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Odgovorno lice izdavača Darko Uremović, Bosna i Hercegovina
Urednik izdavača Prof. dr Aleksandra Vidović, Bosna i Hercegovina

Lektor Prof. Tanja Ančić
Tehnički urednik Sretko Bojić
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Minorities, Territories and the Law of Ownership. Back to Basics and the Way Forward

Francesco Palermo

Professor for comparative constitutional law, University of Verona and Head of the Institute for comparative federalism, Eurac Research, Bolzano/Bozen (Italy). Full CV at http://www.eurac.edu/fpalermo. This paper is largely based on Palermo, F., Owned or Shared? Territorial Autonomy in the Minority Discourse. In: T. Malloy, F. Palermo (eds.). (2015), Minority Accommodation through Territorial and Non-territorial Autonomy, Oxford University Press,13-32.

Abstract: In public law, the concept of property plays, arguably, a much more limited role than in private law. At a closer look, however, a rather different picture emerges. In fact, in public (national and international) law, property is less (if at all) regulated, but not less important than in private law. Rather, it is implicitly assumed and developed in collective rather than individual terms. Especially in the nation state construct, territory is the property of a state and the state is the property of a group of people (the dominant nation), whose power to control a territory is called sovereignty. For this reason, when the question emerges of how to deal with a territory predominantly inhabited by a minority group, the answers by different actors involved might be diametrically opposite. This is essentially because the link between people and territory is always framed in terms of ownership: who "owns" a territory? And how to deal with those who inhabit the territory without (being seen as those) owing it? This essay explores the responses to such questions. The focus will be on challenges posed by autonomy regimes as instruments for the accommodation of minority issues, including the evolving concept of territory. Against this background, the different understandings of the link and the recent practice of selected international bodies will be analysed, leading to some concluding remarks. It will be argued that territory is an unavoidable point of reference, but many aspects are not sufficiently addressed, such as the issue of the addressees of such arrangements, the evolution that minority-related concepts are facing in the present era, marked by the challenge of diversity and the overall understanding of territorial arrangements.

Key words: ethnicity, minorities, territories, ownership, autonomy.

1. INTRODUCTION

In public law, the concept of property plays, arguably, a much more limited role than in private law. At a closer look, however, a rather different picture emerges. In fact, in public (national and international) law, property is less (if at all) regulated, but not less important than in private law. Rather, it is implicitly assumed and developed in collective rather than individual terms. Especially in the nation state construct, territo-

ry is the property of a state and the state is the property of a group of people (the dominant nation), whose power to control a territory is called sovereignty.[1] Consequently, territorial claims by groups other than the dominant ones are addressed either by establishing "their own" state (often after violent conflicts or revolutions) or by forms of territorial autonomy within a state, which are designed as a lighter form of statehood. The link between ethnicity and territory remains largely implicit and is too often simplistically underpinned rather than rationally addressed.

For this reason, when the question emerges of how to deal with a territory predominantly inhabited by a minority group, the answers by different actors involved might be diametrically opposite thus jeopardising precarious conflict settlements based on territorial autonomy. While the settlement of conflicts might in fact require solutions that precisely avoid making incompatible views explicit, when the delicate balance between unexpressed underpinnings is upset, the lack of clarity as to how the link between ethnicity and territory is understood by the different parties involved might turn into the most explosive root for conflicts. This is essentially because the link between people and territory is always framed in terms of ownership: who "owns" a territory? And how to deal with those who inhabit the territory without (being seen as those) owing it?

This essay explores in a comparative perspective the responses to such questions. As the extreme case of creation of new states is relatively simple at least in a constitutional perspective, the focus will be on challenges posed by autonomy regimes as instruments for the accommodation of minority issues, including the evolving concept of territory (2.). Against this background, the different understandings of the link and the recent practice of selected international bodies will be analysed (3.), leading to some concluding remarks (4.). It will be argued that territory is an unavoidable point of reference, but many aspects are not sufficiently addressed, such as the issue of the addressees of such arrangements, the evolution that minority-related concepts (including territory) are facing in the present era, marked by the challenge of diversity and the overall understanding of territorial arrangements, still hostage of an outdated logic of ownership, which limits the potential of autonomy as an overall instrument of good governance.

2. LINKS BETWEEN ETHNICITY AND TERRITORY: DIFFERENT APPROACHES

In a comparative constitutional perspective, a variety of approaches can be observed as to the relationship that the legal system imposes (or pre-supposes) between groups and territories.[2] Simplifying, three main abstract approaches can be identified for our purposes, on a scale ranging from the maximal emphasis on the ethno-cultural dimension to the strongest accentuation of the territorial one – something that social scientists would call a scale ranging from ethnic to civic nationalism,[3] although in this context the scope is

[1] Jellinek, G. (1900). *Allgemeine Staatslehre*, *vol. 1* (*Recht des modernen Staates*), Berlin.

[2] As the Commission for Democracy through Law (Venice Commission) pointed out, there is "no common practice in the matter of territorial autonomy, even in general terms" CDL–INF (1996), 4, *Opinion on the interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly,* § 3c.

[3] See among many others the classic work by Ignatieff, M. (1994.). *Blood and Belonging: Journeys into the New Nationalism*. Toronto: Penguin.

slightly different and therefore it is preferable not to rely on the nationalism terminology.[4]

A first model vests territories with the exclusive task of being the framework for the self-government of specific (minority) groups. Because of geographic or historical reasons, territorial autonomy is conceived in these cases as the exclusive instrument for group protection, representation, and participation within a broader national framework. Typical examples are islands on which a population different from the rest of the State is settled, which belong to a nation-State because of peculiar historical events, such as in the case of the Åland islands (vis-a-vis Finland), Greenland or the Faroe Islands (vis-a-vis Denmark), New Caledonia (vis-a-vis France) and the like. In such cases, where population is homogeneous by fact or by law,[5] territorial autonomy fully overlaps with self-government of the concerned groups. However, while such overlap might be necessary in the case of remote islands for obvious geographic reasons, the coincidence *ope legis* between a territory and a group is often pursued also in much less homogeneous areas, with many more problems attached. Beside controversial, violent, and not yet fully settled contexts,[6] a paramount example in this regard can be observed in Québec, whose identity is framed in ethnic/linguistic terms even though several other French speakers are settled outside the province and, conversely, many non-French speakers live in Québec.[7] In 2006, the Canadian Parliament adopted a motion recognising that Québécois "form a nation within a united Canada",[8] and several legal rules attribute to Québec the exclusive role of representing the

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[4] While the phenomenon is pretty much the same, the scope of this analysis is broader and narrower at the same time. It is broader, because not all links between ethnicity and territory can be framed in national terms, as some identities are really territorial rather than national and do not aspire to own nationhood. It is narrower, since the territorial dimension only refers here to subnational entities and only to those inhabited (predominantly) by (national) minorities, plus it is not necessarily based on citizenship but rather on residence. Furthermore, lawyers might be more at ease with the old concept of *legal geography* developed by Frederic Maitland, who used this term to identify the relationship between a community and its territory: Maitland, F.W. (1964). *Township and Borough: The Ford Lectures 1897*. Cambridge: Cambridge University Press, 6-29. Irrespective of definition issues, the question here is about the relation between organized communities and territorial space in subnational areas whose autonomy was established with a view of accommodating ethnic claims. For these reasons, the nationalism discourse and terminology does not entirely fit here, and a territorial (ethnic or civic) discourse is preferable.

[5] The legal system presupposes and imposes that these territories be considered uniform in terms of elements defining the traditional groups inhabiting the territory and of their representation in the State structure. On the case of the Åland islands, where more of 100 groups are settled, see State, B. *Immigrant Integration on Åland – an exploratory study*, Åland Peace Institute, Report no. 2-2007, available at http://www.peace.ax/en/publications/report-series (15.5.2021).

[6] Such as in several Eastern and South-Eastern European states, as well as in the Iraqi autonomous region of Kurdistan according to the 2005 constitution, etc.

[7] The whole issue of (more or less recent) migrants goes beyond the scope of this paper, as no autonomous entity has so far made them titular groups in terms of territorial claims. Their presence, however, is very relevant for getting the whole picture of the ethnic composition of a territory. See on such aspects Medda, R., Popelier, P. (eds.). (2016). *Pro-independence Movements and Migration: Discourse, Policy and Practice*, Brill, forthcoming.

[8] Motion of 27 November 2006. Though non–legally binding, the motion aims at resolving the long-lasting and still open wound of the role of Québec within Canada. It culminates a process marked by the failure of two proposed constitutional amendments (1987 and 1991), by two provincial referenda on the proposal of unilateral secession (1992 and 1995) and by a fundamental

"French Canada" on the federal scene.[9] Such an approach is the simplest from a legal point of view, because it only requires dealing with one side of the problem – autonomy – which is supposed to cover any other diversity issue.

A second type of relationship between ethnicity and territory is to be observed when ethnic and territorial elements do coexist and interplay with each other, with the consequence that a broad leverage is left in determining which one should prevail in the single case depending on the subjects at stake as well as on variable political priorities. Unlike in the previous category, in these cases, autonomy arrangements do take into account the heterogeneity of the population settled in a territory, although territorial self-government is in the first place conceived for the protection of one (or more) specific (minority) groups. Several examples fall into this category. Some countries rely on the principle of territoriality, such as, for example, in Belgium,[10] in Switzerland,[11] and to some extent also in the European Union.[12] This principle means that a territory is identified by law with a language and a culture, which are the sole official ones of that territory. Within the framework of a multinational polity, this means that the territories are somewhat frozen in their cultural

opinion issued by the Canadian Supreme Court (CSC, *Reference re. Secession of Québec* [1998] 2 S.C.R. 217). One of the open issues regards the concept of "Quebecker", whether this should be intended in territorial or in ethnic terms. It is worth notice that the English term "Quebecker" or "Quebecer" is normally used to refer to any resident of the province, regardless of his/her language, whereas in French the word "Québécois" is used both in the civic (i.e., all residents) and in the ethnic sense (i.e., only French-speaking inhabitants or even only those of French descent). See also the entry "Québécois" in the *Oxford English Dictionary*. Not by chance, even the English text of the motion uses the French term Québécois.

9 An interesting example is article 6 of the Canadian Supreme Court Act 1985, according to which three justices out of nine must come from Québec. This provision conventionally excludes non–French speakers from Québec from the chance to be appointed.

10 The evolution of the Belgian system after the constitutional transformation that culminated in the new constitution of 1993 shows some tendency toward the first model. Significant in this respect is the institutional merging that took place in the Flanders between regional and community institutions in which the latter basically "absorbed" the first. See Swenden, W. (2002/2003). Personality versus Territoriality: Belgium and the Framework Convention for the Protection of National Minorities. In: *European Yearbook for Minority Issues*, 331–356; Keating, M. (2001). So many nations, so few states: territory and nationalism in the global era. In: A.G. Gagnon, J. Tully (eds.) *Multinational Democracies*. Cambridge: Cambridge University Press.

11 The principle of territoriality in Switzerland was firstly elaborated as an unwritten constitutional corrective to the freedom of language by the federal court (see judgment of 31 March 1965, *Association de l'Ecole française*, BGE 91, I, 480, and judgment 25 April 1980, *Brunner*, BGE 106, Ia, 299) and was subsequently formalized in the (Con-)federal constitution (article 70 of the Swiss constitution). See Pedrini, S., Bächtiger A., Steenbergen, M. R. (2013). Deliberative inclusion of minorities: patterns of reciprocity among linguistic groups in Switzerland. *European Political Science Review,* 5, 483-512.

12 Unlike any other international organization, the European Union recognizes the official status of all languages that are official at national level in the various member states (since January 2007, when Irish was accorded the status of a full official language of the union, the sole exception is represented by Letzeburgesch, which is official in Luxemburg but not in the EU)—see article 342 TFEU (former article 290 TEC) and Regulation No. 1/1958. See further Palermo, F. (2006). Linguistic Diversity within the Integrated Constitutional Space. *European Diversity and Autonomy Papers*, 2, available at http://www.eurac.edu/documents/edap/2006_edap02.pdf (15.5.2021).

identity, because this is guaranteed by the central constitution, which therefore provides for the stabilization of groups but also for the guarantee of forced cooperation among them. Other, and no less numerous, examples are those countries in which self-government for groups was the driving force for territorial autonomy, but self-government developed also beyond the original scope, gradually attenuating the "original intent" of "mere" minority protection, moving towards a territory-centred system in which ethnicity becomes recessive to autonomy as such. Examples of this kind of evolution are to be found, among others, in New Brunswick in Canada,[13] in Northern Macedonia,[14] and in South Tyrol in Italy.[15]

A third linkage between territorial autonomy and group protection is to be noted when ethnicity was instrumental in determining the reasons for the development of territorial autonomy, but the legal design of the autonomy regime emphasises the territorial dimension more than (or at least as much as) the ethnic one (also depending on the political positions). One could think of the Spanish autonomous communities where the historic nationalities are settled:[16] beside the clear attempts to identify the autonomous ter-

[13] In the province of New Brunswick, the French- and English-speaking populations are by and large equal in size. The powers of that province, however, are largely made up the same as any other Canadian province except Québec. See Magord, A. (2008). *The Quest for Autonomy in Acadia*. Brussels: Peter Lang; Bickerton, J. (2012). Seeking New Autonomies: State Rescaling, Reterritorialization and Minority Identities in Atlantic Canada. In: A-G. Gagnon and M. Keating (eds.) *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings.* London: Palgrave Macmillan, 98-117.

[14] After the Ohrid agreement of 2001 and the subsequent constitutional amendments, Macedonia has established a strongly promotional minority-protection system, which nevertheless basically only regards the Albanian community. Beside the rules adopted at the state level for the representation of the Albanian minority, in 2002 a law on local self-government was adopted, whose aim was to maximize the number of municipalities in which Albanians make up 20% of the population (and thereby make Albanian an official language at the local level). The subsequent referendum held in 2004 failed because of insufficient participation in the ballot, and the law was therefore confirmed: accordingly, a much higher number of municipalities than before became bilingual. See further Marko, J. (2004/2005). The Referendum on Decentralization in Macedonia in 2004: A Litmus Test for Macedonia's Interethnic Relations. *European Yearbook for Minority Issues*, 4, 695–721 and Tomovska, I. (2008). Post-Conflict Developments and Decentralization in Macedonia", *European Yearbook for Minority Issues*, 7, 146-147.

[15] The autonomy for South Tyrol was conceived as an instrument for the protection of the German-speaking minority, as explicitly stated in its international foundation, the Gruber-Degasperi agreement of 1946. However, the process of reconciliation and normalization that is taking place in that area in the last 30 years has gradually emphasised the territorial elements of the autonomy regime vis-a-vis the ethnic ones. For further analysis see J. Woelk, F, Palermo, and J. Marko (eds.). (2008). *Tolerance through Law. Self Governance and Group Rights in South Tyrol*. Boston: Martinus Njihoff, Leiden.

[16] According to Spanish constitutional terminology, this pre-legal element as a precondition for autonomy is called "differential factor" (*hecho differencial*). Article 151 of the Spanish constitution of 1978 provides for the "fast track to autonomy" for the pre-existing nationalities, even though this term never appears in the constitution. As a matter of fact, the communities that achieved autonomy this way were those in which the national character is most developed (Basque Country, Catalonia, Galicia) plus Andalusia. On origin and development see inter alia Arlucea Ruiz, E. (2014). The Qualitative Development of the Spanish System of Autonomous Communities: Changes to the Statutes of Autonomy. In: A. López Basaguren, L. Escajedo San

ritory with one nation (or nationality),[17] this concept is predominantly inclusive in terms of belonging to the group,[18] which is normally defined by a free choice of individuals who commit themselves to a culture and a language.[19] The same is true for Scotland, which has developed a civic, territorial identity protected through self-government and where the very referendum on independence in September 2014 was open to all residents, irrespective of ethnicity, origin or language.[20] Similarly, one can think of the Croatian region of Istria[21], as well as of the Serbian Autonomous Province of Vojvodina:[22] in both of these cases, regional autonomy has a clear territorial emphasis, because the national minorities are numerically inferior to the majority population even at the regional level. Similarly, other examples of ethnic-originated, but substantially territorially managed self-government can be observed in all cases in which forms of autonomy (additional competences, etc.) for

Epifanio (eds.) *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*. Berlin: Springer, 575-586.

17 The terminological issue ("nation" vs. "nationality") strongly re-emerged during the process of adoption of the new autonomy statute for Catalonia in 2006. The issue was resolved with a compromise: the (legally nonbinding) preamble affirms that "in reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority", whereas the (legally binding) text of the statute only contains the word "nationality". This, however, was held unconstitutional by the Constitutional Tribunal in its seminal ruling on the Catalan statute no. 31/2010. See Arbos Marin, X (2013). The Federal Option and constitutional management of Diversity in Spain. In: A. López-Basaguren, L. Escajedo San Epifanio (eds.) *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain.* Berlin: Springer, 375-399.

18 See Suski, M. (2011). *Sub-State Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions*. Berlin-Heidelberg: Springer, 111.

19 See again the new autonomy statute for Catalonia. Article 1 states that "Catalonia, as a nationality, exercises its self-government constituted as an autonomous community". Moreover, the preamble affirms that "the contribution of [Catalan] citizens has shaped an integrating society […]" Also the Basque identity is, by and large, defined in cultural and linguistic (thus basically voluntary) terms, rather than in ethnic terms.

20 Cohen, A. P. (1997). Nationalism and Social Identity: Who Owns the Interest of Scotland?. In: *18 Scottish Affairs*, 95–107; McLean, I., Lodge G., Gallagher, J. (2013). *Scotland's Choices: The Referendum and What Happens Afterwards*. Edinburgh: Edinburgh University Press; *The Agreement on a referendum on independence for Scotland*, (2012). Constitution Committee of the House of Lords 7th Report, Session 2012-13; Select Committee on the Constitution, 8th Report of Session 2013–14 *Scottish independence: constitutional implications of the referendum*, available at http://www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/188/188.pdf (16.5.2021).

21 See Ashbrook, J. (2008). *Buying and Selling the Istrian Goat: Istrian Regionalism, Croatian Nationalism, and EU Enlargement*. Bruxelles: Peter Lang; Stjepanovic, D. (2012). Regions and Territorial Autonomy in Southeastern Europe. In: A. G. Gagnon and M. Keating (eds.) *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings*. London: Palgrave and Macmillan.

22 Articles 182–187 of the Serbian constitution of 2006. See The participation of minorities in public life, *Science and technique of democracy*, 45 (2011); see also the Statute of Autonomous Province of Vojvodina (Law on Establishing the Competences of the Autonomous Province of Vojvodina, no. 99/09); Guglielmetti, C., Avlijaš, S. (2013). Regionalization and regional development in Serbia. In: F. Palermo, S. Parolari (eds.) *Regional Dynamics in Central and Eastern Europe: New Approaches to Decentralization*. Leiden: Martinus Nijhoff Publishers, 204.

territories in which minorities are settled are subject to numerical clauses; in these cases, it is up to the same minority groups to set self-government in motion.[23]

3. AUTONOMY *FOR* OR AUTONOMY *OF*? THE "LAW OF OWNERSHIP"

In the end, all forms of minority self-government including, to some extent, those normally labelled as non-territorial autonomy, have a territorial dimension. The overlap between territory and its "ownership" by a national, ethnic, or linguistic group can be more or less intense, but the legal instruments to address minority issues are by and large all territorial, both because they are applicable only to a specific territory and because they confer to minority groups certain self-government powers within that territory.[24]

The overlap between one group and one territory reveals an interiorized ownership-relation that goes back even to the very names of groups and territories: territories have usually been named after the populations residing in them, and vice-versa, to an extent that makes it almost impossible, in most cases, to determine which name has been developed first.[25] Our own minds are shaped taking implicitly for granted that territories are the property of groups, and the whole history of mankind is marked by wars and conflicts for the ownership of territories. When autonomy is granted, this addresses a population by conferring control over a territory, now limited by constitutional rules, but still essentially framed as exclusive sovereignty, following the same abstract pattern of statehood (people, territory, sovereignty). In other words, it seems that the implicit paradigm of the link between ethnicity and territory is always an ethnic and not a civic one: when linked with

[23] The examples range from the Finnish "prototype" (at local level, only municipalities inhabited by more than 8% of Swedish speakers can be officially bilingual—see Language Act of 1922 as recently replaced by Language Act no. 423/2003) to more-recent cases making use of the same principle. See, for example, the Italian law no. 482/1999 (which provides for the establishment of forms of municipal self-government upon request of one third of the members of the municipal council) and the Czech law on Regions no. 129/2000, § 78, providing that minority self-governments can be set up in the regions in which at least 5% of the people belongs to a recognized minority.

[24] For non-territorial arrangements, this link is attenuated and partial, as it is not designed in terms of ownership of a whole territory. The scope of application of the personal/cultural rights is however still territorial, as mentioned above: only members of one particular group are entitled to specific rights in a given territory. Like for territorial arrangements, also non-territorial ones succeed in their purpose of being exclusive and to address only members of minority groups, as demonstrated by several examples of legal impossibility to pre-determine who belongs to groups and to exclude those not pertinent to them. See inter alia the issue of registration as members of the minority groups that arose with regard to the Minority Self-Governments in Hungary in 2005 and for Minority Councils in Serbia in 2009. See European Commission for Democracy through Law (Venice Commission), 'Opinion on the New Constitution of Hungary Adopted by the Venice Commission at its 87th Plenary Session' (Venice, 17-18 June 2011), CDL-AD(2011)016; European Parliament Resolution of 16 February 2012 on the recent political developments in Hungary, 2012/2511(RSP). Here, ethnic nationalism is referred to as a characteristic of the general ideological environment. Practical applications of nationalist doctrines differ significantly. For instance, Hungarian nationalism targets predominantly kin minorities outside the country while the Slovakian one concerns primarily domestic policy.

[25] For some hints on such a complex and not fully explored area see Connor, W. (2001). Homelands in a World of States. In: M. Guibernau, J. Hutchinson (eds.) *Understanding Nationalism*. Oxford: Blackwell, 53-73.

minority groups, territorial autonomy is generally framed as autonomy *for* that particular group,[26] even in cases where the approach is more civic than ethnic.

The conferment of a territorial self-government *for* minority groups,[27] however, does not address the whole matter of autonomy[28] and might even be detrimental to the overall management of complexity, because it risks replicating the State pattern at a lower level. Territoriality alone – in terms of (absolute or partial) control of a territory by a group – is thus a far too simple solution for a far too complex problem.

In fact, the ultimate rationale of territorial solutions based on autonomy *for* groups, is to transform minority issues into deliberative processes based on the majority rule. Playing with the territorial scope of legal norms, minority issues are addressed through the classical logic of majority-based democracy, turning (national) minorities into (subnational, territorial) majorities, or at least into much more consistent minorities. Accordingly, the will of the autonomous body is (forcibly) coincident with that of the (territorial) majority of the (national) minority.

Overall, territorial self-government proved to work well.[29] Its immense strength lays not only in its being a viable alternative to external self-determination (thus preventing possible conflicts), but also, and even more so, in its ability to not derogate from the fundamental element of Western constitutionalism (majority rule) in addressing minority issues. By doing so, minority issues do not jeopardize the democratic foundations of the legal systems and can be pragmatically accommodated (although with some difficulties and compromises) within the classical – majority-based – deliberative procedures. Like a wizard, the legal system transforms minorities into majorities and incorporates them into a majority-based decision-making process. It could provocatively be said that the "law of ownership" changes, or at least aims to change, the very nature of minority groups, because it turns them into (potential) majorities. Such an approach—the efficient it can be—might turn majority-minority relations upside down, but it cannot completely resolve them, for the simple reason that it is still based on a principle that is ultimately at odds with minority rights: majority rule.

However, there are several clear signs that such an approach to autonomy based on ownership (and, when referred to minority groups, conceived as autonomy *for* such groups only) is getting outdated. Instead, a more comprehensive and sophisticated view of autonomy is emerging, focusing on territories rather than on groups "owing" them and including minority rights in a wider perspective, that can be called autonomy *of*. Of territories as such, rather than just for one group thereby settled.

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[26] See Weller, M. (2010). Introduction. In: M. Weller, K. Nobbs (eds.) *Asymmetric Autonomy and the Settlement of Ethnic Conflicts.* Philadelphia: University of Pennsylvania Press, 2–7.

[27] See (also on some contradictions of non-territorial autonomy arrangements) Bauböck, R. (2004). Territorial or Cultural Autonomy for National Minorities? In: A. Dieckhoff (ed.) *The Politics of Belonging: Nationalism, Liberalism and Pluralism*. Lanham: Lexington Books, 221-258.

[28] This is why it is a relatively marginal aspect in the comparative federalism literature, while it is of primary importance in a minority-rights perspective, as stated above.

[29] See Weller, M. (ed.). (2009). *Asymmetric Autonomy as a Tool of Ethnic Conflict Settlement*. Philadelphia: University of Pennsylvania Press. See also A. Tarr, R. Williams, J. Marko (eds.). (2004). *Federalism, Sub-National Constitutions and Minority Rights.* Greenwood: Westport; Y. Ghai (ed.). (2000). *Autonomy and Ethnicity*. Cambridge: Cambridge Univ. Press.; Lapidoth, R. (1996). *Autonomy: Flexible Solutions to Ethnic Conflicts*. Washington, D.C.: United States Institute of Peace Press. For interesting reflections *see* Mancini, S. (2008). Rethinking the boundaries of democratic secession: Liberalism, nationalism and the right of minorities to self-determination, 6:3–4 *International Journal of Constitutional Law,* 553–584, esp. 562–566.

3.1. Beyond Ownership: Trends in Theory and Practice

In recent times, at least three factors are contributing to make minority issues much more complex than a purely territorial approach suggests: the emergence of power sharing as a counter-majority mechanism; the increasing attention to the rights of the groups sharing a territory, irrespective of their status; the decreasing importance of the State as the exclusive point of reference for determining minority positions.

Power-sharing or ethnic consociational democracy is a governmental technique that aims at overcoming the majority–minority spill over by obliging all involved groups through institutional cooperation beyond their numerical ratio.[30] It can be paritarian (i.e., the groups have the same number of representatives in the power-sharing institutions)[31] or proportional (i.e., the groups' representation is proportional to their numerical consistency, but nonetheless guaranteed irrespective of their numerical strength).[32] Power sharing follows a different pattern than does territorial autonomy. Although of course applied to a territory, it does not try to turn minorities into majorities; rather, it develops a form of government that is based on a different rationale than majoritarian democracy. Power sharing is an instrument that makes it possible to go beyond the classical democratic paradigm (based on rule of majorities) by enforcing a more sophisticated decision making (based on the rule of law) in a way that none of the groups may be outnumbered (at least not without having been effectively involved) within the institutions of the State or subnational unit. The recent proliferation of power-sharing agreements[33] testifies to the

[30] For a comprehensive analysis and the detailed illustration of several case studies see M. Weller, S. Wolff, (eds.). (2005). *Autonomy, Self-governance and Conflict Resolution: Innovative Approaches to Institutional, Design in Divided Societies*. London: Routledge. See also McGarry, J., O'Leary, B. (2009). Must Pluri-national Federations Fail? *Ethnopolitics*, 5–25; B. O'Leary, J. McEvoy (eds.). (2013). *Power-Sharing in Deeply Divided Places* Philadelphia: University of Pennsylvania Press.; O'Leary, B. and McGarry, J. Territorial Pluralism: Its Forms, Flaws and Virtues. In: F. Requejo and M. Caminal (eds.) *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases*. New York: Routledge, 17-50.

[31] Such as, for example, in the case of the Government and of the Constitutional Court in Belgium, of the Presidency, the Council of Ministers and the House of Peoples in Bosnia and Herzegovina (see however ECHR, *Sejdić and Finci v. Bosnia and Herzegovina*, appl. 27996/06 and 34836/06, 22 Dec 2009), etc.

[32] Such as, for example, in South Tyrol for the composition of the provincial and regional governments, in Canada for the composition of the Supreme Court, in Belgium for the Senate, in Switzerland for the Federal Council as well as for the Federal Tribunal, etc.

[33] From Northern Ireland to Macedonia, from Mindanao to Bougainville, from Bosnia and Herzegovina to Kosovo, just to quote examples from the last decade. Gates, S., Strøm, K. (2007). Power-sharing, Agency and Civil Conflict - Power-sharing Agreements, Negotiations and Peace Processes. *CSCW Policy Brief*. Oslo: PRIO. 1.; Mukherjee, B. (2006). Why Political Power-Sharing Agreements Lead to Enduring Peaceful Resolution of Some Civil Wars, But Not Others? *International Studies Quarterly*, 50, 479–504; O'Leary, B. (1989). The Limits to Coercive Consociationalism in Northern Ireland. *Political Studies*, 37, 562–587; Ripiloski, S., Pendarovski, S. (2013). Macedonia and the Ohrid Framework Agreement: Framed Past, Elusive Future. *Perceptions*, 18 (2), 135-161; Kelleher, S. (2005). Minority Veto Rights in Power Sharing Systems: Lessons from Macedonia, Northern Ireland and Belgium. *Adalah's Newsletter*, 13; O'Leary, B. (2005). Debating Consociational Politics: Normative and Explanatory arguments. In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press, 3–43; Wolff, S. (2005). Between Stability and Collapse: Internal and External Dynamics of

insufficiency of a "pure" territorial model to exclusively address minority issues by simply "majoritarizing" them.

The second critical element that shows the limits of territorial solutions in terms of explicit or implicit ownership clearly emerges from the above considerations. Territories are (and will more and more be) all but homogeneous in ethnic terms. Aiming to transform national minorities into regional majorities (or at least into more consistent minorities), territorial autonomy does not address the fundamental issue of the rights of regional minorities or majorities within minorities, i.e., of persons belonging to the national majorities, which are numerically inferior in the autonomous territory, nor of smaller minorities within that same territory (so called minorities within minorities), nor of the overall integration of ever more plural societies. Scholars[34] and international organizations[35] pay increasing attention to this phenomenon, starting from a substantive approach to rights: according to this approach, minorities are not a stable artefact, but rather a dynamic, relational factor whose very nature as minority groups largely depends on the applicable law.[36] In sum, belonging to majorities and minorities resembles a revolving door rather than being a permanent factor. So, for example, vegetarians might not be a minority in general, because they are not recognized as such by the law, but they can become a minority vested with enforceable rights in some context, in which specific regulations apply O'Halloran, P. J. (2005). (e.g., in prison or in hospital, if the menu is not differentiated). Similarly, English speakers in Québec cannot be considered a national or ethnic minority in the traditional sense,[37] nor are they with

Post-agreement Institution Building in Northern Ireland, In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press, 44–66; Bieber, F. (2005). Power Sharing after Yugoslavia: Functionality and Dysfunctionality of Power-sharing Institutions in Post-war Bosnia, Macedonia, and Kosovo. In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press, 85–103; O'Halloran, P.J. Post-conflict Reconstruction: Constitutional and Transitional Power-sharing Arrangements in Bosnia and Kosovo. In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press, 104–119; Peake, G. (2005). Power Sharing in a Police Car: The Intractable Difficulty of Police Reform in Kosovo and Macedonia, In: S. Noel (2005). (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press, 120–214; Bahcheli, T., Noel, S. Power Sharing for Cyprus (Again)? European Union Accession and the Prospects for Reunification. In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press, 215–238; Wilkinson, S. I. (2005). Conditionality, Consociationalism, and the European Union. In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press. 239–263; Mc. Garry, J. and O'Leary, B. (2005). Federation as a Method of Ethnic Conflict Regulation. In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press. 263–296.

[34] See on the various meanings of the concept A. Eisenberg, J. Spinner-Halev (eds.). (2005). *Minorities within Minorities: Equality, Rights and Diversity*. Cambridge: Cambridge University Press.

[35] See below.

[36] Poulter, S. (1992). Limits of Pluralism. In: B. Hepple, E. M. Szyszczak (eds.) *Discrimination: the Limits of Law.* London: Mansell, 183–215.

[37] See expressly in this sense the UN Human Rights' Committee decision in the case of *Ballantyne et al. v. Canada*, Communications Nos. 359/1989 and 385/1989, *Ballantyne/Davidson v. Canada* and McIntyre v. Canada, in UN doc. GAOR, A/48/40 (II), p. 103, para. 11.5., when the com-

respect to subject matters decided by the federal government, but they are a functional minority when it comes to subjects decided at provincial level, in which they are minoritized in the decision-making process.

Increasing attention is being paid in literature and in law to groups labelled as "regionally, non-dominant titular peoples".[38] This term describes groups that are part of the (local) population and, although locally inferior, who constitute the "majority" group at the national level. Such a concept well reveals the deficits arising from the combination of territoriality and majority rule and forces to develop more accurate devices to deal with ethnic complexity as such, regardless of the specific territorial dimension in which it might be observed. In simple words, at least where the basic conditions of survival for groups are given,[39] a qualitative leap is required where the instruments of diversity management are concerned. In these contexts, today's complexity requires instruments that are able to protect groups that can be occasionally in minority position, that are dynamic and not static, and whose members have the right to freely identify, according to criteria and preferences that might well change over time. Modern instruments for diversity management should address diversity issues in general and should not only focus on the protection of predefined minority groups. A more-comprehensive approach to group rights and to integration of complex multi-ethnic societies is thus required.

The third critical element is the increasing awareness of the fact that the State cannot any longer be the exclusive level of reference for the identification of minority positions.[40] Although it is true that beginning in the Westphalian age the State has been the sole master of minority definition and rights,[41] and although it is not contestable that the State still plays the main role in this respect, it cannot be denied that considering as minorities only the groups that are numerically inferior to the population of the State and fulfilling the other criteria elaborated by Capotorti in the 1970s would be a formalistic exercise that neglects the reality. The limit of a purely territorial approach to minority issues emerges as a consequence of numerous phenomena impacting on the very rationale of territories, including cross-border cooperation also as a means to enhance minority protection[42] and

mittee refused to view English speakers in Québec as a minority, because they are part of the national majority in Canada even though they are a minority in Québec.

[38] Potier, T. (2001). *Regionally Non-Dominant Titular Peoples: The Next Phase in Minority Rights?* JAMIE Paper 6 (2001). Available at http://www.ecmi.de/jemie/download/JEMIE06Potier11-07-01.pdf (15.5.2021).

[39] Unfortunately, for many minority groups in Europe and in the world, the fundamental question is still their own survival as a group. In these situations, it does not seem possible to move beyond the dimension of "mere" legal protection and, from the perspective of the majority, legal recognition of the minority. In many cases, the explicit recognition of basic rights of protection (in the fields of language, culture, participation, etc.) would already be a major step forward.

[40] As it still was in the well-known attempt for a definition by Capotorti, F. *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. Geneva, UN Center for Human Rights, UN Doc E/CN.4/Sub.2/384/Add. 1-7.

[41] On the historical developments see Ruiz-Vieytez, E. (1999). *The History of Legal Protection of Minorities in Europe (XIIth–XXth Centuries)*. Derby:University of Derby.

[42] See articles 17 and 18 of the FCNM and, more broadly on the role of cross-border cooperation in ethnic sensitive areas, Palermo, F. (2012). The 'New Nomos' of Cross-Border Cooperation. In: F. Palermo *et al*. (eds.) *Globalization, Technologies and Legal Revolution. The Impact of Global Changes on Territorial and Cultural Diversities, on Supranational Integration and Constitu-*

more generally globalization,[43] that overall changed the most rooted attitude towards autonomy.[44] More specifically, recent and significant examples of a new and more substantial approach to the link between minorities and territories beyond the State and the national dimension are provided by several international and supranational organizations such as the Council of Europe, the European Union and the OSCE.

3.2. Beyond Territory: The Contribution of International (Soft) Law

At least two important bodies of the Council of Europe have started to pave the way to a new understanding of territory with regard to minority issues.[45] The Commission for Democracy through Law (Venice Commission) has convincingly pointed out that the territorial reference for determining the existence of a minority does not necessarily coincide with the State,[46] nor is the concept of minority necessarily dependent on the requirement of citizenship. In a fundamental report, the Commission stated that citizenship (i.e., the formal relationship with a State and thus a territory) can no longer be considered the only criterion for the recognition of minority rights and that noncitizens should also benefit from specific minority protection.[47] The Commission's definition of a minority "does not limit the protection of the rights of minorities only to persons belonging to minorities who are citizens" of the State they live in.[48] Instead, "a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past".[49]

Similarly, the Advisory Committee on the Council of Europe's Framework Convention for the Protection of National Minorities requires an inclusive approach to minority rights that goes beyond the formal requirement of citizenship, this being sometimes, as a matter of fact, a tool for excluding titular groups from the benefit of fundamental rights.[50] Therefore, the Advisory Committee also encourages an extensive interpretation of the Framework Convention with a view to extending its application to noncitizens where ap-

tional Theory. Liber Amicorum in Memory of Sergio Ortino. Baden Baden: Nomos, 71-90.

[43] De Varennes, F. (2012). The Challenges of Globalization for State Sovereignty: International Law, Autonomy and Minority Rights. In: F. Palermo *et al*. (eds.) *Globalization, Technologies and Legal Revolution*, 113-137.

[44] Z. A. Skurbaty, (ed.). (2005). *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* Boston: Nijhoff/ Leiden.

[45] Other Council of Europe's bodies have also played a role in such a process. Suffice here to mention the Congress of Local and Regional Authorities and its role in monitoring the implementation of the Charter of Local Self-Government.

[46] European Commission of Democracy Through Law, *Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities Could Be Applied in Belgium*, CDL-AD (2002)1, Strasbourg, 12 March 2002.

[47] See European Commission for Democracy through Law, *Report on Non-Citizens and Minority Rights*, adopted at the Commission's 69th plenary session (Venice, 15–16 December 2006), Study no. 294/2004, CDL-AD (2007)001.

[48] CDL-AD (2003)013, *Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania*, §5.

[49] CDL-AD (2004)013, *Opinion on Two Draft Laws Amending the Law on National Minorities in Ukraine*, §18.

[50] See, for example, the first opinion on Estonia, adopted 14 September 2001, §17 (ACFC/INF/OP/I(2002)005).

propriate[51], and calls for a substantive rather than formalistic approach to the issue of titular groups.[52] Even more significant for our purposes are the achievements of the Committee's Third Thematic Commentary on Linguistic Rights of Persons Belonging to National Minorities (2012)[53] and Fourth Thematic Commentary on the Scope of Application of the Framework Convention (2016).[54] Acknowledging that identity is not static but evolving throughout a person's life[55] and that multiple affiliation is in fact quite common and thus identity can change "depending on the relevance of identification for him or for her in a particular situation",[56] the Committee admits that what really matters is integration of diverse societies.[57] This can also be pursued by autonomy arrangements, which "can be beneficial to persons belonging to minorities",[58] but the real challenge for such arrangements is not to isolate titular groups and rather to make autonomous territories more suitable than (nation) States for developing integration and coexistence among different groups.

Such an approach is promoted even more explicitly by the most recent set of recommendations issued by the OSCE High Commissioner on National Minorities (HCNM), the Ljubljana Guidelines on Integration of Diverse Societies (2012).[59] Taking further the achievements of the previous Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999),[60] the Guidelines state that "in certain circumstances, territorial self-governance arrangements, such as territorial devolution of powers, may also facilitate the representation of individual minority groups. Regardless of form, institutions of self-governance must be based on democratic principles and processes to ensure that they can legitimately claim to reflect the views of all the communities settled in the concerned territory

[51] See, for example, the first opinion on Lithuania, adopted 21 February 2003, §90 (ACFC/INF/OP/I(2003)008).

[52] See further Swenden, W. (2003). Personality versus Territoriality: Belgium and the Framework Convention for the Protection of National Minorities. *European Yearbook for Minority Issues*, 2, 331–356; A. Verstichel, A. Alen, B. de Witte, Lemmens, P. (eds.). (2008). *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* Antwerp: Intersentia.

[53] ACFC/44DOC (2012)001 rev, on which Palermo, F. (2013). Addressing Contemporary Stalemate in the Advancement of Minority Rights: The Commentary on Language Rights of Persons Belonging to National Minorities. In: T. H. Malloy, U. Caruso (eds.), *Minorities, their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities. Essays in Honour of Rainer Hofmann* Boston: Martinus Mijhoff, Leiden, 121–140.

[54] ACFC/56DOC(2016)001.

[55] Third Thematic Commentary, para. 13.

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

[57] *Ibid.*, para. 12.

[58] *Ibid.*, para. 90.

[59] T. H. Malloy (ed.), (2013). *Minority Issues in Europe: Rights, Concepts, Policy.* Berlin: Frank & Timme GmbH. 146; Marko, J. (2013). Five Years After: Continuing Reflections on the Thematic Commentary on Effective Participation. The Interplay between Equality and Participation. In: T. H. Malloy, U. Caruso (eds.) *Minorities, their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities,* 98.

[60] In the Lund Recommendations the HCNM affirmed the fundamental democratic role of territorial arrangements for minority self-governance (paras 19 and 20), also called for a possible combination of territorial and non-territorial arrangements for a successful minority participation. See further the special issue of the *International Journal on Minority and Group Rights (2009)*, 16 (4), 511–700, entirely devoted to the Lund Recommendations in their tenth anniversary.

and that they fully respect the human rights of all persons, including of minorities, within their jurisdictions. In this context, power-sharing arrangements, where in place, should not be constructed in a manner that excludes any communities from representation".[61] Such an integration-oriented approach to autonomy is perhaps so far the most advanced statement on territorial autonomy issues contained in an international document, as international law is notoriously hesitant to take any position on territorial organization of States.

Also in the European Union, despite the absence of a direct power to regulate minority issues,[62] a number of decisions of the Court of Justice are quite relevant in supporting a view of territory in terms of provider of services (which can include minority-relevant issues) rather than in terms of ownership. The rulings are formally grounded on subject matters not *prima facie* relevant to specific minority issues, such as the free movement of people and the principle of non-discrimination on the ground of nationality, but they have *de facto* introduced an EU system of minority protection[63] that has had important consequences also in terms of European legislation and ramifications in various areas, including the right to vote, adopting a more "civic" criterion of residence vis-à-vis the State-centred criterion of citizenship.[64] The essence of these rulings is that rights established for specific minority groups in a particular territory, such as the right to use a minority language with administrations and in court, must be available to all who happen to be in that territory, irrespective of their nationality, ethnic belonging and even residence.

All this leads to believe that although territory is still (and will always be) an unavoidable term of reference for the very recognition of minority positions, its practical meaning and its scope are largely variable from case to case and in general are changing because of the evolution of the overall legal environment. However, the meaning of territory and autonomy needs to be profoundly updated in the light of the present challenges. A territorial dimension is inherent to minority rights, provided, however, that territory is seen in a more inclusive and flexible way. In other words, in a more advanced stage of diversity management as we are increasingly experiencing in several parts of the world, territory

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61 Ljubljana Guidelines, no. 39.

62 The reference to rights of "peoples belonging to a minority" added to the values on which the EU is grounded (article 2 TEU as amended by the Treaty of Lisbon in 2009) does not seem to provide any specific power in this field. See more extensively Toggenburg, G. N. (2012). The Dark and the Bright Side of the Moon: Looking at Linguistic Diversity Through the Telescope of the Common Market. In F. Palermo *et al*. (eds.) *Globalization, Technologies and Legal Revolution*, 275-315.

63 Inter alia cases Mutsch (*Ministere Public v. Robert Heinrich Maria Mutsch*, C-137/84, 11 July 1985), Bickel and Franz (*Criminal proceedings against Horst Otto Bickel and Ulrich Franz,* C-274/96), Angonese (C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*), Kamberaj (C-571/10, *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano and Others*). See for further analysis Palermo, F. (2011). The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ. *Maastricht Journal of European and Comparative Law*, 8 (3), 299–318 and Toggenburg, G. N.

64 See inter alia case C-145-04, *Spain v. UK* on the right to vote for the European Parliament for non-citizens (following the seminal ruling of the European Court of Human Rights of 18 February 1999, case no. 24833/94, *Matthews v. United Kingdom*) and case C-300/04, *Eman and Sevinger v. College van Burgemeester*, where the Court held that also the opposite situation is admissible, i.e. to deny the right to vote to some category of European citizens based on their residence (in this case, Dutch citizens of the Antilles). See also ECtHR, judgment 19 October 2004, *Melnitchenko v. Ukraine*.

maintains its central role if its understanding moves away from an old-fashioned design as something simple, static, hard-law based, and exclusive, toward a more modern factor that is necessarily complex, variable, inclusive, and also based on several soft-law instruments. Complexity, variability, nonexclusivity, soft persuasion instead of hard imposition are key elements of the modern law of minorities.[65]

4. CONCLUDING REMARKS: GOVERNANCE VERSUS OWNERSHIP?

Notwithstanding all such theoretical and practical developments towards a more sophisticated and inclusive approach to territory, much of the debate surrounding it is still – often involuntarily – trapped in the Westphalian nation-State discourse. Territory is still seen in terms of something "belonging" to groups competing for the ownership and, where territorial autonomy is concerned, as one (majority) group accommodating another (minority), thus as an instrument to mitigate the deficits of minority participation by replicating the nation-state on a smaller scale.

What in this paper has been called "the law of ownership" is the legal reflection of such an approach in constitutional and legal regulations which, in the name of accommodations, implicitly deal with territory in terms ownership. The logic behind this is simple and perhaps inevitable: groups put forward claims over specific territories and the legal system graduates the intensity of sovereignty (from full – own statehood – to partial – territorial autonomy) depending on the (political, economic, military) strength of the demands. If the right balance between claims and concessions is made, such type of "Westphalian autonomy" regulated by the law of ownership works relatively well, as it quite effectively makes it possible for territorially compact minority groups to manage their own affairs by simply controlling (or having a greater influence on) the devolved institutions.

This view, however, reveals the same flaws as the nation-state approach, which pretended that territories be homogeneous and dominated by one titular group (the nation), in some case granting some rights (up to a certain degree of control to "their own" territory) to other recognized groups. Not only is such view far too narrow and simplistic in today's world, but it is often the reason why fragile democracies reject it and why vocal (or even secessionist) minorities invoke it. The fear of autonomy on the side of the States and its frequent overestimation on the side of some minority groups are inversely proportional to the stability of democracies: a strong democracy is not afraid of autonomy, and a democratic minority usually does not see it as the first step towards independence. But the more autonomy is presented as an instrument for ethnic self-governance, the more it becomes a threat.

This paradox is particularly evident in the post-communist world. To a large extent, the ethnicization of autonomy in the post-communist countries is the main legacy of the communist past. This is still the case in China, where the law on 'national regional autonomies' equals autonomy with ethnic self-government,[66] but also in Russia, where the

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[65] Palermo, F., Woelk, J. (2005). From Minority Protection to a Law of Diversity? Reflections on the Evolution of Minority Rights. *European Yearbook of Minority Issues*, 3. Leiden/Boston: Brill. 5-13. and the following remarks by Malloy, T. H. (2006). Towards a New Paradigm of Minority Law-Making: A Rejoinder to Palermo and Woelk's Law of Diversity. *European Yearbook of Minority Issues*, 4, 2004/2005 Leiden/Boston: Brill, 5-27.

[66] Ghai, Y., Woodman, S. (2009). Unused powers: autonomy legislation in the PRC. *Pacific Affairs,* 82, 29-46; Davis, M.C. (2008). Establishing a Workable Autonomy in Tibet. *Human Rights Quarterly*, 30, 227-58.

very names of the sub-state entities depend on whether their territorial basis corresponds to the ethnic divisions of the populations or not.[67] This is also the reason why hardly any territorial autonomy regime has been established in former communist countries – and the few ones resulted in either cancellation of autonomy[68] or in de facto secession.[69] In fact, not unlike during communism, ethnic autonomy is still in practice accepted only if it is limited to folklore and has no political significance. Substantive autonomy, instead, is immediately linked to (threats of) secession because a different concept of autonomy is simply not imaginable.[70] The paradoxical outcome is that the predominant understanding of autonomy in post-communist countries still does not differ substantially from that of the former Soviet Union which was, effectively, "a pseudo-federation of (on paper) ethno-territorial republics".[71] And the international community, albeit involuntarily, endorses this view of autonomy by default, refusing to openly engage in the development if a more territorial and less ethnic approach to autonomy.

Territorial autonomy has, however, also an indirect and perhaps even more important meaning, including for minorities, provided it is divorced from the law of ownership. Although it is not at all a recipe for success,[72] autonomy is in fact first and foremost an instrument of good governance, which implies targeting a territory as a whole and not only the dominant group within it. Autonomy was actually devised for governance purposes and this function becomes even more relevant the more complex the society and thus the more complex the administration. This is the main reason why the number of federal or quasi-federal countries has more than tripled in the course of the 20th century, and at present the majority of the world's population lives under federal or quasi-federal rule.[73]

In other words, territorial autonomy is an instrument for the management of complexity. And as all countries are increasingly diverse and increasingly complex with respect to

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67 See Tarr, G. A. (1999). Creating Federalism in Russia. *South Texas Law Review,* 40.

68 The extent to which an autonomy can be considered only existing on paper largely depends on subjective and ultimately political evaluations. However, it seems incontestable that former soviet autonomy regimes such as Karakalpakstan in Uzbekistan or Adjara in Georgia only exist on paper. One could argue that the autonomy of "ethnic" subnational entities in Putin's Russia (from Tatarstan to Chechnya) has decreased to a level that puts the very existence of autonomy into question, and also some autonomous regions in former Yugoslavia such as Vojvodina or Istria are at present more "normalized" than in the past.

69 Leaving aside the peculiar case of Kosovo and the entities in Bosnia, one could think of so called "frozen conflicts" and to the most developed autonomy regime of the post-soviet time: Crimea, which recent annexation by Russia represents a self-realizing prophecy. See Wydra, D. (2004). The Crimea Conundrum: The Tug of War Between Russia and Ukraine on the Questions of Autonomy and Self-Determination. *International Journal on Minority and Group Rights*, 10 (2), 111–130.

70 Brubaker, R. (1996). *Nationalism Reframed: Nationhood and the National Question in the New Europe.* Cambridge: Cambridge University Press, 30-31.

71 Khazanov, A. M. (1997). *Ethnic Nationalism in the Russian Federation*. Daedelus, 126.

72 Comparative practice shows examples of both successful and failed territorial arrangements. See for illustration and examples 8:1 *Ethnopolitics* (March 2009), with papers by Brown, G .K. Federalism, Regional Autonomy and Conflict: Introduction and Overview, 1–4; McGarry, O'Leary (2009), 5–25; and Wolff (2009), 27–45.

73 See Hueglin, T. O., Fenna, A. (2006). *Comparative Federalism: A Systematic Inquiry*. Toronto: Broadview Press, 3.

the governance functions to be performed, autonomy has benefits that go beyond minority self-government or the protection of ethno-cultural differences. If a territory, irrespective of its ethnic composition, can autonomously decide on a number of issues (alone or in cooperation with other territories, belonging to the same or to a different country, sharing the same problems),[74] it is likely that the decisions will be qualitatively better and the territory will develop more harmoniously with benefits extending to all communities settled there.

Furthermore, autonomy is a mechanism for enhancing democracy; it is about shared and thus de-concentrated powers.[75] Therefore, it could prove particularly helpful in contexts in democratic transition but also in more consolidated areas in order to prevent drawbacks in conflict settlements based on territorial autonomy. While there is no right to autonomy for persons belonging to national minorities, there is a right to democratic governance, which autonomy might help to establish.

This might indirectly but significantly benefit minorities as well, as minority issues are embedded in larger contexts and cannot be disconnected from them. Thus, the more efficient overall governance is, the less likely it is that minority rights will be neglected and even less likely that minority issues will develop into conflicts. In fact, the bigger the problems are in terms of territorial, democratic and economic development, the more likely ethnic conflicts will be. In turn, the efficiency of the State structure – to which autonomy can effectively contribute if properly used and understood – is a powerful tool for providing the appropriate conditions for minority rights to be respected and for accommodating diversity issues.

Admittedly, in some cases also the opposite is true: ethnic self-government can ease tensions and, if this is the case, may contribute to the overall development of a territory. But this depends on a number of circumstances, including the consent of the State to ethnic autonomy,[76] which is not explicitly given in most contexts, or just reluctantly acknowledged following a violent conflict.[77] Thus, a territorial approach to autonomy is more likely to benefit ethnic groups than an ethnic approach would tend to benefit a territory as a whole.

In sum, only if the law of ownership is replaced or at least strongly complemented by the law of governance, and territories are seen as shared common goods rather than as private property of one or more groups, the full potential of territories as tools for effective governance can be developed and, conversely, their conflict potential be reduced.

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[74] See Palermo, F. (2008) "Bridges" in Self-Determination Disputes? External Relations of Sub-National Entities and Minority Groups. In: M. Weller, B. Metzger (eds.) *Settling Self-determination Disputes. Complex Power-Sharing in Theory and Practice*. Leiden-Boston: Martinus Nijhoff, 667-688.

[75] See Weller, Wolff (eds.). (2005).

[76] See Gagon, Tully (eds.). (2001).

[77] According to Dinstein, "autonomy is most often only reluctantly granted, and usually ungratefully received": Dinstein, Y. (1981). Autonomy. In: Y. Dinstein, (ed.) *Models of Autonomy*. Tel Aviv: Tel Aviv University Press, 302.

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Manjine, teritorije i zakon o vlasništvu. Povratak osnovama i put napred

Rezime: *U javnom pravu, koncept imovine igra nesumnjivo mnogo ograničeniju ulogu nego u privatnom pravu. Međutim, ako se pogleda izbilza, dobija se sasvim drugačija slika. Zapravo, u javnom (nacionalnom i međunarodnom) pravu imovina je manje (ako je uopšte) regulisana, ali ne i manje važna nego u privatnom pravu. Umesto toga, implicitno se predpostavlja i razvija više u kolektivnom nego u individualnom smislu. Naročito u kontekstu nacionalne države, teritorija je vlasništvo države, a država vlasništvo grupe ljudi (dominatne nacije), čija se moć upravljanja teritorijom naziva suverenitet. Iz tog razloga, kad se pojavi pitanje kako upravljati sa teritorijom pretežno naseljenom manjinskom grupom, odgovori različitih uključenih aktera mogu biti dijametralno suprotni. To je u osnovi zato što se veza između ljudi i teritorije uvek postavlja u smislu vlasništva: ko „poseduje" teritoriju? I kako postupati sa onima koji nastanjuju teritoriju bez (da budu viđeni kao) da je poseduju? Ovaj rad istražuje odgovore na takva pitanja. Fokus će biti na izazovima koje postavljaju režimi autonomije kao instrumenti za rešavanje pitanja manjina, uključujući evolutivni koncept teritorije. U tom kontekstu, biće analizirana različita shvatanja veze i nedavna praksa odabranih međunarodnih tela, što će dovesti do nekih zaključnih napomena. Biće argumentovano da je teritorija nezaobilazna referentna tačka, ali da mnogi aspekti nisu dovoljno obrađeni, kao što je pitanje adresata takvih uređenja, evolucija sa kojom se koncepti povezani sa manjinama suočavaju u današnje vreme, a koja je obeležena izazovima raznolikosti i celokupnog razumevanja teritorijalnih uređenja.*

***Ključne reči**: etnička pripadnost, manjine, teritorije, vlasništvo, autonomija.*

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Ugovor o prodaji sa pravom otkupa

(Pactum de retroemendo)

Apstrakt: Iako je zakonsko uređenje ovog ugovora kao posebnog imenovanog modaliteta osnovnog tipa ugovora o prodaji izostalo u našem pozitivnom zakonodavstvu, njegov značaj za današnji savremeni pravni promet je nesumnjiv. Ugovori sa o prodaji sa pravom otkupa se i danas zaključuju i sastavni su dio živog organizima našeg ugovornog obligacionog prava. To je uočeno i od strane Komisije za izradu Građanskog Zakonika Republike Srbije koja je Prednacrtu novog građanskog Kodeksa predvidila pravno uređenje ovoga značajnog pravnog posla. 1 Na taj način je izražena intencija Komisije da se konačno popuni pravna praznina koja i danas postoji u srpskom obligacionom ugovornom pravu u pogledu zakonskog uređenja ovoga pravnog posla kao posebnog imenovanog ugovora. Ugovori o prodaji sa pravom otkupa su valjani pravni poslovi koji i danas proizvode pravna djestva, pod uslovom da su zaključeni u skladu sa opštim načelima našeg ugovornog prava, u granicama propisanim pozitivnim zakonskim i podzakonskim propisima i da nisu u suprotnosti sa javnim poretkom i dobrim običajima. U ovom radu, autor se osvrnuo na porijeklo i istorijski razvoj ovog modaliteta ugovora o prodaji, pojam, osobine i predmet ugovora, uključujući tu i prava i obaveza ugovornih strana, izložio značajnija shvatanja pravne nauke o pravnoj prirodi i trajanju ugovora o prodaji sa pravom otkupa, te ukazao na potrebu njegovog zakonskog uređenja kao imenovanog ugovora.

Ključne riječi: prodaja, pravo otkupa, pravna priroda, trajanje.

Slobodan Stanišić
redovni profesor, Fakultet pravnih nauka Univerzitet "Apeiron" Banja Luka, advokat@blic.net; profesor.stanisic@gmail.com

1. OPŠTA RAZMATRANJA

Na osnovu ugovora o prodaji, predajom, kao načinom sticanja, kupac stiče pravo svojine kao najšire ovlaštenje u pogledu predmeta prodaje. Takvo široko ovlaštenje kupca podrazumjeva da on može, u granicama koje ustanovljava pozitivno pravo, sa kupljenom stvari slobodno raspolagati, što bi značilo da stvar na kojoj ima pravo svojine ili pravo koje je pribavio, u načelu, može prenositi pravnim poslovima *inter vivos* i *mortis causa*. Sljedstveno tome, kupac može stvar na kojoj ima pravo svojine, uz uslov da ne postoje kakva zakonska ograničenja, prodati ili na drugi način otuđiti bilo kada

[1] Radni tekst Građanskog zakonika Republike Srbije (2015), čl. 702-710, Beograd, Vlada Republike Srbije, Komisija za izradu Građanskog zakonika.

i bilo kome, pa i onome, od koga ju je kupio. U takvom slučaju, kada kupac, nakon zaključenja ugovora o prodaji i sticanja svojine na predmetu prodaje, proda stvar licu od koga je istu prethodno kupio, radilo bi se o novom ugovoru o prodaji sa izmjenjenim položajem ugovornih strana. U tom novom ugovoru o prodaji, prvobitni kupac dobija položaj prodavca, a prvobitni prodavac – položaj kupca. Tada kažemo da postoje dva samostalna i odvojena ugovora o prodaji, od kojih svaki ima samostalno i nezavisno pravno djestvo. Ovakva dva samostalna i međusobno nezavisna ugovora o prodaji treba strogo razlikovati od ***ugovora o prodaji sa pravom otkupa*** kod kojega prodavac, u sporazumu sa kupcem, jednom posebnom klauzulom sadržanom u osnovnom ugovoru o prodaji ili na osnovu posebnog ugovora, za sebe ustanovljava odnosno zadržava pravo da stvar koju je prodao, u određenom roku, uz vraćanje novca koji je primio na ime cijene, otkupi od kupca. Da bi se radilo o ugovoru o prodaji sa pravom otkupa nužno je, dakle, da je pravo otkupa ugovoreno u trenutku zaključenja osnovnog ugovora, a ne nakon njegovog zaključenja, jer se u ovom potonjem slučaju ne bi radilo o prodaji sa pravom otkupa kao jednom ugovoru, već o dva posebna ugovora o prodaji sa samostalnim i nezavisnim pravnim djestvima o kojima smo govorili na početku ovoga izlaganja, a u kojima prodavac i kupac, kao ugovorne strane, imaju suprotne uloge.

U pravnoj nauci je izraženo shvatanje da je ugovor o prodaji sa pravom otkupa, u stvari, takav sporazum prodavca i kupca kojim se ustanovljavaju određene pogodnosti za ugovorne strane, mislići pri tome prvenstveno na prodavca, koji, na osnovu takvog ugovora, za stvar koju je dao kupcu, dolazi do određene sume novca koja odgovora utvrđenoj prodajnoj cijeni, stim da stvar koju je prodao kupcu može nakon isteka određenog vremena, pozivajući se na pravo otkupa, uzeti od njega uz povrat novca primljenog na ime prodajne cijene. Koristi, odnosno pogodnosti od ovakvog pravnog posla koji se zove prodaja sa pravom otkupa nesumnjivo može imati i sam kupac, jer je stvar iskorištavao kao njen vlasnik za sve vrijeme trajanja ugovora, dakle, sve do trenutka dok je prodavac, pozivajući se na svoje pravo otkupa, od njega, ne zatraži.

Drugim riječima, iza prodaje sa pravom otkupa se krije svojevrstan sporazum ugovornih strana o zajmu novca obezbjeđen pravom zaloge, gdje se kupac pojavljuje kao "zajmodavac", a prodavac kao "zajmoprimac." Na osnovu ovakvog pravnog posla, prodavac dolazi do iznosa novca koji odgovara kupoprodajnoj cijeni stvari koju je ustupio kupcu koji može upotrijebiti, stim da ima pravo da, u određenom roku, uzme (otkupi) stvar od kupca i obavezu da vrati kupcu novac koji je od njega primio na ime prodajne cijene , dok kupac stiče pravo da stvar, ako hoće, upotrebljava i obavezu da stvar vrati prodavcu ako se ovaj pozove na svoje pravo otkupa, stim što se koristi koje je kupac imao od eventualne upotrebe stvari pojavljuju kao *"kamata na sumu novca koju koristi prodavac."* [2] Zbog svega navedenog, neki naši stariji pravni pisci[3] su ovaj ugovor o prodaji sa pravom otkupa upoređivali sa "*hipotekom i zalogom sa antihrezom."*[4] Inače, podsjećanja radi, klauzula o antihrezi (*pactum antichreticum*)[5] je posebna ugovorrna odredba sadržana u ugovoru o zalozi na osnovu koje se založnom povjeriocu izuzetno daje pravo da stvar koju je primio u zalogu može koristiti, tj. da sa nje može ubirati i prisvajati plodove (prirodne i civilne) i druge koristi ili založenu stvar upotrebljavati na neki drugi način.

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[2] Perović, S. (1980). *Obligaciono pravo – Knjiga prvo.* Beograd: Privredna štampa, 556.

[3] Perić, Ž. (1921). *O ugovoru o kupovini i prodaji*, *III*, Beograd: IKP Geca Kon, 15 i dalje.

[4] Perović. (1980). 556.

[5] lat. *pactum antichreticum, antichresis* – sporazum o antihrezi.

No, bez obzira na pomenute lukrativne ciljeve koje stranke postižu zaključenjem ugovora o prodaji sa pravom otkupa, vrlo je važno ukazati na važno krajnje djestvo ovoga ugovora. Ono se manifestuje u ograničenju kupčevog prava raspolaganja samom supstancom stvari, jer on, za vrijeme trajanja prava otkupa ugovorenog u korist prodavca, ***ne može otuđiti stvar koju je kupio***. Prema tome, za ugovoreno vrijeme trajanja otkupa, predmet prodaje je izvan pravnog prometa. Ugovori o prodaji sa pravom otkupa, nerijetko, u sebi kriju zabranjene i nedozvoljene motive ugovornika koji takvim ugovorima daju atribute protivzakonitog ili čak zelenaškog pravnog posla, zbog čega treba upotrijebiti posebnu pažnju prilikom ocjene valjanosti ovakvih ugovora.[6]

2. PORIJEKLO I ISTORIJSKI RAZVOJ

Prodaja sa pravom otkupa kao ugovor kojim se prodavac, već prilikom zaključenja ugovora, sporazumio sa kupcem da zadržava pravo da stvar koju je prethodno prodao kupcu, nakon izvesnog vremena od njega ponovu kupi, odnosno uzme nazad uz vraćanje kupcu kupovne cijene, bila je poznata već u rimskom pravu i to kao *pactum de retroemendo*[7]. Na osnovu ovoga dodatnog pakta uz ugovor o prodaji (*pacta adiecta*[8]), prodavac bi stekao pravo da *"...jednostranom voljom prekupi stvar od kupca..."* po istoj cijeni po kojoj ju je i prodao, osim ako nije drugačije ugovoreno.[9] Ovakvi sporazumi su se u masovno praktikovali uz ugovor o prodaji u klasičnom rimskom pravu.

Ugovor o prodaji sa pravom otkupa uređuju i poznati evropski kodeksi 19 vijeka, kao što su Francuski Code civil[10] , austrijski Građanski zakonik[11] i njemački Građanski zakonik[12]

Prema austrijskom Opštem Građanskom zakoniku koji se između dva svjetska rata primjenjivao u jugoslovenskim zemljama i čija su neka pravna pravila aktuelna i danas iz razloga što ZOO nije uredio ovaj modalitet ugovora o prodaji kao poseban imenovani ugovor, pravo prodavca da od kupca kupi stvar koju mu je prethodno prodao pripada prodavcu *samo za njegovog života* i odnosi se samo na *nepokretne stvari*.[13] Prema ABGB prodaja sa pravom otkupa se nazivala *"priuzdržanje nazad kupiti stvar"*. Pravo prodavca na pridržaj je, prema ABGB, strogo lično pravo i ne može se prenositi.[14] Ako je pravo upisano u javne knjige isto se može isticati i prema trećem licu, pri čemu će se ispitivati njegova savjesnost.

Ugovor o prodaji sa pravom otkupa regulisan je i njemačkom Građanskom zakoniku pod nazivom *"pravo ponovne kupnje"*. Pravo ponovne kupovine koje je prodavac zadržao na osnovu ugovora o prodaji realizuje se neformalnom izjavom prodavca upućenom kupcu da vrši svoje pravo otkupa, pri čemu cijena po kojoj je stvar prodata važi za ponovnu kupo-

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6 Perović (1980), 556.

7 lat. *pactum*-sporazum, ugovorna klauzula, uglavak; lat.*retroemere* – nazad kupiti.

8 lat. *pactum* – nagodba, sporazum, klauzula u ugovoru; lar.*adiectus* (od glagola *adicere*) – dodavati; lat. *pactum adiectum* – neformalna klauzula u ugovoru, odnosno dodatak ugovoru kojima se mijenjaju izvjesne tipične odredbe istoga ugovora.

9 Stojčević, D. (1960). *Rimsko obligaciono pravo*. Beograd: Univerzitet u Beogradu, Zavod za izdavanje udžbenika NR Srbije, 86.

10 Vid. čl.1587 i 1588 *Code civil*.

11 Vid. § 1068 ABGB.

12 Vid. §§ 497-503 BGB.

13 Vid. § 1070 ABGB.

14 *Ibid.*

vinu stvari od strane prodavca.[15] Na osnovu ugovora o prodaji sa pravom otkupa, kupac je dužan je predmet prodaje predati podavcu zajedno sa njegovim pripatcima.[16]

Prodaju sa pravom otkupa je poznavao i srpski Građanski zakonik. Prema ovom kodeksu, prodaja sa pravom otkupa postoji kada prodavac u sporazumu sa kupcem zadrži prvo da stvar koju je prodao, od kupca nakon određenog vremena ("na urečeno vreme"), otkupi tako da od kupca dobije stvar koju mu je prodao uz plaćanje njene cijene.[17] Pravo prodavca na otkup traje za njegovog života i ne može se prenositi na nasljednike.[18] "Pravo na otkup se ne može zadržati na štetu i uštrb trećega."[19] Više o ugovoru o prodaji sa pravom otkupa u srpskom pravu s kraja XIX i početka XX vijeka, vidi u dijelu naših izlaganja o modalitetima ugovora o prodaji prema srpskom Građanskom zakoniku.

Prodaja sa pravom otkupa bila je predviđena i u Skici za zakonik o obligacijama i ugovorima.[20] Prema Skici prodaja sa pravom otkupa postoji kada prodavac "...posebnom odredbom ugovora zadrži za sebe pravo da raskine ugovor i uzme stvar natrag, a kupcu vrati cenu (pravo otkupa)."[21] Pravo otkupa može biti ugovoreno samo istovremeno sa prodajom, a kad je ugovoreno docnije onda je to novi ugovor o prodaji sa odložnim uslovom između istih lica, ali sa promenjenim ulogama."[22] U slučaju ugovorenog prava otkupa u korist prodavca, kupac ne može otuđiti niti opteretiti stvar, niti na ovoj vršiti suštinske promjene.[23] Otuđenje i opterećenje stvari nema djestva prema prodavcu ako je treće lice znalo ili nije moglo da ne zna za prodavčevo pravo otkupa i prodavca , u tom slučaju može tražiti vraćanje stvari od trećeg lica kao i skidanje tereta.[24]

Prema Skici za Zakonik o obligacijama i ugovorima pravo otkupa nepokretnih stvari se može ugovoriti najduže za 6 godina, a pokretnih stvrai najduže za tri godine[25], ali se ugovoreni rok ne može naknadno produžiti.[26] Ako trajanje prava otkupa nije zakonom određeno ili ako je ugovoren duži rok nego što je zakonom dozvoljeno, smatraće se da je ugovoren najduži dozvoljen rok. [27]

Zakon o obligacionim odnosima uopšte nije ni regulisao prodaju sa pravom otkupa kao modalitet ugovora o prodaji i to iz razloga što su redaktori ZOO smatrali da je ovaj modalitet ugovora karakterističan za nerazvijene pravne odnose i da nema posebnog pravnog značaja u u uslovima sve razvijenijeg pravnog prometa roba i usluga jer ova modifikacija osnovnog ugovora o prodaji u savremenom prometu nije toliko česta da bi je trebalo regulisati kao zaseban imenovani ugovor.

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[15] Vid. § 497 BGB.
[16] Vid. § 498 BGB.
[17] Vid. § 661 SGZ.
[18] Vid. § 662 SGZ.
[19] Vid. § 663 SGZ.
[20] Konstantinović M. (1969). *Obligacije i ugovori, Skica za Zakon o obligacijama i ugovorima*. Beograd: Pravni fakultet u Beogradu, 143 (čl. 466-468).
[21] Vid. čl. 466, st.1 Skice za Zakonik o obligacijama i ugovorima.
[22] Vid. čl. 466, st. 2 Skice za Zakonik o obligacijama i ugovorima.
[23] Vid. čl. 467, st. 1 Skice za Zakonik o obligacijama i ugovorima.
[24] Vid. čl. 467, st. 2 Skice za Zakonik o obligacijama i ugovorima.
[25] Vid. čl. 468, st. 1 Skice za Zakonik o obligacijama i ugovorima.
[26] Vid. čl. 468, st. 2 Skice za Zakonik o obligacijama i ugovorima.
[27] Vid. čl. 468, st. 3 Skice za Zakonik o obligacijama i ugovorima.

To što ugovor o prodaji sa pravom otkupa nije regulisan u ZOO kao imenovan ugovor ne znači da se ovakvi ugovori ne mogu i danas zaključivati. Oni će, po opštim pravilima našeg obligacionog ugovornog prava, biti valjani i proizvodiće svoja pravna dejstva pod uslovom da su zaključeni u granicama određenim u zakonu odnosno da nisu u suprotnosti sa prinudnim propisima, javnim poretkom i dobrim običajima.

Na kraju ovih naših izlaganja o porijeklu i istorijskom razvoju ugovora o prodaji sa pravom otkupa treba reći da je Prednacrtu Građanskog zakonika Republike Srbije predviđeno pravno uređenje ugovora o prodaji sa pravom otkupa[28], čime je izražena težnja Komisije za izradu ovoga građanskog kodeksa da se konačno popuni postojeća pravna praznina koja je do sada postojala u srpskom obligacinom ugovornom pravu u pogledu zakonskog uređenja ovoga pravnog posla kao posebnog imenovanog ugovora.

3. POJAM UGOVORA O PRODAJI SA PRAVOM OTKUPA, PRAVA I OBAVEZE UGOVORNIH STRANA

Ugovor o prodaji sa pravom otkupa ili prodaja sa pravom otkupa jeste takav modalitet ugovora o prodaji na osnovu kojeg prodavac zadržava za sebe pravo odnosno ovlaštenje, da u određenom roku i pod određenim uslovima zahtjeva od kupca vraćanje stvari koju je ovome prethodno prodao odnosno da je otkupi od kupca za istu cijenu po kojoj ju je prethodno njemu i prodao. U domaćoj i stranoj nauci se zaključuje da ugovorom o prodaji sa ovakvom klauzulom, prodavac, u stvari zadržava pravo da u određenom roku uzme stvar nazad od kupca vraćajući mu cijenu.[29]

Klauzula koja ovlašćuje prodavca da zahtjeva od kupca vraćanje, odnosno predaju predmeta prodaje može biti sadržana u samom ugovoru o prodaji, ali i izvan njega, u obliku posebnog ugovora kojim se, u korist prodavca, ustanovljava pravo da u određenom roku od zaključenja ugovora istu stvar uzme od kupca po cijeni koju mu je kupac platio u trenutku zaključenja ugovora o prodaji.

U praksi, ova klauzula o pravu otkupa predmeta prodaje ustanovljava dva ovlaštenje prodavca:

- da kupcu isplati prodajnu cijenu odnosno da mu vrati onaj isti iznos novca koji je od njega primio na ime isplate kupoprodajne cijene , kao i
- da od kupca zahtijeva vraćanje prodate stvari.

Drugim riječima, ovakvom pogodbom, prodavac i kupac, u samom ugovoru ili izvan njega, sporazumno ugovaraju, u korist prodavca ovlaštenje, da ovaj može, ako hoće, u određenom vremenskom periodu od zaključenja ugovora (roku), ***raskinuti već zaključeni ugovor o prodaji***, od kupca uzeti nazad stvar koja je bila predmet prodaje i ovome vratiti kupovnu cijenu koju je od njega primio. U tom smislu se određuje pojam prodaje sa pravom otkupa i u Prednacrtu Građanskog zakonika Republike Srbije: *"Prodavac može*

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[28] Radni tekst Građanskog zakonika Republike Srbije (2015), čl. 702-710.

[29] Perić (1921), 13 i dalje; Blagojević B. (1939). *Posebni deo obligacionog prava - Ugovori, jednostrani pravni poslovi, građansko-pravni delikti*. Beograd: IKP Geca Kon a.d., 51; Vuković M. (1964). *Obvezno pravo, Knjiga II*. Zagreb: Školska knjiga, 230; Vizner, B., Kapor V., Carić S. (1971). *Ugovori građanskog i privrednog prava*. Rijeka: Riječka tiskara, 330; Konstantinović M. (1965). *Obligaciono pravo (prema beleškama sa predavanja)*. Beograd: Savez studenata Pravnog fakulteta u Beogradu, 241; Planiol, M., Ripert, G. (1952). *Traite elementaire de droit civil*. Paris: Dalloz, 821; Vid. §§ 661-663 SGZ; §§ 1068-1070 ABGB; § 497 BGB.

posebnom odredbom ugovora zadržati za sebe pravo da raskine ugovor i uzme stvar natrag, a kupcu vrati cenu (pravo otkupa).”[30]

Prema tome, radi se o ugovoru sa “unaprijed određenim trajanjem, čiji raskid ima retroaktivvno djestvo u tom smislu što se smatra da se pravo svojine prodavca nije ni gasilo još od trenutka zaključenja ugovora.”[31]

Kod ugovora o prodaji sa pravom otkupa kupac prodaje stvar prodavcu i to po ***istoj cijeni*** po kojoj ju je kupio od njega. Shodno tome, cijena po kojoj kupac ustupa stvar prodavcu kao ovlašteniku prava, nije različita od cijene po kojoj je kupac istu stvar prethodno kupio od prodavca, ona za njega nije povoljnija, što znači da ustupanjem iste stvari prodavcu po istoj cijeni, kupac ne ostvaruje nikakvu dobit. Riječ je dakle o istoj cijeni, odnosno istom iznosu novca koji je kupac isplatio prodavcu prilikom zaključenja ugovora koju mu prodavac, u vršenju svoga prava otkupa vraća nakon raskida ugovora.

