

The freedom of establishment of companies in the EU and the Polbud case

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Abstract

The aim of this article is to analyze the possible implications of the Polbud case. The analysis is focused, among others, on whether the decision of the European Court of Justice (ECJ) will clarify the applicability of Article 49 TFEU to cross-border conversions (in particular the transfer of the registered office into another Member State of the EU without doing business in the State of immigration). This is of particular importance since until Polbud, it was questionable whether companies were allowed to transfer their registered seat into another Member State of the EU, without making any changes in regards to the main place of business.

Key words

Freedom of establishment, Companies law, Polbud case,

1. Introduction

The Polbud¹ case is a key decision in regards to the freedom of establishment of companies in the EU. It provides the clarification in a way that the freedom of establishment of companies covers the right to transfer only the registered office while reincorporating abroad (so called cross-border conversion).² Under cross-border conversion we have to understand the transformation a company which is incorporated in one EU member state into a similar legal form of another EU member state.³ According to Article 49 TFEU, “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited”. The question whether the company is faced with a restriction on the freedom of establishment can arise only if it has been established. Article 49 TFEU lays down the abolition of restrictions on freedom of establishment.⁴

¹ C-106/16 Polbud-Wykonawstwo [2016], ECLI:EU:C:2017:351.

² FUNTA, R., BOVOLI, V. (2011): Freedom of establishment of companies in the EU.

³ POILLOT-PERUZZETTO, S. - LUBY, M. - SVOBODA, P. (2003): Evropské právo a podnik.

⁴ FUNTA, R. - GOLOVKO, L. - JURIŠ, F. (2014): Európske právo.

With the Polbud case the transfer of the registered office of a company (if there is no change in the location of its real head office) is covered by the freedom of establishment. The company is not obliged to undertake a real business in the EU member state where the transfer of the registered office is affected.

2. Court proceedings and preliminary questions

Polbud Wykonawstwo sp. z o.o. (a private limited liability company) was incorporated under the laws of Poland. With a resolution (30 September 2011) an extraordinary general meeting of shareholders decided (in accordance with Article 270 paragraph 2 of the Polish Company Code) to transfer the company's registered office to Luxembourg. On 19 October 2011, Polbud submitted a request for the purposes of having opened a liquidation procedure with the respective registry court. On 26 October 2011, the opening of the liquidation procedure was recorded and a liquidator for this purpose was appointed.

On 28 May 2013, shareholders of Consoil Geotechnik Sàrl, whose registered office was in Luxembourg, implemented the resolution of 30 September 2011. Based on it, they transferred the registered office of Polbud to Luxembourg without the loss of its legal personality. The transfer was to take effect on 28 May 2013. On this day Polbud's registered office was transferred to Luxembourg and the company's name changed from 'Polbud' to 'Consoil Geotechnik'. On 24 June 2013, Polbud asked the registry court to remove the company from the Polish commercial register (because of the transfer of the company's registered office to Luxembourg).

For the purposes of the removal (a decision dated 21 August 2013), Polbud was requested to prepare the resolution of the general meeting of shareholders with the name of the depository of the books and documents of the company, the financial accounts relating to the period from 2011 to 2013 (signed by both the liquidator and by responsible person for keeping the accounts), and the resolution of the general meeting of shareholders approving the report on the liquidation.

Polbud responded that there was no need to prepare such documents because it was not being wound up, assets of the company have not been distributed to the shareholders and the application for removal from the register was sent because of the transfer of the

company's registered office to Luxembourg. Because of this (on 19 September 2013), the registry court rejected the application for removal. The court reasoned that the abovementioned documents had not been provided. Polbud replied against that decision before the Sąd Rejonowy w Bydgoszczy (District Court of Bydgoszcz, Poland). Since the action was dismissed, Polbud brought an appeal before the Sąd Okręgowy w Bydgoszczy (Regional Court of Bydgoszcz, Poland). The court again dismissed the appeal (on 4 June 2014). Polbud subsequently appealed before the Sąd Najwyższy (Supreme Court of Poland). Before the Supreme Court of Poland, Polbud stated that its registered office was transferred to Luxembourg, and because of this fact it had lost its status as a company incorporated under Polish law (and become incorporated under Luxembourg law).

The following questions were brought before the Court of Justice:

1) Do Articles 49 and 54 TFEU preclude the application, by the Member State in which a (private limited liability) company was initially incorporated, of provisions of national law which make removal from the commercial register conditional on that company being wound up after liquidation has been carried out, if that company has been reincorporated in another Member State pursuant to a shareholders' decision to continue the legal personality acquired in the State of initial incorporation?

If the answer to that question is in the negative:

2) Can Articles 49 and 54 TFEU be interpreted as meaning that the requirement under national law that a process of liquidation of a company be carried out — including the conclusion of current business, recovery of debts, performance of obligations and sale of company assets, satisfaction or securing of creditors, submission of a financial statement on the conduct of that process, and indication of the person to whom the books and documents are to be entrusted — which precedes the winding-up of the company, that occurs on removal from the commercial register, is a measure which is appropriate, necessary and proportionate to a public interest deserving of protection that consists in the safeguarding of the interests of creditors, minority shareholders, and employees of the migrant company?

3) Must Articles 49 and 54 TFEU be interpreted as meaning that restrictions on freedom of establishment cover a situation in which — for the purpose of its conversion to a company of another Member State — a company transfers its registered office to that other Member State without changing its main head office, which remains in the State of initial incorporation?

3. The ECJ judgement

The ECJ, as well as the Advocate General, examined the third question first. They stated that Polbud (a company established in accordance with the legislation of EU Member State) could rely on the freedom of establishment in accordance with Article 49 TFEU (in conjunction with Article 54 TFEU).⁵ According to the Advocate General, the freedom of establishment allows companies to choose the location of their economic activity. On the other hand it does not give the companies the right to choose the law applicable to them. The Advocate General stated that the pursuit of economic activity is needed for the freedom of establishment. The ECJ, however, ruled that the freedom of establishment applies to companies' cross-border re-incorporations. This applied event though the emigrating company does not relocate its establishment.

Going out from the Centros⁶ decision, the freedom of establishment encompasses the right of a company created in accordance with the legislation of EU Member State to convert itself into a company governed by the law of another EU Member State, under the condition that the requirements stipulated by the legislation of that other EU Member State are met. Another prerequisite is, that the test made by the latter EU Member State to determine whether the connection of a company to its national legal order is met, even that company conducts its main (an possibly entire activity) in the first EU Member State.

Because of this, Polbud was allowed to convert into a company under Luxembourg law, if the conditions laid down by the Luxembourg legislation are met and also that the test adopted by the latter EU Member State is satisfied. The transfer of the registered office to Luxembourg was seen in accordance with Articles 49 and 54 TFEU. The transfer of the registered office of a company incorporated under Polish law to other EU Member State did not entail, in line with Article 19 (1) of the Law on private international law, the loss of legal personality.⁷

Apart from this, in line with Article 270, paragraph 2, of the Companies Code and Article 272 of the Companies Code, a resolution of the shareholders about the transfer of the registered office to other EU Member State (other than Poland), adopted in accordance with Article 562 (1) of the Companies Code code, entails the winding-up of the company when the liquidation procedure is finished. Also, in line with Article 288 (1) of the Companies Code, a

⁵ Opinion of the Advocate General Kokott delivered on 4 May 2017 in C-106/16, Polbud Wykonawstwo sp. z o.o., in liquidation, ECLI:EU:C:2017:351.

⁶ C-212/97, Centros Ltd v Ethervorsog Selskabsstyrelsen, ECLI:EU:C:1999:126.

⁷ GLAVANITS, J. – KNAPP, L. (2016): Az európai jog és a nemzetközi magánjog aktuális kérdései.

company that wants to transfer its registered office to another EU Member State cannot be removed from the commercial register, until the liquidation procedure is concluded.

According to the ECJ, the mandatory liquidation (as laid down in Companies Code) did not entail a reason for any risk of detriment to the interests of creditors, minority shareholders and employees. Because less restrictive measures, in order to protect such interests, may be adopted under EU law, the mandatory liquidation required by the Polish Companies Code was beyond what is necessary to achieve the objective of protecting such interests. The ECJ stated that the Polish legislation was able to prevent the cross-border conversion of a company and constitutes a restriction on freedom of establishment.

4. The ECJ case law on the freedom of establishment and transfer of registered office

The Polbud case was about the so called outbound reincorporation (from an outbound/emigration a company may not be allowed to transfer its registered or administrative seat without having to wind up and dissolve first). On the other side, the inbound/immigration situation means that a company may not be recognized in the host State as a foreign company, and may have to reincorporate in the host State or have to adjust a part of all of its internal law.

In Polbud, the ECJ decided that the EU Member State of departure has to allow cross-border conversion even if it solely linked to transfer of the registered office (without performing economic activity in the EU Member State of arrival). Secondly, there is a need to change in the applicable law in case of cross border conversion. Each EU Member State is free to decide the connecting factor of a company to its national order and apply national incorporation conditions to incoming companies. Even the EU Member State of departure and arrival may impose conditions for the departure and re-incorporation, they cannot be restrictive in their nature, meaning they may not prevent the exercise of the freedom of establishment. If the registered office was established for the purpose of enjoying the benefit of more favorable legislation, this does not constitute an abuse of law. A requirement to wind-up a company before carrying out a cross-border conversion is seen as restriction to the freedom of establishment.

The ECJ in VALE⁸ decided that the freedom of establishment applies to inbound re-incorporations. The ECJ also stated that if the EU Member State of arrival allows equivalent domestic restructurings, stricter rules for inbound re-incorporations are allowed only if they are appropriate and proportionate.⁹ The

⁸ C-378/10, VALE Építési kft, ECLI:EU:C:2012:440.

⁹ FUNTA, R. (2012): Freedom of establishment of companies in the EU and the effects of the VALE ruling, C-378/10. A never ending story or a farewell?.

ECJ made clear that, since secondary EU law “does not provide specific rules governing cross-border conversions, the provisions which enable such an operation to be carried out can be found only in national law, namely the law of the Member State of origin of the company seeking to convert and the law of the host Member State in accordance with which the company resulting from that conversion will be governed”

In Cartesio¹⁰ the ECJ clarified that migration with conversion purposes is possible. Any restrictions may be imposed by the country of departure, but they must be appropriate and proportionate. Going out from the ECJ case law, voluntary outbound reincorporation in other EU Member State must be allowed.

After Polbud it is clear that freedom of establishment covers the right to reincorporate across EU Member States and EU Member States have to allow companies incorporated domestically to reincorporate under the law of a different EU Member States. Also foreign companies have the right to convert into domestic legal entities without liquidation. It is questionable whether the Polbud case (an also the previous decisions e.g. in Centros), gave green light to a so called Delaware race to the bottom concerning company law. Companies are free to incorporate in the EU Member State with the most convenient incorporation standards and subsequently use branches to carry their operations in other EU Member States.

Directive 2017/1132/EU opens the possibility for a company to pursue its existence under another legal form as a legal successor. This is clearly mentioned in the Recital 31 which states that any change in the legal form of the company, as a consequence of “a merger or division, or a cross-border transfer of its registered office” has to be considered as a legal succession. It is also questionable as whether companies (an possibly shareholders) are allowed to choose the most convenient company law at the moment of their incorporation and than change the applicable company law without liquidation of that company in the original country.

