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ARTICLES

Towards a European Administrative Space *– Robert Grzeszczak*

Tiptoeing Around Legal Capital in the European Union – What to Expect From the Reform of the Polish Limited Liability Company. A Comparative Analysis *– Anne-Marie Weber*

The EU Legal Framework on Cross-Border Healthcare After the Adoption of the Patient’s Mobility Directive *– Ilektra Antonaki*

State Accomplice Liability Under International Law – A Comparative Approach *– Magdalena Pacholska*

CASE NOTE

Kadi II: Judicial Review of Counter Terrorism Sanctions, the “Russian Doll” of Legal Conflicts? *– Marianne Madden*

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Academic Review Board's Introduction – A New Warsaw Journal of Comparative Law. An Item for the Agenda

Tomasz Giaro

Reflections on foreign law traditionally seek either to facilitate national law-making or to harmonize several legal systems. Accordingly, comparative legal studies have, apart from the simple acquisition of theoretical comparative knowledge, always pursued a very practical goal. In the present age of globalization, legal pluralism and worldwide trade the studies of comparative law, which the new University of Warsaw Journal of Comparative Law intends to strengthen, need no particular recommendation.

Such studies allow an understanding of one's own legal order and enable discussion as to whether, and how, it may be unified with another or, perhaps, developed at some stage into a global legal system, already foreshadowed by the worldwide protection of human rights. However, a country such as Poland also has domestic reasons to intensify its efforts in this field. Warsaw is the capital of a state whose legal order derives not only from history, which is true in every case, but also from comparative legal research.

Poland, a typical country of East Central Europe as a younger historical region of the continent, lacking the Roman continuity of the Carolingian West, emerged only during the 10th century. Whereas, for centuries, western nation-states constituted the epicentre of European legal tradition, the state-building process was weaker in the East and considerably delayed. Until World War I, Eastern Europe was governed by a few vast poly-ethnic states, such as the Ottoman, Austro-Hungarian and Russian Empires.

What about Polish private law? Looking back in history, the long Roman law tradition in Western Europe, and the almost complete absence thereof in Poland, must

be remembered. However, during the 19th century, a massive transfer of codified Western law to the East occurred. Accordingly, the threefold map of Europe, consisting of England and the western and eastern parts of the continent, was replaced by a dual system, wherein the English common law was confronted with a relatively homogeneous continental area.

Polish private law is amongst the youngest in Europe since, until the end of World War I, Polish territories were partitioned between Russia, Germany and Austria. In addition to the influence exerted by these legal systems, the French *Code civil* applied in Central Poland from 1808. Modern Polish law emerged only following the re-birth of the Polish state in 1918, reaching its peak in 1933 with the Code of Obligations. Given its multiplicity of sources, the Code was rightly defined as the first truly European codification.

After World War II, the paramount source of private law in Poland – now a land of real socialism – became the civil code of 1964. The code was, to a large extent, tacitly based upon inter-war legislation and its *travaux préparatoires*. Owing to such solid foundations, the Polish civil code, even if partly inspired by socialist principles, has revealed itself as capable of surviving until the present day, albeit following several amendments. However, its doctrinal origins were never studied and still remain unknown.

Under communism, the topic constituted a highly sensitive political subject, since evidence of having borrowed numerous legal concepts from the West would have ideologically compromised the drafters of the code. Accordingly, the problem was suppressed until, finally, the conviction emerged that this impressive piece of Polish legislation was born out of nothing. This conviction survived communism, now endowed with the equally unrealistic function of underplaying the communist components of the code.

Thus, the origins of the Polish civil code were removed from their European context and - by both conservatives and leftists - enshrouded in a blanket of silence. Omitted from most Western overviews of continental private law, the Polish code entered the club of the less known in Europe. Let us study it better via a thorough

scrutiny not only of its European sources, but also of the comparative reflection embraced by its drafters. To this end, the method of comparative law must be completed with that of legal history.

The suggestion above constitutes merely one example of a research project which may one day grace the columns of the *University of Warsaw Journal of Comparative Law*. Indeed, given comparative lawyers' widespread dissatisfaction with the long-dominating functionalist approach, connected with the practical aims of private international law, this journal of comparative law expressly welcomes a multiplicity of methodologies and methods, as well as subject areas, cultural regions and points of view.

Editorial Board's Introduction – The Increased Need for the Study of Comparative Law and for the Convergence of Legal Systems

The UWJCL's Editorial Board

Dear Readers,

after several months of work and preparation it is with the greatest pleasure that we deliver to you the very first issue of the University of Warsaw Journal of Comparative Law. Since every new 'creation' brings with it a flare of the unknown and its purpose remains initially obscure, we hope that this brief foreword will allow us to explain the reasons for establishing this Journal as well as the contribution that it can make to the current study of law and finally to introduce to you the content of this Volume 1, Issue 1.

Throughout the years the study of law has often looked into other fields and disciplines, such as history, philosophy, linguistics or sociology, in a quest to better understand the context in which the law operates and the framework that underlies its very foundations. The study of law shifted also to such fields as economics in order to assure the greatest possible practical efficiency of the various rules that it contained. Such movements as law and economics, law and literature or Critical legal studies are examples of how it became desirable to look outside of the law and to analyse its functioning in a broader context in order to better understand it and to improve it. In that sense, comparative law is also a tool which offers us a larger perspective on the law. A perspective which takes out the law of its local context and puts it next to that of other countries.

The value of comparison and the advantages it presents are unprecedented in the study of law. By offering a larger perspective on it and by showing solutions adopted in other countries comparison allows us to look back at our local law and to form a judgement as to the correctness of the rules contained therein. In a sense, to use Plato's allegory of the cave, the lawyer who through comparison has acquired a knowledge of foreign law frees himself from the cave and from the images on the wall projected by the national lawmaker. There is no mystery in the fact that comparative law can be a beneficial tool when it comes to understanding the law and creating it. It is a common practice, used by legislatures all around the world, to refer to foreign systems while drafting new laws. Legal history offers a plethora of such examples; civil codes, constitutions, public and private law acts, judicial systems, commercial regulations and many other which were inspired by previous solutions adopted in other countries. Beyond the possible 'inspiration' that one system may draw from another, comparative law plays an important role when it comes to convergence. It is in fact the study of differences and similarities between different systems that allows us to see the areas in which two or more legal systems are identical, similar or divergent. This allows in turn to unify the law by upholding what is identical, adjusting what is similar and modifying what is different. The developments that took place in the last couple of decades are filled with examples of convergence on national, regional or international level.

Despite such an evolution of the law in the last years, it seems that to some extent, the convergence taking place within the law, and the ongoing globalization of the law are still one step behind the globalization of the world which we see in other areas such as communication, transport, commerce, finances or economics. In other words, the law is in a constant need to adapt and to erase national barriers in order to keep up with the economic, financial and technological convergence which the world experiences. In that sense, there is a growing need to study comparative law, to teach it and to use it as much in the process of creating it as in the process of applying it in courts.

The University of Warsaw Journal of Comparative law hopes to contribute to the ongoing study of comparative law and to complement the research conducted in many prominent academic centres in Europe and in the world. By creating an open

access Journal, we hope to encourage lawyers, students, judges and scholars from all over the world to increase the use of comparative law in their daily work. Comparative law should not be viewed as an extra feature but rather as a tool to which we should always refer whether we are studying the law or applying. In fact, students should be encouraged to look as much as possible to foreign systems in their study of the law to better understand it and to form as early as possible a judgement as to the accuracy of their own law. Lawmakers should always see how a similar problem has been addressed by the foreign legislature and adapt it to the local context. Judges deciding cases should frequently look into foreign case law and keep an eye on foreign judicature to add more 'legitimacy' to their rulings and to contribute to the process of convergence by adhering to a common interpretation of the law.

Comparative law is not merely a theoretical 'game' but rather a field of study which bears important practical consequences. The articles featured in Volume 1, Issue 1 of the Journal clearly prove it. The convergence in the area of public administration within the EU and the concept of a European Administrative Space addressed in the first article are yet another step to a full unification of European law with important consequences for its citizens. Similarly, the Polish debate on whether to lower the state capital threshold for limited liability companies cannot be viewed as a merely local problem. The solutions adopted in that area in other European countries, described in the second article, have some valuable guidance for the Polish lawmaker and prove that serious economic and commercial consequences may flow from the amendment of the Polish Commercial Companies Code. The analysis presented in the third article concerning the 'new' European convergence in the area of patients' rights shows also an important change of a practical significance for many citizens in the EU. The fourth article focuses on the concept of state accomplice liability and seeks inspiration in another area of international law in order to find a definition of a concept which is not yet clearly understood and yet one which may have important legal implications for the ongoing conflicts, namely that in Syria. Finally, the case note featured at the end of this Issue offers a comparative approach to the problem of judicial review of counter-terrorism sanctions which is common to many countries in the EU and outside of it.

We hope that this first issue of our Journal will be of interest to you in either your work, research or studies. We hope that our Journal will increase your curiosity

in foreign law and that it will be a helpful tool in your daily work. We hope that by promoting together the advantages of comparative law and by sharing your perspective on the law we will be able to contribute together to the ongoing convergence of law and to increase it. In turn we trust that this convergence will be beneficial in addressing various problems with which the world is currently struggling.

Towards a European Administrative Space

Robert Grzeszczak*

Abstract

The following article examines the various law-making interactions taking place within the European Union which will eventually lead to the creation of a European Administrative Space. The analysis presented below focuses on the fact that the administration within the EU seems to be stabilising and moving slowly towards a total convergence and the creation of a common administrative space. At the outset of this article, the concepts of public administration within the EU as well as the European tendency to unify the law by creating “common spaces” are described. The article continues with a presentation of some of the aspects of European convergence within the area of public administration.

I. INTRODUCTION

In the recent decades, law has been undergoing numerous changes. It has been taking new directions and becoming more and more complex. There is a growing number of legal systems: national, regional, universal international, regional international, supranational and post-national.¹ Public administration has had to adapt to these new circumstances. Nowadays, it operates on a multitude of levels and applies a polycentric law.

The European Union (hereinafter “EU”) is, and probably will remain for many years, in a period of self-determination of its own legal standards. It is still an open question whether it will apply standards taken from the previous familiar solutions of the Member States, or from the transnational (international) institutions, or whether,

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¹ Neil Walker, Jo Shaw and Stephen Tierney (eds.), *Europe’s Constitutional Mosaic* (CUP 2011) 404

with the flow of time, new and specific standards of defining structures of the EU will be created. Even if the EU has already used some novel solutions taken from Member States (e.g. the Ombudsman institution, the concept of “freedom of information” etc.) or from legal-international ones (e.g. the list of human rights from the European Convention of Human Rights), in the course of a further development of its structures, the EU will have to define anew a number of institutions characterising its unique structure. This process is called “standard-setting”.²

European law is created as a result of the interactions between private and public entities, EU institutions and Member States, as well as specialist (expert) groups. These interactions lead to what is known as European governance.³ A distinguishing feature of EU legislation is the tendency for the continuous increase in the law-making activity of the administration, which creates peculiar legal subsystems while arranging the fulfilment of collective needs on a mass scale. These subsystems often modify the most fundamental legal standards and influence the legal and factual situation of the citizens, which entails a weaker legitimisation of the law.⁴ Thus, the ‘unique’ legal determinants of governance in the EU are manifested in the fact that the basic source of European law are decisions taken by the executives of the Member States at meetings of the Council, complemented by the extensive participation of the EU administration (i.e. the European Commission).

The aim of this article is to examine the hypothesis which assumes that there are processes taking place in the European Union that will eventually result in the creation of a common, integrated administrative space of all 28 Member States. The author understands the European Administrative Space (hereinafter “EAS”) as a set of rules, principles and standards shared by public administrations all over the EU. Moreover, he believes it encompasses numerous bodies, at both national and EU level, which cooperate on the basis of EU law, the national law of the Member States and

² Robert Grzeszczak, ‘Legitymizacja demokratyczna Unii Europejskiej. Ewolucja procesu legislacyjnego i rola parlamentów narodowych’, in Jerzy Kranz (ed.), *Suverenność i ponadnarodowość a integracja europejska* (Warsaw 2006) 205-243

³ See Christian Joerges, Renaud Dehousse (eds.), *Good Governance in Europe’s Integrated Market* (London 2002)

⁴ More on this subject see Matthias Ruffert, *Legitimacy in European Administrative Law: Reform and Reconstruction* (Europa Law Publishing 2011) 360

the case law of the Court of Justice of the European Union (hereinafter “CJEU”). The article opens with a discussion on the concept of „European spaces” and turns to an analysis of the definition of EU administration, the multi-level character of public administration in the EU and its Member States, the role played by administrative networks and the nature of convergence in the field of public administration.

II. DEFINING PUBLIC ADMINISTRATION IN THE EUROPEAN UNION

Public administration is a function of the executive branch of the government. According to Locke, it has been granted a prerogative by the legislature to ensure that the promulgated laws are exercised and maintained. It may assume a variety of forms, depending on the applicable customs and the constitution.⁵

Nowadays, decisions are usually made by the executive branch of the government and the subordinated administrative bodies. In general, this is true for all stages of the decision-making process, from laying the foundation for an action, through its implementation up to the monitoring part.⁶ Technocracy (managing public affairs by the administration) raises doubts as to its legitimacy.⁷ However, this problem goes beyond the scope of the present article.

EU law does not provide a general definition of public administration. In the treaties, it is referred to in different contexts, sometimes under different names such as “public service” in article 45 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”) or “central governments, regional, local or other public authorities” in article 124 TFEU. In EU secondary law, there are numerous references to public administration or to the executive branch of government. In a way, they

⁵ John Locke, *Dwa traktaty o rządy* (Warsaw 1992) 267; see Artur Nowak-Far, ‘Stosowanie *acquis de l’Union* przez administrację publiczną państw członkowskich Unii Europejskiej’ in Jacek Czaputowicz (ed.), *Administracja publiczna. Wyzwania w dobie integracji europejskiej* (Warsaw 2008) 113

⁶ Yves Meny and Andrew Knapp, *Government and Politics In Western Europe* (OUP 1998) 140–142

⁷ Dągmir Długosz, ‘Władza wykonawcza a grupy interesów i praktyka polskiej administracji’ in Jacek Czaputowicz (ed.), *Administracja publiczna. Wyzwania w dobie integracji europejskiej* (Warsaw 2008) 223

specify the framework terms contained in the treaties establishing the EU.⁸ EU secondary law does not define terms such as “state bodies” or “public administration”. However, it shows what they denote, i.e. all bodies exercising legislative, executive and judicial powers, at both national and regional level.

The CJEU has frequently referred to public administration, albeit in different contexts, emphasising its importance for the proper interpretation of EU law. Case 149/79 is crucial for understanding the term “public administration”.⁹ The Court holds that public service does not only encompass public administration in its strict sense but also entities which, whilst not coming under its organisation, are entrusted with the exercise of powers conferred by public law, including even state-owned companies. However, it is up to the legal system of the Member States and their constitutional practices to determine what “public administration” means.¹⁰ This results from the principle of state autonomy underlying EU law, including the autonomy of the Member States with regard to shaping their own administrative and institutional systems.

III. UNIFICATION OF VARIETIES – EUROPEAN SPACES

The process of unification does not keep pace with the advancing integration of various, frequently divergent phenomena within the EU. This in turn causes some structural problems such as the differences in the pursuit of many policies as well as divergent perspectives and interests.¹¹ Accepting, instead of ironing out, the differences in the process of integration means that Member States are giving up and pooling parts of their sovereignty. The model of shared sovereignties has shaped the legal and political relations within the EU as well as its relations with the Member States for some time now. This also means that at a certain time in its development (in the 1990s), the

⁸ Nowak-Far (n 4) 112

⁹ Case 149/79, *Commission v Kingdom of Belgium* ECR I-01845, para 12

¹⁰ Nowak-Far (4) 113

¹¹ Michele Knodt, Sebastiaan Princen (eds.), *Understanding the European Union's External Relations*, (Routledge 2005) 22

EU became the antithesis of the nation state.¹² It was a critical moment when the economic structure based on the integration model adopted in the 1950s began to transform into a hybrid political system.¹³ The European Union is regarded as the first truly polycentric community that challenges the existing traditions of statehood and departs from the notion of a nation state.¹⁴

It is typical of the EU to integrate the national varieties by establishing “common spaces”. This can be best illustrated by the example of the European single market, which can be regarded as the earliest economic “common space”. Currently, a new “common space” is being created in the field of banking. Also, legal scholars have coined the term “European Judicial Space” (hereinafter “EJS”), which is based on the cooperation between the courts of the Member States in civil and criminal matters and the so-called free movement of judgments and judicial decisions.¹⁵ The French president Valéry Giscard d’Estaing is believed to have launched the idea of the EJS by stating at a meeting of the European Council held in 1977 that Europe should adopt such a new concept of a cooperation within the judiciary. The EJS is, in turn, one of the four components of the European area of freedom, security and justice (hereinafter “AFSJ”). The AFSJ was based on numerous mechanisms which had proved to be successful in the process of economic integration, first and foremost on the principle of mutual recognition stipulated in article 81 and article 82 TFEU. The principle of mutual recognition amounts to accepting the differences between the legal systems of the Member States and regarding a judgment or a judicial decision issued in another Member State as one’s own.¹⁶ Another well-known “space” is the European constitutional

¹² Daniel Wincott, ‘National States, European Union and Changing Dynamics in the Quest for Legitimacy’ in Anthony Arnall and Daniel Wincott (eds.), *Accountability and Legitimacy in the European Union* (OUP 2002) 488

¹³ Neil MacCormick, ‘Questioning post-sovereignty’ (2004) 6 *European Law Review* 863

¹⁴ Neil Walker, ‘European Constitutionalism’ (2006) 59 *Current Legal Problems* 51

¹⁵ Agnieszka Frąckowiak-Adamska, ‘Reforma europejskiej przestrzeni sądowej w Traktacie z Lizbony’ in Agnieszka Frąckowiak-Adamska and Robert Grzeszczak (eds.), *Europejska Przestrzeń Sądowa* (Wrocław 2010) 161–162

¹⁶ See Jerzy Supernat, ‘Europejska przestrzeń administracyjna (zagadnienia wybrane)’ in Zbigniew Janku, Zbigniew Leoński, Marek Szewczyk, Michał Waligórski, Krystyna Wojtczak (eds.), *Europeizacja polskiego prawa administracyjnego* (Wrocław 2005); Johan P Olsen, *Towards a European Administrative Space?* in ARENA Working Papers WP 02/26, <https://www.arena.uio.no/publications/working-papers2002/papers/wp02_26.htm> accessed 30 October 2013; Johan P Olsen, *European search of political order: an institutional perspective*, (OUP 2007) 252-258; Martin Shapiro, ‘The Institutionalization of European

space. However, despite the fact that the terms referred to above are widely used to describe newly integrated areas within the EU, none of them, including the EAS, is to be found in the treaties.

Nevertheless, article 197 TFEU supports the improvement of the administrative capacity of Member States as well as their cooperation in the field of public administration. This regulation applies to administrative cooperation. It is defined in the context of the efficiency of the EU Member States when implementing EU law. Article 197 TFEU emphasizes in section. 2 that “The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States”.

IV. EUROPEAN CONVERGENCE IN THE FIELD OF PUBLIC ADMINISTRATION

Introduction of article 197 TFEU was the result of many years of cooperation (convergence) between the public administration of the Member States and the EU. Convergence means that the EU Member States and the countries participating in the European Economic Area agree to abide to common principles, rules and arrangements.¹⁷ Administrative convergence is facilitated by European administrative networks, the concept of which will be discussed in detail below. These networks are aimed primarily at ensuring an efficient and uniform application of EU law.

Administrative Space’ in Alec Stone Sweet, Wayne Sandholtz and Neil Fligsteins (eds.), *The Institutionalization of Europe* (OUP 2002) 94-101

¹⁷ HCH Hofmann and Alexander Türk, ‘The Development of Integrated Administration in the EU and its Consequences’ (2007) 13 *European Law Journal* 253–271

In view of the convergence processes taking place, it has been suggested that the EU is developing a “European Administrative Space” or even its “unique system of government and governance”.¹⁸ In other words, the EAS is part of the “executive order of the European Union”.¹⁹ As a model of EU administration, it can be regarded as a normative programme, a “*fait accompli*” or a mere hypothesis.²⁰ Discussing the development of the EAS is an attempt at capturing the processes of integrating executive bodies and functions referred to in this article. The EAS represents a set of common principles and standards in the field of public administration observed by entities at both national and EU level which cooperate with one another on the basis of EU law, the law of the Member States and the case law of the CJEU.²¹

Different concepts of the EAS are based on different theories. After all, the EAS is not an official EU institution. It is rather a model, the shape of which depends on the particular scientific perspective adopted in a given situation. When referring to a “common European model”, scholars may understand a normative, a descriptive, or an analytical model aimed merely at verifying a hypothesis. However, in all these cases the model concerns convergence in the field of public administration, i.e. convergence towards common administration practices replacing the differing practices previously applied in the Member States.

