreement (the subject of which is the development and operation of the organisation of the company) and non-organisational articles of association (for example, the subject of which is funding the activities of the company).
- Based on the parties taking part in the shareholders' agreement, one may distinguish between a shareholders' agreement with two subjects and one with more than two subjects (multilateral syndicate agreement).
- Based on whether the shareholders' agreement can be accessed by a third party or not, one may distinguish between a public shareholders' agreement and a confidential shareholders' agreement, which is treated as a business secret.

### **III Contracting Parties in the Shareholders' Agreement**

The parties in a shareholders' agreement, according to the general rules, are those persons who have expressed their uniform wills regarding the contract. Just as in the case of the company, both natural persons and legal entities may appear as contracting parties in a shareholders' agreement.

From the definition specified in the previous subsection, a definite position arises with regard to the contracting parties in a shareholders' agreement: a shareholders' agreement may be entered into by each member or some members of the company as contracting parties. What is more, in certain cases, even third parties may participate in a shareholders' agreement. This position, based on the fact that legal literature is not uniform in assessing this question, requires explanation and justification, as there are several specific issues that emerge related to the shareholders' agreement. The subject of this paper is such an explanation and justification.

### **IV Shareholders' Agreements in Which Not Every Member of the Company is a Contracting Party**

It is not absolutely necessary to have a complete overlap between the members of the articles of association and the shareholders' agreement. While the conclusion of the articles of association assumes the unanimous statement of will of all the future parties (members), this is not a precondition to the validity of a shareholders' agreement.



In order to be able to enter into a shareholders' agreement, at least two persons will obviously be necessary.<sup>4</sup> As long as one of the members did not sign the shareholders' agreement, the effect of the shareholders' agreement will of course not extend to that party.<sup>5</sup>

Thus, it can happen that each member of the company is at the same time also a member of the shareholders' agreement. However, it can also happen that a shareholders' agreement is entered into by certain members (for example, between the 'large shareholders', or the 'small shareholders' to establish a syndicate for exercising minority shareholders' rights).

According to the legal literature, this is natural in the case of joint stock companies that count on a subscription to shares in a wider range: '*in the conclusion of a shareholders' agreement, it is usually only the founders or the main shareholders, or some of them who participate.*'<sup>6</sup> However, in the case of limited liability companies, it is more common that each member takes part in the shareholders' agreement as well, because it is less probable that some of the members intend 'to enforce particular interests'<sup>7</sup>. It can definitely be pointed out that not every member of the company is necessarily a contracting party in the shareholders' agreement.

There is no overlap either between the members of the articles of association and the shareholders' agreement when an entity becomes a member of the company later, i.e. as a result of the assignment of a business share. In such a case, if the new member is also intended to be specified as a party in the shareholders' agreement, the shareholders' agreement must be amended. The new member of the company must be accepted by the other signatories of the shareholders' agreement and this person shall also accept the terms and conditions of the shareholders' agreement.<sup>8</sup>

## **V Participation of Third Parties (Those Without Membership in the Company) in the Shareholders' Agreement**

In my view, it is not only the members of the company that can take part in the shareholders' agreement. This can be regarded as a disputed issue in the legal literature but my standpoint is not isolated. It has been pointed out that 'it is not prohibited by the law either that a shareholders' agreement has such a member who is not a member of the company, although it is without a doubt that this very rarely happens in practice (e.g. such a case may be when the real estate property whose use is intended to be granted to the company has a further owner in addition to the member). It is worth making a reference to this possibility as well

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<sup>4</sup> Papp (n 2) 29.

<sup>5</sup> Lukács Mónika, Sándor István, Szűcs Brigitta, *Új típusú szerződések és azok gyakorlata a gazdasági életben (New Types of Contracts and their Practice in Business)* (HVG-Orac 2003, Budapest) 23.

<sup>6</sup> Kolben György: *A szindikátusi szerződés (The Shareholders' Agreement)* (Közgazdasági és Jogi Könyvkiadó 1996, Budapest) 34.

<sup>7</sup> Kolben (n 6) 34.

<sup>8</sup> Lukács, Sándor, Szűcs (n 5) 23.

because, as we will see later, some of the earlier members of the company may remain subjects of the shareholders' agreement, even though their membership in the company has already terminated.<sup>9</sup>

In the same way, the contracting parties of a shareholders' agreement may also come from a circle of persons beyond the members. For example, a major creditor or financier of the company may also take part in the shareholders' agreement (who, for example, stipulates in this contract the terms and conditions under which members may alienate their business shares or shares, or any and all changes in the membership structure may also be prohibited by the shareholders' agreement).

The expression *shareholders' agreement* used in the Anglo-Saxon legal system, however, indicates only the agreements entered into between the holders of shares. However, not even in this approach is the participation of the members is exclusive: it is noted in the legal literature that these agreements are 'predominantly' entered into between the members.<sup>10</sup>

## **VI The Company Regulated in the Shareholders' Agreement as a Contracting Party in the Shareholders' Agreement**

The company regulated in the shareholders' agreement may be the subject and the object of the shareholders' agreement at the same time. It is possible that the very company regulated in the shareholders' agreement should also undertake obligations in the shareholders' agreement, for example in relation to the utilisation of the funding made available by the members (for example, a loan granted by a shareholder).

The joining of the company to the shareholders' agreement may only happen subsequently if the shareholders' agreement was entered into before the conclusion of the articles of association. As long as the shareholders' agreement is entered into after the conclusion of the articles of association, the company may also be an original contracting party, 'co-founding' the syndicate.<sup>11</sup>

The participation of the company in the shareholders' agreement, however, requires further explanation as well.<sup>12</sup> The reason for this is that a significant part of legal literature takes the stance that it is only the members of the company that can be contracting parties in the shareholders' agreement.<sup>13</sup> We can see the re-enforcement of this idea in judicial

<sup>9</sup> Lukács, Sándor, Szűcs (n 5) 23.

<sup>10</sup> Graham Muth, Sean FitzGerald, *Shareholders' Agreements* (5th edn, Sweet & Maxwell – Thomson Reuters 2009, London) 3.

<sup>11</sup> Sárközy Tamás, 'A szindikátusi szerződésről (On Shareholders' Agreements)' in *Eörsi Gyula Emlékkönyv (Gyula Eörsi Commemorative Book)* (HVG-Orac 2002, Budapest) 178.

<sup>12</sup> See Szabó Gergely, 'Gazdasági társaság a szindikátusi kötelemben (Companies in Shareholders' Contracts)' (2012) 5 *Céghírnök* 7–11.

<sup>13</sup> Balásházy Mária, 'Szindikátusi szerződés a társasági és a polgári jog határán (Shareholders' Agreements on the Border of Company and Civil Law)' (1993) 5 *Gazdaság és Jog* 17; Jasztrabszki Tamás, 'A szindikátusi szerződés

practice as well.<sup>14</sup> In practice, a shareholders' agreement settles the cooperation between the parties taking part in the contract; it imposes no obligation on the company.<sup>15</sup> This approach is problematic because it is in fact restrictive in many cases if the company is not a contracting party: in such a case, the company cannot claim that the shareholders' agreement be implemented; it cannot put the obligations undertaken in the shareholders' agreement into action, which, however, may make sense in many cases.

The company could perhaps file a case against the member(s) of the shareholders' agreement, based on the legal institution of a contract on behalf of a third party, as long as the conditions set out in the Hungarian Civil Code exist. As per Section 6:136 of the Hungarian Civil Code:

- (1) If the parties concluded a contract for a service to be performed to a third party, the third party may directly claim the performance of the service if
  - a) his right to this was expressly set forth by the parties; or
  - b) this clearly follows from the purpose of the contract or the circumstances of the case.
- (2) The third party may claim the performance of a service set forth for his benefit as of his notification by either party that a contract for his benefit has been concluded. If the third party waives his right to claim the performance of the service, the service may be claimed by the party that concluded the contract for the benefit of the third party.
- (3) The obligor may also enforce his objections arising from the contract against the third party.

If, in the shareholders' agreement, the goal of the parties is to allow the company to be clearly entitled to enforce the performance of the terms and conditions of the contract then, in order to avoid interpretation problems and legal uncertainty, it is worth expressly stipulating this right of the company in the contract.