5. Any limits to the freedom to reincorporate abroad?

According to the ECJ in Polbud, full prohibition of cross-border conversion shall be seen as being in contrast with the freedom of establishment. EU Member States have the possibility to apply restrictions only if they are justified by the public interest. The ECJ distinguish between the freedom of establishment (Articles 49 and 54 TFEU) and the

¹⁰ C-210/06, Cartesio Oktató és Szolgáltató bt, ECLI:EU:C:2008:723; PATAKYOVÁ, M. - CZÓKOLYOVÁ, B. (2015): Teória spoločnosti v triáde rozhodnutí Daily Mail, Cartesio a VALE – spoločnosť ako fikcia, nexus kontraktov alebo reálna osoba?; NOVOTNÁ, P. (2009): Connecting Criteria after Cartesio.

power of EU Member States to adopt measures in order to hinder certain nationals to evade domestic legislation. Already in SEVIC, the ECJ stated, that *“in so far as concerns justification on the basis of overriding reasons in the public interest, such as protection of the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions, it is established that such reasons may justify a measure restricting the freedom of establishment on the condition that such a restrictive measure is appropriate for ensuring the attainment of the objectives pursued and does not go beyond what is necessary to attain them.”*¹¹

Any national measures which are able to hinder or make the exercise of the freedom of establishment¹² less attractive, must fulfil so called Gebhard conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons of public interest; they must be appropriate to ensure the continuation of the aim pursued; and they must not go beyond what is necessary to achieve the purpose.¹³ There is an overall consensus that the need to protect the creditors of a particular company (in case of transfer of registered and/or administrative office) may be a reason to impose restrictions (e.g. the protection of the employees can be an overriding reason in the public interest).¹⁴ In Polbud, the ECJ recognised the protection of minority shareholders under the condition that they hold the qualified majority needed for the resolution approving the conversion

6. EU Cross-border conversions after Polbud judgment

The European Commission published a proposal for a directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.¹⁵ While the ECJ recognized that companies may rely on Article 49 TFEU for cross-border conversion, such provision cannot remove the barriers to cross-border conversion. In Polbud the ECJ confirmed the right of companies to exercise cross-border conversions on the basis of the freedom of establishment. The freedom of establishment is applicable when the registered office (alone) is transferred from one EU Member State to another EU Member State if the EU Member State of new incorporation accepts the registration (even without

the exercise of an economic activity in that EU Member State). It is also true that, in the absence of harmonisation, EU Member States may decide the connecting factor of a company to its national order.¹⁶ This would lead to the application of their own incorporation conditions to incoming companies. The fact that the registered office or the real seat office of a company was established in accordance with the legislation of a particular EU Member State for the purpose of enjoying the benefit of more favourable legislation does not constitute an abuse.¹⁷ In Polbud the ECJ held that a national legislation which imposes the winding-up prerequisite of cross-border transfer of a company is an unjustified restriction and is unlawful. In EU company law, the protection of stakeholders (employees, creditors, minority shareholders) is seen as ineffective (insufficient) because of contradictory rules. Therefore, the EU needs to provide rules on cross-border conversion with proportionate safeguards for employees, creditors and shareholders. The objective is to provide a specific, structured and multi-layered procedure for cross-border conversions which ensures a scrutiny of the legality of the cross-border conversion firstly by the competent authority of the departure.

7. Conclusion

The Polbud judgment confirmed the ECJ position in a way that the freedom of establishment in accordance with Articles 49 and 54 TFEU (and also the freedom to be re-incorporated in another EU Member State) applies to companies across the EU. According to the ECJ there is no need for the companies to be liquidated or wound up in the EU Member State of incorporation and lose their legal personality. The ECJ ruled that the principle of freedom of establishment in the EU applies to a cross-border change of form by the sole transfer of the registered office of the company. The ECJ judgment raised discussions about possibilities of forum shopping, and the development of letterbox companies with the aim of exploiting a more favourable legal and/or tax regime in other member states.

It is clear that the regulatory power of one EU Member State ends when a company changes into a company governed by the law of another EU Member State. The latter EU Member State has to determine the legal and/or economic conditions that shall be met by the respective company. In line with Articles 49 and 54 TFEU, the State of origin is only allowed to create legislation for the protection of public interests (e.g. the protection of creditors, minority shareholders and employees) but is not allowed to the State of

¹¹ C-411/03, SEVIC Systems AG, ECLI:EU:C:2005:762.

¹² BARNARD, C. (2016): The Substantive Law of the EU. The Four Freedoms.

¹³ C-55/94, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, ECLI:EU:C:1996, 4165.

¹⁴ RATKA, T. (2003): Grenzüberschreitende Sitzverlegung von Gesellschaften.

¹⁵ Proposal for a Directive of the European Parliament and the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.

¹⁶ KARAS, V. - KRÁLIK, A. (2012): Právo Európskej únie; PALA, R. (2004): Sloboda usadzovania spoločností vo svetle novej judikatúry ESD. Inspire Art. Potenciálny dopad na európske a slovenské právo obchodných spoločností.

¹⁷ MÜLLER-GRAFF, P. Ch. (2010): EU Gesellschaftsrecht auf neuen Wegen.

origin to impose mandatory liquidation. At the end it can be stated that the European Commission has proposed a Directive aimed at regulating cross-border conversions in order to create a consistent company law framework in the EU. The aim of the European Commission is to enhance the internal market and provide more certainty to companies in regards to cross-border conversions.

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8. Literature summary

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Programs in the field of water policy and water management in the EU and the USA

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Abstract

The article reveals the historical, legislative and institutional aspects of the implementation of water policy in the EU and the USA. Modern features of implementation of programs in the field of water policy and water management were determined.

Key words

Water resources, state policy, programs in the field of water policy.

1. Introduction

Although environmental programs do not envisage legal obligations and jurisdiction of the EU Court, they determine the general direction of development, main aspects of activity, general orientation and strategy of the European Union in the field of environmental protection, provide for enactment of normative legal acts. As a result political programs in the sphere of environmental protection are of great importance.

2. EU Water Policy

Protection of water resources is one of the priority areas of the European Union's activities.¹ The EU's water policy is aimed at achieving good water quality and sustainable ecological status of all water bodies located in the territory of the member states.²

In the first environmental action programs a lot of attention was paid to the protection of water resources. Thus, in the First Program of Action on the Environment of 1973-1976 in the EU the fight against pollution of the marine environment and protection of water in the Rhine basin was one of the priority areas.³

The second environmental action program in particular focused on the quality of drinking water and the protection of water resources.⁴

In the third environmental action program of 1982-1986 except other priorities reduction of pollution of

marine environment is singled out. In the relations between the EU and the Member States in the field of environmental protection, the principle of subsidiarity was introduced, according to which the Community will take any measures only if they are more effective than the corresponding measures at the national, regional or local levels (exceptions are the areas of exclusive competence of the Community).

The Fourth Action Program on the Environment of 1987-1992 focused more on finding new opportunities for the integration of environmental policies into other Community policies, with particular emphasis on the following areas: development of environmental standards; effective and comprehensive application of existing Community legislation; management of all types of environmental impact; ensuring wider public access to information and dissemination of environmental information, protection of special natural and urban areas, including coastal zones.⁵

The Fifth Action Program on the Environment of 1993-2000 has the title "Towards Sustainability". The programme set longer objectives and focused on a more global approach. In the light of the Fifth Environmental Action Programme the features of sustainability are: to maintain the overall quality of life; to maintain continuing access to natural resources; to avoid lasting environmental damage; to consider as sustainable the development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.

The Sixth Action Program on the Environment of 2002 - 2012 contributed to the full integration of environmental protection requirements into all Community policies and activities and provided the environmental component of the Strategy for Sustainable Development. The sixth action program in the field of water policy provided for the following objectives: conservation, proper restoration and sustainable use of the marine environment, coastal areas and wetlands; achievement of good quality of underground and surface water, which does not cause significant impacts and risks to the health of

¹ History of the Environmental EU Legislation (2017).

² KLIMEK, L. (2017): Mutual Recognition of Judicial Decisions in European Criminal Law

³ Program of action on the environment, 1973-1976.

⁴ FUNTA, R., GOLOVKO, L., AKHTAR, A. (2016): Vybrané otázky európskeho práva a medzinárodného práva súkromného

⁵ Council Resolution of the Council of the European Communities and the Council of Ministers of the Council of 19 October 1987 on the continuation and implementation of the European Community policy and action program on the environment, 1987-1992 // OJ C 289, 29.10.1987, p. 3

population and the environment, ensuring the sustainability of water extraction in the long term.⁶

The Seventh Environmental Action Program in the water sector has set a goal to achieve the good status of all water resources in the EU by 2015, including drinking water and coastal waters at a distance of one sea mile from the coast, and by 2020 - the proper ecological state of all seawater. The Seventh Environmental Action Program also provided for achievement of the following results by 2020: significant reduction of human impact on coastal, surface and groundwater; reduction of pollution of seawater; rational management of coastal zones; full implementation of the European Water Resources Protection Plan, taking into account the specificities of the Member States; warning or significant reduction of water scarcity in the European Union; increasing water use efficiency by establishing and monitoring the efficiency of implementation of river basin plans; common methodology for water monitoring; using market mechanisms such as water pricing provided in the Article 9 of the Water Framework Directive, as well as, where appropriate, other market measures; development of approaches to the management of treated sewage; intensify efforts to implement the Water Framework Directive, the Bathing Water Directive and the Drinking Water Directive, in particular regarding small sources of drinking water supply.

According to the Seventh Environmental Action Program, resource efficiency in water management is also considered as a priority in promoting the proper state of water resources. Resource efficiency in the water sector will also be tackled as a priority to help to achieve good water status. Even though droughts and water scarcity are affecting more and more parts of Europe, an estimated 20-40 % of Europe's available water is still being wasted, for instance, through leakages in the distribution system or insufficient development of technologies for the efficient use of water. Based on existing models, there is still considerable scope for improving water efficiency in the EU. Moreover, rising demand and the impacts of climate change are expected to increase the pressure on Europe's water resources significantly. Against this background, the EU and its Member States should take action to ensure that citizens have access to clean water and that water abstraction respects available renewable water resource limits, by 2020, with a view to maintaining, achieving or enhancing good water status in accordance with the Water Framework Directive, including improving water efficiency through the use of market mechanisms such as water pricing that reflects the true value of water, as well as other tools, such as education and awareness raising. Sectors that are the biggest consumers of water, such

⁶ Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L 242, 10.9.2002, p. 1-15

as energy and agriculture, should be encouraged to prioritise the most resource-efficient use of water.⁷

Today, the main document in the field of water policy of the EU is Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, better known as the Water Framework Directive. The Water Framework Directive is a systematic document that consistently addresses a number of water management tasks to ensure the "good" environmental status of each water object.⁸ An integrated approach to water management allows balanced management and development of water resources, taking into account social, economic and environmental interests.

3. US Water Policy

In the United States, the obligation to preserve and improve the status of water bodies is imposed on individual states. Due to the current shortage of water resources, western states have always had sufficiently effective legislation in the field of management and control over the use and protection of water resources, since they understood the importance of preventing the deterioration of their quality.

Since 1970, the US Congress has adopted a number of laws aimed at combating water pollution and improving their status, which has become the basis for the development and implementation of effective programs aimed at restoring and maintaining the quality of water facilities. These programs were aimed at reducing (and ultimately eliminating) most point sources of pollution. Federal control over pollution was aimed at controlling industrial emissions to water bodies, as well as the state of sewage systems.⁹ For point sources of industrial emissions, a permit system was developed and introduced, requiring all entities that discharge emissions into water bodies to obtain permission for these emissions. In addition, US law requires the use of the best available technologies for wastewater treatment before discharging them into water bodies. Over the years, the conditions for the use of the best available technologies were determined, which take into account the economic burden on business entities.¹⁰

According to the US legislation citizens have the right to identify sources of pollution of water bodies and to initiate enforcement measures to eliminate them,

⁷ Decision No 1386/2013 / EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Program to 2020 "Living well within our planet" Text with EEA relevance JL 354, 28.12. 2013, p. 171-200

⁸ FUNTA, R., NEBESKÝ, Š., JURIŠ F. (2014): Právo Európskej Únie.

⁹ LADYCHENKO, V. (2015): Human right to drinking water in the system of human rights.