The EAS is believed to be launched by the adoption of Regulation No 1024/2012 of the European Parliament and of the Council, which introduced the “free movement of documents”.²² The proposal is streamlining the rules and procedures applied currently between the Member States concerning the verification of the authenticity of certain public documents and at the same time complementing the existing sectorial Union law, including rules relating to the circulation of specific public documents, by abolishing the requirements of legalisation, apostille and simplifying the

¹⁸ Deirdre Curtin and Morten Egeberg, ‘Tradition and innovation: Europe’s accumulated executive order’ in Deirdre Curtin and Morten Egeberg (eds.), *Towards a new executive order in Europe?* (2008) 31/4 West European Politics 639–661

¹⁹ Olsen (n 15) 252

²⁰ Grzegorz Krawiec, *Europejskie prawo administracyjne* (Warszawa 2009) 16

²¹ Supernat (n 15) 78–79

²² Proposal for a Regulation of the European Parliament And Of The Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 nr 1024/2012 (COM(2013) 228) final

use of copies and translations. It draws inspiration from the existing sectorial Union law and relevant international instruments, whilst reinforcing confidence in public documents issued in other Member States. The proposal does not, on the other hand, modify the existing sectorial Union law which contains provisions on legalisation, similar formality, other formalities or administrative cooperation, but complements it. It covers public documents which are issued by the authorities of a Member State and which have to be presented to authorities of another Member State. The proposal does not deal with the recognition of the content of public documents issued by the authorities of the Member States. The proposal concerns situations in which the identified public documents are required in cross-border scenarios by: (i) public authorities of the Member States or (ii) entities of the Member States tasked by virtue of an act or administrative decision to carry out public duties.

Scholars have put forward different hypotheses about the origin of the EAS. Some of them suggest that the development of the EAS might be the result of a global convergence in the field of public administration while others see it as a consequence of institutional independence in the field of public administration.²³ The former regard such convergence processes not merely as a European phenomenon but as a worldwide one, determined by global factors. They see convergence in the field of public administration as a transition “from government to governance” or, in other words, “governance without government”, taking place in countries and their organisations.²⁴ The latter believe that the scope and pace of such convergence processes must not be overestimated. They think that various models of public administration will be preserved in both Europe and other parts of the world for at least some time. They see public administration as a set of partially autonomous institutions, maintaining their own identity and dynamics, as well as playing a vital role in shaping the administration policies.²⁵

²³ BG Peters, ‘Dismantling and Rebuilding the Weberian State’ in Jack Hayward, Anand Menon (eds.), *Governing Europe* (OUP 2003) 113-114; Gunnar Folke Schuppert, ‘Governance Reflected in Political Science and Jurisprudence’ in Dorothea Jansen (ed.), *New Forms of Governance in Research Organizations. Disciplinary Approaches, Interfaces and Integration* (Springer Verlag 2007) 33-57

²⁴ Olsen (n 15)

²⁵ Jerzy Supernat, *Administracja Unii Europejskiej. Zagadnienia wybrane* (Wrocław 2013) 121-124

Evidence in support of both hypotheses presented above can be found in practice, depending on national or even regional circumstances. Global convergence is possible when public administration operates under similar technical (material) conditions and the global dimension (of goals and tasks, for instance) prevails at a given time. European convergence, on the other hand, is likely to take place when the European dimension overshadows the global one, stimulating the process of Europeanising public administration in the Member States.

Convergence processes may be imposed or happen spontaneously as a result of more efficient solutions being taken over on a voluntary basis. The former takes place when there is no model of public administration which would be perceived as superior in a functional or normative way, power is concentrated and the issues concerning public administration are seen as important and given priority.²⁶ The latter is possible when the Member States are willing to learn from one another and take over one another's most functional solutions on a voluntary basis, with the Open Method of Coordination being a good example. A common practice may also develop spontaneously if the Member States face the same challenges or threats (such as crime or increased competition with regard to goods and services coming from other economic areas).

Introducing changes in the field of public administration is not usually hampered by the inability to draft and adopt legal acts but rather by the inability to ensure that such legal acts are in reality applied so that the functioning of the public administration can genuinely improve. It is the EU courts and public administration, including in particular the Ombudsman, that play a vital role in the process of approximating the laws of the Member States and harmonising the application of EU law. Instruments of both soft and hard law (for instance the European Code of Good Administrative Behaviour as opposed to the Charter of Fundamental Rights of the European Union) integrate and approximate the legal bases for the functioning of a public administration in the EU. Finally, European convergence in the field of public administration is stimulated by the declining focus on global convergence resulting from the diminishing

²⁶ Curtin and Egeberg (n 17) 645-646

support for the new public management,²⁷ which can be illustrated by the striking change in the standpoint adopted by the World Bank. Back in the 1990s, the World Bank recommended clearly that the hierarchical, centralised and legally determined public administration be replaced by a market-oriented and managerial one. Nowadays, however, it emphasises that it is necessary to adopt solutions based on understanding and considering the individual situation of the particular country.

V. ADMINISTRATIVE RELATIONS BETWEEN THE EU AND THE MEMBER STATES

The administrative bodies of the Member States, similarly to their courts, functionally become a part of the administrative system of the EU. It happens whenever their work is based on EU law. In the end, a compound and divided into *de facto* and *de jure* system is established.

The relations between the EU and its Member States have a multi-level character. Interactions occur at many levels: between the CJEU and the constitutional courts (and ordinary courts in general), the Council and the European offices along with ministers of foreign or European affairs, Committee of Permanent Representatives (hereinafter “COREPER”) and national working groups coordinated by the relevant ministry, working groups and departments of ministries, expert groups and committees of the Commission, as well as departments of regional ministries (in the case of federal countries or countries with autonomous administrative divisions).²⁸

Vertical and horizontal cooperation between the public administration of the EU and its Member States has assumed many different forms. The administration itself has become more complex. There are scholars who already call it a “quasi-federal, two-level structure”. The process of functional and structural integration between the two

²⁷ More on this subject see Neuhold Ch. “Glass Half Empty or Glass Half-full?: Accountability Issues in Comitology and the Role of the European Parliament after the 2006 Reform of Comitology” in HCH Hofmann and Alexander Türk, *Legal Challenges in EU Administrative Law – Towards an Integrated Administration* (Cheltenham 2009) part 3

²⁸ Hofmann, Türk (no 16) 2

administrative levels (that of the EU and that of the Member States) can be well illustrated by how the national administration is organised with regard to the implementation of integration policies.²⁹ There are more than just one type of administrative implementation. Besides indirect and direct ones, scholars distinguish bottom-up and top-down mechanisms, depending on the level of coordination of EU affairs in the given Member State.³⁰ These four categories help classify the mechanisms of cooperation, in particular in the main fields of common administration such as structural funds, energy, telecommunication and competition policies.³¹ Of course, the scope of such integration and the model of cooperation applied, differ from state to state. Thus, scholars once again refer to a system of linkages between the executive bodies of the EU and its Member States which can be called a European Administrative Space, or a EU executive order within which the EAS is developing.³²

The European administrative order consists of a variety of national institutional solutions which have been shaped throughout centuries. The administrative divergence between the EU Member States hampers convergence processes with regard to both motivation and execution. In consequence, the treaties establishing the EU have never envisaged a single model of common (EU) administration and there is no *acquis communautaire* concerning the structure of public administration.³³ On the contrary, EU politicians have always believed that the variety of public administration systems within the Member States is justified and compatible with EU membership, and that it is possible to implement EU law in countries with different administrative solutions. What is more, the competences of the EU in the field of public administration

²⁹ More on this subject see Edoardo Chiti, 'The Administrative Implementation of European Union Law: A Taxonomy and its Implications' in HCH Hofmann and Alexander Türk, *Legal Challenges in EU Administrative Law – Towards an Integrated Administration* (Cheltenham 2009) part 1

³⁰ More on this subject see Paul Craig, 'Shared Administration, Disbursement of Community Funds and the Regulatory State' in HCH Hofmann and Alexander Türk, *Legal Challenges in EU Administrative Law – Towards an Integrated Administration* (Cheltenham 2009) part 2

³¹ Curtin and Egeberg (n 17) 645

³² Trevor C Hartley, *The foundations of European Community Law, an introduction to the constitutional and administrative law of the European Community*, (OUP 2003) 121-123

³³ Supernat (n 24) 82

are limited. The Member States protect their autonomy in this respect (and many others) and are not willing to transfer general executive and supervisory competences to the EU institutions.³⁴

VI. MULTI-LEVEL ADMINISTRATION IN THE EUROPEAN UNION

In light of the above, the EU administration is complex and operates on a multitude of levels. This raises many questions, some of which remain unanswered. Within the multi-level system of the EU, the power is divided between many levels: the national, the regional and the EU one.³⁵ The competences exercised by national and EU bodies intermingle and create a melting pot of institutional functions. The resulting administrative system requires broad cooperation between these levels.

Their dynamic cooperation shapes the European Administrative Space. According to some scholars, the EU is about to develop forms of cooperation between the national executive entities and the EU ones which will be advanced enough to justify the use of the term “European executive area”, i.e. an area even broader than the administrative one.

Moreover, public administration is no longer purely public and does not constitute an institutional monolith. In more and more Member States of the EU, there are both public administrative authorities and private entities fulfilling tasks conferred by public authorities.³⁶ Such an integrated model of performing executive tasks results in the phenomenon called “disaggregation of sovereignty” or a “disaggregated state”.³⁷ In consequence, integrated executive bodies have been established. Administrative authorities of the Member States cooperate and create networks at both national and

³⁴ Philipp Dann, *Parlamente im Exekutivföderalismus*, (Springer Verlag 2004) 474

³⁵ Grzeszczak (n 2) 46

³⁶ See Robert Schütze, ‘Federalism as Constitutional Pluralism: Letter from America’ in Jan Komarek, and Matěj Avbelj (eds.), *Constitutional Pluralism in the European Union and Beyond. A Law and Policy Analysis* (Hart Publishing 2010) 12-16; HCH Hofmann, ‘Constitutionalising Networks in EU Public Law’ in Eugeniusz Piontek and Katarzyna Karasiewicz (eds.), *Quo vadis Europa III?* (Warsaw 2009) 117

³⁷ Neuhold (n 27) 138

European level to increase their problem-solving capacities to the full potential. Neither national nor even intergovernmental structures would be able to deal with common regulatory issues on their own.

The development of EU agencies and administrative networks, the reform of the comitology procedures or the implementation of the “good governance” programme may suggest that the EU can take a bottom-up approach to adopting new laws and shaping its administrative system by involving European institutions which are close to the citizens and thus in line with the principle of subsidiarity.³⁸ However, it is difficult to predict whether the administrative structure of the EU will evolve towards unique solutions suiting the peculiarity of the EU, given the variety of the exercised competences, depending on the particular policy in question and the “integration moment”. It might just as well take the “beaten” track and adopt practices most typical of the German, French or British administration, the last being the most influential one as a result of the popularity of the new public management (also known as “New Modes of Governance”).

EU membership affects the functioning and competences of national bodies, sometimes even necessitating the establishment of new ones. However, the Member States enjoy institutional autonomy, which protects them from excessive interference of the integration processes in their national structures. In principle, the EU members are independent in setting the legal and organisational frameworks of their state apparatus.³⁹

Nevertheless, the Member States are bound by the principle of loyal cooperation, which requires cooperation between various bodies of the Member States themselves (the horizontal dimension) as well as between such bodies, on one hand, and institutions, bodies and organisational units of the EU on the other (the vertical dimension).⁴⁰ Administrative networks are one of the possible forms of this cooperation.

³⁸ Nowak-Far (n 4) 31

³⁹ See Case 230/81, *Luxembourg v. European Parliament*, ECR 1983, para 255; as well as *Belgium v. Commission*, ECR 2001, I-6076, para 94

⁴⁰ See Armin von Bogdandy and Philipp Dann, ‘International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority’ in Armin von Bogdandy, Rudiger Wolfrum, Jochen von Bernstorff, Philipp Dann, Matthias Goldmann (eds.), *The*

Depending on the type of network, the legal basis for its establishment can be found within the national laws of Member States involved in it or directly in EU law (usually in the secondary one).

The multi-level system of the EU requires that national, supranational and international public authorities cooperate in drawing up programmes, setting the course for the development of integration, creating new policies and implementing those already pursued.⁴¹ The standing of those public authorities may vary within the respective national, supranational and international structures to which they belong.

It is not clear whether the European Union is developing its own legal standards, including those regarding administration and management, and whether it will finally create its own unique administration system setting an example for new solutions to be adopted in the Member States. However, given the successful record of the European Code of Administrative Behaviour or the principle of good administration, this might be the case.

VII. THE EU CONCEPT OF ADMINISTRATIVE NETWORKS

Administrative networks are informal structures of cooperation in the field of public administration, created separately for each area of EU policies.⁴² They are an example of direct cooperation, which means that it is not the Member States as such but rather their particular bodies which cooperate with one another and the relevant institutions of the EU.⁴³ The entities to be involved in a given network are chosen by reference to a particular type of bodies or, more often, on a subject-matter basis (*ratione*

Exercise of Public Authority by International Institutions. Advancing International Institutional Law, (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Heidelberg 2010) 883–912

⁴¹ See Eberhard Schmidt-Assmann, 'Der Europäische Verwaltungsverbund und die Rolle des Verwaltungsrechts' in Eberhard Schmidt-Assmann, Bettina Schöndorf-Haubold (eds.), *Der Europäische Verwaltungsverbund Mohr Siebeck*, (Tübingen 2005) 1–23

⁴² Jerzy Supernat, 'Pojęcie sieci organów administracji publicznej' in Jan Zimmermann (ed.), *Konceptja systemu prawa administracyjnego* (Warszawa 2007) 207

⁴³ Mark Bovens, *The Quest for Responsibility* (CUP 1988) 45–52

materiae). Thus, they differ from country to country with regard to their structure and competences but they all deal with policies regarding the same area.⁴⁴

Network structures have been established in many areas so that they can cover modes of implementation such as “implementation networks”, which concern individual, legally binding decisions, for instance in the field of competition law.⁴⁵ After all, it was the establishment of the European Competition Network which marked a milestone in the development of a new European administration. It was the first time that the Commission had maintained its powers with regard to the national competition authorities, so to speak above the national governments, and the resulting structure acquired a mixed character, pertaining to both the EU and the Member States.

VIII. CONCLUDING REMARKS

EU law requires an uniform application in all Member States, which is the reason behind the establishment of the EAS. A legal system is a complete and well-organised structure of legal norms. The structure is well-organised because the set of legal norms constituting a legal system must be hierarchical and coherent, i.e. the legal norms it contains must not contradict one another. Of course, this is merely a model, just as the EAS itself.

Given the above, the EU administration seems to be stabilising, which has been a phenomenon observed by administrative lawyers in the Member States, scholars, legal practitioners (such as judges) and researchers dealing with the institutional (constitutional) law of the EU, as well as the institutions themselves, i.e. their employees and the judges of the CJEU. Various direct or centralised forms of management coexist with indirect or decentralised ones. A new dimension of network administra-

⁴⁴ See Regulation (EC) No 139/2004 of the Council of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1

⁴⁵ See Philipp Dann, ‘International Composite Administration: Conceptualizing multi-level and network aspects in the exercise of international public authority’ in Philipp Dann, Armin von Bogdandy, *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law*, (Springer Verlag, Heidelberg 2009) 883–912

tion is developing which pertains to both the EU and the Member States. The Europeanization of the administration is governed by the general principles of the EU, i.e. the principle of subsidiarity, the principle of loyal cooperation and the principle of conferral. Thus, the Europeanization concerns the relations between the European and the national legal and institutional systems of administration. Schmidt-Assmann suggests that the principle of conferral governs the structure of a given competence while its functional aspect is governed by the principle of loyal cooperation.⁴⁶

The cooperation within the European administration and between the EU administration and the administration of its Member States has become complex enough for the scholars to coin the term “(European) administrative cooperation law”, in other words the EAS.

⁴⁶ Eberhard Schmidt-Assmann (n 40), also Rudolf Streinz, ‘Rechtssicherheit als Bewährungsprobe des Verfassungsstaates’ in Alexander Blankenagel, Ingolf Pernice, Helmuth Schulze-Fielitz (eds.), *Verfassung im Diskurs der Welt. Liber Amicorum für Peter Häberle* (Tübingen 2004) 745-775

Tiptoeing Around Legal Capital in the European Union – what to Expect from the Reform of the Polish Limited Liability Company. A Comparative Analysis.

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Abstract

This article places itself at the core of the ongoing debate about the reform of the Polish Code of Commercial Companies which aims to lower the required amount of stated capital for limited liability companies. The discussion as to whether such a change is desirable is put here into perspective as the article offers a broader view of the problem by referring to regulations on stated capital in other European countries such as France, Germany, England and the Netherlands. This approach addresses a problem which is not merely theoretical in nature but has important economic implications – as the European common market allows entrepreneurs to choose freely their preferred country of establishment, national legislatures might take into account whether a too high stated capital requirement does not deter investors from incorporating their business in that particular country. The article presents how other European countries have tackled this problem and how their solutions could serve as an inspiration for the planned Polish amendments.

I. INTRODUCTION

“Facilitation of the establishment and pursuit of business” is the main goal of the draft objectives for a reform of the Polish Code of Commercial Companies (hereinafter “CCC”) presented by the Ministry of Justice for public consultation.¹ One of

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the reform's top aim is to amend the regime of stated capital of the Limited Liability Company (hereinafter "LLC"). The reduction of the minimal capital requirement of the LLC from 50 000 PLN to 5 000 PLN has re-inflamed a heated debate on the future of the institution of stated capital.² The cut of the minimal capital requirement by 90% has denuded and ridiculed the economic implications of the concept of stated capital in an obvious manner, provoking the question on its further maintenance in the Polish legal system. In light of the upcoming reforms of the CCC, the question of whether stated capital "matters" calls for consideration.

The debate on stated capital in Poland is being saturated by ongoing reforms in other Member States of the European Union (hereinafter "EU"). Over the past several years, EU Member States have recognized a significant overvaluation in the perception of the institution of stated capital, comparable to similar changes in the United States in the 1980's. The key function of stated capital that is to protect the interests of creditors, seems to be more widely understood as a fictitious concept. One of the key aspects of the 'traditional' stated capital regime, the minimal capital requirement which is supposed to serve as a 'seriousness test' has been also widely criticised. Such criticism was denounced in the report of the High Level Group of Company Experts prepared for the European Commission in 2002³ and restated in the Commission's "Action Plan" in 2003.⁴

The core source of existence of stated capital in various European legal systems is, besides a strong path-dependency originating in German company law, Directive 77/91/EEC on coordination of safeguards which, for the protection of the interests

¹ Ministry of Justice, *Proposal for a draft reforming the Polish Code of Commercial Companies* [2013] (Reform Proposal) <<http://ms.gov.pl/pl/informacje/news,5174,projekt-nowelizacji-ustawy--kodeks-spolek.html>> accessed 4 September 2013 (Preliminary Proposal)

² Michał Romanowski and Adam Opalski, 'Nowelizacja Kodeksu Spółek handlowych reformująca niektóre założenia instytucji kapitału zakładowego' (2009) 14 *supl. Monitor Prawniczy* 1

³ The Report of the High Level Group of Company Law Experts, *A Modern Regulatory Framework for Company Law in Europe* [2002] <http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf> accessed 4 September 2013

⁴ Commission, 'Modernizing Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward' COM (2003) 284

of members and others, are required by Member States of companies within the meaning of the second paragraph of article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (hereinafter “Capital Directive”).⁵ Even though the Capital Directive covers only certain specified types of companies, that is mainly those whose shares may be publicly held, Member States largely apply the concept of stated capital to other capital based types of companies. Whereas changes in the respective Member State’s regulations concerning companies covered by the Capital Directive would require legislative effort on EU level, there is vast freedom concerning other types of capital based companies than those covered by the Capital Directive.

The deconstruction of the concept of stated capital can no longer be understood as a blurry projection of theoretic ideas. It is happening. Europe’s leading economic powers (i.e. Germany, Great Britain, France, the Netherlands) have already taken action by introducing various reforms that “loosen up” the concept of stated capital in companies not covered by the Capital Directive.

For Poland the shape of laws concerning the creation of companies is obviously not only a theoretical riddle – the practical economic implications of the said issues are fundamental. This is primarily due to the common market and freedom of establishment being key features of the EU. The European Court of Justice’s (hereinafter “ECJ”) case law has cemented the principle of competition for incorporation between the EU Member States⁶. As Member States are free to compete for entrepreneurs (their incorporation) within the European Market, even businesses originating in Poland do not have to necessarily be incorporated in Poland. Given that the LLC is by far the most popular form of conducting business in Poland, regulations concerning

⁵ Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [2002] OJ L026/31

⁶ Case C-212/97 *Centros v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459; Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-09919; Case C-167/01 *Inspire Art Ltd. v Kamer van Koophandel en Fabrieken voor Amsterdam* [2003] I-10155

crucial issues (i.e. stated capital) entail immense impact. Therefore Poland's legislative task is not to be underestimated as these reforms will be decisive for the attractiveness of Poland as a place of incorporation and investment. Consequently, the question of whether to abandon stated capital is in fact a question of how successfully Poland will compete for entrepreneurs, along with the popular saying: "You can't expect to meet the challenges of today with yesterday's tools and expect to be in business tomorrow".

The undeniable competition for entrepreneurs within the EU not only justifies the subsequent comparative analysis but rather forces such an approach. Only the consideration of solutions adopted in other EU Member States can lead to the adoption of effective and competitive regulations in Poland. This article aims to present the fundamental characteristics of reforms of the stated capital regime in capital based companies that are not covered by the Capital Directive, conducted in France, Germany, England and The Netherlands. Based on conclusions derived thereof, the article's final goal is to propose key features of a desirable shape of reforms of the LLC. Such key expectations and demands concerning the planned reform of the CCC may serve as a template to assess the Preliminary Proposal of the Ministry of Justice in a subsequent article.

II. THE EFFECTIVENESS OF STATED CAPITAL

For the purpose of this article the term stated capital describes a sum revealed on the liabilities side of the balance sheet within 'equity' that corresponds to the capital contributed by shareholders to cover their shares.⁷ If shares have a par value, the stated capital is the sum of the par value of all the company's shares. The part of a shareholder's contribution in excess of the share's par value is recorded in other reserves being part of the company's equity. Legal systems which provide the possibility of no par value shares, usually attribute competence in determining the amount of the share capital to the management body of the company.

