NATIONAL CONVENTION on European Integration of Montenegro

(NKEI 2013-2014)
National Convention on European Integration of Montenegro (NCEI 2013-2014)

Report on the project implementation for the period January 2013 – February 2014 (activities, recommendations, expert articles)

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This project has been financially supported by the European Union.
INTRODUCTION

Dear friends,

It is our honor and pleasure to present you on the following pages with the results of work of both foreign and domestic experts within National Convention on European Integration of Montenegro, who gave their professional contribution to acceleration of the process of European integration and creation of social synergy for the improvement of overall reforms in our society.

Through debates and expert analysis within 6 working groups and 18 sessions, 145 recommendations were adopted and directed to the Government, the Parliament and other state institutions, civil society and international subjects which are important for the process of European integration of Montenegro. New cycle brought added value, thanks to our donors, which provided us with the possibility to add one day to the sessions thus deepening topics for discussion and broadening number of experts involved.

This result was achieved thanks to all the experts and members of the National Convention, to whom we want to express our gratitude, whose number rose to over 400, because that type of responsible relationship of these individuals and institutions provided for a success in the realization of the project led by partners – European Movement in Montenegro and Research Center of the Slovak Foreign Policy Association.

At the end, we want to express our gratitude to Delegation of the European Union in Podgorica for recognizing the importance of this project, as well as Slovak Aid, Government of Slovak Republic and Embassy of Slovak Republic on financial, organizational and expert assistance in the realization of this project. We want to commend the Government and the Parliament of Montenegro that fully supported the project, thus contributing to accomplishment of full cooperation between public and civil sector in the field of European integration of our country.

It is our wish that, in the years ahead, the National Convention on European Integration of Montenegro becomes even richer, stronger and even more well-rounded framework for the exchange of opinions on significant issues for our society and for defining best ways of solving these issues.

We hope that in the future we can all together contribute to achieving this goal.

Sincerely,

European Movement in Montenegro
Momčilo Radulović, President
About the project

National Convention on European Integration of Montenegro (NCEI 2013-2014) represents a successful continuation and an upgrade of the platform of cooperation of civil and public sector created in NCEI 2011, and has been improving and expanding ever since. Project is realized by European Movement in Montenegro and Research Center of Slovak Association for Foreign Policy, with the financial support of the Delegation of the European Union to Montenegro and Slovak Aid, and participation of the Government and the Parliament of Montenegro.

The purpose of this project is to allow debate on issues which are of general interest in the context of process of accession of Montenegro to the European Union through gathering as many experts as possible in different priority areas within the field of European integration.

Concrete objectives of the project that have, in a broader sense, enabled functioning of the forum of discussion in certain areas are:

- Improving cooperation between civil and public sector through strengthening the existing platform for debate on the topics related to the process of European integration.
- Preparing Montenegrin society for the European integration process and for the process of EU accession negotiations.
- Stimulus to additional and faster social, political and economic reforms in the process of the European integration, through strengthening the role of civil society in the process of creation and implementation of various reform and institutional policies.
- Increasing efficiency and effectiveness of the activities undertaken by public institutions in the process of the European integration of Montenegro.

Through the realization of this project on an even higher and more advanced level, continuity was maintained with regards to cooperation between state institutions and civil society in areas of importance for the Montenegrin society in the process of European integration. The new reality of Montenegro as a membership candidate that, in the mean time, has started the negotiations process, added a new dimension and importance to the recommendations stemming from the implementation of this project.

Therefore, the work on NCEI 2013-2014 build upon already achieved results based on the cooperation of civil sector and state institutions, while it widened the scope of area it covers, not just through more working groups, but also higher number of experts involved. Identifying and assigning experts from various social sectors have directly contributed to strengthening human resources in the area of the working groups’ activities, while contributing to discover weaknesses and shortcomings in a given field in order to propose solution for dealing with these issues. Thanks to funding
from the Delegation of the European Union to Montenegro and Slovak Aid, we managed to organize a two-day meetings of each of the working groups, thus deepening and widening membership of NCEI 2013-2014.

A sound dialogue was achieved through mutual efforts of co-chairs and Working groups’ members, independent of the sector of their origin (public, civil or private), as well as constructive discussions where, through negotiation and compromise, the solutions adopted were acceptable to all participants, mainly due to the fact that they were in the best interest of the Montenegrin society as a whole. All recommendations were presented publicly by the co-chairs, which enabled the broader public to access to their content. All the recommendations were sent directly to the relevant institutions, in order to make sure that they find their way to all stakeholders endowed with responsibility in given areas.

Within the project, working groups were created where civil and public sector representatives from Montenegro, along with the participation of foreign experts and international institutions’ representatives, would have an open discussion and exchange arguments and propositions, with the goal of defining obstacles on the European integrations path, as well as create adequate conclusions and recommendations for overcoming those obstacles.

Compared to previous years number of working groups is bigger, after consulting with both representatives of public and civil sector, taking into account priorities and current issues from the perspective of Montenegrin EU integration process. It is important to stress out that in 2011 there were 117 unanimously adopted recommendations, while in 2012 this number was 164. Based on the previous experience, existing platform was strengthened and improved as similar model of cooperation of interested parties on topics assessed as the most important ones.

Working groups of NCEI 2013-2014 covered following areas:

1. Working group I – Judiciary and fundamental rights (Chapter 23)
2. Working group II – Justice, freedom and security (Chapter 24);
3. Working group III – Agriculture, food safety, veterinary and phytosanitary policy and fisheries (Chapters 11, 12 and 13);
4. Working group IV – Protection of the environment (Chapter 27);
5. Working group V – Competition (Chapter 8) and
6. Working group VI – Consumer and Health Protection (Chapter 28).

Working groups were formulated in this manner in order to follow one or more negotiating chapters in those topics acknowledged as the most pressing ones from the perspective of needs of Montenegro in the reform process within European integration, but also for the overall improvements in Montenegrin society. The working groups consist of representatives from various institutions and organizations from public and civil sector. The Working groups are chaired by two representatives, one from each public and civil sector.
These activities were realized as a part of the NCEI 2013-2014 so far:

- Initial (I) Plenary conference (inaugural meeting of all the participants, 12 April 2013)
- 3 meetings of each of the Working groups (4 to 6 hours per meeting, from April 2013 to February 2014)
- 3 press conferences (presentations of recommendations and conclusions, one press each per every session of the working groups from April 2013 to February 2014)
- Creating and presenting the final publications with all the results of the project, per each working group, including all the recommendations and conclusions from the sessions, expert articles on the topics from the sessions and report on the level of implementation of recommendations up to date.
Plenary Conference and opening ceremony of the National Convention on European Integration of Montenegro (NCEI 2013-2014), 12 April 2013

Continuation of National Convention on European Integration was marked in the Plenary Hall of Parliament of Montenegro, where on 12 April 2013 First Conference of the National Convention on the European integration on Montenegro was held. On this occasion, besides the President of the Parliament, Mr. Ranko Krivokapić, short speeches were given by Mr. Milo Đukanović, Prime Minister of Montenegro, H. E. Ambassador Mitja Drobnič, Head of Delegation of the European Union to Montenegro, Mr. Peter Javorčík, State Secretary for European Affairs in the Ministry of European Affairs of the Republic of Slovakia, H. E. František Lipka, Ambassador of the Republic of Slovakia to Montenegro, Mr. Tomas Strazay, Research Center of the Slovak Association for Foreign Policy and Mr. Momčilo Radulović, President of the European Movement in Montenegro. On this occasion, topics for all three rounds of sessions of working groups in 2013 were presented by co-chairs of those working groups.

Mr. Milo Đukanović, Prime Minister of Montenegro

H. E. Ambassador Mitja Drobnič, Head of Delegation of the European Union to Montenegro

H. E. František Lipka, Ambassador of the Republic of Slovakia to Montenegro

Mr. Peter Javorčík, State Secretary for European Affairs in the Ministry of European Affairs of the Republic of Slovakia
Chairmanship

Chairmanship of NCEI 2013-2014 is formed out of high officials from various Montenegrin institutions and representatives of civil society, local governments and other structures of the Montenegrin society. Thus, as well as the last year, the aim is to achieve that the results of this cycle of the project are more significant, considering that the members of the Chairmanship can influence the process of implementation of the recommendations adopted.

Members of the Chairmanship of the NCEI 2013-2014:

- Igor Lukšić, Minister of Foreign Affairs and European Integration
- H. E. Mitja Drobnič, Head of Delegation of the EU to Montenegro
- Žarko Šturanović, Secretary-General of the Government of Montenegro
- Momčilo Radulović, President of the European Movement in Montenegro
- Alexander Duleba, Director of the Research Center of the Slovak Foreign Policy Association
- Marko Nikčević, Secretary-General of the Union of Trade Unions of Montenegro
- H. E. Ambassador František Lipka, Slovak Ambassador to Montenegro
- Milan Ročen, Chief political advisor of the President of the Government of Montenegro
- H. E. Ambassador Aleksandar Andrija Pejović, Chief negotiator for the accession of Montenegro to the European Union
- Damir Davidović, Secretary-General of the Parliament of Montenegro
- Predrag Mitrović, President of the Employers Union in Montenegro
- Refik Bojadžić, Secretary-General of the Association of Municipalities of Montenegro
- Miodrag Vuković, President of the Committee for international relations and immigrants
- Slaven Radunović, President of the Committee for European integration in the Parliament of Montenegro
- Srđa Keković, Secretary-General of the Union of Free Trade Unions of Montenegro
- Velimir Mijušković, President of the Chamber of Commerce of Montenegro

Co-chairs of Working Groups

Each Working group is chaired by 1 co-chair from the public sector and 1 from the civil sector. The role of the co-chairs is to chair the sessions and participate in formulation of conclusions and recommendations, as well as to prepare a part of working materials. Co-chairs have decided on the topics for first sessions of the working groups.

Co-chairs of Working group I: Ms. Svetlana Rajković, Deputy Minister of Justice for
International Legal Cooperation and European Integration, Negotiator for Chapters 23 and 24 and Mr. Milorad Marković, Center for Monitoring CEMI, who took over this position after session 2 from Mr. Boris Marić, Center for Civic Education.

Co-chairs of Working group II: Mr. Dragan Pejanović, Secretary of the Ministry of Interior, Chief of Working Group for Chapter 24 and Mr. Vlado Dedović, Director of Legal Department in Center for Monitoring CEMI, member of the Working Group for Chapter 24.

Co-chairs of Working group III: Ms. Danijela Stolica, Deputy Minister for Agriculture and Rural Development, Negotiator for Chapters 11, 12 and 13 and Ms. Vesna Maraš, Executive Director of L.T.D. „13. jul Plantaže‟.

Co-chairs of Working group IV: Ms. Ivana Vojinović, General Director of the Directorate for Environment and Climate Change in the Ministry of Sustainable Development and Tourism, Chief of Working Group for Chapter 27 and Ms. Nataša Kovačević, Program Coordinator for Environment in NGO Green Home, member of the Working Group for Chapter 27.

Co-chairs of Working group V: Mr. Zoran Perišić, General Director of the Directorate for Internal Market and Competition in the Ministry of Economy, Chief of Working Group for Chapter 8 and Ms. Bisera Turković, Secretary General of the European Movement in Montenegro, member of the Working Group for Chapter 8.

Co-chairs of Working group VI: Ms. Rada Marković, Deputy Director for Sector for Economy and Market Protection, Games of Chance and Public Procurement in the Administration for Inspection, Chief of Working Group for Chapter 28 and Zvezdan Čađenović, Employer’s Union, member of the Working Group for Chapter 28

Expert rapporteurs and Sessions of NCEI 2013-2014

Expert rapporteurs are bearers of professional activities within working groups and they are responsible for preparing expert keynote address at the beginning of the each Working group session. Expert rapporteur also prepares preliminary draft conclusions on a given topic, which they then present at the end of their speech. His/her conclusions do not have to be adopted, and members of the Working group vote on these conclusions, in the same way they vote on all other proposals, in accordance with the voting procedure. Expert rapporteur makes a selection of working materials for Working group sessions, and delivers the material to European Movement, in reasonable time before the session, for further distribution to all members of the Working groups.

Overview of Sessions and engaged experts of NCEI 2013-2014

Sessions 1

First round of Sessions of Working groups of NCEI 2013-2014 were held in the period between 29 April and 24 June 2013, which resulted in adopting 49 recommendations and conclusions.
Topics of the Sessions 1 were:

**Working group I** (5 June 2013):
**TOPIC:** The role of the Protector of Human Rights and Freedoms of Montenegro (Ombudsman) as the national mechanism for the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment
**Experts rapporteurs:** Mr Petar Ivicević, Office of the Protector of Human Rights and Freedoms of Montenegro and Mr Marian Török, Office of the Human Rights and Freedoms of the Slovak Republic

**Working group II** (29 April 2013):
**TOPIC:** Asylum
**Experts rapporteurs:** Ms Sandra Bugarin, from the Asylum Office (Ministry of Interior) and Ms Natasha Hrnčarova from University in Trnava (Faculty of Law)

**Working group III** (17 June 2013):
**TOPIC:** The importance of producer organizations in the process of negotiations
**Experts rapporteurs:** Mr Zoran Krsnik, National Wholesales Market, Zagreb

**Working group IV** (31 May 2013):
**TOPIC:** Establishing a basis for the development of river basin management plans and the implementation of the Water Framework Directive
**Expert rapporteur:** Ms Rita Barjaktarović from NGO Northland and Mr Michal Maslen, from Trnava University, Faculty of Law

**Working group V** (10 June 2013)
**TOPIC:** Harmonization of secondary legislation with the EU acquis in the field of state aid
**Experts rapporteurs:** Ms Šefika Kurtagić, from the Department for preparation of state aid of Ministry of Finance and Ms Marijana Liszt, former chief of the working group for preparation of negotiations in Chapter VIII and the lawyer of the Law Office “Posavec, Rasica & Liszt”

**Working group VI** (24 June 2013)
**TOPIC:** Unfair Trade Practices and Consumer Protection
**Experts rapporteurs:** Mr Mijat Šestović, Directorate for Inspection Affairs and Ms Marijana Lončar Velkova, Consumers’ organization in Macedonia.

**Sessions 2**

Second round of Sessions of Working groups of NCEI 2013-2014 were held in the period between 3 October and 11 November 2013, which resulted in adopting 53 recommendations and conclusions.

Topics of the Sessions 2 were:

**Working group I** (3-4 October 2013):
**TOPIC:** Normative and institutional framework for the protection and realization of rights of children, with special reference to the treatment of juveniles in conflict with the law
**Experts rapporteurs:** Ms Nataša Radonjić, from the Ministry of Justice of Montenegro and Ms Aleksandra Durakova, a UNICEF expert from Slovakia
This project has been financially supported by the European Union.

**Working group II** (24-25 October 2013):
**TOPIC:** External borders and Schengen  
**Experts rapporteurs:** Mr Vukoman Zarkovic, from the Police Administration, Mr Filip Dragovic, expert of UNDP in Croatia and Ms Miroslava Vozaryova, Ministry of Foreign Affairs of the Republic of Slovakia

**Working group III** (11-12 November 2013):
**TOPIC:** Code of good agricultural practices, cross-compliance, the standards that farmers must meet to be eligible for EU support  
**Experts rapporteurs:** Mr Jovan Nikolic, NGO Monteorganica and Mr Zdravko Tusek, assistant director for direct payments and control of the Agency for Payment of the Republic of Croatia

**Working group IV** (22-23 October 2013):
**TOPIC:** Administration and finance of the process of establishing the Natura 2000 ecological network  
**Expert rapporteur:** Ms Milena Bataković, from the Agency for the Protection of the Environment and Mr Rastislav Rybanič, from Ministry for Environment of the Republic of Slovakia

**Working group V** (28-29 October 2013)
**TOPIC:** Economic analysis of competition cases  
**Experts rapporteurs:** Ms Bozenka Nikolic, from the Agency for Protection of Competition and Ms Ljiljana Pavlic, Agency for Protection of Competition of the Republic of Croatia.

**Working group VI** (30-31 October 2013)
**TOPIC:** Collective action for the protection of consumer rights (administrative and judicial prohibitions)  
**Experts rapporteurs:** Mr Zvezdan Cadjenovic, Montenegrin Employers’ Union and Mr Ales Galic, professor at Law Faculty in Ljubljana

**Sessions 3**

Third round of Sessions of Working groups of NCEI 2013-2014 were held in the period between 12 December 2013 and 4 February 2014, which resulted in adopting 43 recommendations and conclusions.

Topics of the Sessions 3 were:

**Working group I** (3-4 February 2014):  
**TOPIC:** Legal and strategical framework for work of NGOs in the state and the role of civil sector in the process of the European Integration  
**Experts rapporteurs:** Marcel Zajac, Center for Philanthropy of the Slovak Republic and Ana Novaković, Centre for development of NGOs

**Working group II** (16-17 December 2013):  
**TOPIC:** Customs cooperation  
**Experts rapporteurs:** Mr Goran Milonjić, customs inspector in Ministry of Interior
Working group III (29-30 January 2014):  
**TOPIC:** Efficient and consistent safety in all phases of production, processing and distributing food, including food for animals and fulfilment of special hygienic requirements for food traffic in domestic and international market and fulfilment of the requirements regarding food labeling  
**Experts rapporteurs:** Bohuslav Harvilak, chief of the legal department of the Veterinary Administration of the Slovak Republic and Aleksandra Martinović, professor at the Faculty for Food Technology, Food Safety and ecology at the University of Donja Gorica

Working group IV (12-13 December 2013):  
**TOPIC:** Liability for crimes in the field of environmental protection  
**Expert rapporteur:** Maja Kostić- Mandić, professor at the Law faculty at the University of Montenegro and Marija Pujo Tadić, lawyer, Republic of Croatia

Working group V (18-19 December 2013)  
**TOPIC:** Penalties and judicial process in cases of competition infringements  
**Expert rapporteur:** Ms Mihaela Nosa, Director of the Legislative, Legal and European Affairs Division of the Antimonopoly Office of the Slovak Republic

Working group VI (19-20 December 2013)  
**TOPIC:** Rights of the patients in cross-border cooperation  
**Experts rapporteurs:** Ms Slavojka Šuković, from the Ministry of Health in Montenegro and Ms Renata Turčinov, from the Croatian Institute for Health Insurance
National Convention on European Integration of Montenegro (NCEI 2013-2014)

RECOMMENDATIONS AND CONCLUSIONS
(Sessions 1, Sessions 2 and Sessions 3)
(Working Groups I, II, III, IV, V and VI)
Topic: The Role of the Protector of Human Rights and Freedoms of Montenegro (Ombudsman) as the national mechanism for the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment

RECOMMENDATIONS

1. Protector of Human Rights and Freedoms does not have full financial independence and in perspective it is necessary to work on the establishment of an independent budget of Ombudsman.

Explanation: The Protector of Human Rights and Freedoms in the Constitution of Montenegro is considered as an independent and autonomous body which takes measures to protect human rights and freedoms. Independence and autonomy essentially depend on the nature of financing of the Ombudsman. Furthermore, it means that without the financial independence, there can hardly exist institutional independence and autonomy in work, or the need for building capacities of this institution.

2. The existing legal framework should be improved in the area of cooperation between the Ombudsman and NGOs.

Explanation: The continuous development of cooperation between NGOs and Ombudsman is an essential mechanism to further improvement of the Ombudsman, particularly in its relations with the public and in making priorities in work.

3. Ombudsman’s attention should be paid to the cooperation with the media and on building necessary methodology of that cooperation.

Explanation: Periodic reporting on the work of Ombudsman must have greater public visibility, along with the annual reporting to the Parliament and the President, as mandatory. Periodical/quarterly reports can significantly contribute to an increase in public trust in the institution. The methodology of preparation and presentation of reports must be receptive to the public and assure them that the presentation and results are objective, with necessary openness for suggestions and criticism.

4. Ombudsman should pay special attention to the improvement of proactive action of the Protector of Human Rights and Freedoms.

5. Ombudsman must have proactive role in unsolved cases in the area of protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment and insist for investigations to be concluded and brought before the court.
Explanation: The establishment of the necessary practice of the Ombudsman in informing the public about the work, initiatives and findings will contribute to the building of confidence of the citizens. Also it is necessary for Ombudsman to take more initiative in encouraging citizens to engage in the work of the Ombudsman, to develop awareness of the need for reporting various violations of human rights and freedom, for the possibility of reporting is closely associated with the level of knowledge about the need to respect and protect human rights and freedoms.