Consequently, acknowledging the company as a party in the shareholders' agreement seems to be a minority opinion in Hungarian law<sup>16</sup> but we may see examples for its acceptance in judicial practice too.<sup>17</sup>

In the Anglo-Saxon legal literature, it was concluded that it commonly happens that the company also joins the shareholders' agreement. In the relevant literature, many possible reasons for this were defined, for example, in order for the company to undertake certain obligations as well (the company should also accept the agreement on the limits of loans to be granted to the senior executives, which the parties did not wish to include in the articles of association in order to preserve confidentiality); in the same way, if the company is also

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(Shareholders' Agreements)' (2000) 7–8 *Cég és Jog* 7; Papp (n 2) 29; Juhász József: '„Cégek körében” gyakoribb atipikus szerződések I (Common Atypical Contracts in the World of Companies 1.)' (2009) 4 *Cég hírnök* 12; Lukács, Sándor, Szűcs (n 5) 25.

<sup>14</sup> BH (*court decision*) 1999.89.

<sup>15</sup> BH (*court decision*) 1997.10.; VB (*arbitration court decision*) 95.1134.

<sup>16</sup> Sárközy (n 11) 178.

<sup>17</sup> BH (*court decision*) 2007.158.; EBH (*court decision*) 2007.1617.

a contracting party, the executive officers will also be indirectly obliged to perform the shareholders' agreement, which may gain special significance in all such cases where the executive officer is not a shareholder in the company; or in order to ensure that the company (as a 'parent company') should duly fulfil the requirements set out in the shareholders' agreement with regard to its subsidiaries.<sup>18</sup>

My standpoint remains that, in the Hungarian law, a company may be a member of a shareholders' agreement as well.

The most important argument for this is the doctrine of the freedom of contract.<sup>19</sup> According to the principle of the freedom of contract, the parties do not only decide on whether they wish to enter into a contractual relationship and what content the contract should have but also the freedom of contract involves the freedom to select the contracting parties as well. Obviously, the freedom of contract, including the freedom to select a contracting party, is not absolute in nature but it has at least two very significant constraints from the aspect of the issue in question:

- one of the obstacles to the freedom of contract is constituted by *imperative norms*, as those agreements which run counter to a law or which have been entered into by bypassing a law are regulated as prohibited contracts and are considered void by the Hungarian Civil Code;<sup>20</sup>
- second, *good morals*; the Hungarian Civil Code also sanctions those contracts which obviously run counter to good morals with voidness.<sup>21</sup>

Although the contract law subsystem of private law is basically built on dispositive – suppletive norms (default rules), in certain cases, the legislator models the private law relationships by relying on imperative norms, in order to achieve specific legal policy objectives.

It comes up as a question here whether there is any such law in the Hungarian Civil Code or outside the Hungarian Civil Code which prohibits the participation of a company in a shareholders' agreement. A shareholders' agreement is an unregulated contract, as a consequence of which it does not have its own (special) legal provisions, this is why no express statutory prohibition for this may exist. It is possible to investigate the matter on the basis of an analogy: whether any statutory restriction of company law is applicable, on the basis of an analogy, to a company that wishes to take part in a shareholders' agreement. The answer to this is negative: there are no such binding norms which would prohibit a company from taking part in the shareholders' agreement.

<sup>18</sup> John Cadman: *Shareholders' Agreements* (4th edn, Thomson – Sweet & Maxwell 2004, London) 2; Muth, FitzGerald (n 10) 5.

<sup>19</sup> Section 6:59 of the Hungarian Civil Code.

<sup>20</sup> It constitutes an exception to the sanction of voidness if the law attaches another legal consequence to the violation of the law. Despite these other legal consequences, the contract shall also be null and void if it is specifically provided by the law, or if purpose of the law is to prohibit the legal effect intended to be reached by the contract. See Section 6:95 of the Hungarian Civil Code.

<sup>21</sup> Section 6:96 of the Hungarian Civil Code.

Good morals are a supplementary category as compared to the prohibitions contained in the imperative norms. It is difficult to give a concise answer to the issue of running counter to good morals, i.e. good morals are a general clause that requires ad hoc investigations, as well as the precise analysis of the concrete situation. Consequently, the participation of a company in the shareholders' agreement cannot *a priori* be qualified as an act that runs counter to good morals but it cannot be entirely excluded either that, in certain cases, the 'obvious' running counter to good morals exists.

## **VII The Company and Other Third Parties as Contracting Parties: a New Type of Contract?**

A third standpoint was also defined in the legal literature. Starting out from the idea that a shareholders' agreement regulates the relationships, cooperation and expectations between the members of the company within the company, an author concluded that a contract entered into with the participation of the company cannot qualify as a shareholders' agreement, which, due to its nature, is realised within the frameworks of the company, so it is conceptually excluded that the company itself be a member of the shareholders' agreement.<sup>22</sup> This is why, according to the above-quoted author, this agreement is a new unregulated contract, which 'gives a section of shareholders' agreements and civil law contracts', which is a syndicate-type *joint venture* contract, partially a syndicate, partially a civil law contract.<sup>23</sup>

## **VIII Further Arguments for the Acknowledgement of Third Parties as Contracting Parties in the Shareholders' Agreement**

It is a very important argument for acknowledging the company as a possible member of the shareholders' agreement that, in such a case, the company will also become a contractual obligee, i.e. it can act on its own behalf against the members who violate the shareholders' agreement. In such a case, it will not become necessary to apply the scheme of the contract entered into for the benefit of the third party. The situation is that if we do not recognise the entitlement of the company to become a contracting party in the shareholders' agreement, the company 'may not coerce the obligations undertaken in the shareholders' agreement and may not enforce the rights that arise from the latter; except if the shareholders' agreement is at the same time a contract concluded for the benefit of a third party (for example, in the case of the conditions required for the operation of the company, or in the case of benefits provided to the

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<sup>22</sup> Szabó (n 12) 8.

<sup>23</sup> *Ibid.*

company).<sup>24</sup> According to the provisions set out in the Hungarian Civil Code (Section 6:136), if the parties have entered into an agreement for a service to be performed for a third party, the third party will be entitled to directly claim the performance of the service if this right of the third party has been expressly stipulated by the parties, or if this clearly derives from the purpose of the contract or the circumstances of the case. Thus, in a case where the possibility of a company to enforce its own rights by itself is not acknowledged in the shareholders' agreement, the existence of this entitlement will become disputable and it is the judge who can decide whether the possibility of enforcing the rights directly, by the company, clearly derives from the purpose of the contract or the circumstances of the case.

A third party may claim that the service defined for its benefit be performed from the time when it is notified by one of the parties that a contract for its benefit has been entered into. If the third party renounces the claim for the performance of the service, the service may be claimed by the party that has entered into the agreement on behalf of the third party. The obligor may also enforce its objections arising from the contract against the third party.

Consequently, the technique of entering into a contract for the benefit of the third party can be applied restrictively, in an uncertain manner; this is why the solution whereby the company is acknowledged in the shareholders' agreement as a contracting party is more practical and more efficient as well.

As regards the participation of third parties in the shareholders' agreement, we should again refer back to the Anglo-Saxon approach. It is specifically discussed in the legal literature that, in certain cases, the participation of executive officers in the shareholders' agreement may be expressly necessary.<sup>25</sup> This is meant directly to oblige the executive officers to fulfil the requirements set out in the shareholders' agreement.<sup>26</sup> In the same way, the participation of third parties (i.e. non-members of the company) in the shareholders' agreement is also acknowledged by Italian legal practice: essentially an agreement concluded with the participation of at least one member of the company, of syndicate type in its objective, one which is in a functional relationship with the articles of association, nevertheless structurally different from those, is regarded as a shareholders' agreement.<sup>27</sup> In the Italian legal practice, it came up as a typical example for the participation of third persons in a shareholders' agreement when the members of a limited liability company and third parties reach an agreement on the recapitalisation of a limited liability company and its transformation into a joint stock company.<sup>28</sup>

<sup>24</sup> See Papp (n 2) 29–30.

<sup>25</sup> Cadman (n 18) 4; Muth, FitzGerald (n 10) 5.

<sup>26</sup> I have indicated above that if the company is a contracting party in the shareholders' agreement, i.e. if it has undertaken obligations within the framework of this agreement, the executive officers will also be obliged indirectly to execute the shareholders' agreement, i.e. the company can only be managed in the framework of the contract entered into by the company.

