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# Pázmány Law Review

THEMATIC FOCUS
Educational Rights in Global and Comparative Perspective

- Jan de GROOF
- Szabolcs Anzelm SZUROMI
- Charles L. GLENN
- Ingo RICHTER

CURRENT ISSUE
State promoted cartels and other state related competition restrictions

- Tihamér TÓTH
- Rebecca HAW ALLENSWORTH
- David READER
- Or BROOK
- Sih Yuliana WAHYUNINGTYAS

Pázmány Péter Catholic University
Faculty of Law and Political Sciences
Budapest

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THEMATIC FOCUS:
*Educational Rights in Global and Comparative perspective*



# EDITORIAL

*of the International Journal for Education Law and Policy and the Pázmány Law Review*

Educational rights may be approached from any direction, however the common element in every model is the justiciability and the awareness and knowledge of enforceability of this prior right. This is especially important for the more vulnerable groups of society, since there are specific needs may arise, which are necessary to reflect.

The International Conference on 'The Justiciability of the Prior Right to Education – The Role of Civil Society for the Awareness, Advocacy and Accountability of the Right to Education', organized by the European Association for Education Rights and Policy (ELA) in cooperation with the Ereky Public Law Research Center at the Pázmány Péter Catholic University, Budapest on 20-22 October 2016 was devoted to the launch of a dialogue between representatives of science, jurisdiction, and civil society ,– inviting them to exchange their experience in this field. The conference examined primarily the role of civil society in the protection of education rights for the more defenceless people and groups.

We are proud to submit for your interest most of the lectures, rewritten for the special occasion of this volume, – a very special volume indeed: both Journals worked together in a complementary way. The target groups of IJELP and PLR is quite different and followed a similar peer review. We consider this initiative as a truly European concept of cooperation, to be followed by international and national

On Saturday the 22 October the Global Education Law Forum (GELF) - Committed to Good Governance, Human Dignity and Effective Policies in Education, was also officially launched.

The right to education and rights in education are essential in dealing with student and school diversity, but expertise on these fundamental concepts is relatively rare and scattered. In 2015, a group of concerned individuals, active in education, research and public administration, decided to join forces and provide a concerted helping hand to all those who want to formulate and implement sound education principles, policies, codes, rules and regulations.

Prof. Jan de Groof
President of ELA
(Bruges, Tilburg)

Balázs Sz. Gerencsér PhD
Director of PPKE Ereky RC
(Budapest)

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4. 2016. • 7–11.

# THE JUSTICIABILITY OF THE PRIOR RIGHT TO EDUCATION

*Summary of an International Conference held at the PPCU, 2016*

Balázs Szabolcs Gerencsér – Kata Gyöngyösi
(PPCU)

## 1. The aims of the conference

The series of conferences, which has been organized annually by *European Association for Education Rights and Policy* (ELA) in various research locations around the world for decades, are more than valuable. The purpose of these conferences and all the related scientific efforts is to try to find answers to all the emerging and sometimes alarming questions of educational law, mainly on a comparative legal basis. This work is particularly effective if, besides science, it gives input to legislation and jurisdiction too. In 2016 the ELA held its Annual Conference at the Pázmány Péter Catholic University Faculty of Law and Political Sciences.

On 20-22 October 2016 the ELA in cooperation with the *Ereky Public Law Research Center* at the Pázmány Péter Catholic University, Budapest, organized an international conference on the Justiciability of the Prior Right to Education. The conference was devoted to launch a dialogue where representatives of science, jurisdiction and civil society can exchange their experience in this field. The subtitle of the conference explained its focus: *"The Role of Civil Society for the Awareness, Advocacy and Accountability of the Right to Education"*. The conference examined primarily the role of civil society in the protection of education rights especially for the most defenseless people and groups such as minorities and special linguistic or religious communities.

## 2. Organizing in co-operation

The ELA, founded in 1993, is an independent and worldwide NGO, with its head office in Antwerp. According to the motto of ELA, education has the potential to unlock the door to equality and participation, it constitutes the basis necessary for empowerment of each individual, and for the promotion of all human rights. Education law means constructing, block by block, the foundation that will support educational

rights in all nations and for all peoples and individuals. The importance of the law not with standing, its members are aware of the relative value of each legal principle, whether it is founded on a convention or on some other legal source. ELA aims to encourage progress in educational rights by promoting the right to education as a right, by elaborating education law as a discipline and by actively supporting every serious effort made toward the gradual and progressive codification of educational rights and educational legislation. See more at: *http://www.lawandeducation.com*.

The co-organizer of this conference is the *Ereky Public Law Research Center* that was founded in 2011 within the PPCU Faculty of Law and Political Sciences, Budapest. Its founder's aim was to develop an independent think tank, which is actively involved in the current trends and development of public administration and policy. The research center conducts joint and individual research projects, in search for answers to the pressing questions. This way the research group can participate in central and local (governmental) development projects, where knowledge management, scientific basis or international comparison is essential. Research topics are related to human rights, the exercise of state power, central and local public administration, and the control mechanisms of public administration. The team is led by Andras Zs. Varga, professor of law, Head of Department at PPCU and judge of the Constitutional Court of Hungary. The director of the Research Center is Balázs Gerencsér associate professor, while its members are professors, senior researchers and doctoral students, and sometimes even graduate students. See more at: *http://ereky.jak.ppke.hu*.

The importance of the topic was acknowledged by the supporters as well. It was the organizers' honor that the conference was financed by multiple sources who considered this issue important. Such was the PPCU K.A.P.; the Institute for Minority Rights Protection (KJI, Budapest); State Secretary of the Prime Minister's Office (Hungary); the Rákóczi Alliance (Hungary) and the Research Institute for Hungarian Communities Abroad (NPKI, Budapest).

### 3. Sessions of the conference

The conference had seven sessions, splitting by the main cornerstones of the topic. By this method it had an opening keynote session, which was followed by sessions dealing with issues of constitutional law and jurisdiction. These two sessions was devoted to general issues of justiciability of educational rights, as well as the courts' and ombudsman's experience. The second day focused more on the experiences of the civil society in a comparative approach. The comparison had a special attention on the Central and Eastern European region as well as on the enforcement of international and domestic obligations. Lecturers came from thirteen different countries from Russia to the United States.

In the first, opening session keynotes were presented by prof. Jan de Groof, president of ELA, who highlighted the need of judicial case law that can be referred to later on. Prof. Szabolcs Szuromi rector of PPCU in his keynote emphasized the close relation of educational and religious rights on the basis of human dignity. He proved that denominations improves values of the society through their own educational and

other services. Lajos Aáry-Tamás, ombudsman of Educational Rights of Hungary, underlined the importance of forums that are able to solve problems related to educational rights. He presented the best practices that his office gained in the past decades, which is quite unique in Europe. All the keynotes highlighted the need for justiciability of these rights, and the importance of both hard and soft law in domestic and international law.

The second session was about the concerns of constitutional law. Prof. András Zs. Varga, who is also a member of the Venice Commission, exposed the human dignity as the ultimate basis for educational rights. Professor Schanda, Head of Department of Constitutional Law at PPCU, mentioned that not only the state but primarily the family has to educate. The crisis of traditional families has a strong effect on the state's educational role. He highlighted that the way out of the problems is to go back to the family and the children. Renáta Uitz, Chair of the Comparative Constitutional Law Program, Head of Department of Legal Studies at Central European University, dealt with the meaning of justiciability form a comparative legal point of view. Pablo Meix Cereceda, professor of Administrative Law at the University of Castilla-La Mancha, highlighted the importance of EU law in educational rights. The debate was about whether the forum was more important than the rights to be exercised. The second session finished with Krisztina Rozsnyai, associate professor at ELTE Faculty of Law, who talked about the present system of remedies and the administrative jurisdiction as a special legal procedure.

In the third session Elisabeth Sándor-Szalay, the ombudsman for minority rights, underlined that there is a real significant case law at the ombudsman offices all around Europe. She detailed the Hungarian case of minority affairs. Maria Smirnova, researcher of Manchester International Law Centre at The University of Manchester, presented the 2012 Russian law of education. Lilla Berkes, researcher assistant at PPCU, presented a true story from a Canadian school about the freedom of religion versus rights and freedom of other public order. Dragos Efrim, young Romanian scholar at University of Craiova, talked about the Romanian new legislation in connection with the religious education in public schools.

The next day, Friday, prof. Charles Glenn, Boston University, opened the fourth session. He presented his paper on the strengthening of the civil society, mainly from a US perspective. Following, Ingo Richter, Professor at Irmgard Coninx Stiftung and University of Tübingen, dealt with the German case of thousands of immigrants and their relation to education. He expressed that if the state is not able to solve a problem, than the civil society has to. He thinks that the language pre-training of immigrant people is a kind of segregation and civil organizations should keep an eye on these segregated classes and promote the transfer of the children into the regular classes. He underlined the importance of the ELA-type umbrella organizations to raise civil society. Roberto Toniatti, Professor of Constitutional Law at Trento University, talked about a multicultural citizenship that is in close relation with a political and social notion of citizenship. This is the main character of minority rights in Europe. He believes that a "hidden hand" can be a rule making in civil sphere

just like in the economics.[1] Prof. Charles Russo from Dayton University analyzed the perspectives from the US according to the Justiciability of the Prior Right to Education. He presented a broad overview on the case law on educational rights in a historical perspective with a special attention to equality. He concluded that the that litigation will continue as the US continues to seek to provide equal educational opportunities for all Americans.

In the next session a great amount of good practices of single cases were presented. Here we have heard about a Jesuit educational initiative presented by P. Tamás Forrai SJ. He conferred their roma education and refugee integrated education programs, which are successfully led in the previous years. Later, individual cases of minority civil associations were presented from Hungary, Slovakia, Croatia and Romania. Lecturers came from this Central European region representing civil actors in the field of education. At last, Balázs Gerencsér talked about the most recent findings of the Council of Europe of educational systems in Central and Eastern Europe.

The fifth session was on the rethinking of the A4 scheme (adequacy, accountability, awareness and advocacy). Prof. de Groof's said the most important keywords on this topic were respect, protect, promote, fulfill and facilitate. All these are concentrating to implement the right to education. Merilin Kiviorg, professor at the Estonian University of Tartu, underlined the importance of building the environment of acceptance instead of breaking the rules of living together. She said that "freedom had a price". Gábor Kardos, member of Committee of Experts of the European Charter for Regional and Minority Languages, and professor of international law at ELTE, Budapest, presented in-depth the CoE's language charter and its finding and tendencies in implementing educational rights.

## 4. Summaries

The sixth was the closing of the plenary sessions. Prof de Groof, summarizing the conference, said there were good practices in the world regarding educational rights, which were called "best interest of the child". In his opinion we need a sustainable development in the quality of education. In this regard the United Nations have documents and valuable knowledge. The role of ELA is to promote the best ways of implementation of this fundamental right. Educational rights are very close to educational policy, which are in connection with political systems. In his summary he highlighted there was a valuable role of the extra-judicial systems (like the ombudsman) that were need to be developed. Finally he talked about the importance of interculturality. The Brugge document of the early ELA years can be renewed. Politics and research are both needed for future development of these rights.

Balázs Gerencsér in his summary highlighted the importance of focusing on the human being and its dignity. The human rights cannot be treated only as legal elements or mosaics of normative rules. If just some of the elements of dignity is

[1] The „religionclause.blogspot.com" blog was mentioned in the debate as a source of cases.

focused on, we lose the real content: the humanity. He urged to keep always close to the real unchangeable values. As an outcome of this Conference organizers agreed on a continuous collection of best practices in Europe that can be a basis for future researches and policy making.

At the end of the Conference, as a separate event, the Global Education Law Forum (GELF) as an independent initiative was officially launched by its founders (Peter Van der Hijden, Marco Matthijsen) on the 22th October 2016. GELF will be a nonprofit consortium that will address the issue of a broader and a more equal access to education both from a practical and a scholarly perspective. GELF will aim thus to add an education rights' perspective to the implementation of the newly adopted UN Sustainable Development Goal 4: 'Ensure inclusive and quality education for all and promote lifelong learning' and the UNESCO Education 2030 Framework for Action.

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# ON THE IMPLEMENTATION AND JUSTICIABILITY OF THE RIGHT TO EDUCATION

Jan De Groof*
President of the European Association for Education Law and Policy

## 1. Ratio behind the implementation and the justiciability of the right to education

International human rights treaties grant everyone the right to education. States, upon ratification of these treaties, have the primary responsibility to guarantee that individuals subject to their jurisdiction enjoy this right and to ensure that their national educational systems meet the requirements assigned to human rights as proscribed by international human rights conventions.[1] To fulfil their obligation and to fully realise the right to education, it is not sufficient that the right to education merely exists in their national legal order but it is of the utmost importance that national states undertake additional steps.[2]

Contracting parties must effectively implement the right to education into their national legal system in order to create the necessary setting for ensuring the enjoyment of the right to education. Upon ratification concrete and effective measures, such as the adoption of constitutional provisions, legislation and policies or the abolishment of existing inconsistent laws or policies, must be taken by contracting parties.[3] Most of the states have created such settings and abided by their legal obligations to implement international treaties into their national legal order. Still this is not sufficient for guaranteeing the effective and full protection of the right to education.

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1 Jan De Groof: *No Person shall be denied the Right to Education*. Nijmegen, 2004. 725.

2 Jan De Groof – Gracienne Lauwers – Kishore Singh: *The Right to Education and Rights in Education*. Nijmegen, 2006. 426.; Kishore Singh: Report of the Special Rapporteur on the right to education, justiciability on the right to education. *A/HRC*/23/35, (2013) para 17.

3 *Justiciability*, Right to Education Project, promoting mobilisation and accountability. <www.right-to-education.org/issue-page/justiciability>

### 1.1. "Justiciability"

Having a legal right and its mere incorporation into a domestic legal order is not enough; enforcement mechanisms must also be available. Indeed, 'for rights to have meaning, effective remedies must be available to redress violations'.[4] It is not conceivable to have a right without a remedy.[5] One of the options to enforce a right is to render it justiciable. Justiciability refers to 'the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur'.[6] The right to education is justiciable in all its dimensions since it is internationally recognised as demonstrated by the enshrinement of this right in various international and regional treaties as well as its implementation in the national constitutions.[7]

However, this latter statement is contested as the justiciability of economic, social and cultural rights has encountered some opposition based on two main arguments namely: the 'specific nature' of these rights and the doctrine of the separation of powers. The former argument stipulates that since social and economic rights are vague, show a lack of precision and demand the adoption of positive measures for its implementation, the justiciability of such rights is not possible, contrary to civil and political rights which are clearer and impose a negative obligation. The second argument, believes that the doctrine of separation of powers is undermined since by adjudicating on matters related to the right to education the judges step into the executive's sphere of competence. As was said in the *case R v Cambridge Health Authority ex parte B* 'Difficult judgments on how a limited budget is best allocated to the maximum advantage of the maximum number […] is not a judgement a court can make.'[8] However, these arguments can be counter argued.[9] With regards to the first argument, '[t]he nature of the rights themselves is not a legitimate basis for rejecting their justiciability'.[10] The unwillingness to recognise economic, social and cultural rights often stems from political and ideological ideas as well as the cultural and political history of the state.[11] Indeed, political and ideological ideas rather than scientific ones are often behind the non-recognition of economic, social and cultural

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4 General comment No. 5 (2003) *General measures of implementation of the Convention on the Rights of the Child*. CRC/GC/2003/5, para 24.

5 F.Coomans: The Justiciability of economic social and cultural rights. In: E. Hey – F. Amtenbrink – W. Van Boom – S. Taekema – R. Van Swaaninen – A. Naudé-Fourie – K. Henrard: The justiciability of economic, social and cultural rights. *Erasmus Law Review,* 2009/2. 427.

6 International Commission of Jurists: *Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability.* 2008.

7 Singh op. cit. para 27.

8 *R v Cambridge Health Authority ex parte*, B [1995] 2 All ER 129 (CA).

9 A. P. James: The forgotten Rights: the case for the legal enforcement of Socio-economic rights in UK national Law. *Opticon,* 1826, (2) 1.

10 E. C. Christiansen: Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court. *Colum. Hum. Rts. L. Rev.,* Vol. 38, (2006–2007) 347.

11 James op. cit. 1.

rights[12] and non-justiciability of these rights are simply 'a perception'.[13] As to the second argument, the separation of powers does not exclude the possibility that the judges may play a role in the enforcement of the right to education, especially since the separation of powers is currently described as the "dynamic and ongoing interaction between the different branches of government' where the courts engage not only 'in an exacting examination of state policies with respect to socio-economic rights', but also in the 'normative development of the content [… thereof], drawing where appropriate on international and comparative standards'.[14] Besides, the principles of equality and fair hearing, including access to court, would be undermined if some executive decisions would not be entitled to be subject to review. The paradigms of the rule of law or the *Rechtstaat*, to name only two different but celebrated models, rather require the existence of judicial review of administrative and governmental decisions as a guarantee for the individual. Indeed, scholars specializing in administrative law have devoted substantial work to establishing when and how policy decisions may be subject to judicial review.[15] If the allocation of a state's financial resources is certainly a political decision, there are nevertheless certain constitutional goods (among these, the social state clause) that not even a legislating body can overlook, as the theory of the "essential core" of fundamental rights has explained.[16]

This entails that individuals can have recourse to courts to challenge states' compliance with their obligations to protect the right at stake. And it means that international, regional and national judicial and quasi-judicial bodies can review state parties' actions, omissions, provisions and policies, related to education. [17]

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[12] F. Piovesan: The Implementation of Economic, Social and Cultural Rights: Practices and Experiences. In: B. K. Goldewijk – A. C. Baspineiro – P. C. Carbonari (eds.): *Dignity and Human Rights: the Implementation of Economic, Social and Cultural Rights.* Antwerp–New York, Intersentia, 2002. 113.

[13] D. Marcus: The Normative Development of Socioeconomic Rights through Supranational Adjudication. *Stan. J. Int'l L*., 2006/42. 53., 101.

[14] P. O'Connell: *Vindicating Socio-Economic Rights: International Standards and Comparative Experience.* Abingdon–New York, Routledge, 2012. 201.; International Commission of Jurists: *Courts and the legal Enforcement of Economic, Social and Cultural rights- comparative experiences of justiciability.* 2008. 75.

[15] Studies on judicial review tend to base on national law, and therefore it is difficult to cite an internationally valid reference. In English language: P. Craig: Competing models of judicial review. *Public Law*, Autumn, 1999. 428–447.

[16] P. Häberle: *Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz. Zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt*. Heidelberg, Müller, 1983. 43.

[17] F. Coomans: In search of the Core Content of the Right to Education. In: A. Chapman – S. Russell (eds.): *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*. Hart Publishing, 2002. 220. Antwerp, Intersentia,

### 1.2. Why is justiciability important?

The role of the court in the enforcement of the human right is crucial. It guarantees that the right is respected, protected and fulfilled. Judicial and quasi-judicial bodies not only protect but also promote the right to education in guaranteeing and enforcing this right. The justiciability of a right renders the state accountable for action or inaction according to international, regional and national legal norms. Judicial enforcement has a role in granting remedies in cases of violation of the right to education. A finding of violation of the right to education in an individual case may have a large impact and lead to systematic institutional change consequently benefit to other victims of the state behaviour which was challenged and it may simultaneously prevent future violations of the right at stake. Besides, judicial bodies play an important role in the clarification of the scope and the content of the right to education and in the specification of the different rights available to individuals.[18] The court's role is also important as it gives a voice to the marginalised group in a democratic society which often neglects their interests. Indeed, the distinctive nature of the Court's approach is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met.[19] Moreover, a judgment of an adjudicating body may bring a state's violation of a right in the public eye and potentially attract the media's attention. In turn, this will enhance a state's accountability and the possibility of change. With regards to the quasi-judicial mechanisms, such as an ombudsman and domestic human rights establishments, the political and legal pressure put on states subsequent to the decision of quasi-judicial mechanisms illustrates their importance despite the non-binding nature of their decision. Moreover, such mechanisms may, on the basis of their findings, lodge a complaint in domestic courts. [20]

Justiciability of the right to education is also necessary for socio-economic reasons. Besides the fact that education alleviates poverty, persons immigrate in order to obtain better education for their children and better opportunities in other countries. If countries universally implement and realize the right to education, immigration might not be necessary since there will be education everywhere.[21]

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[18] International Commission of Jurists (ICJ): Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability, 2008. *Human Rights and Rule of Law Series*, No. 2, 75.; Key concepts on ESCRs – Can economic, social and cultural rights be litigated at courts? http://www.ohchr.org/EN/issues/ESCR/Pages/CanESCRbelitigatedatcourts.aspx

[19] C. Sunstein: Social and economic rights? Lessons from South Africa. *Public Law and Legal Theory Working Paper No. 12,* University of Chicago; see also C. Sunstein: *Design Democracy, What constitutions Do*. Oxford, Oxford University Press, 221–237.

[20] Singh op. cit.

[21] For a discussion of this issue see Christian Dustmann – Albrecht Glitz: Migration and Education. *Nordface Migration, Discussion Paper,* No. 2011–11.; E. A. Hanushek – S. Machin – L. Woessmann (eds.): *Handbook of the Economics of Education*. Vol. 4., Amsterdam, North Holland, 2014.

## 2. Examples of justiciability of the right to education via judicial and quasi-judicial mechanisms at national and international level

The right to education is and has been justiciable in many jurisdictions.[22] This section will provide some of the many examples illustrating the justiciability facets of the right to education. It will illustrate how the right to education is widely recognised as enforceable in international and national courts. The chosen national case law relates to countries that have ratified the relevant human rights treaties.[23] These countries, although several human rights violations still exist in them and the right to education has not necessarily been fully realized, present models of justiciability. These countries have ratified human rights treaties containing the right to education and incorporated it in the domestic law in attempts towards justiciability.

The Supreme Court of the United States stresses the state's responsibility by stating that 'providing public schools ranks at the very apex of the function of a state'.[24] Another case in this regard, is the *Campaign For Fiscal Equity v. State of New York* case where the Supreme Court of New York held that the State funding of public education did not meet the minimum constitutional requirements in order to comply with the duty to provide a "sound basic education". On appeal, the decision was upheld.[25] In *Brown v. Board of Education*, the US Supreme Court adjudicated on discrimination and ruled that distinct educational infrastructure for black and white children are "inherently unequal" and it recognised education as an element of the foundations of a democratic society.[26]

The South African Constitution, 1996 is famous for its extensive provisions on economic and social rights, which was drafted with the ICESCR in mind.[27] Section 38 of the South African Constitution, dealing with the enforcement right of the Constitution, states that 'anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights'. The court has given a broad interpretation to this provision requiring that the claimant seeking for a remedy demonstrates sufficient interest in receiving the sought relief.[28] Besides, through *amicus curiae* (friends of the court) action has

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22 F. Coomans: The Justiciability of economic social and cultural rights. In: E. Hey – F. Amtenbrink – W. Van Boom – S. Taekema – R. Van Swaaninen – A. Naudé-Fourie – K. Henrard: *The justiciability of economic, esocial and cultural rights*. 2009. 427.

23 Coomans op. cit. 428.

24 *Wisconsin v. Yoder* (1972), 406 U.S 205, 213, 92 S.Ct. 1526, 32 L.Ed.2d 15.

25 State Supreme Court of New York, *Campaign For Fiscal Equity v. State of New York et al.,* 710 N.Y.S. 2d 475, January 9, 2001; see also New York Court of Appeals, *Campaign For Fiscal Equity v. State of New York et al.,* 100 N. Y. 2d 893, June 26, 2003; New York Appellate Division, First Department, *Campaign for Fiscal Equity, Inc. v. State of New York,* 2006 NYSlipOp 02284, March 23, 2006.

26 US Supreme Court of Justice, *Brown v. Board of Education of Topeka*, 347 US 483 (1954).

27 Coomans op.cit. 429.

28 S. Liebenberg: South Africa adjudicating Social Rights Under a Transformative Constitution. In: M. Langford (ed.): *Social Rights Jurisprudence, Emerging Trends in International and Comparative*

been made possible for individuals and organisations to take part in human rights court's litigation by proving that their contribution will be useful for the court and distinct from those of the disputing parties. In practice, South African jurisprudence demonstrates how the courts are developing a model for judicial review of socio-economic rights which supports the constitution's provisions.[29]

In Colombia, the constitutional court has developed a pile of case law concerning the right to education.[30] Its jurisprudence, based on article 27 of the constitution, clarifies that the constitution recognises the right to education as a fundamental right directly enforceable by courts via writ of protection, even in the case where the education provided has been privatised.[31] The writ of protection is enshrined in article 86 which provides that every person has the right to fil a write of protection before a judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whomever acts in his/her name for the immediate protection of his/her fundamental constitutional rights when that person fears the latter may send it to the Constitutional Court for possible revision. The Court found a violation of the right to education when a private school stopped to carry on providing education to a child with attention deficit disorder and it ordered all schools to provide education for such children even if they are not specialised to educate them.[32]

In *O'Donoghue v. Minister for Health*, the Irish High court adjudicated on the subject of the right to education for children having disabilities and held contrary to the defendant (the state) that a severely mentally disabled child is not uneducable.[33] It based its decision on the definition of education clarified by the Supreme Court in the case of *Ryan v. AG* which defines it as 'the teaching and training of a child to make the best possible use of inherent and potential capacities, physical, mental and moral'.[34] It also considered the advance made internationally in the field of education for children with disabilities. Thus, the court made it clear that the constitution obliges the state to provide for free primary education to all children, including disabled ones, and that special measures must be undertaken for those children whose handicap prevented them from enjoying the conventional education.

In Israel, the Supreme Court decided that the right to education for children with disabilities includes the right to free education not only in respect of special education, but also in integrated educative settings. In this case, the government was ordered to arrange its budgetary provisions to cover these services.[35]

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*Law*. Cambridge, Cambridge University Press, 2009. 80.

29 Liebenberg op. cit. 80.

30 M. Sepulveda: Colombia: The Constitutional Court"s Role in Addressing Social Injustice. In: Langford (ed., 2009) op. cit. 155.

31 Sentencia T-534/97.

32 T-255/01.

33 *O'Donoghue v. Minister for Health* & *Ors* [1993] IECH 2.

34 *Ryan v. A.G.* [1965] IR294, O' Dalaigh C.J.

35 Supreme Court of Israel, *Yated and others v. the Ministry of Education*, HCJ 2599/00, August 14, 2002.

The right to education has also been recognised as justiciable by international court.[36] In *the Belgian Linguistics Case No. 2*, the European Court of Human Rights held that despite the negative formation of the first sentence of article 2 protocol No.1 stating 'no person shall be denied the right to education', this article secures this right.[37]

The right of people with disabilities was also protected by the European Committee on Social Rights who held in a collective complaint by Autism-Europe that the European Social Charter was infringed by the French government's general lack of progress.[38] Likewise, the advisory opinions of the French National Consultative Commission defended the right for such children.[39]

Even when the right of education was not mentioned in the constitution, legal recourse has been available for this right as it constitutes an essential element for the exercise of other rights. The Supreme Court of India held that the right to education formed part of an element of the right to life and thus it is enforceable even though it was at that time not identified in the Indian constitution.[40] In India, any individual can directly go to the Supreme Court when there is a violation of the right to education since fundamental rights are considered as primordial element of the constitution. The Inter-American Court of Human rights took a similar approach and underlined in several cases that a violation of the right to life may occur when there is a lack of educational facilities for vulnerable groups.[41] The Inter-American Court of Human Rights has held in a number of cases that the special measures of protection afforded to children by the State (Article 19 of the American Convention on Human Rights) includes the provision of education.[42] Another example of the justiciability of the right to education in India is the following; the Commission for Protection of Child Rights in accomplishing its task to protect the enjoyment of the right to education had examined complaints about the imposition of school fees for primary education when there should not be any. The findings of this Commission led court actions and resulted into parents having their fee reimbursed.[43]

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36 L. Clements – A. Simmons: European Court of Human Rights. In: Langford (ed., 2009) op. cit. 424.

37 *Belgian Linguistics Case* (No 2 (1968) 1) EHRR 252.

38 *International Association Autism Europe vs. France*, Complaint No. 13/2002. European Committee on Social Rights, 4 November 2003.

39 Avis sur la scolarisation des enfants handicapés http://www.cncdh.fr/fr/publications/avis-sur-la-scolarisation-des-enfants-handicapes

40 *Unni Krishnan, J.P. v State of A.P.* (1993 I.SCC 645).

41 Inter-American Court of Human Rights, Case of the *Juvenile Re-education Institute v. Paraguay*, Judgment of 2 September 2004, Series C, No. 112; Case of the *Indigenous Community Yakye Axa v. Paraguay*, Judgment of 17 June 2005, Series C, No. 125; Case of *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C, No. 146.

42 See Inter-American Court of Human Rights, *Instituto de Reeducación del Menor v. Paraguay,* September 2, 2004, paras. 149, 161 and 174.

43 Singh op. cit. para 17.

As already mentioned, most of the states have abided by their legal obligations to implement international treaties into their national legal order. Still this is not sufficient for guaranteeing the effective and full protection of the right to education.

### 3. *Status quo* of the right to education with regards to its implementation

Human rights entail both rights and obligations. Thus, the various international and regional conventions containing the right to education not only grant this right but also impose an obligation on the state parties to guarantee the exercise of this right. As the Limburg principles on the implementation of the International Covenant on Economic, Social and Cultural Rights (the Limburg Principles) specifies, contracting parties are accountable to their individuals as well as to the international community for their compliance to these obligations.[44] There exist different guidelines clarifying the states' duties with regards to the implementation of human rights, including the right to education. This section will expose the main obligations so far imposed on states with regards to the right to education.

The states, when implementing all human rights, must respect three landmark obligations namely: the obligation to respect, protect and fulfil. The obligation to respect prevents the states from interfering with the exercise of human rights. The obligation to protect requires the states to prevent third parties, such as private entities or, individuals or international organisation, from interfering with the enjoyment of the rights. The last obligation requires the states to use all appropriate measures, *inter alia*, judicial, administrative, and budgetary measures to ensure the total realisation of human rights.[45]

The General Comment of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) number 3 clarifies the state obligation with regards to, amongst other rights, the right to education provided in the International Convention on Economic, Social and Cultural Rights (ICESCR).[46] The nature of a state's obligation is provided in article 2 of the ICESCR providing for an obligation of conduct and an obligation of result. The Maastricht guidelines on Violations of Economic, Social and Cultural rights (Maastricht Guidelines) specifies that the former obliges the state to take actions aiming to realise the right and the latter requires the state to realise

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[44] *Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights*, para 10. <http://www.escr-net.org/docs/i/425445>

[45] Fernandez Alfred – Zachariev Zacharie: *Bibliographie choisie sur le doit à l'éducation*. 2011. 7. www.oidel.org/doc/Bibliographiedroiteduc/Biblio%202012%202.pdf; *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*. Maastricht, January 22–26, 1997, para 10.; 18–19. ; UN Human Rights Office of the High Commissioner for Human rights, http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx.

[46] CESCR, *General Comment No.3: The Nature of States Parties Obligations* (Art. 2, para.1, of the Covenant), Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23).

a specific objective to 'satisfies a substantive standards'.[47] According to this article contracting parties must ensure that the rights present in the Convention will be exercised without discrimination and it must 'undertake steps with a view to achieving progressively the full realization of the rights recognized in the present Covenant'. To this end, state parties must use all appropriate means, including particularly the adoption of legislative measures in order to satisfy the obligations to take steps (article 2(1) ICESCR). Otherwise said contracting parties must incorporate the right to education into their legislation and policies at all levels.[48] The failure to effectively enforce legislation aiming to implement the ICESCR violates this Convention.[49] The Committee underlines that the adoption of legislative measures does not exhaust the obligations of contracting parties and it states that the ultimate word as to whether appropriate means have been undertaken by the states is reserved for the Committee itself.[50] Concerning the measures to be taken, the committee of the right of the child stipulates that 'each state party must respect and implement the right of the child to have his or her best interests assessed and taken as a primary consideration, and is under the obligation to take all necessary, deliberate and concrete measures for the full implementation of this right.[51]

Other measures than legislative measures must be taken for states to fulfil their obligations under the ICESCR.[52] The provision of judicial remedies with regards to rights that can be considered justiciable belongs to the means which are considered appropriate.[53] The Limburg principles provide that economic, social and cultural rights can be justiciable.[54] The committee stipulates that article 13(2)(a),(3)(4) ICESRC, providing the right to education, seems to be 'capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain'.[55] The Maastricht guidelines and the Limburg principles stipulate that access

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47 *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.* Maastricht, January 22–26, 1997, para 7.

48 CRC, *General Comment No. 1 (2001), article 29 (1): the aims of education*, CRC/GC/2001/1., para 17.

49 *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.,* Maastricht, January 22–26, 1997, para 15.

50 CESCR, *General Comment No.3 (1991): The Nature of States Parties Obligations (Art. 2, para. 1, of the Covenant*), Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23) para 1–4.

51 CRC, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1).*

52 *Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights*, para 17.

53 CESCR, *General Comment No.3: The Nature of States Parties Obligations (Art. 2, para. 1, of the Covenant*), Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23) para 5.

54 *Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights*; para 8.

55 CESCR, *General Comment No.3: The Nature of States Parties Obligations (Art. 2, para. 1, of the Covenant*), Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights

to effective judicial or other remedies and adequate reparation should be available to any victims of a violation of an economic, social or cultural right.[56]. Jurisprudence in the area of economic and social rights is also encouraged by the Committee via the General Comment adopted in 1998 as it states that 'the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring government accountability must be put into place.[57] Besides this measure administrative, financial and social measures are an example of other appropriate measures. Moreover, impunity of any violations of the rights at stake should be prohibited.[58]

Article 2 ICESRC uses the term 'progressive realisation' of the right to education. This term must be read in the context of the general objective of the conventions meaning that it imposes an obligation on the states to realise the right at stake as quickly as possible. Any retrogressive measures must be justified.

Every contracting party must ensure a minimum core of obligation in order to guarantee the enjoyment of 'minimum essential levels' of each rights which states parties have the obligation to guarantee;[59] a failure to satisfy this 'minimum core obligations' amounts to a violation of the ICESR.[60] The assessment as to whether a state has fulfilled this obligation must take into consideration resource constraints. However, to be able to justify failure to comply with minimum core obligations the state will have to proof that it did its best to use all available resources in order to be in line with these obligations. This entails that a lack of resources does not *de facto* relieve the states from guaranteeing some minimum core obligations.[61] In education, the universal minimum corresponds to primary education. When a state is unable to provide free and compulsory education, it should create strategies to do so and seek

(contained in Document E/1991/23) para 5.

[56] *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22–26, 1997, para 22–23.; Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural, para 19.

[57] CESCR, *General Comment No.9: The domestic application of the Covenant*, UN E/C.12/1998/24, para 2.: See O. De Schutter: Economic, Social and Cultural Rights as Human Right: An introduction. *CRIDHIO Working paper,* 2013. 7.

[58] *Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights*, para 72; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22–26, 1997, para 27.

[59] *Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights*, para 25; CESCR, *General Comment No.3: The Nature of States Parties Obligations (Art. 2, para. 1, of the Conventant*), Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23).

[60] *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22–26, 1997, para 9.

[61] *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22–26, 1997, para 10.

assistance from the international community.[62] In general, international cooperation in implementing the right to education is strongly encouraged.

More specific to the right to education, is that it has a social aspect and a freedom aspect. The former aspect implies that the realisation of this right demands a positive obligation from the part of the state. As providing access to education and making it available to all, demands the states to get involved and to put some efforts. The second aspect refers to the freedom of individuals to choose whether to receive education from a private or a public institution. From this arise, the freedom of legal entities and natural persons to institute their own educational establishment. This aspect implies a negative obligation and demands the states to not-interfere with this freedom.[63]

Four criteria are contained in the *General comment No. 13* on the right to education which on the one hand can be used as a tool to analyse the content of the right to education provided an on the other hand these criteria impose general obligations resulting from them.[64] The four features of the right to education are (1) availability (2) accessibility (3) acceptability (4) adaptability. In my report as Chargé de Mission: adequacy, accountability, awareness, advocacy.[65]

However, when rating the success of the *Millennium Development Goals 2015*, and more specifically Goal 2, it is to be determined whether the measures concerning the justiciability of the right to education have been effective.

## 4. Failure to achieve the millennium goals

The Millennium Development Goals (MDGs) are eight international development goals that were established following the Millennium Summit of the United Nations in 2000, following the adoption of the United Nations Millennium Declaration. Goal 2 aims to achieve universal primary education. More specifically, target 2A hopes to ensure that, by 2015, children everywhere, boys and girls, will be able to complete a full course of primary schooling. However, the UNESCO Institute for Statistics found that progress in reducing the number of children out of school has come to a virtual standstill just as international aid to basic education falls for the first time since 2002. More than 57 million children continue to be denied the right to primary education, and many of them will probably never enter a classroom.[66]

Clearly, effective means of justiciability regarding the right to education is necessary.

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62 K. Tomasevski: Human Rights and Poverty Reduction. Strengthening pro-poor law: legal enforcement of economic and social rights. *ODI,* 2005. 5.

63 Coomans op. cit. 220.

64 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10.

65 J. De Groof: *Report Fulfilling the Right to Education*. 2009. 25.

66 UNESCO Institute for Statistics: *Schooling for millions of children jeopardised by reductions in aid*. June 2013, Number 25.

## 5. Remedial actions

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights[67] is an international treaty establishing complaint and inquiry mechanisms for the International Covenant on Economic, Social and Cultural Rights. Another remedial action that can be taken is the example of the Optional Protocol to the Convention on the Rights of Persons with Disabilities[68]. The Optional Protocol establishes an individual complaints mechanism Parties agree to recognise the competence of the Committee on the Rights of Persons with Disabilities to consider complaints from individuals or groups who claim their rights under the Convention have been violated.[69] The Committee can request information from and make recommendations to a party.[70]

[67] Adopted by the UN General Assembly on 10 December 2008-and opened for signature on 24 September 2009.

[68] Adopted on 13 December 2006, and entered into force at the same time as its parent Convention on 3 May 2008.

[69] Optional Protocol to the Convention on the Rights of Persons with Disabilities: Article 1.

[70] Optional Protocol to the Convention on the Rights of Persons with Disabilities: Articles 3 and 5.

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# RELATION BETWEEN THE RELIGIOUS FREEDOM AND RIGHT TO EDUCATION ON THE BASIS OF HUMAN DIGNITY

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## 1. Introduction

The existence of religion is coeval with the mankind. The religious conviction of the different human communities have defined their culture on the day to day basis since the beginning of history. Therefore, this essential characteristic has made a strong influence not only on the daily life, mentality, on the social relations and structures in general, but particularly on the education at home and even on its institutionalized system.[1] Hence, the personal attitude toward the 'Saint' is a natural feature of every human being, which feature is rooted in his/her own conscience. It is not accidental therefore, that the religious freedom has become one of the first generation human rights in the 18th century.[2] The organized form of European public education has started by the Catholic schools which dominated this field until the 16th century, when we could see the transformation of this system in Europe into a Christian education. Naturally, the Virginia Declaration (1776), Constitution of the United States of America (1787), the French Constitutions – based on the results of the French revolution (1789-1799) – (1791, 1792, 1795)[3], the German Imperial Constitution (1849), constitutional laws of December 1867 of the Austrian Empire, or the Constitution of Weimar (1919), moreover ecclesiastical decrees of which were adopted by the Fundamental Law of Bonn, show precisely the gradual secularization

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1 Szuromi, Sz. A.: *Bevezetés a katolikus hit rendszerébe* (Introduction into the system of the Catholic Faith). Budapest, 2014.7 13.

2 Szuromi, Sz. A. – Ferenczy, R.: *Kérdések az állami egyházjog köréből* (Question about the ecclesiastical law). [Bibliotheca Instituti Postgradualis Iuris Canonici Universitatis Catholicae de Petro Pázmány nominatae III/17] Budapest, 2014. 5., 45. [Szuromi (2014a)]

3 J-L. Thireau: *Introduction historique au droit*. Paris 2001. 270–277.

process of state laws and of the society.[4] Through this process have been crystalized not only different models of state and church relationship, but also a strong basis for religious freedom as one of the most emblematic expression of the human dignity. This new social and legal situation have needed new concept to protect the citizens' rights for education based on their own religious conviction, without the intervention of the state into religious affairs.[5] Peter Card. Erdő points out, that even if a state does not follow in institutionalized form one particular religion or religious ideology, it does not mean necessarily that it makes the state automatically atheist.[6] Nevertheless, the above described brief overview supports well, that within a secularized society every religious educational system has become more vulnerable than before, therefore the ecclesiastical education carries minority characters nowadays, as compared with neutral state- or private schools. Therefore, we cannot neglect to make remarks here regarding the principle and legal basis of the religious communities' right to the teaching of their own faith, in order to educate trough that their children. The *II Catholic – Orthodox Forum* on October 22nd 2010 underlined in its closing Communiqué, that "The participants in the Forum believe that the role as dominating Church or State Church should not result in a legal discrimination for the other Churches and the members of minority religious groups, whose religious freedom should be fully guaranteed, including the right to profess their faith using any means respecting personal freedom."[7]

## 2. The religious school

When we are talking about the religious schools in Eastern Europe, within former communist countries, we cannot forget that the suppression of the religious educational system represents in these countries the loss of their religious freedom during the time of the communist dictatorship. Like in Hungary, when on June 16th 1948 the Hungarian Parliament accepted the secularization of the entire educational system by Act 33/1948. István Barankovics (†1974) – who represented the minority opinion – concluded his parliamentary speech: "This prepared new law certainly will get the majority sympathy of the Parliament; however it will never get the volitional and emotional acceptance of the majority of the Hungarian Nation."[8] Therefore, it

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4 Sz. A. Szuromi: The Changes of Modern Era Relation of Church and State in Europe. *Folia Canonica,* 8, (2005) 65–77.

5 A. M. Rouco Varela: *El derecho a la educación, ¿de nuevo a debate?* In: A. M. Rouco Varela: *Ecclesia et Ius. Escritos de derecho canónico y concordatario.* [Studia Canonica Matritensia 1] Madrid, 2014. 389–409.

6 Erdő, P.: Az Európai Unió és az Egyház (The European Union and the Church). In: Erdő, P.: *Egyház, kultúra, társadalom* (Church, Culture and Society). Budapest, 2011. 273–277., especially 273–274.

7 II Catholic – Orthodox Forum: *Communiqué*. In: *Church and State relations: from Historical and Theological Perspectives.* (Atti del II Forum Europeo Cattolico – Ortodosso, Rodi, Grecia, 18–22 ottobre 2010) Bologna, 2011. 215–221., especially 217. (n. 3).

8 Mészáros, I.: *Mindszenty és Ortutay. Iskolatörténeti vázlat: 1945–1948* (Mindszenty and Ortutay. An outline of School-history: 1945–1948). Budapest, 1989. 175.

must be underlined that the religious educational system does not only depend on emotions, but a clear element of the really existing liberty, justice, solidarity and peace in the particular country. This testifies the acceptance of the cultural values, the religions, and the natural characteristic of the citizens.[9]

Already Pope Pius XI (1922–1939) dedicated an Encyclical letter *Divini illius magistri* (December 31st 1929) to the right of parents to educate their children in ecclesiastical school, following freely their own faith, which is recognized by the state.[10] The pope explicitly argues in this document, Art. 8: "[…] From this we see the supreme importance of Christian education, not merely for each individual, but for families and for the whole of human society, whose perfection comes from the perfection of the elements that compose it. From these same principles, the excellence, we may well call it the unsurpassed excellence, of the work of Christian education becomes manifest and clear; for after all it aims at securing the Supreme Good, that is, God, for the souls of those who are being educated, and the maximum of well-being possible here below for human society […]".[11] Pius XI points out also, that: "[…] Besides every Christian child or youth has a strict right to instruction in harmony with the teaching of the Church, the pillar and ground of truth. And whoever disturbs the pupil's Faith in any way, does him grave wrong, inasmuch as he abuses the trust which children place in their teachers, and takes unfair advantage of their inexperience and of their natural craving for unrestrained liberty, at once illusory and false […]."[12]

Obviously, beside the cited document are those particular social, political, even legal transformations which had happened between the two wars. Nevertheless, the cited papal description – because the argumentation proceeds from the basis of human dignity – is applicable to any denomination. If we take a glance into the Universal Declaration of Human Rights (December 10th 1948) which was composed after the tragedy of the Second World War, we can find the summary of the afore-mentioned concept in general, that the education has to be observant of all characteristics of the human personality (Art. 26,2). The Spanish Constitution (December 27th 1978) – based on the documents of international human rights – in Art. 27 (6) – which was inserted into the Fundamental Law of Spain in 1985[13], and was specified in 2006[14]) expressively declares the principle of the freedom to create educational centers with respect for constitutional principles. The description makes clear that this legal basis is in force for every type of educational categories, mean private-, religious-, or other convictions, as it is explained well by Javier Martínez-Torrón,

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9 Rouco Varela (2014) op. cit. 339–365., especially 340.

10 Pius XI: Litt. Enc. *Divini illius magistri* (31 dec. 1929). *AAS* 22 (1930) 49–86.

11 Ibid. 49.

12 Ibid. 52.

13 Ley Orgánica 8/1985 (3 jul. 1985).

14 Ley Orgánica 2/2006 (3 mai. 2006). Cf. Szuromi, Sz. A.: Spanyol állami egyházjog – új hangsúlyok (Spanish Ecclesiastical Law – New Emphases). *Iustum Aequum Salutare,* X., 2014/2. 155–171., especially 156–157. [Szuromi (2014b)]

professor of the Complutense University of Madrid.[15] I would like to add to Prof. Martínez-Torrón's note, that Art. 27 of the Spanish Constitution deals in detailed the freedom of education within the Spanish Kingdom. The state gives guarantee the free moral and religious educational right of the parents regarding their children.[16] It is supplemented with the principles of the concordat between the Holy See and Spain (January 3rd 1979) which contains the introduction into the Catholic faith even for the universities.[17] Recently, the legal regulation of the teaching in public schools – concerning primary schools – (ECI/2211/2007)[18] and also about the high schools (ECI/2200/2007)[19] have been modified by the order ECD/7/2013.[20] The new rule – based on the recommendations of the United Nation, of the European Council, and of the European Union – touches upon the respect of the entire human person and the unique value of his/her life, but contains also the respect of human dignity, religious belief – including the right for the studies on the basis of his own faith –, the value of the family and the teaching for that.[21]

### 3. Catholic education and its regulation by the Catholic Church

The Second Vatican Council (1962–1965) regulated in general by the Declaration *Gravissimum Educationis* the field of the independent – without state influence – Catholic education.[22] The first chapter defined the legal basis of this independent educational system: "[…] All men of every race, condition and age, since they enjoy the dignity of a human being, have an inalienable right to an education that is in keeping with their ultimate goal, their ability, their sex, and the culture and tradition of their country, and also in harmony with their fraternal association with other peoples in the fostering of true unity and peace on earth. For a true education aims at the formation of the human person in the pursuit of his ultimate end and of the good of the societies of which, as man, he is a member, and in whose obligations, as an adult, he will share […]." Antonio María Card. Rouco Varela establishes well

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15 J. Martínez-Torrón: *Religion and Law in Spain*. New York, NY., 2014. 138.

16 Art. 27 (3) Los poderes públicos garantizan el derecho que asiste a los padres para que sus hijos reciban la formación religiosa y moral que esté de acuerdo con sus proprias convicciones. A. Molina – M. E. Olmos – J. L. Casas (ed.): *Legislación eclesiástica* (Civitas Biblioteca de Legislación). Madrid, 2007. 55.

17 *AAS* 72 (1980) 38–39.

18 ECI/2211/2007 (July 12th 2007).

19 ECI/2200/2007 (July 12th 2007).

20 ECD/7/2013 (January 9th 2013); Cf. Szuromi (2014b) op. cit. 157.

21 Cf. Orden ECD/7/2013, de 9 de enero, por la que se modifica la Orden ECI/2211/2007, de julio, por la que se astablece el currículo y se regula la ordenación de la Educación Primaria, y la Orden ECI/2220/2007, de 12 de julio, por la que se establece el currículo y se regula la ordinación de la Educación Secundaria Obligatoria. A. Molina – M. E. Olmos – J. L. Casas (ed.): *Legislación eclesiástica* (Civitas Biblioteca de Legislación). Madrid, 2013. §§. 154–155.

22 *Conc. Vaticanum II* (1962–1965), Sessio VII (28 oct. 1965), *Declaratio de educatione christiana: Conciliorum oecumenicorum decreta*, Bologna, [3]1973. 959–968, Art. 1: 960.

regarding this introductory chapter that its contents is in harmony with the Universal Declaration of Human Rights (Art. 26,1) and also with the Additional Protocol to the European Convention (May 30th 1952; Art. 2).[23] The cited conciliar document is also an important source of how the parents should fulfill their duties and rights based on their religious conviction within the educational system. In Art. 6 of the *Gravissimum Educationis* we can clearly read: "[…] Parents who have the primary and inalienable right and duty to educate their children must enjoy true liberty in their choice of schools. Consequently, the public power, which has the obligation to protect and defend the rights of citizens, must see to it, in its concern for distributive justice, that public subsidies are paid out in such a way that parents are truly free to choose according to their conscience the schools they want for their children […]."[24]

The Catholic Church, in particular Saint John Paul II (1978–2005) and the Congregation for Catholic Education have published several times such documents which intended to enlighten more precisely the importance of the own schools and educational system of a certain denomination, because within the new secularized society the faithfully committed and institutionalized religious education is the most important instrument to keep the religious attitude, beside the public activity and the teaching- and personal example in the family. This situation shows the minority characteristics of the religious groups which could be easily discriminated, if the state forgets the consequence of its own citizens' right for religious freedom.[25] In order to applicate the directives of the Second Vatican Council, the Congregation for Catholic Education composed a guideline about the religious dimension of education on April 7th 1988. The congregational document testifies well the realism of the Holy See regarding the status of the religious schools within the contemporary society. Already in the introduction is noticed: "[…] Not all students in Catholic schools are members of the Catholic Church; not all are Christians. There are, in fact, countries in which the vast majority of the students are not Catholics – a reality which the Council called attention to. The religious freedom and the personal conscience of individual students and their families must be respected, and this freedom is explicitly recognized by the Church. On the other hand, a Catholic school cannot relinquish its own freedom to proclaim the Gospel and to offer a formation based on the values to be found in a Christian education; this is its right and its duty. To proclaim or to offer is not to impose, however; the latter suggests a moral violence which is strictly forbidden, both by the Gospel and by Church law […]."[26] The Holy See was prepared therefore to give proper answer based on the contemporary circumstances to the current problems, conflicts and questions in the field of education. It is quite clear

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[23] Rouco Varela (2014) op. cit. 342.

[24] *Conc. Vaticanum II* (1962–1965), Sessio VII (28 oct. 1965), *Declaratio de educatione christiana: Conciliorum oecumenicorum decreta*, 963.

[25] Cf. Erdő, P.: A vallási közösségek és jogi kezelésük (Religious Communities and their Legal Status). In: Erdő (2011) op. cit. 253–261, especially 261.

[26] Congregatio pro Institutione Catholica: Lineamenta. *Dimensione religiosa dell'educazione nella scuola cattolica* (7 apr. 1988), *Introduzione*, art. 6.

from that precise overview which dealt with the coming century, and was edited on December 28th 1997, under the title: *The Catholic school on the threshold of the third millennium. The instruction emphasized that "*[…] The phenomena of multiculturalism and an increasingly multi-ethnic and multi-religious society is at the same time an enrichment and a source of further problems. To this we must add, in countries of long-standing evangelization, a growing marginalization of the Christian faith as a reference point and a source of light for an effective and convincing interpretation of existence […]."[27] Also in the same introduction, the legislator calls attention for that misleading idea, which comes from the domination of the state education. As compared with that, the religious education is in minor position, even those which have wide and large organization. Therefore, those initiatives and theories – ignoring the principle of religious freedom and the free choice of the citizens to educate their children on the basis of their own traditional belief – can destroy many values. The document describes: "[…] in recent years there has been an increased interest and a greater sensitivity on the part of public opinion, international organizations and governments with regard to schooling and education, there has also been a noticeable tendency to reduce education to its purely technical and practical aspects […] There is a tendency to forget that education always presupposes and involves a definite concept of man and life. To claim neutrality for schools signifies in practice, more times than not, banning all reference to religion from the cultural and educational field, whereas a correct pedagogical approach ought to be open to the more decisive sphere of ultimate objectives, attending not only to "how", but also to "why" […]."[28] If we compare this stand point with the most recent working document of the same Congregation, which analyzes the entire field of education from the kindergarten to the university, can be seen the most relevant stresses, and every single one derives from the human dignity and from the primary principle of religious freedom. The well detailed text was composed on April 7th 2014 and really considerable in particular concerning the challenge of identity of religious schools and also on the legal challenges. Regarding these the document fixes that the "[…] Contemporary educators have a renewed mission, which has the ambitious aim of offering young people an integral education as well as assistance in discovering their personal freedom, which is a gift from God […]".[29] Concerning the legal problems the document gives a clear reflection on the grievous reality: "[…] Some governments are quite keen on marginalizing Catholic schools through a number of rules and laws that, sometimes, trample over Catholic schools' pedagogical freedom. In some cases, governments hide their animosity by using lack of resources as an excuse […]. Under the guise of a questionable "secularism", there is hostility against an education that

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[27] Congregatio pro Institutione Catholica: *The Catholic school on the threshold of the third millennium* (28 dec. 1997). *Introduction*, art. 1.

[28] Ibid. *Introduction*, art. 10.

[29] Congregatio pro Institutione Catholica: Instrumentum laboris. *Educare oggi e domani. Una passione che si rinnova* (7 apr. 2014) III, 1, a.

is openly based on religious values and which, therefore, has to be confined to the "private" sphere."[30]

## 4. Conclusion: Denominations improves values of the society through their own educational and other services

The religious communities – particularly the historical churches and denominations – make considerable contribution to the general culture, to the development of humanity and to improving of morality in the society. This unique value which originates from the natural religious feature of the human nature – the relation to God, person, and society – gives proper responsibility for the states and even for the denominations in the common work and cooperation for the moral and cultural value of the human society which naturally has civil and religious aspects. The state cannot neglect the fact that the religious beliefs are part of most of its citizens' natural characteristics, and from the exercise of which obligations devolve on the state.[31] This basic concept can be demonstrated well by § 10 (1) Act CCVI/2011 of Hungary which clearly expresses, that the state in order to promote the common goals of the society can cooperate with the Churches. This is eminently true regarding the educational, medical, and social activity of the different denominations.[32] Joseph Schweitzer (†2015; former Chief-Rabbi of whole Hungary) emphasized in 2006 that even an economical or basically political organization needs to manifest ethical values if we liked to speak seriously about a real respect of human rights and religious freedom.[33] Similar clear conviction follows from Joseph Ratzinger's comments (published in 1987)[34] and from statements of representatives of the Hungarian Reformed Church, which analyze values in our contemporary society, in which the family should have an eminent place in social and religious context.[35] Therefore, the religious sphere and the faithful activity of the churches, denominations, etc. have a fundamental impact on the formation of the human values of the concrete society as a community

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30 Ibid. III, 1, l.

31 Sz. A. Szuromi: Legislazione successiva alla transformazione dei rapporti tra Chiesa e Stato nell'Europa centro-orientale. *Ius Missionale,* 9, (2015) 213–224., especially 221–224.

32 Cf. Schanda, B.: *Állami egyházjog. Vallásszabadság és vallási közösségek a mai magyar jogban* (Ecclesiastical Law. Religious Freedom and Religious Communities in the Hungarian Law). Budapest, 2012. 78–84.; Szuromi (2014a) op. cit. 36–38., 45–46.

33 J. Schweitzer: *Jewish values in the European Union* in *The Epoch of Crisis of the Classical Categories*. In: E. S. Vizi – T. G. Kucsera (ed.): *Europe in a World in Transformation* (Conference at the Hungarian Academy of Sciences, 14th–16th December 2006). Budapest, 2008. 129–134., especially 129.

34 J. Ratzinger: *Chiesa, ecumenismo e politica. Nuovi saggi di ecclesiologia.* [Saggi Teologici 1] Cinisello Balsamo, 1987. 202–204.

35 Lukáts, A.: A Dunántúli Református Egyházkerület és az EU csatlakozás. In: *Egyházakkal az Európai Unióba* (A 2003. április 28-án Esztergomban tartott konferencia előadásai; Párbeszéd I). 25–30., especially 28.; cf. Szabó, I.: Reformation and Transformation. In: Vizi–Kucsera op. cit. 135–138.

of people, which aspects support the needy of their special protection.[36] This idea shows well the essential difference between the "laicism" and the "neutral" concepts, the latter of which is ready for cooperation with denominations in order to fulfill the basic human right for religious freedom of the state own citizens.

[36] Cf. B. Munono Muyembe: Le bien commun et la diaconie: service de l'Église dans la société. Possobles formes de coopération en vue d'un bien-être intégral de la personne humaine. In: II Catholic – Orthodox Forum op. cit. 191–198.

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# STRENGTHENING CIVIL SOCIETY

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After an overview of the importance of voluntary associations and other civil society institutions, especially those with a religious character, for the social and political health of liberal democracies, we will consider how well-meaning public policies can do grave damage to the viability of civil society and thus to democratic freedoms, while wiser policies can help to strengthen both.

## 1. Civil Society as a Limitation on Tyranny

Mary Ann Glendon of Harvard Law School reminded us, a quarter-century ago, that *"the institutions of civil society help to sustain a democratic order, by relativizing the power of both the market and the state, and by helping to counter both consumerist and totalitarian tendencies"*.[1] As we will see, this is not all that they do, but it is crucially important.

This is not to say that what the state does, when it acts appropriately, is not vitally important. *"The public sector tends to be better [...] at policy management, regulation, ensuring equity, preventing discrimination or exploitation, ensuring continuity and stability of services, and ensuring social cohesion"*.[2] An argument for the independence of civil society is not an argument against this oversight role of the state; indeed, Osborne and Gaebler argue that the state becomes more effective as it focuses on 'steering the boat' while leaving it up to civil society to pull on the oars.

One classic summary of the purposes of government in a free society is found in the Preamble to the United States Constitution, adopted in 1787: *"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare,*

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* Professor.

1 Mary Ann Glendon: *Rights Talk: The Impoverishment of Political Discourse*. New York, Free Press, 1991. 137.

2 David Osborne – Ted Gaebler: *Reinventing Government*. Reading, MA, Addison-Wesley, 1992. 45.

*and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."* This Constitution, and its subsequent amendments, was concerned not only to define the authority and functioning of the national government, but also to state clearly the limits on that authority, and to define the rights of the people.

But no constitution is self-enforcing. With respect to the tendency of government to encroach upon the freedom of citizens, it is surely not necessary to point out that constitutional and statutory limitations upon governments have proved again and again insufficient. Only a strong countervailing force in the form of a variety of civil society institutions can resist the temptation of legislators and government officials to continually expand their interventions into the lives of citizens. These interventions are especially insidious because they are so often motivated by the conviction that those exercising governmental authority, like Plato's Guardians, possess a superior wisdom about what is in the best interest of citizens.

We should not overlook the other power to be resisted, in Glendon's formulation: that of the market. She is not referring, I think, to what French writers are fond of calling *"Anglo-Saxon savage capitalism,"* but rather to the insidiously seductive power of consumerism and the market's continual generation of new temptations to fill one's life with diversions.

Kept in their place, markets (like government) are a very good thing, as the dismal failure of 'planned economies' has shown again and again, but, as with government, there is danger that markets will undermine the ability of men and women to live lives of steady purpose informed by moral conviction, and to do so in trustful cooperation to meet their common needs and those of others. Markets depend upon, but do not foster, trust.

But markets and government are not the only alternatives. Much of the policy debate in the European Union and in North America over recent decades has been about how to balance the roles of government and the market, debates over "public goods" and privatization. This public/private dichotomy is over-simplified; it misses the essential role, in a free society, of what has been called the "third sector" of voluntary associations, which *"tends to be best at performing tasks that generate little or no profit, demand compassion and commitment to individuals, require extensive trust on the part of customers or clients, need hands-on, personal attention [...] and involve the enforcement of moral codes and individual responsibility for behavior"*.[3]

Or, to put it another way, such *"mediating structures are the value-generating and value-maintaining agencies in society"*.[4] Governments can prescribe what is legal and illegal, but not what is good and what is evil and how we should seek to live

[3] Osborne–Gaebler op. cit. 46.

[4] Peter L. Berger – Richard John Neuhaus: To Empower People (1977). In: Michael Novak (ed.): *To Empower People: From State to Civil Society.* Washington, DC, American Enterprise Institute, 1996. 163.

decent and purposeful lives. Simple compliance with laws is not enough to sustain a healthy society.

There are many different types of associations and institutions making up a healthy civil society, derived from the common concerns of citizens. Few are explicitly intended to limit the power of governments or the influence of markets, but many in fact have this effect. The degree to which this is the case tends to reflect the reason for the existence of the association: those formed to promote a hobby or sport may be quite susceptible to market incentives or government regulation, while those based on a shared religious faith and worldview may be highly resistant to both. This is a reason why religious liberty is one of the most basic of human rights, and is indeed the first freedom protected by the Bill of Rights in the American Constitution.

Religious liberty is important not only as a protection for the conscience of the believer, but also as a limit on the intrusions of the state into civil society. As sociologist Peter Berger has pointed out, *"it can be argued that it is the single most Important right and liberty."* In fact, *"religious liberty is fundamental because it posits the ultimate limit on the power of the state. The status of religious liberty in a society is a very good empirical measure of the general condition of rights and liberties in that society"*.[5]

This is because *"religion ipso facto relativizes, puts in their proper place, all the realities of this world, including all institutions. This proper place, of course, is an inferior place – mundane, profane, penultimate."* Thus, *"the state that guarantees religious liberty does more than acknowledge yet another human right: it acknowledges, perhaps without knowing it, that its power is less than ultimate"*.[6] José Casanova makes a similar point, that *"religion has often served [...] as a protector of human rights and humanist values against the secular spheres and their absolute claims to internal functional autonomy"*.[7] Today, Berger and Casanova are saying, it is not – at least in the West – religion which is making hegemonic claims, but secularism as a militant and intolerant faith, often in alliance with government, that seeks to marginalize or suppress contrasting views. Vibrant religions serve to keep open a sphere of freedom of conscience and of action.

Attempts by the state to intrude upon the sphere of religious freedom has been one of the most common – and bitter – sources of social conflict throughout recorded history. As law professor Douglas Laycock has pointed out, the violence and bloodshed, the 'religious wars,' that we associate with the Reformation in Europe were primarily the result of actions by government rather than by churches. He asks, "what was the dominant evil of these conflicts? Was it that people suffered for religion, or that religions imposed suffering? Is the dominant lesson that religion has a 'dark side' that is 'inherently intolerant and prosecutory' or that efforts to coerce

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5 Peter L. Berger: The Serendipity of Liberties. In: Richard John Neuhaus (ed.): *The Structure of Freedom: Correlations, Causes, and Cautions*. Grand Rapids, MI, Eerdmans, 1991. 14.

6 Berger op. cit. 14.

7 José Casanova: *Public Religions in the Modern World*. Chicago, IL, University of Chicago Press, 1994. 39.

religious belief or practice cause great human suffering?" Even today, *"[m]uch has changed since the Reformation, but one constant is that the State punishes people for disapproved religious practices"*.[8]

On the other hand, the insistence of religious individuals and associations on living out their convictions, in public as well as in private, helps to sustain a vibrant civil society. The legal, political, and social arrangements crafted to accommodate the non-negotiable concerns of religious groups serve also to shelter forms of association with less ultimate agendas, and thus allow a rich pluralism to flourish.

## 2. Voluntary Associations Nurturing Trust

Strongly-held religious convictions can help to create the firm foundation upon which an ordered liberty must rest. Tocqueville famously concluded that *"[r]eligion, which never intervenes directly in the government of American society, should therefore be considered as the first of their political institutions, for although it does not give them the taste for liberty, it singularly facilitates their use thereof"*.[9] A recent author, seeking to answer the secularist charge that religion is dangerous, has made the point more universally: *"[i]t is fairly clear to any unbiased observer that in most societies, most of the time, religion is one of the forces making both for social stability and for morally serious debate and reform"*.[10] Religion and faith-based associations do this through their power to build communities of trust and to imbue them with shared purpose and moral order.

Trust is a quality without which a democratic society cannot flourish: it is the indispensable inclination of citizens to have confidence that most of their fellow-citizens will behave honestly and reliably. Francis Fukuyama has pointed out that *"while contract and self-interest are important sources of association, the most effective organizations are based on communities of shared ethical values. These communities do not require extensive contract and legal regulation of their relations because prior moral consensus gives members of the group a basis for mutual trust"*.[11]

In my study of education before and after the collapse of Communism in Eastern Europe, I noted the significance of trust for a healthy civil society and democratic political order, and that this had been damaged much more profoundly in the Soviet Union than in Poland and other Central European countries where, despite decades of communist rule, the habits of trust and cooperation had been preserved at the grass

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[8] Douglas Laycock: Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century (1996). In: *Religious Liberty, Volume One: Overviews and History*. Grand Rapids, MI, Eerdmans, 2010. 652–653.

[9] Alexis Tocqueville: *Democracy in America*. [J. P. Mayer (ed.); George Lawrence (trans.)] New York, Harper & Row, 1988. 292.

[10] Keith Ward: *Is Religion Dangerous?* Grand Rapids, MI, Eerdmans, 2006. 55.

[11] Francis Fukuyama: Trust: The Social Virtues and the Creation of Prosperity. In: Don E. Eberly (ed.): *The Essential Civil Society Reader: The Classic Essays*. Lanham, Rowman and Littlefield, 2000. 259.

roots within Catholic and other religious organizations.[12] The effort of Communist regimes to eliminate all forms of social organization not directly subordinated to the State and Party did profound damage to the ability of the successor states of the Soviet Union – which were under such a regime for a generation longer than were the other members of the Warsaw Bloc, and most before that under a tsarist autocracy – to the demands of freedom. What Christopher Lasch noted in a Western context, that *"[t]he replacement of informal types of association by formal systems of socialization and control weakens social trust, undermines the willingness both to assume responsibility for oneself and to hold other accountable for their actions, destroys respect for authority, and thus turns out to be self-defeating"* [13], was even more universally true under a totalitarian system. The result was "*that hypertrophy of central authority which became so very characteristic of Communist society, and with the achievement of the erosion or total destruction of rival centres of countervailing power".*[14] A comparison of the vigorous progress of democracy and the economy in Poland – where even under Communism the Catholic Church sustained alternative forms of association – with the stagnation of both in Ukraine and Belarus as well as in Russia over the past post-Soviet quarter-century suggests that these fears were well-founded.

Of course, religious associations and loyalties are not the only source of such trust, but *"democracy requires extra-democratic virtues associated with the commitment to some reasonable comprehensive account of the good, secular or religious. For without the deeper groundings (and I emphasize "groundings" in the plural), the political cooperation is placed at unacceptable risk".*[15] What churches and other religious associations provide is the expectation and thus the habit of gathering regularly, often several times a week, for worship and instruction that help to reinforce this grounding, repairing the damage done to it in other settings through encounters with the dominant culture of materialism. In addition, these regular gatherings solidify the bonds and the trust among the members of the local religious fellowship; it has been suggested that *"any observant coreligionist, at least in a demanding faith, is [considered] naturally trustworthy".*[16] The importance of regular gathering to *"spur one another on toward love and good deeds [...] encouraging one another"*[17] is emphasized in the Christian scriptures and has become an essential feature of non-Christian religious traditions as well as they adapt to American life.

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12 Charles L. Glenn: *Educational Freedom in Eastern Europe.* Washington, DC, Cato Institute, 1995.

13 Christopher Lasch: *The Revolt of the Elites and the Betrayal of Democracy.* New York, W. W. Norton, 1995. 98.

14 E. Gellner: Civil society in historical context. *International Social Science Journal,* vol. 43, 1991/3. 495.

15 David Blacker: Civic Friendship and Democratic Education. In: Kevin McDonough – Walter Feinberg (ed.): *Citizenship and Education in Liberal-Democratic Societies.* Oxford, Oxford University Press, 2003. 238.

16 Nicholas Wade: *The Faith Instinct: How Religion Evolved and Why It Endures.* New York, Penguin Books, 2009. 203.

17 *Hebrews* 10:24f (NIV).

### 3. Prophetic Challenges to Societal Norms

In addition, communities based upon strongly-held religious faith usually nurture worldviews that are to some degree – sometimes to a very large degree – at odds with that prevalent in the majority culture. They offer an alternative understanding of what really matters, and thus the possibility of a critical stance toward the dominant system or culture, one that is not simply idiosyncratic but rooted in a tradition and a supportive community.

It is common for individuals with strong religious convictions, whether Christians or Muslims (or adherents to any other religion) to perceive conflicts between those convictions and elements of the surrounding culture. This may, in fact, make them *better* citizens, since they are more likely to press for positive changes than those who are complacent about the culture, the economic system, or the political order.

While in earlier generations the role of prophetic minorities was often to challenge conventional morality in the name of authenticity or of justice, today they are more likely to assert that a healthy society cannot function without shared norms, even if those are sometimes violated. Hypocrisy, it has been said, is the tribute that vice pays to virtue. The fact that, in recent years, hypocrisy has been judged by many a greater evil than vice is but another sign of what Hunter has called *"the loss of the languages of public morality in American society"*.[18] In fact, the change American society is experiencing goes much deeper than simple differences over, for example, what are often called 'life-style choices' or behavioral preferences.

What is ultimately at issue are not just disagreements about 'values' or 'opinions'. Such language misconstrues the nature of moral commitment. Such language in the end reduces morality to preferences and cultural whim. What is ultimately at issue are deeply rooted and fundamentally different understandings of being and purpose.[19]

Religious perspectives and value-judgments, at least for the adherents of what we are calling 'strong religion', are foundational. Of course, they may change on particular issues as a result of further instruction or reflection, but it is of their essence that they 'go all the way down'. In this they are closely related to and indeed often associated with deeply-held cultural norms of the sort that the superficial multiculturalism purveyed in public schools, the multiculturalism of foods, fashions, and fiestas, cannot do justice to.

What do we mean by 'strong religion'? We use this term, not to distinguish among the usual denominational identifiers, but to describe those individuals and groups who seek to live by the specific requirements of their religious tradition, and do so in a manner which to some extent set them at odds with the surrounding society.

The first thing to note is that strong religions tend to challenge the norms of the surrounding culture, often in ways that make others quite uncomfortable. This may indeed be part of their attraction for those who find the culture either hopelessly perverse or empty of transcendent meanings and assurances. Legal scholar Stephen

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[18] James Davison Hunter: *Culture Wars*. New York, Basic Books, 1991. 316.

[19] Hunter op. cit. 131.

Carter points out that, *"[a]t its best, religion in its subversive mode provides the believer with a transcendent reason to question the power of the state and the messages of the culture."* This in turn leads to government efforts to 'domesticate religion', to seduce or compel religious leaders and their followers to become supporters of the status quo and to stop questioning it on the basis of their scriptures or traditions.[20]

David Wells, writing from an Evangelical perspective, offers a characteristic statement of such disruptive 'strong religion': *"[u]ntil we acknowledge God's holiness, we will not be able to deny the authority of modernity. What has most been lost needs most to be recovered - namely, the unsettling, disconcerting fact that God is holy and we place ourselves in great peril if we seek to render him a plaything of our piety, an ornamental decoration on the religious life, a product to answer our inward dissatisfactions. God offers himself on his own terms or not at all"*.[21]

Sometimes it is observers from another religious tradition who recognize, perhaps a little enviously, the power of such strong religion. Thus Cardinal Ratzinger, later Pope Benedict, recognized the attractiveness of the evangelical and pentecostal churches that, especially in Latin America, are challenging the Catholicism that, for centuries, has been in a monopoly position. These churches, he wrote, are *"able to attract thousands of people in search of a solid foundation for their lives [...] the more churches adapt themselves to the standards of secularization, the more followers they lose. They become attractive, instead, when they indicate a solid point of reference and a clear orientation"*.[22]

A similar acknowledgment, in this case in a publication by a Church of England organization, is that English converts to Islam *"say that they find in Islam all the things that 150 years ago converts said they found in Christianity. These include clear guidance on living; a sense of community or family; a sense of God at the centre of life; meaning and purpose for everyday living; an unequivocal moral code; authoritative scriptures to live by"*.[23]

Keith Ward makes the case that strong religion serves to keep raising issues that contemporary Western culture would rather forget, questions of the significance of human life and of the right way to live. It keeps alive questions of whether there is a supreme human goal, and of how to attain it. And it keeps alive the question of whether there is an absolute standard of truth, beauty and goodness that underlies the ambiguities and conflicts of human life.[24]

For adherents to strong religion, living a moral life is not a matter of adhering to rules nor of consulting one's values, but of *"a living relationship to a personal*

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[20] Stephen L. Carter: *God's Name in Vain: The Wrongs and Rights cf Religion in Politics*. New York, Basic Books, 2000. 30.

[21] Wells (1994) op. cit. 145.

[22] Joseph Ratzinger: Letter to Marcello Pera. In: *Without Roots: The West, Relativism, Christianity, Islam*. New York, Basic Books, 2006. 119.

[23] Copley (2005) op. cit. xv.

[24] Ward op. cit. 196.

*God of supreme goodness"*.[25] The believer's behavior is based in gratitude and in a desire to express it through concrete actions. By contrast, *"if there really is no transcendent source of the good to which the will is naturally drawn, but only the power of the will to decide what ends it desires",*[26] then there is no reliable basis on which to overcome the selfishness of the consumerist culture that prevails in North America and Western Europe. Appeals to common purpose grow increasingly faint, and it is with a sense of nostalgic regret that many look back to the social movements or national crises of the past.

Societies cannot maintain shared norms for behavior or appeal to their members to make sacrifices for the common good unless those members recognize authority beyond their individual interests and impulses. Sociologist David Martin points out that *"religion acts as a repository of human values and transcendental reference which can be activated in the realm of civil society"*.[27] Philip Rieff made the same point more starkly in The Triumph of the Therapeutic: *"The question is no longer as Dostoevski put it: 'Can civilized man believe?' Rather: Can unbelieving man be civilized?"*.[28] Stephen Macedo, no particular friend of religion, writes that religions *"often challenge the materialism, hedonism, and this-worldliness that is so dominant in our time. And religions provide sources of meaning outside of politics that should help keep alive the intellectual arguments by which truth is supposedly approached in a liberal polity"*.[29]

It is perhaps ironical that the Voltaires and the David Humes of our post-secular age, challenging the prevailing conventions and pieties, may well be those who speak with the authority of strong religion – Christians, no doubt, but also Muslims and adherents of other faith-traditions, as indeed the Dalai Lama has exemplified. They will of course have to learn how to speak with authority in a way that can be heard beyond the circles of those already convinced (and Muslims in particular will need to learn a Western idiom), but there seems little doubt that the complacency of secular materialism will be challenged in ways that, in the general disarray of Western culture, cannot readily be dismissed.

## 4. Civil Society as the Nursery of Citizenship

A pluralistic civil society based upon voluntary associations thus nurtures the habits of trust and cooperation essential to a democratic political order, while encouraging the challenges to injustice and vice that keep it healthy. Alexis de Tocqueville was particularly impressed, on his visit in the early 1830s, by the propensity of Americans

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[25] Ibid. 137.

[26] Ibid. 227.

[27] David Martin: *On Secularization: Towards a Revised General Theory*. Famham (England), Ashgate, 2005. 24.

[28] Philip Rieff: *The Triumph of the Therapeutic: Uses of Faith after Freud*. New York, Harper Torchbooks, 1968. 4.

[29] Macedo (2000) op. cit. 220

to form voluntary associations to meet needs and to carry out functions that in France would be left to the government, and how the habits thus formed contributed to the success of democracy on all levels. *"How can liberty be preserved in great matters,"* he asked, *"among a multitude that has never learned to use it in small ones?"*.[30]

*"Where do citizens acquire the capacity to care about the common good?"* Mary Ann Glendon asks. *"Where do people learn to view others with respect and concern, rather than to regard them as objects, means, or obstacles?"*.[31] She expresses her concern that *"neglect of the social dimension of personhood has made it extremely difficult for us to develop an adequate conceptual apparatus for taking into account the sorts of groups within which human character, competence, and capacity for citizenship are formed."* As a result, these *"seedbeds of civic virtue – families, neighborhoods, religious associations, and other communities – can no longer be taken for granted"*.[32]

There was indeed much discussion, a few years ago, about the alleged decline of organizational life in the United States, as argued in Robert Putnam's best-seller *Bowling Alone* (2000). But if there has been a decline in bowling leagues and Parent-Teacher associations, below the surface there may be more happening than is reported by formal associations. After all *"existing surveys are unlikely to have captured all recent changes in U. S. associational life – for example, the proliferation of faith-based informal »small groups«."*[33]

Putnam recognizes the continuing significance of informal as well as more formal organizations with a religious basis.

*"Faith communities in which people worship together are arguably the single most important repository of social capital in America. [...] nearly half of all associational memberships in America are church related, half of all personal philanthropy is religious in character, and half of all volunteering occurs in a religious context. [...] Churches provide an important incubator for civic skills, civic norms, community interests, and civic recruitment. [...] churchgoers are substantially more likely to be involved in secular organizations, to vote and participate politically in other ways, and to have deeper informal social connections"*.[34]

Political scientist Sidney Verba and his colleagues found, in their massive study of the extent to which Americans volunteer for community-building and other civic activities, that participation in churches – especially African-American and white Evangelical congregations – has a strong positive influence on involvement in the wider community as well.

Religious institutions are the source of significant civic skills which, in turn, foster political activity. The acquisition of such civic skills is not a function of SES but

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30 Tocqueville op. cit. 96.

31 Glendon op. cit. 129.

32 Glendon op. cit. 109.

33 Galston–Levine (1998) op. cit. 31.

34 Robert D. Putnam: *Bowling Alone: The Collapse and Revival of American Community*. New York, Simon & Schuster, 2000. 66.

depends on frequency of church attendance and the denomination of the church one attends. As we shall see, individuals with low SES may acquire civic skills if they attend church-and if the church is the right denomination. Conversely, individuals who are otherwise well endowed with resources because of their high socioeconomic status will be lower in civic skills if they do not attend church regularly – or if the church they attend is the wrong denomination[35].

This positive outcome occurs because *"[t]he domain of equal access to opportunities to learn civic skills is the church. Not only is religious affiliation not stratified by income, race or ethnicity, or gender, but churches apportion opportunities for skill development relatively equally among members. Among church members, the less well off are at less of a disadvantage, and African-Americans are at an actual advantage, when it comes to opportunities to practice civic skills in church"*.[36]

This finding is consistent with the results of a study of adults nationwide who had graduated some years before from various types of high schools: those who had attended "Christian" (that is, Evangelical) schools were especially well-integrated into and active in their local communities though rather less involved politically than graduates of other types of schools. The data showed that in contrast to the popular stereotype of Protestant Christian schools producing socially fragmented, anti-intellectual, politically radical, and militantly right-wing graduates, our data reveal a very different picture of the Protestant Christian school graduate. Compared to their public school, Catholic school, and non-religious private school peers, Protestant Christian school graduates have been found to be uniquely compliant, generous individuals who stabilize their communities by their uncommon and distinctive commitment to their families, their churches, and their communities, and by their unique hope and optimism about their lives and the future. In contrast to the popular idea that Protestant Christians are engaged in a 'culture war', on the offensive in their communities and against the government, Protestant Christian school graduates are committed to progress in their communities even while they feel outside the cultural mainstream. In many ways, the average Protestant Christian school graduate is a foundational member of society.[37]

Even with a significant decline in participation in religious services, as has occurred in France, anthropologist John Bowen points out that there has been *"a flourishing of religion-based associations. Catholic youth movements [...] grew steadily in numbers in both urban and rural areas after 1945"*.[38]

This community-building and civic-education role of religious congregations is attested by a study of patterns of charitable giving and of volunteering. Arthur

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35 Sidney Verba – Kay Lehman Schlozman – Henry E. Brady: *Voice and Equality: Civic Voluntarism in American Politics*. Cambridge, MA, Harvard University Press, 1995. 282–283.

36 Ibid.

37 *Cardus Education Survey: Do the Motivations for Private Religious Catholic and Protestant Schooling in North America Align with Graduate Outcomes?* Hamilton, Ontario, 2011. 13.

38 John R. Bowen: *Can Islam Be French? Pluralism and Pragmatism in a Secularist State.* Princeton, NJ, Princeton University Press, 2011. 181.

Brooks found that, in 2000, *"religious people – who, per family, earned exactly the same amount as secular people, $49,000 – gave about 3.5 times more money per year (an average of $2,210 versus $642). They also volunteered more than twice as often (12 times per year, versus 5.8 times)."* Nor is this giving directed only to their own churches and related institutions; Brooks found that *"religious conservatives are more likely to give to secular charities than the overall population"*.[39]

The findings of this study are especially critical of the stinginess of secular liberals, who are 19 percentage points less likely to give each year than religious conservatives, and 9 points less likely than the population in general. They are even slightly less likely to give to specifically secular charities than religious conservatives. They give away less than a third as much money as religious conservatives, and about half as much as the population in general, despite having higher average incomes than either group. They are 12 points less likely to volunteer than religious conservatives, and they volunteer only about half as often.[40]

Brooks found that the same pattern prevails in Europe. In France in 1998, *"73 percent of the population were secularists. The [...] French churchgoer was 54 percentage points more likely than a demographically identical secularist to volunteer, and 25 points more likely to volunteer for secular causes. Similarly, a religious British person would be 43 points more likely to volunteer than a demographically identical British secularist (and 24 points more likely for nonreligious causes)"*.[41]

It appears that being part of a voluntary association or community whose guiding ethos emphasizes trust and mutual support is a good preparation for engaged civic life beyond that association, contrary to the charge advanced by secular elites that it tends toward selfishness and hostility toward outsiders. Thus *"religion matters to public life because it is an important teacher of moral virtues such as self-sacrifice and altruism. The transmission of religious beliefs to one's children can be thought of as instilling a valuable moral resource that contributes to participatory attitudes."* As a result, *"on average, those growing up in homes with religious instruction and practice will be better socialized to contribute to society than those who do not, and a solid body of social science research can be mustered to support this contention"*.[42]

A word of caution is necessary at this point: the fact that religious associations and religiously-motivated individuals make important contributions to civil society and thus to liberal democracy should not be seen as the primary argument for religious freedom. Religious freedom is important above all because it respects the essential humanity, at its deepest level, of every individual in a free society. As political scientist William Galston reminds us, *"religion is valuable, not only for the*

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[39] Arthur C. Brooks: *Who Really Cares: The Surprising Truth About Compassionate Conservatism*. New York, Basic Books, 2006. 34., 47.

[40] Ibid. 49.

[41] Ibid. 126.

[42] James G. Gimpel – J. Celeste Lay – Jason E. Schuknecht: *Cultivating Democracy: Civic Environments and Political Socialization in America*. Washington, DC., Brookings Institution Press, 2003. 122–123.

*contribution it may make to politics and society, but in its own right, and there is no guarantee that religion faithfully practiced will always support the existing political or social order. Instead, political pluralism regards human life as consisting of a multiplicity of spheres, some overlapping, but each with distinct inner norms and a limited but real autonomy".*[43]

## 5. Do Civil Society Associations and Institutions Divide Society?

It is commonly asserted – in the tradition of the post-war discussion of *"the authoritarian personality"*[44] – that religion is a primary source of social division and intolerance; in fact, however, apart from situations of inter-communal conflict in which religion serves as a convenient marker of identity, the social science evidence tends to point in the other direction. The most intolerant individuals are often those who claim a religious identity but are not actively engaged in a religious community. Gordon Allport and J. Michael Ross found, in their 1967 study, that *"frequent church attenders were less prejudiced than infrequent attenders and often less prejudiced than nonattenders. [...] Several studies revealed that casual and irregular fringe members of churches were the most prejudiced".*[45] A study by pollsters George Gallup and Timothy Jones of Americans who are strongly committed religiously, *"found that 'The Saints Among Us', are more tolerant of other creeds and cultures than the uncommitted (1992). In fact, the further down the scale of religious commitment, the less tolerant people are".*[46]

Studies of attitudes toward immigration and immigrants have found that individuals with strong religious commitments tend to be more accepting than individuals sharing the same religious identity who do not make it a central part of their lives. *"Those who attended church services every week ranked about 4 percent higher on the tolerance scale than those who never attended church at all. Viewed in total, the results for diversity confirmed the findings of previous researchers that it is those of nominal-to-middling religious commitment among Protestants, Catholics, and Jews, not the most observant, who are the least accepting of immigration".*[47]

According to Michael Sandel, this is only to be expected, since *"intolerance flourishes most where forms of life are dislocated, roots unsettled, traditions undone. In our day, the totalitarian impulse has sprung less from the convictions of confidently situated selves than from the confusions of atomized, dislocated, frustrated selves, at sea in a world where common meanings have lost their force".*[48] Faith-based schools,

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[43] William Galston: On the Reemergence of Political Pluralism. *Daedalus*, Vol. 135, No. 3, On Body in Mind (Summer), 2006. 120.

[44] Theodor W. Adorno – Else Frenkel-Brunswik – Daniel J. Levinson – R. Nevitt Sanford: *The Authoritarian Personality*. New York, Harper and Row, 1950.

[45] Lewy (1996) op. cit. 101.

[46] Elmer John Thiessen: *The Ethics of Evangelism*. Downers Grove, IL, InterVarsity, 2011. 113.

[47] Gimpel–Lay–Schuknecht op. cit. 133.

[48] Sandel (1984) op. cit. 7.

by anchoring youth firmly in a particular tradition and worldview, may give them the security to recognize the value of other traditions and worldviews to their adherents.

At least in the American context, then, weak religion, religion that makes minimal claims on its adherents but can serve as an identity over against other identities, is associated with intolerance, while strong religion that shapes habits and convictions is associated with tolerance. Such tolerance is a necessary but not sufficient ingredient of productive civic life. After all, as Christopher Lasch has pointed out, *"democracy [...] requires a more invigorating ethic than tolerance. Tolerance is a fine thing, but it is only the beginning of democracy, not its destination"*.[49]

Quite apart from the promotion of tolerance, there is abundant evidence that religious associations play an important role in developing the more constructive skills and habits crucial to civic life. Some of these are quite basic, but not otherwise available to groups on the margins of society. Sociologist David Martin explains how, in Latin America, the intense and supportive community of Pentecostal churches *"takes those marooned and confined in the secular reality by fate and fortune, and offers them a protected enclave in which to explore the gifts of the Spirit such as perseverance, peaceableness, discipline, trustworthiness, and mutual acceptance among the brethren and in the family"*.[50] These habits, in turn, tend to make them good and productive citizens.

While religious associations are by no means the only setting within which these skills and habits can be developed, they are by far the most widespread in American society, and they tend to persist as other forms of association wax and wane. Whether religious or secular in their fundamental motivation, *"only many small-scale civic bodies enable citizens to cultivate democratic civic virtues and to play an active role in civil life. Such participation turns on meaningful involvement in some decent form of community, by which is meant commitments and ties that locate the citizen in bonds of trust, reciprocity, and civic competence"*.[51]

Islam, often cited as an example of a religion-based threat to American and Western-European society, provide evidence of the positive influence of community-based religious associations. Islamic terrorism in the West is not generally based in practicing Muslim communities, but in isolated individuals and networks formed in prison or on the internet. A study of the careers of several hundred jihadists found that Islamist terrorists find religion fairly late in life, in their mid-twenties, and do not have an adequate background to evaluate the Salafi arguments and interpret the material they read. The new-found faith and devotion to a literal reading of early Islamic texts are not a result of brainwashing in madrassas; their fervor results from their lack of religious training, which prevents them from evaluating their new beliefs in context. Had they received such training, they might not have fallen prey to these

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[49] Lasch op. cit. 89.

[50] Martin (2002) op. cit. 71.

[51] Jean Bethke Elshtain: Civil Society, Religion, and the Formation of Citizens. In: Diane Ravitch – Joseph P. Viteritti (eds.): *Making Good Citizens: Education and Civil Society.* New Haven, CT, Yale University Press, 2001. 264.

seductive Manichaean arguments. It follows that more religious education for these young men might have been beneficial.[52]

The research I have been directing over several years in Islamic secondary schools in different parts of the United States found that parents and staff share a deep concern that students be prepared to be good American citizens, while maintaining their commitment to Islamic beliefs and suitably-adapted behavioral norms. Our interviews with the students themselves found that they shared this understanding of their future, along with a concern to correct the popular identification of Islam with terrorism. One student told us, *"America is kind of like a melting pot, right? And to be able to blend in, you have to stand out in a way. I think faith gives you that edge."*

## 6. The Importance of Structural Pluralism

If it is the case that voluntary associations and not-for-profit institutions, and especially those with a religious character, are an essential part of a healthy civil society and of a democratic political order, how should public policy treat them? Certainly, it should not be by entering into an alliance with a particular religious organization, as was the case with the Catholic Church in Franco's Spain; that is unhealthy not only for democratic freedom but for the religious organization itself, clasped in the fatal embrace of the state. Arguably, one of the reasons for the relatively flourishing condition of Christian churches in the United States is that there has never been a national established church and the last (quite attenuated) state establishment, in Massachusetts, was abolished as long ago as 1830. Similarly, as Casanova points out, *"throughout Europe, nonestablished churches and sects in most countries have been able to survive the secularizing trends better than has the established church. [...] it was the very attempt to preserve and prolong Christendom in every nation-state and thus to resist modern functional differentiation that nearly destroyed the churches in Europe"*.[53]

Religious freedom includes, centrally, the right to believe as one's reason and conscience dictate and to act upon such beliefs, within broad constraints that protect the public interest and the rights of others. It includes also the right to reject a particular religion or all religions, and to choose as freely to leave as to enter a religious association. Public policy best protects these rights by refraining carefully from endorsing a particular set of beliefs or of unbeliefs. Thus it must not be secularist. Philosopher Jürgen Habermas points out that the neutrality of the state authority on questions of world views guarantees the same ethical freedom to every citizen. This is incompatible with the political universalization of a secularist world view. When secularized citizens act in their role as citizens of the state, they must not deny in principle that religious images of the world have the potential to express truth. Nor

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[52] Marc Sageman: *Leaderless Jihad: Terror Networks in the Twenty-first Century*. Philadelphia, University of Pennsylvania Press, 2008. 60.

[53] Casanova op. cit. 29.

must they refuse their believing fellow citizens the right to make contributions in a religious language in public debates.[54]

True neutrality of the state, in an age when so much of social life is organized, directly or indirectly, by some level of government requires a recognition of the need for structural (or institutional) pluralism. 'Civil society', Michael Walzer reminds us, *"is a project of projects; it requires many organizing strategies and new forms of state action. It requires a new sensitivity for what is local, specific, contingent – and, above all, a new recognition [...] that the good life is in the details"*.[55] It is in the nature of government bureaucracies to seek to achieve efficiency and impartiality through the imposition of formal rules and treating identical situations (defined as such by external characteristics) identically. This serves very well for issuing driver's licenses and other routine tasks, but not at all well for the human care of human beings, including the education of children.

Children differ on a wide range of characteristics, but the most significant for education is the moral formation that children have received at home and the hopes that parents have for the sort of lives their children will choose to lead, and by what norms these lives will be guided. For a free society, this means that institutional pluralism should extend to the sphere where it is most severely challenged, that of k-12 education. Rather than – as often alleged – subjecting children to indoctrination, the *"best guarantee against institutional indoctrination is that there be a plurality of institutions"*[56] among which families can choose.

What I have called *"the myth of the common school"*[57] contends that civic peace and cooperation around common tasks require that all children be arbitrarily assigned to schools from which any distinctive worldviews are rigorously excluded. This has been the source of bitter conflict in a number of other countries[58], and of a mind-numbing blandness in most American public schools. Stephen Carter protests against the contention that all children should be exposed to a common culture that, increasingly, is made up of relentless consumerism and ever-new fads.

Of course believers should have avenues of escape from the culture. Of course believers should have space to make their own decisions, without state interference, about what moral understanding their children need, both to function in this world and to prepare for the next. Of course a society that truly values diversity and

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[54] Jürgen Habermas: Pre-political Foundations of the Democratic Constitutional State? In: Brian McNeil (ed.): *Joseph Cardinal Ratzinger and Jürgen Habermas. Dialectics of Secularization: On Reason and Religion*. San Francisco, CA, Ignatius Press, 2006. 51.

[55] Michael Walzer: The Idea of Civil Society: A Path to Social Reconstruction. In: E. J. Dionne, Jr. (ed.): *Community Works: The Revival of Civil Society in America*. Washington DC, Brookings Institution Press, 1998. 143.

[56] Elmer John Thiessen: *Teaching for Commitment: Liberal Education, Indoctrination, and Christian Nurture*. Montreal, Quebec, McGill-Queen's University Press, 1993. 274.

[57] Charles L. Glenn: *The Myth of the Common School*. Amherst, MA, University of Massachusetts Press, 1988.

[58] Charles L. Glenn: *Contrasting Models of State and School: A Comparative Historical Study of Parental Choice and State Control*. New York–London, Continuum, 2011.

pluralism should support the development of communities that will reach radically different conclusions from those of the dominant culture. The answer is to nurture many different centers of meaning, including many different understandings on how to find meaning, so that the state will have competition.[59]

These different 'centers of meaning' cannot find expression in individual consciences alone; they require support through voluntary associations and institutions that are free to express and to live out of *"different understandings of how to find meaning"*. This is not a prescription for social isolation or for mutual incomprehension; to the contrary, as George Weigel points out, *"genuine pluralism is built out of plurality when differences are debated rather than ignored and a unity begins to be discerned in human affairs – what John Courtney Murray called »the unity of an orderly conversation«"*.[60]

Such rightly-understood pluralism *"does not abolish civic unity. Rather, it leads to a distinctive understanding of the relation between the requirements of unity and the claims of diversity in liberal politics"*.[61] Defining those requirements of unity with respect to schooling has always been a source of contention, but never more so than today, when society and culture are roiled by competing norms for personal and group behavior, each claiming for itself authoritative status. Those holding these norms claim for them universal validity and seek to communicate them to such to schoolchildren. The Sixties motto of "different strokes for different folks" as the expression of tolerant non-judgmentalism is seldom heard today; the new mood is expressed by a different catch-phrase: *"my way or the highway"*.

Those exercising strong cultural influence today reject the idea that it is enough simply to tolerate behaviors (especially but not exclusively sexual) that until recently – and for many generations – were not tolerated; they should instead be celebrated and shielded from challenge or question. In particular, these new cultural arbiters tend to be actively hostile toward strongly-held religious beliefs, disparagingly referred to as *"fundamentalism"*[62].

In contrast with this insistence on replacing one set of unquestionable norms with another, genuine societal and cultural *"pluralism is an achievement, not simply a sociological fact. A true pluralism [...] is a pluralism in which everyone's truth claims are in play, through a language that is accessible to all, in a public discourse conducted within the bonds of democratic civility"*.[63] Surely that is the pluralism a

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59 Carter op. cit. 116.

60 George Weigel: Roman Catholicism in the Age of John Paul II. In: Peter L. Berger (ed.): *The Desecularization of the World: Resurgent Religion and World Politics.* Grand Rapids, MI, Eerdmans, 1999. 34.

61 William A. Galston: *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice*. Cambridge, Cambridge University Press, 2002. 10.

62 Louis Bolce – Gerald De Maio: Our Secularist Democratic Party. *The Public Interest*, Fall, 2002.; George Yancey: *Hostile Environment: Understanding and Responding to Anti-Christian Bias*. Downers Grove, IL, IVP Books, 2015.

63 George Weigel: Achieving Disagreement: From Indifference to Pluralism. *The Journal of Law and Religion,* VIII, 1990/1–2. 184.

liberal democracy should seek to achieve, one that recognizes, protects, but is not afraid to question and debate the different ways in which we understand the nature of a flourishing human life.

## 7. Good Intentions Weakening Civil Society

There is something to be said for this new mood, or at least for its rejection of the rather demeaning idea that certain beliefs and behaviors – those at issue presently having to do largely with sexuality and with identity – should be "tolerated," in what some have called a flight from judgment. George Washington, in a celebrated letter to a Jewish congregation in Newport, Rhode Island, in 1790, wrote that the *"citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy – a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights, for, happily, the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support"*.[64]

We might elaborate upon that by saying that what citizens owe to other citizens is not mere tolerance but respect for their common humanity, a respect that takes seriously enough how they live out that humanity to be willing to question it. For Jews and Christians it requires that we should see each other as *persons,* valued not only for our characteristics and behaviors, but also – whatever our shortcomings – as made in the image of God;[65] Habermas, no believer, refers to *"the religious origins of the morality of equal respect for everybody"*.[66]

Unlike tolerance, respect cannot properly be undiscriminating, since it does not simply accept uncritically but also entails judgments about character and achievements. We want to be accepted but also respected not only for just our mere existence, but also for what we have done and become. So Washington expected the Jews of Newport to behave as good citizens, with the implication that, if they did not, they would forfeit the positive regard of their country.

This is the crux of the present controversy over how to deal with sexuality issues in schools in the United States. Most Americans have become tolerant of homosexuality and even of gender-switching as phenomena (however deplorable these may be in the view of many) that exist in the wider society and should not be subjected to public disabilities. As schools teach about these behaviors and identities, however, an inevitable evaluative dimension is added. Are they deserving of respect, as equally-valid choices? If public schools respond affirmatively, are they not taking a partisan

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64 George Washington: *Writings*. New York, NY, Library of America, 1997. 767.

65 Jacques Maritain: *The Person and the Common Good*. (Trans. John J. Fitzgerald) University of Notre Dame Press, 1966. 42.

66 Habermas op. cit. 27.

position on an issue about which the public is deeply divided? And, if some faith-based schools teach that such practices are contrary to God's will for how people should exercise their sexuality, are these schools engaging in bigotry that calls into question their right to provide a state-approved (if not publicly-funded) education? To receive tax exemption? To satisfy mandatory school attendance laws?

If, as we have argued above, associations motivated and drawn together by shared religious conviction are an important element in a healthy civil society, and serve as what Mary Ann Glendon has called "seedbeds" of the virtues of citizenship, then efforts to impose a single set of moral norms, whether religious or secular, – or, indeed, to deny that moral norms have any authority apart from what we choose to give them – have seriously negative consequences.

Liberal tolerance (as distinct from religiously grounded tolerance) could be lethal to many seedbeds. Not only is liberal tolerance intolerant of its rivals, but it slides all too easily into the sort of mandatory value neutrality that rules all talk of character and virtue out of bounds. […] Liberalism, in order to survive, may need to refrain from imposing its own image on all the institutions of civil society. […] The best hope for unpopular, non-liberal seedbeds of virtue may be the tolerant liberal polity whose ultimate values are at odds with theirs.[67]

Schools are of course not the only focal point of such religious freedom issues, as the role of government in funding and regulating non-government providers of human services continues to expand,[68] but they represent a particularly sensitive arena for controversy because of the impressionable age of their clientele and the guiding and protective urges of many parents. Until the post-war expansion of the role of state governments and of national associations, the intensely local character of American public schools ensured that they reflected the values of most parents in the communities they served. In addition, for many decades non-public schools – especially Catholic schools between the 1850s and the 1960s, and increasingly Evangelical, Jewish, and Islamic schools in recent decades – have served as an alternative for families unwilling to expose their children to public schools.

Today, however, it is not clear that such alternatives will be allowed to retain their distinctive character if they are considered to promote moral norms and perspectives that conflict with the prevailing orthodoxy. The issue is not limited to sexual norms but includes the insistence, on the part of some influential liberal voices, that every school should take as its primary mission to promote the moral autonomy of its students and thus to set them free from any familial or traditional norms. This educational goal is clearly inconsistent with schools that seek to nurture students in a particular religious or cultural tradition, and thus with genuine pluralism.

In supporting separate schools for the children of non-liberal cultural minorities liberals should be able to recognise the gains that will be made [for those minorities]

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[67] Mary Ann Glendon: Forgotten Questions. In: Mary Ann Glendon – David Blankenhorn (eds.): *Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society.* Madison Books, 1995. 12.

[68] See Glenn (2000) op. cit.

in terms of cultural congruence and a sense of belonging but they will also have to accept that this entails a loss of individual autonomy. This is only problematic if autonomy is granted absolute status as some kind of foundational human value. As [Isaiah] Berlin observes, the reality is a trade-off between human values. There comes a point where we have to make a choice, and for Berlin the genuine liberal does not require that individuals choose autonomy.[69]

Ironically enough, given the liberal elite's scorn for American consumer culture, this emphasis on autonomy is thoroughly consistent with and encourages a lifestyle based on consumerism with no fixed goals. In what philosopher Charles Taylor has called the Age of Authenticity, the only obligation of the fulfilled human life is *"bare choice as a prime value, irrespective of what it is a choice between, or in what domain".* The corollary of this defining value is the obligation to respect the choices that others make; thus the only *"sin which is not tolerated is intolerance",*[70] expressing moral judgments on forms of behavior.

Ironically, the most striking aspect of the emphasis, by liberal education theorists, on autonomy and unconstrained choice is its intolerance: it is not itself represented as a choice. There is instead for every child, at least in intention, a compulsion to become autonomous. Thus Meira Levinson asserts unapologetically that *"[f]or the state to foster children's development of autonomy requires coercion – i.e., it requires measures that prima facie violate the principles of freedom and choice. [...] The coercive nature of state promotion of the development of autonomy also means that children do not have the luxury of 'opting out' of public autonomy-advancing opportunities in the same way that adults do".*[71] Nor should this educational objective of autonomy itself be subject to public debate, since, she insists, it is a fundamental premise of the liberal state which is not open to question![72]

Rob Reich would extend this requirement to homeschooling, now a very widespread phenomenon in the United States. He urges that government *"provide a forum"* for homeschooled children where their *"educational preferences should be heard and duly considered when they are contrary to the preferences of the parents."* Government should also require homeschooling parents to use curricula that ensure *"exposure to and engagement with values and beliefs other than those of a child's parents."* Compliance could then be ensured by subjecting the children to *"periodic assessments that would measure their success in examining and reflecting upon diverse worldviews".*[73] Schools, and even homeschooling families, who fail to promote such autonomy should, in this view, be subject to corrective government

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[69] Neil Burtonwood: Must Liberal Support for Separate Schools Be Subject to a Condition of Individual Autonomy? *British Journal of Educational Studies*, Vol. 48, No. 3, (2000/Sep.) 282.

[70] Charles Taylor: *A Secular Age*. Cambridge, The Belknap Press of Harvard University Press, 2007. 478., 484.

[71] Levinson (1999) op. cit. 38–39.

[72] Ibid. 139.

[73] Rob Reich: Testing the Boundaries of Parental Authority over Education: the Case of Homeschooling. In: Stephen Macedo – Yael Tamir (eds.): *Moral and Political Education*. New York, New York University Press, 2002. 304.

intervention. In the face of this prospect, William Galston urges that there are some things that the government may not rightly require all schools to do, even in the name of forming good citizens. The appeal to the requirement of civic education is powerful, but only in civic republican regimes it is dispositive. In polities that embrace a measure of political pluralism, as does the United States, claims based on religious liberty may from time to time override the state's interest in education for civic unity.[74]

After all, as Galston wrote earlier, *"liberalism is about the protection of diversity, not the valorization of choice. [...] To place an ideal of autonomous choice – let alone cosmopolitan bricolage – at the core of liberalism is in fact to narrow the range of possibilities available within liberal societies. In the guise of protecting the capacity for diversity, the autonomy principle in fact represents a kind of uniformity that exerts pressure on ways of life that do not embrace autonomy"*.[75]

The ugly political mood in recent years in the United States (and in a number of other Western democracies) reflects a growing resistance to the imposition of newly-discovered or invented elite values on a population that does not share them. In some cases the issues involved hardly seem to justify the furore that they have caused, such as (for example) that over trans-gender bathroom use. A little sympathetic imagination makes it possible to understand, however, that millions of Americans brought up since childhood with the unquestioned assumption that boys and men go to one bathroom or changing room and girls and women to another react to a mandate from the federal government that individuals who are biologically male be allowed to use the facilities provided for women or girls. It is not difficult to imagine that, on complaint from a transgender individual, a zealous government official might enforce this requirement against a church or other house of worship on the grounds that it was "open to the public," perhaps by canceling a property tax exemption.

It seems foolish to devote any attention to such largely-symbolic issues, but cumulatively they could have grave consequences. After all, *"If the large number of Americans committed to religious belief and experience come to believe, as many of them already do, that the political system does not respect their way of life to the same extent it respects secular lifestyles, then they themselves will tend not to respect that system or the government and laws that it generates"*.[76] This alienation, of which we can already see abundant signs, would be serious indeed.

The only remedy is to base public policy on structural pluralism, allowing different worldview-based communities to operate their own institutions reflecting their own norms, provided that – as noted above – individuals be completely free

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[74] William A. Galston: Civic Republicanism, Political Pluralism, and the Regulation of Private Schools. In: Patrick J. Wolf – Stephen Macedo (eds.): *Educating Citizens: International Perspectives on Civic Values and School Choice*. Washington, DC., Brookings Institution Press, 2004. 321.

[75] William A. Galston: Two Concepts of Liberalism. *Ethics*, Vol. 105, No. 3, (1995/April) 523.

[76] Frederick Mark Gedicks: Some Political Implications of Religious Belief. In: Margaret J. Early – Kenneth J. Rehage (eds.): *Issues in Curriculum: A Selection of Chapters from Past NSSE Yearbooks. Ninety-eighth Yearbook of National Society for The Study of Education: Part II.* Chicago, IL, University of Chicago Press, 1990. 438.

to enter or to leave them. There was a wise provision under the federal law known as Charitable Choice, that faith-based social-service agencies competing for public funding be allowed to retain and express their religious distinctiveness *provided that* an alternative service without religious character be available to clients. That is certainly as it should be: neither denying nor requiring counseling or other services with a religious character.[77]

To adopt institutional pluralism would entail abandoning the civic republican strategy for social and educational policy, a strategy (as philosopher Charles Taylor and a colleague write) favoring, in addition to respect for moral equality and freedom of conscience, the emancipation of individuals and the growth of a common civic identity, which requires marginalizing religious affiliations and forcing them back into the private sphere. The liberal-pluralist model, by contrast, sees secularism as a mode of governance whose function is to find the optimal balance between respect for moral equality and respect for freedom of conscience.[78]

## 8. Redefining the Role of Government

The relationship of government and civil society differs considerably among Western democracies and even more in other societies, and this is especially evident in the sphere of popular schooling, entailing as it does so many value-laden choices and conflicting interests.[79] Only a totalitarian regime can seek, however imperfectly, to absorb all of the functions of civil society into its own domain, but it is inherent in the very nature of any government to seek to extend its influence if not direct control over ever more aspects of life, often for the most commendable reasons of efficiency and social justice. It was, for example, one of the goals of the Progressive Era a century ago in the United States to entrust progress to an elite of 'social engineers' who would apply rational scientific method to eliminating a wide range of problems and ensuring a better future.

This agenda of government-managed progress showed very little deference toward democratic decision-making, or toward the diversity and intense localism of American life. John Dewey's influential *Democracy and Education* (1916), for example, showed no appreciation for the process of decision-making about schooling at the local level that had always, until then, characterized American popular education. Dewey called, instead, for teachers to decide the goals and the means of education, creating on the basis of their superior understanding *"an educational institution which shall provide something like a homogeneous and balanced environment for the young. Only in this way can the centrifugal forces set up by the juxtaposition of different groups within*

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77 See Glenn (2000) op. cit.

78 Jocelyn Maclure – Charles Taylor: *Secularism and Freedom of Conscience.* (Trans. Jane Marie Todd) Cambridge, MA, Harvard University Press, 2011. 34

79 See Charles L. Glenn – Jan De Groof (eds.): *Balancing Freedom, Autonomy, and Accountability in Education* (four volumes). Nijmegen, Wolf Legal Publishing, 2012.

*one and the same political unit be counteracted"*.[80] The role of parents and families is seldom mentioned in Dewey's copious writing about education, except occasionally as an influence which teachers should seek to counter.

In the nineteenth and early twentieth centuries in a period of heavy immigration in North America and of nation-building and consolidation in Europe, this government-controlled common school strategy – David Tyack's (1974) "One Best System" – functioned reasonably well in promoting literacy, while inculcating national loyalty and the habits required by industrial employment. It did so by treating all children of a given social class as though their needs and goals were similar, not only ignoring the distinctive beliefs of families and their hopes for their children, but treating these as a problem to be overcome by the effects of schooling.

More recently, however, this common school model has fallen into confusion, struggling to respond to a radically-changed economy, and to a loss of confidence in the possibility of teaching a coherent set of moral norms. What seemed self-evident to Horace Mann and his allies (and to Hofstede de Groot and other Dutch education reformers, to Jules Ferry and his allies in France, to philosophers Kant and Fichte in Germany, and to countless others in the nineteenth century) that popular schooling on a uniform basis would reliably create virtuous citizens[81] is no longer convincing. This is not the place to detail how civic education has given way to a multiculturalist recital of grievances, how character education has been replaced by a focus on nurturing the self-esteem of students. Nor are these developments necessarily inappropriate in contrast with what they have replaced, but they do not provide any sort of basis for a uniform system of forming the personal and civic virtues required by a healthy democracy.

Whatever may have been the case in the past, today it is only in individual schools where staff and parents share a clearly-articulated understanding of the goals and the means of character-formation that children and youth experience a coherent education into personal and civic virtue. It is in such schools, and not in the moral confusion of the *"shopping mall high school"*,[82] that children are *"educated towards autonomy"*.[83]

Most Western democracies have in recent years been moving toward policy arrangements that support autonomous or semi-autonomous schools with public funding and recognition of their right to offer an education based on a distinctive worldview, whether religious or secular.[84] As Alessandro Ferrari puts it, this is based on *"an awareness that the state is not the only public 'educator' of youth but rather*

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80 John Dewey: *Democracy and Education* (1916). New York, The Free Press, 1966. 21.

81 See Glenn (2011) op. cit.; or Charles L. Glenn: *The American Model of State and School*. New York–London, Continuum, 2012.

82 Arthur G. Powell – Eleanor Farrar – David K. Cohen: *The Shopping Mall High School*. Boston, Houghton Mifflin, 1985.

83 Elmer John Thiessen: *Teaching for Commitment: Liberal Education, Indoctrination, and Christian Nurture*. Montreal, Quebec, McGill-Queen's University Press, 1993. 131.

84 See Glenn–De Groof op.cit. for many examples.

*the guarantor of a developed and articulated institutional pluralism"*.[85] This finds expression in a rich array of schools that teach the essential knowledge and skills from a variety of perspectives on what it means to live a flourishing human life.

This in turn rests on *"a pluralist conception of civil society as itself constituted by irreducibly different spheres, each with its own relative autonomy. [...] each has its own specific goods, as well as its own specific ways of relating to need, aptitude, competence, interest, or faith"*.[86] Education is one of those spheres, and does not flourish under an imposed uniformity that prevents the articulation, in the schools of a wildly diverse society, of a coherent understanding of the nature of a flourishing human life.

It is not enough, though, for the state to refrain from seeking to impose uniformity in education, a uniformity that (as we have seen) can no longer provide the rich moral content required by a real education. The restraint of American governments in neither supporting nor intrusively regulating non-public schools has been a way of avoiding conflict, but it is not sufficient, as the example of other Western democracies demonstrates. After all, a *"just state is one that upholds structural pluralism as a matter of principle, not as an uncomfortable or grudging accommodation to interest groups, or to individual autonomy, or to its own weakness"*.[87] Policies supporting structural pluralism are not just a way of avoiding conflict over fundamental differences; they are a way of showing respect for citizens for whom those differences are life-defining, and for the associations and institutions through which they give them expression and continuity.

Public policies that seek to nurture the health of civil society in one of its key sectors, that of educating the next generation, should go beyond a hands-off restraint, and instead should value and promote structural pluralism. With schools, as with other civil society institutions, the state must do more than simply leave them alone, more than simply abstain from usurping the functions of these groups. It must actively help these groups in discharging their responsibilities, actively seeking through its laws and public policies to empower them, to enable them to effectively discharge their responsibilities, to effectively pursue their particular ends, by providing them with the direct and indirect assistance they need to do so. Hence, as John XXIII notes, the principle of subsidiarity demands state activity *"that encourages, stimulates,*

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[85] Alessandro Ferrari: Religious Education in a Globalized Europe. In: Gabriel Motzkin – Yochi Fischer (eds.): *Religion and Democracy in Contemporary Europe.* London, Alliance Publishing Trust, 2008. 121.

[86] Joseph Dunne: Between State and Civil Society: European Contexts for Education. In: Kevin McDonough – Walter Feinberg (eds.): *Citizenship and Education in Liberal-Democratic Societies.* Oxford, Oxford University Press, 2003. 109.

[87] James W. Skillen: The Pluralist Philosophy of Herman Dooyeweerd. In: Jeanne Heffernan Schindler (ed.): *Christianity and Civil Society: Catholic and Neo-Calvinist Perspectives*. Lanham, MD, Lexington Books, 2008. 111.

*regulates, supplements, and complements"* the activities of the intermediary groups wherein *"an expanded social structure finds expression"*.[88]

Of course, 'the devil is in the details', and it is a matter of great delicacy and importance to decide what aspects of the operation of a school – or of a social agency or other non-government institution serving the public – should be regulated by government and what aspects should be left free. Different pluralistic democracies have drawn the line and different points, though often with an almost inevitable tendency over time for government officials to seek to extend their prescriptions.

A good starting point for prescribing what government should and should not seek to regulate in schools (and homeschooling) is to distinguish between *education* and *instruction*, with the latter encompassing the skills and knowledge which students should acquire, while the former refers to the formation of character and life-perspectives. Of course, these functions of schooling are frequently intermingled. For example, paying close attention to a problem in mathematics or in translation develops character; indeed, according to Simone Weil, *"the development of the faculty of attention forms the real object and almost the sole interest of studies"*.[89] It is possible, nevertheless, to distinguish between the knowledge and skills that society has a right to expect every school to foster, and the qualities of character that are the business of families and the educators to whom they entrust their children.

It is for the protection of youth and also of the economic interests of society that government may reasonably require that schools provide effective instruction in prescribed areas, though without precluding additional instructional content as the school may determine. Government may also provide oversight to protect the health and safety of students. But it is not government's role to prescribe how schools *educate* students into a responsible, caring, and purposeful life. Democratic pluralism requires that this crucial dimension of each school's mission be left to the educators, parents, and supporters who are directly involved. Thus, as the United States Supreme Court has determined, it is no violation of the free exercise clause [of the Constitution] for states to require private religious schools to meet accreditation requirements and be subject to general state standards of educational quality and governance. Nor is it a violation of the free exercise clause for states to impose instructional and testing requirements in reading, writing, and arithmetic, or in civics, geography, and science. Children who graduate from religious schools cannot be handicapped in their abilities and capacities as budding democratic citizens and productive members of society. Private schools are perfectly free to teach those secular subjects with the religious perspective they deem appropriate.[90]

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88 Kenneth L. Grasso: The Subsidiary State: Society, the State and the Principle of Subsidiarity in Catholic Social Thought. In *Christianity and Civil Society: Catholic and Neo-Calvinist Perspectives*. In: Heffernan Schindler (ed.) op. cit. 51.

89 Simone Weil: Reflections on the Right Use of School Studies with a View to the Love of God. In: *Waiting for God*. (trans. Emma Craufurd) New York, NY, Harper and Row, 1973. 105.

90 John Witte, Jr. – Joel A. Nichols: *Religion and the American Constitutional Experiment*. Third Edition. Boulder, CO, Westview, 2011. 208.

After all, *"one of the many competencies arising from institutional sphere sovereignty is precisely the right to decide on the religious or ideological direction which will guide the institution"*.[91] Upon this right depends the capacity to provide a coherent educational experience, and thus to form the character of students.

Government agencies and the courts, in exercising their oversight responsibility to ensure that every child receive an adequate education, should take care to respect the pluralist character of a healthy civil society, and "must take special care to note whether apparent 'facially neutral' regulations actually create an unfair burden for religious communities." Expecting faith-based organizations and institutions to conform in all respects to the norms of their secular counterparts leads inevitably either to conflict or to a fatal loss of mission. *"Communities of faith contribute to public life in part by offering their adherents alternative modes of meaning and interpretation to the dominant secular culture. If that unique contribution is to be maintained, then the ability of these communities to practice their faith freely becomes especially important"*.[92] Fruitful alternatives must not be regulated away!

In order to promote a flourishing, pluralistic civil society, government agencies and courts need to learn to think in new ways about the nature and goals of regulation and of public funding.

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[91] Jonathan Chaplin: Civil Society and the State: A Neo-Calvinist Perspective. In: Heffernan Schindler (ed.) op. cit. 84.

[92] Ronald E. Thiemann: *Religion in Public Life: A Dilemma for Democracy.* Washington, DC, Georgetown University Press, 1996. 167.

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# THE ROLE OF THE OMBUDSMAN FOR EDUCATIONAL RIGHTS IN HUNGARY

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Ombudsman for Educational Rights, Hungary

Education directly affects the present and *future of millions of people*. When so many people spend so much time together, conflicts are bound to occur in their day-to-day interactions. In our view the problem is not that conflicts arise in educational institutions, the problem is that there are no satisfactory mechanisms to resolve such conflicts.