Co-chairs: Ms. Svetlana Rajkovic (Ministry of Justice) and Mr. Boris Maric, Center for Civic Education.


Working Group I
Judiciary and fundamental rights
Session 2, 3-4 October 2013

Topic: Normative and institutional framework for the protection and realization of children’s rights with special emphasis on the treatment of juveniles in conflict with the law

RECOMMENDATIONS

1. Based on the established legislative framework, it is recommended to strengthen institutions responsible for the implementation through:
   • Further specialization and training of officials for the treatment of juveniles in conflict with the law;
   • Improvement of working conditions and facilities in which official duties under minors are performed;
   • Creating the conditions for the application of alternative measures with respect to the previous practice, considering that we only have the application of diversion orders settlement with the victim.

2. It is recommended to implement prevention activities to combat violence among children: in family, in school, through extracurricular activities and in particular through strengthening of preventive work with children and families at risk in the local community.

3. It is recommended to strengthen inter-institutional collaboration and multidisciplinary approach to juvenile delinquency as well as timely resolution of the problems of youth.
4. It is necessary to provide protection of minors as victims of crimes in the proceedings in order to prevent secondary victimization and subsequent traumatization of minors, as improving the system of compensation and psychosocial treatment outside the procedure.

5. We ought to raise the level of public knowledge about children’s rights and the nature of procedures that could lead to juveniles as criminal offenders as well as the purpose of the sanctions imposed by minors. The application of sanctions affects the proper development of juveniles and strengthens his personal responsibility to resist committing criminal acts the future.

Co-chairs: Ms. Svetlana Rajkovic, Deputy Minister of Justice, and Mr. Boris Maric, Center for Civic Education

Experts: Ms. Alexandra Drakova, UNICEF, the Slovak Republic and Ms. Natasa Radonjic, Ministry of Justice of Montenegro

Working Group I
Justice and Fundamental Rights
Session 3, 3-4 February 2014

Topic: Legal and strategical framework for work of NGO in the state and the role of civil sector in the process of the European Integration

RECOMMENDATIONS:

1. It is recommended that the Ministry of Finance, in collaboration with the Ministry of the Interior by the end of the second quarter of this year, prepares the drafting of proposals regarding the changes of Law to the non-governmental organizations, associated by-laws in the field of funding NGO projects by public funds and co-financing projects from the EU funds.

2. It is recommended that all state authorities, in cooperation with the Ministry of Interior and with NGOs, ensure compliance with the Regulation on the Implementation of Public discussion.

3. It is recommended that all competent government authorities to use their web pages in order to publish reports and analyzes of NGOs.

4. It is recommended that the Ministry of Interior, within the analysis of institutional framework for performing tasks related to development of the NGO sector, place special focus to the Office for Cooperation with NGOs and recommendations for its strengthening.
5. It is recommended that the state administration, while preparing the strategic documents, takes into account the commitments under the Action Plan for Chapter 23 in part related to the cooperation with civil society.

6. It is recommended for NGOs and the Office for Cooperation with NGOs to organize two round table discussions on the concept of social entrepreneurship in accordance with the terms of Action Plan for Chapter 23, as well in accordance with the Strategy of development of NGOs in Montenegro.

7. It is recommended that the Ministry of Labour and Social Welfare establishes a draft law on volunteerism in accordance with the terms of the Action Plan for Chapter 23.

Co-chairs: Svetlana Rajković, Deputy Minister of Justice for International Legal Cooperation and European Integration, Negotiator for Chapters 23 and 24 and Milorad Marković, Center for Monitoring CEMI.

Experts Rapporteurs: Marcel Zajac, Center for Philanthropy of the Slovak Republic and Ana Novaković, Centre for development of NGOs.

Working Group II
Justice, Freedom and Security
Session 1, 29 April 2013

Topic: Asylum

RECOMMENDATIONS

1. Further monitoring of compliance of national legislation with the relevant regulations of the acquis (the existing and revised versions) is recommended, in the field of asylum and in accordance with the commitments undertaken during bilateral screening. Montenegro needs to focus on compliance with the following legal documents:
   - Regulation (EC) no. 343/2003 which refers to establishment of criteria and mechanisms for determining a Member State responsible for examining an application for asylum, submitted by a national of a third country in one of the Member States;
   - Directive 2011/95/EU which refers to standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a unique refugee status or who are eligible for additional protection and its content;
• Directive 2004/83/EC which refers to minimum standards for the qualification of third country nationals or stateless persons as refugees, or as persons who need international protection and the content of it;
• Directive 2005/85/EC which refers to minimum standards in Member States for procedures such as granting and withdrawing status of refugee;
• 2001/55/EZ Directive which refers on minimum standards for giving temporary protection in the case of a mass influx of displaced persons and measures to promote sharing responsibilities between Member States in the acceptance of such persons;
• Directive 2003/9/EC on establishing minimum standards for the reception of asylum seekers.

2. It is recommended that the authorities responsible for law enforcement in this area (Ministry of Interior, Ministry of Justice, Ministry of Labour and Social Welfare, Ministry of Education, Ministry of Health) do technical and capacity preparation for the challenges of implementing the new Law on Asylum, which will be adopted during the year 2015;

3. It is recommended for the Ministry of Interior and Ministry of Foreign Affairs and European Integration to intensify activities related to the implementation of the Readmission Agreement with the Republic of Kosovo (initiate organization of series of meetings of the Joint Committee for readmission in order to improve bilateral cooperation and successful implementation of the Agreement on Readmission in practice).

4. It is recommended to intensify cooperation between state institutions and local self-governments in the implementation of asylum policy. It is recommended that the Association of Municipalities of Montenegro intensify their co-operation activities between local self-governments and the Ministry of Interior, Ministry of Labour and Social Affairs - Directorate for Refugees and NGOs, in order to raise public awareness about the content and significance of the asylum system in Montenegro.

5. It is recommended to the Government of Montenegro to consider for the Ministry of Interior to gain full jurisdiction over the implementation of policy in the field of asylum, complementary with best practices and standards in the EU.

6. In accordance with the adopted conclusions of the Government, more intensive monitoring of the activities of the Ministry of Internal Affairs is recommended, in the field of reorganization and further development of the capacities of the Department for Asylum and the Border Police, in terms of human resources, financial planning, staff training, etc.

7. It is recommended to continue and intensify cooperation with international organizations, primarily with UNHCR, UNDP, IOM, OSCE and other interna-
tional partners on the implementation of projects and activities to meet international standards in the field of asylum;

8. Planning and organization of the training of the personnel by Human Resources Administration and the Police Academy is recommended, regarding implementation of legislation in the area of migration and asylum in terms of successfully meeting new regulations and standards;

9. It is recommended to intensify activities related to the creation of cross-sector projects of state institutions for the use of funds of the EU and other international organizations, related to improving the technical equipment of the Border Police, the Asylum Office and other state institutions dealing with asylum and migration.

Co-chairs: Mr. Dragan Pejanović, Secretary of the Ministry of Interior, Chief of Working Group for Chapter 24 and Mr. Vlado Dedović, Director of Legal Department in Center for Monitoring CEMI, member of the Working Group for Chapter 24

Expert Rapporteurs: Ms. Sandra Bulgarian, Asylum Office (Ministry of Interior) and Ms. Natasha Hrnčarova, Faculty of Law, University of Trnava, Slovak Republic.

Working Group II
Justice, Freedom and Security
Session 2, 24-25 October 2013

Topic: External Borders and Schengen

RECOMMENDATIONS

1. It is recommended to the competent authorities to pursue their efforts to meet the EU and Schengen standards, legislative, administrative and institutional terms.

2. It is recommended that coordinators, on a monthly basis, in the form of a report, follow the results of implementation of the Action Plan for Chapter 24 - Justice, Freedom and Security (External borders and Schengen).

3. The development of high-quality, realistic and achievable strategic documents is recommended (Schengen Action Plan, the Revised Integrated border management Action Plan and of accompanying normative-legal acts) in the terms defined by Action Plan, for Chapter 24.

4. It is recommended to undertake further efforts to build the infrastructure
needed for quality control at the border in order to create the necessary conditions for joining the EU and SIS.

5. It is recommended to further strengthen capacities of border services (border police, customs, veterinary and phytosanitary inspection) in organizational, personnel and technical sense.

6. It is recommended to continue to strengthen inter-institutional, inter-agency and international cooperation on matters of integrated border management.

7. It is recommended that the subjects proposing the budget for the coming year have in mind the obligations foreseen in the Action Plan for Chapter 24 and other strategic documents relating to borders, in order to provide estimates for the financial support.

8. It is recommended to continue organizing training programs for existing and future law enforcement at the border, and all the other agencies that have jurisdiction in the area of external borders and Schengen in order to improve quality of implementation of the law, harmonized with the EU acquis and international standards.

9. High-quality presentation of the balance of the achieved results is recommended, not only through reports provided to the Commission, but also through other forms of internal and external communication and information, bilateral and multilateral cooperation.

Co-chairs: Mr. Dragan Pejanovic, Ministry of the Interior, Head of the Working Group on Chapter 24 (section for Public Administration) and Mr. Vlado Dedovic, CEMI, a member of the Working Group on Chapter 24 (civil sector)

Expert reporters: Mr. Filip Dragovic, UNDP Croatia and Mr. Vukoman Zarkovic, Administration Police and Montenegro

Working Group II
Justice, Freedom and Security
Session 3, 16-17 December 2013

Topic: Customs Cooperation

From the aspect of Chapter 24 and measures which in accordance with it are necessary to be implemented in issues related to customs co-operation, it is important to be aware of the new role of customs services (including aspects of security) in the EU and globally.
**RECOMMENDATIONS:**

1. It is recommended to continue any action regarding the harmonization of the national legal framework with EU acquis in the field of customs cooperation (the Convention on mutual assistance and cooperation between customs administrations (Naples II) and Council Decision 2009/917/JHA of usage of information technology for customs purposes).

2. It is recommended to strengthen the administrative capacity of the customs services through:
   - implementation of training programs for customs officials on the acquis, standards and practices of the customs services of the EU member states and
   - implementation of specialized training for customs officers in the field of smuggling and customs fraud.

3. It is recommended to provide modern and high-quality technical equipment for the customs control and for combating smuggling at border crossings, in internal customs offices as well as for mobile teams (static and mobile scanners, portal monitors, equipment for detection of radioactive materials, explosives and narcotics, vehicles, etc).

4. It is recommended to create the preconditions for joining the Common customs informational systems of the Member States (CIS and other information systems).

5. It is necessary to continuously monitor the implementation of the ICT strategy and ICT tactical plan.

6. It is recommended that the Ministry of Finance, Customs administration, Ministry of Interior, the police and other relevant authorities in charge of implementing the law to approach to the development of detailed financial plans for meeting the obligations and standards regarding the technical and administrative capacities necessary for successful implementation of activities in the process, with the assistance of foreign experts.

**Co-Chairs:** Mr. Dragan Pejanović, Secretary of the Ministry of Interior, Chief of Working Group for Chapter 24 and Mr. Vlado Dedović, Director of Legal Department in Center for Monitoring CEMI, member of the Working Group for Chapter 24

**Experts Rapporteurs:** Ms. Vesna Kadić Komadina, Assistant Director of Customs administration pf the Republic of Croatia and Mr. Goran Milonjić, customs inspector for investigation in montenegrin Customs administration
Working Group III
Agriculture, food safety, veterinary and phytosanitary policy and 
fisheries
Session 1, 17 June 2013

Topic: *The importance of producer organizations in the negotiation process*

**RECOMMENDATIONS**

1. It is recommended that the Ministry of Agriculture and Rural Development intensifies activities on the adoption of the National strategy for agriculture and rural development, in which the fruit and vegetable sector will be incorporated.

2. It is recommended that the Government and the Parliament of Montenegro adopt the Law of Cooperatives by the end of the year 2013.

3. It is recommended that the Ministry of Agriculture and Rural Development and associations of agricultural producers form a working group which would be in charge of launching the first pilot producer group in fruit and vegetable sector.

4. It is recommended that the Ministry of Agriculture and Rural Development and associations of agricultural producers form a working group that would aim at improving further organization of producer groups and producer organizations.

5. It is recommended that the Ministry of Agriculture and Rural Development and associations of farmers take action to secure additional training and planning of additional resources to encourage the establishment of producer groups and producer organizations.

**Co-chairs:** Ms. Danijela Stolica, Deputy Minister for Agriculture and Rural Development, Negotiator for Chapters 11, 12 and 13 and Ms. Vesna Maras, *13. jul Plantaže* (civil society sector).

**Expert Rapporteur:** Mr. Zoran Krsnik, National Wholesale Market, Zagreb, Croatia
Working Group III
Agriculture, food safety, veterinary and phytosanitary policy and fisheries
Session 2, 11-12 November 2013

**Topic:** Code of Good Agricultural Practice, cross-compliance standards that farmers must meet to qualify for support in the EU

**RECOMMENDATIONS**

1. It is necessary to urgently complete the activities on publishing the Code of Good Agricultural practice, and after printing, perform a wide distribution of printed copies to farmers, businesses and institutions.

2. It is necessary to organize additional training and development of advisory services and officials of other institutions that are/will be responsible for the implementation and control codes of good agricultural practices.

3. It is necessary to organize an information campaign to promote the Code of Good agricultural practices, which will include seminars, roundtables, information discussions, visits to local and foreign experts and media promotion of content Code of good agricultural practices. All these activities should be carried out in cooperation with individuals, organizations and institutions of civil society (farmers, agricultural producers associations, small, medium and large companies involved in agriculture, scientific and educational institutions).

4. The rules from the Code of Good Agricultural Practice as minimum criteria for eligibility for direct payments should be gradually introduced.

5. It is necessary to conduct analysis of existing legislation, as well as EU acquis in the field cross compliance, as well as an analysis of the administrative and technical capacities necessary for implementation of legislation. In this regard, it is recommended to establish control system plans for the implementation of the above tasks in regard to cross compliance and good practices.

**Co-chairs:** Ms. Danijela Stolica, Deputy Minister for Agriculture and Rural Development, Negotiator for Chapters 11, 12 and 13 and Ms. Vesna Maras, 13 jul Plantaže (civil sector)

**Experts:** Mr. Zdravko Tušek, the Agency for Payments in Agriculture of the Republic of Croatia and Mr. Jovan Nikolic, Monteorganica
Working Group III
Agriculture, food safety, veterinary and phytosanitary policy and fisheries
Session 3, 29-30 January 2014

Topic: Efficient and consistent safety in all phases of production, processing and distributing food, including food for animals and fulfilment of special hygienic requirements for food traffic in domestic and international market and fulfilment of the requirements regarding food labeling

RECOMMENDATIONS:

1. It is recommended to develop guidelines, instructions and procedures for subjects related to businesses with food and educate food business operators in this area in order to prepare them on time to meet the standards.

2. Furthermore, it is necessary to educate business operators on how to use pre-accession funds and to set out the time priority investments in existing facilities and the need of establishing the new facilities for food production in Montenegro.

3. It is recommended to organize additional training for inspectors for efficient control systems of food safety and quality standards and traceability.

4. It is recommended to develop public campaigns that aim to raise consumer awareness.

5. It is recommended to continue with the development of an integrated data system related to food safety (Ministry of Agriculture, Ministry of Health, Administrative board for Inspection, Veterinary Administration).

Co-chairs: Danijela Stolica, Deputy Minister for Agriculture and Rural Development, Negotiator for Chapters 11, 12 and 13 and Vesna Maraš, Executive Director of L.T.D. „13. jul Plantaže”

Experts Rapporteurs: Bohuslav Harvilak, chief of the legal department of the Veterinary Administration of the Slovak Republic and Aleksandra Martinović, professor at the Faculty for Food Technology, Food Safety and ecology at the University of Donja Gorica.
Working Group IV
Protection of the environment
Session 1, 31 May 2013

**Topic:** Establishing a basis for the development of river basin management plans and the implementation of the Water Framework Directive.

**RECOMMENDATIONS**

1. It is recommended to make changes or adopt a new Law on waters and by-laws for implementation, in order to fully comply with the Water Framework Directive (Ministry of Agriculture and Rural Development).

2. Conduct a National strategy for water management which would lay the foundation for the implementation of modern principles of water policy, in integrated and comprehensive way (Ministry of Agriculture and Rural Development).

3. Establish and maintain a water information system with necessary database (including cadastre of water polluters, etc). It is also important to enable the use of VIS to all relevant stakeholders (Water Administration, Ministry of Agriculture and Rural Development, local self-governments).

4. Supply laboratories with the necessary equipment in order to meet the requirements of international standards (Ministry of Agriculture and Rural Development, Ministry of Health, Institute of Public Health, Department of Hydrometeorology and Seismology, ltd Center for Ecotoxicological Research (CETI), local municipalities).

5. When establishing the Register of protected areas, there is a need to revise the existing and establish new zones of sanitary protection of the public supply of water (Ministry of Agriculture and Rural Development, local self-governments).

6. It is necessary to strengthen the financial, human and technical capacities of institutions related to water management area (Ministry of Agriculture and Rural Development, Department of Water, Department of Inspection, local self-governments).

7. Usage of EU funds should be done in more efficient manner, by clearly defining priorities (Ministry of Agriculture and Rural Development, Water Management, Institute of Public Health, Ministry of Sustainable Development and Tourism, the Department of Hydrometeorology and Seismology).

8. Strengthening of inspection services in the field of water management and
sanitary protection is recommended, by increasing the number of inspectors and the implementation of their continuous training. (Directorate of Inspection: Department of Environmental Protection and the Department of Public Health and human security)

9. Establish a system of physical monitoring of surface and ground water bodies, whenever need for such supervision exist. (Ministry of Agriculture and Rural Development).

10. Strengthen and improve inter-agency cooperation that will contribute to the efficiency of the water policy implementation. (Ministry of Agriculture and Rural Development, Ministry of Health, Ministry of Sustainable Development and Tourism, Agency for protecting the environment, Ministry of Economy, Department of Inspection, CETI, Institute for Public Health, Institute of Hydrometeorology and seismology, local self-governments).

11. It is important to integrate water policy into other policies, in order to establish sustainable development principles in Montenegro. (Ministry of Agriculture and Rural Development, Ministry of Health, Ministry of Sustainable Development and Tourism, Agency for protection of the environment, Ministry of Economy, Department of Inspection, CETI, Institute of Public Health, Department of Hydrometeorology and seismology, local self-governments).

12. Inform all stakeholders and the public about the process of decision making in a timely manner, including representatives of higher education institutions and research institutes, as well as non-government organizations which are dealing with environmental issues (Ministry of Agriculture and Rural Development).

13. Coordinate the preparation of river basin management plans with the plans of flood risk management, as well as with establishing a network of protected areas Natura 2000 (Ministry of Agriculture and Rural Development, Water Management, the Ministry of Sustainable Development and Tourism, Agency for protection of the environment, Ministry of Interior Department for emergency situation).

14. It is important to raise the level of awareness concerning both the protection and utilization of water resources among the public. (Ministry of Agriculture and Rural Development, Ministry of Health, Ministry of Sustainable Development and Tourism, Agency for the Environment, NGOs, local self-governments, Inspection Directorate, Institute of Public Health).

15. Whenever it is possible, participate in the relevant European working groups, actively or as observers, in order to acquire and transfer knowledge and experience. Use multiple memberships in the ICPDR (International Commission for the Protection of the river Danube). (Ministry of Agriculture and Rural Development, Ministry of Sustainable Development and Tourism, Department for Water)
16. Use the experience of countries in the region, members of the European Union, and define more realistic goals and deadlines to pursue. (Ministry of Agriculture and Rural Development)

Co-chairs: Ms. Ivana Vojnović, Deputy Minister for environment, Ministry of Sustainable Development and Tourism (public administration sector) and Mrs. Nataša Kovačević, Program Coordinator for Environment in NGO Green Home, member of the Working Group for Chapter 27

Experts rapporteurs: Mrs Rita Barjaktarević, a member of the working group for accession negotiations, Chapter 27, NGO “Sjeverna zemlja” and Mr. Michal Maslen, Faculty of Law, University of Trnava, Slovak Republic.