⁷ Alternatively, stated capital is also called legal capital, authorized capital or simply share capital.

The essence of the concept of stated capital is commonly said to be the creation of a ‘cushion’ to protect the company’s creditors (the guarantee function). The underlying goal is to protect the creditors from losses incurred through the economic activity of the company.⁸ The economic rationale for the need to protect creditors is the inevitable conflict on the allocation of the company’s capital between creditors of the company (fixed claimants) and its shareholders (equity claimants).⁹ The capital (assets) of the company are in fact a source of potential satisfaction of claims against the company for both creditors and shareholders, which gives rise to the ‘competition’ between those two groups. In the event of an insolvency of the company shareholders become subordinated creditors. In other words, they are the ‘last in line’ to satisfy their claims against the company (residual risk bearers). Consequently, there is a potential danger that shareholders may attempt to impact the company’s functioning in a way that enables them to circumvent the actual submission of their claims versus creditor’s claims.¹⁰ Such an impact may be effected indirectly through the voting process on general meetings of shareholders or directly when shareholders exercise the role of board members. Nevertheless, undoubtedly, the interests of creditors and shareholders will often converge - usually because the two groups will be interested in the ‘success’ of the company and its financial stability.

The idea that creditors should be protected through stated capital is a concept based on the assumption of a weaker position of creditors, stemming from the asymmetry of information that exists in relation to the company.¹¹ According to this notion, creditors of a company are unable to use the same effective channels of information that are available to shareholders and the management of the company. Therefore, creditors do not have the means to effectively respond to signs of business pathologies.

⁸ Adam Opalski, *Europejskie Prawo Spółek* (Lexis Nexis 2010) 229; Jennifer Payne, ‘Legal Capital in the UK Following the Companies Act 2006’ (2008) 13 University of Oxford Faculty of Law Legal Studies Research Paper Series

⁹ Luca Enriques and Jonathan R. Marcey, ‘Creditors versus Capital Formation: The case against the European Capital Rules’ (2001) 86 Cornell Law Review 1165

¹⁰ Saul Levmore, ‘Monitors and Freeriders in Commercial and Corporate Settings’ (1982) 49 Yale Law Journal 51

¹¹ John Armour, ‘Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law’ (2000) 63 Modern Law Review 355

A key principle of company law, present in all developed legal systems, is that shareholders may only receive payments out of the company's assets through legally stipulated procedures that is primarily through dividends. Consequently, the aim is to prevent the abuse of the legal form of a company in order to seek profits by externalising the risk of business activity onto third parties (primarily creditors).

According to the above, stated capital is supposed to act as a remedy against potential opportunism of shareholders in cases of business pathologies. An instrument crucial for such protection is that contributions made by shareholders to cover their shares may not be 'returned' to them. The share capital as a position on the liability side of the balance sheet is supposed to reflect the 'real' value of certain assets that are 'trapped' or 'imprisoned' in the company, and cannot be redistributed to shareholders, for example in the form of dividends. Stated capital is essential for the process of determining the sum that can be paid to shareholders as a dividend or through a repurchase of shares by the company. Share capital is therefore to be seen as a 'price' that a shareholder has to pay in exchange for not bearing the 'consequences' of the economic failure of the company.¹²

The practical 'application' of the concept of stated capital consists in the abidance of capital maintenance rules that regulate the possibility of a distribution to shareholders. Capital maintenance rules are being applied in particular in the course of the following corporate 'events' that are related to the distribution of the company's assets to shareholders: (1) the payment of dividends to shareholders; (2) the repurchase of shares by the company; (3) the financial assistance (financing by the company the repurchase of its own shares); and (4) the reduction of stated capital.

The establishment of a minimal capital requirement is only of secondary importance for the functioning of the concept of stated capital. In other words, although the minimum capital requirement is a characteristic and frequent part of the institution of stated capital, its existence is not a necessary characteristic of such regime.

The key points of the growing critique¹³ of the concept of stated capital are the following:

¹² Enriques and Marcey (n 9) 1173

¹³ See Jonathan Rickford 'Reforming Capital, Report of the Interdisciplinary Group on Capital Maintenance' (2004) 15 EBLR 919; John Armour 'Legal Capital: An outdated concept?' (2006) 7 European

- 1) The fundamental assumption concerning the withering need to protect creditors is doubtful because creditors voluntarily agree to bear the risk in order to make a profit.¹⁴ Voluntary creditors generally may consider the risk taken in their activity by constructing their product accordingly. Often creditors are professionals (i.e. banks), which means that a “welfare state” attitude towards these entities is not justified. Such a point of view is strongly supported in U.S. legal doctrine which emphasizes the ability of creditors to protect themselves by means of contract law. Even if some creditors (‘weak’ or involuntary creditors) will not be able to negotiate with the company contractual instruments destined to protect their claims, such selective interests of creditors should be contrasted with the economic cost of the stated capital regime’s subsistence (i.e. the costs of changes in capital);
- 2) Even if one agrees with the assumption concerning the need to protect creditors, it is doubtful whether the concept of stated capital grants such protection.¹⁵ In particular, it is being emphasized that stated capital as a sole ‘number’ on the liability side of the balance sheet often has no actual connection to the value of assets of the company. It is clear that in the course of doing business assets change their form, and the institution of stated capital only guarantees a certain value, rather than single, original assets. Thus, the protection of stated

Business Organization Law Review; Eddy Wymeersch, ‘European Company Law in Europe and European Company Law’ (2001) 6 Financial Law Institute Working Paper; Enriques and Marcey (n 9); Romanowski and Opalski (n 2); Adam Opalski ‘Kapitał zakładowy: skuteczny instrument ochrony wierzycieli czy przestarzała koncepcja prawna? Próba porównania modeli ochrony wierzycieli w prawie państw europejskich i stanów zjednoczonych’ (2004) 2 Kwartalnik Prawa Prywatnego 435; Michał Romanowski ‘W sprawie spółki z o.o. „light” i efektywności kapitału zakładowego’ (2010) 1 Przegląd Prawa Handlowego 4; Arkadiusz Radwan ‘Sens i nonsens kapitału zakładowego – przyczynek do ekonomicznej analizy ustawowej ochrony wierzycieli spółek kapitałowych’ in Mirosław Cejmer, Jacek Napierała and Tomasz Sójka (eds), *Europejskie prawo spółek, t. II – Instytucje prawne dyrektywy kapitałowej*, (Zakamycze 2005) 23; Hanno Merkt ‘European Company Law Reform: Struggling for a more Liberal Approach’ (2004) 3 European Company and Financial Law Review 35

¹⁴ Adam Opalski ‘Kapitał zakładowy: skuteczny instrument ochrony wierzycieli czy przestarzała koncepcja prawna? Próba porównania modeli ochrony wierzycieli w prawie państw europejskich i stanów zjednoczonych’ (2004) 2 Kwartalnik Prawa Prywatnego 435

¹⁵ Arkadiusz Radwan ‘Sens i nonsens kapitału zakładowego – przyczynek do ekonomicznej analizy ustawowej ochrony wierzycieli spółek kapitałowych’ in Mirosław Cejmer, Jacek Napierała, Tomasz Sójka (eds), *Europejskie prawo spółek, t. II – Instytucje prawne dyrektywy kapitałowej*, (Zakamycze 2005) 23

capital is purely abstract rather than material. The share capital is not an ‘inviolable deposit’, that tangibly guarantees the creditors’ claims. It is rather solely a declaration that initially, at the time of the company’s establishment, the shareholders have covered their shares. Further, the minimum amount of share capital existing in some legal systems tends to be disproportionately low to the scale of business. Consequently, the comparison of assets ‘imprisoned’ with obligations outstanding renders the concept meaningless and inappreciable. Stated capital is thus essentially an arbitrarily fixed amount, which is detached not only from the economic size of the business project but also from its risk exposure;

- 3) The embedment of creditor protection solely on the analysis of the company’s balance sheet does not reflect its liquidity, which is decisive for the possibility of creditor satisfaction.¹⁶ For creditors it is not only essential, if the company has an adequate surplus of assets over liabilities, but also if these assets may be ‘released’ easily;
- 4) The institution of stated capital generates excessive operating costs, in particular due to the framework of formalised procedures concerning the reduction or increase of capital.¹⁷ The declared aims of European policy makers to promote companies based on capital between small and medium-sized enterprises are at odds with the degree of complexity of the practical ‘use’ of stated capital, and thus the costs that are generated;
- 5) The institution of stated capital ‘imprisons’ assets in the company that otherwise could be used for investments to improve its financial situation, which in turn would be beneficial to both shareholders and creditors;
- 6) The institution of share capital deteriorates the possibilities of restructuring. If the market price of the shares falls below its nominal value, it is necessary to implement the costly operation of capital reduction in order to enable the accession of new investors.

¹⁶ Bayless Manning, James Hanks, *Legal Capital*, (Mineola-New York 1997) 85; Romanowski and Opalski (n 2)

¹⁷ Romanowski (n 13)

III. REFORMS IN EUROPEAN COUNTRIES

A. Germany

The types of German companies that will be subject to further analysis are the *Gesellschaft mit beschränkter Haftung* (hereinafter “GmbH”)¹⁸, comparable to the LLC and *Unternehmersgesellschaft* (hereinafter “UG”)¹⁹ which is a subtype of the GmbH introduced in 2008 to German company law. It must be emphasized that the German system of company law is the ‘cradle’ of the institution of stated capital.²⁰ The model of stated capital elaborated within the Capital Directive was significantly influenced by the German doctrine.²¹ Consequently, there is notable influence of German concepts in other Member States’ legal systems.

The institution of stated capital in the GmbH rests on two main pillars which are the contribution of minimum capital (*Kapitalaufbringung*) and the maintenance of capital (*Kapitalerhaltung*).²² The minimum share capital of the GmbH amounts to 25 000 EUR,²³ whereas the establishment of the LLC requires only 5000 PLN,²⁴ that is around 1200 EUR.

The enactment of the UG was the German ‘answer’ to the growing popularity of English private limited companies within the EU. This popularity caused concerns that Germany will lose its attractiveness and competitiveness in terms of business registration.²⁵ A key feature of the UG that differentiates it from the GmbH is the lack of a minimum capital threshold required for establishment.²⁶ Thus, the stated capital of an UG can be established according to the shareholder’s decision in an amount ranging

¹⁸ Act on the Limited Liability Company, Bundesgesetzblatt Part III, section number 4123-1

¹⁹ *ibid*

²⁰ Herbert Wiedemann, *Gesellschaftsrecht* (Beck 1980); Martin Lutter, *Kapital, Sicherung der Kapitalaufbringung und Kapitalerhaltung in den Aktien- und GmbH-Rechten der EWG* (Karlsruhe 1964)

²¹ Adam Opalski, *Europejskie Prawo Spółek* (Lexis Nexis 2010) 227

²² Tim Drygala, Marco Staake and Stefan Szalai, *Kapitalgesellschaftsrecht, Mit Grundzügen des Konzern- und Umwandlungsrechts* (Springer 2012) 381

²³ GmbH-Gesetz § 5 I

²⁴ Polish Code of Commercial Companies, art. 154 § 1

²⁵ Drygala, Staake and Szalai (n 22) 85

²⁶ GmbH-Gesetz § 5a

between 1 and 24 999 EUR.²⁷ If the stated capital is equal or exceeds 25 000 EUR, the company is ‘automatically’ considered a GmbH. This mechanism is not only applicable for the process of establishment – if during further course of business of a UG the threshold of 25 000 EUR is surpassed, the UG is *ipso iure* converted to a ‘traditional’ GmbH. The company may choose whether to remain with the indication of legal form “UG” in its name or whether to switch to “GmbH”. Notwithstanding the possible adherence “UG”, provisions concerning the GmbH will be fully applicable.

Even though a major characteristic of the concept of stated capital (minimum capital requirement) has been abandoned in case of the UG, other more fundamental elements of the institution, that is the capital maintenance rules (*Kapitalerhaltung*) were upheld or even, surprisingly, tightened. Unlike in the case of a GmbH, where prior to the registration of the company only ¼ of the capital needs to be paid, the whole sum of stated capital (as defined by the shareholders) of a UG has to be paid in full prior to its registration.²⁸ Thus, the registration of a UG with a stated capital exceeding 12 500 Euro requires a greater initial contribution by the shareholders, than the registration of a GmbH. Furthermore, the shares of a UG may not be covered by in-kind contributions.²⁹ Such a restraint ceases when the amount of stated capital exceeds 25 000 EUR,³⁰ that is simultaneously with the UG’s conversion into a GmbH. The transformation from UG to GmbH is irreversible - it is not allowed to reduce the stated capital to an amount less than 25 000 EUR.³¹

The ‘loosening’ of the stated capital regime in the UG in terms of the lacking minimal capital requirement is offset by specific provisions concerning the hoarding of profits in the company. The profits earned by the company may not be ‘used’ by shareholders in an unrestricted manner, in particular, they cannot be fully distributed through dividends (as it is the case in the GmbH). The legislature decided to impose the obligation for any UG to set aside 25% of the annual profit less losses brought

²⁷ GmbH-Gesetz § 5 and 5a II

²⁸ GmbH-Gesetz § 5a II rel. to 7 II

²⁹ GmbH-Gesetz § 5a II a

³⁰ GmbH-Gesetz § 5a V

³¹ Martin Lutter, *Peter Hommelhoff, GmbH-Gesetz* (2009)

forward, to a special reserve account.³² Appropriations credited to the fund are ‘frozen’, that is they cannot be distributed to shareholders. The reserve fund may serve as a source to increase the stated capital or cover losses.³³ Consequently, the rules restricting the distribution of profits of the UG aim to ensure that over time stated capital reaches the minimal threshold foreseen for the GmbH which will in turn lead to a *ipso iure* conversion of the UG to a GmbH.

The UG company was supposed to be a legal instrument to ‘enlive’ company registration in Germany. In fact, the abovementioned legal mechanisms have reduced its significance by turning it into a mere transitional stage of business that ultimately leads to the legal regime of a GmbH. Consequently, the German reform of 2008 did not touch upon the core critique of the concept of stated capital. Nevertheless, the lack of a minimum capital threshold is undeniably a ‘step forward’. In view of the fact that Germany is the ‘cradle’ of the concept of stated capital, the abandonment of the minimal capital requirement is to be considered as a clear alert for other EU Member States to accustom to new tendencies.

B. France

French companies being subject to subsequent analysis are the *société par actions simplifiée* (hereinafter “SAS”) and the *société à responsabilité limitée* (hereinafter “SARL”). The SARL, which is comparable to the LLC, is the most popular way of conducting business in France. As data from the year 2012 shows, the SARL represents 81% of all French companies.³⁴

In 2003 a reform abolished the minimum capital threshold for the SARL, which was previously set at 7500 EUR.³⁵ France was thus the first European country

³² GmbH-Gesetz § 5a III

³³ GmbH-Gesetz § 5a III

³⁴ Tableaux de l'économie française, Institut national de la statistique et des études économiques <http://www.insee.fr/fr/ffc/tef/tef2012/tef2012.pdf>

³⁵ Loi n° 2003-721 du 1er août 2003 pour l'initiative économique

with a deeply rooted system of stated capital, which has decided to give up the minimum capital requirement. Despite the abolition of the minimum capital threshold, the French legislature did not ‘abolish’ the concept of stated capital as such. The stated capital of a SARL can be freely determined in the articles of association of the company.³⁶

A similar reform has been introduced to the SAS in 2009.³⁷ This type of company can best be compared to a Polish joint-stock company (*spółka akcyjna*) whose shares are not publicly traded at the stock exchange. Whereas the Polish system differentiates between public and non-public joint-stock companies within one ‘type’ of company and applies the regime of the Capital Directive to both, the French legislator has ‘extracted’ the non-public joint-stock company (SAS) from the Capital Directive’s regime. The abandonment of the minimal capital requirement in the SAS in 2009 should be traced back to positive experiences with the reform of the SARL in 2003.

Mechanisms supplementing the capital maintenance rules are governing the liability of persons managing the company for ‘embezzlement’. Under French law there are effective mechanisms of accountability based on “fault in management” (*faute de gestion*) and the “factual management” (*gérance de faite*). Liability for fault in management is to be understood as a form of private law liability for damage caused by improper management of the company to the company itself or to third parties, as well as the liability in the event of bankruptcy. The manager may be liable, if the company’s assets are insufficient to satisfy the creditors’ claims in the course of bankruptcy proceedings, as long as mismanagement of the company has contributed to such a situation (*responsabilité pour insuffisance d’actif*).³⁸ Alternatively, a similar instrument may be applied if a manager’s action has led the company to cease its debt payments. In such case the court may impose upon the manager the obligation to satisfy all or part of the company’s debt (*l’obligation aux dettes sociales*).³⁹ The French variation of the concept of “fault in management” is based upon the assumption that people exercising actual powers over the company (factual management) should be subject to liability as if they

³⁶ Loi n° 2000-05 du 15 mars 2000 portant Code du Commerce

³⁷ Loi n° 2008-776 du 4 août 2008 de modernisation de l’économie

³⁸ L. 651-2 French Commercial Code

³⁹ L. 652-1 French Commercial Code

were managers (members of the board). Such liability of factual managers may involve shareholders as well as third parties. According to jurisprudence of the French Supreme Court the establishment of a company without the necessary capital to ensure its functioning and the continuation of its operation without the adoption of measures to remedy the problem of lacking capital may be considered as a fault in management.⁴⁰ Consequently, under certain consequences a shareholder may be held liable for the establishment of a company without sufficient capital. It follows, that the abandonment of the minimal capital requirement is being ‘corrected’ by the threat of potential liability of managers and shareholders, if they are treated as ‘factual managers’.

C. The Netherlands

In the Dutch legal system of company law the *Besloten Vennootschap* (hereinafter “BV”) is to be regarded as the equivalent of the LLC. The discussion on the amendment of the regulations concerning the BV were initiated in 2003 when experts commenced to question its competitiveness struggle for the registration of companies between the EU Member States. The adoption of the *Wet vereenvoudiging en flexibilisering bv-recht*, also known as *Flex BV Act* took place June 2012, and came into effect in October 2012. The aim of the Flex BV Act, as the name suggests, was to render the BV more flexible, tailored to the needs of entrepreneurs. The reform affects different areas of regulation BV, including the concept of the stated capital.

The ‘new’ BV breaks almost completely with the key features of a stated capital regime. The introduced amendments abandoned the minimal capital requirement of 18 000 EUR.⁴¹ As a consequence, the procedures of capital contributions were relaxed as well: in-kind contributions are no longer examined by an auditor and the requirement of a bank certificate proving the coverage of shares by a cash payment upon registration has been abolished.⁴²

⁴⁰ Cass.com., 23.11.1999, RJDA nr 4/2000 nr 457

⁴¹ Burgerlijk Wetboek, sec. 2:178¹

⁴² Burgerlijk Wetboek, sec. 2:204a²; Burgerlijk Wetboek, sec. 2:203a.

Most importantly, major changes affected the capital maintenance rules. The revised rules for distribution to shareholders provide for two ‘tests’ designed to determine if under certain circumstances such distribution is admissible. The first test is a test of adequacy (balance sheet test), which allows for distribution to shareholders only if the net assets (assets less liabilities) exceed the amount of obligatory reserves that a company has to maintain.⁴³ Under the balance sheet test only an amount equal to the mandatory reserve, plus the amount of the liabilities of the company is being protected. The second test is a test of liquidity, based on the criterion of the settlement of liabilities by the company.⁴⁴ This test provides that the management (board) may refuse a distribution to shareholders only if it should reasonably be expected that the distribution would prevent repayment of maturing obligations. Thus, the rules for the distribution of funds to the shareholders of a BV have been detached from the share capital.

The Flex BV Act deliberately does not indicate what criteria or instruments management should use in the assessment process. Such approach aims to mobilize management to use analytical methods that enable the most complete assessment. The arbitrariness in the choice of instruments of assessment is ‘naturally’ limited through rules of management liability in case of a company’s failure to meet obligations after a distribution has been performed. Board members are individually and severally responsible for distributions violating the adequacy and liquidity test, which means that they are required to repay the company the amount of the unlawful distribution. The awareness of potential risks associated with negligent ‘testing’ is therefore a constraining factor in the choice of instruments that the management will use.

Liability for unlawful distributions (violating the solvency and liquidity test) embraces not only the managers of the company. Shareholders who were aware or could reasonably assume that the distribution will lead to the inability to satisfy the company’s liabilities are also liable to repay the unlawful distribution to the company. Further, management-level employees (not member of the board) who exercised actual

⁴³ Burgerlijk Wetboek, sec. 2:216¹

⁴⁴ Burgerlijk Wetboek, sec. 2:216²

powers over business decisions of the company (the decision to perform the distribution) are liable for unlawful distributions and therefore obliged to reimburse the company.⁴⁵

The reforms in the field of distributions to shareholders were not limited to payments in the form of dividends. The repurchase of a company's own shares is to be subject to the adequacy and liquidity tests discussed above as well. Further, the rules of liability for unlawful distributions are analogous. In addition, other restrictions on the acquisition of a company's own shares were significantly loosened. Most importantly, the decisions on the repurchase of a company's own shares is no longer to be made by the General Meeting of Shareholders as it has been exclusively delegated to the board. The Dutch legislator also gave up on the strict limitations concerning the number of shares that may be acquired by the company. The only 'quantitative limit' in this regard is that at least one share with voting rights has to rest within the hands of a shareholder other than the company itself.

The reform also affected the procedures of stated capital reduction. In order to determine the threshold of admissibility for a capital reduction, the abovementioned adequacy and liquidity test need to be applied. The Dutch legislator decided to expunge the convocation procedure under which the reduction of capital could be challenged by the creditors.