¹⁰ National Research Council. Water Conservation, Reuse, and Recycling: Proceedings of an Iranian-American Workshop (2005).

which has contributed to an effective system of implementation of the waste management strategy. One of the results of this strategy was to encourage firms to reuse water in the production process. In addition, a program was developed in which the federal government subsidized 75 percent of the price of wastewater treatment systems.¹¹

Despite some positive changes in the quality of water resources, which were caused by changes in legislation in the field of regulation and control of emissions to water bodies, water quality in the United States continues to deteriorate. This is due to the fact that not enough attention was paid to the problems of water pollution from non-point sources at an initial stage of US water policy development. No attention was also paid to the pollution of water objects from agriculture. At the initial stage water policy was focused on point sources of pollution, since it is much easier to identify and control them. Groundwater is a significant source of drinking water in the USA. Approximately 25 % of drinking water in the country is taken from underground sources. Some large cities, such as San Antonio, Texas, Arizona, are completely dependent on groundwater when supplying drinking water.

The strategy for improving water quality monitoring of 1995 envisaged the development of water quality monitoring programs to measure progress towards the achievement of clearly defined goals in the field of water policy; comprehensive assessment of the state of water objects at the national level; mapping with the help of geographic information systems, which would indicate the actual locations of contaminated water bodies and the causes of this pollution; joint planning of monitoring programs; identification of opportunities for cooperation and resource sharing; evaluation of the effectiveness of federal programs; state reports on progress in the implementation of the Strategy (every 2 years or, if no amendments were made to the current state legislation during the given period, the Strategy provided for three consecutive reports at intervals of 6 years); annual updates of information on the Internet; water resource planning and reporting; participation of representatives of counties and municipalities in the implementation of the Strategy at all stages; development of clear guidelines for collecting and processing information in the field of water policy, status of water objects and monitoring methods; involvement of volunteer organizations in monitoring; development of technical recommendations necessary for monitoring and processing of information.¹² Every 5 years the progress in implementing the Strategy is assessed.

¹¹ National Research Council. Water Conservation, Reuse, and Recycling: Proceedings of an Iranian-American Workshop (2005).

¹² The Strategy for Improving Water-Quality Monitoring in the United States (1995).

In order to implement the Strategy, in 1997 the National Water Quality Monitoring Council was created - a body which purpose is to combine the various knowledge necessary to develop common and cost-effective approaches to monitoring and assessing the quality of water resources in the USA.¹³ The creation of a National Water Quality Monitoring Council was necessary in order to ensure that technical support and coordination of monitoring programs are carried out; periodically evaluate the effectiveness of monitoring across the country, while taking into account the regional differences between individual states, since some states have sufficient water resources, while in others states water resources are scarce.

The National Water Quality Monitoring Council is a platform for coordination of scientifically based methods and strategies for monitoring water quality, assessing their implementation and reporting, promotion of cooperation between different bodies, development of science and improving water quality monitoring. Advisory Committee on Water Information was also created.¹⁴ The objectives of the Committee on Water Information are to determine the need for information on water resources, assess the effectiveness of programs in the field of disclosure of information on water quality and provide recommendations for their improvement. Members of the Committee on Water Information represent both the state and the private sector.

The general objective of the National Water Quality Monitoring Council is to protect and support information disclosure in the field of natural resources management and environmental protection. The Council has a broad mandate that covers monitoring and assessment of water quality. The Council develops guidelines for monitoring the quality of water resources, provide technical support to the private sector in implementation of the provisions of the Strategy for Improving Water Quality Monitoring. The purpose of the Strategy is to improve water quality monitoring and to achieve comparative and scientifically justified information on the state of water resources. This information is needed to support decision-making at the local level as well as at the level of individual states.

The activities of the National Water Quality Monitoring Council include the monitoring of the quality of surface water, coastal waters, groundwater in individual states. The Council develops guidelines on the collection, management and use of information on the quality of water resources. This information is needed to assess the state of water resources, trends in their development, identify priorities for addressing existing problems, identify needs for new research,

¹³ National Water Quality Monitoring Council (2017).

¹⁴ Advisory Committee on Water Information (2018).

develop and implement management programs, assess existing ecological requirements, and evaluate the effectiveness of programs and projects in the field of water policy and water management. With regard to the marine environment, the National Water Quality Monitoring Council provides assistance to the United States Environmental Protection Agency, the US National Agency for Oceanology and Atmospheric Research, and individual states in activities aimed at gathering information and monitoring the quality of water resources.

The National Water Quality Monitoring Council issues guidances on various aspects of water quality monitoring: coordination of activities and cooperation, identification of research needs, development of water policy and water management programs, monitoring methods, water quality, management information and data exchange on water quality, data processing methods and analysis, reporting, training, evaluation of monitoring activities and other issues required for successful implementation of the Strategy for Improving Water Quality Monitoring. The specific functions and tasks of the National Water Quality Monitoring Council are: to establish and maintain partnership between monitoring entities at the national level and at the level of individual states; assess progress in the implementation of the Strategy and report on the results of the monitoring. The assessment includes achievements, plans, recommendations and a list of organizations involved in the implementation of the Strategy. To perform these functions, a permanent Methods and Data Comparability Board was established.¹⁵ Monitoring the quality of water in the 21st century is complicated by the large amount of chemicals used in our daily lives and which can be found in water bodies. Chemical analysis and evaluation methods are available only for several thousands of more than 80,000 chemical compounds that, according to the Environmental Protection Agency, are used for commercial purposes in the United States.¹⁶ Each year, government agencies (local, federal), industry, research institutions and a wide range of private organizations in the United States spend a lot of time and billions of dollars on monitoring, protection and restoring water resources. This work includes: monitoring of the state of water resources and trends in its development; identification and classification of existing and emerging problems; development and implementation of water management programs. Cooperation under different programs is possible if the methods of monitoring and processing of information are the same. That is why for implementation of monitoring programs there is constant cooperation and information exchange between all monitoring entities.

¹⁵ Methods and Data Comparability Board (2002).

¹⁶ MYERS, D.M. (2019).

4. Conclusion

The quality of water bodies depends not only on cleaning technologies but, above all, on the effectiveness of state policies aimed at protecting water resources and the activities of individual actors. EU and US state policy and legislation in the area of water protection and water quality are based on the scientific assessment of the risks posed by individual pollutants to human health. The general tendency of water policy development in the EU and the USA is characterized by the development and implementation of effective programs aimed at restoring and maintaining the quality of water facilities. Considerable attention is paid to monitoring of water resources and control of emissions to water bodies. These programs are not declarative, but are actually implemented and provide for ongoing reporting by the states on the progress of their implementation. Public awareness of the status of water resources should also be considered as a positive practice.

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Historical approaches to the principles of public service on the Ukrainian lands

Viktoriiia Halai

Abstract

The purpose of the article is to analyze the historical approaches to the principles of public service in the Ukrainian lands and to highlight the stages of formation and development of the institute of public service in Ukraine, taking into account the concept of "principles of public service".

Key words

Principles, public service, stages of formation, historical approaches

1. Introduction

Public service was formed over a long period as one of the elements of state power. If we talk about historical approaches to the principles of public service, then they can be traced only by analyzing the substantive consolidation of the principles of activity of the "public servants". Assuming that this study concerns the analysis of historical approaches, the use of the term "public service" will prevail in it as a more inherent to historical literature on this issue.

2. The concept "principles of public (state) service"

For an objective analysis of historical approaches to the principles of public service in the Ukrainian lands, it is necessary to clarify such a concept as "principles of public (state) service". For the meaningful consolidation of the principles of public service in the Ukrainian lands before Ukraine officially declared itself an independent state differentiation of the stages of the formation and development of the public service must be done. Assuming that this study concerns the analysis of historical approaches, the use of the term "public service" will prevail in it as a more inherent to historical literature on this issue. From a historical and legal point of view, public service arises and is formed as a necessary element of the system of state power, thanks to which its fundamental function, such as managing the political, economic, social and cultural life of a society is exercised. Public service is a mechanism for implementing the goals and objectives of the state.¹ Realizing its functions, public service is such an institution through which the essence of the

state is realized.² It also should be noted that the implementation of such goals and objectives or the implementation of the functions of the state is unconditionally regulated by the relevant legal acts, which primarily lay down the principles of such activities.

The concept of "principle" comes from the Latin word "principium", which is interpreted as the beginning, the basis. As a scientific category, the "principles of public service" determine the initial positions and theoretical ideas reflecting the objective laws of the development of society and the state, the most characteristic features of the organization and functioning not only of the public service, but also of the entire system of the state apparatus, legal proceedings and the prosecutor's office, determine the content of complex relationships within the whole mechanism of the state.³ Also, the principles of public service can be considered through the principles of law. Thus, in the legal doctrine, when defining the notion of principles of law, scientists use such categories as initial theoretical propositions, fundamental, guidelines (ideas), general normative guidelines, guiding principles, regularity, essence, coordinate system, etc.⁴

In particular, the opinion of V. Babych, who believes that the principles of law are such a legal phenomenon that combines the norms of law with their social prerequisites, seems fair. Moreover, the principles of law do not simply allow to correlate the norms of law and the actual circumstances of social life, but directly reflect them in the first. According to the author, it is this mechanism of interaction between the principles of law and the surrounding reality that creates the necessary prerequisites for lawmaking and the effective implementation of legal norms. Thus, the specificity of the principles of law lies in the way they are enshrined in law. According to V. Babych, two approaches to understanding the issue of expressing the principles of law are distinguished: their direct reflection in the norms of law (textual consolidation)⁵ and the derivation of the principles of law from the content of legal regulations (substantive consolidation).

² BARYSHNIKOV, V. (2010): Institute of Public Service.

³ KOVBASYUK, Y. (2012): Public Service.

⁴ STARCHUK, O. (2012): Concerning the notion of the principles of law.

⁵ BABYCH, V. (2012): Principles of the functioning of the State Bailiffs' Service. In: Advocate 11 (134)/2011.

¹ BOGOVIS, Y. (2017): Historical and Legal Aspect of Formation of the Institute of Public Service of Ukraine.

In our opinion, these approaches can be applied to understanding the expression of the principles of public service. However, if we talk about historical approaches to the principles of public service, then they can be traced only by analyzing the content of the principles of the activity of the "public servants". So, the concept of "principles of public service" must be understood as a direct reflection in the legal regulations of the relevant stage of development of the public service of Ukraine of the basic principles (organizational, legal, functional and other) of the activities of persons authorized to implement the goals and objectives of the state, the implementation of its functions. Thus, in order to trace the historical approaches to the principles of public service in the Ukrainian lands, first of all we define the main stages of the formation and development of the institute of the public service of Ukraine, which in turn, are closely related to the periodization of the state of Ukraine.

3. Stages of the formation and development of the public service

It should be noted that, despite a number of scientific developments, there is no single point of view among academics regarding the actual stages of the formation and development of the public service.⁶ Thus, O. Obolensky, linking the history of public service on the territory of Ukraine with "large state formations of the Ukrainian people", considers the following stages of its formation: the medieval feudal state of Kievan Rus (9th-12th centuries), the Galician-Volyn state (XII - XIV centuries), Ukrainian Cossack Republic (mid XVII-XVII centuries) Ukrainian People's Republic and the Ukrainian state (1917-1920).⁷

A. Dombrovskaya based on the results of the analysis of the historical aspect of scientific-theoretical thought on the institute of public service and its structural elements identifies such periods of its formation and development: Stage I - pre-revolutionary period (the end of XVII century - beginning of the twentieth century); Stage II - Soviet period (the 20 - 90s of the twentieth century); Stage III - the period of independence of Ukraine (the 90s of the twentieth century – till present).⁸ At the same time, the author notes that the emergence of the public service can be observed in the oldest state formations on the territory of Ukraine, among them: the medieval feudal state of Kievan Rus (IX - XII centuries), the Galician-Volyn state (XII - XIV centuries), Ukrainian Cossack Republic (mid XVII - XVIII centuries), the Ukrainian

People's Republic and the Ukrainian State (1917 - 1920).⁹

M. Inshyn believes that the public service in its development went through four stages: Stage I - the time from the rise of Kievan Rus to complete fragmentation and stay under authority of Lithuania and Poland (including the historical period of the Galician-Volyn state); Stage II - the period of the Cossack Republic; Stage III - Ukraine within the Soviet Union; Stage IV - the current stage (since Ukraine gained independence).