Working Group IV
Protection of the environment
Session 2, 22-23 October 2013

Topic: Administration and financing the process of establishing the NATURA 2000 ecological network

RECOMMENDATIONS

1. It is recommended to establish the National Expert Group on Natura 2000, which will include administrative and expert level including representatives of relevant Ministries, experts, relevant NGOs. (Government of Montenegro)

2. It is recommended to adopt the Action Plan of establishing Natura 2000 within National Strategy for approximation. (Government of Montenegro)

3. It is recommended to provide financial means in the budget for additional capacity building and hiring new staff which will deal with the Natura 2000 network.

4. It is recommended to make use of 2014-2020 IPA and other EU funds, with timely planning and provision of co-financing by the competent authorities in relation to Natura 2000. (Government of Montenegro)

5. It is recommended to introduce a coordinated system of harmonization of research programs as part of the approval and program planning of relevant institutions in the system, on annual level (assuming relevant application of the methodology as well as activities) through consultation with national expert team of Natura 2000. (Government of Montenegro)
This project has been financially supported by the European Union.

6. It is necessary to strengthen cooperation between the institutions in the system in terms of delivery and exchange of data (projects, folders, forest inventory, research).

7. It is necessary to consider the possibility of the declaration of the national ecological network-based on available information.

8. It is recommended to coordinate and plan study programs with the focus on universities and colleges within the topic of theses and dissertations from priorities and obligations in relation to Natura 2000. (Ministry of Education, Ministry of Science, the Ministry of Sustainable Development and Tourism and relevant international organizations (UNDP, GTZ, OSCE)).

9. It is necessary to harmonize the project proposal, in order to apply for the various donor funds, with the needs and priorities of Natura 2000 (strengthening cooperation and consultation process between ministries, institutions, NGOs and donors).

10. It is recommended to implement educational campaigns ranging from decision-makers, experts, concessionaire, land owners, etc.

11. It is recommended to strengthen and build the administrative capacity for the implementation of special procedures for the assessment of eligibility, management and protection measures, determining the public interest, compensatory measures, methodologies, reporting and monitoring.

12. It is necessary actively monitor the work of international organizations, through a presence of training and participation in meetings as part of the functioning of the focal points (Bern Convention, CBD, Ramsar, Bonn Convention), in order to strengthen the capacity awareness, understand the process of exchanging information, establish contacts and opportunities of participation in public debates and decision-making.

13. Is necessary to engage all available and build additional capacities (including the NGO sector) for the preparation of projects for different EU funds (Life + Life + Nature, ERDF, FP7, EFF) in order to provide the necessary financial support to the work on establishment and subsequent operation of Natura 2000 sites.

Co-chairs: Ms. Ivana Vojnovic (Director General of the Directorate of Environment and Climate Change of the Ministry of Sustainable Development and Tourism) and Ms. Natasa Kovacevic (program coordinator for environmental NGO Green Home)

Experts: Mr. Rastislav Rybanic, Ministry of Environment of the Republic of Slovakia and Ms. Milena Bataković Agency for Environmental Protection of Montenegro
**Working Group IV**

**Protecting the environment**

**Session 3, 12-13 December 2013**

**Topic:** Liability for criminal acts in the area of environment protection

**RECOMMENDATIONS:**

1. It is recommended to enhance cooperation and communication between representatives of state administration dealing with liability violations of law in the area of protection of the environment (ministries responsible for environmental protection, Police department, Ministry of Justice, Department of Inspection, association of experts and other entities) and the judiciary, as well as NGOs, through the organization of seminars, meetings, exchange of experiences, educational workshops.

2. It is necessary to ensure effective joint pretrial proceedings of the police and the public prosecution, with the role of the prosecutors in the pre-trial proceedings and the authority that gives the required direction and guidance in the work of Police, in order to avoid cases that arise in practice when an organ, for example the Ministry, takes into question certain crimes on its own initiative, without prior consultation with the police or the prosecutor.

3. It is recommended to organize the training of public prosecutors and all those who submitt criminal complaints and requests for misdemeanor proceedings.

4. It is necessary to draw up guidelines for handling legal process by inspections responsible for environmental protection.

5. It is necessary to prepare guidelines in the field of criminal law protection regarding the environment that would contain comparative legal jurisprudence.

6. It is recommended that the Secretariat of the Judicial Council creates a database of criminal procedures in matters of environmental protection.

7. It is recommended that the Ministry of Justice to enable monitoring of the process of action of prosecution in cases of criminal charges in the field of the protection of the environment, in accordance with the best EU practices.

8. It is recommended that the Government of Montenegro forms an expert team for the solution of environmental problems, which would include representatives of civil society, familiar with criminal areas where there are signs of the offense in the area of environmental protection outside the territory of Montenegro and whose consequences reflux on the territory of Montenegro as well.
Co-chairs: Ivana Vojinović, General Director of the Directorate for Environment and Climate Change in the Ministry of Sustainable Development and Tourism, Chief of Working Group for Chapter 27 and Nataša Kovačević, Program Coordinator for Environment in NGO Green Home, member of the Working Group for Chapter 27

Experts Rapporteurs: Maja Kostić-Mandić, professor at the Law faculty at the University of Montenegro and Marija Pujo Tadić, lawyer, Republic of Croatia

Working Group V, Competition
Session 1, 10 June 2013

Topic: Harmonization of secondary legislation with the EU acquis in the field of state aid

RECOMMENDATIONS

1. It is necessary to harmonize by-laws in the field of state aid in Montenegro with the secondary legislation of the EU acquis, in order to harmonize and comply with the SAA requirements and in order to effectively implement the Law on State Aid Control.

Explanation: In Montenegro, all secondary EU legislative acts concerning state aid, currently 68 of them, are summarized in one legislative act - Regulation on detailed criteria, terms and manner of granting state aid. Rules for the assessment of compliance of the state aid with the Law on State Aid Control of Montenegro are stated in one or maybe couple of articles, in different areas/sectors. Thus, there is a small number of detailed rules and guidelines for the assessment of the legality of state aid, which has negative consequences on the implementation of the Law on State Aid Control, and therefore on the obligation undertaken in Article 73 of the SAA.

2. For the purpose of closer harmonization stated in Recommendation 1, it is strongly recommended that Montenegro adopts a model that has been applied in the Republic of Croatia, which consists of publishing the complete texts of secondary EU legislation within the by-laws in domestic legal system.

Explanation: Regulation on detailed criteria, terms and manner of granting state aid, even with the amendments, cannot guarantee full implementation of the requirements laid down by the European Commission, when it comes to full harmonization of rules on state aid with the acquis, for it is too extensive to be transposed into one bylaw. On the other hand, producing a large number of individual by-laws with setting out the rules prescribed in the individual secondary acts of the acquis would be time consuming, expensive and complex process. Also, the EU acts contain a long preamble,
which provides the context, the meaning and interpretation of serving members of such acts, which without preambles do not have sense. These preambles are not common in our legal system, and they are difficult to reformulate. Also, given the assumption that this will be one of the first benchmarks for the opening of Chapter 8, from the Report on screening, harmonization of legislation on state aid with the EU acquis, a system that is currently used in this country (so-called cherry-picking) risk that this benchmark would not be fulfilled in time.

Accordingly, a new system of harmonization with the acquis is proposed, which has been tested and assessed as successful and efficient by Croatia and by the European Commission. The main feature of this model is the transposition of EU rules in the original, translating and publishing the rules in national laws. This provides a number of positive effects:

I. Rules are passed in their original form, without the danger that in ongoing harmonization some of the provisions will lose meaning or be misinterpreted and wrongly transposed.

II. Domestic actors, institutions, courts and other legal entities and individuals adapt and get familiar with the acquis, which will be in direct application when Montenegro becomes an EU member.

III. The rules will be transparent, free of gaps and opportunities for free interpretation.

IV. As the EU rules on state aid often changed and amended, and our legal system is characterized by a complex process of changes and amendments to the regulations, this model will enable more efficient and quicker adaptation to changed rules.

3. It is recommended that the Chief Negotiator for leading accession negotiations of Montenegro to the EU, pays attention to this, for successful negotiations in Chapter 8, a very important issue, and to play key role in adopting this proposed solution among relevant institutions.

Explanation: The adoption of this model and the resolution of alignment in the field of state aid will require the implementation of unusual solutions to our legal system. Institutions dealing with harmonization, particularly the Secretariat for Legislation cannot independently decide on the implementation of this model, and therefore it is necessary to receive political support from the Government. Therefore, it was considered that the Chief Negotiator, as the person most informed about the issues and the importance of negotiations in this chapter, can greatly contribute to the acceleration of this process by presenting the problem and the proposed solutions to Government.

Co-chairs: Mr. Zoran Perisic, Deputy Minister for Economy, Ministry of Economy and Ms. Bisera Turković, Secretary General of the European Movement in Montenegro, member of the Working Group for Chapter 8

Expert Rapporteur: Ms. Šefika Kurtagić, Ministry of Finance and Ms. Marijana Liszt, former chief of the working group for preparation of negotiations in Chapter VIII and the lawyer of the Law Office “Posavec, Rasica & Liszt”
Working Group V, Competition  
Session 2, 28-29 October 2013

**Topic:** Economic Analysis in Competition Cases

**RECOMMENDATIONS**

1. Strengthening of the administrative capacity in the field of economic analysis that Agency for Competition does (through employment, training and internship opportunities in European Commission);

2. Prioritization of objectives and areas (in terms of individual sectors and markets) for performing economic research in the working area of the Agency;

3. Proper and effective implementation of the legislation in its entirety, including the use of non-binding acts of the European Commission - the guidelines, information, best practices and decisions;

4. Increasing the transparency of the Agency for Protection of Competition in the field of economic analysis on which the decisions are based. Improvement of presentation through the web-site through the availability of summaries of decisions in English and publication of the overall decision on Montenegro;

5. Strengthening cooperation with institutions and regulators in some markets - telecommunications, energy, transportation, financial institutions;

6. Implementation of sectoral analysis of the market and their publication;

7. Adoption and implementation of fully developed procedures and work methodologies in the economic analysis, by the Agency;

8. Placing emphasis on the clear economic argumentation process;

9. Adoption of writing standards in accordance with those decisions at the level of the EC;

10. Raising awareness and promoting the culture of protection of competition;

11. Exchange of experience with national authorities for the protection of competition which have more experience in economic analysis.

**Co-chairs:** Mr. Zoran Perisic, Deputy Minister for Internal Market and competition in the Ministry of Economy, Head of the Working Group on Chapter 8 (Public Sector Administration) and Ms. Bisera Turkovic, Secretary General of the European Movement in Montenegro, members of the Working Group on Chapter 8 (civil sector)

**Experts:** Ms. Ljiljana Pavlic, Head of the Department for the Prevention of abuse dominance and evaluation agreement with the Agency for Competition of the Republic
Working Group V
Competition
Session 3, December 2013

Topic: Penalties and judicial process in competition cases

RECOMMENDATIONS:

1. It is recommended to specialize one or more of the Chambers within the Administrative Court in dispute resolution in cases of distortion of competition.

Rationale:
Due to the specific matter which competition law treats, as well as the high proportion of economic theory and analysis, it is recommended that a certain number of judges are dedicated to this area, which is proved to be a good practice in the countries that joined the EU in previous enlargements. It could be achieved by specifying one or more of the Chambers to deal with this matter, as is the practice in many EU countries. The rotation of one member of the Council is recommended if one panel specializes for reasons of preserving the legal security and independence.

2. It is recommended to the Judicial Training Centre to organize intensive trainings of judges in competition law, with particular emphasis on the economic function of competition rules.

3. It is recommended that judges use case law of the European Court of Justice, as a support to reasoning of court decisions. It also recommended to create a guide for judges with the most important cases of judicial practice of the European Court of Justice, which could serve as a useful asset to them in dealing with competition cases.

4. It is recommended to consider introducing the upper limit costs of legal proceedings in competition law.

5. It is recommended to organize discussions on competition law between judges within annual forum, which would include judges of Administrative Court, as well.

6. It is recommended to publish judicial decisions in a timely manner on the website of the Administrative Court in cases of violation of the competition, in accordance with the policy of protection of confidential corporate data.
7. It is recommended that the Agency for protection of competition within the communication strategy makes publicly available their decisions and the outcomes of those decisions in court proceedings, and in accordance with the rules on the protection of confidential corporate data.

Co-Chairs: Mr. Zoran Perišić, General Director of the Directorate for Internal Market and Competition in the Ministry of Economy, Chief of Working Group for Chapter 8 and Ms. Bisera Turković, Secretary General of the European Movement in Montenegro, member of the Working Group for Chapter 8.

Experts: Mrs. Michaela Nosa, Director of Legal and European Affairs in the Office for the protection of the competition of the Slovak Republic.

Working Group VI
Consumer and Health Protection
Session 1, 24 June 2013

Topic: Unfair Business Practices and Consumer Protection

RECOMMENDATIONS

1. Ensure the implementation of the priority measures that are a prerequisite for the effective implementation of the new Consumer Protection Act (CPA) in provisions on unfair business practices:
   - The adoption of the regulation, in accordance with the CPA, which will determine the list of institutions in charge of the implementation of this and other laws in this area, with the recommendation that this regulation should be adopted within six months from the date of entry of the new CPA into force.
   - Improving coordination and cooperation among authorities responsible for supervising the implementation of the CPA, the judiciary, NGOs, the business sector and the media.
   - Identify and promote ways of identifying and informing the public of unfair business practices through public debates, forums, brochures (with examples), educational activities for journalists and others.

2. It is recommended that, as part of the annual Action Plan (AP July 2013 - June 2014), for the realization of the National Consumer Protection Programme 2012-2015 (NCPP), activities for the efficient application of legal provisions on unfair business practices in accordance with the timelines set for the start of the application CPA are planned.
3. Continuously improve public awareness and carry out further education of bodies responsible for monitoring the implementation of the CPA, as well as the judiciary, with the special emphasis on the provisions of unfair business practices (design and implementation of training programs, preparation of guidelines and manuals for the correct application of the law).

4. Furthermore, it is important to strengthen the role of the NGO sector - consumer organizations, through significant financial support of the Government of Montenegro for the establishment and operation of their counseling and organizing public meetings, as well as publication and distribution of brochures and other educational materials for informing and raising consumer awareness, public awareness of the concept of unfair business practices, how to recognize it, the application process and a way of protecting the rights of individuals, the procedure to protect the collective interests of consumers, etc.

5. Encourage proactive role of the media in raising public awareness of the importance of consumer protection and to inform the public, through the organization of training for journalists on what unfair business practices is, in cooperation with the competent authority for supervising the implementation of the new CPA. Recommendations specifically include a request to the Public Service - Radio and Television of Montenegro and the Council of RTCG to include this kind of practice in their program scheme.

6. It is recommended that the Chamber of Commerce, the Employers’ Association and other business associations in Montenegro, in accordance with the new CPA for industries, perform analysis applicable to contractual relations, as well as any codes, in order to further enhance the application of sound business practices and business ethics, and for a measurable contribution to the eventual elimination of the presence of unfair business practices. For this purpose, it is recommended to organize continuous training of entrepreneurs, in cooperation with the competent authorities to monitor implementation of the new CPA.

7. It is recommended that the authorities responsible for monitoring the implementation of the CPA and other laws containing provisions on the protection of consumers and the courts, when deciding the consumer disputes (including the protection of the collective interests of consumers), while collecting data under the new CPA, specifically provide data on cases concerning unfair business practices.

8. It is recommended that persons authorized to submit collective complaints, continuously across sectors, analyze the likelihood of unfair business practices, especially those that violate the collective interests of consumers and thus make adequate preparation for the submission of claims for the protection of the collective interests of consumers, in the shortest possible time from the beginning of new CPA.
9. In the domain of future Central Information System for tracking consumer complaints at the Office of Inspection, provide special monitoring of complaints related to unfair business practices.

10. Follow the experiences of EU Member States in the field of cross-border enforcement and Collaboration (“Cross-border enforcement and cooperation (CPC)”) and the implementation of “sweeps” action, and initiate cooperation in this field at the regional level, in accordance with to Regulation 2004/2006/EZ.

11. It is recommended that the Ministry of Economy and Administration of Inspection and the Ministry of Foreign Affairs and European Integration, apply for the technical assistance from the IPA 2014 program cycle for the implementation of selected priorities of the recommendations contained in paragraphs 1 through 10.

Co-Chairs: Mrs. Rada Marković, Deputy Director for Sector for Economy and Market Protection, Games of Chance and Public Procurement in the Administration for Inspection, Chief of Working Group for Chapter 28 and Zvezdan Čađenović, Employer’s Union, member of the Working Group for Chapter 28.

Experts Rapporteurs: Ms. Marijana Loncar Velkova, Consumer organization Macedonia and Mr. Mijat Šestović, Inspection Directorate.

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**Working Group VI**  
**Consumer and Health Protection**  
**Session 2, 30-31 October 2013**

**Topic:** Collective suits for protection of consumers

**RECOMMENDATIONS**

Since the topic of Session 2, of the Working Group VI, Consumer and Health Protection belongs to the area of special procedural protection of consumers regulating the particular form of action for the protection of collective interests of consumers; the new Consumer Protection Act, which is in the parliamentary procedure in accordance with Directive 2009/22/EZ1, as well as Articles 72 and 78 of the SAA, provides with the possibility to file a lawsuit on behalf of consumers, in a court procedure, with the goal of prohibiting further actions that do not comply with consumer protection legal provisions, and they can be submitted by a legal entity or consumers’ organizations, i.e. chambers and interest associations of merchants; under the new Law on Consumer Protection the purpose of this procedure is enable termination of future actions that would violate collective interests of consumers; the essence of the collective interests
of consumers is in the fact that they are primarily concerned with situations where an individual right of individual consumers (in terms of civil law) is not violated, and this is the difference between individual and collective interests; this procedural and legal innovation in the new Consumer Protection Act is regulated in a way that it is fully in line with the Directive, which in the Article 3 of the preamble states: “Collective interests means interests which do not include the cumulation of interests of individuals who have been harmed by an infringement…”, that is, they do not question claims submitted by individuals when their right was violated by an offence.

National Convention on European Integration of Montenegro 2013/2014, Working Group VI, Session 2, from 30 and 31 October, adopted following recommendations:

1. Ensure implementation of the priority measures that are a prerequisite for the effective implementation of the new Law on Consumer Protection regarding provisions on the protection of the collective interests of consumers (collective action):
   - Adopting, in accordance with Law on Consumer Protection, the by-law establishing the detailed content and keeping the register of collective lodged complaints and court rulings, with the recommendation that they are made within six months from the date of entry into force of the new Law on Consumer Protection.
   - Improving coordination and cooperation between the entities authorized to run the protection of collective interests (the authorities responsible for law enforcement protecting the rights of consumers, consumer organizations, Chambers and interest trade associations (economic, crafts, etc)), judiciary, economic sector and the media.
   - Identifying and promoting means for recognition of violations of collective interests of consumers and informing the public about the new legal institute in Montenegrin procedural law - complaints for the protection of collective interests of consumers (through public debates, discussions, brochures (with examples), education of journalists and etc).

2. It is recommended, within Annual Action Plan (AP July 2014 - June 2015) for realization of the National Consumer Protection Programme 2012-2015, to plan activities on more efficient implementation of legal provisions on the protection of the collective interests of consumers in accordance with the time frame specified for the start of implementation of Law on Consumer Protection.

3. Continuously make improvements on informing and caring out further education of institutions in accordance with the new Law on Consumer Protection, as bodies authorized to file a class action (Ministry of Economy, other ministries and authorities responsible for the enforcement of laws that protect consumer rights, consumer organizations, Chambers and interest groups of merchants (economic, trade unions, etc) and the judiciary, through the devel-
opment and implementation of training programs, preparation of guidelines and manuals for the correct application of the law.

4. Education of judicial bodies should be carried out in collaboration with the Judicial Training Centre, with the recommendation that in the program for education in 2014 and 2015 include regular training on the protection of the collective interests of consumers - collective complaint, as well as additional training of selected provisions of Law on Consumer Protection and other laws that provide for protection of the collective rights of consumers (unfair business practices, unfair terms in consumer contracts, consumer loans, etc).

5. Further strengthen the role of the non-governmental sectors - consumer organizations which authorized to submit collective complaints through significant financial support of the Government of Montenegro for the publication and distribution of brochures and other educational materials intended to inform and raise public and consumer awareness of the new institute of collective lawsuits, collective rights that it protects and the procedure of protection of collective interests of consumers.

