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National Security Exceptions in the WTO – A Carte Blanche for Protectionism? Part II – US - Steel and Aluminium Products disputes, Improvements of the Security Test, Conclusion

Mihai Ioachimescu-Voinea
Leiden University, The Netherlands
E-mail: ioachimescu.mihai@gmail.com

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Abstract

Part two of the article analyses based on two possible scenarios whether United States was indeed right to rely on the security exception of Article XXI, by using the 'roadmap' provided by the panel in the Russia – Measures Concerning Traffic in Transit case.

In the first scenario, I envisaged that United States could easily rely on the argument that the armed conflicts it is currently involved in, amounts to a 'emergency in international relations.'

The advantage of this line of argument is that the emergency represents a 'war' or 'armed conflict' and the 'sliding-scale' test would lean in United States` favour. The disadvantage is that the United States` claimed 'security interests' do not emerge out of the 'emergency in international relations', as it would be necessary to pass the subjective test.

In the second examined scenario, I analysed the possibility of the United States to argue that there is an economic war with China, that should be deemed as an 'emergency in international relations.' The advantage of this argument is that the two investigation reports made by the Department of Commerce of the United States in respect to the steel and aluminium imports identify China`s production practice as being related to United States` industry decline. Therefore, there is a sufficient link between the 'emergency in international relations' and the 'security interests' of the United States. However, as I found out, the reasons provided by the United States are mostly economic in nature and with no substantial impact on its security interests. Therefore, using the test developed in Russia – Measures Concerning Traffic in Transit, the article concludes that a panel would most likely find that the measures undertaken by United States cannot be justified under Art. XXI of the General Agreement on Tariffs and Trade.

The legal test represents a solid framework for further developments, that will allow other panels to engineer future mechanism which will enhance their scrutiny

prerogatives. In this regard, I proposed a series of adjustments to the legal test, that would make it more flexible such as to accommodate new security threats and maintain the necessary deferential approach. The test would enable a panel to closely scrutinize cases where there are traces of abuses, while allowing a large discretion for states to adopt less restrictive measures. Through its flexibility, the test will allow the states to rely more frequently on the security exception, implicitly recognising the de facto loss of the latter's exceptional character.

The upcoming challenges for the panel`s test will be to withstand over time, in face of the pressure the Appellate Body is submitted to, as well as to cope with the new security threats, such as cybersecurity and climate change. In my view, the test is sufficiently adaptable to accommodate such new threats.

Keywords: *Public International Law, trade law, World Trade Organization, national security exception, Art. XXI of GATT, trade war, trade protectionism.*

Chapter 4 – US - Steel and Aluminium Products

4.1 Introduction

In the book – *The next 100 years*,[1] the geopolitical forecaster and strategist George Friedman anticipated the continuation of US's hegemony for the upcoming century. He rejects the possibility of a Chinese dominance, as a result of the historical internal struggles China faces when it opens its market. Mr. Friedman argues that China usually failed to reduce the disparities of wealth between its rich coastline and its much poorer western inland territories. This scenario now seems bleak, with China's GDP growing tenfold since 2000 and averaging a 9.138% yearly increase.[2]

Contrary to this view, the US diplomat Mr. Richard Haass observes a cyclical pattern of world order change, where factors such as the economic strength, political cohesion and military power determine the viability of the prevailing order, as well as its demise.[3] He also observes that China's rise along with other regional powers, the challenges of globalization – *e.g.* cybersecurity and climate change, and the surge in nationalism and populism are all signs that reflect the decay of the current world order and a power shift.[4] In these circumstances, Mr. Haass recommends not to oppose the changes and try to preserve the current world order, as this would prove futile. Instead, he recommends that states should embrace the change, reform international institutions and readjust the

[1] G. Friedman, The next 100 years – A Forecast for the 21st Century 130-147 (2009).

[2] (https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2018&locations=EU-US-CN&start=2000&view=chart) last visited (16-07-2019).

[3] R. Haass, *How a World Order Ends: And What Comes in Its Wake*, 98 Foreign Affairs 22, 24 (2019).

[4] *Id.,* at 27, 28.

balance of power.[5] In respect to the actions that US might take to preserve its leadership, Mr. Haass recommends that it should regain its reputation as a state that favours multilateralism, and not as one that tries to dismantle it. Additionally, US should rebuild its infrastructure, improve public education and reduce government debt, in order to make it more competitive and allow US to effectively promote order abroad, without the need to diverge its attention to internal policies.[6]

Unfortunately, one independent observer could safely say that US is not currently following the path suggested by Mr. Haass. Instead, it appears that US is engaged in a trade war with China. In this clench, it is not diplomacy and reason that prevails, but the strength of the countries, with evident disregards towards multilateralism and rules. In this game of chicken, President Donald J. Trump and his Administration made China their top trade target,[7] imposing a series of tariffs and sanctions based upon Section 301 of the Trade Act of 1974[8] and Section 232 of the Trade Expansion Act of 1962.[9]

4.2 Background of the dispute

US imposed at the beginning of 2018, with only few exceptions,[10] a 25% global import tariff on steel and a 10% global import tariff on aluminium products through Proclamation 9705/08.03.2018[11] and Proclamation 9704/08.03.2018[12] respectively. The measures were taken as a result of the investigations conducted by the US Secretary of Commerce Wilbur Ross, which concluded that imports of steel and aluminium in the US threatens to impair US national security under the amended Section 232 of the Trade Expansion Act of 1962.[13]

Although the European Union (EU) was initially exempted, on 1st of June 2018 Trump Administration extended the tariffs with respect to it. EU's retaliatory response was three pronged. In March 2018, according to Art. 3 of the Agreement of Safeguards,[14] the EU Commission initiated a safeguard investigation[15] in relation to EU`s imports of 26 steel products, which ended with a permanent

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[5] *Id.*, at 28, 29.

[6] *Id.*, at 30.

[7] S. Charnovitz, *Grading Trump`s China Trade Strategy*, George Washington University Law School 1 (2019).

[8] US Trade Act of 1974, as amended, Public Law 93–618, Sec. 301 (1974).

[9] US Trade Expansion Act of 1962, as amended, Public Law 87-794, Sec. 232 (1962).

[10] *E.g.* Australia, Canada, Mexico. Argentina, Brazil and South Korea were exempted from tariffs, but agreed to an absolute quota on steel exports.

[11] *See* US Presidential Proclamation 9705, *supra* note 66.

[12] *See* US Presidential Proclamation 9704, *supra* note 66.

[13] Report on the Effect of Imports of Aluminium on the National Security, US Department of Commerce 107-109 (2018); Report on the Effect of Imports of Steel on the National Security, US Department of Commerce 55-58 (2018).

[14] Agreement on Safeguards, WTO Doc. LT/UR/A-1A/8 (1994).

[15] Notice of Initiation of a Safeguard Investigation, EU Commission OJ C 111 (2018).

tariff-rate quota of 25% against imports of certain steel products.[16] This first measure was adopted by the EU in accordance with Art. 5 of the Agreement of Safeguards and Art. XIX(1) of GATT, as a result of the increased imports of steel products into EU market and the disruption in trade flow created by the US`s tariffs and global overproduction of steel.[17] Secondly, EU adopted a series of rebalancing measures, which consisted in the imposition of additional tariffs (between 10 and 50%) for a number of products, aimed at warding off the negative effects of the US steel and aluminium tariffs.[18] In doing so, the EU argued that US measures represent 'safeguard measures',[19] and as such, retaliation under Art. XIX(3) of GATT and Art. 8 of Agreement of Safeguards is permitted. The final EU response consisted in commencing legal proceedings against the US.[20] On 18 October 2018 the EU filed a request for the establishment of a panel, arguing that the US measures are inconsistent with (a) Articles 2.1, 2.2, 3.1, 4.1, 4.2, 5.1, 7, 9, 11.1(a), 12.1, 12.2 and 12.3 of the Agreement on Safeguards; (b) Articles I:1, II:1(a), II:1(b), X:3(a), XI:1, XIX:1(a) and XIX:2 of GATT; and (c) Article XVI:4 of the WTO Agreement.[21] A number of countries[22] joined the *US - Steel and Aluminium Products*[23] proceedings as third parties.

In the following part, the paper addresses the issue of whether the US steel and aluminium tariffs can be justified under the security exception. In my analysis I will rely on the 'roadmap' in the *Russia - Traffic in Transit*[24] case. I will also rely on the two reports[25] of the US Department of Commerce (DOC), as they express the core reasons that led the US to adopt restrictive measures.

In my view, US could exploit two alternatives when relying on the security exception. Firstly, it could argue that the country is involved in multiple armed conflicts. After all, US is one of the most military active country in the world.[26] Secondly, the US could argue that there is a geostrategic conflict with China, and possibly with Russia,[27] especially as the two US investigations conducted by the

[16] Implementing Regulation (EU) 2019/159, EU Commission, OJ L 31/27 (2019).

[17] *Id.,* paras. 52, 136, 150, 165.

[18] Implementing Regulation (EU) 2018/724, EU Commission OJ L 122/14 (2018).

[19] Notification on suspension of concessions and other obligations by EU, WTO Doc. G/SG/N/12/EU/1 (2018).

[20] *See US — Steel and Aluminium Products, supra* note 18.

[21] Request for the Establishment of a Panel by EU, WTO Doc. WT/DS548/14 (2018).

[22] Bahrain, Brazil, Canada, China, Colombia, Egypt, Guatemala, Hong Kong, China, Iceland, India, Indonesia, Japan, Kazakhstan, New Zealand, Malaysia, Mexico, Norway, Qatar, Russian Federation, Saudi Arabia, Singapore, South Africa, Switzerland, Thailand, Turkey, Ukraine, Venezuela.

[23] *See US - Steel and Aluminium Products, supra* note 18.

[24] *See Russia – Traffic in Transit, supra* note 12.

[25] *See* Steel and Aluminium Reports, *supra* note 191.

[26](https://www.globalresearch.ca/america-has-been-at-war-93-of-the-time-222-out-of-239-years-since-1776/5565946) last visited (16-07-2019).

[27] (https://www.politico.com/f/?id=0000016b-a5a1-d241-adff-fdf908e00001) last visited (16-07-2019).

US DOC identify Chinese economic competition as a main threat.[28] I will analyse both of the two paths that US can choose in order to validate its national security defence.

4.3 Armed conflicts

4.3.1 Objective test

4.3.1a Emergency in international relations

Firstly, an examination must be made with respect to subparagraph (iii) of Art. XXI(b) of GATT, *i.e.* whether the measures adopted by the US were 'taken in time of war or other emergency in international relations.' With respect to the term 'war' the panel in *Russia - Traffic in Transit* indicated that it is part of the larger category of 'emergency in international relations', and it usually refers to 'armed conflict.'[29] The panel subsequently interpreted 'emergency in international relations' as referring to a situation of: a) armed conflict; b) latent armed conflict; c) heightened tension or crisis; or d) general instability engulfing or surrounding a state.[30]

The US currently has its army deployed in multiple Middle Eastern and African countries,[31] mainly in the fight against terrorism, as it is shown in the 2018 White House report.[32]. It is easy to see why the involvement of the US army, especially in countries such as Iraq, Afghanistan or Syria can be deemed as representing an 'emergency in international relations.' Their proximity with other antagonist regional powers, such as Iran and Russia, threatens international stability. In characterizing the 'armed conflict' as an 'emergency in international relations', the panel did not indicate a threshold as to the needed extent of military operations. Thus, although US army is involved in limited operations - mainly airstrikes, in the countries where it is deployed,[33] its activity nevertheless falls within the concept of an 'armed conflict.' As in *Russia – Traffic in Transit* dispute, the panel could rely on the UN resolutions[34] as means of proof, for determining the existence of the armed conflicts.

Involvement of the US in several armed conflicts is enough in my view to determine that there is an 'emergency in international relations.' It is not relevant for our purpose whether or not US was the state who started the conflict.[35] One

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[28] *See* Aluminium Report, *supra* note 191 at 2-4; *See* Steel Report, *supra* note 191 at 4,5 and 51-53.

[29] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.72.

[30] *Id.*, para. 7.76.

[31] *E.g.* Afghanistan, Iraq, Syria, Yemen, Somalia, Libya and Niger.

[32] Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, White House (2018).

[33] *Id.*

[34] *E.g.* UN Resolution no. 2139, UN Doc. S/RES/2139 (2014).

[35] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.121.

noticeable difference exists however, as in *Russia - Traffic in Transit*[36] case the armed conflict took place between the very two parties, while in *United States – Steel and Aluminium Products*[37] the armed conflict takes place between one party to the dispute and other third parties. However, this bears little relevance for the test, because the emergency in 'international relations' refers to 'world politics' or 'global politics', as indicated by the panel in the its report,[38] and it is not limited to an emergency between the parties of the dispute.

In para. 7.76 of the report,[39] the panel indicated that 'an emergency in international relations would […] refer generally to a situation of armed conflict, […] or of general instability engulfing or surrounding a state.'[40] A similar wording was used by the panel when describing the 'sliding-scale' test – 'the further it is removed from armed conflict, or a situation of breakdown of law and public order (whether in the invoking Member or in its immediate surroundings) […].'[41] The question is whether all types of emergency situations must take place in the proximity of the invoking state, or whether the territorial limitation occurs only with respect to 'general instability' one. In *Russia - Traffic in Transit,*[42] the armed conflict took place at the border of the two countries, and there was no doubt regarding the proximity of the hostilities to the states. In ruling that the conflict between Russia and Ukraine represents an 'emergency in international relation', the panel took into account the proximity of the conflict, *i.e.* that 'the situation involves Ukraine' and that 'it affects the security of Russia`s border with Ukraine in various ways.'[43] I am however inclined to believe that the territorial proximity of the conflict will only play a role when the situation refers to a 'general instability.'

My conclusion is based on three factors. Firstly, the panel in *Russia - Traffic in Transit*[44] dispute would have made clear its intention to add a territorial nexus condition for other emergency situations, if it decided to do so. By analysing para. 7.76 of the report,[45] I believe that were it the panel's intention to limit the territorial scope of the conflict to all the cases of 'emergency in international relations', it would have placed the 'engulfing or surrounding a state' wording at the beginning of the sentence. Secondly, by examining the negotiating history, we recall that the US representative replied to the Dutch representative about the

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[36] *See Russia – Traffic in Transit, supra* note 12.
[37] *See US - Steel and Aluminium Products, supra* note 18.
[38] *See* Panel Report *Russia – Traffic in Transit, supra* note 13.
[39] *Id.*, para. 7.76.
[40] *Id.*
[41] *Id.,* para. 7.135.
[42] *See Russia – Traffic in Transit, supra* note 12.
[43] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.119.
[44] *See Russia – Traffic in Transit, supra* note 12.
[45] *See* Panel Report *Russia – Traffic in Transit, supra* note 13.

meaning of 'emergency in international relations', that it referred to a 'situation that existed before the last war, […] war had been going on for two years in Europe and, as the time of our own participation approached, we were required, for our own protection, to take many measures which would have been prohibited by the Charter.'[46] I can infer that the intent of the drafters was not to limit the scope of the 'emergency in international relations' to those situations that are taking place in the proximity of the parties to the dispute. WWII conflict did not, at least substantially, take place on the American continent, and it did not engulf or surround the United States. Finally, I believe that imposing a territorial condition upon all the cases that could lead to an 'emergency in international relations' is a too high threshold to be met. In my view, an armed conflict can lead to a situation of 'emergency in international relations' even if the conflict is not waged in the proximity of one of the combatants. With modern-days weaponry, and considering the developing ones, such as hypersonic missiles, the distance of the conflict bears little relevance for the existence of an 'emergency in international relations' that can raise genuine concerns of national security.

I therefore consider that the armed conflicts in which US army is involved represents an 'emergency in international relations' in accordance with the interpretation of the panel in *Russia - Traffic in Transit* case.[47]

4.3.1.b Measures 'taken in time of' the emergency

As a second step, I must examine whether the measure were objectively 'taken in time of' the 'emergency in international relations.'[48] Both the 10% tariff imposed on aluminium imports and the 25% tariff imposed on steel imports took effect against the EU on 01 of June 2018.[49] At that date, US was involved in conflicts in Libya, Yemen, Syria, Iraq, Somali, North-West Pakistan and Afghanistan.[50] Consequently, the tariffs adopted by the US with respect to the imports of steel and aluminium were objectively 'taken in time of war or other emergency in international relations.'

4.3.1.c Conclusion of the objective test

I therefore believe that, if the panel were to analyse in *US – Steel and Aluminium Products*[51] US's defence with respect to the security exception, it would conclude that the requirements of Art. XXI(b)(iii) of GATT are satisfied, and thus:

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[46] *See* UN Verbatim Report, *supra* note 44 at 20.

[47] *See Russia – Traffic in Transit, supra* note 12.

[48] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.77.

[49] US Presidential Proclamation 9739, Presidential Doc. 83 FR 20677 (2018); US Presidential Proclamation 9740, Presidential Doc. 83 FR 20683 (2018).

[50] *See* White House Report, *supra* note 210.

[51] *See US - Steel and Aluminium Products, supra* note 18.

a. there exists a situation in US's relations that constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT; and
b. the measures at issue were taken in time of the emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT.

4.3.2. Subjective test

4.3.2a Essential security interests

This examination will be more deferential, due to the term 'it considers' enacted in the chapeau of the of Art. XXI(b) of GATT, and the large discretion it confers to the invoking state in determining its 'essential security interests.' However, large discretion should not be understood as unlimited discretion, as the panel judiciously noted in *Russia- Traffic in Transit* report.[52]

In the investigation reports,[53] the US Secretary of Commerce indicated that 'national security' under Section 232 of the Trade Expansion Act of 1962, includes the 'general security and welfare of certain industries' related to the 'national defence' and 'critical infrastructure needs.'[54] This definition does not seem to completely fit the one provided by the panel in para. 7.130 of the *Russia - Traffic in Transit* report[55] with respect to the meaning of 'essential security interest.' In the report the panel refers to the quintessential functions of the state, such as the protection of territory and population of a state and the maintenance of law and public order.[56] Maintaining the welfare of steel and aluminium industry, in order to ensure the weaponry fabrication capacity while the US Department of Defence (DOD) demand of steel is less than three percent of the total US production, is not in my view capable of affecting any of the aforementioned 'essential security interests.' Nor is the maintenance of domestic steel and aluminium industries for the purposes of using the metals in critical infrastructure, such as communications, energy production or building dams.[57] One might argue that the social unrest caused by the dismissed workers can pose a threat to the maintenance of law and public order, but I do not see how this argument could be a valid one, as even the most hostile disorder cannot pose a threat for the security of US at such a small scale. However, defining what the 'essential security interests' are, is generally left to every member,[58] and we can expect that the US definition will be *prima facie* accepted by the panel.

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[52] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.132.
[53] *See* Steel and Aluminium Reports, *supra* note 191.
[54] *See* Aluminium Report, *supra* note 191 at 1; *See* Steel Report, *supra* note 191 at 13, 27.
[55] *See* Panel Report *Russia – Traffic in Transit, supra* note 13.
[56] *Id.,* para. 7.130.
[57] *See* Steel Report, *supra* note 191, Appendix I.
[58] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.131.

The overarching nature of the good faith principle implies that the security interests of the state arise out of the 'emergency in international relations.'[59] It is the duty of the invoking member to articulate sufficiently the veracity of its 'essential security interests', according to the 'sliding-scale' test.[60] In other words, the invoking state must demonstrate that the 'emergency in international relations' caused a genuine concern regarding state's essential security.

Although US is involved in multiple armed conflicts, I believe that a higher level of scrutiny should be used than the one applied by the panel in *Russia - Traffic in Transit*.[61] In my view, the distance of the conflict should play a factor in the 'sliding-scale' test. My task thus is to assess whether the US, in its investigation reports,[62] articulated to a sufficient degree that the armed conflicts gave rise to genuine security concerns regarding the health of the domestic steel and aluminium industries required for defence and critical infrastructure purposes.

Firstly, the investigation reports[63] themselves do not identify the armed conflicts, as one of the causes which lead to the decrease of US steel and aluminium production. The main reasons given in the reports are the continuous increase of cheap steel and aluminium imports[64] and the global excess production, particularly due to China's production,[65] which surpasses the global demand of steel and aluminium.[66] The causes invoked are mostly economic in nature, with no link to the armed conflicts the US is currently involved in. The two reports[67] indicate that the security concerns are more significant in case of 'an unexpected or extended conflict',[68] but they do not identify any conflict as the cause of the domestic industry decline. Therefore, the US's 'security interests' do not stem out of the 'emergency in international relations.' Even if we were to ignore this aspect, the US would not, in my view, be able to prove the veracity of its essential security interest. The total number of US troops in the conflict regions are less than 1,5 % of US`s active personnel.[69] An argument that these conflicts require an increased amount of aluminium and steel, such as to create security concerns is not therefore plausible.

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[59] *Id.,* para. 7.76.

[60] *Id.,* para. 7.134.

[61] *See Russia – Traffic in Transit, supra* note 12.

[62] *See* Steel and Aluminium Reports, *supra* note 191.

[63] *Id.*

[64] *See* Aluminium Report, *supra* note 191 at 2-4; *See* Steel Report, *supra* note 191 at 3,4.