The Flex BV Act abolished the rules restricting financial assistance that were modelled under the regime of the Capital Directive. The board's decision to finance the acquisition of the company's shares will therefore only be subordinated to the rules of prudent and diligent governance. The Dutch legislator even went as far as to retroactively 'heal' financial assistance that would have been illegal under the 'old' laws. The only condition for such a 'cure' is that no legal dispute has been commenced.

⁴⁵ Burgerlijk Wetboek, sec. 2:216³

D. England

Although the concept of stated capital is not as deeply rooted in English company law as it is in continental Europe, the influence of the Capital Directive has led to a far reaching reception of its regime to the Limited Liability Company (hereinafter “Ltd.”) which is not covered by the Capital Directive.

The concept of stated capital has never been tied to the idea of a minimal capital requirement in the Ltd. In that respect England has been ahead of other EU Member States for a long time. Stated capital in the Ltd. is protected through rules corresponding to the principle of irreversibility of shareholders’ capital contributions. According to Section 830 (1) of the Companies Act 2006 „A company may only make a distribution out of profits available for the purpose”. A company's profits available for distribution are its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made. The term distribution not only covers the payment of dividends but also the redemption and repurchase of a company’s own shares.

The Companies Act of 2006 provides that a company may acquire or redeem its own shares even if “profits available for this purpose” are not sufficient.⁴⁶ Such procedure is fortified by the board’s obligation to guarantee that the company will remain solvent within 12 months from the date of the payment for the company’s own shares (solvency statement).⁴⁷ The statement of the directors should assess whether the payment for the company’s shares will cause the company’s inability to settle its obligations in the course of ongoing business operations. In addition, the Companies Act 2006 requires that an auditor's report confirming both the accuracy of calculation of the sum to be paid as well as the statements regarding the absence of any threat to the solvency of the company is attached to the solvency statement.⁴⁸ Unfounded director’s statements are sanctioned criminally.⁴⁹ Payment must also be approved by a resolution

⁴⁶ Companies Act 2006, sec. 709-724 (1)

⁴⁷ Companies Act 2006, sec. 714 (1)-(5)

⁴⁸ Companies Act 2006, sec. 714 (6)

⁴⁹ Companies Act 2006, sec. 715

of the company's shareholders who are entitled to access the directors' solvency statement as well as the auditor's report.⁵⁰

The reform of English company law in 2006 introduced a new, simplified procedure for the reduction of share capital that eliminates the need for court approval. In order to reduce share capital according to the new procedure, the shareholders' resolution must be supported by a statement of directors on the company's solvency perspectives (solvency statement). Different than in case of the solvency statement mentioned earlier, there is no obligation to submit an auditor's report.

Despite extensive preparatory work for the reform of the Companies Act in 2006, the final results do not satisfy the demands of deregulation. Although some cosmetic changes have been enacted, fundamental amendments to the regime of stated capital were introduced. The Committee preparing the reform clearly indicated that the "requirement under which the shares must have a nominal value, has become an anachronism".⁵¹ As it was proposed by the said Committee, no par value shares would allow the issue of shares at a price freely chosen by the company. Subsequently the contributions of the shareholders would be subject to protection under capital maintenance rules discussed above. Despite such clear recommendation from the Committee, a respective amendment to the Companies Act was not adopted.

IV. CONCLUSIONS

The comparative analysis of the concept of stated capital in France, Germany, the Netherlands and England has revealed that each of these countries has recognized the ineffectiveness of stated capital as an instrument for the protection of creditors. The outcome of the respective reforms is generally rather moderate. Only the Dutch legislator has enacted amendments to the BV that are to be recognised as a significant breakthrough. Notwithstanding the classification of the other legislature's reforms as

⁵⁰ Companies Act 2006, sec. 716-718

⁵¹ The strategic Framework, February 1999 (URN 99/654) 88

‘moderate’, they clearly constitute important ‘steps forward’ in search of an entrepreneur friendly, elastic and functional company law.

A key feature of all the reforms analysed is the abandonment of a minimal capital requirement for the establishment of a company. This positively mirrors growing awareness of the need for an economic and practical analysis of law. The fictitious functions of the minimal capital requirement that have broadly been discussed between scholars and practitioners finally became also evident to the legislators.

In terms of capital maintenance rules, strong path-dependency paired with adherence to the regime of the Capital Directive has restrained all analysed countries besides the Netherlands in their commitment to significant changes. In Germany, France and England rules governing distributions to shareholders of capital based companies that do not fall under the Capital Directive, are still in fact based on the provisions of the said directive. With regard to the planned reform of the Polish LLC one should call for changes inspired by the Dutch system. For a company’s creditor, the possibility to satisfy his claim is based upon two conditions: (1) the company’s assets are at least equal to its obligations; and (2) the company must be able to easily monetize these assets.

The adequacy and liquidity tests introduced by the Flex BV Act verify exactly the conditions pointed out above. Thus, the reform of the LLC should embrace the introduction of such tests as a ‘replacement’ for the creditor protection regime based on stated capital. Consequently, the abandonment of the concept of stated capital and the introduction of the adequacy and liquidity test would increase creditor protection.

The comparative analysis has underlined, that Poland faces a competitive challenge on the ‘market’ for company establishment in the EU. Such challenge may lead to success if the ongoing debate will not drown in mediocre and moderate solutions. It may be true that ‘old habits die hard’ and that Polish company law is used to the concept of stated capital but the Dutch example shows that significant reform can overcome strong path-dependence. In the end, it is the entrepreneurs who will decide, if regulatory progress should be accomplished through decisive leaps or hesitant tiptoeing.

The EU Legal Framework on Cross-Border Healthcare after the Adoption of the Patients' Mobility Directive

Ilektra Antonaki*

Abstract

This article focuses on the legal issues arising under Directive 2011/24/EU on the application of patients' rights in cross-border healthcare. This Directive aims to facilitate the access to safe and high-quality cross-border healthcare and promotes cooperation on healthcare between Member States. The present article first examines how general EU free movement law regulates healthcare services and, in particular, medical services provided within the framework of social security systems. It then analyses the provisions of Directive 2011/24/EU regarding the systems of prior authorisation and reimbursement of cross-border healthcare and compares them with the existing framework on the coordination of social security systems and the relevant case law of the European Court of Justice.

I. INTRODUCTION

“Today is an important day for patients across the European Union. As of today, EU law in force enshrines citizens' right to go to another EU country for treatment and get reimbursed for it. From today, all EU countries should have transposed the Directive on Patients' rights in Cross-border Healthcare, adopted 30 months ago, into their National law. For patients, this Directive means empowerment: greater choice of healthcare, more information, easier recognition of prescriptions cross-borders. The Directive is also good news for Europe's health systems, improving cooperation between

*Member States on interoperable eHealth tools, the use of health technology assessment, and the pooling of rare expertise [...]*¹

This statement was made on the 25th of October 2013 by the Health Commissioner, Tonio Borg, on the entry into force of the Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (hereinafter "Directive 2011/24/EU" or "Directive" or "Patients' Mobility Directive").² This Directive was adopted with the aim to facilitate access to safe and high-quality cross-border healthcare, to ensure patients' mobility and to promote cooperation on healthcare between Member States. Although the demand for cross-border healthcare represents only around 1% of public spending on healthcare, including cases of non-planned healthcare such as emergency care for tourists,³ this secondary legislation constitutes an important step towards the harmonisation of national rules in the relevant field, which have so far been significantly divergent, thereby causing difficulties in their application, confusion and legal uncertainty. The present article focuses on the convergence achieved by the Directive at issue in the field of cross-border healthcare. On one hand, this convergence was much desired by the Commission in view of the important discrepancies between national legislations. On the other, the Member States seemed reluctant to sacrifice their welfare structures for the accomplishment of the Internal Market. Nevertheless, a compromise was finally achieved. In order to better describe this compromise, the article first examines how healthcare services are regulated under the general EU free movement law

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¹ European Commission, Statement by Health Commissioner, Tonio Borg, on the entry into force of the Directive on Patients' Rights in Cross-border Healthcare, MEMO/13/932, 25/10/2013

² Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L 88/45

³ European Commission, 'Q&A: Patients' Rights in Cross-Border Healthcare' MEMO/13/918, 22/10/2013

(II) and then it analyses the provisions of Directive 2011/24/EU with an emphasis on the issues of prior authorisation and reimbursement of cross-border healthcare (III).

II. HEALTHCARE SERVICES UNDER EU FREE MOVEMENT LAW

Although the organisation of national health policies remains an exclusive competence of the Member States due to their special and sometimes sensitive nature, the operation of such policies may be subject to Treaty provisions on the Internal Market and competition. In this respect, it should be noted that the EU has a shared competence in the area of “common safety concerns in public health matters” under article 4 (2) (k) of the Treaty on the Functioning of the European Union (hereinafter “TFEU”)⁴ and a supporting, coordinating or complementary competence in the area of “protection and improvement of human health” under article 6 (a) TFEU. This double nature of the EU competence on public health issues is reflected in the legal basis provision of article 168 TFEU, which first sets out the general EU objective to ensure a higher level of human health protection and then provides for three different types of measures that can be adopted in this respect.⁵ Furthermore, article 9 TFEU, the so-called “horizontal” social clause,⁶ stipulates that all EU policies must take into account social requirements “linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a

⁴ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47

⁵ First, article 168 (2) TFEU provides for the method of coordination through which the EU can encourage and support cooperation between the Member States in the area of public health. Second, according to article 168 (4) TFEU, the EU, acting in accordance with the ordinary legislative procedure, may adopt (a) measures setting high standards of quality and safety for organs and substances of human origins, (b) measures in the veterinary and phytosanitary fields and (c) measures setting high standards of quality and safety for medicinal products and devices for medical use. Finally, according to article 168 (5), the EU, acting again in accordance with the ordinary legislative procedure, may adopt *incentive* measures – excluding any harmonization – designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol.

⁶ Opinion of the European Economic and Social Committee on ‘Strengthening EU cohesion and EU social policy coordination through the new horizontal social clause in article 9 TFEU’ (own-initiative opinion) [2012] OJ C 24/29

high level of education, training and protection of human health”. In addition, it must be stated that article 35 of the Charter of Fundamental Rights protects “the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices”.⁷

In this chapter, we will first examine the application of the Treaty provision on the Internal Market and in particular on the freedom to provide services to healthcare services (A) and we will then proceed to a brief comment on the current system of coordination of social security (B).

A. The application of the freedom to provide services to healthcare services

Healthcare services fall within the scope of application of article 56 TFEU on the freedom to provide services. In *Luisi and Carbone*, the European Court of Justice (hereinafter “ECJ” or “Court”) confirmed that article 56 TFEU covers both the providers and the recipients of services and that “persons receiving medical treatment [...] are to be regarded as recipients of services”.⁸ This ruling was reaffirmed in the *Grogan* case, where the ECJ held that “medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of article 60 of the Treaty (article 56 TFEU)”.⁹ The reasoning of the Court was that services are normally provided for remuneration and, in accordance with article 57 TFEU, they fall under the scope of the provisions on the free movement of services in so far as they are not governed by the provisions relating to freedom of movement of goods, capital or persons.¹⁰ This residual character of article 56 TFEU means that the notion of “services” covers situations which are not governed by other freedoms in order to ensure that all economic activity falls within the scope of the

⁷ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

⁸ Joined Cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* [1984] ECR 00377, para 16

⁹ Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-04685, para 21

¹⁰ *ibid* para 17

fundamental freedoms.¹¹ Since the “termination of pregnancy, as lawfully practised in several Member States, is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity”,¹² it is to be considered a “service” falling under the scope of article 56 TFEU whatever the objections on the moral plane.¹³ Consequently, the decisive criterion, which determines whether medical activities are “services” for the purposes of article 56 TFEU, is their economic nature.

The Court has repeatedly held that medical services supplied for consideration fall within the scope of the provisions on the freedom to provide services and it has clarified, in *Smits and Peerbooms*, that there is no need to distinguish between care provided in a hospital environment and care provided outside such an environment,¹⁴ and in *Stamatelaki*, that it is immaterial whether the establishment in question is public or private.¹⁵ It has further underlined that article 56 TFEU “does not require that the service be paid for by those for whom it is performed”¹⁶ and that “the payments made by the sickness insurance funds under the contractual arrangements [...], albeit set at a flat rate, [are] the consideration for the hospital services and unquestionably [represent] remuneration for the hospital which receives them and which is engaged in an activity of an economic character”.¹⁷

Subsequently, in *Watts*, a landmark decision regarding the UK’s National Health Service (hereinafter “NHS”), the ECJ ruled that article 56 TFEU applies where a patient “receives medical services in a hospital environment for consideration in a Member State other than her State of residence, regardless of the way in which the national system with which that person is registered and from which reimbursement

¹¹ Case C-452/04 *Fidium Finanz AG v Bundesanstalt Finanzdienstleistungsaufsicht* [2006] ECR I-09521, para 32

¹² Case C-159/90 *Grogan* (n 9) para 18

¹³ *ibid* para 20

¹⁴ Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-05473, para 53

¹⁵ Case C-444/05 *Aikaterini Stamatelaki v NPDD Organismos Asfaliseos Eleftheron Epangelmaton (OAE)* [2007] ECR I-03185, para 22

¹⁶ Case C-157/99 *Smits and Peerbooms* (n 14) para 57

¹⁷ *ibid* para 58

of the cost of those services is subsequently sought operates”.¹⁸ However, regarding the highly controversial issue of the economic nature of the medical services provided by a NHS, the ECJ, whilst accepting the applicability of article 56 TFEU, it nonetheless added that there was “no need in the present case to determine whether the provision of hospital treatment in the context of a national health service such as the NHS is in itself a service within the meaning of those provisions”.¹⁹ In other words, the Court seemed deliberately hesitant to rule on whether the services provided by a NHS *per se* are regarded as “services” for the purposes of article 56 TFEU.²⁰ The aforementioned developments show that although the sector of public health – contrary to the sector of public education²¹ – has progressively been subjected to the rules of the Internal Market on the freedom to provide services, the ECJ has so far avoided characterizing the healthcare of a NHS in itself as “service” within the meaning of article 56 TFEU, in an effort to maintain a balance between the ultimate objective of the accomplishment of the Internal Market and the respect of some traditionally sensitive areas of

¹⁸ Case C-372/04 *Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* [2006] ECR I-04325, para 90

¹⁹ *ibid* para 91

²⁰ Rita Baeten, Wouter Gekiere and Willy Palm, ‘Free movement of services in the EU and health care’ in Rita Baeten, Tamara K Hervey, Elias Mossialos and Govin Permanand (eds.), *Health Systems Governance in Europe* (CUP 2010) 461-508, 467; Gianni De Búrca and Paul Craig, *EU Law: Text, Cases, and Materials* (3rd edn, OUP 2011) 796

²¹ In *Humbel*, the Court emphasized that “the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service”. The Court held that the national educational system did not fall within the scope of article 56 TFEU because it was lacking the decisive element of remuneration. In this regard, the Court underlined that “the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields” and that “the system in question is, as a general rule, funded from the public purse and not by pupils or their parents” (Case 263/86 *Belgian State v René Humbel and Marie-Thérèse Edel* [1988] ECR 05365, paras 17-19). In *Wirth*, the Court held that “those considerations are equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds”, but conversely agreed with the UK that the establishments of higher education “financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit” are considered “services” within the meaning of article 56 TFEU (Case C-109/92 *Stephan Max Wirth v Landeshauptstadt Hannover* [1993] ECR I-06447, paras 16-17). Finally, in *Schwarz*, the Court reiterated that private education, which is characterized by the element of remuneration, is an economic activity falling within the scope of article 56 TFEU (Case C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I-06849, para 47)

welfare States' competences which affect the provision of public services with significant political and societal connotations.

B. Coordination of social security

Having established early enough that medical services provided for remuneration fall within the scope of application of the Internal Market rules on freedom to provide services, in 1998 the Court went one step further and applied the freedom to provide services in the field of social security. In particular, in *Kobll*, the Court, responding to the objections raised by the Member States, held that the fact that the national rules at issue fell within the sphere of social security could not exclude the application of article 56 TFEU.²² Whilst social security is a competence of the Member States, the latter must nonetheless exercise that competence consistently with EU law. On this basis, it ruled that the treatment provided by an orthodontist established in Germany was considered a "service" for the purposes of article 56 TFEU and that the requirement of prior authorisation for the reimbursement of the treatment received, imposed by Luxembourg, constituted an unjustified restriction on the freedom to provide services.²³

However, the application of the freedom to provide services does not mean that EU law detracts from the powers of the Member States to organise their social security systems.²⁴ Indeed, social security, one of the traditional functions of the welfare State, is a particularly sensitive area,²⁵ which constitutes first and foremost a matter

²² Case C-158/96 *Raymond Kobll v Union des caisses de maladie* [1998] ECR I-01931, para 21. See also the parallel Case C-120/95 *Nicolas Decker v Caisse de maladie des employés privés* [1998] ECR I-01831, para 25, decided on the same day as *Kobll*, where the Court found that the requirement of a prior authorization for reimbursement of the cost of a pair of spectacles with corrective lenses purchased from an optician established in Belgium, on a prescription from an ophthalmologist established in Luxembourg, constituted an unjustified restriction on the free movement of goods under article 34 TFEU

²³ Case C-158/96 *Kobll* (n 22) para 54

²⁴ Case C-158/96 *Kobll* (n 22) para 17; Case 238/82 *Duphar and Others v Netherlands* [1984] ECR 00523, para 16; Case C-70/95 *Sodemare and Others v Regione Lombardia* [1997] ECR I-3395, para 27.

²⁵ Stephane De la Rosa, 'The Directive on cross-border healthcare or the art of codifying complex case-law' (2012) 49 *Common Market Law Review* 15-46, 17

of the Member States. According to settled case law, “in the absence of harmonisation at Community level, it is therefore for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits”.²⁶

Article 48 TFEU, the legal basis provision on social security, provides only for the coordination - and not the harmonisation - of the national legislations relating to social security combined with negative integration (i.e. prohibitions of discrimination). Coordination is one of the integration techniques used in EU secondary law, which aims at improving the interplay of national systems, rather than approaching the national legislations on the substantive level.²⁷ In essence, this means that countries are entitled to establish their own social security system, determining who is to be insured, which benefits are granted and under what conditions without any interference at EU level. The EU rules on social security coordination do not replace national systems with a single European one. However, they do provide protection for EU citizens who exercise their free movement rights.

The main legal instruments of this coordination, which is founded on the cooperation of national social security administrations, is Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems²⁸ - which replaced the Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community²⁹ - and Regulation (EC) No 987/2009 implementing Regulation (EC) No 883/2004 (hereinafter “Regulations”).³⁰ These Regulations, adopted on the basis of

²⁶ Case C-158/96 *Kobll* (n 22) para 18; Case 110/79 *Coonan v Insurance Officer* [1980] ECR 1445, para 12; Case C-349/87 *Paraschi v Landesversicherungsanstalt Württemberg* [1991] ECR I-4501, para 15; Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira v Bundesanstalt für Arbeit* [1997] ECR I-511, para 36

²⁷ Jacques Belinger and Christa Tobler, *Essential EU Law in Charts* (HVG-ORAC, Budapest 2013) Chart 11/4. The other three integration techniques as explained in this Chart are the unified legislation, the harmonization and the mutual recognition

²⁸ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1

²⁹ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/2

³⁰ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of

article 48 TFEU, fall within the framework of the freedom of movement for workers and their main purpose is to ensure that insured persons - mainly workers – do not lose their social security protection when moving to another Member State.³¹

Despite the Court's effort not to interfere with traditional social competences of the Member States and the recognition of the legitimate aim to maintain the financial sustainability of the social security and national healthcare system, it is crucial to understand that certain core aspects of national welfare systems are undoubtedly subjected to the free movement provisions.³² The application of the Treaty provisions on the free movement to publicly funded welfare services has certainly opened the way for the adoption of Directive 2004/11/EU.

III. CROSS-BORDER HEALTHCARE SERVICES UNDER DIRECTIVE 2011/24/EU

The second chapter of the present article deals with the regulation of healthcare services under the provisions of Directive 2011/24/EU. It will first explain how the developments in the field of cross-border healthcare led to the adoption of

social security systems [2009] OJ L 284/1, which was later amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 amending Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 [2010] OJ L 338/35; Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 [2012] OJ L 149/4 and Commission Regulation (EU) No 1224/2012 of 18 December 2012 amending Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 Text with relevance for the EEA and for Switzerland [2012] OJ L 349/45

³¹ For a detailed and comprehensive analysis of the relationship between Regulations (EC) Nos 883/2004 and 987/2009 on the coordination of social security systems and Directive 2011/24/EU on the application of patients' rights in cross border healthcare, see European Commission, Guidance note of the Commission services on the relationship between Regulations (EC) Nos 883/2004 and 987/2009 on the coordination of social security systems and Directive 2011/24/EU on the application of patients' rights in cross border healthcare, AC 246/12, 21.05.2012

³² De Búrca and Craig (n 20) 796

this Directive (A) and it will then address the issues of prior authorisation and reimbursement (B).

A. The adoption of Directive 2011/24/EU

Before analysing the important substantive provisions regarding prior authorisation and reimbursement of cross-border healthcare, we will first make a brief comment on the exclusion of healthcare services from the Services Directive (1) and we will secondly examine the legal basis and the scope of Directive 2011/24/EU (2).