I. Lavrynychuk identifies four stages of development and formation of the public service: Stage I - the times of the feudal state of Kievan Rus, Stage II - the period of Cossacks, Stage III - the power of monarchist tsarist Russia on the territory of Ukraine, Stage IV - the period of domination of Soviet power.¹⁰

I. Kerdzevadze, having carried out a historical and legal review of the formation and development of the public service of Ukraine, is convinced that during the times of Kievan Rus, the Galician-Volyn state, the Grand Duchy of Lithuania, the Polish-Lithuanian Commonwealth, the administration in the Ukrainian lands within Russian and Austro-Hungarian empires, royal Romania, the public service was identified with the head of state and his close environment. During the time of the Zaporozhian Cossack Army, the Ukrainian People's Republic, the Ukrainian State, the state administration of the Ukrainian SSR and, finally, the public service at the beginning of the establishment of an independent Ukraine, the public service was interpreted as the activity of the administrative system.¹¹

So, only during a selective inspection we can state that the stages of the formation and development of the public service in Ukraine are differentiated by researchers in different ways. At the same time, it is obvious that each of the stages of the formation of public service in the Ukrainian lands had its own influence on the formation of the principles of public service. In particular, from the proposed approaches, we fully share the opinion of I. Kerdzevadze. Therefore, we believe that the meaningful consolidation of the principles of public service in the Ukrainian lands before the proclamation of Ukraine as an independent country should be made with the use of the following differentiation of the stages of the formation and development of the public service: I stage - the period of the Cossack Republic, the second stage - the period of the Ukrainian People's Republic

⁶ INSHYN, M. (2011): History of the emergence, development and formation of public service in Ukraine.

⁷ OBOLENSKY, O. (2003): Public service.

⁸ DOMBROVSKA, O. (2012): On the Formation and Development of the Public Service in the System of Public Administration of Ukraine.

⁹ BILA-TYUNOVA, L. (2010): Service career in the administrative science of the Soviet period (20 - 60's of the twentieth century).

¹⁰ LAVRYNCHUK, I. (1999) Legal status of a public servant as a participant in legal relations.

¹¹ KERDZEVADZE, I. R. (2017): Administrative and Legal Principles of the Public Service of Ukraine.

(the time of the Central Rada), stage III – the period of the Ukrainian State, stage IV – the period of domination of Soviet power (state administration of the USSR).

4. Conclusion

The concept of "principles of public service" in the context of the historical retrospective should be interpreted as an indirect reflection of the normative and legal requirements of the relevant stage of the formation of the public service of Ukraine of the fundamental principles (organizational, legal, functional and other) of the persons authorized to fulfill the state's goals and objectives, implementation of its functions.

In order to examine historical approaches to the principles of public service in the Ukrainian lands, the approaches of scientists are analyzed prior to the identification of the stages of formation and development of the institute of public service of Ukraine. According to the results of the analysis, the absence of a single coherent position in the scientific community prior to such differentiation was confirmed, which in turn was due to the multivariable periodization of the state creation of Ukraine.

To follow the historical approaches to the principles of public service in the Ukrainian lands prior to the proclamation of Ukraine as an independent state, it is necessary to use the following differentiation of the stages of formation and development of the public service: the first stage - the period of the Cossack Republic, the second stage - the period of the Ukrainian People's Republic (the time of the Central Rada), the third stage – the Ukrainian State, stage IV – the period of domination of Soviet power (state administration of the USSR).

A detailed description of the proposed stages of the formation and development of the public service, as well as the determination of the basic principles of the public service, which are important for the use by authorities of the investigated period, will be the subject of further scientific investigations.

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Criminal responsibility for market abuse in European legal framework

Libor Klimek

Abstract

The paper deals with the criminal responsibility for market abuse in European legal framework. It is divided into four sections. The first section focuses contemporary legal framework. The second section analyses criminal responsibility for market abuse. While the third section introduces relevant conducts defined as criminal offences, the last fourth section introduces criminal sanctions.

Key words

Market manipulation, insider dealing, unlawful disclosure of non-public information (unlawful disclosure of inside information), Regulation (EU) No 596/2014 on market abuse

1. Introduction

In the times of globalisation and unification of the global markets, the prohibition of insider dealing can be found on all stock exchange markets. Two big competing markets, the European Union (EU) and the United States of America (USA), are basing their regulations on different premises. Although both of them prohibit insider dealing, the justification of this prohibition and its objectives are different. As far as the EU is concerned, insider dealing is understood as a breach, by a person in possession of inside information who uses it, of a general duty of fairness towards the market and other uninformed market players.¹ Practices in market manipulation may change over time and local regulators may need to deal with different practices on different types of markets. Differences in what Member States of the EU may regard as market manipulation may be susceptible to manipulative arbitrage. Fragmentation may have the potential to undermine the integrity of markets across the EU on the whole.² In the EU the approximation of law was intended to improve the conditions for the establishment and functioning of the internal market. The aim was to prevent the emergence of obstacles to free trade and competition resulting from divergent development of national laws.

¹ SEREDYŃSKA, I. (2012): *Insider Dealing and Criminal Law: Dangerous Liaisons*. Heidelberg – Dordrecht – London – New York: Springer, p. 2.

² CHIU, I. H.-Y. (2008): *Regulatory Convergence in EU Securities Regulation*. Alphen aan den Rijn: Kluwer Law International, p. 116.

The diversity of national laws dealing with economic activities resulted in a need for common rules for all market participants.³

2. Legal framework

The EU is the opinion that a genuine internal market for financial services is crucial for economic growth and job creation. An integrated, efficient and transparent financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.

The principal legislative instrument regulating market abuse at the level of the EU is the *Regulation (EU) No 596/2014 of the European Parliament and of the Council on market abuse*⁴ [hereinafter “Regulation (EU) No 596/2014 on market abuse”]. This Regulation establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation (market abuse) as well as measures to prevent market abuse to ensure the integrity of financial markets in the EU and to enhance investor protection and confidence in those markets.⁵ This Regulation aims at contributing in a determining manner to the proper functioning of the internal market and is based the Treaty on the Functioning of the EU.^{6,7}

³ BÖSE, M. The Connection of Internal Market Law and Criminal Law. In MÜLLER-GRAFF, P.-Ch. et SELVIG, E. (eds.) (2011): *Regulation Strategies in the European Economic Area*. Berlin: Berliner Wissenschafts-Verlag, p. 116.

⁴ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16th April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (as amended by the Regulation (EU) 2016/1033). Official Journal of the European Union, L 173/1, 12th June 2014.

⁵ Article 1 of the Regulation (EU) No 596/2014 on market abuse.

⁶ Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon. Official Journal of the European Union, C 83/47 of 30th March 2010.

⁷ Under Article 114 of the Treaty on the Functioning of the European Union the European Parliament and the Council of the European Union shall adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States of the EU which

The Regulation (EU) No 596/2014 on market abuse applies in particular to:⁸

- financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;
- financial instruments traded on a multilateral trading facility, admitted to trading on a multilateral trading facility or for which a request for admission to trading on a multilateral trading facility has been made;
- financial instruments traded on an organised trading facility;
- financial instruments not covered by abovementioned points, the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference.

Market abuse inhibits the full transparency which is essential for trading in integrated financial markets. The rules outlaw three types of abuse:⁹

- market manipulation,
- insider dealing and
- unlawful disclosure of non-public information¹⁰.

First, *market manipulation* shall mean entering into a transaction or behaviour that gives or is likely to give false or misleading signals as to the supply/demand of a financial instrument or secures or is likely to secure the price of a financial instrument at an abnormal level. It may also consist of a transaction or behaviour by using a fictitious device or other form of deception, disseminating misleading information, transmitting false or misleading information, providing false or misleading inputs, or any action which manipulates the calculation of a benchmark.

Second, *insider dealing* arises where a person uses inside information by transacting, on his own account or for the account of a third party, in a financial instrument to which that inside information relates. Inside information is of a precise nature, which is not public, relating to issuer(s) of financial

have as their object the establishment and functioning of the internal market. Details see: CHALMERS, D. – DAVIES, G. – MONTI, G. (2014): *European Union Law*. 3rd edition. Cambridge: Cambridge University Press, p. 677.

⁸ Article 2(a)(b)(c)(d) of the Regulation (EU) No 596/2014 on market abuse.

⁹ Preventing market abuse in financial markets [online]. Available <<https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32014R0596>> [2019-02-13].

¹⁰ It should be noted that while the Regulation (EU) No 596/2014 on market abuses the wording *unlawful disclosure of non-public information*, the Directive 2014/57/EU on criminal sanctions for market abuse uses the wording *unlawful disclosure of inside information*.

instruments and which, if made public, would have a significant effect on prices.

Third, *unlawful disclosure of non-public information* arises when a person possesses inside information and discloses it to another person (for example, through leaking confidential documents containing inside information), except if the disclosure is made in the normal exercise of an employment, a profession or duties.

Many legal documents regarding the Regulation (EU) No 596/2014 on market abuse have been adopted at the level of the EU. Since the adoption of this Regulation, the European Commission has adopted a series of regulations that supplement or further clarify certain aspects of the regulation. They cover, in particular:

- conditions applicable to buy-back programmes and stabilisation measures – the Regulation (EU) 2016/1052 supplementing the Regulation (EU) No 596/2014 on market abuse with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures¹¹;
- details regarding the insider lists that issuers of financial instruments must draw up – the Regulation (EU) 2016/347 laying down implementing technical standards with regard to the precise format of insider lists and for updating insider lists in accordance with Regulation (EU) No 596/2014 on market abuse¹²;
- rules concerning the notification of suspicious orders or transactions – the Regulation (EU) 2016/378 laying down implementing technical standards with regard to the timing, format and template of the submission of notifications to competent authorities according to the Regulation (EU) No 596/2014 on market abuse¹³ and the Regulation (EU) 2016/957 with regard to regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing,

¹¹ Commission Delegated Regulation (EU) 2016/1052 of 8th March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures. Official Journal of the European Union, L 173/34 of 30th June 2016.

¹² Commission Implementing Regulation (EU) 2016/347 of 10th March 2016 laying down implementing technical standards with regard to the precise format of insider lists and for updating insider lists in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council. Official Journal of the European Union, L 65/49 of 11th March 2016.

¹³ Commission Implementing Regulation (EU) 2016/378 of 11th March 2016 laying down implementing technical standards with regard to the timing, format and template of the submission of notifications to competent authorities according to Regulation (EU) No 596/2014 of the European Parliament and of the Council. Official Journal of the European Union, L 72/1 of 17th March 2016.

- detecting and reporting abusive practices or suspicious orders or transactions¹⁴;
- rules on the presentation of investment recommendations – the Regulation (EU) 2016/958 supplementing the Regulation (EU) No 596/2014 on market abuse with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest¹⁵;
 - rules on market soundings – the Regulation (EU) 2016/959 laying down implementing technical standards for market soundings with regard to the systems and notification templates to be used by disclosing market participants and the format of the records in accordance with the Regulation (EU) No 596/2014 laying down implementing technical standards for market soundings with regard to the systems and notification templates to be used by disclosing market participants and the format of the records in accordance with Regulation (EU) No 596/2014 on market abuse¹⁶ and the Regulation (EU) 2016/960 supplementing Regulation (EU) No 596/2014 on market abuse with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings¹⁷;

- technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information – the Regulation (EU) 2016/1055 laying down implementing technical standards with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information in accordance with the Regulation (EU) No 596/2014 on market abuse¹⁸; and
- procedures and forms for competent authorities exchanging information with the European Securities Market Authority¹⁹ – the Regulation (EU) 2017/1158 laying down implementing technical standards with regards to the procedures and forms for competent authorities exchanging information with the European Securities Market Authority²⁰.

3. Criminal responsibility for market abuse

The introduction by all Member States of the EU of criminal sanctions for at least serious market abuse offences is needed to ensure the effective implementation of EU's policy on fighting market abuse.