[65] *See* Aluminium Report, *supra* note 191 at 40; *See* Steel Report, *supra* note 191 at 52.

[66] *See* Aluminium Report, *supra* note 191 at 99-103; *See* Steel Report, *supra* note 191 at 51-53.

[67] *See* Steel and Aluminium Reports, *supra* note 191.

[68] *See* Aluminium Report, *supra* note 191 at 105; *See* Steel Report, *supra* note 191 at 56.

[69](https://www.visualcapitalist.com/u-s-military-personnel-deployments-country/ https://www.businessinsider.nl/us-military-deployments-may-2017-5/?international=true&r=US) last visited (16-07-2019); March 2019 Report, US Defense Manpower Data Center (2019).

4.3.2b Conclusion of the subjective test

Consequently, I believe that if the panel were to apply the 'sliding-scale' test with respect to the argument that the armed conflicts in which US is currently involved in gave rise to security concerns, the panel would conclude that:

a. The US`s 'essential security interests' do not arise out of the emergency in international relations, and regardless of it, US did not articulate to a sufficient degree the veracity of its essential security interests.
b. Therefore, the conditions of chapeau of Article XXI(b) of GATT are not satisfied.

4.3.2c Additional analysis

Because the panel would find that the first condition of the chapeau of Art. XXI of GATT is not fulfilled, it would not examine the second condition. Presuming the veracity of US's security interests and if the panel were to examine the second condition of the chapeau of Art. XXI of GATT, it would have probably found that the measures adopted were necessary for US's protection, due to the leniency of the test. The threshold required for passing the test is that 'the measure […] are not implausible as measures protective of these interests.'[70] In my view, it is plausible that increasing the steel and aluminium import tariffs will lead towards an increasing US's steel and aluminium production. This will amount to better arms production capacity and defence capabilities. It might be said that the measures adopted are incapable of protecting the 'essential security interests', because they are purely protectionist. This may well be true, but I don't believe it to be enough in such a deferential test, if all it is required is for them to have a positive effect on the security interests of that state.

4.1 4.4. Economic war

4.3.1 4.4.1 Introduction

Secondly, US could argue that there is an economic conflict with China, which lays at the heart of the 'emergency in international relations.' I will therefore analyse the likelihood of this argument being accepted by the panel based on the objective and subjective test of Art. XXI of GATT.

The challenge for the US will be to prove that the economic difference with China amounts to an 'emergency in international relation.' US already identifies China as a geostrategic competitor,[71] and it is likely that it will rely on the political or economic conflict argument to convince the panel of the existence of an 'emergency in international relation.'

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[70] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.134.

[71] Report on China`s Expanding Global Access, US Department of Defense (2018).

However, as it was indicated in *Russia - Traffic in Transit*[72] case, political or economic conflicts will not represent 'emergencies in international relations within the meaning of subparagraph (iii), unless they give rise to defence and military interests, or maintenance of law and public order interests.'[73] In my view, the wording of the panel is not very clear. While the panel initially suggested in para. 7.75 of the report[74] that the necessary threshold would be higher for political or economic conflicts to fall within the scope of the 'emergency in international relations' – 'political or economic differences between Members are not sufficient, of themselves, to constitute an emergency […]', it nevertheless added as a condition the requirement that such political and economic conflicts give rise to the regular 'security interests.' Surely, the standard of review in the sliding-scale test will be much stricter. However, for the objective test purposes, the US will only need to prove that there is a *prima facie* political or economic conflict, similar to the cases of armed conflicts.

The existence of an economic war is usually concealed[75] in order to not cause a threat perception within the target country, which would put it into alert and make it retaliate.[76] The concept is not new. The French Emperor Napoleon Bonaparte used false Russian currency to buy supplies for his army while campaigning against the tsar Alexander I of Russia at the beginning of XIX century. The US expert in strategy, Mr. Edward Luttwak, claimed that the ideological rivalries between western liberal and communist collectivist models of societies would be replaced by a worldwide economic rivalry, in which trade, finance, and the mastering of important technologies will prevail over military power.[77] More recently, Mr. Luttwak forecasted that Chinese growth in economic capacity, military strength and diplomatic influence will be contained by means of 'geo-economic resistance.'[78] In this strive, even ideological values, such as 'free trade' can be sacrificed, when balanced with the option of taking a military action against a nuclear state.[79] Luttwak concluded that China's rise threatens the very independence of its neighbours, and this expansion 'will inevitably be resisted by

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[72] *See* Aluminium Report, *supra* note 191 at 107-109.

[73] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.75.

[74] *Id*.

[75] C. Harbulot, *A study on economic warfare and associated problems*, Spanish Official Publications Catalogue 64 (2014).

[76] A. Vihma, *Geoeconomic Analysis and the Limits of Critical Geopolitics: A New Engagement with Edward*

Luttwak, 23 Geopolitics 15 (2018); M. Wigell & A. Vihma, *Geopolitics Versus Geoeconomics - The Case of Russia's Geostrategy and Its Effects on the EU*, 92 International Affairs 611 (2016).

[77] E. Luttwak, *From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce*, 20 The National Interest 17-23 (1990).

[78] E. Luttwak, The rise of China vs. the logic of strategy 38-48 (2012).

[79] *Id.,* at 40.

geo-economic means – that is, by strategically motivated as opposed to merely protectionist trade barriers', such as 'investment prohibitions, extensive technology denials and even restrictions on raw material exports […].'[80]

4.4.2 Objective test

4.4.2a Emergency in international relations

In the following, I will assess to the best of my ability whether an economic conflict between China and US exists in the present circumstances.

In determining that there is an economic conflict between US and China, US could rely on a broad spectrum of arguments, including the trade-war commenced by it. It is paradoxical to seek an exception for GATT inconsistencies based on the very measures that infringe the agreement. The artifice is similar to the fictional baron Von Münchhausen's action of releasing himself from the deadly swamp by pulling his own hair. The rationale is that in an integrated trade system, the actions that reflect the existence of an economic war will unavoidably overlap trade obligations. Similar to the existence of an armed conflict, the panel will not examine who bears the responsibility for the conflict.[81]

According to the Oxford dictionary,[82] economic war is 'an economic strategy based on the use of measures (*e.g.* blockade) of which the primary effect is to weaken the economy of another state.' Some examples of measures taken during an economic war are: control of trade routes, gaining access to natural resources, trade embargoes, boycotts, sanctions and tariff discrimination, freezing of capital assets, suspension of aid, prohibition of investment and other capital flows and expropriation, blocking the access to natural resources, gaining control over strategic sectors of the economy by a foreign power, use of sovereign wealth funds for technology transfer and currency wars.[83] In the table below, I will provide a series of measures adopted by either US or China, which could underline the existence of an economic war, and which could represent a strategic economic measure rather than a mere protectionist one. Please note that an economic conflict is more likely to be global than just between two states, but for the purpose of this paper I have restricted my examination to US and China.

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[80] *Id.,* at 42.

[81] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.121.

[82] Oxford English dictionary, Oxford University Press (2000).

[83] G. Csurgai, *The Increasing Importance of Geoeconomics in Power Rivalries in the Twenty-First Century*, 23 Geopolitics 39-41 (2018).

US measures against China:	Chinese measures against US:	Category / Explanation:
- 4-year global TRQ with 30% above quota tariff, descending 5% annually on solar cells[84] - Effective February 7, 2018; - 4-year 30% import tariff, descending 5% annually on solar modules[85] - Effective February 7, 2018; - 3-year TRQ, 20% in quota tariff descending 2% annually, 50% above quota tariff descending 5% annually on large residential washers[86] - Effective February 7, 2018; - 3-year TRQ, 50% above quota tariff, descending 5% annually on large residential washer parts - Effective February 7, 2018;[87] - 10% global tariffs on specified list of aluminium imports, effective indefinitely[88] – Effective March 23, 2018; - 25% global tariffs on specified list of steel imports[89] – Effective March 23, 2018;	- 15-25% import tariff on 128 types of US products[92] (approx. $3 billion) – Effective April 2, 2018; - 25% import tariff on 545 products[93] (approx. $34 billion) – Effective July 6, 2018 - 25% import tariff on 333 products[94] (approx. $16 billion) – Effective August 23, 2018; - 5-10% import tariff on 5207 products[95] (approx. $60 billion) – Effective September 24, 2018; - 5-25% import tariff on 5140 products,[96] (approx. $60 billion) – Effective June 1, 2019; - Conversely, the Chinese government decreased the bound tariff rates during 2018 on 3252 products[97]. The current average tariffs are of 20.7 % for US and 6.7% for all other exporters – Effective	**Category:** Sanctions and tariff discrimination **Explanation:** While some of the US measures were not directly discriminatory towards China, they indirectly affect China to a large extent. The investigation reports on aluminium[98] and steel[99] renders China as one of the main exporters into US Additionally, China commenced WTO disputes with respect to both solar panels[100] and steel and aluminium tariffs increase.[101]

[84] US Presidential Proclamation 9693, Presidential Doc. 83 FR 3541 (2018).
[85] *Id.*
[86] US Presidential Proclamation 9694, Presidential Doc. 83 FR 3553 (2018).
[87] *Id.*
[88] *See* US Presidential Proclamation 9704, *supra* note 66.
[89] *See* US Presidential Proclamation 9705, *supra* note 66.

- 25% import tariff on 818 US imports[90] (approx. $34 billion) - Effective July 6, 2018; - 25% import tariff on 279 US imports[91] (approx. $16 billion) – Effective August 23, 2018; - 10% import tariff on 5,733 US imports (final, approx. $200 billion) - Effective September 24, 2018 (10%), increased to 25% on May 10, 2019 (25%);	January 1, July 1 and November 1, 2018;	
- Denial Order issued by US DOC`s Bureau of Industry and Security (BIS) against Zhongxing Telecommunications Equipment Corporation and ZTE Kangxun Telecommunications Ltd. (collectively ZTE) – Effective April 15, 2018.[102] The order was	- China announced on May 31, 2019 that it will establish its own unreliable entities lists in response to US entity list;[109]	**Category:** Trade embargoes **Explanation:** US adopted a series of measures that are directed towards restricting Chinese technology companies from having commercial

[92] (https://www.china-briefing.com/news/us-china-trade-war-us-products-affected/), last visited (16-07-2019).

[93] (https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/), last visited (16-07-2019).

[94] *Id*.

[95] *See* link, *supra* note 271.

[96] *Id.*

[97](https://www.piie.com/blogs/trade-investment-policy-watch/trump-has-gotten-china-lower-its-tariffs-just-toward-everyone#_ftn5), last visited (16-07-2019).

[98] *See* Aluminium Report, *supra* note 191 at 72.

[99] *See* Steel Report, *supra* note 191 at 28.

[100] *United States — Certain Measures Related to Renewable Energy,* DS563 (2018).

[101] *See US - Steel and Aluminium Products* (China), *supra* note 157.

[90] Notice of Action, US Trade Representative 83 FR 28710 (2018).

[91] Notice of Action, US Trade Representative 84 FR 23983 (2018).

[102] Denial Order, US Department of Commerce BIS 83 FR 17644 (2018).

[109] *See* link, *supra* note 271.

subsequently lifted through the July 13, 2018. Termination Order, after ZTE concluded with BIS a superseding settlement agreement;[103] - US export control on emerging technologies[104] – Expected 2019; - US DOC BIS adds Huawei Technologies Co. Ltd. to the Entity List, effectively banning US companies from doing businesses with it[105] – Effective May 16, 2019. President Trump however announced that the sanctions will be eased after the G20 meeting in Japan;[106] - US DOC BIS adds five Chinese companies[107] to the Entity List, effectively banning US companies from doing businesses with them[108] - Effective June 24, 2019;		activity in US or from accessing US advanced technological components. Additional measures are previsioned to come into effect.
	- China 'Nine-Dash Line' claims[110] over the maritime routes in South China Sea, said to	**Category:** Controlling trade routes

[103] Superseding Order, US Department of Commerce BIS 83 FR 34825 (2018).

[104] Notice of Proposed Rulemaking, US Department of Commerce BIS 83 FR 58201 (2018).

[105] Entity List Decision, US Department of Commerce BIS 84 FR 22961 (2019).

[106] *See* link, *supra* note 68.

[107] *E.g.*: Sugon, Wuxi Jiangnan Institute of Computing Technology, Higon, Chengdu Haiguang Integrated Circuit and Chengdu Haiguang Microelectronics Technology.

[108] Entity List Decision, US Department of Commerce BIS 84 FR 29371 (2019).

[110] (http://cimsec.org/chinas-nine-dashed-line-faces-renewed-assault/13943), last visited (16-07-2019).

	account for a third of the global maritime trade.[111] On 12 July 2016, the Permanent Court of Arbitration (PCA) constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea,[112] ruled that China has no legal basis to claim 'historic rights' within its nine-dash line in a case brought by the Philippines;[113] - Chinese Belt and Road Initiative (BRI) is a global development strategy which aims at developing infrastructure projects across Asia, Europe, Africa, the Middle East and the Americas. With it, BRI develops several terrestrial and maritime economic corridors. Terrestrial corridors:[114] China-Mongolia-Russia, China-Central Asia-West Asia, China-Indochina Peninsula, China-Pakistan, and Bangladesh-China-India-	**Explanation:** the US currently have the largest navy in the world, and the capacity to control the global maritime trade routes. However, China is asserting increased ambitions over maritime and terrestrial trade routes through its investment projects.

[111] (https://chinapower.csis.org/much-trade-transits-south-china-sea/#easy-footnote-bottom-1-3073), last visited (16-07-2019).

[112] United Nations Convention on the Law of the Sea, UN Doc. 1833 UNTS 3 (1982).

[113] South China Sea Arbitration, *Philippines v China*, Award, PCA Case No 2013-19, ICGJ 495, paras. 631, 633, 692, 694, 1025, 1153 (2016).

[114] The Belt and Road Initiative Progress, Contributions and Prospects (https://eng.yidaiyilu.gov.cn/zchj/qwfb/86739.htm), last visited (17-07-2019).

	Myanmar. Maritime corridors:[115] China through the Indian Ocean to Africa and the Mediterranean Sea; China to Oceania and the South Pacific; China to Europe through the Arctic Ocean;	
- The US plan to extend access to natural resources in the Arctic region;[116] - To address the growing influence of China in Africa, the US senator Bob Corker introduced the Better Utilization of Investments Leading to Development (BUILD) Act,[117] which pledges over $60 billion for investments;	- The US allege that China uses a 'predatory debt trap model' to secure the control of core global resources globally.[118] A Chinese policy to control resources in Africa has been reflected in studies.[119] This can be an additional strategic effect of the Chinese Belt and Road initiative. Examples include:[120] using of economic incentives, including a currency swap agreement to negotiate a 50-year, rent-free lease of nearly 500 acres for a	**Category:** Gaining access to natural resources and strategic assets **Explanation:** While Chinese expansion of access to resources is understandable, in view of the increased dependence of energy in this country, the operational manner in some cases, *i.e.* the use of 'predatory debt system' can raise

[115] Vision for Maritime Cooperation under the Belt and Road Initiative (https://www.yidaiyilu.gov.cn/wcm.files/upload/CMSydylgw/201706/201706200153032.pdf), last visited (17-07-2019).

[116] National Strategy for the Arctic Region, White House 6 (2013).

[117] S.2463 - BUILD Act of 2018, US Senate - 06/27/2018 Placed on Senate Legislative Calendar under General Orders. Calendar No. 493.

[118] How China's Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World, White House Office of Trade and Manufacturing Policy 1 (2018).

[119] K. H. Butts & B. Bankus, *China's Pursuit of Africa's Natural Resources*, 1-09 Collins Center Study 6-11 (2009); A. C. Alves, *China's 'Win-Win' Cooperation: Unpacking the Impact of Infrastructure-for-Resources Deals in Africa*, 20 South African Journal of International Affairs 207-226 (2013).

[120] *See* Report on China`s Expanding Global Access, *supra* note 249.

	satellite tracking facility in Argentina; payment of Tajikistan's debt in exchange of over 1,000 square kilometres; claims to nearly 90 percent of Ecuador's oil reserves through commodities-backed loans; Zambia currently owes China $6 to $10 billion, and China took over Zambia`s airport and plans to take over Zambia's power company to collect on Zambia's financial obligations; - Chinese State-Owned Enterprises, such as China National Petroleum Company, made series of investments in multiple oil and gas companies around the world (countries such as Iran, Angola, Sudan and Nigeria);[121]	concerns about China`s intentions.[122]
	- Through 'Made in China 2025' initiative, China is seeking to develop the high-tech industry capacity, through state-backed investments. US contends that this policy is implemented together	**Category:** Technology transfer **Explanation:** China over the years reduced the technological gap between itself and United States, in

[121] *See* Alves, *supra* note 297 at 214.
[122] *Id.,* at 212-219.

	with a campaign to gain control of the critical, dual-use technologies through imports, foreign direct investment, industrial and cyberespionage, and establishment of foreign research and development (R&D) centres;[123] - The US contend that China requires US companies to license intellectual property at less than FET value, or that it seeks to obtain technology from American companies by intellectual property theft.[124] - China acquired foreign high-end military technologies, for the purpose of reverse engineering, especially from Russia and Ukraine;[125] - According to US, China directs and unfairly facilitates the systematic investment in, and acquisition of, US companies to obtain cutting-edge	both military and civil sectors. The practices used have been heavily criticized by US and other states.

[123] *See* Report on China`s Expanding Global Access, *supra* note 249 at 15.
[124] *Id.*
[125] *Id.*

	technologies and intellectual property and generate the transfer of technology to Chinese companies;[126]	
	- This can be done by China by using the Belt and Road initiative (ex: Chinese takeover of Zambia`s airport and the plan to take over Zambia`s power company); - Chinese companies are investing in foreign companies, with sectors such as Energy, Chemicals and Internet / Software leading the way.[127] As a response, US and EU have increased their scrutiny over Chinese investments. Up to this moment, out of 36 US-China related transactions, only half of them get clearance from the US Committee on Foreign Investment in the United States (CFIUS), with 100% of the transactions refused in the energy sector, and 60% refused in the Semiconductors sector;[128]	**Category:** Gaining control over strategic sectors of the economy by a foreign power **Explanation:** Chinese acquisitions of foreign companies provide us with an indication of China`s appetite for gaining control over foreign essential sectors, such as in energy and new technologies.

[126] Notice of Determination of Action, US Trade Representative 83 FR 14907 (2018).
[127] (https://www.bloomberg.com/graphics/2016-china-deals/), last visited (17-07-2019).
[128] China and Regulatory Practices, CFIUS White Paper at 12, 13 (2018).

	- Overproduction of certain products (such as steel and aluminium), have the effect of lowering the global price to such a degree that is not sustainable for other companies to continue production.[129] Thus, Chinese steel and aluminium overproduction can be viewed as a strategic move, aimed at weakening foreign industries. In turn, China can gain a control of the steel and aluminium sectors of other states by controlling the flow of its exports	
- Conversely, the US refusal of Chinese corporate transactions with Chinese buyers, based on national security grounds, indicates us the existence of an economic conflict.[130] - On March 22, 2018 President Trump signs a memorandum which	- China is known for having a market which is not very accessible to foreign investors. The Organisation for Economic Co-operation and Development placed China second to the last in 2016 foreign direct investment index.[132] On March 15, 2019, the	**Category:** Prohibition of investment **Explanation:** Chinese restrictions in investments dates back for a long time. As a result, EU and US investors had difficulties in

[129] *See* Aluminium Report, *supra* note 191 at 4; *See* Steel Report, *supra* note 191 at 4.
[130] *See* CFIUS White Paper, *supra* note 306 at 11-13.
[132] FDI Regulatory Restrictiveness Index 2016.

requiress the Secretary of the Treasury to 'address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States.'[131]	Foreign Investment Law of China[133] was adopted and will come into effect in 2020. This new investment law addresses some of the concerns, such as offering a national treatment with negative list to foreign investors, introducing a ban of forced technology transfer, allowing access to government procurement and fair and equitable compensation for expropriation.[134]	accessing the Chinese markets, while Chinese investors were benefiting from the open markets of US and EU. In order to address this issue, both the US and EU enhanced their review of Chinese investments on grounds of national security, while China has pledged to ease the access through its new investment law.

Above, there are several examples of both the US and the Chinese part, which can fall within the scope of meaning of an 'economic war.' I do not have the necessary knowledge or information to say for certain that an economic war exists, particularly as its existence is usually concealed and the measures can also be deemed to have economic purposes. There are some hints of a hidden agenda on Chinese part. For example, studies have shown that Chinese investments in foreign countries results in a political alliance on the international political stage.[135] More recently, one study links Huawei's employees to Chinese military and governmental bodies, noting that some of Huawei's employees hold important positions in different Chinese military and intelligence agencies.[136] One thing remains sure, China became a superpower and has global ambitions.[137] As the French President Emmanuel Macron declared, neither US nor EU can afford

[131] US Presidential Memorandum, Presidential Doc. 83 FR 13099 (2018).

[133] Foreign Investment Law of the People's Republic of China, adopted at the Second Session of the 13th National People's Congress on March 15, 2019.

[134] M. Liu, *The New Chinese Foreign Investment Law and Its Implication on Foreign Investors*, 38 Northwestern Journal of International Law & Business (2018).