<sup>27</sup> Cons. St. (Consiglio di Stato), sez. V, 26 novembre 2008, n. 5845. See Dario Scarpa, *I patti parasociali nelle s.p.a. e nelle s.r.l.* (Giuffrè Editore 2011, Milan) 4.

<sup>28</sup> Cass. civ., sez. I, 18 luglio 2007, n. 15963. See Scarpa (n 27) 8.

## IX Executive Officers as Parties in the Shareholders' Agreement

It is an exciting question whether the company's executive officers may appear as parties in the shareholders' agreement. In the legal literature a standpoint appeared, according to which venture capitalists in the shareholders' agreement 'restrict the decision-making competence of the management in a number of areas from the start, which means that decisions on a number of important questions regarding the business cannot be adopted without asking them'.<sup>29</sup>

The Hungarian Civil Code regulates the legal standing of the executive officers with regard to their relationships with the members in its rules related to the 'Autonomy of Executive Officers' [Section 3:112 (2)]. According to the provisions set out in the law, an executive officer manages the company autonomously based on the priority of the interests of the company. In this capacity, he is subjected to the laws, the articles of association and the decisions adopted by the executive body of the company. A member of a company is not entitled to give instructions to an executive officer and the latter's competence cannot be withdrawn by the general (or member's) meeting. One-man companies constitute an apparent exception from this rule, with regard to which the only member may give instructions to executive management, which the executive officer will be obliged to perform. The exception is apparent because the instruction given by the only member is actually the decision adopted by the executive body of the company, to which the executive officer is subject in every case. However, in the case of a company with several members, an instruction given by one of the members, even if this member is a majority member, will not qualify as a decision adopted by the executive body of the company, which is why it is not obligatory for the senior executive.

According to the principle of freedom of establishment in company law (large usage of default rules) (Section 3:4 of the Hungarian Civil Code), as we are analysing internal relations here, we cannot exclude the possibility of diverting from this rule. In my view, diversion is possible not only in the articles of association but also in the shareholders' agreement with effect between the parties, if such an agreement is entered into by the very executive officer as a contracting party as well.

However, the following case, which is managed in the shareholders' agreement, may also emerge in practice. In many cases, company creditors ask the executive officers to provide a guarantee for the debts of the company. For example, the bank makes the lending dependent on the guarantee undertaken by the executive manager of the company for the company's debts. In such cases, the goal is obviously to ensure the company's ability to perform and to prevent the company from undertaking contractual obligations in an irresponsible way, thus this need ultimately comes up for the stronger protection of creditors' interests. If the executive officer has to undertake responsibility himself / herself for the company's debts, the members

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<sup>29</sup> Karsai Judit, 'A kockázati tőkét befektető társaságok és alapok magatartása Magyarországon (Behavior of Companies and Funds Investing in Venture Capital in Hungary)' (1997) 9 *Külgazdaság* 33.

of the company can undertake in the shareholders' agreement that, in such an event, they will perform on behalf of the managing director and they can determine the exact proportion of their respective responsibilities.

It arises from these examples as well that, in certain cases, it may be necessary for the executive officers to take part in the shareholders' agreement.

## **X Effect of the Alienation of Business Shares or Shares on the Shareholders' Agreement**

The alienation of (business) shares or the termination of membership do not involve a change in the subject of the shareholders' agreement, unlike in the case of the articles of association.

The change in the subject of the articles of association takes place but a member or shareholder that is newly entering the shareholders' agreement has to join with a specific expression of will for this purpose: 'thus, the legal succession in the member's position does not mean a change of subject, or a legal succession with regard to the shareholders' agreement, the new member of the company has to enter separately.'<sup>30</sup>

If we acknowledge the possibility for the syndicate membership of a third party, this has yet another key consequence. The question becomes what will happen if somebody is a member of the company and is at the same time a contracting party in the shareholders' agreement and then his or her membership is terminated: will this automatically involve his or her exit from the shareholders' agreement? If we accept the standpoint that, in a shareholders' agreement, only the members of the company may be contracting parties then the conclusion to be made will be clear: 'if the member whose membership is terminated is at the same time the subject of the shareholders' agreement then his or her exit from the company will also result in the termination of his or her contractual relationship in the shareholders' agreement, as his or her being a subject of that agreement is dependent on membership. As long as there was only one other contracting party besides him or her, the shareholders' agreement will also be terminated, as this has to be a legal relationship that is at least bilateral.'<sup>31</sup> If we choose the other way, which I have also proposed, i.e. we do not deny the possibility for participation in the shareholders' agreement to third parties, this conclusion will not be correct: company membership and being a subject of a shareholders' agreement are to be judged separately, and this has to be taken into account when the shareholders' agreement is entered into.

As such, a more permissive interpretation with regard to the scope of subjects has a very important practical implication as well. The shareholders' agreement often regulates questions that refer to the payments to be made to the member exiting the company. As long as, along with the membership, being a party to the shareholders' agreement is also automatically

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<sup>30</sup> Sárközy (n 11) 178; also: Muth, FitzGerald (n 10) 7.

<sup>31</sup> Papp (n 2) 30.



terminated in the case of the person in question then he or she will not be able to enforce his or her rights related to the payments and compensations, etc.

Consequently, the termination of being a subject in the shareholders' agreement is not an immediate and automatic consequence of the termination of membership and, if the parties would like to achieve this legal effect, this has to be specifically stipulated in the shareholders' agreement.

## **XI Conclusions Regarding the Contracting Parties**

The conceptual limitation of the shareholders' agreement should not be made from the aspect of the scope of its subjects. In the case of this contract, the lack of regulation is also meant to ensure flexibility. As a consequence of the need for flexibility, it is not necessary to regulate this type of contract separately (except, perhaps, in the case of companies operating in a capital market context). The scope of contracting parties should be treated in an adaptive manner as well. It should be acknowledged that, despite the fact that the shareholders' agreement is basically entered into by and between the members or shareholders of the company, it cannot be excluded that third parties that are not members of the company, including senior executives, or the very company regulated in the syndicate contract may take part in it.

## **XII Significance of Voting Syndicates**

Voting agreements and voting syndicates belong to the typical, recurring provisions of shareholders' agreements.<sup>32</sup> Regarding shareholders' agreements, it was concluded as early as 1933 that 'they almost always contain the limitation of the voting rights that the individual shareholders are entitled to for each other's benefit'.<sup>33</sup> Even earlier, in 1926, it was pointed out that 'since the existence of Act no. XXXVII of 1875 on Commerce (*Kereskedelmi törvény*), similar agreements have become increasingly common, especially in the case of so-called financing, as the financial institutions or some larger businesses are only willing to take part in the foundation of a joint stock company or take over larger share packets if they are able to ensure appropriate influence on the management of the business operations for themselves, through reaching agreements with some larger shareholders; however, it is not only the financial institutions but also the public authorities that will endeavour to ensure similar

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<sup>32</sup> On this question, see also: Veress Emőd, 'Megjegyzések a szavazati szindikátusról, különös tekintettel a szerződésszegés következményeire (Notes on Voting Syndicates, with special regard to the Consequences of Breaching Contracts)' (2018) 5 *Polgári Jog*.

<sup>33</sup> See König Endre, 'Joghatályos-e az érvénytelen szerződéssel kapcsolatos választottbíróági kikötés? (Is the Arbitration Court Stipulation related to Invalid Contracts Legally Effective?)' (1933) 31 *Jogtudományi Közlöny* 179.

influence for themselves, or they are obliged to ensure such, in the process of the establishment of so-called joint stock companies that are formed with their participation.<sup>34</sup>

The importance of voting agreements is provided by the mechanisms of the generation of the corporate will in the general meeting (members' meeting): the shareholders' agreement ensures the stability and forecastability of the decision-making process, so basically it will become a key tool in the management of the company.

Voting in the executive bodies, in general in the members' meeting (general meeting) makes up a key part of the shareholders' agreements; in certain cases, the objective of a shareholders' agreement is exclusively the establishment of a voting syndicate.

For example, certain members of the company, which have a majority of votes jointly but not individually may establish a voting syndicate for developing and stabilising the voting majority, so it will be them who will determine the decisions of the general meeting; in this way they will exercise control over the company, or even ensure the management or the manageability of the company. The voting syndicate may be valuable for certain minority members (shareholders) as well, as they may reach a bargaining position as members of the syndicate and they can represent their interests more effectively. The contracting parties usually undertake an obligation, in the shareholders' agreement, to vote during the decision-making on a certain question in such a way that they ensure the enforcement of the stipulations of the shareholders' agreement.