The adoption of administrative sanctions by Member States were insufficient to ensure compliance with the rules on preventing and fighting market abuse. The evaluation of the national regimes for administrative sanctions under the Directive 2003/6/EC on insider dealing and market manipulation, replaced and repealed by the Regulation (EU) No 596/2014 on market abuse, showed that not all national competent authorities had a full set of powers at their disposal to ensure that they could respond to market abuse with the appropriate

¹⁴ Commission Delegated Regulation (EU) 2016/957 of 9th March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions. Official Journal of the European Union, L 160/1 of 17th June 2016.

¹⁵ Commission Delegated Regulation (EU) 2016/958 of 9th March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest. Official Journal of the European Union, L 160/15 of 17th June 2016.

¹⁶ Commission Implementing Regulation (EU) 2016/959 of 17th May 2016 laying down implementing technical standards for market soundings with regard to the systems and notification templates to be used by disclosing market participants and the format of the records in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council. Official Journal of the European Union, L 160/23 of 17th June 2016.

¹⁷ Commission Delegated Regulation (EU) 2016/960 of 17th May 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the appropriate arrangements, systems and procedures for disclosing market

participants conducting market soundings. Official Journal of the European Union, L 160/29 of 17th June 2016.

¹⁸ Commission Implementing Regulation (EU) 2016/1055 of 29th June 2016 laying down implementing technical standards with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council. Official Journal of the European Union, L 173/47 of 30th June 2016.

¹⁹ The European Securities Market Authority (known as ESMA) is an independent EU Authority that contributes to safeguarding the stability of the EU's financial system by enhancing the protection of investors and promoting stable and orderly financial markets. See: <<https://www.esma.europa.eu>>.

²⁰ Commission Implementing Regulation (EU) 2017/1158 of 29th June 2017 laying down implementing technical standards with regards to the procedures and forms for competent authorities exchanging information with the European Securities Market Authority as referred to in Article 33 of Regulation (EU) No 596/2014 of the European Parliament and of the Council. Official Journal of the European Union, L 167/22 of 30th June 2017.

sanction.²¹ Moreover, the report introduced by the High-Level Group on Financial Supervision in the EU (de Larosière Group) of 2009 recommended that a sound prudential and conduct of business framework for the financial sector must rest on strong supervisory and sanctioning regimes. The Group concluded that Member States' sanctioning regimes are in general weak and heterogeneous.²²

Not all Member States of the EU have provided for criminal sanctions for some forms of serious breaches of national law on market abuse. Different approaches by Member States undermine the uniformity of conditions of operation in the internal market and may provide an incentive for persons to carry out market abuse in Member States which do not provide for criminal sanctions for those offences.

At the EU level the leading legislative measure harmonising criminal sanctions for market manipulation addressed for Member States is the *Directive 2014/57/EU on criminal sanctions for market abuse*²³. This Directive establishes minimum rules for criminal sanctions for *market manipulation*, for *insider dealing* and for *unlawful disclosure of inside information* and to ensure the integrity of financial markets in the EU and to enhance investor protection and confidence in those markets.²⁴ It should be applied taking into account the system established by the Regulation (EU) No 596/2014 on market abuse.

4. Relevant conducts defined as criminal offences

The Directive 2014/57/EU on criminal sanctions for market abuse regulates three criminal offences, namely:

- market manipulation,
- insider dealing and
- unlawful disclosure of inside information²⁵.

First, as far as *market manipulation* is concerned, Member States of the EU are obliged to take the necessary measures to ensure that constitutes a criminal offence at least in serious cases and when

committed *intentionally*.²⁶ Market manipulation shall comprise the following activities:

- entering into a transaction, placing an order to trade or any other behaviour which: (i) gives false or misleading signals as to the supply of, demand for, or price of, a financial instrument or a related spot commodity contract; or (ii) secures the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level; unless the reasons for so doing of the person who entered into the transactions or issued the orders to trade are legitimate, and those transactions or orders to trade are in conformity with accepted market practices on the trading venue concerned;
- entering into a transaction, placing an order to trade or any other activity or behaviour which affects the price of one or several financial instruments or a related spot commodity contract, which employs a fictitious device or any other form of deception or contrivance;
- disseminating information through the media, including the internet, or by any other means, which gives false or misleading signals as to the supply of, demand for, or price of a financial instrument, or a related spot commodity contract, or secures the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level, where the persons who made the dissemination derive for themselves or for another person an advantage or profit from the dissemination of the information in question; or
- transmitting false or misleading information or providing false or misleading inputs or any other behaviour which manipulates the calculation of a benchmark.

Market manipulation should be deemed to be *serious* in cases such as those where the impact on the integrity of the market, the actual or potential profit derived or loss avoided, the level of damage caused to the market, the level of alteration of the value of the financial instrument or spot commodity contract, or the amount of funds originally used is high or where the manipulation is committed by a person employed or working in the financial sector or in a supervisory or regulatory authority.²⁷

Second, as regards *insider dealing*, the Member States of the EU shall ensure that, recommending or inducing another person to engage in insider dealing, constitute criminal offences at least in serious cases and when committed *intentionally*.²⁸ For the purposes of this Directive, insider dealing

²¹ Report on Administrative Measures and Sanctions as well as the Criminal Sanctions available in Member States under the Market Abuse Directive (MAD). Committee of European Securities Regulators, Paris, 2007.

²² Report of the High-Level Group on Financial Supervision in the European Union. Brussels, 2009.

²³ Directive 2014/57/EU of the European Parliament and of the Council of 16th April 2014 on criminal sanctions for market abuse (market abuse directive). Official Journal of the European Union, L 173/179 of 12th June 2014.

²⁴ Article 1(1) of the Directive 2014/57/EU on criminal sanctions for market abuse.

²⁵ It should be noted that while the Regulation (EU) No 596/2014 on market abuses the wording *unlawful disclosure of non-public information*, the Directive 2014/57/EU on criminal sanctions for market abuse uses the wording *unlawful disclosure of inside information*.

²⁶ Article 5(1) of the Directive 2014/57/EU on criminal sanctions for market abuse.

²⁷ Recital 11 of the Preamble to the Directive 2014/57/EU on criminal sanctions for market abuse.

²⁸ Article 3(1) of the Directive 2014/57/EU on criminal sanctions for market abuse.

arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. This obligation applies to any person who possesses inside information as a result of:

- being a member of the administrative, management or supervisory bodies of the issuer or emission allowance market participant;
- having a holding in the capital of the issuer or emission allowance market participant;
- having access to the information through the exercise of an employment, profession or duties; or
- being involved in criminal activities.

The use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information shall also be considered to be insider dealing.

Recommending that another person engage in insider dealing, or inducing another person to engage in insider dealing, arises where the person possesses inside information and:

- recommends, on the basis of that information, that another person acquire or dispose of financial instruments to which that information relates, or induces that person to make such an acquisition or disposal; or
- recommends, on the basis of that information, that another person cancel or amend an order concerning a financial instrument to which that information relates or induces that person to make such a cancellation or amendment.

Third, as regards *unlawful disclosure of inside information*, Member States of the EU shall take the necessary measures to ensure that it constitutes a criminal offence at least in serious cases and when committed *intentionally*.²⁹ Unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties, including where the disclosure qualifies as a market sounding made in compliance with the Regulation (EU) No 596/2014 on market abuse. In this case the onward disclosure of recommendations or inducements amounts to unlawful disclosure of inside information where the person disclosing the recommendation or inducement knows that it was based on inside information.

²⁹ Article 4(1) of the Directive 2014/57/EU on criminal sanctions for market abuse.

5. Criminal sanctions

The Directive 2014/57/EU on criminal sanctions for market abuse obliges Member States of the EU that they shall take the necessary measures to ensure that above mentioned offences are punishable by *effective, proportionate and dissuasive criminal penalties*.³⁰ The Directive does not define these requirements, however, *effectiveness* requires that the sanction is suitable to achieve the desired goal, i.e. observance of the rules; *proportionality* requires that the sanction must be commensurate with the gravity of the conduct and its effects and must not exceed what is necessary to achieve the aim; and *dissuasiveness* requires that the sanctions constitute an adequate deterrent for potential future perpetrators.³¹

Member States shall take the necessary measures to ensure that market manipulation and insider dealing are punishable by a maximum term of imprisonment of at least four years; unlawful disclosure of inside information by a maximum term of imprisonment of *at least two years*.

In order to ensure effective implementation of the European policy for ensuring the integrity of the financial markets set out in the Regulation (EU) No 596/2014 on market abuse, Member States should extend liability for the offences provided for in the Directive 2014/57/EU on criminal sanctions for market abuse to legal persons through the imposition of criminal or non-criminal sanctions or other measures which are effective, proportionate and dissuasive. Such sanctions or other measures may include the publication of a final decision on a sanction, including the identity of the liable legal person, taking into account fundamental rights, the principle of proportionality and the risks to the stability of financial markets and ongoing investigations.

The Directive 2014/57/EU on criminal sanctions for market abuse stipulates that Member States of the EU shall ensure that legal persons can be held liable for above mentioned offences committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person based on a power of representation of the legal person; an authority to take decisions on behalf of the legal person; or an authority to exercise control within the legal person. Moreover, legal persons can be held liable where the lack of supervision or control, by a referred person, has made possible the commission of above mentioned offence for the benefit of the legal person by a person under its authority.

³⁰ Article 7(1) of the Directive 2014/57/EU on criminal sanctions for market abuse.

³¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law. European Commission, 2011, COM(2011) 573 final, p. 9.

Liability of legal persons does not exclude criminal proceedings against natural persons who are involved as perpetrators, inciters or accessories in the offences.

As regards sanctions for legal persons, Member States of the EU shall ensure that a legal person held liable is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:³²

- exclusion from entitlement to public benefits or aid;
- temporary or permanent disqualification from the practice of commercial activities;
- placing under judicial supervision;
- judicial winding-up;
- temporary or permanent closure of establishments which have been used for committing the offence.

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³² Article 9(a)(b)(c)(d)(e) of the Directive 2014/57/EU on criminal sanctions for market abuse.

The GDPR and the Scientific Research

Jerzy Leśko

Abstract

Personal data represent a key part in scientific research. The Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General data protection regulation (GDPR)) strengthens and harmonises the rules for protecting individuals' privacy rights and freedoms. The present article aims to provide an overview in situations where scientific research include the processing of personal data (also genetic data or biometric data).

Key words

GDPR, EU, Research

1. Introduction

The European Union (EU) adopted the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [general data protection regulation (GDPR)], repealing the previous Data Protection Directive 95/46/EC of 1995. The EU reaffirms its aim in regards to the protection of fundamental rights and freedoms including fundamental right enshrined in the Charter of the Fundamental Rights of the EU and the EU primary law.¹ The goal of the GDPR is to create legal certainty and sustainability of the data protection measures. In comparison to the Directive of 1995, the GDPR introduces some new individual rights and procedures. The GDPR differentiates between different types of personal data by regulating the processing² of special categories of data (sensitive personal data such as health, genetic and biometric data) as stated in Article 9 GRPR. In comparison to this, Article 4 of the GDPR states that personal data means any information

¹ Article 8, Charter of Fundamental Rights of the European Union and Article 16, Treaty on the Functioning of the European Union.

² Processing means any operation or a set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction. See Article 4 (2) of the GDPR.

relating to an identified or identifiable natural person (data subject). An identifiable natural person is one who can be identified directly or indirectly, in particular, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

2. Personal data processing for scientific research purposes

The GDPR maintains the approach of the previous Directive of 1995 in regards to principles of personal data processing, also in research and for archiving purposes in the public interest (regardless of the kind of personal data). On the other hand, the GDPR introduces some new general principles. According to Article 6 of the GDPR, personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject; collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed; accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate are erased or rectified without delay; kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed (storage limitation).

The GDPR completes those principles by adding two additional principles in its Article 6 (which existed under the previous Directive of 1995). The first principle is about respect of the data integrity and of their confidentiality (data have to be processed in a manner that ensures their appropriate security, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures).³ The second principle is the accountability principle, according to which the controller shall be

³ These "appropriate technical and organisational measures" may include technical safeguards against accidents and negligence or deliberate and malevolent actions, or involve the implementation of data protection policies. The scope and range of the GDPR's technical and organisational measures is large, such as vulnerability scans and risk management, through to firewalls, enforcing strong passwords and third-party due diligence.

responsible for, and be able to demonstrate compliance with the general principles of data processing. This means that the controller and the processors maintain secured records of any data processing activities performed under their responsibility in order to be able to demonstrate compliance with the GDPR. In research, such records can constitute archives to be retained for a certain period of time according to applicable law. The GDPR details the minimal information to be preserved within such records in its Article 30.