[135] D. Raess, W. Ren & P. Wagner, *Chinese Commercially-Oriented Financial Flows and UN Voting Realignment*, University of Bern 2 (2017).

[136] C. Balding, *Huawei Technologies' Links to Chinese State Security Services By: Christopher Balding*, Fulbright University Vietnam 10, 11 (2019).

[137] *E.g.* 'Belt and Road" initiative, 'Made in China 2025" policy.

maintaining a state of 'naïveté' towards China.[138] By not making use of the benefit of the doubt, by showing a slight deference towards US's cause (contrary to the standard of review of the objective test) and for the sake of continuing the argument, I will conclude that there is an economic conflict which can represent an 'emergency in international relations.' I am aware of the high likelihood that a WTO panel will not concur. Whether or not the conflict gives rise to security concerns, I will examine in the subjective test.

4.4.2b Measures 'taken in time of' the emergency

The tariffs on steel and aluminium imports were taken in time of the emergency in international relations. Both tariffs took effect against the EU on 01 of June 2018.[139] At that time, the tariffs on solar panels and large residential washers were in place (February 7, 2018), China had for long had territorial claims in the South China Sea and already rejected PCA's adverse ruling[140] (12 July 2016), and the 'Made in China 2025' program and 'Belt and Road' initiative were already being implemented (May 2015 and October 2013).

4.4.2c Conclusion of the objective test

As a result, I believe that if the Panel were to examine the security exception in the *US – Steel and Aluminium Products*,[141] it could conclude that:

a. there exists a situation in the US relations that could represent an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of GATT, if the conflict gives rise to defence and military interests, or maintenance of law and public order interests; and
b. the measures at issue were taken in time of the presumed emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) of the GATT.

4.4.3 Subjective test

4.4.3a Essential security interests

As expressed earlier, states have a large discretion in defining their 'essential security interests.' Therefore, the steel and aluminium production capacity for the purposes of 'national defence' and 'critical infrastructure needs'[142] can be deemed to fall *prima facie* in the definition provided by the panel.[143] However, the

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[138] (https://www.ft.com/content/ec9671ae-4cbb-11e9-bbc9-6917dce3dc62), last visited (17-07-2019).
[139] *See US* Presidential Proclamations 9739 and 9740, *supra* note 227.
[140] *See* PCA Award, *supra* note 291.
[141] *See US - Steel and Aluminium Products, supra* note 18.
[142] *See* Aluminium Report, *supra* note 191 at 1; *See* Steel Report, *supra* note 191 at 1.
[143] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.130.

state discretion is limited by the good faith principle.[144] Thus, the 'essential security interests' have to arise out of the economic conflict,[145] and should be part of one of the following categories: (a) defence and military interest; (b) maintenance of law; or (c) public order interests.[146] The tasks of articulating the 'essential security interests', enough to demonstrate the causality relation and their veracity, falls upon the invoking state.[147] Because in this case the 'emergency in international relations' is not an 'armed conflict' or a situation of 'breakdown of law and public order', the security interests will be open for more scrutiny according to the 'sliding-scale' test.[148]

In respect to the causality relation, I believe that there is a sufficient nexus between the economic conflict and the security interests claimed by the US. The steel and aluminium reports[149] denounce unfair trade practice (including by China),[150] overproduction (mainly by China),[151] and therefore cheap prices[152] and high levels of imports[153] as the main reasons that triggered security concerns. As I have shown in the table above, at least one measure, namely overproduction, can be deemed to represent an action that falls within the economic war concept.

However, I do not believe that US will be able to articulate sufficiently its 'essential security interests', in relation to the high degree of scrutiny that the panel is expected to exert in this case. Firstly, 'critical infrastructure needs' does not seem to fall within one of the three general categories of security interests presented by the panel.[154] While 'national defence' can undoubtedly give rise to 'defence and military interests', US has the task of proving in a sufficient manner that its interests are genuine and real, *i.e.* that the US territory or population is under threat.[155] In my view, the panel in *Russia - Traffic in Transit*[156] case refers to situations of immediate threats, and not those of potential threats.[157] In both the investigation reports, the US DOD found that maintaining the health of domestic steel and aluminium industries is vital in cases of future emergencies, such as a

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[144] *Id.,* para. 7.132.
[145] *Id.,* para. 7.134.
[146] *Id.,* para. 7.75.
[147] *Id.,* para. 7.134.
[148] *Id.,* para. 7.135.
[149] *See* Steel and Aluminium Reports, *supra* note 191.
[150] *See* Aluminium Report, *supra* note 191 at 2,3; *See* Steel Report, *supra* note 191 at 28, Appendix K.
[151] *See* Steel Report, *supra* note 191 at 51 *et seq.*; *See* Aluminium Report, *supra* note 191 at 2, 3, 99, Appendix E.
[152] *See* Aluminium Report, *supra* note 191 at 63, 99; *See* Steel Report, *supra* note 191 at 31.
[153] *See* Aluminium Report, *supra* note 191 at 63 *et seq.*; *See* Steel Report, *supra* note 191 at 29.
[154] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.76.
[155] *Id.,* para. 7.130.
[156] *See Russia – Traffic in Transit, supra* note 12.
[157] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.76.

major armed conflicts.[158] We can thus infer that there is no immediate threat for the territory or population of the United States. We can also deduct that the current level of threat is not enough to raise security concerns such as to permit the adoption of inconsistent measures under Art. XXI of GATT. In fact, the measures are mostly driven by economic interests. The US DOD cites as the reasons of US`s domestic production downfall: (i) unfair trade practices,[159] (ii) overproduction,[160] (iii) cheap prices[161] and (iv) high levels of imports.[162] Some of the above practices are WTO inconsistent, such as the subsidization of industries. But WTO already provides for other legal mechanisms to redress such unfair practices.

Of particular relevance is the finding in the steel report which states that 'given the large number of countries from which the United States imports steel and the myriad of different products involved, it could take years to identify and investigate every instance of unfairly traded steel […].'[163] This observation can signal the true reason US relied on the security exception, namely to avoid following the legal but more bureaucratic procedures of WTO. Some other findings also point out at the US's protectionist intentions. One example is the acknowledgment that the US`s steel and aluminium producers incur higher costs with respect to their foreign peers, due to 'higher taxes, healthcare, environmental, and other regulatory expenses'[164] or due to the high costs of energy.[165] Overall, analysing the investigation reports leads me to the conclusion that US's decision to rely on the security exception was mainly driven by its desire to maintain operational its less performant domestic industry. As the panel noted in *Russia - Traffic in Transit*[166] case, a member cannot seek to 'release itself from the structure of reciprocal and mutually advantageous arrangements that constitutes the multilateral trading system, simply by re-labelling trade interests that it had agreed to protect and promote within the system, as 'essential security interests', falling outside the reach of that system.'[167] As such, the security exception cannot be used to protect less efficient producers, as this will go against the primary object and purpose of WTO, to ensure efficient use of resources and trade

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[158] *See* Aluminium Report, *supra* note 191 at 27, 37, 38; *See* Steel Report, *supra* note 191 at 47, 49, 50, 54, 55.

[159] *See* Aluminium Report, *supra* note 191 at 2, 3; *See* Steel Report, *supra* note 191 at 28, Appendix K.

[160] *See* Aluminium Report, *supra* note 191 at 2, 3, 99, Appendix E; *See* Steel Report, *supra* note 191 at 51 *et seq.*

[161] *See* Aluminium Report, *supra* note 191 at 63, 99; *See* Steel Report, *supra* note 191 at 31.

[162] *See* Aluminium Report, *supra* note 191 at 63 *et seq.*; *See* Steel Report, *supra* note 191 at 29.

[163] *See* Steel Report, *supra* note 191 at 28.

[164] *Id.*, at 33.

[165] *See* Aluminium Report, *supra* note 191 at 41.

[166] *See Russia – Traffic in Transit, supra* note 12.

[167] *See* Panel Report *Russia – Traffic in Transit, supra* note 13, para. 7.133.

liberalization.[168] Using Art. XXI of GATT as a 'commercial escape clause' goes against GATT`s purpose.[169]

4.4.3b Conclusion of the subjective test

I therefore submit that if the panel were to assess the US argument that there is an economic war which gave rise to security concerns, the panel could conclude that:

a. US did not articulate to a sufficient degree the veracity of its essential security interests, arising from the emergency in international relations.
b. Therefore, the conditions of chapeau of Article XXI(b) of GATT are not satisfied.

In the end, it is possible that the panel will ignore US's arguments with respect to the national security exception altogether. According to *Indonesia – Safeguard on Certain Iron or Steel Products,*[170] panels have full discretion to characterize the measures under the WTO Agreements. The fact that US relied upon Section 232 of the Trade Expansion Act will thus not be decisive in assessing whether the measures are exempted under the security exception of Art. XXI of GATT. Rather, the panel might opt for limiting its examination to EU`s argument, which regards US`s measures as being 'safeguard measures.' It is very likely however that, no matter the choice, the panel will find the inconsistency of the tariffs with GATT, if not for substantial reasons, at least for procedural ones. It will be interesting to see how the US will respond to such a ruling. One option would be to continue the refusal of appointment of members to the AB and submit the panel`s report to appeal, thus preventing the award become binding at all.

Chapter 5 – Improvements of the Security Test

5.1 Introduction

The legal test provided by the panel in *Russia - Traffic in Transit*[171] case represents a deferential approach that controls for the abuses of the security exception.[172] The test can be used as a framework in future disputes. Its purpose was not to address every scenario which relates to the security exception, but to constitute a solid base on top of which future panels can build upon. In this vein, we can observe that the panel deliberately left some of the terms undefined,[173]

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[168] *See* Hahn, *supra* note 75 at 597.

[169] *Id.,* at 580; *See also* Van den Bossche, *supra* note 5 at 88-90.

[170] Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, WT/DS490/AB/R, WT/DS496/AB/R, and Add.1, adopted 27 August 2018 paras. 5.32, 5.33.

[171] *See Russia – Traffic in Transit, supra* note 12.

[172] *See* Panel Report *Russia – Traffic in Transit, supra* note 13 at para. 7.98b.

[173] *E.g.*: heightened tension or crisis, general instability and essential security interest.

and it did not set limits as to the extent that the objective and subjective tests can operate. We should also not overlook that it is the first time a WTO panel affirms its jurisdiction on national security questions, and it is only normal that it proceeded with caution, so as to not raise concerns in the eyes of the states with regards to what they deem to represent a realm of state's exclusive sovereignty. In time, I expect the test to either evolve towards a very flexible, modular approach, carefully balancing all the factors in order to determine the existence of an abuse or develop towards a substantive review, in which assessment of pre-determined standards will be made, making the test more intrusive but also providing it with more predictability.

The principle of good faith, which was used by the panel for devising the legal security test, has been said, *inter alia,* to protect the object and purpose of the treaty against actions which aim at depriving it of its use.[174] The main aim of the WTO is to promote free trade. Thus, when using the security exception, the invoking state may not adopt protectionist measures for economic reasons, as this will represent a flagrant abuse of the security provision. Factors such as the degree of restriction of the measures, the type of emergency in international relations and the security interests of the state must all come into play. As such, as the panel noted in *Russia - Traffic in Transit* report,[175] a balance must be struck. In my view, such balance will be attained by using an extremely flexible test, which will consider all the above factors and will be able to address future security threats.

5.2 Objective test

For example, I believe that the gravity of the 'emergency in international relations' should also affect the 'necessity' of the measures. The closer the 'emergency in international relations' is to the meanings of 'war' or 'situations of breakdown of public order', the more deferential the approach must be when applying both the subjective tests. There is nothing in the wording of Art. XXI(b) of GATT that would indicate that a different mechanism of review between the two subjective tests should be used.

5.2.1 Opened questions

Some open questions are left with respect to the objective test. For example, is a territory nexus with the invoking state necessary for the emergency, similar to what the AB suggested *in US – Shrimp*[176] case with respect to Art. XX of GATT? Secondly, must the 'emergency in international relations' take part between two

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[174] R. Kolb, *Principles as Sources of International Law (With Special Reference to Good Faith)*, 53 Netherlands International Law Review 18 (2006).

[175] *See* Panel Report *Russia – Traffic in Transit, supra* note 13.

[176] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755.

or multiple states? And finally, does it have to be an actual or a potential type of emergency?

5.2.1a A territory nexus?

With respect to the territory nexus, for the reasons I expressed earlier, I don`t believe it to bear any relevance in order to *prima facie* prove the existence of an 'emergency in international relations.'[177] The territory nexus might however play a role in the 'sliding-scale' test.

5.2.1b A shared emergency?

The second question should be answered in the positive. However, the term 'emergency in international relations' should be read broadly. For example, a situation of 'heightened crisis or tension' or 'instability surrounding a state' which is in fact limited to one state, must be interpreted such as to easily generate a 'political' international effect. I base my argument on the ordinary meaning of the word 'relations', which suggests that there must be an interaction between multiple states, bearing in mind that the object and purpose of Art. XXI of GATT is to allow states for an 'escape clause' in case their security threats are genuinely under threat. For example, a pandemic disease might not spread towards multiple states, but be limited to one. Such a situation must however give the right to that state to legally rely on the security exception, notwithstanding the fact that the 'emergency' is not necessarily shared between more states.

5.2.1c Actual or potential emergency?

On a similar note, I believe that a potential situation of 'emergency in international relations' will suffice for the objective test, as long as the security threats are real. For example, the European Commission recommended with respect to 5G networks, that EU members should exclude companies from their markets for national security reasons.[178] Such measures could not be adopted, if an 'actual' emergency condition and not a mere 'potential' one was required. In other words, I don't believe we should wait for the water tank to explode, if we have the possibility to release the steam before it does so. Adding to that, for the purposes of the subjective test a security threat might well arise out of a potential emergency, as it does from an existing one.

5.2.2 Choosing between a substantial and a flexible approach

In the end, the panel did not define what the 'emergency in international relations' is but limited itself to providing some broad examples. This signals that

[177] *See supra* notes 216-224 and the accompanying text.

[178] Recommendation Cybersecurity of 5G networks, EU Commission, EU doc. C 2335 (2019).

the meaning is open-ended and can address broad situations that will give rise to new security threats. I agree with such interpretation, because in the end, the more distant the emergency will be from an armed conflict, the harder will be for the invoking state to pass the subjective tests. However, future developments might take a different turn and provide us with a more concrete definition of what 'emergency in international relations' is. This would limit its scope, and offer more clarity towards the states, but at the same time it can set a threshold that might prove too hard to pass and too rigid for accommodating new security threats. Although the author cannot anticipate what the exact definition would be, I believe that it would probably restrict the 'emergency in international relations' to 'political and military hostile interactions' between states.

5.3 Subjective test

The flexibility of the test will mostly be seen in the subjective tests. There are multiple ways in which the 'security interests' and the 'necessity' of the measures can interact and influence each other.

5.3.1 A second sliding-scale tests

As I expressed above, one improvement consists in applying the 'sliding-scale' test to the second subjective test. Thus, the closer the emergency is to a 'military conflict' or a 'situation of breakdown of public order', the more burdensome will be for the state to prove the 'necessity' of the measures.

5.3.1a A nexus between the measures and state`s security interests

In my view, this increased scrutiny can be done by means of assessing the existence of a 'nexus' between the measures adopted and the 'security interests' at stake, similar to the findings in *EC – Seal Products* AB`s report.[179] The 'nexus' seems appropriate for a higher scrutiny review under the 'sliding-scale' test, as there is a directly proportional link between the 'emergency in international relations' and the 'essential security interests.' The closer is the 'emergency' to the concept of military conflict, the more vital the 'security interests' are, such as the protection of population or territory of a state. The aim of the test will be to prove that the measures are capable of addressing the security threats. When the 'emergency in international relations' is closer to the meaning of 'armed conflict' and the security interest are consequently vital, a deferential approach should be applied in the form of the 'plausibility 'test used in *Russia - Traffic in Transit* report,[180] without the applicability of the 'nexus' condition.

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[179] Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7.

[180] *See* Panel Report *Russia – Traffic in Transit, supra* note 13.

5.3.2 Weighing the necessity of the measures and the security interests

5.3.2a The third sliding-scale test

The degree of trade restrictiveness can in turn influence the articulation level needed for proving the security interests. This will help keep the balance between free trade and security interests and allows the accommodation of new security threats, while maintaining a deferential approach. For example, targeted bans of certain products in their use in key strategic networks, such as military communication networks, are not very restrictive measures that would necessitate the articulation of security interests to a large extent, even when an 'emergency in international relations' close to the meaning of an armed conflict is lacking. In turn, imposing general import tariffs or quantitative restrictions would have the opposite effect, granting panels a higher standard of scrutiny in the subjective tests. Such approach would also cope with the *de facto* loss of exceptional character of Art. XXI of GATT, making it easier for panels and the AB to apply the test.

5.3.2b A comparison test

Finally, when disproportionate trade restrictive measures are adopted, especially if the 'emergency in international relations' and 'security interests' are less characteristic in their nature, a 'comparison' test might be used to assess the reasonableness of the measures compared to other alternatives, similarly to the test applied in other WTO cases[181] pertaining to Art. XX of GATT. This would maintain the necessary deferential review, while allowing for higher scrutiny in cases of abuse.

5.4 *Final remarks*

The above proposals for the security exception test will lean towards an assessment of the proportionality of the measures, rather than the good faith of the invoking state. But proportionality can represent a good factor to suggest the existence of good faith. I believe that good faith of a state could have been better assessed through a procedural review, where other factors would be considered, such as whether the state followed a proper procedure, whether the facts were properly investigated and whether the state provided reasons for taking the measures. However, the panel in *Russia - Traffic in Transit*[182] case opted for a

[181] Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7; Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131.

[182] *See Russia – Traffic in Transit, supra* note 12.

deferential review, rather than a procedural review, and my analysis focused on the legal test provided therein. A procedural review would have also had the benefit that it stops a tribunal from assessing the substance of state's decision, thus preserving the 'self-judging' nature of the provision.[183]

Chapter 6 - Conclusion

Article XXI of GATT represents the 'escape clause' necessary in all international legislations to stimulate states to submit themselves to an international regime.[184] The clause was initially drafted to cope with the Cold War threats and states were initially reluctant to either rely on the exception or to bring the matter to the dispute when other states did so.

The anticipation regarding the scope of the security exception and whether it is completely 'self-judging' was finally settled in the *Russia - Traffic in Transit*[185] case. The panel found that the security exception cannot represent a carte blanche towards protectionism. Relying on it will be subject to panel's deferential review. In doing so, the panel provided a 'roadmap' composed of an objective and a subjective test.

President Trump's administration imposed a series of trade restrictive measures, mainly directed against China. By following the 'roadmap' provided in *Russia - Traffic in Transit*[186] case, I concluded that the GATT inconsistent measures cannot be justified under the security exception. The core reasons are first, that there is not a sufficient nexus between the 'emergency in international relations' and 'security interests' and second, that US` arguments are mostly driven by economic interests, making it unlikely to prove that there are any authentic security concerns.

In the end, I considered the initial test devised in the *Russia - Traffic in Transit* report[187] to represent a solid framework that can be improved and developed in future disputes.[188] A few challenges lie ahead, mainly with respect to the capacity of the test to accommodate new security threats, such as the climate change or cybersecurity.[189] Both of these two recently emerge as important security challenges.[190]

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[183] *See* Schill, *supra* note 105 at 136-138.

[184] *See* Hahn, *supra* note 75 at 561.

[185] *See Russia – Traffic in Transit, supra* note 12.

[186] *Id.*

[187] *See* Panel Report *Russia – Traffic in Transit, supra* note 13.

[188] *See* Heath, *supra* note 96.

[189] *Id.*, at 13.

[190] *See* Peng, *supra* note 144 at 449; NATO Policy on Cyber Defence, Defending the networks (2011); L. Hansen & H. Nissenbaum, *Digital Disaster, Cyber Security, and the Copenhagen School*, 53 International Studies Quarterly 1157 (2009); R. Floyd, *Global climate security governance: a case of*

Cyber-threat is a distant concept from what we normally perceive as representing a danger. However, cyber-threats are just as perilous to the security of a state as an armed conflict would be, due to the far reaches of the internet.[191] Chapter 5 of this paper analyses a series of proposals which would make the test more adjustable and better suited to accommodate the realities of the twenty-first century.

For example, by applying the adjusted test to the measure of excluding companies from the EU member states' markets for national security reasons,[192] we would conclude that the states will be entitled to legally rely on Art. XXI of GATT. The advantage of the test is first, that there is no need to prove the actual 'emergency in international relations' as long as a real security threat exists. Thus, states will be able to take preventive measures, without the need to pre-expose their networks to cyber-threats. Secondly, although the potential 'emergency in international relations' is removed from the meaning of 'armed conflict' or 'a situation of breakdown of law and public order', the states will not be obliged to articulate extensively on complex cybernetic security threats, as long as the measures are carefully targeted and impede trade to a reasonable extent. This would not imply that no articulation is needed, and the necessity of a nexus between the 'security interests' and the 'measure' in question will make sure that abuses are prevented. Thirdly, such test will accommodate the *de facto* loss of exceptional character of the security exception, making it easier for the panels and the AB to apply the test, while at the same time it incentivises the states to adopt less restrictive measures. Fourthly, in cases where states abuse the security exception, for example by means of imposing disproportionate restrictive measures, a 'comparison' test will allow the panels to weight the alternatives and sanction the excess.