### **XIII Types of Voting Syndicates**

There are several forms of voting syndicates. Based on its nature, a voting syndicate may be a long-term syndicate on the one hand, which assumes continuous cooperation (defined in time but long-term, or even one that is not defined in time), and on the other hand, it may be an ad-hoc syndicate, which defines a cooperation obligation for a certain general meeting (members' meeting) and thus its effect in time exclusively extends to the general meeting (members' meeting) that is defined therein. Based on its objective, a syndicate may be, on the one hand, a general voting syndicate, in the case of which the members undertake to vote uniformly in any and all questions that are in the competence of the general meeting; on the other hand, it may be a special voting syndicate, which only requires the obligation to vote according to the syndicate decision on some predefined questions such as voting on the dividends or the election of the executive officers or other corporate bodies. As regards its purpose or the strictness of its definition, a syndicate may be a closed-end one on the one hand, when even the method of voting is defined by the contract (for example, the election of the person designated by the head of the syndicate for a certain position in the company), or there may be open-ended syndicates too, in the case of which it is only the obligation of uniform voting that is required and the nature of voting (voting against or for a proposal) is only defined later. Based on its

<sup>34</sup> Sichermann Bernát, 'Két kúriai ítéletről (On Two Curia Judgments)' (1926) I Jogtudományi Közlöny 130.

content, a syndicate may be one that requires a uniform voting obligation or one that qualifies a majority vote as changing in practice the articles of association for the parties of the syndicate agreement. The qualification of the majority or the introduction of unanimous voting in such cases when no such action is required by the law or the articles of association 'can mainly be justified if some of the members are afraid to be exposed to the whims of the others if they were alone, in a minority position.'<sup>35</sup> A piece of practical advice is also given by legal literature: 'it does not make sense to exaggerate in this respect. If, for example, the articles of association said that a unanimous decision is required for each resolution, this would easily lead to paralysing the business activities of the company.'<sup>36</sup>

## XIV Validity of the Voting Agreement

A problem that arises in connection with voting syndicates is the validity or invalidity of the voting syndicate: is preliminary self-restriction regarding voting possible?<sup>37</sup> In classical commercial law, voting restrictions were regarded as something that ran counter to the 'honesty of a good tradesman,' i.e. they were regarded as void due to immorality.<sup>38</sup> It was in this spirit that the Curia made a decision in 1925, for example.<sup>39</sup> A voting syndicate can in fact be interpreted in such a way that it hinders the development of a free company will, the free operation of the company body in question.

The legal literature did not uniformly accept the Curia's position on the invalidity of voting agreements in Hungary, even as early as between the two world wars. It was concluded that

...this decision, according to which an agreement reached by the shareholders that restricts them in the free exercise of their voting rights runs counter to the law, is wrong, as the shareholders may enter into a valid agreement and in this, they may validly oblige themselves to exercise the voting rights that they are entitled to on the basis of their shares as stipulated in the contract. This is not contrary to the concept of the joint stock company, to the law, or to good morals either. The idea that the justification of the decision adopted by the Curia, according to which the above-mentioned,

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<sup>35</sup> Kolben (n 6) 42.

<sup>36</sup> Ibid.

<sup>37</sup> 44.

<sup>38</sup> Sárközy (n 11) 190.

<sup>39</sup> Decision No. P. IV. 3478/1925. See Credit Law Case Book, Volume XIX, p. 54. According to the quoted decision, 'such an agreement entered into by the shareholders which would also oblige them with regard to their legal successors, i.e. one that always restricts them in freely exercising their voting rights in accordance with their financial interests, in a changing business environment, will deprive the shareholders of their important membership right aimed at participating in the management of the company's affairs, which is also provided by the law [Section 157(9) of Act XXXVII of 1875 on Commerce] and thus it runs counter to the concept of a shareholding company'. However, the quoted section from Act XXXVII of 1875 on Commerce no. only stipulates that, in the statute, the voting rights of the shareholder and the method of exercising them should be regulated as well, i.e. the prohibition of voting agreements could actually not be derived from this legal provision.

so-called syndicate agreement of the shareholders runs counter to the concept of a joint stock company, and the law, is not correct; is actually less important than that the Curia states that such an agreement reached by the shareholders is ineffective in general, although the underlying justification is not correct. The situation is that these shareholders' agreements deserve the name of the articles of association much more than the statutes in an economic sense, which is called so by the German legal nomenclature. The syndicate agreement of the shareholders precedes or accompanies the foundation of the joint stock company. Without this, most joint stock companies would not be established at all. But the high business significance of shareholders' agreements does not cease to exist, even when the joint stock company is founded. Those who are experienced in practice are aware that such contracts are very often entered into between the shareholders of all kinds of joint stock companies, i.e. not only between those who subscribe to the shares when the company is established, with the most diverse kinds of economic purposes. These contracts ensure, *inter alia*, not only that the majority of the shareholders stay together but also the placeability of the shares, because there are hardly any shareholders who would be willing to take over a quantity of shares, which are significant in amount but still constitute a minority by themselves, without joining the majority; it is also in the interests of the seller to ensure that the recipient of the shares does not have an unlimited right of disposal over the shares that he has received, as in this case, undesirable entities (such as persons with opposing interests, or even rival companies) may hinder or prevent the operation of the company. All these purposes are legitimate, and they can be realised according to the autonomous discretion of the shareholders... through concluding contracts. It does not need to be explained that it would cause damages to every joint stock company anyway if the direction and results of its operation depended on the will of the majority that is developed at random at the general meetings. But the shareholders need to enter into shareholders' agreements also for their own protection. Thus, it is these syndicate agreements that organise the shareholders. To make this impossible by declaring shareholders' agreements ineffective would equal the disorganisation of the company.<sup>40</sup>

It was also stated about the highly criticised decision No. P. IV. 3478/1925 of the Curia that 'this could not be entered into the authentic collection of the uniformity decisions; just the opposite is true: these should be entered separately in the collection of mistaken decisions, which would warn the courts to act with double caution in far-reaching questions because to err is human.'<sup>41</sup> In the opinion of the age and the public view of commercial law at that time, the decision overshot the mark, as they may damage transactions based on free determination that are economically necessary. The above-quoted author was right to conclude that anyone may undertake a valid obligation regarding how they will exercise their voting right based on their possession of shares.<sup>42</sup>

<sup>40</sup> Sebestyén Samu, 'Rezonanciák (Resonances)' (1926) 14 *Jogtudományi Közlöny* 113–114; Salamon Beck took a similar stance. Cf. Pester Lloyd, July 11, 1926.

<sup>41</sup> Sichermann (n 34) 130.

<sup>42</sup> Liebmann Ernő, 'A közüzemi részvénytársaságok kormányi ellenőrzése a kereskedelmi törvény szempontjából (Government Control of Public Utility Shareholding Companies from the aspect of the Commercial Code)' (1927) 20 *Jogtudományi Közlöny* 181.

At the moment, the voting agreements concluded on the basis of the doctrine of the freedom of contract are considered valid both by legal science and by legal practice. The validity of voting agreements is also acknowledged by the practice of the Hungarian arbitration courts.<sup>43</sup>

The traditional approach in Italian law was also that exercising one's voting rights may not be the subject of a legal agreement. In this approach, the voting right is a feature of the share that does not allow any diversions, and the members may not enter into a contract on the method of exercising the voting right in advance as, according to logical and legal arguments, the votes should serve the interests of the company rather than personal ones, voting is the obligation of the member as well, and the decision of the member regarding how he or she will vote in the framework of the members' meeting/general meeting should be arrived at as a result of appropriate discussions.<sup>44</sup> The freedom of voting rights was regarded as part of the economic public order.<sup>45</sup>

However, in the Italian law, the entry into force of the *Codice civile* (the Italian Civil Code) in 1942 meant a turning point: on the one hand, the reason for this was the change in the perception of the nature of voting rights; on the other hand, the fact that the shareholders' agreement came to be used by the shareholding state as well, as a unique instrument for ensuring the internal balance of the company and the realisation of the owner's interests by the state. A kind of emancipation of the status of the shareholder took place. Thus, the shareholders were given a much greater degree of independence and freedom in exercising their voting rights than before, and the lawfulness of a voting agreement is only questioned if it clearly runs counter to the system of company law.<sup>46</sup> This is why a voting right may become the subject of a legal case.<sup>47</sup>

Voting agreements are excluded or at least significantly restricted by Romanian law. As per Article 128 of Act 31 from 1990 on Companies, voting rights cannot be transferred and any such agreement in which the shareholder undertakes to exercise his or her voting right based on the instructions or proposals made by the company or the persons who have the right to represent the company will be invalid. In spite of this, voting agreements are applied in practice.