Na osnovu prethodno iznesenog pojma ugovora o prodaji sa pravom otkupa zaključujmo da ovaj modalitet ugovora o prodaji ima određena bitna obilježja koja uvijek treba imati u vidu prilikom njegovog razgraničenja od drugih vrsta i modela ugovora o prodaji.

Prvo obilježje ugovora o prodaji sa pravom otkupa se manifestuje u vidu ograničenja kupčevog prava svojine. Ograničenje kupčevog prava svojine se sastoji u tome što on ne može sa stvari raspolagati za vrijeme trajanja prava otkupa ustanovljenog u korist prodavca.

Šta će se desiti, ako kupac u ugovorenom ili zakonom određenom vremenskom periodu ipak otuđi ili optereti stvar koja je bila predmet prodaje sa pravom otkupa?

Kakav je u tom slučaju položaj prodavca u odnosu na treće lice - sticaoca kojem je kupac otuđio stvar uprkos zabrani? Koja prava ima prodavac prema kupcu u takvom slučaju? Da li prodavac može svoje pravo otkupa suprostaviti i prema trećim licima, odnosno, da li njegovo pravo otkupa dejstvuje prema svima (*erga omnes*) ili ono proizvodi dejstvo samo između ugovornih strana (*inter partes*), tj.između prodavca i kupca?

S obzirom da kupoprodaja sa pravom otkupa zasniva prvenstveno obligaciona dejstva, tj. dejstvuje samo između ugovornih strana, dakle, samo između prodavca i kupca, možemo načelno izvesti zaključak, da u slučaju kada kupac u ugovoru o prodaji sa pravom otkupa, uprkos zabrani otuđenja stvari, ovu ipak otuđi trećem licu, prodavac neće imati pravo da od sticaoca zahtjeva vraćanje stvari s obzirom da nije vlasnik stvari, nego će imati pavo da od kupca zahtijeva naknadu štete. Da li će sa ovakvim zahtjevom prema kupcu prodavca uspjeti zavisi od savjesnosti sticaoca, tj od odgovora na pitanje da li je sticalac znao ii je prema okolnostima mogao znati za postojanje prava otkupa ili nije. Ako je treće lice kao sticalac bilo savjesno u sticanju, dakle, ako nije znalo niti je prema okolnostima moglo znati za postojanje prava otkupa, ono će postati vlasnikom stvari na osnovu ugovora o prodaji koji je zaključilo sa kupcem i odgovarajućeg zakonom propisanog načina sticanja. U takvom slučaju kupac neće uspjeti sa svojim tužbenim zahtjevom za naknadu štete usmjerenim prema kupcu. Naime, ako bi se trećem licu, kao savjesnom sticaocu, u ovakvoj situaciji, osujetilo njegovo pravo stečeno zakonitim pravnim osnovom i načinom sticanja, to bi predstavljalo snažan atak na sigurnost pravnog prometa i na pravnu sigurnost uopšte.

[30] Vid. čl. 702, st. 1 Prenacrta Građanskog zakonika Republike Srbije. Dostupno na: https://www.paragraf.rs/nacrti i predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html (15.5.2021).

[31] Toroman, M. (1975). *Vrste i modaliteti ugovora okupovini prodaji*. Beograd: Institut za uporedno pravo, 36.

Međutim ako je treće lice kao sticalac, znalo ili je prema okolnostima moglo znati za postojanje prava otkupa, onda pravo koje je treće lice steklo u takvim okolnostima nije pravno valjano, pa će prodavac, u takvom slučaju, uspjeti sa svojim zahtjevom za naknadu štete prema kupcu koji je stvar otuđio uprkos postojanju prava prava otkupa i zabrani otuđenja stvari povodom koje je pravo otkupa ustanovljeno. Na prodavcu, je dakle, teret dokazivanja nesavjesnosti trećeg lica.

Međutim, ako je predmet prodaje sa pravom otkupa bila nepokretna stvar, prodavac ima mogućnost da se obezbjedi u odnosu na treća lica na način što će svoje pravo otkupa upisati u javne knjige. U takvom slučaju, ako je upisano u javne knjige, podavčevo pravo otkupa, iako obligacione prirode, dejstvuje prema svima (*erga omnes*), pa i prema trećem licu kao sticaocu. Treće lice se, u toj situaciji, neće moći pozivati da mu pravo otkupa nije bilo poznato, jer se sa postojanjem prava otkupa u pogledu stvari moglo upoznati uvidom u javne knjige, koji uvid je, po samom zakonu, omogućen svakom zainteresovanom licu.

Drugo obilježje prodaje sa pravom otkupa je ograničeno trajanje prodavčevog prava otkupa. U pravnoj nauci i legislativi bilo različitih pogleda kada je u pitanju trajanje prava otkupa počev od onoga da, ugovarajući pravo okupa prodavac teži da obezbjedi svoj odeđeni zakonit i opravdan iimovinski interes, zbog čega trajanje ovoga prava ne bi trebalo uopšte ograničavati, do potpuno suprotnog shvatanja, da iz pravo otkupa ne može trajati beskonačno, već da ga treba ipak vremenski ograničiti, uz različito propisivanje ovih rokova u zavisnosti od toga da li su predmet otkupa pokretne ili nepokretne stvari. Konačno, u legislativi određenog broja evropskih zemalja izražava se i jedna podvrsta shvatnja o ograničenom trajanju prava otkupa, koja negira da se trebaju propisivati posebni rokovi za trajanje ovoga prava u pogledu poekretnih i nepokretnih stvari, već da je najbolje rješenje za sve stvari predvidjeti jedan jedinstveni zakonski rok trajanja prava otkupa u čijim okvirima bi ugovornici, u skladu sa svojim konkretnim potrebama i očekivanjima mogli, ugovarati određene rokove koji se ne bi mogli produžavati, a ako se dogodi da trajanje prava otkupa nije uopšte ugovoreno ili ako je ugovoreno duže trajenje od zakonskog roka, smatralo bi se da je u tom slučaju ugovoren najduži dozvoljen rok. O trajanju prava otkupa biće više govora u predstojećim izlaganjima.

Treće obilježje prodaje sa pravom otkupa se iscrpljuje u tome što na osnovu navedenog modaliteta ugovora o prodaji, prodavac stiče pravo da u ugovorenom ili zakonskom roku trajanja prava otkupa uzme stvar natrag od kupca, ali i obavezu da kupcu vati onaj isti iznos novca koji je od njega primio na ime kupopodajne cijene.

Dugim riječima, ovo obilježje prodaje sa pravom otkupa podrazumjeva da prodavac, na osnovu takvog ugovora, ima ovlaštenje, da raskine ugovor o prodaji koji je zaključio sa kupcem. Ovdje se postavlja pitanje, o kakvoj vrsti raskida ugovora o prodaji je u konkretnom slučaju riječ, odnosno da li je za raskid ugovoraa o prodaji dovoljna prosta izjava prodavca da vrši svoje pravo otkupa ili se raskid ugovora može ishoditi jedino angažovanjem suda, tj. podnošenjem tužbe. Pitanje je dakle, da li je potreban i dovoljan vansudski raskid ili je nužno podnošenje tužbe. Jugoslovensko obligaciono pravo se povodom ovoga pitanja opredjelilo za tzv. vansudski raskid ugovora o prodaji, dakle raskid prostom izjavom prodavca da vrši svoje ugovoreno pravo otkupa. Ovakvo stanoviše je zastupljeno i u domaćoj pravnoj nauci.[32]

[32] Perić (1921), 145; Konstantinović (1969), 143-144 (čl. 468-471 Skice za Zakonik o obligacijama i ugovorima); Perović (1980), 559.

Jednostrana izjava volje prodavca da vrši svoje pravo otkupa mora biti upućena konkretnom kupcu da bi proizvodila pravno dejstvo. Riječ je o neformalnoj jednostranoj izjavi volje prodavca, mada u pravnoj nauci postoje i druga mišljenja , tj. da se ova izjava može dati neposredno i izričito ili posredno[33], da ta izjava mora biti formalna ako su predmet prodaje i vršenja otkupa nepokretne stvari.[34] Prema trećem mišljenju ako se izjava ističe prema trećem, onda mora biti "obučena"u odgovarajuću formu iz koje bi se video tačan datum kada je učinjena."[35]

Kada je u pitanju forma izjave prodavca o vršenju prava otkupa, pravilno zaključuju neki naši pisci da navedena izjava kao jednostrana izjava volje, u načelu, treba biti neformalna, što je, kako kažu, u skladu i sa načelom konsensualizma u našem obligacionom pavu. Razlozi pravne sigurnosti ponekad nalažu da se ovakva izjava prodavca ipak mora zaodjenuti u određenu formu , u zavisnosti od toga, da li se za konkretni ugovor o prodaji zakonom traži da mora biti sastavljen u određenoj, po pravilu zakonom popisanoj formi. I same stranke mogu u ugovoru predvidjeti određenu formu za navedenu izjavu, u kojem slučaju izjava mora biti data u toj ugovorenoj formii. Naravno da stranke mogu i odustati od forme koju su pedvidjeli za izjavu volje prodavca o vršenju prava otkupa i to pogotoo onda kad je ugovor inače bio neformalno zaključen.[36]

Pravno dejstvo izjave volje prodavca upućene kupcu da vrši svoje pravo otkupa nastupa već u trenutku davanja te izjave, tako da eventualna sudska odluka o raskidu ugovora, u takvom slučaju, ima samo deklarativno dejstvo.

Inače, dejstvo izjave prodavca o vršenju prava otkupa ogleda se u stvaranju dvije obaveze, od kojih se jedna nameće kupcu, a druga prodavcu. Obaveza kupca se sastoji u vraćanju stvari koja je predmet prodaje i prava otkupa - prodavcu, a obaveza prodavca se sastoji u vraćanju kupcu onog iznosa novca koji je primio od kupca poosnovu prodajne cijene. Obaveza vraćanja stvari prodavcu i primljnog novca na ime cijene kupcu, mora se izvršiti na način kako je to predviđeno u ugovoru, a ako u ugovoru o tome nema nikakvih odredaba, obje obaveze (obaveza vraćanja stvari i cijene) ispunjavaju se istovremeno prema opštim pravilima o izvršavanju obaveza ugovornih strana iz ugovora o prodaji.

Pomenute obaveze koje terete kupca i prodavca , predstavljaju još jedno od obilježja ugovora o prodaji sa pravom otkupa.

Saglasno načelu autonomije volje, ugovorne strane mogu u ugovoru o prodaji predvidjeti da prodavac prilikom vršenja svoga prava otkupa plati više ili manje nego što je iznosila ugovorena kupopodajna cijena. U takvom slučaju, prema mišljenju nekih naših pravnih pisaca[37] , treba voditi računa o tome da li takve odredbe o visini iznosa koji se vraća na ime cijene pogoduju prekomjernom oštećenju ili zelenašenju, te u zavisnosti od toga odlučiti o pravnoj valjanosti takvih ugovornih klauzula.

U vezi sa obavezom prodavca da vrati ono što je primio od kupca na ime kupoprodajne cijene postavlja se nekoliko važnih pitanja.

Prvo se može postaviti pitanje da li je prodavac dužan da na novčani iznos koji je primio od kupca na ime prodajne cijene i koji ima obavezu da vrati kupcu, plati kamatu? Na ovo pitanje, u pravnoj nauci je dat negativan odgovor, što znači da je prodavac, u slučaju

[33] Vid. § 497 BGB; Vid. Vuković (1964), 231
[34] Konstantnović (1969), 144, čl. 470 Skice za zakonik o obligacijama i ugovorima,
[35] Perić (1921), 146
[36] Perović (1980), 559
[37] Perović (1980), 559-560

vršenja svoga prava otkupa, dužan kupcu vratiti samo onaj iznos koji je od njega primio na ime prodajne cijene, a ne i kamatu na taj iznos.[38] Ovo iz razloga, što obaveza plaćanja kamate može teretiti prodavca samo ako bude kasnio, dakle ako bude u docnji sa izvršenjem svoje obaveze vraćanja novčanog iznosa koji je primio na ime prodajne cijene. Međutim, da li će prodavac biti dužan platiti kamatu na iznos cijene koji vraća kupcu ako je već prilikom zaključenja ugovora o prodaji sa pravom otkupa ugovoreno da će biti dužan da plati kamatu na iznos prodajne cijene koju vraća? Na ovo pitanje, po našem mišljenju treba odgovoriti potvrdno, dakle, on će u takvom slučaju biti dužan platiti kamatu, ali samo ukoliko se u svakom konkretnom slučaju ustanovi da se takvom klauzulom u ugovoru bitno ne narušava načelo jednake vrijednosti uzajamnih davanja.

Osim obaveze da vrati ono što je primio od kupca na ime prodajne cijene, prodavac će, u slučaju vršenja svojeg prava otkupa, biti u obavezi da nadoknadi kupcu troškove koje ovaj imao u vezi sa zaključenjem ugovora[39], pod uslovom da u vezi snošenja tih troškova nije ništa drugo ugovoreno.

Posebno značajno je pitanje u vezi snošenja troškova se postavlja ako je predmet ugovora, za vrijeme dok se nalazio kod kupca, dobio na svojoj vrijednosti. Naime, ako je do povećanja vrijednosti stvari koja je bila predmet prodaje došlo usjed radnji kupca, prodavac će, u načelu , biti dužan da nadoknadi kupcu sve nužne i korisne troškove koje je ovaj imao i to do visine povećane vrijednosti stvari. Za slučaj da su kupčevi izdaci koja je bila predmet prodaje bili veći od njene povećane vrijednosti u trenutku vraćanja odnosno uzimanja stvari natrag od strane prodavca kao ovlaštenika prava otkupa, prodavac je dužan navedene izdatke nadoknaditi kupcu, ali samo do granice povećane vrijednosti stvari. Ako bi ti izdaci kupca u vezi poboljšanja stvari bili jednaki sa povećanom vrijednosti stvari, prodavac bi u tom slučaju bio dužan da ih snosi u cjelosti.

Drugačija je, međutim situacija, ako su izdaci koje kupac imao oko poboljšanja stvari manji od povećane vrijednosti stvari. U pogledu rješenja ovoga pitanja, u pravnoj nauci i legislativi, postoje dva shvatanja.

Prema jednom od njih, koje je prihvaćeno u austrijskom Građanskom zakoniku, ako su izdaci kupca manji od povećane vrijednosti stvari, prodavac je dužan da isplati kupcu iznos povećane vrijednosti.[40] To znači da povećana vrijednost stvari, u ovom slučaju pripada kupcu.[41]

Prema drugom shvatanju koje se zastupa u francuskoj legislativi, ako su kupčevi izdaci bili manji od povećane vrijednosti stvari, prodavac je dužan da nadoknadi kupcu samo izdatke koje je kupac imao za poboljšanje stvari, a ne iznos povećane vrijednosti stvari.[42] Dakle , naknada koju je u ovom slučaju prodavac isplatiti kupcu se može kretati samo u granicama izdataka koje je ovaj imao za povećanje vrijednosti stvari. Drugim riječima, prema ovom drugom shvatanju, povećana vrijednost stvari pripada prodavcu.[43]

Naša pravna nauka daje prednost prvom od izloženih shvatanja, prema kojem u slučaju kada su izdaci kupca, u trenutku vršenja prava otkupa i uzimanja stvari od strane pro-

[38] Konstantinović (1969), 144, čl. 472 Skice za zakonik o obligacijama i ugovorima; Perović (1980), 560

[39] Perić (1921), 45.

[40] Vid. § 1069 ABGB.

[41] Perović (1980), 560.

[42] Vid. čl. 1673 *Code civil*.

[43] Perović (1980), 560.

davca bili manji od povećane vrijednosti stvari, povećana vrijednost stvari pripada kupcu. Ovakvo shvatanje naše pravne nauke se brani činjenicom da je kupac, u vrijeme kada se vrijednost prodate stvari povećala bio njen vlasnik, kojem kao vlasniku stvari, u načelu, pripadaju i sve koristi koje ona donosi.[44] Uostalom, kupac, kao vlasnik stvari snosi i rizik za slučajnu propast, oštećenje ili smanjenu vrijednost stvari.

Međutim, ako povećana vrijednost stvari nije posljedica radnje kupca, već nekih drugih okolnosti (na primjer, stan koji je bio predmet prodaje je dobio na svojoj tržišnoj i upotrebnoj vrijednosti iz razloga što je u njegovoj neposrednoj blizini izgrađena podstanica gradske toplovodne mreže koja omogućava jednostavno priključenje toga stana na navedenu mrežu i uvođenje centralnog grijanja ili autobuska stanica, rekreacioni i tržni centar ili obdanište) , prodavac neće biti dužan da kupcu nadoknadi povećanu vrijednost stvari, već se njegova obaveza svodi samo na vraćanje kupovne cijene.[45]

4. PRAVNA PRIRODA UGOVORA O PRODAJI SA PRAVOM OTKUPA

Pronaženjem pravnih specifičnosti prodaje sa pravom otkupa koje ovaj modalitet ugovora o prodaji svrstavaju u određenu pravnu kategoriju određujemo njegovu pravnu prirodu.

U istraživanju pravne prirode ugovora o prodaji sa pravom otkupa je izneseno više teorijskih shvatanja koja ćemo na ovom mjestu sumarno izložiti.

Prema jednom od njih, u slučaju ugovora o prodaji sa pravom otkupa, kupac se smatra uslovnim vlasnikom stvari koju je kupio i njegovo vlasništvo nije konačno sve dok ne protekne vrijeme u kojem se prodavac može koristiti svojim ugovorenim pravom otkupa.

Drugim riječima, kupac stiče vlasništvo na predmetu prodaje uslovno – *pendente condicione*[46] i to samo ako se ne ostvari *raskidni uslov*, tj.ako se prodavac, u ugovorenom vremenu trajanja prava na otkup, ne bude koristio tim svojim pravom i na taj način ne ostvari (realizuje) svoje pravo otkupa. Tek kada protekne rok za vršenje prava otkupa, a prodavac, u tom roku, ne realizuje to svoje pravo, kupčevo pravo svojine na kupljenoj stvari (koje je stečeno po pravnom osnovu i zakonitim načinom sticanja) prestaje biti uslovno i postaje definitivno (konačno), jer se nije ostvario (raskidni) uslov koji se ogleda u vršenju prava otkupa na način da prodavac uzme stvar od kupca i ovome vrati cijenu koju je od njega primio. Ako bi prodavac, u predviđenom roku, uspio ostvariti pravo otkupa, raskidni uslov je ostvaren i smatralo bi se da kupac nije ni bio vlasnik stvari koja je bila predmet prodaje.

Prema iznesenom shvatanju, uslovnim vlasnikom stvari koja je predmet prodaje – vlasnikom *pendente conditione*, smatra se i prodavac i to pod odložnim uslovom, tj. *ako se pravo otkupa ostvari (realizuje)*. Ako se odložni uslov ispuni, tj.ako se realizuje pravo

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[44] Konstantinović (1969), 144, čl. 473 Skice za zakonik o obligacijama i ugovorima; Perić (1921), 50 – navedeno prema Perović (1980), 560.

[45] Perić (1921), 53 - navedeno prema Perović (1980), 560.

[46] lat.*"pendente codicione"* (od lat.*"pendere"* – visjeti i lat.*condicio* – uslov); Prema tome, *"pendente condicione"* je "izraz kojim se označava da se neki pravni posao, zaključen pod uvjetom, nalazi u tzv.*"visećem stanju",* tj. da je sudbina učinka tog pravnog posla – u vremenu dok se uvjet ne ispuni odnosno ne izjalovi – neizvjesna, jer on, može, zavisno od ishoda uvjeta, izazvati pravne posljedice - nastati ili prestati." - navedeno prema Romac, A. (1975). *Rječnih rimskog prava*. Zagreb: Informator, 408, odrednica *"pendente condicione"*.

otkupa, smatraće se da prodavac nije ni prestao biti vlasnik stvari koja je bila predmet prodaje, a ako se odložni uslov ne ispuni, tj. ako prodavac u roku za vršenje prava otkupa ovo svoje pravo ne realizuje, smatraće se da je on definitivno prestao biti vlasnik stvari koju je prodao kupcu i to od trenutka zaključenja ugovora o prodaji.[47] Iz izloženog proističe da su i kupac i prodavac, za vrijeme trajanja ugovorenog prava otkupa uslovni i privremeni i istovremeni vlasnici predmeta prodaje. Prodavac je *pendente condicione* vlasnik stvari pod odložnim uslovom (ako prodavac ne ostvari svoje pravo otkupa u ugovorenom roku), dok je kupac, takođe, *pendente coditione*, vlasnik stvari pod raskidnim uslovom (ako prodavac ostvari svoje pravo otkupa u ugovorenom roku).

Prema drugom shvatanju, ugovorna klauzula o pravu otkupa, predstavlja zaključenje novoga ugovora o prodaji u pogledu istoga predmeta prodaje i između istih lica -ugovornika, s tom razlikom što je u ovom novom ugovoru, zamijenjen položaj ugovornika u ugovoru, tako što je prvobitni prodavac sada u položaju kupca, a prvobitni kupac, u položaju prodavca, stim da je perfektnost odnosno postojanje ugovora o prodaji "...zavisno o ispunjenja odložnog uslova koji se sastoji u činjenici izjave prodavca da se koristi pravom otkupa"[48] , odnosno "...taj se ugovor ima smatrati perfektuiranim u momentu, kada raniji prodavac, u određenom roku, pod pretpostavkom da su ispunjeni svi potrebni uslovi, izjavi da se koristi svojim pravom na otkup svoje ranije prodate stvari." [49]

U ostala shvatanja o pravnoj prirodi ugovora o prodaji sa pravom otkups spadaju: shvatanje da se u slučaju ugovora o prodaji sa pravom otkupa radi o "obaveznoj ponudi na kupovinu ranijeg kupca upućenoj ranijem prodavcu" ; da je u stvari riječ o ugovornom odstupanju od ugovora i druga."[50]

Analizirajući iznesena shvatanja o pravnoj prirodi ugovora o prodaji sa pravom otkupa možemo, prije svega zaključiti, da se u slučaju prodaje sa pravom otkupa nikako ne može raditi o dva ugovora o prodaji u kojima ugovarači imaju zamjenjene uloge, već o jednom ugovoru u kojem je ugovoreno odnosno zasnovano pravo prodavca, da u određenom roku računajući od zaključnja ugovora, na osnovu jednostrane izjave volje o vršenju svoga prava otkupa može uzeti stvar od kupca uz istovremeno vraćanje kupcu onoga što je primio na ime kupoprodajne cijene. Vraćanje stvari od strane kupca i cijene od strane prodavca su posljedica vršenja prava prodavca – vršenja prava na otkup koje ustanovljeno sporazumom ugovornika.

Ni shvatanje o dvojstvu svojine prodavca i kupca, odnosno uslovnoj svojini prodavca i kupca nije prihvatljio, jer pravnu prirodu ugovora sa pravom otkupa treba prvenstveno određivati pomoću obligaciono-pravnih, a ne stvarno-pravnih kriterijuma.[51] Ako bi se prihvatila teza o dvojstvu prava svojine, narušio bi se princip isključivosti prava svojine. Zbog toga je prihvatljivo mišljenje nekih naših pravnih pisaca da ugovor o prodaji sa pravom otkupa ima pravnu prirodu ugovora o prodaji sa raskidnim uslovom. Radi se o potestativnom uslovu, jer od volje prodavca zavisi hoće li se on, u roku određenom u ugovoru, uopšte koristiti svojim pravom otkupa. U slučaju da prodavac izjavi da koristi svoje pravo

[47] Perić (1921), 160– navedeno prema Perović (1980), 561.

[48] Perović (1980), 561.

[49] Blagojević, B. (1939). *Posebni dio obligacionog prava- Ugovori , jednostrani pravni poslovi, građansko-pravni delikti*. Beograd: IKP Geca Kon, 52.

[50] Vuković (1964), 230; Loza, B. (1977). *Obligaciono pravo II" – Posebni dio*. Sarajevo: NGTP Dom štampe, Zenica, 51 – navedeno prema Blagojević (1939), 52; Perović (1980), 560-561.

[51] Perović (1980), 562.

otkupa, raskidni uslov je ostvaren, ugovor o prodaji je raskinut, pa su ugovornici dužni da vrate jedna drugoj ono što su po osnovu takvog pravnog posla primile. Prema tome, u slučaju prodaje sa pravom otkupa ne može biti riječi o ugovoru o prodaji sa odložnim uslovom, jer nastanak prava i obaveza iz toga ugovora ne zaviisi od neke buduće neizvjesne okolnosti. Zaključenjem ugovora o prodaji sa pravom otkupa ustanovljena su prava i obaveze stranaka, a predajom predmeta prodaje i isplatom cijene, glavne obaveze prodavca i kupca su i ispunjenne. Dakle, u ovakvoj situaciji se "...ne može govoriti o odložnom uslovu sa dejstvom na sam ugovor o kupoprodaji, kao neizvesnoj okolnosti od čijeg nastupanja zavisi nastanak prava i obaveza iz ugovora. Međutim, ukoliko se prodavac, u određenom roku, opredeli za vršenje prava otkupa i to saopšti dužniku na siguran način, onda njegova izjava ima sve odlike raskidnog uslova.Pravna dejstva koja je do toga momenta ugovor proizvodio – prestaju i stvara se obaveza povraćaja stvari i cene."[52]

Pored navedenih pitanja u vezi sa pravnom prirodom ugovora o prodaji sa pravom otkupa, nužno se nameće i pitanje kakva je pravna priroda samog prava otkupa koje je prodavac za sebe ugovorio u trenutku zaključenja ugovora o prodaji? O tome su izražena različita shvatanja u pravoj nauci i legislativi, pa ćemo, ovom prilikom i na njih ukazati.

Naime, prije svega se postavlja pitanje da li pravo otkupa djeluje samo između prodavca i kupca (*inter partes*) ili ono možda dejstvuje i prema trećim licima (*erga omnes*)?

Većina pravnih teoretičara obligacinog prava koji su u svojim radovima razmatrali pitanje pravne prirode prava otkupa, smatra to pravo obligacionim pravom odnosno jednim ličnim i ograničenim pravom. Po njima, pravo otkupa, kao obligaciono pravo, ima dejstvo, po pravilu, samo između ugovarača (*inter partes*), dakle, između prodavca i kupca, kao strana u obligacionom odnosu nastalom ugovorom o prodaji. Pravilo je dakle, da pravo otkupa ima samo *obligaciono pravno dejstvo*. Samo izuzetno, ako je predmet prava otkupa nepokretnost i ako je upisano u javne knjige, pravo otkupa može imati i dejstvo prema svima (*erga omnes*).[53] Ako treće savjesno lice kupi stvar od ranijeg kupca ili na njoj stekne kakvo stvarno pravo (na primjer, zalogu, službenost), prodavac neće moći da od njega, vindikacionom tužbom traži da mu stvar vrati, već može samo, od kupca zahtijevati naknadu štete.

Mnogo veća rasprava u pravnoj nauci se odnosila na prenosivost prava otkupa nasljeđivanjem i pravnim poslom.

Prema jednom od dva potpuno suprotna shvatanje, pravo otkupa je neprenosivo. Ono se ne može prenijeti na drugoga čak ni putem nasljeđivanja.[54] Neprenosivost prava otkupa se zagovarala i u nekim starijim evropskim građanskim kodeksima koji su se primjenjivali u jugoslovenskim zemljama između dva svjetska rata i u najširem smislu ostvarili jak uticaj na naše obligaciono pravo. Tako, na primjer, austrijski Građanski zakonik propisuje apsolutnu neprenosivost prava otkupa: *" Pravo da se stvar nazad kupi, može se priuzdržati samo glede stvrai nepokretnih i prostoji prodavaocu dok je živ.* ***Prodavalac ne može prenieti prava svojeg ni na nasljednike, ni na inog kojeg****, al na*

[52] *Ibid.*

[53] Blagojević (1939), 52; Vid. § 663 SGZ, kao i § 1051 Predosnove Građanskog zakonika za Kraljevinu Jugoslaviju (1934), Beograd, Ministrastvo pravde Kraljevine Jugoslavije, 209.

[54] Colin. A., Capitant, H. (1953). *Cours élémentaire de droit civil français*. Paris: Dalloz, 616; Cardahi, C. (1968). *La vente en droit compare occidental et oriental*. Paris: Librairie Générale de Droit et de Jurisprudence, 247; Blagojević (1939), 53, Vizner, B. (1969). *Građansko pravo u teoriji i praksi*. Rijeka: samostalno izdanje, 53; Loza (1977), 48.

štetu trećega može se on time pravom služiti onda samo, ako je to pravo upisano u javne knjige." [55]

I srpski Građanski zakonik je propisivao neprenosivost prava otkupa, ali se tu ipak ne radi o apsolutnoj, nego o relativnoj neprenosivosti navedenog prava , s obzirom da je pravo otkupa prema tome propisu neprenosivo *samo onda kada je ugovoreno na neodređeno vrijeme*: *"Ako vreme otkupa nije opredeljeno, to se razumeva samo za vreme života i nikako se na naslednike neprostire."*[56] Slično rješenje ovoga pitanja sadržavala je i Predosnova Građanskog zakonika za Kraljevinu Jugoslaviju.[57]

Prema drugom shvatanju, pravo otkupa je otuđivo i može se naslijediti. Pristalice ovoga shvatanja posebno ističu da je za pravo otkupa bitno ono u čemu se pravo sastoji, dakle bitan je predmet prava, a ne nosilac toga prava. Prema ovom shvatanju pravo otkupa je ***prenosivo***.[58]

Shvatanje o prenosivosti prava otkupa zastupa i prof.Konstantinović Mihailo u Skici za zakonik o obligacijama i ugovorima. Naime, u čl.469 Skice za zakonik o obligacijama i ugovorima se eksplicitno navodi da *"...pravo otkupa prelazi na naslednike i može biti preneseno na drugog."*

Shvatanje o prenosivosti prava otkupa i njegovom ograničenom trajanju više odgovara današnjem razvijenom pravnom prometu zbog čega je prihvaćeno u nekim značajnim evropskim građanskim kodeksima kao što su francuski[59], njemački[60] i italijanski Građanski zakonik[61], ali i u prednacrtu Građanskog zakonika Republike Srbije.[62]

Izneseno shvatanje prenosivosti prava otkupa prihvata i savremena jugoslovenska pravna nauka, stim što je prema jednom shvatanju prenosivost ovoga prava je ograničena na slučajeve kada je to pravo izričito ugovoreno na određeno vrijeme[63], a prema drugom prenosivost i nasljedivost prava otkupa nije ograničena.[64]

5. TRAJANJE PRAVA OTKUPA

Prema jednom shvatanju, prodavac može koristi svoje pravo otkupa u roku koji je određen u ugovoru, pa ako prodavac propusti da se njime koristi u tom roku, njegovo pravo se gasi protekom toga roka. Ako trajanje prava otkupa nije ugovoreno, a iz prirode posla što drugo ne proizlazi, uzima se da ono traje samo za života prodavca i da ne prelazi na njegove nasljednike. Ali ako ipak bude ugovoreno da pravo otkupa prelazi na nasljednike, što nije dozvoljeno, ono će prestati smrću prodavca. Ovo shvatanje je prihvaćeno u

[55] Vid. § 1070 ABGB.

[56] Vid. § 662 SGZ.

[57] Vid. § 1051 Predosnove Građanskog zakonika za Kraljevinu Jugoislaviju (1934), Beograd, Ministarstvo pravde Kraljevine Jugoslavije, 209.

[58] Perić (1921), 39.

[59] Vid. čl. 1660 *Code civil.*

[60] Vid. § 503 BGB.

[61] Vid. čl. 1509 *Codice civile.*

[62] Vid. čl. 705 Prednacrta Građanskog zakonika Republike Srbije.

[63] Toroman (1975), 39.

[64] Kapor, V. (1978). Posebne vrste i modaliteti ugovora o kuoprodaji. In: *Enciklopedija imovinskog prava i prava udruženog rada*, Tom I. Beograd: Službeni list SFRJ, 874; Perović (1980), 558; Milošević, Lj. (1982). *Obligaciono pravo*. Beograd: Savremena administracija, 305; Babić, I. (2017). *Knjiga 4, Obligaciono pravo - Ugovori građanskog prava*. Beograd: JP Službeni glasnik, 81.

radovima nekih naših starijih pravnih pisaca[65], u Opštem austrijskom Građanskom zakoniku[66] i Građanskom zakoniku za Kraljevinu Srbiju.[67] Ipak, izuzuzetno, ako je rok važenja prava otkupa tačno određen, pa u toku toga roka prodavac umre, pravo otkupa prelazi i na nasljednike.[68]

Prema drugom shvatanju zastupljenom u francuskom Građanskom zakoniku, pravo otkupa može trajati najviše pet godina, tako da za slučaj da je ugovoreno na duži rok, taj rok se svodi na propisani rok od 5 godina.[69] Ovo shvatanje podržavaju i neki naši pravni pisci ističući da pravo otkupa treba ograničiti na tačno određeno vrijeme po zaključenju ugovora.[70]

Trajanje prava otkupa se u nekim građanskim kodeksima različito uređuje s obzirom na stvari koje su predmet ugovora o prodaji sa pravom otkupa. Naime, ako su predmet prava otkupa nepokretne stvari, rok za vršenje toga prava je duži, a u slučaju pokretnih stvari, rok trajanja prava otkupa je kraći. Tako, na primjer, prema njemačkom Građanskom zakoniku rok za vršenje prava otkupa, u slučaju nepokretnih stvari , iznosi trideset godina, a kod ostalih stvari tj.pokretnih stvari - tri godine od ugovaranja prava otkupa,[71] dok prema italijanskom Građanskom zakoniku, taj rok iznosi pet godina ako je ugovoreno pravo otkupa nepokretnih stvari, a 2 godine ako su predmet otkupa pokretne stvari. Razlika u odnosu na njemačko pravo je u tome što je rok prava otkupa po italijanskom pravu, zakonski rok. Ako bi prodavac i kupac, za pojedine stvari ugovorili duži rok trajanja prava otkupa od zakonskog roka, on se svodi na zakonom propisani rok koji je konačan i ne može se odložiti.[72]

Različito trajanje prava otkupa s obzirom o tom da li su predmet prava otkupa nepokretne ili pokretne stvari bilo je uređeno i u Skici za zakonik o obligacijama i ugovorima gdje je predviđeno da se trajanje prava otkupa, ako su predmet ugovora o prodaji sa pravom otkupa nepokretne stvari, može ugovoriti najduže za 6 godina, a ako se su predmet prava otkupa pokretne stvari, onda se to pravo može ugovoriti najduže za tri godine. Ugovoreni rok trajanja prava otkupa se prema rješenju Skice ne može naknadno produžiti. Ako trajnje prava otkupa nije uopšte ugovoreno ili ako je ugovoreno duže trajanje od zakonskog roka, smatraće se da je u tom slučaju govoren najduži dozvoljen rok.[73]

Na ovom mjestu treba naglasiti da je izloženo rješenje trajanja prava otkupa koje je zagovarao prof.Konstantinović, u gotovo identičnom tekstu, predoženo i u Prednacrtu Građanskog zakonika Republike Srbije.[74]

Konačno, prema mišljenju koje se zagovara u pravnoj nauci i legislativi obligacionog prava nekih evropskih zemalja, trajanje prava otkupa valja ograničiti na jedan jedinstven zakonski rok u kojem bi titular mogao vršiti svoje pravo otkupa i u okviru kojega bi ugovorne strane mogle ugovarati trajanje ovoga prava. Neki naši pravni pisci smatraju da ovaj

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[65] Blagojević (1939), 53.
[66] Vid. § 1070 ABGB.
[67] Vid. § 662 SGZ.
[68] Blagojević (1939), 53.
[69] Vid. čl.1660 *Code civil.*
[70] Loza (1977), 53.
[71] Vid. § 503 BGB.
[72] Vid. čl.1501 Codice civile.
[73] Konstantnović (1969), 143, čl.468 Skice za zakonik o obligacijama i ugovorima.
[74] Vid. čl. 704, st. 1-3 Prednacrta Građanskog zakonika Republike Srbije.

rok ne bi trebao biti duži od tri godine od dana ugovoranja prava na otkup.[75]

Imajući u vidu iznesena shvatanja i mi smatramo da bi pravo otkupa trebalo ograničiti i svesti na jedan jedinstveni zakonski rok u trajanju od najmanje 5 godina, za sve stvari koje su predmet ugovora o prodaji sa pravom otkupa, u kojem bi se ugovarači mogli kretati u pogledu utanačenja vremena njegovog trajanja.

6. ZAKLJUČAK

Ugovor o prodaji sa pravom otkupa je jedan od najstarijih modaliteta ugovora o prodaji koji datira još iz Rimskog prava. Sa izuzetkom Zakona o obligacionim odnosima, ovaj ugovor su, kao što smo vidjeli, pravno uredili gotovo svi značajniji evropski građanski kodeksi.

Ugovor o prodaji sa pravom otkupa je, u stvari, takav sporazum prodavca i kupca kojim se ustanovljavaju određene pogodnosti za ugovorne strane.

Na osnovu ovog ugovora, za stvar koju je dao kupcu, prodavac dolazi do određene sume novca koja odgovora utvrđenoj prodajnoj cijeni, stim da stvar koju je prodao kupcu, može, nakon isteka određenog vremena, uzeti od njega uz povrat novca primljenog na ime prodajne cijene, dok kupac stiče pravo da stvar, ako hoće, upotrebljava uz obavezu da je vrati prodavcu ako se ovaj pozove na svoje pravo otkupa, stim što se koristi koje je kupac imao od eventualne upotrebe stvari pojavljuju kao *kamata na sumu novca koju koristi prodavac.*

Ugovorom se ograničava kupčevo pravo svojine i trajanje prodavčevog prava otkupa. Na osnovu ugovora o prodaji sa pravom otkupa, prodavac stiče pravo da u ugovorenom ili zakonskom roku trajanja prava otkupa uzme stvar natrag od kupca, ali i obavezu da kupcu vati onaj isti iznos novca koji je od njega primio na ime kupopodajne cijene.

Krajnje djestvo ugovora o prodaji sa pravom otkupa se manifestuje u ograničenju kupčevog prava raspolaganja samom supstancom stvari, jer on, za vrijeme trajanja prava otkupa ugovorenog u korist prodavca, ***ne može otuđiti stvar koju je kupio***. Prema tome, za ugovoreno vrijeme trajanja otkupa, predmet prodaje je izvan pravnog prometa.

Ugovori o prodaji sa pravom otkupa, nerijetko, u sebi kriju zabranjene i nedozvoljene motive ugovornika koji takvim ugovorima daju atribute protivzakonitog ili čak zelenaškog pravnog posla, zbog čega treba upotrijebiti posebnu pažnju prilikom ocjene valjanosti ovakvih ugovora.

Na kraju, možemo zaključiti, da ugovor sa pravom otkupa nije iščezao iz savremenog pravnog prometa ni do današnjih dana, što potvrđuje savremena uporedna legislativa, ali i novi građanski kodeksi čije je donošenje izgledno u skoroj budućnosti. Zbog toga smatramo da, *de lege ferenda*, postoji potreba uređenja ovoga pravnog posla kao imenovanog ugovora i u našem obligacionom pravu, ali da trajanje prava otkupa valja ograničiti na jedan jedinstven zakonski rok u kojem bi titular mogao vršiti svoje pravo otkupa i u okviru kojega bi ugovorne strane mogle ugovarati trajanje ovoga prava.

[75] Perović (1980), 557; Vid. čl. 566 Grčkog Građanskog zakonika.

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Pravni izvori

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Sale Agreement With Redemption Right

(Pactum de retroemendo)

Summary: Although the legal regulation of this contract as a special named modality of the basic type of contract of sale was missing in our positive legislation, its significance for today's modern legal transactions is undoubted. Sales contracts with the right of redemption are still concluded today and are an integral part of the living organisms of our contractual contract law. This was also noticed by the Commission for the Drafting of the Civil Code of the Republic of Serbia, which envisaged the legal regulation of this important legal work in the Pre-Draft of the new Civil Code. In this way, the intention of the Commission to finally fill the legal gap that still exists in the Serbian contract law regarding the legal regulation of this legal transaction as a special named contract was expressed. Sales contracts with the right of redemption are valid legal transactions that still produce legal effects, under the condition that they are concluded in accordance with the general principles of our contract law, within the limits prescribed by positive laws and regulations and are not contrary to public order and good customs. In this paper, the author looks at the origin and historical development of this modality of the contract of sale, the concept, features and subject of the contract, including the rights and obligations of the parties, presented significant understandings of legal science on the legal nature and duration of contracts of sale and pointed out the need for its legal regulation as a named contract.

Key words: sale, right of redemption, legal nature, duration.

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Long-Term Sentence in the Laws of the Former SFRY and Contemporary European Criminal Law

Summary: Life imprisonment is the term for a prison sentence based on which a convicted person remains in prison for their whole life. After the death penalty, it is the severest criminal sanction. Many countries have introduced it in their legislation as a substitute for the death penalty. On the other hand, many legislations have, along with the long-term sentence, introduced the possibility of the convicts' release, most often conditional release. From the second half of the 20th century onwards, life imprisonment as well as the death penalty has most often been regarded an inhumane and inefficient sanction, given that people sentenced to life imprisonment are considered permanently excluded from society, that is, losing any kind of interest in rehabilitation. This paper analyses the issues related to long-term sentences - life imprisonment in the countries of the former Socialist Federal Republic of Yugoslavia (SFRY) and in the contemporary European criminal law.

Keywords: criminal offence, punishment, prison, long-term imprisonment, comparative law.

Marina Simović
Secretary of the Ombudsman for Children of the Republika Srpska and Associate Professor at the Faculty of Law, University Apeiron Banja Luka.

Vladimir Simović
Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina and Associate Professor at the Faculty of Security and Protection, Independent University in Banja Luka and Faculty of Law, University Vitez in Vitez.

1. LONG-TERM SENTENCE

The countries that abolished the death penalty influenced by abolitionist ideas raised the issue of how and by what means the society or the state could protect itself from the most dangerous forms of unlawful and socially dangerous behaviour by individuals and groups in terms of criminal offences, particularly in cases of professional criminals or repeat offenders, or in case of organised crime. Long prison sentences were accepted as a substitute for the death penalty in a number of countries (long-term sentence, and even life imprisonment). Namely, it is believed that such sentences can achieve an efficient protection of society from crime. However, parallel to the introduction of long-term imprisonment, legal theory brings into question the issue of applicability and purposefulness of this kind of prison sentence[1].

[1] Jovašević, D. (2018). *Krivično pravo, Opšti dio*. Beograd, 205-206.

Numerous objections are made against long-term sentences (life imprisonment), including the following[2]:

(1) This punishment is not humane. It is inhumane in the same way as the death penalty which it is supposed to substitute. The convicted person is practically sentenced to death by it, which truth does not occur immediately but through a long-term deprivation of liberty. Death is quiet and slow, yet definite;

(2) This punishment cannot achieve the goals of general prevention[3]. It is believed that if any sentence can have a general preventive effect, it is definitely the death penalty. Given that despite its existence in numerous criminal justice systems from the ancient times until recently serious criminal offences have continued to be committed by repeat offenders, its appalling impact is obviously still exaggerated. The same goes for the long-term sentence (life imprisonment). A lot of doubt has been cast on the possibility of the generally preventive effect of this sentence. All the more so because there is always a possibility of escape by such a convict or that due to changed political or other condition there is a possibility of its replacement by an act of amnesty or a more lenient sentence;

(3) Such a sentence may not achieve the role of special prevention either. If special prevention entails the rehabilitation and resocialisation of the convict, how can one expect this role to be fulfilled in respect of the person, a convict who is sure to never be released until the end of his life or who will be released only at a very old age. Namely, the convict does not have any active attitude towards the treatment imposed on him. He does not have any encouraging possibilities to become actively involved in his own treatment since, regardless of his behaviour while living and working under prison conditions and respecting the rules of conduct and other rules, he may not deserve early release from the penal institution (conditional release) nor the usage of benefits provided for by law;

(4) Even though this sentence is considered to be able to efficiently protect society from crime by eliminating the perpetrators of serious crimes and remanding them in prison for a long time, such persons are still not fully deprived of the possibility to repeat the crime whether at the expense of other convicts or the penitentiary administration workers (educators, medical staff, prison guards) or at the expense of prison property[4].

In the contemporary criminal law, numerous negative effects of long-term sentences (life imprisonment) are resolved by a wider application of the institute of conditional release, suspended sentence, etc.

2. LONG-TERM SENTENCE OR LIFE IMPRISONMENT IN THE LAW OF THE FORMER SFRY COUNTRIES

The countries that emerged after the disintegration of the SFRY in late 20th century act differently in terms of prescribing sentences for the most serious crimes and severest forms of serious crimes. There are two different approaches used: a) the countries applying long-term sentences: Montenegro and Croatia and b) the countries applying life imprisonment: North Macedonia, Slovenia and Serbia.

The legislations of Montenegro and Croatia recognise long-term sentences.

The Criminal Code of Montenegro in Article 33 stipulates the following types of sen-

[2] Radovanović, M. (1975). *Krivično pravo, Opšti dio*. Beograd, 250.

[3] Grozdanić, V., Škorić, M., Martinović, I. (2011). *Kazneno pravo, Opšti dio*. Rijeka, 209-213.

[4] Vidović, V. (1981). Prilog razmatranju o pojmu i funkciji kazne lišenja slobode. *Godišnjak Pravnog fakulteta u Banja Luci*, 5, 163-170.

tences: a) prison sentence up to 40 years, b) prison sentence between 30 days and 20 years, c) fine, and d) community service. These sentences, in terms of Article 32 of the law, are supposed to meet the following purposes: a) prevent the perpetrator from committing criminal offences and deter them from committing criminal offences in the future, b) deter others from committing criminal offences, c) express public condemnation of the criminal offence and the duty to abide by the law, and d) build ethics and influence the development of social responsibility[5].

The Criminal Code of Croatia stipulates that criminal offences and criminal sanctions (in terms of Article 1) shall be prescribed only for such conduct whereby personal freedom and rights of man as well as other rights and social values guaranteed and protected by the Constitution of the Republic of Croatia and international law are violated or jeopardised in such a manner that it would not be possible to achieve their protection without criminal-law enforcement. In its fourth chapter (provisions of Article 40) the Criminal Code recognises the following types of punishment: a) fines, b) imprisonment between three months and 20 years, and c) long-term imprisonment between 21 years and 40 years[6]. These sentences are pronounced in order to achieve the purpose of punishment defined in Article 41[7]: a) to express public condemnation of the criminal offence, b) to raise the confidence of citizens in the legal order based on the rule of law, c) to exert an influence on the offender and all others so that they do not commit criminal offences by raising awareness of the perils of committing criminal offences and of the fairness of punishment and d) to allow the offender's readmission into society[8].

However, some states in Southeast Europe have criminal legislations that recognise life imprisonment. Those are: North Macedonia, Slovenia and Serbia.

The Criminal Code of North Macedonia stipulates that the protection of human freedoms and rights and of other basic values, and the application of criminal-legal coercion, is necessary to prevent socially harmful activities. Criminal sanctions (Article 4) particularly including punishments are applied to achieve this purpose. The following types of sentences (Article 33) are supposed to achieve this protective function in North Macedonia: a) imprisonment between 30 days and 20 years, whilst only exclusively imprisonment for 40 years (long-term imprisonment), b) life sentence, c) fine, d) prohibition on practicing profession, performing an activity or duty, e) prohibition on operating a motor vehicle, and f) expulsion of a foreigner from the country[9].

Sentences prescribed in that manner are supposed to achieve the proclaimed purpose (Article): a) to achieve justice, b) to prevent the offender from committing crimes and his correction, and c) educational influence on others not to commit crimes[10].

The Criminal Code of Slovenia establishes that criminal liability may be imposed while respecting constitutionally provided human rights and fundamental freedoms in a democratic arrangement and on the principles of a state governed by the rule of law (Article 1). Criminal sanctions (Article 3) achieve this function, the most significant ones being sentences. The criminal justice system in the Republic of Slovenia under Article 43 of

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5 Criminal Code of Montenegro, consolidated text (2016). Podgorica, 25-26.
6 Grozdanić, V., Škorić M., Martinović I. (2013). *Kazneno pravo, Opšti dio*. Rijeka, 225-232.
7 Novoselec, P. (2004). *Opšti dio kaznenog prava*. Zagreb, 394-405.
8 Horvatić, Ž. (2003). *Kazneno pravo, Opšti dio*. Zagreb, 182-197.
9 Kambovski, V. (2006). *Kazneno pravo, Opšt del*. Skopje, 611-622.
10 *Ibid.*, 712-716.

the Code (Chapter Four) includes: a) imprisonment of 15 days to 30 years or exclusively a life sentence, b) fine, and c) revoking of driving licence[11]. These sentences are supposed to achieve the purpose (objective) proclaimed by the law, to suppress and prevent criminal offences.

Finally, the Criminal Code of Serbia[12] in Article 42 stipulates that within the framework of the general purpose of criminal sanctions (Article 4, paragraph 2), the purpose of punishment is defined as: a) preventing an offender from committing criminal offences and deterring them from future commission of criminal offences, b) deterring others from commission of criminal offences, c) expressing public condemnation of the criminal offence, enhancing moral strength and reinforcing the obligation to respect the law, and d) achieving fairness and proportionality between the committed crime and severity of the criminal sanction. The following sentences (Article 43)[13] are supposed to achieve this purpose: a) life sentence, b) imprisonment, c) fine, d) community service, and e) revoking of driving license.

Life imprisonment in Serbia, according to Article 44, is considered the main sentence along with prison sentence. This sentence, pursuant to Article 44a, is imposed for the severest crimes and severest types of serious crimes. It is prescribed for all crimes as an alternative to prison sentence. However, the severest punishment may not be pronounced in the following cases: a) to the person who did not reach the age of 21 at the time of committing the criminal offence, and b) when the mitigation of the sentence is provided for by law (Article 56, paragraph 1, item 1) or if there are grounds for acquittal.

3. LONG-TERM SENTENCE IN THE EUROPEAN CRIMINAL LAW

The situation is similar in the contemporary European criminal law. In case of the most serious crimes and severest forms of serious crimes, certain laws here act in two ways too, foreseeing: a) long-term imprisonment with various duration of the maximum sentence, and b) life imprisonment.

The Criminal Code of Bulgaria[14] in Article 37 prescribes the following types of sentences: a) life imprisonment (given that the death penalty was abolished in 1998), b) imprisonment from three months to 20 years, c) confiscation of property, d) fine, e) deprivation of the right to hold a certain state or public office, f) deprivation of the right to exercise a certain vocation or activity, g) deprivation of the right to receive orders, honorary titles and distinctions, h) deprivation of military rank, and i) public censure. Sentences defined in such a manner are supposed to achieve the purpose (objective) of punishment (Article 36). The purposes are: a) correcting and re-educating the offender to comply to the laws and rules of social community, b) exerting warning impact on him and depriving him of the possibility to commit other crimes, and c) producing an educative and deterring effect on other members of society.

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[11] Selinšek, Lj. (2007). *Kazensko pravo, Splošni del in osnove posebnega dela*. Ljubljana, 283-290.

[12] Stojanović, Z. (2020). *Komentar Krivičnog zakonika Republike Srbije*. Beograd: Službeni glasnik Republike Srbije.

[13] Jovašević (2018), 189-190.

[14] Ненов И., Стойнов А. (1992). *Наказателно право на Народна република България, част 1, Особена част.* София, 284-288.

The Penal Code of Estonia[15] in its third chapter titled "Types and Terms of Punishments" prescribes the types and terms of punishments for the perpetrators of criminal offences in Estonia. The principal punishments are: a) a pecuniary punishment of 30 to 500 daily rates, and b) imprisonment for a term of 30 days to 20 years, or life imprisonment (Article 45 of the Penal Code)[16].

The Criminal Code of France[17] in Article 111-3 stipulates that no one may be punished for a felony or for a misdemeanour which is not defined by statute, while Article 112-1 stipulates that conduct by a natural or legal entity is punishable only where it constituted a criminal offence at the time when it took place[18].

Article 111-1 differentiates between several types of punishable acts according to their seriousness. The categories are: a) felonies, and b) misdemeanours. The subsection titled "Penalties for Felonies" foresees a system of criminal sanctions for natural and legal entities as perpetrators of felonies, as well as misdemeanours (Articles 131-1 through 131-2). Penalties stipulated in Article 131-1 may be imposed on natural persons for the commission of felonies. Those are the following penalties: a) life imprisonment, b) imprisonment for a maximum of 30 years, c) imprisonment for a maximum of 20 years, d) imprisonment for a maximum of 15 years, and e) imprisonment for a maximum of 10 years[19].

It is interesting that the Criminal Law of Latvia[20] in Chapter IV titled "Punishment" does not foresee life imprisonment. In Article 35, the law stipulates the purpose of punishments. According to this legal solution, punishment as provided for in the Criminal Law is a compulsory measure which a court, within the limits of this Law, adjudges on behalf of the State against persons guilty of the commission of a criminal offence, with the purpose of: a) protecting the public safety, b) restoring justice, c) punishing the offender for a committed criminal offence, d) re-socialising (correcting and re-educating) the offender, e) achieving that the convicted person and other persons comply with the law and refrain from committing criminal offences. In addition, Article 36 stipulates the following (basic) punishments to achieve this purpose: a) deprivation of liberty for 15 days up to 15 years, and exclusively imprisonment for 20 years if a serious crime is committed, b) community service, and c) fine.

The Criminal Code of Lithuania[21] in Chapter VII titled "Penalty" stipulates the type, purpose, duration and terms for the application of penalties. Thus Article 41 thereof defines penalty as a measure of compulsion applied by the State (imposed by a court's judgement) upon a person who has committed a crime for which he is criminally responsible. Paragraph 2 of this legal provision explicitly defines the purpose of a penalty: a) to punish a person who has committed a criminal act, b) to prevent persons from committing criminal acts in the future, c) to exert an influence on other citizens to refrain from violating the regulations and committing criminal offences, and d) to ensure implementation of the principle of justice.

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15 RT I 2001, 61, 364.

16 Zaplovalova, V. V., Manceva, N.I. (2001). *Ugolovni kood Eesti Vabariigile*. Peterburi, lk 69–71.

17 Code pènal du France (1992). Paris, 67-69.

18 Jean, J-P. (2008). *Le système penal*. Paris: La Découverte, 122.

19 Pin, X. (2014). *Droit pénal général 2015*. Paris: Dalloz, 483.

20 Лукашов, А.И., Саркисова, Е.А. (2001). *Уголовный кодекс Латвии*. Санкт-Петербург, 82-85.

21 Уголовный кодекс Литовской Республики (УК Литвы). Came into force on 1 May 2003.

Article 42 of this code stipulates the types of penalties the court imposes on the perpetrator of criminal offences. Those are: a) community service, b) a fine, c) restriction of liberty from three months to two years, d) limitation of freedom from 15 days to 90 days, e) custodial sentence from three months to ten years, and f) life sentence of 25 years[22].

The Criminal Code of Hungary[23] in Chapter III stipulates a system of penalties titled "Penalties". Pursuant to the provision of Article 33 of this code, the penal system of the Republic of Hungary comprises the following penalties: a) imprisonment of three months to 20 years, and only exclusively life sentence (for the listed most serious crimes against humans and the State), that is, imprisonment of 25 years, b) custodial arrest, c) community service, d) fine, e) prohibition to exercise professional activity, f) driving ban, g) prohibition from residing in a particular area, h) ban from visiting sporting events, and i) deportation of a foreigner from the country[24]. In Chapter X, the Code stipulates (in the provisions of Article 79) the purpose (objective) of a punishment as the prevention (in the interest of the protection of society) of the offender or any other person from committing an act of crime.

The Criminal Code of Moldova[25] in Chapter VII titled "Criminal Punishment" stipulates the types and purpose of punishments imposed on the perpetrators of criminal offences in Moldova. According to this legal solution (Article 61), criminal punishment is a measure of state force and a means of correction and re-education of an offender which is applied by courts in the name of the law and entails certain deprivations and restrictions of their rights. Paragraph 2 of the same article defines the purpose of punishment: a) to restore social equity, b) to rehabilitate the offender, and c) to prevent the commission of new crimes both by convicts and other persons. To achieve this purpose, Article 62 stipulates the following punishments: a) fines, b) deprivation of the right to hold certain positions or to practice certain activities, c) annulment of military rank, special titles and qualifications, d) community service, e) imprisonment from three months to 20 years, and f) life imprisonment.

The Penal Code of Poland in Chapter IV titled "Penalties" in Article 32 stipulates the following types of penalties: a) fine, b) restriction of liberty in the duration of one month up to 12 months, c) deprivation of liberty in the duration of three months up to 15 years, d) deprivation of liberty for 25 years, and e) deprivation of liberty for life[26].

The Criminal Code of the Russian Federation in Section I, Chapter 1 titled "The Tasks and Principles of the Criminal Code of the Russian Federation" in Article 2 defines the tasks (purpose, role) of the contemporary Russian criminal law. Its tasks are defined as: a) the protection of the rights and freedoms of man and citizen, property, public order and

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[22] Богдашич, О. В. (2004). *Уголовный кодекс Литовская Республика*. Санкт-Петербург, 63-66. Уголовный кодекс Литовской Республики = [Текст]: The Lithuanian penal code: Утв. законом № VIII-1968 г. 26 сент. 2000 г.

[23] A Büntető Törvénykönyv, Magyarországon - Act C of 2012, Budapest, 2012., 17-19, available at https://net *.jogtar.H u/jogs zabaly?docid=A1200100.TV (11.5.2021).*

[24] Karsai, K., Szomora, Z. (2010). *Criminal law in Hungary*. Wolter Kluwer, 224-228.

[25] Criminal Code of the Republic of Moldova No. 985-XV dated 18.04.2002 Republished: *Official Monitor of the Republic of Moldova* No. 72-74/195 dated 14.04.2009 Official Monitor of the Republic of Moldova No. 128-129/1012 dated 13.09.2002. [Ostapciuc, E. (2008). *Criminal Code of the Republic of Moldova*, Chisinau, 2008, 18].

[26] Кузьецова, Н.Ф., Лукашова, А.И. (2001). *Уголовный кодекс Республики Польша.* Санкт Петербург, 72-74.

public security, the environment, and the constitutional system of the Russian Federation against criminal encroachment, b) the maintenance of peace and security of mankind, and c) the prevention of crimes[27]. The law stipulates that a criminal offence is a socially dangerous act, committed with guilt and prohibited by this Code under threat of punishment. The commission of an act provided for by this Code, but which, by reason of its insignificance, does not represent a social danger, which caused no harm and has not created a threat of damage to a person, society, or the State, shall not be deemed a crime (Article 14).

Article 15 of the Code defines the "types (categories) of crimes" depending on the nature and degree of social danger. It differentiates between: a) crimes of little gravity, b) crimes of average gravity, c) grave crimes, and d) especially grave crimes. According to this legal solution, an especially grave crime is an intentional act, for the commission of which this Code provides a penalty of imprisonment exceeding ten years, or a more severe punishment (life imprisonment or death penalty).

Section III titled "Punishment" stipulates punishments imposed by competent courts on the perpetrators of criminal offences. Chapter 9, "The Concept and Purposes of Punishment", defines the purpose of punishment. Article 43 stipulates that punishment is a measure of state compulsion assigned by a court's judgement applied to a person who has been found guilty of the commission of a crime. It consists of the deprivation or restriction of the rights and freedoms of this person. Punishment is applied for the purpose of[28]: a) restoring social justice, b) reforming a convicted person, and c) of preventing the commission of further crimes.

To achieve this purpose, punishments provided for in Article 44[29] are applied. Those are: a) fines, b) deprivation of the right to hold specific offices or to engage in specific activities, c) deprivation of a special or military rank or honorary title, class rank or government decoration, d) compulsory work, e) corrective labour, f) restriction of military service, g) detention from one month up to six months, h) restriction of freedom from two months up to four years, i) restricted liberty from two months up to 20 years, j) serving in a disciplinary military unit, k) life imprisonment, and l) death penalty[30].

The Criminal Code of the Republic of Ukraine[31] in Article 1 defines the purpose (objective) of the criminal code as follows: a) to provide legal protection of the rights and liberties of the human being and citizen, property, public order and public safety, the environment, and the constitutional order of Ukraine against criminal encroachments, b) to secure peace and safety of mankind, and c) to prevent crime.

Article 12 of the Code (titled "Classification of Criminal Offences") lists the types of crimes depending on the type, gravity and the prescribed punishment. Those are: a) minor offences, b) medium grave offences, c) grave offences, and d) specifically grave offences. A specifically grave offence is considered an offence punishable by more than ten years of imprisonment or a life sentence.

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[27] Федосова, И., Скуратова Т. (2005). *Уголовный кодекс Российской Федерации*. Москва, 37-41.

[28] Уголовный кодекс Российской Федерации (2014). 26-28.

[29] Рарог, А. (2008). *Уголовное право России, Част Общая*. Москва, 312-319.

[30] Рарог, А. И., Есаков Г. А., Чучаев, А. И., Степалин В.П. (2007). *Уголовное право России, Част Общая и Особенная***.** Москва, 163-167.

[31] Кримінальний кодекс України, Відомості Верховної Ради України (ВВР), 2001, № 25-26, ст. 131.

In Chapter X titled "Punishment and its Types" (Article 50) defines the notion and purpose of punishments. Punishment is a coercive measure imposed in a judgment of court on behalf of the State upon a person found guilty of a criminal offence and consists in restraint of the sentenced person's rights and freedoms secured by law (paragraph 1). The punishment is aimed at: a) penalising the offender, b) reforming the offender, and c) preventing further offences by both the convicted and other persons. It is explicitly stated that punishment is not meant to cause physical sufferings or humiliate human dignity of the offender.

Types of punishment are listed in Article 51 of the law. The following types of punishment may be imposed on persons convicted of criminal offences: a) fine, b) revocation of a military or special title, rank, grade or qualification class, c) deprivation of the right to occupy certain positions or engage in certain activities, d) community service, e) correctional labour, f) service restrictions for military servants, g) forfeiture of property, h) arrest in the duration of one month up to six months, i) restraint of liberty in the duration of one up to five years, j) custody of military servants in a penal battalion, k) imprisonment for a determinate term of one up to 15 years, and l) life imprisonment[32].

The Swiss Criminal Code[33] (in Title Three titled "Sentences and Measures") defines the notion, types and purposes of punishment, its duration and terms for imposing it. Article 34 prescribes a monetary penalty in the maximum amount of 360 daily penalty units, where the amount of one unit is a maximum of 3000 francs. The court decides on the value of the daily penalty unit according to the personal and financial circumstances of the offender at the time of conviction, and in particular according to his income and capital, living expenses, any maintenance or support obligations, the minimum subsistence level, etc. The convicted person is obliged to pay the monetary penalty imposed on him within one month up to 12 months, that is, in justified cases and in instalments[34]. Article 40 stipulates a custodial sentence of six months up to 20 years. Only in exclusive cases provided for by law can an offender be imposed life sentence. However, the court is obliged to elaborate on this decision thoroughly and with arguments on the basis of all the presented personal and material evidence[35].

4. CONCLUSION

After a number of centuries of existing in the criminal laws of countries around the world, the death penalty finally gave way to prison sentences in late 20th century. Namely, in the field of the crime prevention policy, when seeking an efficient response to the severest forms of unlawful, socially dangerous behaviour by individuals or groups, it has been found that a prison sentence (restriction of the freedom of movement of a convicted person for a certain period of time) is the most efficient measure from the aspect of special as well as general prevention.

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[32] Коржанський, М. Й. (2007). *Науковий коментар Кримінального кодексу України*. Київ, 45-48.

[33] Schweizerisches Strafgesetzbuch vom 21. Dezember 1937 (Stand am 1. Juli 2020). Bern, 2007, 17-19.

[34] Серебренникова, А. В. (2002). *Уголовный кодекс Швеции*, Санкт-Петербург, 83.

[35] StGB, StPO, Schweizerisches Strafgesetzbuch, Schweizwrische Strafprozessordnung (2013). Zürich, 35-38.

Thus, all the contemporary criminal laws, including the laws of the former SFRY countries in the penal system that is supposed to achieve the protective, guarantee function of criminal law - the protection of the most significant social goods and values - recognise the custodial sentence. It is, of course, a pluralistic penal system which recognises several different types and measures of punishment.

Despite many objections that can generally be made against a sentence of long-term, or life imprisonment, the severest punishment is recognised by numerous legislations (as an alternative to the death penalty): North Macedonia, Slovenia, Serbia, as well as the majority of the observed European criminal laws (Bulgaria, Estonia, France, Latvia, Lithuania, Hungary, Moldova, Poland, Russia, Ukraine, Switzerland, etc.).

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Kazna dugotrajnog zatvora u pravu država bivše SFRJ i savremenom evropskom krivičnom pravu

Rezime: Doživotni zatvor je naziv za zatvorsku kaznu na osnovu koje je osuđeni ostaje u zatvoru do kraja svog života. To je poslije smrtne kazne najstrožija krivičnopravna sankcija. U zakonodavstva mnogih država je uvedena kao zamjena za smrtnu kaznu. S druge strane, mnoga su zakonodavstva uz kaznu doživotnog zatvora uvele mogućnost koje osuđenicima omogućavaju puštanje na slobodu, najčešće u obliku uslovnog otpusta. Od druge polovine 20. vijeka doživotni zatvor se najčešće kao i smrtna kazna smatra nehumanom i neefikasnom sankcijom, s obzirom na to da se osuđenici na doživotni zatvor smatraju trajno izbačenim iz društva, odnosno gube bilo kakav interes za rehabilitaciju. U radu se analiziraju pitanja vezana za kaznu dugotrajnog - doživotnog zatvora u državama bivše SFRJ i savremenom evropskom krivičnom pravu.

Ključne riječi: krivično djelo, kazna, zatvor, dugotrajni zatvor, uporedno pravo.

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COVID 19 – Terminanition of Employment Contracts Due to Business Reasons

Abstract: The article deals with Slovenian regulation of the termination of employment contracts due to business reasons. According to settled case law, any termination of an employment contract is ultima ratio of the employer. In addition to pre-redundancy alternatives in ZDR-1 and a review of measures from the PKP packages, the options offered to employers by the state to prevent redundancies, at least at the moment do not provide a sufficient basis for the legality of redundancies solely because of an economic crisis due to the pandemic.

Key words: termination of employment contract, SARS-CoV-2 virus (COVID-19), PKP packages.

Nana Weber
Docent, Attorney, Founding and Managing Partner in Law Firm Weber o.p. – d.o.o.

1. INTRODUCTION

The period from 13th March 2020 onwards has been a fairly difficult period for both employees and employers in Slovenia, especially due to the coronavirus epidemic, consequences of which were that many employees were virtually unable to carry out their work or were (at least) temporarily forced to work on a reduced scale. Slovenia has within the framework of intervention legislation introduced various state incentives, tax or otherwise, to alleviate the burden of employers, however redundancies of employees have been and are still a very common occurrence.

In this article, which focuses on the field of individual dismissals of employment in the private sector, we will mainly deal with the question whether the termination of employment contracts due to business reasons, caused by the epidemic of the Coronavirus and its consequences on the business sector, is legal or not, taking into account the many government measures and incentives offered to employers to address the situation within the so-called "Proti-Korona Paketi" or "Anti-Coronavirus (Legislative) Packages" (hereinafter referred to as "PKPs"), of which to this day there have been eight passed and enacted by the Slovenian parliament.

At this point, it should be emphasized that the part of this article that refers to the presentation of actual incentives and measures, adopted by under each legislative PKP, we will focus

exclusively on incentives, which were and some still are intended for the general segment of (practically) all or at least a fairly wide range of employers.

2. BUSINESS REASONS FOR TERMINATION OF AN EMPLOYMENT CONTRACT IN SLOVENIAN LEGAL SYSTEM AND CASE LAW

Employment Relationships Act (hereinafter referred to as "ZDR-1")[1] in the first paragraph of Article 89 sets out five reasons for regular or so-called ordinary termination of an employment contract:

- cessation of the need to perform certain work according to the conditions of the employment contract for economic, organisational, technological, structural or similar reasons on the employer's side (hereinafter: business reasons), or
- failure to attain the expected performance results because the employee has failed to carry out work in due time, professionally or with due quality, or failure to fulfil the job requirements provided by and Act and other regulations issued on the basis of an act, for which reason the employee fails to fulfil or is unable to fulfil the contractual or other obligations arising from the employment relationship (hereinafter: reason of incompetence);
- violation of a contractual obligation or other obligation arising from the employment relationship (hereinafter: reason of misconduct); ,
- incapacity to carry out the work under the conditions set out in the employment contract owing to disability in accordance with the regulations governing pension and disability insurance or with the regulations governing vocational rehabilitation and the employment of disabled persons;
- unsuccessful completion of a probationary period.

It is of crucial importance for all the listed reasons that they prevent the continuation of work under the conditions of the employment contract (second paragraph of Article 89 of the ZDR-1).[2]

We will now take a closer look at the termination of employment contract due to business reasons (first indent of the first paragraph of Article 89 of the ZDR-1). The essential element in defining business reasons is that the cause or reasons for the termination the contract are on the side of the employer, not the employee (as opposed to other grounds for dismissal set out in the first paragraph of Article 89 of the ZDR-1) and that on the side of the employer there has ceased the need to perform certain work under the terms of the employment contract with the employee concerned.[3]

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[1] Employment Relationships Act (ZDR-1), *Official Gazette of the Republic of Slovenia*, No. 21/13, 78/13 - amended, 47/15 - ZZSDT, 33/16 - PZ-F, 52/16, 15/17 - Decision of the Constitutional Court, 22/19 - ZPosS, 81/19 and 203/20 – ZIUPOPDVE.

[2] The aforementioned second paragraph reads as follows: "(2) The employer may cancel the employment contract only if there is a substantiated reason referred to in the preceding paragraph which prevents the continuation of work under the conditions set out in the employment contract."

[3] Bečan, I., Belopavlovič, N., Korpič Horvat, E., Kresal B., Kresal Šoltes K., Mežnar Š. *et al*. (2016). Zakon o delovnih razmerjih (ZDR-1) s komentarjem. Ljubljana: IUS Software, GV založba, 519; Štelcer N. (2014). *Veliki komentar ZDR-1*. Maribor: Poslovna založba MB, založništvo d.o.o., p. 442.

It should be clarified that the employee can regularly (or ordinarily) terminate the employment contract without any explanation in accordance with the first paragraph of Article 83 of the ZDR-1. However, the employee can also extraordinarily terminate an employment contract for the reasons specified in Article 111 of the ZDR-1:

- the employer has failed to provide him with work for more than two months and has also failed to pay him the statutory wage compensation,
- he has not been able to perform his work due to a decision by a competent inspection service on the prohibition of performing the working process or on the prohibition of using means of work for more than 30 days, and the employer has failed to pay him the statutory wage compensation,
- the employer has failed to pay him his salary or has paid him a substantially lower salary for more than two months,
- the employer has failed to pay him his salary twice in succession or within a period of six months taking into consideration the legally and/or contractually stipulated period,
- the employer has failed to pay in full social security contributions three times in succession or within a period of six months,
- the employer has failed to ensure the employee's safety and health at work and the employee has previously requested that the employer eliminate an immediate and unavoidable danger to employee's life and health,
- the employer has failed to ensure the employee equal treatment in accordance with Article 6 of the ZDR-1,
- the employer has failed to ensure protection against sexual or other harassment or bullying in the workplace in accordance with Article 47 of the ZDR-1.

The objective reasons on the side of the employer which eliminate the need to perform certain types of work are primarily conditions on the relevant market, introduction of new technologies, changes in the organization of work, abolition of working posts or positions, abolition of working or organisational units and similar situations.[4] It is also important that to emphasise, that it is a matter of reducing the need to perform certain working tasks or working posts, that are set out under the terms, already established in the employment contract. This means that it is not necessary that the need to perform the work of a certain employee ceases in absolute terms, but the business reason for termination also includes situations when the need to work under certain (contractually agreed) conditions as such ceases, but the employer may still need this work to be performed, but under modified conditions, different from those previously agreed upon in the employment contract.[5] The employee is obliged to perform the work for which he has committed himself under the employment contract and under the agreed conditions as arising from the concluded employment contract, therefore the employer cannot unilaterally change the definition or types of work and its conditions (except exceptionally and temporarily in cases, provided by the ZDR-1).[6]

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[4] Krašovec, D**.** (2013). *Novi veliki komentar Zakona o delovnih razmerjih in reforme trga dela*. Ljubljana: Založba Reforma d.o.o., 413.

[5] Bečan, Belopavlovič, Korpič Horvat, Kresal, Kresal Šoltes, Mežnar, *et al*. (2016), 520.

[6] *Ibid.*

The minimum content of the notice of termination of an employment contract by the employer is contained in the second paragraph of Article 87 of the ZDR-1, which stipulates that the employer must explain the actual reasons for termination of the employment contract in witing in the written notice of termination of the employment contract. This means that the employer must in the aforementioned notice state facts, factual circumstances or actual conduct of the employee that are reasons for the dismissal which must be so detailed in such a manner, that the facts are clear to both to the employee and to the employer himself.[7]

It is clear from the case law that the courts in adjudicating the legality of the notice of termination of the employment contract do not assess the business and organizational decisions of the employer as such.[8] When adjudicating the existence of a substantiated business reason for termination of an employment contract, the Slovenian courts can only assess whether this proposed reason is fabricated or "fake" (i.e. a sham or a ruse).[9] Several court decisions emphasize that termination due to business reasons is in fact an autonomous decision of the employer, in which the courts cannot intervene, but of course the business reason must not be fictitious and must not be a cover for concealment of some other reason.[10]

Among the arguments for this view, the court decisions highlight the right to free enterprise or free economic initiative from Article 74 of the Constitution of the Republic of Slovenia. For example, the Supreme Court of the Republic of Slovenia (hereinafter referred to as "the Supreme Court") in a judgement VIII Ips 245/2017 from the 16th of January 2018 explains that the notice of termination of an employment contract is an autonomous decision of the employer, which is based on the employer's assessment that he cannot perform the work with such a large number of employees, and this notice means that the employer will reduce costs in a certain segment of his business operations by reducing employment. Court's establishing the precise facts in this regard and its assessment that the employer possibly did not correctly or expediently make such a decision would go beyond the court's right to adjudicate, as it would excessively (or disproportionately) limit the employers constitutional right to free economic initiative (Article 74 of the Constitution of the Republic of Slovenia).

Furthermore, the Supreme Court in its decision VIII Ips 82/2017 from the 19th of December 2017 has explicitly stated that if, besides of termination of the employment contracts, other suitable options exist, that at the same time do not endanger the effective business activity of the employer, no substantiated business reasons can be assessed by the

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[7] *Ibid*., 506.

[8] Legal theory also emphasizes that the reason for termination of the employment contract for business reasons is a matter of the employer, the court assesses only the substantive and formal requirements for lawful termination of the employment contract (the latter goes beyond the purpose of this article, so we do not deal with them in detail) – Cvetko, A., Kalčič M., Klampfer M., Korpič-Horvat E., Novak M., Senčur-Peček D. (2004). *Pogodba o zaposlitvi in podjetniška kolektivna pogodba*. Ljubljana: GV Založba, 246–247.

[9] See, for example, the judgments of the Higher Labor and Social Court Pdp 898/2012, 4. November 2012 and the judgment of the Supreme Court of the Republic of Slovenia VIII Ips 239/2016, 21. February 2017 and VIII Ips 245/2017, 16, January 2018.