6. Encourage a proactive role of the media in raising public awareness about the importance of lawsuits for protection of collective interests of consumers and informing consumers in general about the new Law on Consumer Protection, by organizing training for journalists on collective lawsuits, in cooperation with institution in charge of monitoring of implementation of the new Law on Consumer Protection. Recommendation especially involves a request to Public Broadcaster Radio-Television of Montenegro and it’s Council to include in their program a topic of consumer protection (including collective lawsuits).

7. It is recommended to the Chamber of Commerce, the Union of Employers, and other chamber and interest associations in Montenegro (economic, trade unions, etc) to comply with the new Law on Consumer Protection in cooperation with the competent authorities to supervise the implementation of the new Law on Consumer Protection, to organize continuous trainings for entrepreneurs about the lawsuits in order to protect the collective interests of consumers.

8. It is recommended to entities authorized to initiate proceedings for the protection of collective interests, and courts, to additionally save data on cases related to collective lawsuits in consumer protection area, when making a collective lawsuits, or issuing a ruling, along with their regular procedure of data collection (for example, unfair business practices, unfair terms in consumer disputes, misleading advertising and etc).

9. It is recommended to entities authorized to submit collective lawsuits to continuously conduct cross-sector analysis on the possible presence of unfair business practices, pre-formulated contractual provisions, or other practices and/or activities which violate collective interests of consumers, which would ensure adequate preparation for enabling submission of col-
lective complaints, in the shortest time frame from the beginning of the new Law on Consumer Protection.

10. It is recommended to the Ministry of Economy, Directorate for Inspection as well as the Ministry of Foreign Affairs and European Integration, to nominate the technical assistance from the IPA 2014 program cycle for the implementation of selected priorities contained in recommendations from 1 to 9.

**Co-chairs:** Ms. Rada Markovic, Directorate for Inspection and Mr. Zvezdan Cadjenovic, Employers Union of Montenegro

**Expert:** Mr. Ales Galic, Faculty of Law, University of Ljubljana

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**Working Group VI**

**Health and Consumer Protection**

**Session 3, 19 and 20 December 2013**

**Topic:** Rights of patients in cross-border cooperation

Transposition of EU legislation into Montenegrin legislation and its implementation requires a series of preparatory activities, the expertise and training of personnel who will be involved in exercising the right to health protection in another Member State of the EU after the accession of Montenegro to the European Union. In this regard, the National Convention on European Integration of Montenegro 2013/2014, the Working Group VI Session 3 held on 19 and 20 December 2013 adopted following:

**RECOMMENDATIONS:**

1. It is recommended to the Ministry of Health that already during the 2014 begins preparation and adoption of laws and regulations in this area in order to comply with the EU acquis, in particular in relation to the Directive on the application of patients’ rights in cross-border healthcare 2011/24/EU, in the part of regulations of the directives related to the European health insurance card and the recognition of medical prescriptions issued in another Member State. This would create a normative framework for preparation and provision of conditions for the practical realization of the right of citizens to health protection in another EU member state, immediately after the accession of Montenegro to the EU.

2. It is recommended to all relevant institutions (Ministry of Health, the Fund for health insurance and health care) to get involved in the process of preparing for implementation, training and familiarization with activities, which
are expected Montenegrin health system within the entry into the EU, as well executors who will be directly involved in these activities, and the complete management team of responsible institutions;

3. It is recommended to be done training of a large number of officers involved in the affairs of implementation of these regulations, especially those who work on international health insurance in both central office and regional units of the Health Insurance Fund for the application of coordination provisions that will Montenegro have to apply from the date of entry in the EU, given that these provisions apply directly.

4. It is recommended that the competent institutions involved in the implementation of these rights (Ministry of Health, the Health Insurance Fund and health facilities) establish continuous cooperation and coordination at all levels of the organization.

5. It is recommended the adoption of a strategic document in order to specify the activities that should be implemented in order to be ready with the all capacity for implementation and realization of the right of citizens to healthcare in the Member States in accordance with the acquis of the European Union and adoption of action plans for the implementation of strategic documents.

6. It is recommended to use Twinning projects in order to strengthen the administrative capacity of the institutions for the implementation of the acquis. The aim is to establish an administrative structure for the direct application of Regulation (EU) to coordinate until the time of the accession of Montenegro to the EU.

7. It is recommended to prepare appropriate guidelines and manuals for all branches of social safety, for the effective implementation of regulations for coordination.

8. It is necessary to provide the necessary IT support for implementation (records and the issuance of the European health insurance card, health care use with using the European health insurance card, the application of regulations to coordinate and etc).

9. It is recommended to introduce citizens with their rights in cross-border health care.

10. It is recommended that institutions responsible for establishing these rights develop the cooperation with the media, with the aim of informing the public.

Co-chairs: Ms. Rada Marković, Deputy Director for Sector for Economy and Market Protection, Games of Chance and Public Procurement in the Administration for Inspection, Chief of Working Group for Chapter 28 and Mr. Zvezdan Čađenović, Employer’s Union, member of the Working Group for Chapter 28.

Report on compliance with the recommendations of Sessions 1 and 2, NCEI 2013-2014

After two rounds of sessions and in the timeframe estimated by the experts as sufficient to start the monitoring process, we have tried to collect as much information about whether and how to adopt the recommendations from the meetings of the Working Groups of NCEI 2013-2014. For that purpose, we have sent requests for information and on the basis of responses received in this initial phase of the monitoring process, we can point out that over 30% of the recommendations have been adopted.

Requests for information included only those recommendations that could have been implemented in the previous period, given that a number of recommendations required several months of activities necessary for their implementation. Out of 102 recommendations adopted at the first two rounds of the sessions, a positive response on their fulfillment was received with regards to 35 recommendations, which is over 30% of their total number, but almost 50% of the recommendations identified to have a short-term and mid-term character that was possible to monitor in the given period (72 recommendations).

Within the scope of Sessions 1 and 2 of the Working Group I (Judiciary and Fundamental Rights) 10 recommendations have been adopted in which we acquired further information on the compliance with the recommendations of Session 2, concerning the exercise of the rights of the children, especially of minors in breach of law. The Ministry of Justice, the Ministry of Education and the Ministry of Interior were recognized as key institutions that provided most of the information.

The Ministry of Education states that the topic of “Healthy Lifestyles” is an area in which attention is given to the processing of the following topics: prevention of violence, reproductive health paired with sex education and prevention of sexually transmitted diseases, mental and emotional health and the improvement of inter-personal relationships and communications. This institution also, in cooperation with the NGO “Children First”, organized a seminar on the topic of “Protecting children from sexual abuse and exploitation” aimed at the members who provide professional services in preschools, primary schools and other educational institutions in Podgorica. A seminar on the same topic was organized for the representatives of social and child protection services, health care and education systems (Ministry of Education, Institute of Education, principals of preschool educational institutions and primary schools), police and judiciary. These seminars were carried out as part of the “1 out of 5” Council of Europe campaign in cooperation with the Parliament of Montenegro, aimed at preventing and combating all forms of sexual violence against children.

Also, a “Box of Trust” was installed, set and marked in schools in a special place where students could put their complaints against any kind of violence and based on those complaints the Protocol dealing with Child Victims of all Forms of Violence, Abuse and Neglect was activated.
The Ministry of Education and the Department of ICT Technology affiliated with Microsoft Montenegro Company, undertakes activities aimed at protecting computers in schools to ensure that the children using these computers cannot visit sites with inappropriate content.

In the field of civil servants education in the same area, the Ministry of Justice has taken the following steps:

In the scope of the “Justice for Children” project, implemented in cooperation with the Ministry of Labor and Social Welfare and the Office of UNICEF in Montenegro, activities were aimed at ensuring full implementation of the Law on the Treatment of Juveniles in Criminal Proceedings and in that context, two four-day specialized training sessions were organized for judges and prosecutors of juveniles, police officers, lawyers and civil servants of the High Court in Bijelo Polje and Podgorica and the Supreme Prosecutor’s Office. The training session was attended by a total of 66 prosecutors and judges, 28 police officers, 44 lawyers and 6 representatives of institutions providing professional services.

In terms of the Ministry of Justice activities, a correctional order for settlement with the victim is used as an alternative measure for dealing with juvenile delinquency, for the purpose of which the Ministry organized a working session to promote correctional orders and special obligations. As a result, 24 agreements were signed with NGOs, sports organizations and local government enterprises from Bijelo Polje, 9 such agreements were signed in Podgorica, 6 in Bar and 3 in Ulcinj.

Also, in order to prevent secondary victimization and subsequent traumatization of minors, for the purposes of improving the system of compensation and non-procedural psychosocial treatment and as part of the “Rights for Children” project, audio-visual equipment, used for the hearing of juvenile victims and crime witnesses, was installed in 9 locations: Basic Prosecutor’s Offices in Podgorica, Bijelo Polje, Berane, Bar, Ulcinj, Pljevlja, Niksic, Kotor and in the Supreme Public Prosecutor’s Office in Podgorica. The plan is to install equipment in another 6 locations.

**During the Sessions 1 and 2 of the Working Group II (Justice, Freedom and Security)**

18 recommendations were adopted that were largely focused on the Ministry of Interior’s activities and other institutions involved in the training of the civil servants in charge of the topics dealt with in this WG (“External borders and Schengen” and “Customs cooperation”), such as the civil servants of the Police Academy and the Human Resources Administration.

In the previous year, the Parliament of Montenegro adopted the Law on Amendments to the Law on Border Control, based on which the Decision on the Opening of Border Crossings for International Maritime, Air and Railway Transport was adopted in November 2013. Within the Department of the State Border, Surveillance Group was formed with 17 employees. At the same time, with the goal of combating illegal migrations, the Reception Center for Foreigners was systematized and has been functioning since December 2013. The Integrated Border Management Strategy 2014-2018 was
prepared as well as the Action Plan for the Implementation of the Integrated Border Management Strategy for 2014, which is meant to be updated annually. Currently, these documents are being processed by the Government of Montenegro. In order to create the Schengen Action Plan, a support has been planned through the EU Twinning Support and currently 8 countries are interested in being partners.

During 2013, the Border Patrol received 7 optical document readers /Crossmatch D scan Authenticator CF/ worth 25,000 Euros, through donations and cooperation with the Border Police Sector of Montenegro and the Federal Police of Germany. All border crossings are part of an integrated information system of the Police and have on-line access to Interpol databases via the FIND system which was established in November 2013.

In 2013, additional training sessions were organized at the Police Academy with regards to the basic police training for two groups or 22 border police. The training was conducted in cooperation with the Police Academy of Danilovgrad, the Human Resources Management Authority, Regional School of Public Administration and international organizations such as DCAF, Frontex, IOM, OSCE). Within the scope of specialized training, 147 seminars and training sessions were organized.

The Police Academy in Danilovgrad has made a plan for additional training sessions for border police which are aligned with the Frontex Joint Curriculum for Training – CCC. The first course began on 10 February 2014, and the plan was for the course to be completed by all border police. During 2013, 11 seminars were organized for 250 Border Police officers.

In the two Sessions of the Working Group III (Agriculture, Food Safety, Veterinary and Phytosanitary policy and Fisheries) ten recommendations have been adopted which aimed at the activities of the Ministry of Agriculture and Rural Development, as well as farmers’ associations and farmers.

In addition to this, in March 2014 Ministry of Agriculture and Rural Development established excellent cooperation with relevant ministries on planning of the first draft of the Strategy for the Development of Agriculture and Rural Areas for the period 2014-2020 after which a public hearing will be held.

As the process of the establishing producer organizations, which was the topic of the first Session, requires training sessions, the producers this year are being educated with the support of TAIEX for producers and employees of the Ministry of Agriculture and the Directorate of Inspection. The Regulation of Minimum Quality of Fruits and Vegetables is also being planned.

According to the Budget for Agriculture for 2014, within the budget line Support of the Activities of Cooperatives and National Associations, the support was provided for the organization of production on farms, food processing, promotion and sale of agricultural and food products, supply of raw materials, energy resources, means of production, purchase of agricultural machinery and parts intended for agricultural machinery
as well as the necessary technological equipment. A draft Law on Cooperatives was created and it is at the moment in the process of harmonization with the EU Acquis.

Within the areas mentioned in the Session recommendations, the Code of Good Agricultural Practice was devised and funded by the World Bank through the Project of Institutional Development and Strengthening of Agriculture in Montenegro - “MIDAS” project, guided by the Department of Livestock Breeding and Extension Service Plant Production. The Ministry has organized, in cooperation with the Extension Service in Crop Production and Livestock Breeding Service, the promotion of GAP codes in seven municipalities in Montenegro. All the workshops, apart from the employees in advisory bodies, were attended by representatives of the Directorate of Animal Husbandry and Crop Production as well as the representatives of the Directorate for Payments.

During the Sessions 1 and 2 of the Working Group IV (Environmental Protection) 29 recommendations were adopted in the capacity not only of the Ministry of Sustainable Development and Tourism, but also of the Ministry for Agriculture and Rural Development and the Environmental Protection Agency, Centre for Eco-toxicological Tests, Inspection Administration, Water Administration and Hydrometeorological Office.

In terms of the recommendations from Session 1, not enough information has been obtained. In the area of river basin management, execution plans have not been made, however, in accordance with Article 30 of the Law on Water, the period for informing the public is currently ongoing.

Regarding the recommendations stating that it was necessary to use multiple membership in the ICPDR (International Commission for the Protection of the Danube River) we were informed that, although Montenegro has appointed several representatives of the Working Group to the ICPDR, the representatives have not yet had the opportunity to attend the meetings.

Department of Hydrometeorology and Seismology has informed us that their laboratories for water quality and air are not fully equipped to perform all analytical measures according to international standards, but an acquisition of additional equipment required in accordance with international standards is planned through grants and projects in progress and will take place in the future and with the help of the Government of Montenegro.

Center for Toxicological testing states to be one of the best equipped laboratories in the region. The Center is able to address most of the claims relating to laboratory test parameters in water samples and continuously works to strengthen its technical capacity using all available funds (EU, UN( including the IAEA ), bilateral etc).

The Working Group V (Competition) has adopted 14 recommendations on two topics: “Harmonization of secondary legislation with the EU Acquis in the field of State Aid” and “Economic Analysis in Competition”. In regard to the first session and recommendations concerning the harmonization of laws, we have received information regarding the process of adopting the Croatian model of harmonization of secondary legislation with the EU Acquis in the field of competition.
Recommendations of Session 2 regarding the economic analysis in the field of Competition are largely within the competence of the Agency for Protection of Competition and this is a noticeable improvement. Specifically, the Agency for Protection of Competition, in order to strengthen the administrative capacity, hired two more civil servants. Also, a practice has been established of publishing the newly adopted legislation, pronouncing final decisions, expertise, information and communications as well as the overall direction of spreading awareness about the role and importance that free competition in the market. Further cooperation has also been intensified with most Government agencies and regulators, which is visible through the signed agreements. The Agency conducted a sectoral analysis in the event that price movements or other circumstances indicate the possibility of prevention, restriction or distortion of competition and the report on the conducted analysis can be found on the Agency’s website. Also, the Agency shall prepare and make decisions in accordance with the regulations and standards.

Through **the Sessions 1 and 2 of the Working Group VI (Health and Consumer Protection)** 21 recommendations have been adopted on the two topics of “Unfair business practices and consumer protection” (UBPCP) and “Collective action for the protection of consumer rights”.

In addition to an efficient implementation of the Consumer Protection Act, a very important recommendation with regards to raising public awareness has also been noted, which is achieved through the activities of the institutions. Montenegrin Chamber of Commerce, the Chamber representative designated to protect consumer rights, is the main carrier of activities in the part related to the coordination and cooperation of consumer protection holders, which is performed by monitoring the market in terms of the appearance of unfair business practices sector by sector, in line with the Action Plan 2013-2014 of UBPCP. So far, the institution has conducted various activities that are specifically related to consumer protection. In addition to the existing Code of Business Ethics and the establishment of the Court of Honor, Montenegrin Chamber of Commerce, in cooperation with the Ministry of Economy and Market Inspection conducted successful training sessions and seminars aimed at educating entrepreneurs and promoting consumer protection in Montenegro. Also, the Radio-Television Service of Montenegro has launched a specialized program that deals with issues of consumer protection, which is a big step forward in raising general awareness. The Judicial Training Centre, in its Annual training program for 2014 included topics concerning the need for training of judges and prosecutors in the area of consumer protection and also with regards to the questions on its application.

The subsequent implementation period of the NCEI 2013-2014 project is planned through the monitoring of the part of the recommendations which have yielded no or very little feedback, as well as the ones which, at the time, could not be realized, in order to offer a comprehensive qualitative and quantitative analysis of the results at the end of the project.
National Convention on European Integration of Montenegro (NCEI 2013-2014)

EXPERT ARTICLES
The Role of the Protector of Human Rights and Freedoms of Montenegro (Ombudsman) as the national mechanism for the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment

Petar Ivezić

The Institution of Protector of Human Rights and Freedoms in Montenegro was established by the Law on the Protector of Human Rights and Freedoms, which was adopted by the Parliament of the Republic of Montenegro on 8th of July in 2003.

The Institution of the Protector of Human Rights and Freedoms was established by this Law as an independent and autonomous body which protects human rights and freedoms guaranteed by the Constitution, law, ratified international treaties on human rights and generally recognized rules of international law when these have been violated by means of an enactment, act or failure to act on the part of the state authorities, local government bodies, public services and other holders of public authorities.

The institution of the Protector of Human Rights and Freedoms became the constitutional category through the adoption of the new Constitution of Montenegro (19 October 2007).

Apart from the existing competences – supervision of work of public administration and acting according to individual complaints of citizens, two new competences which are torture prevention (the role of the National Preventive Mechanism – NPM) and discrimination protection (Institutional mechanism for the protection from discrimination) have been given to the Protector by the new Law on the Protector of Human Rights and Freedoms (which entered into force on 23 August 2011).

Montenegro undertook the commitment on 31 December 2008 “to have, define or introduce one or more independent national mechanisms for the prevention of torture at the national level” through the adoption of Law on Ratification of Optional Protocol with Convention against the Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

The commitment should have been fulfilled within a year from the Protocol entering into force. However, during the submission of ratification instruments Montenegro submitted a statement, in compliance with the Article 24 of the Optional Protocol with Convention against the Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, to postpone the execution of the obligation from the Chapter IV for a period of two years from the entry into force of the Optional Protocol.
However, when talking about Optional Protocol with Convention against the Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the National Preventive Mechanism as its product, it is necessary to mention that according to the convention, the term “torture” shall mean any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. In this two-year period there were a lot of dilemmas about who should be assigned this function, therefore it started from the facts that the Institution of the Protector of Human Rights and Freedoms had already owned authorities provided for by the Optional Protocol although it was not NPM, as well as the size of the country and number of citizens. The state of Montenegro chose to define the institution of the Protector of Human Rights and Freedoms as the National Preventive Mechanism (NPM).

In 2008 the Protector of Human Rights and Freedoms of Montenegro inspected the police premises of the Police Administration for retention of persons deprived of liberty and determined that it did not fulfill conditions that meet standards of CPT as well as the Rulebook on conditions which have to be fulfilled by the premises for retention of persons deprived of liberty from 2006. On this occasion, the Protector gives recommendation to the Police Administration to take all necessary actions and measures in order to provide conditions which should be fulfilled by the premises for retention of persons deprived of liberty in branch offices and regional police units and which are in compliance with international standards dealing with this field as well as the Rulebook on conditions which have to be fulfilled by the premises for retention of persons deprived of liberty.

Furthermore, in 2009 the Protector gave the Police Administration of Montenegro individual recommendations which were related to branch offices and regional units, so because of the above-mentioned the Protector decided to re-examine and make:

- A special Report on the conditions of the police premises of the Police Administration for retention of persons deprived of liberty for 2011, which involved assessment of the optimal conditions in relation to space and cubage, beds, bedclothes and other contents according to international standards and regulations of Montenegro, lighting in premises with a special attention to the possibility of reading of written text without activation of artificial lights, providing heating and cooling with control of temperature, presence of moisture, possibility of ventilation, fulfillment of hygienic conditions in premises, restrooms, access to usage of drinking water, possibility of communication of retained person with official persons, video-surveillance, assessment whether there are non-standard items in premises which could be used for harassing and torturing
This project has been financially supported by the European Union.

of retained persons. The subject matter of visits also covered the control of premises in which the hearing of retained persons is carried out in order to eliminate doubt in the possibility of usage of coercion means, examination of police records with a special attention to the register of persons detained and retained, time and ground of retention and the manner of making minutes on retention.