## **XV A Syndicate Organisation?**

In the Hungarian legal literature, there is a viewpoint according to which a shareholders' agreement may not contain any structures that are not organic to company law, or may not regulate, for example, a management committee or a presidency.<sup>48</sup> It in fact comes up as

<sup>43</sup> Cf. Lukács, Sándor, Szűcs (n 5) 45

<sup>44</sup> Scarpa (n 27) 11–12.

<sup>45</sup> Scarpa (n 27) 31.

<sup>46</sup> Scarpa (n 27) 12.

<sup>47</sup> Scarpa (n 27) 30.

<sup>48</sup> Papp (n 2) 33.

a question whether a contractual, cooperative type of legal relationship (and not a legal person) may have ('shadow') organs.

In my view, the answer to this question has to be nuanced. In general, a contractual relationship does not establish an organisation but it does not qualify as a major characteristic feature of the contractual relationship, since an organisational structure may also be established in a contractual relationship. The question obviously is what is meant by an organisation. In the case of legal entities, an organisation means one or more precisely structured organs, which are a high-level materialisation of organisational structures. However, the concept of organisation does not only mean organs established by the law but it may also mean simpler coordination structures than these organs.

In this sense, there is nothing to prevent a shareholders' agreement from creating a unique syndicate organisation. For example, such is the obligatory syndicate meeting (which is the mandatory meeting of the parties that take part in the syndicate) preceding the general meeting or the members' meeting, in which the parties taking part in the shareholders' agreement agree on what position they will take at the general meeting or the members' meeting. 'At this syndicate meeting, the owners of the company many times adopt more important decisions with regard to the operation of the company than the general (members') meetings, and the syndicate decisions determine the decisions made by the general (members') meetings.'<sup>49</sup>

Of course, the syndicate organs do not qualify as company bodies and the decisions of the syndicate organs should also be formally accepted by the company bodies. As long as the decisions adopted by the syndicate meeting are formalised by the members' meeting or the general meeting, the will developed in the syndicate context will become the will of the company.

The organisation-building nature of a syndicate arises from stipulating the operational rules: it can be regulated who can initiate the convening of a syndicate meeting, in what form such a meeting is convened, when the meeting will be held, whether optional and compulsory meetings can be defined, whether the member of the syndicate who does not adhere to what has been accepted at the syndicate meeting may be compelled, or any sanctions may be imposed under the shareholders' agreement; furthermore, it can be stipulated how the syndicate is governed, etc.

The question of a syndicate organization also emerges with regard to a voting syndicate. The situation is that a voting syndicate means that the members of the syndicate will vote uniformly on a given issue. Thus, the methods and procedure of developing the syndicate position may be regulated in the shareholders' agreement. For example, it may be determined that each member of the syndicate will vote in the same way as a predefined member or leader of the syndicate (for example, the member with the largest share in the company). It is a special, strict technique of a voting syndicate when the members of the syndicate exercise their voting rights through a single agent (usually the head of the syndicate), thus minimising

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<sup>49</sup> Sárközy (n 11).

the chances of the individual syndicate members violating the terms and conditions of the shareholders' agreement and to vote on the basis of their own free will and own interests, i.e. differently or contrary to the interests of the syndicate. It represents an even stricter technique that the shareholders or members undertake to assign their participations (shares or business shares) to the head of the syndicate for the time of the general meeting, who will thus vote on his own behalf at the general meeting. In these cases, no syndicate organization will actually be established. The third method for establishing a voting syndicate is the one in which a trust agreement is entered into, when the shares are assigned to the head of the syndicate as a trustee and thus he is the one who exercises the voting rights (*voting trust*), while the shareholders, for instance, preserve their dividend entitlements. The trustee will be obliged to deliver the assets that he has managed to a further or new trustee appointed by the settlor once the mandate of the trustee expires, or in the absence thereof, to deliver the assets (the shares) to the settlor.

It is also possible to elaborate the position of the syndicate on a given question in a syndicate meeting that precedes the members' meeting/general meeting, by majority vote.<sup>50</sup> If the syndicate position is developed in the syndicate meeting that precedes the members' meeting/general meeting, with a majority vote that also obliges the members to vote no, it will be obvious that a specific organisation of the syndicate will also be built, which is different from the company bodies. The cooperative nature of the shareholders' agreement very easily entails that the development of the will of the syndicate should take place in these very peculiar organisational frameworks.

## **XVI Voting Syndicate and Violation of Contract**

The efficiency and enforceability of a shareholders' agreement<sup>51</sup> arises from its contractual nature: the shareholders' agreement is also, according to the general rules of the Hungarian Civil Code, the mutual and unanimous legal statement of the parties from which an obligation for the performance of the service and an entitlement to claim the service will arise. However, enforceability is a very important feature of the contracts, which means that if the terms and conditions of the contract are not fulfilled then the interested party will be entitled to receive the performance of the contract in kind. This party can use the court for coercing the non-performing party to perform the contract. In the event of a violation of the contract, the Hungarian Civil Code will entitle the offended party to claim the performance of the contract and/or damages.

As a very exciting issue, we should analyse the violation of the contract with regard to the voting syndicate. It comes up as to what consequences may be involved if one of the members does not vote in line with what he undertook in the shareholders' agreement. According to

<sup>50</sup> Scarpa (n 27) 7.

<sup>51</sup> For details under Hungarian law, see Attila Menyhárd, 'A szindikátusi szerződés kikényszeríthetősége (Enforceability of Shareholders' Agreements)' in *Acta Conventus de Iure Civili*, Tomus X. (Lectum 2009, Szeged).

the categorical position taken in the legal literature, 'the consequences of a vote contrary to the contract may be several (penalty, compensation), except for one scenario, i.e. that the vote that has been cast in violation of the contract will not render the decision in question invalid.'<sup>52</sup> The same standpoint is accepted by judicial practice, so it has been concluded that a resolution adopted at the members' meeting of a company may not be one that violates the law as a result of its running counter to the shareholders' agreement, since the shareholders' agreement does not have a governing effect in the legal relationships of company law and its violation may not substantiate the non-compliance of the resolution.<sup>53</sup> In the practice of the court of arbitration, the dominant view is that 'the violation of the additional requirements of the shareholders' agreement may not have company law implications. If, for example, in a shareholders' agreement related to a private joint stock company, the majority Hungarian member obliges itself to vote for the persons proposed by the minority foreign member at the general meeting when the members of the supervisory board are elected and despite this, he votes against the persons proposed by the foreign member at the general meeting, by using his majority, the general meeting resolution will be valid from a company law perspective and sanctions may only be applied for the violation of the terms and conditions of the shareholders' agreement according to the rules set out in the civil law.'<sup>54</sup>

It was established in the Italian judicial practice that nothing will prevent the member from violating the voting syndicate agreement if he has a stronger interest in the result of the voting that he expects than the risk that he will be held liable for his violation of the shareholders' agreement.<sup>55</sup> In the same way, in the Italian legal practice, a member of the company is not prevented by the shareholders' agreement from voting in the way that he wishes to vote if his interest in the result of the voting that he expects overrides the risk that he will be held liable for the violation of the shareholders' agreement.<sup>56</sup>

The point is that, in Italian law, a distinction is made between articles of association for a company and a so-called 'para-company' agreement (*'parasociale'*, meaning 'behind' the company). A shareholders' agreement is of a 'para-company' kind, i.e. it does not directly determine the operation of the company from a legal perspective. This is why the freedom to vote of the member/shareholder is not restricted from the perspective of the company; the member/shareholder may vote validly in any way whatsoever. Even if he casts his vote in violation of the shareholders' agreement then his vote and the decision of the company will be valid. However, he will have to bear the contract law consequences of the violation of the shareholders' agreement<sup>57</sup> (usually he will be obliged to pay a penalty). This is why, in the position of Italian legal science, the company and the syndicate are independent and separate

<sup>52</sup> Lukács, Sándor, Szűcs (n 5) 45.