1. The exclusion of healthcare services from the Services Directive

From a historical perspective, as a result of their sensitive nature and their special regime, health services were excluded from the final version of the much-debated Directive 2006/123/EC of 12 December 2006 on services in the internal market (hereinafter “Directive 2006/123/EC”).³³ This Directive, known as the *Bolkestein* Directive after the name of the Commissioner who introduced the initial proposal,³⁴ establishes a general legal framework promoting the exercise of the freedom of establishment for service providers and the free movement of services. Although its name is limited to services, its actual scope of application covers both the area of temporary cross-border provision of services and the area of permanent establishment of entrepreneurs or undertakings. Whilst it covers a wide range of service activities, which represent around 40 % of the EU’s GDP and employment, it nonetheless excludes from its material scope, as defined in article 2 thereof, several important types of services, among which

³³ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36

³⁴ The *Bolkestein* Directive received a strong opposition and was given the name “*Frankenstein Directive*”, as it was considered to be a threat to the social structures of the Member States. It is even argued that the strong opposition against the Services Directive influenced the public debate in France, a traditionally welfare state with a highly developed social protection system, and ultimately resulted in the negative vote in the national referendum concerning the Constitutional Treaty, see De Búrca and Craig (n 20) 813

“healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private”.³⁵

The exclusion of healthcare services from the scope of Directive 2006/123/EC was a compromise between the Commission’s objective to harmonise the national legislations in the field of services and establishment and the Member States’ unwillingness to concede their competences on their welfare systems to the Union. However, despite this exclusion, the Court continued to consider healthcare services as “services” within the meaning of article 56 TFEU. Besides, according to the *Tedeschi* principle, in the absence of secondary legislation, the relevant general Treaty provisions apply.³⁶ The application of the Treaty rules in the field of cross-border healthcare services led to important jurisprudential principles, which were ultimately codified in Directive 2011/24/EU.

2. The legal basis and the scope of Directive 2011/24/EU

Directive 2011/24/EU was adopted on the general legal basis provision of article 114 TFEU, which confers upon the EU the power to adopt measures, in accordance with the ordinary legislative procedure, for the approximation of national legislations in fields relating to the establishment and functioning of the Internal Market. Recital 2 of its Preamble justifies the choice of this legal basis provision by referring to the aim of the Directive, which is to improve the functioning of the internal market and the free movement of goods, persons and services. Even though the Directive affects also (or even primarily) issues of public health, article 168 TFEU was not ultimately added as a second legal basis provision, despite the political pressure exercised by the Member States.

The subject matter and scope of Directive 2011/24/EU is defined in article 1 thereof, according to which the Directive aims at facilitating the access to safe and

³⁵ Article 2 (2) (f) of Directive 2006/123/EC

³⁶ Case C-5/77 *Carlo Tedeschi v Denavit Commerciale s.r.l.* [1977] ECR I-01555, para 35

high-quality cross-border healthcare and promoting cooperation on healthcare between the Member States, while clarifying that this objective will be pursued in full respect of national competences in organising and delivering healthcare. With respect to its material scope, which is defined by the combined provisions of article 1 and 3 (a) and (e), the Directive applies to the provision of cross-border healthcare, regardless of how it is organised, delivered and financed. However, article 1 (3) of the Directive explicitly excludes from its scope of application (a) services in the field of long-term care the purpose of which is to support people in need of assistance in carrying out routine, everyday tasks,³⁷ (b) allocation of and access to organs for the purpose of organ transplants and (c) public vaccination programmes against infectious diseases which are exclusively aimed at protecting the health of the population on the territory of a Member State and which are subject to specific planning and implementation measures (with the exception of Chapter IV which refers to the cooperation between the Member States on the implementation of the Directive). Accordingly, the Directive at issue does not apply to long-term care services, organ transplants and public vaccination programmes.

B. The rules on prior authorisation and reimbursement under Directive 2011/24/EU

Turning to the more substantive questions arising under Directive 2011/24/EU, we will now address the issues of prior authorisation (1), reimbursement (2) and administrative procedures regarding cross-border healthcare (3). For this purpose, we will also compare the provisions of the Directive with the provisions of the

³⁷ The OECD has defined long-term care as the care for people needing support in activities of daily living over a prolonged period of time (OECD Report: “Long-Term Care for Older People”, 2005). Long-term care services are usually provided to persons with physical or mental disabilities and the frail elderly and particular groups that need assistance in their daily life activities. They include rehabilitation, basic medical services, home nursing, social care, housing and services such as transport, meals, occupational and empowerment activities, thus also including help with instrumental activities of daily living (IADLs) (EU Report: “Long-term in the European Union”, April 2008)

social security Regulations in order to obtain a better understanding of this complex system.

Before starting our analysis, it should be mentioned that Directive 2011/24/EU does not distinguish between planned and unplanned healthcare but applies in principle to all care received by patients in a Member State other than the Member State of affiliation.³⁸ With regard to the unplanned healthcare, article 2 (m) and 7 (1) of Directive 2011/24 provide that where the terms of the Regulations are met and the conditions of the Regulations are more favourable to the patient, the Regulations must be used, unless the patient explicitly requests otherwise. The application of the more favourable provisions of the Regulations is also enshrined in recital 28 of the Preamble according to which the Directive “should not affect an insured person’s rights in respect of the assumption of costs of healthcare which becomes necessary on medical grounds during a temporary stay in another Member State according to Regulation (EC) No 883/2004”. Consequently, Directive 2011/24/EU cannot be invoked in an effort to deny access to healthcare for insured persons who possess the European Health Insurance Card.³⁹ With regard to planned healthcare, the system of prior authorisation and reimbursement established by the Directive constitutes to a great extent a codification of the case law of the Court in the relevant field and will be analysed in the following paragraphs.

³⁸ European Commission, Guidance note (n 31) 3

³⁹ Under article 19 (1) of Regulation (EC) No 883/2004, insured persons and their family members staying in a Member State other than the competent Member State are entitled to the benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay. The State of stay provides these benefits taking into account their nature and the length of the stay. The aim is that the person concerned is not compelled to return to his Member State to receive treatment before the expected end of his stay. These benefits are provided by the institution of the place of stay in accordance with the statutory conditions, procedures and rates applied by this institution, as if the beneficiaries were insured under this legislation. To benefit from these provisions, the persons concerned must submit an individual document detailing their rights issued by the competent institution of the Member State where the person is insured, known as the European Health Insurance Card (in application of article 25 (1) of Regulation (EC) No 987/2009), directly to the treatment provider in the State of stay

1. Prior authorisation for receiving cross-border healthcare

Contrary to the Regulations, which prescribe prior authorisation as a necessary requirement for receiving planned treatment in another Member State, the requirement of prior authorisation is not the rule under Directive 2011/24/EU. In particular, according to article 8 of the Directive, the Member State of affiliation⁴⁰ may provide for a system of prior authorisation only for certain types of cross-border healthcare and only in so far as it is necessary and proportionate to the objective to be achieved and does not constitute a means of arbitrary discrimination or an unjustified obstacle to the free movement of patients. The specific types of cross-border healthcare that may be subject to prior authorisation are listed in article 8 (2) of the Directive and are limited to healthcare which: (i) involves overnight hospital accommodation of the patient in question for at least one night; or (ii) requires use of highly specialized and cost-intensive medical infrastructure or medical equipment; or (iii) involves treatments presenting a particular risk for the patient or the population; or (iv) is provided by a healthcare provider that could give rise to serious and specific concerns relating to the quality or safety of the care. By contrast, article 20 (1) of Regulation (EC) No 883/2004 provides that the insured persons and members of their family travelling to another Member State with the aim of receiving benefits in kind during the stay must seek an authorisation from the competent Member State.⁴¹

With respect to the possible refusal of prior authorisation, the general rule laid down in article 8 (5) of Directive 2011/24 is that prior authorisation may not, in principle, be refused if “the patient is entitled to the healthcare in question” in the Member State of affiliation and “when this healthcare cannot be provided on its territory within a time limit which is medically justifiable”. This rule constitutes a codification of the settled case law of the Court regarding the question of “undue delay”. In particular,

⁴⁰ According to article 3 (c) (i) of Directive 2011/24/EU, the Member State of affiliation is the Member State competent to grant to the insured person a prior authorisation to receive appropriate treatment outside the Member State of residence according to Regulation (EC) No 883/2004 and (EC) No 987/2009

⁴¹ In accordance with article 1 (s) of Regulation (EC) No 883/2004, the competent Member State is the Member State in which the institution with which the person concerned is insured or from which the person is entitled to benefits is situated

before the adoption of Directive 2011/24/EU, the Court had been called, in several occasions, to interpret article 20 of Regulation (EC) No. 883/2004, replacing article 22 of Regulation No 1408/71 - which lays down a duty to grant the authorisation where the treatment in question is among the benefits to which the patient is entitled and where he or she cannot be given such treatment within a time-limit which is medically justifiable - in conjunction with article 56 TFEU on the freedom to provide services.

According to the interpretation given by the Court in the cases of *Smits and Peerbooms*,⁴² *Müller-Fauré and van Riet*⁴³ and *Inizan*,⁴⁴ in order to determine whether treatment which is equally effective for the patient can be obtained without “undue delay” in the Member State of residence, the competent institution is required to have regard to all the circumstances of each specific case, taking due account not only of the patient’s medical condition at the time when authorisation is sought and, where appropriate, of the degree of pain or the nature of the patient’s disability which might, for example, make it impossible or extremely difficult for him to carry out a professional activity, but also of his medical history.

In *Müller-Fauré and van Riet*, the Court also pointed out that, in determining whether a treatment which is the same or equally effective for the patient is available without “undue delay” from an establishment on the territory of the Member State of residence, the competent institution cannot base its decision exclusively on the existence of waiting lists on that territory without taking account of the specific circumstances of the patient’s medical condition.⁴⁵ The Court continued the same line of reasoning in the *Watts* case, holding that in order to be entitled to refuse the authorisation on the ground of waiting time, the competent institution must however establish that the waiting time, arising from objectives relating to the planning and management of the supply of hospital care, does not exceed the period which is acceptable in the light of an objective medical assessment of the clinical needs of the person concerned in the light of his medical condition and the history and probable course of his illness,

⁴² Case C-157/99 *Smits and Peerbooms* (n 14) para 104

⁴³ Case C-385/99 *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-04509, para 90

⁴⁴ Case C-56/01 *Inizan v Caisse primaire d'assurance maladie des Hauts-de-Seine* [2003] ECR I-12423, para 46

⁴⁵ Case C-385/99 *Müller-Fauré and van Riet* (n 43) para 92

the degree of pain he is in and/or the nature of his disability at the time when the authorisation is sought.⁴⁶ The Court also added that “the setting of waiting times should be done flexibly and dynamically, so that the period initially notified to the person concerned may be reconsidered in the light of any deterioration in his state of health occurring after the first request for authorisation”.⁴⁷ Consequently, in the light of this case law, it is important to underline the significance of an objective and case-by-case medical assessment of the patient’s condition in order to determine whether the time limit within which an equally effective treatment can be provided in his or her own Member State is reasonable and acceptable.

Having established the rule that the Member State of affiliation is in principle obliged to grant prior authorisation if the treatment requested by the patient could not be provided on its territory without “undue delay”, the Directive then allows for further derogations from this general rule on the grounds of safety or quality considerations. In particular, according to article 8 (6) of Directive 2011/24, the Member State of affiliation may refuse to grant prior authorisation when: (a) the patient will be exposed with reasonable certainty to a patient-safety risk that cannot be regarded as acceptable; (b) the general public will be exposed with reasonable certainty to a substantial safety hazard as a result of the cross-border healthcare in question; (c) the healthcare is to be provided by a healthcare provider that raises serious and specific concerns relating to the respect of standards and guidelines on quality of care and patient safety.⁴⁸ These exceptions can be reduced to the general derogation on the ground of public health mentioned in article 52 TFEU in conjunction with article 62 TFEU. Before the adoption of the Directive, in *Stamatelaki*, the Court dismissed the argument of the Greek government that the exclusion of reimbursement of the costs occasioned in *private* hospitals in another Member State, except those relating to treat-

⁴⁶ Case C-372/04 *Watts* (n 18) para 68

⁴⁷ *ibid* para 69

⁴⁸ The last derogation under article 8 (6) (d) of the Directive, according to which the Member State of affiliation may refuse to grant prior authorisation when the healthcare can be provided on its territory within a time limit which is medically justifiable stems from the general rule of article 8 (5) of the Directive

ment provided to children under 14 years of age, were justified by the need to guarantee the quality of health services.⁴⁹ It based its reasoning on the principle of mutual recognition⁵⁰ and it ruled that private hospitals located in other Member States are also subject to quality controls and that doctors who operate in those establishments provide professional guarantees equivalent to those of doctors established in Greece, in particular since the adoption and implementation of Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications.⁵¹ However, in the absence of a harmonisation of quality standards in hospitals, the imposition of an automatic and unconditional trust of all private healthcare institutions is not a “self-evident solution”.⁵² For instance, in the *French laboratories* decision, the Court recognised that France could require laboratories established in another Member State to prove that the controls of that Member State were no less strict than those applicable in France.⁵³ Due to the wide diversity in the quality of the clinical care,⁵⁴ Member States claim that strict requirements for the approval of cross-border services and frequent inspections are necessary for ensuring the quality assurance of healthcare services.⁵⁵

2. Reimbursement of the costs of cross-border healthcare

With regard to the question of reimbursement of cross-border healthcare, the general principle set out in article 7 of Directive 2011/24/EU prescribes that the Member State of affiliation shall ensure that the costs incurred by the insured person who receives cross-border healthcare are reimbursed. This reimbursement is conditioned

⁴⁹ Case C-444/05 *Stamatelaki* (n 15) para 38

⁵⁰ The principle was first elaborated within the framework of the free movement of goods in the case 120/78 *Reve Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649, para 14

⁵¹ Case C-444/05 *Stamatelaki* (n 15) para 37

⁵² Baeten R., Gekiere W. & Palm W., “Free movement of services in the EU and health care” in Baeten R., Hervey T.K., Mossialos E. & Permanand G. (eds.), *Health Systems Governance in Europe* (CUP 2010) 461-508, 484

⁵³ Case C-496/01 *Commission v France* (French laboratories) [2004] ECR I-2351, para 74

⁵⁴ Glinos I.A., Legido-Quigley H., McKee M. & Nolte E., Assuring the quality of health care in the European Union, WHO 2008 on behalf of the European Observatory on Health Systems and Policies

⁵⁵ C-562/10 *Commission v Germany* (Care Insurance) [2012] n.y.r., para 33

upon the healthcare in question being among the benefits to which the insured person is entitled in the Member State of affiliation. In practice, this means that the patient who seeks a treatment in another Member State has to pay the full cost of the treatment received directly to the healthcare provider and subsequently, he or she may ask for reimbursement only if the treatment received is covered by his or her insurance in the State of affiliation.

The fourth paragraph of article 7 of the Directive makes an important clarification regarding the costs that are to be reimbursed: it provides that “the costs of cross-border healthcare shall be reimbursed or paid directly by the Member State of affiliation up to the level of costs that would have been assumed by the Member State of affiliation, had this healthcare been provided in its territory without exceeding the actual costs of healthcare received”. This means that if the treatment received in the Member State of treatment costs more than it would have cost in the Member State of affiliation, the latter is only obliged to reimburse the amount that it would have paid should the treatment had been provided on its territory. It furthermore means that, in a reverse situation, where the treatment received in the Member State of treatment costs less than it would have cost in the Member State of affiliation, the latter is only obliged to cover the actual costs of the treatment received. This limitation of the reimbursement appears to be reasonable and consistent with the need to prevent the risk of jeopardizing the financial balance of a social security system as an overriding reason in the general interest capable of justifying a barrier to the principle of freedom to provide services and the need to protect public health which includes the objective of maintaining a balanced medical and hospital service open to all.

By contrast, in the *Vanbraekel* case,⁵⁶ which was examined under the regime established by the Regulations and the general article 56 TFEU, the Court reached an opposite conclusion and established the “*Vanbraekel supplement*” which was later incorporated in article 26 (7) of Regulation (EC) No 987/2009. In particular, the Court, whilst recognizing that article 22 of Regulation No 1408/71 did not have the effect of requiring additional reimbursement when the system applied in the Member State in

⁵⁶ Case C-368/98 *Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes (ANMC)* [2001] ECR I-05363

which the person concerned was insured was more beneficial,⁵⁷ it nonetheless held that this additional reimbursement was required in the light of article 56 TFEU. The reasoning of the Court was that the lower level of cover when the person receives treatment in another Member State may deter, or even prevent, that person from resorting to providers of medical services established in other Member States and thus constitutes a barrier to freedom to provide services.⁵⁸ This barrier cannot be justified on the ground of the overriding reason in the general interest of preventing the risk of seriously undermining the financial equilibrium of the social security system or on the ground of the protection of public health under article 62 TFEU in conjunction with article 52 (1) TFEU.⁵⁹ It follows from the foregoing that, under article 56 TFEU the costs are to be assumed at the most favourable tariff and therefore the wording “without exceeding the actual costs of healthcare received” of article 7 (4) of Directive 2011/24/EU seems to be in contradiction with the “*Vanbraekel supplement*”. Of course, under the same article, it remains always possible for the Member State of affiliation to cover the full cost and may even reimburse other related costs, such as accommodation and travel costs, but this is a mere discretion and not an obligation.

It should be noted that article 7 (9) of Directive 2011/24, which codifies the relevant case law of the Court, provides for a derogation whereby the Member State of affiliation may impose restrictions on the reimbursement on the grounds of overriding reasons of general interest, such as planning requirements relating to the aim of ensuring sufficient and permanent access to a balanced range of highly-quality treatment in the Member State concerned or the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources.

3. Administrative procedure regarding cross-border healthcare

Finally, in accordance with article 9 of Directive 2011/24/EU, the Member State of affiliation shall ensure that the administrative procedures regarding cross-border healthcare are based on objective, non-discriminatory criteria which are necessary

⁵⁷ *ibid* para 37

⁵⁸ *ibid* para 45

⁵⁹ *ibid* paras 47-49

and proportionate to the objective to be achieved and that the time limits are reasonable taking into account the medical condition of the patient and the urgency of the situation. The administrative procedures established by the Member States should comply not only with the requirements laid down in article 9 of Directive 2011/24, but also with article 47 of the Charter of Fundamental Rights, which stipulates the right to an effective judicial protection.

IV. CONCLUSION

Although the organisation of public health policies is considered to be one of the traditional competences of the welfare States, the societal and financial significance of cross-border healthcare services in the accomplishment of the Internal Market has subjected them to the rules on the freedom to provide services. As a result of the application of these rules, any directly or indirectly discriminatory measure or any restriction on the freedom to provide cross-border healthcare is prohibited, unless it is justified. A directly discriminatory measure – i.e. a measure which discriminates explicitly on the basis of nationality - can only be justified on the grounds of public policy, public security or public health according to article 52 TFEU in conjunction with article 62 TFEU. An indirectly discriminatory measure – i.e. a measure, which is not based on nationality, but which in practice affects adversely foreign providers or recipients of healthcare services - and a restriction – i.e. any national rule which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State and thus hinders the cross-border provision of healthcare services – can be justified not only on the grounds of public policy, public security and public health mentioned in article 52 TFEU in conjunction with article 62 TFEU, but also on the grounds of overriding reasons in the general interests created by the case law of the Court and later codified in Directive 2011/24/EU. In cases involving cross-border healthcare, the Member States usually invoke the need to prevent the risk of jeopardising the financial balance of their social security systems. The Court has accepted that such an overriding reason in the general interest may justify a restriction on the freedom to provide services if it complies with

the fundamental principle of proportionality, which refers to the double test of suitability and necessity of the restriction in question.⁶⁰ The acceptance by the Court of the possible derogation grounds is linked to the effort to maintain a balance between the subjection of healthcare services to the rules of the Internal Market and the need to respect the exercise of the traditional competences of welfare States. Directive 2011/24/EU tries to achieve this delicate balance by laying down liberal rules regarding the issues of prior authorisation and reimbursement and by allowing at the same time for important derogations for the Member States. Besides, according to recital 4 of its Preamble, the application of the Directive should not result in patients being encouraged to receive treatment outside the Member State of affiliation. Finally, we cannot ignore that the system created by the case law of the Court and subsequently developed by Directive 2011/24/EU is quite complex and may lead to social inequalities, since “it is primarily the wealthier and better-informed European citizens who benefit from the rules”.⁶¹ It remains to be seen how the Member States will implement the Directive and how the Court will interpret its provisions.

⁶⁰ Case C-158/96 *Kobll* (n 22) para 42; Case C-120/95 *Decker* (n 22) para 40. Even though the Court accepted that the need to maintain the financial balance of the social security system constitutes in principle an overriding reason in the general interest capable of justifying a restriction on the freedom to provide cross-border healthcare, it nonetheless found that in this particular case the restriction was not justified, since the medical expenses incurred were to be reimbursed at exactly the same rates as those applied in Luxembourg and therefore there was no risk for the national social security system

⁶¹ Frans Pennings, ‘The cross-border health care Directive: more free movement for citizens and more coherent EU law’ (2011) 13 *European Journal of Social Security* 424 – 452, 449

State Accomplice Liability under International Law – A Comparative Approach

Magdalena Pacholska*

Abstract

A bird's-eye view on this year's international law developments suggests that momentum is growing around the concept of accessorial liability. Yet, regardless of the multitude of important judicial decisions concerning aiding and abetting international wrongdoings delivered recently, the regime regulating the complicity of States is less than settled. While the Draft Articles on State Responsibility for Internationally Wrongful Acts¹ expressly incorporate the notion of accessorial liability, no precise definitions are provided as to the scope of that liability, nor are there any supporting interpretative instruments nor any practice providing much assistance in that matter. For that reason, in order to answer the question when do actions taken by one state in cooperation with another state expose the assisting state to legal liability under international law, this article reaches out to the other doctrinal area in which responsibility for 'aiding and abetting' is well developed - International Criminal Law. The implication of the recent developments in the jurisprudence of international criminal tribunals' – ostensibly based on State practice – suggests that, at a minimum, a State could only incur accessorial liability if it knowingly provides assistance for the purpose of furthering the commission of a wrongdoing, and that the assistance substantially facilitates it.