[10] Judgement of the Supreme Court of the Republic of Slovenia, VIII Ips 205/2014, 15. December 2014.

court, that would justify such a termination. Therefore, such a termination is considered unlawful. In the aforementioned case the Supreme Court even stated that the employer has the right to free economic initiative, guaranteed by the Constitution of the Republic of Slovenia – this also includes downsizing and redeployment of the workforce –, but of course this right is not absolute in its nature, as it must be balanced with (adverse) rights of the employees.[11]

In one of its last judgments, which can be considered as present as "classic", the Higher Court[12] stated that the termination of the working post and thus the cessation of the need to perform certain work under the terms of the previously concluded employment contract is to be considered as a business reason for its termination from the first indent of the first paragraph of Article 89 of ZDR-1:"In assessing this reason, it is not essential whether the termination of the working post was reasonable or sensible and whether or not it will actually contribute to the reduction of costs or streamlining of business operations in the future. It is an autonomous decision of the employer, which the court cannot intervene in, but it is true that the business reason must not be fictitious or be concealing some other reason. A fictitious or fabricated reason for termination can be neither genuine nor justified, and termination for such a reason is illegal. Carrying out a reorganization procedure just as a mere formality, the cause of which are not objective business needs, but the exclusion of a certain person for other (subjective) reasons, constitutes an abuse of the statutory reason for termination, which can only result in such a notice of termination of the employment contract being considered as unlawful (contrary to law)."

It should be noted, however, that some courts in Slovenia are not in favour of the termination of working posts as an absolute proof that the need to perform certain work has ceased, and that the notice of termination of the employment contract due to business reasons is therefore justified. For example, in one of the courts cases[13] it is written:

"In the notice of the termination of the employment contract the employer merely stated that due to the termination of the working post where the employee was previously working, the need to work at that post had ceased. If the mentioned was sufficient, such disputes would be very simple. However, the Court of Appeal points out that the mere fact of termination of a working post is by no means sufficient to establish the existence of a substantiated business reason for termination of an employment contract.

The Court of Appeal therefore agrees with the Court of First Instance that the economic reason for the termination of the employment contract is unfounded. The employer did not prove his allegation in the notice of termination that the working post of the employee had caused him such high costs that he could no longer bear them. The assessment

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[11] In this case the employer claimed that the business reason was given because there was a decrease in turnover and the need to reduce the number of employees due to the redistribution of tasks of certain jobs to other employees. The Supreme Court stated that the circumstance that the employer in the period when terminating employment contracts for business reasons (because it shows the need to reduce the number of employees) employed fixed-term employees, hired agency or student workers, is not irrelevant. Maintaining the employment of employees has, in principle, an advantage over providing the work of hired workers who are not employed by the employer when the employer decides to reduce or streamline operations. The case was remanded for retrial by the Supreme Court.

[12] Judgement of the Higher Labor and Social Court, Pdp 8/2020, 5. March 2020.

[13] Judgement of the Higher Labor and Social Court, Pdp 520/2020. 22. October 2020.

of this allegation as such cannot be seen as an interference by the court with the right of free economic initiative of the employer, as the appeal tries to show. The Court of First Instance did not go into the assessment of the appropriateness of the notice of termination, but admissibly examined whether the employer's business really required urgent cost reductions – or whether the employee's working post had caused such costs that the defendant could no longer bear them."

Here we should point out three questions that often appear in practice:

1. Is it necessary to amend the act on systematization (work post classification) or to adopt a new one for the employer to prove the validity of business reasons and the lawfulness of such reasons for termination of the employment contract?

2. Is the termination of the employment contract lawful even though the scope of the employee's work remains largely the same and the change in work is the omission of only one working task – or are even minimal changes in the content and scope of the employee's duties valid business reasons for termination?

3. Is notice of a termination of an employment contract for business reasons unlawful if the employer terminates the employment contract for an indefinite period of time for a certain employee and at the same time employs another employee for the same sort of work but for a definite period of time?

1. To answer the question, we should point out that systematization (work post classification) is one of the most important internal organizational systems in a company. The document in which the work post classification is written is the act on work post systematization, which represents the basic general act of every employer. In accordance with the second paragraph of Article 22 of the ZDR-1, the employer is obliged to adopt a general act which determines the conditions for performing work at an individual workplace or work post, or for an individual type of work. This obligation does not apply to a so-called small employer (employer who employs ten or fewer employees – see the third paragraph of Article 5 of the ZDR-1).

The act on systematisation of work posts therefore contains a description of the work post and positions at the employer. Employers often refer to it as the Rules on the Systematisation of Work Posts and it usually contains information on the type of work, a description of the work and the conditions for performing work at an individual work post. Personnel and organizational-technical data on the work post, as well as data for work post identification are also useful.

The work post description contained in the work post classification includes a list of all the tasks necessary for the work process to take place in the workplace. The working post description contains the requirements that the employee must meet to achieve the goals of the organization.

ZDR-1 does not stipulate anything in relation to whether the employer must change the act on systematisation in the case of an alleged business reason for termination, but the answer to the question was given by case law. According to the established case law, the amendment of an existing or the adoption of a new act on systematization is not a condition for reorganization, nor for the lawfulness of notice of regular (or ordinary) termination of an employment contract. However, the employer must prove the actual cessation of the need for work of the employee, whose employment contract is to be terminated.[14]

[14] Judgement of the Higher Labor and Social Court, Pdp 379/2017, 5. October 2017.

Namely, the amendment to the act on systematisation is not the only or indisputable proof of the cessation of the need to perform the work of certain employees, but is only one of the otherwise important factors in determining the actual needs of the employer for the employee's work. [15]

2. The Supreme Court has clarified in the decision VIII Ips 26/2020 from 24th of September 2020 that minimal changes in the content and scope of the employee's working tasks do not constitute a valid business reason for termination of the employment contract for business reasons: "The reorganization of the work process in itself does not justify the termination of employment for business reasons. It is not irrelevant whether the tasks that the employee no longer performed after the change, because they were transferred (and appears to have been extensively upgraded with other working tasks) were actually preformed or to what extend they were preformed, taking into account the previous organization and practice of the employer (scope and direction of operation). If these working tasks in addition to the other tasks performed by the employee, to the extent that they were performed, represented a negligible amount of work of the employee, and there was only the transfer of these tasks for the purpose of different organisation, but substantive changes in the performance of these tasks, and at the same time therefore also different requirements of education, it cannot be easily concluded that the needs of the worker for her work have ceased under the conditions from the previous employment contract."

Case law is in no way in favour of such conduct by the employer. Already in 2006, the Supreme Court took the position that an employer cannot terminate an employment contract for an indefinite period of time for business reasons if the employer employs a fixed-term employee for one month at the same work post or work position and continues to conclude new (consecutive) contracts with the same employee on fixed-term employment (even due to increased workload).

If the needs for work were actually reduced (according to the Supreme Court) the employer would no longer conclude new (consecutive) employment contracts with the same employee under a fixed-term employment contract and would keep the employee employed in the same job position for an indefinite period. The different conduct is considered an abuse of the institute of termination of the employment contract for business reasons.

The case law has for quite a long time allowed employers to lay off employees for business reasons, while at the same time hiring student or agency workers for the same work. This was assessed as an admissible and autonomous business decision of the employer or an aspect of the rationalization of his business operations, which did not result in the unlawfulness of the notice of termination of the employment contract. Newer case law however is not in favour of this view. In its decision VIII Ips 82/2017 of 19th December 2017, the Supreme Court took the following position:

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[15] Judgement of the Supreme Court of the Republic of Slovenia, VIII Ips 224/2012, 18. December 2012, which refers to the case law of the Supreme Court of the Republic of Slovenia in this regard (Judgement of the Supreme Court of the Republic of Slovenia, VIII Ips 82/2007, 26. June 2007; Judgement of the Supreme Court of the Republic of Slovenia, VIII Ips 411/2008, 23. February 2010; Judgement of the Supreme Court of the Republic of Slovenia, VIII Ips 69/2010, 19. December 2011; Judgement of the Supreme Court of the Republic of Slovenia, VIII Ips 275/2010, 5. September 2011 and decision of the Supreme Court of the Republic of Slovenia, VIII Ips 115/2009, 15. February 2011 and decision of the Supreme Court of the Republic of Slovenia, VIII Ips 207/2010, 20. December 2011).

"If, instead of terminating the employment contracts, there are other suitable options without damaging the efficient operation of the employer, it is not possible to establish a valid business reason that prevents the continuation of work under the terms of the employment contract.

Therefore, the fact that the employer employs fixed-term employees, hires agency workers or students on equal terms during the period when he terminates the employment contracts of employees for business reasons (because he shows the need to reduce the number of employees) is not irrelevant.

Maintaining the employment of employees has, in principle, an advantage over securing the work of employees who are not employed by the employer, when the employer decides to reduce or rationalize his business operations."

At the end of this chapter, it is important to mention the intervention legislation that at least for a short time allowed so-called forced retirement. The adoption of PKP7[16] changed Article 89 of the ZDR-1[17] thereby providing an additional new reason for a lawful notice of termination of an employment contract for business reasons.

With PKP7, the employer was given the opportunity to terminate the employment contract for business reasons without a valid reason, when the employee fulfilled the condition of:

- 15 years of insurance period and 65 years of age or
- 40 years of pension period without additional purchase and 60 years of age.

We believe that the legislator with this new rule (or exception) has essentially degraded the basic rule of labour law which states that it is not possible to terminate an employment contract without a good reason. Not to mention the judgment of the Court of Justice of the EU from 2012, from which it is clear that compulsory retirement at a certain age constitutes unlawful discrimination due to age, which is not permissible.

In Case C-286/12[18] the European Commission by its action claimed that the Court of Justice of the EU should state that, by adopting a national scheme requiring the compulsory retirement of judges, public prosecutors and notaries upon reaching the age of 62, which gives rise to a difference in treatment on grounds of age, which is not justified by legitimate objectives and which, in any event, is not appropriate or necessary as regards the objectives pursued. The Court of Justice of the EU held, that Hungary has failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[19]

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[16] COVID-19 Second Wave Mitigation Measures Act (ZIUOPDVE). *Official Gazette of the Republic of Slovenia*, no. 175/20, 203/20 - ZIUPOPDVE, 15/21 - ZDUOP, 51/21 - ZZVZZ-O and 57/21 - odl. US.

[17] Similarly, redundancies in the public sector were changed by sectoral laws - Article 156 of the Public Services Act (Civil Servants Act (PPA). *Official Gazette of the Republic of Slovenia*, No. 56/02, 110/02 - ZDT-B, 2/04 - ZDSS-1, 50/04 - ZPol-C, 23/05, 62/05 - odl. US, 75/05 - odl. US, 113/05, 21/06 - odl. US, 68/06 - ZSPJS-F, 131/06 - odl. US, 33/07, 65/08, 69/08 - ZTFI-A, 69/08 - ZZavar-E, 40/12 - ZUJF, 63/13 - ZS-K, 158/20 - ZIntPK-C, 203/20 - ZIUPOPDVE, 28/21 - odl. US

[18] *European Commission v Hungary*, 2012. Judgment of the Court (First Chamber) of 6. November 2015 (Case C-286/12, ECLI:EU:C:2012:687).

[19] *OJ* 2000 L 303, 16. Court of Justice of the EU especially examined the objective, invoked

The decision of the Constitutional Court of the Republic of Slovenia, that stayed this legislative misstep, evokes hope, as it retained the said regulation by its decision no. UI-16/21-11 of 18th of February 2021.The Constitutional Court of the Republic of Slovenia also decided to suspend the effect of already served terminations of employment contracts on the basis of amended legislation until the final decision of the court.

Articles 98-103 of the ZDR-1 specifically lay down rules for dismissal of a large number of employees for business reasons.

The definition of a larger number of employees depends on the number of employees at the employer. ZDR-1 instructs that an employer who finds that work will become unnecessary for 30 days for business reasons:

- at least 10 employees of an employer employing more than 20 and less than 100 employees,
- at least 10 per cent of the employees of an employer employing at least 100 but less than 300 workers,
- at least 30 employees of an employer employing 300 or more employees,
- is obliged to draw up a redundancy scheme or programme.

An employer employing less than 20 workers, does not need to draw up the redundancy scheme, nor does an employer employing more than 20 workers, if within a period of 30 days, the work becomes unnecessary to a lesser extent than prescribed.

The employer has the duty to inform the trade unions in writing as soon as possible about the reasons for the cessation of labour needs, the number and categories of all employees, the envisaged categories of redundant employees, on the estimated period within which the need for work will cease and on the proposed criteria for determining redundancies. In advance, in order to reach an agreement, the employer has to consult with the trade unions on the proposed criteria for determining redundancies, and in preparing a redundancy scheme on possible ways to prevent and limit redundancies and on possible measures to prevent and mitigate possible adverse consequences. A copy of the written

by Hungary, of establishing a more balanced age structure in the area of the administration of justice. In that regard, while recognising that the national legislation may facilitate, in the short term, the access of young lawyers to the professions concerned, the Court pointed out, however, that the immediate, apparently positive, effects are liable to cast doubt on the prospects of achieving a truly balanced 'age structure' in the medium and long term. While, in the course of 2012, the turnover of personnel in the professions concerned will be subject to a very significant acceleration, as eight age groups have been replaced by one single age group (that of 2012), that turnover rate will be subject to an equally radical slowing-down in 2013, when only one age group will have to be replaced. In addition, that rate of turnover will become slower and slower as the age-limit for compulsory retirement is raised progressively from 62 to 65, even leading to a deterioration in the prospects for young lawyers to enter the professions of the judicial system. It follows that the contested national legislation is not appropriate to achieve the pursued objective of establishing a more balanced 'age structure'. Establishing that the national legislation gives rise to a difference in treatment on grounds of age which is neither appropriate nor necessary to attain the objectives pursued and therefore does not comply with the principle of proportionality, the Court concludes that Hungary has failed to fulfil its obligations under Council Directive 2000/78/EC, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-11/cp120139en.pdf (11.5.2021).

notice to the trade unions must be sent by the employer to the Employment Service of Slovenia (hereinafter referred to as "ESS") (Article 99 of the ZDR-1).

In accordance with Article 100 of the ZDR-1 the employer must notify the ESS in writing of the procedure for determining the cessation of work needs of a larger number of employees, about the consultation with the trade unions, about the reasons for cessation of work needs, about the number and categories of all employees, about the envisaged categories of redundant employees and about the envisaged deadline, in which the need for work will cease. The employer must also send a copy of the written notice to the trade unions. The employer may terminate the employment contracts of redundant employees, taking into account the adopted redundancy scheme, but not before the expiry of the 30-day period from the fulfilment of the obligation to inform the ESS.

The role of the ESS is defined in Article 103 of the ZDR-1. The employer is obliged to consider and take into account any proposals of the ESS on possible measures to prevent or minimize the termination of employment of employees and measures to mitigate the harmful consequences of the proposed termination of employment. At the request of the ESS, the employer may not terminate the employment contract of employees before the expiry of the 60-day period from the fulfilment of the obligation to inform the ESS.

The redundancy scheme must contain:

- the reasons for the cessation of employee's labour needs,
- measures to prevent or, as far as possible, limit the termination of employee's employment, with the employer having to examine the possibility of continuing employment under changed conditions,
- list of redundancies,
- measures and criteria for the selection of measures to mitigate the harmful consequences of termination of employment, such as: offering employment with another employer, providing financial assistance, providing assistance for starting a self-employed activity, purchase of additional insurance period for retirement. (Article 101 of the ZDR-1).

The employer formulates a proposal of criteria for determining redundant employees. In agreement with the trade union at the employer, the employer may, instead of the criteria from the collective agreement, formulate its own criteria for determining redundant employees.

In determining the criteria for determining redundant employees, the following must be taken into account in particular:

- professional education of the employee or qualification for work and the necessary additional knowledge and abilities,
- work experience,
- work performance,
- length of the period of service,
- health condition,
- the social status of the employee, and
- that he or she is the parent of three or more minor children or the sole breadwinner of a family with minor children.

In determining the employees whose work becomes unnecessary, employees with poorer social status shall have priority in maintaining employment with the same criteria. Temporary absence of a employee from work due to illness or injury, care of a family member or a severely disabled person, parental leave and pregnancy may not be a criterion for determining redundant employees (Article 102 of the ZDR-1).

If the employer does not comply with the rules of the ZDR-1 regarding the procedure of termination of the employment contract for a large number of employees, a fine of EUR 3,000 to 20,000 is prescribed for the employer, a legal entity, sole proprietor or self-employed individual (item 18 of the first paragraph of Article 217 of the ZDR-1), EUR 1,500 to 8,000 for a small employer (with ten or less employees), a legal entity, a sole proprietor or an individual who independently performs a business activity (second paragraph of Article 217 of the ZDR-1 in connection with item 18 of the first paragraph of Article 217 of the ZDR-1), EUR 450 to 1,200 for an individual employer (third paragraph of Article 217 of the ZDR-1 in connection with item 18 of the first paragraph of Article 217 of the ZDR-1) and EUR 450 to 2,000 for the responsible person of the employer of the legal entity and the responsible person in the state body or local community (fourth paragraph of Article 217 of the ZDR-1 in connection with item 18 of the first paragraph of Article 217 of the ZDR-1).

3. MEASURES IN THE ZDR-1, AIMED AT MAINTAINING EMPLOYMENT

3.1. Temporary lay-off ("waiting for work")

Article 138 of the ZDR-1 stipulates that the employer may temporarily, but for a maximum of six months in an individual calendar year, send the employee in writing to wait for work at home. In this case, the employee has the right to salary compensation in the amount of 80 percent of the base for his usual salary and the duty to respond to the employer's call in the manner and under the conditions as follows from the written referral.

During the temporary lay-off, the employee is obliged educate himself, which is specifically presented in section 2.3 of this chapter.

3.2. Performing other (appropriate or suitable) work

In accordance with the Article 33 of the ZDR-1, the employer may order the employee to temporarily (for a maximum of three months in a calendar year) perform "other appropriate work", namely in the following cases: temporarily increased workload at another work post or another type of work at the employer, temporarily reduced workload at the work post or within the type of work performed and in order to replace a temporarily absent worker.

"Other appropriate work" is a type of work for which the employee meets the required preconditions and for which the same type and level of education is required, as required for the performance of work for which the employee has an employment contract, and for working hours as agreed for the work for which the employee has an employment contract and the place of work is not more than three hours' drive from the employee's place of residence in both directions by public transport or organized transport by the employer.[20]

[20] Art. 33, para. 4, ZDR-1.

A small employer with ten or less employees however may in such cases order the employee to perform so-called "other suitable" work". "Other suitable work" is considered as work for which the same type and at most one level lower education is required than is required for the performance of work for which the employee has an employment contract and for working time as agreed for the work for which the employee has a contract on employment, and the place of performance of work is not more than three hours' drive in both directions by public transport or by organized transport of the employer from the place of residence of the employee.[21]

ZDR-1 specifically states that an employee who temporarily performs other "appropriate" or "suitable" work shall have the right to a salary as if he were performing his work, if this is more (monetarily) favourable for him.[22]

When the performance of other appropriate or suitable work would last more than three months in a calendar year, the employer may otherwise terminate the employment contract for business reasons under the first indent of the first paragraph of Article 89 of the ZDR-1 and at the same time offer the employee a new employment contract to continue working under changed conditions or in another work post.[23]

3.3. Education, improvement, and further training

Article 170 of the ZDR-1 stipulates that an employee has the right and duty to continuous education, improvement or further training in accordance with the needs of the work process, with the aim of maintaining or expanding the ability to perform work under an employment contract, maintaining employment and increasing employability.

In the same provision ZDR-1 stipulates the obligation of an employer to provide education, improvement or further training of employees if the needs of the work process require so or if with additional education and further training termination of employment contract for business reasons can be avoided. The employer has the right to refer the employee for education, improvement and further training, and the worker has the right to apply for education, improvement and further training himself In such referral cases the employer bears the costs of education, improvement and further training.

The duration and course of education and the rights of the contracting parties during and after the concluded further education shall be determined by the education contract or by the appropriate collective agreement.

Article 171 of the ZDR stipulates that an employee who is being educated, improved or further trained in accordance with the aforementioned Article 170, as well as an employee who is being educated, improved or further trained in his own interest, has the right to be absent from work for the purpose of preparing or taking exams. If this right is not specified in a collective agreement, employment contract or a special education contract, the employee has the right to be absent from work on the days when he takes the examinations for the first time. This is therefore the minimum content of the right

[21] Art. 33, para. 5, ZDR-1.

[22] Art. 33, para. 7, ZDR-1.

[23] Art. 50 and 91 of the ZDR-1. It should be noted that in practice, many employers terminate a contract for business reasons and offer a new employment contract where the salary is much lower. It is a clear concealment of the reason for the termination of the employment contract, which, according to the case-law cited, is unlawful, (also - Turk, B. J. (27. 8. 2020): Odpoved pogodbe o zaposlitvi v primeru kriznih razmer.)

to be absent from work, but of course a more favourable agreement with the employer is always possible.

An employee who is being educated, improved or further trained in accordance with Article 170 of the ZDR-1 has the right to paid leave of absence from work.

Of course, in matters of education, it is also necessary to check the collective agreement, which is binding for the employer, as it can give workers more rights than ZDR-1.

4. THE "PKP" INTERVENTION LEGISLATION, AIMED AT MAINTAINING EMPLOYMENT

Slovenia during the epidemic of the coronavirus SARS-CoV-2 provided special incentives to employers with a rather extensive and very complex "anti-corona" intervention legislation adopted in special legislative "packages" or "PKPs". From the first proclamation of the epidemic in Slovenia on 12th March 2020 until the end of writing in May 2021, the National Assembly of the Republic of Slovenia has adopted eight PKPs, which are rather unique in the existing Slovenian legislative practice. Certain provisions of individual and subsequent PKPs complement or repeal each other, often even implying a temporary departure from the otherwise applicable rules and sometimes also containing legislative changes of a fixed nature. And, to introduce even more normative confusion, due to the composite nature of the individual PKPs, in some parts their individual provisions are still in force, but some are not and so it might not come as a surprise that even legal practitioners can have a difficult time with the PKPs. It's also important to note, that "PKP" is an informal abbreviation of this type of legislation, as it has never been formally introduced into the official nomenclature. Therefore, the individual PKPs can consist of one or more individual statutes, that all have a common characteristic: usually very unwieldy designations.

The PKPs are as follows:

PKP1:

- Zakon o interventnih ukrepih na javnofinančnem področju (ZIUJP; Official Gazette of the Republic of Slovenia, No. 36/20); Fiscal Intervention Measures Act;
- Zakon o interventnem ukrepu odloga plačila obveznosti kreditojemalcev (ZIUOPOK; Official Gazette of the Republic of Slovenia, No. 36/20, 49/20 – ZIUZEOP and 203/20 – ZIUPOPDVE); Act Determining the Intervention Measure of Deferred Payment of Borrowers' Liabilities;
- Zakon o začasnih ukrepih v zvezi s sodnimi, upravnimi in drugimi javnopravnimi zadevami za obvladovanje širjenja nalezljive bolezni SARS-CoV-2 (COVID-19) (ZZUSUDJZ; Official Gazette of the Republic of Slovenia, No. 36/20 and 61/20); Act on provisional measures for judicial, administrative and other public matters to cope with the spread of infectious disease SARS-CoV-2 (COVID-19);
- Zakon o interventnih ukrepih na področju plač in prispevkov (ZIUPPP; Official Gazette of the Republic of Slovenia, No. 36/20, 49/20 – ZIUZEOP, 61/20 – ZIUZEOP-A and 80/20 – ZIUOOPE); Act Determining the Intervention Measures on Salaries and Contributions;
- Zakon o interventnih ukrepih na področju kmetijstva, gozdarstva in prehrane (ZIUPKGP; Official Gazette of the Republic of Slovenia, No. 36/20); Act on Intervention Measures on Market on Agricultural Products, Food and Timber Assortments;
- Zakon o interventnih ukrepih za zajezitev epidemije COVID-19 in omilitev njenih

posledic za državljane in gospodarstvo (ZIUZEOP; Official Gazette of the Republic of Slovenia, No. 49/20, 61/20, 152/20 – ZZUOOP, 175/20 – ZIUOPDVE and 15/21 ZDUOP); Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy

PKP2:
- Zakon o zagotovitvi dodatne likvidnosti gospodarstvu za omilitev posledic epidemije COVID-19 (ZDLGPE; Official Gazette of the Republic of Slovenia, No. 61/20, 152/20 – ZZUOOP and 175/20 – ZIUOPDVE); Act Providing Additional Liquidity to the Economy to Mitigate the Consequences of the COVID-19 Epidemic

PKP3:
- Zakon o interventnih ukrepih za omilitev in odpravo posledic epidemije COVID-19 (ZIUOOPE; Official Gazette of the Republic of Slovenia, No. 80/20, 152/20 – ZZUOOP, 175/20 – ZIUOPDVE, 203/20 – ZIUPOPDVE and 15/21 – ZDUOP); Act Determining the Intervention Measures to Mitigate and Remedy the Consequences of the COVID-19 Epidemic;
- Interventni zakon za odpravo ovir pri izvedbi pomembnih investicij za zagon gospodarstva po epidemiji COVID-19 (IZOOPIZG; Official Gazette of the Republic of Slovenia, No. 80/20); Intervention Act to Remove Obstacles to the Implementation of Significant Investments to Start the Economy After the COVID-19 Epidemic;
- Zakon o poroštvu Republike Slovenije v Evropskem instrumentu za začasno podporo za ublažitev tveganj za brezposelnost v izrednih razmerah (SURE) po izbruhu COVID-19 (ZPEIPUTB; Official Gazette of the Republic of Slovenia, No. 80/20); Act Regulating the Guarantee of the Republic of Slovenia in European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak

PKP4:
- Zakon o interventnih ukrepih za pripravo na drugi val COVID-19 (ZIUPDV; Official Gazette of the Republic of Slovenia, No. 98/20 and 152/20 – ZZUOOP); Act Determining Intervention Measures to Prepare for the Second Wave of COVID-19

PKP5:
- Zakon o začasnih ukrepih za omilitev in odpravo posledic COVID-19 (ZZUOOP; Official Gazette of the Republic of Slovenia, No. 152/20 and 175/20 – ZIUOPDVE); Act Determining Temporary Measures to Mitigate and Remedy the Consequences of COVID-19

PKP6:
- Zakon o interventnih ukrepih za omilitev posledic drugega vala epidemije COVID-19 (ZIUOPDVE; Official Gazette of the Republic of Slovenia, No. 175/20, 203/20 – ZIUPOPDVE, 15/21 – ZDUOP, 51/21 – ZZVZZ-O and 57/21 – odl. US); Act Determining the Intervention Measures to Mitigate the Consequences of the Second Wave of COVID-19 Epidemic

PKP7:
- Zakon o interventnih ukrepih za pomoč pri omilitvi posledic drugega vala epidemije COVID-19 (ZIUPOPDVE; Official Gazette of the Republic of Slovenia, No. 203/20 and 15/21 – ZDUOP); Act Determining Intervention Measures to Assist in Mitigating the Consequences of the Second Wave of COVID-19 Epidemic

PKP8:
- Zakon o dodatnih ukrepih za omilitev posledic COVID-19 (ZDUOP; Official Gazette of the Republic of Slovenia, No. 15/21); Act on Additional Measures for Mitigation of Consequences COVID-19

Due to the relevance, we are tackling the measures currently still in force from the above mentioned PKPs, which are intended to maintain employment or prevent the termination of employment contracts for business reasons.

4.1. Subsidized temporary lay-off ("waiting for work")[24]

Subsidized temporary lay-off under the PKP legislation is a measure aimed at maintaining employment. Therefore, the various PKPs have provided government subsidies to employers, who would temporarily lay-off a certain part of their workforce. This subsidy covered all or only a part of the salary compensation and/or social contributions and tax duties, pertaining to employees on temporary lay-off. If an employer made use of such government subsidies, he had to follow restrictions on possible labour redundancies otherwise he had to refund the received subsides to the tax authority. These normative restrictions on labour redundancies for business reasons for employees, that have been temporarily laid-off, and employees, that were still working full-time during the epidemic, if their employer made use of subsidies under PKPs, have intensified with the adoption of each new PKP.

ZIUZEOP (PKP2) had basically no restrictions on dismissal of employees for business reasons, namely not for employees who were temporarily lay-off, not on employees who were still working. The ban on labour redundancies for business reasons was first enacted in the ZIUOOPE (PKP3), where it was stipulated that the employer may not dismiss an employee in the period of receiving the salary compensation (sixth paragraph of Article 32 of the ZIUOOPE (PKP3)). ZIUOOPE (PKP3) did not explicitly stipulate that the ban refers only to business reasons labour redundancies, but there was no doubt of this if the principle of purposeful interpretation of this provision was used. Violation of this ban was however not sanctioned as a minor offence.

ZIUPDV (PKP4) then stipulated that during the period of receiving wage compensation for temporarily laid-off employees, the employer may not dismiss the employee for business reasons for whom he claimed reimbursement of wage compensation. He was also not allowed to terminate the employment contract of a large number of employees for business reasons who worked, unless the labour redundancy program was adopted before 13th March 2020 and the employer did not claim a subsidy for these employees under ZIUOOPE (PKP3) or ZIUZEOP (PKP2) (sixth paragraph of Article 10 of the ZIUPDV (PKP4)).

[24] Art. 39 to 53 of the ZDUOP (PKP8).

ZZUOOP (PKP5) contains the same provision, except that it supplemented it for an even larger number of employees, provided that the employer has not yet claimed a subsidy for these employees even under ZIUPDV (PKP4) (sixth paragraph of Article 76 of ZZUOOP (PKP5)).

Violation of the ban on dismissal for business reasons was defined as a minor offence for which a fine was prescribed only when the ZIUPDV (PKP4) was enacted, and later under the ZIUOPDVE (PKP6). However, it is important to note, that if the employer violated the ban and nevertheless terminated the employment contract for business reasons, such a termination is not unlawful just because of this fact. And this is regardless of whether this violation was classified in the PKP as a minor offence or not.

The measure of subsidized temporary lay-off is currently – or at least until the 30th June 2021 – regulated in the ZDUOP (PKP8). This measure can therefore be exercised by any employer in Slovenia, that was registered in the Slovenian business register on 31st December 2020 at the latest, who cannot temporarily provide work due to the epidemic or the consequences of the epidemic, except:

- direct or indirect state or local government budget users, if the share of revenues from public sources in 2020 was higher than 70%,
- employers who perform financial or insurance activity from group K according to the standard classification of activities and had more than 10 employees on 31st December 2020, and
- foreign diplomatic missions and consulates, international organizations, missions of international organizations and institutions of the European Union in Slovenia.

Furthermore, employers are entitled to this measure if, according to their estimates, their revenues in 2021 will fall by more than 20% compared to 2019 or 2020 due to the epidemic or the consequences of the epidemic, as well as an exception all employers who do not meet the 20% drop in revenues in 2021, but only if they have the status of a humanitarian organization under Slovenian legislation.

During the period of subsidized temporary lay-off, employees can register with the ESS and participate in programs for registered jobseekers. They can participate in various forms of non-formal education and training to improve their professional skills and in obtaining new professional qualifications. Participation in such programs is free from the point of view of employees as well as from the point of view of employers.

As to the amount of compensation or subsidies received:

a) 80% of gross I salary compensation and is limited by the amount of the average monthly salary in Slovenia, calculated for the month of October 2020 (EUR 1,821.44),

b) 100% gross I for employers for whom the total amount of public funding received in accordance with point 3.1 of the Commission Communication Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (2020/C 91 I/01) did not exceed EUR 1,800,000 per individual company. The amount of partial reimbursement of paid salary compensation is limited by the amount of the average monthly salary in Slovenia, calculated for the month of October 2020 (EUR 1,821.44),

c) For the time when the employer is fully prevented from carrying out business activities due to the epidemic, Slovenia covers 80% of gross II or 100% of gross II salary compensation.

However, the right to reimbursement of paid salary compensations cannot be exercised by the employer:

- who does not meet the mandatory duties and other monetary non-tax liabilities, which is collected by the Slovenian tax authority if he has unpaid due liabilities on the day of filing the application. An employer shall be deemed not to have fulfilled such obligations if, on the date of submission of the application, he had not submitted all due tax returns for employment income for the period of the last five years up to the date of submission of the application;
- and/or if bankruptcy proceedings have been instituted against him or he is in liquidation proceedings.
- The application must include:
- an estimate of revenue decline,
- proof of posting employees on temporary lay-off for work due to temporary inability to provide them work for business reasons,
- a statement, for the correctness for which he is criminally liable and liable for potential damages, that on the day of submitting the application he has paid all due tax liabilities from mandatory duties and other monetary non-tax liabilities,
- a statement for the correctness for which he is criminally liable and liable for potential damages, that on the day of submitting the application he has fulfilled the obligations arising from the submission of all tax deductions for employment income for the last five years until the date of submission of the application,
- a statement that he paid all salary compensations to the employees on the day of submitting the application, and
- a statement that the state aid under the intervention legislation does not or will not exceed EUR 1.8 million per individual company (or the total aid will not exceed EUR 270,000 per company active in the fisheries and aquaculture sector or EUR 225,000 per company active in the in the field of primary production of agricultural products).

Partial reimbursement of wage compensation, except for employees for whom the payment of wage compensation is not borne by the employer, shall be paid to the employer on a monthly basis, in proportion or in full, on the tenth day of the month following the month of payment of wage compensation.

The employer is entitled to a refund of salary compensation for the actual monthly or weekly obligation, for a holiday and other non-working day determined by statute, if the employee would actually work on that day, but is now on a temporary lay-off.

However, the employer cannot claim salary compensation for temporary lay-off of an employee, if the latter in the said period is subject of notice of termination of an employment contract.

The employer has to return the received funds in full if, when submitting the application, he submitted (seventh paragraph of Article 47 of the ZDUOP (PKP8)):

- an untrue statement that on the day of submitting the application all due liabilities from obligatory duties and other monetary non-tax liabilities have been paid,
- an untrue statement that on the day of submitting the application he has fulfilled the obligations arising from the submission of all withholding tax returns for em-

ployment income for the period of the last five years until the day of submitting the application, or
- an untrue statement that he paid all salary compensations to the employees on the day of submitting the application.

An employer who received funds from the measure of partial reimbursement of salary compensation to workers on temporary waiting for work in the amount of 100% because the total amount of public funds did not exceed EUR 1.8 million per individual company (or total assistance does not exceed EUR 270,000 per company, active in the fisheries and aquaculture sector or EUR 225,000 per enterprise active in the field of primary production of agricultural products) must, if the total amount of received public funds as received subsidies exceeded the upper limit, return the funds, that he received in excess of the maximum amount (second paragraph of Article 44 of the ZDUOP (PKP8)).

A fine of EUR 3,000 to 20,000 shall be imposed on an employer who (inter alia) initiates the procedure of terminating an employment contract for business reasons of employees on temporary lay-off or terminating the employment contract of a large number of employees for business reasons during the period of receiving partial salary compensation, unless the redundancy scheme was adopted before 13th March 2020 and the employer did not exercise the right to reimbursement for these employees under the ZDUOP (PKP8), ZIUZEOP (PKP2), ZIUOOPE (PKP3), ZIUPDV (PKP4) or ZZUOOP (PKP5).

According to the ZDUOP (PKP8) it is considered that the employer during the period of receiving partial reimbursement of compensation:
- may not initiate the procedure of termination of the employment contract for business reasons to employees who have been sent on subsidized temporary waiting lay-off;
- or terminate the employment contracts of a large number of employees for business reasons. A larger number of employees may be dismissed by the employer only if the redundancy scheme was adopted before 13th March 2020 and the employer has not exercised the right to reimbursement of wages for these employees under this ZDUOP or previous PKPs;

must inform the ESS if he recalls the employee back to work.

4.2. Subsidized shortened or part-time work[25]

The measure of subsidized part-time work is again intended to maintain employment. This institute is subject to stricter restrictions on termination for business reasons than the measure of subsidized temporary lay-off.

This measure can only be partaken by employers for their employees who have an employment contract for full-time employment and in such a way that the employer provides the employee with part-time work in the amount of at least half of their usual working obligation (i.e. at least 20 to 35 hours per week).

An employer who provides work to the employee for at least 20 hours per week, and for the remaining full-time work the employee is partially temporary laid-off, may claim a

[25] Art. 11-23 of the ZIUOOPE (PKP3) and articles from 18-20 of the ZDUOP (PKP8). Decision to extend the partial subsidy measure to reduce full - time work**.** *Official Gazette of the Republic of Slovenia*, No. 190/20), determines that the application of this measure (as it is defined in articles from 11-23 of the ZIUOOPE (PKP3)), is extended until June 30, 2021.

partial refund of salary compensation for the time of ordered temporary lay-off (i.e. from 5 to 20 hours per week), which in the ZDUOP is explicitly defined as a "subsidy".

An employer who provides work to an employee for at least part-time (i.e. for at least 20 hours per week) may apply for or claim a partial refund of salary compensation (or "subsidy") for the period of ordered waiting for work (i.e. from 5 to 20 hours per week). The right can be exercised by an employer who cumulatively meets the following conditions:

- is a business entity who was entered in the Slovenian business register before 18th October 2020,
- employs workers on the basis of an employment contract for full-time employment, and
- according to his estimate, at least 10% of his employees cannot be provided at least 90% of work per month,
- the employer is not direct or indirect state or local government budget users if the share of revenues from public sources in 2020 was higher than 50%.

During the period of receiving the subsidy and for one month after its expiration, such an employer is prohibited from initiating the procedure of termination of the employment contract for business reasons for such employees, nor may he terminate the employment contract of a large number of employees for business reasons. Exceptionally, this obligation does not exist if the redundancy scheme was adopted before 13th March 2020 and the employer did not claim a subsidy for these workers either under the ZIUOOPE (PKP3) or ZIUZEOP (PKP2).

Such an employer shall also be prohibited from ordering overtime or ordering temporary redistribution of working time if such work can be carried out with employees, who were ordered to work on subsidized part-time.

Employers, who do not adhere to the abovementioned bans can expect a fine in the amount from EUR 450 to 50,000.

The "subsidy" is reduced proportionally for the time of the employee's absence from work in the cases, that are specified by the ZDR-1. These are mainly absences due to the use of annual leave, sick leave, holidays, and other non-working days.

The "subsidy" is paid to the employer monthly, but no later than 30 days after the signing of the subsidy agreement between the employer and the ESS.

ZIUOOPE (PKP3) also provided for certain rights and obligations for an employee who has been ordered by the employer to work part-time. Of utmost importance is that such an employee retains all rights and obligations arising from the employment relationship as if he were working full time, unless explicitly provided otherwise in the provisions of the ZIUOOPE (PKP3).

The employee therefore has:

- the right to be paid for work for the period, in which he is actually performing his designated work (100% of salary);
- the right to compensation of salary for the period up to full-time within the ordered part-time work, in the amount determined by the ZDR-1 for cases of temporary inability to provide work to employees for business reasons (80% of the base salary; regardless of to the amount of the subsidy that the employer may or may not receive);
- the right to a break in proportion to the time spent at work;

- the obligation to perform full-time work at the request of the employer;
- the right to a monthly salary compensation when he is absent from work in cases determined by the ZDR-1 (i.e. due to annual leave, sick leave, holidays and other non-working days) in the amount determined by the ZDR-1 for such cases;
- the right to register with the ESS in the register of jobseekers during the ordered part-time work and to be included in the measures provided to registered jobseekers.
- As is the case with other measures in the PKPs, that are intended to maintain employment, some of the individual PKPs have provided fines or compulsory refunds for employers, who despite the ban on termination of employment contracts for such workers due to business reasons have laid-off employees, for whom they received subsidies. However, it is again important to note, that if the employer nevertheless violated such a ban, the termination in itself is not deemed unlawful just because of this fact.

4.3. Reimbursement of a part of the minimal wage in the form of a temporary monthly subsidy[26]

Partial subsidization of the minimum wage for wages, paid in the period from January to June 2021, is in the ZDUOP (PKP8) provided in such a way that the employer for each employee, whose wage for full-time work does not exceed the amount of the statutory minimum wage, is entitled to a refund in the form of a monthly subsidy of EUR 50.

However, such an employer during the period of receiving the minimum wage subsidy and for three months thereafter, may not initiate the procedure of termination of the employment contract for business reasons for the employees for whom he was entitled to receive the subsidy or terminate the employment contract of a large number of employees for business reasons, unless the redundancy scheme was adopted before the entry into force of the ZDUOP (PKP8), i.e. before 5th February 2021 (ban on redundancies).

The employer may terminate the employment contract of employees for business reasons for whom he was not entitled to receive such a subsidy, as long as this does not represent termination for a larger number of employees in accordance with Article 98 of the ZDR-1.

If the employee has a part-time employment contract or performs part-time work, the employer is entitled to a proportionate share of the subsidy.

Article 30 of the ZDUOP (PKP8) defines a minor offence for employers who violate the ban on redundancies due to business reasons for employees, for whom they received minimum wage subsidies, in which case they can expect a fine of EUR 450 to EUR 20,000.

5. INSTEAD OF CONSLUSION – AN ASSESMENT OF THE LEGALITY OF THE TERMINATION OF THE EMPLOYMENT CONTRACT FOR BUSINESS REASONS DUE TO THE PANDEMIC

There is still no case law in Slovenia on the termination of an employment contract for business reasons due to the consequences of the SARS-CoV-2 virus epidemic, which is also understandable. Nevertheless, two judgments of the Supreme Court should be highlighted here, which could be applied to the current economic situation caused by the outbreak of the virus.

In its judgment and decision VIII Ips 233/2016 of 10th November 2016, the Supreme Court took the stance that any (negative seasonal) deviation in the employer's operations

[26] Art. 29 and 30 of the ZDUOP (PKP8).

is not a justifiable reason for dismissal, especially not if it is based on a projection of future business events:

"The employer may justify the termination of the need for work of an employee in relation to specific obligations from the employment contract by predicting future business or economic trends, but such a forecast must be based on a reasonably justified method.

However, the permanent (un)necessity of certain employment cannot be justified by the employer only by considering a short and inappropriate time section concerning the volume of sales, which can change over a longer period of time. Therefore, short-term seasonal fluctuations in themselves do not justify the conclusion, that negative business trends will prevail in the future in other seasonal periods as well."

A similar position is also evident from the decision of the Supreme Court VIII Ips 68/2017 of 5th September 2017, which also referred to the above decision:

"The [Supreme Court] has already explained that the employer can justify the termination of the need for work of an employee also by predicting future business or economic trends, but such a forecast must be based on a reasonably justified method.

Therefore, the plaintiff [as an employee] is justified in stating that this is an assessment of the defendant [as an employer] about possible future events and future reorganization of [his] business operations, which, at least at the time of termination (...), is not clear whether it will even occur at all in any shorter time period, that follows the termination of the plaintiff's employment contract. This means, that reducing the number of individual contractors in the workplace, based just on future planning of the potentially unnecessary tasks on a particular work post, which in turn is based on the assessment of data on reduced future sales, cannot refer to the distant future, and in particular should not be entirely hypothetical in its nature."

It is clear from decisions, presented above, that mere short-term uncertainness of the (business) future of an enterprise cannot in itself be the prevailing criterion in justifying the termination of the employment contract due to business reasons. However, if such a period of uncertainness is substantially longer, for example, if the economic downturn of an enterprise was in place even before the outbreak of the SARS-CoV-2 virus, the employer is on the safer side, when the validity of the grounds for labour termination due to business reasons is concerned.[27] The key, in our view, will be whether or not the business model of each employer was essentially economically sound – or in other words "healthy" – even before the outbreak of the current epidemic. In short, if the companies in question were previously without a serious economic "illness", their resorting to available state "medicines" in form of various temporary subsidies during the epidemic will find them all the more difficult to lawfully resort to labour redundancies, relying business reasons.[28]

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COVID 19 – prestanak ugovora o radu iz poslovnih razloga

Rezime: Članak je posvećen regulisanju prestanka ugovora o radu iz poslovnih razloga u slovenačkom pravom sistemu. Prema ustaljenoj sudskoj praksi, svaki otkaz ugovora o radu je *ultima ratio* poslodavca. Pored alternativa za prekomerni višak zaposlenih iz ZDR-a i pregleda mera iz PKP paketa, opcije koje država nudi poslodavcima da spreče višak zapslenih, bar trenutno ne pružaju dovoljnu osnovu za zakonitost viška zaposlenih zbog ekonomske krize usled pandemije

Ključne reči: otkaz ugovora o radu, virus SARS-CoV-2 (COVID-19), PKP paketi.

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La typologie des modalité de l'intégration différenciée dans l'Union européenne

Abstract: Malgré le fait que la construction communautaire est fondée sur le principe d'unité d'application de droit communautaire, dès le début de processus de l'intégration européenne le principe de différentiation a été appliqué. L'idée principale était de préparer le terrain pour pouvoir poursuivre les objectifs communs. Déjà, lors des premiers élargissements de la Communauté européenne, les périodes de transition de certains États ont été prévues. La prise de conscience de l'impossibilité pour l'ensemble des États d'avancer de la même vitesse a conduit à la constitutionalisation du concept de différentiation/ flexibilité. L'intégration différenciée a été institutionnalisée par le traité d'Amsterdam (1997) sous la forme du mécanisme de coopération renforcée. Les modalités d'intégration différenciée sont assez nombreuses et diversifiées. On peut les trouver dans des matières différentes. Presque tous les domaines d'actions de l'Union sont potentiellement ou effectivement concernées par la différenciation. L'hétérogénéité de l'intégration différenciée se manifeste aussi à travers la multitude d'expressions désignant cette notion. Une gamme des notions diverses est développée. Ainsi, cet article présente un essai de faire une typologie des modalités de l'intégration différenciée. La difficulté ne consiste pas dans la découverte d'un classement de la flexibilité, mais plutôt dans le choix de typologies décisives. Une classification est la plus courante en doctrine. On peut donc la qualifier de classique et elle est examinée dans la première partie de cet article. Étant donné que cette classification s'avère plutôt politique que juridique et qu'elle ne reflète pas suffisamment le droit positif, les nouvelles typologies sont analysées dans la deuxième partie.

Mots clés: l'intégration différenciée, l'Union européenne, les coopérations renforcées, le principe de flexibilité, la typologie.

Jelena Ćeranić Perišić

Professeur agrégée, Associée de recherche principal, Institut de droit comparé, Terazije 41, Belgrade, ceranicj@gmail.com

1. INTRODUCTION

La construction communautaire est fondée sur le principe d'unité d'application de droit communautaire. Cependant, l'augmentation du nombre et la diversité des États membres a conduit à des réflexions sur la possibilité de rythmes différencies d'intégration européenne.

L'idée d'introduire de l'hétérogénéité dans l'intégration est ancienne. Depuis les années 1970, le concept selon lequel tous les membres de la Communauté européenne ne pourraient pas avancer au même rythme a été envisagé. Beaucoup de travaux ont montré la préoccupation d'introduire la souplesse et la flexibilité dans le processus d'intégration. Le rapport Tindemas du 1975 proposait d'admettre que „dans le cadre communautaire, d'une conception d'ensemble de l'Union européenne (...), les États qui sont en mesure de progresser ont le devoir d'aller de l'avant, les États qui ont des motifs que le Conseil reconnaît valables de ne pas progresser ne le font pas, mais reçoivent des autres États l'aide et l'assistance qu'il est possible de leur donner afin qu'ils soient en mesure de rejoindre les autres".[1]

Dans l'histoire de la construction européenne, on peut trouver de nombreux exemples de l'application de principe de différentiation sous la forme de dérogations temporaires et des périodes de transition. L'idée principale était de préparer le terrain pour pouvoir poursuivre les objectifs communs. Déjà, lors des premiers élargissements de la Communauté européenne, les périodes de transition de certains États ont été prévues. Alors, chaque État, en fonction de ces données politiques, économiques et juridiques, est appelé de fixer comme objectif de rattraper l'acquis communautaire afin de se voir un jour au même stade que les États fondateurs. Dans d'autres cas, les rapprochements se sont produits entre les États volontaires et capables d'avancer plus loin et plus vite dans la réalisation d'un objectif. Pour ne pas être empêchés par les États ne souhaitant pas ou n'ayant pas de moyens de s'associer, ils ont fait recours aux certains modèles de l'intégration différenciée.

Alors, „la chose a précédé le mot"[2], et ce qui est appelé depuis le traité d'Amsterdam la coopération renforcée, existe depuis longtemps en droit communautaire. Le mécanisme de la coopération renforcée est apparu comme la grande nouveauté institutionnelle du traité d'Amsterdam. Il s'inscrit dans le cadre plus général d'un paradigme émergeant de l'évolution constitutionnelle de l'Union, celui de l'intégration différenciée (ou, encore, de la flexibilité).[3]

Depuis le début des années 90, l'idée de différenciation est revenue en force et a en même temps changé de nature dans la mesure où, l'on est passé d'un exercice pratique à la recherche d'un concept permettant d'organiser et de codifier la flexibilité.[4] C'est à partir de la fin de l'année 1994 – soit un an à peine après l'entrée en vigueur du traité de Maastricht – que fut lancée le débat sur la différentiation dans le processus d'intégration européenne.[5]

La prise de conscience de l'impossibilité pour l'ensemble des États d'avancer de concert a donc conduit à la constitutionalisation de la coopération renforcée. Institutionnalisée par le Traité d'Amsterdam de 1997, la coopération renforcée était qualifiée comme

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1 Rapport by Leo Tindemans, Prime Minister of Belgium to the European Council, (1976). *Bulletin of the European Communities, Supplement I*.

2 Constantinesco, V. (2001). La coopération renforcée: désintégration ou pré-intégration? In : *L'intégration européenne: historique et perspectives*. Publication de l'Institut suisse de droit comparé, 110.

3 Bribosia, H. (2001). Les coopérations renforcées au lendemain du traité de Nice. *Revue du Droit de l'Union européenne*, 1, 111–171.

4 De la Serre, F. (2000). Les coopérations renforcées: quel avenir? *Politique étrangère*, 2, 457.

5 Bribosia, H. (2000). Différentiation et avant-gardes au sein de l'Union européenne. *Cahiers de droit européen*, 1-2, 59.

une véritable révolution copernicienne.[6] La coopération renforcée n'est une qu'forme institutionnalisée du principe de flexibilité ou de l'intégration différenciée. Le traité d'Amsterdam a fait de l'exception un principe constitutionnel.[7]

Introduit par le Traite d'Amsterdam, le mécanisme de coopération renforcée a été modifiée par le Traite de Nice et le Traite de Lisbonne. Par rapport à la version originale prévue par le traité d'Amsterdam, les conditions la mise en place de ce mécanisme ont été successivement assouplies par les traités de Nice et de Lisbonne. De même, le nombre de domaines où une coopération renforcée peut être instaurée a été élargi.[8] Aujourd'hui c'est l'article 20 du traité sur l'Union européenne qui constitue le fondement essentiel de ce mécanisme. Il indique notamment que les États membres qui souhaitent instaurer entre eux une coopération renforcée dans le cadre des compétences non exclusive de l'Union peuvent recourir aux institutions de celle-ci et exercer ces compétences en appliquant les dispositions appropriées des traités, dans les limites et selon les modalités prévues au présent article, ainsi qu'aux articles 326 à 334 du traité sur le fonctionnement de l'Union européenne. Les coopérations renforcées visent à favoriser la réalisation des objectifs de l'Union, à préserver ses intérêts et à renforcer son processus d'intégration. Elles sont ouvertes à tout moment à tous les États membres, conformément à l'article 328 du traité sur le fonctionnement de l'UE.[9]

Il est prévue que la décision autorisant une coopération renforcée est adoptée par le Conseil en dernier ressort, lorsqu'il établit que les objectifs recherchés par cette coopération ne peuvent être atteints dans un délai raisonnable par l'Union dans son ensemble, et à condition que qu'au moins neuf États membres y participent.[10] Tous les États membres peuvent participer à ses délibérations, mais seuls les membres du Conseil représentant les États membres participant à une coopération renforcée prennent part au vote.[11]

Les modalités de l'intégration différenciée sont nombreuses et diversifiées. On peut les trouver dans des matières aussi différentes que la politique économique et monétaire, la politique sociale, la politique étrangère et de sécurité commune (PESC), la justice et les affaires intérieures, la politique agricole commune (PAC), la fiscalité ou encore les droits de douane.[12] De plus, à l'exception des questions liées au marché intérieure, de la cohésion et des domaines de compétence exclusivement communautaire, toutes les questions relevant de la compétence de l'Union peuvent faire l'objet d'une coopération renforcée, sous réserve du respect de certaines conditions. Ainsi, presque tous les domaines d'actions de l'Union sont potentiellement ou effectivement concernées par la différenciation.

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6 Constantinesco, V. (1997). Les clauses de coopération renforcée. *Revue trimestrielle de droit européen,* 4, numéro spécial sur le traité d'Amsterdam, 44.

7 Phillipart. E., Sie Dhian Do. M. (2000). From Uniformity to Flexibility: The Management of Diversity and its Impact on the EU System of Governance. In: G. De Búrca, J. Scott (eds.) *Constitutional Change in EU: From Uniformity to Flexibility*. Oxford: Hart Publishing, 300.

8 Ćeranić. J. (2017). Flexibility Concept in the context of European Integtaion – Evolution, Survey and Perspectives. *Strani pravni život*, 4, 17–19.

9 Traité de Lisbonne modifiant le traité sur l'Union européenne et le traité instituant la Communauté européenne de 13 décembre 2007, *OJ* C 306, 17.12.2007.

10 Art. 20, al. 3 de traité de Lisbonne.

11 Art. 20, al. 3 de traité de Lisbonne.

12 Cloos. J. (2000). Les coopérations renforcées. *Revue du Marché commun et de l'Union européenne*, 441, 513.

L'hétérogénéité de l'intégration différenciée se manifeste aussi à travers la multitude d'expressions désignant cette notion. Une gamme des notions diverses est développée. En dehors du notion l'intégration différenciée, on peut également trouver l'utilisation des notions l'intégration échelonnée, la coopération plus étroite, la coopération renforcée, les dérogations, l'Europe à géométrie variable, l'Europe à plusieurs vitesses, l'Europe à la carte, l'Europe à plusieurs niveaux ou à plusieurs étages, le noyau dur, l'avant-garde, les cercles concentriques, la faculté de non-participation (*opt-out*), etc.

En tenant compte de cette multitude d'expressions impliquant différentes modalités de flexibilité, cet article présente un essai de regrouper ces hypothèses d'application en catégorie. La doctrine connaît un grand nombre de tentatives pour faire une typologie de l'intégration différenciée. La difficulté ne consiste donc pas dans la découverte d'un classement de la flexibilité, mais plutôt dans le choix de typologies décisives. Une classification semble sortir du lot et elle est la plus courante en doctrine. On peut donc la qualifier de classique (Première partie). Etant donné que cette classification s'avère plutôt politique que juridique et qu'elle ne reflète pas suffisamment le droit positif, il faut se retourner vers la recherche de nouvelles typologies (Deuxième partie).

2. LA CLASSIFICATION CLASSIQUE

Malgré sa popularité et sa prévalence, la classification classique, opposant Europe à géométrie variable, Europe à plusieurs vitesses et Europe à la carte, ne présente pas les qualités d'une typologie suffisante, comme la simplicité, la clarté, et surtout le reflet de droit positif. Les plus grandes lacunes de cette classification sont la diversité des définitions des catégories et la vanité de la recherche de critères d'identification.

2.1. La diversité des définitions des catégories

La classification classique donc fait la distinction entre les trois catégories: Europe à géométrie variable, Europe à plusieurs vitesses et Europe à la carte.

2.1.1. L'Europe à plusieurs vitesses

Le concept d'Europe à plusieurs vitesses ne soulève pas de difficulté particulière. La plupart des auteurs s'accorde pour le définir en se basant sur le critère du temps. Cette notion correspond ainsi à la situation dans la quelles les États membres ne réalisent pas certains objectifs communs au même rythme. M. A Stubb définit ce concept comme „le mode d'intégration différenciée selon lequel la poursuite d'objectifs communs est le fait d'un noyau regroupant des États membres à la fois capable et désireux de progresser dans certaines politiques, ce qui implique l'idée que les autres États membres suivront ultérieurement. En d'autres termes, l'approche *à plusieurs vitesses* vise l'intégration dans laquelle les États membres poursuivent les mêmes politiques et engagent les mêmes actions, non pas en mêmes temps, mais à des moments différents."[13]

M. C. D. Ehlermann s'écarte légèrement de cette présentation et adopte une conception plus large de l'Europe à plusieurs vitesses. Il le décrit comme regroupant en plus des dérogations limitées dans le temps, les situations dans lesquelles „la réglementation n'est pas limitée dans le temps, mais est susceptible de s'appliquer à l'avenir. Le point de

[13] Stubb, A. (1995). *The Sematic Indigestion of Differentiated Integration: The Political Rhetoric of the pre-1996 IGC Debate (*doctoral dissertation). College of Europe, Bruges.

savoir s'il s'agit réellement d'un cas de plusieurs vitesses dépend de la constatation précise de circonstances".[14] Alors, la question est si la fin des dérogations est décidée par l'Etat bénéficiaire seul ou par les institutions, avec ou sans possibilité de blocage de la part de celui-ci. Cette définition vise en réalité l'intégration échelonnée. Dans ce cas également, les objectifs sont définis en commun et le rythme pour les réaliser est variable. En revanche, aucun délai ne doit être fixé à l'avance aux retardataires.[15] Cette notion, donc, ne recouvre pas certaines modalités d'Europe à plusieurs vitesses, telles que les mesures de transition consenties aux nouveaux États membres ou les mesures de sauvegarde.[16]

2.1.2. L'Europe à géométrie variable

La doctrine est très divisée sur la signification de l'Europe à géométrie variable. Ces différences tiennent surtout aux perceptions divergentes de ce concept de l'intégration différenciée.

Certains auteurs insistent sur le fait que les États membres ne partagent pas les mêmes objectifs. Ainsi, selon Mme F. Chaltiel, l'idée consiste en ce que „tous les États ne participent pas aux mêmes actions. Certains pourront participer à des dites intégrées, mais pas à toutes."[17] C'est la conception matérialiste de l'Europe à géométrie variable et elle recouvre les hypothèses de différenciation choisies en fonction de la matière, sans remettre en cause l'acquis communautaire. Ces modalités de différentiation ne sont pas expressément limitées dans le temps.

D'autres auteurs définissent ce concept en se référant à l'espace. Ainsi, M. H. Labayle présente l'Europe à géométrie variable comme une Europe „où l'espace tient une place prépondérante puisque différents cercles géographiques uniraient les États engagés dans des processus allant de la coopération à l'intégration."[18] On peut constater que cette définition permet d'associer le concept d'Europe à géométrie variable à celui de cercles concentriques. Il s'agit de la superposition de plusieurs cercles correspondant chacun à une coopération, dont la composition est inversement proportionnelle au degré d'intégration réalisée. De plus, le cercle le plus restreint est compris dans tous les autres, c'est-à-dire que le groupe d'États membres concernés est associé à toutes les autres coopérations.[19]

Les deux types de définitions qui viennent d'être étudiés ne peuvent pas être retenus, parce qu'ils désignent seulement des cas particuliers de géométrie variable.

C'est pourquoi M. A. Stubb essaie de donner une définition de l'Europe à géométrie plus général. Il définit cette notion comme mode d'intégration différenciée qui admet des différences dans la même structure intégrative en autorisant une séparation permanente ou irréversible entre le noyau et des unités moins intégrés.[20]

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[14] Ehlermann, C. D. (1997). Différentiation, flexibilité, coopération renforcée : les nouvelles dispositions du traité d'Amsterdam. *Revue du Marché Unique Européen*, 3, 57.

[15] Ehlermann (1997), 57.

[16] Ćeranić (2017), 14.

[17] Chaltiel, F. (1995). Pour une clarification du débat sur l'Europe à plusieurs vitesses. *Revue du Marché commun et de l'Union européenne*, 386, 6.

[18] Labayle, H. (1998). Amsterdam ou l'Europe des coopérations renforcées. *Europe*, 1, 4–7.

[19] Ćeranić, J. (2011). *Oblici povezivanja država članica u Evropskoj uniji.* Beograd: Službeni glasnik. 52–53.

[20] Stubb, A. (2002). *Negotiating Flexibility in European Union: Amsterdam, Nice and Beyond*. Paris: Palgrave Macmillan, 43–44.

Ces quelques exemples montrent la disparité des définitions de l'Europe à géométrie variable. Les différences ne tiennent pas seulement aux termes employés. Il s'agit surtout de perceptions divergentes de ce concept de flexibilité.

2.1.3. L'Europe à la carte

Identification de l' Europe à la carte est aussi caractérisée par les incertitudes. Les définitions de l'Europe à la carte sont nombreuses et divers. Certains auteurs insistent sur l'entendue de la différenciation: ses domaines d'applications sont nombreux et les objectifs communs à tous les États membres sont réduits au minimum (l'établissement d'une zone de libre-échange).[21] Selon M. Ehlermann, dans une Europe à la carte des réglementations spéciales peuvent être stipulées dans presque tous les domaines de l'activité communautaire et la liberté de choix des États membres est absolue.[22]

D'autre part, M. Labayle suggère une notion de l'Europe à la carte encore plus large. Il met surtout l'accent sur le choix de la différentiation en fonction de la matière. Il présente l'Europe à carte comme une vision de l'Europe simplement matérialiste puisque le fond commanderait l'adhésion des États aux domaines de coopération à partir d'un noyau minimal mis en commun.[23]

Il y a aussi beaucoup de définitions insistant sur la liberté de choix des États membres: la différentiation résulte de la volonté des États membres et non de leur capacité. En conséquence, chaque État membre peut librement décider s'il participe ou non à une politique ou à une action déterminée. La définition de M. Stubb est certainement la plus large et la plus illustrative. Elle englobe toutes les précédentes: „Par définition, la métaphore culinaire de l'Europe à la carte autorise chaque État membre à choisir [*pick and choose*], comme dans un menu, à quelle politique il souhaiterait participer, maintenant en même temps un nombre minimal d'objectifs communs."[24]

Certaines définitions de l'Europe à géométrie variable ressemblent parfois à celles de l'Europe à la carte. Dans ce contexte, on peut rapprocher la définition de l'Europe à géométrie variable donnée par M. Ehlermann[25], selon lequel la différence réside dans les conceptions différentes des États membres relativement à l'objet, de celle de l'Europe à la carte de M. Labayle[26] (conception de l'Europe simplement matérialiste puisque le fond commanderait l'adhésion des États aux domaines de coopération). Dans le premier cas, le choix de la différentiation en fonction de la matière caractérisé l'Europe à géométrie variable, et dans le deuxième cas l'Europe à la carte. En conséquence, on peut constater que la distinction entre ces deux catégories s'avère assez floue.

Ces incertitudes se retrouvent dans l'identification concrète des différentes catégories. On peut aisément designer les modalités de différentiation se rattachant à la notion d'Europe à plusieurs vitesses. Il s'agit notamment des mesures de sauvegarde, qui doivent cesser avec les difficultés ayant provoqué leur adoption et des dérogations prises par les nouveaux États membres pendant une période de transition fixée par l'acte d'adhésion. En

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[21] Chaltiel (1995), 6.
[22] Ehlermann (1997), 58.
[23] Labayle (1998), 4–7.
[24] Stubb, A. (1996). A categorisation of differentiated integration. *Journal of Common Market Studies*, 2, 283–295.
[25] Ehlermann (1997), 58–59.
[26] Labayle (1998), 4–7.

revanche, il s'avère assez délicat de déterminer concrètement ce que recouvre l'Europe à géométrie variable et l'Europe à la carte. Certaines hypothèses sont alternativement rattachées à l'un ou à l'autre concept.

Cette incapacité à rattacher une modalité de différentiation à une seule catégorie découle de la diversité de leurs définitions. C'est pourquoi il peut paraître opportun de trancher ces différentes conceptions en trouvant des critères d'identification pour chaque catégorie. Mais, la doctrine est ici aussi divisée.

2.2. La recherche des critères d'identification

Pour faciliter l'identification des catégories, M. Stubb a tenté de déterminer un critère pour chaque catégorie. Il suggère d'associer l'Europe à plusieurs vitesses au critère du temps, l'Europe à géométrie variable au critère de l'espace et l'Europe à la carte au critère de la matière.[27]

Selon la théorie de M. Stubb, à partir du critère de vitesse, les mesures de sauvegarde et les dérogations transitoires dont bénéficient les nouveaux États membres peuvent être rattacher à l'Europe à plusieurs vitesses. C'est parce que les modalités de différenciation sont temporaires. Ensuite, le critère de l'espace permet de qualifier d'Europe à géométrie variable les clauses de coopération renforcée ou le système monétaire européen. Enfin, le critère de la matière peut être rattaché aux diverses possibilités de non-participation des certains États membres dans certaines politiques à l'Europe à la carte. Ces diverses possibilités de non-participation ont été accordé au Royaume-Uni, à l'Irlande et/ou au Danemark.[28] „Comme on choisit un plat sur la carte d'un menu, ces États membres sont choisi les matières auxquelles ils participeraient et exigé une différentiation à leur profit dans celles où ils ne souhaitaient réaliser aucun approfondissement."[29]

Les critères proposés par M. Stubb semblent judicieux, parce qu'ils correspondent à chacune des images retenues pour désigner chaque catégorie de flexibilité. Cependant, la doctrine est divisée. Certains auteurs sont convaincus du bien-fondé de ces critères, lors d'autre part de la doctrine ne les accepte pas.

Finalement, la tentative de M. Stubb a été qualifiée comme un échec. La raison en est qu'il n'a pas réussi à dégager des critères incontestés d'identification des différentes catégories. C'est éventuellement dû à la difficulté de manier dont les critères sont proposés. Si le temps et la matière restent aisément saisissables, il n'en est pas de même de l'espace. Sans doute ce terme est -il significatif pour un géographe. Il l'est moins pour un juriste. En outre, ces critères, dégagés en 1995, ne permettent pas de rattacher toutes les hypothèses actuelles de différentiation à une des catégories en cause. Ainsi, le refus de la communautarisation de la libre circulation des personnes par le Danemark ne repose ni sur le temps, ni sur l'espace et ne correspond pas suffisamment au critère de la matière. C'est surtout le refus de la démarche communautaire (appliquée certes à une matière, la libre circulation des personnes).[30]

Alors, la tentative de trouver des critères d'identification précis pour l'Europe à plusieurs vitesses, l'Europe à géométrie variable et l'Europe à la carte est vaine. Étant donné

[27] Stubb (1996), 283–296.

[28] Cloos (2000), 514.

[29] Stubb (1996), 283–296.

[30] Ehlermann, C. D. (1996). Différentiation accrue ou uniformité renforcée. In: A. Mattera (ed.) *La conférence intergouvernementale sur l'Union européenne*. Paris: Cléman Juglar, 51–74.

que les différences entre les catégories sont subtiles, il est impossible de déterminer des frontières précises et permanentes entre ces catégories.[31]

3. LES NOUVELLES CLASSIFICATIONS

La principale raison d'écarter la classification classique opposant l'Europe à plusieurs vitesses, l'Europe à géométrie variable et l'Europe à la carte réside dans le fait qu'elle ne reflète pas suffisamment le droit positif. Cette typologie est plus politique que juridique. Elle repose sur des images empruntées à la mécanique, à la géométrie et à la gastronomie, permettant de mieux expliquer et présenter l'intégration différenciée. On peut constater que c'était significatif dans un période dans lequel la différentiation était encore assez limitée. Compte tenu de la prévalence de phénomène de flexibilité aujourd'hui, il s'avère nécessaire de trouver une classification ou plusieurs autres typologies permettant d'appréhender une réalité juridique.

Il y a un de nombreuses tentatives de classement de la différentiation en catégories. Alors, il n'y a aucune difficulté de trouver une nouvelle classification. Pourtant le problème n'est pas de trouver une ou plusieurs classifications qu'on peut qualifier comme décisives, mais d'établir une hiérarchie entre eux.[32]

La classification de base est certainement celle qui oppose les modalités de différentiation instaurées dans l'Union européennes et les modalités de différentiation mises en œuvre hors du cadre institutionnelle de l'Union européenne.[33] Cependant, l'objectif de cet article est de trouver une typologie des modalités de différentiation instaurées dans le cadre de l'Union européenne. Les différentiations mise en œuvre hors de l'Union européenne donc ne seront pas prises en compte dans l'analyse de ces nouvelles classifications.

Vu l'hétérogénéité des modalités de l'intégration différenciée, la classification qui s'avère la plus satisfaisante est celle opposant les mesures dérogatoires et la coopération plus étroite. Mais, il faut aussi noter que cette classification binaire n'est pas suffisante, c'est-à-dire il est important d'établir les sous-catégories à l'intérieur de ces deux catégories.

3.1. La classification opposant les mesures dérogatoires et la coopération plus étroite

D'emblée il convient de souligner que cette classification opposant les mesures dérogatoires et la coopération plus étroite est d'ordre juridique et non politique. La coopération plus étroite regroupe l'ensemble des exemples de différentiation qui rendent possible l'adoption de nouvelles règles par un groupe d'États membres. Les mesures dérogatoires permettent au contraire à un ou plusieurs pays de s'affranchir de l'application de certaines règles pourtant, censées lier tous les États membres en vertu des traités ou de droit dérivé.[34]

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[31] Ćeranić (2011), 56,

[32] Tuytschaever, F. (1999). *Differentiation in European Union law*. Oxford & Portland, Oregon: Hart publishing. 121.

[33] Quermonne, J. L. (1996). L'Europe a géométrie variable. *Revue politique et parlementaire*, 981, 11–18.

[34] Isaac, G. (1999). *Droit Communautaire general*. Paris: Armand Colin, 23.

Une partie de la doctrine classe les régimes de non-participation parmi les dérogations.[35] D'un point de vue politique, on pourrait qualifier ainsi les clauses d'*opting-out*, car un ou plusieurs États membres ne sont pas liés par des règles qui s'appliquent au plus grand nombre. D'un point de vue juridique, on doit noter que ces clauses ont permis l'insertion dans les traités de nouvelles dispositions qui ne s'appliquent qu'à un groupe d'États membres. Sans la différentiation, le traité n'aurait pas pu être amendé, l'unanimité étant requise. Il s'agit donc de coopération plus étroite et non de dérogation. Seuls les cas où un État membre peut s'abstenir d'appliquer une règle existante et censée s'appliquer à tous constituent des mesures dérogatoires.

Cette conception de la coopération plus étroite et des dérogations a l'avantage de correspondre au droit positif. En effet, les régimes juridiques respectifs des mesures de sauvegarde et des mesures de transition applicable lors de l'adhésion de nouveaux États présentent de nombreuses analogies. Les mesures prises présentent les mêmes caractéristiques: la limitation dans le temps ou encore l'application du principe de proportionnalité. De même, les hypothèses de coopération plus étroite ont toute en commun de permettre un approfondissement d'une politique de l'Union par quelques États.[36]

Il est très important de faire la distinction entre les expressions *coopération plus étroite* et *coopération renforcée*. Les deux formules anticipent les hypothèses où un groupe d'États membres approfondit seul une politique de l'Union. Cependant, il y a une nuance entre les deux expressions. D'un côté, dans toutes les trois versions françaises du traités (traité d'Amsterdam, traité de Nice et traité de Lisbonne), l'expression coopération renforcée n'est utilisée que dans le cas du recours aux institutions, aux mécanismes et aux procédures des traités, accompagné d'une adaptation du système décisionnel. D'autre côté, l'expression coopération plus étroite est employée pour n'importe quelle hypothèse d'approfondissement d'une politique de l'Union européenne par un groupe d'États qu'elle se situe ou non dans le cadre de l'Union. Cette distinction est opportune car elle permet de réserver l'usage de l'expression coopération renforcée à quelques modalités de différentiation, telles quelles les coopérations renforcées prévues par le titre IV TUE ou la reprise de l'acquis de Schengen,[37] qui sont mise en œuvre dans le cadre institutionnelle de l'Union et qui s'accompagnent d'un processus décisionnel original. Cette distinction prévient ainsi tout risque de confusion entre les clauses de coopération plus étroite (telle que celle qui existe en matière de sécurité et de défense) et les clauses de coopération renforcée dans l'article 20 TUE.[38]

En tous cas, la distinction entre les dérogations et les coopérations plus étroites est essentielle. Cependant, elle n'est pas totalement précise en tenant compte du droit positif. Bien que la catégorie des dérogations soit assez homogène, les modalités de coopérations renforcées sont nombreuses et variées. Par conséquent, il est nécessaire de faire des division (sous-classification) supplémentaires et plus profondes au sien du la deuxième catégorie.

[35] Ehlermann (1997); Isaac (1999).
[36] Ćeranić (2011), 60.
[37] Cloos (2000), 514.
[38] Ćeranić (2011), 60.

3.2. Distinction entre différentiation prédéterminée, différentiation globale, différentiation au cas par cas et différentiation spontanée

La coopération plus étroite comprend des modalités relativement diverses. La diversité peut être observée à la fois à travers le prisme des domaines et des régimes juridiques. Pour cette raison il semble assez important de les classer en sous-catégories. Bien qu'elle ne soit pas ni exhaustive ni complète, la typologie opposant la flexibilité prédéterminée, globale, au cas par cas et spontanée s'avère la plus appropriée.[39]

La flexibilité prédéterminée/ la différentiation prédéterminé regroupe les hypothèses de coopération plus étroite instituées pas un traité qui prévoit leur domaine d'application et les modalités de leur mise en œuvre. À titre d'exemple de ce type de flexibilité, on peut citer l'ancien protocole sur la politique sociale et des protocoles additionnels en matière de libre circulation des personnes.[40]

La flexibilité globale/ la différentiation globale vise les clauses habilitant les institutions à autoriser l'instauration d'une coopération renforcée dans un domaine non déterminé à l'avance et selon des modalités variable (dépendant du domaine d'application). Cette forme d'intégration différenciée est éclairée par les clauses de coopération renforcée.

La flexibilité au cas par cas/ la différentiation au cas par cas est mise en œuvre seulement ponctuellement, selon les circonstances ou les intérêts des États membres. L'exemple le plus connue est abstention constructive.[41]

Cette typologie se relève très utile pour classer les hypothèses de coopération plus étroite. Elle illustre notamment les différences dans la mise en place de la différentiation. La flexibilité prédéterminée est instaurée et entièrement régie par le traité qui l'a installée. La flexibilité au cas par cas, prévue aussi par le traité, n'est mise en place que ponctuellement, selon les circonstances. La flexibilité globale est autorisée par les institutions qui y sont habilitées par une clause de traité. En outre, la mise en œuvre de la différentiation au cas par cas présente des particularités par rapport à celles des autres exemples de coopération plus étroite.[42]

Cette classification a été créé lors de la conférence intergouvernementale de 1996-97. Ainsi, elle reflète les modalités de différentiation prévues par le traité d'Amsterdam. Considérant que cette typologie n'est pas exhaustive, elle ne tient pas compte des certaines modalités de flexibilités, comme le Système monétaire européen (SME).[43] Ce système a été établi par les institutions de leur propre initiative et non sur la base d'une clause d'habilitation. Ainsi, le SME ne peut pas être rattaché à aucune des sous-catégories élaborées ci-dessus. Certains auteurs donc proposent de qualifier ce cas de flexibilité en tant que différentiation spontanée.[44]

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[39] Metcalfe, L. (1998). Flexible integration in and after the Amsterdam treaty. In: M. Den Boer, A. Guggenbuhl (eds.) *Copying with flexibility and legitimacy after Amsterdam* (11–30). Maastricht: IEAP. 11–30.

[40] Cloos (2000), 514.

[41] Ćeranić (2011), 62.