Law statutes determine the environment of the educational system. They set out the rights and obligations of the participants in the educational system and also set out the decision-making powers of the authorities. Besides the specific legislative acts on education, the Constitution, various international agreements and a number of other laws also provide rules that govern the relationships between the participants in education. In the course of teaching, various decisions are made and measures are consequently taken. However, sometimes the decisions may infringe upon the rights of others, despite or regardless the best of intentions.

A total of 22.000 complaints have been submitted, thousands of telephone calls have been received and, at conferences, hundreds of problems have been disclosed to the Office thus far. The annual reports on our operations may be of assistance to all actors of education, but especially to pupils, students and their parents. They are those who need to identify cases of infringement, those who seek legal remedy, those who want to make proposals and those who want to file initiatives. The law may offer help in all of these areas but it cannot substitute co-operation. We are convinced that all of us may contribute to promote the development and consolidation of democracy at schools and in higher education. This Office has joined the awareness process; so as to make additional contributions to an open, honest and professional dialogue on childrens' rights, and on the democratic operation of local and higher education institutions.

Our Office may act if educational rights are infringed or directly threatened.

Educational stakeholders will only trust the Commissioner for Educational Rights if they can see that his actions are unaffected by politics or political interests. In addition to autonomy, another prerequisite of trust is impartial and unbiased inquiry.

The Commissioner for Educational Rights may examine the unlawful decisions and measures of educational institutions providing public service. This office was set up by the state to protect its citizens – especially the children – from the unlawful decisions of public service providers. The initiatives and recommendations of the Commissioner for Educational Rights protect the weak, the party who suffered a violation of rights, using legal means exclusively.

The complaints received since 1999 allow us to draw a few *general conclusions*. One of these is that we received many petitions reporting corporal punishment. It has been always known that there is a serious lack of transparency in such issues, many cases are not reported or do not receive publicity outside the school. In our view, the *most serious offence* at school is physical aggression against children and students.

In the course of the investigation of the petitions, it was apparent that conflicts were rooted in the *lack of information*. The children involved in a conflict are often not familiar with the applicable regulations and local provisions. They are not aware of their rights, and do not know what proceedings must be followed in case of legal disputes. If the rules governing the work of educational institutions are not clear for the parents and students, they will not be able to make responsible decisions, and tend to come out of their disputes with the institutions *as losers*. The applicable legislative instruments establish clear lines of distinction between the responsibilities of the family and those of the educational institution. However, when such lines of distinction are known by neither the institution nor the family, conflicts will inevitably occur between them, and the parties will blame each other for the arising situation.

Many cases reveal a total *absence of trust*. A school did not trust a child with disabilities, and did not allow the student to enrol. Another school did not trust that its students would not use drugs at the weekends, and introduced drug tests. Some parents did not trust their children, and authorised drug tests in the school. A student dormitory did not trust the students and bought a breathalyser to check alcohol consumption. The reason why parents do not complain is either that they are afraid of the institution, or do not trust their own children. Institutions tend to dismiss children they do not know how to deal with. These children are not trusted any longer. There are students who prefer not to ask their teacher for advice or help because the latter has abused their confidence. It will lead to a loss of trust if a teacher overtly refuses to observe the rules that would apply to him or her, but does not hesitate to *punish* students when they break the rules. Many teachers do not trust the families. This is because the consequences of family issues tend to appear at school, but teachers feel powerless. We have read hundreds of complaints from parents who want to take their children out of a school because they no longer trust the institution. It is alarming how many forms of control, prohibition and restriction exist.

Trust can be created and strengthened by co-operation. We can often observe that schools are left alone in solving a problem without receiving any external help. In many cases they do not know where they could turn for assistance. Teachers should be aware of the limits of their competence, and they may act only within those limits. However, they should also know that at the point where their own competence ends, someone else's begins, and that this is the person who can help. Teachers need to *find partners* who can take part in the resolution of conflicts which arise in the school,

but not necessarily originate in the school only. Drug and alcohol abuse, violence, children at risk and poverty are all social phenomena which schools are unable to tackle effectively on their own. However, families are also unable to cope with these problems single-handed.

How can one provide effective help in these cases? In our view, co-operation between institutions and NGOs may be the solution in individual cases. Experts agreed that violence at school was often due to factors outside the school, and therefore the various measures and initiatives – especially the preventive ones – could only be successful if the organisations of the local communities work together as partners. Violence results in serious social damage and cost; therefore preventive measures should aim at achieving a tangible reduction of violence. This co-operation must be free of bureaucracy. The joint efforts of professionals from different sectors and services can be a major contribution to success. The possible partners are school communities, local authorities and regional governments, as well as their various educational, cultural and youth services, along with youth and children's organisations, local and regional NGOs, the local and regional media, scientific and research centres, universities and colleges.

Co-operation is of vital importance in the protection of rights as well. Developed democracies have a complex system of institutions for the protection of the rights of citizens. Courts are the ultimate means of dispute resolution, but judicial proceedings tend to be lengthy, expensive and less confidential due to the principle of publicity. Fortunately, the number of institutions helping the better enforcement of childrens' rights increased in the last few years. The advocates of patients' rights and children's rights, the 'solicitors of the people', mediators and certain NGOs all aim to ensure a more effective protection of rights. They are closer to the stakeholders, and may help mediation in the initial stage of conflicts or contribute to their settlement via cheaper, more confidential and faster procedures.

The purpose of co-operation between authorities, institutions and NGOs is to find the most appropriate assistance for the cases presented by the citizens as quickly as possible. If the institution to which a request is addressed may take action, it will provide a service to the citizen. If the matter falls outside its sphere of authority, it will act as a compass to provide information to the petitioner on where he or she can turn for assistance. Citizens can decide which one of the possibilities presented one of the offered avenues they wish to explore. Such co-operation will create trust, as citizens will have a reason to feel that the institutions are there for them, and not vice versa. Such trust is beneficial to both the state and the individual. In a free society, where the rule of law prevails, there is no alternative to co-operation.

We have a great debt towards the Hungarian society: in the last 25 years we havent found an answer to the most important question concerning our educational system: *why do we teach, what is the aim of it*? If we look back in time, we find clear answers, for example the aim of eradicating illiteracy. Later, after the first World War, when Hungary lost its raw material treasure and its geographical advantages, the educational government realized that it in fact it is culture and education, that can pull the country out of trouble. Even to educate the so called "socialist human" can be seen as a goal that was able to indicate a clear vision of what the aim of the

whole educational system was – according to the communist regime. Then came the regime change, when all sorts of reforms started to take place, reforms that we believed were important on the basis of international conventions and democratic principals; there was only one question we forgat to ask ourselves: why are we doing all this? Why are we spending all that money on education? What kind of mandate does the society give to the large team of professionals that we call the community of teachers? During the last 25 years we have heard many debates over *what* we should teach, and even more debates over *how* we should teach, but these should be only one of the many steps – while the very first step has not been made, the question of questions has not been answered.

I dont know whose job it should be to start the discussion on the goal of education, but Im sure in one thing: the answer to this question must be consensual. There is actually a good example to this: about three decades ago the then finnish government addressed the scientific elite, the opposition, artists, churches, the civil sector – and they started a program that was aiming to answer the question of „What will we, finns be in 50 years?". And in the process of this debate that involved the whole society they found the sentence that is now the foundation of the best performing educational system of the world: „We must not let our parents and grandparents pass away without learning from them all that they know".

I am aware of the fact that we are not the Finns. Still, I firmly believe that if we were to start a search together aiming to find a consensual goal for our future and education, that could stream an immense amount of energy towards the educational system.

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# EDUCATION OF LINGUISTIC COMMUNITIES IN CEE AND THE ROLE OF THE NGOS IN THIS REGARD

## *What does the CoE see?*

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### 1. Introduction

This paper examines the justiciability of the prior right to education of the one of the most vulnerable parts of the society: the minorities. In my research I would like to point to the linguistic communities' education, which is a key issue in my opinion in the multilingual and multicultural Central and Eastern Europe (CEE). The two main target groups of this survey are the Roma and Hungarian education as these are the two main minorities in the region, however, I tried to enlarge the survey to all the significant linguistic minorities of the region.

Regarding the connection between linguistic rights and educational rights I focus on the question whether current international framework regarding minority education is relevant, and if yes, does the Council of Europe (CoE) gain appropriate and sufficient information on minority education? What is the role of the civil actors in this respect?

### 2. Relation between identity, language and education

Regardless of the lack of a general normative definition accepted of "national minorities", yet we may accept that regarding the meaning of that phenomenon the almost a century-long literature's position is nearly unchanged. Yet, following the UN documents (International Covenant on Civil and Political Rights and Resolution 47/135), the CoE documents (Framework Convention and Language Charter) as well as the relevant literature (Capotorti, Eide, Smith, Kovács, Heintze, Bibo, or Flachbarth) my starting point is that a "national minority" is characterized by

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both a significant character, which directly links to their identity and a numerical component, which is an objective criteria.[1] Thus, it seems to be wise to start our survey at the relevant international documents.[2]

According to Article 27 of the CCPR, *ethnic, religious or linguistic* character can be determined. However, education is not a direct element of identity of minorities in the related UN and CoE documents. In this regard, linguistic rights can *contribute* fulfilling educational rights and *vica versa*.

Preservation and maintaining of a minority's identity and the language is thus rest on *two pillars*. One is the ability to use the language freely both in oral and written form in private and in public. The other is the possibility to teach the certain language in every level and form to the future generations.[3]

This importance of education of linguistic communities is, however, can be seen in several international treaties and documents. The United Nations' General Assembly adopted the Resolution 47/135 in 1993 of which Article 4 (paragraphs 3 and 4) calls upon States to promote teaching in/of the mother tongue and culture.

In fact, more than seven decades had to pass in the international organizations' history to be able to deal with the content of the education and not just the frame as was in the early 20th century instruments as it is shown in the following.

## 3. The early international regulatory framework for education rights in CEE

Codification affecting national minorities has rapidly evolved after the First World War. Contracts closing the cataclysm had separate provisions on minorities, more or less in detail.

In connection with the educational provisions I examined 5 of the era's international treaties such as the 1919 Saint-Germain-en-Laye Agreement with Austria, Czechoslovakia and the SHS Kingdom, the 1919 Paris Agreement with Romania, and the 1920 treaty with Hungary.

The contracts[4] contains the following issues related to minorities:

- the clause of General legal equality,[5]
- right to life and freedom[6]

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1 In this regard "numerical component" means: group of native citizens who are numerically less than the major group.

2 Péter Kovács: Minorités: peuple qui n'a pas réussi. In: Hervé Ascensio – Pierre Bodeau – Mathias Forteau – Franck Latty – Jean-Marc Sorel – Muriel Ubéda-Saillard (eds.): *Dictionnaire des idées reçues en droit international*. Paris, Editions Pedone, 2017. 381.

3 Tove Skutnabb-Kangas considers these pillars as Linguistic Human Rights. Tove Skutnabb-Kangas: Linguistic Human Rights. In: Tiersma–Solan (eds.): *The Oxford Handbook of Language and Law.* Oxford, Oxford University Press, 2012. 235–236.

4 In the following as "minority contract" I refer to the contracts with Czechoslovakia, Romania and the SHS Kingdom.

5 Czechoslovakia Article 7 (1); Romania Article 8 (1); SHS Kingdom Article 7 (1).

6 Czechoslovakia Article 2 (1); Romania Article 2 (1); SHS Kingdom Article 2 (1).

- Language rights;[7]
- Freedom of religion and belief[8]
- Citizenship[9]
- Institution-establishment rights[10]
- Education[11]
- Religious and educational autonomy[12]

The examined contracts are mostly similar in structure. Obligations of the states follow each other in the similar order in each agreement, basically in the same text.

The texts regarding education had an almost uniform wording:[13]

> "[The state] will provide in the public educational system in towns and districts in which a considerable proportion of [the State's] nationals of other than [majority] speech are residents adequate facilities for ensuring that the instruction shall be given to the children of such [State] nationals through the medium of their own language. This provision shall not prevent the [State] Government from making the teaching of the [majority] language obligatory."

The prescribed "adequate facilities" provided a broad framework, which allowed the same text to be applied to all countries. Interestingly, despite of the same rules, the domestic legal systems developed in very different ways. Some of the achievements of regulations that were introduced in the mid-war period still can be seen in the contemporary legal systems.

An example for such (non-internationally obligated) instrument is the 3-level linguistic education system, where Type A) is where the teaching language is the minority language, the type B) is where the teaching language is a minority language, however the majority language is a compulsory subject; and type C) is where the teaching language is the majority language, but the minority language is a compulsory subject. However, this variety of linguistic education was introduced by Hungary in the mid-war-period, today this model of education, which takes local characteristics also into account, is exercised only in Croatia among the examined countries.

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7 Article 7 of Czechoslovakia (3–4); Romania Article 8 (3-4); SHS Kingdom Article 7 (3–4).

8 Czechoslovakia Article 2 (2), Article 7 (2); Romania Article 2 (2), Article 8 (2); SHS Kingdom Article 2 (2), Article 7 (2), Article 10.

9 Czechoslovakia 3–6. article; Romania 3–7. article; Kingdom of SHS Article 3–6.

10 Article 8 of Czechoslovakia; Romania Article 9; SHS Kingdom Article 8.

11 Article 9 of Czechoslovakia; Romania Article 10; SHS Kingdom Article 9.

12 Romania Article 11.

13 This is a transformation of the text. Here I highlight the common text of the same regulation.

Above all, the most important experience of these international treaties perhaps is that international law recognized minority rights at an early stage, and within both the language and the education rights.

## 4. The fulfillment of current international obligations -a comparative study

The international regulation regarding minority protection born in the '90s – in the context of the breaking-up of the Soviet Union – played a key role in maintaining regional stability of CEE. The two main Council of Europe convention, both the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages recognizes not only rights for the minorities, but also obligations to the Member States, which is going to be important with regard to the fulfillment of educational rights.

These two international instruments are monitored by the CoE by a similar way: the county reports are examined by an independent commission of professionals, who are preparing an opinion to the Committee of Ministers to adopt a recommendation. In this research I examined eight[14] middle-European countries' most recent reports and opinions[15] in the scope of the fulfillment of the articles relating education:

- Framework Convention: Articles 12, 13, 14;
- Language Charter: Article 8.

In the following I highlighted the issues that are common in the Carpathian region as well as the tools suggested by the two commissions.

### 4.1. Statistics

If we have a glance at the population statistics of 2015, with few exceptions, we may conclude that in the examined countries the largest numbers of minorities are Hungarians and Roma/Gypsy. Another observation according to the evolution of the population: the number of ethnic communities (linguistic communities) are running out, while the Roma population is still growing in the last decades.

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[14] Austria, Slovakia, Ukraine, Romania, Serbia, Croatia, Slovenia, Hungary.

[15] Language Charter documents reviewed: *Slovakia*: 3rd and 4th monitoring cycle. *Ukraine*: 1st and 2nd monitoring cycle and the country report submitted for the 3rd monitoring cycle (MIN-LANG (2016) PR 1). *Romania*: 1st monitoring cycle and the country report submitted for the 2nd monitoring cycle (MIN-LANG (2016) PR 2). *Serbia*: 2nd and 3rd monitoring cycle. *Croatia*: 4th and 5th monitoring cycle. *Slovenia:* 3rd and 4th monitoring cycle. *Austria*: 2nd and 3rd monitoring cycle. *Hungary:* 5th and 6th monitoring cycle.
Framework Convention documents reviewed: *Slovakia*: 2nd and 3rd monitoring cycle. *Ukraine*: 2nd and 3rd monitoring cycle. *Romania*: 2nd and 3rd monitoring cycle. *Serbia*: 2nd and 3rd monitoring cycle. *Croatia*: 2nd and 3rd monitoring cycle. *Slovenia*: 2nd and 3rd monitoring cycle. *Austria:* 2nd and 3rd monitoring cycle. *Hungary*: 2nd and 3rd monitoring cycle.

| | SK | UA | RO | SRB | HR | SI | AU | HU |
|---|---|---|---|---|---|---|---|---|
| Country size ($km^2$)[16] | 49 035 | 603 550 | 238 391 | 77 474 | 56 594 | 20 273 | 83 879 | 93 011 |
| Population[17] | 5 421 349 | 44 429 471 | 19 870 647 | 7 176 794 | 4 225 316 | 2 062 874 | 8 576 261 | 9 855 571 |
| Number of Hungarian Minority[18] | 458 467 | 159 297 | 1 227 623 | 253 899 | 14 048 | 6 243 | 25 884 | - |
| Number of Roma[19] | 105 738 | 47 587 | 621 573 | 147 604 | 16 975 | 8 500 | 4 348 | 315 583 |
| 3 largest minorities by population (%)[20] | Hungarian (8,5), Roma (2), Czech (0,6), Ruthenian (0,6) | Russian (17,3), Belorussian (0,6), Moldavian (0,5) | Hungarian (6,1), Roma (3), Ukrainian (0,2) | Hungarian (3,5), Roma (2), Bosnian (2) | Serbian (4,3), Italian (0,4), Roma (0,4) | Serbian (2), Croatian (1,8) … Italian (0,1) | Hungarian (7,8), Croatian (5,9), Slovenian (5,4) | Roma (3,2), German (1,8), Slovak and Romanian (0,36) |

The statistics also repeatedly refer to census data, in which it is clear that the use of the mother tongue is marked more times than the national belonging. One explanation for that is in many countries Roma tend to taken into account themselves as Hungarians.

Nowadays international obligations are significantly more specific than it was in the previous texts of the early 20th century. The framework of the Language Charter approaches from a structural view from the pre-school to higher education, adult education and vocational education. The Framework Convention has another perspective: approaching from the content of the education.

Both the conventions applied the similar mechanism where the key role lies at the independent body (committee of experts / advisory committee). This body gains information from the state (governments) on the one hand and form its own on-the-spot visits on the other hand. From the point of view of the linguistic communities the main question is whether the committees reach the adequate and relevant information? What does the CoE see from a broad picture of a minority's present?

If we compare the CoE documentation it shows the by today the recommendations are not mainly on legislative and legal issues but *often beyond the law*: means of management, support, cooperation or even sensitizing the majority society and striving towards peaceful coexistence. In the following I highlight the common

16 Source: Eurostat (2016).

17 Source: Eurostat (2016).

18 Source: most recent country reports to the examined conventions.

19 Source: most recent country reports to the examined conventions.

20 Source: most recent country reports to the examined conventions.

findings of the above mentioned CoE documents. In other words: these are the common issues (or problematic fields) that the CoE sees in the examined CEE region.

### 4.2. Roma education

The first common highlighted educational area is the Roma/Gypsy education. It seems the CoE recognizes that the Roma community should not be treated as one of the linguistic minorities, partly because they are usually regarded not like that. On the other hand, romas formulate completely different educational demands than others. Roma communities intend to be integrated first and promotion of use of language is a secondary issue besides that. However, it should be noted that romas usually speak in a minority language, so in many countries it is a twofold issue (ethnic *and* linguistic). In contrast, other linguistic communities usually just require self-reliance (self-governance), which may be expressed i.e. as a demand for separated (and not segregated) classes or the right to establish own school. Needs of these two groups are not interchangeable, which is acknowledged by the committees as well. In state reports for the Framework Convention member states usually report the educational programs and integration strategies in detail. We shall note that special Roma strategy has been introduced to all the countries surveyed, which deals largely with educational issues. However, in spite of the strategies, for example Slovakia and Romania reports difficulties of inclusion of Roma in education. We can observe the similar situation in Croatia where this particular number is high: the Croatian country report refers to a UN survey, which states that only the 25% of Roma children finish primary school. Slovenia employs special language support, and educational advisors for this purpose.

### 4.3. Recent changes in legislative environment

In the examined region significant legislative changes have taken place between 2010-13. New acts on education were adopted in Slovakia, Ukraine, Romania and Hungary. Beside legislative measures, some institutional changes (such is the Slovakian newly introduced minority plenipotential or the Educational Center in Komarno/Révkomárom) have occurred in the same period of time. These new instruments will have effect on the educational system, which will provide measurable outcomes in the next cycles of reports.

### 4.4. Accessibility

The accessibility to the right to education for minorities in this particular region is basically guaranteed. The reports and the opinions of expert committees and the advocacy of civil actors can further refine this picture.

The meaning of a “minority-language” or “bilingual” school get different interpretations in different countries. Slovakia set a strict 50–50% of Slovak and minority-language classes in the curriculum. In contrast, Croatia, which introduced a differentiated educational model, does have a school that works completely in the

minority language. Another variation can also be observed in the case of Slovenia, which has mixed schools, but there are also many who are involved in trainings in neighboring countries (Hungary and Austria).

It is an important element of accessibility to have the minorities informed about the opportunity of minority-language training, for example in those countries where the participation is bound to limit (Serbia, Austria). Awareness, as a role of local civil society actors is invaluable in this regard.

According to the reports, it seems that a well-functioning minority school shall have: 1) student, 2) teacher and 3) teaching materials, school books. Among these three factors the teacher training and the curriculum is included in the conventions. Comparing the most recent reports (the last in three years' time), only Serbia reported the increasing number of students enrolled in the bilingual trainings. In all the other countries, the number of students is decreasing parallel to their population.

### 4.5. Quality of training

The summaries of the expert committees contain more information about the quality of training than the country reports. According to the results of this comparison, two subjects can be pointed out as main factors of minority-language training: (1) the issue of the quality of the language, and (2) the quality of the textbooks and teaching materials. However, any minority language is a living language, without conscious use of that particular language it is more exposed to shallowing, archaizing or loss. Worrying reports have been coming for more than a decade from East-Slovenia, where a fast loss of language can be detected of the small Hungarian community. The Slovenian report unfolds that the teachers' command of the Hungarian language is so weak that in many cases they do not able to reach the appropriate level of teaching in minority language. In Slovenia, there are only four kindergartens, four elementary schools and one middle school accessible for the little more than six thousand Hungarians – no wonder that nurturing a new generation of teachers struggling with significant problems. Similar, but not that alarming warnings coming from Transcarpathia (Ukraine), Burgenland (Austria) and East-Croatia as well. These warnings are mainly provided by local civil associations according to the opinions of the committees.

### 4.6. Publishing textbooks

Publishing textbooks is one of the main problematic issues in all the examined countries. Although, minority language textbooks are available in all the countries (*pro forma*), it is not so easy to use them in minority education (*de facto*). Two striking examples can be highlighted. Serbia for example, reports a long list of minority-language textbooks, but it is clear from the commissions' evaluation report that there is a serious administrative burden related to book publishing, which slows down processes. Due to this barrier, new book almost can not even show up to the semester in which those were supposed to, so the old ones or the Serbian (majority) language books are taken instead. In Slovakia after a long time finally a Hungarian textbook

was introduced to the administrative authority, which was, however, rejected by the Ministry of Education in 2015 and can not be used ever since.

### 4.7. Teacher training

Teacher training in all regions struggling with challenges. Speaking about the largest Hungarian minority, first it seems that there is at least one higher education institution in each region, which trains minority language teachers. In the low-inhabited minority areas (Slovenia, Austria) the main reported problem is a shortage of students, but in the large population areas, like Vojvodina (Serbia) the lack of training materials and textbooks is the subject of complains. Slovakia recently introduced teaching of tolerance in teacher training which is a novelty in the region. There is also one important issue in this sphere, which appears implicitly in the CoE documents: the low prestige of teaching as a career. The Romanian report is to map out that vocational schools are lack of Hungarian-speaking trainer, who usually go to business sector rather than teach at school. The teaching profession's existential undervaluation is observed, or at least suspected, in almost all the studied countries. If a teacher is the foreign trained (it usually means trained in the kin-state) recognizing diplomas may arise as a problem, which had appeared Romanian-Serbian relations previously.

### 4.8. Other problematic issues

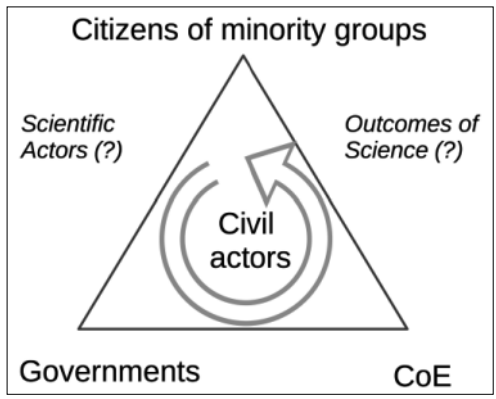
Some of the difficulties that affect the education systems in the region are uncovered during the on-the-spot visits of the expert committees. The first is the trend of centralization of governance, which is common in the CEE counties. In education and mainly regarding curricula, it means the regional needs are counted less than the central interests. Shaping education to the special needs of sub-region or at least recognition of local specialties is almost impossible. (On the other hand we shouldn't forget, that we are speaking about middle and small sized European countries where the local needs are often too small comparing to larger states.) Teaching of history and cooperation between majority and minority is also a sensitive issue, but apparently due to the Language Charter's targeted implementation and monitoring we can observe a much larger dialogue on this issue than before. However, the Language Charter's Committee of Experts regularly calls the examined countries to include minorities in the preparation of curricula.

## 5. How to develop spreading of information in common issues of education?

The answer to the question raised at the beginning of our survey that whether the correct and sufficient information come to the Council of Europe is mainly yes. The multi-source model, by which the Committees gain information seems to be working properly.

It is important to identify those actors who can provide information for the committees of experts. Besides the governments, the civil and political organizations

have to be highlighted, which are sometimes specialized in certain matters, such as education. As a result of the above comparison, I am convinced that minorities' civil organizations form a bridge – as communication channels – linking the international organization, the state and the minority citizens. Their main responsibility is to provide adequate communication to all other actors, so the relevant information is transferred properly.




In addition to the above, more and more research of the highest quality addresses the educational sector from a point of view of pedagogy, methodology and linguistics. However, the questions examined in the scientific literature are often not echoed in country reports or evaluations, nor even in the linguistic strategies of certain counties or minorities. This leads us to the conclusion that there is no proper channel of information between the scientific sphere and civil or political actors.

In summary, it worth emphasizing that the above examined international treaties have a key role to the region's stability. Developing rational linguistic policies are still the strongest supporters of maintaining peaceful coexistence of different languages and communities in the CEE region.

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# MULTANI V. COMMISSION SCOLAIRE MARGUERITE-BOURGEOYS, SUPREME COURT OF CANADA, 2006

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## 1. Background

The case was about a 12 years old boy, Gurbaj Singh Multani who attended a school in Quebec, Canada. He and his father Balvar Singh Multani are orthodox Sikhs, so the boy believed that his religion required him to wear a kirpan[1] at all times.

The case started in 2001, when Gurbaj accidentally dropped the kirpan he was wearing under his clothes in the yard of the school he was attending. The school board – as a kind of first instance – sent his parents a letter in which, as reasonable accommodation, it authorized their son to wear his kirpan with certain conditions to ensure that it was sealed inside his clothing. Gurbaj and his parents agreed to this arrangement.

The governing board of the school refused to ratify the agreement on the basis that wearing a kirpan at the school violated art. 5 of the school's Code de vie (code of conduct) which prohibited the carrying of weapons. The school board's council of commissioners upheld this decision and told Gurbaj and his parents that he could wear a symbolic kirpan in the form of a pendant or one made of a material which is harmless.

The father filed in the Superior Court a motion for a declaratory judgment to the effect that the council of commissioners' decision was of no force or effect. The Superior Court granted the motion (2002), declared the decision to be null, and authorized Gurbaj to wear his kirpan under certain conditions.[2] The Superior Court

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* Junior assistant researcher.

1 A kirpan is a religious object that resembles a dagger and must be made of metal. So actually it can be seen as a kind of a weapon.

2 These conditions are the following:
– that the kirpan be worn under his clothes;

noted that the need to wear a kirpan was based on a sincere religious belief held by Gurbaj Singh and that there was no evidence of any violent incidents involving kirpans in Quebec schools.

The next instance, the Court of Appeal set aside the Superior Court's judgment and restored the council of commissioner's decision (2004). The judge also concluded that the decision in question infringed Gurbaj's freedom of religion, but held that the infringement was justified for the purposes of s. 1 of the Canadian Charter of Rights and Freedoms[3] and s. 9.1 of Quebec's Charter of human rights and freedoms[4]. The judge considered that the council of commissioners' decision was motivated by a pressing and substantial objective: to ensure the safety of the school's students and staff. There was a direct and rational connection between the prohibition against wearing a kirpan to school and the objective of maintaining a safe environment. According to the decision, the kirpan was a dangerous object, and the concerns of the school board were not merely hypothetical. Allowing it to be worn, even under certain conditions, would have obliged the school board to reduce its safety standards and would have resulted in undue hardship. The judge stated that she was unable to convince herself that safety concerns were less serious in schools than in courts of law or in airplanes.

## 2.The decision of the Supreme Court

In the procedure of the Supreme Court, the main question of the dispute was the compliance of the commissioners' decision with the requirements of the Canadian Charter of Rights and Freedoms, especially the requirement of freedom of religion.

Because the council of commissioners' decision was an administrative law decision based on legislation (Code de vie), the standard of review could have been the standard of reasonableness (which was applied by the Court of Appeal) but the Court applied the principles of constitutional justification and held the administrative law standard of review as not relevant. Deschamps and Abella JJ

– that the kirpan be carried in a sheath made of wood, not metal, to prevent it from causing injury;
– that the kirpan be placed in its sheath and wrapped and sewn securely in a sturdy cloth envelope, and that this envelope be sewn to the guthra;
– that school personnel be authorized to verify, in a reasonable fashion, that these conditions were being complied with;
– that the petitioner be required to keep the kirpan in his possession at all times, and that its disappearance be reported to school authorities immediately; and
– that in the event of a failure to comply with the terms of the judgment, the petitioner would definitively lose the right to wear his kirpan at school.

[3] "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[4] "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law."

who wrote concurring reasons to the decision of the Supreme Court argued that the Court should address the issue of justification under s. 1 if the Canadian Charter of Rights and Freedoms only where a complainant is attempting to overturn a normative rule as opposed to a decision applying that rule and not on the decision itself but this argument was rejected. One argument was to avoid the dissolving of constitutional law standards into administrative law standards. Another one was that judicial review may involve a constitutional law component and an administrative law component and the administrative law standard of review is not applicable to the constitutional component of judicial review. The main question was the compliance of the commissioners' decision with the requirements of the Canadian Charter and not the decision's validity from the point of view of administrative law.

A s. 1. analysis can be used when there is a conflict of fundamental rights but in this case, the Court did not at the outset had to reconcile two constitutional rights, as only freedom of religion was in issue as a fundamental right and on the other side there were the safety concerns. Even like this, the Court held that s. 1. analysis was the most appropriate one to decide this case. According to this the infringement is reasonable and can be demonstrably justified in a free and democratic society if the legislative objective is sufficiently important to warrant limiting a constitutional right and the means chosen by the state authority is proportional to the objective in question. The proportionality analysis has three stages: it must be considered whether the decision has a rational connection with the objective, the infringement can be justified (minimal impairment test) and the deleterious and salutary effects must also be measured.

The Court stated that freedom of religion was not an absolute right, it had internal limits and it could be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others. Nevertheless, the interference with Gurbaj's freedom of religion was neither trivial nor insignificant, as it had deprived him of his right to attend a public school. The infringement of Gurbaj's freedom of religion could not be justified under s. 1 of the Canadian Charter of Rights and Freedoms. Although the council's decision to prohibit the wearing of a kirpan was motivated by a pressing and substantial objective (to ensure a reasonable level of safety at the school), and although the decision had a rational connection with the objective, it has not been shown that such a prohibition minimally impairs Gurbaj's rights. The absolute prohibition against wearing a kirpan did not fall within a range of reasonable alternatives. The risk of Gurbaj using his kirpan for violent purposes or of another student taking it away from him was very low, especially if the kirpan was worn under conditions such as were imposed by the Superior Court. The Court also stated that Gurbaj had never claimed a right to wear his kirpan to school without restrictions and there were many objects in schools that could be used to commit violent acts and that were much more easily obtained by students, such as scissors, pencils and baseball bats. The evidence also revealed that not a single violent incident related to the presence of kirpans in schools had been reported. Although it was not necessary to wait for harm to be done before acting, the existence of concerns relating to safety must be unequivocally established for the infringement

of a constitutional right to be justified. Nor did the evidence support the argument that allowing Gurbaj to wear his kirpan to school could have a ripple effect.

Lastly, the argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict was not only contradicted by the evidence regarding the symbolic nature of the kirpan, but was also disrespectful to believers in the Sikh religion and did not take into account Canadian values based on multiculturalism. Religious tolerance was a very important value of Canadian society, the very foundation of the Canadian democracy.

A total prohibition against wearing a kirpan to school undermined the value of this religious symbol and sent students the message that some religious practices did not merit the same protection as others. Accommodating Gurbaj and allowing him to wear his kirpan under certain conditions demonstrated the importance that the Canadian society attached to protecting freedom of religion and showed respect for its minorities. The deleterious effects of a total prohibition thus outweighed its salutary effects.

## 3.Outcomes

Prior to Multani, the approach of the courts to judicial review of Charter questions was inconstant but this case established a rigorous test: an impugned administrative decision that affects Charter rights must be held to the same standard as is a law that affects Charter rights. However, this approach was short-lived. A new framework for analysis was established in Doré v Barreau du Québec (2012).[5] In this decision, the Court cited the critical academic commentary of Multani which generally argued that the use of a strict s. 1. analysis reduced administrative law to having a formal role in controlling the exercise of discretion. Instead of this, Doré suggests that judges should respect the perspectives of administrative officials and reasonableness review shifts the focus to asking whether an administrative official has provided an adequate justification for the outcome.[6]

In Multani, the Court referred the Canadian values based on multiculturalism which has been translated into legal principle by s. 27 of the Canadian Charter of Rights

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[5] Alexander Pless: Judicial Review and the Charter from Multani to Doré. *Working Paper Series*, University of Ottawa, November 2013. 4–5. https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2362924 With Doré, the standard of review for an administrative tribunal's decision is "reasonableness". According to the decision, "when applying Charter values in the exercise of statutory discretion, an administrative decision-maker must balance Charter values with the statutory objectives by asking how the Charter value at issue will best be protected in light of those objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives".

[6] Matthew Lewans: Administrative Law, Judicial Deference, and the Charter. *Constitutional Forum constitutionnel*, Volume 23, Number 2, 2014. 19–32., especially 28. https://ejournals.library.ualberta.ca/index.php/constitutional_forum/article/viewFile/21938/16372

and Freedoms, although did not give legal affect to the term.[7] Still, this case is an important part of understanding multiculturalism in Canada which contains a broad range of policies and programs adopted by governments in response to diversity. One of the tools used by multiculturalism is the policy of exempting minorities from the application of certain rules and regulations, like from rules banning the carrying of dangerous weapons in public. These exemptions are typically justified on the grounds that the law disproportionately impacts individuals because their religious or cultural affiliations.[8] In Multani, the core question was the possibility of exemption from safety rules: the appellate court privileged the fears of non-Sikh students and staff above the religious beliefs of orthodox Sikhs, implying that those fears were more empirical than religious belief, even when assessed primarily in terms of perception rather than actual fact, the Supreme Court however, rejected the argument that the kirpan posed a threat to school safety, especially when sheathed, and concluded that prohibiting the kirpan from school premises excessively infringed Gurbaj's religious rights. The Court privileged a particular cultural sensibility as rightfully dominant. With this, it emphasized tolerance and pluralism as core Canadian values that school boards have an obligation to promote.[9]

The Multani case was also part of the unfolding "reasonable accommodation" debate in Canada: not much time after the decision some commentators have pointed this debate as evidence of growing polarization. People, the media and political parties were talking about "excessive" accommodations of minorities, they called for a new, tougher approach to immigrants and minorities.[10] After the Multani decision, 94 percent of French-speaking Quebeckers and 79 percent of non-French speaking Quebeckers were opposed. The people were disappointed because the leading judge of the decision, Justice Louise Charron was a Franco-Ontarian but she took a position in favour of Canadian values based on multiculturalism and religious tolerance (as a

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7 Joan Small: Multiculturalism, Equality, and Canadian Constitutionalism. In: Stephen Tierney (ed.): *Multiculturalism and the Canadian Constitution*. Toronto, UBC Press Vancouver, 2007. 196–211., especially 208. According to s. 27 the Charter shall be interpreted in a manner consistent with the preservation and enhancement of multicultural heritage of Canadians. S. 27 states rather a value than a binding rule, it is in most cases ignored by the Court, if it has some role, it is in the interpretation of s. 15 (equality guarantee) which must be interpreted so as to accommodate distinctions that are permitted by s. 27. Small op. cit. 198., 200.

8 Michael Murphy: *Multiculturalism: A Critical Introduction*. Abingdon, Routledge, 2012. 39. However, there is a disagreement in the academics over whether exemptions support or undermine the principle of equality. Some think that exemptions can be justified as a means of according equal consideration and respect to the identity-related differences of individuals from minority background. Others think that just because a rule has a disproportionate impact for some people, the rule itself is not unfair and an exemption must not be granted, rather the disadvantage created by the law and the purpose of the law must be weighed and sometimes the legitimacy of the law should be questioned rather than granting an exemption. Murphy op. cit. 40–41.

9 Valerie Stoker: Zero Tolerance? Sikh Swords, School Safety, and Secularism in Québec. *Journal of the American Academy of Religion,* Vol. 75, Issue 4, Dec. 2007. 814–839., especially 835.

10 *The Current State of Multiculturalism in Canada and Research Themes on Canadian Multiculturalism 2008–2010.* http://www.cic.gc.ca/english/pdf/pub/multi-state.pdf 16.

core element of multiculturalism) as the very foundation of the Canadian democracy. Gurbaj as a boy, was kept from school for five months over his wearing of a kirpan. Then he won the right at Quebec Superior Court, so he returned to his public school and got shouted at by 300 people – some told him "Go home, Paki". He gave an interview in 2013, when he considered leaving Quebec. There was a proposed bill, the Quebec Charter of Values, trying to end the Quebec controversy on reasonable accommodation. The Charter would have banned the wearing of conspicuous religious symbols in the public-sector workforce and Gurbaj Multani was wearing not only a kirpan but also a turban.[11] In the end, the bill died as of the 2014 elections.

After the decision, a few years later, a research program was launched, focused on diversity and education, the outcomes were published in 2014. One of the core question was, how the elementary school students in New Brunswick might respond to the case that was before the Supreme Court. The result was surprising. Most of the students didn't know the labels "turban" or "hijab". None of them could name the religion that might require these as part of its followers' adherence to their faith. Instead, they suggested that perhaps the boy wearing the turban was having a bad hair day and just didn't want to show his hair. They didn't know what a kirpan was and ideas about safety trumped any right to wear a kirpan, even if the kirpan itself was perfectly safe. For the students, diversity was something that was foreign. The students really saw no reason to accommodate difference because they didn't understand what it was. Most of the students simply didn't understand that a turban is not just a hat, that in some religions, material expressions of one's religious faith are an integral part of one's identity. Although learning outcomes related to diversity were key components of the New Brunswick social studies curriculum, so they were learning about it in school. The author (Associate Professor of Social Studies Education in the Department of Elementary Education at the University of Alberta) fortunately also found some good points: although the students did not demonstrate an understanding for reasonable accommodation, they were not hostile to the idea, their minds were open, they were willing to discuss it and some even tried to come up with possible solutions.[12]

[11] https://goo.gl/YLG7k6

[12] Carla L. Peck: *Hope for Canadian Multiculturalism*. http://www.cea-ace.ca/education-canada/article/hope-canadian-multiculturalism

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# HUNGARY'S NEW CODE ON ADMINISTRATIVE COURT PROCEDURES

*As a framework for the justiciability of educational rights*

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## 1. Introduction

### 1.1. Educational rights and administrative court procedures

Though principally adherent to the sphere of constitutional law, the justiciability of educational rights is closely connected to administrative court procedures. Administrative law is applied constitutional law – as the German dictum puts it[1]. Thus, it is important to search for the right procedural framework for the enforcement of educational rights and other basic rights. This was also an important perspective of the preparatory work and the codification process of the recently enacted Code on Administrative Court Procedure. This article aims at highlighting those features of the Code, which are connected with the questions of the justiciability of educational rights through administrative court procedures and to give insights to the dilemmas arising in the codification process. These main features, which are able to bring modifications to the present system of remedies, are the scope of judicial protection, the standing, the actions granted by law and the respondent decisions of courts, as well as the special procedures against the omissions of administrative bodies. To highlight the changes, the present situation will also be presented shortly.

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* Associate professor.

1 Formulated by Fritz Werner: Verwaltungsrecht als konkretisiertes Verfassungsrecht. *Deutsches Verwaltungsblatt,* 1959. 527.; and frequently used by German scholars, cf. Eberhard Schmidt-Assmann: *Das allgemeine Verwaltungsrecht als Ordnungsidee.* Berlin–Heidelberg, Springer, [2]2006. 10.; or Rainer Pitschas: Neues Verwaltungsrecht im reflexiven sozialen Rechtsstaat. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae. Sectio Iuridica,* Vol. LIV., 2013. 34.

### 1.2. The long way to the Hungarian Code on Administrative Court Procedure

After the Communist takeover, administrative jurisdiction was abolished in 1949 according to the principles of the unity of power and the unity of the judiciary. In some – very few – administrative matters, however, the possibility of access to ordinary courts remained: the Administrative Procedure Act allowed for judicial review in five categories of cases, but which were of marginal importance. The administrative court procedure was then regarded as a special type of administrative procedure and therefore governed by the Administrative Procedure Act. It was only in 1972 that Chapter XX. entitled 'Review of administrative decisions' was inserted into the Code of Civil Procedure (CCP). Thus, the administrative court procedure was conceived as a special civil process and therefore fell within the jurisdiction of civil justice.

In December 1990, the Constitutional Court found the enumerative regulation of the administrative acts which can be brought before court unconstitutional, and smashed the rules regulating access to court, and obliged Parliament to find a lawful solution by 31 March 1991.[2] As these three months didn't allow for sufficient time for in-depth preparation, the law 1991: XXVI. on the extension of access to court in administrative matters was enacted to provisionally grant access to court against authoritative administrative decisions in general. The extension included certain further decisions by local self-government bodies and also created the possibility for special regulations opening access to justice in other administrative decisions. These latter two categories are important in respect of educational rights, as the local self-government were at that time responsible for the provision of educational public services, thus the maintenance of schools. The head of the territorial government office could bring annulment actions against the decisions of local government as a maintaining organ. With the other extension, the Public Education Act opened access to court against the most significant school decisions causing unlawful harm: after filing an appeal to the maintaining organization of the school, the judicial review of the appellate decision was made possible.[3]

The new constitution, enacted in 2011, the Basic Law of Hungary allowed in Article 25 for certain 'groups of affairs' – in particular for administrative and for labour disputes – the creation of specialized courts.[4] But instead of setting up independent administrative courts, the legislator simply created so called 'administrative and labour courts', which meant, that the administrative judges were transferred from ordinary courts to the already existent labour courts, which are situated at the lowest level of the judiciary.[5] No changes were made to the administrative court procedure at that time. In the beginning of 2015, the Hungarian government adopted the concept

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2 Decision Nr. 32/1990. (XII. 21.) AB of the Constitutional Court.

3 §§ 37–40 of the Public Education Act.

4 On the changes of the constitutional framework of legal protection against administration cf. Krisztina Rozsnyai: Änderungen im System des Verwaltungsrechtsschutzes in Ungarn. *Die Öffentliche Verwaltung,* vol. 65, 2013/9. 335–342.

5 The administrative and labour courts started to function on 1st of January 2013.

of the codification of the new CCP. It was at this point, that it also decided not to regulate administrative court procedures as a special civil procedure. The minister of justice was ordered to start codification work in respect of the rules of administrative court procedures. The concept for the codification was adopted in May 2015 by the government and subsequently, the draft of the Code was presented to the public on 31 March. The draft law was passed at the end of September to the Parliament.[6]

The codification work was centered around the principle of effective judicial protection. Four directions of effectivity have been identified: on the one hand, the granting of subjective legal protection complemented by elements of objective control of legality, on the other hand the granting of seamless judicial protection, against all forms of administrative action, thirdly the effectivity in time, and fourth the effectivity as regards the procedural equality of arms.

## 2. Main features of the administrative court procedure connected to the justiciability of educational rights

### 2.1. Widening the scope of judicial protection

As we can see, at present, judicial protection is ensured generally only against concrete authoritative decisions of authorities brought in administrative procedures. Of course, time has already proven that not all administrative court procedures fit into this framework, which resulted in the creation of special procedures, like the so-called 'non-contentious administrative judicial procedures', which can be filed against omissions in administrative procedures of administrative authorities and some procedural decisions, like the decision of stay of an administrative procedure or its ending without deciding on the merits. This led to a fragmentation of the rules on administrative court procedures. There are at present numerous special rules that widen the scope of judicial protection. To mention only the Public Education Act, administrative courts review the decisions of the maintaining organ of the school concerning unlawful acts of the school. The decisions of local self governments (still responsible for some public services in the field of education, like education in kindergartens) can be sued by the county government office which is responsible for the supervision of local governments.

According to the new Code, all administrative activity of administrative organs, which is regulated by administrative law, can be reviewed by court. Activity is the action and the omission of action which is aimed at producing or factually produces legal consequences, i.e. changes the legal situation of a person. Thus, it does not matter anymore, if the concrete action of an administrative organ was governed by the Act on Administrative Procedures, neither if it was an authority or an

[6] The Parliament enacted the code on 6th December, but the President of State referred it to the Constitutional Court because of some elements of the regulation of the competence of courts. After the decision of the Constitutional Court, the draft was altered accordingly and enacted on 20 February 2017.

administrative organ without exercising authoritative powers. By this change, the activity of administrative organs in the field of service provision can also be subject to review by administrative courts. In the field of service provision, administrative organs exercise numerous activities which can be deemed as administrative activity governed by administrative law, either in connection with the maintenance of institutions providing public services, like public education, or in connection with administrative contracts by which administrative organs organize (mostly by outsourcing) the provision of public services. In both cases, there will be numerous decisions or omissions, which alter the legal situation of individuals.

During the codification process questions arose whether the activity of public service providers, (and this way also schools and other institutions providing educational public services) should be directly susceptible to judicial review. But it seemed to be more appropriate to first give the maintaining organ the possibility for review, as most disputes can be solved this way more easily. Also, this would have given rise to quite many conceptual questions connected to the basic questions of the notion of public service, which would have placed the Hungarian judiciary and legislation under too heavy pressure.

Another important direction of the widening of the scope of judicial protection is the reviewability of the normative acts of non-legislative nature issued by administrative organizations. It is not hard to convey that these acts issued by the maintaining organization regulating the functioning of public institutions providing public services can also have strong impact on the position of users of public services. School rules for example can contain rules which are in connection with the acceptability of education. These normative regulations, which are not legislative instruments, can – according to the rules of the Code – be brought before court in connection with individual acts, which apply these regulations. This ensures the seamlessness of judicial protection. Of course, this will not make void the functioning of ombudsmen, as there are numerous situations where there are no individual acts flowing from these regulations or they do not directly infringe rights or legal interests. This possibility can also in the long run foster the creation of rules of norm setting of administrative organs, like the rules contained in the model rules of ReNEUAL[7] or in the Administrative Procedure Act of 1946 of the United States.[8]

### 2.2. Standing

The other crucial element of justiciability in general is the question of standing: who is allowed to ask for review, who can bring his plea before court? In this respect, the Code makes the rules concerning authoritative decisions to a fully general rule:

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[7] The ReNEUAL Model Rules on EU Administrative Procedure, Book II., at http://www.reneual.eu/

[8] For a comparison of the two sets of rules cf. Anna Forgács: Administrative Rule-Making based on the ReNEUAL Model Rules. In: Balázs Gerencsér – Lilla Berkes – András Zs. Varga (eds.): *Current Issues of the National and EU Administrative Procedures (the ReNEUAL Model Rules).* Budapest, Pázmány Press, 2015. 441–446.

Any person who invokes an immediate infringement of his or her right or legitimate interest, can file an action for review. Besides this group, public bodies invoking an infringement within their area of responsibility also have standing, as well as authorities supervising autonomous organizations (like local governments, minority councils or professional self-regulating bodies, chambers)[9]. The law may also grant standing to civil organizations defending common interests or human rights. Latter possibility has a growing importance in relation to collective litigation, in respect of administrative court procedures mostly in cases of environmental protection and consumer protection[10], but could also be a forceful instrument for the enforcement of educational rights.[11] The Code thus gives a general possibility to grant standing to civil organizations, but the legislator of the special field – in this case responsible for education – has to gauge this possibility.

A question highly connected to standing is the possibility of taking part in administrative court procedures by third parties. Those persons and organizations who have standing, also have the possibility to take part as third parties in administrative court procedures. They enjoy almost the same rights as the parties, with exception of the withdrawal of the action.

## 3. Actions ad decisions

### 3.1. Types of action

The widening of access to courts through this general formulation of administrative activity needs several types of actions, as the traditional annulment action against decisions is not able to cover all sorts of pleas. The mandatory action makes it possible to ask the court to order the administration to perform, or to refrain from performing, for example in relations in connection with administrative contracts. A very important part of unlawfulness of administration resorts from the non-fulfillment of positive obligations posed on administrative organs. The Code will thus also provide for an action against omission. And of course, there are also situations, where we face factual deeds which cannot be annulled, but only deemed unlawful. For these cases, the Code makes possible for the court to pronounce a declaratory decision, given that an other type of decision could be brought. Of course, the plaintiff has to prove that he has a special interest in having the court declare an activity unlawful. The declaration of the unlawfulness of the custodial disposition of the police by

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[9] Cf. István Hoffman*:* The Legal Status of the Procedure of Legal Supervision of the Hungarian Local Governments: An International and Historical Outlook. In: Gerencsér–Berkes–Varga (2015) op. cit. 373–384.

[10] Cf. Krisztina Rozsnyai: Public Participation In Administrative Procedures: Possibilities And Recent Developments In Hungary. *Curentul Juridic,* vol. 58., no. 3. (2014) 50–66.

[11] At least this is a possible interference from the civil court procedures led by civil organisations against ethnic segregation in Hungary, e.g. the case underlying EBH 2015. P.6. of the Curia (April 22, 2015), or *Case Horvath and Kiss v. Hungary,* ECLI:CE:ECHR:2013:0129JUD001114611.

the administrative court for example will be a precondition for filing an action for compensation.

The diversification of the types of actions necessitates the diversification of procedural rules: the Code is therefore divided into a general part containing the general rules on courts and on the procedure of the first instance court, on its decisions, on the rules of remedies, with view to annulment actions. These general rules are followed by rules on the special procedures before administrative courts, among which we can find the mandatory procedure, the omission procedure or the procedures for the execution of court decisions.

### 3.2. Decisions

The types of decisions correspond to the types of actions, of course: there are annulment decisions, mandatory decisions, omission judgements and declaratory judgements, and of course some types of judgements corresponding to special procedures. As a new field, the judgments in connection with administrative contracts will get a systematic regulation. As there are no general substantive rules on administrative contracts, this may lead to the evolvement of such substantive rules, which would be very important pertaining service provision contracts. These are very often used in the field of education, because – as a counter-tendency to the nationalization of educational public service provision, i.e. transferring responsibilities from local governments to the central government[12] – churches and minority self-government organs take over more and more schools.

In the field of annulment decisions, the court can either annul or reform the decision of the administration if it is found unlawful. Borders of these possibilities constitute on one hand the procedural errors that did not have an effect on the merits of the case, and on the other hand decisions implying a margin of appreciation. In latter cases, the court can only review the compliance by the administrative authority with the limits and objective of the power, and with other rules which govern the exercise of discretion exercise of powers, as well as the procedural aspects of the decision making process, but does not conduct a separate assessment of the expediency of a discretionary decision. The possibility to reform administrative decisions (i.e. to remove the contested decision and decide the merits of the case) is not a new feature, but as long as at present the court can only reform decisions if it is given reformatory powers by the special legislator, according to the rules of the Code this will be a general possibility of the court, if the nature of the case makes this possible and the facts of the case are clear and all relevant data is available for the decision. The nature of the case only allows reformation, if the court does not engage by it in an exercise of the discretionary power in the place of the administrative authority. Reformatory powers can help ending administrative disputes in reasonable time, as in lots of cases

[12] Cf. István Hoffman – János Fazekas – Krisztina Rozsnyai: Concentrating or Centralising Public Services? The Changing Roles of the Hungarian Inter-municipal Associations in the last Decades. *Lex localis – Journal of Local Self-Government*, vol. 14., no. 3. (2016) 461–467.

the removal of the contested administrative act and the new procedure would cause harm to the plaintiff through the time still needed to get a new final decision in his case.

### 3.3. Interim relief

Of course, the dimension of time of judicial protection is also very important. If the court can only grant protection with its final decisions that will in numerous cases – in the field of education this is extremely true – be not effective. As Rec(2004)20 formulates this in connection with the effectiveness of judicial protection: "The tribunal should be competent to grant provisional measures of protection pending the outcome of the proceedings."[13] It is thus very important to give the court sufficient means to stop administrative action in advance of the judgment. The Code sets forth a set of tools of interim relief. At the one hand, the court can give suspensory effect to the administrative action, which cannot be performed until the judgement is delivered. This is presently also available in a narrower form, as the setting out of the execution of administrative decisions. As the filing of an action does not have an automatic suspensory effect, this is a very important tool. As in educational cases the suspensory effect of the filing of an action is often granted by law, in this field, the inverse tool of the court to lift the suspensory effect of the filing of the action will be used also quite often. There are of course cases, where the mere prohibition of acting will not provide for effective protection. The judge has therefore also the possibility to order interim measures, in the scope of the judgement, like for example making a public service he was denied access to by the administration available to the plaintiff for the duration of the procedure. The taking of evidence in advance is the tool completing the system. When deciding on granting interim relief, the judge has to ponder *periculum in mora* and strike a fair balance between private and public interests.

## 4. Omissions of administrative bodies

### 4.1. The scope of omission procedures

The omission procedure will hopefully be an apt instrument in issues connected with positive obligations flowing from the right to education. An omission is the absence of the performance of an action prescribed by law, which can be sued before courts in an omission procedure. The court only pronounces that there is an obligation prescribed by law, which the administrative organ responsible for it did not come after. According to the rules of the Code, the administrative organ is obliged in this case to carry out the action by law. As the Code makes suable the duties not only of

[13] Recommendation Rec (2004)20 of the Committee of Ministers of the Council of Europe to member states on judicial review of administrative acts (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies).

authoritative action, but also of service provision, there was need for a differentiated regulation of the omission decision of the court. Against omissions in administrative authoritative procedures, i.e. the omission of issuing an authoritative decision (mostly permits), the above-mentioned non-contentious administrative court procedures are already a functioning means. Other types of obligations, in connection for example with service provision, today are almost not enforceable. Only the local government office responsible for the legal supervision of local governments can bring omissions outside authoritative procedures before court at present. The code will guarantee access to justice also against all types of omissions for all persons and organization with standing. As this field is a very large one, with different types of obligations, varying in their conditionality or finality, the Code had to strike a balance to ensure access to courts and the non-engulfment of courts, which would render access to court practically ineffective. It thus differentiates among omissions according to the criteria, whether there is a time limit given by law for the performance of an obligation: in former, there are mainly the authoritative decisions and decisions in internal appellate procedures. Obligations outside of this area seldom are bound to a time limit. In these cases, the court has a margin of appreciation: if there is no overriding reason relating to the public interest or to the interests of the plaintiff, no omission has to be stated.

### 4.2. Enforcement of omission decisions

Another important field of the non-fulfillment of positive obligations is that of the non-execution of judicial decisions. There are two types of judicial decisions, where court enforcement mechanisms do not work: these are the judgements ordering the repeating of procedures and the omission judgements, according to which the administrative organ has to fulfill the obligations stated to be omitted by court. At present, there are only tools for protection against such omissions in the field of judicial decisions ordering the reiteration of authoritative procedures, but these are lengthy and complicated procedures. According to the new rules, the court will have several possibilities, if the plaintiff signalizes the non-fulfillment of its judgment. After asking for clarification from the administrative organ, if the clarification is not satisfactory, the court can impose a fine on the administration. The fine is not the unique tool for achieving the fulfillment: the court may also order another administrative organ or – according to the type of omission, of course – the supervisory authority to perform the duty in replacement. If these tools are not possible, the courts can order provisional measures until the administrative organ fulfills its obligations flowing from the judgement. In case of a repetitive omission, the fining of the leader of the administrative organ is also possible, which is deemed to be an effective measure against obstruction of administration in cases where the other tools in the hand of the judge do not work.

## 5. Closing remarks

By enhancing the effectiveness of judicial protection against administration, the Code will provide a good framework for a strong judicial review. The general rule of access to court, the differentiated system of actions and decisions form a system that fosters autonomy of judges and the broadening of the horizon of their judicial work. The aspects of human rights will be able to appear more frequently, and this will hopefully lead to a systematic case law which has more and more links to constitutional case law and will also foster the dialogue between administrative courts and the constitutional court. The judiciary will have an important role of interpreting the rules of the Code in accordance with its aim to guarantee effective judicial protection and to exercise substantive control of legality over the administration enforcing both its negative and positive obligations. As there are numerous new institutions and rules regarding judicial review, it will be a great and important challenge to interpret the new rules autonomously, proactively not allowing the present case law to hinder the improvements envisaged by the Court.

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# ONE MILLION ASYLUM SEEKERS IN GERMANY (2015/16)

## *The Role of the Civil Society in their Education and Training*

Ingo Richter
President of Irmgard Coninx Foundation)

### 1. Introduction

In the first days of September 2015, approximately 3,000 refugees were stranded here in Budapest at the railway station waiting for the chance to get to Austria or Germany. The German Chancellor, Angela Merkel, made a lonely decision, to let them in. She decided to admit them into Germany and have them registered. Although, according to the Dublin regulations of the EU, the registration had to be done here in Hungary, or elsewhere, prior to entering the EU.

We all know what happened next: The decision of Chancellor Merkel was understood as an invitation to come to Germany. In the Balkans, in Syria, in the other Arabic states and in North Africa, they believed they would be welcomed in Germany. Meanwhile, the hauler gangs made them believe this too and profited from it. From September 2015 to August 2016, more than 1 million people arrived in Germany and asked for asylum or recognition as a refugee of war.

They were there and had to be registered, fed, housed, cared for, distributed, transported, etc., and their applications for asylum had to be processed. Nobody was prepared for that. And then, Frau Merkel made the famous statement: "Wir schaffen das" – "We will manage."

The famous and effective German administration was not prepared to manage this, and without the massive intervention of the German Civil Society organizations, the problem would not have been solved.

As we talk here about the role of the Civil Society for the awareness, advocacy and accountability of the Right to Education, I will report about the German experience in the refugee crisis last year.

Let me begin with some personal experiences in Berlin, where I live. Here are some snap shots:

1. Our son, a journalist, lives with his family – three little daughters – in downtown Berlin. In the first days of September, when the refugees arrived, they had to wait for hours in long lines to get registered. So, where were they to sleep? Neighbours were asked to give them a bed for a night. My son and his family did. Twice, late at night, after midnight, some tired young refugees came, had some food, and slept on mattresses for a couple of hours before they left to cue up again.
2. Our neighbour, a professor of education, some 100 kilos of weight, put together some of his old suits and coats and brought them to the clothing store for refugees. But, the mostly young refugees, were too slender for those clothes.
3. A friend of ours, a member of the green party, who organized the help for refugees in Berlin, asked for 200 lunch boxes and some skateboards for the kids. So, we bought 200 plastic lunch boxes for 1€ each and some used skateboards and brought them to the school for refugees.
4. Another friend, a former teacher, had taught a course "German for Foreigners" to American students at the university for many years. She wanted to teach German to the refugees at a school for adults where there was an urgent demand for teachers. But, she was not hired by the administration who admitted only those teachers who completed a three-week special training for adult language learning in Würzburg.
5. My wife and I wanted to "adopt" – so to speak – a family with children in order to help them to get through the registration process. No, such kind of so called "adoption" or "sponsorship" was allowed by law. This could only be done informally.
6. There was the case of another friend who runs a small factory for marmalade production in the countryside. She employs 25 seasonal workers from Poland. Last autumn, she asked 25 asylum seekers in a nearby home to help her. The mayor refused because they had no working permit. She just said: "I don't care."
7. Another woman, in the South German countryside, where unemployment is very low, managed to find jobs for 19 refugees who lived in a nearby shelter. These refuges had nothing to do. She just called employers again and again until they resigned and employed everybody. The last one, a 30 year old computer engineer from Nigeria, a Muslim, took a job as an apprentice with a butcher where he produces pork sausages.
8. I, myself, tried to become a legal guardian for a couple of unaccompanied young refugees who could not ask for asylum themselves because they were minors. Although, I am a law professor who has taught family law for years, I was not permitted to without a special training for legal guardians, and the money for that training had run out.

I could go on with these kind of stories for hours, but I will not. They show that the German Civil Society was, in fact, able to create a friendly climate, a "Willkommenskultur" as we call it, to welcome more than one million refugees in

only one year. It was a challenge and nobody thought that the German Civil Society would be able to do that. There were some bureaucratic barriers, and there was some local resistance too, but finally, the Civil Society succeeded and overcame both the resistance and the bureaucratic barriers.

Nevertheless, as you will have read in the papers, there were demonstrations against the refugees and against Frau Merkel. A new anti-refugee movement was founded and it was very successful. A right wing anti-European political party turned against the Chancellor's refugee politics and collected up to 15% of the vote. Asylum homes were set on fire and Neo-Nazi gangs and refugee groups fought in the streets at some places. There was a growing security and criminal problem, and, yes, some of the refugees turned out to be terrorists sent by the Islamic State.

The society was split, and nobody knew whether it would become a wound in the society which cannot be healed. Only time and integration will heal that wound, and integration means education, vocational training and jobs. Therefore, I will now talk in a more systematic way on the function of the Civil Society in providing education, training and jobs for the refugees. I will follow our usual 3 A – scheme of awareness, advocacy and accountability.

## 2. Awareness of the Civil Society for the right to education of refugees.

*Thesis: Within the German Civil Society, there is a high awareness for the fact that education and training are absolutely necessary for the integration of the refugees into the German society and that this is in the interest of the society, but, even Civil Society actors are not aware of the fact that the refugees have a right to education and training.*

### 2.1. Information

The information level of the German public on the refugee problem is very high. For at least six months, the refugee numbers were top news. And, when Angela Merkel came under attack this spring, the refugee problem again was in the news. The media ran front stories about demonstrations, about local conflicts over the housing of the refugees, and about the sexual assaults on German girls as in Cologne on New Year's Eve. The administration regularly issues the relevant data about the arrivals of refugees and the processing of their asylum applications. Big Civil Society organizations, like the welfare organizations, distribute information about the so called refugee crisis too. One could say that there is even too much information on the refugee problem. But, the information is targeted at the social cohesion, at the upcoming social conflicts and at the possible consequences for the political system. There is no information on the fact that the refugees have a right to education in Germany and that this right is guaranteed by international law.

### 2.2. Communication

All over Germany last winter, the refugee crisis was the main party talk. Everybody gave his or her opinion. The social networks were full of divergent attitudes and, if somebody came up with a particular view, whether in favor or not for Frau Merkel´s refugee policy, a "shit storm" came over him or her with hundreds and thousands of tweets leaving the author completely helpless. Journalists and politicians particularly came under attack in the networks. It was a communication of the deaf. Nobody listened anymore to what the other had to say. The right of speech does not imply the duty to listen. Communication about the right to education and training for refugees is therefore absolutely necessary. It must be made clear that the right to education under international law is a right and not a privilege granted in the interest of the society. Particularly, the lawyers must speak up and explain the international law. Therefore, this spring our journal "Youth and Education Law" (Recht der Jugend und des Bildungswesens) organized a conference for lawyers and administrators in order to facilitate the communication between them on the legal aspects of the refugee problems in education.

### 2.3. Documentation

The existing information on the refugees and the asylum seekers must be documented. Such a documentation can be a source for further information and communication. On the internet, you will find a lot of information on asylum laws and on the procedures, and it is very complicated to sort them out, even for lawyers like me. Unfortunately, the legal regulations on education and training are not well documented. Although, compared to the immigration and asylum laws, they are quite simple. Therefore, we will document the papers of the conference which I mentioned above in our journal.

### 2.4. Institutionalization

Germany Civil Society is well organized. The freedom of association as in article 9 I of our constitution guarantees the founding and funding as well as the activities of the associations. Therefore, we have a lot of NGOs which articulate private and public interests. The rights of the religious associations (art. 4) and of the trade unions (art. 9 III) to act as NGOs are protected as well. They all are very active in public life, but they do not have standing in court litigation, except for the environmental NGOs. And, we have NGOs that particularly fight for the rights of migrants and asylum seekers, as e.g. a NGO called "Pro Asyl" and others. However, there is no NGO which has the right to education and training of refugees as a focus. Therefore, it is time to found and fund an NGO under the name of "Refugees´ Right to Education." On the European level, this could be a task for ELA.

## 3. Civil Society Advocacy for the Right to Education and Training of Refugees.

*Thesis: The right to education as a fundamental right is not laid down in the German Constitution, although the constitution can be interpreted in the sense that there is a fundamental right to education. As Germany is a federal state, the right to education has been granted in the state school laws. The Civil Society should fight for the Constitutionalization of the right to education as a fundamental right on the federal level.*

*Federal integration law.* In order to cope with the refugee problem this summer – that is one year after the beginning of the massive immigration wave – the federal parliament passed the new integration law. This does not mention the right to education for refugees. As the federation has no say in school education, the integration law only regulates labor market problems. It namely asks all refugees to participate in: an integration course of approximately 700 hours, 100 hours of general information, 600 hours German language course that is nearly half a year. In addition, it asks the refugees to participate in community work, called "Flüchtlingsintegrationsmaßnahmen" if the local communities provide for such work, but education and training are not included in this. It also supports the vocational training of apprentices, if the refugees fulfill the training conditions and find a trainee position (333€ per month) or a one year vocational preparation course (310€ per month).

Civil Society organizations must advocate for the implementation of the right to education and training on the federal level, particularly for the access of refugees to vocational training, and for the additional education and training within the community work programs.

### 3.1. State School Law

Children under 6 years of age in Germany have the right to preschool education and compulsory schooling begins at age 6. According to international law, to go to school is a human right, not only for nationals, but also for foreigners beginning the first day of their stay in the country. There is no waiting period. Nevertheless, fourteen of the German states provide for schooling of refugee children only after six months and two states after three months. The reason given is the uncertainty of residence. Indeed, it takes a couple of weeks to distribute the refugees in the country and to assign permanent homes to them. But, this is no reason to deny the right to education to the children. We must realize that thousands of young men, 14 -18 years of age, live in camps for six months just doing nothing! Civil Society organizations must insist on the fulfillment of the state obligation to provide for schooling beginning the very first day refugees and their children are in the country. (When I was a refugee myself from Pomerania to Lower Saxony in the spring of 1945, I had to go to school as a first grader during our three-week temporary stay in a Saxonian town which every day was bombed by the allied forces.)

After the waiting period, the refugee children have to attend classes which euphemistically are called "Welcome Classes." This means, as long as they do not

know enough German to follow the instruction in regular classes, they are segregated in order to properly learn German. In Berlin, e.g. there are 530 welcome classes with nearly 6,000 children. When they know enough German, these kids should go to the regular classes. But, who knows when? And, one can doubt that segregation is better for language learning than integration. In these classes, there are refugee children from many countries of the world together who do not meet their German counter parts, and that is not a good condition for integration. The Civil Society organizations should keep an eye on these segregated classes and promote the transfer of the children into the regular classes.

### 3.2. Higher Education Law

In German constitutional law, there is a right of access to the university which can be restricted for qualification reasons and exceptionally also for capacity reasons. But, it is the right of equal access, and therefore, this right is also a right of the refugees, if they fulfill the study requirements. And there is also art. 13 al.2 c of the ICESCR which asks the states to make higher education accessible to everybody on an equal basis, particularly free of tuition. In Germany, it is up to the universities to decide on the access of refugees to the universities. They did so at once last autumn, granting the status of the so called "guest students" to the refugees who fulfilled the requirements, and this was done before their applications for asylum were decided upon. As guest students, the refugees are entitled to the German study grants. I do not have any data on the numbers of guest students and not of the refugees who were registered as regular students. The Civil Society organizations, particularly the university administration and the students´ unions, should report on this.

### 3.3. Lobbying

There are two big NGOs which try to promote the interest in social welfare and in children´s rights. One is called "Deutscher Verein für öffentliche und private Fürsorge" founded more than 130 years ago at the times of the "Kaiser" which is an interesting organization insofar as it tries to lobby for private as well as for the public interest in welfare. This is in fact an organization of the local communities and the so called "Big Five" and these are the Protestant Church, the Catholic Church, the Jewish Community, the labour unions and a "mixed club" of welfare organizations. The Muslim welfare organizations were not included. The second organization is the so-called "National Coalition for the Rights of the Child" founded after the ratification of the UN Convention of the Rights of the Child (CRC). Both organizations should try to promote the right to education and training by lobbying for the implementation of this right. Particularly, the "National Coalition" must have an interest in this subject because the German handling of the right to education as of art. 28 of the CRC will be under review of the UN Children's Commission shortly.

### 3.4. Litigation

To my knowledge, up to now, there are no cases. German courts until now did not hand down decisions on the right to education and training of refugees, and to my knowledge, the German administration has not been sued because of the three to six month waiting period. Also, the "Welcome Classes" and the segregation of children on the basis of their language competencies have not come under legal attack. The Civil Society organizations should try to make a case and bring it to court, whether it is because of the illegal waiting period or the problematic segregation in "Welcome Classes." Then, the administrative courts will have to decide on the right to education and training of refugees or transfer the case to the German Constitutional Court or the European Court for Human Rights. I tried to put together a dossier, but I could not find an NGO to help me to build a suitable case.

## 4. Accountability for the Right to Education of Refugees.

*Thesis: Accountability becomes a big problem when public services are outsourced under very difficult conditions such as the refugee crisis last year. Nevertheless, the Civil Society has a right and a duty to hold public as well as private organizations accountable for the fulfillment of the right to education and training.*

### 4.1. National Reporting

The refugees in Germany are registered by the local administration, e.g. the local communities, where they arrive. Then, they are distributed to the various states according to the population of the states. Their applications for asylum or recognition as refugees of war are sent to the Federal Migration Agency (Bundesamt für Migration und Flüchtlinge – BAMF). In case of recognition, a residence is assigned to the refugees; they now have a right to stay there for a limited time and they receive a work permit. Basically, they have the freedom of movement. In the case of rejection of the asylum, the refugees should be deported to their country of origin, but mostly this is not the case because they get the so called secondary protection under European law. In the case of rejection, the asylum seeker can sue the government and many of them do so, with the help of Civil Society lawyers. The BAMF, the federal migration agency, reports regularly on its decisions; therefore, the information is very good.

The local communities, which are responsible for that housing and the social aid to refugees, mostly outsource their duties to private agencies, because they do not have the administrative means to fulfill these themselves. In this case, there is a great variety of contractors, e.g. charities, welfare organizations as well as private profit-oriented businesses. In this case, reporting and control very often are deficient, and Civil Society organizations have to take over the control and ask for accountability. In fact, up to now, there is no effective control and accountability. As the NGOs themselves can be contractors, they monitor themselves, so to speak.

The state educational administration is responsible for the accountability in the case of the right to education as far as the schools are concerned. They fulfill their

duty and do report regularly but very often they lack the data because the collection of the relevant data is in the hand of the schools and the local communities.

The federal labor administration is accountable for the vocational training, particularly for the integration and language courses. These, too, are outsourced and difficult to control for the same reasons as in the case of the local communities.

As we have so many different agencies on the federal, the state and the local level, not regarding the welfare organizations and the private business, Germany urgently needs a central reporting system for the refugee politics and particularly the right to education and training. However, it does not exist. Therefore, seven foundations founded an expert organization (Sachverständigenrat Deutscher Stiftungen für Integration und Migration) in order to organize the reporting. Their bi-annual report is the best source for the accountability of the right to education in Germany.

### 4.2. International reporting

The German government, under the CRC, has to report every five years to the Secretary General of the United Nations on the implementation of the right to education laid down in art. 28 of the CRC as well as on all the other children´s rights. It did so for the last time in 2010, long before the present refugee crisis, and the concluding observations of the Children´s Commission date from the year 2012. They cannot be very effective for the implementation of the right to education in the present refugee crisis. Nevertheless, the Civil Society organizations, particularly the National Coalition for the Rights of the Child, are prepared to deliver the so called "shadow report" which will be taken into account by the children´s commission when they report on Germany for the next time. The same is true for the Human Rights Council of the United Nations which is responsible for the implementation of the ICCPR and the ICESCR. Their reporting comes too late to be effective, not to speak about the other problems which arise within these international bodies.

### 4.3. Evaluation

One million refugees within one year, 25% under age 18, which is school age. This was, and still is, an extraordinary challenge for the German Civil Society. 250,000 students had to be integrated into the school system, and many thousands in the preschool system and Higher Education and Vocational Training. They all have the right to education and training under international law and this right must be fulfilled by the federation and the states. It is still too early to ask for an evaluation, to ask and answer the question if the German Civil Society did fulfill this right and how it coped with the enormous difficulties. Now, it is time to discuss the question of whether a European Association, like ELA, should be prepared to take over such a task if it is asked to do so by the German government. It would be worthwhile!

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# THE ROLE OF INTERNATIONAL HUMAN RIGHTS MECHANISMS IN STRENGTHENING JUSTICIABILITY OF THE RIGHT TO EDUCATION IN THE RUSSIAN FEDERATION[1]

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The right to education is a universally recognised human right. Article 26 of the Universal Declaration of Human Rights proclaims the right of everyone to education.[2] Article 13 of the International Covenant on Economic, Social and Cultural Rights recognises the right to education and sets out its main dimensions with the view of their progressive realisation.[3] Apart from these two most obvious standards, other universal human rights instruments also reflect a certain aspect of the right to education. Although they are often neglected, they are indispensable for a comprehensive analysis of all dimensions of this right. For instance, the International Covenant on Civil and Political Rights contains non-discrimination provisions that are essential for the provision of education on the basis of equality of all.[4] These provisions correspond to UNESCO Convention against Discrimination in Education.[5]

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[1] This article is an updated, reduced and reworked version of my dissertation awarded LLM Exeter Club annual prize for the best LLM dissertation at the University of Exeter 2012/13. I am most grateful to Dr Ana Beduschi and Mr Michael Sanderson from the Law School of University of Exeter whose expert advice and insightful comments have led to innumerable improvements of the original version. The errors that remain are, of course, my own.

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[2] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR).

[3] International Covenant on Economic, Social and Cultural Rights (adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966) (ICESCR).

[4] International Covenant on Civil and Political Rights (adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966) (ICCPR). See arts. 20(2), 24(1), 26.

[5] UN Educational, Scientific and Cultural Organisation, Convention Against Discrimination in Education (adopted by UNESCO General Conference on 14 December 1960) (CADE).

International Convention on the Elimination of All Forms of Racial Discrimination contains a prohibition of race-related discrimination of the right to education and the urge to combat prejudices through education. [6] Convention on the Elimination of All Forms of Discrimination against Women comprises numerous provisions on equal rights of men and women in education,[7] while Convention on the Rights of the Child calls for recognition of the right to education of all children including those with disabilities, and for elimination of violence, exploitation and drug addiction through educational measures.[8] Furthermore, International Convention on the Rights of Persons with Disabilities urges governments to ensure 'inclusive education system at all levels and life long learning' for people with disabilities, [9] while International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families specifically mentions children of migrant workers and their 'basic right of access to education on the basis of equality of treatment with nationals of the State concerned'.[10] The Convention also establishes the right to education of migrant workers themselves and of members of their families.[11]

According to the OHCHR since the adoption of the UDHR in 1948, 'all UN Member States have ratified at least one core international human rights treaty, and 80 per cent have ratified four or more'.[12] The right to education is, thus, truly universally recognised and has been shaped in all its complexity by the binding acquis of international human rights treaties. Not only the right to education is globally endorsed, but it is also widely represented in binding regional conventions.[13] Moreover, the right to education is mentioned in the overwhelming majority – 90 per cent – of the world's constitutions.[14] With such worldwide recognition one may

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6 International Convention on the Elimination of All Forms of Racial Discrimination (adopted by General Assembly Resolution 2106 (XX) of 21 December 1965) (CERD). See paras 5(e)(v) and 7.

7 Convention on the Elimination of All Forms of Discrimination against Women (adopted by the United Nations General Assembly 18 December 1979) (CEDAW), arts 10, 14(2)(d), 16(1)(e).

8 Convention on the Rights of the Child (adopted by General Assembly Resolution 44/25 of 20 November 1989) (CRC). See art 23, arts 28, 29, arts 19, 32, 33.

9 International Convention on the Rights of Persons with Disabilities (adopted by General Assembly Resolution A/RES/61/177 of 20 December 2006) (CRPD), art 24.

10 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted by General Assembly resolution 45/158 of 18 December 1990) (CMW), art 30.

11 See arts 43 (1)(a) and 45 (1)(a).

12 'Human Rights Bodies', www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx

13 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4 November 1950, art 2 of the Protocol 1 (Paris 20 March 1952) as amended by Protocol No. 11; Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163, arts 7 (1) and (3), 10 (1), 15 (1), 17 (1)(a) and (2), 30 (a); American Convention on Human Rights 'Pact of San Jose, Costa Rica' (B-32), arts 12 (4), 26; African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art 17.

14 Comparative Constitutions Project, directed by Professors Zachary Elkins, Tom Ginsburg, and James Melton, www.comparativeconstitutionsproject.org. See also, Jan De Groof: Legal Framework for

assume that the right to education is universally realised and the situation with the protection is just as ideal.

However, the reality is different. Today 57 million children throughout the world still do not have access to schools.[15] These are children involved in illegal labour and soldier children, girls who were forced to marry at an early age or dropped out of school due to early pregnancy, children of refugees and asylum seekers, children belonging to ethnic, national, linguistic, cultural minorities, indigenous peoples, victims of trafficking and slavery.[16] 774 million adults are still illiterate.[17] Schools are still destroyed in military conflicts,[18] while corruption still devours lumps of educational budgets.[19]

From these devastating examples a conclusion can be drawn that inadequacy of efforts made by individual states and international community as a whole to respect, protect and fulfil the right of everyone to education is indeed a worldwide problem. And although both provision of education and protection of the rights of people within state's jurisdiction clearly belong to the competence of a sovereign state,[20] the significance of unified effort taken through international cooperation and supranational mechanisms of monitoring and protection of human rights should not be underestimated.[21]

In fact, the role that international human rights mechanisms play in strengthening the sense of accountability of states for respecting, protecting and fulfilling human rights of people within their jurisdiction is tremendous. The whole plethora of methods from dialogue, awareness raising and capacity-building to monitoring of compliance with binding human rights instruments and supranational judicial review – all count towards reinforcing national systems of realisation and protection of human rights. After all, the peoples of the world have united for the purpose of reaffirming 'faith in fundamental human rights, in the dignity and worth of the human person'.[22] Moreover,

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Freedom of Education. In: Charles L. Glenn – Jan De Groof (eds.): *Balancing Freedom, Autonomy, and Accountability in Education.* Volume 1. Oisterwijk, Wolf Legal Publishers, 2012. 25.

15 Global Education First, the UN Secretary-General's Global Initiative on Education, www.globaleducationfirst.org/malaladay.html

16 See for example a film prepared by the Office of the United Nations Special Envoy for Global Education, http://educationenvoy.org

17 International Literacy Day 2013: Literacy Rates are Rising, but Women and Girls Continue to Lag Behind, (UNESCO Institute for Statistics, Paris 30 August 2013). www.uis.unesco.org/literacy/Pages/data-release-map-2013.aspx?SPSLanguage=EN

18 Abed Rahim Khatib: Islamic School was Destroyed During Israeli Military Offensive, in Gaza. *Demotix*, 30 December 2009. www.demotix.com/photo/214324/islamic-school-was-destroyed-during-israeli-military-offensive-gaza-214324

19 Transparency International: Global Corruption Report: Education. http://blog.transparency.org/tag/global-corruption-report-education

20 See 'General Legal Obligations' and 'Specific Legal Obligations' in the CESCR General Comment No. 13 on the Right to Education adopted at the Twenty-first session of the Committee, E/C.12/1999/10 of 8 December 1999, arts 43–57.

21 ICESCR art 2 (1).

22 Charter of the United Nations (signed on 26 June 1945 in San Francisco) (UN Charter). Preamble.

the goal of 'promotion of the economic and social advancement of all peoples' is intended to be reached through employment of 'international machinery'.[23]

As a matter of illustration it is worth mentioning the so called '4A' concept that originated from within the UN mechanism. It was proposed in 1999 by the first Special Rapporteur on the right to education Katarina Tomaševsky and was later duplicated in the ICESCR General Comment No. 13.[24] This test, due to its clarity and logical, systemic nature, became a framework for state reporting under ICESCR. Through the reporting procedure and General Comments cited throughout international and domestic case law this scheme was adopted by domestic legislation to define normative content of the right to education.[25]

The purpose of this paper is twofold. I will aim, first, to reveal how international human rights mechanisms contribute to shaping normative content of the right to education that can be effectively enforced through available system of judicial and quasi-judicial protection. In order to render precision to the paper and considering its limits I will choose examples from a particular domestic jurisdiction – Russian Federation. Second, I will focus on demonstrating how these mechanisms can be used to indicate and address inadequacies of implementation of the internationally recognised right to education and to bridge existing gaps of protection of this right.

The structure of this paper reflects its aims and purposes. The first section is dedicated to exploration of existing definitions of justiciability as a legal concept. It will particularly focus on challenges of justiciability of economic, social and cultural rights. The second section will in greater detail analyse the applicability of different concepts of justiciability to the right to education disaggregated by dimensions of the right to education at both international and domestic levels.

This structure will support the main argument of this paper: the idea that justiciability of the right to education in its various dimensions can be positively affected by the practice of international human rights mechanisms.

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23 Ibid.

24 These are Availability, Accessibility, Acceptability and Adaptability of education, CESCR General Comment No. 13, para 6. See Katarina Tomaševski: Preliminary report of the Special Rapporteur on the right to education (adopted at the Fifty-fifth session of the UN Commission on Human Rights, E/CN.4/1999/49 of 13 January 1999). Para 50.

25 See for example *Tarantino and Others v. Italy* (Applications nos. 25851/09, 29284/09 and 64090/09, Judgment of 2 April 2013) notes 2, 4, 16, 32, 33; Constitutional Court of the Russian Federation Ruling on Admissibility No. 476-O of 16 November 2006 on *Borodina* claim; Constitutional Court of the Russian Federation Ruling on Merits No. 5-P of 15 May 2006. In Russian domestic legislation the 4A scheme is reproduced in some provisions of the Federal Law No. 273-FZ of 29 December 2012 'On Education in the Russian Federation' (Federal Law on Education): availability is ensured by public responsibility in education (arts 5(5), 6-9); accessibility is guaranteed in arts 3(1)2, 5(3), 5(5)1, 28(6)1, 41(1)8; acceptability is implied in arts 2(29); 9(1)1, 10(1)1, 11); adaptability is ensured in arts 2(1)1, 2(1)27, 3(1)7, 11(1)3.

## 1. Defining Justiciability

This section will explore the definition of the term justiciability in its dual nature as a judicial tool and a legal doctrine.[26] I will briefly mention the former concept as it is very technical and geographically specific, moreover, its application to a civil law jurisdiction, such as Russia, is not uncontroversial. I will elaborate in more detail on the latter understanding of justiciability since it will lead me to adoption of a working definition for the purposes of this paper.

### 1.1. Justiciability as a Judicial Tool

Considering purposes and limitations of this paper, this section will only briefly outline the concept of justiciability as a judicial tool. This concept refers, in a very technical sense, to a procedural decision of a court on admissibility of a matter for adjudication.[27] As summarised by Fallon lawsuits have three stages: first, the court determines justiciability, second, if the suit is justiciable, the court rules on the merits and, finally, determines the remedy.[28] Thus in common law jurisdictions justiciability is often understood as a statement of assessment,[29] synonymous to that of admissibility of a case.

Galloway cites a practical toolset for basic analysis of justiciability: 'the What, the When, and the Who' justiciability test.[30] According to Galloway, the What refers to crossing the threshold of adversity and non-collusion, it also aims at interception of political questions (such as 'disposition of nuclear armaments, national security, foreign relations and the distribution of scarce public resources,'[31] the latter being, arguably, one of the challenges of judicial protection of economic, social and cultural rights). The When implies meeting the requirements of ripeness, mootness and necessity, while the Who refers to the doctrine of legal standing.[32]

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[26] Thomas Barton: Justiciability: a Theory of Judicial Problem Solving. *B.C. L. Rev.,* vol. 24, (1982–1983) 505.

[27] Robert S. Summers: Justiciability. *The Modern Law Review,* vol. 26, no. 5, (1963) 581.; Erwin Spiro: Justiciability. *Comp. & Int'l L.J. S. Afr.,* vol. 15, (1982) 206. (regards justiciability as antimony of substantive law); Sisay Alemahu Yeshanew: The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia. *Afr. Hum. Rts. L. J.,* vol. 8, (2008) 273.

[28] Richard H. Fallon, Jr.: The Linkage between Justiciability and Remedies: And Their Connections to Substantive Rights. *Virginia Law Review* vol. 92, (2006) 633–634.

[29] Geoffrey Marshall: Justiciability. In: A. G. Guest (ed.): *Oxford Essays in Jurisprudence: a Collaborative Work.* Oxford, 1961. 267.

[30] Russell W. Galloway: Basic Justiciability Analysis. *Santa Clara L. Rev.* vol. 30, (1990) 912.

[31] B.V. Harris: Judicial Review, Justiciability and the Prerogative of Mercy. *Cambridge L. J.,* vol. 62, (2003) 631–634.

[32] Galloway op. cit. 912. See also Erwin Chemerinsky: A Unified Approach to Justiciability. *Conn. L. Rev.* vol. 22, (1989–1990) 677. On the doctrine of legal standing see also R. Craig Wood – George Lange Source: The Justiciability Doctrine and Selected State Education Finance Constitutional Challenges. *Journal of Education Finance.* vol. 32, no. 1, (2006) 1.; Maxwell L. Stearns: Standing Back from the Forest: Justiciability and Social Choice. *California Law Review*, vol. 83, no. 6, (1995)

Generally speaking, it is easy to agree with Harris who expresses his discomfort 'about the courts deciding the limits of their own competence' – a situation akin to one being a judge in his or her own case.[33] Considering lack of consistency in application of the 'What. When. Who' test leading to failures of justiciability, a more solid legislative approach is needed to narrow down the margin of discretion given to the courts in order to guarantee equal access to a unified standard of justice in a democratic manner.

### 1.2. Justiciability as a Legal Doctrine

As a legal doctrine justiciability is explained in two different ways: in its narrow sense, as an ability of a right or its certain dimension to be brought before a competent court and in a wider sense, as a complex system of guarantees comprising domestic, regional and international mechanisms derived from ratified obligations of the state and designed to protect a certain right in a certain country.

#### *1.2.1. Justiciability in a Narrow Sense, as an Ability to be Brought before the Court*

Traditional definition of justiciability has a direct connection with the ability of a matter to 'be properly brought before a court and [to be] capable of being disposed judicially'.[34] Other definitions of justiciable imply being 'appropriate for or subject to court trial' or being able to be 'settled by law or a court of law'.[35] Justiciable law is understood as 'capable of being determined by a court of law' or 'liable to be brought before a court for trial; subject to jurisdiction'.[36]

According to the doctrinal sources, 'justiciable' means 'liable to be tried in a court of justice; subject to jurisdiction';[37] 'peculiarly suited for judicial solution',[38] it is also explained as property of a right of being 'amenable to judicial review'.[39] A right is therefore justiciable if it is 'subject to test and remedy in the judicial system of

1309.; Jonathan R. Siegel: Theory of Justiciability. *Tex. L. Rev.,* vol. 86, (2007–2008) 73.; Charles H. Kennedy: Government Suits against In-Service Conscientious Objectors Who Have Received Educational Benefits: An Examination of Justiciability and Damages. *The University of Chicago Law Review,* vol. 42, no. 4, (1975) 749.; Lawrence Gerschwer: Informational Standing under NEPA: Justiciability and the Environmental Decisionmaking Process. *Columbia Law Review,* vol. 93, no. 4, (1993) 996.

33 Harris op. cit. 638.

34 *Black's Law Dictionary.* West Group, [9]2009.

35 *Random House Kernerman Webster's College Dictionary.* K Dictionaries Ltd., [4]2010.; *The American Heritage Dictionary of the English Language.* Houghton Mifflin Company, [4]2009.

36 *Collins English Dictionary – Complete and Unabridged.* HarperCollins Publishers, [5]2003.

37 Spiro op. cit. 206.

38 Summers op. cit. 530.

39 Gustavo Arosemena: Balancing the Right to a Remedy and the Needs of Governance: The Doctrine of Limitation of Rights as a Framework for the Development of Domestic Remedies for Economic, Social and Cultural Rights. *Tilburg L. Rev.,* vol. 15, (2010–2011) 15.

courts and tribunals'.[40] In this narrow sense justiciability is thus synonymous with enforceability or enforcement.[41]

All these definitions, when read in synthesis, despite their apparent unanimity, leave some fundamental questions unanswered: is justiciability a property of a *right* or does it have to do with the ability of the *legal system* to protect the right? From another angle, is it a property of a *right* or of a certain *decision* implementing / violating the right or perhaps it is a characteristic of a *dispute*? [42] Is it a property of a *right* or of a *legal norm* endorsing it? How can the gap be explained between being *able* to be brought before court and being *appropriate* for such action?[43] Which authority is capable of deciding the latter or setting criteria for the former? How can one definition accommodate the ability of a matter to be settled both *by law* and by the *action of a court* when these are two separate processes involving independent authorities?

All these questions lead to a conclusion that existing understanding of justiciability as a synthetic doctrinal concept referring to the capacity of a matter (a right, a law endorsing the right, a decision implementing the right, or a dispute over a violation of a right) to be able (or appropriate) to be brought before the court (or being settled by the court) – is quite vague and can be interpreted in many different ways depending on the legal system and legal tradition.

Stepping aside from jurisprudence-related doctrine is the interpretation of justiciability suggested by the International Commission of Jurists. In the Commission's report justiciability refers to 'the ability to claim a remedy before an *independent and impartial body* when a violation of a right has occurred or is likely to occur'.[44] The definition provided by the Commission has two significant differences from those analysed above. First, it reduces justiciability of a right to justiciability of a claim; and second, it widens the scope of application of justiciability as, pursuant to the definition, the remedy can be claimed before any independent and impartial body, not necessarily a court of justice. Additionally, it renders justiciability a certain preventive function ('likely to occur').

Despite this broader interpretation, the Commission's definition still applies only to remedial justice and excludes from the notion of justiciability any implications of guarantees ensuring better realisation of a right.

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40 John Veit-Wilson: No Rights Without Remedies: Necessary Conditions for Abolishing Child Poverty. *Eur. J. Soc. Sec.,* vol. 8, (2006) 317.

41 Jose Ricardo Cunha: Human Rights and Justiciability: a Survey Conducted in Rio De Janeiro. *Int'l J. on Hum Rts.,* vol. 3 SUR (2005) 133.

42 Chris Finn: The Justiciability of Administrative Decisions: A Redundant Concept? *Fed. L. Rev.,* vol. 30, (2002) 239.

43 On the dichotomy of legal and extra-legal justiciability and the difference between matters that are 'proper' for decision by court and 'capable' of being adjudicated see Peter Gordon Ingram: Justiciability. *Am. J. Juris.,* vol. 39, (1994) 353.

44 International Commission of Jurists: Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability (ICJ, Geneva, 2008) 6 (emphasis added).

The concept of justiciability has evolved with time. While in mid-XX century it used to be viewed as 'the very foundation of the judicial function,'[45] and was only regarded in connection with the actions taken by the courts,[46] by the end of the century the term received a broader interpretation as a 'juridical mechanism triggered off by the inadequacies in the enforceability or execution of human rights'.[47] This definition is truly revolutionary: not only it regards justiciability as a mechanism of protection, rather than an attribute of a right, but it also for the first time goes beyond strictly judicial context of this term, suggesting that juridical is wider than judicial.[48]

### *1.2.2. Justiciability in a Broader Sense as a System of Guarantees*

By this manner the concept of justiciability has evolved from a mere reaction of a court to a certain characteristic of a right or a claim into a mechanism recognising the gaps of protection, analysing their reasons and consequences and elaborating means to address these gaps. The modern concept of justiciability recognises that the capabilities of courts are limited and that, while the courts have the 'opportunity to oversee the quality of the decision-making procedures used by the executive', there can be cases when rendering the matter non-justiciable 'can mean that an illegal decision […] may survive to perpetrate unfairness'.[49]

Thus, the contemporary understanding of justiciability adopts a somewhat extra-legal, or perhaps even socio-legal approach as it attempts to relate this legal doctrine 'to what actually happens in practice'. [50] As reasonably suggested by Barton, 'justiciability can be fully understood only by adopting a perspective beyond, rather than within, the closed system.'[51] He defines this concept 'as the many relationships between adjudicative procedures, and the problems such procedures are asked to

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45 Edwin Borchard: Justiciability. *The University of Chicago Law Review,* vol. 4, (1936) 1.

46 Summers op. cit. 581.

47 Michael K. Addo: The Justiciability of Economic, Cultural Right. *Commw. L. Bull.,* vol. 14, (1988) 1425.

48 On the need to go beyond purely legal definition of justiciability see also Olivier De Schutter: *International Human Rights Law: Cases, Materials, Commentary.* Cambridge–New York, CUP, 2010. 771.

49 Harris op. cit. 631–633.

50 William Twinning: Mapping Law: The Macdermott Lecture. *N. Ir. Legal Q.,* vol. 50, (1999) 12., 45. Socio-legal approach differs from doctrinal research in law in that it situates legal phenomena in a broader context, namely, in economic, political and social contexts. See David Maxwell Walker (ed.): *The Oxford companion to law.* Oxford, Clarendon, 1980. 1098.; Reza Banakar – Max Travers (eds.): *Theory and Method in Socio-Legal Research.* Oxford–Portland, Or., Hart Pub., 2005.; Brian Z. Tamanaha: *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law.* Oxford, Clarendon Press, 1997.; Richard A. Posner: The Present Situation in Legal Scholarship. *Yale L. J.,* vol. 90, (1980–1981) 1113.; Neil Sargent: The Possibilities and Perils of Legal Studies. *Can. J.L. & Soc.,* vol. 6, (1991) 1.; Alister A. Henskens: Legal Education: Black Letter, White Letter or Practical Law, *Newcastle L. Rev.,* vol. 9, (2005–2006) 81.

51 Barton op. cit. 507.

resolve. So understood, justiciability offers an original perspective from which the workings, capacities, and limitations of adjudication can be better explored.[52]

The same – more pragmatic – approach is advocated by Addo, who argues that justiciability 'presupposes the existence of a review mechanism to determine non-compliance with the terms of the legal regime,'[53] thus suggesting that by tackling inadequacies revealed through such mechanism justiciability evolves into a set of guarantees.[54]

This broader understanding of justiciability forms the basis of synthesised working_definition of this concept adopted for the purposes of this paper whereby justiciability of a right within the framework of a certain domestic legal order is regarded as a complex characteristic of the respective legal order that allows for systemic employment of international and domestic legal and extra-legal mechanisms with a view to identify, assess and address the inadequacies of recognition, protection and full realisation of the right in question.

### 1.3. Justiciability of Economic, Social and Cultural Rights: Myths and Challenges

The nature of the existing debate on *whether* economic, social and cultural rights are justiciable in the narrow sense (hereinafter *judicially enforceable*) is precisely summarised by O'Connell.[55] From the principled side, there are arguments that 'socio-economic rights are simply not real rights, in any meaningful sense',[56] and on somewhat more practical side is the argument that their judicial enforcement is inconsistent with the doctrine of separation of powers.[57]

In a nutshell, the first argument refers to the 'special nature' of economic, social and cultural rights. By 'special nature' of socio-economic rights both the doctrine and the practice understand their 'fundamental difference' from civil and political rights derived from their placement in two separate legal instruments: the ICESCR and the ICCPR which was in fact 'neither an originally-intended nor a necessary separation'.[58]

For the purposes of justifying the unwillingness to adjudicate economic, social and cultural rights both doctrine and jurisprudence insist on identifying these rights

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52 Ibid. 505.

53 Addo (1988) op. cit. 1425.

54 Michael K. Addo: *The Legal Nature of International Human Rights.* Leiden–Boston, Martinus Nijhoff Publishers, 2010. 226.

55 Paul O'Connell: *Vindicating Socio-Economic Rights: International Standards and Comparative Experience.* Abingdon–New York, Routledge, 2012. 9.

56 Ibid. 9.

57 Some authors set institutional capacity of the courts apart from the separation of powers argument (see Aoife Nolan – Bruce Porter – Malcolm Langford: The Justiciability of Social and Economic Rights: an Updated Appraisal. *Center For Human Rights And Global Justice, Working Paper* no. 15, New York, 2007. 19.). However, for the purposes of this paper such over-elaboration is hardly justified.

58 Eric C. Christiansen: Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court. *Colum. Hum. Rts. L. Rev.*, vol. 38, (2006–2007) 344.

as positive rights 'imposing affirmative obligations' on the states,[59] vaguely worded and imprecise,[60] requiring resources for their implementation,[61] and not even creating immediate obligations, but only an indefinite need to ensure their progressive realisation. All these arguments against justiciability of economic, social and cultural rights have long since been rebutted.[62]

The second line of argument insists that judicial enforcement of economic and social rights undermines the democratic doctrine of separation of powers by allowing the judiciary to interfere with budget allocation, since the court must engage in prioritising resources by 'putting a person either in or out of a job, a house or school,'[63] – a function belonging to the competence of the executive branch.

However, when one thinks about the doctrine of separation of powers as a holistic concept it is evident that judicial review of executive functions is an essential element of the principle of checks and balances lying in the core of the concept.[64] If some executive decisions were deemed outside the scope of judicial review it would clearly impede on the principle of equality and fair access to justice. Thus, the position of O'Connell appears fully justified as he insists on reinventing the separation of powers as a 'dynamic and ongoing interaction between the different branches of government' where the courts engage not only 'in an exacting examination of state policies with respect to socio-economic rights', but also in the 'normative development of the content [… thereof], drawing where appropriate on international and comparative standards'.[65]

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59 The negative v. positive dichotomy has been criticised to the effect of regarding 'each right as having [both] negative and positive aspects' (Cristiansen (2006–2007) op. cit. 374., see also Nolan–Porter–Langford (2007) op. cit. 7.), the latter implying providing means to fulfil the rights while the former pertaining to the obligation to respect and protect the right on the basis of non-discrimination and appreciation of human dignity.

60 Nolan–Porter–Langford (2007) op. cit. 9.

61 Ibid. 8.; De Schutter (2010) op. cit. 743.

62 See for the overview of rebutting arguments: Malcolm Langford: The Justiciability of Social Rights: From Practice to Theory. In: Malcolm Langford (ed.): *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law.* Cambridge, CUP, 2008. 30. See also: G. J. H. van Hoof: The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views. In: P. Alston – K. Tomaševsky (eds.): *The Right to Food.* The Hague, Martinus Nijhoff, 1984. 97., 99. On universality of budgetary implications for implementation of all human rights see Jayme Benvenuto Lima Jr.: The Expanding Nature of Human Rights and the Affirmation of their Indivisibility and Enfoceability. In: Berma K. Goldewijk – Adalid C. Baspineiro – Paulo C. Carbonari (eds.): *Dignity and Human Rights: the Implementation of Economic, Social and Cultural Rights.* Antwerp–New York, Intersentia, 2002. 58.

63 E. V. Vierdag: The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights. *Netherlands Yearbook of International Law,* vol. 9, (1978) 103.

64 On the function of judicial review see Thomas Henry Bingham: *The Rule of Law.* London, Allen Lane, 2010. 61.; Michael Vile: *Constitutionalism and the Separation of Powers.* Oxford, Clarendon Press, 1967. 13.; Thomas O. Sargentich: Contemporary Debate About Legislative-Executive Separation of Powers. *Cornell L. Rev.,* vol. 72, (1986–1987) 430., 434.

65 O'Connell (2012) op. cit. 201.

Practically speaking, the functions of the executive branch boil down to defining minimum core obligations of socio-economic rights and designing plans for their progressive realisation in accordance with principles set out by the legislature pursuant to international obligations of the state. At the same time, the judiciary mechanism focuses on non-compliance with established standards. The question of adequacy of the standard itself, as well as assessment of the extent to which it meets the 'progressive realisation' criteria should be left for external monitoring bodies, such as UN Committee on Economic, Social and Cultural Rights (CESCR).

To summarise, both 'special nature' and 'capacity' arguments appear rather artificial. In this regard the reasoning of Christiansen seems perfectly justified as he concludes that '[t]he nature of the rights themselves is not a legitimate basis for rejecting their justiciability'.[66] Having said that and adhering to the premise that all human rights are universal, indivisible, interdependent and interrelated,[67] I will reiterate that the question of *whether* disputes concerning economic, social and cultural rights are capable of being resolved by courts to the same extent as claims concerning other rights is of little relevance for the purposes of present paper. First, because it has long since been affirmatively answered by contemporary scholarship as demonstrated above and, second, it refers to the concept of justiciability in its narrow sense. Although essential for adequate protection, the enforceability of a right amounts only to one of many dimensions of justiciability in the broader sense that would also include all other legal and non-legal mechanisms available within a particular legal order for securing its proper fulfilment.

## 2. Justiciable Dimensions of the Right to Education at International level and in Russia

Having analysed different approaches that exist to define justiciability as a judicial tool and a legal doctrine in both narrow and broad senses, and having supplemented this analysis by the reference to specificities of justiciability of economic, social and cultural rights I will now proceed with narrowing down the focus of my research to justiciability of the right to education.

In this section I will outline the elements of justiciability of the right to education, its preconditions and challenges, as well as dimensions of the right to education that are part of its justiciable normative content both at the domestic level in Russia and through international protection system.

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66 Christiansen (2006–2007) op. cit. 347.

67 Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights on 25 June 1993, endorsed by General Assembly resolution A/CONF.157/23 of 12 July 1993, art 5.

### 2.1. Preconditions of Justiciability of the Right to Education

International human rights instruments and doctrinal sources describe the right to education in a range of ways: as a self-standing right in its narrow sense,[68] or in a broader sense as the right to development,[69] as an empowerment right,[70] implicit in all other rights,[71] or pigeonholed to one of the three 'generations' of human rights;[72] perceived as a right or a freedom,[73] (positive or negative),[74] as a right to receive education and the right to choose education;[75] limited by other rights[76] or reinforced

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[68] Manfred Nowak: The Right to Education – Its Meaning, Significance and Limitations. *Neth. Q. Hum. Rts.,* vol. 9, (1991) 418.

[69] UN General Assembly, *Declaration on the Right to Development*, adopted by the General Assembly, 4 December 1986, A/RES/41/128; C. Raj Kumar: International Human Rights Perspectives on the Fundamental Right to Education – Integration of Human Rights and Human Development in the Indian Constitution. *Tul. J. Int'l & Comp. L.,* vol. 12, (2004) 237.; Philip Alston – Mary Robinson (eds.): *Human Rights and Development: Towards Mutual Reinforcement.* Oxford–New York, OUP, 2005. 551.; Mesenbet Assefa Tadeg: Reflections on the Right to Development: Challenges and Prospects. *Afr. Hum. Rts. L. J.,* vol. 10, (2010) 325.; Mohammed Bedjaoui: The Right to Development, in International human rights. In: Philip Alston – Ryan Goodman (eds.): *Human Rights in Context: Laws, Politics and Morals: Text and Materials*. Oxford, OUP, 2012. 1532.

[70] CESCR General Comment No. 13 (1999) op. cit. para 1.; UNESCO's Medium-Term Strategy 2002-2007, (31 C/4, para. 62.), UNESCO, Paris. http://unesdoc.unesco.org/images/0012/001254/125434e.pdf; Kishore Singh: The Right to Education: International Legal Obligations. *Int'l J. Educ. L. & Pol'y*, vol. 1, (2005) 103., 107.

[71] Roland Winkler: The Right to Education according to Article 14 of the Charter of Fundamental Rights of the European Union. *Int'l J. Educ. L. & Pol'y,* vol. 1, (2005) 60., 62.; Gerhard van der Schyff: Classifying the Limitation of the Right to Education in the First Protocol to the European Convention. *Int'l J. Educ. L. & Pol'y*, vol. 2, (2006) 153.

[72] John C. Mubangizi: Towards a New Approach to the Classification of Human Rights with Specific Reference to the African Context. *Afr. Hum. Rts. L. J.,* vol. 4, (2004) 93.

[73] Winkler (2005) op. cit.; James Breese: *Freedom and Choice in Education.* RLE Edu K, Routledge, 2012.; Virgil C. Blum: *Freedom of choice in education.* Westport, Conn., Greenwood Press, 1977.; Charles L. Glenn: *Educational Freedom in Eastern Europe.* Washington, DC, Cato Institute, 1994.; Noel S. Anderson – Haroon Kharem (eds): *Education As Freedom: African American Educational Thought and Activism.* [Lexington Books] 2009. https://www.ebooks.com/466682/education-as-freedom/anderson-noel-s-kharem-haroon-akom-a-a-banks-ojeya/

[74] Ingo Richter: The Right to Education as a Constitutional Right. *Int'l J. Educ. L. & Pol'y,* vol. 5, (2009) 5.

[75] Fons Coomans – Fried van Hoof (eds.): *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights held from 25–28 January 1995 in Utrecht.* [SIM Special, no. 18] Utrecht, 1995. 427.

[76] Religious freedom: Jan De Groof – Gracienne Lauwers: Nobody Can Be Denied the Right to (an Own Identity in) Education: Legal Bottlenecks in National and International Law concerning the Freedom of Religious Expression: The Case of the Headscarf in Education. *Int'l J. Educ. L. & Pol'y,* vol. 1, (2005) 132.; AnneBert Dijkstra – Ben Vermeulen: Islamic Schools in the Netherlands. *Int'l J. Educ. L. & Pol'y,* vol. 4, (2008) 16.; linguistic rights: Elize Kung – Pablo Meix: Legal Status of Languages in Education: The Cases of South Africa and Spain. *Int'l J. Educ. L. & Pol'y,* vol. 6, (2010) 33.

by the principles of non-discrimination and equality.[77] It is further regarded with disaggregation according to the level of education or organisational form (private[78] and public[79]) or through the prism of special categories of the subjects of this right (disabled,[80] minorities,[81] homeless,[82] women and girls[83]).

The UN Special Rapporteur on the right to education Kishore Singh in his annual report to the Human Rights Council in June 2013 made a direct link between international recognition of the right to education and justiciability of 'any or all of its dimensions'.[84] In his statement Singh appeals to the broader understanding of the term justiciability as described in earlier in this paper. By asserting that the right to education is justiciable so long as it is internationally recognised Singh, according to the synthetic analysis of the whole text of the report, implies a complex set of guarantees: from 'existing constitutional or legislative provisions on the right to education' to the possibility 'to have legal recourse before the law courts on the basis of international legal obligations' in case of violations.[85]

This system of guarantees includes quasi-judicial mechanisms of protection,[86] as well as preventive mechanisms allowing for special attention to vulnerable and marginalised groups.[87] It also accounts for the capacity of the legal system as a whole to effectively monitor and address gaps of protection or specific factors challenging

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77 Mark Jaffe – Kenneth Kersch: Guaranteeing a State Right to a Quality Education: The Judicial-Politial Dialogue in New Jersey. *J. L. & Educ.,* vol. 20, (1991) 271.; Brian P. Marron: Promoting Racial Equality through Equal Educational Opportunity: The Case for Progressive School-Choice. *BYU Educ. & L. J.,* (2002) 53.; Neville Harris: Equal Rights in Education in the UK (England). *Int'l J. Educ. L. & Pol'y,* vol. 4, (2008) 4.

78 Patricia M. Lines: Private Education Alternatives and State Regulation. *J.L. & Educ.,* vol. 120, (1983) 189.

79 Eileen N. Wagner: Public Responsibility for Special Education and Related Services in Private Schools. *J. L. & Educ.,* vol. 20, (1991) 43.; Tomiko Brown-Nagin: Broad Ownership of the Public Schools: An Analysis of the T-Formation Process Model for Achieving Educational Adequacy and Its Implications for Contemporary School Reform Efforts. *J.L. & Educ.,* vol. 27, (1998) 343.

80 Alexandra Natapoff: Anatomy of a Debate: Intersectionality and Equality for Deaf Children from Non-English Speaking Homes. *J.L. & Educ.*, vol. 24, (1995) 271.

81 Walter Kemp: Learning Integration: Minorities and Higher Education. *Special Issue Int'l J. Educ. L. & Pol'y* , (2004) 21.

82 James H. Stronge – Virginia M. Helm: Legal Barriers to the Education of Homeless Children and Youth: Residency and Guardianship Issues. *J.L. & Educ.,* vol. 20, (1991) 201.

83 Michael A. Rebell – Anne W. Murdaugh: National Values and Community Values Part I: Gender Equity in the Schools. *J. L. & Educ.,* vol. 21, (1992) 155.; Jennifer T. Sudduth: CEDAW's Flaws: A Critical Analysis of Why CEDLAW is Failing to Protect a Woman's Right to Education in Pakistan. *J. L. & Educ.,* vol. 38, (2009) 563.

84 Report of the Special Rapporteur on the right to education, Kishore Singh: *Justiciability of the Right to Education* presented at the Twenty-third session of the UN Human Rights Council, A/HRC/23/35 of 10 May 2013 para 27.

85 Singh (2013) op. cit. para 27.

86 Ibid. para 36–43.

87 Ibid. para 54–58.

justiciability, such as lack of awareness of the right, legal, cultural, procedural and financial barriers to full realisation and successful protection of the right.[88]

This important report that features a new broad approach to justiciability is long overdue: the current position of the CESCR expressed in the Committee's General Comments concerning justiciability of economic, social and cultural rights including the right to education is outdated from both doctrinal and practical points of view. The Committee still acts on the premises confirming partial (or conditional) justiciability of economic, social and cultural rights thus lowering the standard of protection of these rights in states parties to the Covenant.[89]

For example, among the appropriate measures the General Comment No. 3 on the nature of state obligations mentions 'provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable'.[90] The Committee thus admits the possibility that some of the rights endorsed by the Covenant might not, in principle, be considered justiciable. This narrow interpretation of justiciability creates a closed circuit system where the rights must first be considered justiciable (by which authority?) and then judicial remedies should be provided for their protection. However, without legislative provision of appropriate judicial remedies these rights will never become justiciable.

Another example of outdated approach to justiciability featured by CESCR is paragraph 10 of General Comment No. 9 that distinguishes between 'justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration)'.[91] These two definitions appear confusing, because being self-executing is a prerequisite condition for justiciability and not an opposing category as it is implied in paragraph 10 of the Comment.

It is understandable that the Committee will be hesitant about immediate adoption of any daring initiatives due to its institutional and political constraints. First, adoption of a new General Comment or revision / update of an existing one is a complicated time-consuming procedure involving wide consultation with specialised agencies, civil society and academics followed by preparation of a draft for further discussion

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88 Ibid. paras 74–80.

89 The use of CESCR General Comments as a benchmark for the state parties reporting procedure has been established in a number of the Committee's reports, see for example UN Committee on Economic, Social and Cultural Rights: Report on the Thirtieth and Thirty-First Sessions (5-23 May 2003, 10-28 November 2003) E/2004/22 E/C.12/2003/14 (Economic and Social Council Official Records, 2004, suppl no. 2) para 52.

90 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant), 14 December 1990, E/1991/23 para 5.

91 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant adopted at the 51st meeting on 1 December 1998 (Nineteenth session) E/C.12/1998/24.

by the Committee and interested parties and formal adoption in plenary session.[92] Considering the time span between plenary sessions (they take place twice a year, in April and November), the fact that the last General Comment was adopted in 2009,[93] and that none of the Comments have ever been updated or revised, the lack of intensity in this process suggests inability of this mechanism to accommodate upcoming issues.

Second, political constraints of the Committee's reluctance to immediately adopt new approaches have to do with hyper-sensitivity of the states towards their reporting obligations. Since General Comments are designed 'with a view to assisting States parties in fulfilling their reporting obligations',[94] all changes will be subject to extreme scrutiny and political negotiations further complicated by the Committee's general inclination to 'work on the basis of the principle of consensus'.[95] Nevertheless, one can anticipate that the ambitious proposal of the Special Rapporteur to use a broader notion of justiciability will find its way into domestic practice through the Committee's monitoring procedure as it had happened before.[96]

### 2.2. Justiciable Dimensions of the Right to Education in Russia at the Domestic Level

According to Singh 'justiciability of the right to education […] has its bases in national legal systems'.[97] For its effective protection in the framework of domestic justiciability the content of the right must be clearly defined and subjected to judicial and quasi-judicial mechanisms of enforcement.[98]

In the Russian legal system the right to education is recognised on the constitutional level and is further developed in both federal and regional legislation. The right to education is protected by the judicial system and non-judicial mechanisms as well.

Without aiming at providing a full review of education law and policies in Russia, I will outline those fundamental constitutional and legislative provisions that shape the foundation of justiciability of the right to education in Russia. In the following

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92 Follow-up to the recommendations of the Twenty-fourth meeting of chairpersons of the human rights treaty bodies, including harmonization of the working methods: other activities of the human rights treaty bodies and participation of stakeholders in the human rights treaty body process. Twenty-fifth meeting of chairpersons of the human rights treaty bodies, Geneva, 24–28 June 2013. Item 4 of the provisional agenda, HRI/MC/2013/3 of 22 April 2013, para 15.

93 UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/21 of 21 December 2009.

94 UN Committee on Economic, Social and Cultural Rights (CESCR), Rules of Procedure of the Committee: Provisional rules of procedure adopted by the Committee at its third session (1989), E/C.12/1990/4/Rev.1 of 1 September 1993, rule 65.

95 Ibid. Rule 46.

96 In 1999 the 4A scheme – Availability, Accessibility, Acceptability and Adaptability of education suggested by the Special Rapporteur on the right to education was adopted by the CESCR General Comment No. 13 as a benchmark of the states' obligations in respect of the right to education.

97 Singh (2013) op. cit. para 26.

98 Yeshanew (2008) op. cit. 273.

three subsections I will describe and evaluate the relevant provisions of the Russian Constitution and basic legislation. I will also list the existing judiciary and non-judiciary mechanisms of protection of the right to education.

### *2.2.1. Justiciable Dimensions of the Right to Education in Russia as Articulated by Constitutional and Legislative Provisions*

It is generally accepted that recognition of a right at the constitutional level is essential for its domestic justiciability.[99] The relation between constitutional recognition of the right and its justiciability was reiterated by the CESCR in General Comment No. 3:[100]

> In cases where constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information *as to the extent to which* these rights are considered to be justiciable (i.e. able to be invoked before the courts).
>
> By invoking the extent to which the rights recognised by the constitution are considered justiciable the Committee presumes that it's not the question *whether* they are, but only the *extent to which* they are.

In Russia the right of every person to education is ensured by Article 43 (1) of the Constitution.[101] In line with international state obligations in the domain of education 'secondary and high vocational education' is generally accessible and provided free of charge 'in state or municipal educational establishments'.[102] The article also places pre-school education under the same standard of accessibility.

Free higher education is guaranteed 'on competitive basis' in a 'state or municipal educational establishment.'[103] Competitive access and institutional limitations are further complemented on legislative level by an additional condition: only first higher education can be exempt from tuition fees, provided all other requirements met.[104]

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99 Addo (1988) op. cit. 1428; Christiansen (2006–2007) op. cit. 323.; Coomans (1995) op. cit. 427.; Singh (2013) op. cit. para 25.; Yeshanew (2008) op. cit. 274.; Salma Yusuf: Rise of Judicially Enforced Economic, Social & Cultural Rights – Refocusing Perspectives. *Seattle J. Soc. Just.,* vol. 10, (2011–2012) 784.; Julia A. Simon-Kerr – Robynn K. Sturmt: Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education. *Stan. J. C. R. & C. L.,* vol. 6, (2010) 83., 86.

100 CESCR General Comment No. 3 (1990) para 6 (emphasis added).

101 Constitution of the Russian Federation adopted by national referendum on 12 December 1993 (Russian Constitution).

102 Russian Constitution (1993) art 43(2) in conformity with ICESCR art 13(2)b: 'Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education'.

103 Russian Constitution (1993) art 43(3) in conformity with ICESCR art 13(2)c: 'Higher education shall be made equally accessible to all, *on the basis of capacity*, by every appropriate means, and in particular by the progressive introduction of free education' (emphasis added).