In conclusion, the test provides enough flexibility to accommodate such unconventional security threats and maintains a good degree of deference towards the states relying on it. One negative aspect could be that its flexibility generates uncertainty, especially as to when the 'nexus' or 'comparison' tests are to be applied. One other matter that might be seen as an issue is that the test allows states to easily rely on the security exception, implicitly recognising the loss of the exceptional character of Art. XXI of GATT, contrary to the initial intention of the drafters. As a result, the AB again risks being subjected to criticism as to its 'judicial activism.' Therefore, a more commendable solution

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institutional and ideational fragmentation, 15 Conflict, Security & Development 129 (2015); K. M. Lietzmann & G. D. Vest, NATO Environment and Security in an International Context Report, Environmental Change & Security Project Report 39-42 (1999).

[191] S. Davis, Report on NATO and Cyber Defence Report, NATO Doc. 173 DSCFC 09 E bis at 1 (2009).

[192] *See* Commission Recommendation, *supra* note 356.

would be for the contracting parties to reach a compromise with respect to the interpretation of the security exception in Art. XXI of GATT, in accordance with Art. IX(2) of the Agreement establishing the World Trade Organization.[193] Such compromise might set up the limits of the security exception and formally recognise the loss of its exceptional character. In the end, only time will tell us whether the test adopted by the panel in *Russia - Traffic in Transit*[194] case will survive to govern future disputes, and if it does so, what will be its final shape.

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Legal aspects of global pandemics

Ovidiu-Horia Maican,
University Lecturer, Ph. D, Academy of Economic Studies, Law Department, Bucharest, Romania, ovidiuszm@yahoo.com

Abstract

Pandemics are for the most important diseases, resulting from the spread of human to human infection.

They have a variety of of negative social, economic and political effects.

Pandemics have the potential to weaken many societies, political systems and economies in the same time.

The global threat determined by pandemics required a global cooperation.

The problem of global cooperation has two aspects.

First,is that member States are not taking their commitment seriously and they are using mostly the no more than rhetoric.

Second, most states are confronting big problems when it comes to building core capacities, especially when domestic health systems are underfunded and understaffed.

Keywords: *European Union, World Health Organization, International Health Regulations, pandemics, cooperation*

Introduction

The European Parliament approved a large financial package of 37 billion Euro from available EU funds to domains that have been hit the hardest by the pandemic (healthcare systems, small and medium-sized firms, SMEs, labor markets, and other vulnerable sectors) together with 800 million Euro to cover public health emergencies. The European Commission has proposed another 100 billion Euro in loans to ensure the survival of businesses, job retention etc.

Heads of State or Government of the 27 EU Member States emphasized the necessity of solidarity in the EU approach to the coronavirus pandemic during their first videoconference.

Four main problems were established and reaffirmed.

Limiting the spread of the virus, Ensuring the provision of medical equipment, Helping researchers to find a vaccine quickly, through existing research funding,

and Alleviating the socio-economic impact: The pandemic is a major, albeit temporary, shock to the global and European economy.

The Revised International Health Regulations: A Framework for Global Pandemic Response

1. International Aspects

In 1951, WHO adopted the current conventions and related agreements as the International Sanitary Regulations, which grew to become binding on WHO member states. In 1969, the guidelines had been revised and renamed the International Health Regulations.

Over time, compliance with the regulations diminished, in part because states saw restrained countrywide benefits from the sickness reporting requirements. The global surveillance system below the IHR (1969) progressively faded in relevance and effectiveness.[1]

On 23 May 2005, the World Health Assembly adopted the Revised International Health Regulations, recognised as IHR (2005). These revised policies are binding on 194 State Parties, such as all WHO (Wolrd Health Organization) Member States.

The mentioned cause of IHR (2005) is to "prevent, protect against, control and grant a public health response to the global spread of disease in approaches that are commensurate with and restricted to public health risks, and which avoid useless interference with international site visitors and trade."

The document has 10 parts and 9 annexes.[2]

The provisions included in IHR emphasize the importance of international communications and cooperation.

This includes obligations for every state to advance the capability to detect, report, and respond to public health emergencies. The regulations require that every Member State set up a National IHR Focal Point for conversation to and from WHO (both headquarters and the regional offices), and meet core capacities for disorder surveillance and response, as described by way of Annex 1 of the IHR (2005). Using these mechanisms, nations should notify WHO inside 24 hours of a countrywide assessment of any event that may also represent a public health threat to other States requiring a coordinated international response. In exchange, WHO will coordinate communications across nations, supply technical assistance to responding nations, and work with global scientific professionals to improve tips for mitigating the consequences of the event.[3]

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[1] See R.L. Katz, J. Fischer, *The Revised International Health Regulations: A Framework for Global Pandemic Response*, Global Health Governence, November 2009, p. 2.

[2] See L. Katz, J. Fischer, *op. cit.*, p. 3.

[3] See L. Katz, J. Fischer, *op. cit.*, p. 3.

Fundamental revisions to the International Health

Regulations in 2005 have been supposed to herald a new era of world health protection and cooperation.

The Director-General did no longer even convene an Emergency Committee for predominant occasions such enhance the International Health Regulations' aspiration for compre hensive preparedness in each and every country.[4]

An "International Health Regulations Capacity Fund" have to be established. The International Health Regulations (article 44) require State Parties to mobilise fi nancial sources to build, strengthen, and hold core capacities. The World Health Organization create an "International Health Regulations Capacity Fund," refreshed each two years thru multiplied assessed dues, a logical funding source in view of the fact that core capacities and worldwide cooperation are legally binding necessities of the International Health Regulations and WHO oversees the International Health Regulations. Voluntary fi nancing is unpredictable, encourages earmarked contributions, and wanes in intercrisis periods. To make sure States Parties live up to their responsibilities, the World Health Organization should set up domestic co-fi nancing expectations as a baseline for accessing Capacity Fund resources.[5]

Alternative financing mechanisms should include the Global Health Security Agenda, the World Bank's proposed Pandemic Emergency Financing Facility, or a donors' conference.

Irrespective of the funding mechanism, ensuring sustainable resources would support safety for all.

WHO ought to set up an independent peer-review core capacity evaluation system, with a feedback loop for non-stop fine improvement.

More rigorous evaluation of core capacities need to be undertaken. WHO approves States Parties to self-assess their capacities, with many now not reporting whether or not they have met their obligation to boost core capacities. States regularly resist exterior evaluation because of sovereignty concerns, but the new device would purpose to foster cooperation.[6]

Civil society participation in reviewing core capacities should be enhanced. States Parties' reports and WHO evaluations need to be open to public scrutiny to amplify transparency. As with different spheres of global law, such as human rights and climate change, civil society ought to off er "shadow" reports to States Parties' reviews and WHO reviews and suggest for full funding of national capacities and fulfilling global obligations.

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[4] See L. Gostin, M.C. DeBartolo, E. A. Friedman *The International Health Regulations 10 years on: the governing framework for world health security,* The Lancet, vol 386,November 2015, p. 2222.

[5] See L. Gostin, M.C. DeBartolo, E. A. Friedman, *op. cit.,* p. 2223.

[6] See L. Gostin, M.C. DeBartolo, E. A. Friedman , *op. cit.,* p. 2224.

2. The situation in European Union

The 27 states of the European Union (EU) are a political and monetary structure with supranational and intergovernmental responsibilities, representing a single market that seeks to guarantee the freedom of movement of people, goods, services and capital between member states. The emergence or re-emergence of ailments such as severe acute respiratory syndrome (SARS) and tuberculosis highlighted the want for EU-level health policy. In the context of diseases control, the executive branch of the EU, the European Commission (EC), has accountability for the co-ordination of epidemiological surveillance of ailment between member states and for regulating things such as case definitions, sickness notificationand improvement of disorder networks across Europe.

The EC is assisted by the European Centre for Disease Control (ECDC).

The EC and ECDC can solely advise gorgeous ailment control measures to states. Neither is accountable for the management of sickness protection and control in member states.[7]

Following the EU Working Paper on Community Influenza Pandemic Preparedness and Response Planning in 2004,10 European states have posted national preparedness plans. As with the range of processes to law, there is a vast vary of techniques to pandemic preparedness planning across Europe.

The Health and Social Care Act 2008 for England and Wales, for example, proposes that the place there is enough urgency, a legal instrument may additionally be made besides following everyday parliamentary procedures. The rules will then end to have effect after 28 days, unless it has been ratified by means of a decision of every of the Houses of Parliament.[8]

The new French Health Code permits that in the case of a grave threat calling for pressing measures, specially in the case of an epidemic, the minister for Health can dictate in the interest of public health measures that are proportionate to the risk and fantastic to the time and place, in order to prevent or to restrict the consequences of viable threats to the health of the population.

In the UK, the Civil Contingencies Act 2004 has replaced the 1920 Emergency Powers Act in relation to brief exclusive regulation to reply to serious emergencies. The Emergency Powers Act had provided power to make emergency regulations, following a royal proclamation of a state of emergency, in case of an interference with the supply or distribution of food, water, fuel, light or the potential of locomotion that disadvantaged the community, or section of it, of the 'essentials of life'. The Civil Contingencies Act expands the domain of emergency powers so

[7] See R. Martin *The function of regulation in pandemic influenza preparedness in Europe*, Elsevier Journal, Public Health 123 (2009), p. 247.

[8] See R. Martin, *op. cit.*, p. 247.

that an emergency is widely described to encompass 'an event or state of affairs which threatens serious damage to human welfare', which could potentially include a public health risk such as a serious disorder outbreak. While no policies have been passed to date, there is genuinely scope for a heavy-handed response in the tournament of a public health threat.[9]

The Bill was once revised and the Government agreed to dispose of a clause that would have prevented emergency rules from being challenge to judicial review with the end result that the rules should no longer be suspended or struck down via a courtroom if they were challenged on human rights grounds.

Under earlier emergency powers legislation, an emergency used to be decided by using a royal proclamation, but beneath the Civil Contingencies Act, a state of emergency is to be announced, without initial reference to Parliament, by using the Secretary of State or a senior minister.[10]

Public health emergency planning in the UK appears to acknowledge that the Civil Contingencies Act will have a extra regularly occurring position in the coordination of disease control, even though how these plans relate to new powers under the Public Health Act 1984 remains to be seen.

The Finnish national preparedness plan for pandemic influenza advocated amending Finland's 1991 Emergency Powers Act so that a most important epidemic can be classified as a country of emergency as described in the Act. Previously, an emergency used to be described to consist of an armed attack against Finland, a serious violation of the territorial integrity of Finland, a danger of war, a serious threat to the livelihood of the populace or the economy by way of interrupted import of integral fuels and other energy, or a catastrophe. Finland's Communicable Disease Act of 2005 already incorporates quite intrusive powers inclusive of the strength to administer compulsory mass vaccination via the defence forces, obligatory scientific treatment, isolation from the workplace, and disease reporting that discloses non-public information.[11]

Article 19 of the IHR requires all signatory states to establish points of entry with surveillance and border control capacities.

Under the 2004 EU Free Movement Directive, member states can also deny entry of EU residents and their household participants if theyare considered to be a threat to public health, however only if this is proportionate and meets strict cloth and procedural safeguards. Most EU member states have signed the Schengen Convention, eliminating border controls between participating nations and growing an exterior frontier.[12]

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[9] See R. Martin, *op. cit.,* p. 249.
[10] See R. Martin, *op. cit.,* p. 249.
[11] See R. Martin, *op. cit.,* p. 250.
[12] See R. Martin, *op. cit.,* p. 252

The Convention referred to as for a common visa policy, harmonization of policies to deter illegal migration, and an automated Schengen Information System to coordinate movements in relation to folks who had been denied entry. The 1997 Amsterdam Treaty included the Schengen Convention into EU treaties, and set out a diagram to combine policies on visas, asylum, immigration and external border controls into Community methods and into the Community legal framework.

The Schengen Agreement includes consent to share statistics about people, by the Schengen Information System. This skill that a character can't 'disappear' without a doubt via moving from one participant us of a to another. Is approved for a state by Article 2.2 of the Schengen Agreement to reinstate border controls for a shortperiod if it is deemed to be in the activity of country wide security. Any Schengen usa can impose brief or permanent border controls if it believes itself to be unprotected via other members.

Norway, in particular, put its border officers on excessive alert to forestall unfold of the disorder into the country. Other Nordic nations have also multiplied spot checks on entries into the region, irrespective of their newborderless status, in an strive to comprise foot-and-mouth disease.

Under the Schengen Borders Code, third-country nationals can also be refused entry if viewed a risk to public health. One difficulty that arises from the lack of border controls inside Europe is the disparity in stages of ailment preparedness throughout Europe. In 2004, 10 new member states joined the EU, eight of which are former communist countries in central and jap Europe (Slovenia, Hungary, Czech Republic, Poland, Lithuania, Latvia and Estonia). These states are characterised by a record of underfunding of health and surveillance systems, unreliability of get admission to to drugs, persevering with make bigger in ailments such as drug-resistant tuberculosis and HIV/acquired immunodeficiency syndrome, and inadequate public health responses to disease. 13

Since these states have entered into the EU, residents can cross borders into other, better-resourced states. In the context of a pandemic, this may want to imply an influx of people who are viable sickness carriers from negative states with a frail public health device and with inadequate medicines, to different EU states, putting residents at hazard and draining health assets in those states. This creates tough choices for host countries in phrases of the help they offer.[14]

Traditionally, liberal states are reluctant to impose draconian measures, but at the equal time can also be unwilling to elevate the public health burden of residents from poorer states. The revised IHR have done plenty to focal point public health regulation reform measures and to make certain some minimal commonality of

[13] See R. Martin, *op. cit.,* p. 252.

[14] See R. Martin, *op. cit.,* p. 252.

content, but it is clear that some states, in accordance with their criminal culture, are prepared to undertake extra intrusive interventions than others.

For all these concerns, it is clear that public health laws will be a mainstay of pandemic ailment strategies, both in relation to the EU and in relation to nation states inside Europe. Public health laws will be crucial in imparting powers to allow moves to be taken to manage ailment spread, but additionally to constrain states from taking moves that may reassure temporary safety worries however that have doubtlessly detrimental long-term public health consequences. Of course, such issues are now not special to Europe, but the nature of Europe as a continent and as a felony entity creates specific problems for the approaches in which law would possibly first-class be used to create a coordinated European pandemic disease strategy.[15]

3. Consitutional and legal aspects

The coordination of a European public health emergency falls under the accountability of Directorate-General SANCO of the European Commission. This Directorate General is divided into two Directorates, one for Health and one for Consumers, each of them represented through a commissioner. The Directorate for Public Health is organized in seven units. Unit C3 "Health Threats Unit" is mainly invested in health threats such as influenza. [16]

The Network for Communicable Diseases is implemented with assist of a regulatory comitology committee. This skill that if the Commission would choose to recommend measure in the area of communicable ailments that exceeds its implementing power, the Committee can refer the Commission choice to the Council. This committee consists of representatives of the Member States and is chaired by a representative of DG SANCO.

The set up of the European Centre of Disease Control (ECDC) in 2004, strengthens the Network for Communicable Diseases. The Centre has to grant impartial scientific recommendation in order to enhance the existing networks beneath the network for Communicable Diseases, such as the Early Warning and Response Network and the Surveillance networks. Under this unit the Commission organizes the Network for Communicable Diseases. This agency, has no regulatory powers, alternatively it does have the task to coordinate the networks that are phase of the Network of Communicable Diseases (art. 3d) and to raise out hazard assessments.[17]

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[15] See R. Martin, *op. cit.,* p. 253.

[16] See A. De Rujiter *The constitutional implications of european public health policy. A Study of the EU Response to the Influenza H1N1 Pandemic,* , University of Amsterdam, Amsterdam Centre for European Law and Governance, Working Paper Series 2010 – 5, p. 17.

[17] See A. De Rujiter, *op. cit.,* p. 17.

The Commission Health Emergency Operations Facility and the Health Security Committee (HSF), put in place with the aid of the Council in 2001, are founded on Article 152 EC Treaty and Decision 211/98/EC on the European Network for Communicable illnesses in the European Union. It also has its basis in the Public Health Programme, which outlines European targets for the response to a public health crisis.

In case of a public health emergency, beneath coordination of the HSC, its mission is to grant ongoing facts to the Commission and the Member States. In order to do so more than a few equipment have been set up to gather and disseminate information. These structures permit public health authorities in Member States and the Commission to acquire and set off an alert as properly as alternate facts concerning activities that may have an effect on public fitness at EU stage and the coordination of measures.[18]

The Commission has outlined that it is authorized to declare a pandemic on the groundwork of decision No 2119/98/EC on Communicable Diseases.

The foremost reason of the Decision is putting up a network and setting up cooperation (art 1) whereas the statement of a pandemic has in addition reaching implications on Union level, such as with regard to the authorization of vaccines, than foreseen in the communicable ailments decision. The Commission despite the fact that can declare a pandemic independently of the WHO. The Commission does use the WHO 6 segment alert system. If the degree is raised to 6 (pandemic), the European emergency architecture, also with respect to the authorization of pandemic vaccines, will become operational.[19] The Treaty on the Functioning of the EU and the Treaty of European Union shape a constitutional basis for the institutional structure of the European Council, the Council of Ministers the European Parliament, the Commission and the Court. And via this institutional order the European Union exerts power and resources on European residents and Member States, thru instruments, institutional and legal restraints and tactics through its personal precise European constitutional set-up. This precise constitutional set-up sets the EU apart from other international organisations.[20]

The legal order of the EU is additionally binding on EU institutions and Member States with appreciate to vital rights. The Court in this respect has played a sizable function in conferring a constitutional popularity on the political and institutional shape of the EU. In a historic point of view then the conceptualization of the nature of the European constitutional order is not found in a modern constitutional moment(s). It is the product of constitutional

[18] See A. De Rujiter, *op. cit.*, p. 18.
[19] See A. De Rujiter, *op. cit.*, p. 19.
[20] See A. De Rujiter, *op. cit.*, p. 20.

sedimentation, a dwelling organism that is shaped thru constitutionalisation of institutional practices, integration and formal treaty revisions.[21]

Article 2 TEU refers to the rule of the law as one of the founding principles of the Union. Although there is some inherent ambiguity on the precise meaning of this principle, in the context of the Union, the rule of law more normally ability that the Union is bound by legal rules. In this first sense, principle of the rule of regulation potential that legal acts of European institutions and actors with (delegated) European public powers, no longer only with respect to the adoption of legal measures, however also with recognize to implementation, have to be in conformity with European legal rules and procedures. This "administrative legality" is the basis of a quantity of prison procedural doctrines. For instance, the EU can only act in these areas where it has exclusive, shared or complementary, aiding or supplementary competence to act (articles 2a-2e TFEU).[22]

In the 2d sense, the rule of law also extends to the principle of judicial manner or the proper to due process. With regard to judicial evaluate Article 263 TFEU is central in that it allows for judicial assessment of procedural elements of treaty amendments, secondary EU law and procedural and important enforcing acts. However due system additionally consists of the idea of administrative review, whereby the workout of public energy of EU actors is checked thru administrative supervision and public accountability, which takes region thru unique strategies throughout different sectors on the European level.

Public health coverage is an example the place europeanization does now not always takes vicinity as a resultant of constraining Member States competence however by interplay of country wide and European actors and pressures. Indeed, with regard to public fitness there is only restrained competence in Article 168 TFEU. The goal of the 1998 Decision on Communicable Diseases was once purely to facilitate cooperation in this area, an not to supply a mechanism in which Member States would transfer some of their authority and accountability for public fitness measures to the European level. In order to reply to health threats, on the other hand the Member States in 2001, after the terrorist assaults did want to create an emergency structure. Therefore the informal Health Security Committee was put in place. This Committee, as the response to the influenza A H1N1 shows, has become the central actor in phrases of responding to health threats.[23]

The decisions taken in this committee have the fame of multilateral international agreements, as each of the Member States representatives in the HSC has been given the authority to make decisions. They signify their respective (ministerial) health departments. In phrases of its working methods, the role of specialists within the Committee and oversight, there are no formal procedures, as it is now

[21] See A. De Rujiter, *op. cit.*, p. 25.
[22] See A. De Rujiter, *op. cit.*, p. 26.
[23] See A. De Rujiter, *op. cit.*, p. 27.

not a formalized Committee in terms of for instance the comitology committee in the context of the Network of Communicable diseases. The implication is that the Health Security Committee, in an emergency scenario can create and endorse measures that have a deep have an impact on in the lives of Europeans without felony constraints. It is unclear in accordance to what regulations the HSC decides, barring that it weighs the political, social and monetary have an effect on of the specialist suggest that is given by way of the ECDC, and other experts, that also take section in its deliberations.[24]

The most poignant implication of looking at the European response to the influenza A H1N1 in the context of the precept of the rule of law is the choice to declare a pandemic. Where the Commission and the rules on conditionally authorizing vaccines define that this assertion need to be primarily based on the 1998 Communicable Diseases Decision, there no provision in this decision to that effect. How the Commission, through what procedure, in accordance with what checks, can declare pandemic is definitely unclear. The coverage files in this appreciate seem to factor out that there has to be scientific agreement to this impact and that there must be coordination with the WHO. However, who, and the place the wider implications of such a assertion are carefully deliberated is not clear. At the same time, declaring a pandemic has made possible that thousands and thousands of European have received a vaccine that used to be solely conditionally authorized for distribution. Moreover, when you consider that the opportunity for bringing a civil or administrative swimsuit in case of clinical issues as a result of one of the influenza vaccines is impossible, both on a countrywide and European level, get entry to to justice is barred in exercise with regard to one of the primary counter measures (a vaccine) to the influenza A H1N1 pandemic.[25]

The Union is established on the constitutional precept of democracy (article 2 TEU). democracy inside the European political system has a twin nature. On the one hand Member States are represented in the Council, whose representatives are democratically elected on the national level. On the other hand European citizens (article 9 TEU) are represented directly with the aid of the European Parliament. In the context of the European constitutional order the subject is that the transfer of legislative powers from the Member States to the EU is now not matched with the aid of an equivalent diploma of democratic accountability and legislative input by means of the European Parliament, or any other democratically representative body. Democratic legitimacy with regard the Council in this experience is problematic. Its democratic legitimation is derived from delegation, in that it consists of delegates of countrywide democratically elected governments.[26]

[24] See A. De Rujiter, *op. cit.*, p. 27.
[25] See A. De Rujiter, *op. cit.*, p. 28.
[26] See A. De Rujiter, *op. cit.*, p. 28.