[42] Misstroli, A. (1998). Coopération renforcée et flexibilité dans la deuxième pilier: un parcours d'obstacles? In: G. Lenzi (ed.) *L'UEO à cinquante ans* (37–53). L'Institut européen de sécurité de l'Union de l'Europe occidentale. 37–53.

[43] Cloos (2000), 513.

[44] Ćeranić (2011), 63.

La flexibilité globale et la flexibilité prédéterminée présentent certaines analogies. Il semble opportun de les rassembler occasionnellement dans une même catégorie. Un des regroupements possibles peut être la différentiation organisée, qui s'accompagne d'aménagements institutionnels subtils.

3.3. Distinction en fonction des aménagements institutionnels réalisés

On peut aussi faire la distinction entre les modalités de différentiation selon qu'elles ont ou non des conséquences institutionnelles et notamment des effets sur les votes lors du processus décisionnel.[45] It peut être prévu par le traité que, au sien du Conseil, le représentant d'un pays non participant ne prend pas part au vote. Le calcul de la majorité qualifiée ou de l'unanimité est adapté. Il est aussi possible de prévoir d'autre adaptations, comme un système spécial de représentation. Des exemples de cette catégorie de flexibilité sont la troisième phase de l'Union économique et monétaire, la libre circulation des personnes, le développement de l'acquis Schengen dans l'Union européenne, l'ancien protocole sur la politique sociale et les coopérations renforcées (prévues par les traités). On peut donc constater qu'il s'agit des modalités de différentiation globale et prédéterminée. L'ajustement du fonctionnement du Conseil présente l'une des originalités essentielles des exemples de flexibilité mentionnées ci-dessus. Dans l'autres cas de flexibilité, par exemple l'abstention constructive, tous les États membres gardent leur droit de vote et il n'y a aucune répercussion sur le fonctionnement du Conseil.

Alors la ligne de démarcation entre les catégories dans cette classification se reflète dans le fait que la différentiation a pour l'objectif l'élaboration d'un droit dérivé dans les matières données. La flexibilité au cas par cas et les dérogations jouent uniquement de façon ponctuelle, pour un acte précis. En conséquence, aucun ajustement n'est nécessaire. Au contraire, l'instauration des coopération renforcées et de la différentiation prédéterminée a pour l'objectif une production normative. Une fois la coopération autorisée, un ensemble d'acte doit se voir adoptée par le groupe d'États participant dans la coopération. C'est pourquoi il est nécessaire d'établir un système décisionnel particulier.

Il est intéressant de noter que les modalités de coopération plus étroite organisée, impliquant des adaptations institutionnelles, ne présentent pas une catégorie homogène. En outre, on peut faire la distinction faire la différence entre les régimes de non-participation et les coopérations particulières.[46]

3.4. Distinction entre les régimes de non-participation et coopération particulière

Parmi les modalités de coopération plus étroite, on peut les régimes de non-participation (*opt-out*) et les coopérations particulières entre quelques États. Il est très important à ne pas confondre la coopération particulière entre quelques États avec les clauses *opt-in* qui permettent aux pays initialement extérieurs de participer dans une forme de coopération.

Les facultés de non-participation laissent la possibilité à des États de s'affranchir du respect de certaines obligations opposables au plus grand nombre. Néanmoins, dans ce cas, les pays concernés s'en prévalent dès la négociation et en font une condition de leur

[45] Ehlermann (1997), 60.

[46] Manin, P. (1999). *Les Communautés européennes*. Paris: Pédone, 83–86.

signature. Les raisons avancées ne tiennent pas toujours (et même pas souvent) à des difficultés réelles et objectives, mais les autres États membres se voient contraints de céder s'ils veulent procéder à l'avancée désirée. On peut donc définir la faculté de non-participation comme la possibilité laissée par une clause du traité (clause d'*opting-out*) à un État, généralement pour un motif politique, de ne pas être lié par certaines dispositions (et par les actes qui seront pris sur leur fondement), sans empêcher les autres de les adopter. Dans la coopération particulière, la différentiation n'est pas imposée par le refus d'un ou de plusieurs États de progresser, mais découle de la volonté d'un groupe d'aller de l'avant, sans vouloir nécessairement que les autres suivent cette même voie.[47]

Il existe différentes appellations pour les catégories au sien de cette conception de flexibilité. Les auteurs opposent solidarité refusée et solidarité renforcée[48]. Ensuite il y a des auteurs qui opposent différentiation positive et différentiation négative.[49] La première catégorie regroupe les cas où le droit primaire permet à un nombre limité d'États membres d'adopter les règles qui ne s'appliquent qu'en ce qui concerne. La seconde recouvre les hypothèses permettant à un ou plusieurs États de ne pas être liés par une règle adoptée par tous les autres pays membres.

Cette typologie n'est intéressante que du point de vue politique, mais elle est aussi importante juridiquement. Grâce à cette typologie on peut expliquer pourquoi certaines règles différenciées sont intégrées dans l'acquis communautaire et d'autre non.

4. CONCLUSION

La tentative de faire une typologie des modalités de l'intégration différencié présente un grand défi, pour au moins deux raisons: leur nombre et leur extrême diversité. La difficulté de classement des modalités de différentiation peut aussi être expliquée par la multiplicité des périodes et des circonstances de l'apparition de la flexibilité et plus généralement par la complexité des relations entre les mécanismes et la construction européenne.

Ce qui semble très important à souligner, c'est qu'aucune typologie ne peut être perçue de manière statique. Le développement de l'Union européenne et de droit communautaire implique le développement des nouvelles modalités de l'intégration différenciée et des nouvelles typologies.

L'Union européenne est actuellement confrontée à la crise la plus longue, la plus grave et la plus incertaine depuis sa création. La crise, qui a commencé en 2008 comme une crise économique, s'étend progressivement, affectant tous les segments de l'économie et de la société. Au fil du temps, il s'avère qu'il s'agit d'une crise complexe, à la fois de nature politique, économique et juridique. Le concept de l'intégration différenciée, y compris ses différentes modalités, est souvent évoquée comme faisant partie de la solution pour sortir cette crise.

[47] Ćeranić (2011), 64–64.
[48] De la Serre, F. (1999). Une Europe ou plusieurs. *Politique étrangère*, 1, 21–34.
[49] Tuytschaever (1999), 121.

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Traité de Lisbonne modifiant le traité sur l'Union européenne et le traité instituant la Communauté européenne de 13 décembre 2007, *OJ* C 306, 17.12.2007.

Tipologija modaliteta diferencirane integracije u evropskoj uniji

Rezime: Uprkos činjenici da Evropska unija počiva na principu jedinstvene primene komunitarnog prava, od početka procesa evropskih integracija prisutan je i princip diferenciranosti/ fleksibilnosti. Diferencirana integracija podrazumeva mogućnost da se države članice nalaze u različitom položaju u pogledu obima prava i obaveza u okviru određenih politika EZ/ EU. Osnovna ideja primene ovog principa bila je da se države članice pripreme kako bi mogle da slede zajedničke ciljeve. Shodno tome, već prilikom prvog proširenja tadašnjih Evropskih zajednica, bili su predviđani periodi tranzicije. Sa povećanjem broja država članica EZ/ EU, što impliciralo i povećanje različitosti između njih, ispostavilo se da sve zemlje ne mogu ili ne žele da napreduju istom brzinom u okviru različitih komunitarnih politika. Upravo to je dovelo do kodifikacije koncepta diferenciranosti. Diferenecirana integracija institucionalizovana je Ugovorom iz Amsterdama 1997. godine u formi mehanizma bliže saradnje. Modaliteti diferencirane intrgracije su brojni, raznoliki i postoje u različitim oblastima. Heterogenost diferencirane integracije može se posmatrati i kroz prizmu terminologije koja se koristi kako bi se osvetlili različiti modaliteti ovog fenomena. Razvijena je čitava lepeza termina, među kojima su: Evropa u više brzina, Evropa promenljive geometrije, Evropa po želji, tvrdo jezgro, centar gravitacije, koncentrični krugovi itd. Ovaj rad predstavlja pokušaj da se uspostavi tipologija modaliteta diferencirane integracije. Kako postoji veliki broj klasifikacija, pojavila se teškoća u vezi sa opredeljenjem za jednu koja bi bila opšteprihvaćena. Tipologija koja se najčešće pominje u doktrini, zbog čega se i naziva klasičnom, biće predstavljena u prvom delu rada. Budući da je ona više političke prirode i da ne reflektuje, u dovoljnoj meri, pozitivno pravo, u drugom delu rada analizirana je nekolicina novijih tipologija.

Ključne reči: diferencirana integracija, Evropska unija, bliža saradnja, princip fleksibilnosti, tipologija.

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Use of Legally Non-Binding Instruments in Contemporary Practice of International Relations

Abstract: The article explores the use of legally non-binding (informal) instruments in contemporary international practice by international political actors. In this context, the article examines definitions and main characteristics of legally non-binding instruments, as well as their effects. In addition, the use of this type of instruments was assessed as a practical response to the need of concerting between the political actors at the international plane due to their functionality and flexibility. It was concluded that these instruments implied a softer form, unlike treaties, and the act of their conclusion does not require conducting a formal and cumbersome procedures, such as parliamentary ratification. These instruments imply political commitments between their parties and their effects are usually shielded by the bona fides principle. Although these instruments are generally deprived of legally binding effects, they remain quite pragmatic tools in brokering political agreements at the diplomatic level between relevant international political actors.

Key words: Public International Law, Sources of International Law, Non-binding Instruments, Soft Law, Gentlemen's Agreement.

Duško Glodić

Prof. dr Duško Glodić, e-mail: dusko.z.glodic@apeiron-edu.eu , College of Legal Studies, Pan-European University Apeiron, Banja Luka.

1. INTRODUCTORY REMARKS

A number of relevant issues stemming from relationships between international law subjects are usually settled down either in the form of treaties or in the form of other legally binding rules, such as the acts adopted within international organisations and customary rules. Nonetheless, some other instruments, which are not binding from a strictly legal point of view, have been also used with a view to resolving some issues at the international plane without the conclusion of treaties. These instruments are not made in the form of treaties, within the meaning of international law, and are usually denoted as non-binding or informal instruments,[1] but different denominations can be seen, such as: *gentlemen's agreement, non-binding agreements, instruments concertés non conventionnels,*[2] and

[1] Dailler, P., Forteau, M., Pellet, A. (2009). *Droit international public*, Paris: LGDJ, 423.

[2] *Ibid*., 423-431.

nonlegal agreements.[3] Therefore, for the purpose of this article, a non-binding instrument will be considered as an expression of concurring will of two or more subjects, which is not made in the form of a legally binding agreement and does not constitute obligations under international law, but which create rather political commitments.

This article will examine the role and importance of these instruments in international relations. In this respect, this article will, firstly, explore their notion and main features, and then it will elaborate the use of these instruments as a pragmatic response to the needs of contemporary practice of international politics.

2. LEGALLY NON-BINDING INSTRUMENTS: THEIR DEFINITION AND MAIN CHARACTERISTICS

Non-binding bilateral or multilateral instruments are used as tools for agreeing on some issues between the interested parties and for constituting their political commitments, without using the instruments existing under international law. Although these instruments are not international agreements under international law,[4] they incite some interest of the international law scholars due to their practical importance. Therefore, the following lines will elaborate on the definitions of the non-binding instruments and then will examine their main features.

2.1. Defining non-binding instruments: a role for legal science or an issue of diplomatic pragmatism

One can find a variety of definitions in the relevant literature. A group of French authors defines these instruments as "*instruments issus d'une négociation entre personnes habilitées à engager l'Etat ou l'organisation internationale ... et appelés à encadrer les*

[3] Posner, E. A., Goldsmith, J. L. (2003). International Agreements: A Rational Choice Approach, *Virginia Journal of International Law*, 44, 114

[4] According to Article 2(1) a) of the Vienna Convention on the Law of Treaties, a treaty „*means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*" (Vienna Convention of the Law of Treaties, *United Nations Treaties Series*, Vol. 1155, I-18232.). A similar definition may be found in Article 2.1 a) of the Draft Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (*United Nations publication, Sales No. E.94.V.5*).

relations de ceux-ci, sans pour autant avoir un effet obligatoire."[5,6] Aust[7] finds that a non-binding instrument is „*instrument which is not a treaty because the parties to it do not intend it to be legally binding*." D'Aspremont[8] finds that „*the instrument is soft when parties decide to resort to an instrument other than a formal treaty or a binding unilateral declaration*." Fastenrath[9] defines a gentlemen's agreement as instruments „*which were originally understood to be agreements reached between statesmen or diplomats in which they committed themselves personally and politically only. The basis of such agreements is not law but trust in one's partner*."

The above cited definitions demonstrate that the scholars usually underline that these instruments are not formally binding in legal terms, albeit the parties thereto are aiming at stipulating certain type of commitment which has merely a political and ethical character. Although not vested with legally binding nature, these instruments, nonetheless, do create some effects towards their parties. The scholars agree that these instruments make political commitment and may engage moral responsibility for their signatories and those who have entered into them.[10] [11]

From a practical perspective, the parties to such instruments usually consider them as regulating political issues and they do not demonstrate their intention to be bound by a legal agreement.[12] Nonetheless, this should not be understood as preventing to settle political issues through legally binding documents. Even more so, the parties tend to regulate important political issues in the form of treaties, albeit, due to some concrete circumstanc-

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5 Dailler, Forteau, Pellet (2009), 424.

6 Alain Pellet in an article from mid 1980s, indicates that there are two groups of scholars with different ideological views regarding the sources of international law. One group is made by the scholars coming from developed countries and these scholars mostly consider that the acts and instruments, which are deprived of legally binding effect, such as the majority of UN General Assembly resolutions and other non-binding instruments, do not constitute part of international law. The other group is composed of the authors coming from developing countries and they advocate the position that these non-binding instruments should, somehow, acquire certain status within international law due to their role played in international relations. Pellet is of the opinion that both groups represent extreme positions and that they neglect the fact that international law is being developed in a given international context and under the influence of realistic circumstances and needs of international community. (Pellet (1987) p. 118). One should not forget that there are historical examples when some statesmen treated fully fledged international agreements as mere sheets of paper. (See: Krivokapić, B. (2017). *Međunarodno javno pravo*. Beograd: Poslovni i pravni fakultet, Institut za uporedno, 139).

7 Aust, A. (1986). The Theory and Practice of Informal International Instruments. *International and Comparative Law Quarterly*, 35(4), 787.

8 D'Aspremont, J. (2008). Softness in International Law: A Self-Serving Quest for New Legal Materials. *European Journal of International Law*, 19 (5), 1082.

9 Fastenrath, U. (1997). The Legal Significance of CSCE/OSCE Documents, *OSCE Yearbook 1995/1996*, 114.

10 Dailler, Forteau, Pellet (2009), 429.

11 Aust points out that, during the preparations of the Vienna Convention on the Law of Treaties, there were some initiatives to consider non-binding instruments as a simplified form of treaties. However, this proposal was not accepted during the codification exercise as there was no wide agreement on this issue. The non-binding treaties, consequantly, were not included in this codifcation (Aust (1986), 794-795).

12 Shaw, M. (2003). *International Law*. Cambridge: Cambridge University Press, 813.

es and different diplomatic conditions, it is also possible to opt for setting some political agreements without concluding a formal treaty. This is, however, subject to a pragmatical choice and political preferences of the concrete parties in a given moment.

It is of utmost importance to carefully treat the issue of nature of any concrete instrument. It is easy to determine the legal nature of an instrument if the will of the parties to this instrument is clearly manifested. On the contrary, some instruments, regardless to their particular title, may leave room for ambiguity regarding their binding or non-binding character under international law[13]. In other terms, in order for one to conclude that the instrument in question is a legally binding treaty, it is necessary for the parties to the former to have expressed their intention to establish rights and obligations based and governed by international law.[14] Although these instruments do not create legal duties, it is legally justifiable to expect that these instruments shall not be contrary to the internationally undertaken obligations of their parties and shall not constitute breach of positive international law, *i.e.* be substantially in contravention of *ius cogens* and other relevant international obligations.[15]

Since the purpose of such instruments is to define certain behaviours of the concerned parties, one may question what would happen if a breach of such an instrument occurs. It appears that, due to the lack of legally binding force, it would not be possible to invoke legal responsibility or to use any dispute settlement mechanism of legal nature. The obligations to which the parties have been committed by concluding a non/binding instrument are of a pure political nature. Thus, any responsibility and potential sanctions would be also political in its essence.[16]

The non-binding instruments may be made in different forms, under various titles, and as both bilateral or multilateral. They may be concluded between the states, but also under the auspices of international organisations. Based on the existing practice, some quite important documents for international politics fall within the category of the non-binding instruments[17] and are often made in the form of final acts or *communiqués* from the international conferences or bilateral political and diplomatic meetings.[18] The most illustrious examples are the Final Helsinki Act of 1975 and the Paris Charter for New Europe of 1990, both of them representing an expression of concerted will of their parties on some important issues of international relations. However, some scholars conclude that the instruments, such as the Helsinki Final Act, represent a collection of already existing general principles of international law, which are binding upon the parties by their own virtue, and, hence the substance of these political documents produce binding effects and not the fact that the political declaration was signed.[19] In the practice of the former Yugo-

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[13] D'Aspremont (2008), 1082; Fastenrath (1997), 412.

[14] Jennings, R., Watts, A. (1992). *Oppenheim's International Law*. Volume I, Harlow: Longman, 814.

[15] Fastenrath (1997), 425.

[16] Aust (1986), 807; Dailler, Forteau, Pellet (2009), 428.

[17] Shaw (2003), 111-112.

[18] Degan, V. Đ. (2000). *Međunarodno pravo*. Rijeka: Pravni fakultet Sveučilišta u Rijeci, 87.

[19] Degan, (2000), 87-88; Dailler, Forteau, Pellet (2009), 430-431; Đurić, V. (2007). *Ustav i međunarodni Ugovori*. Beograd: Institut za uporedno parvo, 78; Cassese, A. (2005). *International Law*. Oxford: Oxford University Press, 196; Shaw (2003), 111; Vaïsse, M. (2005). *Les relations internationales depuis 1945*, 10e Edition. Paris: Armand Colin, 84; Fastenrath (1997), 414. Additional examples of important political instruments are the documents related to Cuban Crisis and

slavia, one may recall the use of the Memorandum of Understanding on Trieste territory of 1954 which was entered to by the USA, UK, Yugoslavia and Italy.[20]

However, the parties sometimes disagree about the nature of the document that they entered to and some of the parties may argue that the document does produce legally binding effect. There does not seem to exist any general pattern on how to overcome such situations, but it is a rather practical issue.[21] The scholars underline few examples of disputes over the legal nature of such an instrument. Two cases before the International Court of Justice are quite notorious in the literature. In the case regarding the continental shelf in the Aegean Sea, the Court has found that the joint communiqué, issued by the parties (Greece and Turkey) following the meeting of their prime ministers held in 1975, could not be considered as a legally binding document by virtue of which the parties agreed on the Court's jurisdiction to settle the dispute between the parties.[22] [23] Actually, the Court has examined the course of relations between the parties regarding the concrete issue, including diplomatic communications and meetings between their representatives that followed the one held in 1975. Thus, the Court has concluded:

„Consequently, it is in that context - a previously expressed willingness on the part of Turkey jointly to submit the dispute to the Court, after negotiations and by a special agreement defining the matters to be decided-that the meaning of the Brussels Joint Communiqué of 31 May 1975 has to be appraised. When read in that context, the terms of the Communiqué do not appear to the Court to evidence any change in the position of the Turkish Government in regard to the conditions under which it was ready to agree to the submission of the dispute to the Court. It is true that the Communiqué records the decision of the Prime Ministers that certain problems in the relations of the two countries should be resolved peacefully by means of negotiations, and as regards the continental shelf of the Aegean Sea by the Court. ... These statements do not appear to the Court to be inconsistent with the general position taken up by Turkey in the previous diplomatic exchanges: that it was ready to consider a joint submission of the dispute to the Court by means of a special agreement. At the same time, the express provision made by the Prime Ministers for a further meeting of experts on the continental shelf does not seem easily reconcilable with an immediate and unqualified commitment to accept the submission of the dispute to the Court unilaterally by Application. In the light of Turkey's previous insistence on the need to "identify" and "elucidate" the issues in dispute, it seems unlikely that its Prime Minister

the acts dopted by the OPEC countries. See: Posner, E.A., Goldsmith, J.L. (2003). International Agreements: Rational Choice Approach, *Virginia Journal of International Law*, 44, 116.

[20] Avramov, S., Kreća, M. (2001). *Međunarodno javno pravo*. Beograd: Savremena administracija, 460.

[21] Aust (1986), 803-804.

[22] Cassese (2005), 172-173.

[23] Greece invoked a joint communiqué of the meeting held in Brussels as a ground establishing jurisdiction of the International Court of Justice to settle this dispute. Namely, the Greek Government put forward the following argumemnt: " *The joint communiqué of Brussels of 31May 1975, which followed previous exchange of views, States that the Prime Ministers of Greece and Turkey have decided that the problems dividing the two countries should be resolved peacefully 'et, au sujet du plateau continental de la mer Egée, par la Cour internationale de La Haye'. The two Governments thereby jointly and severally accepted the jurisdiction of the Court in the present matter, pursuant to Article 36 (1) of the Statute of the Court*." (*Aegian Sea Continental Shelf (Greece v. Turkey),* Judgment of 19 December 1978, ICJ Reports 1978, para. 94.)

should have undertaken such a commitment in such wide and imprecise terms."[24]

Finally, the Court has established:

„ Accordingly, having regard to the terms of the Joint Communiqué of 31 May 1975 and to the context in which it was agreed and issued, the Court can only conclude that it was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers, on behalf of their respective Governments, to accept unconditionally the unilateral submission of the present dispute to the Court. It follows that, in the opinion of the Court, the Brussels Communiqué does not furnish a valid basis for establishing the Court's jurisdiction to entertain the Application filed by Greece on 10 August 1976."[25]

On the contrary, the Court held a different standpoint in the boundary dispute between Qatar and Bahrain, whereby the Court found that the minutes of the meeting between the foreign ministers of the parties could be considered as an agreement constituting the Court's jurisdiction.[26] [27]

Therefore, in light of the foregoing illustrations, one may conclude that the true nature of a document, *i.e.* the issue of its binding effect, has to be assessed in the context of its conclusion and concrete relationship between the involved parties as well as their rapport to the subject matter.

2.2. Features and effects of non-binding instruments

Although they are deprived of formal effects under international law, these instruments, however, enable the conduct of politics and achieving some policy objectives on the international plane. From a practical point of view, there are some resemblances between the treaties, on the one hand, and the legally non-binding instruments, on the other hand. The two types of instruments are to be concluded by the authorised representatives of the parties. Nonetheless, the non-binding instruments are not subject to formal approval procedures and do not systematically require involvement of the parliaments, as the case may be with the ratification of the treaties. Therefore, the non-binding instruments are somewhat procedurally *lighter* and do not entail long and cumbersome procedures under national or international law.[28]

From the substantial point of view, the parties have, in principle, committed to act pursuant to what was defined in the non-binding instruments, albeit they did not concur to make a formal treaty under international law.[29] Although it may not appear evident,

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[24] *Aegian Sea Continental Shelf (Greece v. Turkey),* Judgment of 19 December 1978, ICJ Reports 1978, para. 105.

[25] *Aegian Sea Continental Shelf (Greece v. Turkey),* Judgment of 19 December 1978, ICJ Reports 1978, para. 107. See also: Cassese, 2005, p. 173.

[26] The ICJ has concluded: „*The Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement*. " *Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* Jurisdiction and Admissibility, Judgment of 1 July 1994, ICJ Reports 1994, para. 25.

[27] Cassese (2005), 173; Shaw (2003), 814.

[28] Pellet (1987), 126; Fastenrath (1997), 412-413.

[29] D'Aspremont (2008), 1082.

the scholars widely consider that the parties act pursuant to the non-binding instruments due to the same reasons as when they act pursuant to the treaties. They do not want their international reputation to be questioned and also are fearful that their behaviour, which would go against the instruments, would constitute basis for retorsions.[30] Furthermore, acting pursuant to the instruments creates expectations that the remaining parties would also honour their commitments and will respect their political obligations.[31] These instruments create similar effects to these of the recommendations issued by the international organisations, which do not create binding effects in principle, but do provide for some '*psychological pressure*' to their parties.[32] Overall, behaving in the above explained manner creates the political bounds that ensure effects of the legally non-binding documents.

Another important trait of these instruments is the use of different terminology from the one used in formal treaties. If the instrument is drawn in English, the parties use the word 'will' instead of 'shall', the latter being typical of treaties. Furthermore, in order to denote the effective date, the formulation 'will come into operation' is widely used in non-legal documents.[33]

Lack of legally binding effect means that breaching these instruments would not constitute violation of international law and this would not be a ground for invoking international responsibility.[34] Nevertheless, there are also some views according to which: "*the issue of an instrument's legal form is distinct from the issue of whether particular provisions create legal obligations. The former requires examining the instrument as a whole, and depends on whether the instrument is in writing and is intended to be governed by international law".*[35] Some scholars underline that the non-binding instruments, in some circumstances, can also generate effects similar to the ones of the treaties and breaching of such instruments can cause international responsibility. They consider that it is not possible to draw a strict distinction between legally binding and non-binding instruments. In this context, Degan[36] states that: "*If the text of an instrument whose form of treaty is doubtful provides for precise rights and duties for its parties, and if non-performance or breach of the obligations of one party causes material damage to the other, then it is a genuine legal obligation. Obligations of this kind cannot have non legal, i.e. moral or political significance, regardless of the form of the instrument in question."* Furthermore, Aust[37] mentions an example of a non-binding instrument by which one State expressed political commitment to pay a certain amount of money to the other State within a development assistance programme, and then the latter, pursuant to the political commitment of the former, planned expenditure of the financial resources provided through the expected development assistance. Thus, if the donor State do not honour its political commitment, then the beneficiary could suffer from negative consequences. In this case, the issue of possible legal consequences of such behaviour of

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30 Posner (2003), 118; Aust (1986), 807; Fastenrath (1997), 418.

31 Fastenrath (1997), 425.

32 Diez de Velasco Vallejo, M. (2002). *Les organisations internationales*. Paris: Economica, 116.

33 Aust (1986), 799-802; Fastenrath (1997), 422.

34 Pellet (1987), 128.

35 Bodansky, D. (2015). Legally Binding versus Non-legally Binding Instruments. In: S. Barret, C. Carraro, J. de Melo (eds.) *Towards a Workable and Effective Climate Regime*. London: CERP Press; Bodansky, 155-165.

36 Degan (2000), 129-130.

37 Aust (1986), 808.

the expected donor may arise. Furthermore, in light of the practice of the International Court of Justice (*Nuclear Tests Case*), unilateral declaration of persons authorised to commit the State, pursuant to the principle of *bona fides*, may generate the binding effect to the party that intended to be committed by such a declaration.[38]

Nonetheless, bearing in mind the lack of legally binding effect and different examples from the practice, we tend to conclude that the issue of possibility to invoke any sort of responsibility under international law for the violation of political commitments remains an open issue and, thus, it is impossible to make any general conclusion or prediction on the consequences of the failure to honour one's political obligations. This issue is actually dealt on a case-by-case basis.

Moreover, besides questioning the effect of these instruments on the international plane, it is also possible to examine their potential effect *in foro domestico*, i.e. within municipal legal order. The municipal courts may sometimes recognise relevance to these instruments and use them as rather interpretative instruments than formal legal sources.[39] However, one cannot conclude that there is uniform practice of municipal courts regarding the effects of these instruments. This issue is settled by concrete courts and within the remits of the concrete cases and prevailing legal systems.

Although it is not possible to consider existence of fully fledged treaties, one cannot, however, neglect any practical importance of the legally non-binding instruments. They represent moral and political commitments and the parties thereto are expected to act *bona fide*.[40] Authority and importance of these instruments is also due to the role and

[38] Aust (1986). 808. Aust underlines the *Nuclear Tests case (Australia v. France)* in which the ICJ established, based on a number of unilateral declarations of different political organs of the French Republic, that: "In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers that the President of the Republic … gave an undertaking to the international community to which his words were addressed. … The Court finds that the unilateral undertakings resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation, the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed." (*Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, ICJ Reports 1974, 269-270, para. 51) See also: Brownlie, I. (2001). *Principles of Public International Law*. Oxford: Oxford University Press, 643.

[39] Kanetake, M., Nollkaemper, A. (2014). The application of informal international instruments before domestic Courts. *The George Washington International Law Review*, 46(4), 774-775.

[40] Institut de Droit International has found that „*L'Etat ayant souscrit un engagement purement politique est soumis à l'obligation générale de bonne foi qui régit le comportement des sujets du droit international dans leurs rapports mutuels.*." Institut de Droit International, *Textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes qui en sont dépourvus*, Session de Cambridge – 1983, 29 août 1983, para. 6.

positions of their signatories.[41]

3. USE OF LEGALLY NON-BINDING INSTRUMENTS: A PRAGMATICAL RESPONSE TO THE NEED OF POLITICAL CONCERTING ON THE INTERNATIONAL PLANE

A contemporary legal theory has questioned practical significance of the legally non-binding instruments in defining the way in which the international affairs should develop between their parties. Since these instruments do not produce the same effect as treaties and do not require the same formalities, they are also applied to settle different issues that emerge in the relations between the international law subjects and, thus, they are used instead of the treaties.[42] Actually, in the situation when the representatives of states or international organisations conclude or enact a legally non-binding instrument, they act as political representatives and such instruments, consequently make a political commitment. Therefore, despite the lack of legal force, these instruments can influence the conduct of international affairs and have some practical importance.[43] This section will further examine the issue of their functionality and flexibility.

3.1. Functionality of the use of legally non-binding instruments

Dynamics of international relations require to regulate certain international issues in the most convenient manner , but without necessarily using some of the sources laid down by Article 38 of the ICJ Statute.[44] In this respect, Pellet[45] considers that „*it is not sufficient to recognise that 'it is no longer possible to say that there are no sources of international law other than those listed in Article 38 of the Statute of the International Court of Justice'. The fact is that the venerable and traditional doctrine of the sources of the international law itself proved to be too abrupt and to be unable to satisfy the requirements of contemporary international society*". Such needs and dynamics have exactly motivated the use of such non-binding instruments and have conferred certain 'use value' upon them because there are justified expectations that the parties thereto shall honour these instruments and execute them *bona fide*.[46] Hence, the relevant representatives of the states, international organisations and other players on the international scene, are trustful of these instruments and determined to conduct their international affairs in accordance with them. At the same time, they believe that all other parties will also respect these commitments without need to conclude a treaty.

If the functionality of these instruments is observed from a practical perspective, although one of the basic principles on the contemporary international law is the principle of sovereign equality of the States,[47] the concrete circumstances determine to which extent and by using which means a concrete State can represent its own interests. Not all the international actors dispose of the same powers in influencing international affairs and in conclusion of ei-

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41 Kanetake, Nollkaemper (2014), 787.

42 Posner (2003), 114.

43 Shaw (2003), 111.

44 Statute of the International Court of Justice, available at https://treaties.un.org/doc/source/docs/charter-all-lang.pdf#page=23 (5.5.20210.

45 Pellet (1987), 123.

46 Đurić (2007), 79.

47 Rousseau, C. (1980). *Droit International Public*. Tome IV, Paris: Sirey, 21-22.

ther bilateral or multilateral treaties or purely political agreements. Nonetheless, the possibility for a State to refuse to be bound by international law norms without its consent, except the peremptory norms, opens room for certain influence when it comes to creating international rules.[48] [49] Due to their capacity to create international law, Kelsen qualified the States as international law organs,[50] but pragmatism remains being tightly linked to the use of international law tools.[51] Overall, it is usually underlined that, in the context of international negotiations, the course of bargaining process and nature of issues at stake are able to influence preferences of the parties for choosing the most adequate manner of making a compromise.[52]

The non-binding instruments can also exercise some substantial influence over actions of the states and other actor on the international plane. Namely, the parties may invoke these instruments in their interactions with the other parties, albeit they are deprived of legally binding effect. These instruments actually may be valuable tools to justify one's stances in international politics. Furthermore, these instruments set for a certain law development directions and may be used as a material component in constituting a customary rule.[53] Violation of a legally non-binding instrument, which contains a political commitment, adversely affects international reputation and diplomatic capacity of a party that failed to honour its commitment.[54] Such behaviour would prove that the party in question fails to respect its political commitments.

A continuous development of international political and economic relations impose on the concerned actors a certain level of pragmatism in shaping their international commitments. In this context, *soft law* documents prove to be useful tools for defining the modes of cooperation, either when it is not possible to concur to concluding a treaty or when it is considered that the use of a legally non-binding instrument would suffice to establish expectations that the political commitments would be honoured *bona fide*.[55]

Functionality of the legally non-binding instruments may be also assessed though the lenses of national inter-institutional rapports. The use of legally non-binding instruments may cause different understandings of their nature and the respective procedures at the national level in order to enable their conclusion. Such confusion can appear in inter-institutional relations within a government, particularly if the procedure for concluding treaties is not applied. In other words, different organs of one country can have different understanding of the nature and effects of the instruments in question. Therefore, some scholars advise that all the relevant institutions should be involved and the treaty making procedure should be applied.[56] Although such advises, if founded on the relevant provisions of municipal law,

[48] Pellet (1987), 123.

[49] Rousseau underlines that the principle of sovereing equality is merely a legal principle that does not necessarily reflect into substantial and functiomnal equality between the States, particualrly when they interact wthin an international organisation. See: Rousseau (1980), 27.

[50] Kelzen, H. (2010). Opšta *teorija prava i države.* Beograd: Pravni fakultet Univerziteta u Beogradu, 464.

[51] Bederman, D. J. (2002). *The Spirit of International Law*. Athens: University of Georgia Press,163.

[52] Pekar Lempereur, A., Colson, A. (2004). *Méthode de négociation.* Paris: DUNOND, 228-235.

[53] Pellet (1987), 127; D'Aspremont (2008), 1082; Bederman (2002), 42.

[54] Fastenrath (1997), 418.

[55] Pellet (1987), 129-130; Rosenne, S. (2004). *The Perplexities of Modern International Law*. Leiden/Boston: Martinus Nijhoff Publishers, 338).

[56] Đurić (2007), 79-80.

seem justified. However, one of the general reasons why the parties decide to conclude a non-binding document is their intention not to observe the rules and procedures required for treaty conclusion. The parties rather seem satisfied with making political commitments without concluding a legally binding agreement. Hence, they consider that such approach provides sufficient assurances that the commitments will be honoured.

If the conclusion of informal instruments is observed from a domestic political arena, maturity of political institutions and capability to clearly define national interests play a key role in ensuring political and diplomatic representation of a State on the international plane. Posner and Goldsmith[57] consider that: "*Better political institutions will result in a more constant and far-sighted state interest than political institutions that generate arbitrary, cyclical, or fragile foreign policy preferences. The states with better political institutions have an interest in revealing this information to the world, for those states are more reliable cooperative partners. One way to convey this information is to comply with promises, agreements, and treaties.*" On the contrary, D' Aspremont[58] finds that the international subjects may conclude treaties which are formally binding legal documents, but whose content remains *soft* without imposing any strict and specific obligation upon their parties.[59]

3.2. Flexibility of the legally non-binding instruments

International interactions and transactions may be conducted in more or less formalised way and can result in conclusion of the formal or informal documents and instruments.[60] Therefore, the legally non-binding instruments are used, acknowledging their flexibility, to ease international transactions.[61] The lack of legally binding effect renders these documents much easier for conclusion than the treaties.[62] Actually, it is widely considered that the states and international organisations use the treaties due to their inherent legal nature and binding effects. Their conclusion usually requires involvement and approval by the legislative organs, thus having larger impact on the internal political processes. Their legal form provides for certain assurances that the agreed obligations would be honoured. Any legal system is expected to follow development of social phenomena that are subjects of regulating by that legal system.[63] Dynamics of international relations require development and use of different instruments. Thus, international practice tends to be flexible, in both its form and content, as well as to accommodate political reality and enable the stakeholders to use other instruments besides the formal sources of international law.[64]

It is reasonable, indeed, to question the reasons and justifications for opting to sign a non-binding instrument instead of concluding a formal treaty. Therefore, some scholars tried to explore what would be differences between the two types of documents. Firstly, it

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[57] Posner, E. A., Goldsmith, J.L. (2003). International Agreements: A Rational Choice Approach. *Virginia Journal of International Law*, 44, 136.

[58] D'Aspremont (2008), 1086.

[59] *Ibid.* D'Aspermont mentions Article 3(d) of the Charter of American States for which the ICJ has established in the case *Military and paramilitary activities in Nicaragua* not to produce legally binding effect.

[60] Jennings, R., Watts, A. (1992). *Oppenheim's International Law*. Volume I, Harlow: Longman, 1181-1184.

[61] D'Aspremont (2008), 1076.

[62] Shaw, M. (2003). *International Law*, Cambridge: Cambridge University Press, 814.

[63] Posner (2003), 122-123.

[64] Pellet (1987), 125.

is a general standpoint that these instruments are of legally non-binding nature pursuant to intentions of the parties. It is therefore required that the intentions of the parties be easily readable from such a document. Furthermore, such intentions may be demonstrated by the parties which stipulate provisions excluding the registration of the signed instrument pursuant to Article 102 of the UN Charter; they do not envisage the ratification procedure or similar clauses; they exclude usual parts of treaties, such as final provisions and entry into force provisions; and they may use the language which is not typical for international legal acts. All these elements may be used to determine the nature of the document in question.[65]

Jennings & Watts[66] illustrate such a flexible States' practice in the following terms: "*Where states wish to record certain matters in writing, but wish to do so in a manner which is not intended to create legal rights and obligations and does not constitute a legally binding agreement, various procedures are open to them. Thus they may conclude a memorandum of understanding, or they may make parallel – but unilateral rather than consensual – statements, or they may record their views in a 'gentlmen's agreement' thereby implying that they do not have the intention of entering upon legal rights or obligations, or they may adopt a Declaration intended as more a statement of policy and intention than a legally binding instrument.*" Basically, the practice to use the legally non-binding instruments has been a pragmatical option for the international law subjects. This enables them to conduct international relations without relying on complex and lengthy procedures of concluding treaties as envisaged by municipal law. This is particularly important as the lack of legally binding effect does not mean that the duties politically agreed will not be honoured.[67] In his assessment of political agreements, D'Aspremont[68] finds that „*non-legal instruments may prove more adapted to the speed and complexity of modern international relations and are more and more resorted to in practice. Non-legal instruments can be at least as integrative for a community as legal ones. This means that the use of non-legal instrumentum is not a sign of the disintegration of a community. It simply shows that the members of a community have found more practical and convenient means to regulate their relationships with one another. The presupposition that law is good thus does not suffice to explain the tendency of legal scholars to stretch the boundaries of their field of study.*"

The states' representatives, when concluding legally non-binding instruments, are also looking for a lighter procedure for its approval and acceptance by their respective authorities. In the cases when the conclusion of treaty requires conducting a parliamentary ratification procedure, then the representatives of the parties face a political risk that their agreement may be rejected by the legislature. Since this is not necessarily involved when a non-binding instrument is at the stake, the use of the former renders the whole process *lighter* and smoother.[69] Therefore, the legally non-binding instruments, due to their inherent flexibility, have many advantages over the treaties, and one of them is that their implementation may start upon the conclusion, *i.e.* signature by the parties. They do not require the same formalities as the treaties usually do in order to become effective.[70]

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[65] Đurić (2007), 77-78; Jennings, Watts (1992), 1202-1203; Cassese (2005), 196; Fastenrath, (1997), 413.

[66] Jennings, Watts (1992), 1202-1203.

[67] Dailler, Forteau, Pellet (2009), 428.

[68] D'Aspermont (2008), 1089.

[69] Posner (2003), 124.

[70] Aust (1986), 789.

4. CONCLUDING REMARKS

This article has explored the use of legally non-binding instruments in contemporary practice of international relations. It has explained how these instruments are determined in theory and which types of effects they may produce on the international plane. Possible ways of using these instruments and differences between them and treaties have also been examined. Functionality and flexibility of these instruments have been assessed as their main advantages over the treaties that motivated their use by the states and international organisations. A less formal character and lack of any 'heavy' procedural requirements render these instruments more suitable to stipulate political commitments towards agreed objectives. Their parties usually expect that these instruments will be implemented in good faith and may be an adequate replacement to the formal treaties in order to regulate a number of important issues in the conduct of international affairs.

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Upotreba pravno neobavezujućih instrumenata u savremenoj praksi međunarodnih odnosa

Rezime: Članak istražuje upotrebu i značaj pravno neobvezujućih instrumenata u savremenoj međunarodnoj praksi, koje zaključuju međunarodnpravni subjekti. Nadalje, članak ispituje definicije i glavne karakteristike ovih instrumenata, kao i njihovo dejstvo. Uz to, razmatrana je upotreba pravno neobvezujućih instrumenata, kao praktičnog odgovora na potrebu usaglašavanja političkih aktera na međunarodnom planu te njihova funkcionalnost i fleksibilnost. Zaključeno je da takvi instrumenti podrazumijevaju "soft" formu, za razliku od međunarodnih ugovora, te njihovo zaključivanje ne zahtijeva formalne i dugotrajne postupke, poput parlamentarne ratifikacije. Ti instrumenti stvaraju političke obaveze između njihovih strana, a smtra se da je njihovo dejstvo zagarantovano načelom bonae fidei. Iako su ti instrumenti, u načelu, lišeni pravno obavezujućeg dejstva, oni predstavljaju prilično pragmatična sredstva u postizanju političkih sporazuma na diplomatskom nivou između relevantnih međunarodnih političkih aktera.

Ključne riječi: međunarodno javno pravo, izvori međunarodnog prava, prvano neobvezujući instrumenti, soft law, džentlmenski sporazumi.

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Criteria for Assessing the Violation of the Right to a Trial Within a Reasonable Time

Abstract: The well-known sentence in English Justice delayed is justice denied confirms historical awareness of the value of a speedy court decision. The right to a fair trial within a reasonable time applies to both civil and criminal proceedings. In a criminal trial, the issue of adjournment may also be regulated under Article 5 paragraph 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms when a person is detained. The rationale for the principle, in criminal proceedings, is "based on the need to allow the accused not to remain for too long in a state of uncertainty as to the outcome of criminal charges against him" (Kart v. Turkey, European Court of Human Rights, 2009). Furthermore, the variability of criminal proceedings that take too long - generally damages the reputation of the alleged offender. The European Court of Human Rights explained that "the reason for the verdict in so many lenghty proceedings is that certain contracting parties have not complied with the 'reasonable time' requirement under Article 6 paragraph 1 of the European Convention and have not prescribed a domestic remedy for this type of appeal" (Scordino v. Italy (no. 1) [GC], 2006-V).

Key words: reasonable time, Constitution of Bosnia and Herzegovina, European Convention for the Protection of Human Rights and Basic Freedoms, Constitutional Court of Bosnia and Herzegovina, European Court of Human Rights.

Miodrag Simović
Vice president of the Constitutional Court of Bosnia and Herzegovina, Full Professor of the Faculty of Law of the University of Banja Luka and Active Member of the Academy of Sciences and Arts of Bosnia and Herzegovina.

Marina Simović
Secretary of the Ombudsman for Children of the Republika Srpska and Associate Professor at the Faculty of Law, University Apeiron Banja Luka

1. REASONABLE TIME

The Committee of Ministers stated that too long proceedings were „so far the most common issue raised in applications before the European Court of Human Rights[1] and, therefore, poses a direct threat to the efficiency of the court" [2], and thus to the human rights protection system based on the European Convention for the Protection of Human Rights and Funda-

[1] Hereinafter: European Court.

[2] Recommendation CM/Rec (2010)3 of the Committee of Ministers to member states on effective remedies for excessive length of proceedings (adopted by the Committee of Ministers on 24 February 2010 at its 1077th Session). Available at *https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf8e9.*

mental Freedoms"[3]. The Committee called Member States to ensure existence of mechanisms and remedies to address this issue, pointing out that there is a „strong but rebuttable presumption that the proceedings that take too long will be a reason for awarding non-pecuniary damage" [4]. This has compelled the States to consider ways of non-pecuniary compensation, such as the reduction of sanctions or the suspension of proceedings, and for such measures to be retroactive in appropriate circumstances[5].

Trying to set guidelines for application of the principle of trial within a reasonable time, the practice does little more than conclusion that this must be assessed „in the light of particular circumstances of the case", in particular the complexity of the case, the appellant's proceedings and the proceedings of the authorities" [6]. The line between reasonable and unreasonable time is some five years, „where different criteria work in a difficult puzzle and where predicting the outcome seems most dangerous" [7].

As regards the authorities' actions, unjustified delays and periods of inactivity during the investigation are also relevant[8]. The European Court concluded that although it is unable to examine the legal quality of domestic legal systems, where there is a constant re-examination of cases due to errors of lower courts in the same proceedings, this is a „serious shortcoming in legal system" imposed on the State in deciding on reasonable time[9]. Delays in decision-making process of judges are attributed to the State and are taken into account when calculating „reasonable time" [10].

In criminal matters, the determination of „reasonable time" begins from the moment a person is „charged" with a criminal offense. It is an „official notification given by the competent authority to an individual about allegations that he has committed a criminal offense", a definition that corresponds to the test of whether „the (suspect's) situation significantly affected" [11]. The activities of the police and the prosecution before that date may also be relevant to the extent that they have affected the overall fairness of the trial[12].

Regarding the examination of the complexity of the case, factors such as the number of defendants will be taken into account[13]. Economic crimes are often relatively complicated[14], although this is an assumption. If the defendant used sophisticated legal structures that interfere with the work of the investigator, the court will take this into account[15]. In

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3 Hereinafter: European Convention.

4 CM/Rec (2010)3, para. 9.

5 CM/Rec (2010)3, paras. 10-11.

6 *Pélissier and Sassi v. France*, Merits and Just Satisfaction, App No 25444/94, ECHR 1999-II, [1999] ECHR 17, (2000) 30 EHRR 715, IHRL 3179 (ECHR 1999), 25th March 1999, European Court of Human Rights [ECHR]; Grand Chamber [ECHR], § 67.

7 Henzelin M., Rordorf H. (2014). When Does the Length of Criminal Proceedings Become Unreasonable According to the European Court of Human Rights? *New Journal of European Criminal Law*, 5 (1), 78-109.

8 *Pélissier and Sassi v. France* [GC], no 25444/94, ECHR 1999-II, § 72.

9 *Vlad and Others V. Romania*, no. 40756/06, 26 November 2013, § 133.

10 *Obasa v. the United Kingdom*, no. 50034/99, 16 January2013, § 34.

11 *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51.

12 *McFarlane v. Ireland* [GC], no 31333/06, 10 September 2010, § 144.

13 *Pélissier and Sassi v. France* [GC], no 25444/94, ECHR 1999-II, § 71.

14 *D.M.T. and D.K.I. v. Bulgaria*, no 29476/06, 24 July 2012, § 94.

15 *Pélissier and Sassi v. France* [GC], no 25444/94, ECHR 1999-II, § 71.

criminal trials, a reasonable time is extended until the proceedings when a judgement is rendered[16].

When it comes to the end of that period, it usually covers the entire proceedings in question, including the appeal proceedings[17], and it extends until the final decision on the dispute is made[18]. Therefore, the reasonable time requirement applies to all stages of the court proceedings aimed at resolving the dispute, not excluding the stages after the judgment on the merits is rendered[19].

Enforcement of a final judgment is considered an integral part of the „trial" for the purpose of assessing the criteria of reasonable time[20], although in some cases there may be circumstances that justify a postponement[21]. The enforcement of a judgment rendered by any court must, therefore, be considered an integral part of the proceedings for the purpose of determining the relevant period[22]. The period does not cease to run until the right sought in the proceedings is exercised[23].

Proceedings before the Constitutional Court are taken into account, even though the Court does not have the power to decide on the merits, when its decision may affect the outcome of the dispute before the regular courts[24]. However, the obligation to conduct proceedings in a case within a reasonable time cannot be interpreted in the same way as before regular courts[25].

In non-criminal matters, the starting point for detrmining of a reasonable time may also begin before a court decision is taken to initiate proceedings in which a dispute has been initiated, for example in cases where proceedings cannot be instituted until some preliminary procedural steps have been taken, such as filing a request for making of administrative decision[26]. In legal systems where the injured party may join the criminal proceedings as *partie civile* (civil party), the period taken into account for the length of the proceedings in relation to that person starts from the date on which that person joined the criminal proceedings[27].

2. STANDARDS WHEN ASSESSING THE EXISTENCE OF VIOLATION OF REASONABLE TIME

In accordance with the case law of the European Court, the reasonableness of the length of the proceedings should be assessed in the light of particular circumstances of the case, paying particular attention to the following criteria: period taken into account, complexity of the case, conduct of the parties to the proceedings and competent court or

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16 *Findlay v. the United Kingdom*, (110/1995/616/706), 25 February 1997, § 69.
17 European Court, *König v. Germany*, para. 98*, in fine.*
18 European Court, *Poiss v. Austria*, para. 50.
19 European court, *Robins v. United Kingdom*, paras. 28 and 29.
20 *Lăcătuş and Others v. Romania,* no. 12694/05, 13 November 2013, § 117.
21 *Burdov v. Russia*, no. 59498/00, ECHR 2002-III, § 35.
22 European Court, *Martins Moreira v. Portugal*, para. 44 and *Di Pede v. Italy,* para. 24.
23 European Court, *Estima Jorge v. Portugal*, paras. 36-38.
24 European Court, *Pammel v. Germany*, paras. 51-57 and *Süßmann v. Germany*, para. 39.
25 European Court, *Oršuš et al. v. Croatia*, para. 109.
26 *Vilho Eskelinen and Others v Finland* [GC], no. 63235/00, 19 April 2007, §§ 65-66,
27 *Lăcătuş and Others v. Romania,* no. 12694/05, 13 November 2013, § 107.

other public authorities and signifiance a specific legal matter has for the appellant[28]. Also, the European Court continuously points out that in certain proceedings, in which it is prescribed by domestic law that they are of urgent nature, special diligence of competent authorities is required. This is the case, for example, with cases concerning personal status and characteristics or, for example, in labor disputes[29].

2.1. Period to be taken into account

When considering the issue of a reasonable time, it is necessary to define the period which is to be considered, i.e. to determine starting point and the end. In doing so, a difference is made depending on the type of proceedings, and it does not mean only civil and criminal, but also administrative proceedings.

When it comes to the period to be taken into account, in civil litigations, the beginning of the period generally coincides with the date of addressing the competent court, i.e. the initiation of proceedings before the court, and ends on the day of the final judgment is issued.

The beginning of the relevant period in criminal matters is related to the moment when the person in question became aware of being suspected of criminal offense, because from that moment he has an interest in the court making a decision on the existence of that suspicion. Such determination of relevant period of time is evident in cases where the arrest preceded the formal charges[30]. Furthermore, the end of the relevant period of time is the moment when the uncertainty regarding legal position of the person in question has ended. In this sense, the European Court applies the same criteria in both criminal and civil matters. In doing so, in criminal proceedings, the decision on the indictment, i.e. acquittal or dismissal of the charges must be final. Finally, final decision on the charges may be a waiver of further criminal proceedings[31].

Criteria for assessing the reasonableness of the length of proceedings developed by the European Court in its case law, are used in the same way by the Constitutional Court of Bosnia and Herzegovina[32].

With regard to calculating the length of the proceedings, i.e. the period to be taken into account, the Constitutional Court takes into account only the time from the date of entry into force of the Constitution of Bosnia and Herzegovina - 14 December 1995, which is calculated as the date of establishment of time jurisdiction of the Constitutional Court. However, the duration of the proceedings before that date is not completely neglected. That time is of great importance for determining at what stage the proceedings were on 14 December 1995 and how much time had elapsed by then.

2.2. Complexity of the case

All types of cases can be important for assessing the complexity of the proceedings. The European Court takes into account procedural aspects, complexity of legal and factual issues in each case, and in particular: the number of parties, defendants and witnesses[33];

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[28] European Court, *Mikulić v. Croatia*, application No .l 53176/99 of 7 February 2002.
[29] European Court, *Borgese v. Italy*, judgment of 26 February 1992.
[30] European Court, *Wemhoff v. Germany*, judgment No. 2122/64 of 27 June 1968, para. 19.
[31] *Ibid.*, para. 18.
[32] Hereinafter: Constitutional Court.
[33] *Golder v. United Kingdom* of 21 February 1975, para. 32.

the scope of written evidence; the complexity of expertise[34] and the age of the event that was the subject matter of the dispute[35].

Complex cases require more time, but the complexity of the proceedings is not always sufficient to justify the length of the proceedings. The complexity of the proceedings is considered by the Constitutional Court in the light of the factual and legal aspect of the specific dispute, i.e. evidence to be presented by the court (especially the number of witnesses to be heard), and the assessment of legal issues to be resolved. The number of parties to the proceedings is also important. In one of its decisions, the Constitutional Court concluded that there was no violation of the right to a decision within a reasonable time under Article II/3e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention, even though the investigation in criminal proceedings in question lasted for over four years, and since it was a very extensive and complex investigation involving a large number of persons, including the appellant[36].

2.3. Behavior of the parties to the proceedings

When it comes to the conducts of judicial bodies, it is important to note, among other things, that the European Court does not accept justifications, such as unresolved cases or administrative difficulties, because the States are obliged to organize their judicial systems in a way that will enable their courts to meet European Convention requirements.

In the case law of the European Court, there are a number of situations in which the applicant was considered to be acting irresponsibly: if he presents new facts that need to be verified and which prove to be incorrect[37]; if he frequently changes attorneys[38]; if he frequently and unjustifiably requests the adjournment of the main trial[39] and if he evades justice[40]. Although the domestic authorities cannot be held responsible for the conduct of the defendant, the delay tactics used by one party do not relieve the authorities of their duty to ensure that the proceedings are conducted within a reasonable time[41].

In cases where the Constitutional Court concluded that there had been no violation of Article 6 of the European Convention, even when the length of the proceedings was manifestly excessive, one of the reasons for such decision was the fact that the appellant had contributed to the length of the proceedings. Thus, for example, in case AP-2240/05 of 9 November 2006, the Constitutional Court concluded that despite the evident lack of timeliness of the court which contributed to stalling of the proceedings, the appellant's failure to file a proper complaint, that is, to fully settle the lawsuit following the court's ruling, they sufficiently justify the length of the proceedings in question. In one of the cases relating to the length of civil proceedings for the payment of royalties, the Constitutional Court found that the proceedings lasted 16 years and five months, of which 10 years and four months fall into the relevant period after the entry into force of the Constitution of Bosnia and Herzegovina, but the violation of the right to a fair trial within a reasonable

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34 *Šilih v. Slovenia*, judgment of 9 April 2009, para. 126.
35 *Kostovska v. Macedonia*, judgment of 15 June 2006, para. 42.
36 Decision No. l AP-4340/10 of 15 January 2014.
37 *Bagetta protiv Italije*, presuda od 25. juna 1987. godine.
38 *König protiv Njemačke*, presuda od 28. juna 1978. godine.
39 *Ciricosta and Viola v. Italy,* judgment of 4 December 1995.
40 *Sari v. Turkey and Danmark,* judgment of 8 November 2001.
41 European Court, *Mincheva v. Bulgaria*, para. 68.

time was not established because the responsibility for not making a decision on the merits in the relevant period prevailed on the side of the appellant[42].

2.4. Behavior of the court and public authorities

The state is obliged to organize its judicial system in such a way as to meet the requirements of Article 6 of the European Convention. According to the case law of the European Court, which was also accepted by the Constitutional Court[43], overload of judiciary cannot be accepted in general as a justification for the length of proceedings, since the contracting states are obliged to organize the administration of justice so that various courts meet the requirements of Article 6 of the European Convention[44]. Given that the State party must organize its legal system in a way that guarantees the right to a court decision within a reasonable time, the overload of cases cannot be taken into account[45]. However, temporary delay in resolving the cases does not imply the responsibility of the state, provided that it has taken reasonably prompt corrective measures to resolve an exceptional situation of this kind[46]. In addition, when multiple changes of judges slow down the proceedings, as each new judge must become acquainted with the case, this does not relieve the state of its obligation to request reasonable time, given that the task of the state is to ensure that the judicial system is properly organized[47].

Only delays attributable to the State can justify a finding that „reasonable time" requirement has not been met[48]. The state is responsible for all its bodies: not only for the judiciary but also for all public institutions[49]. Even in judicial systems applying the principle that the initiative to conduct proceedings is the responsibility of the parties, behavior of those parties does not relieve the courts of their obligation to ensure a speedy trial as provided for under Article 6 paragraph 1 of the European Convention[50]. The same applies when expert cooperation is required during the proceedings: the responsibility for preparing the case and speeding up the proceedings rests with the judge[51].

In general, the courts in Bosnia and Herzegovina have a large backlog of cases. However, it should be reminded that the European Conventions are an integral part of the legal system of Bosnia and Herzegovina, and, consequently, the State is obliged to ensure the rights and freedoms set forth in the European Convention to all persons under its jurisdiction, and to organize its legal system to ensure compliance with requirements of Article 6 paragraph 1 of the European Convention, including a request for a trial within a reasonable time.

In Decision number AP-1410/05, the Constitutional Court pointed out that omissions in the organization of the legal and judicial system of the State, in this case the Entities, which endanger the protection of individual rights - cannot be attributed to an individu-

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42 Decision on Admissibility and Merits, No. AP-519/04 of 22 July 2005.
43 Constitutional Court of BiH, Decision No. AP-1097/04 of 17 November 2005.
44 European Court, *Francesco Lombardo v. Italy*, judgment of 25 February 1994.
45 *Vocaturo v. Italy*, para. 17.
46 European Court, *Buchholz v. Germany*, para. 51.
47 European Court, *Lechner and Hess v. Austria*, para. 58.
48 European Court, *Buchholz v. Gemrany*, para. 49 and *Papageorgiou v. Greece,* para. 40.
49 European Court, *Martins Moreira v. Portugal*, para. 60.
50 European Court, *Pafitis et al. v. Greece*, para. 93 and *Sürmeli v. Germany*, para.129.
51 European Court, *Capuano v. Italy*, paras. 30 and 31 and *Versini v. France*, para. 29.

al, nor can the consequences be borne by an individual. According to the Constitutional Court, regular courts have an obligation to direct the competent public authorities, and the High Judicial and Prosecutorial Council have an obligation to ensure independent, impartial and professional judiciary, and to establish a professional and efficient judicial system. Despite the fact that the appellants can contribute, to some extent, to the extension of duration of the proceedings as a whole, the court, which has the role of effectively controlling the proceedings - has a crucial and the most important role.

The Constitutional Court often notes that in its decision *Uljar et al. v. Croatia* it concluded that regular courts must effectively control the proceedings, as they decide how to conduct the proceedings, how to present evidence and how to assess the parties' actions and omissions, taking into account all requirements guaranteed under Article 6 paragraph 1 of the European Convention. As regards to the conduct of the court in the proceedings, an example should be given of a case in which the Constitutional Court fully charged the regular court with failing to reach a decision within a reasonable time, in a situation where in civil proceedings for compensation of pecuniary and non-pecuniary damage, in period of four years and seven months, the regular court did not hold a single hearing (AP-1319/08 of 29 June 2010).

2.5. The importance of what is at stake for the appellant in the dispute

The European Court also draws attention to the special interest the applicant may have. Criminal cases are expected to be resolved faster than civil ones, especially in a situation where the defendant is in custody. This relates in particular to Article 5 paragraph 3 of the European Convention which provides for that anyone arrested or deprived of his liberty pursuant to the provisions of paragraph 1(c) of this Article, shall be brought promptly before a judge and shall have a right to be tried within a reasonable time or to be released pending trial. However, the case law of the European Court indicates that civil proceedings also require expediency.

In the case law of the Constitutional Court, according to this criterion, in addition to cases related to the freedom and security of a person, there are also cases in labor and family legal disputes that have priority in resolving. In several cases, the Constitutional Court found that the proceedings in which the appellant's claim to return to work and be paid his salary and other rights from work was decided, was a proceedings that was extremely important for the appellant, and should therefore be resolved as soon as possible. (AP-3007/07 of 14 April 2010). Also, in case number AP-3013/06 of 29 April 2009, the Constitutional Court determined that this was an extremely important case for the appellant when his the claim is based on a claim for a significant amount of money.

3. CASE LAW OF THE CONSTITUTIONAL COURT OF BOSIA AND HERZEGOVINA

The Rules of the Constitutional Court of BiH (Article 18, paragraph 2), in order to protect the right to a trial within a reasonable time, guarantee the parties to the proceedings before regular courts (in some situations and before administrative bodies) that, even „without fulfilling other requirements necessary for admissibility of the appeal" (such as the existence of a decision on the merits of regular court, deadline, exhaustion of legal remedies, etc.), may file an appeal during the proceedings before the regular courts. The

purpose of this provision is to enable the Constitutional Court to consider the appeal only in terms of the length of the proceedings in order to enable the appellants to reach a final decision on the merits of the dispute within a reasonable time, which is the basic meaning and ultimate goal of any court proceedings.

The Constitutional Court dealt with the length of proceedings in such situations for the first time in its Decision No. U-23/00 issued on 2 February 2001. In the said decision, the Constitutional Court, considering the issue of admissibility, stated that in the context of the appellate jurisdiction, defined under Article VI/3b) of the Constitution of Bosnia and Herzegovina, the term "judgment" must be interpreted broadly. According to the Constitutional Court, this term should not only include all types of decisions and rulings, but also the lack of decision-making when such a deficiency is found to be unconstitutional. Pursuant to the said Article, the Constitutional Court concluded in Decision No. AP-992/04 of 13 September 2005 that in Bosnia and Herzegovina, in the case in question in the Federation of Bosnia and Herzegovina, there was no effective remedy to enable the appellant to appeal against the excessive length of the proceedings, and that shortcomings in the organization of the judicial system of the Entity, i.e. the State, must not affect the respect for individual rights and freedoms established under the Constitution of Bosnia and Herzegovina, as well as the requirements and guarantees set forth under Article 6 of the European Convention. The Constitutional Court further pointed out that an individual cannot be placed under an excessive burden in discovering which is the most efficient way to exercise his rights.

4. CASES BEFORE THE CONSTITUTIONAL COURT AND THE EUROPEAN COURT

There are two groups of cases referring to issues of reasonable time. These are regular court proceedings following a lawsuit where no final court decision has been reached and proceedings that have been terminated, but a final court decision has not been executed.

4.1. Duration of court proceedings

The European Court has issued several decisions on the issue of the length of proceedings in cases against Bosnia and Herzegovina since June 2017, in which it found a violation of the right to a fair trial within a reasonable time.

In the *Kahriman* case, the European Court pointed out that, according to well-established case law in cases concerning the length of proceedings, decisions or measures favorable to the applicant were in principle not sufficient to deprive him of „victim" status, unless the domestic authorities acknowledged the violation, explicitly or substantially, and then provided compensation for that violation[52]. Had the applicant failed to seek compensation before the Constitutional Court, the recognition of violation would, in itself, constitute adequate and sufficient legal protection within the meaning of Article 34 of the Convention[53]. However, since the applicant sought compensation for breach of the reasonable time requirement[54], and the Constitutional Court did not award any compensation, the applicant could still claim to be a "victim". In the present case, the Constitutional Court

[52] See principles established in the judgment *Cocchiarella v. Italy* [GC], No. 64886/01, paras. 69-98, ESLJP 2006-V.

[53] See, analogously, *Lukić v. Bosnia and Herzegovina* (Dec.), No. 34379/03, of 18 November 2008.

[54] Paragraph 6 of this judgment.

found a violation of the right to a fair trial within a reasonable time, but did not award damage compensation.

In the case law of the Constitutional Court, there are a number of glaring examples of violations of the right to a fair trial within a reasonable time. For example, in case number AP-6162/18, a violation of Article 6 of the European Convention was found because the criminal proceedings against the appellant lasted for more than 17 years. In the case law of the Constitutional Court, there is an example where the proceedings for damage compensation began in 1969 and ended in November 2011 (42 years). The relevant (*ratione temporis*) period considered by the Constitutional Court in assessing the length of the proceedings was a bit more than 15 years and ten months and the Constitutional Court found a violation of the right to a fair trial within a reasonable time.

4.2. Reasonable time in enforcement proceedings

Unfortunately, a very large number of final and enforceable decisions made by courts, which have not been implemented, and therefore, in this segment, there is a violation of Article II/3e) of the Constitution of Bosnia and Herzegovina, Article 6 of the European Convention and Article 1 of Protocol 1 to the European convention.

In case of violation of the right to a trial within a reasonable time, the Constitutional Court may order non-pecuniary compensation, within the meaning of Article 74 paragraph 1 of the Rules of the Constitutional Court. The Constitutional Court used to be more restrictive on this issue, but after several decisions of the European Court, there is simply no choice: where a violation has been established, regardless of whether the case has been completed in the meantime, non-pecuniary compensation must be awarded.

5. THE CASE LAW OF THE EUROPEAN COURT REGARDING A SYSTEMATIC VIOLATION OF THE RIGHT TO A FAIR TRIAL WITHIN A REASONABLE TIME IN RELATION TO MEMBER STATES OF THE COUNCIL OF EUROPE

The judgment of the Grand Chamber of the European Court *Burmych v. Ukraine*[55] considered applications concerning the same systemic problem identified by the European Court in the pilot judgment in case *Ivanov v. Ukraine* (problems in the functioning of the judiciary in Ukraine leading to non enforcement or late enforcement of the final decision of the domestic courts and the lack of an effective remedy in this regard). In the judgment in case *Ivanov,* the European Court gave guidelines regarding general measures that should be taken in order to enforce the judgment and ensure compensation of former and future victims of the same violation of the European Convention, in a satisfactory manner. However, Ukraine has not yet implemented them.

Having in mind its own efforts in examining cases such as *Ivanov*, and the aim of the pilot judgment (that general measures to be taken by the State to enforce the judgment apply to all other victims of violation of the European Convention), the European Court concluded that its repeated findings of violations in groups of similar cases are not a gain at all, nor is it the best way to administer justice, while, on the other hand, such cases significantly burden the work of the European Court and increase its backlog. Therefore, the European Court has considered whether it is justified, within the meaning of

[55] Number 46852/13 *et al*., of 12 October 2017.

Articles 19 and 46 of the European Convention, to continue examining applications filed after the *Ivanov* judgment. In accordance with the principle of subsidiarity, which applies to the whole European Convention, and not only to pilot - judgments, issues covered by the *Ivanov* judgment, including the issue of compensation to victims, are subject matter of enforcement of that judgment in accordance with Article 46 of the European Convention and under under the supervision of the Committee of Ministers. The European Court decided to delete these applications from its list of cases, considering that the rights of all the victims of systemic violation established in the *Ivanov* case - should be exercised in the proceedings of execution of that judgment, and not in the proceedings before this court.

The leading (pilot) judgments of the European Court relating to the length of proceedings concern civil, administrative and criminal cases.

6. CONCLUSION

Determining, in an abstract sense, what reasonable duration of criminal proceedings is, is quite a challenge within the case law of the European Court and the Constitutional Court, taking into account the wide variety of cases and circumstances. From a purely academic perspective, a perfect conclusion is impossible. However, the overall analysis of the case law shows at least a fairly clear trend that allows defining the beginning and end of the period to be taken into account for the calculation. In addition, the criteria applicable in the case law of these courts in assessing the reasonable length of the proceedings are well established.

The issue of violation of the right to a trial within a reasonable time in BiH is a systemic problem, which, in addition to violation of the right under Article II/3e) of the Constitution and Article 6 of the European Convention, also leads to violation of the right under Article 13 of this Convention because, in many cases, the proceedings before the courts are ineffective in essence.

Although the Constitutional Court has a larger number of cases referring to the issue of violation of a trial within a reasonable time, of all States in the region, only in BiH there is no legally regulated procedure referring to reasonable time before applying to the Constitutional Court of BiH. This is a special problem.

Despite the small amounts awarded by the Constitutional Court as non-pecuniary compensation for violations of the right to a trial within a reasonable time, they are very significant. The measures taken by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (work on old cases) do not yield results, given that new items become obsolete. Lack of money or judges is not justification for this violation because it is the duty of public authorities to organize its system so that there are no such violations.

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Kriterijumi za ocjenu povrede prava na suđenje u razumnom roku

Rezime: Poznata rečenica na engleskom jeziku Justice delayed is justice denied (pravo koje kasni je pravo koje se odriče) potvrđuje istorijsku svijest o vrijednosti brze sudske odluke. Pravo na pravično suđenje u razumnom roku primjenjuje se i na građanski i na krivični postupak. U krivičnom suđenju, pitanje odgode može se regulisati i članom 5 stav 3 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda kada je osoba pritvorena. Obrazloženje principa, u krivičnom postupku „zasnovano je na potrebi da se omogući optuženom da ne ostane predugo u stanju neizvjesnosti o ishodu krivičnih optužbi protiv njega" (Kart v. Turkey, Evropski sud za ljudska prava, 2009). Nadalje, promjenjivost krivičnog postupka koji predugo traje - uopšteno šteti reputaciji navodnog prestupnika. Evropski sud za ljudska prava je objasnio da je „razlog zbog kojeg je donesena presuda u toliko dugotrajnih postupaka taj što određene ugovorne stranke godinama nisu ispoštovale uslov ´razumnog roka` iz člana 6 stav 1 Evropske konvencije i nisu propisale domaći pravni lijek za ovu vrstu žalbe" (Scordino v. Italy (no. 1) [GC], 2006-V).

Ključne riječi: razuman rok, Ustav Bosne i Hercegovine, Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda, Ustavni sud Bosne i Hercegovine, Evropski sud za ljudska prava.

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Tax Consulting as a Special Type of Service Activity

Abstract: Tax consulting is a special type of service activity, with certain specifics related to some other activities. The name itself indicates that it involves providing advisory services, given by specially qualified and trained professionals, with respect to professional-ethical and professional principles, and above all the principles of legality, independence, autonomy, expertise, conscientiousness and professional secrecy as well as other principles that are mutually determined and supplemented. The main purpose of tax consulting is to help taxpayers in completing their tax obligations and to properly understand and apply tax laws. In a broader sense, it means representing the taxpayer in tax and court proceedings. On the other hand, observing the complexity of the tax-legal relationship, the inequality of the parties in this relationship, which stems from the very nature of taxes, it is indisputable that tax advice contributes to tax efficiency and overall tax policy, humanization of tax-legal relationship, development of taxpayers' awareness on the importance of taxation and the development of tax morale. The goal of this paper is to investigate tax consulting in Bosnia and Herzegovina and the countries of the region, using research, historical, normative and comparative methods.

Key words: tax consulting, tax advisor, taxpayer.

Zorica Drljača
A lawyer and associate professor at the Pan-European University Apeiron Banja Luka, drljacaml@teol.net

Elvir Muminović
Assistant Director in the Business Services Sector in the Indirect Taxation Authority BiH, elvir.muminovic@yahoo.com

1. INTRODUCTION

The very nature of the tax-legal relationship, the content of which consists of a set of tax authorizations and duties on the part of tax authorities, which act as a state authority, and a set of rights and obligations of taxpayers who owe and pay taxes, indicates that alitigants are not equal in this relationship.[1] Besides the complexity of the nature of the tax-legal relationship and the inequality of the parties in this relationship, the complexity of the entire tax issue, and its connection with other areas of law and economics, especially with administrative law, civil law, commercial law, accounting, and the dynamics of change in tax regulations, justifies the need of taxpayers to seek professional assistance from qualified professionals in the performance of their obligations, not only in fulfilling regular obligations to pay taxes, but also assistance in getting to know the entire tax matter.

[1] Tomić. Z. (1991). *Administrative law*. Belgrade: Nomos, 73.

In order to comply with tax laws, taxpayers must be informed about the operation of the entire tax system and the manner of determining the tax liability, in a word, they must understand the tax matter. In addition to other taxpayers' rights (right to appeal, consistent application of legal regulations, right to confidentiality and confidentiality of data), the right to information and the right to certainty are of particular importance because they allow taxpayers to anticipate tax liabilities that may affect planning their own economic and other activities.[2]

Therefore, the complexity of the tax matter, as well as the dynamics of changes in tax regulations are the main reasons that explain the need to provide advisory services in the tax matter. In order to ensure healthy financial relations in the country, it is necessary that all taxpayers have the opportunity to receive expert advice on tax issues, i.e. to establish the activity of tax consulting. Thus, from ancient times (in ancient Greece, the Roman Empire) the first forms of tax advice were recorded.[3] In the Middle Ages, scribes were the ones who, among other things, provided certain assistance to persons in fulfilling their tax obligations, and these persons reflect the beginning of counseling and auditing that we know today. In the period of the new century, commercial bookkeeping developed, which required special experts of bookkeepers and accountants, whose task was to show tax revenues. In the 20th century, as a new form of tax, it was introduced into the tax system of other European countries, when the existing auditors specialized in tax consulting.

However, as the tax system became more complicated over time with the introduction of new forms of public revenue, in practice there was a need for qualified tax advice, so at the beginning of the twentieth century, tax consulting developed into an independent professional activity. Germany is considered to be the first country to most fully regulate the activity of tax consulting by adopting: the Law on Tax Advisers, the Ordinance on the Application of the Law on Tax Advisors, the Professional Code for Tax Advisers and the Ordinance on Fees for Tax Advisors.[4] By complicating the tax system and the need to establish cooperation with taxpayers, other countries, relying on legal solutions from German tax legislation, have established the activity of tax consulting, including countries from the former Yugoslavia.

However, despite the establishment of tax consulting as a special service activity that aims to provide advice and professional assistance to taxpayers, we should not neglect the efforts of tax authorities to increasingly count on cooperation with taxpayers in the taxation process and the commitment of tax authorities to take certain measures to improve the position of taxpayers.[5] Some of the elements aimed at improving the position of taxpayers are as follows: improved level of organization and modernization of tax services, introduction of electronic communication between taxpayers and tax authorities, which provides access to a wide range of information needed for taxation and the need for direct participation of taxpayers in the taxation process.

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[2] Drljača, Z. (2018). *Public finance and financial law.* Istočno Sarajevo: Faculty of Law PIM University in Lukavica, 152.

[3] Dabić, Lj. (2007). Tax consulting and tax advisors in transition countries*. Legal Life - Journal of Legal Theory and Practice,* 12, 5-32.

[4] Ilić-Popov, G. (2013). Tax advisors and their activity in the tax law of the countries of the former SFRY. *Foreign Legal Life,* 1, 26-43.

[5] Anđelković, M. (1999*). Tax Law-Theoretical Aspects and Tax Reforms.* Niš: Center for Publication of the Faculty of Law in Niš, 118.

2. THE IMPORTANCE OF TAX CONSULTING

The profession of tax advisor has acquired one of the most prestigious professions, because its importance is recognized not only in protecting the interests of taxpayers, but also presupposes greater certainty in the collection of public revenues, which contributes to the stability of the budget system and realistic planning of public expenditures. For the taxpayer, expert and professional advice in tax matters means security in fulfilling tax obligations and protection of his rights in tax proceedings, ie it gives him security in exercising the right to consistent application of tax laws, while respecting the principles of fairness and impartiality. At the same time, it should be borne in mind that the efficiency of taxation depends on the cooperation of taxpayers and tax authorities, without which the function of the tax as the primary instrument of economic and fiscal policy would not be achieved. By strengthening trust between the subjects of the tax relationship, the antigonism between tax authorities and taxpayers is alleviated, and the efficiency of the tax system is increased, the degree of which increases with the strengthening of trust.

The skill of tax policy makers is reflected in taking measures to increase the number of taxpayers who understand and pay tax obligations in compliance with the norms of tax legislation.[6] The development of trust between tax authorities and taxpayers is influenced by several factors, such as: perception of the unfairness of the tax law for some categories of the population, inconsistent and rigid tax penal policy, complexity of the law that can be reduced by understanding the tax liability that is provided to taxpayers, etc.