104 Federal Law on Education (2012) art 5 (3).

This provision is very controversial: the law does not make clear what, in fact, is considered 'first' higher education: the first finished university degree or the first one applied for and/or enrolled to (considering expulsions, or voluntary abandoning of the course). There is no unified official database of issued diplomas, let alone of enrolled students. Moreover, universities cannot ask for a proof of existing qualifications. Nevertheless, the legislative limitation was considered by the Russian Constitutional Court (RCC) as fully compatible with the Constitution.[105]

The Constitution guarantees that 'the basic general education shall be free of charge'. It also imposes responsibility on the parents for ensuring compulsory basic general education for their children:[106] since 2008 all 10 years of schooling are compulsory and free of charge.[107]

Russian Constitution was adopted in 1993. Its preparation took place long after the ratification by the Soviet Union of the ICESCR in 1973, and the distinguished members of the Constitutional Council that was called by the President to discuss and edit the project have considered those international standards concerning the right to education that had been already in force.[108]

Therefore, the fact that the Constitution does not guarantee directly neither freedom of education and 'liberty of parents […] to choose for their children schools, other than those established by the public authorities',[109] nor the 'liberty of individuals and bodies to establish and direct educational institutions',[110] means that these provisions have been deliberately omitted due to particular political, economic and/or social concerns.

Although the relevant provisions were, nevertheless, included in the acts of subconstitutional educational legislation from their very early drafts,[111] there is no jurisprudence whatsoever on the issues of parental choice or the right to establish an educational institution. To be sure, there have been cases dealing with freedom

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105 Constitutional Court of the Russian Federation Ruling on Admissibility No. 187-O of 5 October 2001.

106 Russian Constitution (1993) art 43(4) in terms of established level of compulsory education exceeds the standard set by ICESCR art 14: 'compulsory *primary* education, free of charge' (emphasis added).

107 Compulsory level of school education was lifted from 9 grades of secondary education to 11 grades of complete general education as per the Federal Law No. 194-FZ of 21 July 2007 'On Amending Certain Legislative Acts of Russian Federation due to Establishment of Compulsory General Education'.

108 Decree of the President of Russian Federation No. 718 of 20 May 1993 on 'Convocation of the Constitutional Council for the Purpose of Finalising the Project of Constitution of Russian Federation'.

109 ICESCR art 13(3).

110 ICESCR art 13(4).

111 The right to choose forms of education and educational institutions was included into the very first Law on Education No. 3266-1 of 10 July 1992 (1992), as well as the possibility to establish private educational institutions, art 12(3).

of religious education,[112] however the right to establish religious schools is protected by specific legislation.[113] Another case tangentially related to the freedom of school choice is the Supreme Court 2011 ruling on territorial accessibility of education, but it has more implications on accessibility of public schools than on free choice of schools in general.[114]

Therefore, we can conclude that although constitutional recognition is generally connected to guarantees of stronger justiciability,[115] in some cases the lack of relevant constitutional provisions does not necessarily lead to non-justiciability of a certain right or legitimate interest. In this situation adjudication of the claim will invoke other constitutional provisions and will lead to indirect justiciability. For example, although the right to establish a private educational institution is not directly mentioned in Russian Constitution, it is implicit in other provisions, namely, Article 34 on freedom of economic activities, Article 35 on the right of private property, Article 44 on academic freedom.

As to summarise, justiciable dimensions of the right to education as set forth by the Russian Constitution and educational legislation comprise a comprehensive codified system. This system consists of general entitlements that are common for all levels and forms of education: non-discrimination,[116] general availability and accessibility of education,[117] obligation of public authorities to 'establish appropriate socio-economic conditions conducive to obtaining education and progressive widening of educational choices throughout life',[118] guarantees of language choice as appropriate,[119] guarantees of secular nature of education in public educational institutions,[120] freedom of choice in education (including the right to form the contents of one's educational program,[121] etc. It also includes specific entitlements for particular categories of participants of education process: such as the right of public school pupils to use textbooks and teaching aids during the course of their studies without payment[122] or the right of

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112 On Russian case law concerning establishment of religious educational institutions see Maria Smirnova: Freedom of Conscience and the Right to Education in Russia – a Secular Country of Cultural and Religious Diversity. In: Charles Russo (ed.): *International Perspectives on Education, Religion and Law*. Abingdon, Routledge, 2014. 181–194.

113 Federal Law No. 125-FZ of 26 September 1997 'On Freedom of Conscience and Religious Associations'.

114 Supreme Court of the Russian Federation in its Ruling No. 5-G11-106 of 15 June 2011 confirmed that any regional law establishing priority access to enrolment to the first grade of school for children living in close proximity to the relevant institutions, is to be regarded as a purely organisational measure aimed at meeting the requirements of federal legislation and cannot be assessed as discriminatory or restricting access to education.

115 See, for example, O'Connell (2012) op. cit. 7.

116 Federal Law on Education (2012) art 5(2).

117 Ibid. Art 5(3).

118 Ibid. Art 5(4).

119 Ibid. Art 14.

120 Ibid. Art 3(1)6.

121 Ibid. Art 34(1)4–7.

122 Ibid. Art 35.

public university students to receive monthly allowance from the relevant budget for academic achievements or as a means of social support.[123]

These entitlements are numerous, well-defined and relatively detailed, moreover, they are set forth on the legislative (not sub-legal) level: these qualities render particular rights in education susceptible for judicial and non-judicial protection. In the next two sections I will extract those dimensions of the right to education that are protected by judicial and quasi-judicial or administrative methods.

### *2.2.2. Justiciable Dimensions of the Right to Education in Russia as per Domestic Case Law*

In Russia '[s]tate protection of the rights and freedoms of man and citizen [… is] guaranteed' by the Constitution.[124] 'State protection' includes but is not limited to 'judicial protection'[125] of rights, which involves, inter alia, judicial review of '[d]ecisions and actions (or inaction) of bodies of state authority and local self-government, public associations and officials'.[126] It is important that the Constitution does not contain any limitation to Article 46 (1) on judicial protection of all rights and freedoms. For example, it could only refer to rights and freedoms recognised by the Constitution and/or current legislation, or limit the application of judicial protection to only *justiciable* rights and freedoms.[127]

Thus, theoretically, all rights and freedoms of all individuals are subject to judicial protection. However, certain limitations can be imposed at the legislative level depending on the type of adjudication, level of the court and type of applicant. For example, the rules of admissibility for judicial review of decisions or actions of state or municipal authorities or civil servants violating the applicant's rights or freedoms are made clear in a dedicated law.[128] These rules expressly provide that in order to be admissible for judicial review such decisions or actions must constitute a violation of rights and freedoms of the applicant or inhibit their realisation or impose illegal obligations or invoke unjustified responsibility.[129]

The right to education is also adjudicated through administrative, civil and criminal jurisprudence in relevant cases. The vast majority of all decisions (more

123 Ibid. Art 36.

124 Russian Constitution (1993) art 45 (1).

125 Ibid. Art 46 (1).

126 Ibid. Art 46 (2).

127 For example, art 37(1) of the Constitution of Ethiopia limits the scope of protection by providing that 'everyone has the right to *bring a justiciable matter* to court', see Yeshanew (2008) op. cit. 277 (emphasis added).

128 Federal Law No. 4866-1 of 27 April 1993 'On Judicial Review of Actions and Decisions Violating Rights and Freedoms of Citizens' (Federal Law on Judicial Review).

129 Ibid. Art 2.

than one-fourth) concern health and security issues,[130] while another significant part relates to physical integrity of students.[131]

Other dimensions of the right to education appearing on a common basis before Russian courts include the right to receive proper qualifications;[132] the right to access to free pre-school education; the right to combine work and study; the right to receive education in one's native language.[133] Less common are cases involving expulsion and enrolment;[134] equal treatment and fair assessment of knowledge;[135] non-discrimination in education on the basis of income and social origin and other.[136]

The limits of this paper do not provide for discussion of all of these categories in great detail, therefore, I will pick the most salient cases whereby the dimensions of the right to education have been significantly amended or altered and if the outcome of the case is still relevant according to the newest legislation.

One of the challenges of Russian education system is ensuring adequate availability of pre-school education. For years it has been a serious problem with thousands of parents nationwide not being able to secure a place in a nursery for children under 6.6 years old. Lack of places has often led to creation of a virtual 'queue' parents had to sign into from the moment their child was born. Effectively, this situation has led to the expansion of corrupt practices aimed at securing a place in the queue when it 'appeared' to be full.

Understandably, the right to be put in the queue or a right to keep a certain place on the queue was not supported by any legislative provisions, therefore, was not enforceable. By adopting respective legislation the government would have confirmed that the constitutional obligation to ensure availability of pre-school education to all eligible children has not been fulfilled. The Constitutional Court would have

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130 Primorsky Krai Regional Court decision No. 33-10985 of 20 December 2010, on failure of a school to comply with fire safety regulations due to budget cuts. The court prioritised public safety and ruled on liability of the local authorities to install necessary equipment. Similar decisions: Leningradskaya Oblast Regional Court ruling No. 33-5318/2010 of 3 November 2010; Primorsky Krai Regional Court ruling No. 33-2282 of 16 March 2010.

131 Moskovskaya Oblast Regional Court ruling No. 33-21461/2010 of 9 November 2010 on liability of a school for injuries received by a student during the time he was under care of the institution. Similar decision: Supreme Court of Khakassia Republic No. 33-1485/2009.

132 Kirovskiy District Court decision of 24 September 2009 on non-pecuniary damages for delayed issuance of a diploma.

133 Constitutional Court of Russian Federation Ruling on Merits No. 16-P of 16 November 2004, on equal status of Russian language and official language of a federal subject (republic) in educational process. Similar decisions: Constitutional Court of Russian Federation Ruling on Merits No. 88-O-O of 27 January 2011; Supreme Court of Russian Federation Ruling No. 20-GO9-6 of 29 April 2009.

134 See, for example, Saint-Petersburg City Court Cassation Ruling No. 3112 of 9 March 2011, on expulsion for plagiarism or Saint-Petersburg City Court Ruling No. 10622 of 4 August 2010, on expulsion for drug dealing and consumption.

135 Supreme Court of Russian Federation Ruling No. 69-G10-14 of 22 December 2010, on equal payment for holders of similar qualifications.

136 On the analysis of the cases see Vladimir V. Nasonkin: The Constitutional Right to Education in Russian Jurisprudence: Searching for Balance between Private and Public Interests. *Yearbook of Russian Educational Legislation,* vol. 6, (2011) 153.

immediately invalidated such a provision. Moreover, in the majority of cases the courts ruled that the existence of the queue *per se* is just an organisational measure and not an indication of failure to provide access to free pre-school education.[137]

Thus, without due legislative and judicial support those parents who were not able to secure a place in the kindergarten for their children could only justify their claims by appealing to the obligation of public authorities to provide access to free pre-school education. Some claims were successful and the courts confirmed illegal inaction of municipal authorities in not creating enough spaces for all children of relevant age entitled to free pre-school education and residing in the territory governed by these authorities.[138] Now in most of the regions transparent online mechanisms of registration for pre-school education have been introduced to decrease corruption in this sphere and improve visibility of and access to the right to pre-school education.[139]

Quality of education is a significant dimension of the right to education as one of the major characteristics defining its acceptability.[140] The mode of adjudicating quality education in Russia is rather formalised and straightforward and is based on evaluating of, first, conditions in which education is provided against those benchmarks that are set in the license issued to a particular educational institution and, second, contents of education against requirements of state educational standard of the relevant level, as stipulated in its certificate of state accreditation.

In a selection of cases the following inadequacies were recognised as violations of the right to quality education for the purposes of claim validity: [141]

- formal qualifications of teachers are not matching the requirements for teaching profession;
- textbooks are used that are not included in the list of textbooks and teaching materials approved by the Ministry of Education and Science[142] for use in educational process in accredited educational institutions of the appropriate level;
- in-class and extra-curriculum workload exceeds the normative, while the number of hours for compulsory subjects is significantly lower than envisaged by the standard;

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137 On queue-free access to pre-school education see Permsky Krai Court Ruling No. 33-9598/2010 of 2 November 2010; Moskovskaya Oblast Regional Court Ruling No. 33-15552 of 10 August 2010.

138 Cassation Ruling of Perm Krai Court No. 33-6889 of 11 July 2011.

139 See among many others examples from Moscow: http://ec.mosedu.ru/norm_docs/; Tatarstan Republic: https://uslugi.tatar.ru/cei; Bashkortostan Republic: https://edu-rb.ru; Chelyabinsk: www.sadiki74.ru; Lipetsk: http://lipetskcity.ru/lipetsk/menu.php?i=3&page=page_3.5.1.3.10.php&text_pod_menu=pic57

140 As expressly referred to by CESCR General Comment No. 13 (1999) para 6(c).

141 Federal Arbitrage Court of North-Western District Decision No. A56-26788/2007 of 17 June 2008.

142 See for example the Order of the Ministry of Education and Science of Russian Federation No. 1067 of 19 December 2012 'On Approval of Federal List of Textbooks Recommended (Allowed) to Use in Educational Process in State-Accredited Educational Institutions Implementing Educational Program of General Education in 2013/14 Academic Year'.

- the classes are overcrowded;[143]
- there are no pre-drafted plans of fire safety and evacuation and no fire extinguishing equipment, premises of the educational institution do not correspond to the requirements of physical safety (no fence around the territory, no CCTV).[144]

### *2.2.3. Dimensions of the Right to Education in Russia that Are Protected through Non-Judicial Methods*

Special Rapporteur on the right to education in his report also highlights the importance of 'quasi-judicial mechanisms such as local administrative bodies, national human rights institutions, such as ombudspersons or human rights commissions' for enhancing the protection of the right to education on domestic level.[145] As suggested by Yeshanew '[s]uch institutions ensure the justiciability of human rights through quasi-judicial procedures.'[146]

Among the authorities responsible for addressing violations of the right to education in Russia with inquisitorial rather than adversarial functions one will find the Federal Service for Supervision in Education and Science with a mandate to consider individual complaints under the relevant procedure established by the law. [147] Most of the claims concern social benefits, enrolment and expulsion, illegal actions of administration of educational institutions and education authorities, resolution of conflict situations between participants of education process, award of qualifications and other issues.[148]

The statistics of these complaints are, indeed, very indicative. Of 8,763 complaints filed in 2012 twelve per cent were passed on to the Federal Service from the Administration of the President and nearly the same number – from the Ministry of Education and Science. It means that public awareness of the system of protection of the right to education is very low and victims of violations keep sending claims to the

143 Okoneshnikovsky District Court of Omskaya Oblast Decision of 4 February 2010.

144 Other cases on safety of educational process as a characteristic attributable to its quality include, inter alia, Supreme Court of Russian Federation Ruling No. 58-G02-38 of 26 November 2002; Supreme Court of Russian Federation Ruling No. 56-G03-6 of 20 May 2003; Federal Arbitrage Court of Uralskiy District Decision No. A76-5435/2009-50-80; Federal Arbitrage Court of Povolzhsky District Decision No. A55-10197/2008 of 11 November 2008; Supreme Court of Karelia Republic Cassation Ruling No. 33-3527/2011 of 29 November 2011; Moscow Oblast Court Ruling No. 33-24297; Vologodsky Oblast Court Cassation Ruling No. 33-5036/2011 of 2 November 2011.

145 Singh (2013) op. cit. para 30., 36.

146 Yeshanew (2008) op. cit. 289.

147 Regulations on the Federal Service for Supervision in Education and Science, approved by the Government Decree No. 594 of 15 July 2013, para 5.32. Such claims are filed in accordance with the Federal Law No. 59-FZ of 2 May 2006 'On the Procedure Concerning Consideration of Communications of Citizens of Russian Federation'.

148 Information on complaints filed by public in 2012 (Federal Service for Supervision in Education and Science, 2012. http://obrnadzor.gov.ru/common/upload/obrashcheniya_grazhdan_2012_g.pdf

authorities that have the highest profile in media and not to those directly responsible for consideration of such claims.

Response normally provided by the Federal Service includes several types of actions, such as explanation or clarification of the relevant law to the claimant, passing the issue on to the regional authority or to the competent federal authority, such as the Public Prosecutor Office, initiating field checks, or court proceedings.

Public Prosecutor Office is another example of extra-judicial protection of the right to education. This office is very active in extra-judicial protection of the right to education through consideration of individual claims and initiating field checks on the basis of complaints received. [149] This office has a direct effect on wider justiciability of the right to education due to its mandate to act immediately in case of detection of a violation and to bring an administrative action against the violator as per specialised article of the Code of Administrative Offenses (violation of the right to education),[150] be it a state (federal or regional) or local (municipal) authority, or management of an educational organisation.[151]

Examples when Public Prosecutor Office takes action against violations of the right to education are numerous. Some of the recent violations acted upon concerned, for instance, lack of due care on the part of local authorities failing to provide heating in a public nursery;[152] failure of local education authorities to provide free textbooks for public schools and charging parents instead;[153] violations of established procedures of enrolment to a program of higher education (obligatory paid preparatory classes ensuring access to a university);[154] closure of rural schools without proper democratic procedure of obtaining consent of the majority of residents of the village and without organising transport access of the children to other schools,[155] failure of local authorities to ensure record of migrant children not receiving compulsory education and provide access to compulsory education to these children accordingly[156] etc.

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149 Federal Law No. 2202-1 of 17 January 1992 'On Public Prosecution Office of Russian Federation', arts 10, 21 (2), 27.

150 Code of Administrative Offenses of Russian Federation No. 195-FZ of 30 December 2001, art 5.57 (1).

151 Federal Law 'On Public Prosecution Office' art 26.

152 'Prosecutor's Office of Kurgan Region Provided Remedy for Violated Rights to Accessible and Free Pre-School Education', 29 August 2013. www.kurganproc.ru/index.php?option=com_content&view=article&id=4560:2013-08-29-06-25-20&catid=38:news-c&Itemid=166; 'In Sverdlovsk Region the Prosecutor's Office Protects Children's Rights to Accessible Preschool Education', 22 January 2014. www.genproc.gov.ru/smi/news/genproc/news-84587/

153 'Prosecutor's Office in Komi Republic Takes Action to Secure Constitutional Rights of Citizens for Free Education', 16 September 2013. www.prockomi.ru/news/index.php?ELEMENT_ID=5357

154 'Prosecutor's Office Disclosed Violations of the Right of Citizens to Higher Professional Education', 6 February 2012. http://udmproc.ru/news/show/prokuraturoj-vyyavleny-narusheniya-prav-grazhdan-na-vysshee-professionalnoe-obrazovanie

155 'Prosecutor's Office in the Court Asserted the Rights of Ust'-Kamchatsky Children to Education: Local Administration's Decisions on Closure of Two Schools Were Deemed Illegal', 24 April 2013. http://severdv.ru/news/show/?id=71085

156 'Kineshma City Prosecutor's Office Disclosed Violations of the Rights to Education of Migrant Children', 27 May 2013. http://prokuratura.ivanovo.ru/кинешемской-городской-прокуратурой-16/

Public prosecutors in the regions are quite efficient in terms of providing immediate extra-judicial remedy for violations of the right to education. Their interventions result in readmitting expelled students;[157] providing free textbooks to pupils of public schools;[158] opening of final two classes of compulsory schooling for a group of children insufficient for a full class,[159] and so forth.

Field checks conducted by the General Prosecutor's Office on the account of implementation of the priority national project 'Education' in 2012 revealed more than 80,000 violations of the right to education and management of education activities, including misappropriation of funds allocated for equipment of public schools, reconstruction and renovation of public school premises, failure to remunerate class leaders, to provide access to distance learning for disabled children, or to filter out restricted Internet content of pornographic or extremist nature.[160]

Among other non-judicial mechanisms of redress the Commissioner for Human Rights in the Russian Federation,[161] a National Human Rights Institution with ECOSOC status A,[162] plays a very important role. Annually, it considers nearly 200 claims concerning the right to education.[163] The Russian Civic Chamber plays a similar role.[164] Its functions include, inter alia, facilitation of 'coordination between the socially significant interests of citizens of Russia, NGOs, and national and local authorities, in order to resolve the most important problems of economic and social

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157 'In the City Bolshoy Kamen after a Prosecutor's Intervention 85 Illegally Expelled Children Were Readmitted to the Programs of Non-Formal Learning', 13 May 2013. http://prosecutor.ru/news/prokuratura-zato-bolshoykamen/2013-05-13--2.htm

158 Sergey Kuzbassky: Non-Free Right to Education: Authorities of Udmurtia Do Not Provide Textbooks. *Gazeta* No. 33, (1144) 4 September 2013. http://netreforme.org/news/nebesplatnoe-pravo-na-obrazovanie-vlasti-udmurtii-uchebniki-ne-dayut/

159 'Prosecutor Asserted the Right of Children to Continue Education in the 10th Grade in their 'Own' School', 6 September 2013. http://udmproc.ru/news/show/prokuror-otstoyal-pravo-detej-prodolzhit-obuchenie-v-10-klasse-v-svoej-rodnoj-shkole

160 'General Prosecutor's Office Analysed the Realisation of Rule of Law in the Process of Implementation of the Priority National Project 'Education'', 25 February 2013. http://genproc.gov.ru/smi/news/genproc/news-81254/. Priority National Project 'Education' started on 5 September 2005 to address the most sensitive areas of Russian education system: class leaders, school lunches, school buses, revelation and support of best teachers and gifted children, education of military officers, see the Project's page on the Ministry of Education and Science website: http://минобрнауки.рф/проекты/пнпо

161 Acting on the basis of Russian Constitution (1993) art 103 (e); Federal Constitutional Law No.1-FKZ of 26 February 1997 'On the Commissioner for Human Rights of Russian Federation'.

162 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Chart of the Status of National Institutions Accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, accreditation status as of 11 February 2013. www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf

163 Report of the Commissioner For Human Rights in the Russian Federation on Consideration of claims in 2012. http://ombudsmanrf.org/images/stories/word/prilogenie_doc_2012.doc

164 Acting on the basis of Federal Law 'On the Civic Chamber of the Russian Federation' No. 32-FZ of 4 April 2005.

development, to ensure national security, and to defend the rights and freedoms of citizens of Russia'.[165] With regard to the right to education such defence is included in the mandate of the Council's Commission on Development of Education.[166]

These examples demonstrate how non-judicial methods of redress for violations of the right to education in Russia contribute to strengthening of inquisitorial justiciability at the domestic level. Although the thematic issues of complaints filed with the authorities briefly listed above are similar to those that appear in the courtroom, some elements of the right to education are only present in non-judicial proceedings. For example, violence in education connected with violation of human dignity, religious rights in education and corrupt practices comprise, perhaps, the main areas of divergence. These types of misconduct are highly latent and rarely reach courtroom. However, since non-judicial authorities do have, in most cases, the right to initiate checks and investigations, some of the latent cases tend to be disclosed through these procedures. Furthermore, engagement with these extra-judicial procedures does not require any special legal knowledge, nor payment of fees, decisions of these authorities take immediate effect. Therefore, cases that require instant reaction of authorities are most likely to appear before a public prosecutor or a regional supervision authority than before a court.

### 2.3. International Justiciability of the Right to Education

According to Addo the two levels of justiciability – domestic and international – differ from the perspective of both institutional capacity and procedural basis. Domestic justiciability is '*usually* undertaken by the courts of law', while at the level of international law 'judicialism […] is not always necessary'. From the procedural point of view the former type – adversarial justiciability – is achieved, as suggested by the term, through a dispute of opposing parties, whereas the latter – inquisitorial justiciability – proceeds mainly through an enquiry mechanism of a monitoring (treaty) body.[167]

Regional systems of international protection of human rights are, by and large, more substantially and procedurally elaborated and are generally considered more effective than universal enquiry mechanisms.[168] Among them the European Court of Human Rights, the 'crown jewel of the world's most advanced international system

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165 See the information of the Council's official website: www.oprf.ru/en

166 On the activities of the Commission see: www.oprf.ru/1449/1512

167 Addo (1988) op. cit. 1426.

168 Addo (2010) op. cit. 226. For assessment and analysis of regional human rights mechanisms see also, inter alia, Takele Soboka Bulto: The Utility of Cross-Cutting Rights in Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples' Rights. *U. Tas. L. Rev.,* vol. 29, (2010) 142.; Tara J. Melish: 'Justice vs. Justiciability?: Normative Neutrality and Technical Precision, the Role of the Lawyer in Supranational Social Rights Litigation. *N.Y.U. J. Int'l L. & Pol.,* vol. 39, (2006–2007) 385.

for protecting civil and political liberties',[169] is perhaps the most prominent and, effectively, the only adversarial tool of international redress for Russian citizens.

According to Ingram, in relation to international law 'justiciability' is defined as the 'quality of being capable of *being considered legally* and determined by the application of *legal principles* and techniques'.[170] We can see that this definition is much more generous in terms of application – there are no institutional or procedural restrictions whatsoever, moreover, there is no reference to formalised legal norms, on the contrary, according to this definition, a matter would be considered internationally justiciable if legal 'principles' can be applied to resolve it.[171]

A somewhat narrower approach is taken by scholars to define international justiciability with reference to a particular mechanism. For example, with respect to ICESCR justiciability is defined as the possibility for domestic courts to 'take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant'.[172]

Whatever the approach, the capacity of a right to be protected on the international level is not as important *per se* as in its connection with those limitations of economic, social or political nature that undermine the right's justiciability. The limitations can also be substantial in essence. As researched in great detail by Marcus, justiciability of human rights at international level differs in scope not only for different types of rights (civil and political or socio-economic), but also for different state obligations (respect, protect and fulfil).[173] According to Marcus violations of obligations to *respect* economic, social and cultural rights were more successful in being addressed by both judicial and quasi-judicial bodies at supranational level, whereas the obligations to protect or fulfil still 'resist international judicial scrutiny' due to their well-known 'positive and progressive aspects'.[174]

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169 Laurence R. Helfer: Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime. *Eur J Int Law,* vol. 19, no. 1, (2008) 125.

170 Ingram (1994) op. cit. 354 (emphasis added).

171 For the definition of legal principles and the way they differ from legal rules and standards see, *inter alia*, Ronald M. Dworkin: *The Model of Rules*. Yale Law School, 1967.; H. L. A. Hart: *The concept of law.* 2nd ed., Oxford, OUP, 1997.; Joseph Raz: Legal Principles and the Limits of Law. *Yale. L. J.,* vol. 81, (1971–1972) 823.; Thomas R. Kearns: Rules, Principles, and the Law. *Am. J. Juris.,* vol. 18, (1973) 114.

172 Leyla Choukroune: Justiciability of Economic, Social, and Cultural Rights: The UN Committee on Economic, Social and Cultural Rights: Review of China's First Periodic Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights. *Colum. J. Asian L.,* vol. 19, (2005–2006) 31.

173 On political limitations of supranational human rights mechanisms see, for example, David Marcus: The Normative Development of Socioeconomic Rights through Supranational Adjudication. *Stan. J. Int'l L.,* vol. 42, (2006) 53., 68.

174 As asserted by Marcus the practice of international human rights tribunals supports this conclusion as the ECJ is clear on the issue that 'obligations to fulfil are beyond its judicial competence' while the ECHR has addressed positive obligations only when overlapping domestic norms provide legal cover, see Marcus (2006) op. cit. 87.

In Russia 'international treaties and agreements [… constitute] a component part of its legal system'.[175] They do not require incorporation; they have precedence over national law in cases of legal collision and are directly referred to by domestic courts even at the lowest levels,[176] as recommended by the CESCR.[177] Thus it can be argued that all dimensions of the right to education recognised at the international level and confirmed through international case law are potentially justiciable in Russia through direct reference to the treaties and their interpretation.

In Russia the right of everyone to appeal to 'international bodies for the protection of human rights and freedoms, if all the existing internal state means of legal protection have been exhausted' is guaranteed by Constitution.[178] Traditionally, the work of the European Court of Human Rights is referred to under this provision. However, the only two cases on the right to education in Russia that have been considered by the court do not provide much material for analysis.[179]

It should be noted that this constitutional norm does not limit the possibilities of Russian citizens exclusively to adversarial international protection, but also includes, potentially, quasi-judicial procedures, such as treaty monitoring bodies and complaints procedures.

Treaty bodies monitoring procedures directly affect justiciability of the right to education at domestic level by giving highly compelling, albeit not binding, recommendations to improve legal, judicial and organisational guarantees of its protection.[180] However, they do not *per se* provide a forum for appealing decisions

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175 Russian Constitution (1993) art 15(3).

176 See, for example, Tomsk Regional Court Appellate Decision No. 33-2696/2012 of 26 October 2012, concerning arrears in the payment of wages.

177 CESCR expressed their concern, *inter alia*, with poor referencing to the text of the Covenant by national courts, see para 301, Committee on Economic, Social and Cultural Rights: *Report on the Thirtieth and Thirty-First Sessions* (5-23 May 2003, 10-28 November 2003) E/2004/22 E/C.12/2003/14. Economic and Social Council Official Records, 2004. Supplement No. 2.

178 Russian Constitution (1993) art 46(3).

179 In *Timishev v. Russia* (Applications nos. 55762/00 and 55974/00, final judgment of 13 March 2006) the Court held that the applicant's children were unlawfully denied the right to education provided for by domestic law due to the fact that the right to education was made conditional on the registration of their parents' residence (para 66). In *Catan and Others v. Moldova and Russia* (Applications nos. 43370/04, 8252/05 and 18454/06, judgment of 19 October 2012) Russia was held accountable for the violation of the applicants' rights to education on the contested territory of Transdniestria due to the fact that Russia exercised effective control over that territory by virtue of its continued military, economic and political support (para 150).

180 See for example highly detailed concluding observations of the Committee on the Rights of the Child in the 2005 Russian report adopted at the 40th Session of CRC (12 - 30 September 2005) No. CRC/C/125/Add.5. The Committee has produced recommendations: on the right of children to take part in the administration of education (para 88) and forming of its contents (para 92) including through freedom of association (para 103); human rights (paras 90, 262) and patriotic (para 260) education at schools; prohibition from 'physical and mental' violence in education and protection of children from it (paras 168-170); administrative liability of parents for non-fulfilment of their responsibilities to provide education to their children (para 168); 'educational colonies' (para 178) and 'corrective colonies' (para 290) as specific detain facilities for juvenile criminals, 'compulsory

taken at domestic level. In other words, for the purpose of this research, a victim of violation of the right to education cannot directly apply to a treaty body to remedy the violation, but in the long run cumulative effect of similar violations communicated through NGOs or expert mechanisms may give rise to an action from a treaty body that may, in turn, affect the situation on the ground.

Some of the treaty bodies have established their own complaints procedures allowing for consideration of individual communications from victims of violations of human rights enshrined in the relevant treaties.[181] The most relevant procedure for the right to education would be the one envisaged by the Optional Protocol to ICESCR allowing consideration of individual complaints.[182] However, since the Protocol only entered into force on 5 May 2013 and Russia is not among the countries that ratified it by now, there are no relevant cases to cite. Similarly, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure has not yet entered into force, and Russia is also not among the state parties.[183]

As opposed to treaty bodies individual complaints, complaint procedure of the Human Rights Council, as established by the Institution-Building Resolution 5/1 to replace the previously existing 1503 procedure,[184] is strictly confidential and only concerns 'consistent patterns of gross and reliably attested violations of all human

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educational measures' as alternative to detention (para 292); compulsory basic general education (para 247); home education for children who cannot attend general education schools regularly (because of long-term illness, family circumstances, etc.) (para 251); the right to be instructed in one's national language (paras 254, 368); right to education of internally displaced persons and registration of migrant children with the view to providing them with access to education (para 278); access to schools in Chechen Republic (paras 286–-287).

181 Such procedures have been established under Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 United Nations, Treaty Series 171 (ratified by Russia on 1 October 1991); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, New York, 6 October 1999, 2131 United Nations, Treaty Series 83 (ratified by Russia on 28 Jul 2004); Optional Protocol to the Convention on the Rights of Persons with Disabilities adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106 (not ratified by Russia); International Convention on the Elimination of All Forms of Racial Discrimination (adopted by General Assembly Resolution 2106 (XX) of 21 December 1965) art 14; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, (1984) 1465 United Nations, Treaty Series 85 (ratified by Russia on 3 Mar 1987) art 22; International Convention for the Protection from Enforced Disappearance, New York, 20 December 2006 Doc.A/61/488. C.N.737.2008. TREATIES-12 of 2 October 2008 (not ratified by Russia) art 31.

182 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, New York, 10 December 2008, adopted by General Assembly resolution A/RES/63/117, Doc.A/63/435; C.N.869.2009.TREATIES-34 of 11 December 2009.

183 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure adopted at the sixty-sixth session of the General Assembly of the United Nations by resolution 66/138 of 19 December 2011. In accordance with article 19(1) the Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.

184 Economic and Social Council Resolution 1503(XLVIII) of 27 May 1970 on Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms adopted at 1693rd plenary meeting.

rights and all fundamental freedoms' communicated by individuals and / or civil society.[185] A number of individual communications from different countries resulted in serious and immediate action of the Human Rights Council, including passing of country-specific resolutions, urgent debates, establishing of country mandates of special procedures.[186] However, this complaint mechanism still remains a process behind closed doors unavailable for analysis.

Effectively, the complaint procedure is more focused on cooperation with the states aiming at improving a particular human rights situation rather than on resolving individual issues. Thus, it affects the justiciability indirectly, by calling the states to attest their accountability for gross human rights violations and to adopt legislative, judicial and organisational measures accordingly.

As a part of their mandates some special procedures of the Human Rights Council receive communications, for which they are entitled to react with urgent appeals and letters of allegations. The Special Rapporteur on the right to education in his or her work takes into account 'information and comments received from Governments, organizations and bodies of the United Nations system, other relevant international organizations and nongovernmental organizations'.[187]

However, the number of communications regarding the right to education sent to the states by the Special Rapporteur remains consistently low. In 2013 only one communication has been sent (compared to an average of 40 for each mandate covering torture, human rights defenders, freedom of expression and freedom of assembly sent in the same period by the respective special procedures). In the previous five years the rate remained consistent: 39 communications on the right to education against an average of 1,100 of the same categories.[188] In the last three years the Special Rapporteur has not sent a single communication to Russia concerning the right to education.[189] However, this situation is in line with general lack of cooperation with this mandate on the part of Russian government.[190]

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185 Human Rights Council Resolution 5/1 of 17 June 2007 'Institution-building of the United Nations Human Rights Council', para 85.

186 For the full list of actions taken by the Council see List of Situations Referred to the Human Rights Council under the Complaint Procedure since 2006. www.ohchr.org/Documents/HRBodies/HRCouncil/SituationsconsideredHRCJan2013.pdf

187 UN Commission on Human Rights resolution 1998/33 of 17 April 1998, Question of the Realization in All Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems which the Developing Countries Face in their Efforts to Achieve these Human Rights para 6 (a) (i) to (viii).

188 Communications report of Special Procedures: Communications sent, 1 March 2013 to 31 May 2013; Replies received, 1 May to 31 July 2013, A/HRC/24/21 of 22 August 2013.

189 See communications reports of Special Procedures 2011–2013: www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx

190 Special Rapporteur on the right to education has not been able to secure a country visit to Russia for the whole period of time since the mandate's establishment in 1998, and Russia is not listed among the countries that provide standing invitation, see Special Procedures Standing Invitations: www.ohchr.org/EN/HRBodies/SP/Pages/Invitations.aspx

## 3. Conclusion

It is clear that international cooperation in all multiplicity of its methods – from interactive dialogue, capacity building and awareness-raising to monitoring compliance with international obligations – is a powerful tool that can be used to enhance domestic justiciability of all human rights, including the right to education. Inevitably, the effectiveness of this important instrument is often curtailed by political attitudes. Unwillingness to accord appropriate significance or visibility to recommendations issued by treaty bodies or special procedures is often explained by such categories as 'national interests', 'state sovereignty', 'legal culture', 'particularities of the legal system' or even by imperfection of human rights situation in other countries.

Such a defensive attitude does not make allowances for taking into account concrete indications of gaps of protection detected by international experts, whereas a somewhat more pragmatic approach to the results of thorough investigation of the state's legislation and factual situation would build up political assets of the state and, which is more, be beneficial to its citizens. Although study of these attitudes and their effect on realisation of human rights are not in the ambit of the present research, they deserve a dedicated close attention.

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CURRENT ISSUE

# ON THE VOCATION OF A CATHOLIC UNIVERSITY IN THE DECLINE OF THE MODERN AGE

*Address at Pázmány Péter Catholic University, on the occasion of the conferral of a doctorate honoris causa March 27, 2017*

Paolo G. Carozza
Director, Kellogg Institute

Magnificent Rector, honorable Deans, other distinguished guests, colleagues, and friends, it is a great and unmerited honor to be welcomed into your scholarly community, and to be so warmly received at Pázmány Péter Catholic University, and indeed in Hungary as a whole on my first visit here.

I had the privilege of being introduced to your beautiful country with a visit to the Benedictine Archabbey of Pannonhalma. The millennial Archabbey stands as a living monument to constancy and clarity through the centuries and across many ages of great upheaval in these lands. It has been able to do so because the basic goal of the Benedictine monastic communities, as Pope Benedict XVI put it, has always been to seek God, *quaerere Deum*. According to Pope Benedict, "Amid the confusion of the times, in which nothing seemed permanent, they wanted to do the essential – to make an effort to find what was perennially valid and lasting, life itself.… They wanted to go from the inessential to the essential, to the only truly important and reliable thing there is".[1]

This University, too, was born in a turbulent era. I was fascinated to learn how it was founded out of Archbishop Péter Pázmány's desire to respond to the concrete needs and realities of his time, in an age of political occupation and religious division. Your University has had to continue that mission over five centuries that have seen the rise and fall of empires and the ebb and flow of extreme tides of ideological, cultural, and political tumult.

[1] Pope Benedict XVI, Address at the Collège des Bernardins, 12 September 2008.

In looking at the world around us with eyes of realism it is difficult not to conclude that we are again living in times of momentous upheaval, of confusion and instability. Politically, demographically, socially, culturally, intellectually, morally, the ground is sliding beneath our feet. What were the certainties of centuries are crumbling before our eyes into a million fragments, so that what seemed yesterday to be solid rock has today become shifting sand. Perhaps (though one can never really know except in hindsight) we are in the midst of a transformation of epochal proportions. Where can one stand firm on such sliding surfaces, today? How can we be sure of anything? How do we go from the "inessential to the essential", to find what is "perennially valid and lasting, life itself"?

In considering this challenge, I cannot help but observe that the origin of Pázmány Péter Catholic University was rooted in its founder's zealous contestation of the Protestant Reformation. From that original historical mandate, this University can be said to have a special mission to respond to the moral and intellectual crises of the contemporary age as well, because so many of the challenges we are facing today in the decline and crisis of the Modern era took root and grew in large part from seeds sown in the Reformation era. As Brad Gregory, the distinguished historian of early modern Europe (and my Notre Dame colleague and friend) has shown in his monumental study of the long-term consequences of the Protestant Reformation, so many of the distinguishing characteristics of contemporary life are the unintended but direct byproducts of the forces first set in motion at the dawn of the Modern age, in the Reformation's response to the failures of Medieval Christendom. Gregory documents this dynamic with depth and precision, exposing the early-modern origins of today's pervasive secularization of knowledge, of our acquisitive consumerist culture, of the reduction of reason to technocratic scientism, and of our inability to provide the foundational warrants to justify and sustain our own liberal institutions. As he puts it succinctly, "the Reformation is the most important distant historical source for contemporary Western hyperpluralism with respect to truth claims about meaning, morality, values, priorities, and purpose". The unintended result of this has been "an undesired, open-ended range of rival truth claims about answers to the Life Questions" – that is, questions "about the sort of person one *should* become and the sort of life one *should* lead, concerning what one *should* value and what one *should* prioritize".[2]

Among the many consequences of this hyperpluralism that Gregory traces over the centuries of the Modern age are two intertwined dynamics that have occupied the center of my own work in public law and human rights for two and a half decades: the conjoining of a limitless individualism with the hegemony of the bureaucratic state as the only arbiter of our common life. These two strands together can be said to characterize much of the condition of incoherence in which we find the discourse and practice of human rights today.

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[2] Brad S. Gregory: *The Unintended Reformation: How a Religious Revolution Secularized Society.* Cambridge, Massachusetts, Belknap–Harvard University Press, 2012.

On the one hand, human rights are increasingly interpreted to require the equal valuing and acceptance of every individual desire and choice, reflecting our incapacity to make any objective judgments about the good. At the extreme end of that fragmentation of the Life Questions are the conclusions that no desire can be judged to be better than another, and that the only "truth" is that there is no way to discriminate legitimately among autonomous individuals' disparate claims to their own truths.

One the other hand, we increasingly see the power of the state as the only source of cohesion in that shattered world of pluralistic claims to truth and good. Human rights empower states to intervene in every social context, but especially in order to enforce the vision of individualism gone mad.

Allow me to illustrate this dual dynamic with just one recently reported example.[3] This past week was World Down Syndrome Day. In many places, Down Syndrome adults have put together powerful appeals for the occasion, attesting to their human dignity. But last year, the French *Conseil D'État* upheld a ban on a television advertisement that showed Down Syndrome young adults addressing a pregnant woman who was considering whether to terminate the Downs fetus she was carrying (consider that nine out of ten fetuses diagnosed with Down Syndrome in France are aborted). They said to her, "Your child will be able to do many things". "He'll be able to hug you." "He'll be able to run toward you." "He'll be able to speak and tell you he loves you." According to the *Conseil D'État*, this ad risked "disturbing the conscience" of women who had aborted Down Syndrome pregnancies. And thus we end up with an understanding of human rights that requires the State to prohibit expressions urging our societies and fellow citizens to be more open and accepting of the weakest and most vulnerable members of the community, because this might "disturb the conscience" of those whose individual choices differ. Here we have extreme individualism and state control wrapped together in a symbiotic whole, where human rights increasingly become a form of authoritarian orthodoxy in favor of an ideology of autonomy that leaves no room for relationships, or for dissent.

This interdependence of hyperindividualism and the hegemony of the state can be seen as two sides of the same coin, as a single crisis of the difficulty of *belonging to one another* in the contemporary world. As autonomous individuals free of any claims of meaning or truth beyond ourselves, we are constantly told by the law and institutions of late modern liberalism that our freedom and fulfillment is to be found only in the pursuit of our own subjective desires and instincts. And yet, the elementary experience of our need to belong, hard-wired into the structure of the human person, remains whether we acknowledge it or not. The deep awareness that the horizon of our destinies lies ultimately not in what we possess and consume, or even what we autonomously choose, gnaws at us with every reduction of life to lust, money, and power. And so we are left with atomized individuals who nevertheless have a deep thirst for genuine human relationship and for meaning beyond themselves, and yet

[3] Sohrab Ahmari: Soulless Liberalism. *Wall Street Journal*, March 24, 2017.

whose capacity to belong to another has atrophied like a muscle that has never been used. And then the State steps in to claim its heightened role in maintaining our frayed social fabric.

It is no wonder, in this context, that the universality of the human person, especially in its dual structure as both individual and community, is under siege from every direction. From the political right, renewed forms of exclusive ethnonationalism appeal to that unsatisfied thirst for belonging, but in ways that threaten our openness to the stranger, the vulnerable, the other, and thus obscure our awareness of the universality of human nature and experience. On the postmodern left, endless parades of identity politics and emerging forms of post-humanism dissolve the human being into a chimera of socially-constructed or biologically-determined contingencies. Pervasive technocratic materialism provides endlessly better systems and technologies but is not capable of giving us any solutions to the human and moral dimensions of our problems.

Where, amid these powerful contemporary forces assailing the person, can anyone cultivate a self-awareness capable of uniting *both* the individual *and* the community, *both* the value of autonomy *and* of belonging, *both* freedom *and* responsibility?

We need to be able to recognize that participation and belonging in a specific community is essential to the flourishing of the individual, not only for the satisfaction of material needs but even more as the locus of meaning and culture. At the same time that particularity must not close us off to the awareness of the larger scope of our ontological belonging to the entire human family. We must find a way to retain a meaningful sense of being a specific *people*, while at same time remaining oriented toward a greater good, toward a horizon of meaning and purpose that is always beyond any specific attachment.

These are not mere abstractions. In practical terms, the challenge is manifest in our difficulty of dealing with the demands of human migration, integration, and social cohesion; with the protection and stewardship of the environment and our common home; with the need for economic systems that foster a beneficial production and exchange without vaporizing local communities or instrumentalizing and marginalizing vast numbers of people around the world. All of these challenges and others like them require us to come to terms with the universal horizon of human needs and of the common good, while at the same time understanding that the demands of hospitality and social integration, of our need for work and economic inclusion, even the breath of clean air we are able to take (or not), are all intensely local, particular, and personal. For that reason alone, the abstract universals of the Enlightenment self-evidently do not suffice to answer the challenges we face today; they are too removed from the concrete experience of individuals and communities.

And so we see that one of the most difficult yet urgent needs of today is to find ways to reconcile both the universal and the particular dimensions of human experience. How can it be the case that we can affirm universal truths within the horizons of culturally contingent realities? Or, conversely, can universal truths find varied forms of legitimate expression and instantiation amid the plurality of human communities? How can these two dimensions remain united?

The genius of human creativity already gives us suggestive affirmative responses to that question. Consider for instance the music of Béla Bartók, who gathered and gave voice to the folk songs of Hungary, united them with broader European ideas and developments, and thus expressed them in ways capable of enriching the entire world of music? Or to draw from experiences in my own discipline, consider how the great legal synthesis of Justinian, born out of the disparate laws of ancient Rome, has inspired hundreds of legal systems and centuries of juridical thought, for so many distinct human communities across time and space. Closer to our time, the Universal Declaration of Human Rights – one of the "highest expressions of the human conscience of our time", according to St. John Paul II – aimed to articulate universal principles of human dignity while still allowing deliberately for the many different contexts in which they would need to find varied expression.

Both of these legal examples, not coincidentally, achieved their universality by placing the human person at the center of their work: "it is of little purpose to know the law, if we do not know the persons for whose sake the law was made," says the code of Justinian. The Universal Declaration begins with the affirmation that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

Where, today, can we undertake the difficult but urgent, task of creating the conditions for similar reconciliations of the universal and particular on the basis of the centrality of the human person, and not just in law or the arts but in all of our search for knowledge and our common life?

Here is where we can return to the vision of Archbishop Péter Pázmány. In his time, he faced the dual challenges of the Reformation, which fragmented the universality of the world of Christendom, and of the occupation of Hungary by the Ottoman Empire, which threatened to destroy the rich intellectual and moral identity of its people. He was concerned with *both* the universality and coherence of truth, beyond individual or nation, and *also* with the invaluable distinctiveness of concrete human experience that his (and every) culture embodies. His response was to found a *university*, which he would have understood paradigmatically as dedicated to the unity of knowledge. There, the universal and the particular can meet, and the affirmation of a specific moral and intellectual tradition can seek harmony with the universal horizon of the good, the true, and the beautiful.

Today, we are facing the long-term, unintended detritus of the same era of which Péter Pázmány stood at the threshold: a world of hyperpluralism, where universality is in retreat everywhere and where at the same time the pulverizing forces of globalization and technocracy threaten the distinctiveness of every particular cultural expression. Following the example of Péter Pázmány, our most fundamental response should be in the renewal of education, an education in which we aspire to overcome both the fragmentation of the person and the fragmentation of the knowledge of reality, which are in the end one and the same.

Of course, in our era most institutions of higher education have abandoned even the aspiration or ideal of a unity of knowledge; they are multiversities rather than universities. That is even more reason why *Catholic* universities bear a special

vocation in the modern world. They have crucial resources to bring to the problem I have outlined. The Catholic tradition embraces the distinctiveness of belonging to a people, while also affirming that the moral universality of the human person cuts across all ties of blood and politics and history. The Catholic tradition envisions, without paradox, the harmony of a universal common good and of subsidiarity as a fundamental principle of social order. In the past century Catholicism has been one of the principal institutional advocates for the dignity of all human beings as an ontological reality, and yet also defends the distinctiveness of cultures, recognizing that our capacity to honor human dignity only takes visible shape in concrete communities, relationships, and histories. And most of all, perhaps, the role of the Church has always been to respond to the specific needs of men and women in time, but to do so by reminding them and educating them to seek the ultimate meaning that is present in every fragment of reality – what is "perennially valid and lasting", to return to where I began with the Benedictines of Pannonhalma. If individual and community are two essential dimensions of the human person, then transcendence is the third. Indicating, from within our experience of this world, the Mystery beyond the horizon of our vision is like using the method of linear perspective in art, which provides depth and solidity in a painting by pointing to the vanishing point beyond its two-dimensional plane. Without it, our humanity remains flattened and lifeless.

These are, I believe, some guideposts of our vocational paths as faculty members of a Catholic university. In their institutionally embodied ambitions and responsibilities, your university and mine share a deep common friendship and affinity of purpose.

Allow me to conclude, however, with only one cautionary note. To speak of the distinctive vocation of a Catholic university in the decline of the modern era should not be understood as a form of triumphalism, but as a form of *service*. Like all service it can only be done with humility – in this case, the humility of being aware that we do not and cannot ever possess the truth but only can allow the truth to possess us.[4] We must follow where it will lead, and thus not merely rest on the categories of the past but accept that the Spirit will always press us toward newness of life. As Pope Francis has repeatedly and urgently reminded us, service is done at "the peripheries, not only geographically, but also the existential peripheries: the mystery of sin, of pain, of injustice, of ignorance and indifference to religion, of intellectual currents, and of all misery".[5] There, with a radical openness to the truth, and in all the particularity of an unexpected encounter, we may find ourselves surprised by the mystery of the human person and by the unity of reality.

For this reason above all, more than for any honor received, I am grateful for the gift of my encounter with you today.

*Nagyon szépen köszönöm!*

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4 Cf. Pope Benedict XVI, Address to the Roman Curia, Friday, 21 December 2012.

5 Pope Francis, intervention during the pre-Conclave General Congregation meetings of the Cardinals, 9 March 2013.

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# STATE PROMOTED CARTELS AND OTHER STATE RELATED COMPETITION RESTRICTIONS

The following papers focus at the intersection of private and public competition restrictions. There are various state measures which can distort free competition through promoting or approving private anti-competitive arrangements. Some of these cases relate to self-regulatory activities undertaken by boards, or associations of undertakings. The papers focus on how the EU Court of Justice has developed its case law to reach out to anti-competitive state measures, and how national authorities and domestic competition laws deal with mixed infringements, that is where the anti-competitive conduct was influenced by public measures. The topics covered by the papers also raise important questions about the relationship and even conflict of competition and consumer protection with various other public policies. To provide a comparative Trans-Atlantic perspective, we also include a paper summarizing the U.S. Supreme Court's most recent judgment in this field.

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# THE SHADOW OF THE STATE: ANTITRUST LIABILITY AND STATE ACTION IN THE EU AND THE U.S.

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## 1. Introduction

In February 2015, the U.S. Supreme Court affirmed a Fourth Circuit decision, which upheld a Federal Trade Commission decision finding a state licensing board liable for Sherman Act infringements.[1] A couple of months prior, the EU Court of Justice[2] ruled that Italy infringed EU law obligations by delegating the power to fix minimum tariffs of road haulage services for hire and reward by API, a committee composed of a majority of representatives of the economic operators. A couple of years ago, the Hungarian agricultural government actively encouraged the joint setting of minimum prices for watermelon by associations of producers and supermarket chains. Even though the Hungarian Competition Authority opened an investigation, it was terminated soon after due to a lack of public interest. The competition watchdog

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1 *North Carolina State Board of Dental Examiners v. FTC*, 717 F.3d 359 (4th Cir. 2013). See Aaron Edlin – Rebecca Haw: *Cartels by another name: should licensed occupations face antitrust scrutiny?* (explaining that this was the only appellate court case to expose a licensing board to antitrust scrutiny and urging the U.S. Supreme Court to take this opportunity to hold boards composed of competitors to the strictest version of its test for state action immunity, regardless of how the board's members are appointed).

2 Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 *Anonima Petroli Italiana SpA v. Ministero delle Infrastrutture e dei Trasporti, Ministero dello Sviluppo economico,* 4 September 2014, not yet published, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=157343&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=296150.

studied that in the course of the competition law procedure, the Parliament adopted an act introducing a sort of agricultural cartel exemption with a retroactive effect.[3]

These recent cases demonstrate that state and private competition restrictions can be closely connected on both sides of the Atlantic. Hybrid cases,[4] involving agreements and decisions of undertakings that would violate antitrust rules, and corresponding state actions give rise to various challenging legal issues. States may rely on private actors to pursue economic or social policy objectives, thus they may encourage, support or approve market conduct that would normally be condemned as a cartel. The state may also decide to authorize a chamber or other association of undertakings to regulate market entry, quality of services or prices. In this paper I focus on how state involvement may impact corporate and individual antitrust liability. I will identify the state measures that may create immunity for companies and the measures that are considered as mitigating circumstances, reducing the extent of the responsibility of private actors.

The issues covered in this paper are closely linked to the theory and practice of *corporatism*. Several Western states employed corporatist elements to mediate conflict between businesses and trade unions.[5] Corporatist theory is also invoked when representatives of a profession seek state approval to self-regulate the activities of its members, allegedly serving the public interest, just like guilds in the medieval period. Wolf Sauter notes that this system, usually associated with liberal professions, is attractive because the rules are enacted and enforced by experts, allowing for minimal formal state intervention at minimal cost. However, he also warns that the idea of collective representation is essentially antidemocratic, in as much as private interest groups adopt rules with semi-public functions instead of the vote of individual citizens represented by political parties.[6] Public choice theory suggests that rules adopted and enforced by interest groups tend to benefit the members of that group while allocating the costs of the regulation to society as a whole.

State related anti-competitive actions involve a wealth of legal and policy issues. Therefore, I find it useful to state which aspects I will not address in this essay. I

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[3] Case Vj-62/2012, decision of the Competition Council of Act No. CLXXVI of 2012 adopted on November 19 amending Act CXXVIII of 2012 regulating the conduct of professional associations in the agricultural sector. For a short summary and evaluation, see: Pál Szilágyi: Hungarian Competition Law & Policy: The Watermelon Omen. *Competition Policy International – Antitrust Chronicle*, 10/2. (2012) 2–5.; Tihamer Toth: The fall of agricultural cartel enforcement in Hungary. *European Competition Law Review*, 34/7., (2013) 359–366.

[4] By `hybrid cases` I refer to cases where there are two connected actions, one on the side of a state entity, the other by a group of undertakings. In theory, especially in the EU, both the state and the companies could be held liable.

[5] *Encyclopedia Britannica*, http://www.britannica.com/EBchecked/topic/138442/corporatism. Wolf Sauter defines "private interest government, is a term of art in political science that refers to a form of organisation of society where industry bodies (formerly organisations of craftsmen, such as the guild system) play a crucial role in, first, setting rules that apply to their members (and that restrict membership), and second, acting in the public interest." Wolf Sauter: *Containing corporatism: EU competition law and private interest government*. http://ssrn.com/abstract=2550643.

[6] Ibid at 2.

do not intend to cover legal challenges available to attack the state measure itself[7] or the separate antitrust liability of public companies.[8] It is thus not the subject of this paper to look into the liability of states themselves under EU competition[9] or free movement rules,[10] under the WTO regime,[11] or to a lesser extent, under U.S. constitutional law,[12] or to consider the exact scope of the state action doctrine.[13] The

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7 See for example Marek Martyniszyn: *Avoidance Techniques: State Related Defenses in International Antitrust Cases*. 4–5. (quoting cases where U.S. courts accepted or refused to acknowledge foreign states as persons falling under Section 1 of the Sherman Act), available at: http://ssrn.com/abstract=1782888. Also, Spencer W. Waller: Suing OPEC. *U. Pitt. L. Rev.,* Vol. 64., 2002. 105. (arguing that a case against the output restricting OPEC members could be successful, as the US courts have become more focused over time on the nature of the activities when dealing with cases implicating foreign states).

8 Public ownership is not a valid antitrust defense. Publicly owned undertakings come under the scope of competition rules on both sides of the Atlantic. In one notable case the U.S. Supreme Court refused to treat the U.S. Postal Service, lacking separate legal personality, as a 'person' under Section 2 of the Sherman Act: Postal Serv. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736 (2004). In Europe, the Commission also found Eastern European public undertakings liable in the case of Aluminum imports (85/206/EEC: Commission Decision of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty, IV/26.870 – Aluminum imports from Eastern Europe, OJ L 92, 30.3.1985, p. 1–76.). The decision was addressed, among others, to Hungarian, Polish, East German and Czechoslovakian state owned foreign trade companies. Point 9.2 of the decision explained, "Entities which engage in the activity of trade are to be regarded as undertakings for the purposes of Article 85, whatever their precise status may be under the domestic law of their country of origin, and even where they are given no separate status from the State." No fine was imposed on the companies, arguably to avoid diplomatic conflicts and lengthy court procedures.

9 Prominent Articles of the TFEU are Article 37 (commercial state monopolies) and Article 106 (granting exclusive and special rights). Furthermore, the ECJ relied on the combined reading of various provisions of the Treaties to construe a general obligation for Member States not to make antitrust rules ineffective. Unlike the U.S. Supreme Court, the EU Court of Justice developed its own impressive case law according to which, under strict circumstances, even Member State legislative measures making practical use of antitrust rules can be declared unlawful based on competition law grounds. Article 101 TFEU prohibiting anti-competitive agreements is addressed to undertakings. However, if we `mix` it with two other provisions, the result is a cocktail offered to Member States. These other necessary components of the cocktail are, first, the loyalty clause of Art. 4(3) TEU that obliges Member States to facilitate the achievement of the Union's tasks and avoid taking measures that would jeopardize these objectives. Second, Protocol No. 27 on the Internal Market and Competition annexed to TEU and TFEU provides that the EU `includes a system ensuring that competition is not distorted` (before the Lisbon Treaty, the same 'non-distortion' aim was clear from Article 3(g) EEC, later Article 3(1)g) EC).

10 The free movement articles of the TFEU can also be used to challenge anti-competitive state measures (i.e., Article 34 relating to goods, Article 49 on freedom of establishment and Article 56 on the free provision of services).

11 The instruments of the World Trade Organization do not address the issues of anti-competitive practices arising from private conduct, even if they are supported, and encouraged by states.

12 *Interstate* protectionism is illegitimate under the dormant commerce clause. Herbert Hovenkamp: Federalism and Antitrust Reform. *U.S.F.L. Rev*., Vol. 40., 2006. 627., 646.

13 The act of state doctrine should not be confused with the state action doctrine. Although both can be used as a defense in cases brought against private parties, the application of the act of state doctrine does not turn on the identity of the defendants, or on a showing of compulsion. Act of state issues arise

paper does not cover statutory immunities that exempt a whole industry, an economic sector or some specific conduct from the reach of antitrust laws either.[14] Instead, my aim is to focus on cases which, absent state influence, would fall under the scope of regular competition rules and to inquire to what extent undertakings can defend themselves with state actions. In other words, when and how can they rest peacefully in the comforting shadow of the state, escaping the heat around.

In the first part of the paper I set out the various legal standards applicable under EU and U.S. laws.[15] We see that both the EU and the U.S. rely on case law based legal tests instead of well-structured legislation. States seem not to favor adopting clear-cut rules that tie their hands. The European Court of Justice (hereinafter: the ECJ) acknowledged that states can use undertakings, especially public ones, to implement their economic policies, particularly under Articles 37 and 106 TFEU. We will discuss how the *Parker* doctrine can be invoked by potential cartels in the U.S.

In the second part of the paper I present how these various legal standards are applied in practice by looking at a number of typical scenarios. *Hybrid cases* are common with regard to various boards, chambers and other quasi-public gatherings of professionals regulating entry conditions and fair business conduct. Affected markets involve, for example, dentists, lawyers and transporters. In some markets, state intervention is necessary to keep markets working properly. The state regulates conduct that would otherwise be a natural candidate for an antitrust investigation. Dicta in the U.S. *Trinko* case[16] makes it easier for dominant companies to escape antitrust liability, which is in sharp contrast with the approach of the European Commission and European courts. The relevance of the U.S. `filed rate` doctrine, giving safe haven to unilaterally charged prices by dominant companies rather than collective actions by competitors, will also be highlighted.

This paper will conclude that just like U.S. states themselves,[17] U.S. companies benefit from wider protection than their European competitors when their action is

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when a court must decide upon the effect of official action by a foreign sovereign. See: Waller (2002) op. cit. 105. Furthermore, the act of state defense is invoked in international litigation, the state action doctrine is relied on in domestic litigation.

14 In the U.S., statutory exemptions relate to labor, insurance, etc. For example, under the McCanan-Ferguson Act, an anti-competitive business activity by insurance companies is exempt from federal antitrust laws to the extent regulated by state law (15. U.S.C. § 1013 (b)).

15 The temptation to write about how Hungarian law deals with this issue was almost irresistable. I decided not to include rules and practices of my own country, Hungary, so as not to confuse problems of a domestic, national legal system with those of federal, supranational legal orders.

16 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004).

17 Although the EU cannot be characterized as a state, if it were, it could be regarded as a more centralized formation than the U.S. federal system in the sense that EU competition rules impose many more restrictions on how constituent states may intervene in markets. To mention just one example, no competition rules exist in the U.S. on state aid granted to undertakings, whereas the control of state aid is one of the most important pillars of EU competition policy (Articles 107–109 TFEU). Given that the idea of free competition is more deeply embedded in American culture than in Europe, this can only be explained by a sort of `overcompensation' by EU courts reflected at the unbalanced share of powers between the European (quasi-federal) and the member state level. I submit that if more

linked to state action. This reflects a stronger reliance on the theory of federalism in contrast to the basic idea of supremacy of EU law underlying the European integration process, heading toward accomplishing a genuine single market. Apparently, EU Member States enjoy a higher level of sovereignty than U.S. states in the areas of foreign, fiscal and defense policy. This seems to come at the expense of accepting more serious constraints to the regulation of their economies. The single market project, based on the four freedoms of goods, services, capital and establishment ties the members of the family of European countries together, so it needs strict rules also against state related competition restrictions.

## 2. The shield of state action

### 2.1. U.S. and EU law on State action

State action or state compulsion involves an action by the state exercising its sovereign powers of law making or public administration. Whenever the state is acting through a public undertaking, normal competition rules apply. Both jurisdictions acknowledge the unique nature of cases where the sovereign has made its point. The involvement of government officials in a cartel-like agreement or decision may serve as an umbrella to protect from the damaging rays of the 'antitrust-sun' rays. A common feature of EU and U.S. antitrust laws is that they both developed doctrines through judicial case law to exempt business conduct connected with state action from the reach of antitrust.[18] Considering the serious nature of this issue involving important constitutional questions, this may come as a surprise.

There are also differences, though. EU law may provide full or partial immunity to undertakings, whereas the legal law consequences under U.S. law are less certain. Looking at the origins of the immunities, European immunity rules are rooted in the concept of economic activity, whereas U.S. law relies on the federalism doctrine to justify both public and private anti-competitive actions. Furthermore, we will see that the case law of the EU courts places more emphasis on the nature and intensity of state action, factors that are largely irrelevant for U.S. courts.

#### *2.1.1. EU law*

EU law allows for several defenses in cases where undertakings, subject to various degrees of state influence, act anti-competitively. A key feature of EU law is inquiring to what extent the state suppressed autonomous business decision-making. First, the state may create a *regulatory environment* where undertakings cease to enjoy entrepreneurial autonomy. Some agricultural markets may be good examples,

competence and financial resources were available at the European level, European institutions would be less inclined to exert strict control on regulatory actions by Member States.

[18] Even more striking in the statute-based EU legal system is that EU Member States have consistently failed to codify this rule, despite numerous amendments of the founding Treaty.

especially under the previous, old-fashioned EU regulatory regimes. In such a command-state scenario, economic actors would not act as genuine entrepreneurs. Instead, they would act like agents implementing the rules set by the state. Any anti-competitive impact would be the direct result of the state measure itself and not be imputed to the undertakings. Second, a similar scenario would involve the state *compelling* a certain activity, such as setting the resale prices legislatively or by ministerial decree. Again, lack of autonomous business decision may lead to full immunity under competition law. To make this complex situation even more exciting, this immunity will not apply for the future activity of the undertakings if a competition authority or a court has given a final ruling on the incompatibility of the underlying state measure under EU law. The benefits of a case law based exemption can be taken away by the decision of a law enforcer.

As far as this first category of state measures eliminating business autonomy is concerned, the ECJ clarified its position in *Ladbroke Racing*.[19] The judges noted that the EU competition rules of Articles 101 and 102 TFEU apply only to anticompetitive conduct of undertakings carried out on their own initiative. The court explained that if the conduct is required by the legislation, or if the legislation creates a legal framework eliminating competition on the part of the undertakings[20], the restrictions of competition are not attributable to the undertakings.[21] This requires the EU Commission or national competition authorities and courts to analyze the wording of national legislation to check whether undertakings are prevented from engaging in autonomous conduct leading to an anti-competitive outcome.

Being an exception to the general rule, the standard will be set at a fairly high level. *Strintzis Lines* proves that the hurdle is high for companies to avoid liability.[22] The European Commission imposed fines for collusion among ferry service companies operating between Greece and Italy. The companies argued that the regulatory framework and the official policy substantially restricted their autonomous conduct. They were obliged to contact each other to negotiate the parameters of their policies, including prices. Yet, the ECJ found that the undertakings still enjoyed some *autonomy* in setting their prices and there was no 'irresistible pressure' on them to conclude tariff agreements.

The ECJ did not elaborate on the inherent conflict between the principle of supremacy of EU law and legal certainty, also a central concept of the European legal order. Which law shall be followed? The law, often in the form of a statute of

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19 *Commission of the European Communities and French Republic v Ladbroke Racing Ltd. (Ladbroke Racing)*, Joined cases C-359/95 P and C-379/95 P [1997] ECR I-6265.

20 It is not easy to successfully argue that the regulatory framework alone is responsible for an anti-competitive outcome. In the Greek *GSK* case concerning parallel imports of medicine, the ECJ noted that, '[…] the degree of price regulation in the pharmaceuticals sector cannot therefore preclude the Community rules on competition from applying'. Joined Cases C-468/06 to C-478/06 [2008] ECR I-7139, para 67.

21 Ibid 33.

22 *Strintzis Lines Shipping SA v Commission of the European Communities (Strintzis Lines)*, Case T-65/99 [2003] ECR II-5433.

the host country, or the case law based European norm? Proponents of European federalism would argue that even if a member state measure obliges companies to establish a cartel, undertakings should disobey the national rules. The principle of supremacy of European competition rules enshrined in the founding Treaty shall win the battle. EU sceptics would defend national rules by recalling the principle of legal certainty. The ECJ confronted this issue more in depth in the Italian *CIF* case involving the regulatory framework of the Italian match industry.[23] Italian matchstick makers argued that their market quota allocation practice, raising entry barriers to other European companies, was the result of government regulation. The Court ruled that a national competition authority could indeed investigate the conduct of undertakings even if the cartel is the consequence of unlawful domestic legislation.[24] Such legislation must be disused not only by national judges, but also by national regulatory and competition authorities.[25] Yet, balancing general principles of EU law, primacy[26] and legal certainty, the ECJ admitted that this duty to disuse anti-competitive law cannot expose the undertakings concerned to any criminal or administrative penalties with respect to past conduct if the conduct was *required* by the law.[27] However, the primacy of EU law prevails for the foreseeable future. This means that once the national competition authority finds an infringement of Article 101 TFEU and disapplication of the anti-competitive national law becomes definitive, national law no longer shields the companies involved.[28] Put differently, their autonomy is re-established and released from the imperative will of the state.[29]

A second category of state action is when the state measure merely *authorizes or promotes* a given activity. Here, undertakings can be held liable but could invoke state action as a significant mitigating circumstance when it comes to levying fines. This happened, for example, in Hungary during the hot summer of 2012. The State Secretary of the Rural Development ministry acknowledged that he participated in

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23 C-198/01 *Consorzio Industrie Fiammiferi (CIF) and Autoritá Garante della Concorrenza e del Mercato* [2004] ECR I-8079.

24 As previously noted, EU rules prohibit member states from adopting measures that would make EU competition rules ineffective. Consequently, both private and public actions can be deemed unlawful.

25 Id. para 51. The act of 'disapplication' by an authority or a judge may result in legal uncertainty since the legislation found to infringe EU law formally remains in force as long as the national legislature decides to withdraw or amend it in line with national legislative procedures.

26 In the U.S. context, see *Cooper v. Aaron*, where the U.S. Supreme Court explained that federal law prevails over state law due to operation of the Supremacy Clause, and that federal law, "can neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes […]" 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958). The Court held that states are also bound by decisions of the U.S. Supreme Court as precedence.

27 The Court confirmed that if a national law merely encourages, or makes it easier for undertakings to engage in a cartel, those undertakings remain subject to EU antitrust rules and may incur penalties, including with respect to conduct prior to the decision to disapply the national law. Para 56.

28 Ibid. para 55.

29 One issue with this ruling is the confusion created in regard to the potential *erga omnes* effect of a judgment. Put differently, companies not involved in the administrative or judicial procedure, yet subject to the anti-competitive piece of legislation, may still argue that they are shielded from liability.

a cartel in the best interest of watermelon producers. The Ministry's goal was to increase the size of land where watermelon is cultivated and secure a 15–20% profit margin for farmers.[30] According to the GVH investigation, the Ministry hosted a meeting between representatives of watermelon producers and supermarkets in order to set a minimum retail price of HUF 99/kg and exclude imported watermelon from the shelves.

Another defense for a private entity involved in rulemaking or administration is to point out the *public nature* of its activity. The scope of EU competition rules covers only economic activities. Public measures, even with an economic impact, fall beyond the reach of competition rules. Even if corporations are entrusted with the implementation of environmental protection rules or monitoring the air, their action will be immune from antitrust rules. For chambers established by a statute, or for hybrid commissions with both public officials and representatives of corporations on their board, the blurring distinction between what is public and private will be an essential part of their defense. The composition of these bodies, the factors they are required to consider, and the veto or supervisory rights of the government are all important elements in the evaluation of whether the actions of a body like this are of a public nature or pursue profit motivated private goals.

This category of cases often involves unilateral actions potentially infringing Article 102 TFEU, or cartel-like rules set by associations. In the 1980s when predominantly publicly owned undertakings provided telecommunication services, these entities often enjoyed public law status and often combined rule-making with the provision of services. For example, the ECJ rejected the application of the Italian government against a Commission decision finding the activities of British Telekom (BT) unlawful under the equivalent of the current Article 102 TFEU.[31] At that time, BT was a statutory corporation established under the British Telecommunications Act and owned by the state. BT had a duty to provide various telecommunication services as the holder of the statutory monopoly for running telecommunications systems in the United Kingdom. BT also had the right to exercise rule-making powers setting charges and conditions by means of schemes published in official gazettes. Some of these schemes were designed to prevent private message forwarding agencies from entering the BT monopolized market. The Commission argued that the schemes performed the same function as contractual terms, and were freely adopted by BT without any intervention on the part of the United Kingdom authorities.

There were other cases where the Court did not hesitate to refuse challenges against high fees qualifying the activity as public by its nature. *Eurocontrol* concerned allegedly abusive fees charged for the provision of services involving the supervision

[30] See the reports of the daily *Népszabadság* and online portal *Index*: http://index.hu/gazdasag/magyar/2012/08/13/budai_kartelleztunk_es_akkor_mi_van/. Later, he refused to use the term "cartel", but did acknowledge that he invited supermarkets not to sell Hungarian watermelon at dumped prices and not to import the fruit from abroad.

[31] Case 41/83 *Italy v Commission ("British Telecom")* [1985] ECR 873. Remarkably, the Commission decision challenging the state of play in the UK was challenged by the Italian government seeking to maintain its similar institutional setup and not by the UK.

of air space. Since the ECJ held that these activities by their nature were connected to functions of public authority, the competition rules of the treaty designed to address restrictions arising from economic activities could not be applied.[32] Eurocontrol was a public body, regulated by international agreements, which was not the situation for an undertaking registered in Italy as a private corporation that provided environmental protection services in the international port of Genoa for a fee. In *Diego Cali* the ECJ held that SEPG was entrusted with duties that belong in the public authority sphere and so `clients` could not challenge the fees under antitrust rules.[33]

In addition to pointing out the intensity of state intervention or the public nature of activity, undertakings and their associations may also argue that their rule-making activity was *necessary for the proper functioning* of their business or profession. *Wouters* was the first case where the ECJ acknowledged that there are restrictions adopted by an association of undertakings that can be justified under Article 101 (1) instead of the efficiency based exemption provisions enshrined in Article 101 (3).[34] This judicial ruling acknowledges that restrictions exist that are necessary for the proper functioning of a market that restrict free, autonomous market conduct without directly being related to efficiencies.[35] Under this *Wouter* formula, undertakings would not dispute the autonomous or economic nature of their activity. Rather, the emphasis is on the unavoidable necessity of the restriction so that it should not be interpreted as a restriction of competition. The state is involved by establishing a chamber and authorizing the chamber to adopt rules that govern the market activity of its members. In fact, these rules, often intended to maintain the integrity of a profession, could have or should have been adopted by the government itself.

Finally, for the sake of completeness, I mention Article 106 (2) TFEU, which provides a specific exception for undertakings that perform a *service of general economic interest* from infringing competition rules. This defense is not frequently used as it is difficult to prove all the elements of this provision. The undertaking should be expressly entrusted with an activity that involves a genuine public service. The second part of the test is that the undertaking be un able to fulfill its mission

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[32] C-364/92 *SAT Fluggesellschaft v. Eurocontrol* [1994] ECR I-43.

[33] C-343/95 *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [1997] I-1547.

[34] Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577. The Court also applied this reasoning in *Meca Medina* in connection with the Olympic sports doping rules: C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-7006.

[35] The only problem is that the text of Article 101 does not foresee such a category of exemption. Arguing that a restriction like this amounts to an anti-competitive restriction that is justifiable because of its necessity is an extremely vague and somewhat contradictory effort to circumvent the textual limitations of EU competition rules. I suggest that a somewhat less contradictory approach would have been to label these cases as having neither an anti-competitive aim nor effect. A restriction that is absolutaly necessary to the rules of the game is a pre-requisite for that market to exist and not really a restriction of autonomous business conduct.

laid down by the member state.[36] Finally, the restriction of competition should not go against the interests of the common market.

I should note that under EU law, the form of the manifestation of the state will does not seem to matter. It is certainly much more straightforward to prove state compulsion if a legislative or regulatory act is present, but it is not a pre-requisite to establish the lack of liability of the undertakings concerned. In *Asia Motors III,* the ECJ held that Article 101 should not apply if the conduct was imposed by the authorities through the exercise of `irresistible pressure'.[37]

### *2.1.2. U.S. law*

On the other side of the Atlantic, the U.S. Supreme Court has long held that anticompetitive action by state governments and private conduct[38] in compliance with that measure are immune from liability under the Sherman Act.[39] The state-action doctrine provides antitrust immunity if the state's intent to displace competition with regulation is "clearly articulated and affirmatively expressed as state policy".[40] For non-public actors, the state should also establish a mechanism to ensure that private interests do not interfere with the public ones. The test examines whether the private party's anticompetitive conduct promotes state policy rather than merely the party's individual interests.[41]

The leading authority is *Parker v. Brown*, 317 U.S. 341 (1943) involving a raisin cartel sponsored by the State of California in response to a crisis caused by the oversupply of raisins. To put this case into an integration perspective, some 95% of California raisins were sold in interstate or foreign commerce, meaning that California essentially shifted the costs of the market protection measure to consumers outside of California. There does not seem to be much impact on relations between states in the EU or the U.S. Interestingly, the measure was not challenged by a foreign importer but by a Californian raisin producer arguing that the scheme was a conspiracy in violation of Section 1 of the Sherman Act. The plaintiff sued the director and members of the California state advisory committee. The prorate zone was proposed by producers and the prorate program was approved by raisin producers but it was the State of California, acting through a commission, that adopted and enforced the program.

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36 Due to space constraints, I will not deal with this unique defense category in much detail in this paper.

37 *Asia Motor France SA and others v Commission of the European Communities (Asia Motor III)*, Case T-387/94 [1996] ECR II-961.

38 Since Section 1 of the Sherman act is addressed to 'any persons,' a category wider than the concept of 'undertaking' applied in Article 101 TFEU, the American state action doctrine also encompasses actions by state or local government officials.

39 *Parker v. Brown,* 317 U.S. 341 (1943). The U.S. Supreme Court held at 351 that,`[t]here is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only »business combinations«`.

40 *Cal. Liquor Dealers v. Midcal Aluminum, Inc*, 445 U.S. 97, at 105 (1980).

41 *Patrick v. Burget*, 486 U.S. 94, at 101 (1988).

The *Parker* Court ruled that the U.S. Congress did not intend for the Sherman Act to preempt state economic regulation, "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[42] The Court could also point out that there was no contract, agreement or conspiracy under Section 1 of the Sherman Act. Actually, it was the State's action that made such conspiracy superfluous. Even though the marketing program for the 1940 raisin crop eliminated competition among producers with respect to the terms of sale, including the price, of the crop and to impose restrictions on the sale and distribution to buyers who subsequently sell and ship in interstate commerce, this regulation of state industry was held to be of local concern not prohibited by the commerce clause in the absence of Congressional legislation.[43]

Antitrust is influenced by state sovereignty and federalism. Under the Tenth Amendment of the U.S. Constitution,[44] the powers not delegated by the Constitution to the federal government remain in the competence of states. The United States Constitution grants the sovereignty of each state. The authority to regulate their economies is among the powers not delegated to the federal government, as long as such economic regulation does not unduly impede interstate commerce.[45] Judge Kennedy's recent opinion in *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. (2015) recalled that federal antitrust law is a central safeguard for free-market structures. However, there are other values regulated by states at the expense of the Sherman Act. State-action immunity exists to avoid conflicts between state sovereignty and the national commitment to a policy of robust competition.[46] The Court cited *FTC v. Phoebe Putney Health System, Inc.*, 133 S.Ct. 1003 (2013) and *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621 (1992) in warning that the immunity is not unbounded, "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'"[47] This comes close to acknowledging the supreme nature of free markets and competition. Exceptions to the competition principle should be clearly expressed.

The proper definition of "state" and thus the scope of the exception has been the subject of controversy. The U.S. state action doctrine first applies to state

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42 *Parker v. Brown,* at 359.

43 *Parker v. Brown*, at 368.

44 The Tenth Amendement, as part of the Bill of Rights, was ratified on December 15, 1791. The Court reasoned in *Parker v. Brown* that, "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." Ibid. at 351.

45 New York v. U.S. 505 U.S. 114 (1992).

46 *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U. S. (2015).

47 Id. *(*slip op.) at 7 [citing *FTC v. Phoebe Putney Health System, Inc.*, 568 U. S.,133 S.Ct. 1003 (2013) quoting *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, at 636 (1992)].

governmental persons and governments themselves who are generally immune from antitrust liability without further inquiry. The Court explained that "[w]hen the conduct is that of the sovereign itself [...] the danger of unauthorized restraint of trade does not arise." The doctrine also covers quasi-governmental entities, like cities and other municipalities, regulatory boards and private actors, but they need to pass a two-prong test. The two-prong test is also applied to hybrid cases subject to this essay.

### Clearly articulated state policy

The seminal *Parker v. Brown* decision focused on the liability of the state and its officials and the Court did not need to resolve the question to what extent state mandated private action can be shielded from antitrust laws. The Court developed the two-prong test in *Cal. Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).[48]

The first prong is "clear articulation." This prong ensures that the state has clearly authorized departures from the principles of free-market competition. The second prong of the test is called "active supervision," which is intended to ensure that state action immunity covers only the particular anticompetitive acts of private parties that actually serve state regulatory policies. Overall, the state action doctrine makes clear that a properly adopted and thoroughly supervised regulation preempts federal antitrust policy and creates immunity for companies.

A general grant of authority to set prices or acquire other entities does not appear to meet the clear articulation prong of the test. In *Community Communications Inc., v. City of Boulder*, 455 U.S. 40 (1982), the U.S. Supreme Court emphasized that a general grant of authority is not equal to an authorization to engage in specific anticompetitive conduct.[49] Yet, in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Court decided that giving cities the authority to decide where to provide sewage services foreseeably included potentially anticompetitive conduct in the form of refusing to serve.[50] This low standard for foreseeability led to many cases exempting companies from the reach of antitrust law. In *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), the Fifth Circuit held that when the legislature authorized the hospital to contract with any individual for the provision of kidney dialysis services a subsequent exclusive contracts cannot be subject to antitrust laws, because the alleged anticompetitive exclusive agreement was foreseeable.[51]

Clear articulation does not require that the state *compels* the anticompetitive conduct at issue. In *Southern Motor CarriersRate Conference, Inc. v. United States* 471 U.S 48 (1985), the Supreme Court reasoned that a state legislative decision to set rates through a public service commission, rather than through free market forces,

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48 *Cal. Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

49 *Community Communications Inc., v. City of Boulder*, 455 U.S. 40, at 56 (1982).

50 *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, at 41–43 (1985).

51 Martin v. Memorial Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996).

clearly demonstrated its intention to displace competition in motor carrier ratemaking and satisfied the first requirement.[52] The absence of compulsion does not mean that there is a lack of state policy. U.S. law is more permissive than the EU in this regard. Under EU law, permission to restrict competition does not result in immunity. Since the autonomy of undertakings was only limited and not eliminated, they are liable under Article 101 TFEU.

One challenge with the state action doctrine is that some lower level courts extensively apply the doctrine, exempting government officials and undertakings from the reach of federal antitrust laws.[53] The Antitrust Law Section of the American Bar Association (ABA Antitrust Section) warned that, "[s]tate action immunity drives a large hole in the framework of the nation's competition laws."[54] The Federal Trade Commission also urged courts to clarify and re-affirm the original purposes of the state action doctrine to help ensure that robust competition continues to protect consumers.[55] Hebert J. Hovenkamp warned that inferring immunity from the mere grant of otherwise ordinary corporate powers would disserve principles of federalism as well as competition policy.[56]

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52 *Southern Motor CarriersRate Conference, Inc. v. United States* 471 U.S. 48, at 60 (1985).

53 A. M. Dively notes that, "the elusive contours of the doctrine have caused circuit splits and overbroad application that threatens to subvert the goals of both federalism and competition". She analyzes the United States Court of Appeals for the Eleventh Circuit decision in *Federal Trade Commission v. Phoebe Putney Health System, Inc.* as an example of misapplication of state action immunity. The case was about a merger between private hospitals under an allegedly "sham" authorization by the state hospital authority. The district court held the combination of the authority's power to acquire and lease hospitals, to operate on a nonprofit basis, and to operate hospital networks demonstrated that Georgia's legislature "intended to guarantee that hospital authorities could accomplish their mission of promoting public health regardless of the potential anticompetitive effects". In *FTC v. Phoebe Putney Health Sys., Inc*., 663 F.3d 1369, 1378 (11th Cir. 2011) the appellate court affirmed the district court's ruling that because the Georgia Legislature clearly articulated the intent to empower county hospitals to engage in anti-competitive activity, the Hospital Authority of Albany–Dougherty County's proposed acquisition of its only competitor was protected under the state action doctrine. *Phoebe Putney Health Sys., Inc*., 663 F.3d 1369. In: Angela M. Dively: Clarifying State Action Immunity under the Sherman Antitrust Laws: FTC v. Phoebe Putney Health System. *St. Thomas Law Review,* Vol. 25., 2012. 74. Since then, the U.S. Supreme Court agreed with the Federal Trade Commission's petition and more clearly defined the contours of the doctrine.

54 American Bar Association, Section of Antitrust Law: *The State of Antitrust Enforcement – 2001.* at 42 2001., available at http://www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf.

55 The FTC State Action Report concluded that, "[s]ome lower courts have implemented the clear articulation standard in a manner not consistent with its underlying goal." Office of policy planning, FTC, report of the state action task force 5 (2003), at 25. available at http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

56 Herbert J. Hovenkamp: *Antitrust's State Action Doctrine and the Ordinary Powers of Corporations 6–7.* (July 12, 2012), available at http://ssrn.com/abstract=2012717 (criticizing some judgments that carried the idea of "authorization" much further, concluding that authorizing a firm to engage in its ordinary corporate activities, such as contracting or acquiring assets, also operates to authorize conduct that would otherwise be unlawful under the antitrust laws).

### Active supervision by the state

State action immunity covers public actors and private actors may also benefit from the antitrust shield. *Parker* immunity may also cover non-sovereign actors controlled by market participants, but they must demonstrate that the challenged restraint is clearly articulated as state policy, and is actively supervised by the state. These two conditions endeavor to ensure that a non-state entity may invoke immunity only if it exercises the state's sovereign power. Accordingly, *Parker* immunity requires that the anticompetitive conduct of non-sovereign actors, especially those authorized by the state to regulate their own profession, results from procedures that suffice to make it the state's own.

Political subdivisions of the state, such as municipalities, cities or townships, are not entitled to the same protection from antitrust law as the state itself.[57] When faced with actions of an entity that has a combination of public and private attributes courts usually inquire whether the connection between the state and the entity in question is sufficiently strong that there is danger that it is involved in a private arrangement.[58] The city must thus show that there is a state policy to displace competition and that the legislature contemplated the kind of municipal actions alleged to be anticompetitive.[59] The federal government reacted to this narrow interpretation by passing the Local Government Antitrust Act (LGAA) of 1984, barring antitrust damage actions against local governments or private parties whose conduct was based on official action by a local government.[60]

In *GF Gaming Corporation v. City of Black Hawk*, 405 F. 3d 876 (10th Cir., 2005).[61], the businesses and property owner plaintiffs in the Central City, Colorado sued the neighboring city of Black Hawk and several casinos for conspiring to restrain and monopolize trade in the limited gaming industry. The 10th Circuit Court of Appeal held that even if defendants met with city officials and urged them to take anticompetitive action, as plaintiffs alleged, this falls under the *Noerr-Pennington* doctrine, which makes no distinction between petitioning government officials and conspiring with them.[62] The Court made it clear that allegations of private defendants

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57 Assuming that cities act in their public capacity and not as an economic actor, contrasting with the ECJ interpretation that makes no distinction whether the state measure originates from the Parliament, a government entity, or a local municipality.

58 *Crosby v. Hospital Auth. of Valdosta & Lowndes County*, 93 F.3d 1515, 1524 (11th Cir. 1996) and *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.,*753 F.2d 790, 792 (9th Cir.1985).

59 *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.,*at 792. See also: *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (holding that Colorado may have authorized the City of Boulder to regulate cable television services but the statute did not sufficiently articulate state policy to confer protection from antitrust laws).

60 15 U.S.C. § 34–36. Note that the act does not impose a bar on injunction actions.

61 *GF Gaming Corporation v. City of Black Hawk*, 405 F. 3d 876, 886-87 (10th Cir., 2005).

62 Ibid. at point 16.

conspiring to further private interests is irrelevant to the question whether they are entitled to immunity under the Local Government Antitrust Act of 1984 ("LGAA").[63]

Boards, bars, and various other agencies with mixed private-public features are also subject to the second prong of the test. The Supreme Court held in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), that even if the Virginia State Bar is a state agency for some limited purposes, it is not allowed to foster anticompetitive practices for the benefit of its members.[64]

The second part of the *Midcal* test, active supervision, requires the actual involvement of the state. The existence of a state's authority to exercise supervisory power is not sufficient. *Midcal* involved a California statute that required liquor manufacturers to impose resale prices on distributors. The unanimous decision of the *Midcal* Court established that resale price maintenance (RPM) arrangements are not immune under *Parker* due to the lack of active supervision of the state approved price schedules.[65] This test is more demanding than the EU case law. For the statute and subsequent private competition restriction to become lawful, the state not only needs to articulate its policy clearly, but it must also review the reasonableness of the resale prices.

Another interesting case is *Federal Trade Commission v. Ticor Title Insurance Company et al*., 504 U.S. 621 (1992).[66] The Federal Trade Commission (FTC) filed an administrative complaint charging insurance companies with horizontal price fixing in setting fees for title searches and examinations. In each of the four States concerned – Connecticut, Wisconsin, Arizona, and Montana – uniform rates were established by a rating bureau licensed by the relevant state and authorized to establish joint rates for its members. Rate filings were made to the state insurance office and became effective unless the state rejected them within a specified period. Various institutions evaluated this set of facts quite differently during the course of the procedure. The Administrative Law Judge of the FTC held that the anticompetitive activities were covered by state-action immunity in Wisconsin and Montana. The Commission held on review that none of the states had conducted sufficient supervision to warrant immunity.[67] When the matter came to the courts, the Court of Appeals reversed,

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63 Ibid. at point 27.

64 *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 791 (1975).

65 Midcal, a wine wholesaler, sold a number of cases of wine at a price below the effective price schedule. In a similar case, in the EU, the Court did not hold the state measure imposing a vertical RPM unlawful. A 1981 French statute obliged all publishers and importers to fix the retail price for their books. As a rule, retailers were not able to sell books cheaper than 5% of the fixed price. It is also true, that the Court inserted the qualification, that this measure does not contravene EU competition rules "as Community law now stands" and also warned that other rules of the Treaty, notably the free movement provisions, may prohibit a law like this. 229/83, *Association des Centres distributeurs Edouard Leclerc and others/SARL »Au blé vert« and others* [1985] ECR 1. The Court did not have to deal with the liability of the undertakings themselves, but based upon the doctrine of autonomous business conduct, publishers and importers setting the RPM would have been exempt from antitrust rules, since their action was prescribed by the state.

66 *Federal Trade Commission v. Ticor Title Insurance Company et al*., 504 U.S. 621 (1992).

67 In re Ticor Title Ins. Co., 112 FTC 344 (1989).

holding that state action immunity applied in each of the four states. The Court explained that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the active supervision requirement.[68]

The *Town of Hallie* Court explained that where the action of a government entity is at issue, it is presumed that it is engaged in state policy, with little chance of being unduly influenced by private interests.[69]

The U.S. Supreme Court was more demanding in its most recent *North Caroline State Board of Dental Examiners* case. The justices pointed out that there is a structural risk of market participants confusing their own interests with the State's policy goals.[70] The second part of the test is to ensure that these entities should not diverge from the State's considered definition of the public good and engage in private self-dealing.[71] The Court emphasized that the supervision requirement turns not on the formal designation to regulators but the structural risk of market participants confusing their own interests with the State's policy goals.

What do public officials need to do in order to meet the second part of the test? The content of this obligation is still not sufficiently clear. The Antitrust Modernization Commission recommended that courts could consider using a flexible, "tiered" approach that requires a different level of active supervision depending on various factors, like the type of conduct at issue, the industry, and the regulatory scheme. If the conduct at issue were price-fixing, the affirmatively articulated state policy ought to be more detailed and specific than if the conduct involved less clearly anticompetitive activities.[72]

The U.S. Supreme Court stated in *North Caroline State Board of Dental Examiners* that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a non-sovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests. The Court also identified a number of requirements for active supervision: the supervisor must review the substance of the anticompetitive decision; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; the state supervisor may not itself be an active market participant; and the mere potential for state supervision is not sufficient.[73]

An interesting question is to what extent an authorization by the state can meet the second prong of the test as far as the *past effects* of an anti-competitive conduct are concerned. In *Columbia Steel v. Portland General Electric Co.*, 111 F.3d 1427

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68 Ticor Title Ins. Co. v. FTC. 922 F.2d 1122 (1991).

69 Ibid. at 45–47.

70 *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U. S. (2015), at 13.

71 Ibid. at 10.

72 Antitrust Modernization Commission Report, at 373.

73 Ibid. at 13–14., quoting Patrick and Ticor.

(9th Cir. 1996),[74] the 9th Circuit held that retroactive amendment of an order does not immunize the anti-competitive conduct of the past 20 years. The opinion emphasized that, "state-action immunity is a question of federal antitrust law that turns on the clarity of a state's expression of its policy, not the subjective intent of its policymakers".[75] However, in a case decided ten years earlier, the same court agreed that the state's authorization shields conduct that occurred before the measure, provided that this was the intent of the legislator.[76] The plaintiff argued that the provisions of the legislation were enacted in 1982, and those statutes cannot confer retroactive immunity upon a lease agreement that was signed back in 1966. The court disagreed by recalling the legislative intent that was to articulate and affirm a pre-existing state policy of allowing municipalities to enter into anticompetitive agreements at public airports.[77] In contrast to this, measures by an EU member state simply reinforcing, or approving past conduct infringing antitrust rules would not shield undertakings from liability.[78]

If freedom of competition is to be taken seriously, courts should require genuine evidence that the state did intend to replace market functions with other means to reach its goals. Silence on this issue, just like silence regarding the second prong of the test reviewing private business conduct, should not be sufficient to apply the state action doctrine to exempt otherwise unlawful, anti-competitive private action.

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74 *Columbia Steel Co. v. Portland General Electric Co*., 111 F.3d 1427, 1442 (9th Cir. 1996). Columbia Steel was a large consumer of electric power in Portland, Oregon. The company brought action against two electric utilities charging them with dividing the City of Portland into exclusive service territories in violation of the Sherman Act. The companies raised a state-action immunity defense on the basis of a 1972 order of the Oregon Public Utility Commission that approved a division of the Portland market into exclusive service territories. The Court decided that the state did not clearly exercise its statutory authority to approve the allocation of exclusive service territories in Portland in 1972. The 1992 decision by the regulatory commission "could not satisfy the Midcal test retroactively by amending the 1972 order years after the company entered into the monopolistic agreement it now seeks to cloak with federal antitrust immunity. In other words, the state of Oregon cannot satisfy the objective Midcal clear articulation test by declaring that it had intended to displace competition with regulation 20 years earlier."

75 Ibid. at 7–9.

76 *California Aviation v. City of Santa Monica*, 806 F.2d 905 (1986). California Aviation, Inc. sued the City of Santa Monica alleging that the City engaged in unlawful price fixing and unfair competition in the execution of a lease with California Aviation at Santa Monica Municipal Airport. In 1966, California Aviation and the City entered into a thirty year lease at Santa Monica Municipal Airport. The lease provided that California Aviation could charge no less for petroleum products than the City charged. California Aviation contended that this lease provision violated the Sherman Act.

77 Section 21690.5 of the Californian code stipulates, "[t]herefore, since the proper operation of the state's publicly owned or operated airports is essential to the welfare of the state and its people, the Legislature recognizes and affirms such operation as a governmental function to be discharged in furtherance of the policy of securing the benefits of commerce and tourism for the state and its people".

78 Moreover, also the member state itself would be liable under the "reinforce" limb of the *effet utile* rule. See, for example: C-35/96, *CNSD* [1995] ECR I-2883, para 53–54.

Courts should not simply infer from circumstances, or second-guess crucial public policy objectives.

The cases presented so far involved a clash between federal antitrust law and private action supported by a state or municipality. In addition, state courts held that *state antitrust rules* cannot apply to instances of state action. For example, the plaintiff was unable to successfully challenge the fee of a taxi company that was regulated by the City of Chicago.[79]

### 2.2. Foreign state compulsion

A specific form of the state action doctrine is when the sovereign is a foreign state. Hybrid cases involving a foreign undertaking being used by the authorities of its country may also lead to immunity, yet the bar seems to be fairly high in practice.[80] The foreign state compulsion defense may provide safe harbor for a corporation or individuals who participated in otherwise unlawful anti-competitive conduct ordered by a foreign sovereign. Unlike the EU's autonomous economic activity concept or the federalism based state action doctrine in the U.S., this exception recalls international law principles like non-intervention and comity.[81]

Both U.S. and EU case law require compulsion for successful use of this defense. If only the advice, support, or encouragement by the foreign government can be established the defense will be unsuccessful.[82] The Antitrust Enforcement Guidelines of the U.S. DOJ and FTC from 1995 consider the threat of penal or other severe sanctions indispensable for recognition of compulsion.[83] It is pointed out that the defense is unavailable in cases where the conduct occurs in the U.S.

In the U.S., a federal district court in *Animal Science* elaborated a three-part test whereby a defendant alleging compulsion should show: (i) the existence of an entity in the defendant's state qualifying as an arm of the state by enjoying governmental or quasi-governmental powers that are 'either uniquely peculiar to sovereigns or of essentially sovereign nature'; (ii) a direct link between the entity's powers and the defendant, allowing the entity to compel the defendant, subject to significant negative repercussions for non-compliance; and (iii) the compulsion is the fundamental force

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79 *Chirikos v. Yellow Cab*, 410 N.E. 2nd at 69.

80 M. Martyniszyn, ibid at 63 (recalling that although it seems to be universally recognized, it is a judge-made rule, not a principle of international law). See furthermore *United Nuclear Corp. v. General Atomic Co*., 96 N.M. 155, 629 P.2d 231 (1980) (the court in New Mexico allowed a claim to proceed despite allegations that the uranium cartel was compelled by the Canadian government).

81 See for example the 1988 Guidelines the DOJ did not share this logic and considered application of the state action doctrine inappropriate in international cases, citing the federalist concepts behind it and difficulties in establishing "clearly articulated state policies and active state supervision" in an international context.

82 Spencer W. Waller notes that this defense has been successful only once, in *Interamerican Refining Corp. v. Texaco Maracaibo*, Inc., 307 F. Supp. 1291 (D. Del. 1970). Ibid. at 133.

83 Antitrust enforcement guidelines for international operations, April 1995, point 3.32, available at: https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations.

causing the defendant's act, challenged as a violation of U.S. law.[84] The court noted that participation in the framing of the governmental prescript does not exempt it from compulsion.

In *Swiss Watchmakers*[85] the court acknowledged that the compulsion would lift liability from the compelled companies. This case involved state approved and state facilitated regulation of the watch industry. This state action aimed at keeping all the know-how, machinery and watch parts in Switzerland to protect the Swiss watch industry from potential competition. Although the regulation was recognized and approved by the government, it was still considered a private agreement that was subject to antitrust rules and the claim of foreign sovereign compulsion was not successful. Despite the state's engagement, the direct foreign government action compelling the defendant's activities was missing.

A recent state compulsion related case in the U.S. was the Chinese *Vitamin C case*.[86] Chinese manufacturers of Vitamin C and their trade association were accused of price-fixing and limiting exports in 2005.[87]According to plaintiffs, prices rose as high as $15, from about $2.50, a kilogram during the scheme from about 2001 to 2006. In March 2013, the Brooklyn jury found in favor of the U.S. Vitamin C buyers and awarded $54.1 million in damages which was then tripled to $162.3 million under relevant U.S. law. The federal district court found the available evidence too ambiguous and denied the foreign sovereign compulsion defense. It was not enough that the Chinese government submitted an *amicus brief* to the U.S. court admitting that companies were required by law to coordinate export prices and volumes. The court concluded that the government influence was not to be regarded as conclusive evidence of compulsion, especially since other documentary evidence submitted by the plaintiffs contradicted the brief's position.[88]

As far as the EU is concerned, the ECJ was also confronted with arguments relying on irresistible pressure by foreign governments. Yet, this pressure has never been found so intense as to eliminate corporate liability. *Aluminum imports*[89]

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84 *Animal Science Products v. China Nat. Metals & Minerals Import & Export Corp. (Animal Science)*, 69.

85 *United States v. Watchmakers of Switzerland Information Center, Inc. (Swiss Watchmakers)* 1963 Trade Cases (CCH) 70,600 (S.D.N.Y. 1962), *modified*, 1965 Trade Cases (CCH) 71,352 (S.D.N.Y. 1965).

86 *In re Vitamin C Antitrust Litigation (Vitamin C)* 584 F. Supp. 2d 546 (E.D.N.Y. 2008). While more companies were sued, only North China and Hebei Welcome remained in the case at the time of the verdict. Other companies settled out of court. The case is now under appeal: Re Vitamin C. Antitrust Litigation, 13-4791, U.S. Court of Appeals for the Second Circuit (Manhattan).

87 This suit came after EU and U.S. federal agencies imposed huge fines on mostly European manufacturers of various vitamins, including Vitamin C. Interestingly, this lawsuit was initiated by lawyers of private plaintiffs. The EU Commission did not investigate the alleged infringement.

88 Ibid. 557. A retired ministry employee who was formerly in charge of vitamin C exports admitted at trial that 'on the whole,' the government did not involve itself in price fixing.

89 European Commission, *85/206/EEC, Decision Relating to a Proceeding Under Article 85 of the EEC Treaty, IV/26.870 – Aluminum imports from eastern Europe (Aluminum imports), OJ L92, 1-76* (1984). Note that there was no subsequent court review procedure.

concerned anticompetitive agreements with very broad membership between mostly primary manufacturers of aluminum and a decision adopted shortly before the fall of the Berlin Wall. The EU Commission noted that even if a government *supported* a contract in violation of the competition law, this does not alter the position of the companies involved. EU competition law does not distinguish between private and public undertakings and both are subject to competition rules, even if the latter can be used as a tool to pursue public policy.[90] In *Wood Pulp,* a U.S. export cartel attempted to rely on this defense.[91] The ECJ noted that the U.S. legislation at issue, the Webb Pomerene Act, exempts only export cartels from the scope of application of U.S. antitrust, but does not require their creation.

### 2.3. Summary of the tests: different philosophies with similar but not identical results

To conclude the first part of this paper, the common denominator of various European scenarios is the distinction made between economic activity and public actions. Whenever the entity involved in the anti-competitive action can be characterized as an *undertaking* for purposes of EU competition rules, it will be subject to antitrust rules. More specifically, antitrust rules will apply whenever the activity is an *economic activity*, regardless of the public or private law status of the actors.

U.S. case law also covers individual actions of public officials and representatives of undertakings due to the different personal scope of the cartel prohibition. Therefore, rules need to be enacted to carve out officials who implement state policy and thereby interfere with free competition. States may then provide for the defense and indemnification of agency members in the event of litigation. States can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision.

The European approach does not interpret this antitrust shield in the light of proper allocation of sovereign powers between EU (federal) and member states (state) levels of government.[92] Neither undertakings, nor national governments could successfully argue that EU competition rules should not be applied just because a clearly articulated national policy restricted competition. The emphasis in Europe is to draw a line properly between public and genuine business action.

It seems that competition policy protecting the functioning of the single European market is *superior* to industrial and other national policies even if they are clearly articulated and supervised by member states. The U.S. approach reflects a stronger trust in the judgment of states. This U.S. approach is in sharp contrast with

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[90] For example, according to established case law related to Article 107 (1) TFEU, the resources of public undertakings can be regarded as state resources for the purposes of state aid control. That is, a public undertaking selling below market prices may involve providing state aid to the buyer.

[91] *A. Ahlström Osakeyhtiö and others v Commission of the European Communities (Wood Pulp)*, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 [1988] ECR 5193, para 20.

[92] On the other side of the Atlantic, federal law respects the residual sovereignty of states by acknowledging their right to regulate their domestic economies the best they can, even by eliminating or restricting competition.

European law and policy where member state regulations are generally suspected of protectionism that undermines the grand enterprise of the European single market.

## 3. Specific scenarios contrasting the application of U.S. and EU law

In this chapter I compare cases with similar fact patterns to inquire whether the somewhat differing European and U.S. state action tests lead to different results. First, I consider seemingly business conduct aimed at persuading government to adopt rules consistent with the interests of these lobbyists. Second, I discuss regulatory, or tariff setting committees that are undoubtedly part of the public administration but transformable into a cartel meeting by decisive influence of corporate representatives. Next, I present the issues related to regulatory bodies composed of market participants, i.e., chambers in Europe and boards in the U.S., which often have a public law foundation. Government influence may manifest itself either before the chamber action occurs, i.e., by giving market actors an uncontrolled power to set market parameters, or afterwards, in the form of approving a previous decision by this association of undertakings. Then, we turn our attention to regulated industries, like energy, telecommunications and other public utilities where public service is sometimes provided subject to price regulation.

### 3.1. Self-regulation by chambers and other associations of undertakings

The potential competition law issues attached to the functioning of associations of undertakings are of manifold. The state may authorize them to adopt rules regulating entry, advertisement or even prices. This can be done regardless of subsequent state approval. Even if these associations do not defend their case with a reference to direct state involvement, they may argue that their activity was necessary to serve the public interest. A well-organized cartel can also be seen as a form of self-regulation aimed at eliminating risk and rivalry. Will the legal evaluation change if the state empowers an association of undertakings to set certain rules of the game for themselves? In cases under this heading the state exercises soft intervention, i.e., doing nothing more than creating or authorizing the creation of the association. It is then the association, the chamber of undertakings itself that adopts anti-competition action that presumably serves other public policy goals.

As to the public or private nature of rulemaking by association, the ECJ summarized the point of attribution of liability in *Wouters*. According to this, undertakings are exempt from the reach of antitrust, […] when it (*the Member State*) grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the

professional association remain State measures and are not covered by the Treaty rules applicable to undertakings.[93]

Regulatory bodies not covered by the state compulsion defense often develop creative arguments to explain why the anti-competitive consequences of their measures are not contrary to public interest. In Europe, ECJ case law acknowledges that under exceptional circumstances, restrictions inherent in the nature of the private regulatory measure may not fall under the prohibition of Article 101 TFEU at all. This special rule of reason case law may open the door to creative ideas by associations to explain why their profession is special and why they could never properly function without the competition restriction at hand.

This rule of reason exemption was also considered and elaborated upon by the ECJ in *API* relating to the Italian regulation of road haul tariffs. The Court explained that in order to properly assess the objectives and effects of a decision, the overall regulatory and economic context should be taken into account.[94] The Court applies a proportionality test,[95] verifying whether the restrictions imposed by the rules at issue in the main proceedings are limited to what is necessary to ensure the implementation of legitimate objectives.[96] Yet, the Court was confident that the minimum fees set by the commission, and also the legislation approving those fees, were not justified by a legitimate objective. The Court acknowledged that preserving road safety can be a legitimate public interest objective, but refused to accept the argument that road safety would call for setting minimum prices.[97] The Court pointed out that a mere reference in a general manner to the protection of road safety, without establishing any link whatsoever between the minimum operating costs and the improvement of road safety is insufficient. Furthermore, the measures in question go beyond what is necessary. The rules would not enable carriers to prove that they fully comply with the safety provisions in force even though they offer prices that are lower than the minimum tariffs fixed. In addition, there are a number of EU and national regulations protecting road safety that constitute more effective and less restrictive measures.[98]

What is striking with this reasoning is that the ECJ did not even mention the option of Article 101 (3) to justify the anti-competitive rules. Rather, it relied on its case law developed under the free movement provisions relating to goods, services and establishment which relate to member state measures hindering trade between EU countries. In other cases the Court was more restrictive, quickly dismissing

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93 *Wouters and Others*, C-309/99, EU: C:2002:98, para 97 (on rules imposed by the Dutch Bar restricting the establishment of joint offices with accountants).

94 Ibid. para 47. Quoiting the *Wouters* judgment the ECJ noted that it has to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

95 Proportionality is an important principle of EU law that can be applied in various circumstances and in various ways. See Wolfgang Sauter: Proportionality in EU law: a balancing act? *TILEC Discussion Papers*, January 25, 2013.

96 Ibid. para 48. See also *Meca-Medina and Majcen* v *Commission*, C-519/04 P, EU:C:2006:492, para 47.

97 Ibid. para 50–57.

98 Rigorous compliance with those rules on the maximum weekly working time, breaks, rest, night work and roadworthiness tests for vehicles can indeed ensure an appropriate level of road safety.

company arguments that their imposed restrictions would pursue public interests.[99] The protection of public interest is not the task of entrepreneurs but belongs to the hard-core competence of the state.

Another way to make an allegedly anti-competitive agreement lawful is to prove that the four conditions of Article 101 (3) are fulfilled. This balancing act, giving efficiency claims the green light to proceed is paralleled in U.S. antitrust law by the rule of reason principle in Section 1 of the Sherman Act. However, it is uncommon for a sector specific regulatory measure intended to set minimum prices or restrict advertisement to survive the four-prong test of paragraph (3). Competition watchdogs would typically argue that it is the role of the state to act in the public interest, not the undertakings which are inherently obsessed by their own profit motives.

In the U.S., the *North Carolina State Board of Dental Examiners* opinion is the leading authority.[100] This Board is the state agency that regulates the practice of dentistry in North Carolina. Six of its eight members are licensed, practicing dentists. The Board administers a licensing system for dentists. Following complaints that non-dentists were charging lower prices for teeth whitening, the Board issued at least 47 official cease and desist letters to non-dentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This led several non-dentists to stop offering teeth whitening services in the state.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's concerted action to exclude non-dentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. The FTC, sustaining the administrative law judge's ruling, reasoned that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the state to claim immunity, which was not the case. The FTC determined that the Board had unreasonably restrained trade in violation of antitrust law. The Fourth Circuit affirmed the FTC decision. The Supreme Court held that the Board could not invoke state-action antitrust immunity because it was not subject to active supervision by the state. The fact that a controlling number of the Board's decision makers are active market participants was a decisive factor.

*Parker* immunity may also cover non-sovereign actors controlled by market participants but they must show: 1) that the challenged restraint is clearly articulated as state policy; and 2) it is actively supervised by the state. These two conditions strive to ensure that a non-state entity may invoke immunity only it exercises the state's sovereign power. Accordingly, *Parker* immunity requires that the anticompetitive conduct of non-sovereign actors, especially those authorized by the state to regulate their own profession, results from procedures that suffice to make it the state's own. The second part of the test is to ensure that these entities should not diverge from the

[99] See Hilti (the dominant company unsuccessfully arguing that tying the purchuse of cartidge nails to the machine itself is required to protect the safety and health of users).

[100] *North Carolina State Bd. of Dental Examiners v. FTC*, No. 13–534., decided February 25, 2015.

state's considered definition of the public good and engage in private self-dealing.[101] There is a structural risk that market participants would confuse their own interests with the state's policy goals.[102]

### 3.2. Regulatory committees

Whenever market parameters, like prices, are not set by the free play of supply and demand, but by some combination of market players and state officials, there is always a danger of a disguised cartel behind the regulatory process. Usually, there is a top down and a bottom up approach. By top down, I mean when the government creates a committee to be in charge of the regulation and invites representatives of market players to contribute. In my view, there is less likelihood of a disguised cartel in situations like this when the state sets up the consultation mechanisms and takes the initiative. The bottom up approach refers to associations, chambers created by the market players themselves, which take up self-regulatory duties in co-operation with state authorities.[103] These institutions are at the border of public and private law. Their actions are on the edge of anti-competitive decisions, or agreements.

According to EU caselaw, committees that include representatives of enterprises may propose that prices be set by the state, provided that the committee members decided not only for their own private interests but also for the public. Public interest must be taken into account and the State has the power to alter or override a committee proposal.

In *Centro Servizi Spediporto*[104] the ECJ held that, where legislation of a member state provides for road-haulage tariffs to be approved and brought into force by the state on the basis of *proposals* submitted by a committee, the fixing of those tariffs cannot be regarded as an agreement where: that committee is composed of a majority of representatives from the public authorities and a *minority* of representatives from the economic operators concerned; and its proposals must observe certain public interest criteria,. Three years later, the ECJ specified in *Librandi*[105] that there is no cartel agreement even if the representatives of economic operators are the majority of the committee, provided that: the tariffs are fixed with due regard for the public interest criteria defined by law; and the public authorities make the final decision considering the observations of other public and private bodies.

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101 Ibid. 10.

102 Ibid. 13.

103 I find these two groups useful for the purposes of this paper, even though there is a grey area, i.e., a chamber for a profession established by law with complusory membership.

104 EU:C:1995:308. In this and similar cases quoted here, the ECJ was asked to rule on the liability of member states to establish state liability under the combined readings of Articles 101 TFEU and 4(3) TEU a private anti-competitive action should also be identified. Therefore, these cases can help explore the conditions under which an anticompetitive agreement is absent.

105 C-38/97, EU:C:1998:454.

Criticizing the ECJ, Damien Gerard observed that the Court's jurisprudence lacks consistency and there is no clearly articulated and consistently applied test.[106] The reason for that might be because most of the cases decided by the Court focused on the liability of members states in connection with an allegedly anti-competitive private conduct. The Court was obviously cautious not to put an unbearable and unjustified burden on member states, so it tried to navigate wisely to emphasize the factors that helped to legitimize the state measure.[107]

The most recent *API* judgment gives an example for anti-competitive state regulation involving cartel-like conduct in the Italian road transport sector. The Osservatorio adopted a series of tables fixing the minimum operating costs of road transport undertakings for hire and reward. The Osservatorio was composed principally of representatives of professional associations of carriers and customers.[108] Furthermore, decisions of the Osservatorio were approved by a majority of its members without a state representative having a right to veto.[109] Those tables were set out in a ministerial decision a couple of days later. [110]

A subsequent ECJ note is interesting and worrying at the same time. The Court emphasized that the activity of the Osservatorio would fall outside the cartel prohibition if its members were to act as 'experts' who are independent of the economic operators concerned, being required to set tariffs taking into account their

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106 Damien Gerard: *EU Competition policy after Lisbon: time for a review of the „state action doctrine"?* available at: http://ssrn.com/abstract=1533842.

107 The reason for this 'conscious inconcistency' is that, unlike free movement rules, the European *effet utile* rule as applied to antitrust cases does not allow for justification based on important public interests, like security, consumer, or environment protection. So, the only chance to save a well intentioned state measure is to establish that the *effet utile* rule was not infringed, due to the lack of link between the private and public measures, or that a formal residual power left with authorities meant that potential anti-competitive private conduct was supevised by the government. Advocate General Maduro suggested in his opinion delivered in Cipolla that, even though the Italian scheme for regulating minimum lawyer fees may be lawful under the effet utile test, it is likely that it would fail to meet the requirements of free movement provisions (point 67.). Joined cases C-94/04 and C-202/04 *Cipolla and others*, opinion delivered on 1 February 2006. ECR I-11426.

108 At the material time in the main proceedings, 8 of the 10 members of the Osservatorio represented the views of associations of carriers and customers.

109 The state had the power to disregard the desires of private companies in the German cases decided some 20 years earlier, see *Reiff* (C-185/91, EU:C:1993:886, para 22) and *Delta Schiffahrts- und Speditionsgesellschaft* (C-153/93, EU:C:1994:240, para 21). The 'agreement' or 'decision' was always conditional on the approval of the public representative. Thus there was no genuine agreement or decision approved by the state, and neither undertakings nor the state could be held liable under EU competition law.

110 The Italian legislation envisaged a three-layer hierarchy for establishing the minimum operating costs: primarily the professional associations of carriers and customers would adopt an agreement, failing that the Osservatorio decides, and in the event of inaction by the latter, the Ministry for Infrastructure and Transport takes action. During the period between November 2011 and August 2012, to which the cases in the main proceedings relate, the minimum operating costs were in fact fixed by the Osservatorio. From 12 September 2012, the tasks of the Osservatorio were legally assigned to a department of the Ministry for Infrastructure and Transport.

own business interests, the public interest and the interests of undertakings in other sectors or users of the services in question.[111] Can you imagine that a gathering of persons affiliated with various competing undertakings who are empowered to adopt regulatory decisions without, or even with, the presence of some public officials would be able to forget where they came from and where they will return after the meeting? Can they genuinely represent the diverging interests of other market players?

Retaining the right to actively supervise the decision of the undertakings is crucial in the U.S. too. The FTC enumerated a number of factors in *Kentucky Household Goods Carrier Association* that are relevant in determining whether the supervision was indeed actively exercised. These factors include: (i) did the authority proceed with a properly noticed hearing?; (ii) did the agency issue a written, reasoned decision?; (iii) was there a qualitative and quantitative agency assessment of how private action served the public interest enshrined in state legislation?; (iv) what business data was collected to establish the background of the decision?; (v) were economic studies conducted? ;(vi) were operating costs and profit levels checked?; and (vi) the history of denying previous rate proposals, simple 'rubber stamping' being insufficient.[112]

To conclude this topic, only commercial, economic conduct is caught by competition rules on both sides of the Atlantic. For example, if the rules of the game are such that individuals participating in rulemaking do not act as representatives of corporations, but as experts serving the public interest while under the control of public officials, then their gathering would not be regarded as a cartel meeting. Consequently, the rules on the composition and operation of bodies taking part in the lawmaking process are relevant. The ECJ considers the composition of these bodies, i.e., whether private representatives are in a majority, who chairs the meeting, what interests the participants consider, and how private members are nominated. The foregoing is not an exhaustive list and the Court usually looks at the totality of relevant factors before deciding on the existence of market conduct falling under EU antitrust rules.

Not only is the composition of these groups relevant, but also the factors they are supposed to consider. If these factors are unregulated, it is likely that participants will follow their own private economic interests. There is a fair chance of independent action as a wise professional instead of an economic actor, if the factors to be considered for regulating tariffs are well defined by the law.

Finally, the residual role retained by the state, usually by a minister, is decisive in deciding whether the adopted rules fall into the category subject to antitrust or are exempted due to the public nature of the rule making process. A common concern for both jurisdictions is the extent to which government authorities retain the final decision in the regulatory process. Under the more formal approach represented by EU law, EU competition law will not be applicable if the minister has the authority to disregard or amend the agreement or decision put forward by a committee of

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111 Here the ECJ refers again to *Reiff* and *Delta Schiffahrt*, where it was argued that members of the committees were more like experts than representatives of undertakings.

112 139. FTC 404 (2005), aff'd, 2006 U.S. App. LEXIS 21864 (6th Cir. 2006).

representatives of undertakings. The activity and final work product of the commission will be considered merely a proposal that is incapable of having any legal or practical impact without the decision of the minister. The actual interventional history of the state does not seem to matter. The potential for state veto is sufficient to grant immunity from the reach of competition laws. An effect-based approach, like the abuse of dominance provision of Article 102 TFEU, would do no harm here either. U.S. law is more demanding and more realistic in this respect. If the supervision is merely formal, second condition of the state action doctrine will not be met and private anti-competitive conduct will not be immunized.