The response to a health emergency is typically a duty for the government department of government. It is section of the duty of public authorities that are basically represented by using fitness departments. The reason is of direction that it is too unstable to wait for a parliamentary legislative procedure.

The Member State representatives in the Health Security Committee are basically representing their Health departments at the Member State level. However at the European level, they are acting as a quasi-formal institutional choice maker. At the same time this body is additionally compiled –to what extent is no longer clear– of specialists from both Member States or European agencies. In what way these specialists exert have an impact on in the decision making of the HSC is no longer clear either, as there are no formal processes by using which this body works, due to the fact its nature remains informal. Nevertheless Member State representatives are concern of oversight through their countrywide health departments, which are checked by the national parliaments.[27]

The query is on the other hand to what extent this democratic oversight is practicably realizable. The emergency decision-making takes location in Brussels and is regularly based totally on lengthy specialist reports. Moreover at the European level, the Parliament has no formal function to look into the decision-making of the HSC as it is an informal committee. Nevertheless there is a modern initiative by using some MEPs' in the Europe Parliament to seem to be into the function of specialists and undeclared conflicts of hobby that would possibly have led to an over-exaggeration of the severity of the Influenza A H1N1 causing inter alia Member States to order a lot greater vaccines than they needed.[28]

4. The problem of european harmonizationInternational

Protection of men and women in Europe from communicable illnesses requires coordinated management of intervention by means of governments and subsidiary bodies with legal powers of intervention. Where disease is pandemic in its reach, management at supranational and international stages may additionally also be necessary. Policies can be framed across states to assist and assist coordinated management. However, legal guidelines are through their very nature jurisdictional, and not often are legal guidelines framed past the stage of country wide sovereignty.[29]

An exception in this context is the IHR 2005, a legally binding agreement by WHO member states to act in accordance with an worldwide legal framework in

[27] See A. De Rujiter, *op. cit.,* p. 29.

[28] See A. De Rujiter, *op. cit.,* p. 30.

[29] See R. Martin, A. Conseil *Public Health Policy and Law for Pandemic Influenza: A Case for European Harmonization?* Journal of Health Politics, Policy and Law, Vol. 37, No. 6, December 2012, Duke University Press, p. 1092.

managing serious public health risks and emergencies and, at the supranational level, the achievable for European directives and rules to bind EU member kingdom activities. Most global and supranational involvement in public fitness takes the structure of policy recommendations, no longer legally binding however politically widely wide-spread as governing countrywide public fitness endeavors.

Both policy and regulation serve as gadgets to assist states protect their populations from communicable sickness harms, but they are very different tools.[30]

Policy can be framed by means of governments, independent bodies, charities, assume tanks, or any other identified team addressing a precise societal concern. Policy is a statement about the importance of recognized goals and the appropriateness of mechanisms for attaining them and has solely influential weight. Policies may also be made public (e.g., in the shape of a published pandemic preparedness plan) or can also be saved secret inside the confines of an inner circle of organization or government.

In 1999, article 152 (now article 168) used to be brought to the treaty on the functioning of the European Union through the Amsterdam Treaty, giving the EU more legal grounds for taking measures in the subject of public health. Article 168 makes clear that human health safety must be privileged in the definition and implementation of all EU policies and activities. Most talents for motion in the subject of health are held by means of EU member states, however EU things to do can serve to complement country wide policies. In the context of public health, the EU has an responsibility to coordinate cooperation between member states, and to acquire this cooperation it can also set up standards and guidelines. Incentives might also be used to motivate measures to guard towards cross-border health threats.[31]

In 2001 the European Council set up the Health Security Committee (HSC) in the context of issue about bioterrorism. In 2005 the ECDC used to be set up as an EU enterprise with the mission to identify, assess, and communicate modern-day and emerging threats to human fitness posed with the aid of infectious diseases. In addition, the EC has issued communications on strengthening coordination on everyday preparedness planning for public health emergencies at the EU level.

In 2007 the HSC's mandate was prolonged to influenza preparedness and response and to general preparedness and response to public fitness emergencies. Member states have an duty to inform the HSC of activities possibly to affect public health at the EU level.

The EC has made tries to harmonize pandemic planning policy across the EU. In 2001, with increasing evidence that a pandemic was once drawing close and in cognizance that EU member states have been unprepared both for my part

[30] See R. Martin, A., Conseil, *op. cit.,* p. 1093.

[31] See R. Martin, A. Conseil, *op. cit.,* p. 1094.

and as a group, the Commission proposed the development of a pandemic influenza preparedness format at the EU level to help member states and to fortify cross-country coordination mechanisms. [32]

In most European states, pandemic disease is ruled via country wide coverage in the structure of public and private authorities strategies and pandemic plans and by national communicable disorder laws. National public health policy throughout Europe has been framed with big assistance from a vary of WHO coverage files and plans on pandemic preparedness, along with parallel EU coverage documents and plans addressing issues pertinent to Europe.

The European Commission is required to help EU nations enhance the coordination of prevention and control measures for sure communicable illnesses at the EU level, in accordance with agreed case definitions.

National legal guidelines addressing pandemic planning across Europe are even extra numerous than insurance policies and have had drastically less international and supranational input. As a minimal requirement, national communicable disorder legal guidelines must comply with the IHR 2005.[33]

Harmonization is no longer uniformity. Harmonization in the EU works by issuing policy archives and directives supplying frameworks and minimal standards that member states are strongly influenced to include and put in force in their own way, in accordance with the state's individual culture, felony system, and political system. Compliance cannot be enforced, solely entreated, and some EU member states have proved greater compliant than others, relying on factors such as their capability to comply, their political capability to comply, and their culture of acceptance of authority

While incremental harmonization of insurance policies can be carried out with the aid of these means, Article 168 of the treaty on the functioning of the European Union expressly excludes any measures to harmonize the legal guidelines of member states

Some states (such as Germany or Hungary) share borders with various different EU and non-EU international locations and so may additionally have greater intensive cross-border movements. These states are probable to be greater vulnerable than others to the spread of sickness from neighboring states and accordingly would specifically gain from improved worldwide cooperation and coordination. EU operates as a single market entity in many respects, and in view that any serious communicable sickness risk will threaten Europe as a whole, a European response makes sense.[34]

The EU's increasing involvement in public fitness suggests that incremental steps are already being taken toward a extra harmonized method to pandemic

[32] See R. Martin, A. Conseil, *op. cit.,* p. 1094.
[33] See R. Martin, A. Conseil, *op. cit.,* p. 1095.
[34] See R. Martin, A. Conseil, *op. cit.,* p. 1095.

influenza coverage throughout the EU, even if lookup suggests that in practice pandemic policies range considerably throughout states. This does now not advise a unified method to public health threats however a commonality of principles and targets that need to be included into national pandemic policies. If these policies are to be harmonized in this way, and if properly legal guidelines should be framed on the groundwork of and in accordance with policy, an inevitable end result of harmonized policy ought to be a gradual harmonization of criminal principles addressing ailment prevention and control.

Policy is applied inconsistently throughout states, confounding attempts to grant a united European front to pandemic ailment control. This suggests that to make European pandemic coverage efficacious, there will want to be some attempt to harmonize the equipment crucial to make certain policy implementation. But if there were to be a harmonized European prison response to disease prevention and control, it would need to be greatly framed to permit for flexible adaptation to the political, economic, and social situations of each state. , "Given heterogeneous coverage legacies in the member states as properly as the numerous preferences of countrywide governments and other home actors, one-size- fits- all options are neither politically possible nor normatively desirable.

A technical subject for such harmonization is the principle of subsidiarity, as defined in Article 5 of the treaty establishing the European Community. In accordance with this principle, the EU will now not take action except it the action is taken at the national, regional, or local level, besides if the location in query falls beneath EU exceptional competence.

Health overlaps with other issues, such as labor health and safety, environmental protection, social and client protection, and trade, all of which are included by EU regulation, and it is no longer always handy to approach health as a discrete entity. Regulation of different things will have implications for health. Despite acceptance of EU regulation in these other fields, there has been state resistance to supranational involvement in health, an strategy that has been concern to the criticism that states object to EU health necessities due to the fact they reflect onconsideration on health to be a count number of low political priority.

The value of the principle of subsidiarity as a trouble on EU involvement in health is questionable.[35]

Other EU interventions are underneath consideration — for example, pointers on childhood immunization (necessary because of cross-border spread of disease) and the communication on Alzheimer's disease (justified by way of coordination of lookup efforts).

[35] See R. Martin, A. Conseil, *op. cit.,* p. 1101.

There is evidence in different contexts that harmonization leads towards stricter as an alternative than more liberal legal guidelines and that in the technique there is a tendency toward "migration to stricter regimes". This has been determined in the context of replica regulations, environmental harmonization, and competition laws.

The cost of enforcing measures is also an issue mitigating towards commonality of approach.

While the commonality of pandemic preparedness plans across EU states suggests that in idea plenty pandemic policy harmonization has already been achieved, research shows that in practice there remain full-size variations in methods to many components of pandemic disorder policy.

The diversity of country wide public health legislation and laws, imperative for underpinning and implementation policies, jeopardizes coverage harmonization initiatives. Any harmonization of countrywide legal guidelines is a daunting task, however there has been some movement in this route in response to the compliance necessities of the IHR.[36]

If the EU intends to gain harmonized responses to pandemic disorder throughout Europe, it will want to embark on the education of prison ideas and a legislative framework for pandemic diseases control manipulate to support pandemic disorder policy. Such a framework will need to be broad legal structures and legislation that function through giving nominated men and women or institutions discretionary powers to make laws as wanted in response to a ailment hazard may additionally greater easily adapt to EU guidance. Where states have rules that is greater detailed and prescriptive, and where evolution of coverage requires a lengthy legislative technique to amend laws, the tension of laws may prove an obstacle to compliance with concepts designed to reap harmonization.

Implementation of these initiatives at the country wide level will require amendments to national ailment laws. Given the contemporary disconnect between states in their prison strategies to disorder responses, training from the EU on the legal standards and framework necessary to underpin harmonized coverage would be a massive support tool for coverage implementation.[37]

Evidence collated so far suggests that while national disorder insurance policies have kept tempo with European policy guidance, ailment laws have lagged behind. Any concerted European harmonization of pandemic sickness policy will be compromised if there is no accompanying move towards parallel harmonization of pandemic disease laws.

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[36] See R. Martin, A. Conseil, *op. cit*., p. 1103.

[37] See R. Martin, A. Conseil, *op. cit.,* p. 1. 1103.

Conclusion

The problem of coronavirus and public health have effects even in other fields of European Union activity.

The Union must rely mainly on its own resources.

Governments (the European Commission too) are analyzed in the best conditions by judging their actions in times of crisis. The coronavirus pandemic can have big effects for von der Leyen Commission.

From a legal and constitutional point of view, the curent Commission was voted with little parliamentary support, and was criticized for its position towards Hungarian and Polish governments and has been characterized, and for its lack of legislative projects or a clear political message.

If we are taking into consideration the collapse of the Italian and Spanish healthcare systems and with the posibility of an economic recession, the European Union must take decisive actions.

The corona virus pandemic can be used as a big opportunity for the reconfiguration of European Union.

Decisive joint action by the Commission the European Council can be directed towards further economic integration and Union bigger solidiarity. That means a stronger Eurozone with its own budget and a coordinated fiscal policy; one which, in times of social and economic crisis, is capable of reaching out to help those in need.

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[5] R L. Katz, J. Fischer, (2009) *The Revised International Health Regulations: A Framework for Global Pandemic Response*, Global Health Governance, November

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The fairness principle in personal data processing

Prof. univ. dr. Daniel-Mihail Şandru[1]

Abstract

The principle of fairness in processing personal data, kept from the previous regulation, is liable to gain new meanings following the burden placed on the operator to prove its observance. The study aims at outlining the meaning and content of the principle of equity and its role in dispute resolution as well as in the practical workings of the controller, according to the General Data Protection Regulation (GDPR) 2016/679/EU.

Keywords: *fairness; data protection; principles relating to processing of personal data, Court of Justice of the European Union; Regulation 2016/679/EU.*

The context of the regulation of the principle of equity in the General Data Protection Regulation

The principle of fairness is the heart[2] of the principles, grounded in the need for a balance in the relationship between the subjects of Regulation 2016/679 / EU. [3] An indication of the importance of this principle is its immediate location after the principle of legality of data processing, in article 5 of the Regulation,

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[1] Daniel-Mihail Şandru is a professor at "Dimitrie Cantemir" Christian University and at the University of Bucharest. He founded and coordinates the Center for European Law Studies of the Institute of Legal Research "Acad. Andrei Rădulescu "of the Romanian Academy. Ad hoc judge at the European Court of Human Rights and arbitrator at the Court of International Commercial Arbitration at the Chamber of Commerce and Industry of Romania. President of the Society of Legal Sciences and of the Romanian Association of Law and European Affairs. Editor-in-Chief of the Romanian Journal of European Law (Wolters Kluwer). Can be contacted at mihai.sandru@csde.ro Website: www.mihaisandru.ro. The material was prepared for the international conference titled "*The philosophy of law, from Enlightenment to contemporaneity*", Bucharest, 17th – 19th of May, 2018, organized by the "Dimitrie Cantemir" Christian University and the International Association for Philosophy of Law and Social Philosophy. Web references were last checked and /or accessed on the 31st of May, 2018. The author would like to thank Ms. Crina-Bianca Vereş for the support offered in translating the article in English.

[2] European Data Protection Supervisor, Opinion on Coherent Enforcement of Fundamental Rights in the Age of Big Data, Opinion 8/2016 available at https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Events/16-09-23_BigData_opinion_EN.pdf

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th of April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46 / EC (General Regulation on data protection) was published in Official Journal L 119, 4.5.2016, p. 1-88.

namely that personal data is "lawfully, fairly and transparently processed in regards to the data subject ("legality, fairness and transparency").

The legality of the processing of personal data is carried out in almost the entirety of the Chapter II of the Regulation and the other principles are developed throughout the Regulation. Although Chapter II is entitled "*Principles*", it can be observed that the legality of processing personal data is the predominant subject. Outside the article 5, which has a general character ("Principles related to the processing of personal data") [4], the other provisions emphasize the elements / conditions / contexts of the lawfulness of the data processing.[5] The European legislator also allows Member States to bring into national regulations clarifications on data processing under statutory or public interest obligations by "defining more precise and specific requirements with regards to processing other measures to ensure legal and equitable processing". The principle of fairness must thus be found throughout the Regulation, from the rights of the data subject and going through important elements such as the operator and the processor, the transfers of data to third party States or international organizations, the role of the national authority, in particular in regards to the application of sanctions. The paper will not analyze the presence of the principle of fairness in all the provisions of the Regulation, but will indicate elements of structure essential to understanding the role and functions in relation to the other principles, as well as legislative and jurisprudential aspects.

The principle of fairness in the processing of personal data in case-law

The jurisprudence of the Court of Justice of the European Union[6] is very important in the enforcement of data protection law. As stated in the doctrine[7],

[4] Article 6: "Lawfulness of processing", Article 7: "Conditions for Consent", Article 8: „Conditions applicable to child's consent in relation to information society services ", Article 9: " Processing of special categories of personal data ", Article 10: "Processing of personal data relating to criminal convictions and offences", Article 11: "Processing which does not require identification".

[5] **Gianclaudio Malgieri**, *The Concept of Fairness in the GDPR: A Linguistic and Contextual Interpretation*, Proceedings of FAT* '20, January 27–30, 2020. ACM, New York, NY, USA, available at SSRN https://ssrn.com/abstract=3517264 **Daniel-Mihail Şandru,** *Situations in which the processing of personal data is allowed without the consent of the data subject,* in the volume Andrei Săvescu (ed), *The General Regulation on the protection of personal data. Comments and Explanations*, Hamangiu Publishing House, 2018, pp. 39-48; **Daniel-Mihail Şandru**, *Elements regarding the regulation of the consent in the processing of personal data, according to article 6 of Regulation 2016/679*, Revista română de dreptul afacerilor, no. 1/2018; **Daniel-Mihail Sandru,** *The Impossible Coexistence between Data Protection and Virtual Communities? What's next?,* Pandectele române, no. 1/2018, pp. 17-25.

[6] **Adriana Maria Şandru,** *Critical View of the Court of Justice's jurisprudence regarding the interpretation of Article 8 on the protection of personal data from the Charter of Fundamental Rights of the European Union (CFREU),* Pandectele Române, no. 1/2018, p. 26 et seq.

[7] **Damian Clifford, Jeff Ausloos**, *Data Protection and the Role of Fairness, Data Protection and the Role of Fairness,* KU Leuven Centre for IT & IP Law, CiTiP Working Paper 29/2017, p. 13 and the

establishing a balance between the controller and the data subject was a constant in the cases dealt with by the preliminary reference procedure, but also in actions for the invalidity of some European legislative acts.

A translation problem in the Romanian version

Between the translation of the General Data Protection Regulation and the Charter of Fundamental Rights of the European Union, there is a translation difference in the Romanian versions.[8] Article 8 of the Charter of Fundamental Rights of the European Union regulates in its second paragraph the content of the right to data protection, referring primarily to the principle of fairness. In the translation in the Official Journal[9], the text in Romanian is: *"such data must be treated fairly"*, whereas in English *"such data must be processed fairly for specified purposes"* and in French *„ces données doivent être traitées loyalement"*. "*Fairly*" and "*loyalement*" were maintained in the corresponding versions of the regulation, while in the Romanian linguistic version the term "*equity*" was used.[10] Are there practical consequences of this mismatch? From the perspective of interpreting the regulation, the answer is „no", because it is clear that the European legislator, in the Romanian version, eventually adopted the same concept of personal data protection by fairness and not "just" by how it is right/correct. [11]

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case-law cited in footnote 28 (C-362/14, *Schrems*, judgement of 6th of October 2014, ECLI:EU:C:2015:650, paragraph 42; C-28/08 P, Commission v Bavarian Lager, ECR 2010, judgment of the 29th of June 2010, p. I-6055; ECLI: EU: C: 2010: 378, paragraph 115; Case C-101/01 Lindqvist, 6th of November 2003, ECR 2003, p. I-12971, ECLI: EU C: 2003: 596, paragraph 90, C-131/12, Google Spain and Google, judgement of the 13th of May 2014, ECLI: EU: C: 2014: 317, p.). See also: C-70/10, *Scarlet Extended*, judgment of the 24th of November 2011, ECR 2011, p. I-11959, ECLI: EU: C: 2011: 771, the interpretation of which is relevant *mutatis mutandis.*

[8] On the issue of linguistic versions: **Michal Bobek,** *Corrections in the Official Journal of the European Union: Community law as quicksand*, Revista română de drept european, no. 4/2010 **Elina Paunio**, *Legal Certainty in Multilingual EU Law Language, Discourse and Reasoning at the European Court of Justice,* Routledge, 2013, p. 32 et seq. **Michal Bobek,** *Comparative Reasoning in European Supreme Courts*, Oxford University Press, 2013; **Susan Wright**, *The Language of the Law in Multilingual contexts - Unpicking the English of the EU Courts' Judgments*, Statute Law Review, Volume 37, Issue 2, p. 156-163; **Karen McAuliffe**, *Precedent at the ECJ: The Linguistic Aspect. Law and Language*, Current Legal Issues, Vol. 15, 2013

[9] JO, C326, 26.10.2012.

[10] Article 6 of the Directive concerned data processing "*fairly and lawfully*". Directive 95/46 / EC of the European Parliament and of the Council of the 24th of October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, JO L 281, 23.11.1995, p. 31, Special edition, 13/vol. 17, p. 10.

[11] An example of the correct relating between the controller and the data subject can be seen in the guide made by the Information Commissioner's Office (ICO) in Privacy notices, transparency and control. A code of practice on communicating privacy information to individuals, 2016, p. 4.