Tax consulting has a special dimension for the state, i.e. its tax authorities, because it presupposes greater certainty in tax collection, given that in performing his/her activity the tax advisor is bound by the basic principles that accompany the performance of his/her activity: legality, independence, expertise and conscientiousness, which is a significant guarantee that the taxpayer who hires a tax advisor will not commit tax evasion, but will pay the correct amount of tax. The tax advisor, who in the performance of his/her activity assumes personal responsibility for the quality of the services he/she provides, is expected to behave professionally, which gives a certain guarantee in the application of the law from taxpayers and tax authorities.

Tax consulting has its own, extremely important and international dimension. In the conditions of creating a global market and conducting business activities beyond national borders, the role of the tax advisor consists, in particular, in developing a tax plan for the taxpayer, which should offer him a choice of appropriate countries of residence or investment, in order to minimize world income, while remaining within the limits of the law.[7]

3. TAX ADVISORY NORMATIVE REGULATION SYSTEMS

At the international level, the matter of tax advice is not explicitly regulated by international conventions, but considering the rights of taxpayers in the context of basic human rights, which in most countries are guaranteed by the Constitution, which is based on basic principles established by the European Convention on Human Rights and the fundamental freedoms, we can conclude that the right to certainty and information, i.e. the right that taxpayers, among other rights, have the right to be acquainted with tax laws, is guaranteed

[6] Bird M, R., Cassenegra, M. (1992). *Improving Tax Administration In Developing Countries*. IMF 1, 306-308.

[7] Ilić-Popov (2013a).

by the aforementioned Convention.[8]

Examining the normative regulation of tax consulting, in the countries of the European Union and countries that are not members of this international organization, we came to the conclusion that this activity is differently regulated, or not regulated at all.[9]

1) the system of full regulation of tax consulting in the countries that have regulated the profession of tax advisor by law, as we have already stated in Germany, then in Austria, Canada, Japan, the Czech Republic, Poland, Croatia,

2) system of partial regulation[10] of tax consulting in countries that accept the model that even unqualified persons can give tax advice or can prepare and submit a tax return for a taxpayer, with the obligation to provide basic information about the taxpayer, to sign the tax return, enter the social number used for tax purposes (in our legislation "JIB") and the employer's number, whereby the applicant or the compiler of the tax return, took responsibility for the correctness of the tax return or tax return (the USA, Australia),

3) the system of complete non-regulation of tax consulting as a separate activity, represented mainly in underdeveloped countries, i.e. the countries undergoing the transition process, where the activity of tax consulting, preparation of tax returns and tax returns is not specifically regulated, but also in some highly developed countries, e.g. the Netherlands, which does not have formally regulated tax counceling, but has two very powerful organizations dealing with tax issues, and which the government has appointed as partners in disputes in determining certain solutions in tax issues.

4. COMPARATIVE OVERVIEW OF THE NORMATIVE REGULATION OF TAX CONSULTING IN THE COUNTRIES OF THE REGION

In the countries of the region, i.e. the countries that were part of the former SFRY, tax consulting is regulated differently, so we will give an overview of the normative regulation of tax consulting in Slovenia, Croatia, Montenegro, Macedonia, Serbia, with a special overview of tax consulting in Bosnia and Herzegovina.

4.1. Tax counsulting in Slovenia

In Slovenia, which has a highly developed tax advisory activity, this matter is not regulated by a special law, although the draft Law on Tax Consulting (*Zakon o davčnem svetovanju*) was sent to the parliamentary procedure in 1998.[11] Persons providing tax consulting services are gathered in a professional association - the Association of Tax Advisers of Slovenia (*Društvo davčnih svetovalcev Slovenije (DDSS*), which was founded in 1993, as a voluntary association of people engaged in tax consulting.[12] This company, as a profe-

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[8] European Convention for the Protection of Human Rights and Fundamental Freedoms 1999. *Official Gazette of BiH*, no. 6/99.

[9] Drljača, Z. (2018). Some aspects of taxpayer rights in the light of tax reforms. In: V. Čolović (ed.) *Yearbook of the Faculty of Law* 8, 169-181.

[10] Dabić (2017a).

[11] Kovačević, E. (2007). Status davčnega svetovalca v Slovenija in na Hrvaškem. (specijalističko delo). Univerza v Ljubljani, Ekonomska fakulteta. Retrieved Jun 5, 2021, from http://www.cek.ef.uni-lj-si/spscijalist/kovacevic 3401.pdf.

[12] Društvo davčnih svetovalcev Slovenije. Available at http://www.slonep.net/finance/davki/zbornica-davcnih-svetovalcev (10.05.2021).

ssional association, has established a legal framework for the provision of services of tax advisors, with built-in standards from the field of tax consulting set by the European Fiscal Council, of which the Association of Tax Advisers of Slovenia is a full member. The legal framework consists of the following: Rules on taking the exam for a tax advisor (*Pravilnik o opravljenju ispita za davčnega svetovalaca)*), Rules on the license of tax advisors of Slovenia (*Pravilnik o pridoviti certifikata in licence za delo davčnega svetovalca Društva davnih svetovalec Slovenija*). In addition to the Association of Tax Advisors in Slovenia, tax advisory services are also provided by the Institute of Auditors (*Slovenski inštitut za revizija*) established in 1993.[13]

For performing the activity of a tax advisor in Slovenia, the Rulebook on taking the exam for a tax advisor[14], the general conditions are determined, as follows: 1) that the person is an EU citizen; 2) to have at least higher education and three years of practical experience in the field of tax, audit or accounting; 3) that the person has completed a lecture on tax legislation, 4) that he/she actively speaks the language of the EU member state; 5) that he/she has not been convicted of criminal offenses of economy, payment transactions or abuse of official position, while special conditions include: that he/she has passed the exam for a tax advisor and that he/she has been issued a license to provide tax advisor services.

In the general conditions, therefore, it is not determined that it is a person who is a citizen of Slovenia, nor is residence in Slovenia a condition for providing the services of a tax advisor in Slovenia. This should be seen in the context of the obligation of the EU member states to apply the EU Internal Market Services Directive[15], which main goal is to provide full support to the development of the integrated market of the EU member states in the field of services through the simplification of administrative procedures, removal of obstacles to the performance of service activities, strengthening mutual trust between Member States and trust between service providers and recipients. The Directive otherwise applies to a wide range of services, and its provisions are essentially based on the case law of the European Court of Justice in the areas of business residence and freedom of providing services.

4.2. Tax counsulting in Croatia

In Croatia, tax conseling is regulated by the Law on Tax Consulting.[16] The said Law regulates the activity of tax consulting as an independent and autonomous profession of tax advisors, their powers and obligations, as well as the establishment, position and activity of the Croatian Chamber of Tax Advisors. Since Croatia is an EU Member State, the Law stipulates that the above-mentioned Directive 2006/23/EC of the European Parliament and the Council on services in the internal market is transferred into the legal order of the Republic of Croatia.

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[13] Slovenski inštitut za revizija. Retrieved June 5, 2021, from: https://www.si-revizija.sio-instituta.

[14] Pravilnik o opravljenju ispita za davčnega svetovalaca. Available at https.//0501.nccdn.net/4_2/000/000/03f//0C/7/6 Pravilnik –o-opravljenju-ispita za davac-nega-svetovalca.pdf (11.5.2021).

[15] Directive 2006/23/EC of the European Parlament and of the Council of 12 December 2006 on Services in the Internal Market, *OJ* L376 of 27.12.2006, p. 36.

[16] Law on Tax Consulting in Croatia - revised text 2000 *Official Gazette of Croatia*, no. 127/2000, 76/2013, 115/2016.

The legislator in Croatia stipulates that tax consulting is the activity of providing advice on issues related to legislation related to taxes and other public benefits, preparation and certification of tax returns and other acts in the tax-legal relationship, continuously contracted supervision of the correctness of tax and accounting records, that are conducted for the purpose of preparing tax returns and other tax documents, representation in all tax and misdemeanor proceedings before tax authorities, participation in tax disputes, expertise by decision of a court or tax authority in tax cases.[17] In addition to providing advice on these tax issues, legislators in Croatia, leaves the possibility that in addition to tax consulting, you can also perform business bookkeeping, financial reporting, services in the field of accounting and finance, valuation services, and other related services. A tax advisor is a natural person who performs the activity of tax consulting and whose status and activity is regulated by the Law on Tax Consulting.[18]

When it comes to organizing the activity of tax consulting, the Croatian legislator determines that the activity of tax consulting can be performed by: 1) tax advisors who perform the activity of tax advisor as an independent activity; 2) public companies for tax consulting; 3) a limited liability company for tax consulting and 4) foreign tax advisors and companies.[19]

A tax advisory company from a contracting state to the European Economic Area may establish its branch office in Croatia in accordance with Croatia's obligations under an international agreement, as well as the provisions of the Companies Act and the Tax Advisory Act.

In order for a person to acquire the profession of tax advisor, he/she must meet the general and special conditions, and must obtain the approval (license) of the Croatian Chamber of Tax Advisory to provide the services of a tax advisor. The general conditions are: 1) to have legal capacity; 2) to have a permanent residence in the territory of the Republic of Croatia or a contracting state to the European Economic Area, 3) to speak Croatian and write in Latin script or another language and script that are in official use in the area where the activity is to be performed;[20] 4) that he/she has not been convicted of a criminal offense against property, against the security of payment operations and business, against the judiciary, against the credibility of the document, and against official duty. Special conditions are: that the person is a Bachelor of Economics or a Bachelor of Law or a Master of Economics or a Master of Law, with a diploma recognized in Croatia, at least five years of work experience in tax affairs - work on tax and accounting regulations, to have passed the exam for tax advisor, and to have a work permit (license) from the Croatian Chamber of Tax Advisory.

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[17] Art. 2 of the Law on Tax Consulting in Croatia.

[18] Art. 3, Art. 2 of the Law on Tax Consulting in Croatia.

[19] Art. 7, Art. 2 of the Law on Tax Aconsulting in Croatia, leaves the possibility that, limited tax consulting, without the right to sign tax returns, continuous supervision of the correctness of tax records, representation in tax and misdemeanor proceedings, in administrative disputes, can be performed by independent certified auditors and audit firms, within their powers under the Audit Act.

[20] Citizens of the Contracting States of the European Economic Area who provide tax advisory services in Croatia must know the Croatian language at the level necessary for unhindered and necessary communication with taxpayers, tax authorities and for understanding Croatian tax legislation. The Croatian Chamber of Tax Advisory, Article 8, paragraph, checks the knowledge of the Croatian language at the required level. 3. Law on Tax Consulting in Croatia.

Taking the exam for a tax advisor is regulated by the Ordinance on the program and conditions for taking the exam for a tax advisor, which is passed by the Assembly of the Croatian Chamber of Tax Advisers with the consent of the Minister of Finance.[21] The exam is taken before a commission of nine members, including the chairman of the commission. The exam consists of a written and an oral part, with the written part of the exam being a condition for taking the oral exam. It is interesting to point out that the exam is not public, and that candidates sign the written part of the exam, i.e. certain codes are not used as candidates' marks, which for the sake of objectivity has already become a practice when taking other exams (e.g. written part of the notary exam). The program for taking the exam for a tax advisor is determined by the Croatian Chamber of Tax Advisory, and the program includes eight units: 1) the basis of the tax system, tax policy and financial equalization; 2) tax law in the Republic of Croatia; 3) profit tax; 4) income tax and contributions; 5) indirect taxes and customs duties; 6) accounting, financial reports and audit; 7) company law, 8) subjects of tax-legal relationship.

The Croatian Chamber of Tax Advisory, which represents tax advisors as a whole, promotes, harmonizes and represents the common interests of tax advisors, keeps certain records on persons who have passed the exam for a tax advisor and records on persons who have been issued approval (license) for the provision of tax advisory services. The Chamber was founded in 2011 and is a member of the European Tax Advisers (CFE).[22] According to the records of the Croatian Chamber of Tax Advisory, the activity of tax advisory is performed by 29 tax advisors in Croatia. Namely seven tax advisors who perform the activity of tax consulting as an independent activity and others who provide tax consulting in 15 tax advisory companies as tax services.[23]

4.3. Tax counsulting in Montenegro

In Montenegro, tax consulting is regulated by the Law on Tax Advisors.[24] The activities of tax consulting include: providing advice on tax and customs issues, preparation of tax returns (but not certification, as defined in Croatia), preparation of tax balances and other documents relevant to taxation, as well as representation in tax proceedings before administrative and judicial authorities, and in customs proceedings, before ministries and judicial authorities. In addition to tax consulting, it is allowed to keep business books, prepare financial statements and other related activities, in the manner prescribed by a special law (e.g. the Law on Accounting).

The duties of a tax advisor in Montenegro may be performed by a person who meets the general and special conditions. The general conditions stipulate: 1) that the person has

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[21] Ordinance on the program and conditions for taking the exam for a tax advisor, 2017. *Official Gazette of the Republic of Croatia*, no. 2/2017.

[22] The Association of European Tax Advisers based in Brussels - CFE, was founded in 1959, in order to contribute to the coordination and development of tax legislation in Europe, and coordination in promoting national laws governing and protecting the profession of tax advisor. 26 European countries. Available at https://www.taxodviserse europe.org/about-us (10.5.2021).

[23] Data on the number of tax advisors in Croatia. Available at https://www.hgk.hr-pristup (11.5.2021).

[24] Law on Tax Consulting 2007, *Official Gazette of Montenegro*, no. 26/2007, 34/2007, 73/2010, 47/2019.

business and health ability, 2) that he/she has not been convicted of a criminal offense that makes him/her unfit to perform the duties of a tax advisor - criminal offenses against property, payments and business, state authorities, judiciary and official duties. Special conditions for performing the duties of a tax advisor are the following: 1) VII 1 level of education qualification, so it is not determined as in Croatia that he/she has a degree in Economics or Law, 2) that he/she has at least five years of experience in preparing or applying tax, customs and accounting regulations ; 3) to have passed the exam for a tax advisor; 4) that the person has received a work permit from the Chamber of Tax Advisors. For a tax advisor from the country of the European Economic Area, as one of the conditions for providing the services of a tax advisor in the territory of Montenegro, it is necessary to speak the Montenegrin language to the extent that is sufficient to perform the activities of tax consulting.[25]

The organization of the exam for a tax advisor is carried out and organized by the Ministry of Finance of Montenegro, which also appoints the Commission for taking the exam for a tax advisor. In Montenegro, the Commission has five members and a president, i.e. six members, which is a little questionable how the Commission decides whether a person has passed the exam, because it is an even number of members of the Commission, and hypothetically it may happen that three members of the Commission vote that the candidate has passed the exam, and three members to vote against. Unlike in Croatia, where the Commission is appointed by the Chamber, in Montenegro the Commission for taking the exam for a tax advisor is appointed by the Ministry of Finance, with half of the Commission members being representatives of the Ministry of Finance, tax and customs authorities, and three members being economic and legal experts. A person who passes the exam for a tax advisor, submits a request to the Ministry of Finance for the issuance of a permit (license) for work, i.e. the provision of tax consulting services.[26]

In the organizational sense, tax consulting, as a special service activity, can be provided by: 1) natural persons - tax advisors as an independent profession if they have received a work permit; 2) companies if they are registered to perform that activity; 3) a tax advisor and a company registered to conduct tax consulting in a state signatory to the Treaty on the European Economic Area (EFA). When performing the activity of tax consulting in the form of a company for performing tax consulting, the legislator in Montenegro stipulates that the company may establish one or more tax advisors, with the obligation to use the term "tax advisor" and a member of the company can only be a tax advisor.

The Law of Montenegro determines the significant role of the Chamber of Tax Advisers, as a professional and independent organization, which represents tax advisors, promotes their work and represents their common interests, issues approvals (licenses) for work with recognized public authorizations,[27] keeps a register of issued licenses and company register, provides conditions for improving the professional knowledge of advisors and organizes the education of tax advisors. The establishment of the Chamber requires at least ten tax advisors who have received approval for work, and if that is not achieved, the tasks within its competence are performed by the Ministry of Finance. In order to create the basic preconditions for the application of the Law, and the performance of tax consulting activities, in the transitional and final provisions of the Law, it is possible for the

[25] Art. 4, para. 5 of the Law on Tax Consulting of Montenegro.
[26] Art. 7 of Law on Tax Consulting of Montenegro.
[27] Art. 19 of the Law on Tax Consulting of Montenegro.

Ministry to issue a maximum of five licenses within six months from the entry into force of the Law, without taking the exam for a tax advisor, and based on the work experience and professional titles of the applicant, with a certain period of validity, and the obligation of the person to whom the license was issued, to pass the exam within two years.

4.4. Tax Consulting in Macedonia

In Macedonia, the activity of tax consulting is not specifically regulated, although in 2008, a draft Law on Tax Advisers (Zakon za daночni sovetnici)[28] was established, which was supposed to regulate tax consulting issues in line with the laws of other countries that fully regulated this area. By analyzing the Law on Tax Procedure (Zakon za daночna postupka)[29], we determined that the tax advisor is not listed as a procedural party, but it is determined that in the tax procedure the taxpayer can be represented by a legal representative (in cases specified by law) and by authorization, the taxpayer's attorney, without specifying that the taxpayer's attorney may also be a tax advisor.

4.5. Tax consulting in Serbia

In Serbia, tax consulting is not regulated by a special law, but the regulations in this area are regulated by the regulations of the Professional Association of Tax Advisers of Serbia, which, based on the Statute of the Association,[30] adopts the Ordinance on Tax Adviser Examination, the Academy of Tax Advisers, which operates within the Association of Tax Advisers of Serbia, organizes a lecture on thematic units for paying the exam for a tax advisor.[31] In relation to the program for taking the exam for tax advisor in other countries in the region, in Serbia, the program also includes international agreements and tax planning, tax evasion and tax crimes, prevention of money laundering and tax counseling in the EU, as separate thematic units.

When determining the conditions for taking the exam for a tax advisor, the conditions in Serbia are much more flexible, so that the exam can be taken by persons who meet the following conditions: 1) at least a university degree (major is not specified); 2) three years of practical experience in the field of tax, audit or accounting; 3) that they have completed training on Serbian tax legislation lasting at least 48 hours; 4) that they have not been convicted of criminal offenses against property, economy and legal transactions; and 5) that they have not been sentenced to imprisonment for a term of two years or more. Otherwise, the exam is taken only in writing (lasts three hours) and includes questions from the field of tax regulations in Serbia. Article 17 of the Law on Tax Procedure and Tax Administration defines the definition of a tax advisor, in such a way that a tax advisor is

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[28] Nacrt Zakona za daночni sovetnici. Združenie na daночni sovetnici na Republika Makedonija. Available at http:// www.donocnisovetnici.org.mk (10.5.2021).

[29] Zakon-za-danačna-postupka. Available at Ujp.gv.mk/files/attachment/0000/0900/Zakon-za-danačna-postupka-290 od 27-12-2020.pdf (10.5.2021).

[30] Statute of the Association of Tax Advisers of Serbia. Available at http./. ups.rs.com/organi-udru. htm.ml (10.5.2021).

[31] Thematic units, which are adapted to the program of taking the exam for a tax advisor in Serbia are: introduction to tax parvo, tax procedure, parvo of companies, accounting and financial reports, all forms of taxes in the tax system of Serbia, contributions, international agreements and tax planning, tax counsulting in EU. Available at http://ups-rs.com/ispit-za-poreskog-savetnika. html (10.52021).

a natural person who performs tax consulting activities of a taxpayer in tax proceedings, and if he/she acts as a taxpayer's attorney, he/she must have a power of attorney to receive tax attorney, submits a tax return, pays taxes and undertakes other legal actions in the tax procedure, as a proxy of the taxpayer.[32]

In Serbia, the Association of Tax Advisers was founded in 2014, in order to improve and develop the profession of tax advisor, acquire and disseminate knowledge in the field of tax, accounting, auditing, which is a member of the European Tax Association of Tax Advisers (SFE). The members of the Association are, in addition to tax advisors, accountants, auditors, lawyers and other persons with higher education, who are interested in professional development and are committed to the development of a complex area of taxation. According to the Association of Tax Advisers of Serbia, licenses were issued for 29 tax advisors.[33]

5. TAX CONSULTING IN BOSNIA AND HERZEGOVINA

In Bosnia and Herzegovina, tax consulting is not regulated in the entire territory of Bosnia and Herzegovina, i.e. in the Federation of Bosnia and Herzegovina, a special activity of tax consulting is not regulated, but auditors, accountants, accountants, lawyers, special consulting agencies activities, while in the Republic of Srpska, tax consulting as a special activity is regulated by the Law on Tax Consulting, which was adopted in 2008.[34] The mentioned Law normatively regulates the area of tax consulting, providing professional assistance in tax issues related to the tax rights of the Republic of Srpska, regulates the manner and conditions for acquiring the title of tax advisor, as well as forms of their organization, tax issues. Professional assistance in tax matters includes: assistance in keeping records that are important for tax issues, assistance in preparing tax balances and documents that are important for taxation and representation in tax matters before the competent authorities.

The definition of tax consulting is not precisely defined in the Law itself, although in its title the Law contains the term "tax consulting" but it is defined in Article 2 of the Ordinance on the manner and conditions for acquiring the title of tax advisors,[35] in such a way that tax consulting is defined as professional activity related to providing professional assistance and advice to business entities in getting acquainted with the tax and financial aspects of business, keeping records that are important for tax issues, preparation of tax balances and documents important for taxation, as well as representing these entities in tax matters before competent authorities. Unlike the definition of tax consulting in the legislation of Croatia and Montenegro, in the Republic of Srpska tax consulting does not include the provision of expert advice in customs procedures, preparation of tax returns, tax balances and other documents relevant to taxation, nor is the possibility for a tax advisor to perform tasks of keeping business books, preparing financial statements and other related activities, but exclusively, that it is the activity of providing professional assistance

[32] Law on Tax Procedure and Tax Administration. Available at https://www.paragraf.rs/kancelarko/softver-za-administraciju-e-kancelarija-program-za-kancelariju.html?s=a783af847b0ed49338f2cf0705e8a41e#forma-za-prezentaciju-kancelarko (10.5.2021).

[33] Available at http:// ups-rs.com licencirani-poreski svajetnici.html (10.05.2021).

[34] Law on Tax Consulting 2008, *Official gazette of the RS*, No. 17/2008.

[35] Ordinance on the manner and conditions for acquiring the title of tax advisor 2018, *Official Gazette of RS*, no. 15/2018.

and advice to business entities that are important for taxation.

A tax advisor is determined as a person who has passed the exam for a tax advisor (Article 7 of the Law), while Article 11 stipulates that based on the certificate of passing the exam, the Minister of Finance issues a decision approving the work of tax consulting (license).

The organization of tax consulting in the Republic of Srpska occurs in two forms: as an independent entrepreneur and a tax consulting company, which is established as a partnership or limited partnership (company of persons). In relation to the establishment of a company of persons whose business is related to some other activities, when founding a tax consulting company, the legislator determined that the founders of a tax consulting company can only be persons who have acquired the title of tax advisor or that the director of a tax consulting company posseses the title of a tax advisor.

The establishment of the company itself takes place in two phases, the preliminary procedure with the Ministry of Finance, which issues approval (license) for performing tax consulting activities and the registration procedure with the competent court for registration of business entities,[36] with the obligation that the company contains the name "Tax Consulting Association". In determining the registered office of the company, the legislator adopted the Anglo-Saxon approach of determining the registered office according to the place of establishment, i.e. the registered office. The law stipulates on an optional basis that tax advisors may form the Chamber of Tax Advisers of the Republic of Srpska, provided that at least 20 tax advisors receive approval for the work of a tax advisor. Within the competence of the Chamber, it is stated that the Chamber takes care of issues of professional importance for the overall membership of the Chamber, to monitor the fulfillment of professional obligations of tax advisors, represents its membership in state bodies and organizations, mediates in the conflict between the members of the Chamber and their principals, proposes candidates for the Court of Honor, proposes experts requested by the court or some other state body, proposes tax advisors for members of the Examination commission for taking the exam for tax advisor, adopts a professional code on the work of tax advisors and determines the tariff and price list of services of tax advisors, monitors developments in the field of tax system and gives initiatives for amendments to the Law and bylaws in the interest of tax advisors. Until the constitution of the Chamber of Tax Advisors, the tasks within its competence are performed by the Ministry of Finance.[37] Members of the Chamber, in addition to tax advisors, may also be directors of the tax consulting company and members of the management boards of the tax consulting company.

6. MANNER AND CONDITIONS OF ACQUIRING THE TITLE OF TAX ADVISOR IN THE REPUBLIC OF SRPSKA

The title of tax advisor in the Republic of Srpska is acquired by a person who passes the exam for tax advisor before the Commission for taking the exam for acquiring the title of tax advisor. In order for a person to take the exam for acquiring the title of tax advisor, he/she must meet certain conditions: has completed a four-year study at the Faculty of Economics or Law, i.e. has acquired the title of a Bachelor of Economics or a Bachelor of Law; 2) to have at least five years of work experience in the application of tax laws; 3) that

[36] Law on Registration of Business Entities in the Republic of Srpska 2013. *Official Gazette of RS*, no. 67/1013, 15/2016 i 84/2019.

[37] Art. 23 of the RS Law on Tax Consulting.

he/she has not been punished for a criminal offense due to which the candidate would be considered unfit to perform tax consulting activities, and 4) to submit proof that no criminal proceedings are being conducted against him. We can conclude that in the Republic of Srpska there are no precisely defined criminal acts that would make a candidate unfit to perform the duties of a tax advisor, but that it is an imprecise formulation "that he/she has not been convicted of criminal acts that make him/her unsuitable for performing tax counsulting", unlike the legislator in Croatia and Montenegro, where it is precisely determined that these are criminal offenses against property, payment transactions, forgery of documents, against official duty, etc.

The Ordinance on the Manner and Conditions for Acquiring the Title of Tax Advisor determines the exam program in the field of: 1) administrative procedure and tax procedure; 2) basics of the tax system and tax policy of Bosnia and Herzegovina, the Republic of Srpska, the Federation of Bosnia and Herzegovina and the Brčko District of BiH; 3) basis of accounting and auditing; 4) commercial law; 5) public finance and financial law.

The exam for acquiring the title of tax advisor is taken before the Commission, which has five members, and which is appointed by the Minister of Finance of the Republic of Srpska, for a period of four years.[38] The members of the Commission are a representative of the Ministry of Finance who is also the President of the Commission and four members, who are appointed from among prominent experts in the field that make up the content of the exam program and who have at least ten years of work experience in applying tax regulations.[39]

The exam consists of two parts, written and oral, with the written part of the exam consisting of two parts. The first part, which is in the form of a test, contains 20 questions with offered answers to which the candidate answers by circling the correct answer and the second part of the written part of the exam which contains five tasks that require written answers with theoretical presentation and solution. The total number of points that a candidate can achieve in the written part of the exam is 100, and the written part of the exam is considered passed if he achieves at least 60 points, which is a condition for taking the oral part of the exam. Based on the results of the written and oral exam, the candidate is graded "passed" or "failed".

7. APPROVAL FOR THE WORK OF A TAX ADVISOR IN THE REPUBLIC OF SRPSKA

At the request of the natural person who passes the exam for acquiring the title of tax advisor, who meets the general and special conditions determined by the Law, the Minister of Finance issues a work permit (license), which approves the performance of professional activity in the title of tax advisor. Along with the request for the issuance of a work permit, a person who has passed the examination for acquiring the title of tax advisor, among other evidence, encloses proof that he/she has not been convicted of criminal offenses for which he/she would be considered unfit to perform months. The applicant shall submit proof that he/ she has not been convicted of criminal offenses for which he/ she would be considered unfit to perform the duties of a tax advisor with the request for

[38] Art. 7 of the Ordinance on the manner and conditions for acquiring the title of tax advisor.

[39] After the establishment of the Chamber of Tax Advisers of the Republic of Srpska, in Art. 27. pts. e) it is determined that the Chamber proposes tax advisors for members of the Tax Commission for taking the exam for acquiring the title of tax advisor.

taking the exam for a tax advisor, but since it may take a long time from the time of taking the exam to the time of applying for a work permit, it is justified to ask the person who has passed the exam for a tax advisor to prove that he/she has not been convicted and the proof cannot older be older than three months. The permit is issued for an indefinite period of time, unlike e.g. Slovenia, where the permit is issued for a period of two years, with the obligation of the tax advisor to achieve a certain number of points in that period on the basis of various types of education trainings, which is a condition for license extension.[40]

Although the legislator in the Republic of Srpska explicitly stipulates that the approval for the work of a tax advisor is issued only to a person who has passed the exam for acquiring the title of tax advisor, the Rulebook on the manner and conditions for obtaining the title of tax advisor members of the commission and their deputies who are appointed by the decision of the Minister after the entry into force of the Ordinance are granted the license of tax advisor without any restrictions.We believe that this provision is discriminatory because the legislator, when appointing members of the Commission, does not set the condition that members of the Commission are persons authorized to work as a tax advisor, so there is no justification that members of the Commission and their deputies, without passing the exam for a tax advisor, are issued approval that they may perform the duties of a tax advisor, or that they may be founders of a tax advisory company.[41] A work permit (license) is also issued to a tax consulting company, and this is, as we stated above, one of the conditions for entry into the Register of business entities.

Termination of the tax advisor's work permit, which is usually issued for an indefinite period of time, is envisaged in the event of the death of the tax advisor and at the personal request of the tax advisor. In addition to the termination of the validity of the approval for the work of a tax advisor, the legislator also determined the cases when the Minister of Finance revokes the approval, against the will of the tax advisor, as follows:

1) if the tax advisor performs an activity that is incompatible with the title of tax advisor; 2) if the tax advisor does not pay the prescribed compulsory insurance against danger from his professional activity; and 3) if he/she loses his/her legal capacity.[42]

In the Law of Montenegro, e.g. one of the reasons for revoking the license of a tax advisor is the non-compliance of the tax advisor with the principles of legality, conscientiousness, expertise and the code of ethics of tax advisors.[43]

In the Republic of Srpska, the institute of exemption of a tax advisor has not been determined in certain cases, such as, for example, it is determined in the Law of Croatia and Montenegro, in such a way that the provisions of the law governing the tax procedure on exemption of an official in a tax procedure or customs procedure are applied to a tax advisor, which is decided by the official conducting the tax or customs procedure.[44]

8. RESPONSIBILITY OF TAX ADVISORS

Tax advisors perform their activities on their own, professionally and independently,

[40] Art. 11 and 19 of the Rules on the Assignment of a Certificate and License for the Work of a Tax Advisor of Slovenia. Available at http://www.davki.org/549/Interni_akti_ZDSS (11.5.2021).

[41] Art. 45 of the Ordinance on the manner and conditions for acquiring the title of tax advisor.

[42] Art. 13 of the Law on Tax Consulting of the Republic of Srpska.

[43] Art. 31 of the Law on Tax Advisers of Montenegro

[44] Art. 15 of the Law on Tax Advisors in Croatia and Article 12 of the Law on Tax Advisors of Montenegro.

with the obligation to respect the principles of constitutionality and legality, impartiality, keeping business secrets, rules of the code of ethics, etc. The tax advisor is responsible for non-compliance and omissions in the performance of his/her activity, but also for ignorance of professional obligations. Considering that the tax advisor acts independently in his/her work, although it is not explicitly stated in the law of the Republic of Srpska, nor in other laws, which we mentioned in this paper, we can conclude that the responsibility of the tax advisor is personal, because he is responsible if he does not adhere to the said principles in his work, that are defined as the basic principles of providing the services of a tax advisor. The gravity of the violation in performing the activity of a tax advisor is decided in disciplinary or criminal proceedings. His property liability, due to the damage caused to the party bacuse of the failure of the tax advisor, shall be decided in the civil proceedings before the competent court.

The liability of a tax advisor is based on the law and the concluded contract on the provision of tax consulting services, which is concluded in writing, individually with each party, unless it is a matter of giving oral advice. The obligation to conclude a contract in writing (*ad solemnitatem*) as an essential element for the validity of the contract concluded between the tax advisor and the party, is prescribed e.g. in the Law of Croatia and the Law of Montenegro, while in the Law on Tax Consulting of the Republic of Srpska it is not specifically stated, but considering the nature of the activity of the tax advisor, which is an independent occupation, we can conclude that the mutual relations of the tax advisor and the party are regulated by contract. Based on the concluded contract, in some countries, e.g. Montenegro and Croatia, a party is allowed to object to the tax advisor on his work, and in case the tax advisor does not act on the party's complaint and does not eliminate the observed omissions within a certain period, the party has the right to file a complaint to the Chamber of Tax Advisers or to exercise his rights at the competent court. Bearing in mind that the relations between tax advisors and parties are more closely determined by the contract, respecting the powers and duties of the tax advisor, which are determined by law or regulations of professional associations, it turns out that tax advisors are subject to contractual liability, which could be reflected in aiding or abetting tax evasion, or unlawful tax evasion.[45] The contract stipulates the obligations of the contracting parties, i.e. the obligation of the party to cooperate with the tax advisor in addition to paying the fee for the services of a tax advisor, which implies the submission of certain data and documents, otherwise the tax advisor may terminate the contract on providing tax consulting services (e.g. Article 14, paragraph 4 of the Law on Tax Advisors, Croatia).

From the above stated, regarding the responsibility of tax advisors, we can conclude that the specific powers and duties of the tax advisor, in addition to legal powers and obligations, arise from the concluded contract with the party, which binds both parties in relation to what is determined for the subject of the contract, that is, the tax advisor is to provide the services of a tax advisor, but also to represent the party in tax matters before the competent authorities (tax authority and courts).[46] However, it should be borne in mind that by concluding the contract, the tax advisor is not automatically authorized to represent the taxpayer in tax and court proceedings, but in that case, he must have a special power of attorney of the taxpayer with a precisely defined scope of power, e.g. to

[45] The contractual responsibility of the tax advisor is defined in Art. 22 para. 1 of the Law on Tax Advisory Croatia.

[46] Art. 1, para. 2, item c) Law on Tax Consulting of the RS.

make statements on the minutes, to receive submissions, to file an application on behalf of the taxpayer, to pay the main and secondary taxes on behalf of the taxpayer, to object to the minutes on the performed control, etc. Therefore, regardless of the fact that the relationship between the tax advisor and the party is regulated by the contract, in order to be represented before the tax authorities and competent courts, and other procedures, it is necessary for the party to give the tax advisor an individual power of attorney for each individual case, i.e. the tax advisor has to acts in the name and on behalf of the party within the power limith that have been given to the advisor.

9. TAX ADVISOR'S LIABILITY INSURANCE

In order to reduce the risks of damage that a tax advisor could possibly cause to a foreigner in the course of his business (e.g. by giving wrong advice, missing the deadline for filing a legal remedy, etc.), the tax advisor in all countries of the region has a legal obligation to insure himself against liability at the company liability insurance.

In order to reduce the risk and protect the interests of taxpayers, to whom the tax advisor provides services, in most countries, the law determines the minimum amount of the insured amount, which must be contracted for liability insurance for damage to each tax advisor. Thus, e.g. in Montenegro, the law stipulates a minimum amount of insurance of 3,000 euros, for each tax advisor individually, even for tax advisors who perform their activity in the form of a company of tax advisors.[47] In Croatia, the lowest amount of insurance is 200,000 kunas,[48] in Slovenia 33,300 euros, while the Law of Republic of Srpska does not specify the minimum amount of insurance for which liability insurance must be agreed for each tax advisor, but stipulates that the conditions for insurance in the Republic of Srpska are determined by the Chamber of Tax Advisors and Insurance Companies and by the Ministry of Finance until the establishment of the Chamber. According to the Croatian law it is possible that in the case that a tax advisor does not conclude an insurance contract with an insurance company, the liability insurance contract will be concluded by the Chamber of Tax Advisers of the Republic of Croatia.[49]

We have seen how important it is to conclude a contract on liability insurance for tax advisors, which is one of the reasons for revoking the license of a tax advisor in most countries. If the tax advisor does not pay the required insurance from his professional liability, as one of the conditions for the issuance of a permit for the work of a tax advisor, submission of evidence that a tax advisor acting as a sole proprietor or a tax consulting company has concluded a professional liability insurance contract.[50] Tax advisors have a legal obligation to duly extend liability insurance.

10. CONCLUSION

Although international conventions and the acquis communautaire do not create an obligation to enact a national law governing tax consulting, most countries in the region and beyond have regulated this area by a special law or regulation of professional associations established to develop and improvement of tax consulting activities.

The complexity of the tax matter, as well as the dynamics of changes in tax regulati-

[47] Art. 14 of the Law on Tax Consulting of Montenegro.

[48] Art. 23 of the Law on Tax Consulting in Croatia.

[49] Art. 23, para. 5 of the Law on Tax Consulting in Croatia.

[50] Art. 16 of the RS Law on Tax Consulting.

ons, are the main reasons that explain the need to provide consulting services in the tax matter. In order to ensure healthy financial relations in the country, it is necessary that all taxpayers have the opportunity to receive expert advice on tax issues, i.e. to establish the activity of tax consulting. Tax advisors are experts who, within the scope of tax consulting, advise taxpayers and help them to settle their obligations to the state in an orderly and legal manner. They use their professional knowledge within the limits of the application of current and international legislation, in order to minimize the tax burden of the taxpayer with whom they have concluded a tax advisory contract, without exposing him to tax evasion or any other illegal conduct in tax proceedings.

Tax consulting is extremely important not only for taxpayers, because by providing expert advice on tax matters, taxpayers gain confidence in the work of tax authorities and fair application of tax regulations, but tax consulting also has a very important role for the state because it presupposes a significant guarantee that tax taxpayers who hire a tax advisor will not commit tax evasion, which, overall, contributes to an efficient tax system, raising awareness of the obligation to pay taxes and developing tax morale.

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Poresko savetovanje kao posebna vrsta uslužne delatnosti

Rezime: Poresko savetovanje je posebna vrsta uslužne delatnosti, sa određenim specifičnostima vezanim za neke druge delatnosti. Samo ime ukazuje na to da uključuje pružanje savetodavnih usluga koje pružaju posebno kvalifikovani i obučeni profesionalci, poštujući profesionalno-etička i profesionalna načela, a pre svega principe zakonitosti, nezavisnosti, samostalnosti, stručnosti, savesnosti i profesionalne tajne, kao i drugi principi koji se međusobno određuju i dopunjuju. Glavna svrha poreskog savetovanja je da pomogne poreskim obveznicima u ispunjavanju njihovih poreskih obaveza i da pravilno razumeju i primenjuju poreske zakone. U širem smislu, to znači zastupanje poreskog obveznika u poreskim i sudskim postupcima. S druge strane, posmatrajući složenost poresko-pravnog odnosa, nejednakost strana u ovom odnosu, koja proističe iz same prirode poreza, nesporno je da poreski saveti doprinose poreskoj efikasnosti i ukupnoj poreskoj politici, humanizaciji poresko-pravni odnos, razvoj svesti poreskih obveznika o značaju oporezivanja i razvoj poreskog morala. Cilj ovog rada je istražiti poresko savetovanje u Bosni i Hercegovini i zemljama regiona, koristeći istraživačke, istorijske, normativne i uporedne metode.

Ključne reči: poresko savetovanje, poreski savetnik, poreski obveznici.

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Poreski delikti u Bosni i Hercegovini

Apstrakt: Dvije su kategorije poreskih delikata u tzv. poreskom zakonodavstvu u Bosni i Hercegovini, i to su krivična djela i prekršaji. Za razliku od poreskih krivičnih djela koja su propisana isključivo u krivičnom zakonodavstvu (Bosne i Hercegovine, Republike Srpske, Federacije Bosne i Hercegovine i Brčko distrikta Bosne i Hercegovine), poreski prekršaji su propisani desetinama zakona i podzakonskih akata koji su na snazi na svim nivoima vlasti: na nivou Bosne i Hercegovine, zatim entiteta – Republike Srpske i Federacije Bosne i Hercegovine, kantona, Distrikta Brčko i na kraju gradova i opština. Sistem oporezivanja u Bosni i Hercegovini koncipiran je i konstituisan u skladu sa njenim ustavnim uređenjem i on se može okarakterisati kao hibridni sistem, ali i vrlo kompleksan sistem sa složenom fiskalnom strukturom i podijeljenim nadležnostina za oporezivanje sa direktnim porezima koji su u nadležnosti poreskih uprava entiteta, odnosno Federacije Bosne i Hercegovine, Republike Srpske i Brčko distrikta Bosne i Hercegovine. Nadležne institucije na nivou entiteta jesu ministarstva finansija (Ministarstvo finansija Federacije Bosne i Hercegovine i Ministarstvo finansija Republike Srpske), odnosno Direkcija za finansije Brčko distrikta Bosne i Hercegovine. S druge strane, indirektni porezi su u nadležnosti Uprave za indirektno oporezivanje Bosne i Hercegovine, dok je na nivou Bosne i Hercegovine uspostavljeno i Ministarstvo finansija u okviru Savjeta ministara Bosne i Hercegovine.

Ključne riječi: porezi, poreski delikti, krivična djela, prekršaji, Krivični zakonik Republike Srpske.

Ljubinko Mitrović
Redovni profesor, Ombudsman za ljudska prava Bosne i Hercegovine.

Saša Rendić
Diplomirani pravnik, Banja Luka.

1. PORESKI SISTEM BOSNE I HERCEGOVINE

Posljednjih petnaestak godina u Bosni i Hercegovini traje reforma njenog poreskog sistema, i to kako u oblasti indirektnih poreza (odnosno porez na dodatu vrijednost i akcize), tako i u oblasti direktnih poreza (porez na dohodak, porez na dobit pravnih lica, porez na lična primanja fizičkih lica i drugi porezi).

Sistem oporezivanja u Bosni i Hercegovini koncipiran je i konstituisan u skladu sa njenim ustavnim uređenjem i on se može okarakterisati kao hibridni sistem, a uz to i vrlo kompleksan sistem sa složenom fiskalnom strukturom i podijeljenim nadležnostina za oporezivanje sa direktnim porezima koji su u nadležnosti poreskih uprava entiteta, odnosno Federacije Bosne i Hercegovine, Republike Srpske i Brčko distrikta Bosne i Hercegovine. Nadležne institucije na nivou entiteta jesu

ministarstva finansija (Ministarstvo finansija Federacije Bosne i Hercegovine i Ministarstvo finansija Republike Srpske), odnosno Direkcija za finansije Brčko distrikta Bosne i Hercegovine. S druge strane, indirektni porezi su u nadležnosti Uprave za indirektno oporezivanje Bosne i Hercegovine, s tim da je na nivou Bosne i Hercegovine uspostavljeno Ministarstvo finansija u okviru Savjeta ministara Bosne i Hercegovine.

Poreski pravni propisi koji su na snazi u Bosni i Hercegovini ne sadrže posebna pravila koja se značajnije razlikuju u oblasti oporezivanja između Bosne i Hercegovine i drugih država. Važnim svakako treba istaći da Bosna i Hercegovina nema izvornih prihoda u oblasti poreza i finansijski izvori zavise od odluka entiteta. S druge strane, poreski sistem potrošno je orjentisan i za funkcionisanje javnih finansija najvažnije je prikupljanje prihoda od poreza na dodatu vrijednost. Kompleksna ustavna struktura Bosne i Hercegovine sa decentralizovanim zakonima i podzakonskim propisima nudi daljnje izazove s obzirom na to da bi se reformisanjem poreskog sistema u Bosni i Hercegovini i uklanjanjem postojećih prepreka stvorili uslovi za jednostavno i efikasno izmirivanje poreskih obaveza, poboljšala bi se pravednost oporezivanja, generisao bi se novi nivo dodate vrijednosti, dok bi efikasnije ubiranje javnih prihoda doprinijelo smanjenju poreske evazije.

Prema Ustavu Federacije Bosne i Hercegovine nadležnost iz sfere direktnih poreza imaju Federacija Bosne i Hercegovine i njeni kantoni, a prema Ustavu Republike Srpske, nadležnost iz sfere direktnih poreza ima isključivo Republika Srpska. Kvalitetan sistem indirektnih poreza i integritet mehanizma raspodjele prihoda od indirektnih poreza su stoga od najveće važnosti za ukupni fiskalni okvir u Bosni i Hercegovini[1].

2. PORESKI SISTEM REPUBLIKE SRPSKE

Poreski sistem Republike Srpske predstavlja skup svih poreskih i neporeskih davanja koja se plaćaju u Republici Srpskoj[2].

Zakonom o poreskom sistemu Republike Srpske[3] uređen je poreski sistem Republike Srpske, kao i uspostavljanje i vođenje Registra poreskih i neporeskih davanja (poreskim davanjima smatraju se sva prinudna, nepovratna davanja za koja poreski obveznik ne ostvaruje direktnu korist ili protivuslugu, dok se pod neporeskim davanjima smatraju davanja za koja obveznik ostvaruje direktnu korist ili protivuslugu).

U poreska davanja spadaju sljedeće obaveze, i to: 1. porez na dobit, 2. porez na dohodak, 3. porez na nepokretnosti, 4. porez na upotrebu, držanje i nošenje dobara, 5. porez na dobitke od igara na sreću, 6. porez na dodatu vrijednost i 7. akcize, 8. carine i 9. putarine.

U okviru neporeskih davanja u Republici Srpskoj, Zakon o poreskom sistemu Republike Srpske izričito navodi sljedeće obaveze, i to: a) doprinosi, b) naknade i c) takse. Tako u neporeska davanja spadaju: 1. doprinos za penzijsko i invalidsko osiguranje, 2. doprinos za zdravstvenu zaštitu, 3. doprinos za dječiju zaštitu, 4. doprinos za osiguranje od nezaposlenosti, 5. doprinos za profesionalnu rehabilitaciju i zapošljavanje invalida, 6. koncesione naknade, 7. naknade za vode, 8. naknade za šume, 9. naknade za lovstvo, 10. naknade za zaštitu životne sredine, 11. naknade iz oblasti saobraćaja, 12. naknade iz oblasti uređenja prostora i građenja, 13. naknade iz oblasti komunalnih djelatnosti, 14. naknade za priređivanje igara na sreću, 15. naknade iz oblasti poljoprivrede, 16. naknade iz oblasti rudarstva

[1] Terzić, S. (2017). *Poreski sistem u BiH*. Uprava za indirektno oporezivanje BiH.

[2] Čl. 2 Zakona o poreskom sistemu Republike Srpske. *Službeni glasnik Republike Srpske,* br. 62/2017.

[3] *Službeni glasnik Republike Srpske*, br. 62/2017.

i geologije, 17. naknade iz oblasti metrologije, 18. naknade iz oblasti veterinarstva, 19. naknade iz oblasti zaštite zdravlja, 20. naknade iz oblasti civilne zaštite, 21. naknade licima na koja su prenesena javna ovlašćenja, 22. naknade koje se plaćaju ovlašćenim regulatornim telima u Republici Srpskoj, 23. republičke administrativne takse, 24. gradske administrativne takse, 25. opštinske administrativne takse, 26. sudske takse, 27. komunalne takse, 28. novčane kazne i 29. članarine[4].

Poreski sistem Republike Srpske trenutno uređuju sljedeći zakoni, i to: Zakon o poreskom sistemu Republike Srpske, Zakon o poreskom postupku[5], Zakon o porezu na dohodak[6], Zakon o porezu na dobit[7], Zakon o porezu na nepokretnosti[8], Zakon o igrama na sreću[9] i Zakon o porezu na upotrebu, držanje i nošenje dobara[10]. Uz njih, izuzetno važni su i Zakon o odgođenom plaćanju poreskog duga[11] i Zakon o fiskalnim kasama[12]. Neporeska davanja uređena su Zakonom o doprinosima[13], Zakonom o penzijskom i invalidskom osiguranju[14], Zakonom o administrativnim taksama Republike Srpske[15], Zakonom o komunalnim taksama[16], Zakonom o posebnim republičkim taksama[17] i Zakonom o boravišnoj taksi[18].

Poreskoj upravi Republike Srpske, koja se nalazi u sastavu Ministarstva finansija Republike Srpske, data je nadležnost za sprovođenje svih poreskih zakona.

3. KRIVIČNA DJELA U OBLASTI POREZA U BOSNI I HERCEGOVINI

Poreska krivična djela su u krivičnom pravu Bosne i Hercegovine uređena u više krivičnih zakona[19]. Tako, na primjer, Krivični zakon Bosne i Hercegovine uključuje više

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4 Maričić, G., Pavlović, G., Jovašević, D. (2021). *Poreski delikti u Republici Srpskoj*. Istraživački centar Banja Luka. 12-13.

5 *Službeni glasnik Republike Srpske*, br. 78/2020.

6 *Službeni glasnik Republike Srpske*, br. 60/2015, 5/2016, 66/2018, 105/2019 i 123/2020.

7 *Službeni glasnik Republike Srpske*, br. 94/2015, 1/2017 i 58/2019.

8 *Službeni glasnik Republike Srpske*, br. 91/2015.

9 *Službeni glasnik Republike Srpske*, br. 22/2019.

10 *Službeni glasnik Republike Srpske*, br. 37/2001, 35/2007, 52/2014, 110/2015, 44/2016 i 66/2018.

11 *Službeni glasnik Republike Srpske*, br. 94/2015.

12 *Službeni glasnik Republike Srpske*, br. 96/2007, 1/2011, 65/2014, 21/2015 i 58/2019.

13 *Službeni glasnik Republike Srpske*, br. 114/2017 i 112/2019.

14 *Službeni glasnik Republike Srpske*, br. 134/2011, 82/2013 i 103/2015.

15 *Službeni glasnik Republike Srpske*, br. 100/2011, 103/2011 – ispravka, 67/2013 i 123/2020.

16 *Službeni glasnik Republike Srpske*, broj 4/2012. Visina komunalnih taksa u Republici Srpskoj određuje se odlukama skupština opština i gradova.

17 *Službeni glasnik Republike Srpske*, br. 8/1994, 29/2000, 18/2001, 22/2001, 60/2003, 41/2005, 51/2006 i 52/2014.

18 *Službeni glasnik Republike Srpske*, br. 78/2011 i 106/2015.

19 Krivično zakonodavstvo Bosne i Hercegovine danas, shodno njenoj ustavnoj strukturi i raspodjeli nadležnosti čine četiri zasebna krivično-pravna sistema, i to: Bosne i Hercegovine, Republike Srpske, Federacije Bosne i Hercegovine i Brčko distrikta Bosne i Hercegovine. Ovo svakako podrazumijeva i nesmetanu egzistenciju četiri krivična zakona (slično ovom, imamo i četiri zakona o krivičnom postupku ili četiri prekršajna zakona), i to: Krivičnog zakonika Republike Srpske (*Službeni glasnik Republike Srpske*, br. 64/2017; 104/2018 - odluka US i 15/2021) koji je stupio na snagu jula 2017. godine; Krivičnog zakona Federacije Bosne i Hercegovine (*Službene novine Federacije Bosne i Hercegovine*, br. 36/2003; 21/2004; 69/2004; 18/2005; 42/2010; 42/2011; 59/2014; 76/2014; 46/2016 i 75/2017) koji je stupio na snagu 1. avgusta 2003. godine; Krivičnog

krivičnih djela koja sadržavaju zabranjena postupanja u vezi sa porezima. Shodno tome, u odredbi člana 210 Krivičnog zakona Bosne i Hercegovine kao posebno krivično djelo propisano je djelo pod nazivom poreska utaja ili prevara, a zatim u članu 210a krivično djelo pod nazivom nedopušten promet akciznih proizvoda. Uz ova dva, interesantna su i krivična djela neplaćanja poreza (član 211 KZ BiH) i carinske prevare (član 216 KZ BiH).

S druge strane, Krivičnim zakonikom Republike Srpske iz 2017. godine predviđena su sljedeća krivična djela, i to utaja poreza i doprinosa (član 264 KZ RS), neuplaćivanje poreza po odbitku (član 265 KZ RS) i nepravilno izdvajanje sredstava pravnih lica (član 267 KZ RS), dok su Krivičnim zakonom Federacije BiH u posebnoj XXIII Glavi propisana Krivična djela iz oblasti poreza, i to: poreska utaja (član 273 KZ FBiH), lažna poreska isprava (član 274 KZ FBiH), nepravilno izdvajanje sredstava pravnih lica (član 275 KZ FBiH), podnošenje lažne poreske prijave (član 276 KZ FBiH), sprečavanje poreskog službenika u obavljanju službene radnje (član 277 KZ FBiH) i u članu 278 KZ FBiH - napad na poreskog službenika u obavljanju službene radnje (slično stanje je i u Brčko distriktu gdje se u posebnoj glavi predviđaju identična krivična djela uz posebno krivično djelo pod nazivom neplaćanje poreza).

4. PORESKI PREKRŠAJI

Poreski prekršaji[20] predstavljaju kategoriju kažnjivih djelatnosti koje obuhvataju ponašanje fizičkih i pravnih lica kojima se povređuje javni poredak i za koje se njihovim učiniocima izriču zakonom predviđene sankcije. Moraju biti predviđeni zakonom ili drugim propisom (uredbom vlade ili odlukom skupštine grada ili skupštine opštine).

Najveći broj poreskih zakona sadrži zakonski opis određenog broja prekršajnih djela i propisuje, u pravilu, dvije vrste prekršajnih sankcija koje se izriču učiniocima navedenih prekršajnih djela, i to: 1. novčane kazne i 2. zaštitne mjere.

Za prekršajnu odgovornost ne traži se umišljaj, već je dovoljan i nehat učinioca. Novčanom kaznom mogu se kazniti pravno lice, odgovorno lice u pravnom licu i poreski obveznik – samostalni preduzetnik koji je fizičko lice.

Zakon o poreskom postupku[21], u odredbi člana 1 uređuje organizaciju i nadležnost Poreske uprave Republike Srpske, prava i obaveze poreskih obveznika, poreski postupak, plaćanje poreskih obaveza, redovnu i prinudnu naplatu poreskih obaveza, kao i druge načine prestanka poreskih obaveza, poresku kontrolu, posebnu kontrolu, te postupak po pravnom lijeku i nadzor u oblasti poreza u Republici Srpskoj. Uz navedeno, ovaj Zakon u glavi dvanaestoj koja nosi naziv Nadzor i kaznene odredbe, propisuje, pored upravnog i inspekcijskog nadzora, pojam, karakteristike i oblike ispoljavanja više poreskih prekršaja, kao i odgovornost njihovih izvršilaca, i to: 1) poreskog obveznika: a) fizičkog lica, b) preduzetnika, c) prav-

zakona Brčko distrikta Bosne i Hercegovine (*Službeni glasnik Brčko distrikta Bosne i Hercegovine*, broj 19/2020 – Prečišćeni tekst) koji je stupio na snagu 1. jula 2003. godine i Krivičnog zakona Bosne i Hercegovine (*Službeni glasnik Bosne i Hercegovine*, br. 3/2003; 32/2003 - ispr.; 37/2003; 54/2004; 61/2004; 30/2005; 53/2006; 55/2006; 8/2010; 47/2014; 22/2015; 40/2015 i 35/2018) koji je stupio na snagu 1. marta 2003. godine.

[20] Mitrović, Lj. (2019). *Prekršajno pravo – poseban dio*. Banja Luka: Međunarodno udruženje naučnih radnika, 226-250.

[21] Prethodni Zakon o Poreskoj upravi iz 2007. godine definisao je i pojam poreskog prekršaja, te se tako poreskim prekršajem smatrala zakonom ili podzakonskim aktom utvrđena radnja lica koja je prouzrokovala povredu poreskih propisa za koje je propisana prekršajna kazna.

nog lica i d) odgovornog lica u pravnom licu i 2) nadležnih organa: a) banke i b) organa nadležnog za vođenje registra. Shodno prednjem, kao učinioci poreskih prekršaja mogu se pojaviti domaća pravna ili fizička lica, odgovorna lica u pravnom licu i samostalni preduzetnici, ali i strana lica ili organizacije, strani državljani i lica bez državljanstva pod istim uslovima kao domaća pravna lica, organizacije i državljani Republike Srpske. Prekršajni postupak iz oblasti poreza vodi se u skladu sa Zakonom o prekršajima Republike Srpske[22]. Interesantna je i odredba stava 5 člana 43 ovog zakona prema kojoj za prekršaje iz oblasti poreza, carina i finansija, novčane kazne mogu se propisati u višestrukom iznosu poreske ili carinske obaveze koja je trebala da bude plaćena, ili kao procenat ili višestruki iznos vrijednosti robe koja je predmet prekršaja, ali ne u iznosu većem od 200.000 KM[23].

U daljem tekstu, a zbog prostorne nemogućnosti prezentovanja svih poreskih prekršaja u Republici Srpskoj i Bosni i Hercegovini, obradićemo prekršajna djela propisana Zakonom o poreskom postupku Republike Srpske i Zakonom o porezu na dodatu vrijednost Bosne i Hercegovine[24].

Zakon o poreskom postupku Republike Srpske, u odredbi stava 1 člana 112 propisuje prekršajno djelo koje čini poreski obveznik – pravno lice (ili drugi subjekt) ili preduzetnik ako: a) se ne registruje uopšte u Poreskoj upravi, b) se ne registruje u Poreskoj upravi u roku i na način koji je propisan za registraciju poreskih obveznika, c) ne prijavi Poreskoj upravi promjenu podataka u vezi sa upisom u registar kod Poreske uprave, d) ne podnese poresku prijavu, ili ne podnese poresku prijavu na način i u roku koji je propisan poreskim propisima i e) ne vodi poslovne knjige i druge propisane evidencije u skladu sa poreskim propisima[25]. U zavisnosti od toga u kojem je svojstvu učinilac ovog prekršaja propisane su i različite kazne, i to: a) novčana kazna u iznosu od 2.000 do 6.000 KM za pravno lice ili drugi subjekat, b) novčana kazna u iznosu od 1.000 do 3.000 KM za odgovorno lice u pravnom licu i c) novčana kazna u iznosu od 1.000 do 3.000 KM za preduzetnika.

U odredbi stava 2 člana 112 Zakona propisano je da prekršaj čini poreski obveznik - pravno lice ili drugi subjekt, odnosno preduzetnik koji: a) ne dozvoli poreskom izvršiocu da uđe u prostorije u kojima poreski obveznik obavlja svoju poslovnu djelatnost, a radi vršenja popisa i zapljene pokretnih stvari u postupku prinudne naplate poreskih obaveza, b) ne učestvuje na poziv Poreske uprave u postupku kancelarijske kontrole, ne pruži tražena objašnjenja, ili ne dostavi na zahtjev inspektora svu dokumentaciju koja je potrebna za sprovođenje kancelarijske kontrole, c) ne učestvuje na poziv Poreske uprave u postupku terenske kontrole, ne pruži tražena objašnjenja, ili ne dostavi na zahtjev inspektora svu dokumentaciju koja je potrebna za sprovođenje kancelarijske kontrole, d) ne omogući poreskom inspektoru odgovarajuće mjesto (prostor, uslove) za vršenje terenske kontrole i e) ometa službenike Poreske uprave u sprovođenju zakonom utvrđenih dužnosti[26]. I za ovaj prekršaj propisane su različite visine novčane kazne zavisno od svojstva njegovog učinioca. Tako je propisana novčana kazna u iznosu od: a) 1.000 do 3.000 KM za pravno lice ili drugi subjekat kao poreskog obveznika, b) 500 do 1.500 KM za odgovorno lice u tom pravnom licu i c) 500 do 1.500 KM za preduzetnika kao poreskog obveznika.

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[22] *Službeni glasnik Republike Srpske*, br. 63/2014, 36/2015 – odluka US, 110/2016, 100/2017 i 19/2021 – odluka US.

[23] Mitrović, Lj. (2014). *Prekršajno pravo*. Banja Luka: Panevropski univerzitet APEIRON, 86-87.

[24] *Službeni glasnik Bosne i Hercegovine*, br. 9/2005, 35/2005, 100/2008 i 33/2017.

[25] Maričić, Pavlović, Jovašević (2021), 153-179.

[26] *Ibid.*

Za prekršajna djela poreskog obveznika - fizičkog lica propisana odredbom člana 113 Zakona o poreskom postupku Republike Srpske predviđena je novčana kazna u iznosu od 500 do 1.500 KM. Radi se o nekoj od više zakonom alternativno propisanih radnji činjenja ili nečinjenja, i to ako se poreski obveznik - fizičko lice: a) ne registruje u Poreskoj upravi, ili ako se ne registruje u roku i na način propisan za registraciju poreskih obveznika u Poreskoj upravi ili ne prijavi Poreskoj upravi promjenu podataka u vezi sa upisom u registar kod Poreske uprave, b) ne podnese poresku prijavu, ili ne podnese poresku prijavu na način i u roku koji je propisan poreskim propisima, c) ne učestvuje na poziv Poreske uprave u postupku kancelarijske kontrole, ne pruži tražena objašnjenja, ili ne dostavi na zahtjev inspektora svu dokumentaciju koja je potrebna za sprovođenje kancelarijske kontrole i d) ometa službenike Poreske uprave u sprovođenju zakonom utvrđenih dužnosti[27].

Poseban oblik poreskog prekršaja koji nosi naziv: Prekršaj zbog nepodnošenja prijave u Jedinstveni sistem, predviđen je u odredbi člana 114 Zakona o poreskom postupku Republike Srpske. Ovo kažnjivo djelo se sastoji u nečinjenju (negativnoj, pasivnoj radnji, odnosno propuštanju) – nepodnošenju prijave za registraciju obveznika doprinosa u Jedinstveni sistem na način i u roku koji je predviđen zakonom od strane uplatioca doprinosa - pravnog lica. Dakle, ovdje obveznik doprinosa ne podnosi obaveznu prijavu uopšte ili je ne podnosi u određenom roku ili na određeni način. Bitno je da se radi o prijavi u Jedinstveni sistem registracije, kontrole i naplate doprinosa (skraćeno Jedinstveni sistem) koji vodi Poreska uprava (član 15). Radi se o sistemu registracije, kontrole i naplate doprinosa koji predstavlja administrativnotehnički sistem posredstvom kojeg Poreska uprava registraciju, kontrolu i naplatu doprinosa i prikupljanje podataka od obveznika uplate doprinosa i osiguranika. Korisnici ovog Jedinstvenog sistema su: a) Fond zdravstvenog osiguranja Republike Srpske, b) Fond za penzijsko i invalidsko osiguranje Republike Srpske, c) Javni fond za dječiju zaštitu Republike Srpske i d) Zavod za zapošljavanje Republike Srpske[28]. Subjekti upisa u Jedinstveni sistem su uplatioci doprinosa i obveznici doprinosa, koji se, dakle, i mogu javiti kao učinioci ovog prekršaja. Baza podataka Jedinstvenog sistema je jedinstvena evidencija o svim obveznicima uplate doprinosa i obveznicima doprinosa, podacima neophodnim za kontrolu uplate doprinosa i podacima za ostvarivanje prava po osnovu obaveznog i dobrovoljnog osiguranja. U ovom sistemu se sačinjavaju izvještaji o rizičnim uplatiocima doprinosa i identifikuju oni obveznici koji izbjegavaju obavezu uplate, isplaćuju ili prijavljuju manje iznose po osnovu obaveze uplate doprinosa, odnosno ne podnesu prijavu za registraciju u Jedinstveni sistem. Zavisno od svojstva učinioca prekršaja (odnosno uplatioca doprinosa) propisane su različite novčane kazne, i to za: a) pravno lice – novčana kazna u iznosu od 10.000 do 30.000 KM, b) fizičko lice – novčana kazna u iznosu od 3.000 do 9.000 KM i c) odgovorno lice u pravnom licu – novčana kazna u iznosu od 3.000 do 9.000 KM. Pored novčane kazne, učiniocu ovog poreskog prekršaja može se izreći i specifična prekršajna sankcija pod nazivom: "Privremena zabrana obavljanja djelatnosti zbog nepodnošenja prijave u Jedinstveni sistem". Ona je propisana u članu 109 Zakona o poreskom postupku Republike Srpske.

Sljedeći poreski prekršaj predviđen je u odredbi člana 115 Zakona o poreskom postupku Republike Srpske i on nosi naziv: „Prekršaj obaveze prijavljivanja, obračuna i plaćanja poreskih obaveza". Ovo prekršajno djelo čini poreski obveznik koji nije niti prijavio,

[27] *Ibid.*
[28] *Ibid.*

niti uplatio poresku obavezu. Dakle, ovdje se radi o prekršaju sa dvoaktno određenom radnjom izvršenja nečinjenja, odnosno propuštanja. To su: a) radnja neprijavljivanja – nepodnošenja blagovremene prijave poreske obaveze i b) neplaćanja poreske obaveze u cijelosti ili djelimično, odnosno u određenom roku. Ovaj prekršaj može da učini samo određeno lice – poreski obveznik koji ne: a) podnese poresku prijavu u obliku, na mjestu i u vrijeme koji su propisani zakonom i b) izmiruje svoje obaveze na način i pod uslovima koji su propisani zakonom. Za ovaj prekršaj iz člana 115 Zakona o poreskom postupku Republike Srpske propisana je novčana kazna u proporcionalnom (srazmjernom) iznosu od 30 % od iznosa obaveze utvrđene u postupku poreske kontrole, ali najviše do 200.000 KM.

Poreski prekršaj banke predviđen je u odredbi člana 116 Zakona o poreskom postupku Republike Srpske. Ovo prekršajno djelo čini banka koja preduzme neku od više zakonom alternativno predviđenih radnji izvršenja u vidu činjenja i nečinjenja i to ako: a) otvori račun za poreskog obveznika bez dokaza o registraciji u Poreskoj upravi, b) ne izvrši blokadu računa poreskog obveznika po dostavljanju zaključka o uspostavljanju privremene mjere obezbjeđenja od strane Poreske uprave i c) ne izvršava prenos sredstava po nalogu Poreske uprave u postupku prinudne naplate[29]. Za ovo prekršajno djelo propisana je novčana kazna, zavisno od svojstva njegovog učinioca, i to: a) novčana kazna u iznosu od 10.000 do 30.000 KM za banku i b) novčana kazna u iznosu od 3.000 do 9.000 KM za odgovorno lice banke.

Poreski prekršaj predviđen u odredbi člana 117 Zakona o poreskom postupku Republike Srpske čini pravno lice koje propusti zakonom propisane poreske obaveze, i to ako: a) ne izvrši prenos potraživanja prema svom dužniku na račun prinudne naplate u postupku prinudne naplate protiv njegovog dužnika, a po nalogu Poreske uprave, b) ne izvrši prodaju i prenos iznosa ostvarenog prodajom hartija od vrijednosti po nalogu Poreske uprave i c) ne izvrši obavezu po nalogu Poreske uprave u postupku prinudne naplate poreskih obaveza na nenovčanim potraživanjima poreskog obveznika (potraživanje robe, opreme, drugih pokretnih stvari) putem određivanja prenosa nenovčanog potraživanja poreskog obveznika od njegovog dužnika i obaveze obveznikovog dužnika da preneseno potraživanje ispuni Poreskoj upravi, odnosno da potraživanu robu i druge stvari isporuči donosiocu rješenja o prenosu potraživanja[30]. Za ovo prekršajno djelo pravnog lica propisana je novčana kazna u iznosu od 5.000 do 15.000 KM. Iako to sam zakon ne predviđa, logično je da za ovu vrstu poreskog prekršaja odgovara i odgovorno lice u pravnom licu, ali za njega nije propisana vrsta i mjera kazne. Ukoliko ovaj prekršaj izvrši fizičko lice (stav 2), tada je propisana novčana kazna u iznosu od 1.000 do 3.000 KM.

Posljednji poreski prekršaj iz Zakona o poreskom postupku Republike Srpske predviđen je u odredbi člana 118 i on nosi naziv: "Prekršaji organa nadležnih za registar". Sam naziv ovog prekršajnog djela ukazuje na specifičnu prirodu i karakter učinioca prekršaja. To je određeno pravno lice, odnosno lice sa određenim svojstvom – *delicta propria*. Naime, kao učinilac ovog prekršaja mogu da se jave različiti državni organi koji vode odgovarajuće registre koji su od značaja za utvrđivanje i naplatu poreskih obaveza. To su shodno odredbi člana 39: a) Agencija za posredničke, informatičke i finansijske usluge, b) nadležni organ jedinice lokalne samouprave, c) drugi organ nadležan za upis u odgovarajući registar lica koja obavljaju privrednu ili profesionalnu djelatnost i d) organ uprave koji vodi

[29] *Ibid*.
[30] *Ibid.*

evidencije o prebivalištu, boravištu, rođenju ili smrti fizičkog lica. Ovaj prekršaj čini, dakle, neki od navedenih organa koji je nadležan za upis određenih podataka u odgovarajući registar lica koja obavljaju privrednu djelatnost, odnosno organi koji vode matične evidencije i evidenciju prebivališta fizičkog lica ako ne prijave uopšte ili ne prijave u određenom roku od pet dana Poreskoj upravi svaku promjenu u evidencijama ili registrima za koje su nadležni. Ukoliko se kao učinilac ovog prekršaja javi organ koji je nadležan za upis u odgovarajući registar propisana je novčana kazna u iznosu od 1.000 do 3.000 KM. S druge strane, za isti prekršaj se kažnjava i odgovorno lice u nadležnom organu, i to novčanom kaznom u iznosu od 500 do 1.500 KM.

Zakon o porezu na dodatu vrijednost, u odredbama člana 67 propisuje prekršaje koje može činjenjem ili nečinjenjem počiniti svaki poreski obveznik koji[31]:

1. obračuna i naplati porez na dodatu vrijednost na prenos imovine koja čini firmu ili dio firme, u suprotnosti sa odredbom stava 2 člana 7 Zakona o porezu na dodatu vrijednost. Za ovo prekršajno djelo propisana je novčana kazna u iznosu koji odgovara iznosu od 50 % od obračunatog iznosa;

2. ne obračuna i ne plati porez na dodatu vrijednost na osnovicu u skladu sa odredbom člana 20 Zakona o porezu na dodatu vrijednost. Za ovaj prekršaj propisana je novčana kazna u iznosu koji odgovara iznosu od 50 % od neobračunatog ili neplaćenog iznosa, a minimalno u iznosu od 100 KM;

3. ne obračuna i ne plati ili pogrešno obračuna i plati porez na dodatu vrijednost u skladu sa odredbama stava 2 člana 38 i stava 5 člana 39 Zakona o porezu na dodatu vrijednost. Za ovaj prekršaj propisana je novčana kazna u iznosu koji odgovara iznosu od 50 % od neplaćenog ili pogrešno obračunatog iznosa, a minimalno u iznosu od 100 KM;

4. ne podnese prijavu za porez na dodatu vrijednost ili je ne podnese u propisanom roku, u skladu sa odredbama st. 1 do 4 člana 39 Zakona o porezu na dodatu vrijednost. Za ovaj prekršaj propisana je novčana kazna u iznosu od 300 KM, osim u slučajevima kada je prijava negativna;

5. pogrešno obračuna iznos ulaznog poreza u skladu sa glavom X Zakona o porezu na dodatu vrijednost. Za ovaj prekršaj propisana je novčana kazna u iznosu od 50 % od nezakonski stečene dobiti;

6. obračuna porez na dodatu vrijednost, iskaže porez na dodatu vrijednost na fakturama i odbije ulazni porez, suprotno odredbi člana 44 Zakona o porezu na dodatu vrijednost. Za ovaj prekršaj propisana je novčana kazna u iznosu od 100 % od obračunatog iznosa, a minimalno u iznosu od 100 KM;

7. obračuna veću paušalnu naknadu od one koja je dozvoljena prema odredbi člana 45 Zakona o porezu na dodatu vrijednost. Za ovaj prekršaj propisana je novčana kazna u iznosu od 100 % od premašene naknade;

8. ne obračuna i ne plati porez na dodatu vrijednost u skladu sa odredbom člana 46 Zakona o porezu na dodatu vrijednost. Za ovo prekršajno djelo propisana je novčana kazna u iznosu koji odgovara iznosu od 50 % od neobračunatog ili neplaćenog iznosa, a minimalno u iznosu od 100 KM;

9. ne obračuna i ne plati porez na dodatu vrijednost u skladu sa odredbama čl. 47-49 Zakona o porezu na dodatu vrijednost, kao preprodavac korištene robe, umjetničkih djela,

[31] Mitrović, Lj. (2011). Poreski prekršaji u Republici Srpskoj. *Zbornik radova sa Prve međunarodne konferencije Fakulteta poslovne ekonomije,* Banja Luka: Panevropski univerzitet APEIRON. 384-393.

kolekcionarskih predmeta i antikviteta. Za ovaj prekršaj propisana je novčana kazna u iznosu koji odgovara iznosu od 50 % od neobračunatog ili neplaćenog iznosa, a minimalno u iznosu od 100 KM;

10. ne obračuna i ne plati porez na dodatu vrijednost u skladu sa odredbama čl. 50 i 51 Zakona o porezu na dodatu vrijednost, kao aukcionar. Za ovaj prekršaj propisana je novčana kazna u iznosu koji odgovara iznosu od 50 % od neobračunatog ili neplaćenog iznosa, a minimalno u iznosu od 100 KM;

11. ne ispostavi fakturu ili ne sačuva primjerak fakture, u skladu sa odredbama člana 55 st. 1 i 2 Zakona o porezu na dodatu vrijednost. Za ovaj prekršaj propisana je novčana kazna u iznosu od 300 KM;

12. na fakturi ne iskaže porez na dodatu vrijednost ili druge podatke iz kojih se iznos poreza na dodatu vrijednost može odbiti saglasno odredbama čl. 47 i 51 i porez na dodatu vrijednost ne prikaže na fakturi ili u izvodima sa cijenama jasno ne naznači da porez na dodatu vrijednost nije uključen u skladu sa odredbom člana 55 Zakona o porezu na dodatu vrijednost. Za ovo prekršajno djelo propisana je novčana kazna u iznosu od 100 % iskazanog poreza na dodatu vrijednost ili iznosa poreza na dodatu vrijednost koji se može oduzeti, a u iznosu od 300 KM u ostalim slučajevima;

13. ne vodi i ne čuva knjige u skladu sa odredbom člana 56 Zakona o porezu na dodatu vrijednost. Za ovaj prekršaj propisana je novčana kazna u rasponu od 300 do 10.000 KM;

14. ne obavijesti Upravu za indirektno oporezivanje BiH o početku, izmjeni ili prestanku obavljanja svoje djelatnosti saglasno odredbama čl. 57, 60 i 62 Zakona o porezu na dodatu vrijednost. Za ovaj prekršaj propisana je novčana kazna u iznosu od 100 % od obaveze o kojoj se nije obavijestilo zbog propusta poreskog obveznika, a minimalno sa 1.000 KM.

Ovlašteno lice koje radi za pravno lice podliježe istoj novčanoj kazni kao i pravno lice. Propisane novčane kazne povećavaju se za 50 % u sljedećim slučajevima, i to: 1) svaki put kada je počinilac ranije kažnjavan, 2) u slučajevima kada je poreski obveznik sprečavao Upravu za indirektno oporezivanje BiH u otkrivanju prekršaja i 3) u slučajevima kada je poreski obveznik počinio prekršaj primjenom sredstava prevare ili kroz uplitanje trećeg lica koje nije zaposleno kod poreskog obveznika i ne zavisi od njega na bilo koji drugi način[32].