### 3.3. Lobbying for regulation

Public officials usually take into account the intelligence of market players before adopting rules that would govern future market conduct. A distinction should be made between the democratic rulemaking process where market players also play an active role as well as cartels sponsored by the government. If representatives of corporate interests do nothing but lobby for a piece of legislation that would serve their interest then antitrust law would not apply. This form of rent-seeking is not caught by antitrust, but may be subject to other specific laws regulating contacts between business and government. Setting a common price level by the government is not a cartel agreement on prices applied by companies themselves, even though the result for consumers is the same. The rationale is that state intervention into the free play of markets is meant to serve broader public interests, even if they coincide with the private interests of certain companies. This is so regardless of whether the lobbying is in the form of a bilateral relationship, with one undertaking talking to the government, or a multilateral scenario where a group of undertakings strive to persuade the public decision makers.

European law makes a fine distinction between cases where companies genuinely recommend government officials a certain way of conduct and scenarios where undertakings conclude an anti-competitive agreement and then seek state approval or support, i.e., by making their agreement compulsory for every market participant. An agreement among competitors setting the same price would be a naked competition restriction, whereas agreeing on a common plan to lobby the government to set the same price by way of regulation is exempt from the reach of EU competition law.

As far as the U.S. is concerned, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S.127, 135 (1961) established a specific exemption for individuals and corporations.[113] The U.S. Supreme Court made it clear that, "we think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take

[113] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S.127, 135 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

particular action with respect to a law that would produce a restraint or a monopoly."[114] he U.S. approach is based on the respect for the institutions of representation and *the right of petition*. Antitrust rules are meant to govern economic activity. Actions by companies targeting government officials are characterized as political activity, even if they eventually have economic effect.

However, *Noerr-Pennington* does not provide an unlimited coverage for business and context does matter. For instance, firms cannot bring an anticompetitive agreement outside the reach of the Sherman Act merely by requesting a subsequent legislative approval to their pre-existing arrangement. In *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972),[115] the U.S. Supreme Court held that the immunity does not apply where defendants tried to defeat the plaintiff's application to obtain licenses to operate a common carrier by sham complaints before regulators and courts. The Court also refuses to acknowledge immunity if a boycott was aimed at petitioning economic ends.[116]

In sum, bi or multilateral lobbying is beyond the reach of antitrust on both sides of the Atlantic. However, this may not serve as a disguise for genuine cartel conduct, existing prior and without relevance to the subsequent lobbying activity. Representatives of undertakings have a narrow path to walk.[117]

### 3. 4. The filed rates doctrine

Another issue, closely related to lobbying and sector specific regulation to be discussed below, is the doctrine of filed rates. What is the consequence of an administrative authority approving the tariffs proposed by one or more undertakings? Depending upon the market structure, this approval may shadow their liability under the cartel rules or the rules prohibiting an abuse of their dominant market position.

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114 Ibid. at 136.This conclusion was reached even though the track companies lobbied against the truck industry in a deceptive and unfair way.

115 *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972).

116 For example, in *SCTLA*, an association of lawyers did not accept new cases until the District of Columbia did not reaise the hourly fees of court-appointed criminal defense laywers. *FTC v. Superior Court Trial Lawyers Ass'n (SCTLA)* 493 U.S. 411 (1990).

117 In Europe, the liablity of member states may also depend upon how the private component can be categorized. The *effet utile* rule bites only if there is a cartel-like activity connected to the state intervention. State measures creating market circumstances identical to a cartel are not caught by this rule. If there is no conduct by undertakings or their associations running against the cartel rules, Articles 101 TFEU and 4(3) TEU cannot be applied in combination. However, for the sake of completeness, we should mention that state regulation fixing minimum prices may nonetheless be found unlawful under the free movement rules of the TFEU. See, for example *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, para 46 (judgment finding Italian rules on setting minimum lawyer fees not infringing this *effet utile* rule for the lack of delegation of regulatory powers to undertakings). The Court excluded the application of the *effet utile* rule but explained that treaty rules on free provision of services and establishment may be hindered by minimum tariffs making the (higher priced) services of non-Italian lawyers unavailable. Yet, the Court also said that the restriction can be justified under certain circumstances on consumer protection grounds.

U.S. law is driven by the *Keogh* judgment prohibiting a private plaintiff from pursuing an antitrust action seeking treble damages where the plaintiff claimed that a rate submitted to, and approved by a regulator resulted from an antitrust violation. The U.S. Supreme Court explained that only the competent regulator could change these rates, even if the rate was higher due to a price-fixing conspiracy. The Antitrust Reform Commission was quite critical of this exemption. Relying on the two-prong structure of the state action doctrine, it suggested that the U.S. Congress should legislatively overrule when the regulatory agency no longer reviews and just rubber stamps proposed rates.[118]

Similar issues were raised in the influential *Ticor* opinion. The FTC filed an administrative complaint against six of the nation's largest title insurance companies alleging horizontal price fixing in their fees for title searches and title examinations. The Commission charged the title companies with violating Sec.5(a)(1) of the Federal Trade Commission Act that prohibits "unfair methods of competition in or affecting commerce."[119] The U.S. Supreme Court ruled that where prices or rates are initially set by private parties, subject to veto only if the state chooses, the party claiming the immunity has the burden to demonstrate that state officials have taken the necessary steps to determine the specifics of the price-fixing or rate setting scheme. The mere potential for state supervision is not an adequate substitute for the state's decision. While most rate filings were checked for mathematical accuracy, some were completely unchecked. Absent active supervision, there can be no state-action immunity for what were otherwise private price-fixing arrangements.

In the EU, if a tariff is set by the state, an undertaking suggesting this tariff would not be caught by competition law. The conclusion could be different when the dominant undertaking applied an unfair price as a result of its autonomous business decision and sought state approval in the second phase. This rubber-stamping by the state could be held to infringe the *effet utile* rule, the legal shield would disappear and the dominant company could be held liable. Yet, if the state does not automatically transform the private price offer into a public tariff and gives it some consideration, then EU competition law would not be applicable either on the public or private action.

### 3.5. Regulated industries

Competition laws may become superfluous whenever free competition is replaced with regulation since there will be no competition in the form of independent business decisions to be protected. One issue is how intense this regulation should be to eliminate corporate responsibility. An interesting subsection of cases relates to

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118 Report, recommendation No. 68.

119 38 Stat. 719, 15 U.S.C. 45(a)(1). Title insurance involves insuring the record title of real property for persons with some interest in the estate, i.e., owners. A title insurance policy insures against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it refers.

challenging the fees of companies active in the regulated sectors. Another inquiry is, how clearly do these sector specific rules state whether and to what extent antitrust rules are set aside?[120]

Regulation interfering with competition rules is not only an issue in the telecommunication and energy industry. Agriculture is also heavily regulated. The ECJ addressed this issue in *Suiker Unie*.[121] The common organization of the sugar market provided that each member state shall fix, on the basis of the quantity allocated to it for each factory or undertaking producing sugar in its territory, minimum and maximum quotas. The Court acknowledged that this restriction, together with the relatively high transport costs, is likely to have a considerable effect on the essential supply element of competition, and consequently on the volume and pattern of trade between member states.[122] However, the common market regulation did not fix consumer prices and producers were consequently each allowed some freedom to determine the price at which they intend to sell their products.[123] EU rules also did not preclude competition on quality. The Court ruled that regulation left, in practice, a residual field of competition that comes within the provisions of the competition rules.[124] Therefore, whenever market regulation leaves some room for autonomous business conduct, collusion among market players will be caught by EU competition rules.

In the U.S., where regulatory statutes are silent with respect to antitrust, courts must determine whether these rules implicitly preclude the application of antitrust laws. The U.S. Supreme Court in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975) took into account the following factors: (i) the existence of regulatory and supervisory authority under the securities law; (ii) evidence that the regulatory authority did in fact exercise its authority; and (iii) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting results.[125]

The Antitrust Modernization Commission concluded in 2007 that U.S. courts are usually reluctant to recognize implied immunities to the antitrust laws in the absence of a clear exception clause.[126] In contrast, in Credit Suisse Sec. v. Billing, 127 S. Ct.

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120 The Antitrust Modernization Commission recommended that statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws. Furthermore, courts should interpret savings clauses to give deference to the antitrust laws, and ensure that Congressional intent is advanced in such cases by giving the antitrust laws full effect (recommendations No. 64–65.). The practice of the Hungarian Competition Authority has always been not to give way to arguments claiming a lack of jurisdiction just because there exist sector specific regulation in the given sector, i.e., in telecommunications. According to Section 1 of the Hungarian Competition Act, the scope of the Act covers economic activities unless another law in the form of an act of Parliament provides otherwise.

121 Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie v Commission* [1975] ECR 1663.

122 Ibid. para 17.

123 Ibid. para 21.

124 Ibid. para 24.

125 *Gordon* v. *New York Stock Exchange, Inc*., 422 U.S. 659 (1975).

126 Report p. 341.

2383 (2007).[127] the U.S. Supreme Court applied the previous three-prong test and made it fairly difficult for plaintiffs to rely on the applicability of antitrust in the regulated markets of financial services. Under the third prong, the Court reasoned its decision to reverse the contrary decision of the Second Circuit that there is a serious risk that antitrust courts, with non-expert judges and non-expert juries, will produce results conflicting with the position of the Securities and Exchange Commission. Thus, allowing an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities market.[128]

Another case on point is *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko LLP*, 540 U.S. 398 (2004).[129] *Trinko* is cited quite frequently in Europe by incumbents trying to escape additional antitrust control by national authorities or the EU Commission. Interestingly, the Antitrust Modernization Commission warned that *Trinko* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act and that it should not be construed as displacing the role of the antitrust laws in regulated industries.[130]

The European approach is quite different, giving more room for EU antitrust rules in sectors where there is a national regulator. One of the reasons lies in the supremacy of EU law. The other, there is no fear of generalist, non-expert judges or juries reaching flawed conclusions. According to EU case law, EU competition rules do not apply if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part. In a situation like this, the restriction of competition is attributable to the action of the government and not the autonomous conduct of the undertakings. This exception excluding the applicability of EU competition law provisions has only been accepted under exceptional circumstances.[131]

For example, the European Commission did not hesitate to impose fines on Deutsche Telekom for a margin squeeze despite the wholesale fees of the German incumbent having been approved by the sector regulator.[132] It was argued that the

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127 Credit Suisse Sec. v. Billing, 127 S. Ct. 2383, 426 F. 3d 130 (2007).

128 Ibid p. 17. The Court also noted that in this sectors antitrust has little if any added value to the sector specific regulations. The conduct challenged in this case was also prohibited by SEC and there was also a right for bringing damage actions.

129 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004). In a previous case of *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), the First Circuit rejected monopolization claims brought by a municipally owned electric utility against an integrated electric utility. The same Judge Breyer argued that there was no obvious basis for concluding that federal judges sitting in antitrust cases could do a better job than the sectorial regulators in addressing the competitive problem.

130 Report, recommendation No. 67.

131 See Case 41/83 *Italy* v *Commission* [1985] ECR 873, para 19; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, para 27 to 29; and Case C-198/01 *CIF* [2003] ECR I-8055, para 67.

132 Commission Decision of 21 May 2003 (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG), OJ L 263, 14.10.2003.

regulation did not prohibit lowering retail prices so the undertaking could have avoided squeezing its competitors out of the market. Cases like this demonstrate the implications of the well-established EU case law on special responsibility of dominant undertakings.[133] Dominant undertakings are obliged to preserve the residual competition that remains on markets dominated by them. The ECJ also held[134] that the liability of the undertaking is not constrained just because the national regulatory authority may have infringed Article 102 TFEU in conjunction with the *effet utile* principle the Commission could have brought an action for failure to fulfill obligations against Germany.[135] Since EU law is supreme to national law, it is unconcerned with expressing the intentions of domestic lawmakers or the clarity of the relevant member state measure. The rule is that member states should not adopt measures that could restrict the full application of EU competition rules. This is due to the supremacy of EU law to national laws, even legislation adopted by parliaments, and not because competition policy is regarded as superior to other public policies.

### 4. The liability of the state in hybrid cases

EU law seems to be stricter against member state measures than U.S. law, respecting state sovereignty regarding regulating their own economies. EU Article 16 TFEU addresses the issue of state measures related to public undertakings, and those with exclusive or special privileges. More general case-law based on the *effet utile* doctrine also exists which makes states responsible for their measures approving, encouraging, and prescribing cartel-like conduct, including the unsupervised delegation of regulatory powers to industry actors. U.S. states cannot be held responsible for legislative or regulatory measures like these. So, does it mean that EU law does not need antitrust rules covering state-driven anti-competitive actions? Does U.S. antitrust law cover a wider range of issues to counterbalance the lack of state-related competition law provisions?

The practice of the EU Commission regarding hybrid cases seems to support this distinction. Only once has the EU competition watchdog pursued both the undertakings and the state itself in a case involving tariffs set by Italian customs agents. A law authorized the CNSD, a national association of customs agents, to adopt minimum and maximum tariffs that were subsequently approved by a ministerial decree. The Commission addressed the CNSD decision and also sued Italy before the ECJ for infringing its obligation under the Treaty.[136] The ECJ had no doubt that even an association created by an act of Parliament can be seen as an association of undertakings for the purposes of Article 101 TFEU. It noted that members of the

133 Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, para 57.

134 Case C-280/08 P., *Deutsche Telekom AG v European Commission,* judgment of the Court of 14 October 2010., [2010] ECR I-09555., para 91.

135 Ibid. at para 91.

136 C-35/96, *CNSD* [1995] ECR I-2883, para 53–54.

CNSD were not appointed by the government, and they were not obliged to take the public interest into account.

Nowadays, the Commission prefers to challenge anti-competitive state regulation on the basis of the four freedoms, especially the free movement of goods and the free provision of services, or, under Article 37 TFEU regulating commercial state monopolies. Most of the European case law on anti-competitive state practices arose on the basis of competitor challenges before national courts. In the 1980's the Commission adopted a number of decisions addressing monopolies in the telecommunication and postal sectors but it has yet to establish a consistent enforcement policy. We can claim that the European *effet utile* rule is stricter than the U.S. state action doctrine in as much as it does not allow member states to create cartel-like arrangements and justify them by invoking important public interests going beyond competition policy. The consequence would be a broader liability for companies engaging in anti-competitive activities under the public umbrella. However, we should add that other TFEU provisions relating to the free movement rules can more easily be invoked against anti-competitive state actions without the need to prove the link with an Article 101 TFEU-like cartel. These provisions do allow for a public interest defense taking into account other interests than undistorted free competition.[137] With that, more state interventions could be justified, so the room for legitimate anti-competitive behavior by undertakings may not be as narrow as if we considered only the competition rules of the Treaty.

The European internal market rules have a broader reach than the U.S. equivalent 'dormant commerce clause' since the EU rules also include non-discriminatory state measures. Article 1, Section 8 of the U.S. Constitution gives Congress the power to "*regulate Commerce* […] *among the several States*". The U.S. Supreme Court interpreted the Commerce Clause as depriving states of the power to impede interstate commerce and that interpretation is known as the Dormant Commerce Clause. The Dormant Commerce Clause has been applied against discriminatory state measures and indirectly provides more room for U.S. states to legalize anti-competitive market effects.

## 5. Conclusion

The *Midcal* test is a "rigorous" one that ensure[s] that private parties [can] claim state-action immunity from Sherman Act liability only when their anticompetitive

[137] This relationship between competition and free movement rules is also emphasized by Damien Gerard, who suggests that the legality of assessing the legality of state measures limiting competition should be assessed under the internal market rules instead of the ill-equipped competition rules. Gerard op. cit. One remark I would like to add is that this indeed seems to be the policy of the EU Commission. However, the Court has less freedom to make this policy choice since its jurisprudence is largely driven by the questions posed by national courts. If the national litigation is centered around competition rules, the Court has some difficulty in orienting national judges towards internal market rules.

acts [are] truly the product of state regulation.[138] The *Parker* test is different in the sense that it looks at the existence of a clearly established and supervised state policy and does not inquire whether entities subject to the regulation had any realistic chance to deviate from the state policy. In the EU, EU antitrust rules continue to apply when the government only supports an agreement interfering with the free play of competition.

Another important difference between the European and U.S. perspectives, also noted by the Antitrust Modernization Commission,[139] is that the state action doctrines applies regardless of the effects the state measure may have in other states. For example, in *Parker v. Brown* the vast majority of consumers who paid higher prices for raisins because of California's regulatory scheme were outside the state since most of the raisins were sold outside of California, Internalizing the positive effects and exporting the negatives one is a typical result of protectionist state regulation. Avoiding this spillover effect is central to how EU law perceives this issue.

Due to the different conceptual settings of the two approaches, U.S. state action doctrine does not automatically apply if a municipality is the actor, unlike EU case law It must be proven that the actions of the municipality reflect state policy.[140] This is not the situation in the EU where measures adopted by local governments are treated the same way as measures of the state.

Under the second prong of the U.S. test, the state must actively supervise the action of private entities. Passive supervision does not suffice. In contrast, EU courts do not inquire how intensively public officials control the activity of undertakings when it comes to approval of a previous anti-competitive agreement. The second prong of the U.S. state action test is more demanding, whereas the first prong allows for much more leeway by not requesting autonomy erasing compulsion by the state. In sum, it is difficult to judge which approach is stricter. U.S. law provides immunity for firms that were not compelled by the state to act in an anti-competitive manner so long as the state actively supervises their activity. The same situation would constitute an infringement of EU law.

In the EU, the internal market principle and the commandment of free, undistorted competition play a central role in uniting 28 different countries. In the U.S., the 50 states share a common history born in wars and united by strong common interests that are expressed in strong federal foreign, defense, monetary and fiscal policies, all of which are missing in Europe. Perhaps that is one of the reasons why European integration is much more sensitive to state imposed competition restrictions and stricter conditions on member states with an indirect impact on businesses are imposed.[141]

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138 *Patrick v. Burget*, 486 U.S. 94, 100 (1988).

139 Ibid. at 374.

140 *City of Lafeyette v. La. Power & Light Co.*, 435 U.S. at 412–413. (1978).

141 Another reason is that in Europe, state owned undertakings, even monopolies have played and still play a more decisive influence in the economy a sin the U.S.

One area that European law could learn from the U.S. jurisprudence is to give more importance to the ex-post control of the government on anti-competitive, state authorized competition restrictions. The test applied by the ECJ is more formalistic than that of the U.S. Supreme Court. Greater ex-post control would lead to the illegality of some state measures and vanishing of the shield protecting business from antitrust rules as a result. U.S. case law, unlike its European counterpart, does not draw a bright line between state measures mandating or simply encouraging anti-competitive conduct. The autonomous decision making doctrine of the ECJ is clearly well established from a conceptual perspective. Practically, however, it does not really matter whether the state's action is to be classified as mandatory or suggestive given the enormous pressure government entities can exert on individuals or corporations. Loyal entities may even be expected to guess and act according to the will of the state.

A crucial question is, to what extent can the state measure relating to an otherwise cartel-like private arrangement genuinely protect public interest? Under certain circumstances, other public policy interests, like safety, consumer or environment protection, may legitimize the restriction of economic freedom. In other situations, the reference to 'other public policies' covers nothing more than the particular interests of a group of market players.

Judge Kennedy's *North Carolina Dental Examiners* opinion recalled that although federal antitrust law is a central safeguard for free market structures, there are other values regulated by the state at the expense of the Sherman Act. State-action immunity exists to avoid conflicts between state sovereignty and the national commitment to robust competition policies.[142] The Court quoted *Ticor* warning that the immunity is not unbounded, "[g]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, "state action immunity is disfavored, much as are repeals by implication."[143] This comes close to acknowledging the supreme nature of free markets and competition. Exceptions to the competition principle should be clearly expressed.

I believe that free and undistorted competition is key to our human flourishing and the performance of our economies. Yet, competition is not all-mighty. There can be various reasons why it does not function properly, and why the side effects of rivalry call for state intervention. The ultimate question comes easily, but is difficult to answer, to what extent do we trust the state when it regulates markets? The problem is much more complex than the existence of corruption. Lack of information about real and future market circumstances and the lobbying efforts of strong players can easily distort public decisions. I believe that a narrowly construed antitrust immunity for state action can help to properly answer these questions.

142 Ibid. 6–7.

143 Ibid. 636.

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# ANTITRUST SCRUTINY FOR THE OCCUPATIONS: *NORTH CAROLINA DENTAL* AND ITS IMPACT ON U.S. LICENSING BOARDS

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## Introduction

The American system of occupational licensing is under attack. The current regime – which allows for almost total self-regulation – has weathered sustained criticism from consumer advocate groups, academics, politicians, and even the White House itself. But the recent U.S. Supreme Court opinion in *North Carolina Board of Dental Examiners v. FTC*,[1] portends a sea change in how almost a third of American workers are regulated. The case has made it possible for aggrieved individuals and government enforcers to bring suits against most state licensing boards, challenging their restrictions as violating federal competition law. The case has prompted two responses: a flood of antitrust suits against boards, and a panic among states as they scramble to protect licensing boards from antitrust liability. This article describes the current system of professional regulation in the U.S., explains the *North Carolina Dental* opinion and its legal impact, and discusses states' likely responses. The upshot is that in order to protect occupational licensing from antitrust suit, states will have to reform their regulatory systems in ways that will improve the fairness and efficiency of American occupational licensing laws.

## 1. Occupational Licensing in the United States

Occupational licensing is ubiquitous in the United States: nearly thirty percent of American workers must have a government-issued professional license to legally

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1 135 S. Ct. 1101 (2015).

perform their jobs.[2] The legal institutions that form this complex web of regulation, however, are relatively obscure. For the most part, states, not the federal government, regulate occupational licensing. They do so through boards that create and implement entry requirements, rules of ethics, and standards for discipline. Each state has a separate board for most occupations, with some states having up to forty-nine separate boards. This decentralized system of professional regulation has resulted in a proliferation of state licensing boards – currently there are 1,740 operational boards nationwide – permitting each individual board to operate in relative obscurity.[3] In the aggregate, these nearly invisible institutions deliver a hefty bill to consumers – economists estimate the annual cost of licensing restrictions at around $116 billion[4] – while providing perhaps little in the way of public health and safety.

### 1.1. Professionally-Dominated Boards

My investigation into the state statutes creating the 1,740 American licensing boards revealed that the vast majority—85%—are required by statute to be staffed by a majority of license-holders in the profession the board regulates.[5] In other words, most American occupational licensing regimes amount to self-regulation: doctors regulate doctors, and barbers regulate barbers. For example, Ohio's state medical board, which is typical, is comprised of twelve members: seven physicians, one osteopathic physician, one podiatrist, and three "public" (non-licensee) members.[6] This composition gives license-holders the ability to vote as a bloc to set the terms of competition even when other board members disagree. This overwhelming degree of professional control would be bad enough, but the empirical data likely understates the problem. Anecdotal investigation into actual board practices reveals that member absences, position vacancies, and even violations of statutory requirements often lead to professionally dominated decision-making even where dominance is not required by statute.[7]

Self-regulation carries with it the familiar risk of self-dealing. Licensing regulations inherently exclude some would-be professionals from the market and set the terms of competition among professional providers. These kinds of restrictions are justified on theoretical grounds as protecting consumer safety, but of course they also can

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2 See Morris M. Kleiner – Alan B. Krueger: Analyzing the Extent and Influence of Occupational Licensing on the Labor Market. *J. Lab. Econ.,* Vol. 31. (2013) 173., 198. (estimating that, as of 2008, 29% of U.S. workers were licensed and noting that licensing is a growing phenomenon in the U.S. economy).

3 Rebecca Haw Allensworth: Foxes at the Henhouse: Occupational Licensing Boards Up Close. *Cal. L. Rev.,* (forthcoming 2017) manuscript at 3.

4 See Morris M. Kleiner: *Occupational Licensing*., *14 J. Econ. Persp.,* Vol. 14. 189, 115 (2000) 189., 115. (estimating the cost of occupational licensing to consumers at $116–$139 billion a year).

5 Allensworth (forthcoming 2017) op. cit. manuscript at 4.

6 *Ohio Rev. Code Ann*., § 4731.01 (West 2016).

7 See Allensworth (forthcoming 2017) op. cit. manuscript at 4.

lead to a less competitive professional environment, which manifests itself in higher prices and lower service availability. Self-regulation means entrusting the delicate balance between competition and regulation to the license-holders themselves – those who have the most to gain from inefficiently restrictive rules.[8] The dominance of professionals on licensing boards means that the fox is asked to guard the hen house. These results should surprise those under the impression that occupational licensing in the U.S. is governmental, which is to say that it is in any measure public or public-regarding. In reality, licensing schemes are run by entities that look more like cartels than governmental agencies.

### 1.2. Anticompetitive Regulations

The result of self-regulation has been disappointingly predictable. Many licensing requirements seem aimed more at relaxing competition among professionals than at improving public health and safety.

Licensing restrictions can be theoretically justified as addressing market failures that would occur in an unregulated market for professional services. These failures typically involve asymmetrical information about service quality or market externalities in a transaction between a provider and a consumer. The first kind of market failure occurs when the service provider is unable to credibly communicate the quality of his services, and consumers are therefore unwilling to pay a premium for excellent service. Services providers in these circumstances will have little incentive to provide excellent service, since they cannot command a premium for their special efforts, and will therefore provide only the minimum quality the market can bear. This market – famously dubbed the "Market for Lemons" by economist George Akerlof – is inefficient if there are professionals willing to provide, and consumers willing to pay for, high quality service.[9] Licensing regulations can prevent this inefficiency by establishing a "floor" of service quality through strict entry requirements (such as education or examination) and professional standards of practice.

The second kind of market failure occurs as a result of market externalities, which are costs that are visited on society at large, not just the transacting parties. Without externalities, the costs and benefits of an exchange are borne by the parties to that transaction. For example, if I buy a bad cup of coffee, I suffer the harm, and will likely visit a consequence on the seller in the future by not returning with my business. But in some markets, the consequences of poor quality transactions are not fully internalized by the provider and the patient. For instance, the cost of poor quality medical care may be visited not only on the patient but also on the patient's employer, family, and local emergency room. Where transactions create negative externalities, low-quality, low-price transactions may be inefficient. Licensing can

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[8] See Aaron Edlin – Rebecca Haw: Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny? *U. Pa. L. Rev.,* Vol. 162. (2014) 1093., 1156.

[9] See George A. Akerlof: The Market for "Lemons": Quality Uncertainty and the Market Mechanism. *Q. J. Econ.,* Vol. 84. (1970) 488., 489.

prevent these inefficiencies by creating a minimum service quality through licensing requirements and rules.

From an efficiency perspective, restricting competition by limiting entry and dictating the terms of practice can only be justified in the presence of these market failures. Further, a licensing restriction can only be justified to the extent that its benefits (in terms of addressing a market failure) outweigh its costs (the higher prices charged to consumers). In other words, licensing is efficient only if it actually improves quality, and only if it does so without too high a price tag for consumers.

With competitors controlling their own competitive environment, it is unsurprising that many American professional licensing regulations cannot be justified as efficient. The licensing of many professions in America cannot even pass the laugh test. Occupations currently licensed in at least one state include locksmiths, beekeepers, auctioneers, interior designers, fortune tellers, tour guides, and shampooers. And the excesses of licensing go beyond these examples of regulatory overreach. Some commonly licensed professions, such as barbering and cosmetology, lack a plausible market failure justification. It is hard to say that consumers are unable to assess the quality of these services, or that low quality service creates widespread harm. Further, licensing restrictions that do address a plausible market failure often do so with too heavy a hand. For example, the requirement that nurse practitioners be supervised by doctors, a requirement in many states,[10] theoretically addresses externalities in the market for healthcare. But in light of empirical evidence that supervised nursing is more expensive to consumers, yet provides no added quality or safety benefits,[11] it seems clear that the supervision requirement goes too far.

Anecdotal evidence of licensing run amok is easy to find, but so is empirical evidence that licensing often goes too far in benefiting professionals at the expense of consumers. Licensing has an obvious effect on consumer prices, as a theoretical matter and as a matter of fact. Labor economists estimate that when a profession goes from unlicensed to licensed status, wages rise at least 10%.[12] Of course, if that wage premium bought higher quality services, it may be efficient. But while licensing has a significant effect on consumer prices and professional wages, its effect on service quality is dubious. Economic studies of service quality paint a murky picture.[13] Most of the empirical studies measuring the impact of licensing on quality evidence is

[10] See Sharon Christian – Catherine Dower: Scope of Practice Laws in Health Care: Rethinking the Role of Nurse Practitioners. Cal. HealthCare Found., (January 2008) 3, available at http://www.chcf.org/publications/2008/01/scope-of-practice-laws-in-health-care-rethinking-the-role-of-nurse-practitioners (noting that thirty states require at least some degree of physician supervision or collaboration).

[11] See *id.* at 6 (listing multiple studies finding no material difference in quality of care).

[12] See Morris M. Kleiner: Regulating Occupations: Quality or Monopoly? *Emp't Res.,* Vol. 13., N. 1. (2006), *available at* http://research.upjohn.org/empl_research/vol13/iss1/1.

[13] See Morris M. Kleiner: Licensing Occupations: Ensuring Quality or Restricting Competition? 53 tbl.3.2 (2006) (showing varying levels of quality improvements in a number of licensed professions).

equivocal,[14] and one study even claims to show that licensing *reduces* quality.[15] By any measure, the American system of professional self-regulation does not achieve an efficient balance of regulation and competition.

## 2. Antitrust Liability and *North Carolina Dental*

Practitioner-dominated licensing boards came under attack in a recent U.S. Supreme Court case decided in May 2015. The case, *North Carolina State Board of Dental Examiners v. FTC*, completed a revolution in the American federal-state balance of power that previous cases in this area had foreshadowed. In the process, it placed a wide swath of American occupational regulation – perhaps the vast majority of it – in the crosshairs of antitrust law. States should interpret this case as an existential threat to how they regulate the professions. It will no doubt precipitate regulatory reforms.

### 2.1. State Action Immunity and the Antitrust Laws

To understand *North Carolina Dental* and its impact, a few words should be said about a relatively obscure area of American law known as antitrust state action immunity (or sometimes *Parker* immunity, for the case that established it). The Sherman Act,[16] the major federal antitrust statute outlawing unreasonable restraints of trade and monopolistic conduct, does not limit its reach to private actors. Nothing in the text of the statute prevents someone from challenging a state law restricting competition as "unreasonable" under the Act. Most regulation, state or otherwise, creates competitive winners and losers. Yet the wholesale application of federal competition law to state action would threaten to invalidate all or most state regulatory activity, a result that would offend principles of federalism. Thus, in 1943, the U.S. Supreme Court recognized "state action immunity" from federal antitrust law. In *Parker v. Brown*,[17] the Court held that conduct by the state would be untouchable by federal antitrust suits. The opinion, however, included an important caveat: a state could not merely authorize private actors to violate the Sherman Act. Allowing states to selectively repeal the Sherman Act in this way would undermine the national policy in favor of competition.[18]

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[14] See, *e.g,* Sidney L. Carroll – Robert J. Gaston: Occupational Licensing and the Quality of Service. *Law & Hum. Behav.*, Vol. 7. (1983) 139., 145. (concluding that licensing results in better delivered quality but not better quality received by society as a whole). See Joshua D. Angrist – Jonathan Guryan: Teacher Testing, Teacher Education, and Teacher Characteristics. *Am. Econ. Rev.,* Vol. 94. (2004) 241., 246. (finding "no evidence that testing hurdles have raised the quality of new and inexperienced teachers").

[15] See Carroll–Gaston op. cit. 145 (suggesting that "excessive restriction" reduces the quality of services available to the "lower middle income classes").

[16] 15 U.S.C. § 1 (2016).

[17] 317 U.S. 341 (1943).

[18] Ibid. at 351 (explaining that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful").

That caveat in *Parker* has become the source of decades of controversy as the Court has struggled to define the contours of state action immunity. What is the precise line between "state action" and action merely authorized by the state? How close of a relationship must the regulating entity have to the sovereign branches of a state before it can invoke immunity? These questions have proved especially vexing as states have increasingly used entities other than its sovereign branches – such as municipalities, bar associations, and occupational licensing boards – to create and enforce regulation. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[19] the Court created a two-part test for whether an entity could claim immunity for its activity. The *Midcal* test confers antitrust immunity on entities that both act according to a state's "clearly articulated and affirmatively expressed" policy to displace competition, and are "actively supervised" by the state itself.[20]

Shortly after *Midcal*, the Court further complicated the question by creating a shortcut to *Parker* immunity for some kinds of regulatory entities. In *Town of Hallie v. Eau Claire*,[21] the Court held that cities enjoy immunity for their anticompetitive regulation as long as they meet *Midcal*'s first prong. In other words, even unsupervised municipal regulation is immune so long as it comports with the state's "clearly articulated" intent to displace competition.[22] The court justified the shortcut by appealing to a city's public nature, explaining that "[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement."[23]

Who, besides municipalities, can take the *Hallie* shortcut? The question turns out to be crucial to the status of licensing boards, because the "clear articulation" prong has proved to be easily met in the professional licensing context.[24] At the time the Court was set to hear *North Carolina Dental*, the question of whether an occupational licensing board was entitled to take the *Hallie* shortcut was very much in dispute. On the one hand, the *Hallie* opinion itself had suggested (without deciding) that state agencies would be entitled to the shortcut.[25] And because many states refer to their boards as "agencies," this gave boards a good claim to using the shortcut. On the other hand, scholars, some lower courts, and the Federal Trade Commission argued that what made municipalities special for immunity purposes was not their nominal claim to being governmental, but their public accountability. By this measure, occupational

19 445 U.S. 97 (1980).

20 Ibid. at 943.

21 471 U.S. 34 (1985).

22 Ibid. at 46 ("We now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality.").

23 Ibid. at 47 (emphasis omitted).

24 See, e.g., *Benson v. Ariz. State Bd. of Dental Exam'rs*, 673 F.2d 272, 275 (9th Cir. 1982) (holding that a statute which established the board of dentistry and gave it power to regulate professional practice and entry requirements satisfied the clear articulation prong).

25 *Hallie*, 471 U.S. at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.").

licensing boards – which are controlled by self-dealing licensees and which operate outside of the public eye – should be held to both *Midcal* prongs.

### 2.2. North Carolina Dental

The latest chapter in the state action immunity saga specifically addressed the question of whether occupational regulation could be challenged under the Sherman Act. In 2006, the North Carolina State Board of Dental Examiners – a licensing board comprised of six dentists, one dental hygienist, and one public member – initiated a campaign to suppress competition from non-dentists in the market for cosmetic teeth whitening. The dentists were apparently vexed by the rise of a new, cheaper means of whitening teeth that was being performed in malls and at beauty salons, which reduced demand for the expensive teeth whitening services offered by licensed dentists. The Board "did battle" with the non-dentist teeth whiteners by issuing cease-and-desist letters characterizing teeth whitening as the practice of dentistry and threatening legal action if the non-dentists persisted.[26] The campaign worked. Within a few months of the Board's actions, the state's dentists had regained their monopoly over teeth whitening.

The Federal Trade Commission brought suit, charging that the letter campaign was an unreasonable restraint of trade in violation of the Sherman Act. The FTC argued that the board was not entitled to state action immunity because unlike municipalities, it was required to meet *Midcal*'s "active supervision" prong – a test that it would fail. In the FTC's view, the board was private because of the private interests that dominated its decision-making and private regulators were forbidden from taking the *Hallie* shortcut. To the FTC, it did not matter that the state of North Carolina believed the Board was a state entity, that state statutes referred to the board as a "state agency," or that the state itself had filed an amicus brief arguing for the board's immunity.

Ultimately, the U.S. Supreme Court sided with the FTC. The Court made clear that what made the municipality in *Hallie* unlikely to join a private price fixing cartel, and therefore merit the immunity shortcut, was not its claim to being governmental in a formal sense, but rather its lack of incentives to self-deal.[27] However, for an entity controlled by competing professionals and tasked with regulating the terms of their competition, state supervision was required. Otherwise, "the national policy in favor of competition [would be] thwarted by casting […] a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[28] The Court held that a state board on which "a controlling number of decisionmakers are active market

[26] *N.C. Dental*, 135 S. Ct. at 1108 (quoting App. To Pet. for Writ of Cert. at 103a, *N.C. Dental* (No. 13-534), 2013) (internal quotation marks omitted).

[27] *N.C. Dental*, 135 S. Ct. at 1111.

[28] *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 98 (1980).

participants in the occupation the board regulates" must be actively supervised by the state or else face antitrust liability.[29]

*North Carolina Dental* left unanswered several questions that will spawn a new set of controversies, some of which are already working their way through the lower courts. The first open question – what constitutes "active supervision" – is as old as the case that created the supervision requirement in the first place. Although the Court has considered the issue in several cases, it has always been vague in its guidance. The second set of questions – who counts as "active market participants" and how many constitute a "controlling number" – are new to the state action immunity doctrine. Giving proper meaning of these new terms requires understanding what gives rise to the self-dealing risk in the first place.

### *2.2.1. Active Supervision*

The Court has never been particularly clear about what constitutes active supervision. Notably, it has never found a supervisory scheme to pass muster. *North Carolina Dental* emphasized that "the inquiry regarding active supervision is flexible and context-dependent,"[30] making it difficult to predict how much state involvement is enough. The case recited two familiar requirements for supervision – first that it be more than a "negative option," or an unexercised power to review the board's actions,[31] and second that it be substantive and not merely procedural.[32] The case then added a new requirement, that the supervisor "have the power to veto or modify" the decision it reviews.[33]

Based on the Court's renewed emphasis on political accountability as a condition of antitrust immunity, it seems reasonable to predict that "active supervision" will entail a state review process that forces states to take transparent responsibility for the substantive content of the regulation. This almost certainly means that review must be non-deferential: a state must take a fresh look at the regulation and decide whether it comports with state policy without putting a thumb on the scale. And it may mean that state supervisors must identify, quantify, and approve the competitive consequences flowing from the regulation. Delegation of regulation to competitors creates both a theoretical and, as it turns out, a very real risk of self-dealing at the expense of consumers. If, as the Court has said, supervision seeks to "assign political responsibility, not obscure it,"[34] then supervision should force states to own the

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29 *N.C. Dental* at 1114.

30 Ibid. at 1117 ("In general […] the adequacy of supervision otherwise will depend on all the circumstances of a case.").

31 See ibid. at 1112 (explaining that the power to review must be actually exercised to be "active supervision"). See also *Ticor*, 504 U.S. at 622–23 (holding that the mere potential for review is inadequate).

32 See *N.C. Dental* at 1116; see also *Patrick*, 486 U.S. at 101.

33 *N.C. Dental* at 1116.

34 *Ticor* at 636.

economic impact of the regulations they tolerate. To this end, I have advocated for the use of competitive impact statements – identifying and at least attempting to quantify the economic and competitive consequences of a reviewed regulation – as a condition of finding that the state "actively supervised" the challenged regulation.[35]

Under the criteria set out in *North Carolina Dental* for active supervision, most states probably do not supervise their licensing boards. States typically allow boards to be sued for failing to comply with that state's Administrative Procedure Act, but this review is likely to be considered insufficiently substantive to qualify as supervision.[36] Some states have "rules review" procedures whereby substate regulations, such as those created by a licensing board, are reviewed by a state commission or committee before having the force of law,[37] but state legislatures typically cannot modify or veto the decision below. At the time *North Carolina Dental* was decided, no court or commentator had identified an example of state-level substantive review of all board activity, located in an executive agency not dominated by active market participants.

### *2.2.2. Competitor Control*

As my survey of the statutory composition of the 1,740 licensing boards in the U.S. reveals, most boards are comprised of a majority of licensees. The *North Carolina Dental* opinion used a curious phrase to describe the dominance that triggers the supervision requirement. It held that a state board on which "a controlling number of decisionmakers are active market participants in the occupation the board regulates" must be actively supervised to enjoy immunity.[38] This sentence raises two questions. First, who counts as an "active market participant in the occupation the board regulates"? Second, how many is a "controlling number" and why did the court not simply say "majority"?

The courts will interpret "active market participant" to mean those most likely to self-deal, which in the licensing board context means members currently holding a license issued by the board itself. This interpretation comports with the antitrust state action principle that additional state involvement is necessary when the state relies on industry self-regulation, the most competitively risky form of governance. And it comports with substantive antitrust law. Under § 1 of the Sherman Act, naked agreements among competitors to restrict competition are *per se* illegal. This rule reflects the notion that competitors, when combining to decide the terms of their competition, inevitably benefit themselves at the expense of the consumer. The principal concern in an antitrust suit against a board is that board members who are

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[35] See Rebecca Haw Allensworth: The New Antitrust Federalism. *Virginia Law Review,* Vol. 102., Iss. 6. (2016).

[36] See Edlin–Haw op. cit. 1123 n.179. Further, because this review only occurs when someone brings suit these are likely the "negative option" found lacking by the Court. See ibid. at 1123.

[37] See, e.g., Conn. Gen. Assembly, Legislative Regulation Review Committee, https://www.cga.ct.gov/rr/; Ariz. Rev. Stat. Ann. § 41-1052 (2013).

[38] *N.C. Dental*, 135 S. Ct. at 1114.

currently in competition with one another will often that find that their interest in protecting consumers conflicts with their profit motives to keep competitors out and prices high.

The members of a licensing board with the strongest incentive to self-deal are those who hold a license issued by the board. When a board only issues one kind of license – for example, a dental license – the dynamics of self-dealing are simple. Board members who hold the same license are like horizontal competitors dealing in undifferentiated goods. A permissive licensing rule that either lets in more competitors or allows for more competition among incumbents threatens the bottom line of all license-holders. A more difficult question is raised by boards that issue multiple kinds of licenses and have representatives from each kind of license on the board. In this circumstance, there is an argument that because two board members must obtain separate licenses, they should not both be counted towards the dominance discussed in *North Carolina Dental*. But the reality of these boards – that the different licenses issued by the same board often have significant practical overlap, and that there is a risk of back-scratching among similar professions – suggests that all licensees holding *some* license issued by the board ought to count towards professional dominance.

Likewise, "controlling number" ought to be defined according to the reality of board practice and procedure. At the very least, it seems likely that "control" will mean that license-holders, voting as a bloc, can determine a board's vote without assent from non-professional members. In the simplest case (where the full board votes and every member has an equal vote) "controlling number" will be synonymous with "majority." But the voting practices of licensing boards reveals that in many cases, even a board without a majority of licensees can make decisions by a "controlling number" of professionals.

Quorum rules – such as the very common rule that a majority of the board constitutes a quorum – can allow a professional minority of the board to form a majority at meetings.[39] Similarly, voting rules, such as a rule that a non-professional member of the board cannot vote, can turn what by membership is a non-dominated board into one where the licensees enjoy a majority.[40] This may explain why the court used the term "controlling number" rather than "majority": "controlling number" captures circumstances where licensees do not formally make up a majority of the

[39] For example, physical therapists have enjoyed a majority at all of the last five meetings of the North Dakota Board of Physical Therapy, despite a statutory requirement that half the board's seats go to non-licensees. See *Board Minutes*, N.D. Bd. of Physical Therapy, https://www.ndbpt.org/minutes.asp (last visited July 29, 2016). Despite the attendance issues, the current composition of the board reflects the statutorily required membership. See N.D. Cent. Code § 43-26.1-02 (2015); *North Dakota Board of Physical Therapy Members*, N.D. Bd. of Physical Therapy, https://www.ndbpt.org/about_us.asp (last visited July 29, 2016).

[40] For an example of this, see the Arkansas State Board of Acupuncture, which disables one of its non-professional members from voting. Ark. Code Ann. § 17-102-201 (West 2016) ("[T]he ex officio member shall have no vote, shall not serve as an officer of the board, and shall not be counted to establish a quorum or a majority necessary to conduct business.").

board, but in practice exercise voting control. It seems likely that the Court will define "controlling number" to refer to those actually present and able to vote when a decision was made.

## 3. The Future of Occupational Licensing

The basic structure of occupational licensing in the U.S. – self-regulation with little or no governmental involvement – is endangered. States should see the holding of *North Carolina Dental* as both a threat and an opportunity. The threat, of course, is that their boards will be sued and individual board members held liable for treble damages for anticompetitive occupational regulation. These suits have already begun, and will likely continue to be filed in significant numbers. The opportunity is the chance to reform the regulatory infrastructure governing almost a third of American workers to make it more fair, efficient, and immune to antitrust suit.

### 3.1. Boards Under Scrutiny

*North Carolina Dental* has precipitated a legal crisis for states and their occupational licensing boards. Since the decision was handed down last year, at least thirteen suits have been filed against licensing boards. Perhaps unsurprisingly, North Carolina has been the hardest hit, with three suits against three different boards.[41] California is facing two suits[42] and Connecticut,[43] Georgia,[44] Louisiana,[45] Nevada,[46] Pennsylvania,[47] Mississippi,[48] Tennessee[49] and Texas[50] are each facing one suit. These thirteen boards are not unique; for every board that has been sued, there are more than one hundred others that are potentially vulnerable. The variety of suits reflects the spectrum of competitive risks posed by professional self-regulation. Several boards are accused of suppressing innovative new forms of professional practice that threaten the bottom line of traditional practitioners. Other suits allege unreasonable

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41 See *Jemsek v. N.C. Med. Bd.*, No. 5:16-cv-00059 (E.D.N.C. filed Feb. 2, 2016); *Henry v. N.C. Acupuncture Licensing Bd.*, No. 1:15-cv-00831 (M.D.N.C. filed Oct. 7, 2015); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 1:15-cv-00439 (M.D.N.C. filed Jun. 3, 2015).

42 See *Kinney v. State Bar of Cal.*, No. 3:16-cv-02277 (N.D. Cal. filed Apr. 27, 2016); *Gonzalez v. Cal. Bureau of Real Estate*, No. 2:15-cv-02448 (E.D. Cal. filed Nov. 11, 2015).

43 See *Robb v. Conn. Bd. of Veterinary Med.*, No. 3:15-cv-00906-CSH (D. Conn. filed Jun. 12, 2015).

44 See *Colindres v. Battle*, No. 1:15-cv-02843-SCJ (N.D. Ga. filed Aug. 12, 2015).

45 See *Rodgers v. La. Bd. of Nursing*, No. 3:15-cv-00615 (M.D. La. filed Sept. 11, 2015).

46 See *Strategic Pharm. Solutions, Inc. v. Nev. State Bd. of Pharm.*, No. 2:16-cv-00171-RFB-VCF (D. Nev. filed Jan. 29, 2016).

47 See *Bauer v. Pa. State Bd. of Auctioneer Exam'rs*, No. 2:15-cv-01334 (W.D. Pa. filed Oct. 14, 2015).

48 See *Axcess Med. Clinic, Inc. v. Miss. State Bd. of Med. Licensure*, No. 3:15-cv-00307-WHB-JCG (S.D. Miss. filed Apr. 24, 2015).

49 See *WSPTN Corp. v. Tenn. Dep't of Health*, No. 3:15-cv-00840 (M.D. Tenn. filed Jul. 30, 2015).

50 See *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1:15-cv-00343-RP (W.D. Tex. filed Apr. 29, 2015).

and unfair entry barriers, and some concern occupational scope-of-practice, the issue in *North Carolina Dental*.

A finding of no antitrust immunity in these suits means that the board members are legally no different from members of a private cartel, and so are personally financially liable for three times the compensatory damages alleged by a plaintiff. Besides money damages, most of these suits ask for injunctive relief that would reverse the challenged regulatory action. Without state action immunity, any board regulation that does not comply with federal antitrust law is just a lawsuit away from invalidity.

### 3.2. State Responses

States are likely to make changes to how they regulate the professions in the wake of *North Carolina Dental*. They should embrace this opportunity to improve the substance and process of their licensing schemes. States are likely to regard the specter of ongoing antitrust scrutiny as untenable because many licensing rules run afoul of the Sherman Act and because personal financial liability for board members (with treble damages) is very likely to chill board membership. Boar immunity is probably the most efficient option for states.

*North Carolina Dental* provides states with two options for conferring immunity on licensing boards: active state supervision or modification of board membership. If states minimally comply with the requirements for state action immunity, that certainly stands to improve the state of licensing in the U.S.; both options require more state involvement and political accountability and discourage self-regulation. But states should go further than the floor set by federal antitrust law. The stakes of occupational licensing go beyond antitrust law. Inefficient licensing rules cost a state's consumers and can amplify income inequality. Since states must make changes in response to *North Carolina Dental* anyway, they should take the opportunity to further insulate occupational licensing from self-dealing and reform the substance of licensing rules.

#### *3.2.1. Supervision*

Even practitioner-dominated boards enjoy immunity from the antitrust laws, as long as the state actively supervises their activity. Active supervision would allow states to confer immunity on all licensing rules and regulations without making changes at the board level. Supervision has some distinct advantages over board reformation, including centralization: one umbrella supervisor could theoretically oversee all licensing board activity. It also has the advantage of ensuring accountability by forcing politically responsive state supervisors to examine, approve, and take responsibility for board regulations. And if the states use this opportunity – as I argue they should – to reform the substance of licensing regimes, centralized state supervisors can facilitate efficient reform.

The biggest disadvantage of using supervision to immunize boards is that the Court has been vague about what constitutes adequate supervision. States may not

feel confident that a proposed scheme will pass muster. Another disadvantage is that creating a supervisory body would require major legislation, and perhaps even state constitutional amendment. Finding the political capital to make that happen could be difficult, especially in states where small government is prized and supervisory structures would be seen as adding another layer of red tape. A supervisory body would also need significant funding, which again could encounter resistance in the political process. Despite these issues, at least one state has already passed legislation giving its governor's office a supervisory role.[51]

### *3.2.2. Board Reformation*

For states wary of the legal uncertainties surrounding active supervision, the another route to immunity may be attractive. States could reform boards to avoid the dominance identified in *North Carolina Dental* by adding non-licensee members. These non-dominated boards would not need active supervision to be immune from antitrust suit. This solution is relatively cheap, simple, and politically attractive to legislatures hoping to avoid the creation of ever more regulatory infrastructure. It also presents an opportunity to add some diversity to the conversation about licensing. The nonprofessional member seats could be given to stakeholders, especially consumer advocates, who may push for a lighter touch in regulating the professions.

Board reformation has some disadvantages as well. It does not avoid all legal uncertainty, since the Court was unclear about what "controlling number" and "active market participant" could mean. It may be a more cumbersome solution, because while supervision could be created by a single act of the legislature, board reformation requires changing every board. Further, board reformation may be a less promising means than supervision to enact a state's vision of leaner occupational licensing. Reforming boards to avoid a professional majority may help curb the excesses of occupational licensing, but how much it will help remains an open question. States may want more regulatory reform, and to get it they may have to adopt a top-down solution. In the final analysis, it is unclear which route to immunity is the best – whether the goal is lighter licensing requirements or certainty of immunity. States will undoubtedly have to experiment with various solutions before anyone can confidently say which is best.

### *3.2.3. Policy Changes*

Whichever route to immunity a state chooses, the goal should not only be antitrust immunity but sparer and more efficient licensing schemes. For some occupations, such as bee-keeping, shampooing, fortunetelling, and the like, licensing should be eliminated altogether. For others, licensing restrictions should be pared down

[51] See Ga. Code Ann. § 43-1C-3 (West 2016) (giving the governor authority to "review and, in writing, approve or veto any rule" proposed by a state professional licensing board before it becomes effective).

according to a cost-benefit analysis. More data is needed on how specific licensing requirements affect quality and price. Here, the decentralization of American licensing regulation can help; regulatory variety between states means economists can compare approaches and study the effectiveness of various licensing rules. Recognizing this opportunity, the U.S. Department of Labor has made $7.5 million available to states wishing to study their own licensing regulation and to develop and implement improvements.[52] Together with the changes mandated by *North Carolina Dental*, this research and advocacy could have real impact, provided the reforms are data-driven, and not, as has been the case for decades, the result of lobbying by licensees.

## 4. Conclusion

Labor economists have been arguing for decades that American occupational licensing has gone too far, but real reform has been elusive. The vast majority of licensing boards are dominated by licensees, and their regulations reflect the self-dealing one would expect from a cartel, not a governmental body. Now, with the Supreme Court's decision in *North Carolina Dental*, the states face a Hobson's choice: either change the way that nearly a third of the workforce is regulated, or expose licensing rules to antitrust suit. States should take the mandate for reform as an opportunity to introduce efficiency, transparency, and fairness into their occupational licensing schemes.

[52] See *Notice of Intent to Fund Project on Occupational Licensing Review and Portability: NOI-ETA-16-14*, U.S. Dep't of Labor, Emp't. & Training Admin., https://www.doleta.gov/grants/pdf/NOI-ETA-16-14.pdf (last visited Aug. 1, 2016).

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# INSTITUTIONAL DESIGN OF ENFORCING

## *Public Interest Considerations in Merger Control*

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### 1. Introductory remarks

There is an on-going debate on whether or not competition policy should aim to achieve non-competition related goals. Thus, including considerations other than consumer welfare (i.e. pubic interest considerations) into the standard merger assessment is a controversial issue. Public interest considerations widen the horizon of such assessment,[1] but might also encourage political lobbying, which decreases the impartiality of the system and shifts the focus from competition related matters to other agendas.

Even though considerations, which extend beyond consumer welfare can also be found in relation to antitrust procedures,[2] this article will solely focus on public interest considerations in merger control, due to two main reasons. Firstly, more than ninety jurisdictions have merger control laws around the world, and a large-scale cross-border transaction can easily trigger obligation to notify in any of those regimes. Thus, multi-jurisdictional merger control analysis has become a commonplace element of today's cross-border transactions.[3] This feature requires a great level of harmonisation and legal certainty, both in terms of procedural and substantial issues.

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1 In C. Graham: Public Interest Mergers. *European Competition Journal*, Vol. 9., No. 2, (August 2013) 406.

2 See, for instance M. P. Schinkel – L. Toth: Balancing the public interest-defence in cartel offences. *Amsterdam Law School Legal Studies, Research Paper* No. 2016/05.

3 At the intersection of the global economy and national interests: foreign investment review and merger control meet, R. Schlossberg – C. Laciak: *Freshfields Bruckhaus Deringer.* http://www.freshfields.com/uploadedFiles/SiteWide/News_Room/Insgight/At%20the%20intersection%20of%20the%20global%20economy%20and%20national%20interests_GTDT.pdf.

The existence of public interest considerations can create a significant obstacle in merger control procedures and make it considerably difficult for businesses to comply with diverging requirements and manage complex global mergers. Secondly, merger control had been recognised as a form of economic regulation which can be used as an interventionist tool by governments to influence the structure of markets.[4] Mergers between multinational and transnational corporations have the potential to have a significant impact on various national economies.[5] Political and economic consequences can make merger control especially prone to the inclusion of considerations going beyond the core goals of Competition Law.[6]

Many argue that the effective application of competition policy itself serves public interest,[7] and is capable of boosting innovation and economic growth and therefore, there is no need to attach further considerations to it.[8] Some jurisdictions do not consider non-competition factors in their antitrust analysis.[9] For instance, the US submission to the OECD (2016) refers to the keynote address of former Chairwoman Raminez where she points out that while such considerations *"may be appropriate policy objectives and worthy goals overall [...] integrating their consideration into a competition analysis [...] can lead to poor outcomes to the detriment of both businesses and consumers*."[10] These thoughts are largely shared by the business community that believes that introducing public interest considerations into merger

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4 L. McGowan – M. Cini: Discretion and Politicization in EU Competition Policy: The Case of Merger Control. *Governance*, Vol. 12., No. 2., (April 1999) 176–200.

5 J. Oxenham: Considerations before sub-saharan African competition jurisdictions with the quest for multi-jurisdictional merger control certainty. *US-China Law Review*, Vol. 9, 2011. 212.

6 OECD: Public interest considerations in merger control. *Background paper*, 2016. 6.

7 See for instance, UNCTAD, Roundtable on: The Benefit of Competition Policy for Consumers, 2014, *„[...]competition is not an end in itself. It contributes to an efficient use of society's scarce resources, technological development and innovation, a better choice of products and services, lower prices, higher quality and greater productivity in the economy as a whole. Fostering a competition culture in which consumers mak informed choices between products and services offered, businesses refrain from anti-competitive agreements or behaviour and public administrations realise how competition can contribute to addressing wider economic problems, directly contributes to making markets work better for the benefit of consumers and business".*

8 *„[...] the existence of competitive markets benefits consumers in the sense that the competitive process should ensure, under standard economic theory, that competitive markets lead to the efficient allocation of scarce resources and deliver competitively priced goods and services. Public interest factors are more difficult to quantify and address in terms of how these can be achieved through market forces."* D. Poddar – G. Stooke: Consideration of Public Interest Factors in Antitrust Merger Control. *Competition Policy International,* 2.

9 See the US's contribution to the OECD (2016, Public interest considerations in merger control).

10 The US submission to the OECD (2016) also refers to academic literature (Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.vL. & ECON. 7, 1066) which argued that the Sherman Act was not intended *"to achieve [...] broad non-commercial goals"* and that the *"test of illegality was entirely the effect upon commerce, not an effect upon some other thing or condition, such as a supposed social or political evil".*

control is unnecessary and potentially counter-productive.[11] The ICN Recommended Practices for Merger Analysis also suggests that competition authorities should decide mergers, albeit on competition grounds.[12]

Nevertheless, there are certain countries that regard non-competition considerations as an integral part of their merger assessment. Including social, political or other economic goals in merger control allows competition authorities to apply a more holistic approach. For instance, South Africa underlines in its contribution to the OECD (2016) that *"[...] not only does the Competition Act incorporate features which reflect the unique challenges facing South Africa's economic development but it also performs a dual role in South Africa. In addition to stimulating competition and achieving market efficiency, it also aims to be an instrument of economic transformation and a tool (as part of a suite of economic development policy tools) to address the historical economic structure and encourage broad-based economic growth."* The latter approach is echoed by many developing countries, likely due to the greater role of industrial policies, and their efforts to align competition policy with broader government policies.[13] Additionally, public interest considerations may be used as tools for 'young' competition agencies, which still struggle to achieve credibility and legitimacy in their respective countries.[14]

The main focus of this paper will be on the institutional design in which these considerations are enforced. Before categorising existing examples, and demonstrating their advantages and disadvantages, the paper will briefly describe the most common types of public interest considerations. It will then present legislative and case law examples from all around the world.

## 2. Public interest considerations in MergerControl

It is almost impossible to list all the factors that could be qualified as serving 'public interest' in merger control. These considerations generally reflect the social, cultural, historical and political background of an individual state. In line with the recent work of the OECD[15] in this field, we would regard all the non-competition related considerations in merger control as public interest consideration.

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[11] See the BIAC's contribution to the OECD (2016, Public interest considerations in merger control). BIAC points in its contribution that there are several disadvantages of introducing a separate public interest analysis in merger reviews: (a) unpredictability and uncertainty; (b) increasing susceptibility of competition agencies to political pressure and to depart from merger-specific analysis; and (c) the risk of outcomes which damage the long term public interest to the extent efficiency-enhancing mergers are prohibited or deterred.

[12] ICN Recommended Practices (n 1) 1, Comment 3.

[13] See A. Capobianco – A. Nagy: Public Interest Clauses in Developing Countries. *Journal of European Competition Law & Practice,* Vol. 7., Issue 1, (January 2016) 46–51.

[14] D. Lewis: The role of Public Interest in Merger Evaluation, International Competition Network. *Merger Working Group Naples*, September 2002. 2.

[15] OECD: Public interest considerations in merger control. *Background paper*, 2016. 6.

The most common considerations include, for instance, defence, security of supply, media plurality, employment, international competitiveness, exports & imports, or other public goods (i.e. environment). As it will be shown throughout the paper, the considerations might appear as integral parts of the standard merger assessment, as exemptions or exceptions under the general rule, a justification for clearing/blocking a merger or as a ground for action for external parties (e.g. politicians, regulators).

There are many different ways how these considerations can be categorised. The most notable difference probably relates to their form: some jurisdictions prefer to apply a broad, while others a more (sector) specific definition in their laws. This part of the paper will present examples of the 'broad' and 'more specific' considerations, and evaluate the pros and cons regarding their application.

On one hand, broad terms[16] going beyond pure competition considerations provide the relevant authority with a very flexible approach, which can be adjusted according to the circumstances. On the other side, broad terms can be easily stretched to reach distant policy goals which are not necessarily related to the transaction itself. Therefore, it is desirable to provide a very detailed reasoning to the decisions where the competition authority applies broad definitions. By doing so, countries can create a more business-friendly atmosphere, where the enforcement system serves legal certainty and is more predictable. In Australia,[17] for instance, the Australian Competition Tribunal's ('Tribunal')[18] interpreted 'public benefit' broadly. It held that anything of value to the community generally or any contribution to the aims pursued by society, including the achievement of the economic goals of efficiency and progress should be regarded as benefits to the public. In deciding whether to grant an authorisation, the Tribunal must be satisfied that the proposed merger is likely to result in such a 'benefit to the public' in order for a merger to be allowed to occur. As for interpreting what is to be considered as a 'benefit to the public', Australia's recent contribution to the OECD (2016) invokes an example by *AGL Energy/Macquaire Generation* case, where the competition authority ('ACCC') and the Tribunal disagreed on whether the conditions imposed by the Tribunal represent a substantial public benefit. The case points back to 2014, when AGL Energy, a publicly listed Australian energy company, applied to the Tribunal for authorisation to acquire the assets of Macquarie Generation, a State-owned electricity generator. AGL Energy's application for authorisation followed an announcement by the ACCC

[16] For instance, in *Chinese Taipei* the 'overall economic benefits' should be taken into consideration when reviewing merger cases. In practice, the scope of the overall economic benefits also encompass economic benefits not related to competition, such as industrial development, employment and national competitiveness that are associated with the overall economic benefits. See Chinese Taipei's contribution to the OECD (2016, Public interest considerations in merger control).

[17] See Australia's contribution to the OECD (2016, Public interest considerations in merger control).

[18] In Australia, as the statutory test is different from the competition authorities review process, parties may also apply for merger authorization to the Tribunal after the competition authority ('ACCC') has opposed a merger either informally or formally. If the Tribunal's authorization is granted, this provides statutory immunity for the transaction. See Australia's contribution to the OECD (2016, Public interest considerations in merger control).

that it would oppose the acquisition on the basis that it was likely to substantially lessening competition. On the contrary, the Tribunal granted authorisation to AGL Energy, subject to conditions. The Tribunal was satisfied that the acquisition was likely to result in significant benefits to the public from the payment of $1 billion to the State of New South Wales which was proposed to be used by the State of New South Wales to finance new infrastructure projects and by relieving the State of having to continue to operate the assets. The Tribunal accepted that the addition of $1 billion to the infrastructure fund would lead to its application to infrastructure development that would be a significant benefit to the public.

However, more specific merger tests may qualify as a more transparent and business-friendly than the application of the broad term of 'public interest'. Example for such more specific terms can be found in the United Kingdom. The list of considerations specified by the UK Enterprise Act 2002 ('the Enterprise Act')[19] that allows for intervention in mergers by the Secretary of State ('SoS') on certain public interest grounds was originally concerning 'national security' and 'media plurality'. The UK's example shows that a specified list equally does not serve as a guarantee that there will not be attempts to interpret the list of factors wider. Also, there have been attempts for an expansion of the list of public interest considerations. In practice, the only additional public interest consideration added since 2002 was the 'stability of the UK financial system', during the financial crisis and in the context of the *Lloyds/HBOS* merger.[20] Publicly available information suggested that the merger *"was truly exceptional in its scale and would not usually be allowed"*.[21] Thus, the SoS considered that the new public interest consideration – the stability of the UK financial system – overrode the competition concerns identified by the Office of Fair Trade[22] and decided – even before the addition of a new public interest consideration – that the merger should not be referred to further investigation.[23] The SoS' decision was challenged at court before the Competition Appeal Tribunal ('CAT'). Given that no evidence was raised to show that the decision maker had done anything other than balance the considerations of financial stability against the competition concerns and come down in the favour of the former, the application was dismissed by the CAT.[24]

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19 See UK's contribution to the OECD (2016, Public interest considerations in merger control).

20 The merger created the fourth-biggest bank in Britain that also accounted for a third of the mortgage market.

21 See Lloyds TSB seals £12bn HBOS deal, 17 September 2008. http://news.bbc.co.uk/2/hi/business/7622180.stm.

22 The Office of Fair Trade ('OFT') is the predecessor of the Competition and Markets Authority ('CMA').

23 On an other occasion the attempt to enlarge the list of considerations failed. Concerns were expressed in 2014 about the implications of any merger between AstraZeneca and Pfizer with specific regard to their R&D activity being carried out in the UK. As a consequence of this, the possibility of the inclusion of the protection of R&D as a public interest was raised, but that argument failed. OECD: Public interest considerations in merger control, *Background paper*, 2016. 12.

24 C. Graham: Public Interest Mergers. *European Competition Journal*, Vol. 9., No. 2, (August 2013) 394.

Another example where more specified considerations can be found in the law is the European Union's relevant provisions in Regulation 139/2004/EC ('EUMR').[25] Article 21 (4) of the EUMR does allow Member States to adopt, with regard to concentrations of an European dimension, measures to protect certain interests other than competition, for as long as these measures are necessary and proportionate to their aim and are compatible with all aspects of Community law.[26] The three considerations are 'public security', 'plurality of the media' and 'prudential rules' which are regarded as compatible with EU law. Other considerations should be communicated to the European Commission that assesses the public interest consideration based on the general principles of EU law. The Court of Justice of the European Union ('ECJ') interpreted these considerations on several occasions. In *Commission v Belgium* and *Commission v Spain*[27] the ECJ specified that the requirement of public security, as a derogation from the fundamental principles of free movement of capital and freedom of establishment must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. Thus, the public security exception may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[28]

As demonstrated by the above examples, interpreting public interest considerations is a challenge. Legal certainty and predictability can be better served by providing a detailed analysis on the interpretation of the public interest considerations, which can assure businesses that public interest considerations will not be misused. Other tools that serve legal certainty include issuing soft law or well-established case law. In South Africa, for instance, the Competition Commission's approach in respect of the assessment of public interest factors is set out in the 'Guidelines for the Assessment of Public Interest Factors in Merger Regulation'.[29] The recently released guidelines adopted a five-step approach to address public interest in mergers, namely i) the likely effect of the transaction on public interest, ii) whether the effect on the specific public interest is a result of the merger, iii) whether these effects are substantial, iv) whether the merging parties can justify the likely effect on the particular public interest and v) whether the concerns can be addressed with remedies. The business community welcomed[30] the effort to promote greater certainty in enforcing public interest considerations. This is a clear indication that there would be a need for soft

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25 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004. 1–22.

26 See the European Union's contribution to the OECD (Public interest considerations in merger control. 2016).

27 Case C-503/99, [2002] ECR I – 4809, Case C-463/00, [2003] ECR I-4581.

28 EU Merger Control and the Public Interest, A Legal Mapping Report by the Lendület-HPOPs Research Group in Spring 2016, Hungarian Academy of Sciences, Centre for Social Sciences, 10.

29 The guidelines are available at: http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Public-Interest-Guidelines-public-version-210115.pdf.

30 South Africa: Competition Commission makes available draft guidelines for the assessment of the public interest criteria in merger control matters, *African Antitrust & Competition Law News & Analysis,* https://africanantitrust.com/2015/01/23/south-africa-competition-commission-makes-

law documents in this field. However, there are not many documents available with the purpose of clarifying how the relevant authorities will interpret and apply non-competition related considerations.

## 3. Institutional models

There are different ways how competition regimes can meet the public interest objectives through competition law. The available regimes differ considerably in terms of how, when and by whom public interest considerations are taken into account.[31]

This section will examine the various institutional models in which public interest considerations can be taken into consideration in merger procedures and eventually, establishes and institutional design system. While doing so, the article will use as a starting point the basic classification of the OECD background paper on 'Public interest considerations in merger control',[32] however, further develops it by taking into consideration recent developments, case law and the most notable examples of the country contributions and the discussion of the OECD roundtable.[33]

The institutional model developed in this section is demonstrated in the figure below:

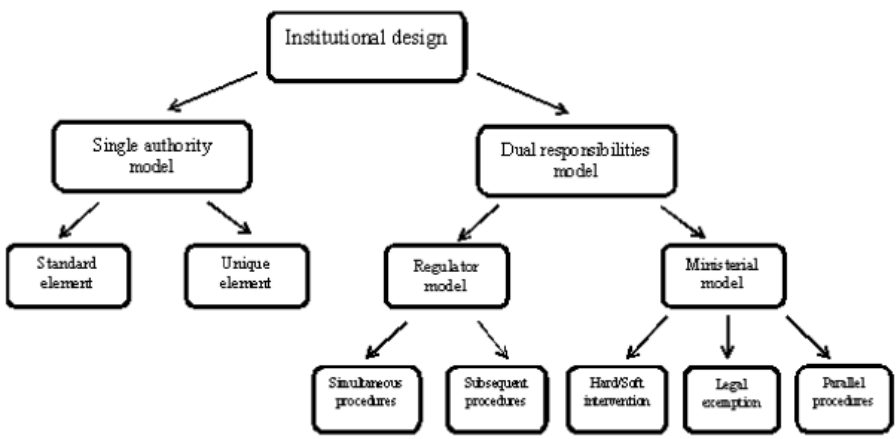


*Figure 1 Institutional design of enforcing public interest considerations*

available-draft-guidelines-for-the-assessment-of-the-public-interest-criteria-in-merger-control-matters/.

[31] Public Interest Regimes in the European Union – differences and similarities in approach, Final Report of the EU Merger Working Group (10 March 2016), http://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf.

[32] The Background Paper is available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En. The author of this article also authored the Background paper referred to in this article.

[33] All country contributions are available at: http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm.

The OECD Background paper identifies two main models: the 'single authority' model and the 'dual responsibilities' model. In the former it is the competition authority that is entrusted to conduct the public interest test in merger review, regardless of the sector or industry concerned. In the latter model, competition authorities follow a standard competition assessment, while public interest considerations are assessed by a different body (e.g. a sectoral regulator or a political decision-making body). The paper will use the same distinction as a starting point of the categorisation.

### 3.1. The single authority model

The question whether or not to entrust the competition authority with the responsibility to enforce public interest considerations relates to the social, cultural and political environment of the country. As for the pros and cons, the single authority model provides the enforcer with the possibility to apply a more holistic approach; while at the same time, it can impose the authority to a greater political influence. Also, the single authority setting might cause serious internal conflict of interest in those jurisdictions where the competition authority is supervised by a ministry, which promotes or prioritises other public interest considerations than competition. An often raised criticism claims that competition authorities are not the best placed authorities to pursue public policy goals as they are technical and non-elected bodies.[34] Therefore, it is very likely that competition authorities lack the necessary expertise to assess public interest considerations. Companies also suggest that the assessment of public interest considerations can significantly slow down the time-sensitive merger procedures.[35] In contrast, other sources emphasise that it should rather be the competition authority than any other body, if public interest is enforced in Competition Law.[36]

One could argue that the single authority model might raise the level of uncertainty and unpredictability, thus it is more desirable to separate the responsibilities of the competition authority from the other body, which is responsible to enforce public interest in merger control. On the other side, the question whether it would be more efficient if the analysis would be conducted by one institution, instead of having a fragmented system, could equally be relevant to raise. Some countries' institutional setting suggests that it is easier to reconcile the different considerations within the framework of one review process, conducted by one authority. The Harper Review (a recently completed comprehensive independent review of Australian competition

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[34] OECD: Global Forum on Responsible Business Conduct. *Competition Law and Responsible Business Conduct*, 2015. 17.

[35] D. Poddar – G. Stook: Consideration of Public Interest Factors in Antitrust Merger Control. *Competition Policy International,* 2014.

[36] V. Hane: *Public interest clauses may be a necessary evil, says OECD head, 13 March 2015.* http://globalcompetitionreview.com/article/1061787/public-interest-clauses-may-be-a-necessary-evil-says-oecd-head.

law and policy),[37] for instance, recommended replacing the current separate ACCC formal clearance process and the Tribunal authorization process and making the ACCC the first instance decision maker for the combined test.

Probably the greatest fear of businesses in this model is the clash of considerations. Mergers are largely driven by the private interest of businesses, whilst public interest considerations are rather motivated by political, social, cultural considerations.[38] Competition criteria might not point to the same direction as broader policy objectives, which make it very likely that these considerations will conflict one another. It is unpredictable how the competition authority would come to its conclusion, which considerations would it value more, and how it would establish the objective criteria to weigh these considerations against each other. This feature can make the system especially uncertain.

Some of the notable examples where competition authorities are also responsible to enforce public interest considerations include countries from all around the globe, from Chinese Taipei to New Zealand. In the following sections the paper will demonstrate through these examples how the single authority works in practice and which are the trade-offs in its operation.

### *3.1.1. Standard element of the merger assessment*

First, the paper will look at a couple of examples where the assessment of the public interest considerations is integral part of finding whether the transaction leads to competition problems. In this model, public interest consideration – which is ideally interpreted in law/soft law and well-elaborated by case law – represents a question that the competition authority evaluates each and every case, regardless of the sector, industry, origin of the undertakings concerned.

The unique operation of South Africa's merger regime[39] has been a subject of ongoing discussion ever since its enactment of the law.[40] Article 12A (3) of the South African competition act specifies that the relevant South African competition authorities (the Commission or the Tribunal) must consider the effect that the merger will have on: i) a particular industry or sector; ii) employment; iii) the ability of businesses owned by historically disadvantaged persons to become competitive; and iv) the ability of national industries to compete in international markets. A recent

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[37] The Competition Policy Review Final Report was released on 31 March 2015. See at: http://competitionpolicyreview.gov.au/

[38] http://www.compcom.co.za/wp-content/uploads/2014/09/The-incorporation-of-the-public-interest-test-in-the-assessment-of-prohibited-conduct-a-juggling-act.pdf.

[39] Other relevant case law examples are *Kansai/Freeworld* (2012), *Glencore/Xstrata* (2013), *Rio Tinto/IDC, Hebei, Mauritius SPV* (2013), *BB/Adcock Ingram* (2014).

[40] See, for instance S. Tavuyanago: Public Interest Considerations and their Impact on Merger. Regulation in South Africa. *Global Journal of Social-Human Science*, Vol 15, Issue 7, (2015); W. Spoelstra: *The Role of Public Interest in Merger Evaluation in South Africa.* University of Pretoria, April 2016.

example includes the transaction conditionally approved by the Tribunal in May 2011, between *Wal-Mart Stores Inc. of the United States ('Walmart') and South African retailer Massmart Holdings Limited ('Massmart')*. The transaction did not raise any competition concerns. The imposed conditions related solely to public interest considerations, in particular employment and the potential displacement of small businesses in markets underserved by large retailers.[41] *AB InBev's recent acquisition over SABMiller* is also worth mentioning.[42] The mega merger that created the world's largest brewery was subject of merger clearances in several jurisdictions, including the European Union, China, United States and South Africa. South Africa gave green light to the transaction subject to several conditions.[43] Many of the conditions aimed at achieving public interest goals, for instance i) the creation of a fund which will be utilised for the development of the South African agricultural outputs for barley, hops and maize, as well as to promote entry and growth of emerging and black farmers in South Africa; ii) the undertaking that InBev will not retrench any employee in South Africa as a result of the merger; iii) merging parties also agreed to submit to the government and the Commission by no later than two years after closing the merger and outline its black economic empowerment plans setting out how the merged entity intends to maintain black participation in the company, including equity. These case examples clearly demonstrate that the uncertainty and unpredictability that accompany the interpretation of public interest clauses may also affect the final results of the case. Where non-competition goals are applicable, businesses should also be ready to offer remedies not based on the 'theory of harm' in merger control.

Many countries from the developing world followed South Africa's example and included public interest considerations into merger assessment (e.g. Kenya, Botswana, Mozambik, Zambia and Tansania). These considerations mainly aim to align the work of the competition authority with government policies. Most notably, and similarly to the ones which are applicable in South Africa, they put focus on social considerations (i.e. employment, protection of disadvantaged people). In Kenya, the competition authority applies both the 'competitive effects' test and the 'public interest' test to any proposed merger transaction. In determining the latter, the competition authority assesses whether the proposed merger conflicts with government policies.[44] Similarly to South Africa, Kenya dealt many times with labour-issues in merger cases, which is very likely part of the Government's responses to major unemployment rates in Africa. These cases involved imposing remedies, purely based on public interest ground. In the merger case *Shareholding British–American Investments Company ("Britam")/Real Insurance Company Limited("Real")*[45] the competition test showed

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41 See South Africa's contribution to the OECD (Public interest considerations in merger control,2016).

42 Anheuser-Busch InBev Clinches $103 Billion SABMiller Deal, Bloomberg (28 September 2016).

43 See the Competition Commission's press release on the merger clearance at: http://www.compcom.co.za/wp-content/uploads/2016/01/SABMiller_AB-InBev_31May16_1530-3.pdf.

44 Getting the deal through – Merger control (2017), Kenya, 236.

45 See also *Art-Caff'e Coffee and Bakery Limited/7 Coffee Shops of Dormans Coffee Limited*. In Kenya's contribution to the OECD (*Does Competition Kill or Create Jobs?* 2015).

that the transaction will not lead to the significant lessening of effective competition, though problems were raised in relation to the possible future job losses due to the merger. Therefore, the merger was approved on the condition that Britam would retain at least 85% of the staff of Real.

Another example is the People's Republic of China, where according to the Anti-monopoly Law of China, the state must protect the legitimate operation of industries dominated by the state-owned economy that are vital to the national economy and national security.[46] Relevant guidance published by Ministry of Commerce ('MOFCOM')[47] also provides that specific explanations should be given in the filing notification if the concentration is related to national security, industrial policy, state owned assets, etc.[48] Some would argue that non-competition issues are a perfect fit to reach goals beyond consumer welfare in the Chinese merger regime, e.g. to both domestic consolidation, where industrial policy factors may be supportive, and to inbound investment where industrial policy factors may create additional challenges in securing merger clearance.[49] In some of its recent decisions, MOFCOM claimed that it had taken into account 'other factors' in the merger assessment it deemed relevant. For example, in the *Coca Cola/Huiyuan* merger, the only deal so far that was prohibited, MOFCOM took into account the harm the merger could have caused to China's domestic small and medium-sized manufacturers and the healthy development of the Chinese fruit-juice drink industry.[50] In the *Uralkali/Silvinit* merger which was conditionally approved MOFCOM shed light on the consideration of 'national economy' as a relevant factor. In that case, the potential adverse impact of the merger of the two entities on China's agriculture and the industries related to agriculture was referred to as a relevant consideration in MOFCOM's decision. Although the underlying analysis and reasoning leading to the relevance of this factor are not explained, publicly available information suggests that MOFCOM's concern possibly was the effect of the merger on the supply stability and price of the products in the Chinese agriculture, which has long been considered as a key sector in China's national economy.[51]

It is important to point out that this model is not only applicable in the developing world. Some of the developed countries also found this model of including public interest considerations appealing. For instance, the application of a public interest test in Poland is the sole responsibility of the competition authority[52]. Public interest test is a part of standard merger proceedings and is applied by the competition authority on a regular basis with no special rules. The so-called 'ministerial model' applies

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46 Getting the deal through – Merger control (2017), China, 106.

47 MOFCOM is in charge of regulating and enforcing the merger control in China.

48 Getting the deal through – Merger control (2017), China, 106.

49 Getting the deal through – Merger control (2017), China, 106.

50 Steven Wei SU: *China Releases New Rules Guiding Merger Control Review.* Available at: https://www.hg.org/article.asp?id=22237.

51 Ibid.

52 See in http://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf .4.

mainly in Europe (3.2. of the paper), whilst interestingly, no ministerial intervention is required in Poland.

*3.1.2. A unique element in merger assessment*

The paper will assess those jurisdictions where public interest considerations come into play in case if the competition authority establishes that the transaction will likely lead to competition problems. In these situations public interest considerations can take a form of a 'modified efficiency' test, or serve as a justification to clear the transaction subsequently. This means that the competition authority conducts a standard merger assessment, while at the end of the process it is either obliged or recommended to measure the results of the competition assessment against the possible efficiencies driven by the transaction. In some situations referring to public interest considerations provides the opportunity to clear mergers that would have otherwise been found anticompetitive. The competition authority is not obliged to assess the public interest considerations in each and every case, but only under certain circumstances, for example, if it founds that the transactions leads to a significant lessening of effective competition.

When the Commerce Commission ('Commission') in New Zealand receives an authorization application for a merger, it first conducts a traditional, efficiency-based assessment. If the Commission came to the conclusion that the merger is likely to lead to a significant lessening of competition, then it must apply the 'public benefit' test. Section 67 of the Act requires the Commission to take into account public benefit considerations when assessing applications for merger authorisation. New Zealand's courts have defined a public benefit as: *"anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress."*[53] The unique efficiency defence applicable in Canada is also worth mentioning.[54] The Canadian model for considering efficiencies in merger review is unique when compared to most of the Competition Bureau's ('Bureau') international counterparts. As Canada pointed out to its contribution to the OECD (2016), instead of being one of many factors that may be considered in the assessment of whether a merger should proceed unopposed, gains in efficiency from a merger are assessed under 'the trade-off analysis' set out in section 96 of the Canadian Competition Act. Section 96 requires the Competition Tribunal ('Tribunal')[55] to allow an otherwise anti-competitive merger if it finds that the gains in efficiency brought about by the merger outweigh and offset its likely anti-competitive effects. Even though certain proposed legislation contained references

[53] See New Zealand's contribution to the OECD (Public interest considerations in merger control, 2016).

[54] See Canada's contribution to the OECD (Public interest considerations in merger control, 2016).

[55] The Tribunal is a separate adjudicative body that has jurisdiction to hear and dispose of all applications made by the Commissioner (the head of the Bureau) under certain sections of the Act, including mergers.

to requiring efficiencies gains to be 'passed on' to the public in the form of lower prices or better products, ultimately the Competition Act did not specify how the Tribunal should regard issues of wealth transfer. In the recently contested merger Canada (*Commissioner of Competition) v. Tervita Corp*., the Canadian courts allowed to proceed on the basis of a section 96 defence, the Tribunal stated that the total surplus standard should be the starting point, but that the Tribunal will also *"determine whether there are likely to be any socially adverse effects associated with the merger"* if such arguments are put forth by the Commissioner and *"If so, it will be necessary to determine how to treat the wealth transfer that will be associated with any adverse price effects…"*.[56]

In some jurisdictions public interest considerations can be referred to as a justification to clear transactions that could eventually lead to the significant lessening of effective competition. If it appears that the merger is likely to substantially prevent or lessen competition', the COMESA Competition Council ('CCC'[57]) must determine whether: i) the merger is likely to result in any technological, efficiency or other pro-competitive gain, greater than the anti-competitive effects, which would not likely be obtained if the merger is prevented; and ii) the merger can be justified on substantial public interest grounds. In determining whether a merger is or will be contrary to the public interest the CCC is required to take into account all matters that it considers relevant in the circumstances and have regard to the desirability of: maintaining and promoting effective competition between persons producing or distributing commodities in the region; promoting the interests of consumers, purchasers and other users in the region with regard to the prices, quality and variety of such commodities and services; and promoting, through competition, the reduction of costs and the development of new commodities, and facilitating the entry of new competitors into existing markets.[58] Similar rules are applicable in Nigeria, when after finding that the transaction likely leads to the lessening of effective competition, the competition authority has to determine whether or not the merger is likely to result in any technological efficiency or other pro-competitive advantage that will be greater than, and offset, the effects of any prevention or lessening of competition; and if the merger is justifiable on the grounds of substantial public interest.[59] Regarding the public interest the competition authority takes into account the following relevant considerations: the particular industrial sector or region; employment; the ability of small businesses to become competitive; and the ability of national industries to compete in international markets.

As already mentioned above, it is important to provide businesses with guidance on how the competition authority will likely interpret and enforce the public interest

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[56] Based on Canada's contribution to the OECD (Public interest considerations in merger control, 2016).

[57] Common Market for Eastern and Southern Africa (COMESA).

[58] Getting the deal through – Merger control (2017), Comesa.

[59] Getting the deal through – Merger control (2017), Nigeria, 299.

criteria in practice.[60] Many jurisdictions aim to help businesses in understanding the competition authorities' assessment and guiding principles, in different ways. Taking the above examples, in New Zealand and Canada it is the Court that interprets the broad definition or the efficiency analysis, whilst in South Africa there is soft law guiding the public on the authorities' approach.

### 3.2. The dual responsibilities model

More frequently, we can see the model in which the competition authority is not the primer responsible authority for addressing public interest. Depending on the actual setting, the competition authority might be consulted, overruled or allowed to conduct a parallel assessment to the regulator/political branch.

One of the biggest advantages of this model is the clear distinction between the body which is responsible to assess competition related considerations (competition authority) and the external body entrusted with assessing public interest (sectoral regulator, minister or other political body). Therefore, it relieves the competition authority from the political pressure, while eventually, places the decision on a competition matter in the hands of a body which is not an expert on those matters. This model also clearly represents its own challenges. First, the public interest interventions tend to prioritise short term solutions,[61] serving the specific public interest, which might result in a serious competition problem on a long term. Second, interventions based on public interest considerations might ignore the need of linking the intervention to the effects caused by the concentration, i.e. to ensure that the intervention will be merger-specific. Third, it can be argued that cases of a larger scale are important to politicians[62] who might be too close to the parties or have a vested interest in the outcome, so that impartiality can be better guaranteed by an independent agency.

In the following sections the paper will make a distinction between those models where the 'other' institution is a regulator or a political branch (e.g. ministry).

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[60] See for instance: Norton Rose: *The World After Wal-mart – will South African mergers ever be the same again*?, available at: http://www.nortonrosefulbright.com/knowledge/publications/67936/the-world-after-wal-mart-will-south-african-mergers-ever-be-the-same-again. *„The Commission should issue guidelines on the information which merging parties are required to provide in their merger filings in order to speed up reviews. Until then, merging parties who need swift clearances will need to anticipate these issues well in advance of lodging their filings, and deal with them appropriately. This could include offering appropriate conditions at an early stage of the investigation."*

[61] See Graham's points in relation to the Lloyds/HBOS merger in the UK. C. Graham: Public Interest Mergers. *European Competition Journal*, Vol. 9., No. 2, (August 2013) 394. It is also suggested by the Bolivian contribution to the GCR – Getting the deal through, Merger control (2016) where it is emphasised that the merger clearing process can be speeded up substantially if public interest considerations are present in the project.

[62] Graham (2013) op. cit. 405.

### *3.2.1. Regulator model*

The 'dual responsibilities' model is particular in certain sectors, for instance in transport, finance, media and broadcasting. In these sectors public interest considerations are channelled into the merger control procedure through the official position of the sectoral regulator, whose procedure is sometimes linked to the competition procedure in terms of timing and procedural rules, while sometimes it is completely distinct from that. In the latter situation the regulator's procedure goes in parallel to the competition authorities' procedure or follows it. Hereinafter the paper will refer to this model as the 'regulator model'.

The paper will first show examples of the regulator model that is linked to the competition procedure ('simultaneous procedures'), and the next part will focus on subsequent procedures by regulators.

#### 3.2.1.1. Simultaneous procedures

A good example for the simultaneous regulator model is the Hungarian regime. The competition authority shall obtain the opinion of the NMHH's Media Council[63] for the approval of certain transactions where the participating undertakings bear editorial responsibility or distribute media content to the general public. The competition authority's task is to investigate a merger's effects on competition, while the NMHH is entrusted with assessing its effects on the plurality of the media. While the NMHH conducts its procedure, the competition authority suspends its merger assessment until the NMHH's professional opinion arrives. The Media Council refused to grant approval two times[64] in the past five years, decisions that were followed by heavy media coverage.[65]

In Ireland undertakings involved in media mergers are required to make two-stage notification process.[66] One notification is sent to the competition authority responsible for carrying out the substantive competition review to determine whether the merger is likely to give rise to a substantial lessening of competition. Another notification is then sent to the Minister for Communications ('Minister'). The Minister has a specified time period to consider the media merger. If the Minister is concerned that the media merger may be contrary to the public interest in protecting plurality of the media, then requests the Broadcasting Authority of Ireland ('BAI') to carry out a 'Phase II' examination. An advisory panel may be set up to assist the BAI in its

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63 The decision-making body of the National Media and Infocommunications Authority, the "NMHH".

64 In Axel Springer/Ringer merger in 2010, and in RTL/Central Mediacsoport merger in 2017.

65 See, for instance http://bbj.hu/business/media-council-blocks-ringier-axel-springer-merger-in-hungary_57235; http://index.hu/kultur/media/2017/01/24/a_mediatanacs_nem_engedi_hogy_az_rtl_bevasarolja_magat_a_central_mediacsoportba/. Hungarian media merger blocked by competition and telecoms agencies, (20 February 2017), PaRR.

66 Seven media mergers have been notified and cleared by the competition authority and the Minister for Communications. See Getting the deal through – Merger control (2017) 209.

review. The ultimate decision, however, is made by the Minister. The Department of Communications, Energy and Natural Resources facilitated the process with issuing guidelines regarding media mergers. The media plurality assessment introduced in 2014 is relatively new and so far the clearance determinations are generally limited to stating that the relevant transaction will not be contrary to the public interest in protecting media plurality in the state.[67]

We have already emphasised above the role that soft law might play in interpreting and enforcing public interest considerations in the 'single authority' model. The same applies to the dual responsibilities model. In the UK the Office of Communication ('Ofcom') published guidance on media mergers in public interest test.[68] Even in the absence of soft law, the relevant case law can provide businesses with the necessary information to comply with the requirements set forth by the law, but only if the decision contains a detailed reasoning. This can help businesses and media industry and practitioners to understand the basis for the determinations and the manner in which the regulator applies the media plurality test.

#### 3.2.1.2. Subsequent procedures

As for the latter, there are many sectors where the regulator conducts a procedure parallel (before or after) to that of the competition authorities. Many of these subsequent procedures are motivated by national interest considerations.

One of the typical examples can be found in the banking industry: mergers in the banking sector are generally a subject of parallel scrutiny, especially if the acquirer is a foreign company. In the US, for instance, foreign banks that operate in the US and seek to acquire another bank operating in the US may need to notify a number of regulators of their transaction for antitrust review. In addition to the Department of Justice ('DOJ'), the Federal Reserve Board ('FRB'), the Federal Deposit Insurance Corporation ('FDIC') and the Office of the Controller of the Currency ('OCC') all have statutory authority to review the competitive effects of proposed bank.[69] Foreign corporations seeking to carry on banking in Australia are subject to the same requirements as domestic corporations - the corporation must apply to the Australian Prudential Regulation Authority ('APRA') to become an 'authorised deposit-taking institution'.[70]

Ideally, these procedures do not interfere with each other's jurisprudence. However, jurisdictional issues are sometimes unavoidable. In Brazil, the Brazilian Central Bank (Banco Central do Brasil – 'BACEN') has broad powers to regulate and oversee financial services. BACEN is involved in a long-standing litigation against

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67 See Getting the deal through – Merger control (2017) 211.

68 "*The guidance on this specific role for Ofcom is now clearer and hopefully more useful for prospective buyers and sellers*." https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2004/ofcom-publishes-guidance-on-media-mergers-public-interest-test.

69 ABA Report 63.

70 ABA Report 68.

Banco de Crédito Nacional S.A. and Bradesco S.A. to decide whether BACEN or the competition authority, the 'CADE' has authority to review transactions in the financial market.[71] As a result of this ongoing tension between CADE and BACEN, financial institutions tend to file applications for review of transactions with both agencies.[72]

### *3.2.2. Ministerial model*

The other type of the dual responsibilities model, to which we will refer as the 'ministerial model', involves three different types:

- The first allows the involvement of a political body (generally, the relevant ministry) either through a consultation process (the 'soft' version), or by overruling the competition authorities' decision (the 'hard' version).
- The second type of the ministerial model involves a situation where the Government or the relevant ministry exempts a certain transaction from the competition authorities' scrutiny.
- The last version concerns an independent and parallel procedure to the competition procedure (i.e. the foreign investment regime).

#### 3.2.2.1. Ministerial intervention

In the soft scenario the competition authority is obliged, under certain circumstances, to consult with the relevant ministry. There can be differences in the soft model on whether the opinion of the minister is obligatory to the competition authority or not.

An example for the soft consultation model can be found in the Canadian legislation. In its contribution to the OECD Canada[73] reported on certain industries where the Competition Bureau ('Bureau') is obliged by law to consult with responsible ministries. One such sector is the transportation where due to reasons relating to Air Canada's acquisition of Canadian Airlines, ministerial jurisdiction for merger review was extended in 2000 to include airline mergers. It was extended again in 2007 to include any matter with a transportation undertaking (i.e., matters that relate to national transportation). As it stands today, under the Canada Transportation Act ('CTA'), parties to a merger that involves a transportation undertaking and that is the subject of a notification under the Act must also provide notice of the transaction to the Minister of Transport. Within 42 days of receiving such notice, *"If the Minister is of the opinion that the proposed transaction does not raise issues with respect to the public interest as it relates to national transportation,..."* the Minister will notify the parties that no further Ministerial review is conducted. However, *"If the Minister is of the opinion that the proposed transaction raises issues with respect to*

71 ABA Report 70.

72 ABA Report 70.

73 See Canada's contribution to the OECD (Public interest considerations in merger control.2016).

*the public interest as it relates to national transportation"*, the Minister may instruct that those issues to be examined and the parties be precluded from implementing their transaction unless it is approved by the Governor in Council. In assessing whether a merger involving a transportation undertaking raises issues or concerns with respect to the public interest as it relates to national transportation, economic, environmental, safety, security and social factors are taken into consideration.

The hard measures model, where consideration of public interest clauses are left to a minister or other political branch (non-regulator), and the outcome of the competition authority's assessment may be overruled on the basis of such other body's subsequent assessment, is a very common model in the European jurisdictions.[74] State interventions in merger procedures are in the spotlight in recent years in Europe.[75] In the following parts the article will briefly describe some of the notable European jurisdictions where the hard ministerial model applies.

As already mentioned before, the UK system allows the SoS to intervene in merger cases based on specific public interest factors specified by the law. The ministerial involvement is governed by a clear and transparent process, and the process followed to introduce new public interest grounds is subject to parliamentary and public scrutiny. The functioning of the UK's system provides sufficient checks and balances to ensure a reasonable level of transparency: intervention notices issued by the SoS must be published, a new public interest consideration requires approval from the Parliament, and there are limited duties on the SoS to explain his or her reasoning.[76] The UK system is also a model from the perspective of guaranteeing the independence of the Competition and Markets Authority ('CMA'), as the roles of the CMA and of the SoS are clearly delineated in the process.

Turning to the Netherlands, Section 47 of the Dutch Competition Act[77] provides merging parties the option to file a formal request to the Minister of Economic Affairs ('Minister') in order to clear the merger that has been blocked by the Authority for Consumers & Markets ('ACM'). The request should be done within 4 weeks after ACM has decided to block the merger. The Minister can clear the merger and grant a licence based on his assessment that certain public interests benefitted by the merger outweigh the impediment to competition. The Competition Act does not provide any specifications on what can be considered as a public interest nor how the assessment

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74 Though there are some interesting examples outside the EU, too. In Morocco copy of the decision is sent by the Chief of Government, or the delegated governmental authority, from the competition authority. Within 30 days the Chief of Government can exert its power and issue a decision on the transaction for reasons of public interest (such as industrial development, competitiveness of the companies within the international context or job creation). The transaction is deemed to be authorised when this 30 day time limit has expired. Getting the deal through – Merger control (2017), Morocco, 277.

75 See for instance: Almunia voices concern over rising protectionism, cites debate over GE-Alstom deal. MLex, 24 June 2014.

76 Graham (2013) op. cit. 390.

77 See the Netherlands' contribution to the OECD (Public interest considerations in merger control, 2016).

by the Minister should take place. Even though such requests have been made on occasion, the Minister has never reversed a decision of the authority before.

In Spain, in those cases where the competition authority decides either to prohibit the merger or to clear it subject to commitments or conditions, the Ministry of the Economy may ask the government to decide on two aspects: whether to i) confirm the competition authorities' decisions; or ii) clear it, subject or not to commitments or conditions. In the second case, the government's decision must be based on certain specified public interest criteria other than competition. Should the Minister ask the government to intervene, the government has one month to decide on the transaction. The intervention of the government in merger control proceedings is informally known as 'Phase III' procedure. The *Antena 3/La Sexta* case (2012) is the only 'Phase III case' in Spain to date. The transaction was notified after the *Telecinco/Cuatro* merger, which had already reduced the number of private free-to-air television broadcaster from four to three; the Antena 3/La Sexta merger would leave only two such operators. The competition authority imposed more severe conditions that were accepted in Telecinco/Cuatro. The Ministry of the Economy decided to refer the case to the government, arguing that the decision concerned *"reasons of general interest related to the guarantee of an adequate maintenance of sector based regulation and the promotion of research and technological development"*. The government softened the conditions originally imposed by the competition authority and declared that the conditions should be in *"line with those [conditions applied to other operators] in the sector"*.[78] The Competition Act expressly states that such decision must be based on certain public interest criteria different from competition ones: national defence and security; the protection of public security and public health; free movement of goods and services within the national territory; protection of the environment; the promotion of technical research and development; and the maintenance of the sector regulation objectives.

As demonstrated above, the most frequent scenario in this model is that a transaction, having national significance is cleared on public interest grounds, although it raises competition problems. A rare example of the opposite (i.e. blocking a non-problematic merger on public interest ground) can be found until recently in Norwegian[79] legislation. The possibility to overturn the competition authorities' decision existed in their competition law since its enactments in 2004. In line with Section 21 in the Competition Act, the Norwegian government (or more formally: the King-in-Council) could approve a concentration that the Norwegian Competition Authority has intervened in cases *'involving questions of principle or interests of major significance to society'*. The government also had the legal power to block a merger the competition authority has decided not to intervene against based on the same grounds. This possibility has been used very rarely, only in two cases since 2004, once in the power production and once in the agricultural sector. A very

[78] Getting the deal through – Merger control (2017), Spain, 377–378.

[79] See Norway's contribution to the OECD (Public interest considerations in merger control, 2016).

similar possibility applies in France, where the Minister for the Economy ('Minister') holds residual powers in two circumstances: i) even if the concentration is cleared by the competition authority at the end of the first phase, the Minister can ask that the competition authority opens a second phase in-depth review of the concentration (although the competition authority has discretion to act upon this request or not), and in addition, ii) whatever the final decision of the Authority at the end of the second phase, the Minister can substitute his or her own decision based on public interest grounds.[80] The considerations on which the ministries' decision can be based may include industrial and technological progress, companies' competitiveness in an international context and social welfare. According to the available sources, this power has not been used by the Minister to date.[81]

Many argue that the independence of the competition authorities can be guaranteed through the clear separation of the agency responsible for competition and the agency responsible for public interest considerations. This can be evidenced by significant changes that took place recently in the Norwegian Competition Act.[82] As a measure to enhance the competition authority's independence, a recent proposal aimed to establish an independent competition complaints board. This complaints board is the first instance to assess complaints on the competition authorities' decisions in mergers as well as cartel and abuse cases. At the same time, the possibility to reverse the competition authorities' decisions based on public interest considerations was abolished. It was argued that public interest considerations are better served through general regulations rather than political intervention in individual cases as such interventions can be influenced by strong lobby interests, i.e. the intended balancing of public interests versus competition considerations may be skewed. The proposals were adopted by the Norwegian Parliament (Stortinget) in 2016, and were implemented 1st January 2017.

#### 3.2.2.2. Legal exemption

The second type of the ministerial model involves situations where the law or the Government/relevant minister regard certain transaction of having strategic importance and therefore, exempts the deal from a competition scrutiny. These exemptions can concern strategically important market players or industries. In many of the relevant cases, the exemption is exerted by the relevant minister through issuing a piece of legislation (e.g. an injunction or decree).

The legal exemption is granted through a piece of legislation in Cyprus, Hungary and Singapore. In the former, the Minister of Energy, Commerce, Industry and Tourism can, by issuing a justified order, declare a concentration as being of major public interest with regard to the effects it might have on public security, pluralism of

80 Getting the deal through – Merger Control (2017), France, 159.

81 Getting the deal through – Merger Control (2017), France, 163.

82 See Norway's contribution to the OECD (Public interest considerations in merger control, 2016).

the mass media and the principles of sound administration.[83] A very similar provision can be found in the Hungarian Competition Act that enables the Government to regard certain transactions on public interest grounds (particularly protecting workplaces or ensuring security of supply) of having national strategic importance.[84] These transactions are exempted under the mandatory notification system in Hungary. The modification of the Hungarian Competition Act was enacted at the end of 2013. In Israel, the Minister of Economy is authorised to exempt a merger from all or some provisions of the law, if he believes that it is necessary on the grounds of foreign policy or national security.[85]

Singapore operates a slightly different system from the above-mentioned examples, as the exemption does not apply from the beginning of the investigation (i.e. the exemption does not shield the merging parties from submitting an application to clear the merger). If the competition authority plans to make an unfavourable decision, the applicants who notified the merger to the competition authority for decision or, in the case of an investigation, the parties to the merger, may apply to the Minister for Trade and Industry ('Minister') the merger to be exempted from the merger provisions on the ground of any public interest consideration.[86] 'Public interest consideration' for the purposes of the Competition Act refers to 'national or public security, defence and such other considerations as the Minister may, by order published in the Gazette, prescribe.'[87] A recent example includes the merger of *Greif International Holding B.V. & GEP Asia Holding Pte Ltd*. The merger concerned the creation of a joint venture company, Greif Eastern Packaging, in which the merging parties wanted to contribute their respective Singapore business in the manufacturing and selling of steel drums, bitumen drums and steel pails of various capacities. The competition authority wanted to prohibit the transaction, as its main concern was that the joint venture may substantially lessen competition in the supply of new large steel drums to Singapore, due to horizontal concentration between the two closest rivals in the market. The parties filed an application to the Minister and claimed that 'public interest' would be the 'wider economic progress and public benefits' that the joint venture would generate for the economy and society of Singapore. The Minister declined the parties' application for exemption on the basis that the grounds relied upon by the parties not fall within the existing definition of public interest considerations, which refers to matters of national or public security and defence.[88]

In other jurisdictions, like Serbia, exemption is also based on the law, while the exemption is granted by the competition authority or the relevant minister under certain circumstances. The competition act exempts companies performing activities in the public interest as well as official monetary institutions if the application of the

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83 Getting the deal through – Merger Control (2017) 126.

84 Article 24/A of the Hungarian Competition Act.

85 Getting the deal through – Merger Control (2017) 216.

86 See Singapore's contribution to the OECD (Public interest considerations in merger control, 2016).

87 Getting the deal through – Merger Control (2017), Singapore, 345.

88 See Singapore's contribution to the OECD (Public interest considerations in merger control, 2016).

competition act could prevent them from performing activities in the public interest (i.e. from performing entrusted affairs). For instance, the competition agencies' report from 2009 points out that the competition authority rejected a merger notification regarding the acquisition of 51 per cent of the shares in the public Serbian petroleum company NIS owing to a lack of jurisdiction. The competition authority took the view that the Law on Confirming the Agreement in the Oil and Gas Sector, which required the Republic of Serbia to sell 51 per cent of the shares in NIS to the acquirer, constituted *lex specialis.* As a result, the competition authority did not have jurisdiction to assess this concentration.[89]

The most notable problem with this system is the lack of judicial review. Without the possibility to challenge the exemptions on court, the reasoning of these interventions remains untested. Hence, it is essential to provide sufficiently detailed reasoning to these exemptions or pieces of legislation, which clarify the underlying reasons and justify the application of public interest intervention. This is an essential part to avoid delivery of the bad message of intervening only for the sake of shielding the transaction from competition scrutiny. Moreover, providing sufficient reasoning serves legal certainty, which contributes keeping the economy desirable for investors.

#### 3.2.2.3. Parallel procedures – Foreign investment regime

Mergers can also be assessed on public interest grounds, in separate and independent administrative procedure that goes parallel with the competition investigation. Even those jurisdictions that exclusively target competition-related goals in their competition assessment may subject the same transaction to public interest assessment. Out of the many possible scenarios, in this subsection we will primarily focus on the foreign investment regime.

This parallel procedure can be distinguished from the subsequent procedures described under the regulator model, as in this case, the scrutiny is not conducted by the regulator. When assessing the acquisition of a foreign investor, the EU Merger Working Group's survey points out that generally it is not the competition authority that is responsible for conducting the investigation, but political bodies (ministries).[90] Even though the paper lists the foreign investment regimes under the ministerial model, it is important to highlight that the foreign investment scrutiny is not always done by a Government or the ministry.[91]

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89 Getting the deal through – Merger Control (2017), Serbia, 342.

90 Such a review is undertaken by relevant ministers, for example the Ministry for Employment and the Economy (FIN), Federal Ministry for Economic Affairs and Energy (GER), Ministry of Finance (FR), or Ministry of Treasury (PL). http://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf, para 18.

91 Though it is the most common example, for instance, the Committee on Foreign Investment in the United States ("CFIUS") is chaired by the Department of the Treasury; in Australia it is the Treasurer of the Australian Government which examines proposals by foreign investors; a foreign investor seeking to invest in France is required to notify the Ministry of Economy, Finance and Employment; in Japan it is the Minister of Finance which has jurisdiction over foreign investment decisions.

Public interest considerations often play a role in the foreign investment regimes. Foreign investment regimes generally asses transactions from a different angle of that of Competition Law, e.g. assessing whether the foreign investment eliminates domestic competition, endangers security of supply or contains risk to public security. As a survey conducted by the EU Merger Working Group suggests, scrutiny of foreign investments is usually limited to strategic industries or companies.[92] Some would argue that foreign investment regimes can be used to support protectionist purposes.[93] For instance, as the French government was openly opposed to the *GE/Alstom* transaction, France has expanded its controls of foreign investments to energy supply, water supply, transport networks, electronic communication services and public health.[94] By doing so, the transaction has equally become a target of a foreign investment scrutiny. Due to the French States' involvement through the foreign investment regime, the deal was restructured to fit conditions set by the French government.[95]

The American Bar Association' Section of Antitrust Law recently released a report on foreign investment regimes around the world ('ABA Report').[96] The ABA report suggests[97] that there is an increasing number of large-scale international mergers that have been blocked or delayed due to the foreign investment regimes.

There are two interesting observations that this paper points out. First, as we could observe in the hard ministerial model, the more typical scenario is the clearance of an otherwise anti-competitive merger. In the foreign investment regime, however, we more often see the opposite: where the otherwise pro-competitive (or neutral) transaction is barred due to foreign investment scrutiny. Secondly and more interestingly, many examples raised by the ABA report come from developed countries. The ABA Report refers to transactions, including interim refusal of BHP Billiton's bid for Potash in Canada,[98] and the French government's intervention in the General Electric acquisition of Alstom.[99] The responsible agency in the US,

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92 Available at: http://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf, para 18.

93 See, for instance: Protectionism in M&A: A mixed picture, March 2015, Allen & Overy, http://www.allenovery.com/SiteCollectionDocuments/Protectionism%20in%20MA.pdf.

94 In focus 'Protectionism' in M&A: A mixed picture, M&A Insights. Q1 2015, http://www.allenovery.com/SiteCollectionDocuments/Protectionism%20in%20MA%20A%20mixed%20picture.PDF.

95 N. Petit: *State-Created Barriers to Exit? The Example of the Acquisition of Alstom by General Electric.* 2015. http://ssrn.com/abstract=2521378.

96 American Bar Association, Section of Antitrust Law: Report of the Task Force on Foreign Investment Review (28 September 2015).

97 ABA report 7.

98 In 2010, the Australian BHP Billiton's (the world's largest fertilizer company) offer to acquire the Canadian Potash Corporation was blocked on the grounds that the sale of BHP Billiton would not provide a 'net benefit' to the country notwithstanding BHP's offer of undertakings in OECD: *Public interest considerations in merger control.* 2016. 14.

99 After the publication of GE's initial offer to buy Alstom Energy, a new regulation was passed in France making foreign investment subject to ministerial authorisation. The deal was structured to fit conditions set by the French government. The merger was eventually cleared by the European

the CFIUS is also willing to make a firm stand if foreign undertakings are aiming to acquire US companies. This appeared to be the case in recent cases involving mergers with the participation of Chinese buyers.[100] It is also worth highlighting that contrary to the socio-cultural approach of developing countries, developed countries tend to prioritise considerations relating to strategic industries (i.e. national security – defence, security of supply – energy, plurality of media – media and broadcasting).

The result of the foreign investment assessment can easily block the whole deal to move forward, although the competition assessment and the foreign investment regime are not directly linked to each other. Archer Daniels Midland's failure to secure foreign investment approval for its bid for GrainCorp after clearing competition review in Australia[101] is a notable example from past years where competition and foreign investment investigation led to different outcomes. A very recent example from the US is Infineon's failed attempt to acquire Cree's Wolfspeed LED business. Publicly available information suggests that there are national security concerns behind Cree's cancellation of the deal.[102]

The ABA Report also revealed the substantial and procedural problems with parallel investigations. Therefore, many recommendations have been put forward. Parties to cross-border and multi-national mergers, acquisitions, joint ventures, and other transactions, and some reviewing agencies, have expressed an interest in fostering greater harmony, transparency, consistency, and predictability in conducting multiple reviews.[103] More precisely, i) creating more consistency in the timetables for reviews; ii) institutionalising communication with comparable agencies in other jurisdictions that review foreign investment; iii) more transparency with regard to the substantive criteria they apply; iv) encouraging the involvement of other entities (e.g. ICN, OECD) in seeking greater harmonization of foreign investment review among different jurisdictions.

In reality, it is worth highlighting that the number of cases in which governments have intervened and influenced deals on national security ground has been relatively small.

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Commission (M. 7278 General Electric/Alstom), subject to remedies. In OECD: *Public interest considerations in merger control*. 2016. 13.

100 See especially Shuanghui Holdings International Limited/ Smithfield, Anbang Insurance Group/ Waldorf Astoria hotel in New York City, ABA Report 10.

101 The plan by Archer-Daniels-Midland Co., a US company to take over Australia's GrainCorp Ltd in 2013 was rejected by the Treasurer who noted that the proposal attracted concern from stakeholders and the broader community (Treasury, 2013) and determined that the acquisition was contrary to the national interest as there was not sufficient competition in grain handling following the deregulation of the industry five years earlier. In OECD: *Public interest considerations in merger control*. 2016. 14.

102 See, for instance 'Cree cancels Wolfspeed deal with Infineon based on US government concerns' (22 February 2017), http://www.ledsmagazine.com/articles/2017/02/cree-cancels-wolfspeed-deal-with-infineon-based-on-us-government-concerns.html.

103 ABA Report 10.

*3.2.3. Possibilities to seek legal remedy*

Ideally, all the other above-mentioned systems should provide a judicial review process for merging parties and interested third parties who are influenced/suffered damages by the decision based by public interest grounds. Possible trade-offs can be avoided if the process is followed by a full judicial review.

There are some models though where judicial review is not available. For instance, if the ministerial model takes a form of a piece of legislation, then there is generally no possibility for third parties to seek legal remedy.

However, there are several other models providing the possibility to seeking legal remedy. Taking the example of one of the jurisdictions where the responsible minister can overrule the competition authorities' decision, Germany is worth mentioning. The German Competition Law provides for the possibility of the so-called 'ministerial authorization'.[104] This means that companies, whose merger have been prohibited by the Bundeskartellamt ('BKart') may apply to the Federal Minister for Economic Affairs and Energy ('Minister') for authorization. The requirement for granting an authorization is that the restraint of competition in the particular case is outweighed by advantages to the economy as a whole resulting from the concentration, or that the concentration is justified by an overriding public interest. The survey conducted by the ECN Merger Working Group on public interest considerations underlines that *"in Germany, ministerial authorisations can be and have on some occasions been challenged in court. The judicial review of the procedure to be followed by the Ministry has been intense (and in one case also lead to the annulment of a ministerial authorisation and a part of the procedure had to be repeated). However, with regard to the interpretation of public interest grounds German law is generally understood to grant the minister a broad margin of appreciation"*.[105] The most recent example relates to Edeka's takeover of Kaiser's Tengelmann. The Bundeskartellamt aimed to block the merger as it was concerned that a takeover would further strengthen Edeka's market power with regard to producers. The ministerial authorization was preceded by broad discussions, including the advisory body to the BKart, the Monopolies Commission. The minister granted authorization to the deal, subject to the condition that Edeka agrees to safeguard the jobs of Kaiser Tengelmann's 16,000 workers for the next five years. Germany's Agriculture Minister, Christian Schmidt stated that whilst he respected the minister's decision, he believed that the takeover would give Edeka even more leverage with regard to negotiating prices with producers, putting them under even more pressure to produce cheaply.[106] Other companies

[104] See Germany's contribution to the OECD (Public interest considerations in merger control, 2016). Cases of ministerial authorisation being granted are rare. Since the introduction of merger control in 1973, a ministerial authorisation has only been granted without conditions in three cases and with conditions in six cases. In total, there have been only about 20 applications. See in Getting the deal through – Merger control (2017) 170.

[105] http://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf. 4.

[106] http://www.dw.com/en/regulators-overruled-in-supermarket-takeover/a-19122420.

in the food retail sector (REWE, Normaand Markant) have appealed against the ministerial authorisation. In December 2016 the BKart cleared the divestment from EDEKA to REWE of 63 food retail outlets in Berlin and two outlets each in North Rhine-Westphalia and greater Munich. The BKart's assessment of the divestment followed after REWE had withdrawn its appeal against the ministerial authorisation and the relevant ministry had communicated that the conditions of the ministerial authorisation had been fulfilled.[107]

Very specific rules apply in those situations where the Member States violate the European Commission's exclusivity due to public interest purposes regarding to mergers having a community dimension. Due to the clear distinction between the jurisdiction of the European Commission and those of the Member States, the European Commission has an exclusive right to deal with concentrations with a community dimension (the "one-stop-shop" principle[108]). Article 21 (4) of the EUMR does, however, allow Member States to adopt, with regard to concentrations of an EU dimension, measures to protect certain interests other than competition, for as long as these measures are necessary and proportionate to their aim and are compatible with all aspects of Community Law.[109] As mentioned above, the three considerations are 'public security', 'plurality of the media' and 'prudential rules' that are regarded as compatible with EU law. Other considerations should be communicated to the European Commission, which assess the public interest consideration based on the general principles of the EU law. The European Commission is empowered to open infringement proceedings against national measures adopted in violation of Article 21 EUMR, pursuant to Article 258 of the Treaty on the Functioning of the European Union ("TFEU"). The European Commission's assessment is not only an empty threat. The *E.ON/Endesa*[110] case in the energy sector, which concerned the acquisition of Spain's electricity incumbent, involved a number of exchanges between the European Commission and Spain. Given the Spanish authorities' failure to comply with its decisions, the European Commission brought Spain before the European Court of Justice ('ECJ'), claiming that the broad discretion that national administrative authorities applied represented a serious threat to the free movement of capital. In March 2008, the ECJ concluded that Spain had failed to fulfil its obligations under the Treaty by not withdrawing the conditions as requested by the European Commission. A very similar intervention took place in the polish *Unicredit/ HVB merger,*[111] the Polish Treasury instructed Unicredit to sell its shares in the Polish

[107] See the BKArt's press release at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Pressemitteilungen/08_12_2016_EDEKA_REWE_EN.pdf?__blob=publicationFile&v=3.

[108] See Articles 21 (2) and (3) of the EUMR.

[109] See the European Union's contribution to the OECD (Public interest considerations in merger control, 2016).

[110] Commission v Spain, C-196/07 [2008] ECR I-41.

[111] M.3894 Unicredit/HVB.

BPH, despite the Commission's approval of the merger.[112] The Commission launched an infringement procedure against Poland and concluded that Poland violated the free movement of capital and freedom of establishment rules. After this, the Polish government announced an agreement with Unicredit/HVB, allowing the merger of two Polish banks, subject to the divestment of almost half of BPH's branches and an agreement not to cut jobs at the merged bank until March 2008.[113]

### 4. Lack of empirical studies

One possible justification for the application of public interest considerations might be their positive effect on the market concerned and through that, the whole economy. For instance, given South Africa's high rate of unemployment, it is not surprising that the South African government is committing itself to rapidly accelerate the creation of employment opportunities.[114] It is very likely to be the reason that the impact of a proposed merger on employment has been the core public interest consideration and has received the greatest attention from the South African competition authorities.[115]

Some authors even point out that the most important issues regarding the justifiability of the public interest clause is whether the remedies imposed are effective.[116] Hence, it would be interesting to see how the intervention (or the lack of intervention) affects the macro-economy or the specific public interest that it aims to facilitate.

There are not many examples assessing the economic effect of the public interest interventions (or the lack of the interventions).[117] Therefore, one of the greatest shortfalls of these models is the lack of empirical evidence of the actual effect of the intervention. Without these empirical data, there is no actual evidence, and therefore concrete justification for the application of public interest considerations.

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112 EU Merger Control and the Public Interest, A Legal Mapping Report by the Lendület-HPOPs Research Group in Spring 2016, Hungarian Academy of Sciences, Centre for Social Sciences, 19.

113 EU Merger Control and the Public Interest: A Legal Mapping Report by the Lendület-HPOPs Research Group in Spring 2016. Hungarian Academy of Sciences, Centre for Social Sciences, 19.

114 J. Oxenham: Considerations before sub-saharan african competition jurisdictions with the quest for multi-jurisdcitional merger control certainty. *US–China Law Review*, Vol. 9, (2011) 218.