<sup>53</sup> ÍH (*Court of Appeal*) decision No. 2014.156. Szeged Court of Appeal, Gf.III.30.059/2013.

<sup>54</sup> See Szakál Róbert, 'Társasági szerződés és szindikátusi szerződés ütközése (The Conflict between the Articles of Association and the Shareholders' Agreement)' (2014) 10 *Gazdaság és Jog*.

<sup>55</sup> Cass. civ., sez. I, 5 marzo 2008, n. 5963. See Scarpa (n 27) 2–3.

<sup>56</sup> Cass. civ., sez. I, 23 novembre 2001, n. 14865. See Scarpa (n 27) 10.

<sup>57</sup> Trib. Milano, 6 marzo 2006. See Scarpa (n 27) 13.



systems which do not influence each other. In the framework of the company legal system, the member's expression of free will cannot be questioned; therefore, a vote cast by violating the shareholders' agreement may definitely not cause the invalidity of the vote or that of the decision adopted by the members' meeting/general meeting, and the voting syndicate is not enforceable. The company's will is developed in the members' meeting/general meeting freely and unconditionally.<sup>58</sup> The separation of the company and the syndicate is a condition for acknowledging the validity of the voting syndicate. The position taken by Italian legal science is also of critical importance in Hungarian law.

A typical sanction of the voting agreement is a penalty, i.e. a cash payment obligation undertaken in the event of a breach of contract by the other parties taking part in the shareholders' agreement, for the benefit of the company. A penalty can be stipulated in a written form. In Hungarian law, the beneficiary may enforce his penalty claim irrespective of whether he has incurred any damage from the violation of the contract by the obligee. This means that if one of the parties in the syndicate has voted against the position of the syndicate and, despite this, the syndicate position won at the voting at the general meeting (members' meeting) (i.e. there is no 'damage'), he will still be obliged to pay the penalty, as the penalty is separated from the damage by the Hungarian Civil Code [Section 6:186 (3)]. However, the beneficiary may enforce his damage claim that exceeds the amount of the penalty [Section 6:187 (3) of the Hungarian Civil Code]. The party that breaches the shareholders' agreement may only request the court to reduce the penalty amount; however, this will only become possible if the court establishes that the extent of the penalty is excessive (Section 6:188 of the Hungarian Civil Code).

## **XVII Conclusions**

Several conclusions may be drawn from the above analysis. On the one hand, not even the ideal regulation of company law, which is predominantly dispositive in its nature, puts any constraints on the significance of shareholders' agreements, as syndicate contracts nuance company law; they adjust it to their peculiar interests. A shareholders' agreement is an instrument for the operation of companies which is separated from company law and one which enforces and coordinates specific interests, one which supplements company law.

On the other hand, despite the diversity in the contents of shareholders' agreements, there are recurring elements that provide coherence to them, which can also be analysed scientifically and can be considered permanent. The contents of shareholders' agreements that refer to exercising voting rights, for example, belong to this category.

In summary, the practical benefits of shareholders' agreements, as well as the complexity and interesting nature of the questions that they bring up; furthermore, the serious professional discussions that emerge, all make it necessary from time to time for science to re-analyse and subject to critical assessment the institution of shareholders' agreements.

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<sup>58</sup> Scarpa (n 27) 31.

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# Lectures

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*ELTE Law Journal is launching a new section entitled 'Lectures', which contains written forms of lectures held at ELTE Faculty of Law.*

*The first lecture to be published in this new section was given by Prof. Dr. dr. hc. Klaus Rennert, the President of the Bundesverfassungsgericht, the Federal Administrative Court of Germany, at the latest seminar held in Budapest in October 2018. Professor Rennert accepted the invitation of the Department of Administrative Law of the Faculty of Law of ELTE Budapest and gave a festive lecture on the ever-topical questions of separation of powers between the administration and administrative justice on 12 October 2018.*

*Professor Rennert has shown great interest in the system and functioning of administrative justice in Hungary and its development. He launched a programme in cooperation with Péter Darák, the President of the Curia (the Supreme Court of Hungary), to foster communication and exchanges of experience and best practice between German and Hungarian judges. In this framework, several German-Hungarian seminars for judges have been held on various topics of administrative law and jurisdiction, and these really proved to have enriched both sides, especially the Hungarian judges and scholars.*



## Administration, Administrative Jurisdiction and Separation of Powers\*\*

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### I

Administrative jurisdiction is a tricky business: state sovereignty is subject to judicial control. In point of fact, this corresponds to the principle of separation of powers in its original, unadulterated form: in its legislative function, the state passes laws; in its administrative function it implements these laws; and as the judiciary it verifies whether or not the administration is actually complying with these laws. This is how we learnt it at school.

It goes without saying that it is not that simple, though. This is immediately obvious if one looks back into history. The three sovereign powers did not emerge simultaneously but instead consecutively. Modern statehood was initially based on the executive branch, on government and administration. That was the age of absolutism. It was not until the 19th century, in the aftermath of the major popular revolutions in the USA and France, that a democratically elected legislature emerged and gradually assumed primacy supported by civil liberties, or as we would say today, based on basic and human rights. True, the judiciary as the third sovereign power is far older, but it was merely an uninvolved observer: it confined itself to civil and criminal jurisdiction; it had nothing to do with the exercise of sovereignty on the part of state administration. At most, it awarded damages if the exercise of sovereignty was unlawful and additionally led to material loss. Any direct judicial control of administration was, however, out of the question.

In Germany, this situation only changed in the course of the 19th century, and then only gradually. First, a supervisory body was installed within the administration, usually at a higher-level administrative authority, which was entitled to intervene *ex officio* but which also took complaints raised by aggrieved citizens. It was not until 1863 that independent administrative courts were established above these internal administrative appeals bodies, which, admittedly, initially only had the authority to set aside decisions, i.e. were authorised to reverse an incorrect administrative decision and refer the matter back to the administration. In a number of federal states it was only after World War I and, throughout West Germany, only after

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\* Prof. Dr. Dr. h.c. Klaus Rennert is President of the Federal Administrative Court of Germany.

\*\* Lecture at the Eötvös Loránd University on 12 October 2018.

World War II that administrative jurisdiction with a three-tier structure evolved and was not only authorised to set aside administrative decisions but also to oblige the administration to issue such acts.

## II

*a)* This is all the more remarkable since the need for administrative control is and has been entirely uncontested for a long time. There are essentially three justifications for administrative control to be performed by the courts.

From the historical perspective, the first motive was fighting corruption, a motivation that supported and still supports the necessity of independent control over the executive. Unfortunately we are continually confronted with ministers, senior officials and other public servants who are not unresponsive to perks of all kinds that boost their often paltry salaries. Supervision and control are the only remedies in this regard, and control exercised by an external, independent body is better than supervision by one's superior. This truth is once again reaffirming its validity these days when the independence of the courts is challenged to avoid the discovery and punishment of instances of corruption.

This motive was then supplemented by a second one: guaranteeing that the administration is bound by law. This is a genuinely democratic concern and the way in which the democratically elected legislature enforces its primacy over the administration. Those in particular who advocate the constitutional principle of democracy must champion independent oversight by the administrative courts. It is by holding democratic elections that the people legitimise their representation in parliament. The parliament's instrument of power is the law: and it is in laws that the people, represented by parliament, express their political will. The administration is tasked with enforcing the law in all parts of the country, at all times and in respect of all people. It is only when the administration respects the law and acts in accordance with it that the people are actually in the position to steer the fate of the state. Ensuring this is among the most important functions of judicial administrative control.