This report covers 21 organisational units of Police Administration and on that occasion 17 general recommendations relating to Regional units and Branch offices of the Police Administration or 83 individual ones have been provided.

Also, in 2011, a special Report on the Condition of Human Rights of the Persons with Mental Disabilities situated in the following institutions:

- Public Institution – the Institute “Komanski most” Podgorica,
- Public Institution – the Centre for education and training “1. Jun” Podgorica,
- Public Institution – the Children’s Home “Mladost” in Bijela
- Health Institution, the Special Hospital for Psychiatric Treatment in Dobrota

In the report the Protector gave 19 recommendations in total to these institutions and other public authorities which are directly responsible for their work.

However, although the Protector has not been NPM until the adoption of the new Law on the Protector of Human Rights and Freedoms (2011), it has undertaken activities to protect persons deprived of liberty or persons with a limited liberty of movement by the Court Ruling or other competent public authority.

With a new Law on the Protector of Human Rights and Freedoms which entered into force on 28 August 2011, Montenegro fulfilled the commitment undertaken by the Law on Ratification of the Optional Protocol with the Convention against the Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, deciding to delegate the performance of function of the national preventive mechanism to the Protector of Human Rights and Freedoms.

The institution kept the same authorities which it had earlier for proceeding on appeal, the visit of premises and institutions in which persons deprived of liberty are located. The work on torture prevention represents its new competence.

Namely, the Law on the Protector of Human Rights and Freedoms defines:

- That the Protector shall be the National Preventive Mechanism for the protection of persons deprived of their liberty from torture and other cruel, inhuman or degrading treatment or punishment;
- That the Protector shall take measures to prevent torture and other forms of inhuman or degrading treatment or punishment in accordance with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- In order to examine the current situation in the authorities, organizations and institutions where persons deprived of liberty or persons whose movement
is restricted are held, the Protector shall create an advisory body composed of experts in relevant fields.

With a view to the realization of the role of the National Preventive Mechanism, in February 2012 the Protector of Human Rights and Freedoms placed mailboxes in every facility of The Institute for execution of criminal sanctions, in order to allow easier and better communication of persons deprived of liberty with the institution of the Protector, and this activity was supported by the Mission of OSCE in Montenegro. In this regard, the memorandum on the cooperation is signed between the Protector of human rights and freedoms and the Institute for execution of criminal sanctions.

In June 2012, The Parliament of Montenegro appointed the Deputy Protector of Human Rights and Freedoms for the field of prevention and protection from torture and trials within a reasonable time.

By circling the legal framework and strengthening administrative capacities of the Institution, preconditions for work and functioning of the National Preventive Mechanism are created. The Deputy Protector of Human Rights and Freedom has been appointed and an officer in the field of prevention has been employed, so the minimum conditions for work and functioning of NPM have been created.

In August last year the National Preventive Mechanism made information on acting of the Police Administration upon the recommendations of the Protector of Human Rights and Freedoms given in the special report from 2011, which is submitted to the Committee on Human Rights and Freedom of the Parliament of Montenegro.

On 6 February 2013 the information was considered at the Committee on Human Rights and Freedom of the Parliament of Montenegro and unanimously adopted, wherein it was concluded that out of 17 general recommendations relating to regional units and branch offices of Police Administration and individually 83, 44 or 53.01% was fulfilled. The Police Administration was given the deadline by June 2013 to notify the Committee of the Parliament of Montenegro on fulfilment of the remained unfulfilled recommendations given in the Special Report on the condition of police premises of the Police Administration for retention of persons deprived of liberty for 2011.

During 2012, within its regular and extraordinary activities, NPM paid 19 unannounced visits to premises in which persons deprived of liberty are located or may be located.

The cooperation with Sub-Committee of the United Nations against the Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has been established and the contact person has been appointed. On the same way the cooperation with the Committee for the torture prevention has been established.

In the implementation of legal commitments and planned daily, monthly and annual activities, in December last year NPM carried out analysis of the state in the Remand Prison in Podgorica. Data were collected in a way that the member of NPM in a direct conversation with detainees asked questions which were prepared in advance and
systematised and recorded every individual answer and in compliance with that he concluded the factual situation.

NPM regularly and on the basis of activity plan pays visits to prisons, police custody and other institutions in which persons deprived of liberty are located or may be located during and out of working hours and independently from weather conditions. In January this year an unannounced visit to the Psychiatric Hospital in Dobrota was paid, analysis of the situation was done in the Remand Prison in Podgorica and Prison for Short Sentences in Bijelo Polje, Regional Units and Branches of Police Administration of the Ministry of Interiors of Montenegro and the Prison for Short Sentences in Podgorica.

Acting of the Protector of Human Rights and Freedoms as the National Preventive Mechanism implies regular, announced but also unannounced visits to persons deprived of liberty or persons with a limited movement freedom, then insight into data of these persons, insight into data of the authorities in which these persons are located, conducting interview with these as well as with other persons who may direct to the possible violation of human rights of persons deprived of liberty and persons with a limited movement freedom.
The role of the Public Defender of Rights in relation to the protection of persons deprived of freedom from torture and other forms of cruel, inhuman and humiliating acts and punishment

Dr. Marián Török

In the introduction it is necessary to clarify what international regulations say about the protection of persons deprived of freedom from torture and inhuman or degrading treatment or punishment. Specifically, there are two conventions regulating this field, one adopted by the Council of Europe and latter one adopted by the United Nations.

The first is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (of 26th November 1987).

In the Slovak Republic the implementation of the Convention falls under the Ministry of Justice of the Slovak Republic. The Convention entered into the force for the Slovak Republic 1st October 1994 and it is published in the Collection of Laws of the Slovak Republic as the statement of the Ministry of Foreign Affairs of the Slovak Republic no. 26/1995.

This Convention belongs to essential international treaties of the Council of Europe in the field of human rights protection and it is also the most common one from the point of its control.

Based on the Article 1 of the Convention, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Committee for the Prevention of Torture CPT = CPT) was established, and through regular visits in states, which are parties to the Convention, examine the treatment of persons deprived of their liberty by a public authority in order to strengthen protection of their fundamental rights and freedoms if needed.

In accordance with the Article 2 of the Convention, each party shall permit visits to any place within its jurisdiction where persons are deprived of their liberty by a public authority.

The CPT held four regular visits to Slovakia so far (in years 1995, 2000, 2005, 2009) and published its reports on these visits with the consent of the Government of the Slovak Republic via its official web site.

The second document is the UN Convention against torture and other cruel, inhuman or degrading treatment or punishment 10th October 1984 (for Czecho-Slovak Socialistic Republic came into force 6th August 1988), published in the Collection of Laws under no. 143/1988.
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 18th December 2002 (OPCAT) – in the Slovak Republic has not been ratified yet. The UN Convention against torture and other cruel, inhuman or degrading treatment or punishment established Committee against torture.

The Scope of Public Defender of Rights of Slovak republic in regard to respect of rights of sentenced

Under the Act no. 564/2001 Coll. of Law on Public Defender of Rights, Public Defender of Rights shall act upon a complaint of a natural person or a legal entity or upon his own initiative. In this case he has the same competences as in the case when investigating a complaint of a natural person or legal entity, for example to enter into the premises of the public administration bodies, to ask public administration body to provide him with the necessary files and documents as well as demanding an explanation concerning the subject of the complaint. The provision is applied even in the case, when right to look into files is granted only to a limited group of entities in accordance with specific regulation, to question the employees of public administration body. Places of custody, imprisonment, disciplinary sanctions of soldiers, court-ordered rehabilitation, juvenile correction, court-ordered hospitalization or residential care of children, or in detention cell belong to the competence of the Public Defender of Rights in Slovak Republic, so the Public Defender of Rights may perform investigation of the fundamental rights and freedoms situation of these people upon his own initiative. Unfortunately, the Public Defender of Rights doesn’t have competences as wide as National preventive mechanism OPCAT.

As it was mentioned beforehand, the Public Defender of Rights has the ability to realize his competences in the case he identifies infringement of human rights in these places. Competence of the Public Defender of Rights in Slovak Republic in relation to these places is not explicitly expressed as in the Czech Republic, where the Public Defender of Rights shall by law perform systematic visits to such places, it’s competence to act implies from general competences for investigating complaints, when infringement of fundamental right by a public authority is alleged. The Public Defender of Rights in Slovak Republic may examine potential infringements of human rights by these places upon a complaint of a natural person or legal entity or on his own initiative. Procedure upon its own initiative allows the Public Defender of Rights to carry out an investigation not only to the extent of the infringement of individual rights of the individual prisoner, but also to perform a systematic review of conditions in which prisoners in these places in the Slovak Republic are held, while giving emphasis on the control of fundamental human rights. At present, such survey is conducted for the first time after a change at the chair of the Public Defender of Rights when Jana Dubovcová came into the office. This research has become one of her priorities for 2013 and its results should be available in autumn 2013.
In the Office of the Public Defender of Rights we mostly deal with the complaints on the places where personal freedom is limited (institutes) about healthcare delivery, about attitude and behavior of staff or about living conditions (the minimum living space, hygiene, appliances etc.).

The Public Defender of Rights shall in the investigation of the complaint use a variety of privileges, among which is especially important a right to question these institutes, visit them personally, opportunity to interview prisoners without the presence of any other person, the possibility of correspondence without official control, as well as proposals of measures. If the institution is not willing to take action to remedy the findings, the Public Defender of Rights shall apply to the governing body, which is the General Directorate of the Corps of Prison and Court Guard.

In the investigation of such complaints, employees of the Office give emphasis on personal contact with prisoners, as in the case of limited communication with a person deprived of its liberty exclusively via written contact showed as insufficient. From our experience, in the case of evident malfeasance at the Institute (e.g. failure to telephone contact with advocate, refusal to watch television etc.), the problem is solved as soon as the institution becomes aware of our initiative. Therefore the problem is generally solved before the Public Defender of Rights manages to call for the Institution to adopt measures. In some cases it is not possible to determine objective facts, especially if it is an argument of sentenced against the employee of Institution and there is no witness who could confirm some of the claims. In this case it is not possible to prove malfeasance of Institute, but it is a motivation of the Public Defender of Rights to develop initiatives at these places to minimize possibilities for violation of the rights of sentenced without the ability to defend itself and objectively prove this fact before control authorities. Installing cameras seems as an effective action, however it is necessary to keep the privacy of prisoners and therefore there is still need to look for the optimal solution.

Monitoring of the conditions in institutions, which is now carried out by the Office of the Public Defender of Rights, is mainly focused on dietary conditions and providing health care in prisons. Eating is one of the most frequent subjects of complaints of sentenced. Complaints object the quantity and quality of food. Some of them also complain of health problems caused by poor diet provided in the Institution, and as a result of further medical examination, they are ordered to be on a different diet. Our preliminary findings indicate that “health problems” may also mean hunger because internal rules set forth that dietary food diet meals are more abundant, so there is obvious motivation to receive more food. The problem is probably related to pricing standards for one prisoner and one day, which seems currently insufficient due to rising food prices and inflation. The question also has been the quality of the food and its variety and the Office preliminarily indicated a lack of vitamin supplement ingredients in some institutions, which may have, from a long term view, negative impact on the health of prisoners. Sentenced may purchase its own food in the cafeteria in order to complete the missing component of the diet, but they must have funds.
Another frequent objection of sentenced is access to health care. Prisoners complain about frequent absence of health personnel in institutions, their approach when health problems are indicated, as well as insufficient provision of the healthcare itself. Each problem is specific and requires a specific solution, but in general the Public Defender of Rights will direct her initiative to ensure that sentenced always have access to health professionals or opportunity to get (even externally) medical assistance if it’s needed, and that the health care is provided in a professional manner.

As monitoring of food and healthcare delivery conditions is still ongoing, it is not possible today to talk about the findings of the survey.

The problem in Slovak prisons is also a lack of capacity, in some prisons resulting in overcrowding, when minimum living space for one prisoner is temporarily restricted. The solution for this problem is, however, beyond the means of individual institution and even beyond the departmental options, as it is in our opinion due to the fact that the courts still (even though criminal law allows them) is not common to apply alternative punishments. It is true that in the Slovak Republic there are not developed technical conditions yet. The Public Defender of Rights will within her competences seek to make a difference also in this problem.

The scope of the Public Defender of Rights in relation to the protection of the rights of sentenced in the Czech Republic

The Czech Public Defender of Rights informs about activities of the National preventive mechanism on his website.¹

The Public Defender of Rights of the Czech Republic became 1st January 2006 so called National preventive mechanism, to creation of which the Czech Republic committed by adopting OPCAT. The role of Public Defender of Rights in this regard is to carry out systematic preventive visits to all sites and facilities where they are, or may be found persons deprived of their liberty. Such devices include devices national, but also private, where are located persons deprived of their liberty by judicial or other decision of a public authority, or where are persons deprived of their liberty as a result of dependence on care delivery. Specifically, it includes the prisons, police cells, devices which perform protective or institutional care, facilities for the detention of aliens, asylum facilities, social services, medical devices, social protection of children and public facilities on the survival of the population during emergencies.

During the visits of the Public Defender of Rights in the facilities, he finds out how people, whose liberty is limited are treated, seeks to ensure respect for their fundamental rights and also to strengthen their protection from mistreatment by any device.

Under the mistreatment it is understood behavior not respecting human dignity. According to the degree of intervention to human dignity, or even to physical integrity, such mistreatment may have form of torture, cruel, inhuman, or degrading treatment or punishment, disrespect to the man and his rights, disregard of his social autonomy and privacy. The Public Defender of Rights of Czech Republic visits the places systematically, regularly and with preventive focus and these visits are carried out under specified plan within a specific timeframe. Employees of the Office of the Public Defender of Rights are entitled to visit any device unannounced, to speak with persons alone, to overlook any space on the device, to study papers and other documents, to ask questions, to evaluate and to criticize. After the visit, the Public Defender of Rights draws up a report with recommendations or proposals of measures and sends it to the device or its governing body for opinion. By means of its arguments, the Public Defender of Rights seeks these entities to rectify the violations. If recommendations are not accepted, the Public Defender of Rights may offer the whole problem to media.

The Public Defender of Rights of Czech Republic also investigates complaints of persons whose freedom is limited by public authorities. However, he is not authorized to investigate individual complaints of persons who are in social service and health care facilities, if they are in these devices upon their agreement, for example under contract for the provision of social services or agreement with hospitalization.

Conclusion

With protection of human rights and freedoms in terms of a modern democratic society, the Slovak Republic as one of the post-socialist countries has less experience than most states of the current European Union. Over the last decades, there is noticeable progress towards raising standards of human rights protection, which puts higher demands on capacities, skills, professionalism and ethics of public employees and public authorities.

Only effectively working rule of law is able to guarantee its citizens that international treaties and national legislation concerning the protection of human rights will actually be implemented and not just remain on a paper. Slovak Republic should be closer to this ideal and the Public Defender of Rights is one of these, who should show the right direction. In addition to solving common problems that society faces in this field, such as delays in judicial proceedings, or social protection of children, the Public Defender of Rights must also focus on protecting the rights of persons whose freedom is limited as these people and their lives are hidden from the eyes of public in these devices. In conditions of the places where personal freedom is limited there is always a risk of misuse of power of those, who supervise or nurture here.

Special emphasis on monitoring the respect for rights in these institutions is therefore necessary in every democratic state.
Normative and Institutional Framework for Protection and Exercise of Children’s Rights with a Special Reference to Treatment of Minors in Conflict with the Law

Nataša Radonjić

The Constitution of Montenegro (Article 74) defines that a child shall enjoy rights and freedoms appropriate to its age and maturity. A child shall be guaranteed a special protection from psychological, physical, economical and any other exploitation or abuse. The constitutional guarantee is elaborated by the set of laws and by-laws from the field of education, child and social protection and healthcare as well as family, employment and criminal legislation. The principle of the best interest of a child is the fundamental principle on which the stated legislation is based.

The strategy of justice reform for the period 2007-2012 defines the reform of the juvenile justice system as one of the priority fields in the reform, including adoption of the separate legislation in this field. Basic objectives of the juvenile justice reform are legislative reform, towards unification into separate law, provisions which define treatment of juveniles in conflict with the law; improvement of rights and treatment of children in conflict with the law; strengthening the preventive work with children and families exposed to the risk; development and enforcement of alternative measures at the level of local community. The result of this strategic commitment regarding juveniles in conflict with law is adoption of the Law on Treatment of Juveniles in the Criminal Proceedings in December 2011\(^2\) which has been implemented since 1 September 2012. The Law united material, procedural and executive provisions which define treatment of juveniles in conflict with the law, as well as the protection of juveniles involved in the criminal proceedings. In order to create all preconditions for the implementation of this Law, in March 2012 the Government of Montenegro adopted the Implementation Plan of Law on Treatment of Juveniles which contains the overview of obligations and competent authorities with the aim of creating conditions for the beginning of the implementation of the law. The support to the law implementation and to novelties it brings to the juvenile justice system is provided through the implementation of the project “Justice for Children”, of the Government of Montenegro in partnership with UNICEF with the financial support of the EU (2012-2013, IPA 2011). The law is harmonized with a great number of international instruments which define this field, and primarily with the Convention of UN on the Rights of the Child (1989) and optional protocols, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982), Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, 1985), United Nations Guidelines for the Preven-

\(^2\) Official Gazette of Montenegro, no 64/11 from 29/12/2011
tion of Juvenile Delinquency (The Riyadh Guidelines, 1990), United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules, 1990), The Universal Declaration of Human Rights (1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); International Covenant on Civil and Political Rights (1966). Starting from the stated international documents, fundamental principles on which the law is based are the following:

- Respect of human rights and fundamental freedoms;
- Respect for the best interest of the juvenile;
- Prohibition of discrimination on any ground;
- Intelligibility of language, the use of technology adjusted to the age and degree of development of the juvenile person;
- Respect of the right to privacy of the juvenile person in all stages of proceedings;
- Respect for rights of juveniles to freely express their opinion;
- As much as possible avoiding limitation of the personal freedom of juveniles;
- Stimulating enforcement of non-custodial measures and manners of juveniles treatment;
- Primacy of criminal sanctions which are not enforced in institutional conditions;
- Giving special importance to the training and specialisation through the multidisciplinary approach and institutional cooperation.

The most important novelties regarding the Law on Treatment of Juveniles in the Criminal Proceedings are introduction of new alternative measures, warnings apart from corrective warrants; amplification of applications of corrective warrants for criminal acts – prison sentence up to 10 years; education of professional services which provide professional support to courts and state prosecutor’s offices; new corrective measures – special obligations relating to corrective warrants; protection of juveniles as participants in proceedings; treatment of juveniles during execution of institutional corrective measures and juvenile prison; execution of the institutional measure and sending to the institution of the Institute character and juvenile prison within the special organisational unit of the Institute for Execution of Criminal Sanctions.

In respect of age of a juvenile who is held criminally responsible, this Law keeps an earlier limit from 14 to 18 years old, which in some respects may be attributed to the legislative tradition, or the requirement set at the level of the international law that this primarily lower limit in terms of criminal legal response to the offender must be clearly defined by the national legislation and it must not be set “too low”. The Law differentiates between juveniles from 14 to 16 years old (junior juveniles) and juveniles between 16 and 18 years old (senior juveniles). This differentiation is significant for enforcement of specific criminal sanctions, as well as for some process provisions, e.g. those relating to prison. However, the Law excludes the enforcement of criminal sanctions and other measures in relation to persons who during the prosecution of criminal offences did not reach the age of 14 (children), since this population should primarily be dealt with by other than judicial authority. However, under certain circumstances, the implementation of specific provisions on juveniles is allowed for a category of adults, among whom especially young adults stand out with fulfilment of certain conditions.
The alternative measure, warning, represents a significant novelty, while corrective warrants are improved in relation to the existing system of their regulation and enforcement. Providing for the possibility of the enforcement of warning for criminal acts for which a fine or imprisonment up to three years is defined and corrective warrants, there is a tendency to enforce as much as possible alternative measures and to enable diversion from the classical criminal proceedings and to enable its suspension.

In that sense, according to the Law, the conflict resolution is possible even prior to the prosecution of the criminal charges against the juvenile, as well as during the very proceeding. However, it must be borne in mind that alternative measures come to the fore in the later stage, when it should be decided upon the appropriate criminal sanction. Alternatives in the role of criminal sanctions, corrective measure of special commitments then serve to avoid those sanctions which add up to deprivation of liberty, which are, especially lately, marked as harmful for the development of juvenile, and for that reason, possibilities of its replacement or at least more restrictive enforcement are required.