115 Metropolitan Holdings Limited and Momentum Group Limited 41/LM/Jul10, at 21 *"Thus if on the facts of a particular case, employment loss is of a considerable magnitude and that short term prospects of re-employment for a substantial portion of the affected class are limited, then prima facie this would be presumed to have a substantial adverse effect on the public interest and the an evidential burden would then shift to the merging parties to justify it before a final conclusion can be made."* Oxenham op. cit. 218.

116 P. Beneke: Antitrust, Cheper Beer, And The First Global Brewery. *Developing Word Antitrust*, 3 June 2016.

117 However, there are some examples to put forward. For instance, see T. Mandiriza et al.: An ex-post review of the Walmart/Massmart merger. *Working Paper*, CC2016/03. The paper evaluates the impact of the Massmart Supplier Development Fund which was established as a condition to the Wal-Mart /Massmart merger in 2012.

## 5. Conclusion

As the above examples suggest, there are surprisingly many jurisdictions around the globe which have considerations going beyond the traditional goals of merger control. Even those jurisdictions that take a firm position in focusing their merger control solely on competition criteria, witness attempts to put the inclusion of public interest considerations back to the agenda.[118]

Public interest considerations seem more frequent in developing countries, where socio-cultural reasons play a more important role in the merger assessment than in developed countries. However, examples show that developed countries also include public interest considerations in Competition Law. These considerations focus more on economic issues relating to industries like energy, media and finance.

The application of public interest considerations remains a challenge. One could argue that the application of public interest considerations is generally limited on a global scale, and are applied in exceptional circumstances. Some of the relevant cases certainly involve a one-in-a-generation situation (i.e. see the Lloyds/HBOS merger in the financial crisis) which might require very speedy solutions.[119] Even though cases invoking the application of public interest considerations are exceptional, and their number is limited (compared to the overall number of cases), it is worth underlining that these cases are very likely to have long-term effects, as they generally concern strategically important sectors, industries or undertakings. This feature keeps them in the spotlight even though the number of relevant cases is limited.[120]

As for the institutional design of enforcing public interest considerations, there is no universal solution on how to enforce public interest considerations in merger control, due to the special characteristic and political/historical background of the countries. The OECD discussion in 2016 confirmed that jurisdictions which have a public interest consideration applicable in Competition Law prefer a dual setting where the sectoral regulator or the political body channels the public interest angle into the process. This paper argues that the dual model has the clear advantage of relieving the competition authorities from political pressure. It is a great controversy though, that legal certainty and predictability might be better served by competition authorities (which might issue guidance or other soft law) than external figures (whose actions are not necessarily subject to judicial review).

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118 P. Feinstein Guniganti: I fear the day. US FTC is asked to consider jobs. *GCR*, 3 February 2017. http://globalcompetitionreview.com/article/1080941/feinstein-%E2%80%9Ci-fear-the-day%E2%80%9D-us-ftc-is-asked-to-consider-jobs.

119 Graham (2013) op. cit. 406.

120 *"[...]public interest based interventions that would be at odds with an economics-based competition assessment have generally been limited to a small number of cases that were characterised by exceptional circumstances"* http://ec.europa.eu/competition/ecn/mwg_public_interest_regimes_en.pdf, para 20.

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# ACCOMMODATING PUBLIC INTEREST CONSIDERATIONS IN DOMESTIC MERGER CONTROL: EMPIRICAL INSIGHTS

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## 1. Introduction

In the wake of advances in economic theory and global initiatives such as the International Competition Network's (ICN) Recommended Practices for Merger Analysis,[1] many jurisdictions have converged towards a competition-based approach to merger assessment.[2] This means, as a default position, most states will assess the majority of mergers according to their potential impact on competition within the relevant market. Given the emphasis that is now afforded to competition criteria, the influence of wider public interest considerations has become increasingly marginalised.[3] However, despite this marginalisation, most domestic merger regimes continue to reserve a role for the public interest, albeit to a very limited degree in most cases.[4] This raises a number of interesting questions regarding the wider role

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1 International Competition Network: *ICN Recommended Practices for Merger Analysis*. 2009. http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf.

2 Frédéric Jenny: Substantive convergence in merger control: An assessment. *Concurrences* 21, n. 1, (2015) 31–33.

3 CN Advocacy Working Group: *Competition Culture Project Report*. 14th ICN Annual Conference, Sydney, April 2015. 10.

4 See Section 3.3, below. Of the countries observed in this paper, 62.7% directly afford scope to the consideration of public interest criteria in their merger control legislation.

of the public interest in domestic states and the feasibility of further convergence internationally.

So how can domestic states seek to accommodate public interest criteria in an environment that is now largely driven by competition ideologies? In practice, states face a number of decisions regarding the framework of their substantive merger law and their institutional arrangement. In terms of substantive law, countries must decide how much influence to afford to the public interest during the assessment proceedings. For example, should public interest criteria be afforded extensive influence by considering it as part of the substantive test for assessment? Should it be considered in only limited circumstances as an exception to the test? Or perhaps it should be assessed as part of a sector-specific policy that runs parallel to merger control. With regards to institutional arrangement, countries face a potential dilemma when identifying who should decide on mergers affecting the public interest. Should this decision-making role be assigned to NCAs, politicians, sector regulators or a combination of these? The decisions a state makes in relation to these substantive and institutional issues can significantly dictate the level of influence afforded to the public interest in its domestic merger assessments. By considering the choices that states have made in practice, this paper identifies the prevailing methods of accommodating the public interest and asks whether this supports the suggestion that the public interest now exists only on the periphery of international merger control.

It is also worth considering whether socio-economic factors have had an influence on the way in which states have chosen to accommodate the public interest in practice. Do domestic variables – such as economic development – have a significant bearing on the importance a state attributes to the public interest and, in turn, how it chooses to accommodate it? It is certainly true that different states will have their own interpretations of how the public interest should be defined and the role it should play in the merger control context. By considering the influence of socio-economic variables, the paper seeks to establish why there has not been universal harmonisation between states with regard to approaching merger control and the public interest.

In seeking to address these research questions, the paper proceeds as follows. Section 2 examines the different approaches that states can use to accommodate the public interest under domestic merger control. It shows that states will typically: (a) adopt one (or a combination) of four core options for framing public interest criteria within legislation, and (b) appoint one (or a combination) of three types of public interest decision-maker. Section 3 seeks to identify how states have accommodated the public interest in practice by conducting an empirical study of 75 domestic merger regimes. It finds that most states will: (i) either treat the public interest as an 'exception' to a competition-based test or frame it within parallel sector-specific policy, and (ii) assign decision-making powers to either a national competition authority or a politician. Section 4 extends the empirical analysis to analyse the potential influence that key socio-economic factors may have on how a state chooses to accommodate the public interest. The analysis suggests that factors traditionally thought of as influential (such as geographic locality, economic development and the type of legal regime in place) have only a negligible influence on the chosen method of accommodation. In contrast, the effectiveness of governance within a state

appears to correspond with how that state chooses to frame public interest criteria within legislation. Section 5 offers concluding remarks.

## 2. Approaches to accommodating the public interest

### 2.1. The decisions facing countries when accommodating the public interest

There are numerous approaches a state can take when seeking to accommodate public interest considerations within their merger control regimes. States will usually adopt formal statutory provisions which specify how public interest criteria is to be accommodated and who will be assigned the relevant decision-making powers. In addition, states may also seek to give effect to the public interest via less formal means that are not specified in legislation.[5] Given that these informal methods are not readily observable for the purposes of empirical analysis, this paper is primarily concerned with the formal means by which states have sought to accommodate the public interest. As such, this section focusses on the formal decisions countries must take with regards to (i) framing public interest criteria in their domestic legislation ("legislative framing options"), and (ii) appointing a 'public interest decision-maker'.

### 2.2. Options for framing public interest criteria in domestic legislation

When seeking to accommodate public interest criteria in merger law, the national legislature must be mindful of a number of intricate drafting details regarding how the public interest should be defined and when it should be considered. It is difficult to compare the different types of public interest criteria that states adopt, not least due to the boundless definitions that countries can attribute to these interests. Having said this, there are only a limited number of options available to states when it comes to deciding *when* the public interest should be invoked in merger assessments. Depending on how the public interest criteria is 'framed' in the merger legislation, public interest considerations may play a prominent role in every merger assessment, a restricted role in some pre-determined assessments, or no role at all. A preliminary examination of the 75 states considered in this paper reveals that there are four main options for framing the public interest within merger control legislation:

*Option 1 – Afford no scope to considering public interest criteria*.

Although not strictly to be classed as an option for 'accommodating' the public interest – in fact, quite the opposite is true – this approach still represents an instance where the state has made a conscious choice regarding the role of public interest

[5] Consider, for example, the negotiations that took place between the South African Government and Wal-mart in *Wal-mart/Massmart*, and the UK Government and Pfizer in *Pfizer/AstraZeneca*. In both cases, there was no statutory requirement for the negotiations to take place but both governments sought commitments from the bidding parties in an effort to alleviate public interest concerns.

criteria.[6] Under this approach, the state adheres strictly to competition-based criteria and affords no scope for considering wider public interest factors at any stage in the merger assessment process.

*Option 2 – Consider public interest criteria as part of the substantive test.* Under this option, the public interest is considered directly alongside competition-based criteria in every merger assessment. This will sometimes involve 'balancing' the public interest criteria against competition findings to determine whether or not a merger should be allowed to proceed. Alternatively, the substantive test may be split into two phases: where the merger is assessed against competition-based criteria in the first phase, and against public interest criteria in the second phase. If the merger is deemed to satisfy both sets of criteria, the merger will be permitted. If the merger raises concerns with regard to one set of criteria, the merger will be blocked or remedies will be sought to address the concerns.

*Option 3 – Reserve public interest 'exceptions' to the substantive test.* Here, the decision-maker will apply competition-based criteria during the merger assessment process but may, in exceptional circumstances, apply public interest criteria if the merger is suspected to raise public interest concerns. These exceptional circumstances may arise in mergers that have a direct impact on specific interests such as national security, media plurality or financial stability. Alternatively, the public interest exception can be defined broadly to include any merger that impacts upon the 'national interest'.

*Option 4 – Enforce sector-specific policies that run parallel to merger control.* As with Option 1, this approach does not allow for public interest criteria to be considered within the merger control assessment itself, but there is a key difference. Even after the transaction has been assessed on competition grounds in accordance with the merger control procedure, the outcome of the transaction may still be subject to a sector-specific policy, prompting a parallel sectoral assessment. This parallel assessment can then afford consideration to a number of sector-specific public interest issues. The sector-specific assessment has the potential to usurp the findings of the merger control assessment and thereby block, permit or seek remedies to address public interest concerns.

Although a state's merger legislation will tend to resemble one of the four options described above, it is also possible for a state to adopt a mixed-options approach which combines two of these options. In this respect, states are limited in the types of combination they can pursue,[7] but two combinations are possible:

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[6] For the purposes of this empirical assessment, Option 1 is to be treated as a decision – on the part of the state – to 'not accommodate the public interest' within its domestic merger legislation.

[7] For example, Option 1 (which avoids considering public interest criteria) will not be compatible with any of the other options. Equally, Option 2 (which considers the public interest within the substantive

*A combination of Options 2 and 4 – Consider the public interest as part of the substantive test and, in addition, enforce sector-specific policies.*

This first mixed-options approach involves assessing the merger on both competition and public interest grounds (Option 2), while simultaneously assessing whether the merger is compatible with sector-specific policy (Option 4). Although there may be some overlap between the public interest criteria considered in each parallel assessment, there is an observable difference between the two. Generally speaking, the public interest criteria considered under Option 2 will relate to issues that are capable of applying to all sectors (e.g. promoting a domestic firm's competitiveness internationally). In contrast, the public interest criteria considered under Option 4 will be sector-specific (e.g. ensuring the continuation of regional water supply in a merger between two water companies). As such, an approach that combines Options 2 and 4 has the potential to give effect to a wide range of possible public interest considerations.

*A combination of Options 3 and 4 – Reserve public interest 'exceptions' to the substantive test and, in addition, enforce sector-specific policies.*

As with the abovementioned combination of Options 2 and 4, this approach is capable of allowing public interest criteria to be considered at two stages of the assessment process. However, although Option 4 guarantees that public interest criteria will be considered in the parallel assessment, Option 3 only allows for such criteria to be considered in 'exceptional' circumstances. As such, any state that adopts this mixed-options approach will only exceptionally consider the public interest in both the merger and sector-specific assessments. It is also worth noting that, in contrast to Option 2, it is not uncommon for the types of public interest criteria considered under Option 3 to be sector-specific (e.g. maintaining a sufficient plurality of the media). This means that there can be an overlap between the markets-based public interest objectives considered under Option 3 and the sector-specific policies considered under Option 4. The range of potential public interest criteria is therefore unlikely to be as vast as that witnessed under the combined Options 2 and 4 approach. That said, certain broader public interest exceptions (e.g. 'national interest' or 'domestic economic interest') can allow a wider range of interests to be considered.

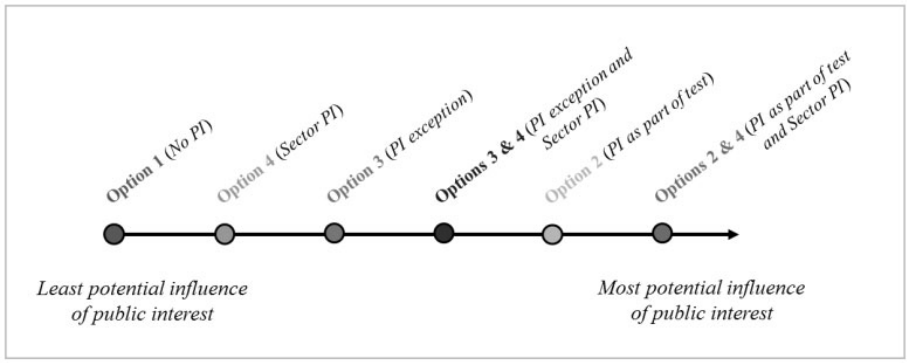
Accordingly, it is clear that a state must choose between six possible options when framing the public interest in legislation (inc. four core options and a further two mixed-options). For the purpose of the empirical analysis that follows, it is important to consider the potential influence that each option affords to the public interest in merger assessments. This is not altogether straightforward. The means by which public interest criteria is framed in legislation cannot, in itself, offer a definitive indication of how influential public interest considerations will be in practice in any given country. For example, let us assume that the merger laws in Country A

test for assessment) will not be procedurally compatible with Option 3 (where the public interest is treated as an 'exception' to the substantive test).

and Country B each frame the public interest as an 'exception' to the substantive test (Option 3). Country A specifies a single public interest exception whereas Country B lists four exceptions. One interpretation that could be taken from this is that the influence of the public interest in Country A is only one-quarter of the influence observed in Country B. But what if Country A enforces a broad public interest exception (e.g. 'national interest') and Country B adopts four narrowly-drafted exceptions (e.g. 'media plurality', 'financial stability', 'energy security' and 'protection of R&D in the domestic science base')? If this is the case, more mergers may fall under the single broad exception in Country A than under all four narrow exceptions in Country B. Consequently, the relationship between legislative framing options and the influence of the public interest should not be taken at face value.

However, this is not to say that legislative framing does not offer any insights into the influence of public interest criteria in practice. Clearly, some of the six options for framing public interest criteria have the potential to afford more influence to the public interest than others. Imagine a scale from 0-100, where '0' represents a merger regime that affords no influence to the public interest, and '100' is a merger regime that treats the public interest as fundamental in every case. At the lower end of the scale, Option 1 *(No public interest)* would feature at point '0', given that it affords zero scope to the consideration of public interest criteria. Option 4 *(Sector-specific policy)* is the next to appear on the scale as it enables the public interest to be considered in limited circumstances involving mergers in certain sectors. This is followed by Option 3 *(Public interest exception)* which can give effect to both broad and narrowly-defined public interest considerations in all sectors. Next to feature is a combination of Options 3 & 4 (*Public interest exception and Sector-specific policy*), which essentially combines the potential influence that each of these standalone options affords to the public interest. Option 2 (*Public interest as part of the substantive test*) would be ranked towards the upper end of the scale, as it allows the public interest to be considered in every merger evaluation. Finally, a combination of Options 2 & 4 *(Public interest as part of the substantive test and Sector-specific policy)* will rank at the top of the scale on account of the fact that it not only enables the public interest to be considered in every merger evaluation, but it also requires some mergers to be subjected to further sector-specific public interest assessments. These rankings are illustrated in *Figure 1*, below.

*Figure 1. Ordinal scale ranking the legislative framing options according to the potential degree of influence they afford to the public interest in merger assessments*




Ranking the legislative framing options in this way lays the foundations for the empirical analysis that follows in Sections 3 and 4 of this paper.[8] By using each option as a proxy for the degree of influence afforded to the public interest in any given state, it is possible to draw preliminary conclusions on the role of the public interest in modern-day merger control (Section 3) and, moreover, the effect that socio-economic factors have had on this role (Section 4).

### 2.3. Options for appointing a 'public interest decision-maker'

The second fundamental choice that states must make when seeking to accommodate the public interest is to appoint a decision-maker to rule on mergers that raise public interest concerns. In a similar vein to the legislative framing options discussed above, states will need to consider certain intricacies before appointing a public interest decision-maker. For example, if there is a main body that oversees merger control in a given state, should this body also decide on mergers affecting the public interest or should the role be assigned to a separate body? States must also consider the expertise, resources and overall competence of a body before it is assigned the decision-making role. Among the 75 states considered in this paper, there have been three main types of public interest decision-maker appointed:

*National competition authorities*

By their very definition, national competition authorities (NCAs) tend to operate under a consumer mandate by seeking to maintain and promote competition in markets.

[8] The ordinal scale in *Figure 1* has its limitations; namely, that it is not possible to specify the exact size of the interval between any two categories. For example, in terms of the potential influence each option affords to the public interest, the interval between Option 1 and Option 4 may be larger than the interval between Option 4 and Option 3. Nevertheless, these ordinal measurements can still be relied upon to draw tangible statistical insights, see Sections 3 and 4 below.

Some states, however, have chosen to extend the mandate of NCAs to consider the welfare of the public at large. NCAs will typically seek to employ individuals with expertise in competition law and economics, although the resources available to NCAs can vary considerably between states.[9] The political independence of NCAs also varies drastically. Some have overt political links, either operating as part of a government department or being overseen by a government minister. Other NCAs may appear independent but governments may retain certain powers to e.g. appoint and discharge the CEO or to overturn the decisions of the NCA. Of course, there are also truly independent NCAs that operate at arm's length from government and are not subjected to political pressure in the decision-making process.

*Politicians*

For the purposes of this paper, the term 'politician' is taken to include a collective group of politicians (i.e. a government or a ministerial cabinet), as well as an individual politician (e.g. a minister). These are, in the most part, elected officials belonging to a particular political party who have a broad mandate to serve the economic and social interests of the state. In the context of public interest mergers, politicians may request advice from NCAs and regulators when seeking to establish the effect that a merger is likely to have on competition and specific public interest issues. Depending on the level of political stability in a given country, the politician(s) appointed to make decisions may change at regular intervals, usually after a cabinet reshuffle or where a new government has been elected.

*Sector Regulators*

The role of sector regulators is generally to monitor and administer policy in specific industries that exhibit unique characteristics and, as such, warrant closer regulatory scrutiny. Regulators can operate under various mandates (e.g. citizen and consumer mandates) and will sometimes have dual mandates which require them to consider the effects a merger is likely to have on two sets of stakeholders. On account of these wide-ranging mandates, regulators may also be required to consider the levels of competition in the relevant sector and, as such, may also work closely with NCAs. Employees will typically have sector-specific expertise and, in some cases, past experience of working in the industry. In much the same way as NCAs, the political independence of sector regulators varies state-by-state and sector-by-sector.

It is also possible for states to assign the public interest decision-making role to more than one of the abovementioned institutions:

*Dual decision-makers*

In theory, a state could prescribe a joint decision-making role involving all three institutions: an NCA, a politician and a sector regulator. In practice, however, no

[9] P. Khelma – K. P. Armoogum – B. Lyons: *What Determines the Reputation of a Competition Agency?* 12th Annual International Industrial Organization Conference, Chicago, April 2014. https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2014&paper_id=470.

state out of the 75 considered in this paper has opted for this triple decision-maker arrangement. That said, some states have appointed dual decision-makers in the form of either: (i) an NCA and a Politician, (ii) an NCA and a Regulator, or (iii) a Politician and a Regulator. It is difficult to summarise how these dual decision-making roles operate in practice, as the relationship between the two decision-makers can take a number of forms. For example, it might be that each institution has equal power in the decision-making process and, as such, both institutions must approve the merger before it is allowed to proceed. Alternatively, in the event of each institution reaching a different conclusion on the effect of the merger on the public interest, one of the institutions may be given the 'final say' on whether or not the merger is allowed to proceed.[10] Furthermore, in contrast to two decision-makers working together to reach a conclusion, states may merely appoint two decision-makers to 'share the workload', with each institution tasked with assessing mergers in specified industries.[11] Given that the dual decision-making approach can take many forms (both with regards to the identity of the decision-makers and the relationship between them), performing an analysis of it poses numerous practical challenges. Therefore, so as not to unnecessarily complicate the empirical analysis, Sections 3 and 4 of this paper group the different types of dual decision-makers into a single category.

It is therefore clear that states can choose from among four possibilities for public interest decision-makers (including three standalone institutions and a dual decision-making approach).[12] The choice is made particularly interesting given that the state legislature (i.e. the government) is essentially faced with a choice between either: (i) assigning decision-maker powers to itself, or (ii) delegating power to a different institution to decide on mergers affecting the wider public interest. Have state governments shown a willingness to delegate these powers in practice? This is one of the questions explored in the next section.

In the same way as the legislative framing options, we can again consider the potential influence that each decision-maker option affords to the public interest. Unfortunately, whereas there are general rules of thumb that allow the legislative framing options to be ranked according to their potential influence,[13] the same cannot be said of decision-makers. Many factors can affect how frequently a decision-maker

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[10] Such a procedure has been proposed in the UK in the context of media mergers raising plurality concerns. For a discussion, see David Reader: Does Ofcom Offer a Credible Solution to Bias in Media Public Interest Mergers in the United Kingdom? *CPI Antitrust Chronicle,* 2014. 4(1). http://www.competitionpolicyinternational.com/does-ofcom-offer-a-credible-solution-to-bias-in-media-public-interest-mergers-in-the-united-kingdom.

[11] This is the case in the United States where the Department of Justice and the Federal Trade Commission are assigned competence over mergers in certain specified industries.

[12] Note that courts do not feature within the list of public interest decision-makers. Of the 75 states in the sample, many assign a role to the courts for reviewing the rulings of the decision-maker, but no states has chosen to appoint a court as a public interest decision-maker in its own right.

[13] The rule of thumb is that, broadly speaking, we can identify whether public interest criteria will be considered in (i) every case, (ii) some cases, or (iii) no cases, depending on how the criteria are framed in legislation.

will give effect to the public interest. The most obvious is the merger legislation itself, which frames the public interest and specifies the powers of the decision-maker. However, we should also be mindful of the extra-legal factors that can influence decision-makers, such as their political independence and whether they are particularly prone to lobbying. These are not clear-cut categories that decision-makers can be grouped into, they are issues faced by every decision-maker regardless of their identity. If we were to rank the different types of decision-maker, it would require making a number of broad assumptions about the institutional make-up of NCAs, politicians and sector regulators in different states. To do so would be to oversimplify the research and, owing to this, the paper refrains from relying on decision-makers as a proxy for the influence afforded to the public interest. Rather, the analysis of decision-makers is conducted to offer important insights into (i) the extent to which governments have been willing to delegate decision-making powers to other bodies, and (ii) whether a certain type body is considered more appropriate for assessing the public interest. This can be achieved without having to rank the decision-makers.[14]

## 3. How have states accommodated the public interest in practice?

Section 2 has identified two fundamental choices that a state must make when seeking to accommodate the public interest in its domestic merger regimes. The first concerns how the state wishes to frame the public interest in merger legislation, where there are six possible options to choose from. The second involves appointing a decision-maker to rule on mergers that raise public interest concerns, of which there are four main decision-makers a state can recruit. Having identified the options available to states, the next stage is to observe how frequently these options have been adopted in practice. This section seeks to make these observations by adopting an empirical methodology which considers the merger regimes of 75 domestic states. The section proceeds by firstly providing an explanation of the empirical methodology, before presenting a description of the domestic data set and, finally, revealing the findings of the empirical analysis.

### 3.1. Research Methods

#### *3.1.1. Advantages and limitations of the empirical approach*

By utilising an empirical methodology, the analysis in this paper is able to draw insights that a traditional doctrinal approach would otherwise fail to deliver. This is achieved by identifying key features within each state in the sample, and thereby

[14] In Carletti et al, the authors rank the different decision-makers by assigning an 'effectiveness' score between 0–1 to each body. This does not, however, overcome the need to make broad assumptions for an entire class of decision-maker. Elena Carletti – Philipp Hartmann – Steven Ongena: The economic impact of merger control legislation. *International Review of Law and Economics,* Vol. 42., 2015. 88., 92.

grouping the states according to the methods of accommodation outlined above. By segregating the data in this way, one can more readily observe the global norms by which states have accommodated the public interest in practice. In addition, the empirical approach has the effect of assigning quantitative values to qualitative data, meaning the data is more directly comparable with some of the quantitative data utilised in the study of socio-economic variables in Section 4.

Despite the notable benefits associated with empirical methodologies, it is worth noting the potential limitations of this approach. The main concern regards overlooking the important domestic variables that an empirical analysis of domestic legislation is unable to take account of. Legal academics have warned of the pitfalls of placing too much emphasis on legislation without consulting other important sources, such as case law, policy statements, news reports and academic commentary.[15] Indeed, although merger legislation can offer a useful proxy for the influence afforded to public interest criteria domestically, it might not offer an accurate representation of the circumstances where the public interest is considered in practice. For example, merger legislation cannot generally reveal whether decision-makers will attach a wide or narrow interpretation to the public interest criteria.[16] Nor will legislation reflect any guidelines or interim policy changes that have taken place in lieu of statutory reform.[17] The author acknowledges these limitations and notes the potential for future research projects that would seek to reinforce the empirical analysis in this paper, by undertaking additional domestic case studies.

### *3.1.2. Methodology*

Having decided to adopt an empirical approach, the next stage is to devise a methodology that makes effective use of empirical methods. A detailed explanation of the methodology used in this paper can be found in Appendix 1 but, broadly speaking, the methodology consists of four steps.

Firstly, as Section 2 has highlighted above, it has been necessary to identify the various methods by which states can accommodate the public interest in practice. This has been accomplished by conducting an initial doctrinal study of 20 states, to reveal the six options for framing the public interest in legislation and the four options for appointing a public interest decision-maker.[18]

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15 Maher M. Dabbah: *International and Comparative Competition Law.* Cambridge, CUP, 2010. 38.

16 For instance, 'national security' is a public interest criteria that is referenced in several regimes and attributed very different meanings.

17 Consider, for example, the introduction of the Tebbit Doctrine in the UK. Although it had no impact on the wording of the merger provisions under the Fair Trading Act 1973, a policy speech by Norman Tebbit MP in 1984 prompted the UK authorities to depart from a public interest test in favour of a competition-based approach to merger control. *HC,* Deb 5 July 1984, vol 63*,* cols 213-14W.

18 For details on the sources of data for this initial doctrinal study, see Section 3.2.1 for an overview of the data set.

Secondly, a data set has been compiled to consolidate the information relating to merger control in each state. Further information relating to socio-economic variables has also been incorporated into the data set in order to lay the foundations for the analysis that follows in Section 4. A detailed account of how the data has been collected and codified can be found in Section 3.2, below.

Thirdly, having compiled the data set, the states are then grouped according to how each has chosen to accommodate the public interest in practice. This involves interpreting the data entries of each state and recording which of the six framing options they have chosen to adopt and which of the four decision-makers they have appointed.[19]

The fourth and final step involves subjecting the grouped data to empirical analyses. A number of analyses are conducted throughout this paper. Section 3.3 undertakes a basic assessment of the frequency distribution of states adopting each legislative framing option and each decision-maker option. Section 4.3 examines whether socio-economic variables have influenced the way states have chosen to accommodate the public interest by making use of a range of statistical techniques (such as choropleth mapping and inferential tests, such as *t*-tests and ANOVA) [20] to interpret the data. With regards to the legislative framing options, the empirical analysis uses the ranking system illustrated in *Figure 1*, above, to identify whether there is a relationship between socio-economic variables and the level of influence states afford to public interest criteria in domestic merger legislation.[21]

## 3.2. Data on domestic merger control

### *3.2.1. Overview of the domestic data set*

The consolidated data set is comprised of information relating to the merger-specific, socio-economic and foreign investment variables of 75 domestic states. The merger-specific variables record various qualitative data, including: (i) the substantive test for merger assessment that the state has adopted, (ii) whether there is direct scope to consider public interest criteria in the merger regime,[22] (iii) whether the public interest is framed as part of the substantive test (Option 2); (iv) whether the public interest is framed as an exception to the substantive test (Option 3); (v) whether sector-

[19] Tables that group the states according to their choice of legislative framing options and decision-makers can be found in Appendices 2B and 2C respectively.

[20] These techniques are used respectively in Section 4.3.1 (Geographic locality) and Sections 4.3.4 and 4.3.5 (Effectiveness of domestic governance and Openness to foreign investment).

[21] An interesting alternative to ranking the options would be to calculate a score for each state, based on the degree of influence it affords to the public interest. As noted above, a similar approach has been used to measure the 'effectiveness' of merger regimes and the impact this has on the stock prices and profitability of targets in bank mergers; Carletti–Hartmann–Ongena (2015) op. cit. 92.

[22] Direct scope is afforded if the public interest is either part of the substantive test or an exception to the test.

specific policy gives effect to public interest criteria (Option 4); (vi) the identity of the public interest decision-maker; and (vii) whether the decision-maker is independent of government. The records for the socio-economic variables include: (i) whether the state in question is a developing economy;[23] (ii) the type of legal system the state has in place; and (iii) the effectiveness of governance in the country.[24] Finally, the records for the foreign investment variables consist of: (i) whether the state is an OECD member country;[25] and (ii) how 'open' the state is to foreign direct investment.[26]

### *3.2.2. Populating and codifying the domestic data set*

The data for the analysis in this section is predominantly derived from two main sources: (i) the country overviews that appear in the 2014 edition of the Global Competition Review (GCR) Merger Control Handbook,[27] and (ii) the country profiles available from the George Washington University (GWU) Worldwide Competition Database.[28]

The GCR Handbook is a reputable reference document that is updated annually and aims to provide legal and business practitioners with overviews of merger control procedures in a number of jurisdictions across the globe.[29] The country overviews have been written by preeminent merger control practitioners and each overview has also received factual verification from some of the world's leading competition authorities.[30] Each country overview also provides answers to 36 'key questions' relating to various substantive and procedural aspects of the domestic merger regime.[31]

The GWU Database is an online research resource hosted on the website of the George Washington Competition Law Center. At the time of writing, the database

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[23] Based on the development status attributed to the state by the IMF; International Monetary Fund: *World Economic Outlook: Uneven Growth – Short- and Long-Term Factors.* IMF, 2015. 150–153. http://www.imf.org/external/pubs/ft/weo/2015/01/. [hereinafter: IMF (2015)]

[24] According to the 2014 readings of the World Bank Governance Indicators; World Bank: *Worldwide Governance Indicators (WGI) project.* http://info.worldbank.org/governance/wgi/index.aspx#home. [hereinafter: World Bank WGI]

[25] i.e. A recognised member of the Organisation for Economic Co-operation and Development.

[26] According to the 2014 ratings of the OECD FDI Index; OECD: FDI Regulatory Restrictiveness Index. *OECD Investment*, June 2014. www.oecd.org/investment/fdiindex.htm.

[27] Global Competition Review: *Getting the Deal Through: Merger Control 2014.* (*Law Business Research* 2013). Hereafter, the *'GCR Handbook'.*

[28] Competition Law Center: Worldwide Competition Database. GWU Competition Law Center. http://www.gwclc.com/World-competition-database.html. [Hereafter: GWU Database]

[29] As an indication of its reputability, the GCR Handbook has been endorsed by both the International Bar Association and the American Bar Association.

[30] *GCR Handbook* op. cit.

[31] The main questions the data collection considers are: (Q1) 'What is the relevant legislation and who enforces it?'; (Q8) 'Are there also rules on foreign investment, special sectors or other relevant approvals?'; (Q19) 'What is the substantive test for clearance?'; and (Q22) 'To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?'.

is populated with short country profiles for 120 competition regimes worldwide. In a similar fashion to the GCR Handbook, the country profiles in the GWU Database pose 38 questions regarding, inter alia, the obligations, independence and governance of competition authorities in each state. Many of these questions require binary 'Yes/No' answers, but the country profiles also provide additional elaboration where appropriate. For the purposes of the analysis in this paper, the GWU Database offers a reliable resource for cross-checking the information relating to decision-makers contained in the GCR Handbook, particularly with regards to their independence.[32]

In total, 75 domestic merger regimes are included in the data set and there are three main reasons for selecting this sample size: (i) to reduce the risk of data distortions, (ii) to ensure the data is sufficiently representative of global merger control, and (iii) to ensure the data is readily accessible from a reliable source.

Firstly, on the point of avoiding potential data distortions, there are justifiable grounds for imposing certain criteria on the types of state that are to be included within the sample.[33] For example, as the purpose of the study is to identify trends in domestic merger control regimes, it follows that the states within the sample should be domestic rather than supranational.[34] Moreover, the state must have enacted formal merger control laws that explicitly refer to assessment criteria.[35] By restricting the sample to states that possess these characteristics, it ensures that the states are sufficiently similar to facilitate a robust empirical analysis of the effect of socio-economic variables.[36] An important question to bear in mind here is whether the sample should include states that have not made efforts to accommodate the public interest domestically. The decision has been made to retain these states in the sample because they potentially offer valuable insights into the effect that socio-economic variables have on the decision of whether or not to accommodate public interest criteria in the first place.

Secondly, the data set must be sufficiently representative of global merger control in order for the empirical analysis to obtain valid insights on the international norms

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[32] In terms of independence, the key questions posed in the country profiles are: 'Does the executive have powers to decide on specific cases based on public interest?' and 'Does the executive retain decision-making powers over the Competition Authority?'.

[33] By imposing qualifying conditions on the sample, this facilitates control variables that can be maintained throughout the sample to reduce the risk of data distortions.

[34] The 'domestic state' requirement precludes the consideration of supranational merger regimes, such as the European Union and the Common Market for Eastern and Southern Africa (COMESA), which both feature in the *GCR Handbook*.

[35] Uruguay enforces a procedural-based merger regime that lacks a substantive test for assessment. As such, the role afforded to competition and public interest criteria is not clear. Uruguay is therefore precluded from the sample. Luxembourg also fails to qualify by virtue of its lack of substantive merger assessment.

[36] Comparative scholars have noted that a meaningful comparative analysis requires states to be sufficiently comparable in terms of certain shared characteristics; see A. Esin Örücü: Methodology of comparative law. In: Jan M. Smits (ed.): *Elgar Encyclopedia of Comparative Law.* Edward Elgar, 2006. 442.

for accommodating the public interest. As such, the sample states are selected from a broad geographic spectrum, thereby ensuring that the sample is more indicative of a range of socio-economic variables, many of which are significantly influenced by a country's geographic location. The 75 states in the sample are selected from six continents,[37] and also consist of a relatively even split between developed and developing economies,[38] one of the key socio-economic variables that will be analysed in Section 4. It is anticipated that this will be sufficiently expansive to identify the international trends relating to the accommodation of the public interest in domestic merger control and to the influence of key socio-economic variables.

Thirdly, the sample size will also be influenced by the availability of reliable data on the merger regime of any given state. Information and literature on certain merger regimes is scarce, particularly in countries that have only recently adopted merger control. This problem is aggravated by language barriers and the various statutes, institutions and reforms that need to be taken account of. Therefore, it is logical to select the sample states from amongst the countries featured in the GCR Handbook or the GWU Database, two reliable points of reference for information on domestic merger control and institutions.

### 3.3. Observations on how states have accommodated the public interest in practice

Before considering the potential influence of socio-economic variables, the data can first be assessed to identify the most common means by which the 75 states have accommodated the public interest, in terms of legislative framing and decision-makers.

#### *3.3.1. Framing the public interest in merger legislation*

Let us first consider the most popular options for framing the public interest in merger legislation. In light of the general rhetoric in academic and practitioner circles which advocates that states should adopt a competition-based approach to merger assessment,[39] one would expect to see most states either framing the public interest in a restrictive way or affording it no scope whatsoever. Indeed, the data appears to support this proposition. *Table 1*, below, specifies the number of states adopting each legislative framing option, with the options ranked according to the potential influence they afford to the public interest, as detailed above.

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[37] These include representatives from Africa (8 states), Asia (12), Europe (37), North America (7), South America (6) and Oceania (5).

[38] Of the 75 states in the sample, 38 are developed and 37 are developing.

[39] See, for example, the ICN Recommended Practices for Merger Analysis (n 1) 1, Comment 1.

*Table 1. Frequency distribution of states adopting each option of framing the public interest in legislation*

| Option 1 (*No PI*) | Option 4 (*Sector PI*) | Option 3 (*PI Exception*) | Opts 3 & 4 (*PI Exceptions & Sector PI*) | Option 2 (*PI Test*) | Opts 2 & 4 (*PI Test & Sector PI*) |
|---|---|---|---|---|---|
| 9 (12.0%) | 19 (25.3%) | 19 (25.3%) | 14 (18.7%) | 9 (12.0%) | 5 (6.7%) |

*[Source: Appendix 2B]*

Within the sample, 81.3% of states either avoid considering the public interest (Option 1) or frame public interest restrictively – either in sector-specific policy (Option 4), as an exception to the substantive test (Option 3) or a combination of both (Options 3 & 4).[40] In contrast, the options that afford a greater degree of potential influence to the public interest (Option 2 and Options 2 & 4) are adopted by only 19.7% of states. The most popular options for framing the public interest are Option 3, Option 4 and, to a lesser extent, a combination of the two; 69.3% of states adopt one of these three options.[41] This indicates that, while the vast majority of states have chosen to afford scope to the public interest,[42] there is a general preference for states to frame the public interest restrictively, meaning it will only be invoked in limited circumstances involving certain types of merger.

Moreover, the skewness of the data indicates a slight positive skew that tails towards the 'least common' options on the right-hand side of *Table 1*.[43] Again, this suggests that, as the degree of influence an option affords to the public interest increases, the probability of a state adopting that option decreases. These findings correspond to the initial proposition that international merger control has converged towards a predominantly competition-based approach.

Inference 1. *The vast majority of states continue to assign a restricted role to public interest criteria in their merger control regimes.*

### *3.3.2. Appointing a public interest decision-maker*

The next step is to consider who states have appointed to the public interest decision-making role in practice. Predicting the most popular decision-maker is not altogether straightforward. On the one hand, given that the ICN Recommended Practices for Merger Analysis suggest that NCAs should decide mergers, albeit on competition

[40] 61 out of 75 states frame the public interest restrictively or afford no scope to it.

[41] 52 out of 75 states adopt Option 3, Option 4 or a combination of both.

[42] 47 out of 75 states (62.6%) afford direct scope to the public interest in their merger legislation, and 66 out of 75 states (88.0%) afford direct scope to the public interest in merger legislation or sector-specific policy.

[43] The degree of skewness within the distribution is calculated at 0.3430, indicating a noticeable – but not significant – positive skew; see Appendix 2A. The distribution also has a kurtosis of 2.44, indicating the curve of the data is relatively flat compared to a normal distribution; Appendix 2A.

grounds,[44] it may be that states have chosen to extend the decision-making responsibilities of NCAs to also include public interest assessments. In particular, if the domestic law requires the decision-maker to balance competition and public interest considerations, states may feel that NCAs are best-suited to this task by virtue of their competition expertise. On the other hand, states may prefer to assign the decision-making role to politicians because of (i) a constitutional belief that mergers affecting the public interest should be decided by a public representative, or (ii) a reluctance to cede decision-making powers on matters of public or strategic significance. *Table 2*, below, indicates that NCAs and politicians are, in fact, equally common among the states in the sample when it comes to appointing decision-makers.

*Table 2. Frequency distribution of states appointing each public interest decision-maker*

| NCA | Politician | Regulator | Dual | N/A† |
|---|---|---|---|---|
| 21 (31.8%) | 21 (31.8%) | 9 (13.6%) | 15 (22.7%) | 9 (N/A) |

*[Source: Appendix 2C]. † Denotes states that do not consider the public interest and, as such, do not appoint a public interest decision-maker.*

Of the 66 states in the sample that have appointed public interest decision-makers,[45] 31.8% have opted for NCAs, a further 31.8% have appointed politicians, 13.6% assign the role to regulators, and 22.7% implement a dual decision-making procedure. Given that less than one-third of states have appointed politicians as decision-makers, this would appear to indicate that states have shown a strong willingness to cede public interest decision-making powers to other bodies. However, if we consider the political independence of the decision-makers in the sample, the influence of state governments may not be as restrained as *Table 2* implies. Only 37.9% of the decision-makers in the sample (25 out of 66 states) take their decisions independently of government.[46] Hence, despite the majority of states opting against appointing politicians as direct decision-makers, the assessment of public interest mergers remains largely politicised in most states.

Inference 2. *NCAs and politicians have proved the most popular choices to fulfil the public interest decision-making role. However, despite showing a readiness to delegate decision-making powers, state governments retain a notable influence over the decision-making process.*

### *3.3.3. The most popular combinations for accommodating the public interest*

We have so far established that states demonstrate a preference for: (a) prescribing a restricted role to public interest criteria in their merger regimes (Options 3, 4 or both), and (b) appointing NCAs or politicians as public interest decision-makers. In

44 ICN Recommended Practices (n 1) 1, Comment 3.

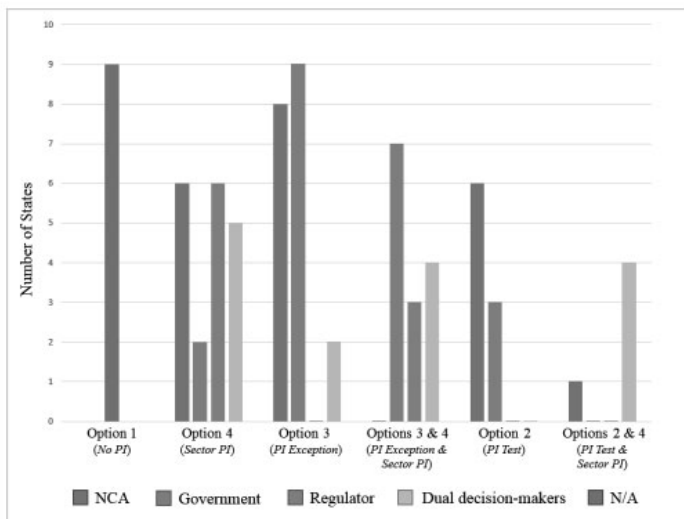
45 These are the 66 states who afford scope to the public interest during the assessment process.

46 See Appendix 2D. The politically independent decision-makers in the sample include: 13/21 NCAs (61.9%), 0/21 Politicians (0.0%), 6/9 Regulators (66.7%), and 6/15 Dual decision-makers (40.0%).

an effort to identify the dynamics between the two sets of choices, the legislative framing and decision-making variables can be considered together to reveal the most popular combinations for accommodating the public interest.

Overall, there are 21 possible combinations for states to choose from.[47] This is a broad range of possibilities but, nevertheless, there are some specific combinations that we would expect to observe more frequently in practice. For example, when a state frames the public interest in terms of sector-specific policy,[48] it might be more inclined to delegate the decision-making role to a sector regulator, in order to benefit from the regulator's industry expertise. Alternatively, if the public interest is framed as part of a substantive test that requires the public interest to be balanced with competition criteria,[49] the state may be more likely to appoint an NCA as decision-maker or, at least, implement a dual decision-making procedure that includes an NCA. *Figure 2*, below, illustrates the most popular accommodation combinations within the sample.

*Figure 2. Distribution of different combinations of legislative framing and decision-maker options available to states*




*[Source: Appendix 2E]*

A number of inferences can be drawn from the data. What is immediately observable is the wide variety of combinations that the states have adopted in practice. Of the 21 possible combinations available, 15 have been utilised by the 75 states in the sample. One explanation for this broad distribution is that, rather than simply transplanting

[47] This figure includes the option of not affording scope to the public interest. For a table of the possible combinations, see Appendix 2E.

[48] I.e. Option 4, Options 2 & 4 or Options 3 & 4.

[49] I.e. Option 2 or Options 2 & 4.

the merger laws of another country, states have shown a willingness to tailor their approach in order to accommodate the public interest in a manner that suits their own domestic needs.[50] By a slight margin, the joint-most common approaches in the sample are (i) to avoid considering public interest criteria altogether (Option 1), and (ii) to frame the public interest as an exception to the substantive test (Option 3) and to appoint a politician as decision-maker – these approaches have each been adopted by 9 states.[51] The next-most popular combination is also Option 3 but with an NCA appointed as decision-maker (8 states).

Given that the sample includes an equal number of NCAs and politicians as decision-makers, it is possible to directly compare the distributions of both. A notable difference between the two can be observed in instances where the public interest is framed as an exception (in Option 3 and Options 3 & 4). Although states adopting Option 3 have shown an eagerness to appoint both NCAs and politicians, not a single state that adopts a combination of Options 3 & 4 has chosen to appoint an NCA (compared with 7 states who have appointed a politician). In other words, where states have framed the public interest as an exception, the ratio of NCAs to politicians is 1:2.[52] One way to interpret this is that, although many states believe that politicians should rule on the public interest, these states have been reluctant to over-politicise their merger regimes and, as a consequence, have restricted political decision-making powers to maintain the objective credibility of the review process. This is in contrast to what is observed under the legislative framing options that afford a greater degree of potential influence to the public interest. If we consider Option 2 and Options 2 & 4 as a whole, the ratio of NCAs to politicians is 2.33:1.[53] The inference here is that, whenever public interest criteria is considered in every merger assessment, states are more than twice as likely to delegate this responsibility to NCAs. However, although NCAs are more likely to play a role when the legislation affords significant influence to public interest criteria, this is not to conclude that NCAs themselves have more influence over the public interest. On the contrary, 6 of the states in the data set have appointed NCAs to oversee Option 4 (one of the lowest ranked options in terms of potential public interest influence). Therefore, considering the distribution as a whole, there is no significant difference between NCAs and politicians in terms of the influence they have been able to derive from their domestic legislation.[54]

As anticipated, states have shown a greater willingness to assign the decision-making role to sector regulators when the public interest is framed in terms of sector-specific policy, either under Option 4 or under a combination of Options 3 & 4. Indeed, these are the only two groups in which states have assigned sole decision-making

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50 Section 4 of this paper will test this claim by considering socio-economic variables.

51 The United Kingdom is one of the states to adopt the 'Option 3 with politician' approach.

52 Of the states adopting Option 3 or Options 3 & 4, 8 have appointed NCAs and 16 have appointed politicians.

53 Of the states adopting Option 2 or Options 2 & 4, 7 have appointed NCAs and 3 have appointed NCAs.

54 Appendix 2F calculates an estimate for the mean level of influence that each decision-maker has derived from legislation. The mean averages of NCAs (3.429) and politicians (3.524) are very similar.

powers to regulators. This implies that states attach a great deal of importance to the sector-specific expertise of regulators, but have little desire for regulators to make decisions outside of their areas of expertise. Option 4 is also the most diverse group in terms of decision-makers, with all four types of decision-maker represented.

States have also been prepared to implement a dual decision-making role in a variety of circumstances. The only instance where dual decision-makers have not been adopted by at least one state is where the public interest has been framed as part of the substantive test for assessment (Option 2). This is somewhat unexpected given that the multi-disciplinary skillset of dual decision-makers (e.g. an NCA and a politician) would appear well-suited to the task of balancing competition and public interest criteria, a common feature of Option 2. However, dual decision-making is more prominent where legislation is framed under a combination of Options 2 & 4.[55]

Inference 3. *States have been prepared to adopt various combinations of legislative framing and decision-makers to suit their own needs. Where states have framed the public interest as an 'exception' to the substantive test, politicians have been the preferred choice in terms of decision-maker. When the public interest is framed to play a role in every merger assessment, most states place their trust in NCAs to make the final decision. Sector regulators are considered desirable when ruling on sector-specific public interest issues because of their industry expertise. But few states have taken advantage of the multi-disciplinary insights of dual decision-makers when it comes to balancing competition and public interest criteria.*

Having identified the most common methods for accommodating the public interest in practice, the logical progression of the paper is to consider whether any socio-economic factors have influenced how states have chosen to make this accommodation.

## 4. What is the potential influence of socio-economic variables?

The extent to which socio-economic factors influence a state's adoption and enforcement of competition policy has become a prominent point of discussion for academics and policy makers alike. Comparative competition law researchers, in particular, have emphasised the importance of appreciating the potential influence of socio-economic variables when it comes to assessing why a country chooses to design its competition law and institutional framework in a certain way.[56] Fundamental design choices can be influenced by a country's legal, political and economic culture,[57] and merger control, in particular, can be immensely reflective of a

[55] Four states have prescribed a dual decision-making role here, and all of them involve NCAs: Greece and Poland (NCA and regulator), and Israel and Taiwan (NCA and politician).

[56] See, for example, Dabbah who suggests that the mere fact that almost all competition regimes are derived from a particular political philosophy makes it extremely difficult to separate competition law from its socio-economic framework. Dabbah (2010) op. cit. 63.

[57] Eleanor M. Fox – Michael J. Trebilcock: The GAL Competition Project: The Global Convergence of Process Norms. In: Eleanor M. Fox – Michael J. Trebilcock (eds.): *The Design of Competition Law*

country's legal traditions, historical context and its stage of economic development.[58] Moreover, as a competition regime begins to mature and its effectiveness becomes more observable, there is an increased likelihood that legislators will seek to adapt the law and, in doing so, take inspiration from the broader institutional arrangement of the state's legal system as a whole.[59]

By virtue of these socio-economic discrepancies between states, it is widely accepted that the goal of a single universal formula for global competition law is, for the time being at least, incomprehensible.[60] However, as has been noted above, efforts have been made at an international level to facilitate substantive and procedural convergence between domestic merger regimes. If such convergence can be facilitated, it has the potential to 'neutralise' the influence of certain socio-economic factors by encouraging greater uniformity.

In practice, initiatives launched by competition convergence champions (namely, epistemic communities including the ICN,[61] the OECD,[62] and UNCTAD,[63] among others) have reached important milestones in their efforts to promote substantive convergence in merger control.[64] Nevertheless, Section 3.3 observes that, between them, the 75 states in the sample have adopted 15 different approaches to accommodating public interest criteria in practice. This is indicative of the notable inconsistencies that persist between states at a substantive and institutional level when considering public interest criteria.[65] So what has been the main obstruction

*Institutions: Global Norms, Local Choice.s.* Oxford, OUP, 2013. 4.

58 Larry Fullerton – Megan Alvarez: Convergence in International Merger Control. *Antitrust ABA*, Vol. 26., N. 2, (Spring 2012) 20–21.

59 Mariana Prado – Michael Trebilcock: Path Dependence, Development, and the Dynamics of Institutional Reform. *University of Toronto Law Journal,* Vol. 59., (2009) 341., 354.

60 Ratnakar Adhikari: What Type of Competition Policy and Law Should a Developing Country Have? *South Asia Economic Journal*, Vol. 5, Iss. 1, (2004) 1., 2.

61 Namely the ICN Recommended Practices (n 1) and the ICN Merger Working Group.

62 OECD: *Recommendation of the Council on Merger Review*, 23 March 2005, C (2005) 34. http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False.

63 The United Nations Conference on Trade and Development. UNCTAD's convergence materials are derived from its peer reviews of merger control in certain regions and jurisdictions; see e.g. UNCTAD: A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe: Comparative Assessment. (2012) *UNCTAD/DITC/CLP*, 2012/1. http://unctad.org/en/PublicationsLibrary/ditcclp2012d1_overview_en.pdf.

64 These initiatives have succeeded in facilitating tangible convergence on market definition and substantive standards of analysis; see Jenny (n 2). However, procedural divergences endure in relation to timeframes for assessment in some countries, which creates unnecessary costs for merging parties in international transactions; Jonathan Galloway: Convergence in International Merger Control. *Competition Law Review,* Vol. 5, Iss. 2, (2009) 179., 185.

65 The Chairman of the OECD Competition Committee, Frédéric Jenny, suggests that substantive differences between merger regimes are primarily due to differing economic characteristics or the presence of public interest clauses. He suggests further convergence can be achieved by reducing the importance of public interest considerations; ibid 41.

to convergence in this area of law? A number of socio-economic factors potentially hold the answer.

### 4.1. Identifying socio-economic variables

This section will analyse the potential influence that five socio-economic variables have on how a state chooses to accommodate public interest criteria in its merger regime. These variables include:

(a) Geographic locality;
(b) Economic development;
(c) The type of legal system in place;
(d) The effectiveness of domestic governance; and
(e) Openness to foreign investment.

The decision to analyse these particular variables as part of the empirical assessment has been made for several reasons. The primary reason is that four of these variables – (a), (b), (c) and (d) – have either formed the basis of previous studies in competition law, or have been cited as potentially influential factors when states are seeking to design and implement competition policy.[66] Given their perceived significance in the literature, these variables offer a useful starting-point for the empirical assessment. In contrast, the fifth variable to be tested – (e) Openness to foreign investment – has been afforded relatively little mention in the competition law literature. It is, however, beginning to receive greater attention in practitioners' circles, owing to the interplay between merger control and foreign direct investment (FDI) review when overseeing cross-border mergers.[67] As it is possible for both merger control assessments and FDI reviews to consider public interest criteria, it is interesting to consider the relationship between the two and how they cohabit.

An important point to raise with regards to variable (e) concerns the dynamics of its relationship with merger control. If we consider variables (a) to (d), it appears that the relationship between these variables and the design of merger control is predominantly one-way; in other words, variables (a) to (d) have the capacity to

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[66] For examples of studies of these variables or references to their potential significance, see (a) Geographic locality, e.g. Mark R. A. Palim: The worldwide growth of competition law: an empirical analysis. *Antitrust Bulletin*, Vol. 43, (1998) 105., and Brian A. Facey –Cassandra Brown: *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations.* LexisNexis Canada, 2013. 19.; (b) Economic development, e.g. Adhikari (2004) op. cit. 2., and Moisés Naím: Does Latin America Need Competition Policy to Compete? In: Moisés Naím – Joseph S. Tulchin (eds.): *Competition Policy, Deregulation, and Modernization in Latin America*. Lynne Rienner Publishers, 1999. 31.; (c) Type of legal system, e.g. Fox – Trebilcock (2013) op. cit. 5–6., and Dabbah (2010) op. cit. 15.; and (d) Effectiveness of domestic governance, e.g. David J. Gerber: *Global Competition: Law, Markets and Globalization.* Oxford, OUP, 2009.

[67] The inspiration to consider openness to foreign investment as a variable comes from the author's attendance of the GCR Live conference on *Foreign Investment Review – Getting the Deal Done in the Evolving Regulatory World.* London, 17 October 2013).

influence – but not *be influenced by* – the design of merger control. For example, how a state chooses to design its merger control will not affect its geographic locality, nor is it remotely likely to prompt a change in its legal system or alter the effectiveness of its domestic governance (which includes factors such as political stability and rule of law). Variable (b) is a slight exception to this because, in the long-term, it is conceivable that the design of merger control will have a tangible impact on the economic development of a state. However, given the wide range of measures that are considered in the calculation of economic development,[68] and the relative infancy of merger control in developing states, we can legitimately assume that no domestic merger control regime has yet given rise to a developing country achieving developed status. For variable (e), on the other hand, there is every possibility that a two-way relationship exists between itself and the design of merger control. If a state adopts a macro-economic stance of being 'closed' to foreign investment, it is logical that the state's merger control will reflect this in some way (e.g. by embedding a public interest clause that seeks to protect 'the national interest' or strategic sectors). Equally, by enforcing these protectionist clauses (and, as such, sheltering domestic firms from potential foreign purchasers), merger control can itself be said to influence the state's overall 'openness' to foreign investment. It is therefore important to bear in mind this two-way relationship when it comes to analysing whether openness to foreign investment has an influence over how a state chooses to accommodate the public interest in merger control.

One limitation to note, which indirectly stems from the adoption of an empirical methodology, is the absence of 'the goals of competition law' as a socio-economic variable in this study. Indeed, there exists a wealth of literature that speaks of the observable relationship between the goals that states attribute to competition law and the design of the competition laws that states ultimately adopt.[69] To analyse the influence that individual goals have had on how states accommodate the public interest would certainly produce some insightful findings. Unfortunately, there are practical limitations associated with such an analysis in an empirical study. In practice, domestic states have a long 'shopping list' of different goals to choose from.[70] The length of this list does not, in itself, pose a practical problem for the empirical analysis because the states in the sample can be grouped according to their

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[68] The World Bank, International Monetary Fund and United Nations Development Programme all consider a broad range of economic, environmental and social factors in their development indices; Lynge Nielsen: Classifications of Countries Based on Their Level of Development: How it is Done and How it Could be Done. *IMF Working Paper*, 11/31, (2011) 7–18. http://www.imf.org/external/pubs/cat/longres.aspx?sk=24628.0.

[69] See, e.g. David A. Hyman – William E. Kovacic: Institutional Design, Agency Life Cycle, and the Goals of Competition Law. *Fordham Law Review*, Vol. 81, N. 5, (2013) 2163.

[70] This list includes, inter alia, protecting jobs, protecting small firms, promoting domestic industries and promoting a diverse spread of ownership. Eleanor Fox – Michal S. Gal: Drafting Competition Law for Developing Jurisdictions: Learning from Experience. In: Michal S. Gal and others: *Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law.* Cheltenham (UK), Edward Elgar, 2015.

chosen goal, in much the same way as this paper has done for the legislative framing options and decision-makers. The practical limitation lies in the fact that states will define these goals differently, in terms of meaning and scope, and may also select more-than-one goal. As a consequence, to model the variable would require grouping the states according to standalone goals (of multiple definitions) and joint-goals (of multiple combinations). As the potential number of groups is high, there is a risk that the data set will become fragmented which, in turn, has the effect of reducing the robustness of the statistical analysis.[71] For this reason, the analysis refrains from considering 'the goals of competition law' as a socio-economic variable.

### 4.2. Overview of data on socio-economic variables

Whereas in Section 3 the data pertaining to domestic merger control has been derived from two main sources (the GCR Handbook and the GWU Database), it has been necessary to consult a number of sources in order to populate the socio-economic fields within the data set.[72] The relevant data sources for each variable are referred to separately under each of the empirical tests conducted in Section 4.3, below. Further details of the data collection process for the socio-economic variables can be found in Appendix 3.

By way of an overview, it is worth noting that some of the socio-economic variables in this section are modelled with discrete data,[73] whereas others make use of continuous data. The decision to use one or the other is, in the most part, a matter of necessity. For example, 'Geographic locality' and 'Type of legal system' are clearly discrete variables that cannot be measured numerically. In contrast, 'Effectiveness of domestic governance', 'Economic development' and 'Openness to foreign investment' can all be considered continuous variables, which can be assigned a numerical value to reflect the level of stability, development or openness in a state.[74] As an extension of this, it is also possible to model these continuous variables with discrete data by defining classes or thresholds. For example, if political stability (a component of domestic governance) is measured on a scale between -2.5 and 2.5,[75] a threshold could be imposed (for example, at point '0') to distinguish between 'politically stable states' and 'politically unstable states'. This 'categorisation' of continuous variables is often seen in the expression of economic development, where continuous data is relied upon to categorise states as discrete variables; either 'developed' or 'developing'.

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71 This is particularly true where a small or moderate sample size is involved (such as the 75 states considered in this study), meaning the average number of states in each group will be small.

72 These sources are referred to below and include openly accessible data from the IMF, World Bank and OECD.

73 I.e. Categorical data.

74 A number of international bodies – including the World Bank, the IMF and the OECD – have developed indices for measuring these variables numerically; see Sections 4.3.2 – 4.3.5.

75 This is the range adopted by the World Bank for expressing 'political stability' (a component of domestic governance) within its World Governance Indicators; see Section 4.3.4.

Both continuous and categorical data have their advantages and disadvantages when undertaking empirical analyses. Continuous data provides greater detail on a variable and can be modelled using more robust statistical methods, but categorical data are less prone to the reliability issues often faced by continuous data that rely on estimates.[76] For the analysis in this section, continuous data is used to model the 'Effectiveness of domestic governance' and 'Openness to foreign investment' variables, whereas categorical data is used to test 'Economic development'. Although continuous data is available on economic development via the World Bank,[77] the data takes the form of separate indicators – such as estimates for human development, environmental resources and industrial development – rather than a single aggregated indicator that specifies the overall level of development in a given country. In the absence of an aggregated indicator, the analysis relies on the development classifications of the International Monetary Fund (IMF), which groups countries into discrete categories of 'developed' and 'developing' economies.[78]

## 4.3. Observations on the influence of socio-economic variables

### *4.3.1. Geographic locality*

Turning first to consider the potential influence that geographic locality has on how a state chooses to accommodate the public interest, what patterns (if any) would we expect to observe? Here, the process of 'knowledge exchange' offers a possible indication. A common occurrence when a country adopts or adapts its competition laws is that it will draw on the experiences of other competition regimes, in an effort to optimise the effectiveness of its own practices. The United States and the European Union have 'dominated' knowledge transfer in terms of inspiring the competition laws of other states,[79] so we might expect that the states located in geographically close proximity to the US or EU will share similar characteristics. Given that the US, in particular, has historically demonstrated a high degree of competition advocacy,[80] it might be that countries in the Americas take a similarly strict competition-based approach to merger control and, as such, afford little scope to public interest criteria. Furthermore, neighbouring states may also seek to accommodate public interest criteria in similar ways in order to address public interest concerns experienced in a particular geographic region.

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[76] Dawn Iacobucci: Continuous and Discrete Variables. *Journal of Consumer Psychology,* 2001. Vol. 10, N. 1, (2001) 37.

[77] World Bank: *World Development Indicators.* http://data.worldbank.org/data-catalog/world-development-indicators.

[78] IMF (2015) op. cit.

[79] Dabbah 2010) op. cit. 3.

[80] Maurice E. Stucke: Is competition always good? *Journal of Antitrust Enforcement*, Vol. 1, N. 1, (2013) 162., 162–165.

The geographic locality variable can be examined in several ways. For this section, choropleth mapping has been used to visualise the distribution of legislative framing options and decision-makers across the geographic spectrum. A limitation of conducting choropleth mapping across international states is that it is prone to exaggerating the significance of land mass, which one should be mindful of when interpreting the maps. However, this aside, choropleth mapping allows clusters of countries adopting similar framing options and decision-makers to be directly observed. The existence of these clusters would indicate that geographic locality is influential when accommodating the public interest in merger regimes in certain parts of the world.

*Figure 3*, below, shows a choropleth map illustrating the geographic distribution of each option for framing the public interest across the sample states. The lighter shaded regions represent states that adopt legisltative framing options that afford little-or-no scope to the public interest, whereas darker regions indicate states that adopt options which afford a greater degree of consideration to public interest criteria.

*Figure 3. Choropleth map showing geographical distribution of legislative framing options across states*


*[Source: Appendix 4A]*

The value of *Figure 3* as a visual aid is somewhat limited by the moderate number of states in the sample but, nonetheless, several observations can be made. Firstly, public interest criteria appears to display a high degree of influence in the merger regimes concentrated around Africa, Southeast Asia and, to a lesser degree, Eastern Europe. Of the 8 African states in the sample, 5 of these states (62.5%) adopt either Option 2 or a combination of Options 2 & 4, which afford the greatest scope to the public interest.[81] This is in contrast to the relatively small proportion of states that adopt the two most influential options in other regions: Asia (33.3%), Europe (10.8%),

[81] See Appendix 4A.

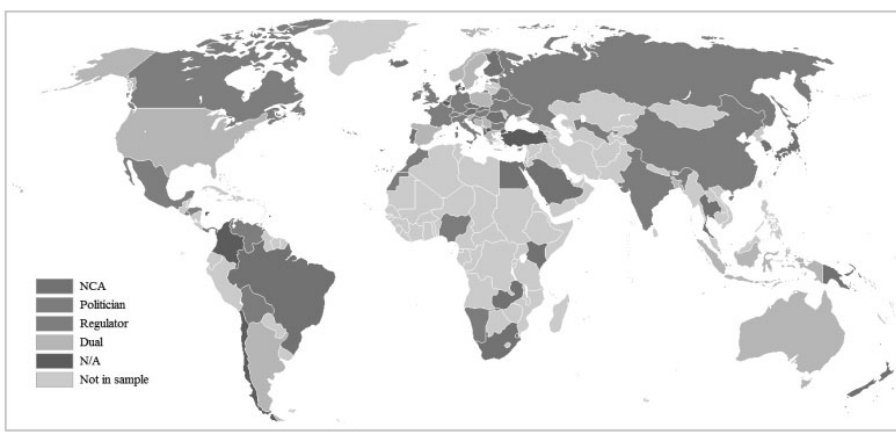
North America (0.0%), South America (0.0%), and Oceania (20.0%). A larger sample size would be necessary to substantiate these percentages but the preliminary indication is that legislative framing options which afford an extensive role to the public interest are much more likely to be adopted in African states, compared to other geographic regions. More generally, the choropleth gradient in *Figure 3* also suggests that states in the Eastern Hemisphere demonstrate a greater willingness to afford scope to the public interest, compared to their Western counterparts.

In terms of regions that exhibit less of a willingness to consider public interest criteria, all 6 of the South American states in the sample adopt either Option 1, Option 4 or Option 3, which afford the least scope to the public interest. Additionally, 6 of the 7 North American states in the sample adopt one of these three options.[82] Furthermore, not a single one of the North and South American states in the sample has adopted Option 2 or a combinations of Options 2 & 4, corroborating the idea that merger control in the Americas will tend to adhere more strictly to competition-based principles.

Inference 4. *African states are considerably more likely to assign an extensive role to the public interest in their merger control regimes. North and South American states typically frame public interest criteria more restrictively in their merger regimes. These observations indicate that the geographic region does have a bearing on how the public interest is framed in merger legislation, although they may also be explained by other socio-economic variables present in a particular geographic region.*

Further observations can also be made by referring to the geographic distribution of public interest decision-makers between states. The map in *Figure 4*, below, charts the decision-makers appointed by each of the sample states.

*Figure 4. Choropleth map showing geographical distribution of public interest decision-makers*




*[Source: Appendix 4B]*

[82] The remaining North American state, Panama, adopts a combination of Options 3 & 4.

The map reveals that a geographically diverse range of appointments have been made in each region, with at least two types of decision-maker present in every continent. As has been noted in Section 3.3.2, NCAs and politicians are the most-favoured decision-makers within the sample and, if we consult the blue and orange-shaded regions in *Figure 4*, we can observe the geographical distribution of each. At first glance, one would be forgiven for thinking that political decision-making is concentrated in Eastern Europe and large parts of Asia, but this is somewhat misleading given the large land mass of China, India and Russia (who each appoint politicians as decision-makers). In reality, the proportion of NCAs and political decision-makers is fairly even on all continents.[83] Nevertheless, there are clusters of neighbouring states which share the same type of decision-maker, therefore implying the existence of regional influence. As aforementioned, both Europe and Asia see large clusters of neighbouring states appointing politicians. In the case of Europe, the cluster of states adopting political decision-makers might be explained by the fact that EU Member States are caught under the jurisdiction of EU merger control, which may have influenced the domestic merger regimes of Member States.[84] In contrast, states appointing NCAs are comparatively well-dispersed; the only region that resembles a 'hot spot' for NCAs is in central and southern Africa. Much of Oceania and even some Nordic territories have opted for dual decision-makers.

Inference 5. *Decision-makers are very widely distributed between continents, suggesting that geographic locality does not have a significant influence on the type of public interest decision-maker selected by a state. NCA and politicians, the two most common types of decision-maker in the sample, are also distributed relatively equally on each continent. A cluster of political decision-makers in Europe may be explained by the influence of EU merger control, whereas there is also a high concentration of NCA decision-makers in Africa.*

Although there are certain inferences we can take from the influence of geographic locality as a socio-economic variable, it is important to consider why we observe similarities in particular regions. Although knowledge transfer, as noted above, provides a possible explanation for these similarities, another possible reason is that states in a particular region are facing similar socio-economic challenges and, as such, are forced to adopt similar laws and institutional designs in order to address these challenges. The analyses of the remaining socio-economic variables in this section should shed further light on why we observe these geographic patterns.

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83 This is more apparent from Appendix 4B.

84 The governments of EU Member States can intervene to assume competence over EU-level merger assessments where it is considered necessary in order to protect a legitimate public interest concern, under Article 21(4) EUMR. The fact that governments perform this public interest function in relation to EU-level mergers may have also influenced the public interest decision-making role in relation to domestic mergers.

*4.3.2. Economic development*

Economic development is commonly cited as a key influencing factor when states decide how to design and implement competition law. This has, in the most part, been attributed to the different types of challenges faced by developed countries when compared with developing and emerging economies.[85] Although the development goals of every developing country are unique in form and scale, they very often seek to address public interest concerns, such as mass unemployment, poverty and social inequality. It has been well-documented in the literature that many developing countries have sought to give effect to these development goals by incorporating them within their competition laws.[86] Scholars have suggested that this may be an attempt by developing countries to make competition law and merger control 'more friendly to growth and development'.[87] This has prompted Frédéric Jenny, the Chairman of the OECD Competition Committee, to suggest that public interest criteria may be a 'necessary evil' in some developing countries, who would otherwise decide against adopting competition law if it meant they could not consider wider development goals.[88] Others have suggested that developing countries may also need to assign a prominent scope to the public interest in order to give NCAs (as public interest decision-makers) credibility in the eyes of the public.[89] In light of this literature, one might therefore expect to see that the developing countries in the sample adopt legislative framing options that afford a greater scope to the public interest.

For this analysis, the states in the sample have been grouped into 'developed' and 'developing' states, according to their IMF classification.[90] This produces a ratio within the sample of 38:37 with regards to developed and developing countries. Because the number of developed and developing states in the sample is almost identical, this avoids significant distortions when it comes to comparing the developed and developing states directly against one another.

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85 For example, whereas developed countries may adopt competition laws to promote welfare and efficiencies, many developing countries have implemented competition law for substantive and even symbolic purposes in pursuit of development goals; Spencer Weber Waller: Comparative competition law as a form of empiricism *Brooklyn Journal of International Law*, 1998/23. 455., 456.

86 South Africa has attracted particular attention from academics and practitioners for integrating development goals within its competition law; see Vani Chetty: *The Place of Public Interest in South Africa's Competition Legislation: Some implications for international antitrust convergence*. 53rd Spring Meeting of the ABA Section of Antitrust Law, Johannesburg, April 2005. http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/spring/05/aba-paper.pdf.

87 Jenny (2015) op. cit. 41.

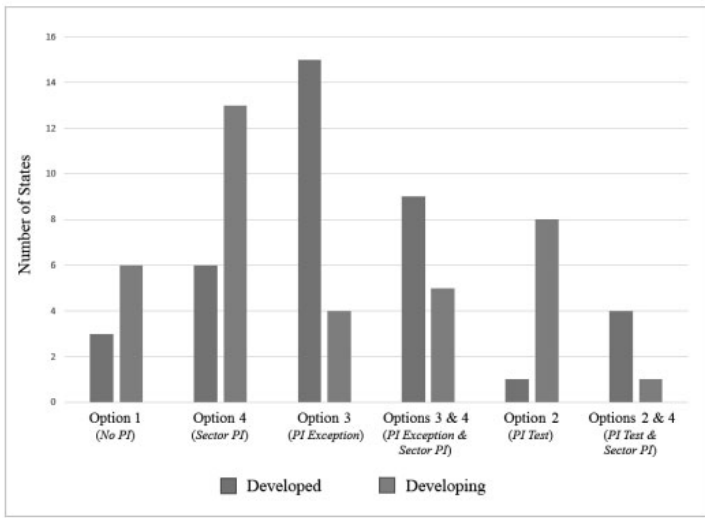
88 Henry Vane: Public interest clauses may be a necessary evil, says OECD head. *Global Competition Review*, 13, March 2015. http://globalcompetitionreview.com/news/article/38187/public-interest-clauses-may-necessary-evil-says-oecd-head.

89 Lewis suggests that, in developing countries, an NCA that is only able to decide mergers on competition grounds, even if the decision appears counterintuitive to development goals, will seriously struggle to achieve credibility and legitimacy; David Lewis: *The Role of Public Interest in Merger Evaluation*. ICN Merger Working Group, Naples, 28–29 September 2002. 2.

90 IMF (2015) op. cit.

*Figure 5*, below, shows the respective number of developed and developing countries adopting each legislative framing option.

*Figure 5. Distribution of legislative framing options adopted by developed and developing countries*




Once again, it is interesting to note that every legislative framing option has been adopted by at least one developed and one developing country. Indeed, we see that developed and developing countries fall into each extreme of the legislative framing options; both Option 1 (no public interest consideration) and Options 2 & 4 (public interest as part of the substantive test and sector-specific policy). This, in itself, is an early indication that economic development does not have a tangible impact on how a state accommodates the public interest.

Indeed, by performing a two-sample *t*-test to compare the respective means of each distribution, as Appendix 5 demonstrates, it transpires that there is no statistically significant difference between the types of legislative framing options that are typically adopted by developed and developing countries.[91] However, even though the *t*-test suggests that economic development does not generally dictate the level of influence a state affords to the public interest, *Figure 5* does reveal certain intricacies that a *t*-test overlooks. For example, a significant proportion of developed countries (39.5%) choose to frame the public interest as an exception to the substantive test (Option 3), which is considerably more than the proportion of developing countries who choose to take the same approach (10.8%). Conversely, 35.1% of developing countries accommodate the public interest in sector-specific policy (Option 4), compared to 15.8% of developed countries. This is perhaps due to the perceived

[91] In testing the null hypothesis that economic development has *no* significant influence on how a state frames the public interest, to a $p = 0.05$ level of significance, the *t*-test returns a *p*-value of 0.338. As this is statistically significant, we fail to reject the null hypothesis. See Appendix 5B.

need that developing states have to protect certain strategic sectors that aid their development goals.[92]

Interestingly, whereas only 3 developed countries in the sample have decided against affording scope to public interest criteria (Option 1), 6 developing countries have decided to do this. This would seem to dispel the commonly held belief that developing countries take an altogether more liberal approach to the public interest. It also hints at the possibility that some developing countries are taking inspiration from the strict competition-based approach witnessed in the United States. However, if we consider the other end of the spectrum, developing countries are also more likely to adopt options that afford extensive scope to the public interest compared to developed countries. Taking Option 2 and Options 2 & 4 as a whole, 9 developing countries apply one of these options, compared with 5 developed countries. In reality then, we observe a disproportionate number of developing countries residing at both extremes on the legislative framing scale, which is in contrast to the common conceptions cited in the literature.

Inference 6. *Considering the sample as a whole, economic development does not have a significant impact on how much influence states choose to afford to the public interest when framing merger law. However, in practice, developed states have typically shown a preference towards public interest exceptions (which appear in the middle of the ordinal public interest scale), whereas developing states favour sector-specific public interest policy and, to a lesser extent, a public interest test (closer to the extremes of the public interest scale). States that afford an extensive role to the public interest are more likely to be developing countries, but states that afford the public interest no scope at all are also more likely to be developing.*

Continuing the analysis of this variable, what of the effect that economic development has on the public interest decision-maker a state chooses to appoint? Once again, the literature presents some insights into the norms that we are likely to observe with regards to decision-makers in developed and developing countries respectively. One of these insights has already been referred to in the analysis of legislative framing options above; namely, the suggestion that developing countries have sought to incorporate public interest criteria into their merger regimes in order to provide credibility for NCAs in the eyes of the public.[93] If this has indeed arisen in practice, we would expect to see more developing countries appoint NCAs as public interest decision-makers, in the belief that this role will benefits NCAs. A second insight from the literature is provided by Adhikari who suggests that, due to the natural monopolies that endure in numerous developing countries, the role of sector regulators is sometimes considered a necessity.[94] This could imply that developing countries will also be more likely to prescribe a decision-making role for sector

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92 The former Chairman of the South African Competition Tribunal has himself claimed that it is 'widely accepted that there is a greater role for industrial policy, for targeting support at strategically selected sectors […] in developing than in developed countries'. Lewis (2002) op. cit. 2.

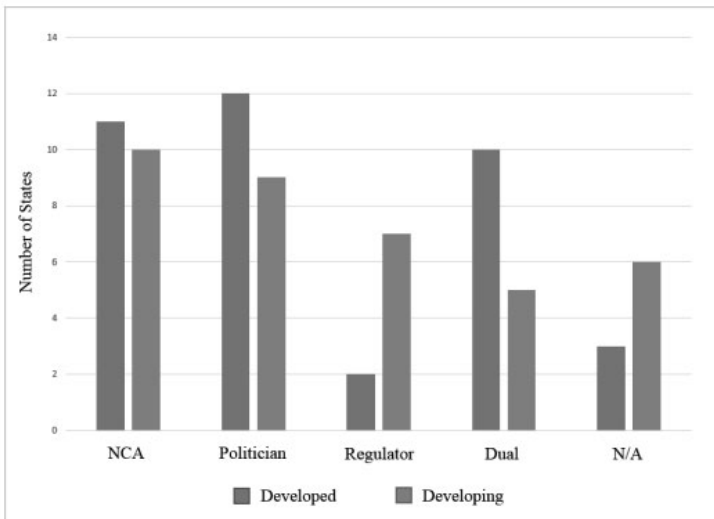
93 Ibid.

94 Adhikari (2004) op. cit. 12.

regulators in the merger control context, either as a standalone decision-maker or as part of a dual decision-making set-up. Both of these hypotheses can be tested with a straightforward comparison of the frequencies with the developed and developing country sub-groups.

*Figure 6*, below, shows the distribution of public interest decision-makers appointed within developed and developing countries.

*Figure 6. Distribution of public interest decision-makers appointed by developed and developing countries*




*[Source: Appendix 5C]*

On the basis of *Figure 6*, it appears that both of the abovementioned hypotheses possess some credibility. Firstly, with regards to the suggestion that developing countries appoint NCAs to the public interest decision-making role in order to increase their credibility, NCAs are indeed the most popular choice of decision-maker for developing countries. But there is a stark evenness between the number of states adopting NCAs and politicians, which is true of both developed and developing states. The ratio of NCAs to politicians is 11:12 for developed countries and 10:9 for developing countries, which demonstrates that states are equally willing to appoint NCAs and politicians, regardless of their level of economic development. Indeed, 65.7% of developed countries and 61.3% of developing countries have adopted either an NCA or a politician as their decision-maker.[95] Given the absence of any significant discrepancies between developed and developing countries with regards to these two main decision-makers, it appears very unlikely that economic development has a

[95] Of the states in the sample that have appointed public interest decision-makers.

statistically significant impact on the type of public interest decision-maker a state appoints.

Secondly, in relation to Adhikari's hypothesis regarding the extended role of regulators in developing countries, *Figure 6* also confirms that standalone regulators are much more likely to be afforded public interest decision-making powers in developing countries compared with developed countries. Sector regulators account for 18.9% of the decision-makers appointed by developing countries in the sample, which is in marked contrast to developed countries, where sector regulators have been the least common appointment to the role (5.3%). This corroborates Adhikari's hypothesis and is also consistent with the aforementioned finding that the single most-common legislative framing option among developing countries is Option 4 (sector-specific public interest policy). Moreover, 28.6% of developed countries have appointed dual decision-makers, compared with 16.1% of developing countries.

Inference 7. *Economic development does not appear to have a significant impact on the type of public interest decision-maker a state chooses to appoint. Developed and developing countries have been equally willing to appoint an NCA or a politician as a standalone decision-maker. Developing countries have made greater use of the specialist skills of regulators (potentially due to the existence of natural monopolies), while developed countries have also been open to the possibility of dual decision-making.*

### *4.3.3. Type of legal system in place*

In a similar vein to the geographic locality variable tested above, the type of legal system an individual state has in place can be readily identified, this time by referring to the sources of law that states attribute the greatest weight to. It is possible to identify whether a state enforces a predominantly civil law, common law, religious law or mixed legal system by referring to its legislative framework and its court system. But, although the task of identifying a legal system is relatively straightforward, establishing how the type of legal system can influence design choices in merger control is less clear. So we can ask whether it likely that a state will assign a different role to the public interest depending on the type of legal system it operates.

The academic commentary on the relationship between the type of legal system and the design of competition law is sparse. Referring to legal systems in the context of the design of competition agencies, Armoogum and Lyons note the tendency of common law states to afford greater discretion to decision-makers (most notably judges), while civil law countries prioritise the word of the national legislature and afford less discretion to decision-makers.[96] The additional discretion that decision-makers possess in common law jurisdictions has the advantage of allowing them to adapt their decisions according to economic and social change.[97] In turn, it has been

[96] Armoogum–Lyons (2014) op. cit. 8.

[97] Richard A. Posner: *Economic Analysis of Law*. Little, Brown and Company, 1973. 569.

suggested that this adaptive decision-making makes common law systems suitable for 'stable, slowly evolving law', whereas civil law is better suited to states who are attempting rapid legal change and institutional upheaval.[98] In terms of what we might expect to see in the context of merger control, the discretion that decision-makers enjoy in common law jurisdictions could suggest that common law countries will afford a more prominent role to public interest criteria, in order to give decision-makers the legislative scope in which to exercise their discretion. Conversely, civil law jurisdictions may be more inclined to frame public interest criteria narrowly in order to limit the scope for discretion to be exercised. Alternatively, if a civil law jurisdiction does afford a wide scope to public interest criteria, it may seek to appoint politicians to the decision-making role order to ensure that this discretion is exercised within the confines of what the legislation intended.

In truth, however, it is difficult to make robust predictions regarding the influence of different types of legal system, not least because the type of legal system a state has in place will itself be influenced by some of the other socio-economic factors that are considered in this section. In addition, empirically testing the influence of legal systems produces its own practical limitations. Of the 75 states in the sample, 48 have adopted civil law, 14 common law, 3 religious law and 10 have incorporated a mixed legal regime. Given the significant proportion of states in the sample that operate under a civil law system, this produces an unbalanced sample that limits the observations one can derive from testing this variable. Nevertheless, by grouping the sample states according to the legal system they have in place, it is still possible that the frequency bar charts can identify the existence of any notable differences between how different legal systems accommodate the public interest in merger control.

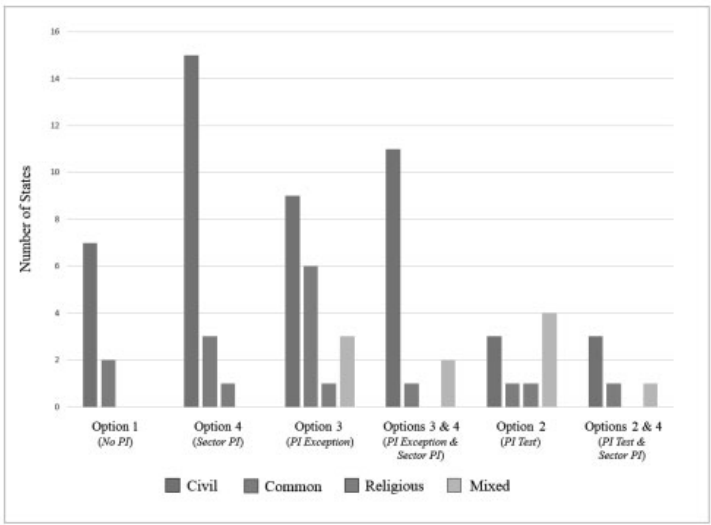
*Figure 7* shows the distribution of legislative framing options adopted by states that operate under each type of legal system.

Given that the vast majority of states in the sample are civil law jurisdictions, it is unsurprising that the preferences of civil law countries resemble those of the overall sample. Civil law countries demonstrate a preference for Option 4, Option 3 or a combination of both, which is consistent with the hypothesis that civil legal systems will frame the public interest narrowly in order to limit the discretion of decision-makers. The most popular legislative framing option among common law states is Option 3, which is adopted by 6 of the 14 common law countries. So despite the expectation that common law systems afford greater scope to the public interest, this is not the case in practice. Another observation one can make regards mixed legal systems, which are represented by the yellow bars in the chart. These appear towards the right-hand side of *Figure 7*, suggesting that states operating under a mixed legal system will typically afford a more expansive role to the public interest. It is unclear why this is the case but, given that mixed legal systems will often entail different bodies of law applying to different groups of people within a state, the interests of

[98] Benito Arruñada – Veneta Andonova: Market Institutions and Judicial Rulemaking. In: Claude Menard – Mary M. Shirley (eds.): *Handbook of New Institutional Economics*. Springer, 2005. 229.

these groups may be more readily served if public interest criteria is broadly scoped within legislation.

*Figure 7. Distribution of legislative framing options adopted by states of different legal systems*



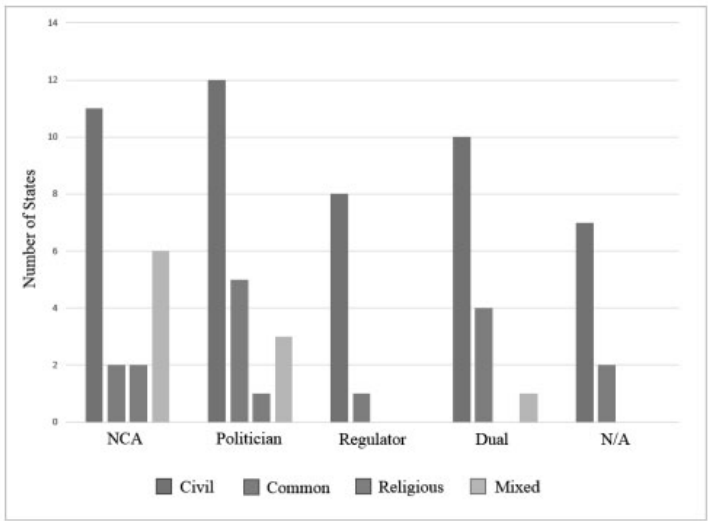

*[Source: Appendix 6A]*

Aside from these observations, the individual sub-groups are distributed relatively evenly. Indeed, although it would be necessary to increase the sample size in order to conduct a meaningful empirical assessment, the lack of any clear divergences within the individual sub-groups in *Figure 7* implies that the type of legal system has no significant bearing on how a state frames the public interest in legislation.

Inference 8. *The impact that the type of legal system has on a state's choice of legislative framing option is inconclusive from the analysis, due to the unbalanced sample. However, both common law and civil law states show a preference for framing the public interest narrowly within legislation.*

With regards to the relationship between the type of legal system and the choice of public interest decision-makers, we can again draw observations from the frequency distributions for each type of legal system. *Figure 8*, below, illustrates the distribution of public interest decision-makers appointed within each type of legal system.

*Figure 8. Distribution of public interest decision-makers appointed by states of different legal systems*




*[Appendix 6B]*

Again, as one would expect given its relative size within the sample, the choice of public interest decision-makers in civil law systems is broadly consistent with the choices of the sample as a whole, i.e. showing a preference for politicians, NCAs and dual decision-makers. In common law countries, politicians are the most favoured decision-makers (35.7%), more so than NCAs (14.3%) and regulators (7.1%) combined. This is an interesting finding given that the literature implies common law states are more willing to delegate discretionary decision-making powers to non-state bodies. One explanation for this is evident from the analysis of the legislative framing options in *Figure 7*, above, which shows that many common law systems choose to frame the public interest as an exception to the substantive test. Like the merger regime in the United Kingdom, which itself operates under a common law system, it may be that national governments have been willing to delegate the majority of merger decision-making powers to an NCA (or another body), but has reserved itself the power to rule on exceptional mergers affecting the public interest.

Note, however, that the unbalanced sample makes it difficult to draw robust conclusions on the influence that different types of legal system have on the choice of public interest decision-makers.

Inference 9. *There is no conclusive evidence to suggest that the type of legal regime a state operates under has any significant bearing on that state's choice of public interest decision-maker. However, a notable observation regards the number of common law states that appoint politicians as decision-makers, which is over twice the number of common law states appointing an NCA.*

*4.3.4. Effectiveness of domestic governance*

Before analysing the potential influence of domestic governance on how states accommodate the public interest, it is worth unpacking the meaning of 'governance' in this context. The World Bank affords a wide-ranging definition to governance, which it refers to as 'the traditions and institutions by which authority in a country is exercised'.[100] This includes, inter alia, the way in which a country selects and monitors its government, the capacity for government to create and implement sound policies, and the government's respect for citizens and their rights. Two components of this definition are particularly applicable in relation to merger control and the public interest; namely, 'rule of law' and 'political stability'.

There are several elements of the rule of law that are of relevance in the context of designing merger control legislation and appointing decision-makers. Generally speaking, a state that adheres to the rule of law will attribute significant value to applying laws with predictability and consistency.[101] Therefore, if consistency between decisions is attributed particular importance in states adhering to the rule of law, the merger laws in these states may afford only a very limited scope to the public interest, to avoid the risk of it being applied inconsistently. Additionally, these states may also be more likely to favour the appointment of NCAs or sector regulators as public interest decision-makers, again due to the consistency and continuity that these bodies provide in contrast to politicians.

Political stability encompasses a host of features, ranging from government stability and ethnic tensions to armed conflict and torture.[102] For the purposes of this assessment, government stability perhaps represents the most relevant feature with regards to the design of merger control. For example, one hypothesis that can be put forward is that states with a low rate of government stability will be more likely to assign decision-making powers to NCAs or sector regulators because of the increased likelihood of political upheaval. Indeed, if certain states demonstrate particularly low levels of political and government stability, it follows that these states are likely to experience a change of government more frequently, meaning there are more opportunities for new governments to gain power and exert own influence and ideologies on domestic merger control. If politicians from across different parties recognise the instability that this could also bring to the domestic merger regime, they might be more inclined to delegate the public interest decision-making role to an independent agency (e.g. an NCA or a sector regulator). As well as facilitating stability and consistency within the merger regime, this also reduces the risk of the

100 World Bank WGI op. cit.

101 Edward Iacobucci – Michael J. Trebilcock: Canada: The Competition Law System and the Country's Norms. In: Fox–Trebilcock (eds., 2013) op. cit.. 131.

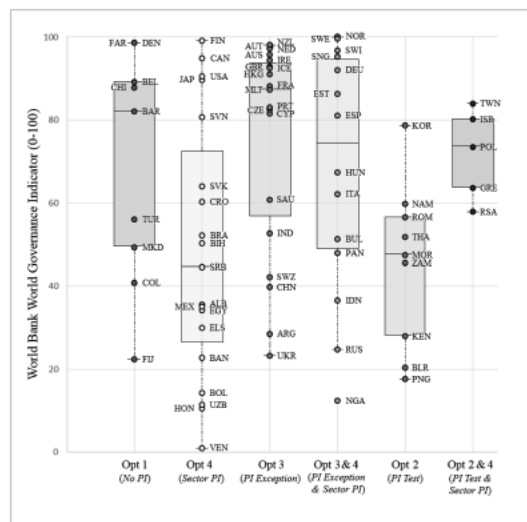
102 See World Bank WGI (op. cit.) for definitions of 'political stability' and the other dimensions of governance.

public interest criteria being applied differently whenever a new political party gains power.[103]

This analysis makes use of the World Bank's Worldwide Governance Indicators (WGI) which, as well as providing an aggregated rating for overall governance within a state, also provides ratings for individual components of governance.[104] The aggregated WGI for each state is represented on a scale from 0–100, with a rating of '100' allocated to states whose domestic governance demonstrates optimal effectiveness.

*Figure 9*, below, plots the WGI ratings of all 75 states in the sample and groups them according to their choice of legislative framing option. It overlays box-and-whisker plots in order to visually illustrate the distributions of the WGI ratings within each group of states.

*Figure 9. Scatter plot with box-and-whisker overlay showing states' ratings for domestic governance and the legislative framing option adopted*




*[Source: World Bank Worldwide Governance Indicators 2013]*

As *Figure 9* illustrates, the WGI ratings within each group appear to be very broadly distributed, with the notable exception of the states in the 'Options 2 & 4' group, which are clustered between the values of 57.82 (South Africa) and 83.89 (Taiwan). The Option 4 category, in particular, demonstrates an extremely broad distribution of states.[105] The means of each group also reveals some interesting results. On average, states that adopt Option 4 or Option 2 perform relatively poorly in relation to

[103] This does not, of course, prevent a new government from reforming the merger legislation to suit its own manifesto. But, depending on the level of political instability, time constraints may hamper the ability of a new government to undertake these reforms. Moreover, if all political parties are mindful of the political instability in the country, there may exist a cross-party consensus on limiting political decision-making if rival parties are frequently in power.

[104] These individual governance indicators include: 'voice and accountability', 'political stability and absence of violence', 'government effectiveness', 'regulatory quality', 'rule of law' and 'control of corruption'. World Bank WGI op. cit.

[105] Of the states adopting Option 3, Venezuela has the poorest WGI rating (0.95) and Finland the highest (99.05). The spread of the distribution is so broad that neither of these states amount to statistical outliers. Indeed, the only outlier in the entire sample is Nigeria, whose WGI rating of 12.32 falls below the lower fence of the Options 3 & 4 group.

governance (both have a median average WGI rating between 40–50). In contrast, states that adopt one of the mixed options ('Options 3 & 4' or 'Options 2 & 4') have a median WGI rating between 70–80, and states adopting Option 1 or Option 3 have the highest median ratings (80–90). These medians do not appear to directly corroborate the hypothesis that states with a high adherence to the rule of law (and, as such, a high WGI rating) will generally frame public interest criteria narrowly. However, if we focus on the states that have achieved the highest WGI ratings (90 and over), we observe that not one of these states feature in Option 2 or Options 2 & 4, the options that afford the greatest legislative scope to the public interest.

The wide distributions and the lack of any notable pattern between the points in *Figure 9* would suggest that there is no relationship between governance and legislative framing options. However, we can test this hypothesis using inferential statistical methods. One way of testing whether domestic governance influences the choice of legislative framing option is to conduct an analysis of variance (ANOVA), which can be used to determine whether one of the legislative framing groups is significantly different to the other groups.[106] With reference to the ANOVA carried out in Appendices 7A and 7B, the test finds that there actually is evidence within the sample that suggests governance has a statistically significant influence on the choice of legislative framing option.[107] This would appear to be a reflection of the considerable differences between some of the median WGI ratings within the groups of legislative framing options, as referred to in the previous paragraph. The relationship itself is not linear; it is not simply the case that a higher level of governance will see a state afford a lower degree of scope to the public interest (or vice versa). Rather, the respective medians within each group suggest the distribution is multimodal, with Option 1 and Option 3 representing the preferred choices for states with effective domestic governance. Therefore, in statistical terms at least, we can draw the conclusion that it is likely that the 'effectiveness of domestic governance' has a tangible impact on a state's choice of public interest decision-maker.[108]

Inference 10. *The 'effectiveness of domestic governance' within a state does appear to have a statistically significant bearing on how that state chooses to frame public interest criteria within merger legislation. States with a highly effective system of governance have all chosen to frame the public interest narrowly, potentially as*

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[106] ANOVA is appropriate in this instance because we are comparing more than two groups (i.e. a multivariate test). It was appropriate to use a *t*-test (a bivariate test) for the analysis of economic development in Section 4.3.2 because the analysis was framed to compare only two groups, developed and developing countries.

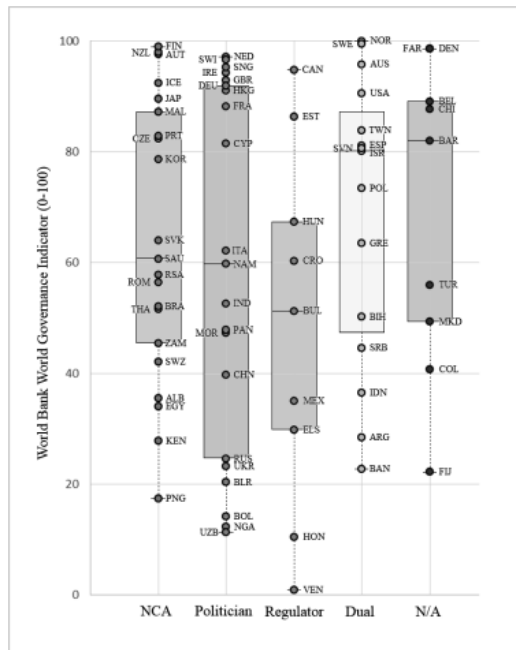
[107] The ANOVA in Appendix 7B tests the null hypothesis that the effectiveness of domestic governance has *no* significant influence on how a state frames the public interest, to a $p = 0.05$ level of significance. The test returns an F-value of 2.9823. This exceeds the critical F-value (2.35) which denotes the upper limit of statistical similarity between different groups. As a consequence, we reject the null hypothesis.

[108] An extension of this analysis would be to use multivariate inferential tests to assess the influence of the 'rule of law' and 'political stability' components separately.

*a means of ensuring consistency between decisions (an important factor of the rule of law).*

Given the influence that domestic governance appears to have on how the public interest is framed in legislation, do we observe a similar influence with regards to the choice of public interest decision-maker? *Figure 10*, below, plots the WGI ratings of the states according to their choice of public interest decision-maker.

*Figure 10. Scatter plot with box-and-whisker overlay showing states' ratings for domestic governance and the public interest decision-maker appointed.*




*[Source: World Bank Worldwide Governance Indicators 2013]*

Once again, the box-and-whisker diagrams demonstrate a very broad spread of WGI ratings within each group of decision-makers. However, on this occasion, we do not observe such significant differences between the median WGI ratings of each group. Indeed, the median average WGI ratings of states adopting either an NCA, politician or sector regulator only range from 51.18 to 60.66.[109] If domestic governance does have a tangible influence on the choice of decision-maker, we would expect to observe greater distortions between these medians. An ANOVA test can again be used to estimate whether it is likely that this influence exists. This time, the ANOVA finds there is no statistically significant relationship between domestic governance and the type of public interest decision-maker operating in a state.[110]

*Figure 10* can also be used to establish whether states with high WGI ratings are more likely to appoint non-political expert decision-makers – namely, independent

[109] The median WGI ratings for the states in each decision-maker group are: 60.66 (NCA), 59.72 (Politician), 51.18 (Regulator), and 80.09 (Dual). The median rating of states that do not consider public interest criteria and, as such, do not appoint a public interest decision-maker is 81.99.

[110] See Appendices 7C and 7D for the statistical descriptives of the sample and the ANOVA. Once again, the ANOVA tests the null hypothesis that the effectiveness of domestic governance has *no* significant effect on a state's choice of public interest decision-maker to a $p = 0.05$ level of significance. The analysis returns an F-value of 0.9295 which sits below the critical F-value (2.50). As such, we fail to reject the null hypothesis.

NCAs and sector regulators – in order to facilitate consistency between merger decisions. Interestingly, *Figure 10* actually implies that the reverse is true, and that states with a high WGI rating prefer to appoint politicians as public interest decision-makers. In total, 19 of the states that appoint public interest decision-makers have a WGI rating of 90 or over, and 7 of these states have chosen to appoint politicians. This is in contrast to NCAs (5 states), sector regulators (1 state) and dual decision-makers (3 states). However, one should also bear in mind that, of the lowest ranking states (the 13 states with a WGI rating of 30 or under), 6 of these states have chosen to appoint politicians. We therefore observe this somewhat odd finding, whereby politicians seem to be the favoured decision-makers of (i) countries with very effective domestic governance, and (ii) countries with very ineffective domestic governance.

Inference 11. *The type of public interest decision-maker that a state decides to appoint is not significantly influenced by the effectiveness of its domestic governance. Politicians are the preferred choice of public interest decision-maker for both states with a very high level of effective governance and states with a very low level of effective governance.*

#### *4.3.5. Openness to foreign investment*

The fifth and final socio-economic variable that this paper examines is a state's 'openness to foreign investment'. Does there exist a discernible relationship between how open or closed a state is to foreign direct investment (FDI),[111] and how that state chooses to accommodate the public interest in its domestic merger regime? There is literature that alludes to this possibility. Economic scholars, for example, have observed a tendency for some states to apply merger control strategically in order to promote national interests – such as the employment of domestic citizens and the competitiveness of domestic firms – at the expense of foreign competitors.[112] One way for a state to serve these strategic national interests is to formulate public interest criteria that enables mergers to be assessed on grounds that promote domestic firms and discriminate against foreign bidders. For this reason, we might expect states that are relatively closed to FDI to afford a broad scope to public interest criteria in their merger control legislation. This is a result to look out for when it comes to testing the influence that 'openness to foreign investment' has on the choice of legislative framing option.

However, there are also good reasons for anticipating a completely different result. Countries often have separate laws for regulating domestic mergers and FDI,

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[111] The intricacies of FDI are plentiful, but they broadly take the form of either (i) a foreign takeover (where foreign firms invest or gain ownership of an existing domestic firm), or (ii) greenfield entry (where foreign firms set up business from scratch in a domestic country). See Financial Times: Definition of foreign direct investment. http://lexicon.ft.com/Term?term=foreign-direct-investment.

[112] Mario Mariniello – Damien Neven – Jorge Padilla: Antitrust, Regulatory Capture and Economic Integration. *Bruegel Policy Contribution*, 2015/11. 4. http://www.bruegel.org/publications/publication-detail/publication/891-antitrust-regulatory-capture-and-economic-integration/.

sometimes justifying this on the basis that FDI poses additional risks to national security and strategic interests.[113] In theory, states can use these foreign investment rules to pursue industrial policy goals; for example, by using FDI rules to block foreign takeovers and, in turn, promote and maintain 'national champions'. Indeed, where industrial policy goals are pursued, the dynamics between merger control and FDI regulation is interesting, because FDI regulation can either be used as a complement to merger control or as an alternative to it. If the latter is true (i.e. states prefer to frame public interest and industrial policy criteria in FDI regulation, rather than in merger control), we might expect states that are closed to FDI to afford less scope to the public interest in merger control.

We can also frame a hypothesis with regards to the potential effect that 'openness to foreign investment' has on a state's choice of public interest decision-maker. States that have a tendency to block foreign takeovers or heavily restrict FDI are, in effect, exerting their control over domestic ownership. Therefore, this would also imply that these states will want to exert greater control over domestic merger control and, as a consequence, they are more likely to appoint politicians as public interest decision-makers in order to ensure the 'word of the State' is given effect to. This is another outcome we can expect to observe in the analysis.

In terms of sourcing data for the analysis, a measure for the 'openness to foreign investment' variable is available from the OECD's FDI Regulatory Restrictiveness Index (hereafter, the 'FDI Index').[114] The FDI Index offers an aggregated estimate for the level of restrictiveness that countries impose on foreign investment within their domestic legislation.[115] The estimates are derived by rating the individual levels of restrictiveness in 22 different industries within each country. These ratings take account of what the OECD describes as 'the four main types of restrictions on FDI': (i) foreign equity limitations, (ii) screening or approval mechanisms, (iii) restrictions on the employment of foreign nationals as key personnel, and (iv) operational restrictions (e.g. restrictions on the repatriation of capital or on land ownership).[116]The 'restrictiveness' of a given state is indicated by a rating between 0 and 1, with '0' indicating a state that imposes no restrictions on foreign investors,

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113 For an overview of FDI rules in Australia, China, France, Germany, Russia, the United Kingdom, and the United States, see Alex Chisholm – Nelson Jung: The Public Interest and Competition-based Scrutiny of Mergers: Lessons from the evolution of merger control in the United Kingdom. *CPI Antitrust Chronicle*, Vol. 4., N. 1. (2014) 17–22. https://www.competitionpolicyinternational.com/the-public-interest-and-competition-based-scrutiny-of-mergers-lessons-from-the-evolution-of-merger-control-in-the-united-kingdom-/.

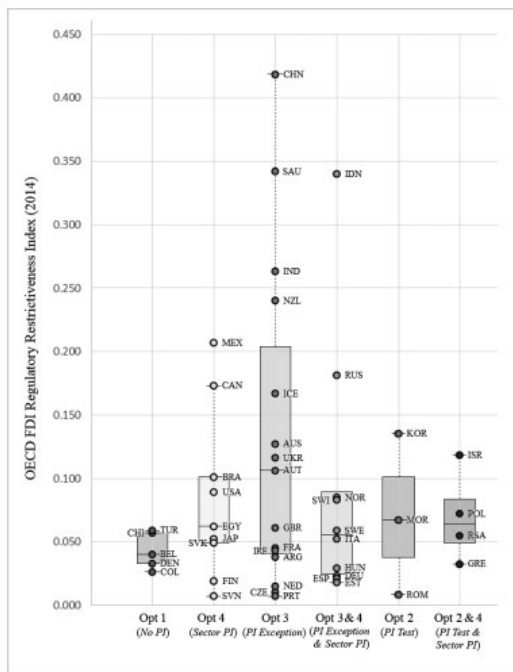
114 OECD: FDI Regulatory Restrictiveness Index. *OECD Investment*, June 2014. www.oecd.org/investment/fdiindex.htm. The analysis in this section uses the ratings from the 2014 study, which are the most recent at the time of writing.

115 Although a rating in the FDI Index measures how 'closed' a state is to foreign investment, this same rating can be interpreted to measure how 'open' a state is to foreign investment.

116 Blanka Kalinova – Angel Palerm – Stephen Thomsen: OECD's FDI Restrictiveness Index: 2010 Update. 2010. OECD *Working Papers on International Investment,* 2010/03. 6. www.oecd-ilibrary.org/finance-and-investment/oecd-s-fdi-restrictiveness-index_5km91p02zj7g-en..

and '1' indicating a state that restricts all foreign investment.[117] The FDI Index does have its limitations. For example, it considers the restrictiveness posed by legislative provisions, but it does not take account of how often these provisions are exercised or the quality of the institutions that conduct the assessment.[118] Furthermore, the FDI Index itself takes account of any restrictive provisions embedded in domestic merger control (whether these be public interest provisions or otherwise). Given that they each take account of domestic merger control, there may be an inherent correlation between the FDI Index ratings and the legislative framing options adopted by the states in this sample, which is an issue to bear in mind when interpreting the results of this section. A final limitation to note is the number of states considered in the FDI Index. The 2014 version of the Index includes aggregates for 58 countries, but only 46 of these countries overlap with the 75 states in the domestic data set that the paper has utilised up to this point. This means that some of the legislative framing options or public interest decision-makers are likely to be underrepresented in the analysis that follows.

*Figure 11. Scatter plot with box-and-whisker overlay showing states' ratings for FDI restrictiveness and choice of legislative framing option*




*[Source: OECD FDI Regulatory Restrictiveness Index 2014]*

The 'openness to foreign investment' variable can be tested with similar techniques to those used for testing the impact of domestic governance in Section 4.3.4, above. Firstly, we can analyse the potential influence that openness to foreign investment has on the way states choose to frame the public interest within merger legislation. *Figure 11* plots the FDI restrictiveness ratings of the states according to their choice of legislative framing options.

117 As will become apparent in this section, no state within the FDI Index has had a restrictiveness rating that exceeds 0.5 in practice. The state with the highest level of restrictiveness in the OECD sample is China, with an FDI Index of rating of 0.418.

118 Stephen Thomsen: *OECD FDI Regulatory Restrictiveness Index: A tool for benchmarking countries, measuring reform and assessing its impact*. Overview presentation. OECD, 2014. 2. www.slideshare.net/OECD-DAF/oecd-fdi-regulatory-restrictiveness-index?ref=http://www.oecd.org/investment/fdiindex.htm.

A striking initial observation that can be derived from *Figure 11* is the broad spread of FDI restrictiveness ratings within the group of states that choose to frame public interest criteria as an exception to the substantive test (Option 3, represented by the blue-shaded region).[119] In contrast, the interquartile ranges for the other groups of legislative framing options are relatively narrow, particularly those states that choose not to accommodate public interest criteria (Option 1, illustrated by the red points). This difference between the spreads of the distributions can, in part, be attributed to the revised sample size, where the states adopting Option 3 are comparably well-represented in relation to other the groups, thus increasing the likelihood of a broad distribution.[120] Nonetheless, the median average FDI restrictiveness rating for states adopting Option 3 is also notable higher than the other legislative framing options, which implies that states which frame the public interest as an 'exception' in domestic merger control are also more likely to impose more restrictions on foreign ownership and investment. This is suggestive of a high instance of broad public interest exceptions, such as 'national security' or 'national interest' exception, which apply to all mergers but are inherently more likely to be of relevance to mergers that involve foreign bidders. However, this finding aside, *Figure 11* reveals no obvious pattern to hint at the relationship between FDI openness and the choice of legislative framing option. Indeed, by conducting an ANOVA in the same way as in the previous section, it finds that there is no statistically significant difference between the variances of the six legislative framing groups.[121] We can therefore conclude that 'openness to foreign investment' has no tangible influence on how states choose to frame the public interest in legislation.

Inference 12. *A country's 'openness' to foreign investment has no tangible impact on how a state chooses to frame public interest criteria in its merger laws. Indeed, countries that frame the public interest as an exception to the substantive test for assessment (Option 3) demonstrate a particularly wide range of different attitudes to foreign investment. However, states that do not consider public interest criteria in their merger assessments (Option 1) are, on average, the states that show the most 'openness' to foreign investment.*

Finally, we can test to see whether there exists a noticeable relationship between a state's 'openness to foreign investment' and the type of public interest decision-maker it appoints. Above, it is suggested that countries that are 'closed' to foreign investment are more likely to appoint politicians as decision-makers, but is this

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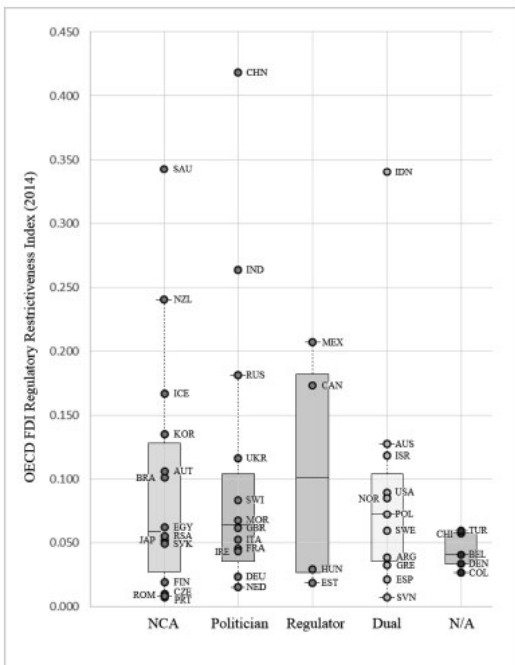
119 In fact, the distribution of the states adopting Option 3 is so broad that neither China (CHN) nor Saudi Arabia (SAU) are statistical outliers, despite being the most restrictive states in the FDI Index.

120 In contrast, Option 4 (sector-specific public interest policy) is underrepresented, having constituted 19 out of the 75 states (25.3%) in the original sample, but only 9 of the 46 states (19.6%) in the revised sample.

121 See Appendix 8A for FDI data descriptives, and Appendix 8B for the corresponding ANOVA. The AVOVA tests the null hypothesis that 'openness to foreign investment' has no discernible impact on the choice of legislative framing option, to a $p = 0.05$ level of significance. This returns an F-value of 0.8907, which is lower than the critical F-value (2.45). Thus, we do not reject the null hypothesis.

actually the case? *Figure 12*, below, plots the FDI restrictiveness ratings of the states according to their choice of public interest decision-maker.

*Figure 12. Scatter plot with box-and-whisker overlay showing states' ratings for FDI restrictiveness and public interest decision-maker*




*[Source: OECD FDI Regulatory Restrictiveness Index 2014*

From an initial glance at *Figure 12*, we see that 2 out of the 4 states that are most 'closed' to foreign investment do indeed appoint politicians as public interest decision-makers.[122] However, both of these states are statistical outliers in terms of their position relative to the other states in the sample.[123] The medians of each group actually reveal that the states that are more 'closed' to foreign investment are most likely to appoint regulators as their public interest decision-makers (see the median of the green shaded region), but this is hardly a robust observation given it is based on the FDI restrictiveness ratings of only 4 states. Lastly, an ANOVA of the sample again finds there to be no statistically significant relationship between 'openness to foreign investment' and the choice of public interest decision-maker.[124]

Inference 13. *A state's 'openness to foreign investment' has no significant impact on its choice of public interest decision-maker. There is an indication that states that demonstrate a restrictive stance towards foreign investment are more likely to*

[122] The four states with an FDI restrictiveness rating over 0.25 are: China and India (who both appoint politicians), Saudi Arabia (which appoints an NCA), and Indonesia (which has adopted a dual decision-making arrangement).

[123] The upper fence for the FDI restrictiveness ratings in the 'Politicians' group is 0.246, which both China (0.418) and India (0.264) exceed.

[124] See Appendices 8C and 8D. On this occasion, the ANOVA tests the null hypothesis that 'openness to foreign investment' does not significantly influence the choice of public interest decision-maker to a $p = 0.05$ level of significance. The ANOVA returns an F-value of 0.4867, which is lower than the critical F-value (2.60). Thus, we do not reject the null hypothesis.

*appoint sector regulators, but the sample would need to be expanded in order to corroborate this.*

### 4.1. Remarks on the influence of socio-economic variables

This section has undertaken an empirical analysis to assess the influence that key socio-economic variables have on the way in which states accommodate public interest criteria in their merger control regimes. In doing so, it has made a number of preliminary observations regarding the potential effect of (a) geographic locality, (b) economic development, (c) the type of legal system in place, (d) the effectiveness of domestic governance, and (e) openness to foreign investment.[125] It could be argued that each of these variables has had at least some discernible impact on how states have accommodated the public interest, even if this merely relates to only a single type of legislative framing option or decision-maker. However, in terms of statistical significance, the only tangible relationship that the analysis uncovers is the influence that the 'effectiveness of domestic governance' has on how a state frames public interest within its merger legislation. This specifically infers that states demonstrating a high degree of governance will tend to either avoid considering public interest criteria completely (Option 1), or will frame the public interest criteria narrowly as an 'exception' to the substantive test for assessment (Option 3).

In many ways, the fact that there are very few observable patterns between the socio-economic variables and the methods of accommodation is an interesting finding in itself. It would seemingly imply that none of the socio-economic variables examined in this section are key determinants in how states choose to accommodate the public interest. But given that other studies have referred to the significant potential influence of these socio-economic variables in competition law – in particular, geographic locality and economic development – it is remarkable that the design and implementation of merger control rules does not correlate with any of these variables. Perhaps the main determinant of how public interest is accommodated in merger control is a socio-economic variable that has not been discussed in this paper. The 'goals of competition law' – which this paper has chosen not to assess due to practical issues posed by modelling them empirically – could well be one such determinant. Alternatively, it is certainly possible that public interest accommodation is determined by more than one of these variables. If this is the case, it becomes more difficult to empirically analyse the influence of individual variables independently, in the knowledge that other factors are also exerting an influence.[126] Indeed, as has been mentioned above, one should also bear in mind the potential impact of knowledge exchange between competition regimes. If knowledge exchange is prominent between the 75 states in the sample, it could be inferred that these states have not so

[125] These findings are detailed in Inferences 3-13, above.

[126] A possible way to overcome this would be to perform a 'Two-way ANOVA' using different combinations of socio-economic variables. This can be used to estimate the combined influence of two dependent variables on a single independent variable.

much been influenced by socio-economic variables but, rather, by the existing laws and procedures of other countries.

## 5. Concluding remarks

This paper has drawn insights on the role that domestic states have afforded to the public interest in merger control by pursuing three distinct research avenues: (i) by identifying the different methods that are available to states who seek to accommodate the public interest; (ii) by considering the methods of accommodation that states have adopted in practice; and (iii) by analysing the potential influence that key socio-economic variables may have on the choices that states exercise when accommodating public interest criteria. By adopting an empirical approach to pursue these avenues, the paper makes a number of revelations and dispels several myths regarding the wider role that the public interest plays in modern-day merger control.

The study estimates that approximately 88% of domestic merger regimes incorporate some form of public interest criteria within their merger control laws. This corroborates the suggestion that 'public interest' does not merely reside on the periphery of international merger control but, rather, retains the potential to influence merger assessments in most jurisdictions. This represents a key motivating factor for the continued research and debate on the role that public interest considerations should play in merger control and competition policy in general.

Based on the assumption that the two main choices a state must make before accommodating public interest criteria are (a) *how to frame the public interest in merger legislation*, and (b) *who to appoint as decision-maker*, the paper finds that there are 21 possible approaches that states can implement. Within the sample, 15 of these approaches have been implemented in practice, with the most popular being: (i) to avoid considering public interest criteria completely, (ii) to appoint a politician and frame the public interest as an 'exception' to the substantive test, and (iii) to appoint a national competition authority and frame the public interest as an 'exception' to the substantive test. The wide variety of different approaches that states have adopted in practice signals a lack of substantive and institutional convergence with regards to how public interest criteria is accommodated in domestic merger control around the world.