Another principle is the principles of 'data protection by design and by default' as laid down in Article 25 of the GDPR. While data protection by design is an approach that ensures to consider privacy and data protection issues at the design phase of any system, service, product or process and then throughout the lifecycle, data protection by default requires to ensure that only the data that are necessary to achieve specific purpose will be processed. Under Article 25 of the GDPR a data controller⁴ is required to implement appropriate technical and organisational measures both at the time of determination of the means for processing and at the time of the processing itself in order to ensure data protection principles such as data minimisation are met (such measures may include, for example, pseudonymisation).⁵ The data controller will need to ensure that, by default, only personal data which is necessary for each specific purpose of the processing is processed (practically, when creating a social media profile, privacy settings should, by default, be set on the most privacy-friendly setting). The by-default principle has the specificity that the system alone should ensure sufficient protection without any human action. An approved certification mechanism in accordance with Article 42 of the GDPR may be used as an element to demonstrate compliance with this requirement.

According to Article 9 GDPR letter j) the processing of personal sensitive data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall be necessary, for the benefit of natural persons and society as a whole, and based on Union or Member State law 'which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the

⁴ 'Controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.

⁵ 'Pseudonymisation' means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person.

fundamental rights and the interests of the data subject.' The data controller shall respect the new Article 89 (1) of the GDPR requiring both sufficient and adequate technical and organisational measures ensuring data protection and to respect the data minimisation.⁶

3. Legal definitions in scientific research

In the GDPR the EU legislator has designed several definitions in regards to scientific research.⁷ In particular, the GDPR introduces some new definitions in Articles 9 and 89 of the GDPR.

- *Data concerning health* means data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject. This includes information about the natural person collected in the course of the registration for, or the provision of, health care services as referred to in Directive 2011/24/EU of the European Parliament and of the Council (9) to that natural person; a number, symbol or particular assigned to a natural person to uniquely identify the natural person for health purposes; information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples; and any information on, for example, a disease, disability, disease risk, medical history, clinical treatment or the physiological or biomedical state of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test (Recital 35 of the GDPR),
- *Genetic data* means personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the

⁶ Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, shall be subject to appropriate safeguards, in accordance with this Regulation, for the rights and freedoms of the data subject. Those safeguards shall ensure that technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation. Those measures may include pseudonymisation provided that those purposes can be fulfilled in that manner. Where those purposes can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner.

⁷ BHATIA, P. (2017): Be Ready for GDPR: Let us check your readiness for General Data Protection Regulation (GDPR).

natural person in question (Article 4 (13) of the GDPR). Genetic data should be defined as personal data relating to the inherited or acquired genetic characteristics of a natural person which result from the analysis of a biological sample from the natural person in question, in particular chromosomal, deoxyribonucleic acid (DNA) or ribonucleic acid (RNA) analysis, or from the analysis of another element enabling equivalent information to be obtained (Recital 34 of the GDPR),

- *Biometric data* means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data (Article 4 (14) of the GDPR).

4. Important procedures in scientific research

The GDPR established a risk-based approach. The data protection officer (DPO), designated by the data controller is of high importance. According to Article 37 of the GDPR, designating a DPO is mandatory where the processing is carried out by a public authority or body, except for courts acting in their judicial capacities, or where the core activities of the controller or the processor consist of either processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of data subjects on a large scale; or where the processing concerns sensitive personal data and is on a large scale. On the other hand, the GDPR does not speak about when a processing shall be considered as a processing on a large scale. Recital 91 of the GDPR, in regards to the data protection impact assessment (DPIA) refers to large-scale processing operations which aim to process a considerable amount of personal data at regional, national or supranational level and which could affect a large number of data subjects. Recital 91 of the GDPR also states that processing of personal data should not be considered to be on a large scale if the processing concerns personal data from patients or clients by an individual physician, other should have sufficient skills to perform its tasks as per the Article 39 of the GDPR. The DPO will have to cooperate with the national data protection authority (NDPA) as a special contact point (supervisory authority). In this regard, the data controller and the processor will have to consult the DPO in the decision-making process regarding data protection issues. As stipulated in Article 38 of the GDPR, the DPO shall have necessary means to perform its tasks independently, without receiving any instructions from the controller or processor. The DPO shall report to the highest management level in the company.

4.1. The data protection impact assessment (DPIA)

According to Article 35 of the GDPR the DPIA is a new self-assessment exercise as a part of the ethics assessment.⁸ The DPIA concretises the risk-based approach of the GDPR. The aim of the DPIA is to describe the likelihood and severity of the risk regarding data subjects' rights and freedoms. According to Article 35 (7) of the GDPR, the assessment shall contain at least: a systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller; an assessment of the necessity and proportionality of the processing operations in relation to the purposes; an assessment of the risks to the rights and freedoms of data subjects [...]; and the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation considering the rights and legitimate interests of data subjects and other persons have to be recorded and made available to the authorities in accordance with the accountability principle.

4.2. Reuse of personal data for research purposes

As stated in Article 5 of the GDPR the processing of personal data for purposes other than those for which the personal data were initially collected should only be allowed where the new purpose of the processing is compatible with the purposes for which the personal data were initially collected. The presumption of compatibility with the initial purposes of the processing advanced at the time of the first collection is related to the specific exemption in line with the principle of storage minimisation (the further processing is for research or archiving purposes in the public interest). According to Article 89 (1) and Recital 156 of the GDPR, this further processing is to be carried out when the controller has assessed the feasibility to fulfil those purposes by processing data which do not permit or no longer permit the identification of data subjects (pseudonymisation), and provided that appropriate safeguards exist. In other cases where the processing for another purpose is not based on the data subject's unambiguous consent the controller shall perform a purpose compatibility test. According to Article 6 (4) of the GDPR, the controller who wants to reuse the data will have to consider, any link between the purposes for which the personal data have been collected and the purposes of the intended further processing; the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;

⁸ LINDER, A. (2016): European Data Protection Law: General Data Protection Regulation.

the nature of the personal data, in particular whether special categories of personal data are processed.

4.3. Notification of personal data breach

A personal data breach may result in physical, material or non-material damage to natural persons (e.g. loss of control over personal data or limitation of rights, discrimination, identity theft or fraud, damage to reputation, loss of confidentiality of personal data protected by professional secrecy). In this regard the GDPR established stricter notification rules for the controller and the processor.⁹ As soon as a breach has been noticed the processor shall notify the controller without undue delay. According to Article 33 of the GDPR, whatever the nature, scope and context of the breach, the controller shall, as soon as he/she becomes aware that a personal data breach has occurred, notify the personal data breach to the supervisory authority without undue delay and, where feasible, not later than 72 hours after having become aware of it, unless the controller is able to demonstrate, in accordance with the accountability principle, that the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. If such notification cannot be achieved within this time frame, the reasons for the delay should accompany the notification and information may be provided in phases without undue delay. Without prejudice to the previous obligation, in application of Article 34 of the GDPR, only when the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall communicate the personal data breach to the data subject without undue delay. In this regard there are a number of exceptions, e.g. where the controller has implemented appropriate technical and organisational protection measures.

5. The research participants' rights

The GDPR provides new provisions specifying the application of the data subjects' rights in the specific context of archiving in the public interest and scientific historical or statistical research (Article 89 of the GDPR). Data subjects should be allowed to give their consent to certain areas of scientific research. Data subjects should have the opportunity to give The data subjects' consent can be done for one or more specified purposes.

6. Exemptions regarding other data subjects' rights

Research data subjects, have many rights allowing them to maintain a certain degree of control over their personal data. The GDPR fixes new important rights such as the right to be forgotten or the right to data portability. They could not apply in the field of research, if the EU or member States laws provides,

⁹ MARKHAM, K. (2018): A Practical Guide to the General Data Protection Regulation (GDPR).

under certain conditions, legitimate exceptions, as it is stated under Article 89 of the GDPR. This is due to an absence of conferred competency to the EU to harmonise legislations in the field of health and scientific research.¹⁰ Member States should provide for appropriate safeguards for the processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes.

7. Conclusion

For the first time, the GDPR refers to the respect of ethical standards. The GDPR opens new possibilities regarding the data sharing in scientific research. While the GDPR adopts new specific provisions to ensure data protection¹¹ in research, the field remains widely regulated at national level.

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¹⁰ VOIGT, P. (2017): The EU General Data Protection Regulation (GDPR): A Practical Guide.

¹¹ CAREY, P. (2018): Data Protection: A Practical Guide to UK and EU Law.

Common Foreign and Security Policy of the EU: towards resilience?

Carlo Pascucci

Abstract

The Common Foreign and Security Policy (CFSP) of the European Union (EU) is alive. There is an increase in conceptual and practical activity in the Common Security and Defense Policy (CSDP) as a contractually anchored area of CFSP. From the defense market development to the fight against terrorism to the military planning and leadership capability, there is a clear desire for reform. This testifies dynamism of integration that is accelerated by a "Europe of different speeds". But how is the renaissance of the CFSP to be explained? And, which legal and political dynamics contribute to its revival?

Key words

CFSP, CSDP, EU, Reform

1. Introduction

The new CFSP¹ is fundamentally different from its predecessor. In its Global Strategy of June 2016, the EU acknowledges that it can not deliver on its high level of transformational aspirations as set out in the Lisbon Treaty: until further notice, Europe has limited ability to stabilize its international environment. Instead, resilience became the central concept of strategy. In general, this refers to resistance and regeneration capability as well as crisis resistance. The concept takes into account the view that the international environment can hardly be designed in accordance with the high ambitions laid down in Article 21 (2) TEU. In view of this, it should enable the EU to preserve its values in an increasingly confusing environment while pursuing its interests.

Building resilience has an external and an internal dimension. The emerging Security and Defense Union will rest on three pillars, namely Security Union, Defense Union and EU-NATO Cooperation. Although it is functionally and regionally variable, political power is concentrated and institutionalized in the CFSP. Classic fields of domestic politics such as cybersecurity, migration policy, but also the fight against terrorism become fields in the CFSP. At the same time, the CFSP and external action of the EU are becoming more and more legalized, in contrast to national foreign and security policy.

¹ ALLEN, D. (2012): Common foreign and security policy.

The European legal community itself will also be more resilient to the political actions of Member States that contradict the fundamental values of the EU.² The European Court of Justice (ECJ) actively supports this process. The Bresso Brok Report of February 2017 describes how further integration is possible. With the UK's exit from the EU, even a treaty change will be realistic again, as stated in the July 2016 Verhofstadt report. However, administrative reforms and project-based integration progress do not eliminate the strategic disagreement between Member States. Reforms would be needed in four areas:

First, a European White Paper on security and defense would provide strategic clarity and facilitate democratic feedback.

Second, the offices of the Commission President and the High Representative for Foreign and Security Policy of the EU should be merged. The merger would include all CFSP agencies and foreign, security and defense policy areas. In the event of a treaty³ change, the ECJ should have a contractually anchored role in external action and CFSP issues.

Third, in the decision-making process, the principle of unanimity should be replaced by majority voting. Alternatively, enhanced cooperation under Article 20 TEU could be implemented.

Fourth, the new CFSP should be subject to parliamentary scrutiny, preferably through the Conference of Community and European Affairs Committees of EU Member States Parliaments (COSAC).

2. The paradigm: transformation

The common foreign and security policy of the EU does not seem to be lost when the preferences of the Member States faltered in the course of the eastward enlargement. Obviously, it lives in the coalitions of the willing outside the official CFSP decision-making process. It was even further developed in the 2009 Lisbon Treaty and now covers all areas of foreign and security policy (Article 24 (1) TEU). According to Article 42 (1) TEU, the Common Security and Defense Policy (CSDP) is an integral part of the CFSP

² HUFELD, U. - EPINEY, A. (2008): Europäisches Verfassungsrecht.