According to the Law, three groups of the criminal sanctions may be enforced against juveniles: in the first place corrective measures, then sentence of the juvenile imprisonment and specific security measures. Under the influence of the contemporary trends in this field, there is a principle emphasised at institutional corrective measures that these measures are the last means to use with a court obligation to re-examine its justifiability every 6 months. Corrective measures of intensive supervision are enriched with the new corrective measure of the semi-institutional character, which serves as a supplement if some of the previous measures are not sufficient for the achievement of purpose. It is the measure of intensive supervision with daily stay in the relevant institutions or organisation for care and education of juveniles. Punishment, as an exception with fulfilment of a set of conditions, is still reserved only for senior juveniles, although it is a special punishment designated exclusively for juveniles.

Regarding procedural provisions, first of all, it should be emphasised that these are divided into two groups. The first group of process provisions consists of those legal provisions which refer to regulation of treatment of juveniles, which represents a special type of criminal proceedings. The second group of procedural provisions consists of legal provisions dedicated to the special protection of the juvenile persons as participants in criminal proceedings. Both groups of procedural provisions are relevant lex specialis in relation to the Criminal Procedure Code, which is lex generalis.

The type of criminal proceedings against the juvenile, according to the concept of the Law, in relation to the typology of the proceedings against the juvenile, may be considered the protective model, which is normally typical for the majority of continental European countries, but now with additional more distinct elements from the so-called judicial model, which is the optimal combination being in line with the most progressive tendencies in the contemporary comparative law in the domain of the criminal procedural law for the juvenile. Having in mind that Montenegro strives for the European integration, acceptance of such model of the procedure against juveniles,
which is imminent to the progressive European tendencies, represents further step towards adoption of the highest European standards within the framework of legal system. Basic stages of the first instance proceedings are: preparation proceedings against the juvenile which is conducted by the state prosecutor for juveniles, then proceedings before judge for juveniles or Chamber for juveniles depending on the jurisdiction of the court. As the investigation in the general criminal proceedings lost the character of judicial investigation, so it under the competence of the state prosecutor, this law has changed regarding the conduct of the preparation proceedings. Investigation in relation to the juvenile is conducted according to the general rules, so the state prosecutor or police dominate here, but even in this, mostly informal stage, which precedes the formal criminal proceedings, certain features manifests which are typical when certain actions in relation to juveniles are carried out.

State prosecutor for juveniles, judge for juveniles and judge of the Chamber for juveniles must be persons who have acquired special knowledge from the field of child’s rights and on rules of treatment of juvenile offenders and juveniles, as participants in criminal proceedings. This introduces the principle of specialisation, which is represented in case of other actors of proceedings against juveniles, and which aims at not only more efficient conduct of these proceedings, but also higher degree of protection and support to a juvenile being prosecuted in the criminal proceedings. Also, important institutional novelty is the fact that professional services were established in which persons are employed with specialized knowledge on rights and protection of the juveniles (pedagogues, psychologists, sociologists etc.) in order to provide assistance to courts and state prosecutor’s offices in conducting proceedings against juveniles and later in treatment during the imposition of alternative measures and criminal sanctions. The professional service in the Supreme State Prosecutor’s Office (for all state prosecutor’s offices) has been established as well as professional services in higher courts for providing assistance to all courts within their territorial jurisdiction.

Basic principles of the proceedings against juveniles defined by the Law are the following: the trial in absentia shall be prohibited; while undertaking actions in presence of the juvenile, and especially during his/her hearing, participants in the proceedings shall act carefully, taking care of maturity, other personal characteristics and protection of privacy of juveniles, so that conduct of criminal proceedings and actions undertaken in proceedings could not harmfully influence on the development of juvenile; no one shall be released from the duty to testify on circumstances relating to assessment of the juvenile personality. These protective provisions aim at elimination of certain harmful consequences of the typical criminal proceedings as well as proceedings against juveniles, which, although not having repressive character, still has a certain criminal component and is focused on resolution of criminal case, so as such it may cause certain negative consequences in relation to the juvenile’s developing personality. The right of juveniles to the obligatory professional defence is extended not only by introduction of the rule that a juvenile must have a defender during the first hearing, as well as during the whole proceedings, but also by introduction of the principle of specialization of the lawyer who would have a role of the defender of the
juvenile in the proceedings who will, as a rule, be a lawyer with special knowledge from the field of juvenile rights. This rule is completely in line with the most progressive tendencies in the field of juvenile criminal law and, which is especially significant, it is harmonized with already settled practice of the European Court for Human Rights, which basically considers that, depending on the concrete experience, professional qualification, special sensibility etc. not every lawyer is competent or suitable to be a defender in relevant cases, and it is especially the case when it comes to the proceedings conducted against the juvenile, and which is very specific and basically focused on the increased protection of the juvenile who is in conflict with the law. The rapidity would be an imperative in every criminal proceedings, but fast conduct of proceedings is very important when it comes to proceedings against juvenile, where longer duration of proceedings has a harmful consequences, regarding that a juvenile as a rule fast becomes an adult, and the whole system of criminal sanctions and manners of response in relation to juveniles is not made for persons who belong to older age categories. Therefore authorities participating in the proceedings against juvenile, other authorities and institutions which are required notifications, reports or opinions, as well as all other entities of proceedings against the juvenile are obliged to act as urgently as possible so that the proceedings could be completed promptly. It is justifiably considered that “justice which is not fast enough loses the character of justice”. Certainly, rapidity must not turn into rashness. Proceedings against juveniles would principally have to be conducted rapidly and efficiently because the juvenile moves to another age category by time, which significantly influences the expected and eventual effects of the criminal procedure which is conducted against him. On the other hand, the social environment, which is extremely important when it comes to the juvenile delinquency in general and its criminal and civil aspects, as a rule, imposes the necessity of rapid resolution of the relevant issue. The custody is defined as the ultimate measure in order to provide the presence of the defendant in general, but also of the juvenile in the criminal proceedings. Having in mind rules of the Criminal Procedure Code, which provided the whole set of very adequate alternatives to the custody ordering, necessary conditions are created for ordering custody to a juvenile very rarely by this Law, whereas the formal duty of the court to attempt to provide the presence of the juvenile in every specific case by the measure of temporary supervision and accommodation of juveniles or by some of the measures of supervision or guarantee in compliance with the Criminal Procedure Code is very important. If a juvenile is ordered custody, it is defined by the Law that the juvenile stays in custody separate from the adults and in compliance with the Constitution the custody against the juvenile shall not last more than 60 days. Exceptionally, the court may rule that the juvenile stays in custody together with an adult, who would not influence him/her harmfully, and otherwise the isolation of the juvenile would last longer and have harmful effects on the development of his/her personality. On this manner the juvenile who is nevertheless ordered custody is optimally protected, when another measure is not possible or is not adequate.

When the state prosecutor for juveniles estimates that there is no ground for conducting preparatory proceedings, the Law defines that the criminal charges will be
dismissed by the court ruling if the charge shows that the charged act is not a criminal act, or that the criminal prosecution or enforcement of criminal sanction is barred by limitation or that the act is embraced by the amnesty or pardoning, or if there are other circumstances which exclude prosecution and the prosecuted will be informed on that. The dismissal of the criminal act is also provided for the reason of fairness if the juvenile due to sincere regret has prevented appearance of damage or he/she has already fully compensated the damage, and state prosecutor for juveniles, according to the circumstances of case, estimates that the imposition of criminal sanction would not be fair. It is also provided for the restraint of the criminal prosecution which is based on the so-called “conditioned opportunity”. Conditioned opportunity represents a type of the hybrid and by its character heterogeneous criminal and procedural institution, which has elements of the classical non-conduct of the criminal proceedings due to inappropriateness as well as elements of abolution to the offender, if he “earns” that specific abolition by fulfilling certain obligations, with regard to the character of those obligations which to a certain extent are similar to some criminal sanctions (e.g. with the fine, as well as with community service). This institution to a certain extent may achieve the purpose of criminal sanctioning whereas there is no punishment in the formal sense and some regular harmful consequences of the imposition of sanction or appearance of so-called stigmatization of the previous conviction. Apart from that, regarding some of the obligations which are imposed to the juvenile and which he accepts with the consent of the injured party, this ruling eventually contains some elements of the reconciliation between the juvenile and the injured party, or their settlement which generally represents one of the most distinguished tendencies in the contemporary criminal proceedings, and in particular in the proceedings of the juveniles. Actually it is about a sort of absolution of the criminal prosecution, which is motivated by the principally non-repressive nature of the proceeding against the juvenile, as well as the whole system of criminal law in relation to juveniles. So it is possible to condition acting on the principle of opportunity of criminal prosecution of the juvenile by fulfilment of obligations by the juvenile, or by the imposition of relevant corrective warrants, as the type of “alternative sanctions” consisting of: settlement with the injured party; regular school attendance or regular work attendance; involvement into certain sport activities; community service or humanitarian work; payment of money to charity, fund or public institution; subdual to relevant examination and weaning off the addiction caused by alcohol and drug abuse; involvement in individual and group treatment in the relevant health institution, clinic or other relevant organization; attendance of courses for professional qualification or preparation and taking exams; restraint from visiting relevant place or contact with relevant persons.

Acting on the principle of the opportunity of the criminal prosecution is now significantly widened and possible for increased number of acts, which is very adequate and progressive solution, especially having in mind certain aspects of the so-called restorative judiciary in form of respective settlement and reconciliation between the juvenile and the injured party, which may be one of conditions for criminal non-prosecution of the juveniles or for the suspension of the proceedings against him/
her for the reason of (in)appropriateness. It is about creation of coherent normative mechanism for resolution of juvenile criminal cases in the manner which is not classical and with avoiding all usually complicated process formalities as well as cost of the conducting classical proceedings against the juvenile. The novelty of the law is very significant in sense of restorative justice and it creates possibility for the settlement with the injured party for the criminal acts which are prosecuted by private actions and all aiming at avoiding conduct of the criminal proceedings. Ratio legis of the special rules of the proceedings against the juvenile is based on the tendency to provide to the age category of persons being prosecuted (the same as that age category of offenders has the special criminal and legal position in the scope of material criminal law) special position within the framework of the legal system, and which is generally motivated by less repressive character of that criminal proceedings in relation to other criminal proceedings. Proceedings against the juveniles must have specific, not too much expressed repressive aspects, which is typical for any criminal proceeding (such as the case with measures of process coercion etc.), despite the fact that those proceedings declaratively do not have the character of the criminal procedure, but in those proceedings any form of repressiveness must be reduced to the necessary minimum, which is based on the general conception of the certain privileges of the youngest age categories.

The primary objective would have to be to avoid conducting criminal proceedings (which is, among others, the basic purpose of the possible acting according to the principle of opportunity of the criminal proceedings) when it is objectively possible and to achieve those effects which would be normally achieved by the appropriate criminal sanction by giving “the new chance” to the juvenile who committed offense. If it is not possible at all, then the secondary objective is that criminal proceedings are rapid and efficient, and to result in that process outcome which is the most suitable to the nature of committed offense, personality of the juvenile and objective assessment on what is the best manner for preventing him/her from re-entering into delinquency.

Special provisions on protection of the juvenile persons as injured parties in the criminal proceedings were unfamiliar to our legislation up to now. They basically contain beginnings of the special criminal legal position, not only concerning juvenile offenders but also concerning injured juvenile parties. Although modest by the volume, they have far-reaching significance, with regards to their reference to the possibility of creation of the whole new legislation in relation to juveniles. These provisions are implemented when the juvenile is injured by the criminal act or when he/she is interrogated as a witness. They are very important because they refer to the prevention of the secondary victimization and subsequent traumatisation of juvenile persons. The hearing of the juvenile person in the proceedings is carried out, as a rule, by the state prosecutor and the judge of the same sex in the special room equipped by the technical devices for audio-visual recording. The hearing is conducted with the assistance of the qualified person and in the presence of the legal representative of the juvenile person. If the hearing of the juvenile person is conducted with assistance of the device for audio-visual recording, the recording will be sealed and attached to the minutes, so that the
juvenile person may only exceptionally be heard if there is a justifiable reason for this. Regarding the big traumatizing effect of the so-called “split hearings” of the victim and the injured in general, the legislator in this way aims at the more efficient protection of those categories of victims, who, as a definition, are considered most vulnerable, and those are children and juveniles. This aims at elimination of the secondary victimization which could appear anyway, and especially due to the encounter between the juvenile victim and the accused of a criminal offense with elements of violence. Likewise, the Law principally excludes the confrontation between the injured juvenile person who falls into category of the particularly vulnerable persons and the defendant. The juvenile person who is injured by the criminal act may be assigned an attorney ex officio in order to protect the personality of the juvenile person and for the reasons of fairness from the budget. The juvenile is summoned by the legal representative.

The Law defines the judiciary control over the imposition of the criminal sanctions to the juvenile, which enables the dominant role for the court in this specific stage, and which is in line with the principally protectively constructed model of the proceedings against the juvenile. Records kept for alternative measures and criminal sanctions imposed to the juvenile are also defined, as well as providing data from the records and rehabilitations and deletion of conviction. Executive provisions contain certain deviations from those applicable up to now. First of all, all provisions referring to the enforcement of corrective warrants and imposition of criminal sanctions are consolidated in one place. The executive provisions of law insist on the protection of the fundamental human and specific rights of juveniles against whom some of the criminal sanctions is imposed. The establishment of the obligatory judge for juveniles represents the most significant novelties in this respect, when he/she determines that it is necessary to undertake some actions in order to protect some rights of juveniles, he/she shall require active engagement of the competent authority of the trusteeship and inform it thereof, and the control role of the court through the professional services and reporting on imposition of criminal sanction is important on the same way. There is a significant novelty regarding the possibility to rule on the parole after two-thirds of the served sentence, by the Commission for Parole and based on the report of the Institute, not based on appeal, but ex officio, which represents a kind of by-rule parole for juveniles. There are also novelties provided for in respect of reception of juveniles and their sending to imposition of the institutional corrective measures and juvenile prison sentence, having in mind the fact confirmed by the numerous research that the reception was the most painful point of every institutional treatment. In this respect, apart from the constant contact with the juvenile on the institutional treatment, working with family, there is a foreseen obligation of the authorities of trusteeship to prepare conditions for returning the juvenile to the local community and his involvement into the latter, during the abidance of the institutional corrective measure and juvenile prison sentence.

We should not forget the great truth, that “child is the father of man”, and if a child or a juvenile commits a so-called starter criminal act, then it is almost certain that there is a big chance that this child, if not treated in adequate way, by time will grow up
into socially more dangerous offender or, in liberal terms, into a criminal. Therefore it is extremely important to pay the greatest attention to suppression of the juvenile delinquency not only in the normative field, i.e. sector of creation of source of juvenile criminal law, but in the practical acting of all official actors of the proceedings against juveniles. Starting from the above-mentioned, the Law on Treatment of Juveniles in the Criminal Proceedings gives a reliable normative ground for more efficient treatment of juveniles in conflict with the law.
Legal and institutional framework for protection of rights of children with special regard to treatment of minors in breach of law

Alexandra Drakova

Protecting the rights of children with special regard to treatment of minors in breach of law build on several levels of legal and institutional frameworks in place which must be taken into consideration.

Legal and institutional framework of each country should build on the principles and standards stipulated in the various international and regional treaties and laws the relevant country voluntarily agreed to be bound by. Through the ratification of such international laws, states declare their willingness to oblige to the standards set by these treaties. They ensure this through implementing them into their national legislations and policies.

With regard to protection of children’s rights in Europe with special protection aimed at children, the international framework which sets minimum standards to ensure every person its fundamental human rights and freedoms solely based on the fact, that we are all born as humans and thus enjoy all the same rights, is based on three main human rights treaties: Universal Human Rights Declaration (in place as of 1948), European Convention for the Protection of Human Rights and Fundamental Freedoms (as of 1950, last amended 2010, hereinafter European Convention) and UN Convention of the rights of a child (in place as of 1989, hereinafter CRC) with its two optional protocols (and third on the way).

International legal framework

Most relevant laws which are obligatory applicable in matters of children in conflict with law are to be found in the CRC, its articles, principles as well as in the European Convention. Besides these international treaties, there are in place several other important, although not mandatory instruments supporting juvenile justice: United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines); UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules); UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules); UN Guidelines on Justice in matters involving child victims and witnesses of crime; UN Guidelines for Action on Children in the Criminal Justice System (ECOSOC
Resolution) and the Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines).  

CRC covers cases of children in conflict with law in its articles 37, 39 and 40 whereby all four principles of CRC, namely 1) non-discrimination, 2) right to life and survival, 3) best interest of a child 4) child participation are always the base for all explanations and provisions derived from specific articles. Moreover, general comment Nr 10 issued by the UN committee on the rights of the child in 2007 deals explicitly with provisions of children’s rights in juvenile justice. Several examples of crucial provisions for juvenile justice framework according to UN are quoted below:

- Legislation should set a minimum age of criminal responsibility; The minimum age of criminal responsibility should be no lower than 12, preferably higher.
- The law should state clearly that all children over the age of criminal responsibility but under the age of 18 should fall within the juvenile justice system regardless of the nature of the offence.
- States should pass a juvenile justice law or code implementing the provisions of Articles 37, 39 and 40 of the CRC. This should cover treatment of the child from the moment the child is apprehended or detained by the police right through to post-sentencing after-care.
- Juvenile courts should be established and provide a child-sensitive environment; The Ministry of Justice or other relevant ministry should issue guidelines to court administrators on how to achieve this.
- Legislation should require that all administrative and other professional staff dealing with children in conflict with the law should receive training on children’s rights.
- Legislation should provide that specialized children’s units should be established in the police, prosecutor’s office, court administration, social services and probation.
- Legislation should ensure court procedure in children’s cases which allows children to understand and participate in the hearing or trial.
- Any new law or code should contain sections or articles on jurisdiction, the extent to which other criminal laws apply to children, the procedures to be followed from the moment of first contact with the police right through to the end of the trial process, the due process guarantees for children, diversionary measures, measures that may be applied to a child who is convicted of a criminal offence, the circumstances in which deprivation of liberty may be ordered and after-care.

7 According to CRC child is a person below the age of 18 years
Regional legal framework

Another important source for regional norms on juveniles in judicial proceedings are documents and provisions produced by different institutions of the European Union (European Commission, Council of Europe, Council of Ministers, Program building Europe with and for children, European court for human rights). When talking about documents, European Convention sets again the minimal obligatory standards to be followed in terms of juvenile justice systems. European court for human rights dealing with cases of breach of rights of children in proceedings involving juveniles often quotes articles 2 (Right to Life), 5 (Right to liberty and security) and most importantly 6 (Right to a fair trial) of European Convention as being violated by the national courts, which makes them the key provisions for the legislative and institutional national juvenile justice framework.

There are dozens of other European documents issued by different bodies addressing in parts rights of children in juvenile justice systems in form of strategies, resolutions, recommendations, as well as guidelines.

The bold example which guides countries to introduce child friendly mechanisms in justice proceedings is clearly stipulated in the last mentioned - Guidelines on child friendly justice adopted by Council of Europe in 2010. The aim of the guidelines is to guarantee and ensure all children an adequate access and treatment in fair justice system and applies to all - criminal, civil and administrative justice system for juveniles. With regard to the stressful situation children are facing when being part of justice proceedings, not mentioning those cases of being in direct conflict with law, all the actions must be planned and executed in accordance with their physical and emotional wellbeing, adjusted to the age and stage of development of that particular child, serving their best interest no matter whether it is in position of victim or as accused offender. Children simply have the right to be protected and treated sensitively so that no additional harm is caused to them, just because they are children and deserve a special protection.

Guidelines were elaborated upon consultation with children across Europe who took part in judicial proceedings - both criminal and civil and thus their voices and experiences were taken into consideration. The main fundamental principles of guidelines consist of child participation (right to receive appropriate information in language

10 e.g. Resolution No. R (77) 33 on placement of children, Resolution (66) 25 on short-term treatment of young offenders of less than 21 years, Resolution (78) 62 on juvenile delinquency and social change
12  Council of Europe: http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines_en.asp
which the child understands, all decisions made are to be in the best interest of the child, children should be treated with dignity and respect, all children must be protected against discrimination and same rule of law must be guaranteed to children as it is to adults (including independent complaint mechanisms). Guidelines also name general elements of child friendly justice as Right to obtain information and advice, Protection of private and family life, Special preventive measures, Training of professionals working with and deciding upon children, Multidisciplinary approach as well as Child friendly procedures which are to be applied before, during and after the trial.