Overall, the vast majority of states that incorporate public interest criteria within their merger laws have chosen to frame this criteria narrowly, i.e. as an 'exception' to a competition-based test, or as part of a parallel sector-specific policy.[127] This illustrates a general preference for states to assess mergers according to competition criteria as a default position, and implies that these states appreciate the wider welfare benefits that a competition-based approach can facilitate, in addition to consumer benefits. Moreover, national competition authorities and politicians have each proved to be equally popular appointments to the public interest decision-making role, with

[127] Of the states that have chosen to afford consideration to public interest criteria, 78.8% have framed this criteria narrowly within merger control legislation.

63.6% of states appointing one or the other. This offers an intriguing insight into the ongoing debate regarding political involvement in competition policy, as it infers that an equal proportion of states are convinced by the perceived advantages of NCAs making decisions (i.e. making effective use of their economic expertise and relative independence) and political decision-making (i.e. satisfying the constitutional belief that matters of significant 'public interest' should be decided by publically-elected representatives). In practice, it is wholly apparent that states take different sides in this debate, and this is a catalyst for institutional divergence between states.

Finally, the paper's statistical analysis of key socio-economic variables acts to dispel a number of myths often associated with states that consider public interest criteria. For example, the geographic location of a state appears to have little bearing on how that state chooses to accommodate the public interest; although, certain patterns emerge, including the tendency of African states to assign an extensive role to the public interest and to appoint NCAs as decision-makers. However, the empirical analysis finds that the level of effective governance within a state often corresponds with that state's design choices, with regards to framing public interest criteria within merger legislation. States with a highly effective system of governance tend to frame the public interest narrowly, perhaps as a means of facilitating consistency and predictability between decisions.

Contrary to oft-cited assertions in the existing literature, there is no evidence to suggest that the economic development of a state has any statistically significant correlation with how much influence it chooses to afford to public interest criteria. Having said this, states that afford an *extensive* role to the public interest are more likely to be developing countries.[128] Therefore, if the epistemic communities (e.g. the ICN, OECD, UNCTAD, etc) believe that states adopting an 'extensive public interest role' pose an obstacle to effective cross-border merger control, these communities should afford due consideration to economic development variables if they decide to draft 'International Best Practice Guidelines'.

[128] Which is intriguing given that the majority of states that afford the public interest no scope whatsoever are also developing countries.

## Appendices

**Appendix 1.** Collecting and compiling the domestic data set

The data collection for the empirical analysis in this paper has been extensive, utilising five different sources,[129] to sample 75 domestic states, and therein collect 1200 unique readings.

The main task with regards to collecting the data has been to interpret the qualitative data sources (namely, the written information in the *GCR Handbook* and the *GWU Database* that relates to domestic merger control and competition law) and identify the relevant extracts that relate to the legislative framing options and the public interest decision-makers that each of the 75 states has adopted. Having identified the options that each state has adopted in practice, the sample states could then be grouped according to their public interest accommodation methods, ready for statistical testing. Segregating the sample in this way lays the foundations for the empirical analysis and, in the case of the legislative framing options (which have been subjected to ordinal ranking in *Figure 1*), it indirectly affords a quantitative dimension to the qualitative data.

For identifying a state's legislative framing choice and its public interest decision-maker, it has been necessary to refer to the *GCR Handbook* and, in particular, the answers that the expert practitioners had given to the following questions: Q1) 'What is the relevant legislation and who enforces it?'; Q8) 'Are there also rules on foreign investment, special sectors or other relevant approvals?'; Q19) 'What is the substantive test for clearance?'; and Q22) 'To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?'. The answers to these questions have been recorded and interpreted within the data set. The accuracy of these readings was checked against the corresponding information in the *GWU Database* and, in order to increase the sample size to 75 states, the data for approximately 10 further states was harvested from the *GWU Database*. The decision was made to add these additional states in order to increase the number of developing countries in the sample, in order to minimise data distortions when testing the 'economic development' variable. Given that the *CGR Handbook* is aimed at legal practitioners, its selection of countries is somewhat skewed towards states that experience a relatively high degree of merger activity, or have a long-established

[129] These include: Global Competition Review: Getting the Deal Through: Merger Control 2014. *Law Business Research,* 2013.; Competition Law Center: Worldwide Competition Database. GWU Competition Law Center. http://www.gwclc.com/World-competition-database.html. Hereafter, 'the GWU Database'; World Bank Governance Indicators; World Bank: *Worldwide Governance Indicators (WGI) project*. http://info.worldbank.org/governance/wgi/index.aspx#home.; International Monetary Fund: *World Economic Outlook: Uneven Growth – Short- and Long-Term Factors.* IMF, 2015. 150–153. http://www.imf.org/external/pubs/ft/weo/2015/01/; and OECD: FDI Regulatory Restrictiveness Index. *OECD Investment*, June 2014. www.oecd.org/investment/fdiindex.htm.

merger regime. This means the *GCR Handbook* includes a higher proportion of developed countries. So there is a need to redress this imbalance in the data set with reference to other sources.

Finally, the accuracy for the data relating to these 10 states was checked with reference to the national legislation websites, and the websites of state governments, sector regulators and national competition authorities.

**Appendix 2.** Distribution of the domestic data set

*Appendix 2A. Sample skewness for distribution of states adopting legislative framing options*

| | |
|---|---|
| $n$ | 75 |
| $\Sigma \chi_i$ | 235[†] |
| $\bar{x}$ | 3.1333 |
| $\Sigma (x_i - \bar{x})^2$ | 148.6666 |
| $\Sigma (x_i - \bar{x})^3$ | 70.3556 |
| $\Sigma (x_i - \bar{x})^4$ | 672.5956 |
| $\frac{n\sqrt{n-1}}{n-2} \frac{\Sigma(x_i - \bar{x})^3}{(\Sigma(x_i - \bar{x})^2)^{3/2}}$ | 0.3430 (Skewness of sample) |
| $\frac{n(n+1)(n-1)}{(n-2)(n-3)} \frac{\Sigma(x_i - \bar{x})^4}{(\Sigma(x_i - \bar{x})^2)^2}$ | 2.4422 (Kurtosis of sample) |

[†] *Represents total 'ranking values' where the each legislative framing options is assigned a value from 1–6 according to the potential influence they afford to the public interest (for rankings, see Figure 1). 1 = Option 1, 2 = Option 4, 3 = Option 3, 4 = Options 3 & 4, 5 = Option 2, 6 = Options 2 & 4.*

*Appendix 2B. List of states adopting each option for framing the public interest within legislation*

| Option 1 (No PI) | Option 4 (Sector PI) | Option 3 (PI Exception) | Options 3 & 4 (PI Exception & Sector PI) | Option 2 (PI Test) | Options 2 & 4 (PI Test & Sector PI) |
|---|---|---|---|---|---|
| Barbados, Belgium, Chile, Columbia, Denmark, Faroe Islands, Fiji, Macedonia, Turkey | Albania, Bangladesh, Bolivia, Bosnia & Herz, Brazil, Canada, Croatia, Egypt, El Salvador, Finland, Honduras, Japan, Mexico, Serbia, Slovakia, Slovenia, United States, Uzbekistan, Venezuela | Argentina, Australia, Austria, China, Cyprus, Czech Republic, France, Hong Kong, Iceland, India, Ireland, Malta, Netherlands, New Zealand, Portugal, Saudi Arabia, Swaziland, Ukraine, United Kingdom | Bulgaria, Estonia, Germany, Hungary, Indonesia, Italy, Nigeria, Norway, Panama, Russia, Singapore, Spain, Sweden, Switzerland | Belarus, Kenya, Papua New Guinea, Republic of Korea, Morocco, Namibia, Romania, Thailand, Zambia | Greece, Israel, Poland, South Africa, Taiwan |

*Appendix 2C. List of states adopting each option for appointing a public interest decision-maker*

| NCA | Politician | Regulator | Dual | N/A |
|---|---|---|---|---|
| Albania, Austria, Brazil, Czech Republic, Egypt, Finland, Iceland, Japan, Kenya, Republic of Korea, Malta, New Zealand, Papua New Guinea, Portugal, Romania, South Africa, Saudi Arabia, Slovakia, Swaziland, Thailand, Zambia | Belarus, Bolivia, China, Cyprus, France, Germany, Hong Kong, India, Ireland, Italy, Morocco, Namibia, Netherlands, Nigeria, Panama, Russia, Singapore, Switzerland, Ukraine United Kingdom, Uzbekistan | Bulgaria, Canada, Croatia, El Salvador, Estonia, Honduras, Hungary, Mexico, Venezuela | Argentina, Australia, Bangladesh, Bosnia & Herz, Greece, Indonesia, Israel, Norway, Poland, Serbia, Slovenia, Spain, Taiwan, USA | Barbados, Belgium, Chile, Columbia, Denmark, Faroe Islands, Fiji, Macedonia, Turkey |

*Appendix 2D. Table specifying political independence of public interest decision-makers appointed by states within the sample. [Source: GWU Database]*

| | Total in sample | Proportion independent | |
|---|---|---|---|
| NCA | 21 | 13 | (61.90%) |
| Politician | 21 | 0 | (0.00%) |
| Regulator | 9 | 6 | (66.67%) |
| Dual | 15 | 6 | (40.00%) |
| | | | |
| Total | 69 | 25 | (37.88%) |

*Appendix 2E. Distribution of combinations of legislative framing and public interest decision-maker options adopted by states*

| | NCA | Politician | Regulator | Dual | N/A |
|---|---|---|---|---|---|
| Option 1 | 0 | 0 | 0 | 0 | 9 |
| Option 4 | 6 | 2 | 6 | 5 | 0 |
| Option 3 | 8 | 9 | 0 | 2 | 0 |
| Options 3 & 4 | 0 | 7 | 3 | 4 | 0 |
| Option 2 | 6 | 3 | 0 | 0 | 0 |
| Options 2 & 4 | 1 | 0 | 0 | 4 | 0 |
| | | | | | |
| Total | 21 | 21 | 9 | 15 | 9 |

*Appendix 2F. Descriptive statistics for decision-makers and the influence afforded to the public interest in the merger legislation they oversee*

| | NCA | Politician | Regulator | Dual | N/A |
|---|---|---|---|---|---|
| $n$ | 21 | 21 | 9 | 15 | 9 |
| $\Sigma x_i$ | 72 | 74 | 24 | 56 | 9 |
| $\bar{x}$ | 3.429 | 3.524 | 2.667 | 3.733 | 1 |
| | Where $\bar{x}$ represents the mean category of each decision-maker.† | | | | |

† *The means are calculated by assigning a value from 1–6 for each legislative framing option, based on the potential influence that each option afford to the public interest (for rankings, see Figure 1). 1 = Option 1, 2 = Option 4, 3 = Option 3, 4 = Options 3 & 4, 5 = Option 2, 6 = Options 2 & 4.*

**Appendix 3.** Compiling data for the analysis of socio-economic variables

As with any empirical study of this kind, the objective is to test for any relationship between the independent and dependent variables. Identifying which variables are independent and which are dependent is not always straightforward and much depends on how the study is framed. In simple terms, empiricists will generally seek to change the independent variable and measure the effect that this change has on the dependent variable. This logic can be applied to the analysis in Section 4. As the aim of Section 4 is to identify the effect that key socio-economic variables have on how the public interest is accommodated domestically, it follows that the *independent variable* will be the socio-economic variable and the *dependent variable* will be the method of accommodation.

**Appendix 4.** Estimating the influence of 'economic development' on accommodating the public interest in merger control

*Appendix 4A. Table showing distribution of states adopting each legislative framing option according to their geographic region*

| | ***Africa*** | ***Asia*** | ***Europe*** | ***N. America*** | ***S. America*** | ***Oceania*** |
|---|---|---|---|---|---|---|
| Option 1 | 0 | 0 | 5 | 1 | 2 | 1 |
| Option 4 | 1 | 3 | 7 | 5 | 3 | 0 |
| Option 3 | 1 | 4 | 11 | 0 | 1 | 2 |
| Options 3 & 4 | 1 | 1 | 10 | 1 | 0 | 1 |
| Option 2 | 4 | 2 | 2 | 0 | 0 | 1 |
| Options 2 & 4 | 1 | 2 | 2 | 0 | 0 | 0 |
| | | | | | | |
| | 8 | 12 | 37 | 7 | 6 | 5 |

*Appendix 4B. Table showing distribution of states appointing each public interest decision-maker according to their geographic region*

| | ***Africa*** | ***Asia*** | ***Europe*** | ***N. America*** | ***S. America*** | ***Oceania*** |
|---|---|---|---|---|---|---|
| NCA | 5 | 4 | 9 | 0 | 1 | 2 |
| Politician | 3 | 5 | 11 | 1 | 1 | 0 |
| Regulator | 0 | 0 | 4 | 4 | 1 | 0 |
| Dual | 0 | 3 | 8 | 1 | 1 | 2 |
| N/A | 0 | 0 | 5 | 1 | 2 | 1 |
| | | | | | | |
| | 8 | 12 | 37 | 7 | 6 | 5 |

**Appendix 5.** Estimating the statistical significance of 'Economic development' on accommodating the public interest

To examine whether a state's economic development has a meaningful impact on how a state frames the public interest in merger legislation, the following null and alternative hypotheses can be proposed:

$H_0$: The economic development of a state has no significant impact on the legislative framing option it chooses.

$$\mu_{Developed} = \mu_{Developing}$$

$H_1$: The economic development of a state has a significant impact on the legislative framing option it chooses.

$$\mu_{Developed} \neq \mu_{Developing}$$

In order to test the legitimacy of $H_0$, it is necessary to establish that there is no significant difference between the data relating to developed and developing states. For this analysis, we are only comparing two data categories, so it is appropriate to use a *t*-test.[130] A *t*-test assesses the similarity of two groups of data by comparing their respective means relative to the overall spread of the data. However, which type of *t*-test is appropriate depends on whether the variance between the two data groups is equal or not.[131] The equality between the respective variances of the developed and developing state data can be assessed using Levene's test, as detailed in Appendix 5A, below.[132]

*Appendix 5A. Non-parametric Levine's test for equality of variances between developed and developing states, at p = 0.05 significance level*

($H_0$: $\sigma_{Developed}^2 = \sigma_{Developing}^2$ and $H_1$: $\sigma_{Developed}^2 \neq \sigma_{Developing}^2$)

| Source of Variation | SS | df | MS | F | p - value |
|---|---|---|---|---|---|
| A (Between Groups) | 8788.468 | 5 | 1757.694 | 361.420 | 0.000 |
| B (Within Groups) | 335.568 | 69 | 4.863 | | |
| Total | 9124.036 | 74 | | | |
| | | | $p < 0.05$, so reject null hypothesis. | | |

130 To compare the statistical similarity of three-or-more data groups, an analysis of variance (ANOVA) would be required.

131 David W Nordstokke and others: The operating characteristics of the nonparametric Levene test for equal variances with assessment and evaluation data. *Practical Assessment, Research & Evaluation,* Vol. 16., N. 5., (2011) 1.

132 Because the sample data is not distributed normally (rather, it is positively skewed, see Appendix 2A), a non-parametric Levine's test is required. Ibid 2.

In this instance, Levine's test returns a *p-value* which is less than 0.05 (the level of significance), so we reject the null hypothesis that the variance between the data groups is equal. As such, when comparing the respective means of the developed state and developing state data groups, it is important that the *t*-test assumes unequal variances. The results of the *t*-test feature in Appendix 5B, below.

*Appendix 5B. Two-sample t-test assuming unequal variances between developed and developing states, at p = 0.05 significance level*

($H_0$: $\mu_{Developed} = \mu_{Developing}$).

| | **Developed** | **Developing** |
|---|---|---|
| $n$ | 38 | 37 |
| $\bar{x}$ | 3.2895 | 2.9730 |
| $SD = \sqrt{\frac{\Sigma(x_i - \bar{x})^2}{n-1}}$ | 1.7248 | 2.3048 |
| df | 70.993 | |
| *t* | 0.965 | |
| *p-value* | 0.338 | |
| | | $p > 0.05$, so do not reject null hypothesis. |

As the table illustrates, the *t*-test returns a *p*-value of 0.338, meaning we fail to reject the null hypothesis $H_0$. We therefore conclude that there is a significant probability that the economic development of a state has *no* significant impact on the legislative framing option it chooses.

*Appendix 5C. Table showing distribution and proportions of developed and developing states appointing public interest decision-makers*

| | **Developed** | **Developing** |
|---|---|---|
| NCA | 11 (31.4%) | 10 (32.3%) |
| Politician | 12 (34.3%) | 9 (29.0%) |
| Regulator | 2 (5.7%) | 7 (22.6%) |
| Dual | 10 (28.6%) | 5 (16.1%) |
| N/A† | 3 | 6 |
| | 35 (38) | 31 (37) |

† *Figures for 'N/A' are not counted when calculating percentages because the state has chosen not to accommodate the public interest and, as such, does not exercise a choice to appoint a decision-maker.*

**Appendix 6.** Observing the relationship between types of legal systems and how states accommodate public interest

*Appendix 6A. Table showing distribution and proportions of legislative framing options adopted in each type of legal system*

| | Civil | Common | Religious | Mixed |
|---|---|---|---|---|
| Option 1 | 7 | 2 | 0 | 0 |
| Option 4 | 15 | 3 | 1 | 0 |
| Option 3 | 9 | 6 | 1 | 3 |
| Options 3 & 4 | 11 | 1 | 0 | 2 |
| Option 2 | 3 | 1 | 1 | 4 |
| Options 2 & 4 | 3 | 1 | 0 | 1 |
| | | | | |
| Total | 48 | 14 | 3 | 10 |

*Appendix 6B. Table showing distribution and proportions of public interest decision-makers appointed in each type of legal system*

| | Civil | Common | Religious | Mixed |
|---|---|---|---|---|
| NCA | 11 | 2 | 2 | 7 |
| Politician | 12 | 5 | 1 | 2 |
| Regulator | 8 | 1 | 0 | 0 |
| Dual | 10 | 4 | 0 | 1 |
| N/A | 7 | 2 | 0 | 0 |
| | | | | |
| Total | 48 | 14 | 3 | 9 |

**Appendix 7.** Estimating the statistical significance of 'Effectiveness of domestic governance' on accommodating the public interest

$H_0$: The level of 'rule of law' in a state has no significant impact on the legislative framing option it chooses.

$$(\mu_{Opt1} = \mu_{Opt4} = \mu_{Opt3} = \mu_{Opt3\&4} = \mu_{Opt2} = \mu_{Opt2\&4}).$$

$H_1$: The level of 'rule of law' in a state has a significant impact on the legislative framing option it chooses.

(Not every μ is equal).

*Appendix 7A. Descriptives of adherence to 'rule of law' and chosen legislative framing options*

| | Option 1 (No PI) | Option 4 (Sector PI) | Option 3 (PI Exception) | Options 3 & 4 (PI Exception & Sector PI) | Option 2 (PI Test) | Options 2 & 4 (PI Test & Sector PI) |
|---|---|---|---|---|---|---|
| n | 9 | 19 | 19 | 14 | 9 | 5 |
| $\Sigma x_i$ | 624.17 | 919.91 | 1428.43 | 952.60 | 405.22 | 358.77 |
| $\mu$ | 69.352 | 48.416 | 75.181 | 68.043 | 45.024 | 71.754 |
| $\Sigma (x_i - \mu)^2$ | 6211.29 | 17416.38 | 11572.70 | 11357.14 | 3181.18 | 481.80 |

*Appendix 7B. One-way ANOVA for effect of adherence to 'rule of law' on chosen legislative framing option*

| Source of Variation | SS | df | MS | F | p - value | F crit |
|---|---|---|---|---|---|---|
| A (Between Groups) | 10853.18 | 5 | 2170.6357 | 2.9823 | < 0.05 | 2.35 |
| B (Within Groups) | 50220.49 | 69 | 727.8331 | | | |
| Total | 61073.67 | 74 | | | | |

$F(5,69) = 2.9823$, $p < 0.05$; $F(5,69) > 2.35$, so reject $H_0$.

$H_0$: The level of 'rule of law' in a state has no significant impact on the public interest decision-maker it appoints.

$$(\mu_{NCA} = \mu_{Politician} = \mu_{Regulator} = \mu_{Dual} = \mu_{N/A})$$

$H_1$: The level of 'rule of law' in a state has a significant impact on the public interest decision-maker it appoints.

(Not every $\mu$ is equal).

*Appendix 7C. Descriptives of adherence to 'rule of law' and chosen decision-maker*

| | NCA | Politician | Regulator | Dual | N/A |
|---|---|---|---|---|---|
| n | 21 | 21 | 9 | 15 | 9 |
| $\Sigma x_i$ | 1353.54 | 1244.55 | 436.03 | 1030.81 | 624.17 |
| $\mu$ | 64.454 | 59.264 | 48.448 | 68.721 | 69.352 |
| $\Sigma (x_i - \mu)^2$ | 12810.69 | 21133.57 | 8303.98 | 9533.89 | 6211.29 |

*Appendix 7D. One-way ANOVA for effect of adherence to 'rule of law' on chosen decision-maker*

| Source of Variation | SS | df | MS | F | p - value | F crit |
|---|---|---|---|---|---|---|
| A (Between Groups) | 3080.25 | 4 | 770.0620 | 0.9295 | < 0.05 | 2.50 |
| B (Within Groups) | 57993.42 | 70 | 828.4774 | | | |
| Total | 61073.67 | 74 | | | | |

$F(4,70) = 0.9295$, $p < 0.05$

$F(4,70) < 2.50$, so do not reject H0.

**Appendix 8.** Estimating the statistical significance of 'Openness to Foreign Investment' on accommodating the public interest

$H_0$: The openness of a state to foreign direct investment has no significant impact on the legislative framing option it chooses.

$$(\mu_{Opt1} = \mu_{Opt4} = \mu_{Opt3} = \mu_{Opt3\&4} = \mu_{Opt2} = \mu_{Opt2\&4})$$

$H_1$: The openness of a state to foreign direct investment has a significant impact on the legislative framing option it chooses.

(Not every μ is equal).

*Appendix 8A. Descriptives of openness to foreign direct investment and chosen legislative framing options*

| | Option 1 (No PI) | Option 4 (Sector PI) | Option 3 (PI Exception) | Options 3 & 4 (PI Exception & Sector PI) | Option 2 (PI Test) | Options 2 & 4 (PI Test & Sector PI) |
|---|---|---|---|---|---|---|
| n | 5 | 9 | 15 | 10 | 3 | 4 |
| $\Sigma x_i$ | 0.215 | 0.759 | 1.998 | 0.891 | 0.210 | 0.277 |
| μ | 0.043 | 0.084 | 0.133 | 0.089 | 0.070 | 0.069 |
| $\Sigma (x_i - \mu)^2$ | 0.0009 | 0.0363 | 0.2304 | 0.0914 | 0.0081 | 0.0040 |

*Appendix 8B. One-way ANOVA for effect of openness to foreign direct investment on chosen legislative framing option*

| Source of Variation | SS | df | MS | F | p - value | F crit |
|---|---|---|---|---|---|---|
| A (Between Groups) | 0.0413 | 5 | $8.26 \times 10^{-3}$ | 0.8905 | < 0.05 | 2.45 |
| B (Within Groups) | 0.3710 | 40 | $9.28 \times 10^{-3}$ | | | |
| Total | 0.4123 | 45 | | | | |

$F(5,40) = 0.8905$, $p < 0.05$; $F(5,40) < 2.45$, so do not reject $H_0$.

$H_0$: The openness of a state to foreign direct investment has no significant impact on the public interest decision-maker it appoints.

$$(\mu_{NCA} = \mu_{Politician} = \mu_{Regulator} = \mu_{Dual} = \mu_{N/A})$$

$H_1$: The openness of a state to foreign direct investment has a significant impact on the public interest decision-maker it appoints.

(Not every μ is equal).

*Appendix 8C. Descriptives of openness to foreign direct investment and chosen decision-maker*

| | NCA | Politician | Regulator | Dual | N/A |
|---|---|---|---|---|---|
| n | 14 | 12 | 4 | 11 | 5 |
| $\Sigma x_i$ | 1.353 | 1.367 | 0.427 | 0.988 | 0.215 |
| μ | 0.097 | 0.114 | 0.107 | 0.090 | 0.043 |
| $\Sigma (x_i - \mu)^2$ | 0.1239 | 0.1568 | 0.0284 | 0.0837 | $8.5 \times 10^{-4}$ |

*Appendix 8D. One-way ANOVA for effect of openness to foreign direct investment on chosen decision-maker*

| Source of Variation | SS | df | MS | F | p - value | F crit |
|---|---|---|---|---|---|---|
| A (Between Groups) | 0.0187 | 4 | $4.67 \times 10^{-3}$ | 0.4867 | < 0.05 | 2.60 |
| B (Within Groups) | 0.3936 | 41 | $9.60 \times 10^{-3}$ | | | |
| Total | 0.4123 | 45 | | | | |

$F(4,41) = 0.4867$, $p < 0.05$
$F(4,41) < 2.60$, so do not reject $H_0$.

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# THE DISAPPEARANCE OF ARTICLE 101(3) IN THE REALM OF REGULATION 1/2003: AN EMPIRICAL CODING

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## 1. Introduction

The debate on the scope of Article 101(3) and the room that it leaves for the consideration of non-competition interests is as old as the Article itself. From the very beginning of the EEC project, the protection of competition interests had to be balanced against the protection other non-competition interests,[1] such as efficiencies, innovation, public health, culture, and education. From the time of the drafting of the Treaty of Rome the Member States have not reached a consensus about the role non-competition interests should have under the Article. Such role directly affects the characteristics and limits of EU competition law, and as such reflects a balance between various political, economic and social interests. Yet today, some sixty years after its instatement, there is still no clear legal or economic framework guiding the scope of application of Article 101(3).

In the past, the lack of a clear framework had rather limited consequences. The Commission had a monopoly to grant exemptions under Article 101(3) in

* PhD candidate, University of Amsterdam, Faculty of Law, Amsterdam Centre for European Law and Governance (ACELG). Comments gratefully received at o.brook@uva.nl. This paper is part of a broader ongoing Ph.D. study, which maps the role of public policy considerations in the enforcement of EU competition law. The study codes all Article 101 TFEU decisions rendered by the Commission, EU Courts, and NCAs and national Courts of five Member States. I would like to Tihamer Toth, Rebecca L. Zampieri, Kati Cseres and the participants of the Public Interest Considerations in Competition Law Workshop in the Competition Law Research Centre, Budapest for their valuable comments; any errors are mine.

1 In this paper the term "competition interests" refers to the protection of the competitive process and competitive structure as such. All other interests are referred to as "non-competition interests" (including, economic and non-economic values, such as consumer welfare, economic efficiency, industrial policy, growth, market and social stability, market integration, environmental and cultural considerations).

public enforcement proceedings. The enforcement was based on a notification and authorization system, where potential anti-competitive agreements required an *ex-ante* Commission approval in order to benefit from an Article 101(3) exemption. Hence, the institutional setup allowed the Commission to apply Article 101(3) on a case-by-case basis in a centralized and fairly unbiased manner.

The 2004 reform of the enforcement of EU competition law has changed this institutional setup. The new enforcement regime enacted by Regulation 1/2003 is based on a self-assessment and decentralized system. Undertakings must evaluate the applicability of Article 101(3) independently, and the Commission and NCAs only assess the Article *ex-post*. Therefore, achieving the aims of the enforcement regime of Regulation 1/2003 – namely, an effective, uniform and clear application – merits a clear framework defining the scope of Article 101(3).

This paper exhibits, on the basis of a comprehensive set of empirical findings, that the Commission's practice has failed to achieve this goal. In fact, the comprehensive and empirical "coding" of the more than 800 Commission decisions applying Article 101 TFEU between 1958–2016 reveals the "disappearance" of Article 101(3) under the enforcement regime of Regulation 1/2003. The empirical findings demonstrate that in the period from 1958 through April 2004, Article 101(3) exemptions were the heart of many Commission decisions. Exemptions were granted in 48% of the proceedings in which they were requested equating to 28% of all Commission Article 101 TFEU proceedings during that time. Nevertheless, following the entering into force of Regulation 1/2003 in May 2004, the Commission never accepted Article 101(3) as a defense from the application of Article 101 TFEU.[2]

Remarkably, the empirical findings indicate that not only had the Commission never accepted an Article 101(3) exception after 2004, but that the undertakings also stopped invoking it. There is a significant drop in the reference to Article 101(3) in the Commission's decisions after May 2004, from 60% to a mere 22% of the proceedings.

Consequently, the discussion of the much-debated scope of Article 101(3) and the role it leaves for non-competition interests has nearly disappeared from the Commission's post-2004 decisional practice.

This paper argues that this outcome is regrettable. As part of modernizing EU competition law, the Commission has advocated a new, narrower interpretation to Article 101(3). Whereas past practice of the Commission and EU Courts considered broad non-competition interests when applying Article 101(3), today the Commission declares in its policy papers that application of Article 101(3) is confined to the consumer welfare standard. Nevertheless, this paper maintains that the boundaries of Article 101(3) remain ill-defined since the Commission has yet to demonstrate how the new interpretation of Article 101(3) ought to be applied in practice and the EU Courts have not fully endorsed the Commission's new approach. As a result, the disappearance of Article 101(3) from the Commission's decisional practice actually

[2] A so-called "positive decision" pursuant to Article 10 of the Regulation.

contradicts the Commission's own policy. Unfortunately, the debate on Article 101(3) disappeared at the time when the Commission's guidance on the issue was perhaps needed the most.

## 2. Empirical methodology and structure

The application of Article 101(3) and the role of non-competition interests within this Article have already been the subject to an extensive debate. Previous studies were predominantly based on analyses of selected case studies or policy papers.[3] In addition, they were mostly confined to a limited period of time without addressing the challenges emanating from the 2004 reform.[4]

This paper is based on a comprehensive empirical analysis aimed to describe the enforcement of Article 101(3) in practice. It applies a systematic content analysis ("coding") of all of the Commission's Article 101 TFEU proceedings[5] from the establishment of the EEC in 1958 to 2016. Covering more than 800 proceedings, the

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[3] See, C. Semmelmann: The future role of the non-competition goals in the interpretation of Article 81 EC. *Global Antitrust Review*, 2008.; B. Van Rompuy: *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations Under Article 101 TFEU, 51.* 2012., http://scholar.google.com/scholar?hl=en&btnG=Search&q=intitle:Economic+Efficiency+:+The+Sole+Concern+of+Modern+Antitrust+Policy?+Non-efficiency+Considerations+under+Article+101+TFEU#0; G. Monti: Article 81 EC and public policy. *Common Market Law Review*, 127(2), 2002., http://www.kluwerlawonline.com/document.php?id=5103811; A. C. Witt: Public Policy Goals Under EU Competition Law – Now is the Time to Set the House in Order. *European Competition Journal*, 8(3) 2012. 443–471., http://doi.org/10.5235/ECJ.8.3.443; S. Lavrijssen: What role for national competition authorities in protecting non-competition interests after Lisbon? *European Law Review*, Vol. 35., N. 5., 2010.http://dialnet.unirioja.es/servlet/articulo?codigo=3324846; L. Gyselen: The emerging interface between Competition Policy and Environmental Policy in the EC. In: J. Cameron – P. Demaret – D. Geradin (eds.): *Trade and the Environment: The search for balance.* Vol. I. 1994.; R. Nazzini: Article 81 EC between time present and time past: A normative critique of "restriction of competition" in EU law. *Common Market Law Review*, 81(1), 2006.; H. H. Schweitzer: *Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81.* 2007., http://cadmus.eui.eu/handle/1814/7623.; P. Nicolaides: The balancing myth: The economics of article 81 (1) & (3). *Legal Issues of Economic Integration*, Vol. 32., N. 2., 2005. 123–145., http://www.kluwerlawonline.com/document.php?id=LEIE2005017.; GCLC Annual Conference. (2010a) M. Merola – D. F. Waelbroeck (eds.): *Towards an Optimal Enforcement of Competition Rules in Europe: Time for a Review of Regulation 1/2003?* Groupe de Boeck, 2010.; C. Townley: *Article 81 EC and public policy.* http://cadmus.eui.eu/handle/1814/23975. including an annex with a review of some Article 101 TFEU formal decisions granted between 1993–2004.

[4] See S. W. Davies – P. L. Ormosi: *Assessing competition policy: Methodologies, gaps and agenda for future research.* 2010. 48. noting the general lack of long-term studies evaluating EU competition policy in general.

[5] In this paper the term "Article 101 TFEU proceedings" covers all public enforcement actions of the article published in any form (decision, opinion, press release or reference in an annual report) and using any regulatory instrument (decisions on infringements, inapplicability, settlements, formal or informal commitments, decisions not to investigate or to terminate investigations, and formal or informal opinions on conduct of a specific undertaking). In addition, it includes proceedings involving the enforcement of the national cartel equivalent.

content analysis is based on the assumption that each proceeding has roughly the same value. Therefore, it departs from the focus of previous scholars on leading cases and precedence, and reflects the position that case law is not simply a reflection of the law but it is the law itself.[6]

This is predominantly true with regard to the debate on the role of non-competition interests within Article 101(3). As elaborated in the following sections, the wording of the Treaties tells us little about the scope of the respective Article, and the Commission and EU Courts have yet to supply a clear framework defining application of Article 101(3). In the absence of such a framework, under the self-assessment regime of Regulation 1/2003, undertakings must evaluate their compliance with EU competition rules essentially pursuant to the practices of Commissions, NCAs and Courts.[7]

The paper is structured as follows: Section 3 begins with a historical overview of the drafting of Article 101(3) and the development of the EU Court and the Commission interpretations of the Article. It shows that the uncertainty about the role of non-competition interests in Article 101(3) dates back to disagreements among the Member States on the wording and structure of Article 101 TFEU and the procedural enforcement rules of Regulation 17/62. While the issue remained unresolved, until 2003 the Commission and EU Courts have interpreted Article 101(3) in a way which allows to consider a broad array of non-competition interests. Yet since they have followed a case-by-case approach to the balance between competition and non-competition interests they have not established clear legal and economic principles for applying the Article.

Section 4 describes the changes introduced by Regulation 1/2003 and the Commission's policy papers. It shows that while the Commission advocated a new, narrow interpretation of the Article, the EU Courts have not seemed to accept this change. Section 5 discusses the empirical findings on the application of Article 101(3) prior to, and following, the reform. It demonstrates the disappearance of the debate on the scope of the Article from the Commission's practice since 2004. Finally, section 6 concludes with a plea for "positive" Commission decisions illustrating the application of Article 101(3) in practice.

## 3. The debate on the scope of Article 101(3) prior to 2004

The uncertainty of Article 101(3)'s scope derives from the wording and structure of Article 101 TFEU and the procedural enforcement rules of Regulation 17/62. These were the result of negotiations and compromises among the Member States having substantively different economic policies and traditions at the time of drafting

[6] M. Hall – R. Wright: Systematic content analysis of judicial opinions. *California Law Review*, 2008. 78, 84–86., http://www.jstor.org/stable/20439171.

[7] GCLC Annual Conference. (2010b). M. Merola – D. F. Waelbroeck (eds.): *Towards an Optimal Enforcement of Competition Rules in Europe: Time for a Review of Regulation 1/2003?* Groupe de Boeck, 2010. 19., 58–76.

the Treaty of Rome.[8] Favoring consensus over clarity, EU primary and secondary competition rules have not explained how Article 101(3) should be applied.

This section describes how in the absence of such an interpretive framework, the substantive scope of Article 101(3) was developed on a case-by-case basis by the decisional practice of the Commission and the jurisprudence of the EU Courts. However, prior to the 2004 this practice had not produced a set of well-defined legal or economic tools explaining what non-competition interests can be examined under Article 101(3) and how.

### 3.1. The origins of Article 101(3) and the enforcement regime of Regulation 17/62

The EU prohibition against anti-competitive agreements, laid down in Article 101 TFEU, is based on a bifurcated structure. Article 101(1) identifies competition restraints. It is drafted in broad terms to cover *"all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."*

In its place, Article 101(3) sets an exception to the general prohibition. It states that Article 101(1) may be declared inapplicable in the case of any agreement *"which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."* Thus, Article 101(3) provides a structured framework to balance anti-competitive effects, primarily the harm to competition interests, against possible benefits arising from an agreement.[9]

This distinctive feature of Article 101 TFEU is linked to the political process preceding its adoption. The wording and the bifurcated structure of Article 101 TFEU were strongly influenced by French competition rules. During the negotiations of the EEC Treaty, France was the only Member State with an existing competition law.[10] French Decree of 9 August 1953 on the maintenance and re-establishment of free competition,[11] and the Draft Law 9951 of July 1952 that preceded it, initiated a two-step mechanism to assess anti-competitive agreements. *Article 59 bis* prohibits

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[8] K. Seidel – L. Federico Pace: The drafting and the role of regulation 17: a hard-fought compromise. In: K. Klaus Patel – H. Schweitzer (eds.): *The Historical Foundations of EU Competition Law.* Oxford, OUP, 2013. 55.; A. Kuenzler – L. Warlouzet: National Traditions of Competition Law: A Belated Europeanization through Convergence? In: Patel–Schweitzer (eds.) op. cit. 103–109.

[9] J. Faull – A. Nikpay: *The EC law of competition.* Oxford University Press, 2014. 310., http://scholar.google.nl/scholar?q=Faull+and+Nikpay+%282014%29&btnG=&hl=en&as_sdt=0%2C5#5.

[10] Seidel–Pace (2013) op. cit. 59–62.

[11] Decree No. 53–704 of 1953.

anti-competitive agreements, while Article *59 ter* exempts agreements having a beneficial effect.

The bifurcated structure of the French competition law reflected the French view on restrictions to competition. It aimed to control anti-competitive agreements rather than outright prohibit them. The French law assumed that an anti-competitive agreement in not necessarily harmful. Rather, a distinction should be made between a "bad" agreement that is prohibited under *Article 59 bis*, and a "good" agreement that could be exempted under *Article 59 ter*.[12] Under the French system of that time, such distinction was made *ex-post*, on a case-by-case basis.

This French principle aiming to "control" anti-competitive agreements stood in contrast with the German concept of competition law. During negotiations on the Treaty of Rome, Germany had not yet finalized its national competition law. However, the German vision of competition law advocated a principle of prohibition, barring any horizontal agreement between undertakings. Based on this policy choice, the German representatives proposed a rule during the negotiations on the Treaty that applied a total prohibition on anti-competitive agreements, allowing for no exceptions.[13]

The clash between the French and German approaches was resolved by a compromise. Although the wording of Article 101 TFEU closely followed the French law and tolerated some anti-competitive agreements [Article 101(3))], it was inspired by the German approach by declaring that anti-competitive agreements are in principle prohibited [(Article 101(1)] and automatically void [Article 101(2)]. As part of this compromise, the controversial decision on how the exception provided in Article 101(3) should apply was postponed. Article 101(3) remained silent as to the procedural and substantive criteria guiding the declaration of inapplicability.[14]

The procedural criterion for applying Article 101(3) was clarified only in 1962, when the procedural enforcement rules embodied in Regulation 17/62 came into force. During the negotiations on Regulation 17/62, the French delegation proposed that a declaration of applicability would be based on a self-assessment with an *ex-post* control, corresponding to the French law. However, the German delegation rejected the French proposal as being incompatible with the wording and structure of Article 101 TFEU. They noted that the phrasing of Article 101(3) that the provisions of Article 101(1) "*may, however, be declared inapplicable*", requires a constitutive decision by the Commission in order to exempt an agreement from the cartel prohibition.[15]

The German proposal, which was finally accepted, gave the Commission a monopoly for granting exemptions under Article 101(3) in public enforcement proceedings. The application of the Article was based on a notification and authorization system where

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[12] Seidel–Pace (2013) op. cit. 59., 62.; Kuenzler–Warlouzet (2013) op. cit. 100., 103–104.

[13] Seidel–Pace (2013) op. cit. 60–62.; Kuenzler–Warlouzet (2013) op. cit. 96–98., 103–104.

[14] Seidel–Pace (2013) op. cit. 63.; Kuenzler–Warlouzet (2013) op. cit. 110–111.; *Commission Modernization White Paper* para 12, 18.

[15] Seidel–Pace (2013) op. cit. 70.; B. Sufrin: The Evolution of Article 81 (3) of the EC Treaty. *The Antitrust Bull*, 51. 2006. 923.

potentially anti-competitive agreements needed to be notified and approved *ex-ante* by the Commission in order to benefit from Article 101(3). Indeed, while the wording of Article 101 TFEU reflected a strong French influence, the procedural enforcement rules adopted by Regulation 17/62 were influenced by the German approach opposing the creation of anti-competitive agreements.

### 3.2. The practice of the Commission and EU Courts prior to 2004

Even after the adoption of the procedural enforcement rules, the substantive aspect of the application of Article 101 remained unclear. The general and vague wording of Article 101(3) did not clearly indicate: what type of "*improvements*" can justify the disapplication of Article 101(1); how to measure the "*fair share*" of such improvements; "*indispensability*"; or when the competition on the market is "*eliminated*."

Moreover, questions were raised regarding the possibility of considering non-competition interests when applying the four conditions of Article 101(3). Unlike the free movement rules, the EU Treaties do not contain any explicit *ipso facto* exception for non-competition goals.[16] Therefore, the possibility of considering those types of interests within competition law had to be resolved with case law of the Commission and Courts.

As early as the 1966 *Grundig-Consten*[17] ruling, the EUCJ recognized that the application of Article 101(3) may entail balancing certain benefits and harms to competition.[18] The Court explained that an anti-competitive agreement could only be exempted under Article 101(3) when it generates benefits that are large enough to compensate for the distortion of competition. It noted that "*the very fact that the Treaty provides that the restriction of competition must be 'indispensable' to the improvement in question, clearly indicates the importance which the latter must have. This improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition*."[19]

The possibility to consider certain types of non-competition interests was explicitly formulated by the EUCJ in 1977 in its landmark decision of *Metro I.*[20] According to the teleological interpretation adopted by the Court, Article 101 TFEU read in conjunction with Article 3 EEC, the appropriate standard for applying Article 101(3) is not necessary one of *perfect* competition. Rather, the Court adopted a notion of *workable competition* in which the degree of competition protected under Article

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16 Semmelmann (2008) op. cit. 20.; Sufrin (2006) op. cit. 925–926.; *GCLC Annual Conference* (2010a) op. cit. 82–92.

17 Joint Cases C-56/64 C-58/64 Grundig-Consten

18 Nicolaides (2005) op. cit. 134.

19 Joint Cases C-56/64 C-58/64 Grundig-Consten, 348.

20 C-26/76 Saba.

101 TFEU is that required for the attainment of Treaty objectives, particularly the creation of a single market.[21]

The need to balance competition and non-competition interests within the application of Article 101(3) was further formalized with the introduction of what was referred to as "cross-sectional" or "policy-linking" clauses by the Single European Act of 1986 (SEA).[22] Those clauses required that EU institutions consider certain public policy interests within the enforcement of other EU policies. The first three cross-sectional clauses of the SEA included industrial policy, cohesion and environmental policy.[23] The Maastricht Treaty of 1992[24] expanded upon the SEU by including health, culture, consumer protection, development cooperation, education, employment and equality between men and women.[25]

While the cross-sectional clauses require that, as EU institutions, the Commission and EU Courts consider certain social policies within the application of Article 101 TFEU as an EU policy, they have not explained *how* such consideration should take place. Regrettably, case law has not resolved this question. Rather, as Sufrin described it, both the Commission and the EU Court decisions were "*neatly side-stepping*" the issue.[26]

In *Ford/Volkswagen,*[27] for example, the Commission mentioned the cross-sectional clauses as a source for justifying an exemption under Article 101(3). The Commission explained that it considered the contribution of the examined joint ventures to two interests that are protected by the EU Treaties: the creation of jobs and reduction of regional disparities. Yet, the Commission ambiguously added that, "*this would not be enough to make an exemption possible unless the conditions of Article 85 (3) were fulfilled, but it is an element which the Commission has taken into account.*"[28]

The GC upheld the Commission's reasoning. It added that, while the Commission was right to consider the interests protected by the cross sectional clauses, they did not serve as the basis for the Commission's exemption.[29] By simply affirming

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21 The notion of "workable competition" was derived from the work of an American scholar J. M. Clark: *Competition as a dinamic process*. 1961. For more information, see R. Wesseling: *The Modernisation of EC Competition Law*. 2000. 35. http://scholar.google.nl/scholar?q=competition+wesseling&hl=en&as_sdt=0,5&as_ylo=2000&as_yhi=2000#2.; Rompuy (2012b) op. cit. 151.

22 D. J. Gerber: *Law and Competition in Twentieth Century Europe: Protecting Prometheus.* Oxford University Press, 1998. 371.

23 Articles 130, 130a, 130r.

24 Articles 3, 126–130.

25 Article 2 of the Agreement on social policy concluded between the Member States of the European Community, with the exception of the United Kingdom of Great Britain and Northern Ireland (OJ 1992 C 191, p. 91), annexed to Protocol (No 14) on social policy, annexed to the Treaty establishing the European Community.

26 Sufrin (2006) op. cit. 959–960.

27 33814 Ford v.Volkswagen.

28 33814 Ford v.Volkswagen, para 36.

29 T-17/93 Ford v.Volkswagen, para 96.

the Commission's decision, the Court did not explain what the result would be if the Commission had not explicitly recognized the supererogatory nature of the exceptional circumstances.[30] In other words, could the creation of jobs or the reduction of regional disparities in and of themselves justify an anti-competitive agreement?

Subsequently, even during the mid-1990s when the GC's decision in *Ford/ Volkswagen* was rendered, the scope of Article 101(3) remained unclear almost 40 years after its drafting.

### 3.3. The lack of a clear framework detailing the boundaries of Article 101(3) in a centralized enforcement system

The cases presented above demonstrate that, while the EU Courts and the Commission have regularly emphasized the possibility, if not duty, to balance competition against a variety of social and political interests when applying Article 101(3),[31] they have not established a clear framework for applying Article 101(3). They followed a case-by-case approach, tailoring the application to the specific circumstances of the case, economic and social situations, and to the concept of competition applicable at the relevant time.[32] The scope of Article 101(3) was based on the discretionary powers of the Commission. It was founded on a set of well-defined legal or economic tools explaining what non-competition interests can be examined under Article 101(3) and how.

Up to the mid-1990s, the need to employ discretionary powers and assess various objectives when applying Article 101(3) was actually viewed as one of the justifications for the EU centralized enforcement system. For instance, in its 1993 policy report the Commission explained, "*the grant of a derogation from the ban on restrictive agreements requires assessment of complex economic situations and the exercise of considerable discretionary power, particularly where different objectives of the EC Treaty are involved. This task can only be performed by the Commission*".[33] Along the same lines, in the "Modernization" White Paper of 1999, the Commission emphasized that the centralized enforcement system was seen in past as the "*only appropriate system*" to ensure a uniform application of Article 101 TFEU throughout the EU and to allow a sufficient degree of legal certainty for undertakings.[34]

Consequently, the lack of a clear framework for applying Article 101(3) had rather limited consequences under the enforcement regime of Regulation 17/62. The institutional setup of the old enforcement regime meant that conflicts between

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30 Sufrin (2006) op. cit. 959–960.

31 See Townley (2009a) op. cit. 102.; Faull–Nikpay (2014) op. cit. 311–312.; C. D. Ehlermann: The modernization of EC antitrust policy a legal and cultural revolution. *Common Market Law Review*, 37/2000. 549.

32 Wesseling (2000) op. cit. 36–41.; Rompuy (2012b) op. cit. 153.

33 *Policy report 1993.* 107. Also see *Commission Modernization White Paper*, para. 4.

34 *Commission Modernization White Paper*, para 4, 6, 24.

competition and non-competition interests were balanced *ex-ante* and resolved in a centralized and fairly independent manner by the Commission.

As the next section demonstrates, this situation had dramatically changed with the introduction of Regulation 1/2003 that replaced the old procedural enforcement regime of Regulation 17/62.

## 4. The scope of Article 101(3) following 2004

### 4.1. Regulation 1/2003 merits a clear definition of the scope of Article 101(3)

The 2004 reform in the enforcement of EU competition law, brought about by Regulation 1/2003, introduced two main changes. First, the enforcement regime was decentralized, entrusting the NCAs with application of Article 101(3) in parallel to the Commission. Second, agreements could be declared inapplicable even without notification. Rather, similar to the original French proposal for Regulation 17/62,[35] the assessment of Article 101(3) ought to be independently preformed *ex-ante* by undertakings and is only reviewed *ex-post* by the competition enforcers.

Just six years after the Commission argued that the balancing within Article 101(3) "*can only be performed by the Commission",* it had completely revised this statement in Modernization White Paper of 1999. According to the Commission's new approach, the switch to a self-assessment system was now possible since, "*after 35 years of application, the law has been clarified and thus become more predictable for undertakings*."[36] This statement was perhaps true with respect to EU competition law in general but did not reflect the legal situation with respect to the boundaries of Article 101(3). As discussed above, prior to the modernization of EU competition law, the EU had no clear legal and economic rules defining the boundaries and rules for applying Article 101(3).

The need for case law clarifying the boundaries of Article 101(3) became even more pressing due to the substantive modernization of the EU competition rules. In parallel with the procedural reform announced by the enforcement system of Regulation 1/2003, the Commission advocated for a narrow consumer welfare approach as the basis for Article 101(3). It called for a narrow and rigorous application of the four conditions leaving little room for non-competition interests.

This section begins with setting out the Commission's new approach to the application of Article 101 (3). Next, it shows that such approach had deviated from the Commission's and EU Courts' previous case law.

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35 See section 3.1

36 *Commission Modernization White Paper*, para 48.

### 4.2. The Commission's approach in its policy papers since 2004: narrowing the scope of Article 101(3)

From the very inception of the Modernization White Paper, the Commission was concerned that the decentralized enforcement of Article 101 TFEU would result in the incorporation of national-political non-competition interests in the application of Article 101(3). While the Directorate-General for Competition of the European Commission (DG Competition) is generally free from political interference in the enforcement of individual cases, not all NCAs are equally independent authorities.[37] Although some NCAs are institutionally and politically independent of their governments, others are not.[38] For example, in some Member States the selection of cases is based on the influence, direct or indirect, of national political institutions.[39] Moreover, even in the NCAs that are relatively independent from the influence of private undertakings and political pressure, the Member States have found ways to direct NCAs to protect specific national interests, for example by adopting legislation that interprets EU law.[40]

In order to avoid such influences, the Modernization White Paper reframed Article 101(3) as a tool facilitating economic assessment that is devoid of political considerations.[41] It explained that Article 101(3) is intended "*to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations*."[42] The Commission limited the discretion required in its application by transforming Article 101(3) into a pure economic efficiency norm.[43]

Commentators quickly pointed out that the new interpretation of Article 101(3) was incompatible with Commission and EU Court case law that reserved significant

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[37] Riley (2003) op. cit. 659.; FIDE Congress: *General Report on the Application of Community Competition Law on Enterprises by National Courts and National Authorities*. 1998. 17; I. Maher: Networking competition authorities in the European Union: Diversity and change. *European Competition Law Annual*, 2002. 223–236; https://scholar.google.nl/scholar?q=Maher+%22Networking+Competition+Authorities+in+the+EU%3A+Diversity+and+Change%22&btnG=&hl=en&as_sdt=0%2C5. 224.

[38] Riley (2003) op. cit. 659.; FIDE Congress (1998) op. cit. 17.

[39] M Guidi: *Competition Policy Enforcement in EU Member States*. Springer, 2016.; N. Petit: How Much Discretion Do, and Should, Competition Authorities Enjoy in the Course of Their Enforcement Activities? A Multi-Jurisdictional Assessment. *Concurrences: Revue Des Droits de La Concurrence*, 2010.

[40] Riley (2003) op. cit. 659.; Maher (2002) op. cit. 225.

[41] Petit (2009) op. cit. 6.; Rompuy (2012a) op. cit. 257.; Sufrin (2006) op. cit. 96.; Townley (2009b) op. cit. 80.; Monti (2002) op. cit. 1092.; G. Monti: *EC competition law.* 2007. 21., http://books.google.nl/books?hl=en&lr=&id=hHe2PklOqPUC&oi=fnd&pg=PA1&dq=%22EC+competition+law%22+%22monti%22&ots=hLTMi7ED-Q&sig=jOFJm-G9-Fcha04UoSXwUZZrh4g.; Cseres (2007) op. cit. 169.; Komninos (2005) op. cit. 17.; GCLC Annual Conference (2010a) 82.

[42] *Commission Modernization White Paper*, para 57. Also see para 72.

[43] K. Cseres: *The controversies of the consumer welfare standard.* 2007., https://papers.ssrn.com/sol3/papers.c–fm?abstract_id=1015292.

room for non-competition interests under that provision. Former Director General of DG Competition Ehlermann acknowledged that a literal reading of the above White Paper provision conflicted with case law. Instead, he suggested a restrictive interpretation of the Modernization White Paper, explaining: *"[i]t would probably be an exaggeration to assume that, according to the Commission, non-economic considerations are to be totally excluded from the balancing test required by Article 81(3). Such an interpretation would hardly be compatible with the Treaty, the Court of Justice's case law, and the Commission's own practice."* [44] Rather, Ehlermann believed that the Modernization White Paper was only an indication that non-competition-oriented political considerations should not determine the application of Article 101(3).[45]

Similarly, the German *Monopolkommission* was critical of the Commission's approach. It stated that, "*in the White Paper the Commission attempts to tone down the significance of a discretionary process of weighing up in the frame of exemption decisions [...] No matter how much such a viewpoint should be welcomed the Commission is neither empowered nor able to issue a binding interpretation of the EC Treaty.*"[46] In other words, while the *Monopolkommission* seemed to agree with the substantive merits, it considered the Commission's approach to be incompatible with EU law.

The new narrow interpretation of Article 101(3) was reinforced by the adoption of Article 101(3) Guidelines in 2004.[47] The Guidelines limited the *"improvements"* mentioned in Article 101(3) to only *"objective economic efficiencies"*,[48] stating that the aim of Article 101(3) analysis *"is to ascertain what are the objective benefits created by the agreement and what is the economic importance of such efficiencies."*[49] The Guidelines further concluded that, *"goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3)"*.[50] This, in conjunction with the general spirit of the Guidelines, suggests that non-competition interests could only be considered under Article 101(3) if viewed as economic efficiency gains. A similar approach was followed in new versions of the vertical Guidelines adopted in 2010 and the horizontal Guidelines of 2011.[51]

Moreover, as part of the more economic approach, Article 101(3) Guidelines also introduced the notion of consumer welfare as the sole aim of EU competition policy, particularly with Article 101(3). They declared *"the aim of the Community competition rules is to protect competition on the market as a means of enhancing*

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44 Ehlermann (2000) op. cit. 549. Also see Rompuy (2012b) op. cit. 255–256.

45 Ibid.

46 German Monopolies Commission (2000) para 52.

47 Guidelines on the application of Article 81(3) of the Treaty (2004).

48 Commission Article 101(3) Guidelines para 59.

49 Commission Article 101(3) Guidelines para 50.

50 Commission Article 101(3) Guidelines para 42.

51 Vertical Guidelines (2010) 6, 19, 60, 96, 122–127.; Horizontal Guidelines (2011) para 29, 49, 95-100, 141, 183, 217, 246.

*consumer welfare and of ensuring an efficient allocation of resources consumer welfare and of ensuring an efficient allocation of resources."*[52]

The new interpretation of the "improvements" that can be examined under Article 101(3) and the focus on consumer welfare marked a clear deviation from case law of the Commission and EU Court. Many non-competition interests considered until the end of April 2004 were no longer applicable in the Commission's view.[53]

This new approach increased the uncertainty with respect to the scope of Article 101(3) following the 2004 reform. As soft-law instruments, the Commission's Modernization White Paper and Guidelines cannot contradict EUCJ case law which has supremacy. On the other hand, in contrast with EUCJ judgments, the Commission Guidelines offered a rather detailed framework for the application of Article 101(3). As we discuss in the next section, the confusion on the scope of Article 101(3) grows when examining the EU Court decisions after 2004.

### 4.3. The EU Courts have not fully endorsed the Commission's narrow approach after 2004

The EU Courts have yet to fully endorse the Commission's new interpretation of Article 101(3).[54] As demonstrated below, while the EU Courts have refrained from stating so explicitly, various indications suggest that they have not embraced either the consumer welfare standard and or the limited non-competition interests that can be examined under Article 101(3).

In 2009, first in *T-Mobile*[55] and later in *GlaxoSmithKline,*[56] the EUCJ rejected, at least in part, the consumer welfare standard as the sole aim of Article 101 TFEU. It declared that, *"Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or*

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[52] Commission Article 101(3) Guidelines para. 33. In parallel, the Guidelines also declare that the protection of the competitive process, not consumer welfare, is the "*ultimate*" role of Article 101 TFEU. The Guidelines contain a rare statement by the Commission on the goal of the article by declaring "*ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements. The last condition of Article 81(3) recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 81 is to protect the competitive process" (*Commission Article 101(3) Guidelines para 105). Also see D. Gerard: The effects-based approach under Article 101 TFEU and its paradoxes: modernisation at war with itself? In: J. Bourgeois – D. Waelbroeck (eds.): *Ten Years of Effects-Based Approach in EU Competition Law Enforcement*. Brussels, Bruylant, 2012. 29–30.

[53] Witt (2016) op. cit. 166.

[54] Also see Townley (2009a) op. cit. 178–181.; A. Witt: T*he More Economic Approach to EU Antitrust Law*. 2016. 261–295., https://books.google.nl/books?hl=en&lr=&id=j3dDDQAAQBAJ&oi=fnd&pg=PR5&dq=witt+the+more+economic+approach+to+eu+antitrust&ots=wcN176fpnm&sig=t-fTRYK_7F6laLkPZWH_bR6BwXE. 6).; Gerard (2012) op. cit. 36–38.; GCLC Annual Conference (2010a) op. cit. 84–85.

[55] C C-08/08 T-Mobile.

[56] C-501-06P C-513-06P C-515-06P C-519-06P GlaxoSmithKline.

*consumers but also to protect the structure of the market and thus competition as such."*[57] This definition has since been repeated in other cases discussing the objectives of EU competition law.[58]

Notably, the EUCJ opted for a softer formulation in *T-Mobile* compared to the one suggested by the Advocate General. AG Kokott stated that Article 101 TFEU is not designed *"only or primarily"* to protect competitors or consumers but is mainly to *"protect the structure of the market and thus competition as such (as an institution)."* She argued that consumer welfare is only a secondary effect of competition policy as "*consumers are also indirectly protected."*[59] Unfortunately, unlike the Advocate General, the Court has not adopted a clear legal position on the role of consumer welfare.

Seemingly, EU Courts have not accepted the Commission's narrow reading of the "improvements" that can be examined under Article 101(3). First, the EUCJ recognized in its preliminary rulings that the protection of non-competition interests related to financial services,[60] IPRs,[61] sport,[62] and regulated professions[63] could justify exemptions. The EUCJ also made a parallel between the justifications under Article 101(3) and the free movement rules that have broad public policy considerations to justify an exemption.[64]

Second, the GC held that cross-sectional clauses require the consideration of non-competition interests in the application of Article 101(3). In *CISAC*, it noted that Article 151(4) EC on the protection of culture implies, "*that it is necessary to bear in mind the requirements relating to the respect for and promotion of cultural diversity when considering the four conditions for the application of Article 81(3) EC, in particular as regards the condition relating to the indispensable nature of the restriction*."[65] While the Court does not specify how culture should be considered within Article 101(3), it is clear that such interests are relevant.

Finally, following Regulation 1/2003's effective date, the EU Courts upheld the Commission's decisions prior to 2004 exempting agreements on the basis of non-

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57 C-08/08 T-Mobile para 38. Also see C-501-06P C-513-06P C-515-06P C-519-06P GlaxoSmithKline para 62.

58 T-357/06 Bitumen para 11; T-461/07 Visa para 126. Also see A. Witt (2016) 266.

59 Opinion of AG Kokott in C-08/08 T-Mobile para 58: *"Article 81 EC forms part of a system designed to protect competition within the internal market from distortions (Article 3(1)(g) EC). Accordingly, Article 81 EC, like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution). In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared."*

60 C-238/05 Asnef-Equifax para 67.

61 C-403/08 C-429/08 Football Association Premier League para 145–146.

62 C-403/08 C-429/08 Football Association Premier League para 145–146.

63 C-1/12 Ordem dos Técnicos Oficiais de Contas para 100–101.

64 C-403/08 C-429/08 Football Association Premier League para 145–146.

65 T-451/08 CISAC para 103.

competition interests. Accordingly, they confirmed that non-competition interests relating to sport,[66] the environment,[67] and financial services[68] justify declaring exemptions under Article 101(3). In addition, they confirmed that at least in theory, that protection against free riding,[69] and the promotion of R&D[70] and culture[71] could also justify an exemption.

The above indicates that the EU Courts seemed to object, at least in part, to the Commission's new interpretation of Article 101(3). EU Courts continued to follow the case law prior to 2004, leaving significant room for consideration of non-competition interests within Article 101(3). Nevertheless, EU Courts did so in an indeterminate manner. They were unclear on the role of consumer welfare and non-competition interests in application of the Article, and the substantive criteria for declaring inapplicability.

The remainder of the paper explores how the uncertainty regarding the scope of Article 101(3) is especially apparent given the very limited Commission cases applying Article 101(3) since 2004. The Commission has yet to explain how the narrow interpretation of the scope of Article 101(3), which was declared in its policy paper, aligns with the broad interpretation by the Courts.

## 5. Empirical findings: the "disappearance" of Article 101(3)

Table 1 summarizes the application of Article 101(3) by the Commission. It presents the percentage of proceedings in which Article 101(3) was mentioned (left column). In addition, the table includes the percentages of Article 101 TFEU proceedings (right column) and Article 101 TFEU proceedings wherein Article 101(3) was argued (middle column) in which Article 101(3) was accepted.

*Table 1. application of Article 101(3) by Commission*

| | % of cases in which Article 101(3) was argued from total Article 101 TFEU proceedings | % of cases in which Article 101(3) was accepted from cases in which it was argued | % of cases in which Article 101(3) was accepted from total Article 101 TFEU proceedings |
|---|---|---|---|
| 1958–2004 | 60% | 48% | 28% |
| 2005–2016 | 22% | 0% | 0% |

The empirical findings support the following conclusions. First, Article 101(3) had great importance in the enforcement of Article 101 TFEU until the effective date of

66 T-193/02 FIFA rules on player agents; C-171/05P FIFA rules on player agents.

67 T-289-01 DSD para 38; T-419/03 Austrian system for the disposal of packaging waste para 23.

68 T-259-02 T-260-02 T-261-02 T-262-02 T-263-02 T-264-02 T-271-02 Austrian banks – 'Lombard Club.

69 T-491/07 Groupement des cartes bancaires para 77, 259.

70 T-168/01 GlaxoSmithKline para 268.

71 T-451/08 CISAC para 103.

Regulation 1/2003 in 2004. The Article was discussed in 60% of Commission Article 101 TFEU proceedings, and accepted in 48% of the proceedings in which it was discussed, equating to 28% of total Article 101 TFEU proceedings.

The role of Article 101(3) was marginalized after May 2004. Article 101(3) was never accepted as a basis for disapplication of Article 101 TFEU under the realm of Regulation 1/2003. Since the effective date of Regulation 1/2003, the Commission has not rendered any "positive decision" in the meaning of Article 10 of the Regulation.[72]

Second, the empirical findings record a significant drop in the percentage of Article 101 TFEU proceedings in which Article 101(3) was discussed, from 60% of the proceedings prior 2004 to only 22%. The drop can perhaps be attributed to the new priority setting powers granted to the Commission by Regulation 1/2003.[73] Whereas the Commission was required to examine all notified agreements under the old notification regime, the Commission can allocate its own enforcement efforts under the new self-assessment regime.

The Commission had declared that it would focus on hard-core cartels involving naked restrictions of competition.[74] This focus is compatible with Recital 3 of Regulation 1/2003, which explains that the abolishment of the notification procedure was justified since it prevented the Commission from concentrating its resources on curbing the most serious infringements. The coding indicates that the Commission followed this approach in practice. After 2004, the application of Article 101(3) was mainly examined in cases involving price fixing, market sharing and restrictions having equivalent effects.[75]

Notably, the Commission declared with its Article 101(3) Guidelines that although Article 101(3) does not exclude *a priori* certain types of agreements from its scope, hardcore restrictions are unlikely to fulfill the conditions of Article 101(3).[76] Arguably, the undertakings would not have attempted to invoke Article 101(3) since it is unlikely to apply to those hardcore, anti-competitive agreements.

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[72] Article 10 of Regulation 1/2003 provides, "[*w*]*here the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied*."

[73] Regulation 1/2003, preamble 18; *Modernisation White Paper* para 45.

[74] Policy report 2004. 36.; Policy report 2006. 11.

[75] 37750 French beer market para 75; 38456 Bitumen Nederland para 162–168; 39181 Candle waxes para 317; 39188 Bananas para 339–343; 39125 Carglass para 529–532; 39633 Shrimps para 438–440; 39510 Ordre National des Pharmaciens en France (ONP) para 703–706; 38549 Barême d'honoraires de l'Ordre des Architectes belges para 104–110; 38662 GDF-ENEL para 143–145; 38662 GDF-ENI para 120–122; 39736 SIEMENS/AREVA para 82–83; 39596 BA-AA-IB para 77–80; 39258 Airfreight para 1040–1045; 39839 Telefónica and Portugal Telecom para 439–446; 37214 DFB (Joint selling of the media rights to the German Bundesliga) para 24; 38173 The Football Association Premier League Limited para 30.

[76] Commission Article 101(3) Guidelines para 46.

Third, the coding demonstrates that the Commission has not detailed the substantive scope of Article 101(3) in the few proceedings following 2004 in which the Article was mentioned. In most of those proceedings, Article 101(3) was outright rejected because the agreement failed to meet the first condition, declaring that no relevant benefit was identified.[77] In others, such as the pay-for-delay settlement proceedings, the Commission held that the efficiency gains claimed were not sufficiently substantiated.[78] Consequently, the Commission has not taken the opportunity to detail the possible scope of Article 101(3), even in the few cases involving the Article.

Finally, the empirical findings might explain the scarcity of EU Court decisions after 2004 detailing the role of non-competition interests under Article 101(3). The Courts have not had the opportunity to scrutinize its application in appeals since the Commission has not discussed Article 101(3) in its decisions.

## 6. Conclusions – a plea for "positive decisions"

The disappearance of the debate on the scope of Article 101(3) following 2004 is unfortunate. The combination of a lack of clear framework to apply Article 101(3) in the practice of the Commission and Courts prior to 2004, together with the Commission's new interpretation of the Article since modernization and the case law of EU Courts that have not endorsed the Commission's new approach, created uncertainty in a period when certainty was needed the most.

This uncertainty hinders attaining the aims of Regulation 1/2003, specifically the effective, uniform and clear enforcement of Article 101 TFEU.[79] On the one hand, there is a risk that undertakings will refrain from concluding agreements that are good for undertakings, markets and the society due to the narrow interpretation given to Article 101(3) in the Commission's policy papers. An incorrect interpretation of Article 101(3) could thus impede the effectiveness of the Article. On the other hand, the Commission's policy papers serve an important role in ensuring a uniform and clear application of the Article. Ignoring them and relying solely on the EUCJ's case law may hinder attainment of the latter two aims.[80]

Against this backdrop, it is argued that the Commission was wrong to conclude that a positive decision detailing the scope of Article 101(3) was "*unnecessary to date*" in its Report on the Functioning of Regulation 1/2003.[81] This paper makes

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77 37980 Souris para 143–158; 38456 Bitumen Nederland para 162–168; 37750 French beer market para 75; 39181 Candle waxes para 317; 39188 Bananas para 340; 39633 Shrimps para 438; 39510 Ordre National des Pharmaciens en France (ONP) para 703–706; 38549 Barême d'honoraires de l'Ordre des Architectes belges para 104–110; 38698 CISAC para 231–237.

78 39226 Lundbeck para 1221–1231; 39685 Fentanyl para 406–439; 39612 Perindopril (Servier) para 2074–2122.

79 Regulation 1/2003, preamble 1; *Modernisation White Paper* para 11., 43–47.

80 GCLC Annual Conference (2010a) 63

81 "Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003 [2009] (COM(2009) 206).," n.d para 15. Also see Commission

a plea for formal Commission decisions demonstrating how an exception from the prohibition of Article 101(1) can be successfully obtained. Such decisions are essential in order to define the scope of Article 101(3) under the already aging realm of Regulation 1/2003.

(2009) para 114; GCLC Annual Conference (2010a) 63.

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# SAFEGUARDING PUBLIC INTERESTS IN SELF-REGULATING PLATFORM: AN OPTION FOR ONLINE TRANSPORTATION NETWORK INDUSTRY IN INDONESIA?

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## 1. Introduction

Indonesian Constitution of 1945 has established the first premise for the setup of public policy in economic matters in Indonesia mandating that everybody shall have equal opportunities to take part in all economic activities.[1] This premise is understood as the implementation of democracy in economic life. However, it also entangles other premises that anchor in the concept of state responsibility to achieve public welfare, such as the provision of employment and the protection of small companies. Competition policy in the country attempts to adopt the divergence of means of how public welfare could be achieved and the attempt results in the diverse objectives of competition policy from aiming at public welfare, protecting fair competition, achieving efficiency, safeguarding the interest of consumers, to protecting small companies. Despite the legitimacy of having a multipurpose competition policy, this policy model entails major difficulties, in the first instance, to balance between different competing policies in certain cases, and second, to adopt certain public policy that has not received sufficient room in the current competition policy consideration.

Among other matters, ensuring consumer welfare might conflict with other elements of economic welfare, such as securing the interest of small and medium-size enterprises (SMEs) to remain in the market and securing other non-competition interests, such as employment. While innovation serves the interest of consumer in terms of the provision of product choices, better technology and product quality, and

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1 Indonesian Constitution of 1945, 4th Amendment (2002), Article 33 par. (4): "The national economy is governed on the basis of economic democracy […]".

other traits that make life easier, it also requires research and development processes in many cases that SMEs might not be able to afford. Hence, shaping public policy that provides equal protection for different parts of and interests in the market in some cases could be a dreadful task.

To shed some light in weighing different public interests in the purview of competition policy, Indonesian competition authority (Commission for the Supervision of Business Competition, hereafter KPPU) has published check lists of regulations that require reviews on the basis of their compliance to competition policy and guidelines on how to use the check lists for reviewing purposes. The Guidelines are set forth in KPPU Regulation No. 04 of 2016 on Guidelines for the Review of Drafts of Regulation or Policy or for the Review of Regulations or Policies on Economic Sectors Based on Competition Policy Check List (hereafter, Policy Guidelines). The Policy Guidelines contain four categories of check list: (1) concerning regulations on economic sectors that are not exempted from the application of Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (hereafter, Law No. 5 of 1999); (2) concerning regulations on economic sectors that are exempted from the application of Law No. 5 of 1999; (3) concerning regulations on economic sectors that grant monopoly rights; and (4) concerning regulations that provide protections for SMEs and for domestic enterprises against foreign enterprises.[2] Based on the Guidelines, KPPU shall undergo a process of policy review and provide a recommendation to the Government as to whether changes should be made in order to ensure the compliance of the regulation under scrutiny to competition policy. While the Guidelines could be useful, there might be a problem whether such recommendation would be effective in practice, because it might entail, to some extent, a sacrifice of certain interests in favor of some other interest. A balancing is again required, only this time it would be somewhere else, i.e. not by KPPU but by the regulator.

On another spectrum of consideration, while policy makers and regulators are struggling to reach a compromise about the most workable policy and regulation, markets might take initiatives to regulate themselves in order to shield the interests of the contracting parties. Although such initiative is guarded by the principle of the freedom of contract, questions remain in how far the interests of all parties are well balanced and how this mechanism could carry out the missions mandated by an established public policy.

The problem becomes more complex in cases of disruptive innovation where there has not been any regulation serving as a solid legal ground for the parties to base their contract and the existence of their transaction on yet, apart from consensus and certain fundamental principles such as the utmost good faith. Disruptive innovation has its trait of potentially not only creating a new market, but also exterminating the existing market that might mean a risk of people losing their jobs – a non-competition but important part of public interests. Hence, dealing with disruptive innovation is a

[2] KPPU Regulation No. 04 of 2016 Article 2 lit. a–d.

hard fact for the players of the existing market and this might call for public policy intervention when the existing market involves the living of many.

In the past at least a couple of years, new players have entered Indonesian market to offer an online platform to bring supply and demand of transportation services together throughout the country, such as Uber, GrabCar, and GoJek.[3] I refer to these types of services as the online transportation network.[4] The introduction of the new kind of door to door public transportation services in the market is not without controversies concerning numerous issues from the legality of its business license, the measures in place to ensure passenger safety and security, taxation, to competition concerns that are raised until today by conventional taxi providers.[5] Indonesia has a large market for both taxi and motorbike service (in Indonesian, the motorbike service is called *ojek*). With the entrance of automobile-based service, the market has witnessed the birth and development of online transportation network that challenges the existing conventional taxi and motorbike services.

Among the complex issues brought be the emerging of the online transportation network in the country is the question about safety and consumer protection. Also, the implementation of the sharing economy concept combined with the rise of market demand, the new business models and innovation that has produced easiness to offer and obtain door-to-door transportation services – have created a major resistance from conventional transportation service providers that suffer substantial losses of market share in a reasonably short period of time. Asymmetrical regulations applied for conventional door to door transportation providers and for online transportation network have been blamed as the major cause of the imbalance of competition capacity in the market. However, the short-term outcome for consumers is not to be undermined. Not only consumers have more choices available in the transportation market, they also benefit from taxis reducing their fares in order to make their pricing more competitive.

Online transportation network is one among new online business schemes developed in the digital market. Indonesian market also witnesses other schemes such as online shopping (e.g. Tokopedia.com, Lazada.com), non-banking loan (e.g. UangTeman.com), and online traveling agent for hotel, flight, and train reservation (e.g. Taveloka.com, Tiket.com). Focusing on online transportation network, GoJek – one of the major players in the market, has been expanding its business to differentiate its products ranging from offering motorbike or car ride, to courier services to carry documents and packages and delivery of services ranging from services to do

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[3] J. Russell: Uber Gains Government Approval to Operate Legally in Jakarta, Indonesia. *Techcrunch,* 2015. http://techcrunch.com/2015/12/08/uber-gains-government-approval-to-operate-legally-in-jakarta-indonesia.

[4] This term is a subset of the broader term transportation network – that includes conventional taxi providers.

[5] L. Cosseboom: The Jakarta Police's Uber Investigation Raises Many Questions, and Is Likely Just to Appease Taxi Firms. *Tech in Asia*, 2015. https://www.techinasia.com/talk/the-jakarta-polices-uber-investigation-raises-many-questions-and-is-likely-just-to-appease-local-taxi-firms.

shopping, food and medicine order and delivery, top up services for mobile phones, to massage services. The study takes the case of online transportation network as the focus of analysis and excludes other types of online businesses.

The paper is structured into five parts. After explaining the background and uttering the research questions in the first part, the second part of the paper discusses the challenges brought by the emerging of online transportation network to the existing competition policy. The third part analyses whether public policy could be integrated in the self-regulation of online transportation network. In the fourth part, the paper analyses whether self-regulation of online platform could serve as an alternative of balancing the existing regulation asymmetry by means of government regulation for the online transportation network industry. The fifth part concludes.

## 2. The Emerging of Online Transportation Network and Challenges to the Existing Competition Policy

### 2.1. The Role of Innovation in Indonesian Competition Policy

Innovation is mentioned as a new element included in competition policy considerations taking into account the current development in the market. Law No. 5 of 1999 does not mention innovation in its provisions. How innovation plays a role in Indonesian competition policy will be discussed below.

#### *2.1.1. Competition Policy Framework*

There are two main KPPU Regulations that refer to innovation as a key element in guiding how competition law should be implemented by the competition authority. First, innovation receives a place in competition policy consideration in the context of the interplay between competition law and intellectual property rights. Second, innovation is used as a reference when evaluating whether a certain policy or regulation results in the decreasing of consumer welfare when it lessens the incentive to compete.

##### 2.1.1.1. Innovation and the Interplay between Competition Law and IPR

In KPPU Regulation No. 2 of 2009 concerning the Guidelines on the Exemption of the Agreements related to Intellectual Property Rights from the Application of Law No. 5 of 1999, KPPU clarifies that both intellectual property right (hereafter, IPR) protection and competition law share a common interest to encourage innovation and creativity. While IPR regime provides incentive and rewards for innovation, competition law plays its role in ensuring a level playing field that enables fair

competition in the market and thereby, opens the opportunities for innovation to take place.[6]

According to the Guidelines, although agreements related to IPR are exempted from the application of the competition law,[7] the Guidelines provide a basis to justify competition law intervention in cases where IPR is abused to foreclose a market. [8] In order to evaluate whether competition law intervention can be justified, the Guidelines rely on a test as the primary indicator whether an IPR license has a significant negative impact on the market.[9] While the test has a broad scope of interpretation, it also covers a specific reference to innovation in cases where license agreements involve limitations of production and distribution. Agreements that put restrictions as such that hinder a licensee to innovate are considered as infringing competition law. [10]

#### 2.1.1.2. Innovation and the Policy Guidelines

The policy Guidelines place innovation as part of the testing element in the first check list concerning regulations on economic sectors that are not exempted from the application of Law No. 5 of 1999 when considering whether a regulation or policy or its draft has been in conflict with the interest to protect fair competition. The term regulation covers not only those imposed by the Government but also regulations that are imposed by private entities. The latter is further distinguished between self-regulation and co-regulation (such as those created and imposed by associations).[11] However, the discussions in this paper are limited to regulations imposed by private entities in the form of self-regulation.

To carry out the test, the evaluation process is grouped in four categories of regulations or policies (1) concerning the limitation of volume and scope of companies, (2) concerning the limitation of the capacity of companies, (3) reducing the incentives to compete, and (4) concerning the limitation of consumer choices of goods and/or services. The Guidelines use innovation as a reference to evaluate the third test concerning regulations or policies that reduce the incentives of market players to compete. However, it is also used in the examples of cases in other categories of the test.[12]

The Guidelines emphasize that a regulation or policy that reduces the incentives to compete would hinder innovation and in turn, it would reduce consumer welfare.[13] In order to evaluate whether a regulation or policy or its draft has such impact, the

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6 KPPU Regulation No. 2 of 2009, p.10.

7 Law No. 5 of 1999 Article 50 lit. a.

8 KPPU Regulation No. 2 of 2009, p. 16.

9 Ibid. 13–14.

10 Ibid. 20.

11 KPPU Regulation No. 04 of 2016, Attachment, p. 33.

12 Ibid. Article 2.

13 Ibid. 12.

Guidelines provide a catalogue of questions whether the regulation or policy consists of a provision that:

(1) grants a full authorization to regulate a sector of industry to a group of companies (such as associations);
(2) requires an agreement between a group of companies and the Government in order to enact a sector regulation;
(3) requires all companies to inform public or an association all data about their products, prices, distributions, and/or costs;
(4) exempts certain companies from the application of Law No. 5 of 1999.[14]

Further, to exemplify how a regulation or policy could harm innovation, the Guidelines provide three cases as discussed below.

2.1.1.2.1. Market Allocation Policy v. Innovation[15]

Innovation might be hindered in cases of a regulation or policy that limits distribution areas or imposes market allocation either for goods, raw materials, services, capital, or labour. The Guidelines clarify further that under this category are regulations or policies that facilitate companies to allocate market between them and it does not include local government regulations that by its nature are limited in terms of the scope of geographical jurisdiction. This clarification, nevertheless, makes the Guidelines unclear whether it would address only regulations or policies that facilitate distribution cartels or those that contain provisions that limit the distribution area or impose market allocation. The Guidelines use both terms, but then limit the scope to the first in the description while at the same time excluding local government regulations.

This category is the case, for instance, when a regulation or policy either in national of regional level attempts to protect new comers or infant industries. Such regulation is not uncommon in developing countries. However, it also has the downside that by limiting the area of distribution or allocating the market, it creates isolated market fractions and this could result in the limitation of innovation and product differentiation. To evaluate whether negative impacts of such type of regulation or policy occur, the competition authority should carry out an investigation whether: (1) there is a relation between the obstacle to innovate and the purpose of the regulation or policy; (2) the regulation or policy that results in the obstacle to innovate does not exceed what is necessary to attain the purpose; (3) rational arguments would support the use of the obstacles to reach the purpose of the regulation or policy; and (4) the restrictions are imposed for a certain period of time.[16]

[14] Ibid.

[15] Ibid. 28.

[16] Ibid.

The zoning policy for the food retail industry could become an example of this case, in which modern retailers are subject to the minimum proximity from traditional retailers.[17] The policy has been under debates since the enactment. However, it has not yet been investigated under the new Guidelines.

Although the Guidelines take a further steps from what have previous state of the art that left the justification of providing privileges for any activity or agreement that is carried our as an implementation of a regulation or policy merely as part of the block of exemption in Article 50 of Law No. 5 of 1999, it lacks of a critical question, namely the justification of the purpose of the regulation or policy under scrutiny as such. Hence, a contradiction between the purpose of competition policy and a regulation or policy in question remains unresolved.

2.1.1.2.2. Pricing Policy v. Innovation[18]

A regulation or policy that limits the freedom of companies to set prices might also harm innovation. The pricing policy referred to in the Guidelines includes policies for both the floor and ceiling prices. Both types of pricing are common in Indonesia. The first is for instance for agricultural products such as rice and chili. The second is common for goods that are in high demand to meet basic needs of the consumers, such as cement. While the first is imposed in order to protect small market players (SMEs) from unfair competition from strong players, the second is used to protect consumers from too high prices.[19]

There are two scenarios of how pricing policies might harm innovation. In the first scenario*,* when the floor price is imposed, although efficiency or innovation could result in the ability to offer low prices, companies are still not allowed to sell below the floor prices. Thus, companies would not have sufficient incentives to innovate. On the other hand, innovation does not always result in low prices. It could also entail high prices, for instance, because of the cost for the research and development (hereafter, R and D). Thus, in the second scenario, the enforcement of a ceiling price policy might dissuade companies from innovating, although the innovation might lead to better quality of products, if it results in a higher price level than the assigned ceiling price.[20]

The Guidelines do not elaborate further, how eliminate the negative impacts of the pricing policy to innovation or which grounds could be considered as justifications to keep the policy at the cost of innovation, or whether the Guidelines would not justify such policy at all.

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17 S. Y. Wahyuningtyas – A. Y. A. Nugroho: Retail Policy and Strategy in Indonesia. In: M. Mukherjee – R. Cuthbertson – E. Howard (eds.): *Retailing in Emerging Markets: A Policy and Strategy Perspective*. Oxford, Routledge, 71–72.

18 Ibid. 29.

19 Ibid.

20 Ibid. 29–30.

2.1.1.2.3. Self- and Co-Regulation v. Innovation[21]

Self- and co-regulation are also referred to by the Guidelines as types of regulation that potentially could impair innovation. The term self-regulation refers to a regulation made by a group of companies, i.e. association, based on an authorization granted by the Government on the matters relevant to competition, such as price fixing, new business permit, and selling quota. The term co-regulation is understood as a regulation that requires a policy related to the industry that has to be agreed upon by the group of companies, i.e. association, and the Government.[22]

Innovation might be at stake when a regulation or policy contains a reduction of incentives to compete. According to the Guidelines, this is the type of regulation or policy that potentially would facilitate a cartel. Self- and co-regulation are seen as belonging to this type. They are considered as being able to be used to secure the interests of companies to survive in the market. Because such regulations potentially do not leave a sufficient room for other parties to negotiate, it could be used to reinforce the market power of the companies. As such, by allowing self- or co-regulation, there would be a danger that companies would not have sufficient incentives to innovate any longer.[23] However, the statement in the Guidelines seems to be more of reflecting concerns about self- and co-regulation models and a traditional view that favors state regulation over the other regulation models than inducing a *per se* prohibition of using self- and co-regulation.

The Guidelines also do not elaborate further on how to evaluate such types of regulation and to what extent they could be justified or whether all regulations of those types would be considered as by design in conflict with competition policy and hence, when exist, shall be revoked.

### *2.1.2. Policy and Regulation Framework for Digital Market*

The policy road map for Indonesian digital market is included in the 9th Package of Economic Policy aiming at becoming a major digital market player in South East Asia in 2020. According to the policy road map, to optimize the development of the digital market in the country, it would be based on the empowerment of local SMEs (startups). This leads to the policy to significantly reduce legal costs and administrative burdens for setting up businesses. This approach is taken based on the major contribution of SMEs to the product domestic brutto (PDB), which according to the data from the Ministry of SMEs in 2015, the total amount of 59.2 billion of SMEs in the country contributed to 61,41% of the PDB. To implement this Policy Package, the Government is preparing a Government Regulation that is expected to be released and to enter into force in 2017.

[21] Ibid. 32.

[22] Ibid. 32.

[23] Ibid. 33.

According to the Report by Indonesian Telecommunication Providers Association, in 2014, 91% of Indonesian population had access to cellular signal and in 2016, almost all the inhabited land area has signal coverage.[24] In 2016, the penetration of cellular phone in Indonesia was 126% and internet users reached 51.85% of the population (93.4 million users), among those, 71 million are smartphone users.

The responsibility for regulating activities on the internet in Indonesia is mandated to the Ministry of Communication and Information (hereinafter, Menkominfo) with one of the main tasks to support the Government to set policy for the industry.[25] The Ministry is also responsible for regulating the telecommunication industry that had been existent long prior to the use of internet. The placing of the responsibility to regulate activities on the internet on the Ministry is based on the reason that internet access is basically made available by internet network that becomes part of the telecommunication services.

The task as the regulator in the telecommunication market is further carried out by Indonesian Telecommunication Regulation Body (*Badan Regulasi Telekomunkasi Indonesia,* hereinafter, BRTI) that was established in 2008.[26] The strong intervention of the Government in the industry is justified under Law No. 36 of 1999 on Telecommunication (hereinafter, Indonesian Telecommunication Law). The Law sets out that telecommunication is controlled and fostered by the state in order to improve telecommunication operations, by means of setting policy, regulation, supervision, and monitoring.[27]

Although competition policy in the telecommunication industry uses *ex-ante* regulation approach, an *ex-post* approach is also used in the applicability of competition law. Under Law No. 36 of 1999, in providing services in the telecommunication industry, companies are prohibited from carrying out activities that could result in monopoly practices and unfair business competition,[28] i.e. Law No. 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition (hereinafter, Indonesian Competition Law). The provision is further implemented in the Decision of the Ministry of Communication No. 34 of 2004 concerning the Supervision of Fair Competition in the Fixed Network and the Provision of Basic Telephony Services. It mainly lays down the prohibition of dominance abuse, rules for the use of access code and interconnection, and obligation to meet demand in limited services.

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[24] Indonesian Telecommunication Providers Association: Building A Digital Indonesia: A Snapshot of the Indonesian Telecommunication Industry. *Summary Report*, 2015. 10.

[25] Ministry of Communication and Information Regulation No. 17/PER/M.KOMINFO/10/2010 concerning Organization and Working Procedure of the Ministry of Communication and Information.

[26] Ministry of Communication and Information Regulation No. 36/PER/M.KOMINFO/10/2008 concerning the Establishment of Indonesian Telecommunication Regulation Body as amended by Ministry of Communication and Information Regulation No. 31/PER/M.KOMINFO/8/2009.

[27] Law No, 36 of 1999 Art. 4 par. (1)–(2).

[28] Ibid. Art. 10 par. (1).

As regards the use of internet, a different regulation applies, namely Law No. 19 of 2016 (hereafter, EIT Law) that amends Law. No. 11 of 2008 on Electronic Information and Transaction. The provisions of the law are implemented further in the Government Regulation No. 82 of 2012 concerning the Provision of Electronic Transaction System (hereafter, PETS Regulation). Although the placing of the responsibility to regulate the use of internet on the Ministry of Telecommunication and Informatics seems to be logical, it is feared that the Ministry would treat the digital market industry the same way as it treats the telecommunication industry as such that the digital market would be heavily regulated as the telecommunication industry. This concern is, however, still to be closely observed.

### *2.1.3. The Ex Post and Ex Ante Approaches*

#### 2.1.3.1. Ex Post v. Ex Ante Approach

To complete its task to ensure fair and effective competition in the market, competition law commonly takes an ex post approach, according to which the evaluation on the occurrence of anticompetitive elements in a certain conduct is carried out on a case by case basis. By taking this approach, competition law provides sufficient rooms for the freedom of companies to engage in business activities and moreover, to innovate, without the companies being restricted to overly rigid rules. In Indonesia, Law No. 5 of 1999 is applied as a tool for ex post analysis of an allegation of an infringement of competition law.

Nevertheless, in certain cases, an ex ante approach is necessary. Such approach can be seen in several industries, especially those that are heavily regulated such as the telecommunications,[29] energy,[30] food retail,[31] and the transportation industry.[32]

The choice to use an ex ante approach is justified for instance when it involves public interests such as the interest to protect consumers and to safeguard public welfare by means of imposing tax regulation. In order to ensure that those interests are well shielded in the market, ex ante regulations are imposed. This is also the case in the transportation industry which becomes the focus of this study such as in Law No. 22/2009 on Traffic and Transportation, related specifically to taxi services.

The problem with taking ex ante approach is that it could be the case that a new development in the market has not yet been covered by the existing regulations,

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[29] C. Wattegama – J. Soeharjo – N. Kapugama: Telecom Regulatory and Policy Environment in Indonesia Results and Analysis of the 2008 TRE Survey. *Final Report,* 2008. 12.; E. Makarim: The Protection of Consumer' Rights and the Application of Criminal Law in the Unlawful Operation of Services and Content Service Applications. *Indonesia Law Review,* Vol. 2., N. 2., 2012. 231.

[30] OECD and ADB Development Centre Seminars Asia and Europe Services Liberalisation: Services Liberalisation. Paris, OECD/ADB, 2003. 12–13.

[31] Wahyuningtyas–Nugroho op. cit. 73.

[32] S. Wallsten: The Competitive Effect of the Sharing Economy: How Is Uber Changing Taxis? *Technology Policy Institute, Studying the Global Information Economy,* 2015. 2.

while regulations cannot always predict such development, especially those brought by disruptive innovation. Online transportation network is not included Law No. 22/2009 and hence, leaves a legal loophole as regards whether they are also subject to the obligation imposed by the Law and if so, whether it would be subject to the same obligation imposed to conventional taxi providers. However, there are difficulties to apply the Law to the online transportation network, mainly because by definition, they do not have the same characteristics as conventional taxi providers. This leads to asymmetrical regulations applicable to different market players, i.e. the incumbents and the new players that brought innovation that has not yet been recognized yet in the existing regulation. In order to deal with this development, the Transportation Ministry enacted a new regulation that includes provisions applicable to online transportation network, namely Transportation Ministry Regulation No. 32 of 2016 on the Provision of Transportation of Persons Using Motor Vehicle Not Based on Route (hereafter, Regulation No. 32/2016).

#### 2.1.3.2. Online Transportation Network: Ex Ante Regulation and Asymmetrical Regulation Issue

The asymmetric regulation in the door to door transportation services apparently leads to advantageous circumstances for the new entrants.[33] It has given rooms for the online transportation network to enter the market with lower legal costs than those applicable to the conventional taxi providers. This advantage contributes to the ability of the new entrants to gain a foothold in the market by offering generally lower prices than the incumbents. However, low price is not the only benefit they offer to consumers. The innovation that makes it easier for consumers to order a transportation service from smartphones as well other relevant services such as the facility to track the car or motorbike being ordered or in transport and the review mechanisms has a significant role in enabling them gaining consumer trust.

With the new Transportation Ministry Regulation, the Government attempts to balance the regulation asymmetry in order to ensure that no market player is standing above the law, although it also seems to be reluctant to clarify the obligations imposed on the online transportation network. In the interests of protecting consumers, businesses should not be hindered from innovating, but they are also subject to a number of requirements such as minimum safety and security standards. Regulations are meant to afford protection for consumers, who are usually in a weaker bargaining position when dealing with business entities. In other words, the regulations have a role to restore the balance by means of imposing appropriate policies.

However, it still needs to be clear that certain characteristics of the online transportation network actually make it more prone to be amenable to regulations.[34]

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[33] D. E. Rauch – D. Schleicher: Like Uber, but for Local Governmental Policy: The Future of Local Regulation of the "Sharing Economy". *Working Paper*, 15-01, 2–3. http://ssrn.com/abstract=2549919.

[34] B. G. Edelman – D. Geradin: Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber? *Stanford Technology Law Review*, Vol. 19., 2016. 326.

Transparency of payments and traceability of location exemplify this. Another feature such as reliable user review mechanisms that provide a reputational mechanism to address asymmetric information for users prior to the ride is also a considerable mechanism that could be more effective than security measures imposed by a government regulation.[35]

## 2.2. Sharing Economy or Just Business As Usual?

### *2.2.1. Online Transportation Network and Sharing Economy*

The use of the sharing economy concept can be seen in how the online transportation network works. It has been applied by other online businesses as well. Zervas and Proserpio have made an extensive study on the application of the sharing economy concept by Airbnb[36] in the accommodations market. Another example is UmbraCity, an umbrella sharing service.[37] Companies operating as online transportation network act as an intermediary between consumers and vehicle owners with the purpose of gaining "full utilization of available resources",[38] in this case, optimizing the functionality and utility of goods by making them available for consumers and of creating economic value for the owner.

With the use of the internet that has become easily accessible, it becomes easier than ever for the owners of the available vehicles to offer them to potential users and for consumers to find and order a ride service.[39] This creates new businesses providing direct, peer-to-peer platforms with ease of access and competitive price[40] to bring together the owners of the resources and the users, usually in the short term.[41] This is the underlying idea of online transportation network to offer an answer for urban transportation problems.[42]

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35 A. Thierer and Others: How the Internet, the Sharing Economy, and Reputational Feedback Mechanism Solve the 'Lemon Problems'. *Mercatus Working Paper*, 2015. 37.

36 G. Zervas – D. Proserpio: The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry. *Working Paper*, 2016. 2.

37 UmbraCity, Homepage. http://umbracity.com/.

38 A. T. Bond: An App for That: Local Governments and the Rise of the Sharing Economy. *Notre Dame Law Review Online,* Vol. 90., N. 2., (2015) 78.

39 Ibid.

40 R. H. Brescia: Regulating the Sharing Economy: New and Old Insights into an Oversight Regime for the Peer-to Peer Economy. *Nebraska Law Review,* Vol. 95., N. 1., (2016) 100.

41 Rauch–Schleicher op. cit. 2. See also T. Teubner: Thoughts on the Sharing Economy. In: P. Kommers et al. (eds.): *Proceedings of the International Conference ICT, Society and Human Beings 2014, Web Based Community and Social Media 2014, e-Commerce 2014, Information Systems-Post Implementation 2014, and e-Health 2014, Multi Conference on Computer Science and Information Systems.* July 15–19, 2014. Lisbon, Portugal, 323.

42 N. M. Davidson – J. J. Infrance: The Sharing Economy as an Urban Phenomenon. *Yale Law and Policy Review*, Vol. 34., N. 2., (2016) 219.

Online transportation network services are well-known for its competitive pricing[43] that is defined by calculating the distance and other relevant elements, for instance, the road traffic. However, price is not the only successful keys; online transportation network also offers a convenient process from ordering a vehicle to paying the service. In addition, a navigation system equips the vehicle to make it easier to pinpoint the exact location of the passengers and the destination. Prospective passengers can also track the location of the car being ordered and calculate how much time it will take for them to be picked up.[44] The navigation system does not only contribute to convenience, but it also offers security measure to ensure that the passenger will be safely taken to the destination as ordered.

Responding to whether or not the sharing economy shall be regulated or how to regulate it, Stephen R. Miller introduced the first principles for regulating the sharing economy[45] based on the consideration that the sharing economy due to its disruptive nature usually has not been addressed in existing regulations, which leads to perception that it is flouting of the existing rules. He uttered further that regulating the sharing economy requires a specific approach that involves a differentiated regulatory response. Hence, asymmetric regulation would remain in place, but this is merely a result of the different nature of the object of the regulation. It is not recommended to apply the same rule equally to all players despite their different natures.

### *2.2.2. New Business Scheme or An Escape from Rules?*

A tempting question is whether the online transportation network in Indonesia is a pure implementation of the sharing economy that emphasizes on the full utilization of the available resources or they are merely a new business scheme used to avoid the existing rules. While the element of innovation and its role in attracting customers remain undeniable, the question focuses on understanding the nature of the business itself.

While the concept of the sharing economy centers in the optimization of resources, in practice, the resources used in the online transportation network are not always made available for customers not because they have already been existing, unused, and thus, available. Instead, people invest in buying vehicles, either cars or motorbikes, and paying drivers, then registering themselves by the online platforms such as Uber, GrabCar, GoJek or the likes. Hence, it is not the resources in terms of vehicles, but in terms of money that are optimized in the business. From this viewpoint, the scheme seems to escape from the original idea of the sharing economy

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[43] C. Dyal-Chand: Regulating Sharing: The Sharing Economy as an Alternative Capitalist System. *Tulane Law Review*, Vol. 90., N. 2., (2015) 256.

[44] M. Motala: The "Taxi Cab Problem" Revisited: Law and Ubernomics in the Sharing Economy. *Banking & Finance Law Review,* Vol. 31., 2016. 470–471.

[45] S. Miller: First Principles for Regulating the Sharing Economy. *Harvard Journal on Legislation*, Vol. 53., 2016. 151.

and move towards the usual business of car rental with a combination of the role of the online platforms as the intermediary or an agent to hook them up with potential customers. Rather, it looks more like a scheme to circumvent the existing laws.

From the above point of consideration, it seems that treating the online transportation network in Indonesia as an implementation of the sharing economy would not be entirely correct. A further study on the business scheme is therefore necessary, for which an intervention from economists would be highly valuable.

## 3. Public Policy and Self-Regulation of Online Transportation Network in Indonesia

### 3.1. Public Policy in Indonesian Transportation Industry for Taxi Services

Door to door transportation services in Indonesia, i.e. taxi services, are subject inter alia to the provisions of Law No. 22 of 2009 on Traffic and Transportation (hereafter, Law No. 22/2009) and further regulations, including Transportation Ministry Regulation No. 32 of 2016 on the Provision of Transportation of Persons Using Motor Vehicle Not Based on Route (hereafter, Regulation No. 32/2016). The policy in the industry opens the participation of private entities to operate in the market, although it obliges local governments to ensure the provision of public transportation within their respective region and between different regions operated by state-owned companies. This study is focusing on taxi services as the closest comparison to the online transportation network, because each type of public transportation is subject to different policy and rules.

Taxi services, according to the law, fall under the category of "public transportation" to carry passengers (this term is used to distinguish the services from freight cars) offering door to door services (to be distinguished from public buses, for instance),[46] specially marked, and equipped with a meter.[47] In addition, there are specific features that have to be assigned, such as the word "TAXI"[48] on the top of the car accompanied with a translucent light to indicate whether the taxi is vacant or occupied and the brand of the taxi company that has to be easily visible for potential passangers.[49] As a type of public transportation, taxis is also subject to the obligation to use a yellow shield number like other types of public vehicles in the country. There are two more types of shield number: red for state-owned cars and black for private cars. Taxi is allowed to operate only within a specific operating region so called the administrative district of regency.[50]

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46 Ibid. Art. 9, par. (1).

47 Regulation No. 32/2016, Art. 1, no. 15.

48 "TAKSI" in Indonesian.

49 Regulation No. 32/2016, Art. 9, par. (2).

50 Ibid. Art. 4. In Jakarta, for instance, it covers a larger area than a province (the Capital of Jakarta), it includes five areas covering also the suburbs, namely Jakarta, Bogor, Depok, Tangerang, and Bekasi. These areas are commonly known by their abbreviation *Jabodetabek*.

Prior to the operation, taxi businesses are subject to a mandatory requirement to obtain an operating license.[51] The licensing policy is based on the needs to supervise various aspects that are important first of all, for consumers. One of the major considerations is ensuring the quality of the vehicles and drivers, for which certain measurement and test have to be followed. For the eligibility of an entity that is capable of taking legal liability, a business entity that wishes to operate as taxi service providers is obliged to first establish a legal entity before it can apply for a license.[52]

Second, the licensing policy is based on the necessity to control the number of vehicles on the roads in the operating area concerned.[53] The basic idea of this policy is to maintain a balance between the market demand and the road capacity with the purpose of preventing excessive congestion on the roads.

The third aspect is ensuring the interest to protect public welfare by means of controlling the fulfillment of tax obligations by taxi companies.[54] The obligation to establish a legal entity as explained above also aims at covering this aspect of the policy.

Still in the spectrum of protecting the interests of consumers, taxi services are subject to the rate formula and price range (between the minimum charge and maximum cap) determined by the taxi company with the approval of an association of public transportation service providers (called *Organda*) and the government.[55] Based on this, the actual fare is calculated and shown on the meter. Local governments can also set the fares on the basis of the cost of living standard in the region.

While taxi service providers are subject to the rules above that also incur costs, in practice, online transportation network entered the market without having to meet the same requirements due to the absence of regulation applicable to them. In order to address the imbalance resulting from the asymmetric regulation, Regulation No. 32/2016 imposes the same obligations to online transportation network providers as those imposed to conventional taxi service providers. The Regulation clarifies further that the online transportation network are treated under the regulation as public transportation provision with an IT application basis,[56] as distinguished from taxi services, which are categorized as transportation for persons using motor vehicle not based on route.[57]

Regulation No. 32/2016 distinguishes between two different types of companies involved in the online transportation network business model: first, companies that provide IT applications that are used to bring together transportation service providers and their users; and second, companies that provide transportation services. Further,

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51 Ibid. Art. 21.

52 Ibid. Art. 22.

53 Ibid. Art. 5–7.

54 Law No. 22/2009, Art. 67.

55 This issue has been subject to discussions whether it would not qualify price cartel.

56 Law No. 22/2009, Art. 2, lit. c.

57 Ibid. Art. 3.

for the provision of online transportation network services, Regulation No. 32/2016 the first party to cooperate with the second party,[58] but it specifically prohibits the first party to also act as the second party.[59] Thus, the two parties will remain separate entities.

However, in the next step, Regulation No. 32/2016 also allows an exemption of the prohibition without clearly clarifying the ground for the exemption. It basically allows IT companies that provide applications and enter the online transportation network to operate businesses in the provision of transportation services for persons, under the condition that they are treated the same way as companies that operate in that particular industry, including conventional taxis.[60] Hence, they are also subject to the obligations applicable for conventional taxis: (1) mandatory requirement to obtain operating licenses,[61] (2) obligation to establish an Indonesian legal entity,[62] and (3) owning a car pool of at least five cars and a storefront, and employing only drivers with driver licenses, as pre-requisites to obtain an operating license.[63]

It seems that the regulation attempts to encourage IT companies operating as online platforms that provide applications for matching transportation service providers with users to limit their business strictly to providing such services. Once they expand their operation to provide the transportation services themselves, they will fall under the same regulations applicable for conventional taxis and this is something that they would not be fond of because it would incur costs that would not allow them to set their prices as low as before.

### 3.2. Integrating Public Policy in Self-Regulation of Online Transportation Network

Ensuring safe use of internet has become the interest of different stake holders and internet governance has been discussed from various perspectives. *Roy Balleste* argued that while there are numerous views on how to govern the internet, the most crucial concern in approaching internet governance should be human dignity.[64] Although the idea is sound and ideal, it has not been sufficiently discussed how it is defined and implemented. Nevertheless, there are a number of issues that become common concerns in the use of the internet, such as privacy and data protection, cyber security, the freedom to speech, dispute resolutions, and intellectual property rights protection. Moreover, there are also competition law concerns such as how to make sure that self-regulation is not abused by dominant market players to define terms and conditions in order to strengthen their market power or to facilitate

58 Ibid. Art. 41, par. (1).

59 Ibid. Art. 41, par. (2).

60 Ibid. Art. 42.

61 Ibid. Art. 21.

62 Ibid. Art. 22.

63 Ibid. Art. 23.

64 R. Balleste: *Internet Governance: Origins, Current Issues, and Future Possibilities.* Lanham–Boulder–New York–London, Rowman & Littlefield, 2015. 7.

cartel practices. The question is whether or how far self-regulation is capable of covering public interests or whether it would be better to leave those interests to state intervention in the form of government regulation.

The discussions could start from understanding the nature of internet governance. *Milton L. Mueller* observed that internet governance has two dimensions: technical management and regulatory control, and a fundamental issue when discussing about internet governance is to define the distinct scope of each dimension and where both intersect.[65] As *Laura DeNardis* put it, internet governance *'refers generally to policy and technical coordination issues related to the exchange of information over the Internet.'*[66] In the process of governing the internet, a question arises as to who governs the internet. *Rolf H. Weber* envisaged the multi-stakeholder of governing the internet as he stated that internet governance deals with questions, for instance, of *'who rules the internet, in whose interest, by which mechanisms and for which purposes'*.[67] Thus, there are various actors on the internet who have interests not only to have safe internet for their activities, but also take further steps, namely to design the rules of how to carry out activities on the internet.

*Mueller* argued that the control of the internet is exercised by institutions instead of by command. Parties interacting in the internet set rules to ensure reliable network equipped with monitoring and sanctions to safeguard the rules. However, the rules themselves are influenced by the bargaining power of the parties involved and thus, never entirely neutral in nature, because some parties are more powerful than the other. The way they are formulated and applied might favor certain interest over the other. In process, the rules will deal with pressures to adjust with the interest of various parties.[68] The exercise of bargaining power between parties is therefore part of the vital process in governing the internet. When discussing how the internet would challenge the nation-state, he argued that the internet will keep on creating institutional innovations in information and communication globally that both the volume of transactions and content on the internet might overcome the capacity of and transform traditional government processes. Also, the participation in the network as well as the authority over the network is decentralized as such that they are no longer closely aligned with political components.[69]

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65 M. L. Mueller: *Ruling the Root: Internet Governance and the Taming of Cyberspace*. Cambridge–Massachusetts–London, MIT Press, 2002. 8.

66 L. DeNardis: *Protocol Politics: The Globalization of Internet Governance*. Cambridge–Massachusetts–London, MIT Press, 2009. 14.

67 R. H. Weber: *Shaping Internet Governance: Regulatory Challenges*. Berlin–Heidelberg, Springer, 2010. 105. See also L. Pigoni: Internet Governance: Time for An Update. *CSS Analysis on Security Policy,* No. 163, November 2014. ETH Zurich, 2.

68 M. L. Mueller: *Ruling the Root: Internet Governance and the Taming of Cyberspace.* Cambridge–Massachusetts–London, MIT Press, 2002. 11.

69 M. L. Mueller: *Ruling the Root: Internet Governance and the Taming of Cyberspace.* Cambridge–Massachusetts–London, MIT Press, 2010. 4.

*J. Mathiason* categorized three types of governance functions in the internet, namely standardization, resource allocation and assignment, and public policy. While the first two are performed mostly by non-state actors that he classified further as engineers, entrepreneurs, and netizens (referring to avid internet users), the third function to formulate and enforce policy as well as dispute resolution function is exercised mostly by state.[70] Thus, he emphasized the role of state in governing the internet when it comes to public policy.

Self-regulation has been recognized as one way to regulate activities within the scope of a certain industry. In the context of internet governance, *Vey Mestdagh and Rudolf Rijgersberg* viewed self-regulation as an unsophisticated way to regulate the internet since the subjects of the regulation are at the same time also the creators and enforcers of the regulation.[71] *Virginia Haufler* explained that although the rules governing the behavior of the subjects are adopted voluntarily, they could also be backed up by a set of enforcement mechanisms that include agreements between companies or other groups.[72]

*George Christou and Seamus Simpson* argued that self-regulation from economic viewpoint implies both the freedom and the responsibility of market players to govern their own behavior in the market. Hence, a self-regulated market is a commercial construct of the most liberally ordered in the capitalist system.[73] This is also happening in online businesses in order to secure the interests of the parties involved in the transactions. Although the general rules that are mandatory in nature from the applicable laws or government regulations apply, certain activities are too complex to rely merely on the general rules, for which exhaustive discussions and interpretations are needed before the rules could be applied. Moreover, disruptive innovation might bring also new business models that have not yet been recognized in the existing laws or government regulations that applying the general rules to the transactions involved becomes more intricate. However, it could also be the case that self-regulation mechanism is chosen for the basic consideration that the online platforms wish to shield themselves from legal liability and sometimes they also limit their liability to an extent that it actually does not equally safeguard the interest of the users (or consumers). Moreover, it is could be the case that the rules in the self-regulation mechanism are not (at least easily) negotiable by applying standard clauses that do not leave sufficient rooms for users to negotiate otherwise.

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70 J. Mathiason: *Internet Governance: The New Frontier of Global Institutions*. London–New York, Routledge, 2009. 18.

71 C. Vey Mestdagh – R. Rijgersberg: Internet Governance and Global Self Regulation: Building locks for a General Theory of Self-Regulation. *The Theory and Practice of Legislation,* Vol. 4., N. 3., (2010) 385–404.

72 V. Haufler: *A Public Role for the Private Sector: Self-Regulation in A Global Economy.* Massachusetts, Carnegie Endowment for International Peace, 1957. 8.

73 G. Christou – S. Simpson: The Internet and Public-Private Governance in the European Union. *Journal of Public Policy*, Vol. 26., N. 1., (2006) 47–48.

*Michael Hutter* explained two guiding principles that lead to the creation of self-regulation. Both are complimentary. The first, and the dominant view, is the efficiency principle, in which private actors in the market, i.e. in the internet, among different alternatives concerning cost, effectiveness, and utility make a rational decision that results in new rules and organizational forms. Such result might emanate from an explicit choice or merely an unintended consequence of the sequence of choices. The second is the viable principle, according to which all regimes adopt and follow a set of rules and institute supporting regimes in order to maintain their continuity that results in evolutionary process of self-reproduction in which new regime will emerge and replace the old one.[74]

While extensive studies have been made to explain how internet stakeholders take responsibilities to design, follow, and enforce the rules on the internet, the question remains whether they would have either the will or the capacity to tackle public interests that might not or not directly fall under their own interests. The analysis on this issue focuses on the sector of online transportation network. I will start with discussing how self-regulation in online transportation network could be useful to protect the interests of parties involved in the transactions and how it could integrate public policy in the regulation. Afterwards, I will discuss the downsides of this type of regulation.

### *3.2.1. Public Policy and Self-Regulation*

There are advantages and disadvantages of choosing self-regulation over state regulation as a way to design the rule of the game in the market. *Ian Bartle and Peter Vass* claimed that self-regulation has advantages over state regulation in certain aspects, such as the more effective use of knowledge and expertise of all parties, more commitment within the industry, less regulatory burden placed on business entities and less expenses for state to make regulation, and better functioning of the market. [75] Because it is of the parties' best interest to design the most suitable rules for their activities, they will optimize the use of their knowledge and expertise to draw the rules. Following the logic of the game theory, they also understand that by abiding by the rules they have made, they will be better off than otherwise.[76] Hence, the commitment to follow the rules is more inner-driven than having to be enforced by external powers such as from law enforcers or courts. It entails less regulatory

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[74] M. Hutter: Efficiency, Viability, and the New Rules of the Internet. *European Journal of Law and Economics*, Vol. 11., N. 1., (2001) 5–22., especially 17. See also, D. Graham – N. Woods: Making Corporate Self-Regulation Effective in Developing Countries. *World Development*, Vol. 34., N. 6., (2006) 869.

[75] I. Bartle – P. Vass: A Theory of Government Regulation and Self-Regulation: A Survey of Policy and Practice. In: *Research Report 17.* Centre for the Study of Regulated Industry, School of Management, University of Bath, 2005. 2.

[76] See B. Christiansen – M. Basilgan: *Economic Behavior, Game Theory, and Technology in Emerging Markets*. Hershey, Business Science Reference, 2013. 33.

burden for business entities, because they understand best how to effectively design a set rules that costs the least. For state, as argued by *A. Roßnagel and G. Hornung*, it means also less expense in economic and political terms for regulation making, while state can then focus on more essential matters.[77] In the end, it results in a market that functions better, because of less infringement and hence, less legal costs being spent to deal with legal infringements.

On the benefit or loss regarding the costs for regulation making, *Peter Grajzl and Peter Murell* argued that it is influenced by country-specific aspects. The benefit of delegating regulatory powers to private sectors, i.e. self-regulation, will be greater than the loss, when the uncertainty around the result of the regulation making is large or when the divergence between the interests of producers and consumers is small.[78]

*Éric Brousseau* uttered that the absence of control by state in self-regulation also contributes to the innovative way the internet could be regulated, although it does not make it a perfect model.[79] Further, the technical logic that governs the work of the internet allows it to expel infringers from the platform and thus, facilitate the enforcement by means of access control and use of subscribers list. However, this power is also problematic, because it can be exercised without having to take into account constitutional or ethical principles, merely because it can technically be done. [80]

*Philip J. Weiser* citing *Robert Pitofsky*, Chairman of the United States Federal Trade Commission, explained how self-regulation could play a role in supporting public policy as follows:[81]

From a public policy perspective, self-regulation can offer several advantages over government regulation or legislation. It often is more prompt, flexible, and effective than government regulation. Self-regulation can bring the accumulated judgment and experience of an industry to bear on issues that are sometimes difficult for the government to define with bright line rules. Finally, government resources are

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77 A. Rossnagel – G. Hornung: Self-Regulation of Internet Privacy in Germany and the European Union. *SungKyunKwan Journal of Science and Technology Law,* Vol. 55., 2007. 61. See also, S. Ranchordas: Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy. *Minnesota Journal of Law, Science and Technology*, Vol. 16., N. 1., (2015) 439.

78 P. Grajzl – P. Murrell: Allocating Law Making Powers: Self-Regulation vs Government Regulation. *Journal of Comparative Economics*, Vol. 35., 2007. 540.

79 É. Brousseau: *Internet Regulation: Does Self-Regulation Require an Institutional Framework?* Paper to be presented at the DRUID Summer Conference on "Industrial Dynamics of the New and Old Economy – Who Is Embracing Whom?" Copenhagen–Elsinore 6–8 June 2002. 2.

80 É. Brousseau: *Internet Regulation: Does Self-Regulation Require an Institutional Framework?* Paper to be presented at the DRUID Summer Conference on "Industrial Dynamics of the New and Old Economy – Who Is Embracing Whom?", Copenhagen–Elsinore 6–8 June 2002. 9–11.

81 P. J. Weiser: The Future of Internet Regulation. *UC Davis Law Review*,Vol. 43., 2009. 529–590, 557., fn. No. 106.; cited from R. Pitofsky: *Self Regulation and Antitrust*. Address at the D.C. Bar Association Symposium, February 18, 1998. See also C. T. Marsden: Beyond Europe: The Internet, Regulation, and Multistakeholder Governance – Representing the Consumer Interest? *Journal of Consumer Policy*, Vol. 31., 2008. 117.

limited and unlikely to grow in the future. Thus, many government agencies, like the FTC, have sought to leverage their limited resources by promoting and encouraging self-regulation.

Self-regulation can also be useful to gain user trust as pointed out by *Z. Tang, Y.D. Hu and M. D. Smith*.[82] This is why online feedback mechanisms through which businesses build their reputation is important. Users, or consumers, rely on producer's reputation more than on procedural laws or alternative dispute resolution mechanisms when deciding in split seconds whether they will buy the product or not. Trust via reputation is hence, seen as the basis of dispute prevention mechanism that gain more importance than dispute settlements either by or without court.

However, there are limitations in how public interests could be fully dealt with self-regulation by default in such a way that state intervention in the form of regulation is no longer needed. *Zoë Bird* criticized self-regulation as falling shorts certain expectations to protect public and consumer interests, such as privacy protection, security, and access to diverse content.[83] *Norman E. Bowie and Karim Jamal* also expressed privacy concerns in self-regulation of internet in the absence of government regulation.[84] *Ian Bartle and Peter Vass* in their study warned that self-regulation should be used with certain cautions. One of them is that self-regulation has to represent not only private but also public interests.[85] *John E. Savage and Bruce W. McConell* in their paper suggested that self-regulation of the multi-stakeholder internet has several disadvantages. It lacks of rules applicable for multi-stakeholder operation, suffers a perceived lack of accountability, many states consider it as having feeble legitimacy, and there is inequality of engagement from stakeholders who are not technology providers.[86]

All types of regulation have its scope of applicability. Even when territorial scope does not play a role due to a non-territorial nature of the activities, such as the internet or to be more specific, online businesses, it remains subject to other scope limitations, such as the platform itself. How to use *Google* is not applicable to *Bing* or *Ebay,* for instance. Hence, one of the limitation is that self-regulation within a specific market – relevant market borrowing the term used in competition law - cannot include rules

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82 Z. Tang – Y. D. Hu – M. D. Smith: Gaining Trust through Online Privacy Protection: Self-Regulation, Mandatory Standards, or Caveat Emptor. *Journal of Management Information Systems*, Vol. 24., N. 4., (2008) 153–173.

83 Z. Baird: Governing the Internet: Engaging Government, Business, and Nonprofits. *Foreign Affairs*, Vol. 81., N. 2., (2002) 16.

84 N. E. Bowie – K. Jamal: Privacy Rights on the Internet: Self-Regulation or Government Regulation? *Business Ethics Quarterly*, Vol. 16., N. 3., (2006) 331. See also M. J. Culnan: Protecting Privacy Online: Is Self-Regulation Working? *Journal of Public Policy & Marketing*, Vol. 19., N. 1., (2000) 22.; D. Hirsch: The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation? *Seattle University Law Review*, Vol. 34., 2011. 443.