5. ISTRAŽIVAČKI DIO

5.1. Podaci o kontrolama i izdatim prekršajnim nalozima Uprave za indirektno oporezivanje Bosne i Hercegovine za period od 2016-2018. godine

2016. godina

U 2016. godini Uprava za indirektno oporezivanje Bosne i Hercegovine izvršila je ukupno 7.909 kontrola što je za 839 kontrola ili 12 % više od planiranog broja kontrola (7.070) za 2016. godinu. Broj izvršenih kontrola za 2016. godinu je u odnosu na broj izvršenih kontrola za 2015. godinu (izvršeno 7.012) povećan za 897 ili 12,79 %. Bruto efekat kontrola ostvaren u 2016. godini iznosi 65.409.117 KM što predstavlja ukupan razrez do-

[32] Mitrović (2011), 23-24.

datnih obaveza prema rješenjima inspektora, što je za 2.958.170 KM, ili 4,74 % više nego u 2015. godini kada je ostvaren bruto efekat u iznosu od 62.450.947 KM. Neto efekat (efekat nakon rješavanja žalbi i obnova postupka) ostvaren tokom 2016. godine iznosi 48.122.230 KM što je za 5.229.003 KM ili 9,8 % manje nego u 2015. godini kada je ostvareni neto efekat iznosio 53.351.233 KM.

U provođenju poslova revizije i kontrole izdata su ukupno 2.653 prekršajna naloga, što je za 629 odnosno 31,08 % više nego u 2015. godini kada je broj izdatih prekršajnih naloga iznosio 2.024.

U oblasti kontrole velikih poreskih obveznika izvršeno je ukupno 1.679 kontrola što je za 10,4 % više od planiranog (planirano 1.521). Broj izvršenih kontrola u 2016. godini je povećan za cca 8,39 % u odnosu na 2015. godinu, kada je izvršeno 1.549 kontrola. U 2016. godini ovlaštena lica su u postupku kontrole velikih poreskih obveznika izdala ukupno 818 prekršajnih naloga, što je po broju prekršajnih naloga više za 51,2 % u odnosu na 2015. godinu kada je izdat 541 prekršajni nalog.

2017. godina

Odsjek za reviziju i kontrolu Uprave za indirektno oporezivanje Bosne i Hercegovine je za 2017. godinu realizovao planirani broj kontrola sa 128 %, budući da je od planiranih 6.859 kontrola izvršeno 8.816 kontrola. Procenat izvršenja kontrola za 2017. godinu u odnosu na isti period 2016. godine iznosi 111 %. Kada su u pitanju potpune kontrole, od planiranih 4.218 kontrola, izvršeno je ukupno 4.236 kontrola što znači da je postotak realizacije potpunih kontrola 100%.

Grupe za reviziju i kontrolu	Broj izvršenih kontrola u periodu I - XII 2016. god.	Broj planiranih kontrola u periodu I - XII 2017. god.	Broj izvršenih kontrola u periodu I - XII 2017. god.	Broj izvršenih kontrola u periodu I - XII 2017. god. u odnosu na period I - XII 2016. god. (%)	Realizacija planiranih kontrola za period I do XII 2017. god. (%)
	1	2	3	4=3/1	5=3/2
Banjaluka	1.980	1.258	2.386	120%	190%
Mostar	1296	1.441	1.447	112%	100%
Sarajevo	2.555	2.249	2.659	104%	118%
Tuzla	2.074	1.911	2.324	112%	122%
Ukupno sve kontrole	**7.905**	**6.859**	**8.816**	**111%**	**128%**
Ukupno potpune kontrole	**4.655**	**4.218**	**4.236**	**91%**	**100%**

Odsjek za kontrolu velikih poreskih obveznika je u 2017. godini izvršio veći ukupan broj kontrola za 25 % u odnosu na godišnji plan za 2017. godinu, budući da je planirano 1.500, a izvršeno 1.879 kontrola.

Aktivnosti na sprečavanju krijumčarenja i činjenja prekršaja u izvještajnom periodu rezultirale su podnošenjem 598 zahtjeva za pokretanje prekršajnog postupka i prema procjeni ukupna vrijednost privremeno oduzete robe iznosila je 4.856.550 KM. Izdato je ukupno 566 prekršajnih naloga po kojima su izrečene novčane kazne u ukupnom iznosu od 242.390 KM.

2018. godina

Odsjek za reviziju i kontrolu je u izvještajnom periodu realizovao planirani broj kontrola sa 95 %, budući da su od planiranih 7.680 kontrola izvršene 7.322 kontrole. Broj izvršenih kontrola u 2018. godini u odnosu na 2017. godinu manji je za približno 17 %.

Kada su u pitanju potpune kontrole od planiranih 5.540 izvršena je ukupno 5.141 potpuna kontrola što znači da je postotak realizacije plana potpunih kontrola 93 % , a u odnosu na 2017. godinu više je za 21,36 % kada je realizovano ukupno 4.236 potpunih kontrola. Ukupni bruto efekti tj. razrezi dodatno utvrđene obaveze po rješenjima inspektora u kontrolama iznose 67.789.609 KM i veći su za 2,98 % u odnosu na 2017. godinu kada su iznosili 65.830.758 KM.

Odsjek za kontrolu velikih poreskih obveznika je u izvještajnom periodu realizovao 93 % od planiranog broja kontrola (izvršeno 1.455 kontrola svih tipova od planiranih 1.512 kontrola).

Broj provedenih kontrola u 2018. godini u odnosu na 2017. godinu manji je za 23 %, zbog velikog broja djelimičnih kontrola bez razreza (informativnih) tokom 2017. godine u sklopu akcije kontrola prometa naftnih derivata i „zamjenskih goriva" što pored povećanja broja potpunih kontrola u odnosu na prethodnu godinu za 5,5 %, dovodi do značajnijeg smanjenja u ukupnom broju kontrola. Kada su u pitanju potpune kontrole, od planiranih 611 provedene su 643 potpune kontrole, što znači da je postotak realizacije plana potpunih kontrola 105 %.

U okviru provođenja obavještajnih aktivnosti u izvještajnom periodu cilj je bio prikupljanje kvalitetnih informacija usmjerenih na otkrivanje i sprečavanje carinskih i poreskih prevara, a rezultati prikupljenih informacija sadržani su u tabelarnom pregledu:

God.	Grupe za istrage			Grupe za sprečavanje krijumčarenja i prekršaja					Ostale org. jedinice UINO i drugi organi		Finansijski učinak
	Info	Podnesen o prijava	Iznos štete u KM	Info	Zahtjevi za pokretanje prek. postupka	Izdani prek. nalozi	Iznos u KM	Vrijednost privremeno oduzete robe	Info	Učinak kontrole	KM
2017	66	10	**7.831.566**	300	55	86	**46.400**	**934.477**	1.055	**4.339.327**	**13.151.770**
2018	45	7	**200.809**	390	30	209	**76.400**	**2.237.817**	809	**2.585.267**	**5.100.293**

U toku 2018. godine Sektor za provođenje propisa obavljao je operativno najsloženije poslove i provodio aktivnosti na otkrivanju, sprečavanju i procesuiranju krivičnih djela i prekršaja iz oblasti indirektnih poreza sa smanjenim brojem izvršilaca. Naime, važećim Pravilnikom o unutrašnjoj organizaciji u UIO, predviđeno je da Sektor za provođenje propisa svoje aktivnosti realizuje sa 157 zaposlena radnika, a trenutno je u Sektoru raspoređen 141 radnik, odnosno kadrovska popunjenost je u visini od 89,81 % u odnosu na sistematizovanu.

2019. godina

Odsjek za reviziju i kontrolu je u 2019. godini realizovao 21,81 % više kontrola od planiranog broja, budući da je planirano 7.299 kontrola, a izvršeno 8.891 kontrola. Kada su u pitanju potpune kontrole planirano je 5.514 potpunih kontrola, a izvršene su 5.366 potpune kontrole, što znači da je postotak realizacije potpunih kontrola manji za 2,68 % od planiranog broja.

Vrijednost izrečenih novčanih kazni po prekršajnim nalozima iznosi 11.107.948 KM što je više za 38,31 % nego u 2018. godini kada je iznosila 8.031.037 KM. Naplaćeni iznos po prekršajnim nalozima u 2019. godini je 1.655.307,27 KM što je za 58,93 % više nego u 2018. godini, kada je iznosio 1.041.547,54 KM.

Odsjek za kontrolu velikih poreskih obveznika je u izvještajnom periodu izvršio 1.587 kontrola, što je za 7,23 % više od planiranog broja za izvještajni period za koji je planirano ukupno 1.480 kontrola svih tipova (srazmjerno uzevši u odnosu na godišnji plan) (Tabela 15). U ovom izvještajnom periodu realizovano je 9,07 % kontrola više u poređenju sa istim periodom 2018. godine. Kada je riječ o potpunim kontrolama, od planiranih 640 kontrola za izvještajni period, izvršeno je 656 potpunih kontrola ili 102,50 % od planiranog broja i za približno 2,02 % više u odnosu na isti period prošle godine, kada je izvršeno 643 potpunih kontrola. U ovom periodu izdato je 6.957 prekršajnih naloga.

5.2. Podaci o kontrolama i izdatim prekršajnim nalozima Poreske uprave Republike Srpske za period 2015-2018. godina

Poreska uprava Republike Srpske osnovana je krajem 2001. godine Zakonom o poreskoj upravi i nalazi se u sastavu Ministarstva finansija Republike Srpske. U ovom obliku poslovanja funkcioniše od 1. januara 2002. godine, a nastala je spajanjem Republičke uprave javnih prihoda i Finansijske policije Republike Srpske. Nadležnosti Poreske uprave Republike Srpske definisane su Zakonom o poreskom postupku Republike Srpske. Osnovne djelatnosti Poreske uprave Republike Srpske jesu kontrola primjene poreskih zakona, obračun i uplata poreza, kazni i kamata, otkrivanje i sprečavanje krivičnih djela, poreskih prekršaja i korupcije, u okviru svoje nadležnosti. Poreska uprava Republike Srpske je organizovana u Sjedište, područne centre, područne jedinice i privremene kancelarije

Osnovni zadatak Poreske uprave Republike Srpske jeste da dosljedno, nepristrasno i efikasno prikuplja javne prihode i tako služi Republici Srpskoj i njenim građanima. U ostvarivanju ovog svog zadatka, Poreska uprava Republike Srpske rukovodi se sljedećim principima u radu, i to: integritet, zakonitost, nepristrasnost i pouzdanost.

2015. godina

U izvještajnom periodu izvršene su 3.883 kontrole na nivou Poreske uprave Republike Srpske, od čega je 197 kontrola izvršeno kod velikih poreskih obveznika.

Inspektori Poreske uprave Republike Srpske su u izvršenim kontrolama, pored prijavljenih, a neplaćenih obaveza, dodatno utvrdili iznos od 69,69 miliona KM neprijavljenih obaveza. Za obaveze koje nisu plaćene inspektori su, nakon izvršenih kontrola, donijeli rješenja za plaćanje na ukupan iznos obaveza od 94,05 miliona KM (osnovni dug + kamata), dok je na navedena rješenja uloženo 130 žalbi, uključujući i žalbe na rješenja inspektora donesena u prethdnom periodu.

U dobrovoljnom periodu uplaćeno je 7,20 miliona KM ili 7,65 % od ukupnih obaveza naloženih rješenjem za plaćanje. Takođe, po osnovu kontrola završenih u prethodnom periodu, u izvještajnom periodu u dobrovoljnom roku naplaćeno je 418.570 KM.

U odnosu na prethodnu godinu izvršeno je 12 % kontrola manje, dok je plan kontrola za 2015. godinu realizovan sa 106 %. Kod 2.468 izvršenih kontrola, odnosno kod 64 % od ukupnog broja izvršenih kontrola utvrđene su nepravilnosti koje su počinjene od strane poreskih obveznika, dok je kod 2.346 poreskih obveznika u kontroli utvrđena nova obaveza.

Po završetku kontrola ovlašteni službenici Poreske uprave Republike Srpske izdali su 356 prekršajnih naloga na ukupan iznos od 779.069 KM zbog uočenih nepravilnosti u radu kontrolisanih poreskih obveznika. Podnesena su i 53 zahtjeva za pokretanje prekršajnog postupka.

Врста контроле	Број контрола			Проценат извршења плана	Индекс 15/14
	План 2015.	Извршене контроле 2015.	Извршене контроле 2014.		
Теренске контроле	1.770	1.752	1.692	99%	104
Канцеларијске контроле	1.899	2.131	2.702	112%	79
УКУПНО КОНТРОЛЕ	**3.669**	**3.883**	**4.394**	**106%**	**88**

U 2015. godini Poreska uprava Republike Srpske je izdala 2.121 prekršajni nalog koji se odnose na sve postupke u skladu sa Zakonom o poreskom postupku Republike Srpske i drugim zakonima kojima se regulišu prekršajne sankcije, a u domenu nadležnosti Poreske uprave Republike Srpske, na iznos kazne od 1,99 miliona KM. Od tog broja 1.077 naloga je prihvaćeno i po njima naplaćeno 373.739 KM.

Podneseno je 245 zahtjeva za pokretanje prekršajnog postupka. Takođe, doneseno je 369 mjera zabrane obavljanja djelatnosti. Najviše prekršajnih naloga 1.140 izdato je zbog kršenja odredaba propisa o fiskalizaciji, dok je zbog neprijavljivanja poreskih obaveza izdat 841 prekršajni nalog.

U odnosu na prethodnu godinu, izdato je 359 prekršajnih naloga manje, ali je po istim naplaćeno 127.828 KM više. Od ukupnog broja izdatih naloga za 801 prekršajni nalog na iznos kazne od 712.744 KM, do 31.12.2015. godine nije istekao dobrovoljni rok za plaćanje.

2016. godina

U ovom periodu izvršeno je 3.299 kontrola na nivou Poreske uprave Republike Srpske, od čega je 179 kontrola izvršeno kod velikih poreskih obveznika. Inspektori Poreske uprave Republike Srpske su u izvršenim kontrolama, pored prijavljenih, a neplaćenih obaveza, dodatno utvrdili iznos od 26,19 miliona KM neprijavljenih obaveza.

Za obaveze koje nisu plaćene inspektori su, nakon izvršenih kontrola, donijeli rješenja za plaćanje na ukupan iznos obaveza od 36,97 miliona KM (osnovni dug + kamata), dok je na navedena rješenja uloženo 105 žalbi, uključujući i žalbe na rješenja inspektora donesena u prethodnom periodu.

U dobrovoljnom periodu uplaćeno je 5,30 miliona KM ili 14 % od ukupnih obaveza naloženih rješenjem za plaćanje. Takođe, po osnovu kontrola završenih u prethodnom periodu, u izvještajnom periodu u dobrovoljnom roku naplaćeno je 2,61 milion KM.

U odnosu na prošlu godinu izvršeno je 15 % kontrola manje, dok je plan kontrola za 2016. godinu realizovan 95 %.

Kod 2.106 izvršenih kontrola, odnosno kod 64 % od ukupnog broja izvršenih kontrola utvrđene su nepravilnosti koje su počinjene od strane poreskih obveznika, dok je kod 1.998 poreskih obveznika u kontroli utvrđena nova obaveza.

Po završetku kontrola ovlašteni službenici Poreske uprave Republike Srpske izdali su 280 prekršajnih naloga na ukupan iznos od 690.293 KM zbog uočenih nepravil-

РБ	Врста контроле	Број контрола			Проценат извршења плана	Индекс 16/15
		План I-XII 2016.	Извршене контроле I-XII 2016.	Извршене контроле I-XII 2015.		
	Теренске контроле	1.476	1.438	1.752	97%	82
	Канцеларијске контроле	1.989	1.861	2.131	94%	87
	УКУПНО КОНТРОЛЕ	**3.465**	**3.299**	**3.883**	**95%**	**85**

nosti u radu kontrolisanih poreskih obveznika. Podnesena su i 42 zahtjeva za pokretanje prekršajnog postupka.

U 2016. godini Poreska uprava Republike Srpske je izdala 2.233 prekršajna naloga koji se odnose na sve postupke u skladu sa Zakonom o poreskom postupku Republike Srpske i drugim zakonima kojima se regulišu prekršajne sankcije, a u domenu nadležnosti Poreske uprave Republike Srpske, na iznos kazne od 2,01 milion KM. Od tog broja 984 naloga su prihvaćena i po njima je naplaćeno 546.459 KM. Podnesena su i 164 zahtjeva za pokretanje prekršajnog postupka. Takođe, izrečene su i 544 mjere zabrane obavljanja djelatnosti.

Najviše prekršajnih naloga, 1.749 izdato je zbog kršenja odredaba propisa o fiskalizaciji, dok je zbog neprijavljivanja poreskih obaveza izdato 368 prekršajnih naloga.

U odnosu na prethodnu godinu, izdato je 112 prekršajnih naloga više, ali je po istim naplaćeno 172.720 KM više.

Od ukupnog broja izdatih naloga za 949 prekršajni nalog na iznos kazne od 788.863 KM, do 31.12.2016. godine nije istekao dobrovoljni rok za plaćanje.

2017. godina

U 2017. godini izvršene su 3.922 kontrole (terenske i kancelarijske) na nivou Poreske uprave Republike Srpske, od čega su 183 kontrole izvršene kod velikih poreskih obveznika. U odnosu na isti period prethodne godine izvršeno je 19 % kontrola više, dok je plan kontrola za 2017. godinu realizovan 118 %. Planirani iznos obaveza naložen rješenjem realizovan je 84 %.

Врста контроле	Број контрола			Проценат извршења плана	Индекс 17/16
	План 2017.	Извршене контроле 2017.	Извршене контроле 2016.		
Теренске контроле	1.452	1.567	1.438	108%	109
Канцеларијске контроле	1.861	2.335	1.861	127%	127
УКУПНО КОНТРОЛЕ	**3.313**	**3.922**	**3.299**	**118%**	**119**

Kod 2.463 izvršene kontrole, odnosno kod 63 % od ukupnog broja izvršenih kontrola utvrđene su nepravilnosti koje su počinjene od strane poreskih obveznika, dok je kod 2.380 poreskih obveznika u kontroli utvrđena nova obaveza.

Inspektori Poreske uprave Republike Srpske su u izvršenim kontrolama kod 2.380 poreskih obveznika utvrdili novih obaveza u iznosu od 37,84 miliona KM.

U 2017. godini Poreska uprava Republike Srpske je izdala 2.379 prekršajnih naloga koji se odnose na sve postupke u skladu sa Zakonom o poreskom postupku Republike Srp-

ske i drugim zakonima kojima se regulišu prekršajne sankcije, a u domenu nadležnosti Poreske uprave Republike Srpske, na iznos kazne od 2,51 milion KM. Od tog broja 830 naloga je prihvaćeno i po njima je naplaćeno 430.948 KM. Podneseno je 156 zahtjeva za pokretanje prekršajnog postupka. Takođe, donesene su 584 mjere zabrane obavljanja djelatnosti.

Najviše prekršajnih naloga, 1.631, izdato je zbog kršenja odredaba propisa o fiskalizaciji, dok je zbog neprijavljivanja poreskih obaveza izdato 408 prekršajnih naloga. U odnosu na prethodnu godinu, izdato je 146 prekršajnih naloga više, a i iznos kazne po istim veći je za 449.746 KM.

2018. godina

U 2018. godini izvršeno je ukupno 3.916 kontrola, od čega je 3.454 redovnih terenskih i kancelarijskih kontrola, 351 kontrola stečaja i likvidacije, te 111 ponovljenih kontrola. Od ukupno izvršenih kontrola 175 kontrola je izvršeno kod velikih poreskih obveznika.

U odnosu na isti period prethodne godine izvršen je skoro isti broj kontrola, dok je plan kontrola za 2018. godinu realizovan 118 %.

Врста контроле	Број контрола			Проценат извршења плана	Индекс 18/17
	План 2018.	Извршене контроле 2018.	Извршене контроле 2017.		
Теренске контроле	1.437	1.676	1.567	117%	107
Канцеларијске контроле	1.891	2.240	2.355	118%	95
УКУПНО КОНТРОЛЕ	**3.328**	**3.916**	**3.922**	**118%**	**100**

Kod 2.609 izvršenih kontrola, odnosno kod 67 % od ukupnog broja izvršenih kontrola utvrđene su nepravilnosti koje su počinjene od strane poreskih obveznika, dok je kod 2.536 poreskih obveznika u kontroli utvrđena nova obaveza. Inspektori Poreske uprave Republike Srpske su u izvršenim kontrolama kod 2.536 poreskih obveznika utvrdili novih obaveza sa kamatom u iznosu od 40,89 miliona KM.

U 2018. godini Poreska uprava Republike Srpske je izdala 2.714 prekršajnih naloga koji se odnose na sve postupke u skladu sa Zakonom o poreskom postupku Republike Srpske i drugim zakonima kojima se regulišu prekršajne sankcije, a u domenu nadležnosti Poreske uprave Republike Srpske, na iznos kazne od 2,53 miliona KM.

Od tog broja 981 nalog je prihvaćen i po njima je naplaćeno 437.916 KM. Podnesena su 62 zahtjeva za pokretanje prekršajnog postupka. Takođe, doneseno je i 519 mjera zabrane obavljanja djelatnosti. Najvećoi broj prekršajnih naloga, odnosno 1.550, izdato je zbog kršenja odredaba propisa o fiskalizaciji, dok je zbog neprijavljivanja poreskih obaveza izdato ukupno 927 prekršajnih naloga.

U odnosu na prethodnu godinu, izdata su 335 prekršajna naloga više, a i iznos kazne po istim veći je za 19.422 KM. Od ukupnog broja izdatih naloga za 1.356 prekršajnih naloga na iznos kazne od 1,31 milion KM, do 31.12.2018. godine nije istekao dobrovoljni rok za plaćanje.

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Tax Ofences in Bosnia and Herzegovina

Summary: There are two categories of tax offenses in the so-called tax legislation in Bosnia and Herzegovina, and these are criminal offenses and misdemeanors. Unlike tax crimes prescribed exclusively in criminal law (Bosnia and Herzegovina, Republika Srpska, the Federation of Bosnia and Herzegovina and the Brcko District of Bosnia and Herzegovina), tax offenses are prescribed by dozens of laws and bylaws in force at all levels of government. : at the level of Bosnia and Herzegovina, then the entities - Republika Srpska and the Federation of Bosnia and Herzegovina, cantons, Brcko District and finally cities and municipalities. The taxation system in Bosnia and Herzegovina is conceived and constituted in accordance with its constitutional system and it can be characterized as a hybrid system, but also a very complex system with a complex fiscal structure and divided responsibilities for taxation with direct taxes under the jurisdiction of the entity tax administrations. that is, the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina. The competent institutions at the entity level are the Ministries of Finance (Ministry of Finance of the Federation of Bosnia and Herzegovina and the Ministry of Finance of the Republika Srpska), ie the Finance Directorate of the Brčko District of Bosnia and Herzegovina. On the other hand, indirect taxes are the responsibility of the Indirect Taxation Authority of Bosnia and Herzegovina, while at the level of Bosnia and Herzegovina, the Ministry of Finance has been established within the Council of Ministers of Bosnia and Herzegovina.

Key words: taxes, tax offenses, criminal offenses, misdemeanors, Criminal Code of Republika Srpska.

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Pojedina rješenja u zakonu o izmjenama i dopunama zakona o krivičnom postupku Republike Srpske

Apstrakt: Autor se u radu bavi novim položajem oštećenog u krivičnom postupku, lica koja mogu odbiti svjedočenja i izuzecima od neposrednog izvođenja dokaza zbog nedostupnosti svjedoka po izmjenama i dopunama Zakona o krivičnom postupku Republike Srpske iz 2021. godine. Polazeći od dosadašnjeg uređenja ove materije, ukazujući na rješenja u uporednom zakonodavstvu, analizom ovih izmjena ukazauje na posljedice ovakvog nedosljednog i kod pojedinih instituta nepotrebnog i pogrešnog normiranja te osjetljive materije. Skreće se pažnja na suprotnost rješenja o privilegovanom svjedoku maloljetničkom zakonodavstvu, koje je usklađeno sa konvencijama koje štite njihov položaj, i Evropskoj konvenciji za zaštitu ljudskih prava i osnovnih sloboda. U tom smislu zakonodavcu se kritički ukazuje na nedostatke pojedinih rješenja i sugerišu odgovarajuće promjene i dopune radi otklanjanja problema do kojih može doći prilikom njihove praktične primjene.

Ključne riječi: oštećeni, svedok, maloljetnik, odbijanje, nedostupan.

Veljko Ikanović
Sudija Vrhovnog suda Republike Srpske i vanredni profesor Fakulteta pravnih nauka, Panevropskog univerziteta Apeiron Banja Luka, veljko.ikanovic@pravosudje.ba

1. UVOD

Krivično procesno pravo definiše se kao sistem zakonskih propisa koji određuju krivičnoprocesne subjekte, sadržinu, način i formu preduzimanja procesnih radnji i krivičnoprocesne odnose koji nastaju tim povodom u cilju rasvjetljenja i razrješenja krivične stvari u cilju zaštite najznačajnijih društvenih dobara i vrijednosti od povrede i ugrožavanja vršenjem krivičnih djela fizičkih i pravnih lica.[1] Zadatak nauke krivičnog procesnog prava jeste postavljanje osnova i određivanje pravca zakonodavnog uređenja arhitektonike krivičnog postupka, instituta, subjekata, procesnih odnosa i pravnih lijekova, koje zakonodavac slijedi pri izradi procesnog zakona ali i drugih zakona od kojih zavisi njegova primjena. Kakav će krivični postupak biti prihvaćen zavisi od pravne tradicije, ekonomskih uslova, opštih društvenih prilika jedne države i, u novije vrijeme, međunarodnog uticaja na zakonodavca. Svaki krivični postupak

[1] Jovašević, D., Ikanović, V. (2016). *Krivično procesno pravo Republike Srpske*. Banja Luka,15.

oslikava sistem represivnih mjera formalne društvene reakcije u borbi protiv kriminaliteta, seizmograf je demokratičnosti i opštih društvenih prilika, „trenutak istine" pravnog i političkog sistema u nekom društvu.[2] Krivičnom procesnom pravu nisu svojstvene česte promjene jer je ono veoma konzervativna grana prava i njegovim promjenama pristupa se veoma oprezno, bez radikalnih rješenja, sa ciljem da se sačuva tradicionalni tip postupka koji je na snazi u određenoj zemlji.[3] To potvrđuju i sve reforme koje su provedene početkom ovog vijeka u kontinentalnim zemljama evrope, izuzimajući Italiju koja je potpuno reformisala svoj krivični postupak tako što je mješoviti krivični postupak zamijenila čisto optužnim modelom.[4] Sve ostale zemlje izvršile su samo djelimične reforme, uglavnom preuređenjem prethodnog krivičnog postupka i osavremenjavanjem pojedinih procesnih ustanova ne remeteći ustaljenu arhitektoniku krivičnog postupka.

Suprotno ovim tendencijama bivše jugoslovenske države, uključujući i Bosnu i Hercegovinu (BiH) sa Republikom Srpskom (RS), Federacijom BiH (FBiH) i Brčko distriktom BiH (BDBiH), su pod snažnim spoljnim uticajem i uz učešće stranih pravnih eksperata svoj mješoviti postupak zamijenile optužnim tipom (mada i sada pojedini autori ukazuju na njegov mješoviti karakter pozivajući se na određene institute koji se sporadično kombinovano primjenjuju u određenim fazama, što ne odgovara suštini postupka).[5]

Reformom krivičnog procesnog zakonodavstva 2003. godine i njegovim daljnjim izmjenama BiH (misli se na sve zakonodavne nivoe) je potpuno i veoma radikalno napustila svoju dotadašnju pravnu tradiciju uvodeći novine koje su u tom obliku do tada bile potpuno nepoznate našem zakonodavstvu. Ovdje su najznačajnije dvije novine koje u potpunosti mijenjaju suštinu i karakter krivičnog postupka, a to su: a) promjena prirode istrage i b) adverzijalno (adversarno) uređenje glavnog pretresa.[6] S obzirom da se reforma krivičnog zakonodavstva odvijala pod budnim okom i uz pomoć američkih pravnih stručnjaka (i njihovu finansijsku pomoć), postavljen je zahtjev da se sudska istraga zamijeni tužilačkom sa ciljem da se prethodni postupak učini bržim i efikasnijim. Zašto je nametnut i adversijalni model krivičnog postupka ostalo je nejasno jer se u krivičnoprocesnoj literaturi, izvan kruga domaćih stručnjaka koji su učestvovali u izradi reformisanih zakona, ne mogu naći zastupnici optužnog tipa krivičnog postupka. Skloni smo vjerovati da je to urađeno po uzoru na Statut Međunarodnog krivičnog suda za bivšu Jugoslaviju (ICTY), čije su mnoge odredbe očigledno inspirisale tvorce zakona, ali i lakšem poimanju tih odredbi od stranih sudija koji su jedno vrijeme učestvovali u suđenju u Sudu BiH. Upravo ta kompilacija prirodno nespojivih dijelova postupka, tužilačke istrage sa dominacijom inkvizitorskog načela i glavnog pretresa koji za osnovu ima optužno načelo, zahtijevala je da se izvrše koncepcijske promjene drugih faza krivičnog postupka i klasičnih procesnih ustanova i načela. Ovo nije učinjeno jer je to očigledno bio nerješiv zadatak za tvorce zakona, a što se odrazilo na nejasnoće, teškoće i proizvoljnosti u primjeni samog zakona ili pojedinih njegovih instituta, sa dalekosežnim posljedicama u praktičnoj primjeni. Zbog toga se naučna, stručna, pa i opšta, javnost u Bosni i Hercegovini u posljednjih osamnaest godina

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[2] Đurđić, V. (2015). Perspektiva novog modela krivičnog postupka Srbije. *Nauka, bezbednost, policija*, 20 (2), 71-95.

[3] Đurđić, V. (2014). *Krivično procesno pravo – Opšti deo*. Niš.

[4] *Ibid.*

[5] Ikanović, V. (2019). O nekim učincima osnovane sumnje i izuzecima od neposrednog izvođenja dokaza. *Pravo i pravda - Časopis za pravnu teoriju i praksu*, 18 (1), 73-91.

[6] Više o tome u: Sijerčić Čolić, H. (2012). *Krivično procesno pravo*, *Knjiga 1.* Sarajevo.

iscrpljuje raspravama o pojedinim institutima krivičnog procesnog prava, skoro potpuno zanemarujući materijalno krivično pravo koje predstavlja suštinu krivičnopravne nauke. Uostalom, zakon o krivičnom postupku, koji je u svakoj državi inače jedan od ključnih zakonskih akata, donesen je za par mjeseci, u odsustvu javne rasprave, koja bi zakonopisce uputila na najbolja rješenja. Poređenja radi Talijani su svoj zakonik o krivičnom postupku iz 1989. godine radili punih 13 godina, a Portugalci 15 godina.[7]

Posljedice koje su takva rješenja proizvela ogledaju se u brojnim izmjenama i dopunama procesnog zakonodavstva koje je dugo vršeno usaglašeno, a kasnije su se pojavila i različita rješenja. Republika Srpske je osnovni tekst zakona iz 2003. godine mijenjala jedanaest puta, da bi zbog nomotehničkih nemogućnosti daljnjih izmjena 11.06.2012. godine donijela „novi" Zakon o krivičnom postupku Republike Srpske[8] (raniji nije sadržavao ni odrednicu „Republike Srpske" tako da nije bilo jasnog razlikovanja od ostalih identičnih zakona u BiH). Ovaj zakon sadrži osnovni tekst zakona iz 2003. godine sa svim dotadašnjim izmjenama i dopunama ali nije se upuštao u bilo kakve izmjene postojećih rješenja. Zakon nije riješio osnovne probleme koji su se javljali u praksi ali ni zahtjeve proizašle iz Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda (EKLJP), odgovarajućih pravnih akata Evropske unije, presuda Suda za ljudska prava i odluka Ustavnog suda BiH. Ovdje prije svega mislimo na položaj oštećenog u krivičnom postupku, posebno u fazi istrage i odustanka tužioca od gonjenja (nesprovođenje istrage, obustava istrage, odustanak od optužnice), kome su skoro sva prava uskraćena. Ovo nije riješeno ni izmjenama i dopunama tog zakona iz 2017. i 2018. godine[9] jer se zakonodavac time nije ni bavio.

Posljednje značajnije izmjene izvršene su donošenjem Zakona o izmjenama i dopunama Zakona o krivičnom postupku Republike Srpske 23.02.2021. godine[10] kojima je uvedeno više novih rješenja koja poboljšavaju sam zakon i čine ga efikasnijim. Tu, prije svega, mislimo na postupak izuzeća koji je sada u pretežnom dijelu povjeren predsjedniku suda, čime se izbjegava nepotrebno obustavljanje rada sazivanjem svih sudija na sjednicu, ubrzava donošenje odluke i nastavak pretresa i vraća značaj opštoj sjednici Vrhovnog suda Republike Srpske. Zatim tu je i drugačije postavljanje branioca po službenoj dužnosti kojima se uvodi veća kontrola i izbjegavaju moguće zloupotrebe u ovom postupku. Ova su rješenja, kao provjerena i dokazana u praksi, već postojala u ranijem zakonodavstvu prije zakonodavne reforme. Položaj oštećenog je djelimično poboljšan ali zakonodavac nije u tome bio dosljedan jer nije izvršio radikalnije izmjene bez kojih taj položaj neće biti doveden na nivo koji se očekuje. Osim ovih izmijena učinjene su i intervencije u dijelu koji se odnosi na pravo lica da odbije svjedočenje i izuzetku od neposrednog izvođenja dokaza. Razlozi za ove izmjene nisu dati, niti se o njihovoj potrebi govorilo prilikom pristupanja radu na izmjenama samog zakona. Autor ovog rada je bio član radne grupe za izradu izmijena i dopuna zakona i tim izmjenama se usprotivio kao nepotrebnim i naučno neosnovanim ali je ostao u manjini i one su unesene u tekst zakona i kao takve usvojene. Zato smatramo da je potrebno da u ovom radu razmotrimo, pored određenih prava oštećenog, najvažnije karakteristike novih instituta prava da se odbije svjedočenje i izuzetaka od neposrednog izvođenja dokaza kod postojećeg modela krivičnog postupka i njihovim

[7] Škulić, M. (29. april 2021). Novo krivično zakonodavstvo "Nevinost i osnovana sumnja". Vreme. Preuzeto 29.4.2021. sa https://vreme.com/cms/view.php.

[8] *Službeni glasnik Republike Srpske*, br. 51/12.

[9] *Službeni glasnik Republike Srpske*, br. 91/17 i 66/18.

[10] *Službeni glasnik Republike Srpske*, br. 15/21.

učincima koji ostvaruju na krivični postupak sa stanovišta koncepcijske valjanosti i usaglašenosti sa drugim zakonskim odredbama i institutima ali i ustavnim odredbama i međunarodnim standardima. Ukazaćemo i na neke odluke sudova, koje ćemo podvrći analizi i ocjeni sa stanovišta zasnovanosti na postojećim zakonskim normama i ustaljenoj sudskoj praksi.

2. OŠTEĆENI KAO TUŽILAC

Oštećeni je lice kome je kakvo lično ili imovinsko pravo krivičnim djelom povrijeđeno ili ugroženo. Koja su to lična ili imovinska prava povrijeđena ili ugrožena potrebno je utvrditi u svakom konkretnom slučaju i na osnovu toga odrediti oštećenog. U svojstvu oštećenog može se pojaviti fizičko i pravno lice. Oštećeni ima određena značajna procesna prava, koja se razlikuju u pojedinim pravnim sistemima. U pravnim sistemima koji poznaju institut privatnog tužioca i oštećenog kao tužioca oštećeni može, u svojstvu stranke u postupku, da vrši funkciju krivičnog gonjenja učinioca krivičnog djela. Ako se radi o krivičnom djelu za koje se gonjenje preduzima po službenoj dužnosti pa javni tužilac ne preduzima gonjenje ili od njega odustane, oštećeni može umjesto njega započeti ili nastaviti krivično gonjenje. Oštećeni tada ima ulogu supsidijarnog tužioca i svojstvo procesne stranke. Uz ovo, oštećeni može biti stranka u jednom dijelu krivičnog postupka, u adhezionom postupku, ako sud odlučuje o njegovu imovinskopravnom zahtjevu.[11]

Evropska konvencija za zaštitu ljudskih prava i osnovnih sloboda (dalje: EKLJP), kao jedan od najznačajnijih dokumenata Savjeta Evrope, ne uređuje izričito položaj žrtve i oštećenog u krivičnom postupku. Ovo važi i za niz drugih međunarodnih dokumenata koji se bave isključivo položajem optuženog, tako da proizilazi da je on jedino lice uključeno u krivični postupak koje uživa zaštitu međumarodnog prava. Konvencija sadrži mnoga garantna prava optuženog u krivičnom postupku, ali ne i žrtve. Shodno tome, Komisija i Sud dugo su vremena odbijali sve tužbe žrtve krivičnog djela kao nedopuštene uz obrazloženje da žrtva nema pravo podignuti tužbu budući da njezina prava nisu povrijeđena.[12] Navedeno stanovište više puta je potvrđeno i u praksi ESLJP (Npr. u presudi Perez v. France, § 70, navodi se da Konvencija "ne daje nikakvo pravo na privatnu osvetu". Slična stanovišta Sud je izrazio i u: Helmers v. Sweden, § 27; Tolstoy Miloslavsky v. United Kingdom, § 58; Windsor v. United Kingdom i dr.)[13].

Postoji i više preporuka Savjeta ministara Savjeta Evrope koje uređuju položaj žrtve u krivičnom postupku odnosno koje se odnose na zaštitu svjedoka, kao što su: R(85)11, R(87)4, R(87)18, R(87)21 i R(06)8. Tim preporukama uređuje se opšti način postupanja prema žrtvi (razumijevanje, zaštita, obaviještavanje o pravima i okončanju istrage, poseban način ispitivanja), ističe se pravo žrtve na izjašnjavanje o primjeni načela oportuniteta te na pobijanje odluke o obustavljanju krivičnog gonjenja.[14] Statut i Pravila o postupku i dokazima Međunarodnog krivičnog suda poklanjaju veliku pažnju pravima žrtve u postupku i sadrže čitav niz novih materijalnopravnih i procesnih rješenja. Prvi put u istoriji

[11] Više o tome u: Škulić, M. (2009). *Krivično procesno pravo*. Beograd: Pravni fakultet Univerziteta u Beogradu.

[12] Trechsel, S. (2006). *Human Rights in Criminal proceedings*. Oxford University Press, 36-37.

[13] Tomašević, G., Pajčić, M. (2008). Subjekti u kaznenom postupku: pravni položaj žrtve i oštećenika u novom hrvatskom kaznenom postupku. *Hrvatski ljetopis za kazneno pravo i praksu*, 15 (2), 827.

[14] *Ibid*., 829.

međunarodnog krivičnog sudstva žrtve nisu samo svjedoci, već imaju niz prava aktivnog učešća u krivičnom postupku u određenom obimu, po pravilu putem svoga pravnog predstavnika.[15]

U našem sistemu krivičnog procesnog prava oštećeni nije stranka nego učesnik u postupku, sporedni krivičnoprocesni subjekt. Kao sporedni krivičnoprocesni subjekt u postupku on ima određena zakonom propisana prava i dužnosti. Zakonom o izmjenama i dopunama Zakona o krivičnom postupku Republike Srpske proširena su značajno prava oštećenog i data mu nova prava koja do sada nije imao. Nove odredbe su sačinjene u duhu međunarodnih dokumenata čijim se instrumentima poboljšava položaj oštećenog u krivičnom postupku.[16] Većina od njih je bila na snazi i prilikom reformisanja krivičnog procesnog zakonodavstva ali se o njima očigledno nije vodilo računa, na šta smo ukazali u uvodnom dijelu ovog rada. Ove izmjene nisu dovoljne i u narednom periodu će biti neophodno proširiti ta ovlašćenja u fazi istrage, u smislu davanja prava na preuzimanje gonjenja kada tužilac donese naredbu o nesprovođenju ili obustavljanju istrage, a što sada nije slučaj. Oštećeni sada ima pravo (član 46a.) da, pored podnošenje prijedloga u vezi imovinskopravnog zahtjeva, aktivnije učestvuje u dokazivanju tako što će ukazivati na činjenice i predlagati dokaze, da sam ili uz pomoć punomoćnika advokata, razmatra spise i razgleda dokaze i slično.

On ima pravo da u krivičnom postupku postavi imovinskopravni zahtjev i zahtijeva da mu se naknade troškovi krivičnog postupka. Ovaj zahtjev može postaviti u fazi prethodnog postupka i na glavnom pretresu, a tužilac je u obavezi da prikuplja dokaze koji se tiču tog zahtjeva. O tom pravu sud je dužan da pouči oštećenog koji se poziva na glavni pretres, na kome mu se pruža mogućnost da postavi imovinskopravni zahtjev i zahtjev za troškove krivičnog postupka. Takođe, sud je dužan da oštećenom dostavi presudu na koju on može izjaviti žalbu a samo zbog odluke o troškovima krivičnog postupka i imovinskopravnom zahtjevu (član 307. tačka 4) ZKP RS). Sve to govori da su prava oštećenog u našem procesnom zakonodavstvu veoma ograničena.[17]

O odštenom zahtjevu sud odlučuje u tzv. pridruženom (lat. adhezionom) postupku, zajedno sa glavnom krivičnom stvari. Ovaj postupak se zove adhezioni zato što se sporedna građanska stvar pridružuje ili adherira glavnoj krivičnoj stvari iz razloga ekonomičnosti. U krivičnom spisu postoje dokazi koji mogu poslužiti za odlučivanje o odštetnom zahtjevu koji je građanska stvar, i na taj način izbjeći nepotrebno vođenje novog parničnog postupka sa troškovima i gubitkom vremena. Sud postupak vodi po pravilima krivičnog

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[15] *Ibid*., 831.

[16] Recommendation No. R (85) 11 on the Position of the Victim in the Framework on Criminal Law and Procedure, Strasburg 1995; Recommendation No. R (87) 21 on Assistance to victims and the preventionof Victimisation, Committee of Ministers, 17 september 1987; Research on Victimisation, Europeah Committee on Crime Problems, Strasbourg, 1985. Direktiva 2019/29/EU Europskog parlamenta i Savjeta o uspostavljanju minimalnih standarda za prava, podršku i zaštitu žrtava krivičnih djela, *Službeni glasnik EU*, L. 315, 14. novembra 2012; dokumenti doneseni od strane Ujedinjenih nacija – Declaration of basic principles of justice for victims of crime and abuse of power, General assambly Resolution 40/34; Commission on crime Prevention and Criminal Justice. Report on the sixth and Social Council, supplement No. 10, United Nations, New York, 1997.

[17] Više o komparativnim rješenjima vezano za imovinskopravni zahtjev vidi u: B. Pavišić (ed.). (2004). *Transition of Criminal Procedure Systems*. Rijeka. 2..

procesnog zakona, a zahtjev raspravlja primjenjujući propise građanskog prava. Sud može odštetni zahtjev dosuditi u potpunosti ili djelimično, a može oštećenog sa cijelim ili dijelom odštetnog zahtjeva uputiti na parnicu. Pošto je primarni zadatak krivičnog postupka presuđenje krivične stvari u što kraćem vremenu i sa što manje troškova, sud će oštećenog uputiti na parnicu ako nema podataka potrebnih za odlučivanje ili ako bi utvrđivanje vodilo nepotrebnom i neopravdanom odugovlačenju krivičnog postupka. Postavljanjem zahtjeva i upućivanjem na parnicu ne zasniva se pravo oštećenog, ono nema konstitutivni već samo deklarativni karakter, jer se pravo zasniva na materiji građanskog zakonodavstva. Ako oštećeni ne postavi odštetni zahtjev u toku krivičnog postupka on ga može ostvarivati u parničnom postupku.

U vezi odlučivanja o imovinskopravnom zahtjevu zanimljivo rješenje usvaja Zakon o krivičnom postupku Sjeverne Makedonije propisujući da je prilikom donošenja osuđujuće presude sud dužan da odluči u potpunosti ili djelimično o imovinskopravnom zahtjevu. Ovim se prevazilazi ranije nepovoljno stanje po oštećenog koji je u svakom slučaju bio upućivan na parnicu bez obzira da li su dokazi u vezi imovinskopravnog zahtjeva s kojima sud raspolaže dovoljni za odlučivanje.[18]

Međutim oštećeni je najčešće žrtva krivičnog djela koja ima neposredna saznanja o djelu i učiniocu tako da je nezaobilazni svjedok ali i lice koje podnosi prijavu nadležnom organu. U tom smislu oštećeni može biti saslušan kao svjedok (što najčešće i jeste) koji organima krivičnog postupka daje najvažnije podatke o djelu i učiniocu. On u tom svojstvu ima sva prava i obaveze koje ima svjedok u krivičnom postupku.

Zakonom je sada drugačije uređeno podnošenje pritužbe glavnom okružnom tužiocu ako tužilac donese naredbu o nesprovođenju istrage, obustavi istragu ili odustane od gonjenja do potvrđivanja optužnice (član 46b.), o čemu je tužilac dužan da oštećenog obavijesti u roku od osam dana sa poukom o pravu na pritužbu. Ovdje je značajno da se uvodi pravo prigovora protiv rješenja glavnog okružnog tužioca republičkom tužiocu, uz određivanje rokova za donošenje odluke. Smatramo da s obzirom na monokratsko uređenje tužilaštva nije bilo mjesta da se na odluku podnosi prigovor glavnom okružnom tužiocu, jer po tome on u suštini odlučuje o prigovoru protiv svoje odluke što je nepotrebno odugovlačenje postupka. Zato se zalažemo da se prigovor podnosi glavnom republičkom tužiocu, a putem okružnog tužioca.

Preuzimanje krivičnog gonjenja od strane oštećenog sada je omogućeno samo ako tužilac odustane od gonjenja nakon potvrđivanja optužnice (član 46v.). Ovo jeste napredak u odnosu na dosadašnje stanje ali smatramo da to nije dovoljno bez mogućnosti preuzimanja gonjenja i u toku istrage. Suština problema jeste u nekontrolisanoj istrazi i odlukama tužioca koje nisu podložne sudskoj kontroli koja se davanjem prava oštećenom vraća u naš krivični postupak. Oštećenom kao tužiocu se daje niz prava za ostvarivanje njegove uloge kroz zastupanje optužbe lično ili putem punomoćnika iz reda advokata. Svojstvo tužioca mu prestaje odustankom od optužbe preuzimanjem gonjenja od strane tužioca i smrću ili prestankom pravnog lica.

Kao jedan od mogućih načina rješavanja ovog pitanja ukazujemo na hrvatski Zakon o kaznenom postupku koji je dao šira ovlašćenja oštećenom u pogledu preuzimanja krivičnog gonjenja, koja su usklađena sa odgovarajućim evropskim dokumentima i tenden-

[18] Lažetić – Bužarovski, G., Novine u korist oštećenog u zakonodavstvu Republike Makedonije, Žrtve i pravni sistem. Preuzeto 5.7.2021, sa http://www.doiserbia.nb.rs/img/doi/1450-6637/2005/1450-66370502003L.pdf.

cijama u ovoj oblasti. Tako oštećeni kao tužilac (član 55) može sam preduzeti krivično gonjenje ako državni tužilac utvrdi da nema osnova za krivično gonjenje ili ako odustane od gonjenja, o čemu oštećenog mora biti obaviješten u roku od osam dana. Oštećeni je dužan preuzeti gonjenje u roku od osam dana.

3. LICA KOJA MOGU ODBITI SVEDOČENJE

Svjedok je svako fizičko lice koje nije osumnjičeni ili optuženi, kome je nešto poznato o činjenicama koje se utvrđuju u krivičnom postupku i koje organ koji vodi postupak poziva da dâ svoj iskaz o ovim činjenicama. Saslušanje svjedoka[19] je posebna vrsta ličnog dokaznog sredstva u krivičnom postupku i da bi se jedno fizičko lice uopšte moglo pojaviti kao svjedok mora postojati vjerovatnoća da ono može pružiti određena obavještenja o krivičnom djelu, učiniocu i drugim važnim okolnostima djela. Osim toga to lice mora biti pozvano od organa koji vodi krivični postupak kako bi se saslušalo u svojstvu svjedoka. Starost, fizičke i psihičke karakteristike su bez uticaja na mogućnost da se neko lice pojavi kao svjedok jer se kao svjedok može pojaviti bilo koje lice, uključujući i oštećenog koji ima određena saznanja o krivičnoj stvari i ako svojim iskaznom može doprinijeti potpunijem i pravilnijem rasvjetljenju i razrješenju krivične stvari. Svjedok je najčešće ali i najnesigurnije dokazno sredstvo, ako se imaju u vidu njegove psihofizičke sposobnosti i mogućnosti, emotivne i subjektivne opredijeljenosti.

Zavisno od toga kako je neko lice saznalo okolnosti o kojima je pozvano da svjedoči razlikuju se pravi svjedoci ili svjedoci očevici i svjedoci po čuvenju. Svjedoci očevici iz vlastitog, neposrednog čulnog opažanja znaju nešto o činjenicama i okolnostima koje se utvrđuju u krivičnom postupku. Svjedoci po čuvenju o spornim činjenicama znaju ne iz neposrednog ličnog opažanja, već posredno, na taj način da je neko drugo lice pričalo o tim činjenicama.

Radi zaštite opštih interesa i zbog nespojivosti više funkcija u jednoj ličnosti u krivičnom postupku određena lica ne mogu se uopšte saslušati kao svjedoci. Ova lica su u potpunosti isključena kao svjedoci u krivičnoj stvari. Pored toga, zakon navodi da su određena lica oslobođena dužnosti da svjedoče zbog posebnog ličnog odnosa sa osumnjičenim (optuženim) licem. Upravo ova lica su predmet našeg interesovanja.

Predmet svjedočenja su činjenice o krivičnom djelu, učiniocu i drugim važnim okolnostima krivičnog slučaja. Te činjenice su u prvom redu rezultat čulnog neposrednog opažanja svjedoka i pripadaju prošlosti, ali ne sadašnjosti. Položaj svjedoka u krivičnom postupku određuju njegova prava i dužnosti. Pored dužnosti koje svjedoci imaju kao i svi drugi krivičnoprocesni subjekti, za njihov položaj su posebno značajne dužnosti vezane za specifičnu prirodu i karakter ovog dokaznog sredstva. U krivičnoprocesnoj teoriji se smatra da su dužnosti svjedoka sljedeće:

1. dužnost odazivanja pozivu,
2. dužnost svjedočenja i
3. dužnost istinitog davanja iskaza.

Iako zakon predviđa dužnost svjedočenja za sva lica koja imaju neposredna ili posredna saznanja o činjenicama od značaja za razrješenje krivične stvari i rješenje drugih sporednih krivičnoprocesnih pitanja, ipak je isključio ili ograničio mogućnost određenih

[19] Dajčić, A., Bubalović, T. (2012). Novi model ispitivanja svjedoka na raspravi, *Anali Pravnog fakulteta u Zenici*, 10, 223-248.

lica da se pojave u ulozi svjedoka. Pored navedenih lica, zakon u članu 148 određuje i lica koja mogu da odbiju da svjedoče, a da pri tome ne snose zakonom propisane sankcije. Ovdje su utvrđeni srodnički i drugi odnosi koji svjedoku daju ovlašćenje da uskrati svjedočenje u konkretnoj krivičnoj stvari. Bez obzira što je dužnost svjedočenja opšta zakonom je učinjen neophodan izuzetak u odnosu na određene kategorije svjedoka kojima je ostavljena mogućnost da se sami opredijele da li žele da svjedoče ili da svjedočenje odbiju. Zakonom se uvažavaju određeni porodični odnosi i odnosi srodstva zbog kojih zakonodavac prepušta tim kategorijama svjedoka da se opredijele da li će koristiti pravo da odbiju svjedočenje. Ovakvo zakonodavno rješenje polazi od humanističkog stava da se ne narušavaju, ugrožavaju ili remete porodični ili srodnički odnosi obavezivanjem srodnika da svjedoče na štetu određenog srodnika, pošto je dužnost svjedoka da govori istinu pa i ako je ona na štetu optuženog. S druge strane, obavezivanjem srodnika na svjedočenje, takav svjedok bi bio doveden u tešku dilemu da li da svjedoči i tereti srodnika (koji može biti i vrlo blizak) ili pak da da lažan iskaz u korist srodnika (čime bi opet izvršio krivično djelo lažnog svjedočenja).[20]

Najzad, uvijek je vrlo diskutabilna vrijednost srodničkog iskaza zbog moguće (svjesne ili čak nesvjesne) pristrasnosti. Zbog toga je zakonodavac sve te dileme razriješio time što je određene kategorije svjedoka ovlastio da bez ikakvih posljedica po njih ili njihovog srodnika odbiju svjedočenje. No u postupku prema maloljetnicima niko nije oslobođen od dužnosti svjedočenja o određenim okolnostima.

Prema tekstu zakona prije izmijena svjedočenje su mogla da odbiju sljedeća lica:

a) bračni i vanbračni drug osumnjičenog, odnosno optuženog i

b) srodnici osumnjičenog, odnosno optuženog po krvi u pravoj liniji, srodnici u pobočnoj liniji do trećeg stepena zaključno, kao i srodnici po tazbini do drugog stepena zaključno,

c) usvojilac ili usvojenik osumnjičenog odnosno optuženog.

Posljednjom novelom zakona učinjene su izmjene u članu 148 stav 1 tačka b) tako što su iza posljednje zapete dodate riječi „osim djeteta koje je neposredno oštećeno krivičnim djelom“ (član 18).

Organ koji vodi postupak dužan je da ova lica prije njihovog saslušanja ili čim se sazna za njihov odnos prema osumnjičenom, odnosno optuženom upozori da oni ne moraju svjedočiti. Ovo upozorenje nadležnog organa, kao i odgovor lica se obavezno unose u zapisnik. Lice koje može odbiti svjedočenje prema jednom od osumnjičenih, odnosno optuženih, može takođe da odbije da svjedoči i prema ostalim osumnjičenim, odnosno optuženim, ako se njegov iskaz prema prirodi stvari ne može ograničiti sam na ostale osumnjičene, odnosno optužene. Ako je pak kao svjedok saslušano lice koje može odbiti svjedočenje, a nije na to upozoreno ili se nije izričito odreklo tog prava ili to upozorenje i odricanje nije uneseno u zapisnik, na takvom iskazu se ne može zasnivati sudska odluka[21].

Rekli smo da je posljednjom novelom zakona pravo da skrati svjedočenje oduzeto djetetu koje je neposredno oštećeno krivičnim djelom. Prema članu 2 stav 1 Zakona o zaštiti i postupanju sa djecom i maloljetnicima u krivičnom postupku[22] dijete je svako lice koje nije navršilo 18 godina života. Ovo rješenje je potpuno u suprotnosti sa svim razlozi-

[20] Petrić, B. (1982). *Komentar Zakona o krivičnom postupku*. Šid, 569.

[21] Jukić, P. (1981). Pravno nevaljali dokazi prema odredbama Zakona o krivičnom postupku. *Pravna misao*, 5 – 6/, 107-117.

[22] *Službeni glasnik RS*, br. 13/10 i 12/13.

ma na kojima se zasniva pravo odbijanja svjedočenja. Osim toga ono djeci, kao jednoj od najosjetljivijih kategorija, uskraćuje pravo koje daje drugim licima povezanim srodstvom i drugim odnosima sa optuženim. Pomenuti zakon je zbog toga posebnu pažnju posvetio saslušanju djeteta ili mlađeg maloljetnika kao svjedoka. Šta je motivisalo zakonodavca i koji je cilj ovakvog rješenja ostaje potpuno nejasno. Sigurno je samo to da se najosjetljivija kategorija izlaže traumatičnom pritisku da razriješi moralnu dilemu da li da svjedoči ili ne svjedoči protiv bliskih srodnika. Posljedice će sigurno biti psihičke jer se radi o velikom pritisku na dječiju psihu ali i na odnose u porodici poslije svjedočenja koje nije u korist optuženog. One će biti i materijalne u vidu drugačijeg odnosa optuženog lica i ostalih njegovih srodnika prema djetetu koje je svjedočilo (uskraćivanje materijalnih pogodnosti, školarine, naklonosti, izostavljanje iz testamenta i slično). Jedan od najvećih izazova u praksi biće zadatak kako objasniti djetetu oslobođenom dužnosti svjedočenja da ne može uskratiti iskaz ako se radi o krivičnim djelima gdje je neposredno oštećeno krivičnim djelom. Djetetu je najvažnije objasniti da su njegovi interesi ispred svih drugih, što u praksi nije jednostavno. Te su odredbe kontradiktorne jer se dijete prvo upozorava da ne mora svjedočiti, a nakon toga se upozorava da mora svjedočiti u odnosu na krivična djela kojima je neposredno oštećeno krivičnim djelom.

Kod rečenih manjkavosti samog iskaza svjedoka i posebno srodnika koji svjedoče nije bilo uopšte opravdanja da se poseže za ovakvim kontroverznim rješenjem od koga ima više štete nego koristi. Zakonodavac uopšte ne navodi šta to znači neposredno oštećeno krivičnim djelom jer takva definicija u značenju izraza ne postoji. Zakon poznaje izraz „oštećeni" pod kojim se podrazumijeva lice kome je lično ili imovinsko pravo krivičnim djelom povrijeđeno ili ugroženo, što je veoma širok pojam. Prema sadržini norme to se odnosi na sva krivična djela od onih protiv života i tijela pa do krivičnih djela protiv bezbjednosti javnog saobraćaja, protiv službene dužnosti itd. U situaciji kada se vodi krivični postupak za krivično djelo ugrožavanja javnog saobraćaja, a dijete koje je bilo suvozač se prisiljava snagom zakonske norme da svjedoči ili se vodi krivični postupak za krivično djelo šumske krađe kada je optuženi drva dovezao da mu porodica prezimi i slično, nije opravdano zahtijevati i očekivati da dijete koje je snagom zakonske norme prinuđeno da svjedoči tada govori istinu. Sve to ukazuje na jedno sasvim pogrešno rješenje koje se neodložno mora ukloniti iz zakona.

Sličnu odredbu nalazimo u hrvatskom Zakonu o kaznenom postupku[23] (čl. 285 st. 6) po kome privilegovani svjedoci ne mogu uskratiti iskaz ako se radi o krivičnom djelu krivičnopravne zaštite djece. Međutim, to je mnogo određenije nego u našem zakonu jer je Zakonom o sudovima za mladež[24] (čl. 113) propisano koja su to djela na štetu djece na koja se primjenjuje ovaj zakon, a samim tim i odredba procesnog zakona o nemogućnosti da se svjedočenje uskrati. Bez obzira na to dolazilo je do dilema u primjeni ove odredbe kada se radi o više krivičnih djela gdje maloljetni svjedok za neka može da koristi ovu privilegiju, a za druga ne može. To je svojom odlukom korigovao Vrhovni sud Hrvatske koji u presudi Kžm 15/13 zbog krivičnog djela teškog ubistva iz čl. 91. KZ/97 i krivičnog djela zapuštanja i zlostavljanja djeteta iz čl. 213. KZ/97 obrazlaže da su „privilegirani svjedoci bili pogrešno poučeni o blagodati nesvjedočenja u odnosu na oba kaznena djela. Maloljetni sin optuženika nije mogao uskratiti iskaz u pogledu kaznenog djela počinjenog na njegovu štetu. Kako

[23] *Narodne novine*, br. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19.

[24] *Narodne novine*, br. 84/11, 143/12, 148/13, 56/15, 126/19.

nije utvrđeno je li dijete s obzirom na dob i duševnu razvijenost bilo sposobno shvatiti značenje prava da ne mora svjedočiti za kazneno djelo teškog ubojstva, sud je ispravno utvrdio da je počinjena apsolutno bitna povreda kaznenog postupka."[25]

4. IZUZECI OD NEPOSREDNOG IZVOĐENJA DOKAZA

Od pravila da se dokazi izvode neposredno na glavnom pretresu pred sudom zakon propisuje određene izuzetke. Ovi izuzeci su taksativno nabrojani i samo se u tim slučajevima može odstupiti od načela neposrednosti.[26] S obzirom da se tužilačka istraga shvata i zakonski je uređena kao strogo formalna faza krivičnog postupka to je i snaga dokaza koji su u njoj prikupljeni i izvedeni ostala ista kao da ih izvodi istražni sudija, iako dokaze izvodi tužilac, zaista po pravilima koja su važila za istražnog sudiju. Ovdje je djelimično zadržano i izvođenje tzv. incidentnih dokaza od strane suda, u slučajevima kada prijeti opasnost od odlaganja i koji se izvode po formi po pravilima koja važe za glavni pretres pa zato mogu biti činjenična osnova presude.[27] Međutim, pravilo je da dokazi koje izvedu ovlašćena službena lica (OSL) po naređenju ili odobrenju javnog tužioca ili suda (sudije za prethodni postupak) imaju istu snagu kao da ih je izveo sud ili javni tužilac. Zapisnici o dokazima izvedenim u istrazi, bez obzira što ih je izveo nesudski organ, mogu se čitati na glavnom pretresu i biti osnova presude (član 288 ZKP RS). Ovo je koncepcijski suprotno opšteprihvaćenim rješenjima u uporednom pravu da samo sudski dokazi iz istrage imaju pravnu snagu ako su izvedeni po strogo formalnim pravilima, kada mogu biti činjenična osnova presude. Od navedenog pravila izuzimaju se materijalni dokazi i dokazi do kojih se došlo posebnim istražnim radnjama sprovedenim po odluci suda.

Ovdje ćemo prvo ukazati na rješenje o čitanju iskaza optuženog datom u istrazi koji se na glavnom pretresu koristi pravom da ne iznosi svoju odbranu ili odgovara na postavljena pitanja (član 288 stav 3 ZKP RS). Ovakvo rješenje opravdano se može podvrći kritici jer se za činjeničnu osnovu presude koristi dokaz koji nije izveden pred sudom već pred jednom od procesnih stranaka. Teza zastupnika ovakvog rješenja je da je tužilac državni organ kome je povjerena istraga je koncepcijski pogrešna i neodrživa iz više razloga. Prvo, istraga koju vodi tužilac koji nije sudski organ nije pandan istrazi koju je vodio sud i istražni sudija. Drugo, u konceptu adverzijalnog glavnog pretresa svi dokazi koje nije izveo sud u istrazi moraju biti izvedeni na glavnom pretresu. Treće, kao što smo već naglasili ako bi se dosljedno proveo koncept adversijalnog krivičnog postupka faza istrage bi bila neformalna, a glavni pretres formalan sa dokazima koji se na njemu izvode, dok se dokazi iz istrage ne bi mogli koristiti za zasnivanje presude. Sada imamo situaciju da se iskaz optuženog dat u istrazi pred nesudskim organom koristi za zasnivanje sudske presude što je potpuno neprihvatljivo. Ovaj defekt ne može da popravi ni to da taj iskaz mora biti dat uz upozorenje i uz prisustvo branioca, jer to nije iskaz dat u krivičnom postupku pošto krivičnog postupka nema zato što bez suda nema krivičnoprocesnog odnosa. Prema tome iskaz koji nije dat u krivičnom postupku, a o krivičnom postupku i njegovom zasnivanju smo već kratko govorili, ne može se prihvatiti kao dokaz koji služi kao činjenična osnova presude. Ovakav iskaz bi se na navedeni način mogao koristiti samo ako bi bio dat pred sudijom za prethodni

[25] Lj. Stipišić (2018). Procesni aspekti ispitivanja djece žrtava i recentna sudska praksa u svjetlu direktive 2012/29 EU. *Hrvatski ljetopis za kaznene znanosti i praksu*, 25 (2), 561.

[26] Jovašević, Ikanović (2016), 217.

[27] Više o tome: Đurđić, V. (2015). Perspektiva novog modela krivičnog postupka Srbije. *Nauka, bezbednost, policija*, 20 (2), 71–95.

postupak, međutim to ruši koncept tužilačke istrage. Ista je situacija i sa ostalim iskazima koji se često koriste za zasnivanje sudske presude protivno prirodi adversijalnog glavnog pretresa. Smisao njihovog korišćenja mora biti u postizanju uvjerljivosti ili neuvjerljivosti iskaza svjedoka koji daje na glavnom pretresu kroz direktno i unakrsno ispitivanje, a ne u prostom integralnom prihvatanju iskaza datog u istrazi (najčešće pred OSL).

Što se tiče dokaza iz 288 stav 2 ZKP RS da se izuzetno od stava 1 ovog člana, zapisnici o iskazima datim u istrazi mogu po odluci sudije, odnosno vijeća pročitati i koristiti kao dokaz na glavnom pretresu samo u slučaju ako su ispitana lica umrla ili trajno duševno oboljela ili se ne mogu pronaći, ili je njihov dolazak pred sud nemoguć ili je znatno otežan iz važnih razloga, ili ako bez zakonskih razloga neće da daju iskaz na glavnom pretresu. U dosadašnjoj sudskoj praksi nije bilo nejasnoća niti sporenja u primjeni ovih odredbi na konkretne životne situacije. Međutim, u pogledu odstupanja od neposrednog izvođenja dokaza posljednje izmjene procesnog zakona uvode jedan kontroverzan institut kojim se po odluci suda omogućava čitanje zapisnika o iskazima lica datim u istrazi, pored ostalih razloga „ako bez zakonskih razloga neće da daju iskaz na glavnom pretresu". Ovdje se radi o doslovno prepisanoj odredbi iz člana 288 stav 2 Zakona o krivičnom postupku Federacije Bosne i Hercegovine (ZKP FBiH)[28].

Smatramo da je ovo potpuno pogrešno jer je time obesmišljena odredba člana 288 ZKP RS o kažnjavanju za odbijanje svjedočenja. Ovom odredbom su propisane sankcije za odbijanje svjedočenja koje su propisane sa ciljem da se pod prijetnjom kažnjavanja svjedok prinudi da svjedoči. Prinuda se sastoji u vidu verbalnog upozorenja stavljanjem u izgled primjene sankcija ako se ne pokori volji zakonodavca izraženoj kroz obavezu svjedočenja. Ako svjedok odbije da svjedoči bez opravdanog razloga i nakon upozorenja na posljedice, može biti kažnjen novčanom kaznom do 30.000 KM, a ako svjedok i poslije toga odbije da svjedoči, može se pritvoriti. Zatvor traje dok svjedok ne pristane da svjedoči, ili dok njegovo svjedočenje ne postane nepotrebno, ili dok se krivični postupak ne završi, ali najduže 30 dana. Sankcije se primjenjuju tako što se prvo izriče blaža sankcija, pa ako ona ne ostvari uticaj onda se može primijeniti teža u vidu pritvora. Kada se iscrpe sve ove mogućnosti tada prestaje svaka vrsta prinude i od tog dokaza se odustaje, a odlučne činjenice se utvrđuju drugim dokaznim sredstvima. Uvođenjem mogućnosti čitanja praktično se poništavaju svi efekti sankcija i negira potreba njihovog postojanja jer samo nepotrebno odugovlače postupak.

Osim toga, zakonodavac zanemaruje činjenicu da optuženom nije data mogućnost da u istrazi ispita svjedoka, jer se osumnjičeni u istrazi ne obavještava o ročištu za njegovo saslušanje. Ovo je bilo propisano našim ranijim zakonodavstvom, kada je istragu vodio istražni sudija, pa ni tada nije bila predviđena mogućnost čitanja iskaza u ovoj situaciji iako je osumnjičenom u istrazi pružana mogućnost ispitivanja svjedoka. Samim tim odredba je potpuno suprotna članu 6 stav 3 tačka b. Evropske konvenciji za zaštitu ljudskih prava i osnovnih sloboda. Ovim članom je izričito propisano da svako ko je optužen za krivično djelo ima pravo da ispita ili da se u njegovo ima ispitaju svjedoci protiv njega i da se obezbijedi prisustvo i saslušanje svjedoka u njegovu korist pod istim uslovima koji važe za one koji svjedoče protiv njega. Ovdje je to pravo uskraćeno jer samo tužilac saslušava svjedoke u istrazi, ta mogućnost nije data osumnjičenom i on je uskraćen u ostvarivanju

[28] *Službene novine FBiH*, br. 35/2003, 56/2003 - ispr., 78/2004, 28/2005, 55/2006, 27/2007, 53/2007, 9/2009, 12/2010, 8/2013, 59/2014 i 74/2020.

svog konvencijskog prava. Osim toga ovo može da vodi procesnoj zloupotrebi od strane tužioca kada mu odgovara da odbrana ne podvrgne ispitivanju svjedoka i „sruši" iskaz iz istrage, a što se nikako ne smije zakonom dozvoliti.

Što se tiče dokaza koji se sudski obezbjeđuju smatramo da do sada nije bilo nejasnoća niti sporenja u njihovoj primjeni. Međutim, u pogledu odstupanja od neposrednog izvođenja dokaza pažnju nam je privukla jedna presuda Suda BiH broj: S1 2 K 006087 11 K od 28.11.2013. godine koji je donio odluku da se odstupi od neposrednog izvođenja dokaza, u smislu člana 273 Zakona o krivičnom postupku Bosne i Hercegovine (ZKP BiH)[29], koji ne sadrži gore navedenu odredbu kao ZKP RS i ZKP FBiH, kada je pročitana izjava svjedoka P. D. U toj presudi se kaže: „U odnosu na ovog svjedoka, i njegovo uporno odbijanje svjedočenja, Sud je primjenio sve zakonom raspoložive mjere i sankcije, što nije utjecalo na svjedoka da promijeni svoju odluku o odbijanju svjedočenja. S obzirom da sam procesni zakon, ne predviđa šta će se desiti ukoliko svjedok i nakon novčanog i zatvorskog kažnjavanja i dalje odbija da svjedoči, Sud je našao da se iskaz ovog svjedoka ima pročitati u skladu sa članom 273 stav 2 ZKP-a BiH."

Apelaciono vijeće Suda BiH je podržavajući ovaj zaključak prvostepenog suda (da se pročita iskaz) kao pravilan i zakonit navelo da: „sintagmu dolazak pred sud" (iz člana 273 stav 2 ZKP) ne treba usko tumačiti kao sam pristup u sudnicu već u smislu dovođenja u situaciju da se efikasno obavi ova procesna radnja". Sud BiH je naveo da, „kada svjedok pristupivši na sud odbije da svjedoči, a to učini i nakon kažnjavanja, pokazujući svojim stavom da odbija da svjedoči i da ubuduće neće svjedočiti, takvo ponašanje de facto predstavlja odbijanje dolaska pred sud, pa se ono ukazuje znatno otežanim iz tog važnog razloga a što je predviđeno i dijelom odredbe iz člana 273 stav 2 ZKP".

Ispitujući ove presude po apelaciji koja je protiv njih podnesena Ustavni sud BiH u ovakvom tumačenju odredbe ZKP (za koju su najprije, kako je u svojoj praksi već naveo Ustavni sud prvenstveno nadležni redovni sudovi) ne nalazi bilo kakvu proizvoljnost niti nelogičnost. Osim toga, Ustavni sud primjećuje da je Sud BiH jasno naveo da je iskaz svjedoka D. P. zakonit, jer je saslušanju optuženog bio prisutan branilac, a nakon što je optuženi upoznat i upozoren o pravima i obavezama koje proizilaze iz davanja iskaza.

Odredba zakona, na koju se sudovi potpuno bez osnova (pogrešno) pozivaju, propisuje da se izuzetno zapisnici o iskazima datim u istrazi mogu po odluci sudije, odnosno vijeća pročitati i koristiti kao dokaz na glavnom pretresu samo u slučaju ako su ispitane osobe umrle, duševno oboljele, ili se ne mogu pronaći, ili je njihov dolazak pred Sud nemoguć, ili je znatno otežan iz važnih uzroka. Dakle fizička odsutnost svjedoka je jedan od propisanih uslova da bi se uopšte moglo pristupiti čitanju njegovog iskaza. Ovdje je živi, duševno zdravi svjedok došao na sud, što znači da ga nije trebalo tražiti, njegov dolazak je bio moguć i nije bio znatno otežan, pa je i prisutan na sudu. To što neće da svjedoči je ispoljavanje njegove slobodne volje prema građanskoj obavezi koju svjesno odbija zbog toga trpeći zakonom propisane sankcije. Odbijanje svjedočenja nije nemogućnost dolaska na sud, ne može se podvesti pod sintagmu „dolazak pred sud" kako to sudovi tumače i to zakonodavac sankcioniše mjerama procesne discipline koje je, kako iz obrazloženja vidimo, sud primijenio i one nisu dale rezultate. Do ovakvog zaključka dolazimo jezičkim, sistematskim, ciljnim i logičkim tumačenjem ove odredbe, koje se do sada nikada u sudskoj

[29] *Službeni glasnik BiH*, br. 3/2003, 32/2003 - ispr, 36/2003, 26/2004, 63/2004, 13/2005, 48/2005, 46/2006, 29/2007, 53/2007, 58/2008, 12/2009, 16/2009, 53/2009 - dr. zakon, 93/2009, 72/2013 i 65/2018.

praksi nije postavljalo kao sporno pitanje. Kod ovakvog stanja stvari tu se dalje svjedok kao dokazno sredstvo ne koristi jer nije moguće da se dođe do njegovog iskaza kao dokaza u krivičnom postupku, što zakonodavac prihvata i ne propisuje bilo kakve druge radnje u vezi ovog dokaznog sredstva.

Ovdje sudovi postaju tvorci norme, a ne njeni tumači, što je suprotno osnovnim postavkama nauke krivičnog procesnog prava i vodi krivljenju volje zakonodavca zbog potrebe da se pribavi jedan očigledno važan dokaz mimo zakonom propisanog postupka. Zato smatramo da je bio osnovan prigovor odbrane na zakonitost ovog dokaza, zasnovan na tome da se odbijanje svjedočenja ne može smatrati nemogućnošću dolaska svjedoka na sud i da se na takvom dokazu ne može zasnovati presuda, sa prijedlogom da se taj dokaz proglasi nezakonitim. Ovakvo nešto se ne bi smjelo činiti u postupku koji se vodi pred jednom sudskom instancom toga ranga, a pogotovo ga ne bi smjele opravdati više instance u postupku po pravnim lijekovima. Ovakvim postupanjem ruši se pravna sigurnost i povjerenje u sam sud, koji se kontroverznim tumačenjem jasne zakonske norme koja to ne zahtijeva i koje nije zasnovano na pravilma nauke krivičnog procesnog prava, već na zanatskoj utilitarističkoj primjeni zakonske norme upušta u pribavljanje dokaza na neprihvatljiv način u korist tvrdnji jedne od procesnih stranaka. Pitamo se kako bi sud postupio u situaciji da nije imao raniji iskaz koji je svjedok dao kod tužioca, da li bi i tada njegovo odbijanje svjedočenja smatrao kao „otežani dolazak pred sud", i koje bi tada mjere primijenio da pribavi njegov iskaz. Da li bi se upustio u primjenu nekih zakonom nepredviđenih mjera i postupaka zbog toga što zakonodavac ne propisuje izričito kako će sud dalje postupiti u toj situaciji? Vjerujemo da sigurno ne bi, jer je zakonodavac stavljanjem tačke iza riječi u tom članu pokazao svoju volju da se dalje odustaje od bilo kakve aktivnosti na pribavljanju iskaza takvog svjedoka.