Without going into the digressions on the content of a possible principle of the correctness of data, two clarifications must be made. On the one hand, it should be noted that the "correctness" of the data processing is included in the principle of accuracy (Article 5 paragraph 1 letter d) and in the principle of integrity (Article 5, paragraph 1, letter f) and, on the other hand , fairness concerns obligations of the parties, verifiable obligations, primarily by reference to the principle of legality of data processing, while the principle of fairness of data processing takes into account the relationship between subjects and the appreciation beyond legality or fairness. [12] "Beyond" legality does not imply passing into figures of speech that are impossible to quantify and are imprecise from the point of view of the justifier, be it a controller. And the controller must enjoy the predictability of the law and the coherent character of the legal rules.[13] From the perspective of the interpretation of the CFREU (Charter of Fundamental Rights of the European Union), if the correlation with the GDPR (General Data Protection Regulation) is not realized, in case of application by the court, the consequences may be legal, and these effects could come from the grammatical interpretation of the text.

Among these minimum conditions, elements of controller identification, data processing reasonably to the expectations of the data subjects, etc. are considered.

[12] "Also, the existence of an appropriate legal basis does not exempt the data controller from its obligations under Article 6 [of the Directive, currently Article 5 of the Regulation] regarding fairness, lawfulness, necessity and proportionality as well as data quality. For example, including where the processing of personal data is based on legitimate interest or performance of a contract, it would not allow data collection that is excessive in relation to the specified purpose. "Opinion 06/2014 on the notion of legitimate interests of the data controller provided in Article 7 of Directive 95/46 / EC, WP217.

[13] See the rationale of the Romanian courts: "The mere consideration by the (...) complainant of a tax as discriminatory and in breach of the principle of fiscal fairness is not such as to cause its annulment as long as its establishment has been made in compliance with legal provisions, which have not been declared unconstitutional or annulled by the court as the case may be (possibly removed by way of the exception of illegality). "Court of Appeal Galati, Administrative and Fiscal Appeals Section, Civil Decision, no. 1538/2015, available in rolii.ro. We suppose that a vision that will give priority to the law will also be in the conflict between the principles of data protection and the Romanian legal norm, even before the regulation's entry into force, until the Court of Justice of the European Union or the Constitutional Court will rule on this "conflict". Moreover, it should be noted that "the principle of the power of the trial cannot be overcome by the principle of fairness." In a case in which the applicant based his action on the principle of fairness, without any other legal provision, the court appealed to the provisions of Art. 5 of the Code of Civil Procedure, according to which "If a cause can not be settled either on the basis of the law or the customs and, in the absence of the latter, nor on the basis of the legal provisions regarding similar situations, it shall be judged based on the general principles of law, taking into account all its circumstances and taking into account the requirements of fairness." The limitations of this provision are the other principles, such as authority of final decision or legal certainty. This means that even in the field of data protection the principle of fairness is not an absolute right. The Bucharest Tribunal, the Third Civil Section, the Civil Decision no. 781A / 2016 available in rolii.ro

Equity - definition of the concept, principle of data protection

The principle is not defined in the regulation and that is something that can be easily understood. Fairness has different definitions[14], from general dictionaries to legal dictionaries, and in some branches of the law there is a special concern for this particular principle. The provision of paragraph (2) of Article 5 according to which the operator/controller must demonstrate compliance with the principles, including the principle of fairness, attaches particular importance to the documents of the European Data Protection Supervisor (EDPS), the preamble to the Regulation and other EU legislation concerning the principle of fairness. Essential elements of the ex ante and ex-post manifestation of the principle of fairness were analyzed in a paper realized at the Catholic University of Louvain.[15] Problems arise in relation to the regulation, since most personal data is likely not to be subjected to human action and there is no classical consent to the data action. Profiling possibilities, the use of algorithms, the use of artificial intelligence or the Internet of Things can lead to massive data processing without being able to take into account the principle of fairness. The "big data" era of consumerism also produces collateral victims. [16]

We will furthermore look at the relationship with the other principles covered by the regulation. The relationship between GDPR principles and general principles of EU law could be subject for separate research. [17] Sometimes, the principal does not appear *expresis verbis*, but can be deduced from the

[14] Among the Romanian dictionaries, the 1986 Neologism Dictionary has the most comprehensive definition where fairness is defined as "behavior based on the rigorous mutual respect of rights and duties, on the equal satisfaction of everyone's interests, rights, and debts. [Gender. -tății. / cf. fr. équité, lat. aequitas]. "The Oxford Online Dictionary defines "fairness" as "impartial and just treatment or behaviour without favouritism or discrimination."

[15] About the Principle of Fairness, see: **Damian Clifford, Jeff Ausloos,** *Data Protection and the Role of Fairness,* loc. cit., , p. 8-9, available at https: /ssrn/abstract=3013139 and **Winston J. Maxwell**, *Principles-based regulation of personal data: the case of 'fair processing'*, International Data Privacy Law, Volume 5, Issue 3, 1 August 2015, p. 205-216; **Harri Kalimo, Klaudia Majcher**, *The Concept of Fairness: Linking EU Competition and Data Protection Law in the Digital Marketplace*, European Law Review, 2017, p. 210 et seq.

[16] See, for example, for development, regarding article 22 and the impossibility of applying the principle of fairness (without the authors referring to this principle, but to the practical (im)possibilities of applying the GDPR): **Sandra Wachter, Brent Mittelstadt, Luciano Floridi**, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation*, International Data Privacy Law, Volume 7, Issue 2, 2017, p. 76. About the Big Date and Data Protection: **Ira S. Rubinstein**, *Big Data: The End of Privacy or a New Beginning?*, International Data Privacy Law, Volume 3, Issue 2, 2013, p. 74–87.

[17] For legal certainty, see Editorial **Christopher Kuner, Dan Jerker B. Svantesson, Fred H. Cate, Orla Lynskey, Christopher Millard**, *The language of data privacy law (and how it differs from reality)*, International Data Privacy Law, Volume 6, Issue 4, the 1st of November 2016, p. 259–260.

context.[18] For example, the jurisprudence from the Court of Justice takes into account a "fair balance".

The relationship with the other principles of the General Data Protection Regulation

The principle of fairness has been laid by the European legislator between two principles with specific features, which have received the deserved attention from the Working Group on Article 29, namely the principle of "lawfulness of processing"[19] (consent, legitimate interest) and the principle of transparency. Since we have made some considerations regarding the principle of legal processing, what remains to discuss about is the principle of transparency, which is also included in the regulation in articles 13, 14 and 40. The *Transparency Guidelines in Regulation 2016/679,* developed by the Working Group on Article 29, has multiple references to the principle of fairness. [20] In the first reference, fairness appears to be rather a condition of the principle of transparency than a principle in itself: *"transparency is an overarching obligation under the GDPR applying to three central areas: (1) the provision of information to data subjects related to fair processing; (2) how data controllers communicate with data subjects in relation to their rights under the GDPR; and (3) how data controllers facilitate the exercise by data subjects of their rights."*

The relationship between the principle of fairness and the principle of proportionality is the most difficult to distinguish, as both act as a reasonable means of action. Proportionality is an *externally-related* principle, namely a reasonable behavior of the controller in a certain area (e.g. in insurance) or in the action of sanctioning the authority conducting an act of public law (see also recital 129).[21] Fairness is an *internal* principle of the relationship between the

[18] C-362/14, *Schrems,* cited above, paragraph 42: "In order to guarantee such protection, the national supervisory authorities must, inter alia, *ensure a fair balance* between respect for the fundamental right to private life and, on the other hand, the interests which impose a free movement of personal data (see, to that effect, Commission v Germany, C 518/07, EU: C: 2010: 125, paragraph 24, and Commission v Hungary , C 288/12, EU: C: 2014: 237, point 51)."

[19] Fairness must be legitimate, see **John Rawls**, Justice as Fairness, in Vol. **Adrian Miroiu** (ed.), *Theories of Justice*, Ed. Alternative, 1996, p. 78.

[20] Guidelines on Transparency under Regulation 2016/679, WP260 rev.01, adopted in the final version on the 11st of April 2018.

[21] Laura Grava stresses that the regulation puts national data protection authorities on the same level of competence, capacity and fairness. **Laura Grava**, *Personal data protection in the EU – cooperation and competences of EU and national data protection institutions and bodies*, RGSL Research Paper, no.18, 2017, p. 41, available at http://www.rgsl.edu.lv/wp-content/uploads/2017/04/05_Grava_final.pdf, The author cites in this consideration: **Paolo Balboni, Enrico Pelino, Lucio Scudiero**, *Rethinking the one-stop-shop mechanism: Legal certainty and legitimate expectation*, Computer law & security review 30 (2014), p. 394. See also **Irina Alexe**, *Institutional Reform on data protection at European* level in Andrei Săvescu (coordinator), *General Data Protection Regulation. Comments and explanations,* Hamangiu Publishing House, 2018, p.1-11.

subjects of law, and the appreciation of the application of the principle is not related to external criteria of the relationship but to the concrete context. The purpose limitation principle, under the conditions established by article 6 paragraph (3) considers that the controller will have to take into account fairness in the assessment of data processing, given that the data subject does not always have the possibility of consent. The principle of data accuracy is, alongside the principle of fairness, one that poses problems in technical solutions that involve algorithms[22], or in technical solutions such as the Internet of Things. [23] The principle of data minimization is one of the "actual" obligations for the controller in relation to the data subject. [24] The principle of fairness concerns not only the amount of data processed but also the relationship between the controller and the data subject.

Applications of the principle of fairness in the regulation

Fairness is recalled between the principles of data protection in the preamble, in recital 45, along with the lawfulness of the processing and the principle of transparency without defining or listing the constituent elements in recital 45 concerning the processing of data under national law or European Union law, as well as in recitals 60 and 71 on the creation of profiles and the existence of pictograms.

The applications of the principle of fairness in Regulation 2016/679 are either direct, by reference to it, or indirect. The situation of regulating some rights and obligations for the data protection law subjects without mentioning the principle of fairness means neither its removal nor the lack of value and preeminence in relation to the other principles. The rights of the data subjects were analyzed in the Romanian legal literature. [25]

Regulation 2016/679 mentions fairness in provisions relating to:

- information to be provided when personal data is collected from the data subject (Article 13 paragraph (2)); thus, when the personal data is obtained, the controller provides the person concerned with the additional

[22] **Philipp Hacker**, *Teaching Fairness to Artificial Intelligence: Existing and New Strategies Against Algorithmic Discrimination Under EU Law*, Common Market Law Review, Forthcoming. Available at https://ssrn.com/abstract=3164973, p. 25-26 in the document available in SSRN.

[23] **Philipp Hacker**, *Personal Data, Exploitative Contracts, and Algorithmic Fairness: Autonomous Vehicles Meet the Internet of Things*, International Data Privacy Law, 2017, 7, p. 266-286 available at https://ssrn.com/abstract=3007780

[24] Concerning the principles of limiting the purpose of data processing and accuracy, see **Călina Jugastru**, *European Reform in Personal Data. Regulation (EU) 2016/679, (I),* in the magazine Dreptul, no. 6/2017, p. 38-40.

[25] **Gabriela Zanfir,** *Personal Data Protection. Rights of the person concerned*, C. H. Beck Publishing House, 2015. **Simona Şandru,** *Personal Data Protection and Privacy*, Hamangiu Publishing House, 2016.

information necessary to ensure a fair and transparent processing (the types of information are detailed in Article 2, Article 13).
- information to be provided when personal data have not been obtained from the data subject (Article 14 paragraph (2));
- the development of codes of conduct (Article 40 paragraph (2)) by associations and other bodies representing categories of controllers or processors (empowered by controllers); they can prepare codes of conduct, modify or extend existing ones in order to specify how the regulation applies in the areas of reference. [26]

The principle of fairness must be taken into account in relation to the obligations of the controller and the abusive exercise of rights by the data subject. In other situations, the Regulation does not impose an absolute obligation on the controller but takes into account technical possibilities.[27] The principle of fairness must also be taken into account when assessing the rights of the data subject, such as the right to erase (Article 17), the right to object (Article 21) and the right not to be the subject of a decision based solely on automatic processing (Article 22).

Conclusions

The principle of fairness of the processing of personal data is difficult to define and therefore difficult to assess the effects of its application in the practice of controllers data protection authorities or jurisdictions. It is a principle of relationship both with respect to the other principles and in the legal relationship between the subjects of the General Data Protection Regulation.

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[26] In another context but also in relation to codes of conduct, the Article 29 Working Party replaced by the European Data Protection Board welcomed, among other things, the reference to the establishment of the general principles for the fair processing of data and the rules that the data controller must comply with. In this context, the principle of fair processing appears as a general principle. See: Opinion 4/2010 on the European Code of Conduct for the use of personal data in direct marketing, 00065/2010 / RO, GL 174.

[27] For example, in the case of the portability of data, they can be "transmitted directly from one controller to another where it is technically feasible" (Article 20 paragraph (2)).

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The Transfer of Seat of Companies within the European Single Market

Ovidiu Ioan DUMITRU[1]

Abstract

The company law in Europe continues showing a difference of opinions in relation to the transfer of a company seat from one system to other, affecting the well functioning of the Single Market and the principle of freedom of establishment provided by the Treaty, no matter the way those organisations want to move, the Court of Justice being the only one offering, in time, clarifications and decisive solutions, many of them limiting the member states's action in restraining the freedom of establishment of companies.

As a consequence, the caselaw on transfer of seat of companies from one member state to another, rather timid at the beginning, but approaching a more bold attitude recently, become more favourable towards the acceptance of the freedom of establishment in most cases of transfer, the national company law, especially the provisions on conflict of law, facing a new challenge in the harmonisation of the provisions related to incorporation, functioning, merger/division/conversion or the creation of secondary establishments.

Moreover, the development of the market, leaning towards a speedy digitalisation, forces both the institutions and the members states to take measures to solve the problem of transfer of seat of companies in a more integrated market and one of the steps made in this way was the adoption of the Company Law Package, by which the European Union addressed two crucial issues: the use of digital tools by the companies and the cross-border conversions, mergers and divisions.

The article follows the main developments of the treaty provisions and caselaw in relation to freedom of establishment and transfer seat of companies, especially the pivotal decisions of the Court of Justice which made possible for the new attitude in the field and analyses the possible structural implications of the new provisions on cross-board conversions .

Keywords: *Private Law, European Union Law, European Company Law, Freedom of Establishment, Transfer of Seat, Incorporation, Real Seat, Mergers, Divisions, Conversions, Digital*

JEL Codes: K22, K23, K33

[1] Assistant Professor, Ph.D, Bucharest University of Economic Studies, Faculty of Law, office@ovidiuioandumitru.ro.

a1. Internal market and freedom of establishment

The European Union legal order is characterised by autonomy, meaning that it constitutes a legal system which is different from the international legal order, although, formally, it belongs to it, and the national legal systems of Member States, being a supranational one, considered a common internal law.[2] The opinion that European Union Law, as a legal order based on treaties should belong to the international law was for a period very solid among the scholars[3], but as the Court stated being "a new legal order" many authors decided to lean towards the constitutionalism theory rather than internationalism[4], considering that European Union has passed to new level, unique among the international organisations[5].

The Court of Justice of European Union by explaining the special nature of the European legal system went to one of the first objectives provided by the founding treaties and in its decision from case Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited Case no. 270/80[6] when it expressed, in relation to the common market, that "the Treaty (…) seeks to create a single market reproducing as closely as possible the conditions of a domestic market", so the relations between the internal markets are seen as being of an internal legal order, common to all Member States and not belonging to international law.[7]

As the Court explained, among the first aspirations of the Member States of European Union has always been the creation of a unique Internal Market, without any internal barriers, enjoying the free movement of goods, persons, services and capital in a common tariff zone and functional competition between the merchants from different countries, for a long time the term "common market" being used as synonym for what now stands European Union.[8]

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[2] Lefter C., *Fundamente ale dreptului comunitar instituțional*, Economica Publishing House, 2003, p. 49

[3] Wyatt, D., *A new Legal Order or Old?*, European Law Review, 1982, p. 147

Berman, F., *Community Law and International Law. How Far Does Eithet Belong to Other?*, in Markesinis B.S., The Clifford Chance Lectures, Vol. 1, Oxford University Press, 1996, p. 241

[4] For a extended debate on the matter see:

Spiermann, O., *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order,* European Journal of International Law, Vol. 10, No. 4, 1999, p. 763-765 &

De Witte B., E.U. Law: *Is It International Law?* in Barnard C. & Peers S., *Introduction*, in Barnard C. & Peers S (eds.), *European Union Law,* Oxford University Press, 2014, p. 174-180

[5] Moravcsik, A., *The European Constitutional Settlement,* in Meunier S. And McNamara K. (eds.) *Making History: European Integration and Institutional Change at Fifty,* Oxford University Press, 2007, p. 23

[6] Polydor Limited and RSO Records Incorporated v Harlequin Record Shops Limited and Simons Records Limited, Judgment, Case 270/80, [1982] ECR 329, ILEC 067 (CJEU 1982), [1982] 1 CMLR 677, 9th February 1982, Court of Justice of the European Union [CJEU]; European Court of Justice [ECJ]; European Court of Justice (Grand Chamber)

[7] Manolache O., Drept comunitar, Ediția a IV a, All Beck Publishing House, Bucharest, 2003, p 63

[8] When United Kingdom expressed itself before accession, it voted for becoming part of the "common market"

The development of the European Internal Market has a long history, from the first steps passing now more than 50 years and, still, we cannot conclude that certain areas are clearly defined, the role of the Court of Justice being crucial in interpreting and providing new principles, most of the enrichment process being based on the substitutes offered by the caselaw.

In regard to the definition of the Internal Market, an objective of paramount importance as I indicated in the above paragraphs, remains the same as in the firsts texts, in strict correlation with the freedoms, as defined in art. 26(2) Treaty on Functioning of European Union (TFEU), an area bereft of internal frontiers, where the four freedoms: of goods, persons, services and capital are guaranteed, a definition which is somehow circular in the idea that for the understanding of the market you need to discover the meaning of freedoms and vice versa.[9]

As to the main role attributed to the institutions and states for the fulfilment of the Single Market, there can be identified the action in the integration of the national ones into a single European market and that has to be fulfilled by removing all possible obstacles to trade between states, the rationale[10] for pursuing such a project being not purely economic, but also social and political, as for many, the market defines a form of ordoliberalism, but also supplies a greater degree of uniformity of structure and conditions.[11]

The nature of European market integration changed in time[12], as the paradigm from Rome Treaty, established in the Spaak report, to create a common market, replaced in late 70's by the single market paradigm, when the substantive law moved towards a more competitive model with the home country holding a greater role[13] and now we can witness the third one called Economic Union, where the market and the monetary union "complement each other"[14] with benefits of using a single currency in a well-functioning internal

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[9] Snell J., *The Internal Market and the philosophies of market integration,* in Barnard C. & Peers S., *European Union Law,* Oxford University Press, 2014, p. 301

[10] The objective was explained by the Court in case 15/81 Gaston School (1982): "involves the elimination of all obstacles to intra-trade Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market"

[11] Chalmers D. , Davies G., Monti G., *European Union Law*, 2nd edition, Cambridge University Press, 2010, p. 675-676

[12] More on the integration of internal market in:

Craig. P., *The evolution of the Single Market,* in Barnard C. Scott J. (eds.), *The Law of the Single Market*, Hart Publishing, 2002, chapter 1

Gormley L.W., *The Internal Market: History and Evolution,* in Shuibhne N.N., (ed), *Regulating the Internal Market,* Cheltenham: Edward Elgar, 2006

[13] Mainly the Court of Justice, by its decision on "mutual recognition" from the Casis de Dijon Case, Rewe-Zentral v Bundesmonopolverwaltung für Branntwein (1979) - C-120/78

[14] Snell J., *The Internal Market and the philosophies of market integration,* in Barnard C. & Peers S., *European Union Law,* Oxford University Press, 2014, p. 313

market, but with questions raised on the reduced flexibility, seen in the last financial crisis.[15]

As we analyse the evolution of the European market, we can notice that the nature of market integration has changed in time and if, at the beginning, it was a market based on the freedoms and common tariff, with an assumed objective to be harmonised, later it switched to another, based on less harmonisation and more home country control and competition, and now it got to an integrated structure, pushing the market integration to a more centralised direction.

One of the reasons for this new approach is the increase of digitalisation which leads also to a faster and smoother cross-border process in the internal market, many goods, services persons and, definitively, capital moving a lot easier from one member state to the another and by that resetting the initial view on freedoms.

Whatever paradigm of the internal market we are analysing, there are two main conditions to be satisfied: to maintain a free movement and to confer power to European Union to harmonise in order to achieve the wanted market integration, but as I am going to show in the paper, there were many situations in which the free movement was affected by obstacles to trade or transfer represented by the lack of uniformity of national rules.

Moreover, we can notice, by overviewing the evolution of the harmonisation process, that from the corporate life view, the creation of a single financial market was an easier objective to be fulfilled in comparison to the still struggling process of company law harmonisation[16]. The integration of national markets was and still is one of the main objectives for the creation of a functional Single Market and the harmonisation company law was an integral part, but, in time, it remained the task of the Freedom of Establishment, an unquestionable cornerstone of the European Union with regards to free movement.