85 Bartle–Vass op. cit. 3.

86 J. E. Savage – B. W. McConell: *Exploring Multi-Stakeholder Internet Governance.* Report, East West Institute, 20 January 2015. https://www.eastwest.ngo/idea/exploring-multi-stakeholder-internet-governance.

applicable to other market. The rules governing online transportation network are not applicable to conventional taxis and cannot be expected to take into account interests of parties beyond their own platform. The problem is that public interests might occur beyond the platform, but are affected by activities within the platform. Thus, the ability of self-regulation to govern activities in their own specific sector or platform should not release stat from its task to shield public interests by means of state regulation or by means of supervision and regulatory reviews.

### *3.2.2. Self-Regulation and Anticompetitive Conducts*

Self-regulation might raise competition law concerns when it is (mis)used to facilitate anticompetitive conducts, for instance if it is used to enable companies providing the services to exclude competitors or to exploit their market power in the market. Hence, self-regulation is rightly subject to competition authority supervision.

Exclusionary conducts might occur for instance when self-regulation contains a privacy policy that restricts users to provide the same personal data or the same quality of data to competitors or limiting the choice of users to use services provided by the online platform's competitors. It could also be an exclusionary policy when it hinders portability to allow them moving to or using the same services from competitors.

Exploitative conducts, on the other hand, might be the case when the freedom of user to negotiate a policy is restricted. Due to the online platform's dominance in the market, the user would be left only with the option to take the policy or leave it and use less preferable services provided by the online platform's competitors.

The Policy Guidelines[87] published by KPPU alert that competition authority shall consider self-regulation with cautions. Because the incentive to compete is an important element of encouraging innovation, the Guidelines find it necessary to carefully evaluate regulations having potentials to facilitate cartels. Here, innovation should play an important role as the main concern of the competition authority for evaluating such regulations, to which type self-regulation is considered to belong.[88]

As regards online transportation network, anticompetitive pricing concern arises due to the low prices offered in comparison to those of conventional taxi providers. The concern is now under the scrutiny of KPPU focusing on whether such pricing is part of predatory pricing in the early stage that aims at driving out competitors from the market.[89] KPPU might also need to look into another concern whether there is no abuse of power by squeezing suppliers, i.e. vehicle owners, in order to generate such competitive prices in the market.

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87 KPPU Regulation No. 04 of 2016.

88 KPPU Regulation No. 04 of 2016, Attachment, p. 33.

89 KPPU: Predatory Pricing, KPPU Awasi dan Selidiki Angkutan Online. http://www.kppu.go.id/id/blog/2016/10/predatory-pricing-kppu-awasi-dan-selidiki-angkutan-online/.

## 4. Self-Regulating Online Transportation Network or Government Regulation?

### 4.1. Balancing Asymmetrical Regulation Through Government Regulation

Asymmetrical regulation tends to result in at least perceived inequality before the law for market players. Although asymmetrical regulation could be a result from the difficulties to predict innovation and hence, first, certain innovative products are missing from the existing regulation, and second, either condemn the product as illegal or applying the regulation on the basis of one regulation fits all would not be fair, it creates tension to some extent in the market because of the absence of the legal cost for new comers could bring new comer advantages.

The enactment of the new Ministry Regulation, Regulation No. 32/2016, was a response of the Government in its attempt to balance the asymmetrical regulation resulting from the entrance of online transportation network in the market. The message to deliver with it is that the Government has taken action to restore justice. According to the Regulation, companies operating as online transportation network is given two options. First, they can operate merely as online application providers, or second, they can at the same time also operate as conventional taxi providers, e.g. operating their own cars, for which similar rules with those applicable for conventional taxi providers apply.

Although the new regulation might pragmatically solve the problem – which remains to be seen in the coming years -, the question remains: how fast the government would or should respond in similar ways whenever new innovation occurs in the market? It seems that changing regulations all the time would not only be costly, but also unpredicted. Bearing in mind that legal compliance would incur costs; unpredictable changes of regulation would be daunting for market players and tend to deter them from innovating.

### 4.2. Self-Regulation of Online Platform Instead of Government Regulation

*M. Mueller, J. Mathiason, and H. Klein* while proposing principles and norms for the foundation of global internet governance suggested that "governmental forms of supervision and oversight must be strategically placed but also carefully limited and lawful" and instead, to legitimate and maintain multi-stakeholders governance.[90] Although this view seems to be favoring limited governmental intervention in the internet governance, it should be understood in the context of the global nature, i.e. the non-territorial characteristic, of the internet that entails the necessity of detaching from the traditional approach of a top-down regulating mechanism based on territorial state(s) interests.

[90] M. Mueller – J. Mathiason – H. Klein: The Internet and Global Governance: Principles and Norms for a New Regime. *Global Governance*, Vol. 13., N. 2., (2007) 250.

There are matters that still require state involvement in the form of regulation. In utilizing self-regulation, *J. P. Kesan and A. A. Galo* proposed a mixed model of bottom-up and top-down regulation approach.[91] Certain issues such as tax compliance, security measures on the internet or in online transactions, and consumer protection still require state intervention at least in provision of the guiding principles and supervision, as well as law enforcement when self-regulation fails to enforce them on free will or voluntarily basis.

### 4.3. Regulating Innovation and Sharing Economy

Innovation is hard to regulate, especially disruptive innovation, because it is difficult to envisage. If at all, the role of regulations as regards innovation would be to encourage and provide incentives to innovate. On the other hand, leaving innovative products unregulated might also create legal uncertainty. Sharing economy, the underlying business idea of online transportation network, also elevates legal issues that might lead to uncertainty, because there are elements of the business operation that do not fall under the existing legal categories.[92] Certain issues such as tax, consumer protection, insurance, security measures, business licensing, and pricing mechanisms are among others that have been addressed in the debate of the legality of online transportation network.

As regards consumer protection, *C. Koopman, M. Mitchel, and A. Thierer* argued that traditional legal measures are not the only way to protect the interests of consumers. In the case of sharing economy, they specifically addressed the role of reputation established through the modern online feedback mechanisms.[93] Reputation has increasingly important roles for business players to build consumer trust[94] and consumers have a critical part in defining the reputation of business players they are dealing with. This mechanism is also used in sharing economy business model. Only reputable players will survive in the market. Hence, the compliance to what is necessary to serve the consumer interests is not enforced by law, but by understanding how the business works.

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[91] J. P. Kesan – A. A. Galo: Why Are the United States and the European Union Failing to Regulate the Internet Efficiently? Going Beyond the Bottom-Up and Top-Down Alternatives. *European Journal of Law and Economics*, Vol. 21., 2006. 262–263.

[92] V. Katz: Regulating the Sharing Economy. *Berkeley Technology Law Journal*, Vol. 30., N. 385., (2015) 1068.

[93] C. Koopman – M. Mitchel – A. Thierer: The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change. *Mercatus Research,* George Mason University, 2014. 16.

[94] US Federal Trade Commission: The Sharing Economy: Issues Facing Platforms, Participants & Regulators. *Staff Report*, November 2016. 51.

## 5. Conclusion

The role of innovation in the emerging of the digital market becomes more prominent, but it also raises legal questions. While innovation has not been given a clear role in shaping suitable approaches, markets take their own way to respond to the new development as shown in the use of online transportation network. Along with this development, regulation asymmetry has been accused for not allowing a level playing field between conventional taxis and online transportation network and the concept of the sharing economy challenges current policy approach in the country that tends to prefer ex-ante regulation approach in transportation industry. This paper argues that self-regulation of online platform could be a better alternative than attempting to restore the balance of the existing regulation asymmetry by means of introducing a government regulation aiming at fitting all size. However, state intervention in the form of state regulation, supervision and regulatory reviews remain necessary to protect public interests that are not or difficult to be covered by self-regulation such as issues concerning tax compliance, security measures on the internet or in online transactions, intellectual property rights, consumer protection, and fair competition.

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# SMASHING PUMPKINS: INTERVENTIONS TO THE ECONOMY IN HUNGARY, FROM A COMPETITION POLICY PERSPECTIVE

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## 1. Introduction

In a previous article, I described the actual mishaps in competition regulation in Hungary.[1] The newly elected Hungarian Government introduced very protectionist rhetoric followed by similar actions. In this article, I will show some of the actions of the government and look at how this relates to mainstream competition policy thinking.

The Government began a large-scale redirection of the economy as Hungary was on the verge of bankruptcy. This redirection involved several contested decisions, such as: Erzsébet utalvány (cafeteria vouchers system); lex MOL; and statutory price drops for utilities.[2]

For a long time, Hungarian competition policy was regarded as one of the best among countries with newly introduced competition legislation.[3] This was a result of the legacy of the first few leaders of the Hungarian competition authority, who

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1 See Pál Szilágyi: Hungarian Competition Law & Policy: The Watermelon Omen. *Competition Policy International – Antitrust Chronicle*, 10/2. (2012) 2.

2 See also Márton Varjú – Mónika Papp: *The crisis, national economic particularism and EU law: What can we learn from the hungarian case?* http://hpops.tk.mta.hu/uploads/files/The_crisisCMLREV.pdf.

3 See also Tihamér Tóth: The Reception and Application of EU Competition Rules in Hungary: An Organic Evolution. *PLWP*, 2013/17. https://ssrn.com/abstract=2402616.; Tihamér Tóth: EU Enlargement and Modernisation of Competition Law: Some National Experiences. In: Damien Geradin (ed.): *Modernisation and enlargement: two major challanges for EC competition law.* Antwerpen–Oxford, Intersentia, 2004. 367–384.; Tihamér Tóth: Competition Law in Hungary: Harmonisation Towards EU Membership. *European Competition Law Review*, 19/6. (July 1998) 358.

could achieve large-scale real independence for the authority. The leaders of the competition authority changed after the election of the new government in 2010. There was a large turnover of former competition authority too. These departures left the new President and his team with the responsibility to recalibrate the authority. The staff that was hired around that time now hold leading positions within the national competition authority.

Skimming through the case law we see several protectionist measures that make it difficult to navigate the Hungarian competition policy landscape. In a previous article,[4] I highlighted the difficulties arising from the first few interventions by the Hungarian government. In this article, I will elaborate on the issue that draws a clear, systematic system of national protectionist measures.

## 2. Legislative interventions

### 2.1. Direct intervention – a consumer welfare gain or loss?

One of the first initiatives of the new Government after the 2010 election victory was requiring utilities to drop their prices for households by 10%, including electricity, gas or water utilities. This is a clear short-term gain for households. Between 2010 and 2015, household electricity prices decreased 27.3% and household gas prices fell 36.5%.[5] Consumers in competition law include both natural persons and undertakings that are the final buyers of a particular product or service. As can be seen in the same European Commission report, the end-user electricity prices paid by industrial consumers only had a very small price range and was basically stagnant while many Member States faced an increase in prices. Based on pricing alone, the Government intervention had led to a clear consumer welfare gain in the short term. However, many question what impact this will have on the state of the utilities networks and innovation. In the water sector there are already some signs that the underinvestment and lack of systematic maintenance and upgrades is leading to harm that might be greater than the savings generated by the price drop. No systematic study on this exists so a conclusion cannot be drawn yet.

### 2.2. Transfer of welfare

For a short time, a very important topic was the role of Uber on the market. It is very obvious that Uber generates huge consumer welfare gains. It provided a clear system for paying for travel with the cab and led to decreased prices for consumers. Quality was also improved for individual consumers since, contrary to the taxi companies, consumers could rate the drivers and achieved a higher rate of satisfaction and better-quality treatment in the end. The decree on regulating taxi drivers was adopted a

4 Szilágyi (2012) op. cit. 2.

5 See European Commission: 2nd Report on the State of the Energy Union (2017).

short time before Uber entered the market. Probably due to political reasons, the government finally succeeded in expelling Uber from the Hungarian market. Uber's expulsion led to higher, regulated prices for consumers and a welfare transfer to the few taxi drivers.

### 2.3. Wasting an opportunity

In September 2014, the Hungarian Competition Authority began an investigation into a public procurement cartel and conducted a dawn raid.[6] Four companies connected with the undertakings allegedly shared information with each other regarding public procurement procedures in the waste collection sector between 2012 and 2014. In the decision that finally closed the case, the GVH stated that protecting public interests would have warranted a full investigation of the alleged practices, especially due to the very high market share of the undertakings participating in the alleged cartel and the nationwide presence of these companies.[7] In December 2014, an MP proposed an amendment to the Act on the Foundations of the Central Budget of Hungary arguing that public procurement of products in the waste collection sector that are subject to environmental product charges requires information sharing between the undertakings that are capable of collecting waste and that if the undertakings entered into price competition it would endanger waste collection and environmental policy goals. Therefore, such cartels shall be exempted from the cartel prohibition. The final act adopted by the Hungarian Parliament was worded, as follows: "[a]n infringement of Article 11 of the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices cannot be established for behavior committed in 2012-2013 regarding the public procurements concerning the execution of the activities of the OGyHT."[8] As can be seen, the Parliament basically exempted all cartels in the sector in a specific act directed at infringements committed in the previous two years. These rules entered into force on the 1st of January 2015. In February 2015 the GVH terminated the investigation and closed the case. The GVH decision particularly relied on the act and stressed that under such circumstances, public interest is best served if the GVH concentrates on other possible infringements of the competition act.[9] However, the national competition authority failed to argue why Article 101 (1) TFEU was not applied to the infringement in the case. According to the press release issued a day after the dawn raids, the undertakings being investigated basically cover the entire market and have a nationwide presence.

### 2.4. Agri~~cartel~~culture – nomen est omen

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6 See press release on 19 September 2014. http://www.gvh.hu/sajtoszoba/sajtokozlemenyek/2014-es_sajtokozlemenyek/kartellgyanu_miatt_inditott_eljarast_a_gazdasagi_v.html.

7 See Vj/67-59/2014 – ALCUFER et al., 19/02/2015.

8 Article 125 of Act 99 of 2014.

9 Vj/67-59/2014 – ALCUFER et al., 19/02/2015.

Even today the competition act has another "interesting" article: Article 93/A. In 2012, an act[10] introduced some surprising passages into the competition act.[11] The new rules came into force on the 28th of November 2012.[12] In May 2015, the Minister for Justice proposed an amendment to the competition act to stress that if EU law is applicable, the rules in the article do not apply. The legislation in force currently is, as follows:

(1) In respect of agricultural products an infringement of the prohibition pursuant to Article 11 shall not be established if the distortion, restriction, or prevention of competition resulting from an agreement pursuant to Article 11 does not exceed the extent which is necessary to attain an economically justified, legitimate income and the player of the market affected by the agreement is not shut out from the attainment of such income.

(2) The minister responsible for agricultural policy shall establish whether the conditions of the exemption pursuant to paragraph (1) are met.

(3) In the course of an investigation of the infringement of the prohibition pursuant to Article 11 in respect of an agricultural product the Hungarian Competition Authority shall obtain the statement of the minister responsible for agricultural policy pursuant to paragraph (2) and shall proceed in line with it. The minister responsible for agricultural policy shall provide its statement within sixty days from the receipt of the inquiry of the Hungarian Competition Authority, for the period of which the Hungarian Competition Authority shall suspend its proceeding.

(4) The competition council proceeding in the case shall suspend the imposition of a fine in the case of an agreement infringing Article 11 where the infringement has been committed in respect of an agricultural product. In such a case the competition council proceeding in the case asks the parties to the agreement or the concerted practice to bring their conduct in line with the legislation by setting a time limit. If the time limit expires to no effect, the competition council proceeding in the case shall impose a fine.

(5) Paragraphs (1)–(4) shall only apply to a case, if the necessity of the application of Article 101 of the TFEU does not arise. The necessity of the application of Article 101 of the TFEU shall be established by the Hungarian Competition Authority in its competition supervision proceeding pursuant to Article 3(1) of Council Regulation (EC) No 1/2003, before making the final resolution.

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[10] Act no. CLXXVI of 2012 on amendment of Act CXXVIII of 2012 on inter-branch organisations and on certain aspects of agricultural markets.

[11] See also Tihamér Tóth: The fall of agricultural cartel enforcement in Hungary. *European Competition Law Review*, 34/7. (2013) 359.

[12] I have already written about this previously: Szilágyi (2012) op. cit. 2.

While writing this article, the last case concerning agriculture in Hungary was in 2016 (a concentration).[13] Prior to that, there was a case on misleading advertising.[14] The last case concerning the antitrust rules a matter that was terminated based on the amendment of the Competition Act in 2012.[15]

In 2013, the Hungarian Chamber of Agriculture was established as a public body. The Hungarian Chamber of Agriculture (HCA) covers the whole domestic food chain, the agricultural production activity and the field of rural development through its members. Recently, the Chamber has been pushing for stabilization in the agricultural market.

### 2.5. Public interest at stake

Since 2010 more than 200 firms were renationalized, for which more than 5 billion EUR was paid out.[16] As part of this process, in 2013 a new article was introduced to the competition act.[17] Article 24/A. The new act entered into force the day after official publication. The new article concerns merger control and was amended in 2016. The original text of the act stated that there is no need to ask for the authorization of the GVH for certain concentrations. This was amended and after the 2016 amendment entered into force, the text changed to the following: "[t]*he Government may, in the public interest, in particular to preserve jobs and to assure the security of supply, declare a concentration of undertakings to be of strategic importance at the national level. Such concentration must not pursuant to Article 24 be notified to the Gazdasági Versenyhivatal*."

Since the adoption of these rules there have been several government regulations to declare certain concentrations to be of strategic importance at the national level. These include:

- a concentration in the gas sector,[18]

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13 Vj-69-116/2016. GreenChem Hungary Kft. and Multicore Kereskedelmi és Szolgáltató Kft.

14 Vj/82-72/2013. Első Magyar Karbongazdálkodási, Megújuló Energetikai, Egészségmegőrzési és Ingatlanhasznosítási Technológiákat Fejlesztő Innovációs Projekt Kft. et al.

15 Vj-62-64/2012. ALDI Magyarország Élelmiszer Bt. et al.

16 See Péter Mihályi: The renationalization of privatized assets in Hungary, 2010–2014. MT-DP – 2015/7. http://econ.core.hu/file/download/mtdp/MTDP1507.pdf.

17 Act Nr. CXCI of 2013. Article 1.

18 146/2017. (VI. 12.) Government regulation: az MFB Magyar Fejlesztési Bank Zártkörűen Működő Részvénytársaságnak a Fővárosi Gázművek Zártkörűen Működő Részvénytársaságban fennálló társasági részesedése ENKSZ Első Nemzeti Közműszolgáltató Zártkörűen Működő Részvénytársaság általi megszerzése nemzetstratégiai jelentőségűnek minősítéséről; and 268/2015. (IX. 14.) Government regulation: a GDF International S.A.S.-nek a GDF SUEZ Energia Magyarország Zártkörűen Működő Részvénytársaságban fennálló részesedése Fővárosi Gázművek Zártkörűen Működő Részvénytársaság általi megszerzése nemzetstratégiai jelentőségűnek minősítéséről; and 14/2014. (I. 29.) Government regulation a Fővárosi Gázművek Zártkörűen Működő Részvénytársaság 49,83%-os társasági részesedése MVM Magyar Villamos Művek Zártkörűen Működő Részvénytársaság általi megszerzése nemzetstratégiai jelentőségűnek minősítéséről; and 330/2014. (XII. 16.) Government regulation az MFB Magyar Fejlesztési Bank Zártkörűen Működő Részvénytársaságnak a Fővárosi

- energy sector,[19]
- electriciy sector,[20]
- tobacco industry,[21]
- the exhibition real estate market,[22]
- financial sector,[23]
- railway sector,[24]
- TV broadcasting sector[25] and

Gázművek Zártkörűen Működő Részvénytársaságban történő részesedésszerzése nemzetstratégiai jelentőségűnek minősítéséről; and 338/2014. (XII. 18.) Government regulation: az MVM Magyar Villamos Művek Zártkörűen Működő Részvénytársaságnak a Fővárosi Gázművek Zártkörűen Működő Részvénytársaságban fennálló részesedése MFB Magyar Fejlesztési Bank Zártkörűen Működő Részvénytársaság és MFB Invest Befektetési és Vagyonkezelő Zártkörűen Működő Részvénytársaság általi megszerzése nemzetstratégiai jelentőségűnek minősítéséről; and 254/2014. (X. 2.) Government regulation: a Magyar Gáz Tranzit Zártkörűen Működő Részvénytársaság társasági részesedéseinek állam javára történő megszerzésére irányuló ügylet nemzetstratégiai jelentőségűnek minősítéséről; and 218/2014. (VIII. 28.) Government regulation a Fővárosi Gázművek Zártkörűen Működő Részvénytársaság Fővárosi Önkormányzat tulajdonában lévő társasági részesedésének állam javára történő megszerzése nemzetstratégiai jelentőségűnek minősítéséről.

19 326/2016. (X. 27.) Government regulation: az Alpiq Csepel Korlátolt felelősségű Társaság 100%-os üzletrészének MVM Magyar Villamos Művek Zártkörűen Működő Részvénytársaság általi megszerzése nemzetstratégiai jelentőségűnek minősítéséről.

20 434/2016. (XII. 15.) Government regulation: az EDF International S.A.S.-nek az EDF DÉMÁSZ Zártkörűen Működő Részvénytársaságban fennálló részesedése ENKSZ Első Nemzeti Közműszolgáltató Zártkörűen Működő Részvénytársaság általi megszerzése nemzetstratégiai jelentőségűnek minősítéséről and 455/2016. (XII. 19.) Government regulation: az MVM Magyar Villamos Művek Zártkörűen Működő Részvénytársaságnak az Első Nemzeti Közműszolgáltató Zártkörűen Működő Részvénytársaságban történő részesedésszerzésének nemzetstratégiai jelentőségűnek minősítéséről.

21 151/2015. (VI. 18.) Government regulation: a Tabán Trafik Dohánytermék-forgalmazó, Kereskedelmi és Szolgáltató zártkörűen működő részvénytársaság és a BAT Pécsi Dohánygyár Korlátolt Felelősségű Társaság összefonódásának közérdekből történő nemzetstratégiai jelentőségűnek minősítéséről.

22 14/2016. (II. 9.) Government regulation a Foncière Polygone Hungária Korlátolt Felelősségű Társaság 99,9934169% társasági részesedésének állam javára történő megszerzésére irányuló ügylet nemzetstratégiai jelentőségűnek minősítéséről.

23 190/2014. (VII. 30.) Government regulation: a Magyar Államnak az MKB Bank Zrt.-ben történő részesedés szerzése társasági összefonódásának közérdekből történő nemzetstratégiai jelentőségűnek minősítéséről; and 48/2014. (II. 26.) Government regulation: a Magyar Takarékszövetkezeti Bank Zártkörűen Működő Részvénytársaság és a Magyar Takarék Befektetési és Vagyonkezelő Zártkörűen Működő Részvénytársaság összefonódása közérdekből nemzetstratégiai jelentőségűnek minősítéséről; and 56/2015. (III. 17.) Government regulation a Budapest Bank Zrt. tevékenysége feletti befolyás megszerzésével megvalósuló társasági összefonódás közérdekből történő nemzetstratégiai jelentőségűnek minősítéséről.

24 235/2014. (IX. 18.) Government regulation: a Magyar Államnak a Bombardier MÁV Hungary Kft.-ben történő részesedés szerzése társasági összefonódásának közérdekből történő nemzetstratégiai jelentőségűnek minősítéséről

25 106/2014. (III. 26.) Government regulation: az „Antenna Hungária" Magyar Műsorszóró és Rádióhírközlési Zártkörűen Működő Részvénytársaság 100%-os társasági részesedése állami tulajdonban álló társaság általi megszerzése nemzetstratégiai jelentőségűnek minősítéséről.

- IT sector[26].

The regulations adopted by the Government typically do not comment or provide reasons for declaring these concentrations to be a matter of national interest. Most of the time, the reason is quite clear that the state is basically monopolizing the markets concerned, or the Government wants to intervene on the markets and increase the market share that is covered by undertakings not owned by foreign undertakings.

### 2.6. Missed(?) opportunities

One of the main focuses of the Government in recent years is the tourism sector. Therefore, it is surprising that the Government misses some very important market aspects that would also increase consumer welfare.

The Hungarian Competition Authority completed a market analysis of the market for online hotel bookings. The final report was adopted in May 2016.[27] The report found no real competition concerns on the Hungarian market of online travel bookings. However, the report included some severe flaws[28] and was basically going against the mainstream approach of EU states. Basically several Member States abolished price parity clauses in the travel market sector, by either adopting a decision that it is anticompetitive[29] or by legislative act[30]. After careful evaluation it is obvious that the current price parity conditions are leading to severe consumer welfare loss. Recent data shows that consumer welfare increases in those Member States where price parity was abolished, even in short term.[31] Since the final sector inquiry report, the GVH might have noticed developments on the market that could bring enforcement action back to the table since it carried out a dawn raid at Booking.com in March 2017.[32] According to information in the press, this raid was done not for price parity issues, but for another type of market manipulation.

Given the current tools available to consumers, and their shopping and searching habits for accommodation, it is obvious that an introduction to the competition in

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[26] 282/2014. (XI. 14.) Government regulation: a WELT 2000 Szolgáltató és Kereskedelmi Korlátolt Felelősségű Társaság társasági üzletrészének a Magyar Állam javára történő megszerzése nemzetstratégiai jelentőségűnek minősítéséről

[27] Gazdasági Versenyhivatal: *Végleges jelentés az online szálláshelyfoglalás piacán lefolytatott ágazati vizsgálatról*. (2016).

[28] See further Pál Szilágyi: The evaluation of the Hungarian sector inquiry in the online travel market. *PLWP*, 2017/16. http://www.plwp.eu/files/2017-16_Szilagyi.

[29] See B9-121/13 Booking.com B.V., Booking.com (Deutschland) GmbH, HRS-Hotel Reservation Service Robert Ragge GmbH, Expedia Inc., Hotelverband Deutschland (IHA) e.V.

[30] E.g. France, Italy or Austria. See also European Competition Network: *Report on the monitoring exercise carried out in the online hotel booking sector by EU competition authorities in 2016*. (2016).

[31] See e.g. Matthias Hunold – Reinhold Kesler – Ulrich Laitenberger – Frank Schlütter: Evaluation of Best Price Clauses in Hotel Booking. *ZEW Discussion Paper*, No. 16-066. http://ftp.zew.de/pub/zew-docs/dp/dp16066.pdf.

[32] See e.g. www.portfolio.hu/vallalatok/lecsapott_a_gvh_a_bookingcom-ra.245902.html.

commission rates charged by online travel agents would clearly benefit consumers and not hinder innovation on the market.[33]

### 2.7. Decisions of the GVH

For the sake of this article, and a short survey, I checked the GVH antitrust decisions from 2015-2017.[34]

Cases under Article 102 TFEU and the national equivalent: There were only 5 decisions (against MasterCard[35] and against Sanofi-Aventis[36] and against three national undertakings (two owned by the state). There were dozens of decisions concerning allegedly anticompetitive agreements and the cases involved both national and foreign undertakings.

Pure statistics is of course not conclusive as to whether there is a bias or not, but taking into account also the substance of the cases, it seems that there is no systematic protection of national undertakings by the competition authority.

## 3. Theory and practice

Current mainstream competition policy found its soul in the early 1990s, by declaring consumer welfare as the goal of competition policy enforcement. This goal can easily be translated to common sense, that money is best spent by those who earn it. At least in theory, competition policy protects the final consumer by ensuring lower prices, better quality[37] and, according to a recent trend, choice.[38]

Giuliano Amato wrote a great book on antitrust law[39] in which he basically argued that too much private or public power is harmful for the society. Consumers are best served if neither the state nor the private actors are capable of seizing market control.

One important aspect of competition that is difficult to measure, in practice, is innovation on the market. Consumers might be better off in the short run by

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[33] An interesting fact is, that the overcharge paid by consumers – in the form of higher room prices, due to high commission rates charged by the online travel agencies – is mainly spent on advertisement of the services of the travel agent and not on innovation. Since the advent of the OTA systems, there are hardly any breakthrough innovation visible. (The author of this article has ownership in hotels).

[34] Those that were published until 29/08/2017 on the webpage of the authority.

[35] Vj-46/2012/244.

[36] Vj/61-460/2014.

[37] See also Ariel Ezrachi – Maurice E. Stucke: *The Curious Case of Competition and Quality*. SSRN eLibrary. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494656.

[38] See also Paul Nihoul: *Freedom of Choice – The Emergence of a Powerful Concept in European Competition Law*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2077694.; Robert H. Lande – Neil W. Averitt: *Using the 'Consumer Choice' Approach to Antitrust Law*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121459.; Julian Le Grand: *The other invisible hand : delivering public services through choice and competition*. Oxford, Princeton University Press, 2007.

[39] Giuliano Amato: *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market*. Oxford, Hart Publishing, 1997.

achieving lower prices but they might be left in the "middle-ages" if innovation falters for a longer period. Innovation is not something one can easily measure. A breakthrough idea might not come for decades and no one knows in advance which ideas will turn out to be game changers for an undertaking, or even for the society. It is beyond question that constant innovation is costly and it is difficult to define at what particular point price competition prevails over innovation, by undermining innovation due to loss of earnings.

In 2017, the current Hungarian government has seemed to follow a very successful economic policy according to macroeconomic data. Basically, important macroeconomic data is consistently moving in the right direction.[40] As I highlighted earlier, some elements of the economic policy included direct and indirect intervention to the market. At this time, it is not possible to irrefutably state whether consumers are better off because of the interventions, such as a price drop in electricity prices (10% statutory decrease) or worse off, due to, lower pace of innovation and less upgrades on the grid.[41]

One argument by critics of the current government policy is that the state is monopolizing the markets by nationalizing industries. From a competition policy perspective, whether there is private or state ownership, is irrelevant.[42] Values of competition can be both achieved by state- or privately-owned enterprises, by monopolies or by a large number of competing firms. Therefore nor is private ownership good, nor state ownership bad in itself. One key aspect that ensures the protection of consumer welfare on the market is the contestability of markets. If market entry remains possible and feasible, international competition will ensure the proper functioning of the market and deliver the expected consumer welfare gains. Apart from some very radical interventions by the Hungarian state related to the tobacco market, cafeteria system, nationalization of some utilities, most of the interventions are not endangering the protection of consumer welfare. Some of the radical interventions are found in other policy goals, like protection of human health (tobacco) or industrial policy and it would be very difficult to condemn those practices taking into account similar interventions by other Member States.

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40 I am not an expert in macroeconomic policy, therefore I am not allowing myself conclusions on the real reasons behind the improvement of these macroeconomic factors.

41 It is not necessarily the case that decrease in revenue leads to lower innovation or less upgrades, it might be that innovation is in the right state, since there was for example overspending, etc.

42 Another take on this question is that the cost of nationalization now is much smaller than the earnings via privatization in the '90s. See Mihályi op. cit.

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# PUBLIC INTEREST AND A PLACE FOR NON-COMPETITION CONSIDERATIONS IN POLISH COMPETITION LAW

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## 1. Introduction

For some time one can observe growing discussion as to whether antitrust scrutiny based on economic reasoning and market analysis should also include broader, external considerations.[1] The question is, whether public interest goals not directly linked to consumer welfare or market integration, in the case of EU competition law, can or should be pursued by competition law. This article presents the experience of Polish competition law in this context. In particular, attention is focused on the meaning public interest invoked in Article 1 of the Polish Competition Act.[2] We study the case law of Polish courts to the extent it offers any suggestions as to whether non-competition considerations make part of the assessment under the Polish Competition Act. In particular, we analyse if public interest is associated, in the context of applying the Competition Act, only with economic competition law goals (consumer welfare) or if it is related to other goals that can be pursued in the public interest, such as protection of public health or protection of environment. We also study whether

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1 See A. Ezrachi: Sponge. *Journal of Antitrust Enforcement*, vol. 5, n. 1, (2017) 49–75.

2 Act of 16 February 2007 on competition and consumer protection, *Journal of Laws* of 2015, item 1634.

courts are ready to stop antitrust intervention because the anticompetitive practice at stake pursues other public interest goals. Since developments in Polish competition tend to be inspired by EU competition law approaches, the place for non-competition considerations in EU competition law is also discussed. The question here is, whether the Polish approach under Article 1 of the Competition Act diverges from the EU one.

The scope of the article is limited to agreements restricting competition and abuse of dominance cases. The control of concentration, particularly an extraordinary consent for concentration, is not covered.[3] Block exemptions are also beyond the analysis.[4]

## 2. Non-Competition Considerations in the EU Competition Law

Article 101 of the Treaty on the Functioning of the European Union (hereinafter: "TFEU")[5] prohibits anti-competitive agreements that have as their object or effect the restriction, prevention or distortion of competition within the EU and which have an effect on trade between EU member states. On the basis of Article 101(3) TFEU it is possible to exempt an agreement, if the procompetitive benefits outweigh the negative effects.[6] However, the question arises to what extent non-competition interests can play a role in such assessment. The role of economic analysis in the application of EU competition law has grown significantly since the late 1990s. The economisation of EU competition law reflects this trend.[7] According to this new paradigm, restrictive practices should be assessed on the basis of their potential effects on competition and their impact on consumer welfare. Although the notion of

[3] The non-competition goals are only directly mentioned in the Competition Act only in Article 20(2) that regulates the extraordinary consent for concentration (Art. 20(2)). Under this provision, the UOKiK can clear anticompetitive concentration if justifiable, and in particular if the concentration: 1) is expected to contribute to economic development or technical progress; and 2) it may have a positive impact on the national economy. In practice, the extraordinary consents were issued a couple of times concerning the need for strengthening the production capacity and efficiency of the Polish arms industry, as well as the electro-energy sector. Public security was considered a goal worthy of protection in these cases. Still, enhanced efficiency also played a role in the UOKiK analysis. See T. Skoczny: *Zgody szczególne w prawie kontroli koncentracji* (Special Clearances in Merger Control Law). Warszawa, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2012. 182–204.

[4] See A. Jurkowska — T. Skoczny (eds.): *Wyłączenia grupowe spod zakazu porozumień ograniczających konkurencję we Wspólnocie Europejskiej i w Polsce* (Block Exemptions from the Prohibition of Restrictive Agremeents in the EC and Poland). Warszawa, Studia Antymonopolowe i Regulacyjne, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, 2008.

[5] Consolidated Version of the Treaty on the Functioning of the European Union, 2008. OJ C 115/47, [hereinafter: TFEU].

[6] Article 101(3) TFUE contains four cumulative conditions: (i) the agreement must create efficiencies; (ii) the benefit of the efficiency gains must be passed on to consumers; (iii) the agreement's restrictions of competition must be indispensable to the attainment of the efficiencies; and (iv) the agreement must not eliminate competition.

[7] L. Parret: Do we (still) know what we are protecting? *TILEC Discussion Paper*, April 2009. 24.

consumer welfare is not clearly defined[8] and the Court of Justice has not embraced it as a single standard for EU competition law, it is currently the dominant approach advocated by the European Commission.[9] If the national competition authorities (NCAs) of Member States also embrace this concept**,** it becomes difficult for them to consider other values than competition in itself. Such difficulties stem from the fact that non-competition interests are difficult to quantify by economists and lawyers undertaking competition analyses.[10]

The adoption of the Regulation 1/2003 also influenced the debate whether non-competition interests can play a role in the competition law assessment.[11] Before the decentralization of 1 May 2004, solely the European Commission resolved conflicts based on balancing non-competition and competition interests. In theory, the new decentralized model of competition law enforcement in the EU allowed the NCAs to balance those interests. However, the Commission adopted a rather strict approach with regard to the ability to consider the non-competition interests. In the guidelines on the application of Article 81(3) (now 101(3) TFEU) of the Treaty, the Commission states that, "[g]oals pursued by other Treaty provisions can be taken into the account to the extent they can be subsumed under the four conditions of Article 101 (3) TFUE (ex Art. 81(3) EC)".[12] A similar approach is visible in EU courts judgments.[13] Since the NCAs often apply national competition laws in parallel with EU competition rules, the position of the Commission and the EU courts potentially limits the ability of NCAs to balance non-competition considerations against competition ones.

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8 K. J. Cseres: The Controversies of the Consumer Welfare Standard. *Competition Law Review*, Vol. 3, No. 2, (2006) 121–173.

9 In 2004, the Commission presented consumer welfare and allocative efficiency as the goals of Article 101 TFEU in the notice on the application of the former Article 81(3) EC. More recently, in the 'Commission Staff Working Paper Accompanying the Report on Competition Policy 2011' SWD (2012), the Commission stated that, "EU competition policy aims at achieving three main objectives: i) protecting competition on the market as a means of enhancing consumer welfare, ii) supporting growth, jobs and the competitiveness of the EU economy and iii) fostering a competition culture." Available at: http://ec.europa.eu/competition/publications/annual_report/2011/part2_en.pdf; For more on the issue of consumer welfare from the European Commission perspective see: V. Daskalova: Consumer Welfare in EU Competition Law: What Is It (Not) About? *The Competition Law Review*, Vol. 11, Issue 1, 131–160.; *TILEC Discussion Paper* No. 2015-011. Available at SSRN: https://ssrn.com/abstract=2605777.

10 A. Gerbrandy – R. Fransen: *Non-competitive interests are no competition for 'Market Europe': does EU competition law hamper civil society's political rights?* Report for EU-citizen – Workpackage 8, deliverable 8.2, 2016. 4., available at https://dspace.library.uu.nl/handle/1874/348450.

11 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04. 01. 2003. 1–25.

12 Guidelines on the application of Article 81(3) of the Treaty, par. 42.

13 Judgment of the ECJ of 3 July 1985, C-243/83 Binon, ECLI:EU:C:1985:284, par. 43–46.; Judgment of the Court of First Instance of 18 September 2001, T-112/99 TPS, ECLI:EU:T:2001:215, par. 106–107.; Judgment of the General Court of 28 June 2016, T-208/13 Telefónica/Portugal Telecom, ECLI:EU:T:2016:368, par. 102–104.

Today, Article 101(3) TFEU remains the only treaty-based method for potential balancing of competition and non-competition interests within Article 101 TFEU. The consumer welfare approach advocated by the Commission has considerably reduced the types of non-competition interests in such analysis.[14] Advantages of an agreement must include economic benefits for the actual consumers and not society at large. Some of the non-competition interests may have an economic efficiency facet and so lead to some pro-competitive consumer benefits. Other non-competition interests that cannot be quantitatively measured seem unable to justify an Article 101(3) exemption. On one hand, such approach prevents the risk of arbitrary application of competition law. On the other, it has further downgraded the role of Article 101(3) TFEU. It should be noted that Article 101(3) was discussed only three times and the exemption was never granted during the first ten years of Regulation 1/2003.[15]

Nevertheless, there has been debate as to what extent the Commission approach[16] is in harmony with the system of EU competition law. First of all, some authors argued that since the Lisbon Treaty modified the EU Treaty and the EC Treaty in a way that competition policy was not mentioned in the new list of goals in Article 3 TEU, it gave more room for non-competition considerations.[17] Others pointed out that the Lisbon Treaty has enhanced the importance of policy-linking clauses because of the wording of Article 7 TEU, "[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account".[18] Some of the discussions centred on the judgments of the ECJ in *Glaxo Smith Kline* and *T-Mobile*.[19] Although the ECJ did not address non-competition issues as such in those judgments, it stated that market integration and competition, along with consumer welfare, are core goals of competition law. The Commission should therefore be aware of the possibility for conflict between different objectives. In such a case, appropriate balancing of objectives shall be allowed.[20] A slightly different resolution of conflicting objectives is based on the ECJ judgment in *Wouters*.[21] One commentator proposed avoiding the import of non-competition and non-economic concerns into the substance of Article 101(3) TFEU, and advocated balancing them against Article 101 TFEU as a whole.[22]

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14 Guidelines on the application of Article 81 EC to horizontal agreements, OJ 2001 C 3/2, par. 31–36.; Guidelines on Article 81(3), par. 33.

15 D. Bailey: Reinvigorating the role of Article 101(3) under Regulation 1/2003. *Antitrust Law Journal*, vol. 81, n. 401, (2016) 120–123.

16 The approach advocated by the European Commission implied that NCAs should solely or mainly focus on arguments related to competition, market structure, efficiencies and consumer welfare while applying competition law.

17 Parret (2009) op. cit. 7–9.

18 C. Townley: *Article 81 EC and Public Policy.* Oxford, Hart Publishing, 2009. 68–70.

19 European Court of Justice, *GlaxoSmithKline*, C-501/06 P; Court of First Instance, *Glaxo Smith Kline* T-168/01, ECR (2006), *T-Mobile*, C-8/08, *Wouters*, C-309/99.

20 Parret (2009) op. cit. 46–47.

21 European Court of Justice, C-309/99, *J. C. J. Wouters and Others v. Commission*, 2002, ECR I-1577.

22 A. P. Komninos: Non-competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC. *Working Paper* (L) 08/05, Oxford, Oxford University, 2005. 10.

Such balancing could be considered at a prior stage, leading to the exemption from the scope of Article 101 TFEU. Following the classic constitutional rules on resolving conflicts would protect the purity of the antitrust analysis. However, such approach appears inconsistent with the Commission guidelines on the application of Article 81(3) EC.

It is also notable that the Commission developed the concept of objective justification under Article 102 TFEU. The Commission states in its Guidance paper on enforcement priorities for applying Article 102 TFEU that a dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies similar to Article 101(3) TFEU.[23] Therefore, it is arguable that Article 102 TFEU is open for non-competition interests to the same extent as Article 101 TFEU.[24]

## 3. Public interest in Polish competition law

### 3.1. Introduction

Polish competition law replicates the structure and the content of Article 101(1), Article 101(3) and Article 102 TFEU in Articles 6, 8 and 9 of the Competition Act, respectively. In addition, Polish law contains a general clause in Article 1 that the Competition Act regulates the development and protection of competition, as well as rules governing the protection of the public interest of undertakings and consumers. The public interest premise plays two main functions: jurisdictional and evaluative. Jurisdictional function limits potential scope of intervention by the President of the Office of Competition and Consumer Protection (Polish NCA, hereinafter "UOKiK") by obligating him to specify what public interest justified the intervention with regard to the specific practice in each case. In other words, any antitrust intervention aimed at protecting competition must pursue public interest (and not purely a private one). The evaluative function of public interest influences the application of competition rules in the Competition Act. This is related to the fact that public interest is a broad and elastic concept and allows for clarification of the actual scope of the competition act.[25] It also helps to define the primary and secondary goals of competition law.[26] This function also plays a role in accurate implementation of the competition policy

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[23] Communication from the Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings', OJ 2009 C45/7, para 28–30.

[24] T. Käseberg: *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US*. Vol. 1. Oxford–Portland, Oregon, Hart Publishing, 2012. 168.

[25] For the understanding of jurisdictional and evaluative functions of the public interest clause see M. Bernatt – A. Jurkowska-Gomułka – T. Skoczny: Interes publiczny w ochronie konkurencji. In: M. Kępiński (ed.): *System prawa prywatnego Prawo konkurencji tom 15*. Legalis/el., 2014.; T. Skoczny (ed.) *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Lex/el., 2009.

[26] T. Skoczny – D. Miąsik: Commentary on Article 1. In: T. Skoczny (ed.): *Ustawa o ochronie konkurencji i konsumentów. Komentarz*. Legalis/el., 2014. Nb 38.

by the UOKiK given the limited resources of the competition authority and the resulting inability to intervene in every case.

### 3.2. The interpretation of the public interest clause in Polish case law: between a quantitative and qualitative approach

The public interest clause now contained in Article 1 of the Competition Act has not been controversy free. Since the introduction of the first Polish contemporary competition law act,[27] the concept has been expressed solely by the judiciary and doctrine. As a result, conflicting interpretations occurred that blurred and altered the notion of public interest. The Antimonopoly Court[28] held in one of its very first judgments that conducting antimonopoly proceedings is permissible only in cases where an economic entity violates public interest.[29] Awareness that competition law is an area of public law with a purpose of protecting the public interest, not the interests of individual entities participating in business transactions already existed in the jurisprudence and legal literature. Therefore, the notion of public interest became an additional, non-statutory requirement for the application of competition law.[30] The subsequent introduction of the concept into the Article 1 of the Competition Act of 2000 was a mere formality.[31] The Antimonopoly Court used an unfortunate phrase in the aforementioned decision of 24 January 1991. It stated that the violation of public interest may occur, for example, where an unlawful practice concerns a "broader scope of market participants." This judgement initiated a mathematical,[32] or quantitative,[33] approach to interpreting the notion of public interest. The "broader scope of market participants" language became a primary and preliminary condition for any intervention by the UOKiK. This begged the question of how many entities is

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[27] Act of 24 February 1990 on counteracting monopolistic practices. *Journal of Laws*, No. 14, item 88.

[28] The Antimonopoly Court was established by the Regulation of the Minister of Justice of 13 April 1990 on the establishment of antimonopoly court (*Journal of Laws*, No. 27, item 157). In 2002, by the Act of 5 July 2002 on amending the Act on competition and consumers protection, the Act – Civil procedural code and the Act on unfair competition (*Journal of Laws*, No. 129, item 1102), the name was changed to "the Court of Competition and Consumer Protection" (hereinafter: the "Competition Court").

[29] Judgment of the Antimonopoly Court of 24 January 1991, XV Amr 8/90, Wokanda 1992, No. 2, 39.

[30] T. Skoczny (ed., 2009) op. cit.; see also: Judgment of the Antimonopoly Court of 3 August 1994, XVII Amr 15/94; Judgment of the Antimonopoly Court of 6 June 2001, XVII Ama 78/00; Judgment of the Supreme Court – Civil Chamber of 29 May 2001, I CKN 1217/98.

[31] Until the introduction of the Act of 15 December 2000 on Competition and Consumer Protection (consolidated text – *Journal of Laws*, of 2005, No. 244, item 2080), the concept of public interest was not indicated *expressis verbis* in Polish competition law. With the introduction of the Act of 2000, the concept was specified in the Article 1 of the Act.

[32] A. Stawicki – E. Stawicki (eds.): *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Lex/el., 2016.

[33] T. Skoczny (ed., 2014) op. cit.; A. Jurkowska-Gomułka: *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję.* Warszawa, 2013. 154.

sufficient for the interest to be considered public.[34] The quantitative approach was very visible in the court judgments stating that UOKiK intervention is pre-conditioned by the impact of the practice on a broader circle of market participants, or by the impact on an entity representing a certain collection of individuals (a community or a cooperative).[35] Soon, this became the dominant approach as the Polish Supreme Court approved it in several judgments.[36] However, after few years, the flaws of such interpretation became apparent. Situations in which it was impossible to identify any entity potentially affected by an anti-competitive practice were considered incapable of violating public interest.

The first departure from such quantitative interpretation of public interest was visible in the 24 July 2003 decision of the Supreme Court.[37] The court stated that the mere threat of distortion of competition is contrary to public interest in contrast with the previous mathematical interpretation. A new qualitative approach emerged in the judicature in the 2003-2008 period. The Supreme Court reiterated in one decision that it is not necessary for the practice to infringe an interest of an individual in order to apply the instruments provided in the Competition Act.[38] It also specified the concept of the public interest, stating that it should be interpreted from the perspective of antitrust axiology.[39] The Court of Competition and Consumer Protection (hereinafter "the Competition Court") also deviated from the quantitative approach. In a judgment of 2005 it defined the objective of the Competition Act as the very existence of competition, namely an environment in which business activity is conducted. According to the Competition Court, the protection of consumers (purchasers of goods and services offered under competitive conditions) takes place by means of protection of competition. The Competition Court emphasised that public interest is violated if the practice has a negative impact on the competition process, even if such negative impact results from practices against individual competitors.[40] The Court of Appeal in Warsaw defined "public" as "affecting the general society" and ruled that a violation of a private interest does not preclude simultaneous violation of the public interest.[41]

The adoption of the qualitative interpretation of the notion of public interest is most discernible in the judgments of the Supreme Court issued in 2008 and subsequent

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34 Jurkowska-Gomułka (2013) op. cit. 151.

35 Jurkowska-Gomułka (2013) op. cit. 152.

36 Judgment of the Supreme Court of 29 May 2001, I CKN 1217/98, OSNC 2002, No 1, item 13; of 28 January 2002, I CKN 112/99, OSNC 2002, No 11, item 144; of 23 July 2003, I CKN 496/01, UOKiK Official Journal of 2004, No 1, item 283.

37 Judgment of the Supreme Court of 24 July 2003, I CKN 496/01, UOKiK Official Journal of 2004, No 1, item 283.

38 Judgment of the Supreme Court of 7 April 2004, III SK 27/04, OSNP 2005, No 7, item 102.

39 Judgment of the Supreme Court of 27 August 2003, I CKN 527/01, LEX No. 137525.

40 Judgment of the Court of Competition and Consumer Protection of 16 November 2005, XVII Ama 97/04, UOKiK Official Journal of 2006, No 1, item 16.

41 Judgment of the Court of Appeal in Warsaw of 5 June 2007, VI ACa 1084/06, Lex No. 1641001.

years. The Supreme Court departed from the quantitative or mathematical approach by stating that, "the number of entities affected by the effects of an anticompetitive practice is irrelevant from the point of view of the admissibility of the application of the Polish competition act."[42] The judgment of 5 June 2008 is considered revolutionary in the legal literature.[43] In this judgment, the Supreme Court summarised existing case law, including the two opposing approaches (quantitative and qualitative), and firmly upheld the correctness of the qualitative approach. This judgment is now the standard primary point of reference for interpretation of public interest. Today, this approach is accepted in the legal literature[44], even if with some exceptions.[45]

Currently, it is assumed that qualitative interpretations of the public interest correspond with the understanding of competition as a mechanism to control the behaviour of market participants.[46] It also allows the identification of the ultimate competition goal on a case-by-case basis.[47] The relationship between the axiology of the competition protection act and the qualitative understanding of public interest is based on the "reciprocal connection." The reciprocal connection means that the axiology should be reflected in defining the public interest and the axiological assumptions of the act should be decoded by referring to the concept of the public interest.[48] It is generally accepted that the ultimate goal of Polish competition law is consumer welfare.[49] Therefore, although competition is equated with rivalry among independent undertakings, competition law should be concerned with the effects of such rivalry and not with the process itself. The question remains whether there is any room for non-economic considerations, unrelated to competition, when evaluating such effects.

### 3.3. A place for non-competition considerations in Polish competition law

The question whether there is a place for the inclusion of non-competition considerations in the competition law analysis has not attracted much attention in Polish legal scholarship. The discussions, which followed developments in the Supreme Court case law, focused on how to understand the Article 1 public interest

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42 Judgment of the Supreme Court of 16 October 2008, III SK 2/08, LEX No. 2551023.

43 Bernatt–Jurkowska-Gomułka–Skoczny: op. cit.; Judgment of the Supreme Court of 5 June 2008, III SK 40/07, OSNAPiUS 2009, No 19–20, item 272.

44 See for example Stawicki–Stawicki (eds., 2016) op. cit.; See A. Bolecki, A. Bolecki – S. Drozd – S. Famirska – M. Kozak – M. Kulesza – A. Magała – T. Wardyński: *Prawo konkurencji*. Warszawa, 2011. 27–28.

45 At times, the quantitative approach is still considered the primary approach. See, for example: K. Różiewicz-Ładoń: *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję.* Warszawa, 2011. 71.; and Judgment of the Court of Appeal in Warsaw of 16 January 2014, VI ACa 830/13.

46 Skoczny–Miąsik (2014) op. cit. Nb 53.

47 Skoczny–Miąsik (2014) op. cit. Nb. 58.

48 Jurkowska-Gomułka (2013) op. cit. 152.

49 See for example Skoczny–Miąsik (2014) op. cit. Nb. 65.

clause in its pure competition law context. In 2008 the opinion was still expressed that "neither the subject matter of Polish competition law nor the wording of its substantive provisions support the consideration of non-economic arguments when declaring a certain conduct as anticompetitive or when justifying it."[50] It was observed that prior to 2008, the courts only accidentally saw the application of competition law in the public interest in a broader perspective.[51] One instance involved the assessment of farmer protests against pricing policy as an indication of conduct violating competition.[52] In another case, restrictive practices adopted by the incumbent Polish telecom operator were seen as positive due to improvements to network coverage in Poland.[53] However, two recent cases discussed below show that courts believe that there is a place for balancing public interests pursued by competition law with other public interests goals. The court approach is instantly discernible from the approach of the UOKiK that focused on classic competition law goals. The court approach gives no deference to the UOKiK's interpretation of Article 1 of the Competition Act.

In dominance cases, courts interpret the notion of public interest quite broadly. Courts reason that the violation of public interest should be assessed within a "broader perspective", taking into account all the negative effects of a dominant firm's practice on a particular market.[54] In some cases this may seem to provide leeway for introduction of non-competition considerations into the notion of public interest.[55] However, there are arguments against such approach. The Supreme Court, in the judgment of 16 October 2008, has clarified the meaning of "broader perspective", a term used in the prior judgements.[56] It clarified that "broader perspective" should be interpreted in light of the competition law goals.[57] With a view of that decision, public interest is, for example, violated if the behaviour has impact on quantity, quality,

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[50] D. Miąsik: Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law. *Yearbook of Antitrust and Regulatory Studies,* Vol. 1, n. 1, (2008) 52.

[51] Miąsik (2008) op. cit. 52–53.

[52] Miąsik (2008) op. cit.52–53.; See the judgment of the Supreme Court of 27 August 2003, I CKN 527/01.

[53] Miąsik (2008) op. cit. 52–53. See the judgment of the Antimonopoly Court of 25 January 1995, XVII Amr 51/94.

[54] Judgment of the Supreme Court of 24 July 2003, I CKN 496/01, UOKiK Official Journal of 2004, No 1, item 283; Judgment of the Supreme Court of 27 August 2003, I CKN 527/01, LEX No. 137525; Judgment of the Supreme Court of 16 October 2008, III SK 2/08, LEX No. 2551023; Judgment of the Supreme Court of 19 February 2009, III SK 31/08, LEX No. 503413; Judgment of the Court of Appeal of 1 March 2012, VI ACa 1179/11 LEX No 1167649; Judgment of the Court of Appeal in Warsaw of 20 February 2015, VI ACa 675/12, LEX No. 1683336; Judgment of the Court of Appeal in Warsaw of 17 March 2015, VI ACa 539/14, LEX No. 1667658.

[55] In the Judgment of the Supreme Court of 27 August 2003, I CKN 527/01, the Court found that a wave of farmers protested the pricing policy of the dominant firm.

[56] The term was expressly used in the Judgment of the Supreme Court of 24 July 2003, I CKN 496/01, UOKiK Official Journal of 2004, No 1, item 283, and in the Judgment of the Supreme Court of 27 August 2003, I CKN 527/01, LEX No. 137525.

[57] Judgment of the Supreme Court of 16 October 2008, III SK 2/08, LEX No. 2551023.

price of the goods or the range of choice available to consumers. The 2008 judgement suggests a more economic approach.

The Supreme Court adopted a different approach with a broader explanation in a 27 November 2014 decision.[58] The case concerned the abuse of dominance by a Polish city. The City imposed an obligation on the undertakings operating in the municipal waste collection market to transfer the waste to a single company that became responsible for further transportation of the waste to the final disposal site. The Competition Court did not go beyond 'pure' competition goals in its analysis and did not consider arguments related to environmental protection.[59] In contrast, the Court of Appeal in Warsaw did consider potential positive impact of the city's practice on the environment, but it did not find any beneficial aspects in this respect. The Supreme Court rejected the cassation complaint filed by the City. However, it discussed to what extent different values can be balanced under the Competition Act. The Supreme Court held that the ability to balance different values that are important for lawmakers or society depends on the particular institution of the Competition Act. Following the principle *de minimis non curat praetor*, the legislator sometimes limits the scope of the application of Polish competition law.[60] The application of the Act is also excluded in relation to restrictions of competition allowed under separate acts.[61] In addition, according to the Supreme Court, other values than protecting competition may be taken into account whena case-by-case inquiry is made whether the restriction of competition can be objectively justified and so eligible for an exemption from the abuse of dominant position prohibition. In the Supreme Court's view, such balancing should also exist with regard to the assessment of anticompetitive agreements. Such position is different from the European Commission's opinion expressed in the Guidelines on the application of Article 81(3) of the Treaty.[62] The Court believes that, "the consideration of other values that may interfere with competition protection may also affect the applicability of the premises provided in the Competition Act which justify an exemption from the prohibition of competition restricting agreements".[63] This is also true with regard to fines. The Court is of the opinion that, "it is not possible to exclude references to other categories of public interest at the stage of imposing fines by the UOKiK".[64] According to the Supreme Court, such non-competition considerations should not be analysed at the assessment stage regarding whether the intervention of the UOKiK is justified (jurisdictional function of public interest). Instead, analysis should occur at the stage of assessment of whether given practice is as anticompetitive (evaluative function of public interest). As explained above, the Court of Appeal in Warsaw accepted the importance of the environment protection

58 Decision of the Supreme Court of 27 November 2014, III SK 21/14, LEX No. 1565780.

59 The Judgement of the Competition Court of 22 November 2012.

60 See Article 7 of the Polish Competition Act.

61 See Article 3 of the Polish Competition Act.

62 See Guidelines on the application of Article 81(3) of the Treaty, para. 42 and the supra point 2.

63 Decision of the Supreme Court of 27 November 2014, III SK 21/14.

64 Decision of the Supreme Court of 27 November 2014, III SK 21/14.

concerns in the municipal waste collection case, but did not find them significant enough to justify the alleged anticompetitive practice.[65] While anticompetitive, the additional burdens imposed on the contractors of the dominant entity did not yield any positive results on the protection of the environment in practise.

In light of the discussed Supreme Court's decision of 27 November 2014, balancing various interests within the assessment of anticompetitive practice falls within the evaluative function of public interest and should be considered appropriately at the regular anticompetitive practice analysis stage. Still, the decision falls short in explaining who bears the burden of raising and analysing non-competition considerations. It seems that this should be the role of the defendant rather than the UOKiK. The clear role of the UOKiK is to protect competition and so it should be not obliged to consider other non-competition factors on an *ex-officio* basis. The Supreme Court's observation that non-competition considerations could form part of an individual exemption analysis under Article 8 of the Competition Act (the counterpart of Article 101(3) TFEU) requires further elaboration. Neither the limited practice of applying Article 8,[66] nor its language suggests that there is a strong basis for inclusion of non-competition considerations under Article 8 analysis. It is noteworthy that Article 8 invokes only economic efficiencies (contributions to improving the production or distribution of goods) and contribution to technical or economic progress as potential justifications for the anticompetitive agreement. For this reason, potential non-competition factors would need to form part of the demonstrated economic benefits.

Another case in which such non-competition interests were considered concerned the prohibition by the Polish Chamber of Physicians and Dentists (hereinafter: "NIL") of homeopathic products in Poland. In 2011, the UOKiK found that NIL violated competition law by adopting a policy prohibiting doctors from prescribing homeopathic products and imposed a fine.[67] The decision by the UOKiK is considered an example of an effect-based approach.[68] The decision was based on a pure competition analysis. The issue of whether homeopathic products actually have

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65 Judgment of the Court of Appeal in Warsaw of 19 September 2013, VI ACa 170/13.

66 Only one instance of the UOKiK applying the individual exemption exists. It concerned the decision of an association of raftsers on the Dunajec river to fix prices of rafting services. In 2011, the UOKiK regional office in Katowice exempted the agreement on pure efficiency grounds in holding that the decision facilitated the distribution of rafter services among travel agencies and individual consumers. The UOKiK believed that not doing so would result in higher prices and longer waits for tourists. See the UOKiK decision of 4 November 2011, RKT-33/2011.

67 The UOKiK decision of of 25 July 2011 r., DOK-6/2011.

68 A. Jurkowska-Gomułka: Stosowanie zakazu porozumień ograniczających konkurencję zorientowane na ocenę skutków ekonomicznych? Uwagi na tle praktyki decyzyjnej Prezesa Urzędu Ochrony Konkurencji i Konsumentów w odniesieniu do ustawy o ochronie konkurencji i konsumentów z 2007 roku. *Internetowy Kwartalnik Antymonopolowy i Regulacyjny (iKAR),* vol. 1, n. 1, 2012. 39.

positive effects for patient health was beyond the interest of the UOKiK.[69] Regarding the competition concerns, the UOKiK believed that consumers were deprived of choice and access to homeopathic products that they may have been interested in obtaining. Additionally, the threat of initiating disciplinary proceedings against those doctors who would prescribe homeopathic products strengthened the potential anticompetitive impact of the NIL decision. The Competition Court annulled the decision in 2014.[70] According to the Court, the UOKiK did not act in public interest. The reasoning of the judgment suggests that the Competition Court believed that the quantitative aspect of public interest was fulfilled but the qualitative was not. The Court analysed the impact of the NIL position and stated that the positive effects of competition in the health services market were demonstrated in the right of patients to be treated consistent with current medical knowledge, and not in the right to be treated by any lawful products, including those without therapeutic value. The Competition Court clearly put the protection of health above competition law concerns. It held that the NIL correctly prohibited homeopathic products as they can have adverse health effects. The Court also stated that it is the responsibility of doctors to select and prescribe adequate medicine, not patients. The Court clearly stated that it would be unacceptable if competition was the determining factor on the health services market. The NIL policy served goals, such as health and life of patients, that Competition Court viewed as more important than mere protection of competition. The UOKiK appealed the Court decision and although for different reasons, the Court of Appeal in Warsaw found the UOKiK decision unfounded.[71] The Court of Appeal in Warsaw did not consider the notion of public interest and based its decision on classic antitrust analysis. It also distanced itself from the Competition Court's firm belief that homeopathic products might have adverse health effects. This judgement may suggest that the Court of Appeal in Warsaw believed that the public interest was present in the case, even if the UOKiK failed to prove the anticompetitive nature of the NIL policy.

The Competition Court judgement in the homeopathic case has already faced criticism[72] One criticism is the risk of inconsistent analysis in competition law that would indirectly allow decisions of professional self-governing bodies to practically

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[69] Małgorzata Krasnodębska-Tomkiel, then President of UOKiK, stated "UOKiK is not the party to discussions on the effectiveness of homeopathic products. This issue was not at all subject of our interest. We found that the practice of the Polish Chamber of Physicians and Dentists is a violation of competition by restricting market access to undertakings selling products approved for legal trade, and thus the availability of these products for consumers", UOKiK Press release (2011.08.05), available at: https://uokik.gov.pl/aktualnosci.php?news_id=2828&print=1.

[70] Judgment of the Court of Competition and Consumer Protection of 30 December 2014, XVII AmA 163/11.

[71] Judgment of the Court of Appeal in Warsaw of 11 July 2016, VI ACa 397/15. In particular, the Court believed that the NIL policy had neither an anticompetitive object (it did not have a truly binding character) nor anticompetitive effect.

[72] J. Sroczyński: Spór o homeopatię (czyli o władzę nad rynkiem). *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, vol. 5, n. 8, 2016.; A. Jurkowska-Gomułka: Znachor czyli SOKiK

be exempted from any antitrust scrutiny.[73] Our concern relates to the Competition Court's understanding of public interest. First, the Competition Court did not state the legal grounds for balancing competition law related interests against public health considerations. This was an anticompetitive agreement case and the Court could have considered, consistent with the Supreme Court's suggestion discussed above, whether public health considerations could be included under the individual exemption provided in Article 8 of the Competition Act (Article 101(3) counterpart). Second, the Court did not expressly allow for such balancing and it did not directly point out that other interests fall within the interpretation of public interest prescribed in Article 1 of the Polish Competition Act. The Court narrowly focused on the result of this judgment, and did not provide any guidance for future cases. Third, the Court did not appear to consider the Supreme Court decision of 27 November 2014. Although the decision was only final for just over a month, it concerned the essence of the problem and could have been taken into account.[74] While it is rather unlikely that consideration of the Supreme Court decision would have changed the outcome, it would have contributed to greater legal certainty in the future. For example, at the moment it is unclear why the Competition Court believed that the UOKiK did not act in the public interest whatsoever. The Supreme Court decision of 27 November 2014 suggests that public interest in competition law may potentially be balanced with other public interest goals. In its light, it seems more appropriate to consider both conflicting interests while assessing the undertaking's practice and decide which should prevail.

## 4. Conclusions

The article tried to answer the question to what extent can non-competition considerations play a role in the application of public interest under Article 1 of the Competition Act Recent cases show that despite the focus by competition authority and academics on considering public interest contained in Article 1 only in the competition law context (public interest in competition law), courts might be ready to balance different public interests as part of their antitrust analysis. However, clear legal framework in this respect is missing. It seems that despite the Supreme Court decision of 27 November 2014, the notion of public interest mentioned in Article 1 of the Competition Act should be concerned only with the goals pursued by competition law, the goals for which the UOKiK is responsible. Such position does not exclude the

o homeopatii. *Modzelewska&Paśnik Blog*, available at: http://www.modzelewskapasnik.pl/pl/blog/36/26/znachor-czyli-sokik-o-homeopatii.

[73] Sroczyński (2016) draws attention to the fact that depriving the competition authority. UOKiK, of the power to scrutinize the activities of professional self-government bodies may lead to adverse effects for the protection of competition and consumers, such as limitating market access for the undertakings and legal product and service access for consumers.

[74] Similarly, the Decision of the Supreme Court of 27 November 2014 was not included in the later judgment of the Court of Appeal of 11 July 2016.

permissibility of the Supreme Court's proposal being understood as a possibility to balance public interests in competition law with other public interests, such as public health and environmental protection, if raised as a defence by the undertakings involved. Still, further judicial interpretation in this respect is necessary. In particular, it could be clarified that the defendant, rather than the competition authority, bears the burden of proof that a given practice may be objectively justified in light of non-competition considerations. In addition, since consistency in competition law is a value, the courts should not refrain from clarifying which existing legal concepts or institutions serve as a base for such balancing. As hinted at by the Supreme Court, individual exemptions under Article 8 of the Competition Act could be applicable in case of anticompetitive agreements. Or, the objective justification doctrine could be used in dominance cases. Still, this would be certainly not free of controversies and potential non-competition factors would likely have to make part of economic benefits shown.

In any event, a reference to other public interests should be the exception rather than the rule in competition law analysis. Traditional competition analysis should be exhausted before the competition authority, or courts, embark on risky balancing exercises. In fact, the homeopathic case Judgement of the Court of Appeal in Warsaw demonstrates that the case might have been decided by the court of first instance within by object/by effect analysis without needing to raise controversies as to whether public health considerations should trump competition law considerations.

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ARTICLES

# HUMANITARIAN AND PASTORAL FURTHERANCE OF REFUGEES IN THE CATHOLIC CHURCH[1]

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## 1. Introduction

The most significant challenge in foreign and security policy that European states had to face in the year 2015 was a migrant and refugee crisis. Each European country and EU state built their political standpoints along different principles, which later manifested in different actions. We could see a great deal of clashes of views, which derived from the different points of views. However, not only among the leaders of European countries but also in each European society did tension occur. Those civil or international organizations that delt with refugees or immigrants often ran counter to the migration policy of the represented country.

Meanwhile, both the leaders of each country and the society expected the Catholic Church to reflect the current situation theoretically, and to join aid and charity work as well.

In this study I am trying to clarify the principles on the following issues: what are the duties of the Catholic Chrurch regarding people far from their homes, and what are its tasks which do not belong to the main field of activity, but according to its humanitarian attitude it will take part in.

In the article I use the words 'refugees', 'migrants', 'immigrants' as working terms without any ideological and political content.

## 2. The appearance of the refugee issue in the Pope's and the Holy See's documents

[1] The work was created in commission of the National University of Public Service under the priority project KÖFOP-2.1.2-VEKOP-15-2016-00001 titled „Public Service Development Establishing Good Governance" in the Miklós Zrínyi Habilitation Program.

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Regarding the current refugee crisis, it must be clearly seen that the Catholic Church is primarily responsible for the pastoral care of Catholics who are far from their left behind. The first ecclesiastical documents and the field of activity of the gradually established ecclesiastical institutions also confirm this. Besides, the Holy See or local churches take several humanitarian and diplomatic steps to handle the refugee issue both globally and locally.

The speed of the course of events requires the leaders of the Catholic Church to give an 'ad-hoc' assessment. These papal or Holy See "reflections", formulated for motivational and encouraging resons, are not laws. Instead, they serve as guidelines for the ecclesiastical administration which participate in humanitarian and pastoral care of immigrants'. This fact is not marginable, but its significance cannot be overrated. It is not about legislative amendment, nor are we talking about establishing new institutions or assigning tasks, but it is about defining basic behavior and moral principles.[2] What is more, not each local ecclesiastical institution has appropriate infrastructure, financial and human resources to comply these basic principles.

The refugee issue appears basically in the topic of social teaching of the church. Ecclesiastical documents reflected a social phenomenon when it became effective for some historic or economic reason or when migration became a world political and security issue. Papal utterances examine migration issues with different thoroughness. It is not their task to create legislative frameworks. They define those main guidelines along which the migration policy of the Holy See, the canonical frameworks of pastoral care and the institutions of humanitarian assistance can develop.[3]

*Lumen gentium,* the dogmatic constitution on the church of the Second Vatican Council notes in connection with the activity and unity of the church that the pastoral care of different ethnical and ritual groups should favour true Catholic mind. (LG 13) According to *Christus Dominus* (18) "Special concern should be shown for those among the faithful who, on account of their way of life, cannot sufficiently make use of the common and ordinary pastoral care of parish priests or are quite cut off from it. Among this group are the majority of migrants, exiles and refugees, seafarers, air-travelers, gypsies, and others of this kind." The same article of the document calls the attention of local episcopal conferences that "they should look to and promote their spiritual care by means of suitable methods and institutions. They should also bear in mind the special rules either already laid down or to be laid down by the Apostolic See (15) which can be wisely adapted to the circumstances of time, place, and persons." The conciliar documents formulate pastoral-teological principles, which must be considered in the pastoral care and humanitarian assistance of people

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2 Pope Francis: Migranti e rifugati. Verso un mondo migliore. *Migranti,* 2014/1. 5.

3 Jaime Bonet: El Factor Religioso en el derecho humanitario bélico: algunas cuestiones de interés para el Derecho eclesiástico del Estado. In: María Blanco – Beatriz Castillo – José Fuentes – Miguel Sánchez-Lasheras (ed.): *Ius et Iura.* Navarra, Universidad Navarra, 2010. 134–150. For example Leo XIII: Enc. Rerum novarum. 15. V. 1891. n. 33. *Acta Sanctae Sedis,* 1890–91/23. 641–670. It states the principle that is still determinant today: Everybody has the right to stay in their native land […] and no to be forced to leave for a strange country.

far from their native land.[4] The principles were repeated in the post-conciliar Canonlaw, specially in the so-called 'constitutional' law. In this sense the legislater created legal relationship between hierarchy and the Christian faithful.[5] Thus the duty of the hierarchy is to provide pastoral care to the Christian faithful who are far from their native land for any reason.[6]

To give an efficient pastoral care, particular features deriving from their mother tongue, culture and traditions must be considered.[7] This way the institutions that provide them pastoral care must be established on the level of the universal and particular church.[8] Moreover, different Catholic institutions that provide humanitarian assistance come into existence under teological principles. However, whist the primary subjects of pastoral care – yet, the Catholic Church has a missionary feature – are the Christian faithful, the church does not make such a differentiation on the field of humanitarian aid. What is more, the institutions mark that they must provide humanitarian assisitance for the vulnerable without any discrimination on the grounds of denomination and religion.

The post-conciliar social encyclicals and the Pope's utterances also follow conciliar principles. Pope Paul VI's encyclical, *Populorum progressio*, published in 1967, speaks about the duties of developed countries to accommodate and educate the young and immigrant workers and to promote the dialogue between cultures. John Paul II's encyclical, *Sollicitudo rei socialis* refers to the difficulties that stand in the way of individual development, because of which a lot of people "opt out of national life, impelling many to emigrate".

According to paragraph 62 of Pope Benedict XVI's encyclical, *Caritas in veritate*[9], published in 2009, the drama of migration on one hand derives from the huge number of people involved, and on the other hand from the social, economic, political, cultural and religious problems it raises. It is a serious epochal phenomenon whose handling exceeds the capability of each state and requires the cooperation of nations and international organizations.[10] An important factor is that not only do the rights of migrants but those of the host societies have to be protected. Hardly ever can we hear the latter factor though, it is an integral part of the social teaching

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4 Jean Beyer: Fondamento ecclesiale della Pastorale dell'Immigrazione. In: Jean Beyer – Marcello Semeraro (ed.): *Migrazioni Studi Interdisciplinari*. Roma, Centro Studi Emigrazioni, 2003. 9–33.; Velasio De Paolis: La chiesa e le migrazioni nei secoli XIX e XX. *Ius Canonicum*, 2003. 13–49.

5 Javier Hervada: *Introduzione critica al diritto naturale*. Milano, Giuffrè, 1990.

6 Velasio De Paolis: L'impegno della Chiesa nella pastorale della mobilità umana secondo il Codice di Diritto Canonico. *Seminario*, 1985/25. 131.

7 Benlloch Poveda: La nuova legislazione canonica e sulla mobilità sociale. In: Julián Herranz (ed.): *Migrazioni e diritto ecclesiale.* Padova, Edizioni Messaggero, 1992. 21.

8 Josémaria Sanchis: La pastorale dovuta ai migranti ed agli itineranti (aspetti giuridici fondamentali). *Fidelium Jura*, 1993/3. 452–453.; Velasio De Paolis: La pastorale dei migranti nei documenti conciliari. *Informationes SCRIS*, 1989/2. 238–257.

9 Pope Benedict XVI: Enc. Caritas in veritate. 29. VI. 2009. *Acta Apostolicae Sedis*, 2009/101. n. 61., 696–697.

10 Pope Benedict XVI: Enc. Caritas in veritate. n. 67., op. cit. 701–702.

of the Church when we analyse the possibilities of pastoral care and humanitarian assistance to migrants.

### 3. Basic priciples of Pope's and the Holy See's documents and offices toward ensuring pastoral care to those living far from their native land

Certain documents of the Pope's and the Holy See explain the legal and structural frames of the pastoral care for people living far from their native land. The ninth canon of the Fourth Lateran Council (1215) is an interesting record of legal history. It directs local curch leadership to take into consideration the pastoral care of those who had to leave their native land and did not speak the language of the area where they had settled down. The conciliar direction refers to the responsibility of the local church authority.

Because of the Catholic migration of the 19th and 20th century, the opinion became much more general that not only on local level should the pastoral care of migrants be assisted but via a separate office of the Roman Curia.[11] In 1912, with his *muto proprio, Cum omnes catholicos*, Pope Pius XI established the special office responsible for migrants.[12] The Pope regularized its power,[13] so the office acted exclusively and in its own right in organizing the pastoral care for those living far from their native land. Besides, that time the office did not work separately but in subservience of Consistorial Congregation.[14] Later, the Congragation tried to give a briefing, mainly through documents and instructions, to those who provided pastoral care to Catholics of different nations.[15]

In 1914, Pope Pius X established the office, whose exact legal frames were laid down too, to provide pastoral care to Italian immigrants.[16] In 1914 the Pope wanted to establish a seminary which was to educate priests providing pastoral care to refugees, but it came into existence only in 1920 because of WW I.[17] Then, Consistorial Congregation established an institution to provide pastoral assistance to refugees of Italian nationality.[18] Pope Benedict XV appointed a 'personal prelate' to coordinate the activities of those priests who provided pastoral care to Italians living abroad.[19]

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[11] Comprehensive historical description: Angelo Negrini: La Santa Sede y el fenómeno de la movilidad humana. *People on the move*, 2002/34. 88–89.

[12] Pope Pius X: Motu proprio. Cum omnes catholicos. 15. VIII. 1912. *Acta Apostolicae Sedis*, 1912/4. 526–527.

[13] Pope Pius X was always deeply concerned about the life of people living far from their native land. Gian Carlo Perego: Un Papa, un Vescovo e I migranti. *Migranti,* 2014/1. 7–8.

[14] Consistorial Congregation is the predecessor of the current Episcopal Conference.

[15] Consistorial Congregation: Decretum. Etnographica studia. 25. III. 1914. *Acta Apostolicae Sedis*, 1914/6. 182–186.

[16] About the establishment of Collegio Urbano di Sacerdoti per l'Immigrazione italiana see. Pope Pius X: Motu proprio. Iampridem. 19. III. 1914. *Acta Apostolicae Sedis*, 1914/6. 173–176.

[17] Consistorial Congregation: Notification. 26. V. 1921. *Acta Apostolicae Sedis,* 1921/13. 309–311.

[18] Consistorial Congregation: Decretum. 3. IX. 1918. *Acta Apostolicae Sedis,* 1918/6. 669–671.

[19] Pope Benedict XV: Notification. 23. X. 1920. *Acta Apostolicae Sedis*, 1920/12. 534–535.

The office was reformed after WW2 and it was subordinated directly under the Secretary of State. Then, in 1951, the International Catholic Migration Commission was formed. In 1952, the Apostolic Constitution, Exsul familia reassured its exclusive competence, and formed its ongoing structure.[20] Pope Pius XII's constitution is often mentioned as the magna charta of the Holy See's migration policy[21] although it still carried the ecclesiastical approach of the era: it could not forget about territorial principle, and the assistance of lay faithful was limited.[22] However, the document must be considered a significant step: the idea is expressed that it is not the minimum to reach in pastoral assistance of those far from their homes but a system must be built up that is able to supply their pastoral care.[23]

During Paul VI's papacy certain offices of the Roman Curia were significantly reshaped, which affected the Holy See's office responsible for those far from their homes. In 1965, the Pope established a separate office which became responsible for the nomadic. Then, in 1967 under the leadership of the Congregation for the Clergy, he built up another office responsible for tourists.[24] In 1970, Paul VI contracted the two offices, and built up the Pontifical Council, subordinated under the Congregation for Bishops for the pastoral care of migrants and tourists.

In terms of law development, Pope Paul VI's *motu porprio*, *Pastoralis migratorum cura,* is significant as it emerged in the light of the principles of the Second Vatican Council.[25] The direction of the Congregation for Bishops, „*De pastoralis migratorum cura" („Nemo est"),*[26] which formulates practical aspects, is attached to this Papal document.

Oppositely the 1917 Code of Canon Law, the current Code of Canon Law does not give details on the function of the Roman Curia. Therefore the regulation of the office responsible for the faithfuls far from their home could be found in the Apostolic Constitution, *Pastor Bonus* (art. 149–151)[27], and in the regulation for internal use. The Apostolic Constitution, *Pastor Bonus* eliminated the dependence of

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[20] Pope Pius XII: Apostolic Constituion, Exsul Familia. VIII. 1. 1952. *Acta Apostolicae Sedis*, 1952/44. 649–704.

[21] Luigi Governatori: Commentarium in Const. Apost. „Exsul Familia". *Apollinaris,* 1953/26. 155–174.

[22] Eduardo Baura: La cura pastorale extraparrochiale. In: Gruppo Italiano Docenti di Diritto Canonico (ed.): *La parrochia*. Milano, Glossa, 2005. 255.

[23] Lugi Sabbarese: Girovaghi, migranti, forestieri e naviganti nella legislazione ecclesiastica. In: *Corso di formazione della Fondazione Migrantes*. Manuscript. 5.

[24] Giovanni Cheli – Lugi Sabbarese: Pontificio Consiglio della Pastorale per i Migranti e gli Itineranti. In: Pio Vito Pinto (ed.): *Commento alla Pastor Bonus e alle Norme Sussidiarie della Curia Romana.* Cittá del Vaticano, Libreria Editrice Vaticana, 2003. 216.

[25] Pope John Paul II: Motu proprio. Pastoralis migratorum cura. 15. VIII. 1969. *Acta Apostolicae Sedis*, 1969/61. 601–603.

[26] Congregation for Bishops: Instr., De pastoralis migratorum cura („Nemo est"). *Acta Apostolicae Sedis,* 1969/61. 614–663.

[27] John Paul II: Apostolic Constitution. Pastor Bonus.VI. 28. 1998. *Acta Apostolicae Sedis*, 1988/80. 899–900.

the office, changed its name and so it became Pontifical Council for the Pastoral Care of Migrants and Itinerant People.

The Pontifical Council did not cover only migrants but all of those who left their native land for any reason:[28] "going on trips", "leaving their native land", "nomads", who has not had to leave their native land but, because of their lifestyle, they lead an itinerant life, occasionally over the borders of their own native land. Similarly, the council was competent in the pastoral care of fishermen, seafarers and air transport personnel.[29] There was no difference whether they have left their native land of economic, political, religious, ethnic reasons or they have been forced to leave. The council was directed by the President, in the rank of an archbishop,[30] helped by the Secretary, assisted by the Under-Secretary and by the Councillors.[31]

The council was devided into nine "departments": migrants, exiles, refugees, displaced people, fishermen and seafarers, air transport personnel, nomads, circus and fairground people, those who go on trips for reasons of piety, study or recreation, land transport workers and other similar categories, which are of different importance.

Though the most important duty of the council was to provide pastoral care for people far from their native land, the classical form of charity, providing psychological and material help for migrants, occurs, too.

The council works with the authority of the universal church as well as of the Pope's, but in order to achieve higher efficiency it cooperated with the local churches.

## 4. Reflection and structural modification of Holy See in light of ongoing migration crisis

By the beginning 2000s it had become relevant to publish a new ecclesiastical document which was coherent with the existing legislation. Such a basic document needed which was harmonized with the pastoral-theological principles of the Second Vatican Council and considered the new social, political and security challenges.[32] As a result, the direction *Erga migrantes,* published 3rd May 2004, was born.

The document, *Erga migrantes* is a summary as the Apostolic See had already referred to the most important questions of migration in its documents examining the social teachings of the Church before the direction appeared. In post-synodal documents, examining the situations of Africa (1994), America (1997), Asia (1998), Oceania (1998) and Europe in the year of the Great Jubilee (2000), we can find references to the protection of refugees' human rights, to their reception and pastoral care.[33]

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[28] Cheli–Sabbarese opt. cit. 216.

[29] John Paul II: Motu proprio. Stella Maris. 31. I. 1997. *Acta Apostolicae Sedis,* 1997/89. 209–216.

[30] Gian Giacomo-Sanzi Sartori: Comment on Canon 360. In: Quaderni di Diritto Ecclesiale (ed.): *Codice di Diritto Canonico Commentato.* Milano, Ancora, 2001. 350.

[31] Heribert Schmitz: Die Römische Kurie. In: Joseph Listl – Heribert Scmitz (ed.): *Handbuch des katholischen Kirchenrechts.* Regensburg, Verlag Friedrich Pustet, 1999. 378.

[32] Julián Herranz: *Giustizia e pastoralità nella missione della Chiesa*. Milano, Giuffrè, 2011. 412.

[33] „If we consider, among the causes which lead many to leave their own land, the state of extreme poverty, underdevelopment and insufficient freedom which unfortunately still characterizes various

The direction, *Erga migrantes* contains four big parts and a final conclusion, into which the actual parts of the ecclesiastical documents were incorporated. Its appendix deals with the canonical concepts of migration. It refers to the lay faithful (1), chaplains and missionaries (2), men and women religious (3), church auhorities (4), Conference of Bishops and corresponding hierarchical structures of the Eastern Catholic Churches (5) and the than Pontifical Council.

Regarding the refugees' pastoral care, the direction notes that the leaders of the church must do their best for the refugees' pastoral and humanitarian care. Regarding the non-Christian or non-Catholic, they must respect the principle of freedom of conscience and religion (17). Local church authorities must be prepared for refugees' different language and cultural background. Therefore, it is an important aspect that the number of refugees in local communities should not exceed the limit that could cause tension because of the differences (89). Previous papal statements encouraged local church authorities to use the advantages of church universalism, its cross-border institutions and help new-comers with keeping in touch with the left-behind (32). Regarding waves of migration, the importance of people-to-people contact and the role of Catholic institutions have arisen again. At the same time, more called attention to national security risks which can be caused by these kinds of activities of the church. Because of the vast number of refugees, national security agencies are overwhelmed. Therefore, the more significant entities of a given country should show greater national security sensitivity, and should avoid unnecessary risks, which can be generated by contribution in communication.

The direction, *Erga migrantes* considers that in western societies there can be extreme political powers which can perform violently against refugees. In different official forums the church has already raised objection against refugees' ethnic or religious discrimation.[34] The document urges canonical opportunities to be used locally, and to form personally organized church institutions to provide pastoral care for migrant groups.

The Holy See asks the church authorities of the countries involved to send the Pontifical Council an annual report (p. 20 § 1 7), through which the Holy See can obtain up to date information regarding each country. The present nature of immigration requires more frequent communication between local and central organizations.

Because of the current security challenges and the migration crysis, Pope Francis published the *Motu Proprio Humanam progressionem*[35] and formed a new "dicastery", Promoting Integral Human Development by unifying the former pontificial councils for Justice and for Peace, for Migrants, for Charity and for Healthcare. The new dicastery is currently governed by statutes approved *ad experimentum*. The four

countries, there is a need for courageous commitment on the part of all to bring about a more just international economic order capable of promoting the authentic development of every people and country." John Paul II: Post-synodal Apostolic exhortation Ecclesia in Europa. 28. VI. 2003. *Acta Apostolicae Sedis*, 2003/92. 710.

[34] Giovanni Giulio Valtolina: "La paura è la madre di ogni razzismo". Atteggiamenti e orientamenti dei cittadini europei verso gli stranieri immigrati. *People on the move*, 2010/11. 113–129.

[35] Pope Francis: Motu Proprio, Humanam progressionem. 17. 08. 2016. *Acta Apostolicae Sedis*.

dissolved councils lost their functions and and articles of 142–153 of the Apostolic Constitution Pastor Bonus have also been abrogated. The new office is simply called a "Dicastery" and not a "Congregation" or a "Pontifical Council". This must be a temporary solution until the permanent place of the new Dicastery is found within the the curial structure. According to the fifth article of the statute "the Dicastery also represents the Holy See with regard to the creation and supervision of international charitable organizations and funds established for the same purpose".[36] The new Dicastery is responsible for "migrants, those in need, the sick, the excluded and marginalized, the imprisoned and the unemployed, as well as victims of armed conflicts, natural disasters, and all forms of slavery and torture." The pope's decision was not a suprise since many analysts expected a similar move.[37] The creation of this combined office is in line with Pope Francis's social views expressed in his encyclical – 'Laudato si'. It is worth mentioning the messages on the World Day of Migrants and Refugees. These assesments are not laws. At best, they clarify the function of legal institutions or the meaning of legislation. They formulate basic principles and behaviour, moral sentences and – if you wish – recommendations for political leaders of each country and for the leaders of international organizations. The supreme ecclesiastical legislator describes how to put canonical institutions much better into the pastoral and humanitarian service of people far from their homes. The opportunity is given to reflect to the actual situation of world politics and security state, and in this forum it calls the attention of each country and international organization to the new challenges of migration.[38]

## 5. The opportunity of refugees' pastoral care in current Canon Law

The Code of Canon Law, published in 1983 was formed with taking into account the conciliar principles. While CIC (*Codex Iuris Canonici*) was being adapted, it was clearly visible that migration had become a much more significant challenge but then, migration – either considering nationalities or its quantity – was radically different from the current situation.To reach higher efficiency, the new code makes basic principles which can be used regarding the humanitarian and pastoral care of people

[36] Francis: Statutes of the Dicastery for Promoting Integral Human Development. 17. 08. 2016. http://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco_20160817_statuto-dicastero-servizio-sviluppo-umano-integrale.html.

[37] Elise Harris: *Pope Francis creates new Vatican office for integral human development*. http://www.catholicnewsagency.com/news/pope-francis-creates-new-vatican-office-for-integral-human-development-34673/.

[38] On the occasion of the 89th World Day of Migrants and Refugees Pope John Paul II asked local Catholic institutions to help strangers with integration and not to make them feel cultural and language differences. Moreover, he condemned exaggerated nationalism of any kind, and referred to the 'most vulnerable strangers': refugees without any documents, the exiled , people looking for shelter[…] refugees of bloody conflicts, female and child victims of human trafficking." John Paul II: Presentation of the Pontifical Message for the World Day of Migrants and Refugees. *People on the move*, 2002/90. 5–7. Regarding their structures and messages these presentations, given on the World Day of Migrants and Refugees, are similar.

living far from their native land.[39] The legal options, guaranteed by the code, open the way to establishing different organizations for the pastoral care of migrants'.[40] Each institutional option cannot always be used. A competent ecclesiastical authority considers the circumstances, and establishes the most appropriate institutional setting to provide pastoral care for migrants.

### 5.1. The pastoral care of people living far from their native land within the frames of the local parish

Canon 529 of CIC deals with the general pastoral duties of the parish priest. Paragraph four commends "those exiled from their country" for the attention of the parish priest. The word usage of the Canon is general, it refers to anyone who is a refugee or far from their native land for any reason from education to work.[41] The legislator wanted to indicate that the parish was the liturgical and spiritual place for Catholics far from their native land. As for putting the law into practice, the legislator's purpose did not totally happen. For migrants, because of their cultural, language and other difficulties, could not be fully integrated into a local parochial community.[42] Or rather, the faithful did not take the strangers unreservedly. It is a typical example of the problem when the legislator's intentions and the implementation of the legislation cannot be put into effect because of the attitude of the recipients and other objective barriers. The first paragraph of Canon 529 mentions the pastoral care of "those exiled from their country" among the tasks of the parish priest. The Canon indicates that the parish priest should pay special attention to – in addition to the poor and the sick – those far from their native land. It is the pastoral duty of the parish priest arising from his office.[43] In a parish church, people far from their native land can receive from the 'treasury of the Church'. (LG 37; Can. 213).[44] It involves administration of sacraments[45] and words of God and

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[39] Eduardo Baura: Movimientos migratorios y derechos de los fieles en la Iglesia. *Ius Canonicum*, 2003/43. 51.

[40] Piero Antonio Bonnet: Comunione ecclesiale, migranti e diritti fondamentali. In: Pontificio Consiglio della pastorale per i migranti e gli itineranti (ed.): *Migrazioni e diritto ecclesiale. La pastorale della mobilità umana nel nuovo Codice di Diritto Canonico.* Padova, Edizioni Messaggero, 1992. 35.

[41] Juan Calvo: Comment to Cannon 529. In: Ignacio Juan Arrieta (ed.): *Codice di Diritto Canonico. Leggi e Complementari.* Roma, Colleti a San Pietro, 2004. 413.; Agosto Montan: *Il dirittto nella vita e nella missione della Chiesa*. Bologna, Edizione Dehoniane, 2000. 446–447.

[42] Hans C. Vöcking: Migration und Pastoral. Eine Chance für die Katholizität der Kirche. *Ost–West. Europäische Perspektiven*, 2003/3. http://www.owep.de/artikel/353/migration-und-pastoral. In his studies the author, the ex-secretary of the Migration Committee of the Council of European Episcopal Conferences, calls the attention, that it is difficult to integrate immigrants into local parishes.

[43] Montan op. cit. 449.

[44] Francesco Coccopalmerio: Il parroco »pastore« della parrocchia. *Quaderni di diritto ecclesiale*, 1993/1. 12–13.

[45] Because of greater mobility and unsettled conditions, from time to time it is not easy tell which sacraments can be administrated validly. In case of a marriage it can effect the validity of the

other pastoral activities.[46] However, due to cultural and language difficulties the effectiveness of these activities, especially of Catechism and spiritual conversations, is questionable. The legislator indicates that preaching God's words on the level of Catechism, homily and preaching should fit the faithful's age and intellectual capacity (LG 28; CD 30; can. 757). In case of refugees and immigrants, it can hardly or at the expense of sacrifices be achieved, as their cultural and language differences are extremely significant.[47] The pastoral care of immigrants cannot make up the majority of a parish priest's everyday work, it should fit into the group of tasks that he provides regarding his office. It is reasonable to provide the pastoral care of people far from their native land via the local parish church if the number of immigrants does not exceed the critical threshold, which would come at the expense of the parish's other pastoral work arising from his office. There is no reason why competent members of the parish church cannot join in the pastoral care of people far from their native land. Furthermore, it increasingly semms to be a task that makes it possible for the faithful, suitably their position, to participate in the priestly, prophetical and royal mission, instituted by Jesus Christ, of the Church on the level of the parish church. This participation can involve visiting immigrant families, looking after the ill, chartity activities, even religious education – if one has ecclesiastical permission.[48] The last one is extremely significant if the secular faithful have language, where appropriate cultural knowledge.

If the pastoral care of "those exiled from their country" exceeds the capabilities of the local parish priest, it is advisable to exercise other possibilities guaranteed by the current canon law. It can mean appointing a personal parish priest or, if circumstances justify, establishing pastoral institutions, which is guaranteed by canon law. The competent priest can be a 'chaplain' (Can. 564), an episcopal/general vicar providing and organizing pastoral care for migrants (Can. 476) and a personal parish priest. (Can. 518).

In theory a personal prelate could be established, but so far one personal prelate has been established with a totally different character.

Formerly, the so called 'mission' was known, it was deliberately established to provide pastoral care for people arriving from other countries.[49] Mission is not an exact canonical category, therefore it is difficult to place it among the other ecclesiastical structures. So can it be difficult to find financial sources for a pastoral

presentation of sacraments. (In case of not verified marriage obstacles).

46 Alvaro Del Portillo: *Laici e fedeli nella Chiesa*. Milano, Giuffrè, 1999. 64–74.

47 Mauro Rivella: Il parroco come evangelizzatore: l'esercizio del »munus docendi« (c. 528, par. 1). *Quaderni di diritto ecclesiale*, 1993/1. 23.

48 Erdő, Péter: A világiak munkája a plébánián. Teológiai és egyházjogi vonatkozások. In: Erdő, Péter (ed.): *Élő egyház joga.* Budapest, Szent István Társulat, 2006. 292–293.

49 Jaime B. Achacoso: Shepherding an Itinerant Flock A Survey of Institutions and Jurisdictional Structures for the Pastoral Care of Filipino Migrant Workers. *Philippine Canonical Forum*, 2010/12. 29–68.

institution, especially when a certain institution is not recognized and nor supported by the civil law.[50]

Nevertheless, if a pastoral institution is not established, the parish will be a spiritual and liturgic place for them, too.[51]

### 5.2. The pastoral care of people living far from their native land via appointing a parish priest

The new code, compared to the old one, attributes greater significance to the legal institution of the parish priest. A chaplain "is a priest to whom is entrusted in a stable manner the pastoral care, at least in part, of some community or particular group of the Christian faithful, which is to be exercised according to the norm of universal and particular law" (Can. 564). CIC introduces the legislation regarding chaplains through eight canons. (Cann. 564–572) Canon 568 of the Code is especially about those chaplains who are appointed to take care of a certain social group. The legislator sees the importance of the chaplain's activity in their taking care of groups who cannot receive the parish priest's general service. According to the Code, these social groups are those of "migrants, exiles, refugees, nomads, sailors." The legislator's intention is that "as far as possible, chaplains are to be appointed" for the pastoral care of the above mentioned. The list of CIC is not exclusive, rather it gives examples, and it entrusts to choose the groups who are in need of special pastoral care to the local ordinary's judgement.[52] It is an advantage for the priest to speak the language of a certain ethnic group and to know its culture. It is the best for the priest to belong to that certain ethnic group as the particular churches of the host country rarely have competent priests from all aspects.

In connection with migration, particular churches can use the possibilities of the current law which applies to handing over priest permanently or temporarely. The post-conciliar legislation made incardination easier.[53] On the one hand, it had theological reasons: priesthood should carry the responsibility towards universal

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[50] Astrid Kaptijn: *Die katholischen Migrantengemeinden – Staatskirchenrechtliche Ausblicke und das Kirchenrecht.* http://www.migratio.ch/de/dokumente/artikel-buecher-und-studien-zur-anderssprachigenseelsorge/studien/die-katholischen-migrantengemeinden.

[51] Francesco Coccopalmerio: La pastorale dei fedeli che si trovano fuori del domicilio. In: *Migrazioni e diritto ecclesiale. La pastorale della mobilità umana nel nuovo Codice di diritto canonico.* (Pontificium Consilium de Spirituali Migrantium atque Itinerantium Cura) Padova, Edizioni Messaggero, 1992. 193–200.

[52] John A. Alesandro: Comment on Canon 568. In: James Coriden – Thomas Green – Donald Heintschel (ed.): *The Code of Canon Law. A Text and Commentary.* New York, Paulist Press, 1985. 446.

[53] José Martín Agar: Appunti per una reflessione sull'incardinazione. In: Luis Navarro (ed.): *L'istituto dell'incardinazione.* Milano, Giuffrè, 2006. 452.

church.[54] On the other hand, it had to promote a better distribution of the clergy.[55] Regarding better distribution of priests, the regulation of the Second Vatican Council, *Presbyterorum ordinis,* puts emphasis on supplying particular pastoral care.[56] "Not only should a better distribution of priests be brought about but there should also be favored such particular pastoral works as are necessary in any region or nation anywhere on earth." (PO 10) The pastoral care of people far from their native land can be regarded as such a particular area.[57]

The legislation of the current Code which refers to incardination was born accordingly conciliar principles (Cann. 265–272). Therefore the legal possibility of both ex- and incardiation and "handing over" for predetermined time was made easier. If the diocesan bishops of two particular churches agree, there is the possibility to incardinate a cleric from the diocese of the sending country into the diocese of the host country to supply pastoral care for immigrants. So the particular churches of the host countries can get a pastor that speaks the immigrants' language and knows their culture. This canonical institution is worth being used when the number of immigrants makes it reasonable and therefore pastors stay in the host country on a permanent basis. However, it is only the canonical side of accepting pastors, the accepting particular Church should consider its national security and civil law aspects as well.

If people far from their country intend to stay temporarely in the territory of a particular church, or there are not many of them, or rapid integration can be foreseen, it is better to use the canonical institution of moving to another particular church for predetermined time (Can. 271). [58] As for accepting clerics for predetermined time, it is not only the cleric's request and competence, but also the bishops' of the two particular churches opinion, and last but not least the faithful's interests are considered.[59] In case of the priest from the sending country for ethnic groups far from their native land permanent reception is hardly an option, but the diocese of the accepting country receives pastors temporarely.[60] In this case, the two bishops should agree on the activity of the clericals in a written agreement. Code of Canon Law does not mention what elements the agreement between ecclesiastical principals should

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54 The rules of incardination and excardination must be modified so that the ancient institution should remain, but they should suit present pastoral demands better." PO 10. See Pierantonio Pavanello: I Presbiteri fidei donum speciale manifestazione della comunione delle Chiese particolari tra loro e con la Chiesa universale. *Quaderni di diritto ecclesiale*, 1996/1. 49–51.

55 Javier Hervada: Personal Prelature from Vatican II. to the New Code: An Hermeneutical Study Canons 294–297. *The Jurist*, 1985/45. 379–418.

56 Alvaro Del Portillo: *Consacrazione e missione del sacerdote.* Milano, Ares, 1990. 30.

57 José María Ribas: *Incardinación y distribución del clero.* Pamplona, Universidad de Navarra, 1971.

58 Congregation for Clergy: Notae directivae. Postquam apostoli. 26. p. 25. III. 25. 1980. *Acta Apostolicae Sedis*, 1980/72. 343–364. It has been confirmed again recently by the Holy See. Congregation for Bishops: Directorium. Apostolorum successores. n. 17. 22. II. 2004. *Enchiridion Vaticanum*, 2004/23. 1068–1069.

59 Clergy Personnel: Policy and Canonical Issues. *The Jurist*, 45/1985. 517.

60 Juan Ignacio Arrieta: *Diritto dell'organizzazione ecclesiastica*. Milano, Giuffre, 1997. 365.

contain. According to different authors, the following questions are worth discussing: the length of a future service, the particular duties of a cleric's during his pastoral care, the place of service and housing, remuneration and the question of health and social insurance.[61] Civil law and national security barriers, which according to the canonlaw do not mean the limits of temporary take-over, should be considered. Pastoral duties, the pastoral care of migrants as well, can be provided – with the superior's permission – by a cleric that belongs to an institution of consacrated life. It is more and more frequent in dioceses, because of the growing lack of priests.

### 5.3. Appointing an episcopal vicar to organize the pastoral care of people far from their native land

If it is justified, the pastoral care of migrants can be organized through an episcopal vicar. The Second Vatican Council thought, paying attention to the changed social circumstances, it was important for the diocesan bishop to have other assistents beside the general vicar in more important pastoral cases (CD 27).[62] After the council, the importance of this institution was emphasized in several Papal and Holy See documents.[63] The Code refers to the episcopal vicar's competence, appointment and losing office in general (Cann. 475–481). In case of an episcopal vicar, that is responsible for immigrants, there are special qualities which are worth being measured.[64] Among others, these qualities can be the knowledge of a language, a culture or, where appropriate, a special rite. The latter does not only mean liturgy but also the tradition of the church "sui iuris" and its peculiarities in ecclesiastical disciplines and government. In many cases, the episcopal vicar, appointed for providing pastoral care for people far from their native land, comes from the cultural milieu of migrants in majority. In other cases, the episcopal vicar has spent a long time in the sending country, or he has some language and cultural knowledge for other reasons. In the countries that are involved in migration, dioceses, using their canonical rights, have appointed episcopal vicars to harmonize the pastoral care of migrants on diocesan level. This solution exists in several Anglo-Saxon and Western-European countries.

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[61] Francis Schneider: Comment on Canon 271. In: James Coriden – Thomas Green – Donald Heintschel (ed.): *The Code of Canon Law. A Text and Commentary*. New York, Paulist Press, 1989. 340.

[62] Velasio de Paolis: De Vicario Episcopali secundum Decretum Concilium Oecumenicum Vaticanum II „Christus Dominus*". Periodica*, 1967/56. 309–330.

[63] Episcopal Congregation: Directorium. Ecclesiae imago. 22. II. 1973, *Leges V,* nr. 202. 6528–6529.

[64] Gian Giacomo Sarzi Sartori: I vicari del vescovo e l'esercizio della »vicarietà« nella Chiesa particolare. *Quaderni di diritto ecclesiale*, 2005/18. 11–12

### 5.4. Pastoral care of people far from their native land through structures organized on ecclesiastical personal concept

After the Second Vatican Council the personal concept, beside the territorial institutions, was getting more and more important regarding pastoral activity.[65] These institutions are built up – on the one hand – on universal law, on the other hand on local, particular canon law which considers national circumstances.[66] Pastoral structures on personal concept, providing pastoral care for people far from their native land, had already been established before the Vatican Concil. Pope Pius X established ordinariates in the USA and Canada to provide pastoral care for Rusyns. Pope Benedict XV also established an ordinariate for refugees in Italy. Pope Pius XI used the same canonical structure when he provided pastoral care for Slavs in China.

Pope Pius XII used this ecclesiastical structure for Eastern Catholics in Brasil, for Polish refugees in France and Germany. Pope John XXIII ordered to establish an ordinariate for Eastern Catholics in Argentina. Pope Benedict XV established a personal diocese in Calabria to provide pastoral care for Greek Catholics arriving from Albania. Pope Pius XII established a personal diocese for refugee Maronites in Cairo.

#### *5.4.1. The personal diocese to provide pastoral care for people far from their native land*

According to the principles of the current CIC, particular churches and diocese as their preferred forms are basically organized on territorial concepts. It is also a general principle that a diocesan bishop should consider the faithful's special situation and circumstances when providing them pastoral care. (Can. 383 § 2)[67] Pope John Paul II's post-Synodal apostolic exhortation about episcopal service, *Pastores gregis* emphasized this principle regarding refugees and migrants. He added that diocesan bishop had to separate financial resources for this activity in the territory of a diocese.[68]

Besides, the Code reinforces the main rule of the territorial concept (Can. 372 § 1), in the same canon (Can. 372 § 2) the Code makes it possible for the supreme authority of the Church to erect personal diocese after the conferences of bishops have been heard and the faithful's spiritual demands have been considered.[69] The law speaks

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[65] Erdő–Szabó (ed.) op. cit. The volume of studies outlines the institutions of the Catholic Church operating on territorial and personl concept, and describes the legal framework of new, personal institutions.

[66] Eloy Tejero: Comment on Canon 568. In: Ángel Marzoa – Jorge Miras –Rafael Rodríguez Ocaña (ed.): *Exegetical Commentary on the Code of Canon Law.* Vol. II/2. Montreal, Wilson and Lafleur, 2004. 1443–1444.

[67] *Communicationes*, 1980/12. 296.

[68] John Paul II: Post-synodal Apostolic exhortation. Pastores gregis. 16. X. 2003, 16. n. 45, 67. *Acta Apostolicae Sedis,* 2004/96. 885–886.; 914–916.

[69] John Renken: Comment on Canon 372. In: Beal–Coriden–Green op. cit. 509.

generally, and the difference from the territorial rule is explained with "due to special circumstances". The cultural and language capabilities of people far from their native land constitute the special pastoral circumstances.[70] The personal diocese has all those rights that the territorial diocese owns: it can incardinate clericals, it can have its own clergy and can erect ecclesiastical institutions on a wide scale. Managing and controlling occur according to the laws of the institutional structure of the territorially limited diocese and to its existing laws. Besides, if the pastoral care of people far from their native land is provided through the personal diocese, the jurisdictional competences must be clarified, and the tensions deriving from clashes of competences should be minimalized.

The personal diocese's – or rather its leader's, the personal bishop's – competency is also territorially limited, which is the territory of a certain country under its conference of bishops.[71] It is not the competency of the local ecclesiastical authority to erect a personal diocese, but of the Apostolic See.[72] Normaly, this competence belongs to the Congragation for Bishops, but in missonary territories the Congregation for the Evangelization of Peoples has competence (Can. 373).[73] Regarding the Conference of Bishops, Canon 372 § 2 notes that the Apostolic See can erect a personal diocese "after the conferences of bishops concerned have been heard". This process is logical in case of a personal diocese erected to provide pastoral care for people far from their native land. If all goes well, local bishops have sufficient information regarding the nationalities, the rites and the number of immigrants in the territory of the Conference of Bishops. At best, the members of the Conference of Bishops can judge which canon law structure is the most suitable to provide pastoral care for people far from their native land. The members of the Conference of Bishops may be familiar with migration policy of the state authorities and they are in connection with state participants.[74] With the information they have, they can significantly help the Apostolic See erect the most suitable ecclesiastical institution to provide pastoral care for people far from their native land.

Local diocesan bishops still have the rights and duties to provide pastoral care for people far from their native land even if a personal diocese is erected because of the diocesan bishop's general pastoral responsibility, which covers the pastoral care of immigrants', refugees', migrant workers' and students'. In order to avoid

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70 Luis Okulik: Apetti giuridici della cura pastorale dei fedeli di rito orientale nelle diocesi latine. In: Arturo Cattaneo (ed.): *L'eserczio dell'autorità nella Chiesa.* Venezia, Marcianum Press, 2004. 53–63.

71 Giorgio Feliciani: La dimensione collegiale del ministro del vescovo a livello locale. In Cattaneo (2004) op. cit. 64.

72 Thomas Green: Commentary on Canon 372. In: Beal–Coriden–Green op. cit 318.

73 It is confirmed by *Pastor Bonus,* paragraphs 75–78 of the Apostolic Constitution referring to Congregation for Bishops.

74 In certain countries – eg. in the USA – the committee of the Conference of Bishops charged with immigration and refugee issues criticizes civil laws considering human rights. Committee on Migration of United States Conference of Catholic Bishops: *On Human Trafficking.* Washington DC, United States, Conference of Catholic Bishops, 2012.

superfluous duplication[75] and to reach higher pastoral effectiveness, the cooperation among the members of the Conference of Bishops cannot be ignored.[76]

*5.4.2. Personal parish to provide pastoral care for people far from their native land*

Personal parish, also organized on personal concept, is a kown institution in current law with its much narrower powers. In case of a prelature the legislator has maintained the principle that the prelature is erected on territorial concept (Can. 518). Besides, CIC gives the possibility, if it is reasonable, to erect a personal parish similar to the personal diocese. While the personal diocese is erected considering the aspects of the Holy See, a personal parish is established within the diocesan bishop's own power.[77] In Canon 518, the legislator shortly refers to the principles that can play roles in establishing a parish. The list of CIC is not complete, it only gives some examples to the diocesan bishop. In the text of the Canon, the legislator mentions the aspects of the rite, languages, nationalities which can form the base of establishing a parish. All these reasons can occur due to migration in the territory of a particular church or an Conference of Bishops. The local diocesan bishop has the right to establish more than one parishes to provide pastoral care for people far from their native land. In case of organizing such a differentiated pastoral care, he can consider the language, rite, nationality, age, etc. of a certain community.

A personal parish priest regarding people he takes care of, has the same rights and duties as a territorial parish priest has.[78] It means catechism, preparation for sacraments, having spiritual discussions or providing a service. The advantage of the personal parish is, comparing to the personal diocese, that the smaller organization requires less administration, it can be erected, modified or terminated faster.[79] It is the diocesan bishop's right to evaluate the situation and to make a decision, but the opinion of the clerical senate should be considered as well when establishing a parish (Can. 515 § 1). Namely, it is a basic principle that a diocesan bishop cannot establish a parish without the clerical senate being heard. In case of the parish, erected to provide pastoral care for people far from their native land, it is extremely important

[75] Carlos Soler: La jurisdicción cumulativa. *Ius Canonicum*, 1988/28. 172–179. In his study, the author analyses the duplications appearing in the territory of the ecclesiastical government. Regarding the pastoral care of immigrants, he notes that the pastoral institution established for immigrants is useful, and the legal possibilities are the fruits of legal development, but both the leader of this institution and of the local particular church should be tolerant and cooperative with each other.

[76] Feliciani (2004) op. cit. 53–63.

[77] Paolo Moneta: Territorialitá Personalitá Nell'organizzazione funzione Giudiziaria. In: Erdő–Szabó (ed.) op. cit. 687–689. The author emphasizes the duties of the local ecclesiastical authority to ensure the rights of those living in need of special pastoral care and in specila circumstances.

[78] Helmut Pree: Nichtterritoriale Strukturen der hierarchischen Kirchenverfassung. In: Erdő–Szabó (ed.) op. cit. 518–519.

[79] Winfried Aymans – Klaus Mörsdorf: *Kanonisches Recht.* Paderborn–München–Wien–Zürich, Ferdinand-Schönigh, 1997. 190.

as the priests of the senate together have a wider view on the pastoral care required by people far from their native land.

### *5.4.3. Erecting a personal prelature to provide pastoral care for people far from their native land*

The canonical institution of a personal prelature is new in the existing canon law.[80] As the Code says, the reason for erecting a personal prelature is "to promote a suitable distribution of clerics" or "to accomplish particular pastoral or missionary works for various regions or for different social groups". The Apostolic See can erect a peronal prelature after bishops concerned have been heard. The prelature consists of priests and deacons (Can. 294), but the lay faithful can also join the pastoral activity of the prelature.[81] The law reveals that, in theory this legal institution would correspond to providing pastoral care for people far from their native land as the legislator clearly stated that the institution wanted to look after people who are in need of pastoral care. It is obvious that people far from their native land need special pastoral care, as well as they form a clearly visible group of the local Catholic community.[82] When establishing a personal prelature, similarly to personal dioces, the Apostolic See seeks the opinion of the Conference of Bishops concerned. Establishing, later modifying or terminating is the right of the Holy See.[83] The personal prelature is, considering its territorial aspects, more flexible than the personal diocese. It is not evitable for that the pastoral and governmental jurisdiction of the prelature to cover the territory of an episcopal conference. If the situation of people far from their native land is similar in the territory of the neighbouring Conference of Bishops, it is not forbidden for the same personal prelature to have jurisdiction in the territory of the country concerned. As the personal prelature has also got the right to have its own seminar, namely to have an institution responsible for educating priests and to have its own presbitery (Can. 295), it has the advantage that during their studies priest candidates are not only provided with general teological, philosophical and canonical education but with education in connection with the special duties of a prelature. Beisdes, the Holy See does not seem to prefer to establish this legal institution to provide pastoral care for people far from their native land.

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[80] Javier Hervada: Personal Prelature from Vatican II. to the New Code: An Hermeneutical Study Canons 294–297. *The Jurist*, 1985/45. 379–418.

[81] Joseph Edward Fox: *The Personal Prelature of the Second Vatican Council: An Historical Canonical Study.* Roma, Università San Tomaso, 1987.

[82] Jean Beyer: Il nuovo Codice di Diritto Canonico e la pastorale della mobilità. *On the move,* 1983/3. 18.

[83] Gaetano Lo Castro: Le prelature personali. Profili giuridici. *Ius Ecclesiae*, 1989/1. 467–491.

### 5.5. Catholic organizations erected to provide humanitarian aid for immigrants

In 2015, the wave of migration made it clear that not only did the Catholic Church have to give pastoral assistance but humanitarian aid as well. While the pastoral care is the right and duty of the church, refugees' humanitarian aid is an overall social challenge.[84] As the church has always been sensible on the poor, the helpless and the vulnerable, it is obvious for the church to participate in refugees' humanitarian service through its different organizations.

However, a few principles must be seen clearly.

The ecclesiastical structures of each country have different capacity. You cannot compare the organizations of the German Catholic Church, having been in service for a long time, to the human, financial and structural resources of the Catholic Church in the former socialist countries.

There are significant differences in the needs of migrants. If migrants do not want to settle down or stay longer in a certain country, it is no use thinking of institutions which, as in Germany, help migrants with integration, language education, housing or taking a job. It is not what refugees need either. In these countries instituions should be turned towards providing rapid and temporary help (food, water, medicine, warm clothes, blankets etc.).

The activities of ecclesiastical, state and other denominational organizations should be coordinated. Superfluous institutional duplication in assistance must be avoided. It is important to be familiar with the legal frames of the activity, as there can be gap in the law or uncertainty in state or international regulations. It is not worth for Catholic organizations dealing with humanitarian aid, undertaking an activity that leads to tension with state authorities.

Regarding the activity of Catholic institutions, national security awareness must be emphasized. The tasks of national security services have increased because of the growing number of migrants arriving in European countries. We must be aware that certain activities (sheltering, providing anonym health care) raise national security concerns, which must be regarded by Catholic charity organizations, too.

### 5.6. The canonic diversity of organizations erected to provide humanitarian service

While the above mentioned institutions, which can be established to provide pastoral care, are canonically clearly defined institutions of the Cathilic Church, the organizations participating in humanitarian activities are canonically diverse, even unidentifiable in some cases. It is problematic as the supervisory bodies, the legal limits of asset management and activity scope cannot be identified clearly.

Quite often a committee or an office, governed by an Conference of Bishops, provides humanitarian service for immigrants in the territory of the conference. The Code has a short reference to the committees and institutions of the Conference of

[84] Fischl, Vilmos: Egyházi karitatív szervezetek szerepe a válságkezelésben. *Kard és Toll*, 2006/2. 92–101.

Bishops, which says the conference can have "other offices and commissions which, in the judgment of the conference, more effectively help it to achieve its purpose." Their functions must be clarified in the regulation of the episcopal conference. (Can. 451) The usefulness and the exact functions of an institution have to be measured and defined by the members of the conference. For example, in Italy the permanent council of the Conference of Bishops ordered to erect a separate office for immigrants in 1987.[85] The office fulfils its duties through diocesan representatives and its five offices in the country.

The rules of the institution, with its centre in Rome, indicates that the centre – according to canon law – is a legal person. If secular law does not guarantee legal personality for ecclesiastical persons, the secular legal status of the institution must be clarified.

In the USA, *US Conference of Catholic Bishops Migration and Refugee Services,* the institution subordinated to the Conference of Bishops, possesses a significantly wide range of legal power and field of activity, ecclesiastical and secular institutional connections.[86]

The majority of immignrants arriving in the USA are Catholics, so the church feels more involved in not only providing pastoral care but humanitarian assistance as well.[87] It has a separate program for children who have lost their families,[88] it is in touch with state authorities responsible for immigration, and it makes regular analyses, evaluations about state laws, and, where appropriate it proposes daring legislative amendments.

In accordance with the legislator's intention, among episcopal conferences there are initiatives to give theoretical and practical solutions for migration. "Relations between conferences of bishops, especially neighboring ones, are to be fostered in order to promote and protect the greater good" (Can. 459 § 1), to which the Apostolic See must be heard. (Can. 459 § 2) Such an initiative was the foundation of a team, by the Symposium of Conference of Bishops of Africa and Madagascar, to help refugees. The conferences were motivated by the fact that there were three million African refugees in 2011, and according to some forecasts every tenth African will work far from their native land. The task of the team is to study the phenomenon of migration, and to make suggestions to the local churches on organizing common actions. For example, a recommendation was formulated on an action in the interests of protecting families as migration has disarranged a lot of African families.[89]

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85 Antonio Interguglielmi: Le novità legislative e lo spirito di accoglienza. *Social news. Mensile di promozione sociale*, 2014/3. 15.

86 Ugo Poletti: Decreto di costituzione della fondazione »migrantes«. https://www.chiesacattolica.it/cci_new_v3/allegati/10429/STATUTO%20Migrantes.pdf.

87 Migration and Refugee Services. http://www.usccb.org/about/migration-and-refugee-services.

88 Children and Migration. http://www.usccb.org/about/children-and-migration/index.cfm.

89 La migrazione di molti africani distrugge le loro famiglie. http://vaticaninsider.lastampa.it/nel-mondo/dettaglio-articolo/articolo/africa-18495/.