Sve ovo govori u prilog gore iznesenom stavu da se nije smjelo posljednjom zakonskom izmjenom ZKP RS uvesti mogućnost čitanja iskaza svjedoka koji odbija da svjedoči. Protiv ovog govore i argumenti prava optuženog da ispita svjedoka

5. ZAKLJUČAK

Oštećeni i njegov položaj u krivičnom postupku, svjedoci i njihova prava i obaveze, kao i izuzeci od neposrednog izvođenja dokaza, su veoma važni instituti krivičnog procesnog prava. Njihova primjena zavisi od uređenja krivičnog postupka, ovlašćenja procesnih subjekata, cilja i namjere zakonodavca šta želi sa njima postići. Oni moraju biti harmonizovani sa drugim sličnim institutima i ne smiju biti u suprotnosti sa opštim tipom krivičnog postupka. Smatramo da u našem krivičnom procesnom zakonodavstvu položaj oštećenog, prava svjedoka i izuzeci od neposrednog izvođenja dokaza, nisu na adekvatan način pozicionirani u krivičnom postupku jer se zakonodavac nije ponašao dosljedno u uređenju tipa tog postupka. Tako je doveo u sukob adversijalni tip glavnog pretresa sa inkvizitorskom istragom koju je povjerio tužiocu, a koja je formalno ostala kao da je u rukama istražnog sudije. To u narednom periodu treba ispraviti tako što će se zakonodavac jasno opredijeliti koji tip postupka u cjelini želi i uskladiti ove dvije faze krivičnog postupka da budu istog tipa. Tek tada će dobiti koherentne norme koje ne izazivaju sporenja u opravdanost njihove primjene i primjenljivost na glavnom pretresu gdje se izvode dokazi i na njima zasniva sudska presuda. Položaj oštećenog je posljednjim izmjenama samo kozmetički popravljen ali nije riješena suština problema koji se postavlja pred zakonodavca. Uskraćivanje prava maloljetniku da odbije svjedočenje potpuno je kontraproduktivno svrsi ovog instituta i

razlozima zbog kojih je on u cjelini ugrađen u krivično procesno zakonodavstvo. Što se tiče izuzetaka od neposrednog izvođenja dokaza smatramo da tu uopšte ne postoji bilo kakva nejasnoća i dilema, da ove norme ne zahtijevaju dopunu i da se takvo što nije nikad postavilo u dugogodišnjoj sudskoj praksi. Skloni smo vjerovati da se ovdje radi iz sasvim nejasnih i neopravdanih razloga o upuštanju zakonodavca u stvaranje neustavne zakonske norme, protivne ljudskim pravima i kao takve neodržive u provjeri njene ustavnosti. Zato je potrebno navedene zakonske norme poboljšati tako što će se položaj oštećenog pojačati davanjem odgovarajućih prava u istrazi, a prava svjedoka i izizeci od neposrednog izvođenja dokaza vratiti na ranije zakonsko rješenje.

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Certain Solutions in the Law on Amendments to the Law on Criminal Procedure of the Republic of Srpska

Summary: The author deals with the new position of the injured party in criminal proceedings, persons who may refuse to testify and exceptions from the direct presentation of evidence due to the unavailability of witnesses after the amendments to the Criminal Procedure Code of Republika Srpska from 2021. Starting from the current regulation of this matter, pointing to the solutions in the comparative legislation, the analysis of these changes indicates the consequences of such inconsistent and in some institutes unnecessary and erroneous standardization of this sensitive matter. Attention is drawn to the contradiction between the decision on the privileged witness and juvenile legislation, which is in line with the conventions protecting their position, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In that sense, the legislator is critically pointed out the shortcomings of certain solutions and suggests appropriate changes and additions in order to eliminate the problems that may arise during their practical application.

Keywords: injured party, witness, juvenile, rejection, unavailable.

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Značaj jurisprudencije suda pravde Evropske unije za dosljednu primjenu direktive o uslugama

Apstrakt: U ovom radu pažnju usmjeravamo na sprovođenje Direktive o uslugama na unutrašnjem tržištu u državama članicama Evropske unije, s tim da je u našem fokusu procjena jasnoće normi ovog izvora pravne tekovine, koju vršimo kroz analizu odabranih slučajeva iz jurisprudencije Suda pravde Evropske unije. Predmetni izvor prava evropske organizacije, između ostalog, sagledavamo s obzirom na njegovo sprovođenje u oblastima javnog zdravlja, djelatnosti sertifikovanja i vršenja tehničkog nadzora, te u oblasti veterinarskih usluga. Tema našeg rada je korisna za stručnu i naučnu zajednicu zbog dodatnog pojašnjenja značaja razvoja prakse Suda pravde za jednoobraznu primjenu Direktive koja uređuje veoma važan segment unutrašnjeg tržišta.

Ključne riječi: unutrašnje tržište, direktiva, usluge, poslovno nastanjivanje, sudska praksa.

Radmila Dragišić
Zamjenik direktora Republičkog sekretarijata za zakonodavstvo i doktorand na Pravnom fakultetu Univerziteta u Banjoj Luci.
r.dragisic@rsz.vladars.net

1. UVOD

Tendencija evropskog zakonodavca da kroz Direktivu o uslugama na unutrašnjem tržištu[1] (u daljem tekstu: Direktiva) objedini praksu Suda pravde Evropske unije u oblasti poslovnog nastanjivanja i slobode pružanja usluga nedvosmisleno se iskazuje kroz uvodne izjave Direktive.[2] Podsjećanja radi, „pravo ili sloboda nastanjivanja u opštem smislu obuhvata pravo lica da uđu u državu članicu i da se tamo nastane, sa ciljem da u toj državi vrše određene ekonomske aktivnosti različite od onih koje su obuhvaćene ugovorom o zapošljavanju iz fiksiranog ili fiksiranih mesta u toj državi".[3] Sa druge strane, sloboda pru-

[1] Eng. *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ* L 376, 27.12.2006, 36-68.

[2] Timmerman, P. (2009). Legislating Admist Public Controversy: The Services Directive. Preuzeto 12.6.2021, sa: http://aei.pitt.edu/11870/1/ep32.pdf; Minico, de G.,Viggiano, M. (2017). Directive 2006/123/EC on services in the internal market. In: A. R. Lodder, A. D. Murray (eds.) *EU Regulation of E-commerce – A Commentary*. Elgar Commentaries, Cheltenham, UK: Edward Elgar Publishing, 126–146.

[3] Vukadinović, R. (2011). *Uvod u institucije i pravo Evropske unije*.

žanja usluga podrazumijeva pružanje podrške razvoju integralnog tržišta u oblasti usluga kroz pojednostavljenje administrativnih procedura, otklanjanje prepreka za obavljanje uslužne djelatnosti, jačanje međusobnog povjerenja između država članica i povjerenja između pružalaca i primalaca usluga.[4] Tako se, na primjer, u tački 34. ukazuje da je, u skladu sa sudskom praksom Suda, potrebno na pojedinačnoj osnovi ocijeniti da li se određene djelatnosti mogu smatrati "uslugama" s obzirom na sva njihova obilježja, a prvenstveno s obzirom na način na koji se pružaju, organizaciju djelatnosti i finansiranje takve djelatnosti u određenoj državi članici. U tački 37. jasno se determiniše da mjesto poslovnog nastana pružaoca usluga treba da se odredi u skladu sa sudskom praksom Suda, prema kojoj pojam "poslovni nastan" podrazumijeva stvarno izvođenje privredne djelatnosti na osnovu stalnog poslovnog nastana na neodređeno vrijeme. Nadalje, u tački 40. ukazuje se da je koncept "preovladavajućih razloga od javnog interesa" Sud pravde razradio u sudskoj praksi u skladu sa čl. 43. i 49. Ugovora o funkcionisanju Evropske unije[5] (u daljem tekstu: UFEU), pri čemu se implicira i mogućnost njihove dalje razrade.[6] Odredbom u tački 41. podsjeća se da, prema tumačenju Suda, "javni red" obuhvata zaštitu od stvarne i dosta ozbiljne prijetnje nekom od osnovnih interesa društva i može posebno uključiti pitanja koja se odnose na ljudsko dostojanstvo, zaštitu maloljetnika i ranjivih odraslih lica, te dobrobit životinja.

Za razlikovanje slobode poslovnog nastanjivanja i slobodnog kretanja usluga, u tački 77. uvodnih izjava Direktive navodi se da, u skladu sa sudskom praksom Suda, ključni element predstavlja činjenica ima li privredni subjekt poslovni nastan u državi članici u kojoj pruža određenu uslugu. Ako privredni subjekt ima poslovni nastan u državi članici u kojoj pruža svoje usluge, ulazi u područje primjene slobode poslovnog nastana. Ako, suprotno tome, privredni subjekt nema poslovni nastan u državi članici u kojoj pruža svoje usluge, njegove djelatnosti potpadaju pod slobodno kretanje usluga.[7] Sud dosljedno smatra da se privremena priroda navedenih djelatnosti ne određuje samo u svjetlu trajanja usluge, nego i u svjetlu njezine učestalosti, povremenosti ili neprekidnosti. Činjenica da je aktivnost privremena ne znači da pružalac ne smije posjedovati neku vrstu infrastrukture u državi članici u kojoj pruža uslugu, kao na primjer kancelariju, poslovne prostorije ili savjetovalište, ako je takva infrastruktura nužna za pružanje određene usluge.

Uspješnost evropskog zakonodavca u objedinjavanju sudske prakse koja je profilisana prije stupanja na snagu Direktive o uslugama može da se procjenjuje iz dva ugla. Prema prvom (kvantitativnom uglu gledanja), može se istražiti u kojoj mjeri je odgovarajuća sudska praksa obuhvaćena Direktivom, tj. da li je sveobuhvatno "pretočena" u pravne norme sadržane u Direktivi, kao i da li je i na koji način sistematizovana u ovom izvoru pravne tekovine. Prema drugom (kvalitativnom uglu gledanja), može da se istraži i procijeni jasno-

Kragujevac: Centar za pravo Evropske unije, 287.

4 Dragišić, R. (2012). Direktiva o uslugama na unutrašnjem tržištu, *Moderna uprava – časopis za upravno pravnu teoriju i praksu*, 7/8, 172.

5 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *OJ* C 83, 30. 3. 2010.

6 Tomkin, J. (2019). Freedom to provide services. In: M. Kellerbauer, M. Klemert, J. Tomkin (eds.) *Commentary on the EU Treaties and the Charter of Fundamental rights – A Commentary*. Oxford University Press, 725.

7 Kainer, F. (2019). Contribution to the Growth: Free Movement of Services and Freedom of Establishment. Preuzeto 10.6.2021, sa http://www.europarl.europa.eu/supporting-analyses.

ća normi posredstvom kojih su interpretacije Suda pravde postale dodatno obavezujuće za države članice kroz svrstavanje u obavezujući izvor prava Unije. Naravno, sama mjera usklađenosti je uslovljena jasnoćom pravnih normi sadržanih u Direktivi.

Smatrajući da je procjenu jasnoće normi Direktive najsvrsishodnije izvršiti istraživanjem izabrane prakse Suda pravde Evropske unije koja je objavljena nakon 28. decembra 2009. godine, kada je istekao rok za njeno sprovođenje, u nastavku pažnja će biti usmjerena upravo na analizu odabranih odluka Suda.[8] Navedeno istraživanje će pokazati koliki je značaj prakse Suda pravde za jednoobraznu primjenu ovog obavezujućeg izvora prava, a samim tim i za uspješno funkcionisanje unutrašnjeg tržišta Evropske unije.[9]

2. SLUČAJ *FERMABEL*[10]

Što se tiče glavnog postupka koji je vođen pred nacionalnim tijelima, Belgijski savez privatnih domova za starija lica (*Femarbel*[11]) je 15. februara 2010. godine, pred Državnim savjetom[12], tražio poništenje odluke koju je 3. decembra 2009. godine donijela Komisija zajedničke komune Grada Brisela (COCOM[13]), a kojom se određuju pravila za izdavanje dozvola za rad centrima za starija lica. U okviru zahtjeva za poništenje, Femarbel je istakao i prigovor nezakonitosti, tražeći preispitivanje odredaba čl. 11. do 19. Uredbe o ustanovama za boravak i smještaj starijih lica koju je 24. aprila 2008. godine donio COCOM. Državni savjet je podnio Ustavnom sudu Belgije[14] zahtjev za ocjenu ustavnosti, pri čemu je iznio više nedoumica u vezi sa usklađenošću navedene uredbe sa belgijskim ustavom. U okviru navedenog postupka, Ustavni sud Belgije je postavio Sudu pravde Evropske unije prethodno pitanje o usklađenosti navedene belgijske uredbe sa pravom Evropske unije, konkretno sa Direktivom o uslugama. Postavljeno je pitanje da li treba zdravstvene usluge iz člana 2. stav 2. tačka (f) i socijalne usluge iz člana 2. stav 2. tačka (j) Direktive tumačiti na način da su centri za dnevni boravak, u smislu Uredbe COCOM od 24. aprila 2008. godine izvan područja primjene Direktive, budući da starijim licima pružaju pomoć i zaštitu koje su prilagođene gubitku samostalnosti kod tih lica, kao i centri za noćni boravak, u smislu iste uredbe, utoliko što starijim licima pružaju pomoć i zdravstvenu zaštitu koju im njihovi bližnji ne mogu kontinuirano osiguravati. Suštinski, u postupku po prethodnom pitanju traži se tumačenje odredaba koje se odnose na materijalno područje primjene Direktive o uslugama, u skladu sa kojima se iz područja njene primjene izuzimaju zdravstvene usluge [tačka (f)] i određene socijalne usluge [tačka (j)]. Zdravstvene usluge se iz područja primjene izuzimaju bez obzira na to da li ih pružaju zdravstvene ustanove, bez obzira na način na koji su organizovane i finansirane na nacionalnom nivou i bez obzira na to da li su javne ili privatne. U vezi sa ovom odredbom, izjašnjenja koja su podnijeli "Femarbel", Holandija i Evropska komisija stoji da se navedena odredba ne primjenjuje na centre za dnevni boravak i centre za noćni boravak starijih lica jer, prema njima, ako glavna djelatnost centra

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[8] Woods, L., Costa, M., Peers S. (2020). *Steiner & Woods EU Law*. Oxford University Press, 490.

[9] Snell, J. (2020). The internal market and the philosophies of market integration. In: C. Bernard, S. Peers (eds.) *European Union Law*. Oxford University Press, 335-347.

[10] ECJ, C-57/12 *Fédération des maisons de repos privies de Belgique (Femarbel) ASBL v. Commission communautaire commune de Bruxelles-Capitale*, ECLI:EU:C:2013:517.

[11] Franc. *Fédération des maisons de repos privies de Belgique*.

[12] Franc. *Conseil d´État.*

[13] Franc. *Commission communautaire commune de Bruxelles-Capitale.*

[14] Franc. *Cour constitutionnelle*.

za boravak ne obuhvata pružanje zdravstvenih usluga, smatra se da je centar obuhvaćen područjem primjene Direktive o uslugama. Suprotno tome, COCOM je ukazao na vezu između tih centara i centara koji pružaju intenzivniju zaštitu, kao i centara koji pružaju isključivo zdravstvenu zaštitu, na osnovu čega, prema njemu, treba da se zaključi da centri za dnevni boravak i centri za noćni boravak pružaju zdravstvene usluge i zbog toga treba da su isključene iz područja primjene Direktive. Cijeneći naprijed navedeno, opšti utisak je da je za odgovor na prethodno pitanje od ključne važnosti da se sadržinski odrede pojmovi „zdravstvena usluga" i „socijalna usluga".

Direktiva o uslugama ne bavi se sadržinskim određenjem „zdravstvene usluge", te je razumno pretpostaviti da je to stvaralo problem u rješavanju slučaja *Femarbel*. I u mišljenju opšteg pravobranioca Pedra Cruza Villalóna[15] i u presudi Suda[16] koristi se ista matrica u nastojanju da se te usluge sadržinski odrede, pa se tako konstatuje da treba da se prilikom određivanja uzme u obzir opšti okvir propisa (Direktive), poziva se na Priručnik za provođenje Direktive[17], koji je podržala Evropska komisija (iako priručnik ima instruktivni, a ne normativni karakter), te se čak problem sadržinskog određenja pokušava premostiti pomoću člana 3. tačka (a) Direktive 2011/24/EU o primjeni prava pacijenata u prekograničnoj zdravstvenoj zaštiti[18], u kojem je određeno da zdravstvena zaštita predstavlja zdravstvene usluge koje pacijentima pružaju zdravstveni stručnjaci radi procjene, održavanja ili liječenja njihovog zdravstvenog stanja, uključujući propisivanje, izdavanje na recept i davanje lijekova i medicinskih proizvoda. Naime, Direktiva 2011/24/EU ne sadrži nijednu odredbu koja bi predstavljala bilo kakvu poveznicu sa Direktivom o uslugama, o čemu se veoma jasno određuje opšti pravobranilac Villalón, kada u tački 23. navodi da je definicija „zdravstvene zaštite" iz Direktive 2011/24/EU korisna, iako je izvan pravnog okvira slučaja *Femarbel*. Međutim, Sud pravde je u tački 37. svoje presude prenebregnuo činjenicu izlaženja iz pravnog okvira i zauzeo se za sadržinsko određenje iz te direktive.[19] Takođe, iako je Sud pravde zahtjev nacionalnog tijela za donošenje odluke u prethodnom postupku ocijenio dozvoljenim, u predmetnom slučaju nedostaje prekogranični element. Naime, radi se o internoj situaciji u državi članici.

Što se tiče određenja „socijalna usluga" na koje se ne primjenjuje Direktiva o uslugama, iz uvodne izjave 27. ove direktive, može se zaključiti da je za izvođenje određenja potrebno da se ispune dvije hipoteze. Prva hipoteza, pretpostavka ili uslov odnosi se na prirodu djelatnosti koje se obavljaju i koje se moraju odnositi na pomoć i podršku starijim licima koja se zbog potpunog ili djelimičnog gubitka samostalnosti trajno ili privremeno nalaze u takvom stanju da im je potrebna posebna zaštita i koje su u opasnosti da ih se

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[15] ECJ, Opinion of Advocate General Cruz Villalón delivered on 14 March 2013, Case C-57/12, *Fédération des maisons de repos privées de Belgique (Femarbel) ASBL v Commission communautaire commune*, points 20, 22. i 23.

[16] Vidjeti tač. 37. i 35. Presude.

[17] *Eng. Handbook on implementation of the Services Directive.* Preuzeto 11.6.2021, sa https://op.europa.eu/en/publication-detail/-/publication/a4987fe6-d74b-4f4f-8539-b80297d29715.

[18] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, *OJ* L 88, 4.4.2011, 45–65.

[19] Direktiva 2011/24/EU se u stranoj literaturi često naziva „Patient Mobility Directive". Više o ovom sekundarnom izvoru vidjeti, na primjer, u: Greer L. S., Sokol, T. (2014). Rules for Rights: European Law, Health Care and Social Citizenship. *European Law Journal*, 20 (1), 76-84.

zbog toga marginalizuje.[20] Drugo, bitan je status pružaoca usluga jer usluge može pružati sama država, dobrotvorna organizacija koju država priznaje kao takvu ili privatni pružalac usluga kojeg je država za to ovlastila.[21] Što se sadržaja ovlaštenja tiče, Direktiva o uslugama ne sadrži bilo kakve zahtjeve u vezi sa njegovom pravnom formom. Međutim, Sud pravde u tački 48. Presude u slučaju „Femarbel" ističe da određeni minimalni kriterijumi ipak moraju biti zadovoljeni u smislu da akt ovlaštenja treba da na jasan i transparentan način povjerava obaveze u vezi sa socijalnom uslugom, pri čemu se Sud poziva na presudu u Predmetu *C-140/09 Fallimento Traghetti del Mediterraneo*[22].

Za privatne pružaoce usluga Sud ističe da se oni mogu smatrati ovlaštenima od države ako imaju „obavezu" da pružaju socijalne usluge koje su im povjerene. Tu obavezu treba shvatiti na način da je ona ozbiljna i da zahtijeva poštovanje određenih posebnih uslova kojima je cilj osiguranje da se usluge pružaju u skladu sa postavljenim zahtjevima i na način da se garantuje jednakost pristupa uslugama, uz odgovarajuću finansijsku naknadu. Parametri na osnovu kojih se izračunava naknada moraju biti utvrđeni unaprijed na objektivan i transparentan način da bi se izbjeglo davanje ekonomske prednosti i na taj način favorizovao subjekat koji pruža uslugu u odnosu na konkurentne subjekte.[23]

Opšti pravobranilac se u Mišljenju povodom slučaja „Femarbel" veoma jasno odredio da član 2. stav 2. tačku (f) Direktive o uslugama treba tumačiti tako da centri za dnevni boravak starijih lica, kako su definisani u predmetnoj belgijskoj uredbi, ne predstavljaju centre „zdravstvene usluge", te da centri za noćni boravak starijih lica (kako su definisani u toj uredbi) ne predstavljaju centre „zdravstvene usluge", ako sud koji je uputio zahtjev zaključi da je osnovni zadatak centra osiguranje smještaja starijim licima, a ne pružanje zdravstvenih usluga. Pored toga, istakao je da član 2. stav 2. tačku (j) Direktive treba tumačiti na način da centri za dnevni boravak i centri za noćni boravak starijih lica, kako su definisani u belgijskoj uredbi, ne predstavljaju „socijalne usluge" koje pružaju od države ovlašteni pružaoci. Međutim, Sud se u Presudi u slučaju *Femarbel* od 11. jula 2013. godine nije određivao u vezi sa tim da li djelatnosti koje obavljaju centri za dnevni i centri za noćni boravak potpadaju pod zdravstvene usluge u smislu člana 2. stav 2. tačka (f) ili socijalne usluge u smislu člana 2. stav 2. tačka (j) Direktive, već je provjeru prepustio nacionalnom sudu, s tim što je dao određene smjernice koje se, u nedostatku adekvatnih odredaba Direktive o uslugama, zasnivaju na od Suda prepoznatom pravnom izvoru koji je, kao što je navedeno, izvan pravnog okvira slučaja „Femarbel", sudsku praksu[24] i priručnik koji nema

[20] Vidjeti tač. 42. i 43. Presude u slučaju *Femarbel.*

[21] Vidjeti tač. 44. Presude u slučaju *Femarbel*.

[22] ECJ, C-140/09, *Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri*, ECLI:EU:C:2010:335, point 37.

[23] Vidjeti predmete: ECJ, C-140/09, *Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri*, ECLI:EU:C:2010:335, point 38; ECJ, C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, ECLI:EU:C:2003:415, para. 90; ECJ, C-451/03 *Servizi Ausiliari Dottori Commercialisti Srl v Giuseppe Calafiori*, ECLI:EU:C:2006:208, para. 64; ECJ, C-206/06, *Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV, and in the indemnification proceedings Aluminium Delfzijl BV v Staat der Nederlanden and in the indemnification proceedings Essent Netwerk Noord BV v Nederlands Elektriciteit Administratiekantoor BV and Saranne BV*. para. 83.

[24] Craig, P., de Búrca, G. (2015). *EU Law: Text, Cases, and Materials*. Oxford University Press, 847–850.

normativni, već samo instruktivni karakter. Suštinski, kada je riječ o prirodi prethodnog postupka, onda treba da podsjetimo da Sud pravde rješavajući u tom postupku ne bi trebalo da odlučuje ni o tumačenju nacionalnog prava, ni o usklađenosti tog prava s pravom Evropske unije.[25] Iako, u praksi je bilo različitih situacija, te je Sud često odlučivao upravo o usklađenosti nacionalnog prava s pravom evropske organizacije. Stoga, u ovom dijelu se „na mala vrata" može izvući zaključak o tome da Direktiva o uslugama, ipak, nije ponudila sve odgovore i iscrpila sve mogućnosti kako bi sveobuhvatno kodifikovala sudsku praksu koja je stvorena prije njenog stupanja na snagu, a koja se tiče sadržinskih određenja pojmova „zdravstvena usluga", „javno ovlašćenje" i slično. Dakle, Sud pravde je u maniru neodređenosti, a u vezi sa članom 2. stav 2. tačka (f) Direktive o uslugama, utvrdio da on mora biti tumačen u smislu da isključivanje zdravstvenih usluga iz područja primjene te direktive obuhvata svaku djelatnost čija je namjena ocjena, održavanje ili poboljšanje zdravstvenog stanja pacijenata, ako tu djelatnost obavljaju zdravstveni radnici koji su kao takvi priznati u skladu sa zakonodavstvom određene države članice, bez obzira na način na koji je ustanova u kojoj se usluga zaštite pruža organizovana i finansirana i bez obzira na to da li je ona javna ili privatna. Nacionalni sud treba da provjeri da li su centri za dnevni boravak i centri za noćni boravak, uzimajući u obzir prirodu djelatnosti koje u njima obavljaju zdravstveni radnici i činjenicu da te djelatnosti čine glavni dio usluga koje se pružaju u tim centrima, izvan područja primjene te direktive. U vezi sa članom 2. stav 2. tačka (j) Direktive, Sud se odredio tako što je utvrdio da ga treba tumačiti u smislu da se isključivanje socijalnih usluga iz područja primjene te direktive odnosi na svaku djelatnost koja se odnosi na pomoć i podršku starijim licima, ako je obavlja privatni pružalac usluga kojeg je za to ovlastila država putem akta kojim mu se na jasan i transparentan način povjerava stvarna obaveza da osigura takve usluge, uz poštovanje određenih posebnih uslova. Nacionalni sud treba da provjeri da li su centri za dnevni boravak i centri za noćni boravak, s obzirom na prirodu djelatnosti pružanja pomoći i podrške starijim licima koja se u njima primarno zbrinjavaju kao i njihov status kakav proizlazi iz belgijskih propisa, izvan područja primjene te direktive. Važno je istaći da su pojedini autori iskazali žaljenje što se Sud pravde u ovom slučaju nije više vezao za mišljenje opšteg pravobranioca koji je dao smjernice da se pojam „zdravstvena zaštita" tumači u skladu sa Direktivom o uslugama.[26]

3. SLUČAJ *RINA*[27]

Presuda Suda pravde Evropske unije u slučaju *Rina* donesena je 16. juna 2015. godine.[28] Predmet postupka je zahtjev italijanskih nadležnih organa vlasti za donošenje odluke

[25] ECJ, C118/08 *Transportes Urbanos y Servicios Generales SAL v Administración del Estado*, ECLI:EU:C:2010:39, para. 23. i 24; ECJ, C379/98 *PreussenElektra* [2001] ECR I2099, paragraph 38; ECJ, Case C18/01 *Korhonen and Others* [2003] ECR I5321, paragraph 19; and Joined Cases C261/07 and C299/07 *VTB-VAB and Galatea* [2009] ECR I0000, paragraph 32. Vidjeti i mišljenje opšteg pravobranioca u slučaju ECJ, C-641/18, *LG and Others v Rina SpA and Ente Registro Italiano Navale*, para. 31, ECLI:EU:C:2020:3.

[26] Zahn, R. (2014). The regulation of healthcare in the European Union: Member States' discretion or a widening of EU law?: Femarbel and Ottica New Line. *Common Market Law Review*, 51 (5), Kluwer Law International. Preuzeto 13.6.2021, sa https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/51.5/COLA2014115, 1521-1538.

[27] ECJ, Case C-593/13 *Rina Services* [2015] EU:C:2015:399

[28] Krommendijk, J. (2019). The highest Dutch courts and the preliminary ruling procedure: Criti-

u prethodnom postupku pred Sudom pravde u vezi sa tumačenjem odredaba čl. 49, 51. i 56. UFEU i čl. 14. i 16. Direktive o uslugama.

Prethodno, u Italiji je vođen spor koji je pokrenut po tužbama nadležnih italijanskih organa vlasti protiv tri italijanska privredna društva. Protiv presude u predmetnom sporu, koja je donesena u korist tužioca, izjavljena je žalba, između ostalog, radi osporavanja zakonitosti člana 64. stav 1. Uredbe broj 207. Predsjednika Republike od 5. oktobra 2010. godine o izvršenju i sprovođenju Uredbe broj 163. od 12. aprila 2006. godine[29], kojom se zahtijeva da registrovano sjedište društava koja se bave sertifikovanjem u oblasti građevinarstva mora biti isključivo na teritoriji Republike Italije.

U periodu vođenja spora, predmetna privredna društva su poslovala iz sjedišta koje se nalazilo u Italiji (*Genova*), a obavljala su djelatnost sertifikovanja i vršenja tehničkog nadzora u vezi sa organizacijom i proizvodnjom u oblasti građevinarstva. Naprijed navedena sporna odredba italijanske uredbe nije sprečavala privredna društva da se bave sertifikovanjem, kao ni da presele sjedište izvan Italije i tako ostvare poslovni nastan u drugoj državi članici. Međutim, kako je to kasnije u postupku pred Sudom pravde pravilno primijetio i postupajući, opšti pravobranilac Cruz Villalón, za osporenu uredbu su vezane dvije hipoteze koje su se ogledale u tome da, prema spornoj odredbi Uredbe, privredna društva u slučaju da ostvare poslovni nastan u drugoj državi članici više ne bi mogla da obavljaju usluge sertifikovanja na teritoriji Republike Italije, a sa druge strane poslovni subjekti sa poslovnim nastanom u drugim državama članicama ne bi mogli da pružaju usluge sertifikovanja u Italiji.

Regionalni upravni sud u Laciju[30] je presudama od 3. decembra 2011. godine prihvatio žalbe privrednih društava kao opravdane, navodeći u obrazloženjima presuda da je naročito zahtjev u vezi sa mjestom registrovanog sjedišta u suprotnosti sa čl. 14. i 16. Direktive o uslugama. Tužioci iz glavnog postupka podnijeli su protiv tih presuda žalbu Državnom savjetu[31], ističući da je djelatnost koju obavljaju privredna društva od posebne važnosti jer je to u domenu vršenja javnih ovlaštenja u smislu člana 51. UFEU i da samim tim ulazi u područje primjene Direktive o uslugama, kao i čl. 49. i 56. UFEU. Consiglio di Stato je odlučio da prekine postupak i uputi Sudu pravde Evropske unije dva prejudicijelna pitanja:[32]

- Prvo, tražio je odgovor na pitanje da li načela o slobodi poslovnog nastanjivanja koja su sadržana u članu 49. i načela o slobodnom pružanju usluga iz člana 56. UFEU, kao i načela iz Direktive o uslugama zabranjuju donošenje i primjenu nacionalnog propisa koji određuje da privredna društva koja imaju formu akcionarskog društva moraju imati registrovano sjedište na teritoriji Republike Italije;

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cally obedient interlocutors of the Court of Justice. *European Law Journal*, 25, 394–415.

[29] *Decreto del Presidente della Repubblica del 5 ottobre 2010, n. 207, recante esecuzione ed attuazione del decreto legislativo del 12 aprile 2006, n. 163 (Supplemento ordinario alla GURI n. 288, del 10 dicembre 2010), e che abroga il decreto del Presidente della Repubblica del 25 gennaio 2000, n. 34*

[30] Ital. *Tribunale amministrativo regionale per il Lazio.*

[31] Ital. *Consiglio di Stato*.

[32] Weiler, H. H. J. (1985). The European Court, National Courts and References for Preliminary Rulings: the paradox of success - a revisionist view of article 177 EEC. Florence: European University Institute, *1985EUI Working Paper 85/203*, Retrieved from Cadmus, European University Institute Research. Preuzeto 13.6.2021, sa http://hdl.handle.net/1814/23232.

- Drugo, tražio se odgovor na pitanje da li izuzeće iz člana 51. UFEU treba tumačiti na način da je njime obuhvaćena i djelatnost sertifikovanja koju obavljaju pravna lica privatnog prava koja, s jedne strane, moraju imati oblik akcionarskog društva i poslovati na tržištu, a s druge strane, učestvovati u vršenju javnih ovlaštenja, pa su stoga podložna odobravanju i striktnoj kontroli nadzornog organa.

U svojoj presudi, Sud pravde se primarno osvrnuo na drugo pitanje konstatujući da usluge sertifikovanja ulaze u područje primjene Direktive o uslugama jer se abrogaciono pominju u njenoj uvodnoj izjavi 33, te da je zahtjev u vezi sa sjedištem tijela za sertifikovanje o kojem je riječ u glavnom postupku naveden u članu 14. Direktive o uslugama. Sud je naveo da se taj zahtjev, u dijelu u kojem obavezuje privredna društva da imaju registrovano sjedište na nacionalnoj državnoj teritoriji, s jedne strane neposredno osniva na mjestu registrovanog sjedišta pružaoca usluga u smislu člana 14. tačka 1. Direktive, a sa druge strane, ograničava njihovu slobodu da izaberu između glavnog ili sekundarnog poslovnog nastana, obavezujući ih posebno da imaju svoj glavni poslovni nastan na nacionalnoj državnoj teritoriji u smislu tačke 3. tog člana Direktive. Takođe, Sud je podsjetio da se o takvom pitanju već izjasnio u presudi *Nazionale Costruttori*[33], u kojoj je zaključio da privredni subjekti koji obavljaju poslove sertifikovanja u cilju sticanja dobiti i u uslovima tržišne konkurencije ne raspolažu ovlaštenjima da odlučuju, kao ni ovlaštenjima koja se odnose na vršenje javne vlasti, te da se ne može smatrati da je djelatnost sertifikovanja neposredno i specifično povezana sa izvršavanjem javnih ovlaštenja u smislu člana 51. UFEU. Konkretnije, Sud je u presudi *Nazionale Costruttori* istakao da se to što privredna društva provjeravaju tehničke i finansijske kapacitete subjekata podvrgnutih sertifikovanju, te istinitost i sadržinu izjava, potvrda i dokumenata koje su podnijela lica kojima se potvrda izdaje, kao i da se postojanost uslova u vezi sa ličnom situacijom kandidata ili podnosioca zahtjeva ne može smatrati djelatnošću koja proizlazi iz autonomije odlučivanja koja je svojstvena izvršavanju prerogativa javne vlasti. Ta je provjera u cijelosti utvrđena nacionalnim zakonodavstvom, sprovodi se pod neposrednim državnim nadzorom i svrha joj je da olakša zadatak vlastima kada odlučuju u vezi sa zaključivanjem ugovora o javnim radovima. Budući da Sud u zahtjevu za prethodnu odluku u slučaju *Rina* nije utvrdio postojanje razlike u prirodi djelatnosti koje obavljaju tri italijanska privredna društva u odnosu na činjenice iz presude *Nazionale Costruttori,* odredio se na način da se izuzeće od prava na poslovni nastan iz člana 51. stav 1. UFEU treba tumačiti tako da se izuzeće od prava na poslovni nastan iz te odredbe ne primjenjuje na djelatnosti potvrđivanja koje obavljaju društva koja imaju svojstvo tijela za sertifikovanje. Dodatno, u ovom dijelu je korisno da se napomene da je opšti pravobranilac Cruz Villalón u predmetu C-57/12, u tački 43. svog mišljenja istakao da značenje izraza "ovlaštenje" treba da se pojasni jer svaka djelatnost privatnog subjekta koju više ili manje uslovljava država ne predstavlja "ovlaštenje". U protivnom, svaka bi se djelatnost koja se samo nadzire ili na koju se primjenjuju državna pravila mogla smatrati obuhvaćena "ovlaštenjem" namijenjenim privrednom društvu koje pruža usluge.[34]

[33] ECJ, C-327/12 EU:C:2013:827, para. 28. do 35. i 52.

[34] ECJ, Opinion of Advocate General Cruz Villalón delivered on 14 March 2013, ECJ, Case C-57/12, *Fédération des maisons de repos privées de Belgique (Femarbel) ASBL v Commission communautaire commune*, para 43.

O prvom pitanju Sud je zaključio da usluge sertifikovanja ulaze u područje primjene Direktive o uslugama jer su izričito spomenute u njenoj uvodnoj izjavi 33, te se nalaze na netaksativnom popisu djelatnosti obuhvaćenih tom direktivom. Takođe, Sud je utvrdio da bi tumačenje člana 3. stav 3. Direktive o uslugama, prema kojem bi državama članicama bilo dozvoljeno da na osnovu primarnog prava opravdaju zahtjev zabranjen članom 14. Direktive, lišilo odredbu iz tog člana svakog korisnog dejstva i prenebregnulo ciljano usklađivanje koje ta odredba vrši. Stoga je Sud odlučio da je propis države članice kojim se utvrđuje da društva koja su tijela za sertifikovanje moraju imati registrovano sjedište na nacionalnoj državnoj teritoriji u suprotnosti sa članom 14. Direktive o uslugama.[35] Pritom, kako navodi profesor Jasper Krommendijk,[36] „Sud pravde se nije upuštao u ocjenu o tome da li je nadležan za postupanje i da li je zahtjev za donošenje odluke o prethodnom pitanju dozvoljen s obzirom na to da u slučaju `Rina` ne postoji prekogranični element" (str. 1373) koji je nužan i korespondirajući Direktivi o uslugama kao pravnom instrumentu namijenjenom ukidanju prepreka razvoju uslužnih djelatnosti među državama članicama.[37] I opšti pravobranilac Cruz Villalón je smatrao da u slučaju "Rina" postoje hipotetički elementi koji se mogu, kako je navedeno, odnositi na situacije u kojima, prema odredbama sporne italijanske uredbe, poslovni subjekti sa poslovnim nastanom u drugim državama članicama ne bi mogli da pružaju usluge sertifikovanja u Italiji, te da italijanski poslovni subjekti od trenutka ostvarenja poslovnog nastana u drugoj državi članici takođe ne bi više mogli da obavljaju te usluge u Italiji.[38] Stoga je, u najmanju ruku, virtuozno djelovanje Suda pravde, koji se na specifičan način kreće izvan postavljenog zahtjeva za rješavanje prethodnih pitanja, proširujući taj zahtjev i na pitanja koja njime nisu postavljena, pretpostavljajući i predviđajući uslove koji ne postoje, odnosno koji bi eventualno mogli postojati u nekom budućem vremenu kada bi italijanska privredna društva (koja su u vrijeme vođenja postupka po prethodnom pitanju svoju djelatnost obavljala isključivo na teritoriji Republike Italije) odlučila da osnuju poslovni nastan u drugoj državi članici ili kada bi privredno društvo iz druge države članice pretendovalo da ostvari poslovni nastan u Republici Italiji. Pokazuje se opravdanim u ovom dijelu podsjetiti da je prvo područje u kojem je Sud donio presudu u području potpuno unutrašnje situacije (situacije koja se tiče samo države članice, bez prekograničnog elementa) područje slobodnog kretanja robe.[39]

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[35] Barnard, C., Snell, J. (2020). Free movement of legal persons and the provision of services. In: C. Barnard, S. Peers (eds.) *European Union Law*. Oxford University Press, 461-467.

[36] Krommendijk, J. (2017). Wide Open and Unguarded Stand our Gates: The CJEU and References for a Preliminary Ruling in Purely Internal Situations. *German Law Journal*, 1373-1374. Preuzeto 11.6.2021. sa https://www.researchgate.net/publication/331619729_Wide_Open_and_Unguarded_Stand_our_Gates_The_CJEU_and_References_for_a_Preliminary_Ruling_in_Purely_Internal_Situations.

[37] Monteagudo, J., Rutkowski, A., Lorenzani, D. (2012). The economic impact of the Services Directive: A first assessment following implementation, *Economic papers 456*. Preuzeto 11.6.2021. sa ec.europa.eu/economy_finance/publications, 8-83.

[38] Vidjeti prethodna razmatranja koja je opšti pravobranilac Cruz Villalón iznio u t. 11. do 16. Mišljenja koje je Sudu pravde vezano za slučaj ECJ, C-593/13 dostavio 10. marta 2015. godine, ECLI:EU:C:2015:159. Preuzeto 11.6.2021, sa http://curia.europa.eu/juris/document/document.jsf;jsessionid=BBFB035EF4F31A6AE6ADFE69E8DD9E3B?text=&docid=162761&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=18036155

[39] Hatzopoulos, V., Uyen Do, T. (2006). The Case Law of the ECJ concerning the Free Provision of Services: 2000 – 2005. Preuzeto 10.6.2021, sa https://www.coleurope.eu/study/european-legal-

Izvodeći iz navedenog dodatne zaključke, treba se osvrnuti na navode u presudi koji se tiču odnosa između odredaba primarnog i sekundarnog prava Evropske unije, u kojima Sud pravde daje veoma interesantno tumačenje. Naime, Sud u tački 38. Presude, između ostalog, ističe da kada bi se priznalo da "zabranjeni" zahtjevi na osnovu člana 14. Direktive ipak mogu biti opravdani na osnovu primarnog prava, to bi upravo dovelo do ponovnog uvođenja takvog ispitivanja od slučaja do slučaja na osnovu UFEU, za sva ograničenja slobode poslovnog nastanjivanja. Druga interesantna situacija odnosi se na tačku 40. Presude u kojoj se navodi da, iako je na osnovu odredbe iz člana 52. stav 1. UFEU državama članicama dozvoljeno da iz nekog od u toj odredbi navedenih razloga opravdaju nacionalne mjere koje ograničavaju slobodu poslovnog nastanjivanja, to ipak ne znači da zakonodavac Unije prilikom donošenja akta sekundarnog prava kao što je Direktiva o uslugama, kojom se konkretizuje osnovna sloboda iz UFEU, ne može predvidjeti određene izuzetke, tim prije kada, kao u predmetnom slučaju, odredba sekundarnog prava u biti samo ponovo preuzima ustaljenu sudsku praksu prema kojoj zahtjev kao što je onaj o kojem je riječ u glavnom postupku nije u skladu sa osnovnim slobodama na koje se mogu osloniti privredni subjekti. U dijelu ustaljene sudske prakse, Sud navodi presudu u predmetu *Commission of the European Communities v French Republic*.[40] Dakle, Sud konstatuje da zakonodavac Unije, posredstvom sekundarnog izvora prava, može predvidjeti izuzetke od odredaba UFEU, pravdajući svoj stav tvrdnjom da se sekundarnim izvorom prava konkretizuje osnovna sloboda iz Ugovora. Naime, član 51. UFEU jasno u stavu 1. propisuje da se odredbe Poglavlja 2 (Pravo poslovnog nastanjivanja) ne primjenjuju u određenoj državi članici na djelatnosti koje su u toj državi članici, makar i povremeno, povezane s izvršavanjem javnih ovlaštenja. U vezi s tim, iako italijanski nadležni organi ukazuju na činjenicu da u skladu sa njihovim nacionalnim propisima djelatnost sertifikovanja u oblasti građevinarstva predstavlja djelatnost povezanu sa izvršavanjem javnih ovlaštenja, Sud pravde smatra da to nije tako, pri čemu se poziva na ustaljenu sudsku praksu koja je sada objedinjena u Direktivi o uslugama. Štaviše, sudija Suda pravde, Christopher Vajda[41] je istakao da "u svom radu zakonodavac nije apsolutno vezan praksom Suda pravde Evropske unije koja se odnosi na član Ugovora. Prvo, tamo gdje je zakonodavac izvršio sveobuhvatnu harmonizaciju, Sud će cijeniti harmonizacionu mjeru, a ne Ugovor". Vajda u tom smislu podsjeća upravo na slučaj *Rina*, tj. na mišljenje koje je opšti pravobranilac Cruz Villalón dao u tom predmetu u kojem je, između ostalog, podsjetio da "prema ustaljenoj sudskoj praksi, kada je određena oblast predmet detaljne harmonizacije na nivou Evropske unije, svaka nacionalna mjera vezana za to mora biti cijenjena u svjetlu odredaba te harmonizacione mjere, a ne u svjetlu odredaba primarnog prava".[42] Iz navedenog proizlazi da je u nacionalnom pra-

studies/research-publications, 21.

[40] ECJ, C-334/94 EU:1996:90, para. 19.

[41] Vajda, C. (2015). Democracy in the European Union: What has the Court of Justice to Say? Preuzeto 13.6.2021, sa http://cilj.co.uk/wp-content/uploads/2016/11/Vol-42.pdf.

[42] Originalan tekst na engleskom jeziku: When the legislator legislates, it is not bound absolutely by the CJEU's case law on a Treaty article. First, where there has been complete harmonisation by the legislator, the CJEU will look to the harmonised measure, and not to the Treaty. (See, for example, ECJ, Case C-593/13 *Rina Services* [2015] EU:C:2015:399, Opinion of AG Cruz Villalón, footnote 7: 'It should be recalled that, according to settled case-law, where a sphere has been the subject of exhaustive harmonisation at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not of those of primary law.'

vu Republike Italije, u ovom slučaju, egzistirala uredba koja nije u skladu sa Direktivom o uslugama. Ta uredba je donesena 5. oktobra 2010. godine, dakle nakon 28. decembra 2009. godine. Tako je presuda Suda poslužila i u identifikaciji propisa države članice koji nije u skladu sa predmetnom direktivom. Pored navedenog, u pravnoj literaturi se navodi da lista nedozvoljenih (restriktivnih) zahtjeva iz člana 16. stav 2. Direktive o uslugama nije najpreciznije definisana u odredbama Direktive, ali da posredna pojašnjenja daje Sud pravde posredstvom sudske prakse, kao što je to upravo urađeno u slučaju *Rina.*[43] Ovaj slučaj je, prema Izvještaju Suda pravde Evropske unije za 2015. godinu[44], uz još dva slučaja[45], izdvojen kao posebno značajan u oblasti prava poslovnog nastanjivanja i slobodnog pružanja usluga.

4. SLUČAJ *CMVRO*[46]

Zahtjev za donošenje prethodne odluke u predmetu C-297/16 odnosi se na interpretaciju člana 15. Direktive o uslugama i člana 63. stav 1. UFEU. Upućen je u okviru glavnog spora koji se vodio između Komore veterinara Rumunije (CMVRO[47]) i Državnog tijela za veterinarsko zdravstvo i sigurnost hrane Rumunije[48], na čijoj je strani intervijent bilo Nacionalno udruženje rumunskih distributera veterinarskih proizvoda[49]. Predmet glavnog spora bio je poništenje Rješenja 31/2015 kojim je ukinuta obaveza podnošenja potvrde o upisu u jedinstveni registar veterinarskih praksi. U svojoj tužbi je CMVRO istakao da je predmetno rješenje u suprotnosti sa članom 4. tačka (i) Zakona br. 160/1998, kojim je propisano da veterinari imaju isključivo pravo maloprodaje i upotrebe ekoloških proizvoda, antiparazitskih proizvoda za posebne namjene i veterinarsko-medicinskih proizvoda. Pod isključivošću u navedenom smislu, podrazumijeva se pravo veterinara na odlučivanje, a to je pravo koje može postojati samo ako kapital veterinarskih apoteka ili drogerija drže isključivo ili bar u većinskom dijelu veterinari upisani u registar. Pored toga, CMVRO je istakao da Povelja veterinara predviđa da samo apoteke ili drogerije koje su u isključivom vlasništvu veterinara mogu biti upisane u jedinstveni registar veterinarskih praksi. Međutim, kako se navodi, poništenjem predmetnog rješenja poštovanje tog zahtjeva u vezi sa vlasništvom nad kapitalom više nije zagarantovano.

Državno tijelo za veterinarsko zdravstvo i sigurnost hrane je tvrdilo da je ukidanje obaveze podnošenja potvrde o upisu u jedinstveni registar veterinarskih praksi bilo nužno jer te odredbe nisu bile u skladu sa Direktivom o uslugama i jer su, prema noti Savjeta za

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[43] Tomkin, J. (2019). Freedom to provide services. In: M. Kellerbauer, M. Klemert, J. Tomkin (eds.) *Commentary on the EU Treaties and the Charter of Fundamental rights – A Commentary*. Oxford University Press, 702-743.

[44] Vidjeti: Synopsis of the work of the Court of Justice, the General Court and the Civil Service Tribunal, Annual report 2016, Luxemborurg 2015, 29-30. Preuzeto 13.5.2015, sa: https://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels.

[45] ECJ, C-25/14 and C-26/14 UNIS *and Beaudout Père et Fils*, EU:C:2015:821 i C-347/14 *New Media Online* EU:C:2015:709.

[46] ECJ, C-297/16, *Colegiul Medicilor Veterinari din România (CMVRO) v Autoritatea Naţională Sanitară Veterinară şi pentru Siguranţa Alimentelor*, ECLI:EU:C:2018:141.

[47] Rum. *Coleguiul Medicilor Veterinari din România.*

[48] Rum. *Autoritatea Naţională Sanitară Veterinară şi pentru Siguranţa Alimentelor.*

[49] *Asociaţia Naţională a Distribuitorilor de Produse de Uz Veterinar din România.*

tržišnu konkurenciju Rumunije[50], one mogle ograničavati tržišnu konkurenciju na maloprodajnom tržištu veterinarskih proizvoda.

Nacionalno udruženje rumunskih distributera veterinarskih proizvoda, koje je umiješano lice na strani tužioca, osporilo je tumačenje člana 4. tačka (i) Zakona br. 160/1 koje je dao CMVRO, prema kojem isključiva nadležnost koju veterinari imaju u vezi sa upotrebom određenih proizvoda ne povređuje pravo potrošača na kupovinu i posjedovanje veterinarsko-medicinskih proizvoda koje je čl. 67. i 69. Direktive 2001/82/EC Evropskog parlamenta i Savjeta od 6. novembra 2001. godine o zakoniku Zajednice o veterinarsko-medicinskim proizvodima[51] priznato vlasnicima i držaocima životinja.

Smatrajući da položaj veterinara obilježavaju određene posebnosti koje bi mogle opravdati drugačija rješenja od onih koja su sadržana u nacionalnom zakonodavstvu, Žalbeni sud u Bukureštu, odlučio je prekinuti glavni postupak i uputiti Sudu pravde Evropske unije dva prethodna pitanja:

Prvo, da li je u skladu sa pravom Evropske unije nacionalni propis kojim je predviđeno da veterinar ima isključivo pravo maloprodaje i upotrebe ekoloških proizvoda, antiparazitskih proizvoda za posebne namjene i veterinarsko-medicinskih proizvoda;

Drugo, ako je isključivo pravo maloprodaje i upotrebe, u naprijed pomenutom smislu, u skladu sa pravom Evropske unije, da li je u skladu sa tim pravom nacionalni propis prema kojem isključivo pravo maloprodaje za navedenu prodaju imaju poslovni subjekti koji su u većinskom ili isključivom vlasništvu veterinara?

U uvodnim napomenama u vezi sa odgovorom na prethodna pitanja, Sud je dao određena pojašnjenja koja se, između ostalog, odnose na propise Evropske unije. Istakao je da se iz člana 2. stava 2. tačke Direktive o uslugama vidi da su „zdravstvene usluge" abrogaciono isključene iz područja primjene te direktive, ali i da su, u skladu sa njenom uvodnom izjavom 22, isključene usluge one usluge „koje zdravstveni radnici pružaju pacijentima da bi ocijenili, zadržali ili poboljšali njihovo zdravstveno stanje", a to znači da se pružaju ljudima. Prema tome, iako djelatnosti maloprodaje i upotrebe ekoloških veterinarskih proizvoda, antiparazitskih proizvoda za posebne namjene i veterinarsko-medicinskih proizvoda stvarno ulaze u oblast zdravstva, one ipak nisu zdravstvene usluge koje se pružaju ljudima, pa u tim okolnostima te djelatnosti nisu obuhvaćene izuzetkom iz člana 2. stav 2. tačka 2. Direktive. Pored toga, budući da je nacionalni sud u velikoj mjeri u svom zahtjevu za odlučivanje u prethodnom postupku upućivao na Direktivu 2001/82/EC Evropskog parlamenta i Savjeta od 6. novembra 2001. godine o zakoniku Zajednice o veterinarsko-medicinskim proizvodima, koja ustanovljava nekoliko načela u vezi sa distribucijom veterinarsko-medicinskih proizvoda, Sud pravde je ukazao da, u skladu sa članom 3. stav 1. Direktive o uslugama, ako su njene odredbe u suprotnosti sa odredbom nekog drugog akta Evropske unije koji uređuje posebne aspekte pristupa ili izvođenja uslužne djelatnosti u specifičnim sektorima ili za specifične struke, prednost ima odredba drugog akta Evropske unije koja se primjenjuje na te specifične sektore ili struke. Dakle, u uvodnim napomenama, u svrhu pojašnjenja, Sud pravde rezonuje o položaju Direktive o uslugama u pravnom sistemu Evropske unije. Dodatno, Sud pravde ukazuje da član 68. stav 1. Di-

[50] Rum. *Consiliul Concurenţei.*

[51] Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products, *Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products OJ* L 311, 28.11.2001, 1–66.

rektive 2001/82/EC obavezuje države članice na preduzimanje mjera kako bi osigurale da jedino ovlaštena lica posjeduju ili imaju pod svojom kontrolom veterinarsko-medicinske proizvode ili tvari koje se mogu upotrebljavati kao veterinarsko-medicinski proizvodi koji imaju antiparazitska svojstva, pri čemu ne precizira šta se podrazumijeva pod „ovlaštenim licima". U tom smislu, Sud pravde konstatuje da treba odbiti tumačenje Direktive 2001/82/EC koje favorizuje i zastupa Udruženje distributera veterinarskih proizvoda, da se iz čl. 67. i 69. te direktive može izvesti pravo vlasnika životinja da sami na svoje životinje primjenjuju veterinarsko-medicinske proizvode koji su im prepisani. Sud dalje navodi da je cilj člana 67. Direktive 2001/82/EC da uredi izdavanje lijekova, ali i da on ne dovodi u pitanje striktnija nacionalna pravila o zaštiti zdravlja ljudi. S druge strane, iako član 69. te direktive vlasnicima životinja nalaže da u toku od pet godina moraju pružiti dokaz o upotrebi bilo kojeg veterinarsko-medicinskog proizvoda, Sud pravde konstatuje da ta odredba ipak ne precizira da vlasnici životinja imaju pravo da sami primjenjuju te proizvode. S obzirom na navedeno, Sud je konstatovao da je prethodna pitanja potrebno razmatrati jedino s obzirom na član 15. Direktive o uslugama.[52]

Prvim pitanjem se suštinski traži odgovor na pitanje da li je propis Rumunije kojim je utvrđen uslov da veterinari imaju isključivo pravo maloprodaje i upotrebe ekoloških proizvoda, antiparazitskih proizvoda za posebne namjene i veterinarsko-medicinskih proizvoda, u skladu sa odredbama člana 15. Direktive o uslugama. Propisivanje ovakvih zahtjeva u nacionalnim propisima država članica zahtijeva da oni budu nediskriminirajući, nužni i proporcionalni s obzirom na razloge zaštite opšteg interesa. Prema ocjeni Suda pravde, ništa u spisu ne navodi na zaključak da je zahtjev da djelatnost maloprodaje i upotrebe određenih veterinarskih proizvoda pružaju isključivo veterinari neposredno ili posredno diskriminirajući u smislu člana 15. stav 3. tačka (a) Direktive o uslugama. Štaviše, sud je ocijenio da je navedeni zahtjev nužan jer ima za cilj zaštitu javnog zdravlja, te je podsjetio da iz njegove ustaljene sudske prakse proizlazi da je zaštita javnog zdravlja nužna zbog zaštite opšteg interesa priznatog pravom Evropske unije[53] i da ona može opravdati donošenje mjere u državi članici koja ima za cilj da osigura sigurno i kvalitetno snabdijevanje javnosti lijekovima. U ovom dijelu je interesantno ukazati na okolnost da se u ovoj presudi Sud pravde, iako govori o javnom zdravlju, ne poziva na UFEU u čijem je u članu 168. stav 1. UFEU, između ostalog, propisano da se u utvrđivanju i sprovođenju svih politika i aktivnosti Evropske unije, osigurava visok stepen zaštite zdravlja ljudi i da djelovanje Evropske unije nadopunjuje nacionalne politike na način da je usmjereno prema poboljšanju javnog

[52] O postupcima pred Evropskom komisijom u vezi sa sprovođenjem člana 15. Direktive vidjeti: Evropski revizorski sud (2016). *Je li Komisija zajamčila efikasno provođenje Direktive o uslugama*, Tematski izvještaj u skladu sa članom 287. stav 4. UFEU, Kancelarija za publikacije, Luksemburbg, 55: eca.europa.eu

[53] ECJ, Joined cases C-159/12 to 161/12, *Alessandra Venturini v ASL Varese, Ministero della Salute, Regione Lombardia, Comune di Saronno, Agenzia Italiana del Farmaco* (AIFA) (159/12), and *Maria Rosa Gramegna v ASL Lodi, Ministero della Salute, Regione Lombardia, Comune di Sant'Angelo Lodigiano, Agenzia Italiana del Farmaco (AIFA*) (C160/12), and *Anna Muzzio v ASL Pavia, Ministero della Salute, Regione Lombardia, Comune di Bereguardo, Agenzia Italiana del Farmaco (AIFA*)(C161/12), para. 41. and 42, ECLI:EU:C:2013:791; ECJ, Joined cases C570/07 and C571/07, *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios* (C-570/07) and *Principado de Asturias* (C-571/07), para. 65. and 66, ECLI:EU:C:2010:300.

zdravlja, dok je u članu 35. Povelje o osnovnim pravima Evropske unije [54] propisano da svako ima pravo na pristup preventivnoj zdravstvenoj zaštiti i pravo na liječenje pod uslovima utvrđenim nacionalnim zakonodavstvom i praksom, te da se pri utvrđivanju i sprovođenju svih politika i aktivnosti Evropske unije osigurava visok stepen zaštite zdravlja ljudi. Dakle, umjesto poziva na relevantne odredbe primarnog prava, Sud pravde upućuje na svoju ustaljenu sudsku praksu iz čega se jasno vidi koliki značaj u tumačenju i primijeni, ali i u stvaranju prava evropske integracije imaju odluke Suda. Na ovakav način Sud pravde, stavljajući svoju praksu u ravan ugovornih odredaba, a opet ne izlazeći iz okvira svoje nadležnosti, šalje državama članicama i svojevrsnu poruku dajući smjernice u kojem bi eventualno pravcu trebalo da se konkretnije interveniše u ugovornim odredbama kako bi se na ravni evropske organizacije harmonizovale mjere u oblasti javnog zdravlja. O trećem uslovu iz člana 15. stav 3. Direktive o uslugama (proporcionalnost), upravo odredba tog stava, prema ocjeni Suda, pretpostavlja ispunjenje triju elemenata – da zahtjev mora biti podoban za sigurno ispunjenje postavljenog cilja, da ne smije da prekorači ono što je nužno za ostvarivanje tog cilja i da ga nije moguće zamijeniti drugim, blažim mjerama kojima se postiže isti rezultat. Što se tiče prvog elementa, treba da se vodi računa o posebnoj prirodi lijekova koja se ogleda u njihovom terapeutskom dejstvu po kojem se razlikuju od ostale robe[55], o čemu je već Sud zauzeo stav u presudi u spojenim predmetima C-171/07 and C-172/07, Apothekerkammer des Saarlandes and Others (C-171/07) and Helga Neumann-Seiwert (C-172/07) v Saarland and Ministerium für Justiz, Gesundheit und Soziales, ali i u još starijem slučaju C-369/88 Delattre[56]. Samim tim, Sud je priznao da zahtjev da se pravo prodaje lijekova utvrdi isključivo za lica koja obavljaju određenu vrstu profesije može opravdati garancijama i informacijama koje ona moraju pružiti potrošačima kako je to već rečeno u Presudi u predmetu C-531/06[57] i u već pomenutom predmetu "Delattre"[58]. Treba da se razumije, istakao je Sud, da se, iako se u sudskoj praksi na koju se upućuje u ovom predmetu, radi o njegovim izjašnjenjima u domenu lijekova za ljudsku upotrebu, određene bolesti životinja prenose na čovjeka, a i hrana životinjskog porijekla može dovesti u opasnost zdravlje ljudi kada potiče od bolesnih životinja ili nosilaca bakterija otpornih na liječenje, kao i u slučajevima kad sadrži ostatke lijekova korištenih za liječenje životinja. Sud smatra da ako se veterinarske tvari primjenjuju na nepravilan način ili u nepravilnoj količini, onda njihovo terapeutsko dejstvo može nestati ili njihova prekomjerna upotreba može uzrokovati prisutnost takvih ostataka u hrani životinjskog porijekla i potencijalno dugoročno uzrokovati otpornost određenih bakterija prisutnih u prehrambenom lancu na liječenje. Također, Sud je ocijenio i da takvi lijekovi proizvode samo posredna dejstva na zdravlje ljudi, te da obim margine prosuđivanja kojom raspolažu države članice u tom drugom području nije nužno isti kao onaj u području prodaje lijekova za ljudsku upotrebu. Međutim, isključivo pravo prodaje i upotrebe određenih veterinarskih

[54] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, 391–407.

[55] ECJ, Joined cases C-171/07 and C-172/07, *Apothekerkammer des Saarlandes and Others* (C-171/07) and *Helga Neumann-Seiwert* (C-172/07) *v Saarland and Ministerium für Justiz, Gesundheit und Soziales*, para. 31, ECLI:EU:C:2009:316.

[56] ECJ, C-369/88 *Delattre (Criminal proceedings against Jean-Marie Delattre)* [1991] ECR I1487, para. 54.

[57] ECJ, C531/06, *Commission of the European Communities v Italian Republic*, para. 58, ECLI:EU:C:2009:315.

[58] *Ibid*., para. 56.

tvari dodjeljuje se veterinarima upravo zato što oni imaju znanja i profesionalne kvalitete da sami primjenjuju te tvari na pravilan način i u pravilnim količinama ili da o tome pravilno poduče druga lica i to je prikladna mjera za zaštitu javnog zdravlja. Što se tiče drugog elementa, tj. da predmetni zahtjev ne smije prekoračiti ono što je nužno za ostvarenje tog cilja, Sud je podsjetio da je zaštita javnog zdravlja jedna od najvažnijih vrijednosti koja je zaštićena Ugovorom o Evropskoj uniji, te da države članice odlučuju o stepenu zaštite javnog zdravlja i načinu na koji će taj stepen dostići. S tim u vezi, iz spisa predmeta Sud pravde nije zaključio da je donošenjem nacionalnih propisa o kojima je riječ u glavnom postupku Rumunija prekoračila naprijed pomenutu marginu. Što se trećeg elementa tiče, koji se odnosi na to da ne postoji blaža mjera kojom se može postići isti rezultat, Sud se nije složio sa ocjenom Evropske komisije prema kojoj se cilj zaštite javnog zdravlja na jednako efikasan način može postići mjerom koja prodaju predmetnih proizvoda dozvoljava licima koja pripadaju drugim kvalifikovanim profesijama, poput farmaceuta ili drugih lica koja imaju napredno stručno obrazovanje u farmaceutskoj oblasti. Sud je, naime, zauzeo stav da oni nemaju posebno obrazovanje neophodno za brigu o zdravlju životinja, te stoga mjera koju predlaže Komisija ne može osigurati isti rezultat poput onoga koji je predviđen nacionalnim propisima. Dakle, u vezi sa prvim pitanjem koje je uputio nacionalni sud, Sud pravde je u Presudi, koju je donio 1. marta 2018. godine, konstatovao da član 15. Direktive o uslugama treba tumačiti na način da je u skladu sa njim nacionalni propis kojim je predviđeno da veterinari imaju isključivo pravo maloprodaje i upotrebe ekoloških proizvoda, antiparazitskih proizvoda za posebne namjene i veterinarsko-medicinskih proizvoda.

Što se tiče drugog pitanja, da li je u suprotnosti sa članom 15. Direktive o uslugama nacionalni propis koji nalaže da kapital organizacija koje prodaju veterinarsko-medicinske proizvode na malo mora biti u isključivom ili barem u većinskom vlasništvu jednog veterinara ili više njih, Sud je primarno cijenio član 15. stav 2. tačku (c) Direktive o uslugama koji među zahtjevima koje treba ocijeniti pominje i one koji su u vezi sa vlasništvom nad kapitalom. Prema tome, nacionalni propis kojim se predviđa takav zahtjev može se smatrati kompatibilnim sa članom 15. Direktive ako ispunjava tri uslova iz njegovog stava 3. Prva konstatacija koju je izveo Sud odnosi se na okolnost da u predmetnom slučaju nije sporno da nacionalni propis ispunjava prvi od uslova, koji se odnosi na nediskriminaciju na osnovu državljanstva. Što se tiče drugog uslova, jasno je da je donošenjem nacionalnog propisa zakonodavac želio, između ostalog, garantovati da veterinari efikasno kontrolišu prodavnice veterinarsko-medicinskih proizvoda na malo, a to je u svjetlu odgovora na prvo pitanje dio šireg cilja zaštite javnog zdravlja (razlog od opšteg interesa). I konačno, treći uslov je uslov proporcionalnosti koji zahtijeva da nacionalni propis bude podoban za sigurno ispunjenje postavljenog cilja. U vezi sa ovim uslovom, Sud je istakao da su veterinari koji su vlasnici kapitala organizacije koja prodaje veterinarsko-medicinske proizvode na malo podvrgnuti, za razliku od privrednih subjekata neveterinara, deontološkim pravilima kojima je cilj ublažiti potragu za dobiti, tako da se njihov interes za ostvarenjem dobiti može ublažiti odgovornošću koja im pripada, s obzirom na to da eventualno kršenje zakonskih ili deontoloških pravila ugrožava ne samo vrijednost njihove investicije, nego i samo njihovo profesionalno ponašanje. Naime, iako država članica može legitimno spriječiti da privredni subjekti koji ne obavljaju veterinarsku djelatnost mogu izvršavati odlučujući uticaj na upravljanje organizacijom koja prodaje veterinarsko-medicinske proizvode na malo, ništa ne može opravdati da su ti subjekti u potpunosti isključeni od vlasništva nad kapitalom tih organizacija jer nije isključeno da veterinari mogu imati stvarnu kontrolu

nad tim organizacijama i u slučaju da nemaju cjelokupan kapital u svom vlasništvu jer vlasništvo privrednih subjekata koji nisu veterinari nad ograničenim dijelom tog kapitala nije nužno prepreka takvoj kontroli. Prema tome, nacionalni propis poput onog iz glavnog postupka prekoračuje ono što je nužno za ostvarenje postavljenog cilja. Dakle, na drugo pitanje, prema zapažanju Suda pravde, treba odgovoriti na način da nije u skladu sa članom 15. Direktive o uslugama nacionalni propis koji nalaže da kapital organizacija koje prodaju veterinarsko-medicinske proizvode na malo mora biti u isključivom vlasništvu jednog veterinara ili više njih.

5. ZAKLJUČAK

Iz naprijed navedene analize sasvim sigurno se može izvesti zaključak da norme sadržane u Direktivi o uslugama ostaju prilično nejasne i nedovoljno razrađene, a to svakako ne ide u prilog njihovoj dosljednoj primjeni. Kroz uvodne izjave se Direktiva pozicionira u pravnom sistemu Evropske unije kao *omnibus* propis u odnosu na propise kojima se uređuju pojedini sektori i pojedine profesije. Međutim, kroz izvršenu analizu odluka Suda pravde Evropske unije sasvim sigurno se može izvesti zaključak da su te izjave u nedovoljnoj mjeri eksplanatorne, pa i sam Sud, nastojeći da objasni određene pojave i odnose, u velikoj mjeri poseže za svojom praksom, iako je namjera zakonodavca bila da Direktiva o uslugama prevashodno bude pravni akt kodifikacione i unifikacione prirode. Posezanje za sudskom praksom u mjeri u kojoj to čini Sud pravde potiskuje prirodno predodređenu potrebu da se pri tumačenju propisa Evropske unije vrši pozivanje na primarne izvore prava evropske organizacije i da se omogući pravnim subjektima da se u dovoljnoj mjeri i u razumnom roku upoznaju sa pozicijom Suda pravde.

U slučaju *Femarbel* Sud pravde se nije određivao u vezi sa tim da li djelatnosti koje obavljaju centri za dnevni i centri za noćni boravak potpadaju pod zdravstvene usluge u smislu člana 2. stav 2. tačka (f) ili socijalne usluge u smislu člana 2. stav 2. tačka (j) Direktive, već je provjeru prepustio nacionalnom sudu s tim što je dao određene smjernice koje se, u nedostatku adekvatnih odredaba Direktive o uslugama, zasnivaju na od Suda prepoznatom pravnom izvoru, koji je kao što smo naveli izvan pravnog okvira slučaja „Femarbel“, sudsku praksu i priručnik Komisije koji nema normativni, već samo instruktivni karakter. Samim tim, može se izvesti zaključak da je Sud pravde ocijenio zahtjev za donošenje odluke o prethodnom pitanju, a da u stvari odluka koju je donio ne sadrži odgovor na prethodno pitanje jer su smjernice date nacionalnom sudu nedovoljno precizne da bi on mogao da cijeni prirodu zdravstvenih i socijalnih usluga, kao i da ih pozicioniraju u odnosu na Direktivu o uslugama. Istina, kada je riječ o prirodi prethodnog postupka, Sud pravde ne bi trebalo da odlučuje ni o tumačenju nacionalnog prava, ni o usklađenosti tog prava s pravom Evropske unije, već o tome treba da odlučuje nacionalni sud na osnovu smjernica Suda pravde. Međutim, smjernice bi trebalo da budu utemeljene na valjanom pravnom osnovu, a ne na međusobno nepovezanim aktima harmonizacije na nivou evropske organizacije ili priručniku ilustrativnog karaktera. Premda, moramo podsjetiti da je u praksi bilo različitih situacija, te da se Sud pravde u određenim situacijama u postupku po prethodnom pitanju indirektno upuštao i u ocjenu o usklađenosti nacionalnog prava s pravom evropske organizacije. U svakom slučaju, naše je mišljenje da je Sud pravde trebalo preciznije da se odredi u vezi sa statusom navedenih zdravstvenih i socijalnih usluga jer je zbog dosljednosti u primjeni Direktive o uslugama od suštinskog značaja da se utvrdi status tih usluga u kontekstu ovog izvora sekundarnog zakonodavstva.

Utvrđivanjem kakvo je vršeno u slučaju *Rina*, da bi tumačenje člana 3. stav 3. Direktive o uslugama, prema kojem bi državama članicama bilo dozvoljeno da na osnovu primarnog prava opravdaju zahtjev zabranjen članom 14. Direktive, lišilo odredbu iz tog člana svakog korisnog dejstva i prenebregnulo ciljano usklađivanje koje ta odredba vrši, čini se da bi hipotetički mogla da postoji situacija u kojoj Direktiva ne bi bila u saglasnosti sa primarnim izvorom prava, a što svakako ne bi išlo u prilog jedinstvu pravnog sistema Evropske unije. U navedenom slučaju ne možemo da ne primijetimo da je Sud pravde veoma neobično postupio budući da se nije upustio u ocjenu svoje nadležnosti s obzirom na nedostatak prekograničnog elementa koji je nužan i korespondirajući Direktivi o uslugama kao pravnom instrumentu koji je namijenjen ukidanju prepreka razvoju uslužnih djelatnosti između država članica. Stiče se utisak da se kroz ovakvo djelovanje Suda pravde udaljavamo od svrhe Direktive o uslugama, te da, umjesto tumačenja njenih odredaba, Sud kroz uvođenje hipotetičkih elemenata o eventualnim situacijama koje bi mogle da se dogode u budućem vremenu, djeluje suprotno opredjeljenju koje su države članice imale u vrijeme izrade Direktive o uslugama na unutrašnjem tržištu.

Iz analize trećeg slučaja jasno se može uočiti da se Sud pravde, iako obrazlaže o javnom zdravlju, ne poziva na relevantne odredbe UFEU i Povelje o osnovnim pravima Evropske unije u kojima se utvrđuje pravo pristupa preventivnoj zdravstvenoj zaštiti i pravo na liječenje, te stepenu zaštite zdravlja ljudi. Dakle, umjesto poziva na relevantne odredbe primarnog prava, Sud pravde upućuje na svoju ustaljenu sudsku praksu iz čega se, kako smo naprijed naveli, jasno vidi koliki značaj u tumačenju i primjeni, ali i u stvaranju prava evropske organizacije imaju odluke Suda. Međutim, prema našem mišljenju, sudska praksa treba da je u službi dosljedne primjene pravne tekovine Evropske unije, a dosljednost podrazumijeva kretanje u okvirima izvora prava čije se tumačenje zahtijeva, što nije slučaj u odabranim primjerima iz sudske prakse. Takođe, potrebno je da se razumije da djelovanje koje ima za cilj da se stvaranje prava u velikoj mjeri vrši posredstvom sudske prakse ne ide u prilog jedinstvu bilo kojeg pravnog sistema, pa tako ni pravnog sistema Evropske unije.

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The Importance of the Jurisprudence of the Court of Justice of the European Union for the Consistent Application of the Service Directive

Summary: In this paper, we explore the implementation of the Directive on services in the internal market in the Member States of the European Union, with the focus on assessing the clarity of the norms of this acquis. We perform analysis of selected cases from the jurisprudence of the Court of Justice. The source of law in question, among other things, we consider with regard to its implementation in the areas of public health, certification and technical supervision, and in the field of veterinary services. The topic of our work is useful for the professional and scientific community due to the further clarification of the importance of the development of the case law of the Court of Justice for the uniform application of the Directive governing a very important segment of the internal market.

Keyword: internal market, directive, services, right of establishment, case law.

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Pravna prihvatiljivost nivoa bezbjednosti sistema elektronske identifikacije

Apstrakt: Sajber prostor se profiliše kao dominantna globalna arena za posredovanje u razmjeni roba i usluga. Sajber prostor zauzima sve veću ulogu u zadovoljavanju socijalnih potreba savremenog čovjeka. Usluge koje pružaju organi javne uprave se pomjeraju prema internetu i savremenim informaciono-komunikacionim tehnologijama. U takvom okruženju sve više dolazi do izražaja neophodnost i potreba da se pojedinac pouzdano identifikuje i da se potvrdi veza između stvarnog identiteta i identiteta koji se predstavlja u sajber prostoru. Elektronska trgovina, kao i elektronsko poslovanje u najvećem broju slučajeva podrazumjeva posjedovanje kretne kartice kao instrumenta bezgotovinskog platnog prometa. Kreditna kartica je, dakle, prepoznata i kao instrument kojim se potvrđuje identiteta pojedinca u okviru elektronskih interakcija, a banka se može posmatrati i kao pružalac usluga povjerenja u postupcima elektronske identifikacije. U velikom broju elektronskih transakcija u sajber prostoru se, često, ne javlja potreba za potvrdom identiteta putem kreditne kartice, jer se ne vrši nikakva finansijska transakcija. Istovremeno se javlja potreba da se pouzdano utvrdi identitet pojedinca u sajber prostoru. Intenzivan razvoj interneta, te transfer velikog broj poslovnih, ali i socijalnih aktivnosti u ono što se naziva sajber prostor doveo je do potrebe prilagođavanja pravnih rješenja kojima se oblikuje i reguliše internet, odnosno gore pomenuti sajber prostor. Tako se razvio i sistem pouzdanog digitalnog ovjeravanja transakcija i prepoznavanja identiteta pojedinca kod pojave u sajber prostoru. U Republici Srpskoj, ali i Bosni i Hercegovini usvojila zakonska regulativa kojiom se prepoznaju elektronski potpis, te usluge povjerenja i elektronske identifikacije. Evropska unija je, još 1999 godine usvojila regulativu vezanu za digitalne potpise koja je zamjenjena Regulativom o elektronskoj identifikaciji i uslugama povjerenja za elektronske transakcije na unutrašnjem tržištu broj 910/14, popularno nazvana eIDAS. Pored toga što se eIDAS regulativnom izjednačava pravna valjanost elektronskog dokumenta i elektronskog poslovanja sa tradicionalnim dokumentom i poslovanjem, uvode se i pravno definišu nivoi elektronske identifikacije. U okviru rada su, upravo i obrađeni nivoi elektronske identifikacije, te moguća rješenja u zakonodavstvu i praksi u R. Srpskoj i Bosni i Hercegovini.

Ključne riječi: usluga povjerenja, elektronska identifikacija, kvalifikovani digitalni potpis, napredni digitalni potpis, jednostavan digitalni potpis, uređaj za izradu pečata i potpisa.