Only in the 20th century did a third motive finally come forth, which was to secure the protection of citizens' rights. This primarily relates to the protection of their basic rights. Adherence to the law alone already realises one of the two main basic rights – the principle of equality of all citizens before the law. Although the other major basic right, i.e. the right of freedom – which includes freedom in numerous respects – was incorporated into constitutions in southern Germany quite quickly in the aftermath of the French Revolution, it took quite some time until it gained legal effectiveness, and did so fully only after World War II. It was not until then that the Basic Law unmistakably stipulated that the state was bound to observe basic rights in all of its acts. At the same time, the constitution provided everyone with recourse to the courts if their rights were violated by any public authority. In this way, the protection of the rights of the individual became another major function of judicial administrative control.

b) In summary, our Basic Law calls the Federal Republic of Germany a democratic state governed by the rule of law. This wording combines the two most significant constitutional principles: democracy and rule of law. In a nutshell, the democratic element determines the content of the political will to dominate in the state, whereas the rule of law moderates and restricts this will to dominate. Moderation and restriction are the two sides of the rule-of-law coin. Moderation insofar as it shapes and conforms the state's will to dominate to the form of the law; enforcing the law rests with the administration which, in doing so, is subject to judicial control. And at the same time, restriction: in a state governed by the rule of law, the state's political will to dominate is restricted through certain inviolable civil and minority rights that must also be respected by the democratic majority within the state. This serves to secure two things: firstly, civil liberty, for the sake of which power has been conferred to the state in the first place, and secondly political freedom, the indispensable basis of any democracy. It guarantees the chance that today's opposition could become tomorrow's majority. Only this type of free society can also offer an open atmosphere that welcomes new ideas and competition to develop good and better solutions for private life, business and politics, which further the common good. Seen historically, systems that lack freedom have altogether failed in the end.

What I am describing here in brief is the result and achievement of a long historical development that has, for the greater part, been quite painful. Just remember the National Socialist and fascist regimes in Germany, Italy, or Spain and the Stalinist dictatorships in the former Eastern Bloc. The link between democracy and rule of law therefore forms the core of the common constitutional convictions of the peoples in Europe and far beyond. It is a tremendous asset that must be preserved.

### III

The two state functions of executive and judiciary or, more precisely, of administration and administrative jurisdiction, fit into this overall picture of a power-separating state governed by the rule of law. Yet the relationship between administrative jurisdiction and administration is not free from tension in Germany and other European states. It does not come as a surprise that the administration is not a fan of being controlled and even less of being corrected. This repeatedly triggers system malfunctions.

A number of recent events and measures have hit the headlines in this regard, although they definitely differ in terms of intensity. That said, there is a degree of intensity that should not be exceeded, because overstepping it would be tantamount to abandoning the rule-of-law system. This includes measures aimed squarely at the very independence of judges themselves, i.e. measures to sanction unpopular judgments. Also included are instances in which the administration reserves the right to review the content of and approve court rulings, such as when it makes the entry into force of such court rulings dependent on itself officially publishing them – or intentionally failing to do so. In the following I will not discuss measures

of this kind. A discussion about this topic would require addressing the sense and nonsense of independent administrative jurisdiction, and ultimately the sense and nonsense of liberal democracy governed by the rule of law itself. This has been done numerous times, and I am hardly in the position to add anything new.

Germany, too, has occasionally seen some resentment about the relationship between administration and administrative jurisdiction, including – and perhaps more often – in the more recent past. Naturally, this resentment has remained far below the critical degree of intensity that would endanger our democracy governed by the rule of law. Resentment like this therefore does not call the system as such into doubt; rather, it should be discussed within the system. It is precisely under these circumstances that dealing with this subject is likely to yield additional insight. It goes without saying that there are voices, specifically in the press, which turn individual events into scandals and point to the decline of liberal civilisation in the West. However, such voices only detract from the heart of the matter and hinder us from learning from various past events.

## IV

Resentment between administration and administrative jurisdiction definitely arises on both sides. At times, the judiciary is outraged by acts on the part of the administration. At other times, the administration is annoyed at the courts. Let me provide a few examples:

*a)* The administrative courts are outraged if the administration fails to comply with their judgments. In this context, one must be aware that in Germany, administrative courts are authorised to oblige the administration to issue sovereign acts if citizens are entitled to this. However, whether or not the administrative authorities will actually act upon such a judgment is another question altogether. Generally speaking, this is the case. Of course, there are indeed cases in which the administration fails to comply with judgments. Fortunately, this happens only rarely; but if it happens, it attracts that much more attention.

This is often the case when the rights of politically unwelcome parties are at stake. It is the National Democratic Party of Germany (NPD) in particular that causes a stir over and over again. The party is openly right-wing extremist and nationalist and clearly pursues aims that are hostile to the constitution; however, as long as it has not been prohibited by the Federal Constitutional Court, the party is entitled to claim equal treatment with all other parties.

It is quite evident that no Lord Mayor wants to be suspected of supporting the NPD in any way, shape or form. He will therefore not voluntarily allow the NPD to hold its local party congress in the town hall in 'his' town, and he will repeatedly forbid NPD demonstrations, even without a viable reason. The Lord Mayor knows full well that, legally speaking, he is actually obliged to enable the NPD to carry out its political activities, but on the other hand he also knows with certainty that this would result in negative publicity for him, and this is

what he wants to avoid at all costs. Naturally, the NPD will then turn to the administrative court, and of course, the administrative court will then oblige the Lord Mayor to meet the NPD's demand: to make the town hall available to the party, to allow and possibly even have the police protect their demonstration.

Responding to such a judgment, the Lord Mayor will at minimum rail against the administrative court, while the administrative court in turn might react to such a public statement with a sober press release. As long as the Lord Mayor complies with the substance of the judgment, no further damage will be done; the press back-and-forth is part of the game, to a certain degree. However, it occasionally happens that the Lord Mayor fails to comply with the judgment. This recently happened in Wetzlar. In such an event, the principle of separation of powers is overtly disrespected, and this attracts a lot of attention.

*b)* In these examples, the administrative authorities know full well that they are at fault. However, there are also cases in which the administration considers itself to be in the right, reproaching the administrative courts for overstepping their powers and interfering with the sphere of competence of the administration. In such cases the administration is aggravated by the courts. A prominent current example is the judgments on air pollution control in our cities.

It is a well-known fact that, in many city centres in Germany, certain air pollutants exceed threshold values and older diesel vehicles have been identified as the main source of this pollution. European law now dictates that everything possible must be done to comply with these thresholds as soon as possible. This dictate gives rise to two fundamental questions. On the one hand, we must figure out what 'as soon as possible' means. At what point must the values be below the thresholds, and how intensely must we pursue this result? On the other hand, a determination must be made about what disadvantages might arise elsewhere in connection with reducing pollution. Driving bans place serious limitations on residents, delivery people and tradespeople, as well as on municipal transportation and waste disposal services, and they lead to macroeconomic consequences for industry, and by extension, on the labour market and social safety nets. Who is responsible for taking decisions on all this?

Recently some German administrative courts have obliged cities that have been sued to issue driving bans on older diesel vehicles. Administrative authorities and politicians in turn would rather avoid driving bans, if possible; they seek alternative solutions. They see the fact that the courts have forced them to take what they consider radical measures to be an overreach: the courts have encroached on the administration's original leeway and sphere of responsibility. Here again, the administration displays little willingness to comply with judicial rulings. However, other than in the case of the NPD, it believes itself to be in the right.



## V

The conflicts I have described are rare exceptions in Germany. Generally, the separation of powers between the administration and administrative courts works like a well-oiled machine. But there are voices that warn about an increase in the number of critical situations like these. That raises the question of whether solutions are possible within the confines of the principle of the separation of powers and what these could be.

*a)* We have therefore touched upon the ‘never-ending story’ of whether and how administrative authorities could be forced to implement court judgments. In this context, there are three general models for resolving this situation, from which the legislator can choose when creating procedural law.

The oldest model historically puts the courts in a comparatively weak legal position. In this case, the administrative courts are limited to setting aside administrative acts they view as unlawful, and then the administration must do its job again. If that does not happen, or if its actions are insufficient, a new suit can be brought, in the best case ending with the same result of reversing the act. The threat then is a game of ping-pong between the judiciary and the administration; time passes, and the claimant fails again and again to obtain redress. This situation is not compatible with the German constitution, which stipulates that the administrative courts must provide effective legal protection. The simple authority of the courts to set aside an act would not meet this standard.

Like many European legal systems, Germany therefore acknowledges the administrative courts’ authority to oblige the administration to issue certain administrative acts by issuing judgments. If the administration does not comply, the prevailing citizen can compel enforcement of the judgment. The law of civil procedure is clearly the guiding principle behind this model. However, in a worst-case scenario, the model works on an intractable government agency only when the issue in question is monetary claims. If, in contrast, the administration is obliged to issue a sovereign act, the downside is that the court cannot itself enact it. It is left with only penalties to force the administration to enact the sovereign act. Penalty payments are not really motivating; the administration is to a certain degree paying the money to itself. Coercive detention against civil servants or ministers is unlikely to be an option, even if such action is openly being discussed these days. Such penalties therefore prove mostly symbolic. The mere fact of their being imposed would result in such bad press that no politician would risk tarnishing his or her image in this way. To date, the worst case scenario has not occurred, apart from a few individual cases.