³ MÜLLER-GRAFF, P. Ch. (2008): Der Vertrag von Lissabon.

and can draw on Member States' civilian and military capabilities for the entire crisis cycle from crisis prevention to post-conflict rehabilitation. Many EU external trade instruments - such as accession negotiations, the European Neighborhood Policy, trade with other countries and development policy - are within the scope of the European Commission. In the words of former Commission President Barroso, the EU has long been understood as a "non-imperial power" committed to transforming its international environment. This understanding of the EU as a "power of transformation" was expressed in different variants. They were based on legal provisions in the Treaty of Lisbon or individual EU policies.

Nevertheless, the EU's transformational approach can be considered as largely failed. It has failed to influence the European neighborhood with regard to conflict settlement in such a way as to effectively contain the consequences of the sometimes catastrophic developments in the countries of Africa or the Middle East and thereby prevent larger migration flows. Every day hundreds of migrants try to escape the poverty and lack of prospects in their home countries. Despite all measures to promote democracy and the rule of law as well as the conditionality policies, the balance sheet of the European Neighborhood Policy remains negative. There are several reasons why the EU's transformative approach can only be implemented to a limited extent. Of these, only a few are executed here:

First, the pursuit of a normative policy is always associated with an EU claim to power over other regional organizations and economic blocs. However, the Member States are primarily interested in security and wealth maximization. Therefore, these factors mainly determine the actions of EU countries. But because all states are allowed to have their say, and each of them has the power to appeal, the EU's external action and CFSP are little more than the expression of the "lowest common denominator" of diverging interests.

Second, the balance of CFSP/CSDP missions and operations is mixed. It is obvious that the EU can only assume crisis management tasks if the Member States provide these capabilities. These are procured in a coordinated manner and made available to the EU as needed.

Third, the main purpose of the CSDP (Articles 42 to 46 TEU) as an integral part of the CFSP is to ensure "Union operational capability based on civilian and military capabilities".⁴ However, this capability can only be used by the EU for missions outside its territory, and only for the purposes of peacekeeping, conflict prevention and strengthening international security in accordance with the principles of the UN Charter.

⁴ OPPERMANN, T. - CLASSEN, C. D. - NETTESHEIM, M. (2011): *Europarecht*.

Fourth, as far as the fight against hybrid threats is concerned, the EU has scant results. This type of threat is characterized by a mixture of coercion and infiltration as well as conventional and unconventional methods by state and non-state actors, without exceeding the threshold for an officially declared war. While EU policy dialogues with third countries have been extended to cybersecurity issues, they have been inconclusive.

The overall meager record of transformative foreign policy has been instrumental in raising the profile of a strategic reorientation of the CFSP.

3. The new paradigm: resilience

At the end of June 2016, the EU adopted a new Global Strategy for EU Foreign and Security Policy, redefining the normative framework of the Common Foreign and Security Policy. A Stronger Europe, building of resilience, a resilience of the EU against internal and external threats, is the overall goal. The legally non-binding document has replaced the 2003 European Security Strategy. The term resilience refers to a »resistance and regeneration capacity« as well as »crisis resistance« in disaster and other challenging situations. The Global Strategy places high demands on the resilience of EU Member States and neighboring countries. According to the European Commission, one of the key elements is "to promote peace and to guarantee the security of the EU and its citizens, as internal security depends on peace beyond the EU's external borders". The new Union strategy sees resilience as a comprehensive concept of internal and external security, involving "all individuals and the whole of society." From this perspective, a resilient society must be democratic, based on trust in state institutions and sustainable development. According to the Global Strategy, this requires an integrated approach that involves all relevant stakeholders and adequately speaks of »social resilience. The new paradigm of resilience puts a preserving foreign and security policy in the foreground. A resilient Union in the sense of the Global Strategy is characterized by two aspects: on the one hand, the idea of being able to avert external risks and dangers and, on the other hand, the ability to act as a stabilizer in the EU's neighbors.

The external understanding of resilience differentiates between domestic and foreign policy. Therefore, the term resilience refers exclusively to security-related issues and refers to the ability to withstand attacks and external challenges. These include cyberattacks on critical infrastructures of member state or European institutions, natural and environmental disasters, uncontrolled migration movements or terrorist attacks.

The internal understanding of resilience does not distinguish between domestic and foreign policy nor between security-related and other challenges for the EU and its binding legal acts (acquis). Resilience covers all actions that direct individuals and

institutions against the legal *acquis* of the Union. In addition to open attacks, this includes all violations of European Member States or other legal entities against European law.⁵

4. The Security and Defense Union

Building European resilience against internal and external challenges requires a close coexistence of legal and political initiatives. Out of the perceived need to create resilience, political activism has declared itself to be implementing the EU's Global Strategy since July 2016. One result is the planned creation of a Security and Defense Union, which is responsible for the CFSP structures, including the High EU Foreign and Security Policy and Vice-President. The idea of a security and defense union is not new, but in the past mainly concerned the external dimension of security. Today it combines internal and external security policies and also close cooperation between the EU and NATO.

Defense Union and Security Union have so far been clearly separated by treaty. The Security Union project is a major initiative promoted by the European Commission, with a primary focus on issues of domestic and judicial policy, but also with the aim of strengthening the link between internal and external security. The Defense Union, on the other hand, is a political project of foreign and defense ministers. This formal separation is broken in cyber security policy and migration policy. These policies form interfaces between the major projects of internal and external security and of domestic, foreign and defense policy in the European multi-level system. The Union should develop enhanced resilience, i.e. the ability to better respond to terrorist attacks, illegal migration, cyberspace changes and hybrid threats. In order to fulfill this claim, the integrated approach, i.e. the coherent use of military, civilian and economic instruments, should serve as well as the stronger networking of internal and external security.

4.1. Security Union

The Security Union has its origins in the concept of "Area of Freedom, Security and Justice". It is being implemented through the Tampere (1999-2004), the Hague (2005-2009) and Stockholm (2010-2015) programs. It is contractually anchored in Article 3 (2) TEU. The European Commission program and the restructuring of the European Commission, however, continue. From the outset, the European Commission goal was to strengthen internal and external security, internal and external policies. Following the attack on the French satirical magazine *Charlie Hebdo*, the European Commission presented the European Agenda on Security in April 2015. Organized crime,

terrorism and cybercrime are cross-border challenges that constitute a common European task and substantiate deeper European cooperation in the context of a European Agenda on Security. A year later, in response to the terrorist attacks in Brussels in March 2016, the European Commission announced plans to build a security union. Legally, it is essentially based on Article 67 TFEU, taking into account Article 4 (2) TEU and Article 72 TFEU. Thus, the EU creates "an area of freedom, security and justice", also known as the Schengen area. By 2020, the interoperability of information systems in the areas of security, border management and migration management has to be achieved. This is to ensure that Border Guard and law enforcement officers, including customs officers, immigration and justice officials, have the information they need. Furthermore, the European Commission is examining whether US Internet companies are adhering to the agreed code for deleting hate comments and how the network economy generally deals with illegal content. All four areas of the Security Union - counter-terrorism, organized crime, cybersecurity and information sharing - show a high degree of overlap of internal and external security. This explains the growing support for European security cooperation and the institutional and political merger of the legally separate major security and defense union projects at EU level.

4.2. Defense Union

The Security and Defense Union is widely accepted, even in the European Parliament. In addition, European Commission President Juncker formulated a clear timetable in September 2017. By 2025, a "functioning European Defense Union" must be a reality. At the end of June 2017, the European Commission proposed to establish a European Defense Fund to enable joint investment in research and development. The fund is intended to promote joint research on defense technologies, such as electronics, encrypted software or robotics.

4.3. EU-NATO cooperation

European security is not only based on greater networking of internal and external security in the EU, but is also an essential field of activity within NATO. According to a framework agreement of March 2003 (Berlin Plus Agreement), the EU may use the resources and capabilities of NATO in military operations. The Joint Declarations of the two organizations in July and December 2016 also reflect the guiding principle of the Global Strategy that the area of the Union can be effectively defended only through close cooperation between the EU and NATO. Another factor in favor of EU-NATO cooperation is that the CSDP is solely external, territorial defense is not envisaged, and that EU deployment is

⁵ BORCHARDT, K. D. (2002): Die Rechtlichen Grundlagen der Europäischen Union.

contractually excluded. Nevertheless, national defense is a core task for NATO as a defense alliance.⁶

4.4. Cyber security

Cyber attacks on states and critical infrastructures have long been a reality. The quantity and quality of such attacks are growing steadily. The cyber and information space knows neither national borders nor an institutional structure. Cybersecurity policy is a shared competence between Member States and the EU level. In August 2016, the Directive "on measures to ensure a high common level of security of network and information systems in the Union" (NIS Directive) entered into force. EU cybersecurity policy is based not only on the NIS Directive, but also on the 2013 cybersecurity strategy and the 2015 Digital Single Market Strategy. It also builds on recent communications on the implementation of the 2015 European Agenda on Security and on countering hybrid threats from 2016.

The EU's revised cybersecurity strategy took into account initiatives in internal and external security as well as the developments in data security in the Digital Single Market. All these initiatives point in the right direction, as the CFSP, the EEAS and the High Representative for Foreign Affairs and Security Policy, as well as the European Commission, are designated as the level at which Member State security and defense should be developed. The cybersecurity of the EU also needs to develop the role of the EEAS and the civilian instruments of cyber-diplomacy - confidence- and security-building measures - as well as the Cyber Diplomacy Toolbox of 2016. This sanction catalog allows the EU to take political, financial and legal action. to respond appropriately to those cyberattacks that are legally below the threshold of armed conflict. This concerns technical attribution, international issues as well as confidence-building measures in the United Nations Group of Governmental Experts (GGE), in the OSCE and in the G20.

4.5. Migration

The refugee crisis has made it all too clear that there is hardly any solidarity between the Member States of the EU. In May 2015, the European Commission presented its Agenda for Migration. Since then, there have been several legislative acts by the European Commission to find a European response to the refugee crisis. All Member States agree that a long-term solution will only be achieved if the living conditions in the countries of origin are improved. To this end, the European Commission and Member States agreed on a "New European Consensus on Development". In the mid/long term, a European response to the refugee crisis should consist of more effective external border controls and improved

cooperation with the transit countries. On the other hand, a Europe-wide quota solution or even immigration policy is sought. However, this will only be possible if the Member States postpone national egoisms or, if appropriate, the ECJ to co-operate.

The EU draws on three main CFSP activities related to refugee policy and is also involved in the foreign and security policy offensive with the EU Border Assistance Mission Libya (EUBAM Libya), the work of the Planning and Liaison Cell (EUPLC) and Operation EUNAVFOR MED. Since 2015, the EU and NATO have adopted a series of "military crisis management measures" to combat people smuggling and trafficking networks. There is also evidence of increased EU cooperation with the AU and other countries of origin and transit in Africa. All of this points to a strategic understanding of the EU, not based on the transformation of countries of origin and the fight against migration, but rather on security.

Border management, migration policy and counterterrorism have become fields of action of the CFSP/CSDP.⁷ However, they are not deprived of control by the European Court of Justice if EU citizens are suing European Union legislation. Even third-country nationals have the opportunity to exercise their rights. The separation between CFSP on the one hand and the legal community on the other is likely to become obsolete in the foreseeable future.

5. The role of the ECJ

The ECJ plays an important role in building legal policy resilience. Essentially, this is about the shaping of the European legal area in order to cooperatively design and realize a common order in Europe. According to Article 275 of the TEU, the European Court of Justice is only partially responsible for the CFSP. According to its constitutional mandate (Article 19 (1) TEU, 263 (TFEU)), the ECJ has to review the actions of the political institutions on the basis of the legal system. The EU institutions are not deprived of the EU's external action in legal protection-related constellations of judicial control. The ECJ has emphasized that the review by the Court of the validity of any act of the Community with regard to fundamental rights should be regarded as an expression of a constitutional guarantee in a community of law.