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¹ ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries' 2001, Yearbook of the International Law Commission (2001) UN Doc A/56/10

I. INTRODUCTION

Accessory liability under international law appears to have dominated the agenda of both international and national courts in recent years, in the context of both private and criminal law – a regional court has examined the State responsibility for actions taken to support an ally;² the US Supreme Court evaluated a multinational corporation's alleged accessory responsibility for human rights violations by a regime to which it ostensibly provided assistance;³ the Dutch Supreme Court considered State liability for alleged assistance provided by its troops to the forcible transfer and other crimes against civilians in Srebrenica while acting as part of a United Nations peace-keeping operation;⁴ and last but not least, two major and contradictory decisions have been issued on the criminal liability of senior government officials for allegedly providing assistance to forces in neighbouring States that committed crimes.⁵

State responsibility lurks in the background of those cases, but the implications of this effervescent jurisprudence are seldom expressly addressed. On the contrary, when international courts are faced with cases involving not individual or corporate, but State, responsibility for aiding and abetting international wrongdoings, they are reluctant to dwell upon the complicity of the problem and rather opt for more traditional approaches. By alluding to the landmark ICJ *Nicaragua* case⁶ they merely ask whether the State had an “effective control” over the direct perpetrators.⁷ This much is uncontroversial: if a State does possess effective control over the principal perpetrators of a certain wrongdoing – their conduct is then considered as an act of a State.⁸ Complicity, however, which is recognised in the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts (hereinafter

² *El-Masri v. The Former Yugoslav Republic Of Macedonia* App no 39630/09 (ECtHR, 13 December 2012)

³ *Kiobel v. Royal Dutch Petroleum Co.*, 133 US (2013)

⁴ *The State of the Netherlands v. Hasan Hubanović*, Supreme Court of the Netherlands, 12/03324 LZ/TT (2013)

⁵ See Part II, Controversies around ‘Specific direction’, and subsequent sections

⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1984] ICJ Rep 1986 [115]-[116]

⁷ *The State of Netherlands* (n 1) [3.5.2.]

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2003] ICJ Rep 2007 [406] [420]

“ARSIWA”) as a distinct and separate type of liability,⁹ involves liability of an entirely different order. State responsibility arises in such cases not from committing the wrongful act, but from some form of assistance to the wrongful act. The distinction is significant, not only as to the threshold of liability, but also to the extent of liability since the commission of the wrongful act in most cases would require full reparation and compensation by the perpetrator of the wrongful act for the harm caused, whereas “the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act”.¹⁰

The only judgement that has so far directly addressed State accomplice liability was the ICJ *Genocide* case, applying the particular provisions of the Genocide Convention, and which dismissed the applicant’s claim after a rather cursory treatment.¹¹ Consequently, the regime of State responsibility for aiding and abetting remains, to a large extent, unclear. The ARSIWA provides some guidance on the issue in question but, interestingly, its commentary’s references to relevant practice are fairly limited. For that reason, in order to answer the question – “When do actions taken by one state in cooperation with another state expose the assisting state to legal liability under international law?” – this article reaches out to the other doctrinal area in which the liability for ‘aiding and abetting’ is well developed - International Criminal Law.

This article consists of four parts. A brief overview of the heads of responsibility is set out in the Problem overview (II). Part three deals with the question of what types of conduct can give rise to international legal responsibility (III), while part four attempts to describe the current understanding of the so-called ‘knowledge requirement’, according to which an international actor to be held responsible for assisting a particular wrongdoing, must be familiar with its circumstances (IV). The last section touches upon the issue of whether the international law as it stands today requires that assistance, in order to give rise to international responsibility, has to be given not only knowingly but actually be aimed at furthering another actor’s wrongdoing (V).

⁹ Such a situation would fall into a purview of art 8 of ARSIWA, not art 16 which is of interest for this paper

¹⁰ ILC Draft Articles Commentary (n 1) [66]

¹¹ *Application of the Genocide Convention* (n 8) [420]-[424]

II. PROBLEM OVERVIEW

International criminal jurisprudence receives attention as a guide for state accessorial liability primarily because of the absence of any alternative sources, and because international criminal law is, in theory, guided by the overarching requirement of compliance with customary international law. Nevertheless, the importation of international criminal law principles to State responsibility is subject to several important caveats. Mainly because, the circumstances in which international criminal law operates are dramatically different from those in which we look into the international responsibility of states. This, on the other hand, may have important consequences on the applicable doctrine. Although some have argued that “the responsibility of States in international law is neither civil nor criminal – it is simply international”,¹² there seems to be a far-reaching consensus among the international community that the ARSIWA’s nature is civil (‘delictual’)¹³ and not criminal.¹⁴

Two significant sets of consequences follow from that distinction. The first is of a procedural and evidentiary nature, and includes issues like diverging standards of proof, circumstances in which the accessorial liability can be ascribed absent a determination of a primary perpetrator’s responsibility,¹⁵ or the evidentiary value of different items used as a proof in various international judicial fora.¹⁶ Those kinds of challenges, however often highly consequential, due to the limited character of this article will remain outside of its scope.

¹² See Bosnian Counsel argumentation during 2006 the ICJ Genocide Oral pleadings <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=f4&case=91&code=bhy&p3=2>> accessed 25 January 2014

¹³ The description of state responsibility as ‘delictual’ refers to the civil law concept of a civil *delict* roughly comparable to a tort-like wrong, which corresponds to the French *délit civil*, and in the German legal system is part of a branch of law called *Deliktsrecht*.

¹⁴ UNGA Sixth Committee, ‘State Responsibility Can Only Be Civil, Not Criminal, In the Context of International Law, Assembly’s Legal Committee Told’ (5 November 1998) Press Release GA/L/3089

¹⁵ Under public international law this situation is regulated by the *Monetary Gold* principle, set forth by the ICJ (*Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom, United States)* (Judgment) ICJ Rep 1954 [32])

¹⁶ Generally on the rules of evidence in international criminal law, see: KAA Khan, C Buisman and Chris Gosnell (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010), and before the ICJ, see: Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice*

The second consequence is a substantive one, and goes right to the core of this paper. Indeed, comparing the liability of a state (an abstract legal entity) for an ‘internationally wrongful act’, a tort-like wrongdoing, with the responsibility of an individual – a natural person – for a crime is a fraught exercise. Article 16 of ARSIWA nevertheless adopts a notion of “Aid or assistance” to internationally wrongful acts that is closer to criminal than to private law:¹⁷

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.”

Such an understanding of liability would be unknown to many *delictual*- or tort-like liability systems, but a criminal lawyer is perfectly familiar with it. Section (a) appears to correspond to an *actus reus* and section (b) to a *mens rea*. The premise of this provision is that States, like individuals, can possess mental states necessary for determining the wrongfulness of their acts.¹⁸

Furthermore, and without undermining in any way the reservation included in the ARSIWA, according to which the articles create no prejudice towards State officials’ individual responsibility,¹⁹ and its corresponding provision in the Rome Statute,

(British Institute of International and Comparative Law 2009). More specifically, on admitting and assessing evidence in cases including charges based on aiding and abetting liability, see: Yael Vias Gvirsman, *Taylor Appeal Judgement: On Assessing Evidence: Hearsay, Corroboration and the ECtHR Al Khawaja and Tahery v. UK case* <<http://ilg2.org/2013/10/08/second-thoughts-on-the-scsl-charles-taylor-appeal-judgement-on-assessing-evidence-hearsay-corroboration-and-the-ecthr-al-khawaja-and-tahery-v-uk-case/>>

¹⁷ ILC Draft Articles (n 1) art 16

¹⁸ Such a position strives from the ICJ deliberations on Serbia’s responsibility for genocide in which the court engaged in assessing the evidence of Serbian state alleged ‘genocidal intent’ (*dolus specialis*), (*Application of the Genocide Convention* (n 1) [424])

¹⁹ ILC Draft Articles (n 1) art 58

the main codification of modern international criminal law,²⁰ it is impossible to completely separate the liability of State officials from the liability of the State itself. It is a well-established principle of customary international law that a State bears the responsibility for the actions of its organs.²¹ As bluntly noted in the ARSIWA's commentary:²² "where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them." This is particularly important since State practice proves that in regard to grave violations of international norms, particularly within the field of international humanitarian and human rights law, the liability for the same wrongdoings can be attributed multiple times. The non-exclusive character of State, individual and in some cases even corporate responsibility, arguably propelled by a collective international sentiment following the Second World War,²³ appears to be recognised by many governments – including the British and American one, which claimed compensation from Libya for the Lockerbie bombing, despite the criminal conviction of Libyan agents²⁴ – and is unequivocally affirmed in the ICJ *Genocide case*, concerning Serbia's responsibility for the Srebrenica genocide, notwithstanding the ascription of individual criminal responsibility for those events to various Serbian nationals.²⁵

All those cases concerned the direct commission rather than complicity, but there is no reason to assume – in particular in light of article 16 of the ARSIWA – that the international responsibility for "aiding and abetting" a wrongdoing should work differently. After an initial confusion regarding the scope of complicity under international law, the latter has now reached a status of a distinct and well-recognised mode

²⁰ Rome Statute of the International Criminal Court (adopted 16 January 2002, entered into force 1 July 2002) 2187 UNTS 90 art 25(4)

²¹ Draft Articles (n 1) art 4. The customary character of this rule was explicitly confirmed by the ICJ in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) ICJ Rep 1999 [62]

²² ILC Draft Articles Commentary (n 1) [142]

²³ Even though German leaders were convicted of the multitude of war-related crimes, the same actions gave rise to a civil reparation to the victims, provided directly from the German government what can be safely considered as an indicator of acknowledging a legal, and not only a political, responsibility for those events.

²⁴ André Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 *International and Comparative Law Quarterly* 620

²⁵ *Application of the Genocide Convention* (n 8) [385]-[395]

of liability.²⁶ There are still some nuances in the international law terminology on that issue, but it is generally well acknowledged that “accomplice liability” or simply “complicity” connotes “aiding and abetting”,²⁷ and in this sense all three terms are used in this article interchangeably. On a final note, a minor caveat shall be made in regard to the concept of complicity in genocide which is qualified as a separate substantive crime and not only a mode of liability for genocide.²⁸ It does not nevertheless influence the subsequent analysis that concentrates on the international responsibility from the perspective of secondary rules, meaning the general conditions under which an international actor can be held responsible for wrongful actions or omissions of another.²⁹

III. OBJECTIVE ELEMENTS OF AIDING AND ABETTING

The objective elements of aiding and abetting require special attention because they encompass a conduct which does not have to be, and often is not, intrinsically criminal. Under international criminal law this feature of complicity is referred to as

²⁶ Under the ILC, ‘International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind’ accomplice liability included all acts other than commission and attempted commission (ILC Yearbook 1996 18); an analogous approach was adopted in both the ICTY and ICTR statutes, but the distinctive character of aiding and abetting from both other forms of participation, chiefly planning and ordering, has been crystallised in the very early jurisprudence. See the discussion on the modes of liability in *Prosecutor v. Furundžija* (Trial Judgement) IT-95-17/1 (10 December 1998) [189]-[249]

²⁷ See Judge Keith’s extended analysis of the scope of the term ‘complicity’ in the *Application of the Genocide Convention* (n 8) [353], where he reaches a conclusion that “complicity is often equated in whole or in part with aiding and abetting”. But see also arguments on the opposite side, according to which complicity still encompasses all modes of participation other than committing: William A Schabas, *The U.N. International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) 305

²⁸ At least that is the understanding of the customary international law on genocide, see: Antonio Cassese, Paolo Gaeta and John RWD Jones, *The Rome Statute of the International Criminal Court, Volume 1* (Oxford 2002) 347; Tahlia Petrosian, ‘Secondary Forms of Genocide and Command Responsibility under the Statutes of the ICTY, ICTR and ICC’ (2010) 17 Australian International Law Journal 29; Chile Eboe-Osuji, “‘Complicity in Genocide’ versus ‘Aiding and Abetting Genocide’ Construing the Difference in the ICTR and ICTY Statutes’ (2005) 3 Journal of International Criminal Justice (2005) 56

²⁹ In other words, this paper approaches the notion of complicity from the perspective analogous to the ARSIWA, without engaging in the discussion of the content of international obligations the breach of which results in international responsibility. ILC Draft Articles Commentary (n 1) 31

“borrowed criminality” (*criminalité d'emprunt*). As the International Criminal Tribunal for Rwanda (hereinafter “ICTR”) Trial Chamber put it in landmark *Akayesu* case:³⁰

“[T]he accomplice borrows the criminality of the principal perpetrator. By borrowed criminality, it should be understood that the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise. Thus, the conduct of the accomplice emerges as a crime when the crime has been consummated by the principal perpetrator.”

A. Basic features of accomplice liability

None of the international criminal tribunals’ statutes contains a complete definition of aiding and abetting, nor enumerates means through which the support must be provided to give rise to accomplice liability.³¹ Defining its contours and thresholds has been therefore left to the judges. The seminal case setting out parameters of the *actus reus* of aiding and abetting was the 1999 *Tadić* Appeal Judgement, according to which:

“The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (...), and this support has a substantial effect upon the perpetration of the crime.”³²

A number of important consequences follow from that ruling, and from subsequent case law referring to it.

³⁰ *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) [528]

³¹ ICTY, ICTR, SCSL and STL Statutes just mention aiding and abetting as one of the modes of liability which gives rise to criminal responsibility under their respective jurisdictions; the Rome Statute in art 25(3)(c) singles out “provisions of the means” but does not go into greater detail than that. See, ICTY Statute art 7(1), ICTR Statute art 6(1), SCSL Statute art 6(1), STL Statute art 3(1)(a)

³² *Prosecutor v Tadić* (Judgment in Sentencing Appeals) (2000) 39 ILM 635 [229]

Firstly, the assistance may consist of an act or omission.³³ In certain circumstances even a tacit approval or an encouragement may result in accomplice liability;³⁴ that was the case for instance in the *Duch* case before the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (hereinafter “ECCC”), where the Co-Prosecutors alleged that Duch provided “practical assistance, encouragement, and support” through his “mere presence.”³⁵ Whether a particular contribution constitutes aiding and abetting is a fact-based inquiry. The case law of international and national courts and tribunals demonstrates the breadth of conduct which may give rise to accomplice liability, including the provision of: weapons,³⁶ dual use goods,³⁷ information,³⁸ expertise,³⁹ services and personnel,⁴⁰ or simply financial assistance. What is more, unlike other modes

³³ *Prosecutor v. Blaskić* (Appeal Judgement) ICTY IT-95-14-A (29 July 2004) [48]; ICTY, *Prosecutor v. Nalatić et al* (Trial Judgement) IT-98-34 (28 September 2001) [63]; *Prosecutor v. Fofana and Kondewa* (Appeal Judgement) SCSL (26 June 2003) [72]

³⁴ Such a situation usually occurs when the accomplice is in a position of authority towards the perpetrator, and his presence of approval had a ‘decisive effect’ on the commission of a crime, for a detailed analysis see: *Blaskić* (n 33) [47]; *Prosecutor v. Callixte Kalimanzira* (Appeal Judgement) ICTR-05-88-A (20 October 2010) [74]; *Tharisse Muvunyi v. Prosecutor* (Appeal Judgement) ICTR-2000-55A-A (1 April 2011) [80]; *Prosecutor v. Dominique Ntawukuliyayo* (Appeal Judgement) ICTR-05-82-A (14 December 2011) [216]

³⁵ *Public Information by the Co-Prosecutors Pursuant to Rule 54 Concerning Their Rule 66 Final Submission Regarding Kaing Guek Eav alias “Duch”* 002/14-08-2006/ECCC/OCF (18 July 2008) [266]

³⁶ In many cases individuals were held liable for aiding and abetting for providing, distributing or simply transporting the weapons, either directly to perpetrators, their superiors or just to the scene of the crime, see e.g. *Prosecutor v. Kamuhanda* (Appeal Judgement) ICTR-99-54A-A (19 September 2005) [67]-[68]; *AFRC* (Trial Judgement) SCSL-04-16-T (20 June 2007) [1941]; *Prosecutor v. Karera* (Trial Judgement) ICTR-01-74-T (7 December 2007) [438] [547] [555]; *Kalimanzira* (n 34) [473]-[474]

³⁷ Such as Zyklon B, officially sold for lice extermination, and *de facto* used at the Nazi concentration camps, (*Zyklon B case (Prosecutor v. Bruno Tesch and two others)* British Military Court Hamburg (8 March 1946) 93-102), or the chemical known as TDG, which has been used by the Saddam Hussein’s regime to produce mustard gas, used subsequently against the Kurdish civilians (*Public Prosecutor v. Van Anraat* The Hague Court of Appeal LJN BA6734 (9 May 2007) [12.1]-[12.5])

³⁸ Historically, that usually encompassed denouncing members of a group, a participation in which was likely to expose others to being a victim of human rights abuses, such as the French resistance during the Second World War (*Gustav Becker, Wilhelm Weber and 18 Others* (Case no 40) Permanent Military Tribunal at Lyon (17 July 1947) [67] [70])

³⁹ *Zyklon B case* (n 37). The accused’s company not only provided SS with the poisonous gas, but also with the expert technicians who trained the SS in carrying out the gassing.

⁴⁰ In *Prosecutor v. Blagojević and Jokić* (Appeal Judgement) IT-02-60 (9 May 2007) [130]-[135] convicted a military commander of aiding and abetting murder as a war crime for allowing his subordinates guard prisoners who were subsequently murdered by a different contingent. For accomplice liability for providing vehicles and fuel for the transport of the direct perpetrators, see: *Prosecutor v. Michel Bagaragaza*

of liability, which require that the conduct for which the liability is to be ascribed has preceded the perpetration of the crime itself, the *actus reus* of aiding and abetting may take place before, during or after the act of the principal offender.⁴¹ It can also be removed in time and place from the actual crime.⁴²

B. Substantial effect requirement

The fact that almost any kind of contribution to the commission of a crime might be considered the *actus reus* of aiding and abetting is significantly limited by a prerequisite of substantial effect, according to which “participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way”.⁴³ At the same time, the substantial effect shall not be understood as implying that the conduct of the aider and abettor has to be essential for the commission of the crime; the cause-effect relationship between the assistance and underlying crime is not required.⁴⁴ Even though the substantiality requirement has not been included in either the Nuremberg Charter, or in the statutes of the *ad hoc* or *hybrid* tribunals, the jurisprudence of modern international criminal courts has firmly established it, and the parties to the proceedings have never seriously challenged its validity.⁴⁵ It can be therefore

(Trial Judgement) ICTR-05-86 (1 December 2006) [25]; *Prosecutor v. Krstić* (Appeal Judgement) IT-98-33-A (19 April 2004) [137] [144]

⁴¹ *Prosecutor v. Nabimana* (Appeal Judgement) ICTR-99-52-A (28 November 2007) [482]; ICTY *Blaskić* (n 33) [48]; *Prosecutor v. Celebići* (Appeal Judgement) IT-96-21 (8 April 2003) [352]; *Prosecutor v. Simić* (Appeal Judgement) IT-95-9-T (27 July 1999) [85]

⁴² *Blagojević and Jokić* (n 40) [127]; *Naletilić et al.* (n 33) [63]; *Fofana* (n 33) [72]

⁴³ ILC, ‘The Code of Crimes against the Peace and Security of Mankind, International Law Commission’s Commentary’ ‘Report of the ILC, on the work of its 48th session’ (1996) UN Doc A/51/10 (24); as cited in *Furundžija* (n 26) [231]

⁴⁴ *Ntawukuliyayo* (n 34) [214]; *Prosecutor v. Rukundo* (Appeal Judgement) ICTR-2001-70-A (20 October 2010) [52]

⁴⁵ For older case law, see: Katharine Gibson, ‘Memorandum for the Extraordinary Chambers in the Courts of Cambodia, A Comprehensive Study to Determine the Elements and Scope of Convictions for Aiding and Abetting, as Illustrated by Case Law from the International Criminal Tribunals’ [2008] International War Crimes Research Law 8. For the references to more recent cases see: *Prosecutor v. Taylor* (Appeal Judgement) SCSL-03-01-A-1389 (26 September 2013) [1129], citing with approval the substantiality requirement.

said with a high degree of certainty that the substantiality requirement is well embedded in customary international law on accomplice liability.

C. Controversies around ‘specific direction’

A fierce debate has emerged about other elements of accessorial liability in international criminal law. One of the earliest International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY”) appeal cases from 1999, *Tadić*, indicated that the assistance must be “specifically directed” to the commission of the crime. After some ambiguity arose about this criterion in the jurisprudence of the ICTY, the ICTY Appeals Chamber reaffirmed the necessity of that element in the *Perišić* case, holding that it “considers that specific direction remains an element of *actus reus* of aiding and abetting liability”.⁴⁶ Just a couple of months later, however, the Special Court for Sierra Leone (hereinafter “SCSL”) Appeals Chamber in *Taylor* took directly the opposite view and stated unequivocally that it “concludes that specific direction is not an element of the *actus reus* of aiding and abetting liability.”⁴⁷ Both decisions attracted much attention, and led to a robust discussions on the leading international law fora.⁴⁸ Although the reiteration of arguments used by the supporters or critics of either holding is beyond the scope of this paper, this section attempts to clarify those points of confusion arising from recent commentaries on the issue which might be of potential relevance for state responsibility.⁴⁹

⁴⁶ *Prosecutor v. Perišić* (Appeal Judgement) IT-04-81 (28 February 2013) [36]

⁴⁷ *Taylor* (n 46) [481]

⁴⁸ See e.g. debate on *Opinio Juris* <<http://opiniojuris.org/2013/09/27/scsls-incoherent-selective-analysis-custom/>> accessed 25 January 2014 or discussion on *EJIL Talk!*, available at: <http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/>> accessed 25 January 2014

⁴⁹ Notably though, the controversial ICTY Judge Harhoff letter including his opinions and allegations on the judicial developments on accessorial liability <<http://www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-letter-english.pdf>> accessed 25 January 2014. Due to its highly political character, is not commented upon in the following analysis.