In case of minors committing a crime, special additional provisions and advises are to be taken into consideration in matters of Deprivation of liberty (only if last resort, separated from adults, for shortest time possible, enjoying their all rights), as to Police: right to have adult person during hearings, assured Right to be represented by own lawyer free of charge and Right to speak out in the court, Right to get information they understand - whereby these Rights must be protected - and last but not least, all decisions are to be made as quick as possible.

**National framework: Criminal offences of minors and juveniles in Slovakia**

In terms of legislative framework, most important laws and provisions applicable to children in justice system are to be found in Constitution of Slovak Republic, Law on social protection of children and social guardians, Penalty code, Family Law, Procedural Law and Civil code.

Besides legislative framework, there is wide net of institutions which are responsible for the appropriate execution of Slovak legislative. These incorporate court system, ministries, state institutions, municipalities, social protection units, police officers and investigators, schools, hospitals and medical workers, youth detention centres, crisis centers, psychologists, helplines, NGOs providing services to children and families, as well as independent monitoring institutions (Ombudsperson, National Center for Human Rights).

In recent years, Slovakia has experienced increase in crimes committed by juvenile offenders. Penal code in general sets criminal responsibility at the age of 14 years. Terminology of penal code uses word juvenile offender for young offenders between 14 and 18 years of age. Children younger than 14 years are referred to as minor of offenders in penal code and due to the age limit set for criminal responsibility cannot be made responsible for criminal offenses. It is important to note, that in parallel, the family law uses only term “minor” for all persons below 18 years of age\(^\text{13}\), which creates sometimes misunderstandings for professionals with no legal background.

**Main problem: Violations of procedural processes by administrative and legal bodies**

\(^{13}\) Zákon č. 300/2005 Z.z., zákon č. 36/2005 Z.z. o rodine
Despite of strong formal will of state aiming at protecting and promoting children’s rights and youth, grave violations on the side of administrative power are observed on a daily basis. Violations of procedural rights of minors and juveniles, inadequate practices in matters involving children and insufficient knowledge and understanding of the international treaties and its provisions are the reasons for common practice of misconduct and failure of executive among state and municipal institutions and employees.

The main problem of not complying with the principles of child friendly justice in Slovak republic, despite rather strong legislation protecting rights of children, is the procedural weakness of institutions and professionals in executive positions. In other words, violations of rights of children in justice system by relevant institutions responsible for protection of child rights (including minors in breach of law) is the consequence of applying the set of procedural and administrative provisions (guidelines, standards, norms, recommendations, rules of procedure), hence either only formally, or not the correct way.
Legal and strategic framework for activities of NGOs in the state and the role of civil sector in the process of the European Integration

Ana Novaković

Introduction:

In Montenegro, legal and strategic framework for work and activities of non-governmental organisations (NGO) are created to a large extent. The process of building the most important regulations, as well as creation of institutional mechanisms which stimulate work of non-governmental sector, was the most intense in the period from 2010 to 2013. This period is characterized by increased number of initiatives from the non-governmental sector, focused on regulating systemic issues for their activities, the issue of cooperation with state and local institutions as well as the issue of financing projects of NGOs from the state budget. However, for answering the question why exactly in this period even the Government decided to support these initiatives, it is immeasurably important to take into consideration the whole political context. Namely, what characterized the year 2010 in Montenegro was certainly the delivery of the opinion of the European Commission on the application for EU membership of Montenegro. The Opinion identified 7 key priorities which needed to be especially addressed by the Government of Montenegro in order to gain the date for start of the negotiations with the EU. One of 7 priorities was Improvement of Media Freedom, Especially Harmonization with the Practice of the European Court for Human Rights in Terms of Libel and Strengthening the Cooperation with Organizations of the Civil Society. In the analytical report followed by the Opinion, the European Commission more precisely pointed out “that cooperation of the Government with non-governmental organizations, especially in the legislative process and defining the main public policies and projects, remains insufficient”, and in this respect that “there is a need to improve the quality of consultations in the process of law preparation with all stakeholders, including civil society”. Soon after presentation of the Opinion, the Government of Montenegro prepared the Action Plan for monitoring implementation of recommendations given in the Opinion, in which the following activities in the area of cooperation of the Government with civil sector were defined: adoption of act on criteria and procedure of the participation of NGOs in the process of creation of public policies, as well as acts on criteria and procedure for selection of NGO representatives in the relevant bodies and working groups which are established for drawing up regulations by the Government/ministry.
Non-governmental organizations have actively participated in drafting of this Action Plan and with their comments contributed to creation of the quality document, which became foundation for development of future legal regulations and institutional mechanisms, focused on creation of the stimulating environment for work and activities of NGOs in Montenegro.

Therefore in this period of time from 2010 to 2013 the following legal regulations were drafted and adopted: the Law on Non-Governmental Organisations, the Decree on Manner and Proceeding of Establishing the Cooperation between the public administration authorities and NGO, the Decree on Manner and Proceeding of Conduct of Public Debate in the Process of Law Preparation, the Strategy of the Development of Non-Governmental Organisations 2014-2016. In January 2011, the Council for Co-operation of the Government of Montenegro with non-governmental organizations, which supplements the work of the Office for Cooperation with Non-Governmental Organizations of the Government of Montenegro, was established in 2007. At the local level, a set of decision models which regulate issues of cooperation between the Government and NGOs, financing NGOs from the local budget and participation of citizens in the decision-making process have been prepared.

In the context of involvement of NGOs in the process of the European integration of Montenegro, the decision of the Government of Montenegro to involve representatives of non-governmental sector in work of working groups for preparation of negotiations for all chapters stands out as the most important one. In that way in February 2012, The Government formed first working groups - for the preparation of Chapters 23 and 24 and it included representatives of NGOs in its composition. After that, representatives of non-governmental sector participated in work of all newly formed working groups for the preparation of negotiations. Additionally, non-governmental organizations independently monitor the implementation of reforms in different chapters.

In that way the legal and institutional framework for work and activities of NGOs in Montenegro is completed to some extent, as well as their involvement in the process of European integration. Having in mind that this framework was established in a relatively short period of time, a little attention is paid to monitoring of implementation of these regulations, or effectiveness of institutional mechanisms. Therefore, it is very important that the following period involves the very monitoring of implementation and quality assessment of all above-mentioned regulations and authorities, which should respond to the needs of non-governmental sector and be in compliance with those needs. What should be avoided is additional standardization of relations between non-governmental sector and authorities, possible “pre-institutionalization” until it becomes clear how existing solutions function in practice and which effects they have.

In further text, a detailed insight is provided into legal and institutional decisions regarding work and activities of NGOs in the country, as well as the participation in the process of the European integration:
Legal and strategic framework:
The Law on Non-Governmental Organisations (Official Gazette of Montenegro, no. 39/11)

Activities of non-governmental organisations in Montenegro are defined, first of all, by the Law on Non-Governmental Organisations. This is systemic law which defines issues of establishment, entry and deletion from the register, status, entities, financing and other issues significant for work and activities of non-governmental organisations. A novelty in this Law in relation to the previous legal solution is the increase of good management within the very NGOs, the increase of transparency of non-governmental sector work, a new, so-called centralized system of financing projects and programs of NGOs from the state budget. This system implies establishment of a centralized inter-agency Commission, which allocates all funds intended for NGOs’ projects in the state budget based on the clear criteria. The new Law is to a full extent aligned with the international standards (Convention on Human Rights of the Council of Europe and Recommendations CM/Rec (2007)14 of the Committee of Ministers of Member States on legal status of non-governmental organisations in Europe), as well as with the practice of the European Court of Human Rights. Regarding national documents, the European Convention for the Protection of Human Rights and Fundamental Freedoms is especially significant for the legal status of NGO, so for that reason the special attention is paid to harmonization of new legal solutions with this document.

The Decree on the Manner and Procedure of Realisation of Cooperation between Public Administration Authorities and Non-Governmental Organisations (Official Gazette of Montenegro, no 7/2012)

The Decree on the Manner and Procedure of Realisation of Cooperation between Public Administration Authorities and Non-Governmental Organisations defines all forms of cooperation of two sectors, recognized in the regional and European practice, especially in the Code of Good Practice for Civil Participation in the Decision-Making Process of the Council of Europe. In such manner, the Decree defines the manner of informing NGOs by the public administration authorities, the process of consulting NGOs by the public administration authorities, as well as the manner and procedure of selection of NGOs’ representatives in working bodies which are formed by the public administration authorities during preparation of various regulations.
The Decree on Manner and Proceeding of Conduct of Public Debate in the Process of Law Preparation

The significance of the adoption of this Decree is reflected in the fact that before its adoption the procedure of conduct of public debate had not been normatively regulated. The Development of the institute of public debate, which implies consultations with the public stakeholders (authorities, organisations, individuals) in the initial stage of law preparation and debate on the text of the law, provides first of all informing the general public on the planned activities regarding law preparation, then more complete exchange of information between ministries and public stakeholders, better consulting of public stakeholders before draft preparation, which is the highest form of civil participation in the decision-making process.

The strategy of Development of Non-Governmental Sector 2014-2016

The strategy represents the new strategic framework for development of stimulating working framework and activities of non-governmental organisations in Montenegro. Based on the analysis of implementation of strategic documents (the Strategy for Cooperation of the Government and NGO 2009-2011), the Strategy recognizes several key areas within which the significant number of activities will be carried out in the following two-year period. Areas planned by the Strategy are: participation of NGOs in the creation and implementation of public policies at the state level, participation of NGOs in the creation and implementation of public policies at the local level, financing of NGOs at the state level, financing of NGOs from the budget of local self-governments, development of philanthropy, development of volunteerism, participation of NGOs in the implementation of the concept of informal and lifelong education, social entrepreneurship, establishment of conditions for equal access of persons with disabilities to public administration authorities, statistics and records regarding NGOs, the role of NGOs in the process of EU accession of Montenegro and capacity building of NGOs.

Institutional framework: Office for Cooperation with Non-Government Organisations of the Government

The Office for Cooperation with Non-Government Organisations was established in 2007, as the organizational unit of the General Secretariat of the Government of Montenegro. The task of the Office is to improve and coordinate the work of state authorities with NGOs on the principles of partnership, transparency, responsibility, mutual informing and independence of NGOs, to initiate and organize education of
This project has been financially supported by the European Union.

civil servants on issues significant for cooperation with NGOs and civil participation, and to cooperate with NGOs, their coalitions and networks, international organisations and institutions concerning issues which fall under the competence of the Office. The Office also performs professional and administrative activities for the purpose of the Council for Cooperation of the Government of Montenegro with Non-Governmental Organisations.

**Council for Cooperation of the Government of Montenegro with Non-Governmental Organisations**

The Council for cooperation of the Government of Montenegro with non-governmental organisations was established by the Decision of the Government of Montenegro and it was constituted in January 2011 and it consist of the President and 24 members (12 representatives of the state authorities and 12 representatives of NGOs, who were selected based on the public tender and on proposal of Government). The President of the Council is the representative of the Government, while the Deputy is the representative of NGO. The Council is responsible for monitoring the implementation of the Strategy for cooperation of the Government of Montenegro with non-governmental organisations and Action Plan for its implementation; it gives opinion on regulations and other documents relating to work and activity of NGOs, defines recommendations for improvement of cooperation of the Government and NGOs and encourages dialogue between two sectors. At least once a year the Council informs the Government on its work and issues significant for achievement of cooperation of the state authorities and NGOs.

**Participation of NGOs in working groups for the preparation of negotiations of Montenegro with EU**

Representatives of non-governmental sector are involved in the composition of working groups for the preparation of negotiations with the EU. The legal ground for this involvement is contained in the Decision of the Government on establishment of the structure for negotiations of accession of Montenegro to EU. By the end of 2013, representatives of non-governmental sector were involved in the composition of 33 working groups. Involvement of NGOs’ representatives in working groups influenced the higher transparency of work of this working body, as well as better quality of action plans which were created for different chapters.
Coalition of NGOs for monitoring negotiations within the framework of Chapter 23

Apart from the formal participation in work of working groups, non-governmental organisations unite and independently monitor reforms in different fields. One of such models is Coalition of non-governmental organisations for monitoring negotiations within the framework of Chapter 23. The Coalition consists of 16 non-governmental organisations with multiannual experience and expertise in the fields related to Chapter 23: judiciary, corruption and human rights. Since its establishment, the Coalition created, in July 2012, two independent reports on implementation of reforms in these fields, as well as the comment on the Government’s Report on implementation of measures from the Action Plan for the Chapter 23.
Legal and strategic framework for activities of NGOs in the state

Marcel Zajac

Civic Society

The civic society represents the third sector existing alongside the state and the market. Civil society is created by heterogeneous free activities of citizens that are independent of public authorities (state, public sector, general government, political power) and whose purpose is not to gain a profit (market, business sector), but the realization of some interest, both - the higher interest, public, general or a partial interest, group, or individual.

The very term “third sector” in today’s Slovakia is often related only to the one component of the civil society, formed by the non-governmental organizations.

NGOs are seen as the strongest component of civil society as they represent the institutional background for active citizens to act in a planned, strategic and institutional way. At the same time they are financially difficult to sustain for the reason of financial demands. Furthermore they are entering the relationships that may create certain types of addiction.

Therefore very important is to know that if we speak about the civil society, we must talk about citizen individuals, actively entering into public policy, involved in administrative proceedings, petitions organizers, bloggers, initiators on social networks, ...

It should also be noted that there are historically known institutions in society, which are non-profit and non-governmental but they exceed an ordinary perception of the term “non-governmental” non-profit organization by theirs history and activities (for example trade unions, associations of towns and villages, professional associations such as chambers (lawyer or medical), or significant humanitarian organizations “Red Cross ...“)

Further, let us look especially to the non-governmental organizations.

**Nature of non-governmental organization (NGO):**

1. **Legislative - organizations with the legal entity.**
   
   *The emphasis is on that a legal entity allows them to act in legal relations.*

   Institutionalization: Unlike informal and casual associations, NGOs take somewhat formal and institutionalized forms. In most cases they have got statutes or a charter, or other similar document which defines the objectives and details the scope of their activities. Their activities must be accountable in the relation to its members and supporters.
2. **Non-governmental** - are not established by the government neither its authority nor an organization. Not to be set up by the government expresses their degree of independence from these structures. Historically, this independence was the achievement of political changes in 1989. Today, many organizations voluntarily extend this definition as follows: “NGOs are established by citizens - natural persons not by bodies and government organizations, municipality or business entities.” This definition extends their degree of independence not only from the government but also from other subjects.

3. **Nonprofit** – regards the definition of these legal forms in terms of their economy. This does not mean that they do not work with financial gain but they must not redistribute this profit among its members or founders but the profit must be used to fulfil the mission to which they were set up. A non-profit purpose: NGOs do not act in their own interests. Their aim is the public benefit. They do not serve for the business or professional interests of its members.

**The basic division NGOs according to the nature of their activities:**

In Slovakia we recognize the following types of NGOs:

1. **NGOs providing services.**
   These organizations are created there and then, where the networks of organizations of the other two sectors - the state and the market fail or may not be functional. According to who they provide their services to, we know
   - Public benefit organizations providing services - provides services to previously undefined or undetermined citizen group.
   - Mutually beneficial organizations providing services – provides services only to their members. These organisations are represented the most, in well-functioning society it is about 80% of all NGOs.

2. **“Pioneering” NGOs** which are involved in the development, advancement of society or the verification of the results of science and research in society. They carry out their activities in the field of science and research just then and for the topics even though they are not interesting for the state or to the market and often remain unfulfilled. NGOs are absolutely irreplaceable in verifying the impact of various proposed amendments and regulations for citizens, individuals or specific groups. These include various “Think-tank organizations, analytical centres, but also the organizations providing infrastructure, platform or association. It is a number of very small groups of NGOs.

3. **“Watch Dog” NGOs** are dealing with quality control of the functioning of society. Their main objective is to take care of the public institutions paid by public funds give services in high quality and efficiency. It is said that these organizations are a barometer of the quality of democracy in society. They are based on the fundamental principles of individual civil rights in society. They are often very well known and popular NGOs with a strong impact and
overlap in public policy. With what they have also a big problem while they are entering the different relationships and dependencies in which they may fail completely. On the other hand, societies do not often know, even with a good will, how to help such organizations in their institutional strengthening.

The number of these organizations depends on the quality of the society, as well as the intensity and theirs access to certain topics. Here are known internationally operating organizations such as “Amnesty International”, “Transparency International”, but also the “Greenpeace International”.

The basic division of the NGOs according to the social field in which they operate (the purpose for which they were established):

State of play in the Slovak Republic:

Laws which NGOs are constituted by and that affect their lives in the Slovak Republic are established on the Constitution of the SR adopted after 1989, after the social changes and reflect the company’s desire to be a democratic and justice. Status of the citizen in such imagination is relatively strong and for this there is also an effort to be a civil society. Therefore legislation allows citizens to establish NGOs and do not speak ahead of societal areas where such organizations should work. Legislation only identifies certain areas or certain types of activities that may cause their non-registration, or rather to cancel NGOs as legal entities. There are negatively defined terms such as “arming”, “denial of constitutionally defined rights of individuals / citizens’ etc.

About the social areas / purposes they were established for, it is more said in legislation regulating the environment in which NGOs work and live mainly when a company is looking for rate of the public benefit of such organizations in order to be more supportive the more public benefit organizations.

There are countries that have the term “public benefit” defined in the legislation. And there are also countries and the Slovak Republic belongs to this group, where it is not clearly defined. There is either lead a discussion on a definition, or it leaves the assessment of this status of the organization for various public institutions (often tax authorities).

Currently, in Slovakia the area of public beneficiary include:

- protection and health support, prevention, treatment, social reintegration of drug addicts in the area of Health and Human Services,
- support and development of physical culture,
- provision of social assistance,
- preservation of cultural values,
- support for education,
- protection of human rights,
- protection and creation of environment,
- science and research,
- organization and facilitation of volunteering.
However, this is defined in the Law on Income Tax in paragraph that says about who might the tax payer (legal or natural person) to remit the proportion of its paid taxes, which may or may not accept either other public or private institutions.

**Types if the NGO according to the act they were established:**

1. **In the first group there are organizations - “assembling citizens”**

**Civic associations.**
They bring together citizens (at least 5), which connects clearly defined common interests and goals. (e.g. common interest of parents of disabled children about providing some specific services, but also the collecting of postage stamps). Civic organizations are founded and managed by citizens who established them, according their current will and preferences.

**Non-profit organizations providing generally beneficial services.**
They are established by citizens, on clearly defined intention to provide those one who needs certain generally beneficial service, while the service recipient does not have to be a member of, or be involved in its working. Many times it is about a selfless aid of stronger ones to those one in need.

**Purposeful Church and religious society facilities.**
They are established on the similar principle such as ‘Non-profits organizations”, while the major motivation for the expressed solidarity is the belief, religious beliefs.

2. **In the second group there are organizations - “associating financial means’**

**Foundations.**
Foundations are an purposeful property associations which serves supporting public benefit purpose. The Act according to the Foundation is set up is not determined neither the public benefit purpose nor number of them.

**Non-investment funds.**
They are a non-profit legal entity which is gathering the funds intended for the fulfilment of generally beneficial purpose or for humanitarian aid for an individual or a group of persons.

3. **The third group are an organizations with an international element.**

These are international organizations associating citizens or financial projects that carry out activities on the territory of the Slovak Republic but their registration, legal entity and the form of its implementation and fulfilment is carried out in another country.

**The state’s relationship with NGOs**
The reasons for the involvement of NGOs in the implementation of the state and municipality tasks and for possible cooperation can be divided into two basic groups. The first group represents the **value reasons** for which it is important that political elites, government and officials of public administration share the conviction that the democratic state needs civil society for its functioning, and therefore also non-profit organization.
The second includes **practical and economic reasons**. There are areas where NGOs provide services and carry out activities that bodies made by state shall not perform adequately or at all, or the NGOs realized them cheaper or better.

**The concept of civil society development in Slovakia:**
The concept includes basic starting points and vision on priority areas for the civil society development in which the state and the public government in Slovakia shall be active. The concept focuses on four areas, in which proposes activities of public government, namely:

- cooperation of public government and NGOs;
- supporting active citizens and strengthening social capital;
- supporting public debate on important issues of society;
- open governance and transparent public affairs governance and civil society.