By establishing this principle in the treaty, the European legislator intended to enable EU citizens to become ongoing participants of the economic life of a Member State, different than their home state[17]. The Freedom of Establishment is regulated by Art 49 TFEU[18] which states that any measure restricting the citizens

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[15] For more overviews on :

Andenas M., Chiu I.H.Y, *Financial Stability and Legal Integration in Financial Regulation*, European Law Review, vol. 38, issue 3, 2013, p. 335-359

Moloney N., *EU Financial Market Regulation after the Global Financial Crisis: More Europe or More Risk?*, Common Market Law Review, vol. 47, issue 5, p. 1317-1383

[16] Davies P.L., Worthington S., *Principles of Modern Company Law*, 10th edition, Sweet&Maxwell, Thomson Reuters, 2016, p. 131

[17] Moens, G., Trone J., *Commercial Law of the European Union*, Spinger 2010, p. 74

[18] Article 49 TFEU: "*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.*

of a certain Member State in a different Member State is banned. In this way, the article promotes equal treatment and prohibits unjustified barriers.

The court of Justice intervened in clarification of art. 49 by judgement in *Gebhard* case[19] explaining that *"the concept of establishment within the meaning to the Treaty is therefore a very broad one, allowing a (Union) national to participate, on a stable and continuous basis, in the economic life of a Member State other than his state of origin and to profit therefor, so contributing to social and economic penetration within the (Union) in the sphere of activities as self-employed persons"*[20]

Art. 49 of TFEU covers two situations, first, called primary establishment, regards the right of individuals, natural or legal persons, to create and manage undertakings in other states and a second situation, qualified by the doctrine as secondary establishment, the ability of legal persons to create branches, subsidiaries and agencies in other Member States. The provision is clear, but it is not sufficient from the application point of view, so remained the job of the Court to clarify the extend and conditionality, so judgements in cases like *Cadbury's Schweppes*[21] or *Stauffer*[22] provided the conditions of having permanent present in host state and pursue and economic activity in order for freedom of establishment to be activated.[23]

Notably, one challenging issue regarding the freedom of establishment is the cross-border transfer of companies within the internal market, as a company may intend to transfer its seat to another Member State due to several reasons, including a change in the nature of the business, or in search of a less restrictive legislation concerning company law, or due to several socio-political factors.

As indicated already in the paper, there is a common assumption that, although an objective, the company law is not yet harmonised and the member states may often find themselves in the position to constrain such a transfer of seat by means of national law and only the Court of Justice was able to clarify the

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Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

[19] Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (1995) C-55/94

[20] More on the explanation of freedom of establishment by Court judgement in Gerbhard case in Craig P. & de Burca G., *Eu Law. Text, Cases and Materials*, Fourth Edition, Oxford University Press, 2015, p. 801-802

[21] Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue Case(2006) C-196/04

[22] Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschafte (2006), Case C-386/04

[23] Barnard C., Snell J., *Free movement of legal persons and the provisions of services,* in Barnard C. & Peers S., *European Union Law,* Oxford University Press, 2014, p. 405

scope of the freedom of establishment and when needed, to eliminate barriers. One recent case was *Polbud*[24], where the Court took a broader approach when detailing the scope of the freedom of establishment[25], the case being the trigger for the adoption of new Directive which was enacted in November 2019 on cross-border mobility of companies, amending the Directive 2017/1132 relating to certain aspects of company law.

In relation to the secondary establishment, the caselaw is kind of explicit as what means a branch/subsidiaries/agencies, explained by case *Somafer*[26] and that the provision applies no matter the possibility to formally qualify as a branch or agency, the Court trying to ensure that the right is effective based on the condition of existence of permanent activity, as can be noticed form in case *205/84 Commission v. Germany* and *C-101/94 Commission v. Italy*.[27]

The treaty, for a better understanding to whom the Freedom of Establishment granted by art. 49 applies, provides in art. 54[28] that enjoys this right both companies/firms and natural persons, but the understanding of company may differ from one national system to another and by that it might be difficult to achieve an equal treatment between companies and nationals, as the second category exists due to birth, whilst the other has to be created by a specific national company law, the so called by "creatures of national law"[29]. Where that company may claim to exist as a legal person with rights and obligations, to be able to perform activities and conclude acts, all based on its national law, how should react a host jurisdiction, with different provisions on the company's existence and capacity? While the company is wanting to be acknowledged and protected based on the Freedom of Establishment.

The main issue to be addressed would be the very existence of the "visiting" company, whether the host state may recognise that person as a company on

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[24] Case C-106, Polbud - Wykonawstwo sp. z o.o., 2016

[25] Answering the questions, the CJEU made possible for *Polbud*, to legal transfer to Louxembourg, but, also, strengthened the mobility of companies within the European Single Market. First, the CJEU stated that the freedom of establishment applies to the transfer of the registered office of a company from one Member State to another even if no real business is intended to be conducted in the latter Member State. Secondly, the CJEU ruled out national legislation providing for the mandatory liquidation of a company if the company requests the removal from the initial commercial register in cases of outward migration

[26] Somafer SA v Saar-Ferngas AG (1978) Case 33/78

[27] Barnard C., Snell J., *Free movement of legal persons and the provisions of services,* in Barnard C. & Peers S., *European Union Law,* Oxford University Press, 2014, p. 406

[28] Article 54: *"Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.*

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

[29] ECJ in Daily Mail case and Cartesio

account of its life in a different jurisdiction and the treaty provisions on Freedom of Establishment or look for a qualification of the respective person as a company based on the national provisions. A solution might be the application of private international law rules specific in that host state and by that identifying the circumstance in which it applies its own legal system or accept the foreign one, but this leads to a large range of possibilities[30], including the one of not recognising the company's existence, Freedom of Establishment being restricted due the lack of harmonisation of private international law or the substantive national company law.[31]

The states may address differently the issue of recognising foreign entities, mainly by identifying the connecting factors and apply different types of combined domestic and foreign law. Not only those companies are different in terms of forms or requirements, but each member state has also the power to choose between two contrasting factors when deciding when a company is regarded as a national one.[32]

In relation to another aspect which may raise questions, due to the complexity of possible national approaches, there is the view of the European legislator, in the second paragraph of art. 54, that a company or a firm is that undertaking formed under civil or commercial law, with the exception of the non-profit ones. The focus of the Treaty is placed on the economic activity of the legal person, and less on its legal form, companies existing with respect to the variable legislation which determines the company's incorporation and functioning[33] which, again, may lead us to different lists from each Member State.

Still, the same art. 54, offers us some extra information on company which may exercise the rights from Freedom of Establishment and we can notice that, in order for that undertaking to be declared established in a Member State, it is enough for it to be formed accordingly to the legislation of one Member State and to have its registered office, principal place of business of central administration within the European Union[34]. Thus, companies fulfilling national requirements receive the status of an EU company and can make use of the Freedom of Establishment.

We can express that, since the free movement of companies takes place, the next issue is to determine which law is applicable for the company in question

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[30] Wouters J, *Private International Law and Companies's Freedom of Establishment*, European Business Organization Law Review, Volume 2, Issue 1, 2001, p. 101

[31] Rammeloo S., *Corporations in Private International Law: an European Perspective*, Oxford University Press, 2001, p. 10-86

[32] Mucciarelli, F.M., Companies's Emigration and EC Freedom of Establishment, European Business Organization Law Review, Volume 9, Issue 1, 2001, p. 267

[33] See the reasoning of ECJ in Case 81/87,The Queen v Treasury and Commissioners of Inland Revenue, 1987

[34] See case Case 79/85, Segers v Bestuur van de Bedrijfsvereniging voor Bank, 1985

and which law will apply as the transferring process begins. As the nationality of the company is established, the company may be considered national or foreign, in which case, it has to be determined which law is to be applied. While deciding it, conflicts may arise between the law of the home or the host country, namely the Member State where the company has its seat and the one in which it will have it moved, especially if they have different approaches regarding conflict of laws for corporations[35], since each Member State may be advantaged if it regulated the company's activity.[36]

In relation to the different approaches regarding the "connecting factor", in order to determine the applicable *lex societatis,* there are two traditional approaches in Europe, on one hand some states (like United Kingdom or Denmark) adopted the incorporation theory, which indicates the place of incorporation as the connecting factor for determining the applicable law and, by that, any movement of the company abroad the relation with the state of origin is not interrupted and other states (like Germany of Hungary) which went with the "real seat" theory, considering the place where the activity is performed as being the connecting factor and, by that, any transfer of activity changes also the law applicable to the respective company.

2. Incorporation and Real Seat Doctrines

2.1 The incorporation theory

For the incorporation theory, according to which the validity, its internal rules and legal capacity are determined by the law of the state in which the company was incorporated, to transfer the "seat" of the respective company has no real legal meaning, in the idea that it remains subject to the jurisdiction in which it has the official headquarters.[37]

As a consequence, by choosing the place of incorporation of the company, if that state is one applying the incorporation theory, the founders decide the law which will govern their company[38]. In the world, there are many states who are open to the simple creation of companies without forcing them to have a strong relation and activities to the jurisdiction of incorporation, but this makes also room for for excessive use and may lead to the so-called "mailbox companies" or

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[35] Fabris D., *European Companies "Mutilated Freedom". From the Freedom of Establisment to the Right of Cross Border Conversion*, European Company Law, Vol. 16, Issue 3, 2019, p. 3

[36] Chalmers, D. & Tomkins, A., *European Union Public Law, Text and Materials,* Cambridge University Press, 2007

[37] Wymeersch E, *The Transfer of the Company's Seat in European Company Law*, ECGI Working Paper Series in Law, 2003, p. 8

[38] Kozyris, J., *Corporate Wars and Choice of Law,* Duke Law Journal, 1985

"shell corporations", the ones which do not generally have commercial ties to the incorporation state, but are rather incorporated for tax advantages.[39]

This theory developed, first, during the eighteenth century, in England, with the scope to support the English companies operating in other foreign places, as a rebalancing in relation with the ones from the colonies[40]. This is one of its features, that in relation to its own companies, the state choosing this doctrine will apply its own company law no matter the connecting factors in foreign jurisdictions. On the other hand, that state, as a host one, will recognise the existence of foreign companies under the jurisdiction of formation.

According to the incorporation theory, when a company is formed in a state, it automatically gets legal personality, together with all its rights and obligations in different other states. Hence, if a company relocates, it will be recognised together with all the rights and liabilities in the state where it moved.

The advocates of this approach sustain that a major advantage is related to the legal certainty, since the company statute is confirmed in other states as well. Likewise, this doctrine is the one fostering the cross-border mobility,[41] the mergers being seen as an important tool to foster competition between jurisdictions, at least in the American states.

2.2 The real seat theory

Other states prefer to choose a different approach, the so-called "real seat" theory, which provides that the connecting factor between the company and its applicable law is the main place of activity[42], by that seeking to determine the legal system applicable to a company by finding the factual connections with a certain place, one where the decisions are taken and the main activities are carried out. As a rule, the real seat, also known as the head office, is to be considered the place of key control, more precisely where the central governance agreements are transposed into managerial decisions.

The real seat theory emerged during the nineteenth century in France and Germany with the view to retrain the French companies to emigrating in moderated states such as Belgium[43] and was mainly adopted by continental states[44].

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[39] Kristo, I. & Thirion, E.,. *An overview of shell companies in the European Union*, European Parliamentary Research Service, 2018

[40] Dammann, J., *Freedom of Choice in European Corporate Law,* The Yale Journal of International Law, Volume 29, 2004, p. 477

[41] Siems, M., *Convergence, Competition, Centros and Conflicts of Law:European Company Law in the 21st Century,* European Law Review, pp. 47-59, 2002

[42] Ebke W.F., *The "Real Seat" Doctrine in the Conflict of Corporate Laws*, The International Lawyer no. 36, 2002, p. 1015

[43] Buxbaum M., Hopt K.J, *Legal Harmonization and the Business Enterprise. Corporate and Capital Market Law Harmonization Policy in Europe and the U.S.A.,* European University Institute - Series A, 2/4, DeGruyter, 1988, p. 174

This doctrine is focused on the idea that the state where the company undergoes its activities it is also the state where the most powerful effects occur, thus the company should abide by this respective legislation, perceived as the most appropriate one[45].

In the case of the real seat doctrine, if a company relocates to another Member State, the applicable law would be that of the country where it moves to. Worth mentioning the fact that the relocation formed according to the real seat theory would place costly burden on entrepreneurs due to incurred taxation.

The real seat doctrine accomplishes the European Company's Law aspirations since it accommodates and resolves the conflicts of interest, mainly between a company's shareholders, employees and suppliers or creditors, rather than expanding shareholder's revenues[46].

3. Treaty provisions and caselaw on Freedom of Establishment

The exceptions to the freedom of establishment can be regarded as similar to the ones practiced in free movement of goods or services and by that be considered legislative exceptions and case-law exceptions, also known as discriminatory or non-discriminatory measures.

In the Art. 51 TFEU[47] it is stated that the provisions related to the Freedom of Establishment are not to be applied in the cases where it is exercised official authority, clarified also by the Court in *Reyners* case[48] when it explained the lack of connection between the advocate profession and the authority of the state. The ECJ also clarified that private security undertakings activities do not make the subject of official authority[49] and neither do the activities of security systems companies[50].

Art.52 TFEU[51] is another treaty provision which provides an exception from the freedom of establishment, this one being in relation to public policy, security

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[44] Frost, C., *Transfer of Company's Seat-Unfolding Story in Europe,* Victoria University of Wellington, Volume 36, 2005, pp. 359-383.

[45] Ebke W.F., *The "Real Seat" Doctrine in the Conflict of Corporate Laws*, The International Lawyer no. 36, 2002, p. 1015

[46] Kubler, F.,. *A Shifting Paradigm of European Company Law?*, Columbia Journal of European Law, Volume 11, 2005, p. 219

[47] Article 51TFEU:*"The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities"*

[48] Reynes v. Belgian State (1974) Case 2/74

[49] Commission v. Spain (1998) Case C-114/97

[50] Commission v. Belgium (2000) Case C-355/98

[51] Article 52 TFEU: *"1.The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.*

2.The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the above mentioned provisions"

and health matters, similar to the ones from free movement of goods. An example of a case when the state tried to justify its application was in Case C-3/88[52], but rejected by the Court of Justice.

The case-law exceptions, which can be considered as non-discriminatory, can be based on public interest cause and in order to justify activities on these grounds several conditions have to be fulfilled, conditions which were laid down by the ECJ in *Gebhard* case[53] and qualified by the doctrine as a formula, known as the Gebhard formula. This case is a leading one, frequently cited, on the conditions which Member States must satisfy when they "hinder or make less attractive" the exercise Freedom of Establishment.

Gebhard was a German authorised layer, holding a a residency in Italy, who decided, after a period of practice in a bigger law firm, to start its own office and practice, but without being part of the Italian Bar, which was breaching the Italian law on the association of attorneys in Bars, a provision which was addressed to all professionals, nationals or foreign. Answering the questions addressed in the reference by the Italian National Bar Council, the European Court of Justice enacted four conditions to be satisfied so as to base an action on the public interest cause:

"It follows, however, from the Court' s case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:

they must be applied in a non-discriminatory manner;

they must be justified by imperative requirements in the general interest;

they must be suitable for securing the attainment of the objective which they pursue; and

they must not go beyond what is necessary in order to attain it " sending, also, at the end of the paragraph to another solution from a similar case[54]

In one of the pivotal European cases in freedom of establishment, *Centros*[55], a branch of a company which had the central office in the UK was denied registration by the government in the Netherlands, the motivation being the public and private creditor's protection as well as fraud prevention. Although stating that it could represent a reasonable argument, the Court discharged the justification, stating that the action was not proportional and was not appropriate to achieve the aim.

A case which came to sustain the solution in *Centros*, one from the famous triangle caselaw which changed an initial view in the field, is *Uberseering*[56], where

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[52] Commission of the European Communities v Italian Republic (1988) Case C-3/88

[53] Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (1994) Case C-55/94

[54] Kraus v Land Baden-Wuerttemberg (1993) Case C-19/92, paragraph 32

[55] Centros Ltd v Erhervs-og Selskabsstyrelsen (1999) Case C-212/97

[56] Überseering BV v Nordic Construction Company Baumanagement GmbH (2002) Case C208/00

a company which transferred its seat in Germany did not receive legal capacity, action justified by minority shareholders and creditors as well as tax authorities' protection through a minimum capital requirement. One more time, the Court stated that this could represent a compelling argument, but rejected it, since the action went beyond the intended purpose. The Court held that it was an infringement of Freedom of Establishment, forcing German state to accept its existence, even though the company did not meet the requirement for incorporation under the respective national law[57]

Both the above cases are seen by the doctrine as some which were overturning the decision in *Daily Mail* case when the Court upheld the national restrictions imposed by the national British Treasury on the company which wanted to transfer its central administration in the Netherlands, thus escaping the tax provisions on unrealised capital gains, a greatly commented decision by which the Court allowed Members States to restrict freedom of establishment just on legal technicalities.

3.1. Transfer of seat of companies within the Single Market

The right of freedom of establishment differentiates between the primary and secondary establishment, the first one relating to the right of individuals/companies to create or to manage undertakings as stated in the Art. 54 of the Treaty. An individual or a company have the freedom to incorporate the company in a different Member State with the right to be equally treated by the respective state just as are the national companies from the host country with respect to the capital participation of the newly incorporated organisation.

The primary establishment also covers the right of companies to merge with companies from a different Member State or to transfer its seat to another Member State. Mergers with other companies from different Member States, as well as seat transfers, were essentially precluded in multiple Member States, since such transactions could lead to companies' dissolution or could have restrictive results [58]

In the present article, due to the complexity of the area, I decided to concentrate on the transfer of seat as main issue in relation to the Freedom of Establishment, the mergers being indicated in the text as other ways of primary establishment.

Companies who function in the European Single Market, in their intention to transfer from one Member State to another, enjoy the rights granted by the European legislation, exercised one of the cases of primary right of establishment,

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[57] Davies P.L., Worthington S., *Principles of Modern Company Law*, 10th edition, Sweet&Maxwell, Thomson Reuters, 2016, p. 140

[58] Grundmann, S., *European Company Law: Organization, Finance and Capital Markets*, Intersentia, 2007

specifically, the transfer their seat. In this case, the separation of different situations is decisive, since in conflict legislation, according to the connecting factors, the company's seat has distinctive understandings. In other words, a company may transfer its seat, also known as registered office, according to the place of registration, and it can also transfer its real seat, or head office, which is the place where the management and administrative offices are located[59].

The transfer of seat has raised many debates in time, following the complexity of issues the encountered in the European company law environment. One of these refers to the possibility of company to change the identity and its law applicable, which, subsequently, to the transfer, implies that the company will be subject to the law of the host country. Further, it will preserve its identity and will not be seed as going through the wind up process which ensures that its assets will not be lost. Secondly, the company may preserve its identity and not change the law applicable, in which case, it will not be regarded as winding up, but the law applicable will remain unchanged. Another outcome would be for the company to end its existence following the seat transfer and, as a consequence, all the assets will be liquidated and the current relations will have to terminate. Finally, the seat transfer decision may turn out to be unsuccessful, as the real seat or the registered seat will be regarded as belonging to the incorporation state, thus the law applicable will not be changed.[60]

A) The transfer of the real seat

The real seat or head office, which can be relocated freely across the Union, represents the main administrative place of the company, also corresponding to the place of the company management and control.

The real seat transfer may occur in 4 distinct situations:

a) Real seat relocation through emigration in case of the real seat doctrine

The transfer of the real seat of a company from a country applying the real seat theory could not be possible before the judgement in the *Cartesio*[61] case, the view being that the consequence would have been the company's dissolution or other applied restrictions. According to the real seat theory, in order to transfer, the company had to cease the activity and end being a subject of the respective jurisdiction, ultimately wind-up and, following the disappearance form the other legal system, be able to reincorporate in the host country. The main reason for aiming the end of the company was considered the protection of the company's

[59] Stampe, J., *The Need for a 14th Company Law Directive on the Transfer of Registered Office,* University of Lund, 2010

[60] Mucciarelli, F.,. *Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited,* European Business Organization Law Review, Volume 9, 2008, pp. 267-303.

[61] CARTESIO Oktató és Szolgáltató bt. (2008) Case C-210/06

stakeholders. This situation implied a modification to the connecting factor, as it will result in changing the applicable law, more specifically, the company will be subject to the host country's jurisdiction. Without dissolution, the company might have been constrained to transfer the real seat or the transfer may not be treated as valid in the home country.

b) Real seat relocation through emigration in case of the incorporation doctrine

According to the incorporation theory, a company has the right to transfer its real seat without obstacles and without giving up its legal identity. With respect to the registered seat, it continues to represent the connecting factor selected by the applicable provisions. The majority of states applying this theory do not request the winding-up of the company, nor they demand the amending of the company's statute, when transferring the real seat, since it is not considered as a connecting factor. The focus is put on the registered seat and the company will remain under the governance of incorporation state, disregarding the place of the principal administration.

c) Real seat relocation through immigration in case of the real seat doctrine

This movement is to be regarded from the perspective of the host country, thus any transfer of the real seat from a country applying the real seat theory to another of the same kind implies the alteration in the legislation to be applied. Conflict legislation of the home Member State is not of relevance. When transferring the real seat under these conditions, the company needs to either move the registered office as well in the new Member State, or to re-incorporate under the law of the new Member State. As a consequence, the host Member State can reject the recognition of the company if it had not re-incorporated on its territory and had not undergone dissolution in the home Member State.

d) Real seat relocation through immigration in case of the incorporation doctrine

In this case, the host country will turn over to the incorporation Member State, meaning it will have to consider the law of the incorporation state. If this action is not agreed upon by the incorporation state, the applicable law will not suffer any changes, thus the applicable law will continue to be that of the incorporation state.