The Council of the Bishops' Conferences of Europe working in the spirit of the ecclesiastical colleagues of the Second Vatican Council has kept an eye on European migration since its foundation. The migration section of the Committee of *Caritas in Veritate* deals with the assessment of pastoral and humanitarian activities for refugees.[90] The Committee *Caritas in Veritate* was named after Pope Benedict's encyclical, and beside migration it pays attention to justice, peace and the protection of creation. Its aim is that European bishops should share their experiences in these questions. Earlier, refugee issues were delt with by separate committees, which – after having been converted into sections – were incorporated into Committee *Caritas in Veritate* which deals with other social questions, too. Its efforts are helped by the Pontifical Council and other international Catholic societies, responsible for refugee issues.[91]

A lot of ecclesiastical organizations that were established by the faithful are engaged in humanitarian aiding of refugees. In most cases, these organizations are not specifically established for aiding of refugees, but for more general assistance, and they changed their mission to the modified circumstances. The faithful have the rights to erect such organizations. Thanks to the teological thinking of the Second Vatican Council, the freedom of association to promote the goals of the church has an honoured place in current Canon Law (Can. 299 § 1).

Among the goals of the church, practicing charity has always played an important role (Can. 298 § 1),[92] which appears – in connection with 20th century refugee issue – in helping refugees exiled from their native land. Such associations can be international, national or regional, namely diocesan, and according to their dependence on ecclesiastical authorities they can be public (Cann. 312–320) or private (Cann. 321–326). The public associations of the Christian faithful, even if they are grassroot initiatives, are approved by ecclesiastical authorities, universal and international associations are approved by the Holy See (Can. 312 § 1 1) Saint Egedius Association is of such character, which – beside its humanitarian activities – maintains soup kitchens, social centres for refugees in several cities, and provides legal counselling, health care, food and clothes donation for people in need. In such cases, approval and supervision are provided by the the Pontifical Council for the Laity.

National public associations are approved by the episcopal conference in its territory (Can. 312 § 1 2), and diocesan associations are approved by the diocesan bishop also in his own territory. (Can. 312 § 1 3) An example for the former is the German Saint Raphael Society, which was recognized by the German Conference of Bishops in 1947, as the only association of the conference responsible for refugees.

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90 There are institutions with the same names subordinated to Conference of Bishops too.

91 Migration section. http://www.ccee.eu/ccee_en/ccee/00002309_Migration_Section.html. Pl. Caritas Europa, the International Catholic Migration Commission.

92 Giorgo Feliciani: Il diritto di associazione e le possibilità della sua realizzazione nell'ordinamento canonico. In: Winfried Aymans – Karl Th. Geringer – Heribert Schmitz (ed.). *Das konsoziative Element in der Kirche*, 1989. 408–409.

The association was renamed to Saint Raphael Work, and it went through significant structural changes.[93]

Private societies, although they had more freedom, were subordinated to the supervision of ecclesiastical authorities regarding their activities. In the field of humanitarian aid for refugees, several legal and ethical questions can arise, which shoud be supervised by an ecclesiastical authority. Regarding the pastoral care for refugees, the Code has significant general principles (Can. 304). It is such a sensitive field of activity that it must be specified accurately how the pastoral care for refugees fits in the goals of the society. Regarding the correct identification of the society, it is important to specify the conditions of headquarters, management and participation exactly.[94] For Catholic associations, dealing with refugees, there can be national security aspects that are irrelevant in other areas of humanitarian aiding. These must be considered by the principal responsible for acceptance and specifying tasks.

Every kind of society is subordinated to the supervision of the Holy See (Can. 305 § 2), diocesan and other societies if they work in a particular diocese, to the supervision of the local ordinariaties.[95]

Societies can wear the name Catholic with the consent of a competent ecclesiastical authority (Can. 300).[96] In sensitive areas, such as humanitarian aiding of migrants, it is extremely important to define which society of the Catholic Church works in which area.

It is more and more frequent that Catholic associations with similar characters cooperate in order to reach higher efficiency. As we are talking about institutions with significantly different canonic and civil legal opportunities, the frames of co-operation should be clarified in this case, too. In Italy, at the beginning of the 2000s, a summary was given to the Catholic organizations that were involved in the pastoral and humanitarian care of immigrants.[97] In the documents, the most important questions with a view to humanity, which often arise in this field, are discussed: unemployment, the under-age, children, women's specific support, family reunion, people of different faiths, handling challenges concerning Islam, legal aid and health care. Naturally, the situation has changed, but it is worth giving such out line, as the staff of the organizations providing humanitarian aid do not know the pitfalls that arise in connection with the humanitarian care of immigrants. In such activities, education and preparation are canonic principles, at the same time. (Can.

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93 Die Katholische Arbeitsgemeinschaft: http://www.kam-info-migration.de/55427.html.

94 Miguel Delgado Galindo: Gli statuti delle associazioni di fedeli. *Ephemerides Iuris Canonici,* 2011/51. 429–444.

95 Luis Navarro: *Diritto di associazione e associazioni di fedeli*. Milano, Giuffrè, 1991. 44–48.; Maria Angela Punzi Nicolò: *Libertà e autonomia negli enti della Chiesa.* Torino, 1999. 71–83; Venerando Marano: *Il fenomeno associativo nell'ordinamento ecclesiale*. Milano, Giuffrè, 2003. 90–101.

96 Fidel González Fernández: *I movimenti. Dalla Chiesa degli apostoli a oggi*. Milano, BUR, 2000.; Joseph Ratzinger: I movimenti ecclesiali e la loro collocazione teologica. In: *I movimenti nella Chiesa*. Città del Vaticano, 1999. 23–51.; Giuseppe Rivetti: *Il fenomeno associativo nell'ordinamento della Chiesa tra liberta e autorità*. Milano, Giuffrè, 2008. 135–142.

97 Ibid.

329) Several German Catholic organizations which are engaged in the pastoral care of immigrants also co-operate. For example, it is a peculiar German initiative of the relief organizations which provide anonim health care for immigrants. Anonimity is for those who, without any valid documents and residence permit, are not able or do not want to turn to health care institutions.[98] Anonimity is guaranteed, which is partly good as diseases dangerous for the whole society may be discovered, on the other hand, it raises certain national security worries.

It is not unususal that some section of organization is involved in the humanitarian care of immigrants. For example, German Caritas Association has a separate organizational unit responsible for immigrants, and it has diverse tasks from organizing language courses to promoting integration and actions against racism.

In other cases, it is not stated literally that a certain institution has a separate section to provide humanitarian aid for immigrants, but simply this field can be found among its other a ctivities. So does it work in case of Hungarian Catholic Caritas.

Due to migration, other institutitons of the Catholic Church, not dealing with migration originally, became involved. Educational institutions are of this kind, in this field ecclesiastical institutions have to face the fact that the proportion of migrant young people is rising.[99] Moreover, in connection with migration, where the social teaching of the church should be reconsidered, ecclesiastical and Catholic universities and research institutions will have significant roles, too.[100]

## 6. Possible solutions of the Code of Canons of the Eastern Churches for the pastoral care of people far from their native land

In most cases faithfuls far from their native land belong to an Eastern Church. So personal canonic formations, established for immigrants follow the traditions and law of the Eastern Churches. *Codex Canonum Ecclesiarum Orientalium* (CCEO) knows personal ecclesiastical structures – similarly to the Latin Code. Obviously, these ecclesiastical structures, due to the traditions of Eastern Churches, show differences both in their names and leadership.

Before the existing *Codex Canonum Ecclesiarum Orientalium* appeared, the Holy See, considering the geographical fragmentation of each *sui iuris* churches, had already established personal ecclesiastical formations for the faithful of the community, which was justified with belonging to the same rite. In the 20th century, the Holy See, due to the significant migration of the Rusyn Greek Catholics, established exarchies to provide pastoral care for Rusyn Greek Catholics in Canada and Germany, for Ukranian Greek Catholics in the USA, Canada, Argentina,

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98 Malteser Migranten Medizin. http://www.malteser-migranten-medizin.de/startseite.html.

99 Vinicio Ongini: A che punto siamo con l'integrazione? *Migranti*, 2014/1. 14–16.; Alberto Campoleoni: Una scuola "diversa". *Migranti,* 2014/1. 17.

100 Lóránd Ujházi*:* Il regolamento giuridico della formazione dei teologi nella Chiesa Cattolica. In: András Lóránt Orosz – Lóránd Ujházi (ed.): *Vita consacrata e diritti umani nella Chiesa Cattolica dell'Europa centro-orientale ed altri saggi. ed altri saggi di diritto canonico.* Budapest–Pannonhalma, L'Harmattan, 2011. 87–112.

Australia, Brasil and Great-Britain and for Armenian Catholics in France. According to the the Code of Canons of the Eastern Churches, an exarchy is the part of people of God which was not formed into an eparchy (diocese) for some reason, and which is led by an eparch on territorial or other principles (CCEO, Can. 311 § 1). The legislator indicated that this ecclesiastical structure is not appropriate, but there can be objective circumstances which make it necessary to use this form. Such a circumstance is when vast number of the faithful belonging to the Eastern Church with its own rights lives over the border of the patriarchate or major archiepiscopate. In these cases, in order to the canonic discipline – according to which the Christian faithful have the right to get pastoral care in accordance with their own rites – be realized, the Holy See can order their pastoral care to be provided via exarchies (CCEO, Can. 312 § 2).CCEO gives the possibility for patriarchs and major archbishops, considering the particular circumstances, to establish an exarchy in their own territories with the contribution of their permanent synod (CCEO, Can. 85 § 3) and with a prior notice to the Holy See (CCEO, Can. 85 § 4). It may be important in the Middle-East regions, where the security states of the bordering countries are significantly different, and migration is frequent among the countries. As in these territories several Eastern Churches co-exist with similar and territorially defined hierarchies. However, it is more frequent to establish an exarchy outside the territory of the patriarchate or major archdiocese – in North- and South-America and in Europe –to provide pastoral care to those who belong to a certain Eastern Churches. In this case the Apostolic See has the right of establishment.[101] As for the duties and the rights of the Holy See, it has a separate office responsible for providing pastoral care for people far from their native land, yet in case of Eastren Catholics the Congregation for the Oriental Churches has the authority, too.[102] The basic task of the Congregation is to provide the opportunity of spiritual life in accordance with their own rites for the members of Eastern *sui iuris* communities. To realize it, the congregation has to estimate the number of Eastern Catholics in a certain territory and to assess the possibility of establishing the institutional frames to provide pastoral care. The congregation can play a mediatory role among a local Conference of Bishops, a local diocesan bishops and a *sui iuris* ecclesiastical hierarchy. The mediatory role can mean that the in rite responsible hierarchy provides

[101] Luigi Sabbarese: Comment on Canon 312 of CCEO. In: Pinto (ed.) op. cit. 277. Before the publication of CCEO, there was a suggestion that if an exarchy is established for the faithful of the Eastern Church anywhere all over the world, the patriarch of the *sui iuris* church should have a kind of voice and consultation right. The suggestion was rejected. See *Nuntia*, 1989/28. 56. See George Nedungatt: The Patriarchal Ministry in the Church of the Third Millennium. *The Jurist*, 2001/61. 1–89.

[102] Pablo Gefaell: Impegno della Congregazione per le Chiese Orientali a favore della comunità orientali in diaspora. *Folia Canonica*, 2006/9. 117–137.

priests of rite who have language and cultural competences.[103] Namely, it can be difficult for local ecclesiastical authorities to provide pastors of rite.[104]

Though CCEO misses a pastor's canonical description, in practice Eastern *sui iuris* churches appoint pastors in duties for different immigrant Christian faithful. As for the significance of the legal possibilities of incardination and excardination, they are possible only inside a certain *sui iuris* church. So, a priest belonging to the Eastern *sui iuris* Church cannot be incardinated into a Latin particular church, but temporary taking over is possible.

## 7. Consequences

In the canonical regulations of the Catholic Church, and in the Code of Canon Law, ecclesiastical structures organized on the personal concept were appearing more and more important. These institutions are used when pastoral organization on the territorial concept cannot comply with a special pastoral challenge for some reason. These institutions do not put an end to the responsibilities and rights of local ecclesiastical institutions.

Before the Second Vatican Council, the Catholic Church was already aware of the fact that people far from their native land live in special conditions, and this fact must be considered when organizing pastoral care for them. The new Code significantly made it easier to build up the institutional background. On local level, the personal diocese, the personal parish, or theoretically the personal prelature can be the solution.

The recent migrant crises made the church realise that not only should pastoral care but humanitarian aid also be considered. The latter is not only for Catholics, but for any people in need.

The ecclesiastical structures of countries possess significantly different sources in this field. On the other hand, the demands that are drawn up about the Catholic Church concerning migrants are different.

The task of the instituions responsible for Catholic humanitarian aiding of the so called transit countries is to give fast and temporary help. On the contrary, the institutions with similar features of destination countries help establish the bases of integration.

When establishing humanitarian aiding, the operation of ecclesiastical, state and other denominational organizations should be coordinated. The organizations cannot ignore the existing secular legal environment and national security risks arising in connection with migrant crisis.

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[103] Ariel David Busso: *La organización eclesiástica de los inmigrantes.* In: Erdő –Szabó (ed.) op. cit. 386–387.

[104] The organization of the pastoral care of each Eastern Churh is described definitely by Antonio Maria Veglió: Strutture pastorali per i migranti cattolici delle Chiese Orientali. *People on the move*, 2010/11. 147–161.

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# FREEDOM TO BELONG AND FREEDOM TO LEAVE RELIGIOUS COMMUNITIES ACCORDING TO THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

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## 1. Introduction

Religious diversity has become an increasingly common fact of life as migratory flows take on planet-wide dimensions. Changing religion and the legal consequences of such a change take on a growing importance in multicultural societies, in which those changes are made more possible by increasing contact among people of different faiths. Conversion is also the result of proselytising activities carried out by various religious faiths or groups. Both religious affiliation and changing religion can have legal consequences with respect to State laws.

This social reality requires that thought be given to the issue of managing religious diversity in accordance with the fundamental principles of democratic systems. The aim of this contribution is to reflect on major moments involving religious affiliation. How should religious law and State law interact at these moments? State law should protect religious freedom at any time, but how far should such protection go? It is also necessary to determine how and to what extent the State can impose legitimate limitations on the autonomy of religious communities. To a religious body, autonomy is what religious freedom is to individuals, and it reflects the true essence of the right to religious freedom in its collective dimension.[1] We will take into consideration the European Court of Human Rights' (ECtHR) case law in trying to answer these questions.

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1 "The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords." (*Metropolitan Church of Bessarabia and Others v Moldova*, n. 45701/99, March 27 2002, §118).

## 2. Becoming member of a religious community

The first moment comes with incorporation into a specific religious community: the conditions for affiliation are a matter of religious law. Can State law establish any limits? How should State laws protect individual religious freedom at this time? Religious beliefs may be expressed externally through adherence to a religious institution. The European Court supports the need that such adherence should be a free act. Thus it is considered that State Church System does not contravene Article 9 of the Convention if no one may be forced to enter or prohibited from leaving it.[2]

Freedom of incorporation into a specific religion could also be limited where religious proselytising is banned (*Stahnke* 1999, 295.).[3] The ECtHR, however, has made it clear that religious freedom becomes no more than a 'dead letter' if it does not include the right to try to win over one's neighbour to one's own beliefs as long as the means used are lawful. In the case *Kokkinakis v Greece*, the ECtHR sustained that Article 9 includes the right of individuals and of religious groups to spread their doctrine and to win new followers through proselytism, as long as they do not use fraudulent or violent means.[4]

Outside Europe, however, a number of Asian States – for example India, Sri Lanka, Indonesia and Nepal – have enacted anti-apostasy or anti-conversion laws[5]. These are usually said to be laws on religious freedom aimed at preventing forced conversions, but in practice, they have tended to become legislation restricting the freedom of choice in religious matters. In effect, they grant the State the power to

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[2] See *Darby v. Sweden*, n. 11581/85, May 9 1989, § 45: "A State Church system cannot in itself be considered to violate Article 9 of the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy the requirements of Article 9, include specific safeguards for the individual's freedom of religion. In particular no one may be forced to enter, or be prohibited from leaving, a State Church".

[3] The government of Malaysia, in a report to the UN Human Rights Committee, takes the view that the prohibition against proselytising is a measure to prevent the use of coercion against Muslim believers. This prohibition is not an obstacle to the recognition of individuals' right to change religion (UN ESCOR 1990, Capital Provisional Agenda Item 24, Committee on Human Rights, para. 58).

[4] *Kokkinakis v Greece*, § 17. However, the government of Greece succeeded in persuading the ECtHR that restrictions on proselytising can, in theory, be upheld as a way to protect the right to identity and the peaceful enjoyment of religious freedom (M. D. Evans: *Religious Liberty and International Law in Europe*. Cambridge, Cambridge University Press, 2008. 100.). A detailed comment on this decision can be found at Gunn. J. Gunn: Adjudicating Rights of Conscience Under the European Convention on Human Rights. In: J. D. van der Vyver – J. Witte (eds.): *Religious Human Rights in Global Perspective*. The Hague, Martinus Nijhoff, 1996. 305–330.

[5] According to the last U.S Department of State *International Religious Freedom Report*, in 2015 six out of 29 state governments in India had and enforced anti conversion laws: Arunachal Pradesh, Gujarat, Himachal Pradesh, Chhattisgarh, Odisha, and Madhya Pradesh. According to the Evangelical Fellowship of India, a Christian advocacy organization, there were 177 incidents of violence, harassment, or discrimination across the country targeting Christians. Incidents included assaults on missionaries, forced conversions, and attacks on churches, schools, and private property. The report can be accessed at http://pa-public.state.gov/mystatedept/reports/pdfreport_1370.pdf.

decide the legitimacy of conversions and they often hinder abandonment of a given religious faith, which is generally the one to which the State gives preferential treatment on the basis of considerations of public order, social cohesion and national security.[6] In addition to limiting the right to freedom of religious choice, these laws have contributed to rising tension among the various groups in the countries in which they are in force.[7]

In Israel, controversy has been sparked by the refusal of Orthodox Jewish courts to deem valid the conversions performed according to the rites of Reform Judaism. The State of Israel grants a privileged status to such courts, with the result that these

[6] There is no implementing legislation for Arunachal Pradesh's anticonversion law. Gujarat mandates prior permission from the district magistrate for any form of conversion and punishes forced conversions with up to three years' imprisonment and a fine up to 50,000 rupees ($756). Chhattisgarh and Madhya Pradesh prohibit religious conversion by the use of "force," "allurement," or "fraudulent means" and require district authorities be informed of any conversions one month in advance. Violations are subject to fines and other penalties. Himachal Pradesh maintains similar prohibitions against conversion through force, inducement, or fraud and bar individuals from abetting such conversions. In Himachal Pradesh, penalties are up to two years' imprisonment and/or fines of 25,000 rupees ($378). Punishments are harsher for conversions involving minors, Scheduled Tribe or Scheduled Caste members (historically disadvantaged groups also known as Dalits), or, in the case of Odisha, women (U.S. Department of State: *International Religious Freedom Report* 2015).
Current law in the state of Odisha requires under penalty of a fine (1000 rupees) that the priest performing the conversion ceremony indicates to the district magistrate, with 15 days' notice, the date, time and place of the ceremony as well as the name and address of any individual who is going to convert (Odisha Freedom of Religion Rules 1989, para. 7). It also requires district magistrates to maintain a list of religious organizations and individuals engaged in proselytism. The Odisha Freedom of Religion Act was enacted in 1967 by the Rajendra Narayan Singhdeo government to regulate forced or manipulative conversion (the text of the law is available at: http://www.lawsofindia.org/statelaw/2512/TheOrissaFreedomofReligionAct1967.html. It could not be implemented for the next 22 years because of the absence of Rules to support it. In 1989 the Odisha Freedom of Religion Rules were framed (Chang et alt. 2014, 807–808). The first case under the Act was registered in 1993 when a superintendent of police booked 21 pastors in Nowrangpur for breaking the law (B. Parker: *Orissa in the Crossfire*. Morrisville, North Carolina, Lulu Press Inc., 2011. 328.).
There were various cases in which Catholic priests in India have been punished even though the converts in question stated that they had changed religion of their own volition. In 2002 a Court in Raigarh, in the State of Chhattisgarh, sentenced two priests and a nun to prison on charges of induced or fraudulent conversion (L. Dudley Jenkins: Legal Limits on Religious Conversion in India. *Law and Contemporary Problems*, Vol. 71., 2008. 116.). According to the last U.S Department of State *International Religious Freedom Report*, in July 2015 police arrested Reverend Timothy Chaitanya Murmu, a Pentecostal minister in the Village of Manohar in Odisha, and charged him with forced conversions after he baptized 16 members of Scheduled Tribes. According to the indictment, he induced them to embrace Christianity in exchange for money. On October 23, an Ahmedabad di strict magistrate court ordered an inquiry a day after 90 members of Scheduled Castes converted to Buddhism at a program in Dholka town in Gujarat. According to the court, those performing the conversion ceremony had not obtained prior permission from district authorities as required by Gujarati law. More information about other cases can be found in European Centre for Law and Justice 2012 and US Department of States' Religious freedom reports.

[7] U.S. Department of State: *International Religious Freedom Report* 2015.

conversions do not have civil effect, thus raising issues for non-Orthodox Jewish immigrants seeking to acquire Israeli nationality through the Law of Return.

Lastly, it is necessary to consider the extent to which automatic incorporation – according to the criteria of *jus sanguinis*, as in the case of Islam or Judaism – respects the religious freedom of the individual. The Supreme Court of Israel declared back in 1966 that there can be no religious freedom if the citizen does not have the freedom to belong to no religion.[8] In Israel, however, Jews – believers and non-believers alike –must submit to religious courts in the area of marriage and divorce, because civil marriage does not exist. In 2014 the case of Meriam Ibrahim, a citizen of Sudan, led to much discussion. She had been baptised by her mother, who was a Coptic Christian, but her father was Muslim. As a result, the law of her country (*sharia*) viewed her as Muslim and she was sentenced to death for apostasy from Islam, a religion to which she had never considered herself affiliated. Ultimately, as we know, the sentence was not applied and she was granted asylum in the United States[9].

## 3. Membership status

Religious laws usually determine the rights and the duties of members inside the group. In which sense could this position as a member put some limits on freedom of religion? History has shown cases where belonging to a particular religious body has had a direct influence on the legal status of persons (rights of citizenship). In such circumstances, religious membership has a direct influence on the regulation of numerous legal relations existing under private and public law. This was the case of Italy's colonies in Africa in the early twentieth century. And this is the current situation in Israel, where there is a recognised variety of personal statutes based on religious affiliation. The religious law of the individual governs personal status matters, such marriage and divorce; and, in some cases, also issues of child custody and inheritance. This structure is based on the Ottoman Empire's millet system, which was applied during the 400 years of its rule in the area (1517–1917). Under this system, a dominant State religion (Islam) operated also as a source of law of the State, while the courts of minority religions were granted authority to decide in their religious matters for the members of their own communities. Israel has adopted the millet system with some significant differences.[10] There is a similar situation in India,

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8 N. Lerner: Retos de la protección jurídica de la diversidad religiosa en Israel: In: F. Pérez-Madrid (coord.): *La gestión de la diversidad religiosa en el área del Mediterráneo*. Barcelona, 2011. 178., footnote n. 15.

9 U.S. Department of State: *International Religious Freedom Report* 2014.

10 For example, it has not adopted Judaism as its official religion or source of its laws. Nevertheless, because Israel is a Jewish and democratic state, the Jewish religion has a more dominant status. This can be seen both in the fact that the regulation of the public sphere is sometimes affected by Jewish norms and in the fact that Jewish institutions receive differential treatment in terms of statutory recognition and budget allocations. M. Karayanni: The Separate Nature of the Religious Accommodations for the Palestinian-Arab Minority in Israel. *Northwestern Journal of International Human Rights,* Vol. 5., N. 1., 2007. 55–57.; H. Moodrick-Even Khen: Revisiting the Protection

where "Personal status laws" are applicable only to certain religious communities in matters of marriage, divorce, adoption, and inheritance. The Government grants significant autonomy to personal status law boards in drafting these laws. Law boards are selected by community leaders; there is no formal process and selection varies across communities. Hindu, Christian, Parsi, and Islamic personal status laws are legally recognized and judicially enforceable. These laws, however, do not supersede national and state-level legislative powers or constitutional provisions. If the law boards cannot offer satisfactory solutions, the case is referred to the civil courts.[11]

Such a societal model cannot be considered compatible with the European Convention on Human Rights. In the case *Refah Partisi v Turkey* (July 31, 2001), the European Court pointed out that such a system "would introduce into all legal relationships a distinction between individuals grounded in religion, would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement" (§70). There are two main reasons why this is incompatible: firstly, "it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society" (§70). Secondly, "such a system would infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy".[12]

Another issue we should examine in relation to membership status concerns dissidence within religious organisations. If the State safeguards religious freedom, is it possible to seek its protection in case of religious dissidence? That is, can the State be requested to safeguard religious freedom within religious communities? According to the ECtHR the individual right to change religion or belief cannot be understood as a right to remain within the religious body, maintaining a heterodox attitude (*Martínez-Torrón* 1986, 427.). The Court has expressly recognised the right of religious faiths to impose uniformity in internal questions. So, they are not obliged to grant "religious freedom" to their members or ministers.[13] Churches and other Faith organisations have the right to set limits to the exercise of religious freedom by their members within the religious organisation itself. This is the basis of their right to sanction or expel members in accordance with the norms of religious law. In all cases, according to European Court case law, the religious freedom of the individual is sufficiently safeguarded by the fact that a person is free to abandon his

of Individual Rights and Community Rights on the Grounds of Religious Belief in Israel. In: F. Pérez-Madrid – M. Gas-Aixendri: *La gobernanza de la diversidad religiosa*. (The Governance of Religious Diversity) Cizur Menor, Thomson Reters Aranzadi, 2013. 219–220.

11 U.S. Department of State: *International Religious Freedom Report* 2015.

12 "A difference in treatment between individuals according to their religion or beliefs cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination" (§ 70).

13 *Case X. v Denmark*, n. 7374/76, March 8 1976.

religious community at any time.[14] The case law of the European Court has remained consistent over time on this issue.[15] This represents an example of respect for the autonomy of religious faiths (i.e., religious freedom in its collective dimension).

## 4. The third and the last moment: departure

Changing religion is not merely the individual and internal act of the person who undertakes it. The exercise of this right reflects the various dimensions of the right of religious freedom, related to the individual, the State and religious institutions. The abandonment of a religious community is an expression of religious freedom but at the same time is an act with religious content. One may wonder what should be the role of State and religious bodies on this issue. As we have already seen, on the one hand, some countries with State religions have put limits on the right to abandon the official religion by prohibiting proselytising and enacting anti-conversion laws. On the other hand, as an external act of religious content, changing one's religion should also be an affair between the individual and the religious Faith.

Article 9 of The European Convention on Human Rights (1950) not only safeguards the formation and changing of religious beliefs internally in the individual (the *forum internum*), it also protects the individual's outward expression of these beliefs, that is, the ability to belong to a given religious organisation and to change this membership. Therefore, religious freedom also covers the external institutional act of leaving a religious organisation (apostasy) and joining another one. The right to hold and change religious beliefs is an absolute right. The State cannot limit its free exercise since it cannot control the thoughts of people (*Doe* 2011, 48; *Martínez-Torrón* 2005, 582).

In fact, the Strasbourg Court has pointed out that the limitations established by article 9.2 of the Convention are applicable only to the external dimension (freedom of manifestation) not to the internal dimension (freedom of choosing one's religion or beliefs).[16] But we can pose the question whether the State should be able to impose limitations on individuals or on faiths with respect to the right to leave a

[14] "Their individual freedom of thought, conscience or religion is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the Church guarantees their freedom of religion in case they oppose its teachings" (*Case X. v Denmark*, n. 7374/76, n. 1). A similar ruling has subsequently been delivered in the cases *Finska församlingen i Stockholm and Hautaniemi v Sweden*, n. 24019/94, April 11 1996, in which a pastor of the Church of Finland in Stockholm refused to change liturgical books as required by the church authorities. In the case of *Williamson v United Kingdom*, n. 27008/95, May 17 1995, an Anglican minister refused to accept the ordination of women as the doctrine and practice of his church.

[15] Recent cases: *Fernández Martínez v Spain*, n. 56030/07, June 14 2014 § 128; *Miroļubovs and Others v. Latvia*, n. 798705, September 15 2009, § 80 d); H*oly Synod of the Bulgarian Orthodox Church (Metropolitan Inokentyi) and Others v Bulgaria*, n. 412/03 and n. 35677/04, January 22 2009 § 137. There are other previous rulings where the criteria are reaffirmed: *Karlsson v Sweden*, n. 12356/86, September 8 1998; *Spetz and others v Sweden*, n. 20402/92, October 12 1994); *Williamson v United Kingdom*, n. 27008/95, May 17 1995.

[16] See *Kokkinakis v Greece*, n. 14307/88, May 25 1993, §§ 31 and 33.

religious organisation. For example, in order to safeguard the religious freedom of citizens, should religious organisations be required to establish legal channels for leaving? Should they be allowed to have systems that restrict either direct or indirect abandonment of the community? Or should the State be able to reject the registration of a religious organisation that does not permit leaving or puts obstacles to members wishing to leave? In 1987 Spain's Directorate General for Religious Affairs (DGAR) denied registration in the Register of Religious Bodies to the Evangelical Church of the Good Shepherd, because, among other grounds (and this was not the main one), it had a clause that was incompatible with the freedom to change religion (the withdrawal of a member had to be submitted to the General Assembly for authorisation by absolute majority). The Directorate General took the view that such a restriction was incompatible with the constitutional clause on public order.[17] The right to change religion should be one of the powers or faculties of religious manifestation; therefore it should have some limits. In this sense, the law of the State could require such hurdles to be removed if they are considered incompatible with public order.[18]

The European Court in Strasbourg has applied the right to change religious belief in several landmark cases and it prohibits States both from penalising apostasy and from the obstruction of free religious affiliation. Just as religious affiliation to a given faith can have significance under State law, changing that affiliation can also have certain consequences in the same sphere. In some Central European States, the existence of a system of Church taxes has made it necessary to establish a civil procedure for abandoning a Church (*Kirchenaustritt*), leading to a situation in which acts are duplicated, but with differing force before the State and the Church to which the individual belongs. The State has a margin of appreciation when defining the formal requirements that individuals must fulfil in order to declare that they are abandoning their Faith organisation, especially when such membership has certain effects in the civil domain. In the case *Gottesman v Switzerland* the Court found that the position taken by the Swiss authorities was legitimate when they held that two Catholic citizens had not clearly and unequivocally expressed their abandonment of the Catholic Church. These citizens had not declared their affiliation to a specific religion in the municipal registry, and had left the section blank on their income tax

[17] Resolution DGAR of 10 September 1987 which, in point 4, deems that the effectiveness of the right to freely abandon a religious faith can be hindered or even prevented by the real means of external control (of the community) and even internally (if mind-control techniques are employed). Obviously, such cases, which are occasionally mentioned in the media by former members of this or that new religious movement, can be combatted only through police investigation and the *ius puniendi* of the state (A. López Castillo: *La libertad religiosa en el jurisprudencia constitucional*. (Religious Freedom in: Constitutional Case-law) Cizur Menor, Aranzadi, 2002. 60.). The text of the Resolution is published in S. Català Rubio: *El Derecho a la personalidad jurídica de las entidades religiosas.* (The Right to the legal status of religious organizations) Cuenca, Universidad de Castilla-La Mancha, 2004. 370–372.

[18] On the neutrality of the State in the registration of religious bodies, see J. Murdoch: *Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention on Human Rights.* Strasbourg, Council of Europe, 2012. 55–60.

form where they were supposed to state their religion. The government upheld their obligation to pay the religious tax to the Catholic Church, because, at least in the eyes of the State, they had not yet terminated their membership.[19]

According to the case law of the Court, the right of religious freedom can require the State to establish rules to determine the leaving of a religious body when this has civil effects. Therefore, it can be considered that the European Court has admitted indirectly that when the leaving of a religious organisation has no civil effects, the religious organisation itself should establish the conditions for departure just as it does the conditions for membership, which are acts of a religious nature and the regulation of which falls within the autonomy of religious organisations.

In the case *E & GR v Austria*,[20] the appellants – an Austrian couple who were both Catholic – alleged that the system of religious taxation in force in the country forced citizens into the position of paying the tax or abandoning the Church. The appellants considered it incompatible with religious freedom that the State directly or indirectly compels the performance of an act of religious relevance (the *Kirchenaustritt*) if someone does not want to pay the tax[21]. The Commission held that the obligation to pay the tax is a direct consequence of their freely taken decision to be members of a given religious body.[22] In addition, their religious freedom was protected by their ability to abandon the Church.[23] Accordingly, Article 9 of the Convention does not allow for continued membership in a church and at the same time claiming to be

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19 "The Commission finds […] that for the purposes of Article 9 of the Convention the domestic authorities have a wide discretion to decide on what conditions an individual may validly be regarded as having decided to leave a religious denomination. It accordingly does not consider arbitrary the domestic courts' refusal to recognise a decision to leave a religious denomination unless such decision is unambiguously intimated, where no formality for that purpose is prescribed in cantonal law."

20 *E & GR v Austria* , n. 9781/82, May 14 1984.

21 "They submit, in particular, that the provisions applied to them leave them no other choice than either to pay Church contributions, or else to terminate their Church membership. They consider it incompatible with freedom of religion that the State directly or indirectly compels a person to perform an act of religious relevance, including State assistance to a Church to enforce contributions from its members." (*E & GR v Austria*, n. 9781/82 § 2).

22 "The Commission notes that in Austria the individual's duty to pay contributions to a certain Church does not arise directly under the State's legislation which merely authorises (but does not require) the Churches to prescribe such contributions from their members. The fact that the Churches are in this respect subject to State control does not change the nature of the levy of contributions as an autonomous activity of the Churches. Under Austrian law, the individual's duty to pay these contributions is considered as an obligation of civil law which the Church in question may enforce against the individual by an action in the civil courts. It is thus left to the Church's discretion whether or not it wishes to bring such an action against any particular person." (*E & GR v Austria*, n. 9781/82, § 1).

23 "The applicants are entirely free to practise or not to practise their religion as they please. If they are obliged to pay contributions to the Roman Catholic Church, this is a consequence of their continued membership of this Church in the same way as e.g. the duty to pay contributions to a private association would result from their membership of such association. The obligation can be avoided if they choose to leave the Church, a possibility for which the State legislation has expressly provided." (*E & GR v Austria*, n. 9781/82, § 2).

free of the legal obligations that derive from such membership, including any tax liability.[24]

The German courts do not accept as valid so-called "modified" declarations. These declarations express the individual's desire to leave only the civil religious corporation in order to stop paying the church tax, while at the same time remaining a member of the religious faith. In practice, the State is obliged to perform a religious act of apostasy. By contrast, the intention of the individual is only to stop paying a tax. The Holy See has agreed with these members, taking the view that the wish to stop paying the church tax is not sufficient to renounce membership in the Catholic Church.

In my opinion, when regulating the abandonment of a Faith, the State should limit itself to determining the effects of this action in the civil domain. The principle of neutrality necessitates that the State make no ruling on the religious effects of the action, and it must respect the autonomy of religious bodies: in this case the decision of the Church not to grant religious effects to a declaration of abandonment made to the State. In other words, an act of abandoning a Church carried out before the State should not necessarily be a religious act of apostasy. It is the Church that should establish the channels for leaving the religious institution or renouncing that religious faith. Since 2007, Swiss courts have accepted that the *Kirchenaustritt* has effects only before the State, leaving religious communities to determine the conditions of the act of apostasy.

Applications to apostatise by removing baptism records from Church registers, which are covered by legislation on data protection, have given rise to conflicts in various European countries such as Italy, France and Spain (*Gas Aixendri* 2015a). However, this is not an issue in which there is a conflict involving religious freedom. Rather, it concerns the autonomy of religious faiths in the management of their files and registers and, at a deeper level, a dispute over jurisdiction between the government and Catholic Church bodies. In fact, these conflicts have been a way to voice protest against particular stances taken by the Catholic Church.

In the area of family law, religious affiliation and its modification are important factors in family relations. For example, changing religion can be indirectly relevant in determining the custody of children when a marriage breaks up. A parent's change of religion must be taken into consideration when the profession of a given religion can have an influence on the interests of the dependant minors. If one of the parents changes religious affiliation, it can cause conflicts if this parent tries to educate the children in these new beliefs.[25] The standard under case law is that the children

[24] "By making available this possibility, the State has introduced sufficient safeguards to ensure the individual's freedom of religion. The individual cannot reasonably claim, having regard to the terms of Art. 9 of the Convention, to remain a member of a particular Church and nevertheless be free from the legal obligations, including financial obligations, resulting from this membership according to the autonomous regulations of the Church in question." (*E & GR v Austria*, n. 9781/82, § 2).

[25] A number of decisions at the ECtHR have been issued on this matter. In the case of *M. M. v Bulgaria*, n. 27496/95, September 10 1996, a mother claimed that the national courts had based their granting

should continue with the religious education that they have received since childhood. However, in the case *Hoffmann v Austria*, the ECtHR acted inconsistently by reversing this line of rulings. The ECtHR held that awarding custody of the children to the father had discriminated against the mother, because the decision was based on the mother's newly adopted religion (she had become a Jehovah's Witness).[26]

In legal relations defined by religious membership, a change of affiliation will have inescapable effects before the law of the State. In the workplace, this occurs in companies or non-profit organisations (a media company, hospital or school, for example) that may be described as having a religious character. Changing religion will also be a determinant factor in paid and voluntary activities performed in the service of religious faiths. In these cases, the termination of an employment relation could be justified and will not constitute discriminatory treatment on religious grounds where there is a genuine occupational requirement to share the religion of the employer.

Lastly, the European human rights system safeguards the religious freedom of individuals who have decided to change religion by recognising the right of asylum. Individuals who are persecuted in their countries of origin can seek asylum in countries that have signed the Convention. In the case *M. B. and others v Turkey,*[27] the European Court found that the Turkish government had violated the Convention when it denied asylum to several Iranian citizens who had converted to Christianity and then been sentenced for the crime of apostasy from Islam.

## 5. Conclusion

Recognition of the right to belong to a religious faith and to change religion appears as an essential aspect of the complete safeguarding of religious freedom, which is one

of her child's custody on the fact that she had converted to a non-traditional religious group (the Warriors of Christ). She argued that Article 9 of the European Convention had been violated because the ruling had coerced her to change her religious belief if she wished to have any chance to gain custody of her child. In the ruling in the case *Palau-Martínez v France*, n. 64927, December 16 2003, the ECtHR found that the freedom of belief is violated when a decision on the care and custody of children uses the parents' religious beliefs as the sole or principle criterion. Along the same lines, the ruling in the case *Gineitiené v Lithuania*, July 27 2010, found that the decision on child custody had not been based on the religion of the mother (a convert to the Osho group a year prior to divorce), but on the best interests of the child (the minor's stated wishes to live with the father and the better living conditions offered by him). That religion is not the determining criterion in the awarding of care and custody does not exclude the consideration of any negative impact of a given religion on minors. Potential harm to child's physical and mental well-being and to the free development of his or her personality are factors that can have an influence on awarding of care and custody, provided that a causal link may be shown between the religious beliefs of one of the parents and the existence of harm to the minor [M. Gas-Aixendri: The Religious Factor in Family Conflicts. In: M. Gas-Aixendri – R. Cavallotti (eds.): *Family and Sustainable Development*. Cizur Menor, Thomson Reuters Aranzadi, 2015. 333–334.].

[26] *Hoffmann v Austria*, n. 12875/87, June 23 1993, § 33.

[27] *M. B. and Others v Turkey*, Application no. 36009/08, June 15 2010.

of the foundations of a peaceful society. The secular nature of the state represents a prerequisite to fully safeguarding the freedom of choice in religious matters. According to the international human rights legal system, the function of the secular State should be to safeguard equal treatment for all citizens, ensuring that neither religious affiliation nor a change of such affiliation results in discrimination.

The European human rights system protects this right adequately, but States should review whether in practice their religious freedom laws properly recognise the right of individuals, and at the same time respect the legitimate autonomy of religious communities. The full recognition of the right to change religion is a necessary step on the road to achieving a better management of religious diversity in the multifaith societies that characterise Western countries.

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# CIRCUMVENIO IM RÖMISCHEN KAUFVERTRAG

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## 1. Die Bedeutung der Wendung *'Circumvenio'*

Der vorliegende Aufsatz beschäftigt sich mit dem Ausdruck *circumvenio*, der im Zusammenhang mit dem Kaufvertrag infolge einer Aussage Ulpians mit der Frage nach dem gerechten Preis eng verbunden ist.

Als Ausgangspunkt zum Thema des gerechten Preises dient im Allgemeinen die auf Ulpian zurückgeführte wohl bekannte Digestenstelle.[1] Er sagt in einem aus Pomponius stammenden Zitat folgendes:

> Ulp. D. 4, 4, 16, 4. (11 ad ed.)
> *In pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire.*[2]

Ausgehend von dieser Stelle können hinsichtlich des Kaufpreises der römischen *emptio venditio* folgende Anforderungen festgehalten werden: die Römer haben den

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* Doktorantin.

1 Neben dem oben erwähnten Fragment dient eben eine andere Digestenstelle von Paulus als Ausgangspunt des Themas des gerechten Preises, nämlich Paul. D. 19, 2, 22, 3, wonach „*in emendo et vendendonaturaliter consessum est, quod pluris sit, minoris emere, quod minoris sit, pluris vendere, et ita invicem se circumscribere*" Die zwei erwähnten Stellen werden im Allgemeinen parallel zitiert. Im Rahmen dieses Aufsatzes wird aber die Paulus– Stelle nicht näher geprüft, wegen dem Wortgebrauch des Fragments: die Zentralfrage der gegenwärtigen Untersuchungen stellt sich im Bezug auf die Wendung '*circumvenio*'. Vgl. unter Anderem Max Kaser: *Das römische Privatrecht*. München, C.H. Beck'sche Verlagsbuchhandling, 1971. Erster Abschnitt, 550. FN.45.; Andreas Wacke*:* Circumscribere, gerechter Preis und die Arten der List. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, *Romanistische Abteilung, 94*. 1977. 185.

2 Sowohl die lateinischen, als auch die deutschen Texte der Quellen der Digesten sind im Folgenden aus der deutschen Digestenübersetzung zitiert. Okko von Behrends – Rolf Knütel – Berthold Kupisch – Hans Hermann Seiler (Hrsg.): *Corpus Iuris Civilis Text und Übersetzung*. Heidelberg, C. F. Müller Juristischer Verlag, 1995.

Marktverhältnissen lange Zeit freien Lauf gelassen,[3] im Zuge der Preisbestimmung wurde die Vereinbarung der Parteien geachtet,[4] die Bestimmung des Preises wurde nicht unter dem Gesichtspunkt des Strebens nach Gerechtigkeit betrachtet. Es stellt sich aber die Frage, was genau das eben als „das klassische Prinzip des freien Verhandelns"[5] erwähnte Fragment bedeutet, was genau unter der Wendung *licere contrahentibus se circumvenire* zu verstehen ist. Warum dieser Satz formuliert wurde, und wie sein Inhalt mit den Aussagen der Quellen über die Gerechtigkeit in Einklang zu bringen ist. Insbesondere geht es dabei um die Aussage Ulpians, wo er betont, „*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*".[6]

War es wirklich so, dass das klassische römische Recht von der Forderung nach einem gerechten Preis abgesehen hat?

Die Problematik wird im Folgenden aus dem Blickwinkel des Ausdrucks *circumvenio* untersucht. Im Zuge der Darstellung dieser Fragen werden zunächst diejenige Digestenstellen geprüft, in denen Ulpian den Ausdruck *circumvenio* benutzt, es wird dargestellt, was in seinem Wortgebrauch *circumvenio* bedeutet, hinsichtlich welcher Rechtsverhältnisse er die Wendung benutzt, und wie er dem damit verbundenen Verhalten gegenübersteht. Nach diesen Überlegungen wird das oben zitierte Fragment näherer geprüft. Zuletzt wird das Verhältnis dieses Ausdrucks zur Gerechtigkeit durchgesehen, und im Sinne eines Ausblickes auf die möglichen Richtungen der weiteren Forschungen hingewiesen.[7]

### 1.1. Allgemeines

In den Digesten kommt der Ausdruck *circumvenio* insgesamt 32-mal vor,[8] davon 18-mal bei Ulpian.[9] Die Prüfung der Ulpian-Stellen zeigt ein interessantes Bild. Ulpian

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3 Vgl. Bessenyő, András: *Római magánjog. A római magánjog az európai jogi gondolkodás tükrében*. (Römisches Privatrecht. Das römische Privatrecht im Spiegel des europäischen Rechtsdenkens) Budapest–Pécs, Dialóg Campus, 2010. 379.

4 Vgl. Kaser op. cit. 550.; Földi, András – Hamza, Gábor: *A római jog története és institúciói*. (Geschichte und Institutionen des römischen Rechts) Budapest, Nemzeti Tankönyvkiadó, [20]2015. 516.

5 Jusztinger, János: *A vételár meghatározása és szolgáltatása a konszenzuális adásvétel római jogi forrásaiban*. (Die Bestimmung und die Leistung des Kaufpreises in der römischrechtlichen Quellen des konsensualen Kaufvertrages. Dissertation.) Doktori értekezés. Pécs. 2012. 10., 142. http://doktori-iskola.ajk.pte.hu/files/tiny_mce/File/Archiv2/jusztinger/jusztinger_ertekezes_nyilv.pdf .

6 Ulp. D. 1, 1, 10pr.

7 Diese Untersuchungen zeigen, dass Ulpian mit dieser Aussage kein zu befolgendes Verhaltensmuster zeigen wollte, er nimmt bloß eine Erfahrung zur Kenntnis S. a. Kapitel 2 des vorliegenden Aufsatzes. Bezüglich des Kontextes des Fragments s. a. Kapitel I. 3.

8 Die einschlägigen Quellen sind mittels der Webseite Intratext geprüft worden. www.intratext.com/IXT/LAT0866/.

9 Die einschlägige Quellen der Digesten sind folgende: D. 2, 15, 8, 11 (5. de omn. trib.); eod. 8, 20; D. 4, 3, 1, 2 (11 ad ed.); D. 4, 4, 3, 6 (11 ad ed.); eod. 7, 3 (11 ad ed.); eod. 16, 4 (11 ad ed.); eod. 44 (5 opin.); D. 4, 8, 31 (13 ad ed.); D. 17, 1, 29, 2 (7 disp); D. 21, 1, 37 (1 ad ed. aedil. curul.); D. 23, 3, 12, 1 (34 ad sab.); D. 29, 4, 1 pr (50 ad ed.); eod. 4 pr (50 ad ed.); D. 35, 1, 92 (5 fideic.); D. 40, 12, 16, 2 (55 ad ed.); D. 43, 29, 3, 5(71 ad ed.); D. 44, 4, 20 (76 ad ed.); D. 50, 17, 49 (35 ad ed.).

verwendet den Ausdruck in vielfältigsten Zusammenhängen, aber es ist schon auf den ersten Blick offenkundig, dass der Jurist das mit diesem Wort ausgedrückte Verhalten im Allgemeinen zurückweist, selten steht er ihm gleichgültig gegenüber, eine ausdrückliche Zulässigkeit der *circumvenio* findet sich aber nur in dem oben schon erwähnten Fall. In der Mehrheit spricht er über das Vermeiden des Verhaltens, wie zum Beispiel *„ne emptores a venditoribus circumveniantur“*.[10] In vielen Fällen wird der Ausdruck im Kontext folgender Wörter benutzt: *decipio*,[11] *callide,*[12] *calliditas*,[13] *dolus*.[14]

Folglich wird mit diesem Wort im Allgemeinen ein verwerfliches Verhalten ausgedrückt. So ist es zum Beispiel hinsichtlich der wohl bekannten Definition des *dolus malus*,[15] in zwei verschiedene Fällen in dem Titel *De transactionibus*,[16] bei der Formulierung einer Regelung zum Schutz der Bürgen,[17] und in mehreren Fällen im Zusammenhang mit dem Umgang des Willens des Erblassers,[18] wie zum Beispiel in der folgenden Aussage Ulpians: *plane indignandum est circumventam voluntatem defuncti*.[19]

Erwähnenswert sind die Fälle bezüglich der Mündigen die jünger als fünfundzwanzig Jahre sind. Im Titel *De minoribus viginti quinque annis*[20] wird das Verb *circumvenio* dreimal benutzt, hier befindet sich der schon erwähnte Fall über den Kaufpreis. Am Anfang des Titels werden die Ziele des einschlägigen Ediktes aufgeführt.[21] Der natürlichen Gerechtigkeit folgend hat der Prätor dieses Edikt erlassen, zu schützen sind die Mündigen, die jünger als fünfundzwanzig Jahren sind. Später fügt er dazu: *Mihi autem semper succurrendum videtur, si minor sit et se circumventum doceat.*[22]

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10 Ulp. D. 21, 1, 37 (1 ad ed. aedil. curul.).

11 Ulp. D. 4, 4, 44 (5 opin.): […] vel ab aliis circumventi, vel sua facilitate decepti […].

12 Ulp. D. 4, 8, 31 (13 ad ed.): […] vel si adversarium callide circumventi […].

13 Ulp. D. 29, 4, 1pr (50 ad ed.): […] et eorum calliditati occurit.

14 Insbesondere Ulp. D. 4, 3, 1, 2 (11 ad ed.): […] dolum malum esse omnem calliditatem fallaciam machinationem *ad circumveniendum* fallendum decipiendum alterum adhibitam. (Hervorhebung von mir: A. R.).

15 Ulp. D. 4, 3, 1, 2 (11 ad ed.) Dem in der Servius – Definition angeführte Ausdruck ‘*machinationem quandam alterius decipiendi causa*‘ entspricht der Satzteil ‘*ut quis circumveniatur*‘ im darauf folgenden Gliedsatz. Vgl. auch vorige Anmerkung.

16 Ulp. D. 2, 15, 8, 11 (5. de omn. trib.): […] numquid circumvenire velit eum, cum quo transigit; Ulp. D. 2, 15, 8, 20 (5. de omn. trib.): ‘ne circumveniatur oratio‘.

17 Ulp. D. 17, 1, 29, 2 (7 disp.): ne forte creditor obrepat et ignorantiam eius circumveniat et excutiat ei summam, in quam fideiussit.

18 Ulp. D. 29, 4, 1pr (50 ad ed.); Ulp. D. 29, 4, 4pr (50 ad ed.); Ulp. D 35, 1, 92 (5 fideic.).

19 Ulp. D. 29, 4, 4pr (50 ad ed.).

20 D. 4, 4.

21 Ulp. D. 4, 4, 1pr (11 ad ed.): Hoc edictum praetor *naturalem aequitatem* secutus proposuit […] (Hervorhebung von mir: A. R.).

22 Ulp. D. 4, 4, 7, 3 (11 ad ed.): Ich jedoch meine, dass immer geholfen werden muss, wenn jemand minderjährig ist, und dartut, er sei benachteiligt worden. Diese Aussage Ulpians ist auch durch das Fragment Ulp. D. 4, 4, 44 (5 opin.) belegt. In diesem Fragment betont Ulpian nämlich, dass „nicht

1.2. Beispiele bezüglich des Kaufvertrages

Nach diesen einleitenden Anmerkungen lohnt es sich, sich mit den Fällen des Kaufvertrages zu beschäftigen. Der Ausdruck kommt im Zusammenhang mit dem Kaufvertrag insgesamt dreimal vor.[23] Eine Stelle in dem Titel *De liberali causa* weist auf ein Fragment Ulpians[24] hin, das eine Klage gegen diejenigen bietet, die zwar wissen, dass sie frei sind und sich dennoch in betrügerischer Absicht als Sklaven verkaufen.[25] Auf die erwähnte Stelle weist Ulpian hin, wenn er formuliert:

Ulp. D. 40, 12, 16, 2 (55 ad ed.)
*Tunc habet emptor hanc actionem, cum liberum esse nesciret: nam si scit liberum et sic emit, ipse se circumvenit.*

Wie es sich aus dem Kontext ergibt, deutet der Jurist auch in diesem Fall mit dem Ausdruck *circumvenio* auf ein verwerfliches Verhalten hin. Darauf weisen die folgenden Wörter im Kontext hin, womit Ulpian das einschlägige Verhalten ausdrückt: *calliditas*,[26] *decipio*[27] *dolus*[28]. Im vorliegenden Fall wird deswegen dem Übervorteilen keine juristische Relevanz zugeschrieben, weil der Käufer mit seinem Verhalten – wie es in der reflexiven Form des Verbes: *ipse se circumvenit* zum Ausdruck kommt – sich selbst betrügt. Es ist offenkundig, dass es nicht als Betrug zu betrachten ist, wenn der Käufer einen Vertrag abschließt ungeachtet dessen, dass er weiß, dass er damit schlecht fährt. Diese Interpretation entspricht dem Grundsatz: *Nemo videtur fraudare eos, qui sciunt et consentiunt*.[29]

Im Folgenden wird ein Rechtsfall geprüft, in dem es um einen Sklavenkauf geht.

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alles, was Mündige vornehmen, die jünger als 25 Jahren sind, ist rückgängig zu machen, sondern nur das, von dem sich in der Voruntersuchung herausgestellt hat, dass die Minderjährige von anderen übervorteilt, oder auch durch eigenen Leichtsinn betrugen wurden[…]" Im Sinne der *aequitas naturalis*, die auch für *ius positivum* maßgebend ist, sollen die Minderjährigem jeweils unterstützt werden, wann sie übervorteilt worden sind. Vgl. Nadja El Beheiri: Die Bedeutung der laudationes edicti am Beispiel des Kommentars Ulpians zur Rubrik des prätorische Edikts „De pactis". *Iustum Aequum Salutare*, III. 2007/3. 5–29., s. a. insbesondere 6–7.

23 Ulp. D. 4, 4, 16, 4 (11 ad ed.); Ulp. D. 21, 1, 37 (1 ad ed. aedil. curul.); Ulp. D. 40, 12, 16, 2 (55 ad ed.).

24 Ulp. D. 40, 12, 14 pr. (55 ad ed.).

25 All das haben sie getan, um den Kaufpreis mit dem Verkäufer zu teilen (*pretii participandi causa*). Nach der Abwicklung des Kaufes erhob nämlich der Käufer mit dem römischen Bürger zusammenwirkend, der sich für einen Sklaven ausgibt, eine Freiheitsklage. Dem verweigerte später der Prätor jedoch die Klage: diejenigen, die auf diese Art und Weise sich als Sklaven verkauften, sind zur Strafe Sklaven geworden. Vgl. Földi–Hamza op. cit. 214.

26 Ulp. D. 40, 12, 14 pr (55 ad ed.): Rectissime praetor *calliditati* eorum, qui, cum se liberos scirent, dolo malo passi sunt se pro servis venum dari, occurrit. (Hervorhebung von mir: A. R.).

27 Ulp. D. 40, 12, 14, 2 (55 ad ed.).

28 Ulp. D. 40, 12, 14 pr (55 ad ed).

29 Ulp. D. 50, 17, 145 (66 ad ed.).

Ulp. D. 21, 1, 37 (1 ad ed. aedil. curul.):
*Praecipiunt aediles, ne veterator pro novicio veneat. Et hoc edictum fallaciis venditorum occurrit: ubique enim curant aediles, ne emptores a venditoribus circumveniantur. Ut ecce plerique solent mancipia, quae novicia non sunt, quasi novicia distrahere ad hoc, ut pluris vendant: praesumptum est enim ea mancipia, quae rudia sunt, simpliciora esse et ad ministeria aptiora et dociliora et ad omne ministerium habilia: trita vero mancipia et veterana difficile est reformare et ad suos mores formare. Quia igitur venaliciarii sciunt facile decurri ad noviciorum emptionem, idcirco interpolant veteratores et pro noviciis vendunt. Quod ne fiat, hoc edicto aediles denuntiant: et ideo si quid ignorante emptore ita venierit, redhibebitur.*[30]

Zunächst wird formuliert, dass dieses Edikt vor Betrügereien der Verkäufer schützt. Zur näheren, genaueren Formulierung des im zweiten Satz befindlichen Ausdrucks *fallaciis venditorum* dient die Wendung *ne emptores a venditoribus circumveniantur***:** die Käufer sollen nicht von den Verkäufern übervorteilt werden. Danach kommen im Ulpians empirischen Stil[31] die Beispiele. Anschließend wird der Grund für dieses Verhalten angeführt: *ut pluris vendant.* Schließlich spricht er über die mögliche Rechtsfolge des erwähnten Verhaltens. Hieraus ist ersichtlich, dass in diesem Kommentar des Edikts Ulpian seine Aussage von Allgemeinheiten bis zu konkreten Beispielen fasst: die Wendungen *fallaciis venditorum – ne* **[**...**]** *circumveniantur* **–** und *quasi novicia distrahere* zeigen das Verhalten, gegen das die Ädile mit diesem Edikt auftreten wollen. *Circumvenio* ist hier auch im negativen Sinne benutzt.

Als Zwischenergebnis kann festgestellt werden, dass Ulpian das Verb *circumvenio* für die Bezeichnung eines Verhaltens verwendet, das rechtlich zurückzuweisen ist. Unter den bis jetzt erwähnten Fällen gab es nur einen, wo dieses Verhalten nicht negativ besetzt war. Wie es aber der Text ausweist, übervorteilte dort der Käufer sich selbst. Ein Rechtsschutz ist in solchen Fällen nicht notwendig.

Ein Rechtsgrundsatz aus dem 17. Titel des 50. Buches der Digesten (*De diversis regulis iuris antiqui*) dient auch als Beleg für unsere Feststellungen im Zusammenhang

[30] Die Ädilen schreiben vor, ein Altsklave dürfe nicht als Neuling verkauft werden. Und dieses Edikt schützt von den Betrügereien der Verkäufer. denn überall sind die Ädilen darauf bedacht, dass die Käufer nicht von den Verkäufern übervorteilt werden. Zum Beispiel pflegen viele Verkäufer Sklaven, die keine Neulinge sind, als Neulinge auf den Markt zu bringen, um sie teurer verkaufen zu können. Denn man vermutet, dass Sklaven, die noch unverbildet sind, natürlicher sind und brauchbarer und gelehriger für Dienste und so zu jedem Dienst tauglich. Abgestumpfte Sklaven und Altsklaven lassen sich dagegen schwer ändern und den eigenen Gewohnheiten anpassen. Da nun die Sklavenhändler wissen, dass man mit Vorliebe zum Kauf zum Neulingen neigt, lassen sie Altsklaven herausputzen und verkaufen sie als Neulinge. Durch dieses Edikt tun die Ädilen kund, dass dieses nicht geschehen darf. Und wenn deshalb ein Sklave in dieser Weise ohne Wissen des Käufers verkauft wird, muss er zurückgenommen werden.

[31] Vgl. Tony Honoré: *Ulpian – Pioneer of human rights*. Oxford, Oxford University Press, [2]2005. 58–59.

mit der Bedeutung der Wendung *circumvenio*. Das von Ulpian stammende Zitat lautet folgendermaßen:

Ulp. D. 50, 17, 49 (35 ad ed.)
*Alterius circumventio alii non praebat actionem.*[32]

### 1.3. *'Circumvenio'* hinsichtlich der Preisbestimmung

Im Zusammenhang mit der Preisbestimmung zitiert und nimmt Ulpian eine Aussage des Pomponius an, die eben das Verb *circumvenio* verwendet, und die dieses Verhalten nicht zurückweist, sondern es zulässt.

Ulp. D. 4, 4, 16, 4 (11 ad ed.)
*Idem Pomponius ait in pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire.*[33]

Zunächst ist der Kontext dieses Fragments erwähnenswert. Es befindet sich in dem oben schon kurz geprüften Titel über die Mündigen, die jünger als fünfundzwanzig Jahre sind. Unmittelbar vor der Formulierung der Aussage werden Rechtsfälle behandelt, in denen es um die Frage geht, durch welche Rechtsmittel der Minor die Wiedergutmachung seines Nachteiles verlangen kann. Ulpian macht darauf aufmerksam, dass vor der Zulassung der *in integrum restitutio* zu prüfen ist, ob ihm eine zivilrechtliche Klage zur Verfügung steht[34] (…*num forte alia actio possit competere citra in integrum restitutionem*…). Wenn ihm nämlich im Rahmen des ordentlichen Verfahrens ein angemessener rechtlicher Schutz gesichert werden kann, durch den er seine nachteilige Lage ausgleichen kann, braucht er die prätorische Hilfe der *in integrum restitutio* kaum. Es werden mehrere Beispiele angeführt[35], bei denen die prätorische Hilfe nicht notwendig ist, weil eine Rechtshilfe des *ius civile* zur

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[32] Die verschieden Übersetzungen geben diese Stelle voreinander abweichend wieder eine ungarische Übersetzung formuliert den Grundsatz allgemein im weiterem Sinne, als Grenze des Rechtserwerbs. Die Übersetzung von Gábor Hamza – István Kállay lautet so: „Senki sem szerezhet jogot más rászedéséből.", das heisst: „Niemand darf durch Betrug anderer Rechte erwerben". Vgl. Hamza, Gábor – Kállay, István: *De diversis regulis iuris antiqui, A Digesta 50. 17. regulái (latinul és magyarul).* Budapest, Tankönyvkiadó, 1979. 11. Eine neuere ungarische Übersetzung formuliert dem Originaltext wohl entsprechend: „Más megtévesztése nem szolgálhat kereset alapjául." Vgl. Nótári, Tamás: *Jogi regulák és szentenciák latinul és magyarul.* (Rechtliche Regeln und Sententien auf Lateinisch und Ungarisch) Szeged, Lectum Kiadó, 2013. Diese Übersetzung entspricht dem englischen auch: „Damage to one person does not provide an action for another". Vgl. Theodor Mommsen – Paul Krueger – Alan Watson: *The Digest of Justinian*. Philadelphia, Pennsylvania, University of Pennsylvania Press.

[33] Pomponius sagt ferner, beim Kaufen und Verkaufen sei es den Vertragsparteien hinsichtlich des Kaufpreises natürlicherweise erlaubt, einander zu übervorteilen.

[34] Ulp. D. 4, 4, 16 pr. (11 ad ed.): […] *num forte alia actio possit competere citra in integrum restitutionem* […].

[35] Wie z. B. Ulp. D. 4, 4, 16, 1 (11 ad ed.).

Verfügung steht, und auch ausreichend ist. (So zum Beispiel die Rechtsgeschäfte ohne *auctoritas* des Vormunds, es kann aber auch ein Fall bezüglich der *societas* erwähnt werden, wo der Minor übervorteilt wurde: keine besondere Beihilfe des Prätors ist erforderlich, weil die ganze *societas* in diesem Fall nichtig ist.) Im Anschluss an die Auflistung der Beispiele wird ganz allgemein festgehalten: wenn ein Vertrag nichtig ist, braucht man keinen Eingriff des Prätors.[36] Nach solchen Überlegungen wird die oben zitierte Aussage über den Kaufpreis formuliert. Aus dem Kontext ergibt sich, dass dieses Fragment im Gegensatz zu den früher erwähnten Beispielen deswegen formuliert wird, weil Ulpian andeuten möchte, dass es den Vertragsparteien im Falle der *emptio venditio* erlaubt ist, einander zu übervorteilen. Dies führt auch zu der Notwendigkeit, die wehrlose Position der erfahrungslosen Mündigen unter fünfundzwanzig Jahren speziell zu schützen.[37] Diese Überlegungen können auch als Beweis der früher schon erwähnten Feststellung dienen, dass Ulpian mit dieser Aussage kein zu befolgendes Verhaltensmuster zeigen und kein Rechtsprinzip formulieren, sondern bloß seine Erfahrungen zum Ausdruck bringen wollte.

Zunächst lohnt es sich diesen Fall mit dem anderen, bezüglich des Sklavenkaufs erwähnten Fall zu vergleichen.[38] Die im oben erwähnten Fall befindliche Wendung *ne emptores a venditoribus circumveniantur* und die hier erwähnte *licere contrahentibus se circumvenire* lassen einander widersprechendes Verhalten bezüglich desselben Vertrages zwischen denselben Parteien zu. In beiden Fällen geht es um *emptio venditio*, im ersten Fall ist *circumvenio* zugelassen, im zweiten aber nicht. Es stellt sich die Frage: Dürfen die Parteien einander übervorteilen?

Mindestens zwei wichtige Elemente sind aber zu erwähnen, wonach diese zwei Fälle gegeneinander abgegrenzt werden können. Diese Aspekte beleuchten den wesentlichen Unterschied, der Ulpian dazu führt, dem selben Verhalten einmal zulassend, dann aber prohibitiv gegenüberzustehen. Diese wesentlichen Unterschiede liegen in dem Fragment über den Kaufpreis **[**Ulp. D. 4, 4, 16, 4. (11 ad ed.)]. An der geprüften Stelle befindet sich die Wendung *in pretio [...] licere contrahentibus se circumvenire***,** also hinsichtlich des Kaufpreises. Einander zu übervorteilen ist bei *emptio venditio* allein dann erlaubt, wenn dieses Verhalten nur die Höhe des Kaufpreises beeinflusst, beziehungsweise sich darauf bezieht. Andere Weisen des Umgehens, die sich auf den Vertragsgegenstand, die Qualität der Leistung, die Art und Weise der Erfüllung beziehen, sind nicht erlaubt. Diesbezüglich haben wir schon ein Beispiel im Fall über den Sklavenkauf gesehen. Indirekt beeinflusste die Betrügerei die Höhe des Kaufpreises, und das wird ausdrücklich formuliert: *ut pluris vendant*, aber *circumvenio* selbst besteht hier darin, dass der Verkäufer über die Ware andere Eigenschaften behauptet, als über die sie wirklich verfügt. Der Verkäufer spricht über Sklaven die Neulinge sind, in der Wirklichkeit sind sie aber Altsklaven.

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[36] Ulp. D. 4, 4, 16, 3 (11 ad ed.).

[37] Als Fundament dieses Schutzes diente das Gesetz aus ungefähr 200 vor Chr. nämlich die *Lex Laetoria* S. a. Zlinszky, János*: Ius Privatum*. Budapest, Osiris, 1998. 63–64.; Földi–Hamza op. cit. 227.; Theo Mayer-Maly: *Römisches Privatrecht*. Wien, Springer Verlag, 1991. 18–19.

[38] Ulp. D. 21, 1, 37 (1 ad ed. aedil. curul.).

Die Ware anzupreisen, ihre Empfehlung um ein gutes Geschäft, um einen höheren Gewinn ist erlaubt, aber die Möglichkeit ist nicht unbeschränkt. Ulpian macht an einer Digestenstelle darauf aufmerksam, dass alles, was der Verkäufer wegen der Empfehlung seiner Ware sagt, als *quasi neque dictum neque promissum* zu betrachten ist. Wenn er aber zur Täuschung des Käufers etwas behauptet, kann man ihn mit der *actio de dolo* klagen.[39] Darum geht es im oben erwähnten Fall.[40] Daraus folgt, dass – wie darauf schon Andreas Wacke aufmerksam machte, – einander zu übervorteilen hinsichtlich des Kaufpreises nur erlaubt ist, wenn es im Rahmen der bona fides bleibt.[41]

Ein weiterer Unterschied zeigt sich zwischen den Fällen in einem anderen Aspekt, was grammatisch sich in den zwei verschiedenen Wendungen darstellt: *contrahentibus se circumvenire* und *ne emptores a venditoribus circumveniantur***.** Im Fall des Sklavenkaufs geht es nämlich um eine einseitige Betrügerei, der Verkäufer nutzt seine Position aus, dass er seine Sklaven wohl kennt, nicht nur auf den ersten Blick, er übervorteilt den Verkäufer eben hinsichtlich einer wesentlichen Eigenschaft der Sklaven, der bereit ist, wegen dieser Eigenschaft mehr zu bezahlen. Im zweiten Fall aber, wenn die Vertragsparteien ausschließlich bezüglich des Kaufpreises taktieren, ist die Möglichkeit des Übervorteilens beiderseitig. Es geht um das Verhandeln, was zur *emptio venditio* natürlicherweise gehört. Es ist nur möglich, wenn beide Seiten ihre Vorteile suchen. Die Interessen der Parteien sind gegensätzlich, bei der Erwartung eines guten Geschäftes wollen beide Seiten mehr Gewinn erhalten. Solange die Verhandlungspositionen gleich sind, und sie während des Verhandelns die Erfordernisse der *bona fides* einhalten, ist es wegen der Eigenschaften der Marktverhältnisse zulässig. Darauf weist unter anderen Theo Mayer-Maly hin, wenn er *circumscribere/circumvenire* auf die *natura contractus* zurückführt.

Die weitere römischrechtliche Entwicklung der Problematik ist wohl bekannt. Die Freiheit der Parteien bezüglich der Kaufpreisbestimmung stößt bald mit dem Erscheinen des Rechtsinstituts *laesio enormis* zumindest hinsichtlich der Immobilien gegen objektive Grenze. Diese rechtliche Konstruktion kommt in den Kommentaren und in den bürgerlichen Gesetzbücher als allgemeine, sich nicht nur auf die Immobilien beziehende Regelung vor Die Frage bleibt dieselbe: wie groß die Freiheit der Parteien angesichts der Preisbestimmung ist?

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[39] Vgl. Ulp. D. 4, 3, 37 (44 ad sab.): Quod venditor ut commendet dicit, sic habendum, quasi neque dictum neque promissum est, si vero decipiendi emptoris causa dictum est, aeque sic habendum est, út non nascatur adversus dictum promissumque actio, sed de dolo actio. S. a. sog. marktschreierisches Anpreisen Földi–Hamza op. cit. 485.

[40] Die Regelungen bezüglich der Empfehlung der Ware formen sich auch demgemäß, auf welche Eigenschaft der Ware die Empfehlung oder der Anpreisen sich bezieht. Vgl. Flor. D. 18, 1, 43 pr (8 inst.): Ea quae commendandi causa in venditionibus dicuntur, si palam appareant, venditorem non obligant. Im Zusammenhang mit dieser Problemstellung kommt eben die Frage der Gewährleistung zur Sprache, darauf wird aber jetzt nicht eingegangen.

[41] Wacke weist darauf hin, dass diese Freiheit der Parteien Fides-konforn ausgelegt werden soll. Vgl. Wacke op. cit. 190.

## 2. Ergebnis

Aus diesen Überlegungen her ergibt sich einerseits, dass Ulpian das Wort *circumvenio* zweifelfrei in negativem Sinne benutzt. Immer, wenn er dieses Verhalten trifft, tritt er dagegen auf und setzt sich für redliches, aufrechtes Verhalten ein. Andererseits aber spricht er die Zulässigkeit des Verhaltens hinsichtlich des Kaufpreises aus. Über die dargestellte enge Interpretation hinaus bleibt die Frage zu beantworten was das Ziel dieser Aussage Ulpians war, bzw. wie weit die daraus folgenden Regelungen der Gerechtigkeit entsprechen. Bei der Beantwortung dieser Frage scheint die Feststellung Bessenyő's vorwärts weisend zu sein. Er sagt nämlich, dass diese Aussage Ulpians eine „weise resignierte Stellung" sei, er deutet darauf hin, dass dahinter „die Erkenntnis wirtschaftlich-sozialen Notwendigkeiten"[42] liegt. Wahrscheinlich weist die in diesem Fragment befindliche Wendung *naturaliter* auch darauf hin. Eine Richtung der weiteren Forschungen des Themas ist die Darstellung der Bedeutung dieser Wendung. Andererseits aber stellt sich die Frage, wie weit diese Aussage Ulpians ein Rechtsprinzip sein kann und als Grundsatz zu betrachten ist.[43] Bei dieser Aussage schein es, dass es hier um kein zu befolgende Verhaltensmuster geht, sondern um die Schilderung einer spontanen menschlichen Reaktion, die unter den herrschenden Marktverhältnissen in Erscheinung tritt. Wenn diese das zu befolgende Muster wäre, würde es schwer mit dem Bestreben nach *ius suum cuique tribuendi* vereinbar.

## 3. Ausblick

Nach diesem kurzen Überblick stellt sich schließlich die Frage, was für Richtungen die weiteren Forschungen bilden? Mir scheint es so, dass es zwei wesentliche Themas gibt, womit die Problematik der *circumvenio* bezüglich des Kaufvertrages eng verbunden ist, und die die Bedeutung dieser Aussage Ulpians näherer erörtern. Das erste ist die Frage des Grundsatzes. Wie weit diese Aussage als ein Grundsatz zu betrachten ist. Diesbezüglich ist zunächst die Bedeutung und den Begriff des Grundsatzes im römischen Recht zu prüfen. Wenn man annimmt, dass die Grundsätze das befolgende Verhaltensmuster formulieren, ist diese Aussage als keinen Grundsatz zu betrachten. Bei seinen Erörterungen nimmt Ulpian die Beispiele aus das wahre Leben, er legt seine Erfahrungen zugrunde, unter Berücksichtigung dieser Umstände trifft er seine Feststellungen. Interpretiert man diese Feststellungen als selbständige Aussagen, ohne ihren originalen Kontext zu berücksichtigen, kann es passieren, dass

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[42] Bessenyő op. cit. 378.

[43] Im Zuge der Erörterung der Frage des römischen Kaufvertrages im Rahmen der nachklassischen Entwicklung weist Kaser eben auf die klassische Preisbestimmung hin, und formuliert: „Für die Höhe des Kaufpreises bleibt es zunächst bei dem Grundsatz, der ihre Festsetzung der freie Übereinkunft überlässt." Vgl. Max Kaser: *Das römische Privatrecht*. München, C.H. Beck'sche Verlagsbuchhandling, [2]1971. 388.

ganz anders aus dem Text hervorgeht, als im Originaltext gemeint wurde –es zeigt sich zum Beispiel im Zusammenhang mit der Problematik des *portio mulieris*.[44]

Zweitens wäre es interessant diese Problematik in Hinblick auf die vorvertragliche Schuldverhältnisse und auf *culpa in contrahendo* zu prüfen. Die Möglichkeit der *circumvenio* ist bei *emptio venditio* sicherlich beschränkt. Einerseits wegen dem Wesen des Kaufvrtrages: *emptio venditio* ist *obligatio bonae fidei*: die Grenzen der Freiheit der Parteien werden durch die Erfordernisse der *fides* gebildet. Andererseits, wegen der Formulierung der Aussage Ulpians: *circumvenio* ist nur *in pretio* erlaubt. Diese zwei Aspekte zeigen, dass die Möglichkeit der *circumvenio* bis einem gewissen Zeitpunkt, bis zum Vertragsabschluss vorstellbar sein kann. Deswegen wäre es wichtig, diese Frage in Hinblick auf die vorvertragliche Schuldverhältnisse zu prüfen.

[44] Vgl. Wolfgang Waldstein: *Ins Herz geschrieben. Das Naturrecht als Fundament einer menschlichen Gesellschaft.* Augsburg, Sankt Ulrich Verlag, 2010. 93–104.

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# DIE RECHTLICHEN HINTERGRÜNDE DER VERTREIBUNG DER UNGARNDEUTSCHEN NACH 1945

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Die Zeit zwischen den Jahren 1944 und 1949 stellte in Ungarn eine Übergangsphase dar. Während viele Menschen darauf gehofft hatten, der neue Staat könne endlich nach dem Vorbild eines demokratischen politischen Systems aufgebaut werden, wurden in Wirklichkeit die Bedingungen für die Sowjetisierung des Landes geschaffen.

Zwischen Oktober 1944 und April 1945 ist Ungarn von einem durch Deutsche besetzten Land zu einem durch die Sowjetunion besetzten Land geworden.

Das bedeutendste Hindernis für die ungarischen Souverenität war die – wie es in Ungarn 44 Jahre hindurch formuliert wurde – „provisorisch" in Ungarn stationierte sowjetische Armee.[1] Die Besetzung versuchte das in Moskau unterzeichnete Waffenstillstandsabkommen vom 20. Januar 1945[2] zwischen der Sowjetunion und Ungarn zu legalisieren. In diesem Abkommen erkannte Ungarn bis zum Friedensabschluß die Beaufsichtigung des sog. Alliierten Kontrollausschusses an, an dessen Spitze immer sowjetische Generale saßen. (Marschall Vorosilov, General Sviridov).

Dieser Kontrollausschuß hatte das Recht, die Gründung von Parteien zu gestatten oder zu verbieten, Verhaftungen zu verordnen, die Presse zu zensieren, Filme zuzulassen, oder die Post zu kontrollieren. Die sowjetische Besatzung unterstützte die Machtübernahme der Kommunisten mit allen Kräften und der sowjetische

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* Dozent.

1 Milovan Đilas: *Találkozások Sztálinnal* (Treffen mit Stalin) Budapest, Magvető Kiadó, 1989. 105.; L. Balogh, Béni (szerk. és a bevezető tanulmányt írta): *„Törvényes" megszállás. Szovjet csapatok Magyarországon* 1944–1947 között. („Gesetzmäßige" Besetzung. Sowjetische Truppen in Ungarn zw. 1944–1947) Budapest, Magyar Nemzeti Könyvtár, 2015. 567.

2 Balogh, Sándor: *Magyarország külpolitikája 1945–1950.* (Ungarns Aussenpolitik 1945–1950) Budapest, Kossuth Könyvkiadó, 1988. 5.

Einfluß hat dem politischen, geistigen und kulturellen Leben des Landes von Anfang an seinen Stempel aufgedrückt.[3]

Durch den am 10-ten Februar 1947 unterzeichneten[4] und am 16. Juli des gleichen Jahres ratifizierten[5] Friedensvertrag wurde Ungarn völkerrechtlich zu einem souveränen, unabhängigen Staat. Das Mandat des Kontrollausschusses ist zwar abgelaufen, aber 50 000 Mann sowjetischer Truppen blieben in Ungarn, um die Verbindung mit den in Österreich stationierten sowjetischen Truppen zu sichern.[6] Am 15. Mai 1955 wurde der Staatsvertrag mit Österreich unterzeichnet, das Land wurde zu einem neutralen Staat, die sowjetischen Truppen verließen Österreich,[7] aber einen Tag zuvor wurde die vom Warschauer Pakt[8] geschaffene, von der Sowjetunion geleitete militärische Allianz gegründet, so blieben die russischen Soldaten wieder in unserem Land. Die militärische Besatzung und die sowjetische politische Kontrolle beschränkte die ungarische Souverenität 44 Jahre lang in großem Maße. Die sowjetische Macht wirkte durch ihre „Berater" offiziell im Land, manchmal leiteten sie den ungarischen Staat durch direkte Befehle. Der Aufbau des diktatorischen Einparteistaates wurde bis zu dem Jahre 1949 beendet, – nach der Vernichtung der einzelnen Parteien und der erzwungenen Vereinigung der Sozialdemokratischen und Kommunistischen Parteien hatte niemand mehr die Möglichkeit, gegen die einzige kommunistische Partei, gegen die „Partei der Ungarischen Arbeitenden" eine politische Gegenmeinung zu formulieren.[9]

Am 3. Dezember 1944 wurde die Ungarische Nationale Unabhängige Front aus 5 Parteien gegründet, dazu gehörten die Partei der Unabhängigen Kleinwirte, die Sozialdemokratische Partei, die Kommunistische Partei, die Nationale Bauernpartei, die Partei der Bürgerlichen Demokraten, sowie die Gewerkschaften, aber ihr

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[3] Földesi, Margit: *A megszállók szabadsága – a hadizsákmányról, a jóvátételről, a Szövetséges Ellenőrző Bizottságról Magyarországon*. (Die Freiheit der Besetzungsmacht – über die Kriegsbeute, die Kriegsentschädigung, den Alliierten Kontollrat in Ungarn) Budapest, Kairosz, [2]2009. 480.

[4] Romsics, Ignác*: Az 1947-es párizsi békeszerződés.* (Der Pariser Friedensvertrag vom Jahre 1947) Budapest, Osiris Könyvkiadó, 2006. 276.

[5] Gesetz Nr. XVIII. vom Jahre 1947.

[6] Halmosy, Dénes (szerk.): *Nemzetközi szerződések (1945–1982). A második világháború utáni korszak legfontosabb külpolitikai szerződései.* (Internationale Verträge (1945–1982). Die wichtigsten aussenpolitischen Verträge der Zeitepoche nach dem zweiten Weltkrieg) Budapest, Közgazdasági és Jogi Könyvkiadó, 1985. 84.; Pataki, István: Egyezmények a szovjet csapatok magyarországi tartózkodásáról. [Abkommen über den Aufenthalt der sowjetischen Truppen in Ungarn]. *Múltunk*, 1995/3. 127–158.

[7] Hajdú, Gyula (szerk.): *Nemzetközi szerződések gyűjteménye 1945–1958.* (Sammelwerke internationaler Verträge 1945–1958) Budapest, Közgazdasági és Jogi Könyvkiadó, 1958. 259.; Valerij Muszatov: Az osztrák államszerződés és a Szovjetunió. [Der österreichische Staatsvertrag und die Sowjetunion]. *História*, 2005/5. 3., 5–8.

[8] Király, Béla: A magyar hadsereg szovjet ellenőrzés alatt. [Die ungarische Armee unter sowjetischer Kontrolle]. In: *Magyarország és a nagyhatalmak a 20. században*. *Tanulmányok.* Budapest, 1995. 235.

[9] Izsák, Lajos (szerk.): *A Magyar Dolgozók Pártja határozatai 1948–1956.* (Die Beschlüsse der Partei der Ungarischen Arbeiter 1948–1956) Budapest, Napvilág Könyvkiadó, 1998. 10.

Programm war mit dem der Kommunisten identisch. Auf der Grundlage dieses Programmes wurde drei Wochen später auch das Regierungsprogramm formuliert.[10]

Am 14. Dezember 1944 wurde die Vorbereitungskommission der Provisorischen Nationalversammlung gegründet, die hinter den Frontzonen – zwar ohne Regelung –, die Wahl von den Mitgliedern des neuen gesetzgebenden Organs abgewickelt hat. Am 20. Dezember 1944 hat die Vorbereitungskommission aus 44 Siedlungen 230 gewählte Abgeordnete nach Debrecen gebracht, damit die Provisorische Nationalversammlung am nächsten Tag (nämlich am offiziellen Geburtstag von Stalin)[11] ihre konstituierende Sitzung abhalten kann. Das Provisorische Parlament hatte aber insgesamt nur 2 Sitzungen abgehalten. Die erste: im Dezember 1944, diese Sitzung dauerte kaum 8 Stunden, zum zweiten Mal tagte die Versammlung am 6. September 1945, bei dieser Gelegenheit dauerte die Sitzung sechs Tage lang. Obwohl Béla Zsedényi, Präsident der Provisorischen Nationalversammlung, die Einberufung der Sitzungen öfters angebahnt hatte, wurden diese vom Alliirten Kontrollausschuß nie genehmigt. Höchstwahrscheinlich wollte der Ausschuß eine aktivere Parlamentstätigkeit nicht unterstützen.[12]

Ab April 1945 begann der demokratische Neuaufbau Ungarns. In allen Teilen der Neugestaltung können jedoch eine Reihe von Rechtsverletzungen festgestellt werden, manchmal ging es sogar um die Mißachtung von demokratischen Grundprinzipien und Regelungen. Durch ein paar, besonders die Ungarndeutschen betreffende Beispiele soll diese Behauptung im Folgenden illustriert werden. Die besondere Aktualität des Themas ergibt sich aus der Tatsache, daß die Aussiedelung der Ungarndeutschen genau vor 70 Jahren statt gefunden hat.

Die Vertreibung der Ungarndeutschen geschah aufgrund vom Potsdamer Abkommen. Im Artikel XIII. des Abkommens wurde festgelegt: Die drei Regierungen (nämlich die USA, Großbritannien, Sowjetunion) haben die Frage der Übersiedlung der Deutschen „unter allen Gesichtspunkten beraten und erkennen an, daß die Überführung der deutschen Bevölkerung oder Teile derselben, die in Polen, Tschechoslowakei und Ungarn zurückgeblieben sind, nach Deutschland durchgeführt werden muß. Sie stimmen darin überein, daß jede derartige Überführung, die stattfinden wird, in ordnungsgemäßer und humaner Weise erfolgen soll. Da der Zustrom einer großen Zahl Deutscher nach Deutschland die Lasten vergrößern würde, die bereits auf den Besatzungsbehörden ruhen, halten sie es für wünschenswert, daß der alliierte Kontrollrat in Deutschland zunächst das

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[10] Korom, Mihály: *Magyarország ideiglenes nemzeti kormánya és a fegyverszünet: 1944–1945.* (Die Provisorische Nationalregierung Ungarns und der Waffenstillstand: 1944–1945) Budapest, Akadémiai Kiadó, 1981. 128.

[11] Edvard Radzinszkij: *Sztálin*. (Stalin) Budapest, Európa Könyvkiadó, 1997. 17–18.

[12] Jónás, Károly (szerk.): *Adatok és tények az 1944–1945. évi Ideiglenes Nemzetgyűlésről*. (Angaben und Tatsachen über die Provisorische Nationalversammlung vom Jahre 1944–1945) Budapest, Parlamenti Módszertani Iroda, 1994. 88.; Vagyóczkyné Kékes, Viktória (szerk.): *Az Ideiglenes nemzetgyűlés és az Ideiglenes kormány megalakulása: 1944. december 21–22*. (Die Bildung der Provisorischen Nationalversammlung und der Provisorischen Regierung: 21–22. Dezember 1944) Budapest, Kossuth Könyvkiadó, 1984. 8.

Problem unter besonderer Berücksichtigung der Frage einer gerechten Verteilung dieser Deutschen auf die einzelnen Besatzungszonen prüfen soll. Sie beauftragen daher ihre jeweiligen Vertreter beim Kontrollrat, ihren Regierungen so bald wie möglich über den Umfang zu berichten, in dem derartige Personen aus Polen, der Tschechoslowakei und Ungarn nach Deutschland gekommen sind, weiters beautragen sie die zuständigen Stellen, eine Schätzung über Zeitpunkt und Ausmaß vorzulegen, zu dem die weiteren Überführungen durchgeführt werden könnten, wobei die gegenwärtige Lage in Deutschland zu berücksichtigen ist. Die tschechoslowakische Regierung, die Polnische Provisorische Regierung und der Alliierte Kontrollrat in Ungarn werden gleichzeitig von obigem Beschluss in Kenntnis gesetzt, gleichzeitig werden sie ersucht, weitere Ausweisungen der deutschen Bevölkerung einzustellen, bis die betroffenen Regierungen die Berichte ihrer Vertreter an den Kontrollausschuß geprüft haben."[13]

Marschall Vorosilov berichtete an demselben Tag, als die Konferenz in Potsdam angefangen hat (17. Juli 1945), dem Alliierten Kontrollausschuß, der eben in Budapest seine Sitzung hielt, – wie er formuliert hatte, – über die Bitte der ungarischen Regierung, ung. 200 000 von 500 000 Ungarndeutschen weit von der ungarischen Grenze auszusiedeln, mit denen man auf gleicher Weise, wie mit den Kriegsverbrechern umgehen soll. Obwohl alle Teilnehmer ihre Zustimmung von dem Einverständnis ihrer Regierung abhängig gemacht hatten, hielten sie es als durchzuführende Idee. Vorosilov betonte, sie müssen diese Frage entscheiden, weil die Frage der Aussiedlung auch in anderen Ländern auftauchte.[14]

Zwei Wochen früher (am 3. Juli) verlangte die tschechoslowakische Regierung[15] (mit der Ünterstützung von Stalin), die Umsiedlung von 3 Millionen Sudetendeutschen und weitere 400 000 Ungarn. Die Begründung lautete wie folgt: in Ungarn leben ung. 350 000 Slowaken, die in die Slowakei umsiedeln wollen.

Obwohl viel darüber debattiert wurde, ob die Konferenz in Potsdam mit ihrem Abkommen bloß die Möglichkeit für die Vertreibung der Deutschen geschaffen hatte. Die Formulierung des Abkommens ermöglichte verschiedenen Interpretationen, so wurde am 23. November dem Alliierten Kontrollausschuß die Antwort von dem ungarischen Ministerpräsidenten gegeben: Die Zahl der auszusiedelnden Deutschen sei 303 419 Menschen.

Trotz des Potsdamer Abkommens haben sich die Russen und die Tschechen so verhalten, als ob sich die Großmächte – zwar nicht schriftlich, wohl aber mündlich – darüber geeinigt hätten, den Vorschlag des tschechoslowakischen Präsidenten, Edvard Beneš zu unterstützen. Dem Abkommen folgte das bilaterale Abkommen zwischen der Tschechoslowakei und Ungarn. Aufgrund dieser beiden Abkommen

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13 http://potsdamer-konferenz.de/dokumente/potsdamer_protokoll.php#XII, Seite 10–11.

14 Zinner, Tibor: *A magyarországi németek kitelepítése.* (Die Aussiedlung der Ungarndeutschen) Budapest, Magyar Hivatalos Közlönykiadó, 2004.

15 Németh, István: *Németország története – egységtől az egységig.* (Die Geschichte Deutschlands – von der Einheit bis zur Einheit) Budapest, Aula, 2002. 357.

wurden ungarische und slowakische Volksgruppen gezwungen, ihr Zuhause zu verlassen.

Am 13. Mai 1946 debattierten die Abgeordneten in der ungarischen Nationalversammlung vor der Abstimmung des Abkommens zwischen der Tschechoslowakei und Ungarn über die Umsiedlungen. Die ungarischen Abgeordneten waren überhaupt nicht begeistert, daß Hunderttausende von ungarischen Volksgruppen umgesiedelt werden sollten. Der Abgeordnete, István Kossa (Abgeordneter der Gewerkschaften, später von der Kommunistischen Partei) argumentiert dagegen aus wirtschaftlicher Sicht, die ungarische Wirtschaft kann das nicht überleben, wenn Hunderttausende (er sprach von über 650 000 Ungarn) nach Ungarn umgesiedelt werden.[16]

Pál Jaczkó (von der Partei der Unabhängigen Kleinwirte) beklagte, daß sich die Slowaken frei entscheiden können, ob sie das Land wechseln, oder in Ungarn bleiben, die Ungarn jedoch ungarische Volksgruppen übernehmen müssen. Noch dazu dürfen die Ungarn weder ihr Vermögen, noch Dokumente darüber mitbringen, was sie hinterlassen hatten. Es ist inakzeptabel, dass die Ungarn entschädigungslos von ihrer Heimat vertrieben werden. In der Tschechoslowakei sollten die ungarischen Menschen das gleiche Recht bekommen, wie die anderen.[17]

Die parlamentarischen Protokolle enthalten keine Dokumentation über seine Empörung im Falle der entschädigungslos vertriebenen Ungarndeutschen. Wir können feststellen: die meisten Abgeordneten haben kein Wort dagegen erhoben.

Nach der Erklärung des Aussenministers über die internationale Lage Ungarns wurde über das Gesetz zum Abkommen über die Übersiedlung der ungarischen Volksgruppen abgestimmt.[18]

Die ungarische Regierung versuchte mit der Hilfe der Deportierung der Ungarndeutschen mehrere Probleme zu lösen: unter anderem das der Bodenreform, aufgrund der Kollektivschuld die Vertreibung der Ungarndeutschen, die Unterbringung der Flüchtlinge, ausserdem ging es darum die Erfordernisse des Abkommens über den Bevölkerungstausch zwischen der Tschechoslowakei und Ungarn zu erfüllen.

Im Sinne des Waffenstillstandsabkommens[19] vom 20. Januar 1945 verpflichtete sich Ungarn, die Kriegsverbrecher zu Rechenschaft zu ziehen. Im März wurde es dringend, weil im Sinne des Gesetzes über die Bodenreform den Besitzlosen Grund und Boden zugeteilt werden mußte. Noch in demselben Monat wurde über das

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16 *Nemzetgyűlési Napló*. (Protokoll der Nationalversammlung) 1945 II. kötet (Band II.), 1946. május 10., 1946. augusztus 9., a *Nemzetgyűlés 33. ülése, 1946. május 13-án* (an der Sitzung 33. von 13. Mai 1946.) 99–100.

17 *Nemzetgyűlési Napló*. (Protokoll der Nationalversammlung) 1945 II. kötet (Band II.), 1946. május 10. – 1946. augusztus 9., a Nemzetgyűlés 33. ülése, 1946. május 13. (Sitzung 33. von 13. Mai 1946) 101.

18 *Nemzetgyűlési Napló*. (Protokoll der Nationalversammlung) 1945 II. kötet (Band II.), 1946. május 10. – 1946. augusztus 9., a Nemzetgyűlés 34. ülése, 1946. május 14. (Sitzung 34. von 14. Mai 1946) 119.

19 Balogh, Sándor: *Magyarország külpolitikája 1945–1950*. (Die Aussenpolitik Ungarns 1945–1950) Budapest, Kossuth Könyvkiadó, 1988. 5.

Gesetz über die Beschlagnahme der Grundstücke von ehemaligen Mitgliedern des Volksbundes, dh. von den Landesverrätern abgestimmt. Im April formulierten die Parteien nacheinander ihre Stellungnahme über die Vertreibung der Ungarndeutschen. Sie fiel im Allgemenen positiv aus.

Im Sinne des Potsdamer Abkommens und des Waffenstillstandsabkommens werden mehrere Verordnungen vom Ministerpräsidenten ausgegeben, um den Erfordernissen der oben genannten Abkommen zu erfüllen. Laut der Verordnung Nr. 3820/1945. vom 1. Juli sollte die politische Vergangenheit der Ungarndeutschen überprüft werden. (Natürlich nicht nur die frühere politische Tätigkeit, oder einfach nur das alltägliche Verhalten der Ungarndeutschen wurde unter Kontrolle gesetzt, sondern es wurden nacheinander für viele Menschen von bestimmten Berufen Kontrollen vorgeschrieben, so z. B.: aufgrund der Verordnung Nr. 15/1945. für die Angestellten im öffentlichen Dienst.)

Die Verordnung des Ministerpräsidenten Nr. 12.330/1945[20] verpflichtete die Ungarndeutschen, ihre Heimat zu verlassen. Am 29. Dezember 1945 verfügte die ungarische Regierung,[21] daß diejenigen ungarischen Staatsbürger nach Deutschland „umzusiedeln" seien, die sich bei der Volkszählung vom Jahre 1941 zur deutschen Nationalität oder Muttersprache bekannt, oder die Magyarisierung ihres Namens rückgängig gemacht hätten, Mitglied des Volksbundes, oder einer bewaffneten deutschen Formation gewesen waren. Es wurde oft betont: Diese Deportierung beruhte auf Artikel XIII. des Potsdamer Abkommens, aber es war bloß eine Ausrede. In Ungarn gab es auch manche Politiker, wie der demokratisch denkende István Bibó, der sich in mehreren Denkschriften gegen die Vertreibung der Ungarndeutschen wandte. Unter anderem sagte er im Jahre 1946: „Wir tun jetzt mit ihnen (also mit Ungarndeutschen) nichts anderes, als vor einem Jahr mit unseren Juden."[22]

Bibó hatte Gewissensbisse, dass die Vertreibung der Deutschen durch seine Mitwirkung in das Potzdamer Abkommen aufgenommen worden war. Im Jahre 1945 war es in Südungarn mit der Unterstützung der Bauernpartei und der Kommunistischen Partei zu Privataktionen gekommen. Um den aus Jugoslawien vertriebenen Szeklern Platz zu machen, war die deutsche Bevölkerung ganzer Dörfer war aus ihren Häusern vertrieben worden. Diese Schwaben standen dann tagelang auf den Feldern ohne Essen und Trinken im Regen. Als Bibó über diese Vorfälle gehört hat, hat er sich an den Innenminister gewandt. Das Problem wurde darauf hin im Ministerrat besprochen und es wurde entschieden, die Potzdamer Konferenz um Hilfe zu bitten.

Die Volkszählung 1941 hatte im Gebiet von Trianon-Ungarn rund 477 966 Personen deutscher Muttersprache erfasst, 303 527 hatten sich zur deutschen Nationalität

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[20] Verordnung von Ministerpräsidenten Nr. 12.330/1945. *Magyar Közlöny,* 1945. Nr. 211.

[21] Verordnung der Regierung Nr. 12.200/1947. *Magyar Közlöny,* 1947. Nr. 245.

[22] Litván, György – S. Varga, Katalin (szerk.): *Bibó István (1911–1979). Életút dokumentumokban*. (István Bibó (1911–1979) Lebensweg in Dokumenten) Budapest, 1956-os Intézet–Osiris–Századvég, 1995. 252–254.

bekannt.[23] Die Nationalität und die Muttersprache sollten extra angegeben werden, nur bei den Ungarndeutschen stimmten diese zwei Angaben nicht überein, und zwar bei 1/3 der Schwaben. Sich zur ungarischen Nationalität mit deutscher Muttersprache zu bekennen, das war damals eine Art der politischen Stellungnahme gegen Hitler. Rund 100 000 hatten der SS angehört, (selten freiwillig), viele davon waren gefallen oder in Kriegsgefangenschaft geraten. Dem Volksbund[24] und seinen Organisationen hatten im Herbst 1942 (im vergrößerten Ungarn) rund 300 000 Angehörige der deutschen Minderheit angehört. Etwa 60 000 bis 70 000 waren bereits zusammen mit der Wehrmacht geflohen, darunter zahlreiche SS-Mitglieder[25] und ihre Familien, sowie Volksbund-Mitglieder. Diese Zahlen zeigen, daß die meisten Ungarndeutschen, die nach dem Krieg in Ungarn geblieben sind, keine Kriegsverbrecher gewesen waren.

Der Grundbesitz der Ungarndeutschen wurde entschädigungslos enteignet. Am 1. Juni 1946 wurden die Transporte in die Amerikanische Besatzungszone von den Amerikanern gestoppt, weil Ungarn das zurückgelassene Vermögen der Deutschen auf seine Reparationsverpflichtung anrechnen lassen wollte, was die Amerikaner nicht anerkannten. In dieser ersten Phase wurden bis zu 130 000 Ungarndeutsche nach Deutschland gebracht.[26]

Ab Januar 1946 wurden die Ungarndeutschen nach Siedlungen registriert, und die ersten Transporte fuhren ab. Es gab oft Schwierigkeiten bei der Organisierung der Deportierungen, es war auch nicht immer klar, wer das Land verlassen soll.

Bis zum 5. November 1947 gab es schon Erfahrungen über die chaotischen, und gesetzwidrigen Situationen der Aussiedlungen, als der Abgeordneter, József Gróh an der Sitzung der Landesversammlung[27] die Aussiedlung scharf kritisierte. Er sagte unter anderem Folgendes.

Wenn es überhaupt vorkommen kann, daß eine Regierungsverordnung Leid, Untergang, Qual, Tod vertvoller Menschen, Vernichtung des Vermögens verursachte, dann war es die Verordnung über die Aussiedlung der Ungarndeutschen. Im Jahre

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[23] Marchut, Réka: A Pest megyei németek kitelepítése a kitelepítési névjegyzékek alapján. (Die Aussiedlung der Deutschen vom Komitat Pest aufgrund des Aussiedlungsnamenverzeichnisses) In: Dombóvári, Ádám –Manhercz, Orsolya (szerk.): *Vázlatok két évszázad magyar történelméből. Tanulmányok*. Budapest, ELTE, 2010. 174.

[24] Spannenberger, Norbert: A Volksbund. Egy népcsoport nemzetiszocialista szervezete vagy emancipációs kisebbségi egyesület? (Der Volksbund. Nationalsozialistische Organisation einer Volksgruppe oder Emantipationsminderheitenverein?) *Aetas*, 2000/4. 50–63.

[25] Tilkovszky, Loránt: *SS-toborzás Magyarországon*. (SS-Rekrutierung in Ungarn) Budapest, Kossuth Kiadó, 1974. 28–29., 35., 40–43., 60–60., 121–124.

[26] Balogh, Sándor: A német nemzetiségű lakosság kitelepítése Magyarországról a második világháború után. (Die Aussiedlung der deutschen Bevölkerung aus Ungarn nach dem zweiten Weltkrieg) *Információs Szemle*, 1981/4. 101.; Zilbauer, György: *Adatok és tények a magyarországi németség történetéből (1945–1949)*. {Angaben und Tatsachen aus der Geschichte des ungarischen Deutschtums (1945–1949)} Budapest, Akadémiai Kiadó, 1989. 57.

[27] *Országgyűlési Napló*. (Protokoll der Landesversammlung) 1947 I. kötet (Band I.), az országgyűlés 16. ülése, 1947. november 5. (Sitzung 16. von 5. November 1947) 817–818.

1946 haben wir schon über ein Gesetz abgestimmt, in dem formuliert wurde, daß die Schändlichkeit, die in diesem Land der Judenschaft dem Judentum angetan wurde, nicht nur mit den ewigen Werten der Menscheit, sondern auch mit der Moral und dem Charakter der ungarischen Menschen in direktem Widerspruch steht. Warum begehen wir dann denselben Fehler gegen die Deutschen, warum deportieren wir sie? Und wir lassen das Vermögen verloren gehen, das in den Händen der Deutschen auch die ungarische Volkswirtschaft bereicherte. Die von ihnen zurückgelassenen Häuser wurden von Angesiedelten, oder noch schlechter, von Lumpen bezogen, Tiere und Werkzeuge wurden wertlos. Dieser wirtschaftliche Untergang steht mit der Deportierung der Ungarndeutschen in engem Zusammenhang. (Bei diesem Satz wird dazwischengerufen, es steht im Protokoll: Fragen Sie die Amerikaner, oder die Engländer, sie haben es verordnet!) Dann hat er so fortgesetzt: Es ist unrecht, das Vermögen der Deutschen wegzunehmen. Es geht nicht ohne Entschädigung. Haben Sie keine Angst davor, daß Ungarn aufgrund der völkerrechtlichen Regeln verurteilt wird, und wir dann sehr viel Geld zahlen müssen?

Er hat seine Rede mit einem Zitat von unserem ersten katholischen König, Stefan, dem Heiligen beendet. Der erste König Ungarns hat in den Ermahnungen an seinen Sohn folgenden Satz geschrieben: „Schätze die fremden Völker deines Landes, davon wirst du viel Nutzen haben, weil das einsprachige Land schwach und gebrechlich ist." Der Abgeordnete fügte noch hinzu: Die Deportierung der Deutschen ist zugleich die Abnahme der Kräfte der ungarischen Nation. Mit bitterem Gesicht betrachte ich die festlichen Veranstaltungen am Tag des Heiligen Stefans, – sagte er –, als Heiliger feiern wir diesen König, und gleichzeitig richten wir solche Dinge an.

Andere Abgeordnete, wie z.B. Gyula Hajdu (von der Partei der Unabhängigen Landwirte), berichteten in der Sitzung der Nationalversammlung vom 23. Oktober 1946 über die durch die Umsiedlungen entstandenen chaotischen Verhältnisse.[28] Er sagte unter anderem, es herrscht im Land ein völliges Durcheinander, auf grossen Flächen der Felder wird nichts angebaut, die Angesiedelten sind angekommen, aber die Auszusiedelnden sind auch noch da, vielen Armen wurden noch kein Boden zugeteilt. Wir haben uns gefreut, den Boden der Deutschen wegnehmen zu können, nicht deshalb, weil sie Deutsche, sondern weil sie alle Faschisten seien sind. Und was ist jetzt? Die Transporte wurden abgestellt, die Angesiedelten sind angekommen, die Deutschen wohnen in dem gleichen Haus mit den Ansiedlern, sie (nämlich die Ansiedler) manchmal im Keller. Diese katastrophale Lage betrifft Zehntausende, es kommen Atrozitäten vor, die Ansiedler fliehen, oder falls sie bleiben, dann hungern sie. Man betreibt keine Landwirtschaft, und noch dazu bedrückt die Aufsichtsbehörde auch die Ansiedler. Nach seiner Meinung liegt die Schuld natürlich nur bei den Ungarndeutschen.

Die Absicht der kollektiven Sanktionierung der Deutschen ist in mehreren Gesetzen zu erkennen.

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[28] *Nemzetgyűlési Napló*. (Protokoll der Nationalversammlung) 1945 IV. kötet (Band IV.), a Nemzetgyűlés 68. ülése, 1946. október 23-án, (Sitzung 68 von 23. Oktober 1946) 97–98.

Am letzten Arbeitstag der Provisorischen Nationalversammlung, am 13. September 1945 wurde über den von Innenminister, Ferenc Erdei eingereichte Gesetzentwurf über das Wahlrecht abgestimmt. Das Gesetz Nr. 8 vom Jahre 1945 legte das Prinzip eines allgemeinen, geheimen, gleichen und direkten Wahlrecht fest. Im § 5. (Punkt 8. und 10.) dieses Wahlgesetzes wurde folgendes geregelt.

Vom Wahlrecht ist derjenige ausgeschlossen:

– wer im Sinne der Verordnung des Ministerpräsidenten Nr. 600/1945 über die Vernichtung des Großgrundbesitzsystems und der Bodenverteilung (§ 5.) als Vaterlandsverräter, Kriegsverbrecher oder Volksfeind zu betrachten sei, weil er die politischen, wirtschaftlichen oder militärischen Interessen des Faschismus auf Kosten des ungarischen Volkes unterstützte, oder sich freiwillig in deutsche, faschistische militärische –, oder Ordnungsorgane eingetreten ist, oder dem Angaben lieferte, der die Interessen des ungarischen Volkes verletzte, oder als Spitzel gewirkt hat, oder wieder seinen deutschen Familienname angenommen hat, und gegen den aufgrund des § 4. der oben genannten Verordnung bis zum Inkrafttreten dieses Gesetzes aus diesen Gründen die Beschlagnahme schon angefangen hat.
– wer Leiter, Mitglied, oder Unterstützer des Volksbundes gewesen war, und diese Tatsache aufgrund der Verordnung des Ministerpräsidenten Nr. 3820/1945 durch einen Ausschuß festgestellt wurde, oder trotz Mangels an Beweisen ohne allen Zweifel festgestellt werden kann, daß er Mitglied des Volksbundes, Kulturbundes, oder Hitler–Jugend war, oder sich selbst zur deutschen Nationalität bekannt hat.

Aufgrund dieses Wahlgesetzes verloren die Ungarndeutschen eigentlich bis zu dem Jahre 1950[29] ihr Wahlrecht. Eine ganze Literatur beschäftigt sich mit den Fehlern der Volkszählung des Jahres 1941. damit, welche Fehler die Volkszählung vom Jahre 1941 innehatte. Das wußten die Beamten des Statistischen Büros auch, daher hat die Leitung des Zentralen Statistischen Büros den Beschluss gefasst, dass die entsprechenden Angaben erst dann an die Öffentlichkeit gelangen durften, wenn mit diesen kein Mißbrauch mehr betrieben werden konnte und die Benutzung in schlechter Absicht ausgeschlossen war. Trotz dieses Beschlusses gerieten die entsprechenden Daten dennoch an die Öffentlichkeit.

Es war doch umsonst, die obenen Kategorien aufzustellen. Am 15. Januar 1946 wurde von Imre Nagy eine Verordnung über die Durchführung der Aussiedlung der Deutschen ausgegeben,[30] in diesem Sinne durfte die Zahl der Befreienen 10% der deutschen Bevölkerung nicht übersteigen kann.

Die Politik rechnete auch mit dem Vermögen der Schwaben.[31]

[29] Verordnung des Ministerrates Nr. 84/1950, § 3. (1).

[30] Verordnung des Innenministers Nr. 70.010/1946.

[31] Verordnung der Regierung Nr. 12.200/1947.

Die ungarischen Politiker, die damals in der Politik eine Rolle gespielt hatten, konnten über die weitläufige Problematik nicht die Oberhand gewinnen: die internationale Abneigung, die Vorurteile gegen Schwaben, die feindliche Gesinnung, die Kollektivschuld der ungarischen Menschen nach Beneš, das Chaos im Land, die sowjetische Besetzung, die ungarischen Kommunisten und die anderen, derer sie bedient hatten – waren zusammen viel stärker als die demokratischen Bestrebungen. die zusammen waren viel stärker, als die demokratischen Bestrebungen. Sie hatten keine Chance auf eine demokratsiche Gestalgung des ungarischen Staates So hatten sie keine Chance bei der demokratischen Neugestaltung des ungarischen Staates, so blieb es nach den ersten Hoffnungen noch lange Zeit ein Traum, in Ungarn einen demokratischen Staat aufzubauen.

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# BOOK REVIEW

Larry Siedentop: *Die Erfindung des Individuums – der Liberalismus und die Westliche Welt*. Stuttgart, Klett-Cotta, 2016.[1]

Besprochen von Viola Heutger*

Der Buchumschlag von Larry Siedentops »Die Erfindung des Individuums – Der Liberalismus und die westliche Welt« ist in dunklem Braun gehalten. Wie eine Sonne erleuchtet das Porträt Siedentops in der oberen rechten Ecke die Leserin und den Leser. Der Umschlag vermittelt den Eindruck, dass in dem Buch die persönlichen Ansichten des Autors geteilt werden. Siedentop ist ein geistvoller Mann. Erfüllt von einem reichen Forscherleben schaut er zurück auf die Entwicklung der westlichen Welt und versucht, in die Fülle der Quellen und sonstigen Überlieferungen einen roten Faden zu weben und die Gesellschaft einst und heute zu erklären. Larry Siedentop gelingt es, die Schnittstellen zu benennen, an denen gravierende Änderungen in der Geschichte eintraten. Einige dieser von Siedentop benannten Wendepunkte überraschen, wie auch einige seiner Schlussfolgerungen oder Wertungen.

Das Buch kann den Leser, die Leserin fesseln. Es gelingt Siedentop mit seiner Sprache Bilder zu zeichnen. Sein Vergleich des Christentums mit der heidnischen Götterwelt anhand der Architektur der heiligen Orte ist sehr einprägsam. So war der antike Tempel aussen schmuckvoll gehalten, die christliche Basilika dagegen aussen schlicht und dafür innen voller Schmuckelemente. Hieran schliesst Siedentop die folgende Erkenntnis: »Dem Heidentum ging es in erster Linie um äussere Verhaltenskonformität, dem Christentum vor allem um die innere Überzeugung« (114). Das Christentum schuf so die Voraussetzungen für die Freiheit, in der wir leben.

Siedentop liebt unterschiedliche Quellen. So finden sich antike Texte neben Sekundärliteratur, weltliche neben christlicher Literatur. Die Auswahl des Ausgangsmaterials ist jedoch nicht immer nachvollziehbar. Andererseits ist diese Quellenfülle auch wieder eine Stärke, da es dem Autor dadurch gelingt, ganz unterschiedliche Themen zu behandeln und der Leserin, dem Leser anschauliche Erklärungen für die Phänomene der damaligen Zeit zu bieten.

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[1] Aus dem Englischen von Hainer Kober. Englische Erstausgabe 2014.

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Den Menschen in der Antike sieht Siedentop als einen festen Bestandteil einer Familie, die an ein Territorium gebunden ist, am heimischen Herd den Familiengöttern opfert und Ahnenkult betreibt. Freiheit in der damaligen Zeit bedeutete, an der öffentlichen Macht teilzuhaben. Diese Position ist nur wenigen Männern vorbehalten, jenen Bürgern, die auch der Familie als pater familias vorstehen. Eine soziale Revolution mit dem Ziel Gerechtigkeit zu schaffen, ist in der Antike nicht denkbar, es geht nur um einen Kampf um mehr Privilegien. Ein römischer Bürger, eine Funktion, die nur Männern zukam, geniesst den Reiz seiner Überlegenheit. Anderen Bevölkerungsgruppen ist dagegen eine tribale Identität gegeben. So ist der Jude Teil einer Gemeinschaft durch Beschneidung und koschere Ernährung (S. 70). Die Individualität wird nach Siedentop erst durch den Apostel Paulus und seine Verkündigung möglich. Ab hier kommt auch zum ersten Mal die Frau ins Spiel. Zuvor definiert sie sich durch den Vater oder durch den Ehemann. Im Brief des Paulus an die Gemeinde von Galatien, wird nach Siedentop das Individuum geboren mit dem Halbsatz: »denn ihr seid allesamt einer in Christus Jesus« (Gal 3,28). In dieser Textstelle sieht Siedentop eine neue Transparenz in menschlichen Beziehungen (78). Zuvor sei kein Raum für das Individuum gewesen, es zählte nur die Verbindung zu einer Familie, zu einem Herd, zu den gleichen Göttern. Diese Auslegung Siedentops und die Hinwendung zu Paulus überraschen und sind nicht ganz nachvollziehbar.

Ab hier liest sich das Buch wie ein Versuch, eine religiöse Grundlage der westlichen Welt zu etablieren: Zunächst geht es um die Aufweichung der Familienbande. Die Rolle des pater familias wurde dadurch entkräftet, dass eine separate Priesterschaft dem pater familias die religiöse Rolle entzog. Dieser Vorgang lockerte die familiären Abhängigkeitsverhältnisse (147). Siedentop bemüht sich nun, die Stellung der Frau darzustellen und nachzuweisen, ab wann Frauen in der Geschichte als rationale Akteurinnen vorkommen (96). Auch hier sieht Siedentop einen entscheidenden Einfluss des Christentums. Durch die Nachfolge Christi werden die dominanten Familienbande zerrissen und so eine Gleichheit von Mann und Frau erreicht. Als Quelle dient Siedentop hier das Thomasevangelium. Später konnten Frauen dann durch den Eintritt ins Kloster aus der antiken Familie ausbrechen. In den Klöstern wurde auch die Bildung für Mann und Frau zugänglich. Die Arbeit, man denke zum Beispiel an die Tätigkeit in Skriptorien oder auf dem Felde, war durch das klösterliche Leben nun nicht mehr der Unterschicht vorbehalten. Dadurch kam es zu einer weiteren Gleichstellung von Mann und Frau wie auch von Oberschicht und Unterschicht (121). Ausserdem wurden die Klöster Orte der Selbstverwaltung und der Selbstauferlegung von Regeln und boten damit eine deutliche Abgrenzung zur Familie oder zur antiken Stadt.

Als Juristin sprachen mich Siedentops Anmerkungen zum antiken Rechtsstudium an, ebenso die Entwicklung der Ausbildung im Mittelalter in Bologna. Ganz richtig vermerkt der Autor, dass die Religion kaum Eingang in das Studium in der Antike gefunden hatte und sich die Studenten nicht den aktuellen Themen ihrer Zeit widmeten, sondern an den überlieferten Texten hängen blieben (169). Das Studium blieb weitgehend den Männern vorbehalten, nur wenige gelehrte Frauen sind uns aus der Antike überliefert worden. Durch das kanonische Recht kam um 1100 eine

Entwicklung in das Rechtsstudium. Man brauchte ein neues System. Nicht mehr ein ideales System des römischen Rechts wurde kommentiert, sondern man schuf ein neues System samt eigener Kirchengerichtsbarkeit (265). Religion und Recht gingen nun Hand in Hand. Siedentop belegt das mit vielen Nachweisen zu Juristenpäpsten, die geschulte Kirchenrechtler waren (268 und 320). Seine Ausführungen zum Naturrecht sind dagegen recht kurz und nicht sehr griffig. Die Schattenseiten der Kirchengeschichte blendet Siedentop aus.

Wenig überzeugend sind die Passagen über die Sklaverei und andere Formen der Abhängigkeit, hier berichtet er nicht, dass bis spät ins 19. Jahrhundert und darüber hinaus Sklaverei zur westlichen Welt gehörte. Es gelang mir leider nicht, das Buch in einem Schwung durchzulesen. Immer wieder legte ich es aus der Hand. Der Spannungsbogen ist oft unterbrochen, was sicher auch an der Verwendung und Verwertung von unterschiedlichem Quellenmaterial liegt. Will der Leser wissen, wen Siedentop in seinen Fussnoten zitiert, so muss man sich auf eine lästige Suche nach Endnoten am Ende des Buches begeben, die zudem auch noch in Kapitel unterteilt sind.

Immer wieder verliert sich Siedentop schwärmerisch in Zitaten von Sekundärliteratur. Diese wird dem interessierten Leser allerdings auch häufig bereits bekannt sein. Ausserdem liest man die dann lieber selber im Original als in einer Stilblütensammlung von Siedentop. Diese Feststellung gilt besonders für das wirklich sehr lesenswerte Buch von Fustel de Coulanges über den antiken Staat. Aus Fustel de Coulanges Werk stammen das Motto des Buches, wie auch zahlreiche Zitate.

Persönlich hätte ich gerne mehr zur Reformation gelesen, die Siedentop nur in Randlage behandelt. Als evangelische Christin gelingt es ihm allerdings, mir den Reliquienkult näher zu bringen, so dass meine Ablehnung sich in Verständnis wendet. Nach einer sicher berechtigten Kritik an den Wallfahrtsorten als Wirtschaftsadern schreibt er: »Die sterblichen Überreste der Heiligen vermittelten den Gläubigen Hoffnung und einen Eindruck von einer durch die ‘Menschwerdung Gottes‘ ermöglichten Willensstärke« (239).

Siedentop erinnert die Leserin, den Leser an die Geschichte und den Beitrag einzelner Personen und Begebenheiten, die zu unserem christlichen Wertesystem beigesteuert haben. Das Buch macht neugierig auf die Geschichte und regt zu einer weiteren Beschäftigung mit der vergangenen Zeit an. Die Antwort auf die Frage nach der Erfindung des Individuums ist allerdings noch nicht abschliessend geklärt.