Other countries choose not to risk a crisis at all. They authorise the courts to issue the required administrative act themselves, in the place of the administration. It goes without saying that that is very effective, but ultimately causes the courts to encroach on the sphere of responsibility of the administration. This blurs the separation of powers between the executive and judicial branches. In historical terms, the explanation for this in some countries is that the predecessors of the administrative courts were supervisory authorities, in other

words, themselves part of the executive branch. Now that they have been separated from the public agency hierarchy, this is actually outdated. The admonitory reference to the concept of separation of powers is not just a meaningless insistence on principles, either. Through their assignment to the executive-branch hierarchy, supervisory authorities, like the executive as a whole, obtain their legitimacy by democratic means, while the courts generally do not. In addition, the judiciary's responsibility is only to stand behind the legality of its rulings, not to answer for their appropriateness and political expediency. Imagine in our example here, if the court itself were to issue a driving ban. To which streets would it apply? Which diesel vehicles would be covered? Those up to Euro 4 standard, or Euro 5 or even the top group, Euro 6, as well? Should there be exceptions? For municipal refuse vehicles or public buses? For doctors heading to the scene of an emergency? For tradespeople and delivery people? Or for severely disabled people? What times of day should the ban be in effect each day and how long overall? Questions breed more questions. Are judicial proceedings really suited to reviewing and providing answers to all of these highly complex issues? And who is liable if the courts fail to consider every last detail?

German law therefore takes the middle-of-the-road approach. Here, the courts – and claimants – basically have to count on the administration to comply with court rulings voluntarily. That almost always happens. And it has to be that way. The system is built on the idea that the worst-case scenario will not happen.

b) A description of the relationship between the administration and administrative jurisdiction in Germany would be incomplete, however, if we left it at the enforcement problem I outlined. The enforcement issue only comes up when the case has been decided. A complete picture is obtained only when we consider future comparable cases, when the effects and consequences of judicial rulings are applied to parallel situations and future cases.

Although, generally speaking, court rulings apply to a specific individual case only, administrative court decisions not infrequently end up having a wide-ranging impact, because administrative authorities have numerous comparable cases to settle. The opportunity therefore arises for the administration to exercise a particular kind of disobedience: administrative authorities may indeed comply with the court ruling in an individual case, but then refuse to transfer the *ratio decidendi* to comparable cases. In some instances, this is even decreed from above in the form of what is known as a 'non-application decree' by the competent minister. Here as well, the courts most frequently react with indignation, but not always justifiably so. We must take a closer look.

The starting point must be the principle that, by law or normatively, a judgment has a binding effect in a specific individual case only. A legal effect *inter omnes* is ascribed only to judgments in judicial review processes that declare a law or an administrative legal standard to be against the law and invalid, and certain statements by the Federal Constitutional Court interpreting the Basic Law. In all other cases, there is no far-reaching normative effect beyond the individual case.

Of course, at the same time, there is a need for this type of wide-ranging impact, for instance in what we call 'mass administration', which must issue similar sovereign acts in

numerous comparable individual cases, such as in social services or tax administration. In this instance, it makes no sense to fight every single case in court. Instead, a test case is pursued, in which the disputed issue is decided by the court and then holds to that ruling thereafter. The rules of procedure themselves provide for formal test cases as long as all of the affected parties are known and participate in the proceedings. Otherwise, once a court has handed down a ruling, that ruling must be respected, even if it is only binding in a normative sense on the initial case. Any other approach would be a waste of resources.

However, even in certain areas of this type of mass administration, new cases can arise or new arguments can be put forth and, in other fields, similar cases may not turn out to be completely parallel situations once looked at more closely, but instead be found to have unique circumstances. This illustrates the advantage of a lack of a widespread normative impact: the administration is not prevented from bringing a new case before a court and attempting to convince the court to issue a new, maybe different ruling.

As you can see, the relationship between the administration and administrative jurisdiction, viewed as a whole and over time, is structured as a dialogue based on argumentation back and forth and continual progress. Therefore, the most important reason for taking a legal dispute to the third instance and to the highest court is that its ruling promises to advance jurisprudence. The administration itself is the courts' most important conversation partner in bringing about this progress.

## VI

What can we learn from this? Essentially, three things:

*a)* The first finding is sobering from the point of view of administrative courts: they are actually powerless with respect to the administration. However, they can – and should – monitor the administration to ensure this branch is complying with the law and in particular respecting the rights of citizens. They cannot, however, themselves enforce their rulings. That was something even Montesquieu knew: the power of the judiciary 'is in some measure next to nothing'. In civil and in criminal law the third state 'power' may wield the sword symbolising the execution of sentences or the bailiff's position with respect to citizens, but in administrative law, its only weapons against the other state power, the executive branch, are words and arguments.

That is not insignificant in view of the fact that it frequently has public opinion on its side. Precisely because administrative courts enforce the law not with force, but with intellectual means, with an appeal to the persuasiveness of its arguments, it finds followers among those who also use intellectual weapons – the press and journalists, in political and cultural discourse. That gives their decisions considerable weight. Of course, two key conditions must be fulfilled to this end: for one, a free society with freedom of speech where free speech carries weight; second, administrative courts that use analytical reasoning to underpin their rulings, thereby striving for sophisticated argumentation.

*b)* That leads to the second conclusion. This relates to the courts themselves. They derive their authority solely from the law that they apply and enforce; and lose this authority as soon as they act outside the law, drawing suspicion that they themselves want to take political action. It is a difficult undertaking, especially because the law is not always clear, and the courts are called in precisely when the law is unclear. Particularly in such instances, the crux is not deciding that specific case; the point then is always also the authority of the judiciary as such. The courts must make it clear that they are using the law alone as a guide in such cases, that their sole aim is to derive a logical rule from the unclear law. To achieve this, they must formulate an argument. Rulings by the highest court therefore require justification arrived at by analytical reasoning, which makes the connection back to the law transparent and, on top of it all, one hopes that it is persuasive as well.

Only people who can accomplish that should be judges. That requires not only professional expertise and judicial excellence but also internal independence and sovereignty. Any system for appointing judges should be designed to elevate such personalities to judgeships. This is the sole source of legitimacy for judges. Political orientation is immaterial in this regard, and allegiance to a political party even damaging.

*c)* The third realisation relates to state administration. Our expectation is that the administration respects and complies with judicial rulings unconditionally. Naturally, it will not be pleased with every ruling and, of course, an incorrect decision will be handed down on occasion. However, that is not the point. The issue at hand is the authority of the judiciary and therefore the constitutional order of the state as a power-separating state governed by the rule of law.

And if we have just determined that a state governed by the rule of law relies on personally and professionally excellent judges, it follows further that administration and politics must take care to ensure the excellence of these judges and their institutional, personal and professional independence so that any overreach by the judiciary remains a one-off mistake and does not raise the suspicion that this is the result of political control of the judiciary.

# ELTE LAW JOURNAL

## CONTENTS

### SYMPOSIUM

**ALEXANDER BALTHASAR:** Foreword to the ELI-SIG Papers

**ALEXANDER BALTHASAR:** Alternative Dispute Resolution in Administrative Law: A Major Step Forward to Enhance Citizens' Satisfaction or Rather a Trojan Horse for the Rule of Law?

**MARC CLEMENT:** Breach of the Right to Good Administration: So What?

**ANNA SIMONATI:** Administrative Transparency Through Access to Documents and Data in Italy: Lights and Shadows of a Principle in Transformation

**BRUNO REYNAUD DE SOUSA:** Migration, the Sahel and the Mediterranean Basin: Which Scenario for the EU27 by 2025?

### ARTICLES

**SÁRA FEKETE:** Preserving Intra-Corporate Mobility Between the UK and the EU After Brexit

**BILJANA GRBIĆ:** The Liberalisation of the Serbian Electricity and Gas Markets

**TOMÁŠ MACH:** Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims

**EMÓD VERESS:** Some Remarks on Shareholders' Agreements in the Context of Hungarian Law

### LECTURES

**KLAUS RENNERT:** Administration, Administrative Jurisdiction and Separation of Powers