With respect to the transfer of the real seat through immigration, by virtue of the *Uberseering*[62] case, the Court decided that in the case of a corporation lawfully

[62] Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) (2002) Case C-208/00

established, with the registered office in a state , it is not justifiable by another state to decline the recognition of the corporation on its territory.

In the Uberseering case, a Dutch company contracted a German construction company, for works on one of its buildings, bought together with a piece of land. For reasons which are not immaterial here, the construction company asked in court for payment. Nonetheless, the performance was unsatisfactory for Uberseering, which proceeded with legal actions against NCC. The company's legal proceedings were dismissed on two occasions, on the grounds that Uberseering lacked the legal capacity in Germany. Since Germany supports the real seat theory, under its conflict legislation, the location of the head office establishes the company's legal capacity. Consequently, as Ubersering was under the jurisdiction of German legislation, and because it was regarded as being a foreign company, the legal capacity was recognised only if it reincorporated in Germany. The company appealed the two decisions, thereupon the German Supreme Court referred the case to the European Court of Justice as to the compatibility of the lower court's refusal to grant the company access to the trial, with rules on Freedom of Establishment. In its judgement, the ECJ declared that Uberseering had the right to exercise its right to freedom of establishment in Germany as a company which is incorporated in the Netherlands, under the Art 49 and 54 TFEU. The decision was based on the fact that Uberseering was lawfully incorporated in Netherlands, having the registered seat there. Forasmuch as a company exists by means of the national law which governs the company's incorporation and registration, Uberseering's existence connected to its condition of being a company incorporated according to the Dutch legislation.

In Uberseeing case, the Court stated that Germany's disapproval of the company's legal capacity represented an unjustified restriction with respect to the free movement of establishment[63]. The case addressed mainly the immigration case, but it touched also the emigration issue introducing some clarification to the hypothesis launched by Daily Mail case, recalling the former court's decision on the power of the state within its own jurisdiction and allow them to impose restrictions on emigrating companies.[64]

Considering the seat movement by means of emigration, through *Cartesio*[65] case, it was acknowledged that as a company is incorporated and established in a state, it has the right to move its seat to other state while converting into a company according to new host's legislation, provided that legislation permits the conversion.

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[63] Fabris D., *European Companies "Mutilated Freedom". From the Freedom of Establisment to the Right of Cross Border Conversion*, European Company Law, Vol. 16, Issue 3, 2019, p. 7

[64] Wymeersch E, *The Transfer of the Company's Seat in European Company Law*, ECGI Working Paper Series in Law, 2003, p. 16-18

[65] Cartesio (2008) Case C-210/06

Cartesio Bt, a company setup in Hungary as a limited partnership in 2010, intended to move its real seat to Italy, with no change in the applicable law. The specialised Court, having to register the operation, declined the registration of the new Italian seat in the registry, claiming that such a transfer was not allowed according to the legislation in Hungary, since in order to transfer its seat, a company has to wind-up in Hungary, thereupon to re-incorporate in the host Member State. *Cartesio* made an appeal and the case was referred for a preliminary ruling to the European Court of Justice.[66]

The European Court of Justice maintained its approach as in a previous case, namely the *Daily Mail*[67] case, as the cases present striking similarities. One essential difference, nonetheless, is that in *Daily Mail*, a head office transfer was intended from the United Kingdom to Netherlands, both states supporting the incorporation theory. In contrast to *Cartesio* case, the connecting factor was not changed. The judgement in the *Daily Mail* case stated that provisions of the treaty represented the precluding legislation, therefore when transferring its seat to another Member State, a company may not remain governed by the incorporation's state legislation.[68]

The case was received with great interest by the scholars in the light of the fact that the Court was asked to provide its ruling on a case regarding the primary establishment, and secondly, the case was of interest due to the fact that as the Court's opinion on the *Cartesio* case was expected, the undertakings concerning the Fourteenth Directive regarding mergers had been interrupted

The importance of the *Cartesio* case, as already indicated in the text, lies in the judgement of the Court regarding the distinction between the seat transfer with or without a change in the legislation applicable.[69] Tackled in the *Sevic*[70] case, the Court confirms that companies have the right to cross-border conversions, right which shall not be restricted by the home Member State. The remaining question after *Cartesio* was related to which rules companies have to adhere to when pursuing a cross-border conversion. Nonetheless, as there are no settled procedural rules, when pursuing a cross-border conversion, companies may face different risks.

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[66] Korom, V. & Metzinger, P.,. *Freedom of Establishment for Companies: The European Court of Justice Confirms and Refines its Daily Mail Decision in the Cartesio Case C-210/06*. ECFR, Volume 1, 2009, pp. 125-160

[67] Daily Mail (1988) Case 81/87

[68] Wymeersch E, *The Transfer of the Company's Seat in European Company Law*, ECGI Working Paper Series in Law, 2003, p. 19

[69] Fabris D., *European Companies "Mutilated Freedom". From the Freedom of Establisment to the Right of Cross Border Conversion*, European Company Law, Vol. 16, Issue 3, 2019, p. 9

[70] SEVIC Systems AG C 411/03

B) The transfer of the registered office

The registered seat represents the statutory seat of a company, more precisely, the place where the offices of the companies are as per its official registration or its articles of association.

Just as in the case of the real seat, there are four situations in which the transfer of the registered seat may occur:

a) Registered office relocation through emigration in case of the real seat doctrine

Theoretically, such a transfer is not possible, except for the cases where the registered office is transferred simultaneously with the real seat. In those Member States supporting the real seat theory, the registered office as a connecting factor is not accepted, thus there is no reason for the transfer of the registered seat to be accepted as the central administration of the company remains in the home Member State. Practically, the companies are required to register in the country's public registry which establishes the jurisdiction that governs the company thus transferring the registration office of the company will also generate a change in the applicable legislation, henceforth the national legislation will not be applicable anymore[71].

b) Registered office relocation through emigration in case of the incorporation doctrine

In such conditions, the transfer of the registered office will change the connecting factor and it will imply that the company will no longer be subject to the home country's legislation. This situation can be avoided depending on the home country's legislation. As the applicable legislation is altered, in order for the company to maintain its legal status, it has to be able to transfer the registered office and to reincorporate in another country, without having to dissolute or liquidate according to the home country's legislation. Another requirement refers to the conflict legislation whereby a reference is made both to the home and the host country.

c) Registered office relocation through immigration in case of the real seat doctrine

In accordance with this theory, the connecting factor is represented by the real seat. In some cases, a company may be required to also move its real seat in the host Member State so as to be recognised as a foreign company or as a re-incorporated one.

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[71] Mucciarelli, F.,. *Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited,* European Business Organization Law Review, Volume 9, 2008

d) Registered office relocation through immigration in case of the incorporation doctrine

As a state supports the incorporation theory, whereby the connecting factor is indeed the registered office, it has the right to request that as the company transfers the registered office to also re-incorporate in the host country, which will alter the law applicable. Nonetheless, the company may not be subject of a change in the law applicable provided that the home country also supports the incorporation theory and the country where it intends to transfer the registered office makes use of the "Doctrine of Renvoi", according to which the Court of the country considers the legislation of another country too.

A decisive case which addressed the issue of transfer of the registered seat is the *Vale*[72] case, which is said to mirror the *Cartesio* case. A limited liability company, Vale Contruzioni Srl, incorporated in Italy intended to move its registered seat to Hungary and consequently, to stop its activities in Italy, the home state. In Italy, the company was erased from the registry, however, in Hungary the registration of the company, now Vale Epitesi Kft, was denied, on the grounds that according to the legislation, conversions are lawful only for the national companies. The Court referred the case to the European Court of Justice, asking whether an inbound conversion was a matter of the freedom of establishment[73].

In his statement, the Advocate-General expressed that inbound conversions represent a subject of the freedom of establishment[74] and that limitations to this freedom are accepted provided that these support the general interest and are non-discriminatory. Similar to the *Sevic* case, the Court's conclusion was that Hungarian legislation did not meet the *Gebhard* criteria thus precluding inbound conversions in spite of the fact that the general interest was not jeopardised. Also, the Court reconfirmed its judgements from the *Daily Mail* and *Cartesio* cases, that Member States have the right to define the connecting factor when it comes to a company's registration under its national law as well as the connecting factor when a company intends to preserve that status. As a consequence, the registered seat together with the real seat have to be in accordance with the host country's legislation.

Further analysis regarding the registered office transfer was taken up in the Polbud case[75], one of the latest cases in the field, which triggered the adoption of new Directives. The case resembles the *Vale* one, but it is different in two aspects. Firstly, as the company intended to transfer its seat to Luxemburg, it faced restrictions from Poland, the incorporation state, which required the company's

[72] VALE Építési (2012) C-378/10

[73] Krarup, M.,. *Vale: Determining the Need for Amended Regulation Regarding Free Movement of Companies within the EU,* European Business Law Review, 2013

[74] VALE Építési (2012) C-378/10 Opinion of the Advocate General (2011)

[75] Polbud (2017) Case C-106/16

liquidation, not from the host Member State and, further, Polbud had no intention to move its head office or transfer its economic activities from Poland to Luxemburg[76]

Opposing to the Advocate General's opinion[77] and the ones coming from the Member States, in its judgement, the Court confirmed that the transfer of the registered office was a right of the company. Over and above that, the Court ruled that the mandatory winding-up required for Polbud was not authorized and could not be based on the grounds of protecting the company's stakeholders. The Court also referred to the *Centros* case using an analogy, whereby if a company satisfies the test regarding the connecting factor of a host state, it may transfer its registered office, irrespective of the fact that the activities will take place in the home state[78].

From the outbound cross-border conversions perspective, issues are raised regarding the way in which the home state perceives it, since its rights to state conditions are not immune, but have to be in accordance with the freedom of establishment. With this in mind, the requirement to liquidate the company was considered a restriction. The home state losses the supervision over the company in case the company undergoes a conversion, which implies a switch in the applicable law, and it cannot impede the company's migration. On the other side of the spectrum, from the perspective of the host state, (the case of inbound conversions), the company is regarded as a foreign one, but it has the right to conversions if it meets the requirements of the host country's legislation, coupled with the conditions referring to the connecting factor. Further, as domestic conversions are available, so should a foreign company have the possibility to convert, thus ensuring equality in terms of treatment for national and foreign companies.

Since the company was allowed to transfer its registered seat in another state while maintaining its business activities in the home state, it can be settled that this case makes room for forum shopping. When moving the registered office, the company changes its nationality together with the legal identity, conforming to the new state and thus it can take advantage of more lenient legislation. The prerequisite for so doing is represented by the connecting factor to be the registered office or the incorporation place, as companies seek to move their registered office in the Member States with competitive regulations, whilst

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[76] Markovinovk, H. & Bilk, A., T*he transfer of a company seat to a different member state in the light of the recent "Polbud" decision,* Journal for International and European Law, Economics and Market Integrations, Vol. 5 Issue 2, 2018

[77] Polbud (2017) Case C-106/16 Opinion of the Advocate General Kokott (2017)

[78] Mucha, A., Case C-106/16, Polbud-Wykonawstwo: The Polish Supreme Court Requests the CJEU for a Preliminary Ruling on the Outbound Limited Company Seat Transfer. Instytut Allerhanda, 2017

undergoing their activities in the Member States most favourable. In its decision, the ECJ gave green line to letterbox companies' establishment, thus creating a so called "race to the bottom" across the Member States, considering the protection of stakeholders, while fostering tax evasion[79]. The *Polbud* case indeed settled the availability of cross-border conversions within the spectrum of the freedom of establishment on condition that the company fulfils the conditions of the host.

4. Is the Conversion of Companies the solution?

As from offering an alternative point of view, I consider that the field of mergers, conversions and divisions have developed immensely in the last period, mainly due to the growth of business and need for many of them to merge in order to adapt better to the requirements on the market. As I, already, indicated this paper didn't analyse the evolution of establishment by mergers, mainly due to its complexity which requires a separate study on its own, but I can indicate that for managers and, sometimes, even shareholders, mergers can be seen as an alternative to transfer of seat, with the only conditionality that there are more entities involved and they have common plans. Mergers and acquisitions can be regarded as a process of unification of two or more companies into a new company or exiting one, the difference between the two lying in the fact that the merger process leads to the disappearance of the entities which decided to combine forces and to the creation of a new company, whereas in the case of an acquisition, the bigger company continues its activity, but with an extra patrimony.[80]

Prior to the judgement of the European Court of Justice in the *Sevic*[81] case a veil of uncertainty existed around cross-border mergers, since it was presumed that these processes were possible only if and how they were provided in the national jurisdictions. In the Sevic case, a German public limited company, Sevic Systems AG, asked for the merger with its subsidiary, Security Vision SA, a Luxembourgese company. As a result of the acquisition, the assets of the subsidiary would have been transferred to SEVIC, and the company would no longer exist. Nonetheless, the German court denied the registration of the process because, in accordance with its national law, the merger was possible only between companies "established" in Germany. [82]

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[79] Soegaard, G., *Cross-border Transfer and Change of Lex Societatis After Polbud, C-106/16: Old Companies Do Not Die … They Simply Fade Away to Another Country. European Company Law Journal*, Volume 15, 2018

[80] Dumitru O.I., Seucan A., *Business Law. Lecture Notes*, ASE Publishing House, 2019, p. 213

[81] SEVIC Systems AG Case C-411/03, 2005

[82] Siems, M.,. *SEVIC: Beyond Cross-Border Mergers*. European Business Organization Law Review, Volume 8, 2007, pp. 307-316

The Court stated that the national provisions created a distinction between national and cross-border mergers and by that contravening to the Art. 49 and 54 of the TFEU[83]. The ECJ thus concluded that cross-border mergers represent actions deriving from the freedom of establishment, consequently their rejection would contravene to the Art 49 and 54 of TFEU. Although the judgement provided some clarifications, some questions remained unanswered. These concerned the way in which such a merger is to be incorporated; whether the requirements of the host or the home state are to be fulfilled; which legal persons can be part of a cross-border merger.[84].

The European legislator, following the caselaw in the field of mergers, decided to come with a new tools to enrich the the cross-border mobility within the Single Market and issued in 2005 a Directive on cross-border mergers of limited liability companies which was repealed in 2017 by complex and general Directive 2017/1132 relating to certain aspects of company law[85], providing the creation of a secure and protected corporate border of the Union as an inevitable prerequisite[86], trying to harmonise a very active field of mergers and acquisitions of companies which had either the registered office or the central administration within the European Union.

The new European approach towards a digital transformation of the Single Market, brought the European legislator in the circumstance to develop and propose to Member States a new instrument in the area of company law, one which has to take into consideration all the past experiences and interpretations in relation to freedom of establishment, next to digitalisation. As a result, on 25th April 2018, the European Commission proposed the so called "company law package" which aimed from the beginning to establish "simpler and less burdensome rules for companies" regarding incorporation and cross border transactions and consisted of two Directive proposals, one on the use of digital tools and procedures in company law by which Member States will need to allow a fully online procedure for the registration of new companies and of branches of other companies, that permits the incorporation without the physical presence of the members before any public authority, having as final objective the digitalisation of incorporation and registration process, with benefit effects, I consider, on the collaboration between Members Staes, individuals and companies, in the end, positively help to attain the so wanted harmonisation.

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[83] Stampe, J., *The Need for a 14th Company Law Directive on the Transfer of Registered Office,* University of Lund, 2010

[84] Storm, P., *Cross-border Mergers, the Rule of Reason and Employee Participation,* European Company Law, 2006

[85] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017, p. 46–127

[86] Bartman, S., *10 Years Cross-Border Mergers Directive: Some Observation about EU Border Protection and Minority Exit Rights*. European Company Law Journal, Volume 6, 2017

As regarding the second Directive[87] , the one bringing a possible answer to all our questions and debates in the field of transfer of seat, the European Commission mentioned when it launched the proposal that, next to minor amendments in the field go cross-border mergers, the "real novelty is the introduction of common procedures for cross border divisions and conversions" and to prove the need and usefulness, the Commission mentioned at that time that this act comes as a result of different cross border conversions which had been expressly admitted by the Court of Justice of the European Union in cases like *Cartesio*, *Vale* or *Polbud*.

But, is the conversion provided in Directive 2019/2121 the solution for transfer of seat of companies? In the following paragraphs I am going to present the main provisions in this new field, corroborated with the current critics, remaining for the company law practice to answer the question in the near future.

Firstly, the Directive defines the operation of conversion as one in which a company, which without ending its existence, like it was so often required by Member States in the specific caselaw, converts its legal form registered in a home Member State into one of the host Member State while also transferring its seat and keeping its legal personality. One clear advantage of the new scheme relates to the fact that since the legal personality is retained, the company's assets and liabilities together with the acts already concluded will be transferred to the new company. As the statutory seat will be relocated to the host Member State, the status of the real seat will be determined according to the real seat doctrine or the incorporation doctrine respectively, adhered to by the Member States.

In the case which triggered the initialisation of conversions, *Polbud*, the Court indicated the need of cross boarder transfer of the registered seat with simultaneous transformation of the respective in a company of the destination state, but despite the opinion of the Court, the question of lack "genuine economic activity" as a condition creates debates[88] among the Member States, remaining to overview the way this objective will be implemented.

The Directive comes as a result of *Polbud* and other cases' judgements, but there is a critical view on the sphere of application, some specialists indicating that the Commission fulfilled partially its objective due to the limitation types of companies which can stand for conversion, the act listing mainly the limited liability ones and not partnerships[89].

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[87] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, PE/84/2019/REV/1

[88] Alexandrpoulou A., *European Legislative Proposals on Cross-Border Mobility of Companies and the use of Digital tools and process in Company Law*, Business and Company Law Review (Dikaio Epihireiseon kai Etairion, Δίκαιο Επιχειρήσεων και Εταιριών), 2019, v. 4, pp. 507-516

[89] Position Paper no. 31/2018 of the German Bar Association

The Directive provides a uniform procedure to facilitate these transactions while at the same time protecting the rights of minority shareholders, creditors and employees. The procedure, requires the issuance of an certificate which will be governed by the home state, while the ones subsequent to the certificate receipt will be governed by the host state. The pre-conversion certificate is to be issued by the host state in terms of its legality, but for that it has to be examined by an independent expert. It is debatable if this ex ante control by the expert and the authority is an efficient way of preventing the abusive use of these transactions.

A further concern is that this complex procedure may lead to arbitrary decisions, as judging *ex ante* the intentions of the company might be difficult. Some Member States would be tempted to pressure the national authorities to be strict, to prevent the flight of companies to other member states, which instead of increased freedom of establishment and company law harmonisation, we may notice even more national obstacles.

From the stake owners interest post of view, the Directive provides that shareholders may dispose of their shares in exchange for adequate compensation, in case they oppose the conversion, creditors with claims due before the draft terms are disclosed and appropriate solutions found for their interests to be protected and employee participation is also the subject of a scheme in which they can exercise influence on the management/supervisory board appointments. Still, the procedure also implies risks for stakeholders because it provides that the operations initiated may not be declared, the justification being hat the *ex ante* control should offer a total guarantee and therefore should not be challenged, but this can lead to a fraud and if the company has been able to hide its real intentions from the expert and the competent authority.

4. Conclusions

This paper intended to present the evolution of the caselaw in relation to the transfer of seat of companies within the European Single Market and the opinions launched by the doctrine afterwards, without generating a general perspective on the free movement of companies, but just concentrating on the struggle of different individuals and companies in exercising their rights conferred by the treaty through the provisions regarding Freedom of Establishment when they intended to transfer their seat from one Member State to another. These cases forced the Court to make interpretations and issue new principles, in a very sinuous process, exchanging positions from one situation to another, but offering us the chance to research and, ultimately to understand that

the intended process of company law harmonisation is still far away from conclusion and the job of the Court will still be the one to offer the best choice given the complexity of the issues offered by practice.

Nevertheless, as indicated in the previous section, the European legislator, reacting to the continuous pressure of company law harmonisation and as an effect of one of the most pivotal current cases, the *Polbud* case, decided to include in one of the Directives, part of the European Company Law Package, which brought amendments to the main Directive in the field company law, Directive 2017/1132, next to provisions regarding mergers and divisions, the new institution of "cross-boarder conversions" and by that trying to solve a long and tortuous period of Transfer of Seat of companies.

As I mentioned in the paper it seams that this act may reduce uncertainties and facilitate the transfer of seat of companies, but the Member States have to be very careful how they fulfil the directive's objectives, especially in the field of *ex ante* control of abusive operations by the competent authorities, which may bring costs and uncertainties while not ensuring the absence of fraud, and as final conclusion on this new form, we just have to wait for implementation and practice to see if this is the solution or we have to work on new proposals.

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