First of all, there seems to be a deep misunderstanding of what “specific direction” actually means. Some commentators have mistakenly asserted that “specific direction” requires explicit orders to the principal perpetrators.⁵⁰ This is simply incorrect; “specific direction”, as previous jurisprudence has made it clear, only requires the accomplice’s acts to be aimed in some way towards assisting the crimes of the principal perpetrators and not that he or she orders the crime.⁵¹ The difference is pivotal. In fact an accomplice does not have to have any communication with those who commit the crime and neither a position of authority nor any specific ties between the aider and the abettor and the principal perpetrator are required;⁵² the latter may not even know about the accomplice’s contribution.⁵³

Furthermore, contrary to what several scholars maintain, the *Perišić* judgement did not purport to add a new standard to the aiding or abetting liability,⁵⁴ nor did it set a precedent on that mode of liability.⁵⁵ It merely restored the element that had always been present in previous *ad hoc* tribunals’ jurisprudence,⁵⁶ because the Appeal Chamber noted the need to clarify in what circumstances the specific direction must be explicitly considered.⁵⁷ Indeed, although one might argue on its application in this particular case and the results to which it led, there is a huge number of cases in which the *Tadić*

⁵⁰ Owen Bowcott, ‘Hague war crimes ruling threatens to undermine future prosecutions’ (13 August 2013) *The Guardian*; Kenneth Roth, ‘A Tribunal’s Legal Stumble’ (9 July 2013) *The New York Times*

⁵¹ For a throughout analysis of this misunderstanding and its potential reasons, see: Kevin Jon Heller, ‘More Misdirection on Specific Direction, *Opinio Juris*’ <<http://opiniojuris.org/2013/08/13/yet-more-specific-direction-misdirection/>> accessed 25 January 2014

⁵² *Prosecutor v. Seromba* (Appeal Judgement) ICTR-2001-66-A (12 March 2008) [59]

⁵³ *Tadić* (n 32) [229]

⁵⁴ J G Stewart, “‘Specific Direction’ is Unprecedented: Results from Two Empirical Studies” (4 September 2013) *EJIL Talk!*

⁵⁵ Roth (n 51)

⁵⁶ As rightly noted in John RWD Jones, Kevin Jon Heller, Elies Van Sliedgret and Elizabeth Wilmshurst, ‘Recent Legal Controversies at the UN Yugoslav Tribunal’ (16 October 2013) *Chatham House Publication International Law Summary Milestones in International Criminal Justice* 4

⁵⁷ *Perišić* (n 47) [37]

wording was either repeated *verbatim*,⁵⁸ or rephrased.⁵⁹ As a result, the averment that the “specific direction” requirement is firmly established in the ICTR and ICTY jurisprudence, especially in the light of the recent *Stanisić and Simatović* Trial Judgement, which adhered to the *Perišić* reasoning,⁶⁰ seems to be defensible.

Admittedly though, there are both trial⁶¹ and appeal judgements⁶² which can be invoked to further an argument that the ICTY did not apply the “specific direction” unswervingly, nor did it initially provide a compelling justification (much less one rooted in customary international law) for injecting it into the *actus reus* of aiding and abetting in the first place.⁶³

The *Taylor* Judgement, in effect, relied on these alleged methodological weaknesses to discard the specific direction requirement entirely. First, it argued that the doctrine emanating from the ICTY was somehow unique to its own State and jurisprudence, rather than being an expression of customary international law.⁶⁴ Curiously, the Special Court then failed to conduct any analysis of the customary foundations of the doctrine that it then adopted and applied. Instead, it simply isolated the “specific direction” element, examined whether it had any customary foundation, and then rejected it without considering whether its own standard survived that test. The methodology conflict with well-established criminal law theory appeared here since the “specific direction” raises the threshold required for attaching criminal liability, its inclusion is coherent with the fundamental *nullum crimen sine lege* axiom, requiring that in cases of any doubts concerning the elements of the crime, the interpretation more protective for the defendant should be endorsed. In this regard, Professor Heller’s comment (albeit made in reference to the *Perišić* reasoning), is equally applicable to all

⁵⁸ As in, *inter alia*, the following ICTR cases: *Prosecutor v. Mubimana* (Appeal Judgement) ICTR-95-1B-A (21 May 2007) [189]; *Kalimanzira* (n 34) [74]; *Muvunyi* (n 34) [79]; *Rukundo* (n 45) [52]; *Seromba* (n 53) [44]. See also various ICTY judgements: *Prosecutor v. Kvočka et al.* (Appeal Judgement) IT-98-30/1 (28 February 2005) [89]; *Blaskić* (n 33) [45]; *Prosecutor v. Vasiljević* (Appeal Judgement) IT-98-32 (25 February 2004) [102]; *Prosecutor v. Krnojelac* (Appeal Judgement) IT-97-25 (17 December 2003) [33]

⁵⁹ For the particular cases where the *Tadić* wording was rephrased and the way it was done, see: *Perišić* (n 47) [29]

⁶⁰ *Prosecutor v. Stanisić and Simatović* (Trial Judgement) IT-03-69 (30 May 2013) [1264]

⁶¹ *Perišić* (n 47) [126]

⁶² *Prosecutor v. Mrksić and Slijvančanin* (Appeal Judgement) IT-95-13/1-A (5 May 2009) [159]

⁶³ Stewart (n 55)

⁶⁴ *Taylor* (n 46) [476]

international criminal tribunals: “*Ad hoc* tribunals are limited to applying customary international law because of the *nullem crimen sine lege* principle: relying on non-customary principles to convict a defendant would convict a defendant of acts that were not criminal at the time they were committed”.⁶⁵

Consequently, since it was the Special Court for Sierra Leone, which excepted the element commonly used by fellow tribunals also bound by customary international law, and the norm in question made the ascription of liability more difficult, there should be a very compelling reason to do so. Yet, even firm supporters of excluding the “specific direction” standard from the elements of aiding and abetting liability admit that the SCSL analysis of relevant customary international law was “not particularly persuasive”.⁶⁶ An even more interesting position on the SCSL’s findings on the “special requirement” has been taken by the defence in the post-Taylor ICTY *Stanisić and Simatović* case, which argued that since in the course of the Taylor oral appeal hearing both parties accepted that “special direction” had to be explicitly or implicitly demonstrated as either part of the *actus reus* (the Prosecution) or (by analogy to “purpose”) as part of the *mens rea* (the Defence) of aiding and abetting, the Special Court’s holdings was simply part of the *obiter dictum*.⁶⁷

That being said, regardless of how one evaluates the quality of either Appeals Chambers’ argumentation, one thing is undisputable – the inclusion or exclusion of the “specific direction” requirement significantly influences the scope of complicity under international law. It is important to note that both the *Perisić* and *Taylor* cases concerned factual scenarios that are highly relevant for the purposes of state responsibility, namely assistance provided to a foreign entity that is engaged in both lawful and unlawful activities, but nevertheless uses the assistance in furtherance of crimes. Neither the Armed Forces Revolutionary Council (hereinafter “AFRC”)/Revolutionary United Front (hereinafter “RUF”) supported by Taylor, nor the *Vojaska Republike Srpske*

⁶⁵ Kevin Jon Heller, ‘The SCSL’s Incoherent — and Selective — Analysis of Custom, *Opinio Juris*’ <<http://opiniojuris.org/2013/09/27/scsls-incoherent-selective-analysis-custom/>> accessed 25 January 2014

⁶⁶ Marko Milanovic, ‘SCSL Appeals Chamber Affirms Charles Taylor’s Conviction’ (26 September 2013) EJIL Talk!

⁶⁷ Stanisić Defence Response to Prosecution Request Seeking Leave to File Supplementary Authority (3 October 2013) ICTY [15]

(hereinafter “VRS”) supported by Perišić were considered criminal organisations,⁶⁸ and none of the accused was charged with helping to wage the war; indeed both the SCSL and the ICTY felt the need to reiterate that war is not *per se* a crime under their respective statutes.⁶⁹

Therefore, the decisions well exemplify how the “specific direction” draws the line between culpable and non-culpable assistance to the crime. While the Taylor Appeals Chamber, after discarding its validity, affirmed the Trial Chamber’s holding that “any assistance towards these military operations of the RUF and RUF/AFRC constitutes direct assistance to the commission of crimes by these groups”,⁷⁰ the ICTY bench, after applying the “specific direction” requirement, made a very important observation and held that “in most cases, the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators.”⁷¹

Neither Judgement found that the organisations to which assistance was provided were inherently criminal. Nazi’s Germany SS, for example, was deemed inherently criminal in *post* Second World War jurisprudence in order to criminalize mere participation in a particular group or any association with its activities.⁷² Such an understanding of an inherently criminal organisation might now arguably encompass terrorist organisations such as *Al-Qaeda* as well as drug trafficking networks like the Colombian *Norte del Valle Cartel*.⁷³ But at least in terms of the written reasons in the Judgements, neither the *Taylor* nor the *Perišić* cases involved assistance to organisations deemed inherently criminal.

⁶⁸ This arguably distinguishes them from the SS classified by the Nuremberg Tribunal as a criminal organisation and therefore any support provided to it as criminal. For the importance of that classification, see: Kevin Jon Heller, ‘The Specific-Direction Requirement Would Not Have Acquitted the Zyklon-B Defendants’ <<http://opiniojuris.org/2013/08/19/no-specific-direction-would-not-have-acquitted-the-zyklon-b-defendants/>> accessed 25 January 2014

⁶⁹ *Taylor* (n 46) [399]; *Perišić* (n 47) [53]

⁷⁰ *Taylor* (n 46) [6905]

⁷¹ *Perišić* (n 47) [44]

⁷² Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (adopted on 8 August 1945) art 10

⁷³ Security Council resolutions concerning support for Al-Qaeda and entities associated with it seem to go even further and suggest that any assistance to them, regardless of its substantiality, is prohibited under international law. See e.g. UNSC Res 1526 (2004), operative paragraph 1(c) repeated verbatim in subsequent resolutions, most recently in UNSC Res 2083(2012)

The ICTY and the SCSL holdings are *prima facie* irreconcilable. One may wonder, however, whether the VRS can really be assimilated to the RUF, which engaged in sustained, repeated and systematic crimes. Such a distinction might help in reconciling the outcome of the two cases: the Taylor case could be viewed as involving assistance to a genuinely criminal organisation, and thus subject to a much lower standard, whereas the *Perišić* case involved assistance to an organisation that may have had a criminal propensity, but not a criminal *modus operandi*.⁷⁴

The distinction between those (sub)categories is somewhat speculative and subjective, to say the least. In fact, it can be safely assumed that the absence of clear-cut factors of classification of an entity as a criminal organisation is one of the reasons why the modern international criminal tribunals are reluctant to the whole concept of criminal organisation, and it is generally not followed in their case law. Nevertheless now, subsequent to conflicting ICTY and SCSL pronouncements it might have to be re-examined, and it remains to be seen whether the idea of various accomplice liability standards based on the character of the assisted entity would actually be followed by any judicial or quasi-judicial body.

What is certain though is that the international law on *actus reus* of aiding and abetting is a matter of substantial controversy and of outright disagreement amongst international courts.

IV. THE KNOWLEDGE REQUIREMENT

A more satisfactory approach is to focus on the accomplice's mental state. All main international responsibility regimes include the "knowledge requirement", which requires the assistant provider to have some awareness of the other actor's wrongdoing, in order to assign him with complicity liability. The standard adopted in the ARSIWA – that the accomplice must have "knowledge of the circumstances of the

⁷⁴ Presented distinctions are roughly based on Kevin Jon Heller, 'Why the ICTY's "Specifically Directed" Requirement Is Justified' and his subsequent debate with Marko Milanovic and Jens Ohlin on *opinio juris* <<http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/>> accessed 25 January 2014

internationally wrongful act” of the principal perpetrator⁷⁵ – mirrors that in the Draft Articles on Responsibility of International Organizations.⁷⁶ Yet, since neither of them provides further guidance on what the phrase actually means, it is worth to see how the international criminal tribunals address the issue of accomplice’s *mens rea*.

Under international criminal law, the “knowledge standard” appears to have two prongs; one concerning the intentional completion of the crime by the principal perpetrator, the other relating to the assisting character of the accomplice’s own conduct.⁷⁷ The first is not particularly controversial – a clarified position is that the accomplice does not have to know the precise crime committed or to be committed, the awareness of its “essential elements” suffices.⁷⁸ Elements considered to be essential vary between particular substantive crimes, and that determination needs to be done on a case-by-case basis.⁷⁹

The second prong is definitely more contentious. The overall look at the *ad hoc* and hybrid criminal tribunal jurisprudence suggests that the prevailing *mens rea* for complicity is “knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator”.⁸⁰ A threshold requiring actual knowledge that the contribution assists or will assist a concrete wrongdoing is not only undoubtedly predominant under the joint ICTY and ICTR Chamber, the final arbiter of the

⁷⁵ Draft Articles (n 1) art 16(a)

⁷⁶ ILC, ‘Responsibility of international organisations, Texts and titles of draft articles 1 to 67 adopted by the Drafting Committee on Second Reading in 2011’, 63rd session (26 April–3 June and 4 July–12 August 2011) UN Doc A /CN.4/L.778 art 14

⁷⁷ While there are many contentious questions about the mental element of aiding and abetting, the distinction between those two prongs seems to be generally accepted, either implicitly, or explicitly, even by those decisions which dissociate from the ICTY approaches on other aspects, see e.g. *Taylor* (n 46) [404] [440]. For a careful analysis of the differentiation between the prongs, see: *Prosecutor v. Orić* (Trial Judgement) IT-03-68 (30 June 2006) [288]

⁷⁸ The ‘essential elements’ in this regard seems to be the universally adopted term of art, see e.g. *Prosecutor v. Lukić and Lukić* (Appeal Judgement) IT-98-32/1 (4 December 2012) [428]; *Perišić* (n 47) [37]; *Nabimana* (n 42) [482]; *Karera* (n 36) [321]; *Taylor* (n 46) [403]; *Prosecutor v. Duch* (Trial Judgement) 001/18-07-2007/ECCC/TC (26 July 2010) [536]

⁷⁹ In cases of specific intent crimes, *inter alia* genocide, the requisite principal perpetrator’s *dolus specialis* is considered an essential element about which the accomplice must know (*Blagojević and Jokić* (n 40) [127]) although he does not need to share it (*Seromba* (n 53) [56]; *Ntawukuliyayo* (n 34) [222])

⁸⁰ *Kalimanzjira* (n 34) [86]; *Karera* (n 36) [321]; *Munyinyi* (n 34) [79]; *Seromba* (n 53) [56]; *Rukundo* (n 45) [53]; *Prosecutor v. Haradinaj* (Appeal Judgement) IT-04-84 (21 July 2010) [58]

law for both tribunals, but has also been endorsed by the International Law Commission's 1996 Draft Code of Crimes,⁸¹ and resonates in the International Court of Justice comments on the concept of complicity.⁸² Finally, such an understanding is in line with the wording recently adopted by the UN General Assembly Arms Trade Treaty (hereinafter "UNGA ATT"), which is seminal not only because of its subject matter relevance – indeed, the provision of weapons is the most common way of providing assistance – but also because it may serve as a proof of customary international law, since the text is a result of direct inter-state negotiations. Article 6(3) of the UNGA ATT provides:⁸³

“A State Party shall not authorize any transfer of conventional arms (...), if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.” (emphasis added)

Nonetheless, it cannot be overlooked that there is an alternative understanding of the knowledge requirement, which sets the threshold significantly lower and requires only knowledge of the possibility that the provided assistance would contribute to the principal perpetrator's crimes. This standard adopted by the SCSL in its case law defines *mens rea* of aiding and abetting in the following way:⁸⁴

⁸¹ ILC, 'Draft Code of Crimes against the Peace and Security of Mankind with commentaries' (1996) 'Report of the International Law Commission' art 2(3)(d)

⁸² *Application of the Genocide Convention* (n 8) [422]

⁸³ The Arms Trade Treaty, UNGA Res 67/234 (2013). The treaty is not in force yet due to a lack of the required number of ratifications, but during the General Assembly's vote on the resolution adopting it, 154 out of 194 States were in favor. See the statistics on the United Nations Office for Disarmament Affairs website <<http://www.un.org/disarmament/ATT/>> accessed 25 January 2014

⁸⁴ *Taylor* (n 46) [414]; *Prosecutor v. Brima et al.* (Appeal Judgment) SCSL-2004-16-A (22 February 2008) [242]; *Fofana* (n 33) [366]-[367]; *Prosecutor v. Sesay et al.* (Appeal Judgment) SCSL-04-15-A (26 October 2009) [546]

“[T]he accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. (emphasis added).”

Although individual ECCC⁸⁵ and Special Tribunal for Lebanon (hereinafter “STL”)⁸⁶ decisions indirectly alluded to this interpretation, it appears to be highly unconvincing. The SCSL, aside from failing to discharge its obligation to set out the customary international law basis of this standard, failed to acknowledge or to consider that it was adopting a standard that substantially lowered the *mens rea* standard that had previously been adopted at the ICTY. Indeed, the Special Court’s pronouncements on the subject indicate no awareness that they were doing so. The relevant paragraph of the *Blaskić* Appeal Judgement – the sole case invoked by the SCSL Trial Chamber in *Brima et al.* in support of the newly pronounced threshold – provides:⁸⁷

“(...) it is not necessary that the aider and abettor...know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.” (emphasis added)

It is therefore evident that the *Blaskić* decision, and for that matter other ICTY and ICTR judgements using the probability standard,⁸⁸ confined themselves to the first prong of the overall “knowledge requirement” described at the beginning of this sec-

⁸⁵ *Duch* (n 79) [535]

⁸⁶ *Prosecutor v. Ayyash et al.* (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) STL-11-01/I (16 February 2011) [227]

⁸⁷ *Blaskić* (n 33) [50]; *Furundžija* (n 26) [246]

⁸⁸ *Haradinaj* (n 81) [145]; *Karera* (n 36) [321]

tion (the one concerning the intentional completion of the crime by the principal perpetrator), and rephrased it to encompass situations where multiple crimes are committed.

On a final note it is worth emphasizing that it is a general principle of law that the *mens rea* shall always be aligned with the *actus reus*. This so called “correspondence principle”, is not only equally firmly established in common⁸⁹ and civil law jurisdictions,⁹⁰ but also has been recognised explicitly in the International Criminal Court’s Elements of Crimes.⁹¹ In the context of the requisite “knowledge standard” required for aiding and abetting liability, it means that the accomplice must know that his contribution would, at the very least, have a “substantial effect” on the commission of the crime.⁹² If one was to put aside technical legal nuances and look from a practical point of view, such an understanding comes immensely close to the provision of assistance simply for the purpose of furthering someone else’s crimes, and this is more or less how the accomplice liability is crafted in the Rome Statute, and in the Commentary to the ARSIWA. The next part examines them both in greater details.

V. DOES THE ASSISTANCE NEED TO BE PURPOSEFUL TO GIVE RISE TO INTERNATIONAL RESPONSIBILITY

The conflicting pronouncements discussed above are particularly troublesome since a compelling argument can be made that customary international law sets a high threshold for aiding and abetting liability. There are two main sources supporting a premise that accomplice liability can be ascribed only if the accomplice actually aims its contribution to further the commission of a wrongdoing – the official International

⁸⁹ In the United States for instance, see Section 2.02(1) of the Model Penal Code which provides: “[e]xcept as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense”.

⁹⁰ Under German law the rule is spelled out in Section 16(1) of the Penal Code: “[w]hoever upon commission of the act is unaware of a circumstance which is a statutory element of the offense does not act intentionally. Punishability for negligent commission remains unaffected”.

⁹¹ ICC, Elements of Crimes, General Introduction, (2000) UN Doc PCNICC/2000/1/Add.2 [2]

⁹² See however the SCSL’s hesitation in that regard in *Taylor* (n 46) [439]

Law Commission Commentary to the ARSIWA, and the Rome Statute of the International Criminal Court. Their importance derives from the fact that – unlike the principles spelled out by the judges of the *ad hoc* and hybrid tribunals – every single norm they contain was either extensively consulted with the multitude of national governments (ARSIWA),⁹³ or is a direct effect of robust inter-state negotiations (Rome Statute).⁹⁴

As for the first – the ARSIWA Commentary leaves very little doubt that the ‘knowledge standard’ does not suffice, and puts forward an additional requirement according to which “the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so” (emphasis added), and then continues even more explicitly:⁹⁵

“A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct (...).”