6. The reform prospects

The idea of the democratic transformation of the European neighborhood and the goal of further integration of all member states take a back seat. Instead, the EU is focusing on increasing its resilience to external threats and developing new flexible forms of cooperation of concentrated integration. At the same time, the EU is quite ready to move forward in

⁶ CRAIG, P. - de BURCA, G. (2003): EU Law, Text, Cases and Materials.

⁷ CRAIG, P. - de BURCA G. (2008): EU law: text, cases, and materials.

individual policy areas with a limited number of Member States, unless comprehensive consensus can be found. The envisaged Security and Defense Union is built on three pillars: the Security Union, the Defense Union and EU-NATO cooperation. It aims to increase the EU's resilience to external and internal risks and challenges. Although it is functional and regionally flexible, it does lead to the concentration of political power in the CFSP. In the Security and Defense Union, fields of domestic politics such as cybersecurity or migration policy are transformed into fields of action of the CFSP. The more the fields of action of foreign and security policy expand, the more the CFSP opens up to the ECJ's entitlement to legal proceedings. At the same time, the separation between legalized domestic and justice policies and "political" foreign and security policy in key areas such as the fight against terrorism, the fight against organized crime, border management and cybersecurity is on increase.

The EU's Global Strategy in regards to Foreign Affairs and Security Policy leaves sufficient scope for an inclusive process in which a European White Paper on security and defense can be prepared. In the medium term, Britain's exit from the EU also opens up opportunities for EU treaty reforms that could bring about the necessary changes in primary rights.

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Legal regulation of quality and safety of drinking water in the EU and Ukraine

Vitalii Vitiv

Abstract

The article is devoted to the study of the mechanism of legal regulation of ensuring the right to qualitative drinking water. The author conducted a comparative analysis of Directive 98/83/EC and the system of normative legal regulation of the quality and safety of drinking water in Ukraine. The basics of the right to be informed about the state of water supply in Ukraine and the EU were defined.

Key words

Drinking water status, monitoring of drinking water, standardization of indicators for monitoring of drinking water standards, environmental awareness

1. Introduction

According to the findings of a UN survey, Ukraine is 95th state in the ranking of drinking water quality. The fulfillment of the association agreement with the European Union and the critical state of drinking water supply in Ukraine set the task to find the mechanisms for ensuring the legal right to quality drinking water. In the light of the fact that the right to drinking water is only emerging in international human rights standards, it is important to evaluate the scope of this right in the Ukrainian and European Union legislation with the use of comparative legal method.

2. Legal regulation of quality and safety of drinking water in Ukraine

The right to drinking water is the cornerstone of the right to a decent standard of living, health and a safe environment. In the UN General Assembly resolution 64/292 of July 28, 2010, and the commentary of the Committee on Economic, Social and Cultural Rights No. 15 of 2002, the right to drinking water and proper sanitary condition is determined as an integral part of the basic human right to life and health.¹ Viktor Ladychenko substantiates the theoretical and legal principles of the concept of human right to high-quality and safe drinking water and defines the concept of ensuring the human right to high-quality

and safe drinking water as a component of the system of guarantees of human rights to life.² The human right to drinking water is rightly regarded as a physical right, without which human existence is impossible. The right to drinking water stands alongside other such fundamental rights as the right to life and the right to food. Legal regulation of drinking water and drinking water supply in Ukraine is governed by a system of legal acts of various branches of law.

The main regulatory legal acts regulating the right to drinking water and its quality in Ukraine are the Laws of Ukraine: "On Environmental Protection", "On Drinking Water and Drinking Water Supply", the Water Code of Ukraine, the Code of Laws on Mineral Resources. Rationing of the quality and safety of drinking water is related to the area of subordinate legislation, but in Ukraine there are two standards at the same time: SanPiN 2.2.4-171-10 "Hygienic requirements for drinking water intended for human consumption" and State standards of Ukraine 7525: 2014 "Drinking water. Requirements and methods of quality control". Thus, legal relations in the field of centralized water supply are governed by the provisions of legislation on the housing and communal services, while legal relations on the extraction and purification of water are governed by environmental regulations. SanPiN 2.2.4-171-10 is a binding normative legal act, agreed with all interested ministries and departments and registered in the Ministry of Justice in the established procedure. State SanPiN is applied to most water sources (drinking water, packaged water, water used for production). At the same time State standards of Ukraine 7525: 2014 are optional.³ According to the Law of Ukraine "On Technical Regulations and Conformity Assessment Procedures", the use of standards or their individual provisions is mandatory for:

- business entities, if the standards are referred to in technical regulations;
- parties to an agreement (contract) on the development, manufacture or supply of products if it contains certain standards;
- manufacturer or supplier of products, if he made a declaration of conformity of products with certain standards.

² LADYCHENKO, V. (2015): Place of the right to drinking water in the system of human rights. In: Scientific notes of the International Humanitarian University.

³ What is behind the new water quality standard: expert opinions (2015).

¹ Resolution of the UN General Assembly (2010).

Thus, SanPiN 2.2.4-171-10 remains the main valid normative document in the area of drinking water supply and drinking water quality in the country. Yarotskaya O. believes that effective water management activities need to be formed on the basis of public-private partnership. Public-private partnerships, according to the author, enable authorities to shift away from water management problems and focus on regulating the industry, providing private business guarantees and wider financial capabilities. A significant factor that influences public administration in the field of water supply for the urban population is the legislative regulation of its development.

3. Legal regulation of quality and safety of drinking water in the EU

The legal regulation of the quality and safety of drinking water in the European Union is carried out on the basis of "directives".⁴ Unlike a resolution or decision, directives are implemented through national law.⁵ They oblige member states to adopt, within a certain period of time, measures aimed at achieving its objectives. Directives are a subordinate tool, they must reflect the provisions of the treaties, but they, like treaties, have supremacy over national law. Therefore, if a country has not introduced the relevant directive into national legislation in time, it still has the force of law in that country, and its violation can be appealed to the EU court.⁶ As indicated by E. Antonov water legislation adopted by the European Community can be divided into three categories:

- a) Directives establishing standards for water quality for use with various purposes, including drinking water;
 - b) Directives aimed at limiting or prohibiting industrial emissions of hazardous substances into water;
 - c) Directives on the protection of natural reservoirs (rivers, seas, etc.) from pollution and exhaustion.⁷
- For the purposes of the study, we analyze only directives related to ensuring the quality and safety of drinking water.

The EU Water Framework Directive 2000/60 / EC is the basic directive for water resources regulation, and the quality and safety of drinking water is regulated by Directive 98/83 / EC.

The objective of Directive 98/83 / EC is to protect a person from harm caused by the consumption of poor quality water, ensuring health safety by setting

standards and requirements for their monitoring. The objective of Directive 98/83 / EC is to protect a person from harm caused by the consumption of poor quality water, ensuring health safety by setting standards and requirements for their monitoring. The Directive is applied to drinking water from a distribution network (water supply), bottles, tanks, containers, individual sources with a capacity of 10 m³ / day or more, or those that serve 50 people or more (for less productive ones, if water enters the commercial or public network), as well as for the production of products in industrial enterprises, which require the use of drinking water.⁸

Article 6 of the Directive determines that the parametric values shall be complied with: in the case of water supplied from a distribution network, at the point, within premises or an establishment, at which it emerges from the taps that are normally used for human consumption; in the case of water supplied from a tanker, at the point at which it emerges from the tanker; in the case of water put into bottles or containers intended for sale, at the point at which the water is put into the bottles or containers; in the case of water used in a food-production undertaking, at the point where the water is used in the undertaking.⁹ In order to reduce or eliminate the risk of non-compliance with a parametric value, the Directive requires strict compliance with the requirements of informing the public about changes in the quantity and quality of drinking water. However, in national legislation, insufficient attention is paid to controlling the quality of equipment and materials (pipes, containers, cranes, etc.).

4. Conclusion

As a result of our research on legal regulation of the quality and safety of drinking water, problems of legal regulation in Ukrainian legislation were identified. Drinking water quality in the European Union is regulated by Directive on the quality of water intended for human consumption, according to which member states formulate national legislation. The Directive contains basic regulatory provisions insuring the right to drinking water. Ukrainian legislation, in turn, is not so effective due to inconsistencies, and often the contradictory nature of its provisions. To solve these problems, it is necessary to improve the Law of Ukraine No. 887-VIII by setting the requirement of a monthly report on the quality of drinking water supply services to the population. At the same time, it is advisable to further work on harmonization of normative documents in the field of standardization of drinking water supply systems to prevent water quality

⁴ FUNTA, R., NEBESKÝ, Š., JURIŠ F. (2014): Právo Európskej Únie.

⁵ FUNTA, R., GOLOVKO, L., AKHTAR, A. (2016): Vybrané otázky európskeho práva a medzinárodného práva súkromného.

⁶ Glossary of terms of the European Union (2018).

⁷ ANTONOVA, S. (2014): Organizational and Legal Support in Public Administration of Water Supply of the Population.

⁸ ZORINA, O. (2014): Implementation in Ukraine of Directive 98/83 / EC on water quality intended for human consumption.

⁹ Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption OJ L 330, 5.12.1998, p. 32–54.

deterioration and compliance with the requirements of the EU Directive, which requires further research.

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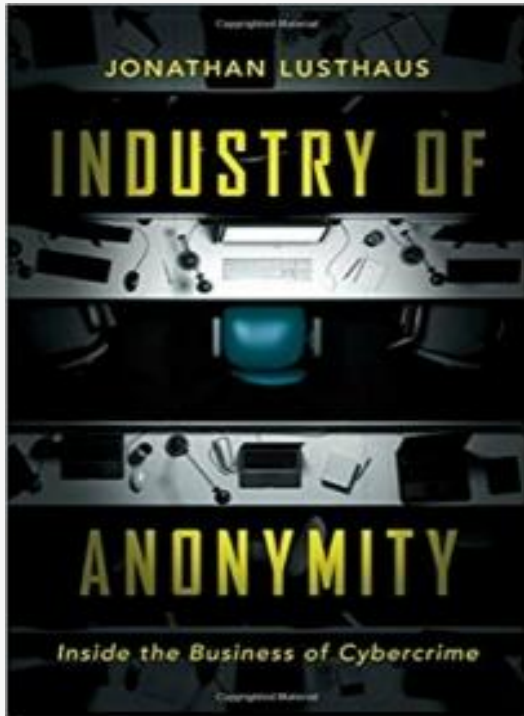
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Industry of Anonymity: Inside the Business of Cybercrime

(by Jonathan Lusthaus)

book review



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In *Industry of Anonymity: Inside the Business of Cybercrime*, the author unveils how the industrialisation of cybercrime has occurred despite some of the challenges. This book will inspire readers to rethink some of their assumptions about the operations of cybercriminals. It may be a good book to anyone working in the fields of organised crime or criminal law. The author unveils how the industrialisation of cybercrime has occurred despite the challenges experienced by cybercriminals.

What resonates are the ways in which geographic factors influence why and how people commit illicit cyber activity. In particular, geography seems to influence the likelihood of cybercriminals collaborating in-person. The cybercrime industry generally relies on social networks: firms that operate with a clear division of power and a level of professionalisation and markets of exchange between buyers and sellers with a certain degree of demand.

Lusthaus concedes that ‘there does not appear to be that much that is new about cybercrime’, adding that ‘the definitions of cybercrime we use should probably reflect this [...] there is little to justify the development of new theoretical frameworks around this type of crime’ (p. 194). Lusthaus takes up a question in the fifth chapter, stating that ‘within this distrustful world, trustworthiness, enforcement, institutions, and governance all play key roles in driving cooperation’ (p. 140).

The author argued that ‘punishment in the form of exclusion from a forum or other grouping means the loss of a nickname’s reputation’ (p. 144). Important to mention is, that there is no typical way in which cybercriminals operate and cooperate. Some work exclusively with familiar associates; some work exclusively with distant electronic strangers. At the end of the book the author offers his recommendations for future research on cybercrime, including the efficacy of law enforcement approaches. Based on his research, he suggests that the majority of cybercriminals would rather perform legitimate technological services if they were presented with such opportunities.