Siniša Macan
Doktor nauka iz oblasti računarstva i informatike

1. UVODNI DEO

Razmjena robe, usluga i kapitala, ali i veliki broj socijalnih aktivnosti dobija potpuno novu dimenziju razvojem informaciono-komunikacionih tehnologija koja se desila u poslednjih trideset godina i zaživljavanjem sajber prostora. U poslednjoj deceniji, obim maloprodaje putem elektronske trgovine se povećao 3,2 puta. Globalni obim elektronske trgovine u 2014 godini je iznosio 1336 milijardi američkih dolara, dok je u 2020 godini povećan na 4280 milijardi američkih dolara[1], sa projektovanim trendom rasta do 2023 do cca 5900 milijardi dolara. Istovremeno, statistike pokazuju[2] da je broj korisnika interneta u svijetu oko 4,5 milijardi ljudi, dok društvene mreže koristi cca 3,8 milijardi ljudi.

Navedene cifre pokazuju izuzetan potencijal sajber prostora, ali otkrivaju i potrebu za pouzdanijom identifikacijom pojedinaca i smanjenjem rizika od raznih vrsta zloupotreba. U ovom kontekstu treba posmatrati i tržište u Republici Srpskoj i Bosni i Hercegovini. Korisnik usluge, kupac robe, ali i svaki pojedinac koji pristupa internetu ili društvenim mrežama iz Republike Srpske jeste dio globalnog sajber prostora sa svim prednostim i rizicima koje nosi ovaj prostor. U takvim novim uslovima sajber prostora javila se potreba za regulisanjem ponašanja, posebno u domenu identiteta i pristupa globalnoj mreži kod obavljanja raznih vrsta transakcija.

Sa aspekta zaštite prava i zakonitosti, izuzetno bitno je da se uspostavi nedvosmislena relacija između stvarnog i digitalnog identiteta prilikom obavljanja elektronskog poslovanja, ali i kod učešća na globalnim mrežama ili u transakcijama koje obavljaju javni organi sa građanima i pojedincima.

Republika Srpske, odnosno Bosna i Hercegovina se nalaze u postupku integracije sa Evropskom Unijom. Sporazum o stabilizaciji i pridruživanju između Evropske Unije, odnosno država članica, s jedne strane, i Bosne i Hercegovine, s druge strane potpisan je u Luksemburgu 16. juna 2008. godine. Sporazum je stupio na snagu 1. juna 2015. godine.[3] Sporazuma o stabilizaciji i pridruživanju je pravno obavezujući u Bosni i Hercegovini i u Republici Srpskoj, tako da postoji obaveza usklađivanja propisa u BiH sa propisima Evropske unije.[4]

Digitalne usluge, te reforma tržišta roba i usluga koje promoviše elektronsko poslovanje i trgovinu predstavlja jedan od prioriteta Evropske unije. U reformama koje su sprovedene na prostoru Evropske unije se značajno transformisalo zakonodavstvo vezano za digitalne identiteta, posebno u kontekstu bezbjednost. Transformacije koje su se dešavale su bazirane na naučno-tehnološkom razvoju što predstavlja jedan od temelja Ugovora o funkcionisanju Evropske unije.[5]

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[1] Dostupno na: https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/, (12.5.2021).

[2] Dostupno na: https://wearesocial.com/digital-2020, (12.5.2021).

[3] Dostupno na: https://www.dei.gov.ba/bs/stabilization-agreement, (12.5.2021).

[4] Čl. 70, st. 1 Sporazuma o stabilizaciji i pridruživanju između Bosne i Hercegovine i Evropske Unije glasi: „1. Strane priznaju važnost usklađivanja postojećeg zakonodavstva Bosne i Hercegovine sa zakonodavstvom Unije, kao i njegovog efikasnog provođenja. Bosna i Hercegovina će nastojati osigurati postepeno usklađivanje svojih postojećih zakona i budućeg zakonodavstva s pravnom tekovinom (acquisem) Unije. Bosna i Hercegovina će osigurati propisnu primjenu i provođenje postojećeg i budućeg zakonodavstva."

[5] Čl. 114 Ugovora o funkcionisanju Evropske Unije navodi u stavu 3: „Komisija, u svojim predlozima iz stava 1 koji se odnose na zdravlje, bezbjednost, zaštitu životne sredine i zaštitu potrošača, uzima za polaznu osnovu visoki nivo zaštite, naročito vodeći računa o svakom novom razvoju zasnovanom na naučnim činjenicama. I Evropski parlament i Savjet, u okviru svojih nadležnosti, teže postizanju ovog cilja."

Tržište digitalnih usluga, ali i društvene mreže i druge aktivnosti koje se ostvaruju putem interneta zahtjevaju oprezno regulisanje sajber prostora u kome su povezani računarski sistemi. „Sajber prostor je nefizički prostor u kome, prema trenutnom važećem zakonodavstvu, ne postoje nacionalne granice i uspostavljaju se nova pravila, bazirana na tehničkim mogućnostima računarskih sistema“[6]. „Sajber prostor je nova vrsta prostora koji se sastoji od Interneta, World Wide Web[7], odnosno osnovne infrastrukture i informacija o internetu i WWW, nakon poznatih i tradicionalnih četiri vrste prostora: kopno, more (okean), vazdušni prostor (atmosferski prostor, ili unutrašnji prostor) i svemir. Sajber prostor je zapravo peti prostor u kome savremeni čovjek živi, radi, igra se i posluje.“[8] U okviru sajber prostora, a posebno prilikom obavljanja digitalnih transakcija koje zahtjevaju određen nivo pouzdanosti, neophodno je da se obezbjede mehanizmi provjere identiteta lica.

Zemlje članice Evropske unije su u prethodnih 25 godina prepoznale potrebu za pouzdanom identifikacijom prilikom obavljanja transakcija u sajber prostoru, pa je tako 1999 godine usvojena prva direktiva koja se bavi digitalnim identitetima, odnosno digitalnim potpisima[9]. Kroz višegodišnju primjenu Direktive o elektronskim potpisima uspostavljeni su sistemi za digitalnu identifikaciju u zemljama članicama, ali su se javili problemi usklađenosti i interoperabilnosti sistema između država članica. Ovo je dovelo do potebe reforme propisa vezanih za digitalnu identifikaciju, kako bi se stvorili jednaki uslovi u svakoj zemlji članici. Shodno navedenom, usvojena je Uredba o elektronskoj identifikaciji i uslugama povjerenja za elektronske transakcije na unutrašnjem tržištu broj 910/14 (u daljem tekstu: *eIDAS*). Uredbom *eIDAS* je, prevashodno stvoren pravni osnov za uspostavu sistema elektronske identifikacije i usluga povjerenja koje će biti unificirane i priznate jednako u svim zemljama članicama Evropske unije. Definisani su postupci koji obezbjeđuju da se kroz proces akreditacije[10] postigne cilj da svaki pružalac usluge povjerenja, odnosno certifikaciono tijelu zadovoljava tehničke uslove u skladu sa standardima i preporukama. Postupak akreditacije se provodi na unificiran način[11], što garantuje ujednačene uslove na cijeloj teritoriji Evropske Unije.

Ono što je bitno jeste da su Uredbom 910/14 definisani i određeni nivoi bezbjednosti, a na osnovu kojih se utvrđuje pravna snaga usluge povjerenja elektronske identifikacije, odnosno digitalnog potpisa[12]

Bosna i Hercegovina, odnosno Republika Srpska imaju pravnu obavezu da usklađuju svoje zakonodavstvo sa zakonodavstvom Evropske unije.

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6 Macan, S. (2020). Procjena usklađenosti u postupku primjene zakona o digitalnom potpisu Republike Srpske i usaglašenost sa eIDAS regulativom. *Godišnjak Fakulteta pravnih nauka*, 10, 241-255.

7 World Wide Web – usluga interneta koja se najčešće koristi i koja omogućava pristup dokumentima putem linkova i otvaranjem novih stranica, skraćeno WWW. U osnovi, to je mreža stranica koje su povezane

8 Song, Y. Y. (2019). *Cybercryptography: Applicable Cryptography for Cyberspace Security*. Springer Nature Switzerland, https://doi.org/10.1007/978-3-319-72536-9;

9 Direktiva 1999/93/EZ Evropskog parlamenta i Savjeta od 13. decembra 1999. o okviru Unije za elektronske potpise.

10 U Odjeljku 2, eIDAS Uredbe broj 910/14 definisana je obaveza provjere usklađenosti, koju zahtjeva Nadzorno tijelo.

11 Uredba (EZ) br. 765/2008 o utvrđivanju zahtjeva za akreditaciju i za nadzor tržišta u odnosu na stavljanje proizvoda na tržište.

12 Shodno članu 3. eIDAS-a, digitalni potpis se definiše se kao “podaci u elektronskom obliku koji se prilažu ili logički povezuju s drugim podacima u elektronskom obliku i koje potpisnik koristi za potpisivanje”

U radu se obrađuju nivoi bezbjednosti elektronske identifikacije, uz pregled prakse u Bosni i Hercegovini, te susjednim zemljama. Istraživanje se vrši kroz analizu zakonskih i podzakonskih akata, regulative Evropske unije, te praksi koje se primjenjuju.

2. NIVOI POUZDANOSTI I BEZBJEDNOSTI KOD UTVRĐIVANJA DIGIRALNOG IDENTITETA

Pružanje usluga elektronske identifikacije[13] i elektronskih potpisa[14] ima za cilj da omogući pouzdanu identifikaciju kod pristupa sajber prostoru. Uredbom *eIDAS* je regulisano između ostalog i sledeće: [15]

- Utvrđivanje uslova pod kojima države članice priznaju sredstva elektronske identifikacije fizičkih i pravnih lica koja su obuhvaćena prijavljenim sistemom druge države članice,
- Utvrđuju se pravila za usluge povjerenja, posebno za elektronske transakcije,
- Uspostavlja se pravni okvir za elektronske potpise, elektronske pečate, elektronske vremenske žigove, elektronske dokumente, usluge elektronske preporučene dostave i usluge certificiranja za autentikaciju mrežnih stranica.

Kako bi se prikazala suština potrebe za elektronskom identifikacijom, neophodno je definisati pojmove realnog identiteta, odnosno pravnog i digitalnog identitata.

Svaki pojedinac se u realnom svijetu identifikuje i prepoznaje na osnovu svog porijekla, odnosno imena i prezimena, te datuma i mjesta rođenja. Realan identitet pojedinca čini skup svih podataka koji određuju tog pojedinca, a organi javne uprave kroz zakonom utvrđen postupak na osnovu skupa poznatih podataka o ličnosti utvrđuju jedinstvene identifikatore za svakog pojedinca. Ovako utvrđen identetet se naziva pravni identitet. Pravni identitet predstavlja podskup od svih podataka o nekom pojedincu, a na osnovu kojih se taj pojedinac identifikuje. Kao posljedica ovakvog postupka organi javne uprave pojedincima izdaju identifikacione dokumente.

Realni i pravni identitet se mogu opisati na sledeći način":[16]

1. Ličnost po rođenju dobija određene karakteristike koje mogu biti fizičke, geografske, vremenske i slično
2. Na osnovu karakteristika se kreira identitet ličnosti
3. Identitet ličnosti je skup podataka koji jedinstveno određuju ličnost, kao što su:
   a. Ime, prezime,
   b. Podaci o roditeljima i podaci o rođenju

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[13] Elektronska identifikacija je postupak korištenja ličnim identifikacionim podacima u elektronskom obliku koji nesporno predstavljaju fizičko ili pravno lice ili fizičko lice odgovorno u pravnom licu, prema eIDAS

[14] Elektronski potpis predstavljaju podaci u elektronskom obliku koji su pridruženi ili su logički povezani s drugim podacima u elektronskom obliku i koje potpisnik koristi za potpisivanje, prema eIDAS

[15] Macan, S., Karan, S. (2019). Ustavnopravni osnov primjene EU uredbe o elektronskoj identifikaciji i uslugama povjerenja u Republici Srpskoj. *Godišnjak Fakulteta pravnih nauka*, 9, 160-175.

[16] Macan, S. (2018). *Registri za identifikaciju građana – Zaštita ljudskih prava i efikasna državna uprava* (doktorska disertacija), Fakultet pravnih nauka Panevropskog univerziteta Apeiron, Banja Luka.

c. Fizički podaci o ličnosti i podaci koji se nadleđuju
d. Zdravstveni podaci
e. Socijalni podaci
f. Vještine ličnosti
g. Sklonosti su podaci koji karakterišu navike lica

4. U realnom svijetu su dostupni resursi kojima ličnost ima interes da pristupa
5. Ličnost dokazuje svoj identitet na osnovu dokumenta koje izdaje ovlašteni organ, odnosno identifikacionog dokumenta
6. U postupku prepoznavanja, odnosno autentikacije u realnom svijetu, se utvrđuje da li lice sa određenim identitetom (odnosno identifikacionom dokumentom) ima pravo da pristupi određenim resursima"
7. Pojavom sajber prostora javila se potreba da se ličnosti iz realnog svijeta identifikuju u digitalnom svijetu, te se na taj način kreira digitalni identitet. Prilikom obavljanja aktivnosti u sajber prostoru neophodno je stvoriti određen nivo pouzdanosti, odnosno povjerenja u digitalni identitet i njegovu vezu sa stvarnim identitetom. U realnom svijetu, te kod obavljanja određenih stvarnih transakcija ili traženja određenih usluga se često traže različiti nivoi identifikacije. Nekada je dovoljno da se pojedinac samo pojavi i traži određenu uslugu. Pružalac usluga uopšte nema potrebu da utvrđuje stvarni identitet, odnosno uspostavlja odnos povjerenja bez dodatnih provjera. Međutim, određene transakcije koje se dešavaju u stvarnom svijetu zahtjevaju utvrđivanje identiteta lica, a nekada je potrebno da se određene aktivnosti obavljaju uz prisustvo treće strane koja je, najčešće ovlaštena od strane države. Tako, kada se lice pojavi u prodavnici da kupuje određenu robu, uopšte se ne traži identifikacija lica. Ukoliko se na primjer, podnosi zahtjev za izdavanje dokumenta ili neku drugu uslugu, onda je potrebno da lice pokaže lični dokument i dovoljno je da se potpiše. Međutim, kod određenih poslovnih ili privatnih transakcija, kao što su zaključenje ugovora većih vrijednosti ili prodaja nekretnina, potrebno je da se identitet potvrdi ličnim dokumentom, a takve transakcije ovjerava notar. U realnom svijetu se, dakle, javlja potreba za različitim nivoima bezbjednosti kod identifikacije.

Analogno gore navedenom, u okviru *eIDAS* regulative su prepoznati različiti nivoi digitalne identifikacije[17]. Shodno potrebama iz realnog svijeta, gdje se, kod obavljanja ra-

[17] U preambuli 16 eIDAS regulative se već govori o nivoima identifikacije: „Nivo osiguranja identiteta trebale bi označivati stepen pouzdanosti u sredstva elektronske identifikacije pri utvrđivanju identiteta pojedinca, te na taj način osigurati da pojedinac koja se predstavlja pod određenim identitetom stvarno jest pojedinac kojoj je taj identitet dodijeljen. Nivo bezbjednosti zavisi od stepena pouzdanosti koji sredstvo elektronske identifikacije pruža u odnosu na traženi ili utvrđeni identitet pojedinca uzimajući u obzir postupke (na primjer dokazivanje identiteta i verifikaciju te autentikaciju), aktivnosti upravljanja (na primjer organ koje izdaje sredstva elektronske identifikacije i postupak izdavanja takvih sredstava) i provedene tehničke kontrole. Postoje različite tehničke definicije i opisi nivoa bezbjednosti koje su posljedica pilot-istraživanja finansiranih sredstvima Unije, kao i normiranja i međunarodnih aktivnosti. Posebno, opsežni pilot-projekti STORK i ISO 29115 odnose se, između ostalog, na nivoe 2, 3 i 4, o čemu bi trebalo voditi u najvećoj mogućoj mjeri računa pri određivanju minimalnih tehničkih zahtjeva, normi i postupaka za nizak, značajan i visok nivo bezbjednosti u smislu ove eIDAS, osiguravajući

zličitih transakcija ili radnji zahtjeva različit nivo identifikacije, u okviru Uredbe *eIDAS* se definišu tri nivoa bezbjednosti sredstava elektronske identifikacije[18]:

1. Nizak nivo bezbjednosti[19]
2. Značajan nivo bezbjednosti[20]
3. Visok nivo bezbjednosti[21]

Elektronski potpis predstavlja, shodno članu 3 *eIDAS* „podatke u elektronskom obliku koji se prilažu ili logički povezuju s drugim podacima u elektronskom obliku i koje potpisnik koristi za potpisivanje". Dakle i običan potpis u elektronskoj poruci zadovoljava navedenu definiciju elektronskog potpisa. Međutim, shodno nivoima bezbjednosti sredstava elektronske identifikacije, u odnosu na pravnu snagu, možemo definisati sledeće nivoe elektronske identifikacije:

1. Jednostavne elektronske potpise[22], koji predstavljaju bilo koji potpis u digitalnom obliku, kao što je potpis elektronske pošte. Ovakav potpis nema nikakvu pravnu težinu i može se posmatrati analogno situaciji iz realnog svijeta u kome pojedinac izvrši svoje predstavljanje bez pružanja ikakvih dokaza.
2. Napredne elektronske potpise[23], potpise kojim se može napraviti veza sa stvarnim identitetom. Jedinstven je za stvarnog korisnika, međutim nema pravnu snagu. Česta tehnička rješenja su vezana za upotrebu biometrijskih podataka kod identifikacije ili kod identifikacije korisnika korišćenjem nekih autentikacionih metoda.
3. Kvalifikovani elektronski potpis[24] je napredni elektronski potpis koji se kreira na kvalifikovanim sredstvima za izradu potpisa i kvalifikovanom certifikatu. Ima istu snagu kao svojeručan ovjeren potpis pojedinca. Kvalifikovanim elektronskim potpisom povećava se nivo sigurnosti u odnosu na napredni elektronski potpis

pri tome dosljednu primjenu eIDAS, posebno u pogledu visokog nivoa bezbjednosti koja se odnosi na dokazivanje identiteta za izdavanje kvalifikovanih certifikata. Utvrđeni zahtjevi trebali bi biti tehnološki neutralni. Neophodne bezbjedonosne zahtjeve trebalo bi biti moguće ispuniti primjenom različitih tehnologija.

[18] Čl, 8, st. 2 eIDAS.

[19] Čl. 8, st. 2, tač. a) eIDAS: „nizak nivo bezbjednosti odnosi se na sredstva elektronske identifikacije u kontekstu sistema elektronske identifikacije, koja pruža ograničen stepen pouzdanosti u odnosu na traženi ili utvrđeni identitet pojedinca, te se upućuje na tehničke specifikacije, norme i povezane postupke, uključujući tehničke kontrole čija je svrha smanjenje rizika zloupotrebe ili promjene identiteta"

[20] Čl. 8, st. 2, tač. b) eIDAS: „značajan nivo bezbjednosti se odnosi na sredstva elektronske identifikacije u kontekstu sistema elektronske identifikacije, koja pruža značajan stepen pouzdanosti u odnosu na traženi ili utvrđeni identitet pojedinca, te se upućuje na tehničke specifikacije, norme i povezane postupke, uključujući tehničke kontrole čija je svrha smanjenje rizika zloupotrebe ili promjene identiteta"

[21] Čl. 8, st. 2, tač. c) eIDAS: „visok nivo bezbjednosti se odnosi na sredstva elektronske identifikacije u kontekstu sistema elektronske identifikacije, koja pruža viši stepen pouzdanosti u odnosu na traženi ili utvrđeni identitet pojedinca, te se upućuje na tehničke specifikacije, norme i povezane postupke, uključujući tehničke kontrole čija je svrha smanjenje rizika zloupotrebe ili promjene identiteta"

[22] *Simple Electronic Signature* (SES)

[23] *Advanced Electronic Signature* (AdES)

[24] *Qualified Electronic Signature* (QES)

imajući u vidu da je certifikat izdat od tijela koje je prošlo postupak akreditacije i dobilo neophodne dozvole od strane organa vlasti. U postupku akreditacije izvršena provjera usklađenosti[25], te je potvrđena tehnička ispravnost i sigurnost opreme i postupaka od strane Nadzornih tijela[26] zemlje članice.

4. Elektronski potpisi imaju različite nivoe bezbjednosti, a pravna lica pružaju različite usluge, shodno utvrđenom nivou bezbjednosti u postupku identifikacije lica koje traži određenu elektronsku uslugu.

Shodno navedenom, elektronske usluge mogu biti dostupne shodno različitim nivoima identifikacije, a u zavisnosti od neophodne sigurnosti i zaštite podataka, odnosno povjerenja koja se očekuje kod pružanja usluga. Najveći nivo povjerenja se očekuje od kvalifikovanih digitalnih potpisa, te je u sledećem poglavlju obrađen postupak kojim se utvrđuje kako pravna lica stiču pravo da izdaju kvalifikovane digitalne potpise.

2.1. Pravna snaga kvalifikovanog digitalnog potpisa

Razvojem digitalnog tržišta, javila se potreba za stvaranjem jednakih uslova za izdavanje kvalifikovanih digitalnih potpisa, koji imaju jedinstvenu pravnu snagu kao i svojeručni potpisi. Takva potreba zahtjeva uspostavljanje takve zakonske regulative koja će garantovati da se na određenom tržištu izdaju kvalifikovani digitalni potpisi pod istim i sličnom uslovima, odnosno na opremi i uređajima koji garantuju zahtjevani nivo sigurnosti. Činjenica je da tržište Evropske unije predstavlja jedinstveno tržište, tako da je i u slučaju digitalnog tržišta neophodno obezbjediti interoperabilnost[27] sistema elektronske identifikacije što je jedan od ciljeva *eIDAS* regulative. Obavezu svake države članice EU jeste da prihvata sisteme kvalifikovane elektronske identifikacije u postupcima obavljanja elektronskog poslovanja, ali i pružanja elektronskih usluga, čime se postiže identično pravno tretirnje elektronskih dokumenata sa papirnim dokumentima.

Kako bi kvalifikovani digitalni potpis na cijeloj teritoriji Evropske unije, ali i u zemljama koje su u postupku pridruživanja imao identičnu pravnu snagu kao svojerečni potpis, neophodno je uspostaviti proces provjere tehničkih uslova i sigurnosti opreme

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[25] U čl. 17, st. 4, tač. e) eIDAS je navedeno da je zadatak nadzornih tijela: obavljanje revizija ili zahtijevanje od tijela za proocjenjivanje usklađenosti da provede procjenjivanje usklađenosti kvalificiranih pružatelja usluga povjerenja u skladu s čl. 20, st. 2. eIDAS;

[26] eIDAS regulativom je definisana obaveza uspostavljanja Nadzornih organa čija je uloga, shodno članu 17 stav (3) uredbe sledeća: (a) da nadzire kvalifikovane pružaoce usluga povjerenja s poslovnim sjedištem na području države članice koja ga određuje kako bi se osiguralo, putem prethodnih (ex ante) i naknadnih (ex post) aktivnosti nadzora, da ti kvalifikovani pružaoci usluga povjerenja i kvalifikovane usluge povjerenja koje oni pružaju ispunjavaju zahtjeve utvrđene u ovoj Uredbi; (b) da, prema potrebi, preduzima mjere u odnosu na nekvalifikovane pružaoce usluga povjerenja s poslovnim sjedištem na području države članice koja ga određuje, putem naknadnih (ex post) aktivnosti nadzora, kada primi obavijest da ti nekvalifikovani pružaoci usluga povjerenja ili usluge povjerenja koje oni pružaju navodno ne ispunjavaju zahtjeve utvrđene u ovoj Uredbi.

[27] U preambuli Uredbe eIDAS, u tačkama 19, 20 i 54 se definišu obaveze vezane za interoperabilnost, dok se članom 12 Uredbe definišu obaveze zemalja članica prilikom prihavljivanja sistema elektronske identifikacije.

putem kojih ovlaštena pravna lica[28] izdaju kvalifikovane digitalne potpise. Postupak u okviru koga se provjeravaju uslovi se naziva provjera usklađenosti. Provjeru usklađenosti vrše ovlaštena akreditaciona tijela[29] koja provode identične postupke i na objektivan način utvrđuju da li su ispunjeni svi uslovi da se digitalni certifikati koje izdaju ovlaštena pravna lica mogu smatrati pouzdanim kako bi izdavli kvalifikovane digitalne certifikate. Prema *eIDAS* regulativi su uspostavljena nadzorna tijela u svakoj državi članici i ova nadzorna tijela, angažuju akreditaciona tijela koja treba da, kroz proces provjere usklađenosti[30] utvrde tehničke, organizacione i sigurnosne uslove stvorene u pravnom licu koje treba da izdaje kvalifikovane digitalne certifikate.

Upravno proces akreditacije omogućava da se napravi razlika između naprednih digitalnih potpisa i kvalifikovanih digitalnih potpisa. Česta je situacija da i napredni i kvalifikovani digitalni potpisi koriste slična tehnološka rješenja. Međutim, kvalifikovani digitalni potpis su prošli dodatne provjere od strane ovlaštenih laboratorija i potpisi izdati na ovakvim uređajima imaju identičnu pravnu snagu kao svojeručni potpisi i mogu se koristiti u bilo kakvih digitalnim transakcijama, sa punom pravnom snagom. Dokumenta potpisana sa ovakvim kvalifikovanim potpisima i u sudskim postupcima imaju identičnu pravnu snagu kao klasična dokumenta. Napredni digitalni potpisi se mogu koristiti da se podigne nivo povjerenja između pravnih subjekata kod elektronskog poslovanja.

Na ovakav način je omogućeno da se, u zavisnosti od potrebe, koriste različiti nivoi bezbjednosti kod elektronske identifikacije, što će se opisati u sledećem poglavlju.

U Bosni i Hercegovini postoji obaveza usklađivanja regulative sa regulativom Evropske unije, a shodno ustavnoj strukturi nadležnost je Republike Srpske, odnosno entiteta u Bosni i Hercegovine za usluge elektronske identifikacije[31]. Prema gore navedenom, u Republici Srpskoj je usvojn zakon o elektronskom potpisu[32] u kome su uvedeni pojmovi koji su definisani *eIDAS* uključujući i kvalifikovani elektronski potpis[33]. Shodno pravnoj regulativi u Republici Srpskoj, postoji obaveza u kojoj pravna lica da bi izdavala kvalifikovane

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[28] Pravna lica koja izdaju kvalifikovane digitalne potpise se nazivaju certifikaciona tijela, odnosno *certification authorities* (CA)

[29] U preambuli 15 Uredbe (EZ) br. 765/2008 o utvrđivanju zahtjeva za akreditaciju i za nadzor tržišta se navodi: „Imajući u vidu da je svrha akreditacije osigurati adekvatnu izjavu o osposobljenosti određenog pravnog lica za izvođenje aktivnosti vezanih za procjenu usklađenosti, države članice ne trebaju imati više od jednog akreditacionog tijela i trebaju osigurati da to tijelo bude organizovano tako da se garantuje objektivnost i nepristranost njegovih djelatnosti. Pomenuta državna akreditaciona tijela trebaju djelovati nezavisno od komercijalne djelatnosti procjenjivanja usklađenosti. Zbog toga je potrebno predvidjeti da države članice osiguraju da se smatra da državna akreditaciona tijela u vršenju svojih provode javna ovlaštenja bez obzira na njihov pravni status.“

[30] U čl. 17, st. 4, tač. e) eIDAS je navedeno da je zadatak nadzornih tijela: obavljanje revizija ili zahtijevanje od tijela za proocjenjivanje usklađenosti da provede procjenjivanje usklađenosti kvalificiranih pružatelja usluga povjerenja u skladu s čl. 20, st. 2. eIDAS;

[31] Čl. 3, st. 3, tač. a) Ustava Bosne i Hercegovine glasi: „a) Sve funkcije i ovlaštenja koja nisu ovim Ustavom izričito povjerena institucijama Bosne i Hercegovine pripadaju entitetima.“. Oblast elektronske identifikacije i usluga povjerenja nije povjerena institucijama BiH.

[32] Zakonom o elektronskom potpisu Republike Srpske (*Službeni glasnik Republike Srpske*, br. 106/15 i 83/19).

[33] Zakonom o elektronskom potpisu Republike Srpske, članom 4 definiše kvalifikovani elektronski potpis.

digitalne potpise moraju da dobiju dozvolu resornog ministarstva[34], a na osnovu izvještaja Komisije[35] koja provjerava uslove kod tog pravnog lica. Ova odredba zakonodavstva u R. Srpskoj je u suprotnosti sa *eIDAS*[36].

U sledećem poglavlju su navedeni primjeri iz Republike Hrvatske i Republike Srbije vezano za nivoe identifikacije, odnosno mogućnosti provjere identiteta kod pružanja usluga povjerenja.

2.2. Primjeri nivoa bezbjenosti digitalnog potpisa

Pravna lica, te organi javne uprave prikupljaju i obrađuju podatke o građanima shodno zakonskoj regulativi. Ovakav način obrade podataka omogućava kreiranje usluge povjerenja elektronske identifikacije. Pravna lica koja obrađuju podatke o građanima mogu da pružaju usluge elektronske identifikacije, te da omoguće da se, uz određene metode autentikacije vrši provjera identiteta na osnovu koje se vrši pristup uslugama.

Bankarski sistem i regulatorni okvir koji se uspostavlja omogućio je da se na relativno pouzdan način prikupljaju podaci o građanima. Dalje, kroz kartično poslovanje je omogućeno da se koriste postupci provjere identiteta kod pružanja elektronskih usluga i plaćanje. Na ovaj način je omogućeno da se podaci iz banaka mogu koristiti kod pružanja usluga povjerenja.

Ovakav pristup, uz adekvatno zakonsko regulisanje koje ima osnov u *eIDAS* regulativi je omogućio da se na fleksibilan način omogući pružanje digitalnih usluga povjerenja.

Tako imamo primjer u Republici Hrvatskoj u kojoj je podignuta platforma „e Građani – informacije i usluge“[37]. Uspostavljen je Nacionalnog Identifikacioni i Autentifikacioni Sistem (NIAS) koji „posreduje između pojedinih usluga u sistemu e-Građani i izdavaoca potvrda – elektronskih potvrda identiteta krajnjih korisnika koji se služe tim uslugama. NIAS provjerava korisnikov identitet i omogućuje mu pristup pojedinim e-uslugama javnog sektora. Ujedno mu omogućuje pojedinačnu i jedinstvenu odjavu iz usluga koje koristi.“[38]

Sistemom e-Građani u Republici Hrvatskoj je kreirana jedinstvena platforma koja, shodno *eIDAS* regulativi omogućava različite nivoe sigurnosti pristupa. Tako su definisani sledeći nivoi pristupa u Republici Hrvatskoj[39]:

1. Visok nivo bezbjednosti je definisan za ukupno pet sistema pristupa i u pitanju su

[34] Čl. 22, st. 1 Zakona o elektronskom potpisu Republike Srpske glasi: „Certifikaciono tijelo iz člana 21. ovog zakona, koje izdaje kvalifikovane elektronske certifikate, može da obavlja usluge na osnovu dozvole koju izdaje Ministarstvo za naučnotehnološki razvoj, visoko obrazovanje i informaciono društvo“

[35] Čl. 22, st. 2 Zakona o elektronskom potpisu Republike Srpske glasi: „(2) Na osnovu zahtjeva certifikacionog tijela za izdavanje dozvole, ministar imenuje Komisiju za provjeru ispunjenosti uslova za obavljanje usluga izdavanja kvalifikovanih elektronskih certifikata (u daljem teksu: Komisija), koja ima tri člana.“

[36] Macan (2020), 241-255.

[37] Dostupno na: www.gov.hr, (4.5.2021).

[38] Dostupno na: https://nias.gov.hr/authentication/Step1, (4.5.2021).

[39] Dostupno na: https://nias.gov.hr/Authentication/Step2, (4.5.2021).

kvalifikovana certifikaciona tijela regustrovana u Republici Hrvatskoj[40]

2. Značajan nivo bezbjednosti, gdje se nalazi ukupno dvanaest pružaoca usluga povjerenja[41]. Uglavnom su u pitanju banke. Ovakva vrsta autentikacije je dozvoljena, s tim što nije moguće pristupati uslugama koje zahtjevaju kvalifikovan digitalni potpis
3. Nizak nivo bezbjednosti, gdje se nalaze ukupno četiri pružaoca usluge digitalne identifikacije[42]
4. Shodno gore navedenom, Republika Hrvatska je omogućila pristup elektornskim servisima putem 21 pružaoca usluga elektronske identifikacije u momentu pisanja rada. Sitaucija sa pružaocima usluga povjerenja se mijenja protokom vremena. U zavisnosti od zahtjevanog nivoa sigurnosti, omogućava se pristup određenim servisima.

Republika Srbija je uspostila platformu eUprava[43]. Prijava na usluge je moguća na tri načina[44]:

1. Kvalifikovanim digitalnim certifikatom, koji „predstavlja najviši nivo pouzdanosti i korisnicima koji se prijavljuju na ovaj način dostupne su sve usluge. Korisnici koji se prijavljuju na ovaj način mogu samostalno da generišu niže nivoe poverenja (osnovni i srednji nivo pouzdanosti) kao i da elektronski potpisuju dokumenta i zahjteve."
2. Dvofaktorska autentikacija, „prijava mobilnim telefonom (dvofaktorska autentikacija) predstavlja srednji nivo pouzdanosti i korisnicima koji se prijavljuju na ovaj način dostupno je 98% usluga. Prednost ovog načina prijavljivanja jeste u tome što korisnicima nisu potrebni kvalifikovani elektronski sertifikati, već instalirana aplikacija na njihovim pametnim uređajima (mobilni telefon ili tablet)." Međutim, na ovaj način nije moguće vršiti pravno verifikovane transakcije.
3. Prijava korisničkim imenom i lozinkom, „predstavlja osnovni nivo pouzdanosti i ovim korisnicima dostupan je ograničen broj usluga."
4. U Republici Srbiji, dakle, nisu još uvjek prepoznate banke ili druge institucije kao pružaoci usluga povjerenja.

Bosna i Hercegovina je susjedna zemlja Republike Srbije i Republike Hrvatske, sa kojima vrši veliki obim robne razmjene i koje pripadaju Evropskoj uniji, odnosno CEFTA sporazumu[45]. Interes Bosne i Hercegovine i Republike Srpske je da ima slične uslove za

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[40] Na stranici https://nias.gov.hr/Authentication/Step2 se nalazi pet kvalifikovanih sistema elektronske identifikacije među kojima je elektronska lična karta, FINA kvalifikovani potpis, FINA kvalifikovani pečat i drugi kvalifikovani pružaoci usluga povjerenja (4.5.2021).

[41] Na stranici https://nias.gov.hr/Authentication/Step2, se nalazi ukupno dvanaest banaka, među kojima su Erste banka, Zagrebačka banka, OTP banka, Istarska banka, Zavod zdravstvenog osiguranja i drugi, (4.5.2021).

[42] Na stranici https://nias.gov.hr/Authentication/Step2, se nalazi ukupno četiri pružaocu usluga povjerenja niskog nivoa bezbjednosti, među kojima su pošta i telekom, (4.5.2021).

[43] Dostupno na: https://euprava.gov.rs/, (2.5.2021).

[44] Dostupno na: https://prijava.eid.gov.rs/, (2.5.2021).

[45] Republika Srpska i Bosna i Hercegovina najveći deo svoje poslovne razmene obavlja sa tržištem Evropske unije i zemalja CEFTA sporazuma. Prema podacima Spoljno-trgovinske komore

pristup digitalnim uslugama kao susjedne zemlje, odnosno kao zemlje Evropske unije. U sledećem poglavlju je dat kratak pregled po pitanju mogućnosti pouzdane digitalne identifikacije u BiH.

3. DIGITALNA IDENTIFIKACIJA U REPUBLICI SRPSKOJ

Članom 3. Ustava Bosne i Hercegovine su navedene direktne nadležnosti Bosne i Hercegovine.[46] Sve što nije nadležnost Bosne i Hercegovine jeste nadležnost entiteta. Usluge povjerenja i elektronska identifikacija jesu u nadležnosti Republike Srpske[47]. Slično kao u susjednim zemljama, pravna regulativa, ali i praksa u Republici Srpskoj treba da omogući uslove za efikasnu elektronsku identifikacije. Kako je ranije navedeno, u Republici Srpskoj je usvojen zakon o elektronskom potpisu[48], a ranije je usvojen i zakon na nivou Bosne i Hercegovine.[49]

U Republici Srpskoj postoji pravni osnov za vođenje registara kvalifikovanih certifikacionih tijela[50]. Također, shodno pravnoj regulativi u Republici Srpskoj, postoji osnov da MUP Republike Srpske pruža usluge kvalifikovane elektronske identifikacije[51].

Banke u Republici Srpskoj i Bosni i Hercegovini provode procedure kojima se na pouzdan način utvrđuje identitet klijenata.

Međutim, u Republici Srpskoj nisu uspostavljeni servisi pouzdane elektronske identifikacije niti je uspostavljena praksa slična praksama u susjednim zemljama ili zemljama Evropske unije.

4. ZAKLJUČAK

Intenzivan razvoj informaciono-komunikacionih tehnologija je indukovao prilagođavanje pravne regulative i propisa vezanih za pružanje digitalnih usluga. U poslednjih trideset godina se kreirao specifičan nematerijalni prostor koji je nazvan sajber prostor, kome savremeni čovjek pristupa, obavlja poslovne transakcije, ali i zadovoljava različite socijalne potrebe.

Bosne i Hercegovine, od ukupne robne razmene u 2016 godini, 65.18% se odnosi na zemlje Evropske Unije, a 13.5% na zemlje CEFTA ugovora. Dostupno na: http://www.mvteo.gov.ba/izvjestaji_publikacije/izvjestaji/default.aspx?id=8622&langTag=bs-BA, (27.3.2018.).

[46] Čl. 3, st. 1 Ustava Bosne i Hercegovine glasi: Sledeća pitanja su u nadležnosti institucija Bosne i Hercegovine: a) Spoljna politika, b) spoljno-trgovinska politika, c) Carinska politika, d) Monetarna politika, kao što je predviđeno članom VII Ustava, e) Finansiranje institucija i međunarodnih obaveza Bosne i Hercegovine, f) Politika i regulisanje pitanja imigracije, izbjeglica i azila, g) Provođenje međunarodnih i međuentitetskih krivičnopravnih propisa, uključujući i odnose sa Interpolom, h) Uspostavljanje i funkcionisanje zajedničkih i međunarodnih komunikacijskih sredstava, i) Regulisanje međuentitetskog transporta, j) Kontrola vazdušnog saobraćaja

[47] Macan, Karan (2019). 160-175.

[48] Zakonom o elektronskom potpisu Republike Srpske. *Službeni glasnik Republike Srpske,* br. 106/15 i 83/19.

[49] Zakon o elektronskom potpisu Bosne i Hercegovine. *Službenom glasniku BiH*, br. 91/06

[50] Čl. 22, st. 1 Zakona o elektronskom potpisu Republike Srpske glasi: „Certifikaciono tijelo iz člana 21. ovog zakona, koje izdaje kvalifikovane elektronske certifikate, može da obavlja usluge na osnovu dozvole koju izdaje Ministarstvo za naučnotehnološki razvoj, visoko obrazovanje i informaciono društvo“

[51] Macan, S. (2019). Evropski okvir za pružanje usluga povjerenja i uloga MUP Republike Srpske u pružanju usluga povjerenja u Republici Srpskoj. *Časopis MUP Republike Srpske Bezbjednost, policija, građani*, 2.

Identifikacija u ovakvom prostoru i pouzdana potvrda da je stvarni i pravni identitet jednak digitalnom identitetu koji se pojavljuje u sajber prostoru se profilisala kao potreba koja garantuje određen nivo bezbjednosti digitalnih usluga.

Radom je prikazan kratak pregled razvoja digitalnih usluga i metoda digitalne identifikacije koja je prepoznata kroz pravnu regulativu Evropske unije. Iskazujući volju da se pristupi Evropskoj uniji i Bosna i Hercegovina je preduzela pravne obaveze da uskladi svoje zakonodavstvo sa zakonodavstovom Evropske unije. Tako je u zakonodavstvu Evropske unije prepoznat različit nivo realizacije elektronske identifikacije, u zavisnosti od tehničkih rješenja, ali i potreba bezbjednosti u postupku elektronske identifikacije.

Određene usluge koje se pružaju u sajber prostoru zahtjevaju izuzetno visok nivo pouzdanosti, tako da je uspostavljen pravni osnov za korišćenje kvalifikvanih digitalnih certifikata. Ovakvi certifikati se izdaju od pravnih lica koje ispunjavaju određene uslove i koji se posebno provjeravaju i dobijaju dozvole države da vrše pružanje usluga identifikacije. Svi elektronski dokumenti i postupci koji se dešavaju u sajber prostoru, a koji su verifikovani ovakvim certifikacima imaju identičnu paravnu snagu kao i svojeručno potpisano i ovjereni dokumenti i postupci.

Često postoji potreba za uslugama u kojima se ne zahtjeva visok nivo sigurnosti, tako da su pravno prepoznati i ovakvi nivoi identifikacije.

U radu su prikazani primjeri iz susjednih zemalja, gdje je vidljivo da se koriste različiti nivoi identifikacije, te se omogućava pristup određenim uslugama elektronskim putem. Usluge su dostupne u zavisnosti od zahtjevanog nivoa bezbjednosti, za različite metode elektronske identifikacije. Tako da se za određene usluge traži kvalifikovani digitalni potpis, a za određene usluge ne postoji takav zahtjev. Ono što je ključno, jeste činjenica da je građanima omogućen određen nivo fleksibilnosti i dostupnosti usluga, shodno njihovim potrebama.

U Bosni i Hercegovini i u Republici Srpskoj ne postoje uspostavljeni sistemi elektronske identifikacije, niti prepoznati nivoi pouzdanosti koji su definisani zakonodavstvom Evropske unije. Shodno navedenom, građani Bosne i Hercegovine nemaju isti nivo usluga koje postoje u susjednim zemljama, te u zemljama Evropske unije.

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Pravni izvori

Evropski parlament i Evropske Savjet, Uredba o elektronskoj identifikaciji i uslugama povjerenja za elektronske transakcije na unutrašnjem tržištu (eIDAS) broj 910/14

Zakonom o elektronskom potpisu Republike Srpske. *Službeni glasnik Republike Srpske,* br. 106/15 i 83/19.

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Legal Acceptability of the Security Level of the Electronic Identification System

Summary: Cyberspace is becoming the dominant global arena for the exchange of goods and services. In addition, cyberspace is playing an increasing role in meeting the social needs of the modern human being. Services provided by public administrations are moving to the Internet and modern information and communication technologies. In such an environment, the need for reliable identification of an individual in cyberspace becomes increasingly demanding. E-commerce, as well as e-business in most cases implies the possession of bancing cards as an instrument of non-cash payment transactions. Therefore, a banking card is recognized as an instrument that confirms the identity of an individual within electronic interactions, and the bank can also be seen as a provider of trust services in electronic identification procedures. In a large number of electronic transactions in cyberspace, there is often no need for identity verification via credit cards, because no financial transaction. At the same time, there is a need to reliably determine the identity of an individual in cyberspace. The intensive development of the Internet, the transfer of a large number of business and social activities in cyberspace has led to the need to adapt legal solutions that regulate some activities on the Internet, or the mentioned cyberspace. Thus, a system of reliable digital authentication of transactions and recognition of an individual's identity when appearing in cyberspace has been developed. In the Republic of Srpska, but also in Bosnia and Herzegovina, legislation has been adopted that recognizes electronic signatures, as well as trust and electronic identification services. Back in 1999, the European Union adopted a regulation for digital signatures, which was replaced by the Regulation on electronic identification and trust services for electronic transactions in the internal market number 910/14, popularly called eIDAS. eIDAS regulations legally regulate the met-

hods of digital identification, as well as the legal validity of electronic documents and electronic business with traditional documents and business. The paper studies the levels of electronic identifications, possible solutions in legislation and practice in the Republic of Srpska and Bosnia and Herzegovina and presents examples from neighboring countries.

Key words: trust service, electronic identification, qualified digital signature, advanced digital signature, simple digital signature, devices for creation of digital signature and digital stamp.

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Relationship Between the Police and the Prosecutor's Office in Individual European Countries

(experiences that can be used in the process of investigating traffic offences in Bosnia and Herzegovina)

Abstract: One of the main characteristics of the investigation in Germany is that the public prosecutor is in charge of investigation and the role of the police mainly depends on whether and to what extent the public prosecutor will entrust them with undertaking investigative actions. France has retained the division into inquests and investigation, as well as a powerful investigative judge. When a formal investigation is optional (it is obligatory only in the event of crimes) and is not conducted, inquests are the only form of preliminary proceedings. Preliminary investigations (inquests) are conducted by the judicial police, at the request of a public prosecutor or ex officio. The Criminal Procedure Code of the Republic of Italy, which was adopted in 1988 and which came into force in 1989, with its subsequent amendments, is significant, among other things, for introducing the accusatory model of criminal procedure instead of the inquisitorial one included in the Criminal Procedure Code of 1930 that was revoked when the new Criminal Procedure Code came into force.

Ključne riječi: prosecutor, police, investigation, investigation supervision.

Miroslav Janjić
Tužilaštvo Bosne i Hercegovine

1. THE RELATIONSHIP BETWEEN THE POLICE AND THE PROSECUTOR'S OFFICE IN CRIMINAL PROCEEDINGS OF THE FEDERAL REPUBLIC OF GERMANY

Pursuant to the German Constitution, certain federal states do not have legislative competences in the areas of criminal law and procedure, that is, the overall criminal legislation in Germany is federal legislation. The main source of German procedural criminal law is the Criminal Procedure Code of 1877 (Reichgesetzblatt p. 253), which is based on the German Constitution and the European Convention on Human Rights ratified by Germany in 1952 (although not implemented at the constitutional level).

Apart from the Federal Public Prosecutor's Office and a special body attached to the Federal Court (headed by the Federal Public Prosecutor General), whose jurisdiction is limited to prosecuting certain defined crimes against the interests of the Federal Republic and certain defined serious crimes in cases of "particular importance", criminal prosecution is under the jurisdiction of the federal states. The Federal Public Prosecutor General is subordinate to the Federal Minister of Justice, and is hierarchically superior to the Federal Public Prosecutors, but has no jurisdiction over them in the federal states. Each federal state has its own Public Prosecutor's Office which is subordinate to the Federal Ministry of Justice.[1]

Pursuant to the Criminal Procedure Code, as well as pursuant to the Law on Courts, a public prosecutor is heading the procedure during the entire investigation period. Although conducted by the police and their (technical) units, all investigations are conducted under the responsibility of the public prosecutor. Although according to the law, the police are only an aid to the public prosecutor, in practice it is mostly the police that conduct investigations. The police intervene either on their own initiative taking protective measures to avoid the concealing of facts of the case, or intervening as instructed by the Public Prosecutor.

One of the main characteristics of the investigation in Germany is that a public prosecutor is in charge of investigation and that the role of the police largely depends on whether and to what extent the public prosecutor will entrust them with undertaking investigative actions. Upon the completion of the investigation, the activity of the police[2], in theory, ends. Whether an indictment will be filed or not is the exclusive right of the public prosecutor, that is, the public prosecutor has a monopolistic position in relation to the police, while the police have no discretional powers and as soon as the investigation is completed, all files must be forwarded without delay to the Public Prosecutor, who is the only one with the power to decide whether there is sufficient evidence for prosecution in court.[3]

In most cases, the public prosecutor entrusts certain investigative actions and even entire investigation to the police[4] and, therefore, the main characteristic of the investigation in Germany is that the public prosecutor is in charge of investigation and that the role of the police largely depends on whether and in what extent the public prosecutor will entrust them with undertaking investigative actions.[5]

In German preliminary proceedings, the public prosecutor is a dominant figure. He/she receives information from citizens and he/she himself must investigate a reported case or supervise police inquests carried out by the police on his instructions. In order to be able to investigate effectively, he/she has the right to use means of coercion – arrest, search, seizure of items, verification of identity, etc., and some of these measures are allowed only if there is a risk of delay. The Public Prosecutor may also apply coercive measures. In addition to ordering the defendant into preventive detention, which, as a

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1 *Javno tužilaštvo, policija, krivični sud i suzbijanje kriminaliteta.* (2008). Beograd: Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, 298 – 307.

2 Bošković, A. *Saradnja javnog tužioca i policije u krivičnoprocesnim zakonodavstvima sa konceptom tužilačke istrage,* 577-591.

3 *Javno tužilaštvo, policija, krivični sud i suzbijanje kriminaliteta.* (2008). Beograd: Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, 298 – 307.

4 *Ibid.*

5 Bošković, 577-591.

measure of restricting personal freedom, is reserved for an out-of-court judge, they can also take the witness's assertive oath. The search and the seizure of items, or the supervision of postal and other communications ordered in the event there is a risk of delay are subject to judicial supervision. A new division of powers between the out-of-court judge and the public prosecutor was introduced into German law in 1975 with the intention of speeding up preliminary proceedings.[6]

The German Criminal Procedure Code stipulates that depending on the importance of investigation into a particular criminal offence, a significant part of the police force that isproviding assistance to a Public Prosecutor's Office as its assistants reports directly to the public prosecutor.[7]

The procedural position of the police, that is, their powers in the pre-criminal and preliminary criminal proceedings, viewed from the perspective of the Federal Republic of Germany as a whole, is resolved by several legal texts, some of which are federal and some are state ones. Viewed from the aspect of this matter, the following legal texts among them deserve attention: the Criminal Procedure Code, state laws on police duties, the Basic Law on Courts and the Law on Public Gatherings, while some issues relating to this matter have been resolved, although only in principle, by the Constitution of the Federal Republic of Germany, which shows how important the police are.[8]

The procedural position of the police is very pronounced and active in the criminal procedure legislation of Germany, and with such a procedural position they play an extremely important role in the preparation of public prosecutor's indictments.[9]

The police have a duty to carry out initial seizure, which means that they must secure that evidence is preserved when they arrive at the crime scene. The Federal Crime Bureau (BKA) at the federal level generally provides support; it may ex officio investigate only a limited number of crimes of federal significance, such as terrorism or internationally organised crimes. For some coercive measures that require a court order, a public prosecutor or even the police may order a measure or issue an order themselves in an emergency.[10]

The concept of public prosecutors' investigators in Germany is defined in German federal legislation through Article 152 of the Constitutional Court Act (Gesetzblatt I, p 253), which obliges them to carry out orders of competent public prosecutors and superior officers and sets the framework for their appointment.[11]

Most investigators come from police ranks and they do a significant part of the work for the Public Prosecutor's Office. These are mostly middle and senior level police officers.

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6 Krstulović, A. (2004). Uloga državnog advokata u suvremenom prethodnom postupku. *Hrvatski ljetopis za kazneno pravo i praksu*, 11 (1), 95.

7 Pavliček, J. (2009). Uloga istražitelja u krivičnom postupku. *Hrvatski ljetopis za kazneno pravo i praksu,* 16 (2), 895-910.

8 *Javno tužilaštvo, policija, krivični sud i suzbijanje kriminaliteta.* (2008). Beograd: Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, 298 – 307.

9 Bejatović, S. (2005). Položaj i uloga policije u pretkrivičnom postupku i prethodnom krivičnom postupku u nemačkom krivično procesnom zakonodavstvu. *Policija i pretkrivični i prethodni krivični postupak*. VŠUP, 265.

10 *Reforma pretkrivičnog postupka u Hrvatskoj. Analiza, usporedba, preporuke i plan djelovanja* (2007-2012), 124.

11 Pavliček (2009), 895-910.

Managerial and senior police structures are not involved and their subordinates have broader powers than them to investigate crimes.

In practice, all more qualified police officers have the role of investigators and this has no real impact on the daily work of each individual police officer. In addition to police officers, as already mentioned, the role of Public Prosecutor's Office investigators is also played by officers of some other state bodies and ministries (responsible for finance, tax system, environmental protection, etc.). The prevailing view is that the actual competence of these officers should be limited to the scope of their main work in their respective bodies. Within the job and powers deriving from it, they can perform actions independently, but need an order of the public prosecutor to undertake criminal procedural acts.

Although, normatively speaking, the public prosecutor plays a central role in the preliminary investigation procedure, in practice the situation is somewhat different. The police, that is, Public Prosecutor's Office investigators coming from police ranks generally perform most actions independently, especially when it comes to evidentiary actions that do not tolerate any delays, as well as in minor criminal offences. Public prosecutors are personally more involved in investigation when more serious crimes are concerned.

The first empirical research in the German preliminary proceedings showed a pronounced dominance of the police in the investigation procedure, that the German Public Prosecutor's Office has almost completely given up on conducting the investigation procedure and this is also valid for conducting the procedure in legal terms, that is, if it is to send orders for the performance of certain investigative actions, the content of such orders would almost always be consistent with the results of the police investigation and in line with the hypotheses set by the police. The consequences of such a division of tasks are twofold – on the one hand, the activities of the German police are often focused also on the facts that are not of importance and they use them for later court proceedings and for proving the commission of a crime, while on the other hand, the police sometimes investigate "too little", that is, they focus more on resolving the issue of identifying the perpetrator and clarifying how the crime has been committed, and too little on collecting and securing legally valid evidence that would be useful later in the proceedings. The consequence of such deficient investigation is that many proceedings have been discontinued due to deficient evidence.[12]

There have been attempts by the German Minister of Justice to legitimise the de facto dominance of the police in preliminary proceedings, but the prevailing belief is that the legality is better protected through supervision by public prosecutors than exclusively by higher police bodies focused on efficiency and expediency.[13]

In the end, it can be concluded that in the German criminal procedural legislation, the preparatory procedure in the field of medium and minor crimes has passed from the hands of the public prosecutor to the police, while only in the field of serious crimes the Public Prosecutor's Office retained a leading role in the preparatory procedure.

[12] Hull, S. (2009). Der Richtervorbehalt – seine Bedeutung fur das Straffverfahe und die Volgen fur Verstosen Zeitschrift fur Internationale Strafrechtsdogmatik, 4.

[13] Novosel, D., Pajčić, M. (2009). Državni odvjetnik kao gospodar novog prethodnog krivičnog postupka. *Hrvatski ljetopis za krivično pravo i praksu*, 16 (2), 434.

2. THE RELATIONSHIP BETWEEN THE POLICE AND THE PROSECUTION IN THE CRIMINAL PROCEEDINGS OF THE REPUBLIC OF ITALY

The Criminal Procedure Code of the Republic of Italy was passed in 1988 and was implemented from 1989, with subsequent changes and amendment. Its significance is, inter alia, in the fact that it introduces adversarial model of criminal procedure rather than inquisitorial which has been represented in the Criminal Procedure Code of 1930 and ceased to be valid following the entry in force of the new Criminal Procedure Code.

Italian Criminal Procedure Code introduces, instead of judicial investigation that was conducted by investigating judges, prosecutorial investigation that is handled by the state prosecutor directly or through the judicial police to which the implementation of investigative action [14]can be entrusted, where the investigative activity and the collection of elements of evidence in criminal proceedings is entrusted to state attorney who is dominus litis of the investigation and under his/her leadership to the judicial police.[15]

The investigation is conducted by a State Attorney. This body operates within the framework of the office of Republic and General State Attorney.[16]

Actions in the investigation are mostly carried out by the judicial police. Judicial police consists from officers of the state police, the gendarmerie and officers of the financial guard. Officers of the judicial police are assigned to the office of the State Attorney. They operate under the direct supervision and on the orders of the State Attorney.[17]

The provisions of the Criminal Procedure Code provide for the preliminary investigation which is conducted by the state prosecutor on the basis of received criminal report, without making a formal decision, which means that the existence of grounds of suspicion that a criminal offence was committed is sufficient for initiation of the preliminary investigation.[18]

Investigations in the preliminary procedure are performed by the Republic State Attorney within the court pursuant to criminal reports received. He/she carries out these activities either directly or entrusts them to the judicial police. If he/she has entrusted the performance of investigative activities to the police, the Republic State Attorney shall perform general supervision and direct the investigation. In every activity that is entrusted to the judicial police, it must apply the rules that are valid for the body which entrusted the activities to the police.[19]

The preliminary investigation is managed by the state prosecutor who directly instructs the judicial police, which is authorized to, even after the criminal report is filed and under legal conditions, conduct investigations on its own initiative. The introductory activity to preliminary investigation is receipt of criminal report.[20] State attorney and judicial police submit and receive reports of criminal offenses on their own initiative and from other per-

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[14] Huber, B. (1992). *Javno (državno) tužilaštvo: pravni položaj, djelatnost i nadzor*. Zagreb: Zakonitost, 785.

[15] Bošković, 577-591.

[16] Pavišić, B. (2008). Novi hrvatski Zakonik o krivičnom postupku. *Hrvatski ljetopis za krivično pravo i praksu*, 2, 489 – 602.

[17] *Ibid.*

[18] Bošković, 577-591.

[19] Krstulović (2004), 96.

[20] Bošković, 577-591.

sons which means that action which initiates criminal proceedings is not only the report received by the state attorney and judicial police, but also the one they themselves submitted.[21]

In the course of the preliminary investigation, the state prosecutor shall take the necessary actions that are required for deciding on criminal prosecution, naturally he/she establishes the facts and circumstances that go in favor of the suspect as well. The Judicial Police has a duty to report criminal offenses on its own initiative, prevent occurrences of further consequences, detect the perpetrators of criminal acts, carry out activities necessary to ensure sources of evidence and collect everything else which could be of use for the application of the Criminal Code, as well as to undertake investigative activities which were entrusted to it or ordered by the appropriate judicial authorities. Furthermore, the judicial police are obliged to, after receiving the criminal report, without delay, notify in writing the State Prosecutor about the basic elements of the criminal act and about all collected facts, citing sources of evidence and activities that were carried out on which it delivers notes.[22] If the report is submitted to the judicial police, it must submit it to the State Attorney " without delay ", but in the time limit of 48 hours if it undertakes activities requiring the attendance of a defense counsel i.e. immediately if it refers to the most serious criminal acts.[23]

Judicial police, after submitting the report on committed criminal offense to the state prosecutor, undertakes activities by its own initiative in order to prevent further consequences, detects the perpetrator, collects the source of evidence and other facts of importance for the further course of the proceedings, but is required to carry out activities entrusted to it by the State Attorney. In this sense, the judicial police has the obligation to implement the guidelines given by the State Prosecutor, and in addition to that, take actions by its own initiative thus directly informing the State Prosecutor of all so taken activities.[24]

It can be said that in Italy a full and sustained cooperation between the state prosecutor and the police when conducting an investigation is not fully set, i.e. in a large number of cases the police are the main subject of detection of criminal acts and securing evidence which is not in accordance with the intention of the legislator that the state prosecutor be the dominus of investigation.[25]

3. THE RELATIONSHIP BETWEEN THE POLICE AND THE PROSECUTION IN THE CRIMINAL PROCEEDINGS OF THE REPUBLIC OF FRANCE

According to the French Code de procedure penale (Criminal Procedure Code), a state attorney is a body of government that carries out public lawsuits, i.e. . criminal prosecution. Hierarchically it is under the Minister of Justice.[26]

France has maintained a division for preliminary investigation and investigation, as well as a strong investigative judge. When the formal investigation is optional (obligatory is only in the case of crimes) and is not carried out, preliminary investigation results are

[21] Krstulović (2004), 96.
[22] Bošković, 577-591.
[23] Krstulović (2004), 96.
[24] Bošković, 577-591.
[25] *Ibid.*
[26] *Ibid.*

the only form of the preliminary procedure. The preliminary investigation is carried out by the judicial police, at the request of the state attorney or ex officio. The role of state attorney is reduced to supervision and directing the investigative activities of the police. Somewhat greater powers are in the pre-trial phase where the state attorney has powers in terms of keeping the suspect in custody, when the prosecutor of the Republic can, after having examined a person detained by the police, extend his/her detention for a further 24 hours (the police can keep the citizens for only 24 hours).[27]

State Attorney must be informed without delay about the criminal offense and the actions taken by the judicial police, especially if the suspects freedom is limited.[28]

State attorney has no right to use coercive measures, unless exceptionally, in the case of flagrant procedure, in which case the police and the Prosecutor of the Republic and the investigating judge may order the search (personal and search of the apartment), seizure of items, remand in custody, and prohibit all those present to go somewhere further.[29]

For the largest number of criminal offenses investigation is carried by rule as a police investigation. It is conducted by the judicial police, which acts on its own initiative or on the orders of the state attorney. Police investigation is a set of investigative activities in connection with the investigation of criminal offenses undertaken by the police. This investigation may be conducted outside or within the judicial investigation, as ordered by the investigating judge.[30]

Traditionally, there is a difference between the police investigations of flagrant criminal offenses and preliminary (police) investigations. With the expansion of police powers in the preliminary investigation, the difference loses its significance. The judicial police are under direct supervision by the state attorney. The investigation begins depending on the gravity of the crime and the previous situation.[31]

Minister of Defense. The National Police is a far larger force operating in all other areas and for its work it is responsible to the Minister of the Interior. The judicial police have the task of detecting criminal offenses and criminal offenses perpetrators, and the administrative police have There is a traditional distinction between a police investigation of a flagrant crime and a previous (police) investigation. By the expansion of police powers in the preliminary investigation this difference is becoming less important. The judicial police are under the direct supervision of the state attorney. The investigation starts depending on the severity of the offense and the previous situation.

The most important role of the prosecutor in the preliminary procedure, after reviewing the police files, is whether a criminal prosecution will be initiated or not. Thus, the prosecutor can: file an immediate indictment (if he/she considers that there is enough evidence) or forward the case to the investigating judge with a request to open an investigation. The investigating judge will then examine the results of the police investigations, examine the defendant and decide whether the case has been clarified enough for an indictment to be filed. The investigating judge is responsible for the investigation, not the public prosecutor.[32]

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[27] Krstulović (2004), 96.
[28] Pavišić (2008), 504.
[29] Krstulović (2004), 96.
[30] Pavišić (2008), 505.
[31] *Ibid.*
[32] Krstulović (2004), 96.

In complex cases, the state attorney interrupts the police investigation and proposes to open a court interrogation.[33]

The investigating judge performs the historical (investigative) function of a court detective only in certain complex cases. A formal judicial investigation allows the widest possible investigations. It is the task of the investigating judge to establish the facts in favor or against the defendant. In that sense, the investigating judge is a 'filter' for the possible further continuation of the proceedings. The results of the judicial investigation have probative value in criminal proceedings. It is proposed by the state attorney.

The most significant division of the French police force is into the judicial police and the administrative police. However, the division of these police forces into civilian and paramilitary wings is even more noticeable, both of which have their responsibilities when it comes to criminal justice. In essence, the gendarmerie is a military unit, located in the barracks and under the direct responsibility of the a role related to maintaining public order and peace and work on the prevention of criminal offenses.[34]

The national police are in the domain of the responsibility of the Minister of the Interior, while in 1986 the organizational form of the "junior minister" was established with special responsibility for the national police. Within the police force itself, there are two categories of officers: uniformed, which includes commanders and police officers - officers and policemen in civilian clothes, which include senior police inspectors / non-chief police officers, inspectors and detectives. These forces are managed through six divisions:

- The Department of Public Order and Peace, which operates in those large cities that are outside the jurisdiction of the gendarmerie.
- Judicial police organized in nineteen regional units coordinated at the national level by a central department representing the French connection with INTERPOL.
- The intelligence service is responsible for comparing and processing of information concerning groups or individuals considered dangerous to the state.
- State security is a special secret level with about 2,000 officers.
- The police in case of incidents, riots and disturbances of public order and peace consists of policemen in civilian clothes who are organized and trained as a paramilitary unit under the authority of the Minister of the Interior.[35]

The gendarmerie is a uniformed paramilitary force operating in rural areas and smaller towns. Unlike the national police, there is no judicial department here at all, but most people with lower ranks can conduct criminal investigations. The gendarmerie also functions as a military police force and provides central suitability such as technical support, as well as naval and air transport police, as well as a security department.[36]

The role of the judicial police is to act as an auxiliary force to the judicial authorities, and to carry out their operational orders.[37]

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[33] Pavišić (2008), 505.

[34] *Ibid.*

[35] Vogler, R. (2007). *Krivični postupak u Francusko*j. Pravni fakultet Sveučilišta u Mostaru, 51.

[36] Simović – Nišević, M. (2010). *Otkrivanje dokaza krivičnih djela organizovanog kriminaliteta u Bosni i Hercegovini.* Sarajevo, 250.

[37] Vogler (2007), 52.

As early as 2009, the French government announced a radical reform of criminal procedure, which would include the abolition of the investigative judge and the transfer of significant investigative powers to the state attorney's office. In that case the 'investigating judge 'would be a new figure overseeing the investigation, but he/she wouldn't conduct it. In September 2009, the Report of the Criminal Justice Review Committee, or the Report for short, was made public. The report contains 12 reasoned proposals, seven of which refer to the pre-trial procedure, and the remaining five to the hearing as the central stage of the criminal procedure.[38]

A draft proposal for a new Criminal Procedure Code was published in March 2010 and was welcomed by critics as they had the opportunity to discuss in detail the key determinants of the reform presented in the Léger Report.

The draft proposal is substantially divided into nine books, preceded by an introductory book dedicated to the basic principles of criminal procedure. Considering that the legislative reform should have mostly covered some essential issues of the previous procedure, the proposal to abolish the investigating judge as an independent magistrate that is to take over his investigative powers by the state attorney's office, caused the most controversy. According to the current Code of Criminal Procedure, the investigation is conducted by 'investigative jurisdictions' that is the investigating judge and the investigative chamber, in other words judicial bodies convened by a state attorney or the injured party.

The draft proposal envisages merging police investigations into uniquely regulated 'criminal judicial investigations' conducted by the state attorney's office under the supervision of newly established judicial bodies, with the aim of investigating and establishing criminal offenses, gathering evidence and identifying perpetrators. Although the conduct of criminal judicial investigations is entrusted to the State Attorney's Office, a significant role in their implementation will certainly be played by judicial police officers who will act under the order and control of the State Attorney's Office. In addition, similar to what it does under current law in special proceedings for organized crime, the state attorney would supervise the execution of detention, which the police may order independently or on the order of the state attorney, provided that the state attorney must always be notified of the determination of these measures, and may extend it by 24 hours. However, the detainee would have to be in front of a judge within 48 hours of being taken into custody.[39]

4. THE RELATIONSHIP BETWEEN THE POLICE AND THE PROSECUTION IN THE CRIMINAL PROCEEDINGS OF ENGLAND AND WALES

England and Wales form a criminal justice adversarial system based on common law. Before professional police forces were established in England and Wales in the years after 1829, neither local nor central government accepted responsibility for day-to-day law enforcement. Anyone could file a lawsuit. The victim usually indicted the suspects, if that happened at all, and no special powers of the prosecution were given to the police or anyone else.[40]

[38] *Ibid.*

[39] Vogler (2007), 53.

[40] Ivančević Karas, E. (2010). O glavnim značajkama reformi suvremenog francuskog krivičnog postupka. *Hrvatski ljetpis za kazneno pravo i praksu*, 17 (1), 120.

In England, where a high degree of decentralization of power was maintained, criminal proceedings took place on the private initiative of the injured party, which only began to be supported by the police in the middle of the 19th century, gradually taking over the prosecution.[41]

As the police force developed and the authority of the police grew, so did the expectations of the victims so that the police would start and conduct the procedure instead of them. Additional powers of arrest have been given to the police and they have developed the practice of 'accusing' convicts without seeking permission from the judiciary. Thus, the police began to take control of the prosecution decisions, but no special authority or responsibilities of the prosecution were handed over to the police. Thus, the police had, and still have, complete discretion regarding the decision of the prosecution. This is a characteristic that announces the approach of "possibility" or "expediency" of common law. The private option remained the model on which the police lawsuits were based and the right to a private lawsuit remains. It is often considered to be the main defender of crime victims, so the police refuse to file an indictment. However, the right to a private option is limited in two ways. First, some types of crimes can only be prosecuted by the agencies given the role in the legislation establishing only the crime, e.g. The Health and Safety Act of 1984, which establishes the criminal offense against health and safety and the establishment of an external authority for health and safety, which will adjust the possibilities of equipping the law on setting up the law. Second, the Royal Prosecutor's Office, as we will see, was established 20 years ago to be a prosecutor instead of the police also has the right to 'take over' (and if it wants to reject) any private indictment.[42]

England represents a special category where the police are entirely and solely responsible for investigating criminal offenses. In the previous procedure, namely, there is no supervision of the Crown Prosecution Service. Since the enactment of the Law on Police and Evidence in Criminal Matters in 1984, the investigative powers of the police as well as the legal possibilities of taking coercive measures have been exhaustively regulated by that law and bylaws based on it - ordinances, or, as they are called, 'codes of practice'.[43]

In the absence of special laws to regulate their lawsuits, the police developed their own system. They prosecute most of their cases in magistrates' courts (lower courts) and some forces have deployed special police officers to take over the task. For cases in the Royal Court (more serious cases, which are judged in higher courts), the police advised prosecutors who then advised defense counsel. Gradually, larger police forces began hiring their own prosecutors. According to the traditional prosecutor-client relationship, prosecutors had to follow police instructions. If the police insisted on a lawsuit in case there was not enough evidence, the prosecutor could not do much or anything about it.[44]

In 1981, the Royal Commission for Criminal Procedures (Phillips Commission) proposed an independent prosecutor's office to take over those cases that the police decided to prosecute. If the prosecutor did not agree with the police, the case could be dismissed, the charges could be changed, or more evidence could be sought. This was accepted by the

[41] *Ibid.,*121.

[42] *Javno tužilaštvo, policija, krivični sud i suzbijanje kriminaliteta.* (2008). Beograd: Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, 324 -329.

[43] Krstulović (2004), 83

[44] *Javno tužilaštvo, policija, krivični sud i suzbijanje kriminaliteta.* (2008). Beograd: Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, 324 -329.

Government, which established the Royal Prosecutor's Office in 1985 by Law on the Prosecution of Misdemeanors. The head of the Royal Prosecutor's Office was supposed to be the State Prosecutor. The State Prosecutor was first established in 1879 with the function of advising the police on criminal issues and on resolving particularly important cases. At the time of the establishment of the Royal Prosecutor's Office, the State Prosecutor's Office (which included about 70 lawyers) dealt with murders, other very serious cases and the prosecution of police officers. The sudden transition to the civil service, which was initially established with over 1,500 lawyers, many of whom were prosecutors previously employed by the police to file charges, created serious problems. This meant a shortage of staff and difficult relations with the police. These relationship problems ranged from over-identification with police objectives and methods in some areas (especially when the Royal Prosecution consisted predominantly of pre-existing lawyers) to conduct that consisted of a lack of communication with other participants in criminal proceedings.

Other agencies, not just the police, deal with a large number of different laws and criminal activities. In this respect, the situation is similar to the situation with police before 1985: law enforcement agencies are responsible for lawsuits, and they have full discretion over decisions regarding a lawsuit. The main difference is that, unlike criminal offenses dealt with by the police, most non-police offenses are not permitted to raise private charges. As far as the Royal Prosecution is concerned, most of the charges pending in the lower courts are handled by lawyers employed by those agencies, while the charges pending in the higher courts are handled by defense attorneys from private practice.

As noted earlier, law enforcement agencies, including the police, are responsible for their investigations. Prosecutors are not responsible for the activities or negligent conduct of investigators. It follows that older police officers themselves must ensure that younger police officers abide by the law. Inevitably, it is a system with a weak point.

Since the police are fully responsible for their own investigations, it follows that they do not have to consult with prosecutors about any investigative measures. It also follows that prosecutors do not have the right to issue instructions to the police on investigative measures.

The following also deserves attention: First, the police have the right to seek advice from the prosecutor on any aspect of their work. Second, after the police decide whether to file an indictment or not, the case is transferred to the Royal Prosecutor's Office. The Royal Prosecution may continue the charge or dismiss the case, or reduce the number of counts in the indictment. Third, although the police do not have to seek approval from the Royal Prosecution for the use of informants, intrusive surveillance methods, to extend detention, etc., they must obtain court approval (usually from the magistrate) to use some of these investigative measures. Fourth, finally, the Royal Prosecutor's Office does not negotiate investigative priorities with the police, and the police remain legally independent. They can investigate what they want and they can choose not to investigate what they do not want (in line with human rights obligations) according to European Convention on Human Rights, which is incorporated into English law. However, other bodies to which the police are responsible play a role in setting priorities, in conversation with the police. This is usually done locally.

The Royal Prosecution was unwilling to have any relationship with the police. For example, communication was always only in writing. After the reform was carried out, the iron curtain between the two services suddenly fell and it went too far. The Royal Prosecu-

tor's Office is independent on the police and had to show that it is the case. Shortly after the establishment of the Royal Prosecutor's Office in 1986, local police accountability was reduced by reducing the elected element in local police authorities. Therefore, not only is the Royal Prosecutor's Office tied to the police more than ever, but the influence of locally elected bodies on the police has faded (and thus on the Royal Prosecutor's Office). The emphasis on efficiency, quality of decision-making and cooperation between the police and the Royal Prosecutor's Office has led to the establishment of a joint 'criminal justice unit' between the police and the Royal Prosecutor's Office in each police area or Royal Prosecutor's Office (one or more depending on the area size).

Serious cases, which will be brought before the Crown Court, are forwarded to special units managed exclusively by the Royal Prosecutor's Office. On the other hand, the government seems to have accepted criticism that the Royal Prosecution is a police-dependent body. This is not only a problem, in many respects, of too much identification with the goals and ideology of the police, but also a structural problem: that while the police made initial decisions, the Royal Prosecution was not the one who decides, but the one who changes direction. Now, the Royal Prosecutor's Office will make the decisions on the prosecution, not the police. This was set out in the 2003 Criminal Justice Law, but changes were gradually introduced during 2004 and 2005. This change should increase the independence of the Royal Prosecutor's Office, although the problem of case construction will remain. The Royal Prosecution will always assess cases prepared by the police, usually without any interference done by the prosecutor.[45]

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Odnos policije i tužilaštva u pojedinim evropskim državama

(iskustva koja se mogu koristiti u postupku istrage saobraćajnih prekršaja u Bosni i Hercegovini)

Rezime: Jedna od glavnih karakteristika istrage u Njemačkoj jeste da je javni tužilac glavni subjekt istrage i da uloga policije najvećim dijelom zavisi od toga da li će i u kojoj mjeri će joj javni tužilac povjeriti preuzimanje istražnih rdanji. Francuska je zadržala podjelu na izvide i istragu, kao i jakog istražnog sudiju. Kada je formalna istraga fakultativna (obligatorna je samo u slučaju zločina – crimes) pa se ne provodi, izvidi su jedini oblik prethodnog postupka. Prethodnu istragu (izvide) vodi sudska policija, na zahtjev državnog advokata ili po službenoj dužnosti. Zakonik o krivičnom postupku Republike Italije koji je donesen 1988. godine, a počeo je da se primenjuje 1989. godine, sa kasnijim izmenama i dopunama, pored ostalog, značajan je i po tome što uvodi akuzatorski model krivičnog postupka umjesto inkvizitorskog koji je bio zastupljen u Zakaonu o krivičnom postupku iz 1930. godine i koji je prestao da važi stupanjem na snagu novog Zakonika.

Ključne riječi: tužilac, policija, istraga, nadzor nad istragom.

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- *Intrasoft International SA v European Commission* , 2015. EGC, Judgment of the General Court (Second Chamber) of 13 October 2015. (Case 403/12, ECLI:EU:T:2015:774). Dostupno na : https://eur-lex.europa.eu/l (18. 1. 2019).

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By case law of international tribunals, the name of the judicial council should also be stated and ECtHR case law should also contain application number. Relevant case law data bases can be used (Paragraf Lex, Intermex, EUR-Lex, CURIA, Lexiweb.co.uk, Legifrance, HUDOC itd.).

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In case authors have any further questions, they can contact the editorial board.

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