Similar elements are found in Article 25(3)(c) of the Rome Statute, which states:⁹⁶

“(...) a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (...)
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission,

⁹³ From 1980 until 2000, the ILC dedicated 7 sessions exclusively to comments and observations from Governments, which resulted in the adoption of an entirely new draft that was submitted for another set of governmental comments. Only after the examination of the final observations and incorporating them, the Commission eventually adopted the final text. Subsequently, in Res 56/83 (12 December 2001) adopted without a vote, the General Assembly took note of the ARSIWA and commended them to the attention of Governments. For details on the drafting process and particular governments’ comments, see <<http://legal.un.org/avl/ha/rsiwa/rsiwa.html>> accessed 25 January 2014

⁹⁴ For an insider views on the negotiation of the Rome Statute, see e.g. David Scheffer, *All The Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton, 2011) 199-227; John Washburn, ‘The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century’ (1999) 11 *Pace International Law Review* 361

⁹⁵ Draft Articles Commentary (n 1) [5]

⁹⁶ Rome Statute (n 20) art 25(3)(c)

including providing the means for its commission;”
(emphasis added)

Contrary to some prominent scholars and practitioners’ assertion that the mental element for aiding and abetting under the Statute is “ambiguous and most reasonably interpreted as a knowledge standard”,⁹⁷ the ICC clearly distinguishes between the standards expounded in its Statute and the laws on aiding and abetting pronounced by other tribunals. As the Pre-Trial Chamber noted:⁹⁸

“unlike the jurisprudence of the *ad hoc* tribunals, article 25(3)(c) of the Statute requires that the person act with the purpose to facilitate the crime; knowledge is not enough for responsibility under this article.”

An argument has been made that the Rome Statute was not intended as a codification of the minimum *mens rea* requirement for accomplice liability of individuals under customary international law.⁹⁹ The circumstances of the negotiation and adoption of the Rome Statute should be understood, however, as creating at least a rebuttable presumption of codification particularly where, as here, the standard adopted reflects that which is widely practiced in domestic legal systems. Many such systems require more than a mere awareness that provided assistance will facilitate the crime;¹⁰⁰ indeed Art. 25(3)(c) at the very least is “a negotiated compromise among mostly common law and civil law governments after years of discussion”.¹⁰¹ It can therefore safely be considered as an indicator – even if not decisive, then definitely very indicative – of States’ *opinio juris* on emerging international law standards on accomplice liability.

⁹⁷ Brief of David Scheffer as Amicus Curiae in Support of Appellants and of Reversal, U.S. Court of Appeals of the Ninth Circuit, *John Doe v. Nestle, S.A.*, No. 10-56739 (2011)

⁹⁸ *Prosecutor v. Mbarushimana* (Decision on confirmation of charges) ICC-01/04-01/ (16 December 2011) [274]

⁹⁹ *Taylor* (n 46) (Prosecution Response Brief) [300]

¹⁰⁰ That list includes, *inter alia*, the United States (on which the Model Penal Code the provision is based), Germany, Hong Kong, Canada, and Poland. For a comprehensive study of standards adopted in various jurisdictions, see *Taylor* (n 46) (Appeal Brief) [314]-[317]

¹⁰¹ Scheffer (n 100) 3

VI. CONCLUSION

International criminal law on aiding and abetting is regrettably fragmentary and even to some extent incoherent. Indeed, the SCSL Judge Shireen Fisher's comment that "reasonable minds may differ on the law" reflects an unfortunate abdication of a judicial function which should be present even at the international level: that of defining a common legal doctrine derived from customary international law. The contending propositions on accessorial liability in international criminal liability nevertheless offer fertile ground for considering the doctrine that could or should apply in the realm of State responsibility.

The issues are far from academic. The ongoing war in Syria is a crucible of the potential issues and consequences arising from a doctrine of accessorial liability in the realm of State responsibility. Many States provide some kind of support to either the government, or the rebels, and it is fair to assume based on the length and intensity of the conflict that this contribution has been a substantial one. Furthermore, when the United Nations Commission of Inquiry Report documenting atrocities on the ground and saying that:¹⁰² "the perpetrators of (...) violations and crimes, on all sides, act in defiance of international law" is discussed by State governments' representatives, it can be reasonably inferred that States have a knowledge about the circumstances of the wrongdoings. Consequently, if the State accomplice liability was limited only by substantiality and knowledge requirements, all States providing support to the fighting parties would be responsible for aiding and abetting violations committed by them. This cannot possibly stand, especially in the light of the fact that history furnishes us with numerous examples of States' assistance for entities involved in both lawful and unlawful activities, and the standards under which accomplice liability would be attached in all these cases, are simply unreasonable.¹⁰³

¹⁰² UNGA HRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (16 August 2013) UN Doc A/HRC/24/46 1

¹⁰³ A thorough analysis of various factual scenarios in which States provided aid or assistance for countries involved in serious international law violations can be found in *Taylor* (n 46) (Appeal Brief) [397]-[398]

It is undisputable that there is a global community interest in creating an international “complicity” legal regime capable of holding responsible those who provide aid or assistance and further the perpetration of international wrongdoings. Nevertheless this goal, although noble, needs to be weighed against the cold-hearted reality in which many States simply have interests in supporting various international actors whose conduct can at times be internationally wrongful. The purpose requirement, pursuant to which the provision of assistance gives rise to accomplice liability only if it was provided with a view of facilitating a particular international contravention, offers a rational balance between the two. The adoption of such an element would also rationalise the ICC standard of accessorial liability and that of State responsibility. The ICJ, without slavishly following concepts arising from international criminal tribunals, is evidently mindful of the consequences of divergent principles in different areas of the same legal system.¹⁰⁴

To sum up, after a comparative examination of international criminal law accomplice liability standards of aiding and abetting, it appears that three conditions need to be fulfilled to hold a State internationally liable for aiding and abetting an international wrongdoing:

1. The assistance provided needs to have a substantial effect on the commission of a wrongdoing;
2. The State needs to have an actual knowledge that its contribution will further the commission of a wrongdoing; and
3. The assistance needs to be provided for the purpose of facilitating the commission of a wrongdoing.

¹⁰⁴ See *Application of Genocide Convention* (n 8) [406]

Kadi II: Judicial Review of Counter Terrorism Sanctions, the “Russian Doll” of Legal Conflicts?

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Abstract

The following case note concerns the so-called Kadi II case decided by the Court of Justice of the European Union on 18 July 2013. The case note analyses how the CJEU addressed the issue of judicial review of counter-terrorism sanctions and compares this “European” stance adopted by the Court with how the problem has been tackled at international and national level.

I. INTRODUCTION

Since 9/11, a plethora of counter-terrorism sanctions have been adopted at international, regional and national level. In particular, the United Nations Security Council (hereinafter “UN SC”) has adopted Resolutions establishing Sanctions Committees charged with the task of maintaining updated lists of individuals and entities suspected of involvement in terrorist activities. These Resolutions are then implemented by regional organisations, such as the European Union (hereinafter “EU”), and national legislatures. Counter-terrorism sanctions include measures such as asset freezes, travel bans and arms embargoes. In recent years, certain blacklisted individuals and entities have introduced judicial review proceedings challenging the counter-terrorism sanctions adopted against them. Such challenges have raised complex legal issues pertaining to the hierarchy of norms between the United Nations Charter (hereinafter “UN Charter”) and fundamental human rights. In addition, judicial review proceedings have raised questions relating to the disclosure of secret intelligence information. On 18 July 2013, the Grand Chamber of the Court of Justice of the European

Union (hereinafter “CJEU”) rendered its judgment in the *Kadi II*¹ case, dismissing appeals against the General Court’s annulment of Commission Regulation (EC) n° 1990/2008. Without seeking to be exhaustive, this case note will compare the various approaches adopted by several supreme judicial bodies on this issue.

II. BACKGROUND OF THE KADI SAGA

On 12 October 2001, the United States Office of Foreign Asset Control identified Mr Kadi as a “Specially Designated Global Terrorist”. Within days, Mr Kadi was added to the Sanctions Committee Consolidated List and to the list maintained by the EU authorities.² In December 2001, Mr Kadi brought a first action for annulment of the EU measures before the General Court. The General Court held that the contested EU measures enjoyed immunity from jurisdiction, except for a limited review regarding compatibility with norms of *jus cogens*.³ On appeal, the Court set aside the judgment of the General Court and held that the contested EU measures did not enjoy immunity from jurisdiction. It annulled the EU measure listing Mr Kadi for violating the rights of the defence, the right to respect for property and the principle of proportionality, and the right to effective judicial protection.⁴ In November 2008, an EU measure returned Mr Kadi’s name to the list.⁵ In February 2009, Mr Kadi brought a second action for annulment; this time, the General Court annulled the EU measure listing Mr Kadi.⁶ The Council, the Commission and the United Kingdom appealed this judgment to the

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¹ Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v Kadi* [2013] ECR not yet reported

² Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001 (OJ 2001 L 277, p. 25)

³ Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649

⁴ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351

⁵ Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 (OJ 2008 L 322, p. 25)

⁶ Case T-85/09, *Kadi v Commission*, [2010] ECR II-5177

Court. In October 2012, when the appeal was still pending, Mr Kadi's name was removed from the Sanctions Committee Consolidated List. In *Kadi II*, the CJEU was forced to tackle the questions which *Kadi I* left unanswered, namely regarding the scope of judicial review. The significance of *Kadi II* is reflected by the fact that a total of 20 EU Member States intervened in the proceedings.

III. IMMUNITY FROM JUDICIAL REVIEW

A. Absence of judicial review at United Nations level

In *Kadi II*, the Court recalled that delisting procedures at the United Nations (hereinafter "UN") level fail to guarantee the right to effective judicial protection, despite recent improvements to listing and delisting procedures.⁷ These recent improvements were made following the Court's judgment in *Kadi I*. First, Resolution 1730 (2006)⁸ established a Focal Point to receive delisting requests directly from individuals and entities. Second, Resolution 1822 (2008)⁹ introduced an *ex officio* periodic review of the names of individuals and entities to be maintained on the list. Nonetheless, as this review is conducted by the Sanctions Committee itself, it lacks the independence and impartiality inherent to judicial review proceedings. This Resolution also provides that the designating State must identify the parts of the statement of case that may be publically released and that the Sanctions Committee must make available on its website a summary of reasons for the listing decision. Third, Resolution 1904 (2009)¹⁰ created the Office of the Ombudsperson, who partially replaced the Focal Point, charged with the task of receiving individual delisting requests and submitting a Comprehensive Report on delisting requests to the Sanctions Committee. Fourth, Resolution 1989 (2011)¹¹ provides that delisting becomes automatic in the absence of a consensus to

⁷ See n 1 [133] referring to *Nada v Switzerland* (App no 10593/08) [2013] 56 EHRR 18, [211]

⁸ S/RES/1730 (2006)

⁹ S/RES/1822 (2008)

¹⁰ S/RES/1904 (2009)

¹¹ S/RES/1989 (2011)

the contrary or a request to refer the matter to the UN SC. However, the UN SC retains the ultimate decision-making power regarding delisting requests. This Resolution also improves the access of the Ombudsperson to confidential information and to the identity of the designating State. Finally, Resolution 2083 (2012)¹² reversed the presumption that a designating State does not wish for its identity to be made known. These listing and delisting procedures at UN level have been the subject of extensive judicial criticism.¹³ It remains to be seen whether the UN SC will make further changes to its listing and delisting procedures in light of the Court's judgment in *Kadi II*. In the meantime, judicial review before the CJEU remains particularly important given that there is currently no judicial review of listing decisions at UN level.

B. Judicial review at national and regional levels

In *Kadi II*, as expected, the Court reiterated its position from *Kadi I* regarding the absence of immunity from jurisdiction.¹⁴ Essentially, the Court's position is that judicial review by the EU judicature of the validity of EU measures in the light of fundamental rights is a constitutional guarantee in the autonomous EU legal order, regardless of whether those measures were adopted to implement an international law measure. The Court's judgments in *Kadi II* and *Kadi I* form part of a growing trend at national and regional levels to allow judicial review of counter-terrorism sanctions. In the face of this trend, the position adopted by the Swiss Federal Court in *Youssef Mustapha Nada v Staatssekretariat für Wirtschaft*,¹⁵ and reiterated since,¹⁶ is becoming increasingly isolated. In that case, the Swiss Federal Court followed the approach of the General Court in *Kadi I*. It held that it lacks jurisdiction to review the legality of national

¹² S/RES/2083 (2012)

¹³ *HM Treasury v Ahmed* [2010] UKSC 2, [78]; *Abdelrazik v Minister of Foreign Affairs* [2009] FC 580, [51]

¹⁴ See n 1 [65-69]

¹⁵ *Youssef Mustapha Nada v Staatssekretariat für Wirtschaft*, Case No. 1A 45/2007 BGE, 133 II 450 (14 November 2007), ILDC 461 (CH 2007)

¹⁶ *A v. Federal Department of Economics*, Case No. 2A 783/2006, Swiss Federal Tribunal [Judgment] (23 January 2008) ILDC 1200 (CH 2008); *A v. Federal Department of Economics*, Case No. No 1A48/2007, Swiss Federal Tribunal [Judgment] (22 April 2008), ILDC 1201 (CH 2008)

measures implementing UN SC Resolutions, except as regards a limited review of compatibility with norms of *jus cogens*. The Swiss Federal Court based this conclusion on the hierarchy of international legal norms under Article 103 of the UN Charter, according to which obligations under the UN Charter prevail over obligations under any other international agreement.

On 12 September 2012, the European Court of Human Rights (hereinafter “ECtHR”) rendered its long-awaited judgment in *Nada v Switzerland*.¹⁷ According to the judgment, the denial of access to judicial review by the Swiss Federal Court¹⁸ constituted a violation of article 13 in conjunction with article 8 of the European Convention on Human Rights (hereinafter “ECHR”). However, the ECtHR reached this conclusion using a different reasoning than the one adopted by the CJEU. Ultimately, the ECtHR avoided the question of a hierarchy between obligations resulting from the ECHR and the UN Charter by adopting a “harmonious interpretation” approach.¹⁹ It concluded that Switzerland had not done everything in its power to harmonise its obligations under the ECHR with its obligations under the UN Charter.²⁰ In *Abdelrazik v Canada*,²¹ the Federal Court of Canada adopted a similar “harmonious interpretation” approach, granting an effective remedy to the breach of fundamental rights as required under the Canadian Charter of Rights and Freedoms that did not violate Canada’s international legal obligations.

The Supreme Court of the United Kingdom has adopted yet another approach, viewing the issue in terms of parliamentary supremacy. In *HM Treasury v Ahmed*,²² the very first case heard by the Supreme Court, it was held that domestic measures implementing UN SC Resolutions are subject to judicial review of their validity in view of fundamental human rights, unless Parliament expressly provides otherwise. According to the judgment, section 1 of the 1946 United Nations Act does not allow the

¹⁷ See n 7

¹⁸ See n 15

¹⁹ *From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions*, Erika de Wet, Chinese Journal of International Law (2013) 12(4): 787-807

²⁰ See n 7 [163-199]; see *Al-Jedda v United Kingdom* (App no 27021/087) [2011] ECHR 1092 for more on the harmonious interpretation approach of the ECtHR to reconciling ECHR and UN Charter obligations

²¹ See n 13

²² *ibid*

executive to override fundamental human rights. Therefore, the domestic measures at issue were *ultra vires* and void. The reasoning followed by the Supreme Court suggests that it would be possible for the Parliament to adopt an Act providing that measures implementing UN SC Resolutions are exempt from the necessity to respect fundamental human rights. Following the ECtHR's judgment in *Nada*, such a situation would appear in clear violation of the ECHR. It is worth noting that the position of the ECtHR is particularly relevant in the light of the EU's imminent accession to the ECHR. A consequence of this accession is that the ECtHR will have jurisdiction to review EU measures, including measures implementing UN SC Resolutions, in order to determine their compatibility with human rights guaranteed by the ECHR.²³

IV. SCOPE OF REVIEW

The scope of judicial review was the main issue in *Kadi II*. The General Court held that EU measures implementing UN SC Resolutions would be subject to a full review, "at the very least, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection".²⁴ On appeal, the Court referred very briefly to this doctrine of equivalent protection,²⁵ stating that full review is "all the more essential" given the lack of judicial review at UN level.²⁶ The Court had already held in *Kadi I* that counter-terrorism sanctions are subject to "in principle, full review" of their legality.²⁷ In *Kadi II*, the Court explained what "full review" entails. It considered that effective judicial review requires the scope of review to include the verification of the allegations against the individual or entity concerned. This includes a review of whether the allegations are "sufficiently detailed and specific" and of whether the "accuracy of the facts" underlying these allegations

²³ Draft Accession Agreement of the European Union to the European Convention on Human Rights, 10 June 2013 available at <www.coe.int>

²⁴ See n 6 [127]

²⁵ BVerfGE 73, 339 2 BvR 197/83 Solange II-decision, (f)

²⁶ See n 1 [133]

²⁷ See n 4 [326]

has been established.²⁸ The Court's endorsement of "full review" is contrary to the recommendations of Advocate General Bot. In his Opinion, he recommended that the EU judiciary show restraint and conduct only a "limited review" of the alleged facts, their legal classification and the proportionality of the measure.²⁹

As regards confidentiality concerns, the Court considered that confidentiality is not a valid objection to disclosing information or evidence before the EU judiciary.³⁰ Indeed, the Court considered that the EU judiciary has the power to require the competent EU authority to disclose information or evidence. The CJEU then decides whether the grounds for precluding disclosure are well-founded. If it concludes that those grounds do not preclude disclosure, the decision to disclose the material remains the decision of the competent EU authority. However, if this authority does not allow disclosure, the CJEU will review the measure solely on the basis of the disclosed material. If it concludes that those grounds do preclude disclosure, then it may consider the confidential material. However, the CJEU will assess the effect of non-disclosure on the probative value of the information or evidence. The techniques developed by the Court regarding the disclosure of confidential information appear to strike a proper balance between two competing interests: legitimate security concerns and the protection of fundamental human rights. It will be interesting to see if these techniques are followed by other regional and national courts.

As regards the burden of proof, the Court in *Kadi II* considered that it lies with the competent EU authority to prove that their decision is well-founded, and not with the person who is targeted by the measure to prove it is not.³¹ The Court's position on the burden of proof is significant as the reversal of the burden of proof in delisting procedures at UN level has been the object of extensive judicial criticism. For example, in *Abdelrazik v Canada*, Zinn J. of the Federal Court stated in memorable terms: "One cannot prove that fairies and goblins do not exist anymore than Mr. Abdelrazik or any other person can prove that they are not an Al-Qaida associate. It is a fundamental

²⁸ See n 1 [136]

²⁹ *ibid*, Opinion of Advocate General Bot [105-110]

³⁰ *ibid* [125-129]

³¹ *ibid* [122]

principle of Canadian and international justice that the accused does not have the burden of proving his innocence, the accuser has the burden of proving guilt”.³²

For the first time, the Court proceeded to conduct this “full review”. It found that the judgment of the General Court was vitiated by several errors of law. However, these errors did not affect the operative part of its judgment which annulled the contested EU measure. First, the non-disclosure of evidence or information underlying the decision does not in itself constitute a violation of the rights of the defence or the right to effective judicial protection.³³ As outlined above, the CJEU must instead review the legality of the measure in view of the information and evidence disclosed in the summary of reasons. Second, the Court held that all but one of the reasons were “sufficiently detailed and precise”, contrary to the finding of the General Court. In addition, it held that a reason expressed as a possibility of involvement in terrorist activities was “sufficiently detailed and specific”. Factors which the Court appears to consider in analysing whether the reasons are “sufficiently detailed and specific” include whether the reasons identify the persons concerned, the activity reported, the time this activity was conducted and the alleged links with terrorism.³⁴ Nonetheless, the Court annulled the contested EU measure because it was impossible to substantiate the allegations based on the material before the Court.³⁵

V. THE SUSPENSION OF THE EFFECTS OF ANNULMENT

In *Kadi II*, the contested measure was annulled with immediate effect; the issue of suspension was not even discussed. Perhaps, suspension was considered inappropriate due to the already long duration of a succession of unlawful measures against Mr Kadi. However, in *Kadi I*, the effects of the annulled regulation were maintained for a period not exceeding three months in order to allow the Council to adopt new measures. The Court feared that otherwise “Mr Kadi and Al Barakaat might take steps

³² See n 13 [53]

³³ See n 1 [137-139]

³⁴ *ibid* [140-149]

³⁵ *ibid* [151-164]

seeking to prevent measures freezing funds from being applied to them again”.³⁶ In *HM Treasury v Ahmed (No. 2)*,³⁷ the Supreme Court decided, by a majority of six to one, not to use its power to suspend the effects of its decision to quash domestic measures on the basis that to do so would, or might, give the impression that they were not void. This aspect of the *Ahmed* judgment has been criticised;³⁸ the power to suspend the effects of its decisions would become redundant as this objection could be made against every request for suspension. The CJEU’s position on suspension appears preferable to that of the Supreme Court; the latter’s position risks seriously compromising the effectiveness of counter-terrorism sanctions.

VI. CONCLUSION

Clearly, judicial review of counter-terrorism sanctions raises a series of intriguing questions ranging from whether judicial review is possible at all, to the intensity of this review and the exercise of the power to suspend the effects of annulment. This topic is particularly suited to a broad comparative analysis in view of the dialogue between the CJEU, the ECtHR and national courts. Once the CJEU held in *Kadi I* that counter-terrorism sanctions were subject to judicial review, it was only a matter of time before the CJEU would be called upon to rule on unresolved issues such as the disclosure of confidential information. Accordingly, the CJEU was called upon to rule on these issues in *Kadi II*. The intensity of the judicial review conducted by the CJEU in *Kadi II* may have come as somewhat of a surprise in the face of the Advocate General’s recommendation to exercise restraint. It is too early to ascertain whether national courts will adopt a similar interventionist position when conducting a judicial review of domestic measures; this is one to watch.

³⁶ See n 4 [373]

³⁷ *HM Treasury v Ahmed (No. 2)* [2010] UKSC 5

³⁸ Public Law in the Supreme Court 2009-2010 - [2010] 15(4) JR 299-322, 309-310: “If the court has the power to suspend the effect of its judgment it is difficult to think of a case in which it is more appropriate to use that power than in a case where suspected terrorists and terrorist sympathisers will suddenly have their financial assets released.”

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