**The Government Council of the Slovak Republic for the Non-governmental organizations.**
It is one of the instruments to the fulfilment of the Programme Government Statement of the Slovak Republic that the Government Council assesses achieved results and proactively proposes solutions in the given area. The Council is designed so that its action had contributed to strengthening participatory democracy in a society in order to the accepted governmental documents in the public policy area, were not only effective, fair and democratic, but also accepted whit a wide consensus of governmental and non-governmental sectors and at the same time that their fulfillment was controlled by civil society.

The Council is a permanent expert, consulting, coordinating and consultative body of the Government of the Slovak Republic in the field of non-governmental organizations, which are mainly the civic associations, foundations, non-profit organizations providing public services, non-investment funds and interest association of legal entities and they acts in the area of the civil society development in Slovakia

**Plenipotentiary of the Government of the Slovak Republic for the civil society development**
He was established with the purpose to solve the crucial issues of the participation of active public on the public affairs governance, non-profit organizations governance, as well as state governments and municipality to be opened to the active public in the Slovak Republic

**State and NGO funding**
A state plays a major role in financing or in the creating the conditions for the NGOs financing.

**Public funds for NGOs and direct support for NGOs from public funds:**
Public institutions should prepare and implement that kind of mechanisms of public finances flows that enables NGOs to use them.

- Public tenders
- Subsidy mechanisms
Indirect support of NGOs from public resources:

- State through legislation allows to decrease taxes, contributions, payments or fees for non-profit bodies active in the field of public benefit or for their supporters.
- Non-taxation of income from the main activities of NGOs
- Lower prices for services in state-owned companies (shipping, rail transport, ...)
- Possibility of depreciation for NGOs donations from the tax base of business subjects
- Assignment mechanism
- Remission of VAT for the products or services provided by NGOs
- Remission of customs duties and other charges in the case of transferring to NGOs

Their own resources of NGOs

- Promoting corporate donation
- Supporting individual donations
- Supporting volunteering
- Facilitating access of NGOs to government contracts

In NGOs, ideal would be a suitable combination of these resources. The more incomes from its own resources an organisation has got the more independent it is.

Recommendations:

Recommendations for NGOs:

- **Invest time, money and energy to mutual communication among NGOs:**
  Communication at the national level
  Communication of organizations sharing common goals
  Communication of organizations at regional level
  The aim of this communication is
  - Blanket coverage of services offered by NGOs
  Mountain rescue
  Green school
  Patient organizations
  - Coordinated approach to partners from other sectors of society
  Agreement of community foundations with the large corporation representatives on joint programs in different communities
  Process of the creation of Economic and social development programs and other strategic, development documents
  Drafting legislation that modifies the life of NGOs
  - Application of the principle of solidarity
  Campaign “SOS 3 S” against the bad proposal of the act on foundations
  Campaign against uranium mining in Jahodná village
  Campaign for educational reform,
Campaign for legislation regulating the financing of domestic care services

- **Think about establishing a fair mechanism of representation of NGOs and civil society in relationship with public institutions**
  Forms of relationships from a position of NGOs:
  - NGOs that cooperate with public institutions
  - NGOs that have got a neutral relationship with public institutions
  - NGOs that criticize public institutions and try to change their decisions

Interests of public institutions:
  - to communicate with a small number of partners
  - finality, immutability of the agreement reached
  - to have the last word (legislation)
  - to have partners under control

Recommendations:
  - Try to define various partnerships for the various relationships and equip them with different representatives
  - Do not have an ambition to have got the NGO representatives in all relationships

- **Discuss about the definition of public benefit and on how this status will bind the public finances to himselfs**
  - There have been discussion in SR for more than 10 years without legislative termination
  - The NGO Code, Act on the associations, ACCREDITATION
  - The attempt to bind the public benefit to the type of NGO is indeed simpler and easier for public institutions to carry out, nevertheless it raises problems in the form of social dis-agreement
  - It is more realistic to orient a public benefit to that field of action in which the organization carries out its own activities. Public institutions, however, indicate an excessive width of public benefit and thus the impossibility of controlling of such determined extent of it.
  - Currently, there is a combination of above mentioned two approaches. The aim of this is to establish of a voluntary accreditation registry, which would give those organizations, working in one of the broadly-defined areas of public benefit and want to use the public means in its own activity, various institutional responsibilities (audit, annual report, tax declaration).

- **Do not avoid the discussion with public institutions about financing of NGOs in society**
  - NGO is not a new concept in Europe and even not in the space of our both countries. They were only repressed and artificially suppressed by dictatorships

A big amount of clubs and charity, cultural companies, but also for example organisations focused at nation, ethnic identities or religious rights and freedoms. There were also known philanthropic activities of funds, especially family ones.
• The absence of individual freedom, lack of access of individuals to governance (dictatorship) in Europe was historically rejected (fascism, communism as well as their manifestations)

• On the contrary, the USA and also Europe, more prefer elements of participatory governance for it proves to be more efficient and sustainable (experience with Western Europe. But today, particularly in the fight against corruption and clientelism).

• In this discussion do not just say about the contribution of public funding to NGOs but also on the ability of NGOs to supplement these resources by sources of individuals and corporations.
The System of Asylum in Montenegro

Sandra Bugarin

The system of asylum in Montenegro started to be implemented by adoption of the Law on Asylum (Official Gazette of the Republic of Montenegro, No. 45/06) which entered into force on 25 July 2006, and its implementation started on 25 January in 2007.

Before adoption of the Law on Asylum, these issues had been solved by the federal Law on Movement and Residence of Aliens, and decisions had been adopted by the Federal Ministry of the Interior.

We recall that the Constitution of Montenegro (Article 8) prohibits any direct or indirect discrimination on any grounds.

Furthermore, the Constitution of Montenegro (Article 44) defines that an alien who has a founded fear of being persecuted for reasons of race, language or ethnicity or affiliation to the group or political convictions may require the asylum in Montenegro.

The Constitution of Montenegro (Article 9) defines that ratified and published international agreements and generally accepted rules of the International Law are constituent part of the interior legal system, have primacy over the domestic legislation and are directly applicable when regulating relations in a different way from the national legislation.

The Decree on Proclamation of Independence of the Republic of Montenegro defines that the Republic of Montenegro shall apply adopted international agreements and treaties to which State Union of Serbia and Montenegro had acceded and which are related to Montenegro and in compliance with its legal order.

The Law on Asylum itself contains the statement that the Convention and the Protocol Relating to the Status of Refugees represent the grounds of the legal system for refugee protection management, amended by documents on human rights.

By-laws which were adopted with the aim of implementation of the Law on Asylum are:

- Rulebook on the procedure and the manner of taking photographs, fingerprints, signatures and other data from persons seeking asylum (Official Gazette of Montenegro No. 04/07)

The State is indisputably obliged to determine the identity of persons seeking asylum, to carry out verification whether the stated person has already sought the asylum in Montenegro or another country, as well as to compare data with data from the police and other public authorities.
- Rulebook on the forms of applications for obtaining asylum and minutes on orally submitted application for obtaining asylum (Official Gazette of Montenegro, No. 04/07).

The abovementioned bylaw was adopted in order to allow the person seeking the asylum to submit the application for obtaining asylum as soon as possible, which should contain appropriate data on the person, origin, reasons for which he/she seeks asylum as well as other data significant for initiating and conducting the proceedings.

- Decree on the Content and Manner of Keeping Records in the Area of Asylum (Official Gazette of Montenegro No. 09/08), of 08 February 2008.

Pursuant to the Article 70 of the Law on Asylum, Directorate for Care of Refugees is obliged to keep, update and use records on persons seeking the asylum, having the recognized refugee status and having approved additional or temporary protection, according to rights they exercise with issued and temporarily retained personal identification documents.

- Decree on Appearance, Content of the Form and the Manner of Issuance of the Documents for the Asylum Seekers, Recognized Refugees and Persons under the Additional or Temporary Protection (Official Gazette of Montenegro, 13/09 from 19 February 2009)

The stated bylaw defines the appearance and the content of the forms and the manner of issuance of the identification document to the person seeking asylum, identification card to the recognized refugee, identification document to the person under the approved additional protection, identification document to the person under the approved temporary protection and passport to the person with a recognized refugee status.

- Decree on the Financial Assistance for Persons Seeking Asylum, Persons with Refugee Status and Persons who have Additional Protection (Official Gazette of Montenegro No. 56/08 from 19 September 2008)

- Rulebook on the manner of health care implementation for persons seeking asylum, persons with Refugee Status and Persons who have Additional Protection and persons who have temporary protection (Official Gazette of Montenegro No. 31/10 from 27 May 2010).


Refugee status shall be recognized to an alien if, upon his or her application for asylum, it has been established that he or she has a well-founded fear of being persecuted for reasons of race, religion, citizenship, affiliation to a particular social group, or political
opinion, in his or her country of origin, and because of this fear he or she is unable or unwilling to avail himself or herself of the protection of the country of origin.

Subsidiary protection, as supplemental protection of refugees in accordance with human rights documents, shall be approved to an alien who has not met the requirements for the recognition of refugee status but who would be subjected to torture or inhuman or degrading treatment or punishment, or whose life, safety or freedom would be threatened on account of generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which seriously threaten life, safety or freedom, in case he or she returned to his or her country of origin or another state.

Temporary protection is an urgent and exceptional measure by which aliens shall be provided protection in case of a mass, sudden or expected influx from a state where their life, safety or freedom is threatened on account of generalized violence, foreign aggression, internal conflict, massive violations of human rights or other circumstances which seriously threaten life, safety or freedom, where because of the mass influx there is no possibility to conduct individual proceedings for refugee status determination.

Basic principles incorporated in the Law on Asylum are the following: non-refoulement, non-discrimination, confidentiality and data protection, family unity, non-punishment for unlawful entry or residence, protection of person with disability, provisions relating to gender, respect for legal order, legal protection, cooperation with UNHCR, etc.

In particular, after the adoption of the Law on Asylum, a separate organizational unit has been established within the framework of the Ministry of the Interior – Asylum Office, now Directorate for Care of Refugees.

Directorate for Care of Refugees shall receive applications for asylum, conduct proceedings and issue decisions upon the application for asylum, issue decisions on cessation and revocation of asylum, conduct proceedings and issue decisions on status of persons who have already had status. It shall also issue documents for proving identity and travelling abroad, legal status and rights in accordance with regulations, keep records on situation in the country of origin, conduct proceedings for approval or revocation of additional protection, temporary protection and perform other tasks from the field of asylum.

The State Asylum Appeals Commission, which was established by the Decree of the Government of Montenegro in November 2007, shall decide on appeals lodged against decisions of the first-instance body and it consists of chairman and four members who are judges of Administrative Court of Montenegro or professional assistants in the same Court.
PROCEDURES FOR OBTAINING PROTECTION IN MONTENEGRO

A – SUBMISSION OF APPLICATION FOR ASYLUM

An alien may declare, at a border crossing, his or her intention to submit an application for asylum.

An application for asylum shall be submitted to the Directorate for Care of Refugees, in a language which a person seeking asylum is familiar with (language which is in official use in Montenegro, language of his or her country of origin or other language he or she is familiar with).

Non-competent body before which an alien seeks asylum is obligated to record such application and inform the Directorate on that without delay.

B- THE PROCEDURE OF DETERMINATION OF THE REFUGEE STATUS

An employee in the Directorate for Care of Refugees, the competent body for procedure upon the request, to which an alien addressed for the purpose of submission of application for asylum, shall perform the following activities:

• Informing an asylum seeker about his/her rights and obligations,
• Providing interpreter and legal representative to an asylum seeker,
• Filling in the form of application for asylum,
• Taking photographs, fingerprints and signature,
• Copying personal and other documents relevant for the proceeding,
• Issuing a certificate on the submitted application for asylum,
• Calling asylum seeker for an/scheduling an interview
• Conducting an interview (one or more),
• Collecting information on the country of origin,
• Preparing and issuing a decision,
• Proceeding on appeal.

Interpreter and legal representative

The Directorate for Care of Refugees shall allow an asylum seeker to participate and follow the course of proceedings in language he/she indicated he/she understands, in a way that it provides him/her an interpreter. An asylum seeker shall be handed written notification in language he/she understands on the right to free legal aid and the manner of realization of communication with NGO which is engaged in providing free legal aid through assistance in submission of applications for asylum during an interview as well as making written submissions.

Form of the application for asylum

In the presence of the interpreter, legal representative and representative of UNHCR Office in Podgorica, an asylum seeker shall be enabled to submit an application for
asylum, which contains appropriate data on person, origin, reasons for which he/she seeks asylum and other data significant for initiation and conduct of proceedings.

**Taking photographs, fingerprints and signature**

For the purpose of establishing identity of an asylum seeker, taking photographs, fingerprints and signature shall be carried out without delay and at the latest within three days from the day of submission of application for asylum.

**Documents relevant for the proceeding**

An employee of the Directorate for Care of Refugees shall copy personal and any other documents which may serve as a proof for establishment of facts in the proceeding.

**Certificate on the submitted application**

The certificate on the submitted application, after the submission of application for asylum, shall be issued to an asylum seeker.

**Call for an interview**

With the aim of issuing decision on an asylum application, the person conducting the proceedings shall conduct one or more interviews with an asylum seeker. An asylum seeker (in language he/she understands), legal representative, representative of UNHCR and an interpreter shall be notified on date, time and place of making statement of an asylum seeker in writing. If asylum seeker fails to respond to the scheduled interview, he shall be delivered a second call. If he/she fails to respond to a second call as well, the decision on termination of proceeding shall be made.

**Making a statement (interview)**

It represents one of the most complex activities in the proceeding on asylum application in which the person conducting the proceeding shall establish and examine all relevant facts and circumstances, especially information on the country of origin, assess the general credibility of an asylum seeker and with the assessment of validity of evidence, prepare proper and legal decision in terms of determining refugee status or other form of protection. The person conducting the proceeding shall take into account the cultural background of an asylum seeker, and pay special attention to certain conditions in which asylum seekers are, especially persons who experienced violence, torture or trauma. Apart from the stated, a special duty is to warn the asylum seeker about his/her obligation to present all circumstances and facts relating to his asylum seek in Montenegro, where asylum seeker must be enabled to thoroughly present, clarify and substantiate with all available evidence, all facts and circumstances relevant for issuing the decision upon the application for asylum. An interview shall be conducted under conditions which ensure confidentiality of proceedings with respect for the principles *exclusion of public* and confidentiality and data protection. Making a statement may be audio-recorded, on which an asylum seeker must be informed.
The minutes on the interview, in which basic information on the application are given as an asylum seeker presented them, shall be taken.

C- INFORMATION ON COUNTRY OF ORIGIN

During collecting and using information on country of origin, the Directorate for Care of Refugees uses following principles:

- Relevance in relation to the motive for asylum,
- Objectivity,
- Reliability of sources,
- Accuracy and timeliness of information
- Transparency.

Employees of the Directorate for Care of Refugees, pursuant to the Law on Asylum, may collect and search information and data on conditions in the state of origin of asylum seekers or persons who obtained asylum from different sources, including UNHCR. Using Internet, they verify the political background of the source, compare information with other sources, and check the mandate of organization which offered information. Mainly used websites are HUMAN RIGHTS WATCH, AMNESTY INTERNATIONAL, HELS. COMITY, UNHCR etc. Also, employees may collect certain information on countries of origin through the Ministry of Foreign Affairs and European Integration of Montenegro.

D – DECISION IN THE PROCEEDING

Decisions in the proceedings upon the application for the asylum shall be issued at the latest within 90 days from the day of submission of the application, unless it is about clearly unfounded application, when the deadline for decision taking is, instead of 90 days, reduced to 15 days.

On the other hand, applications of minors and persons with special needs have priority in solving, so the decision shall be issued within 30 days.

After established factual situation and given evidence the decision shall be issued, which may be:

- An order which adopts the application and recognizes the status of refugee or approves additional protection
- An order which rejects application for asylum (absence of founded fear of persecution, clearly unfounded application etc.)

Manifestly unfounded asylum application (Article 41)

An asylum application is manifestly unfounded if the person has no valid grounds for the application due to fear of persecution in the country of origin, or if the application is based on deliberate fraud or abuse of the asylum procedure.

An asylum seeker shall be considered to have no valid grounds for the application due to fear of persecution if:
1) the application is based on economic reasons or better living conditions;

2) the application is entirely lacking the information that there would be exposure to fear of persecution in the country of origin, or the asylum seeker’s statement does not contain any circumstances or details of personal persecution;

3) the application obviously lacks credibility, and the person’s statement is inconsistent, contradictory or realistically impossible;

4) it may be generally considered that no fear of persecution can exist due to the overall political circumstances, legal situation or enforcement of laws in the country of origin or third country, unless the asylum seeker can prove that this state is not safe for him or her;

5) the person was earlier banned from entering Montenegro, in compliance with the law, and the reasons for which the ban was imposed have not changed.

EXERCISE OF RIGHTS OF PERSONS FROM THE ASYLUM SYSTEM

Decree on Organization and Manner of Work of Public Administration determines that activities of administration related to care of persons from the asylum system shall be performed by the Directorate for Care of Refugees and that through the performance of activities relating to care of persons seeking asylum, who have the status of refugee, additional or temporary protection approved, and that care includes support in exercise of rights to: accommodation, education, health care, social protection, work, legal aid, freedom of religious convictions, access to humanitarian and non-governmental organizations, humanitarian aid, family reunification, inclusion in society and other rights prescribed by Law. Furthermore, the Law on Asylum defines:

- That an asylum seeker shall be provided accommodation by the competent authority in the Centre for accommodation of persons seeking asylum or other facility for collective accommodation of a competent authority,
- That a person with disability shall be provided a special accommodation and care.

According to Act on internal organization and systematization of working posts of the Directorate, activities of care are located in Department – Centre for Accommodation of Persons Seeking Asylum, as a special organizational unit of the Directorate.

Based on the Conclusion of the Government of Montenegro, the construction of Centre for Accommodation of Persons Seeking Asylum and Aliens started in Spuž in 2006, with a capacity for accommodation of 100 persons. The project was implemented by the Ministry of Interior and UNHCR by 2009. Based on the Conclusion of the Government of Montenegro from 2009, there was a division of construction plot, so one part was allocated for the construction of the Centre for Accommodation of Persons Seeking Asylum and the other part for construction of Shelter for Aliens. According to the above-mentioned Conclusion, the Directorate for Care of Refugees as a future user of the Centre and the Public Works Directorate are obliged to further implement the
project of the construction of the Centre, now with a capacity for accommodation of 65 persons, with facilities needed for care of asylum seekers. The project has been previously implemented with numerous technical, financial and property issues. The implementation of the project is in the final stage, i.e. the performance of terrain restructuring of the complex of the Centre and the construction of the designed power capacities are going to start very soon. There is a realistic basis that the Centre will be ready to be put into effect this year. The implementation of the project of the Centre reconstruction from 2009 was financed through the capital budget and through IPA implementation 2009. The implementation of IPA project is in the final stage. In order to put the Centre into effect after the realization of the forthcoming construction works, it is necessary to perform a technical review and to obtain the certificate of occupancy as well as work permits of the certain facilities of the Centre.

Regarding the fact that the Centre for the Care of Refugees has not yet been operational, nor did the other facilities for the collective accommodation, in the previous period the accommodation was provided depending on needs and objective possibilities of the Directorate, through the alternative solutions, that is by using services of particular hotels and resorts and through the lease of individual residential buildings, as unfurnished and more often as furnished space. In most cases, the accommodation was provided on the territory of Podgorica. In accommodations within the hotel capacities, a service provider provided accommodation, food and hygiene, while in accommodations in individual residential buildings food and hygiene was provided by the Directorate through the delivery of usually seven-day or ten-day packages for food and hygiene.

**FIGHT AGAINST ILLEGAL MIGRATIONS**

Before submitting the application for asylum and after the finalization of the decision upon the asylum application, provisions of the Foreigners Law shall be applied to the person who stays in Montenegro.

Fight against illegal migrations represents one of the significant priorities in the work of Sector of Border Police of Montenegro, therefore the cooperation and exchange of information is necessary on the national as well as on the regional and international level.

The Sector of Border Police successfully deals with combating this phenomenon, although it still does not have all available capacities, so the technical equipment as well as increased number of police officers must be at a higher level.

The source of illegal migration issue comes from the area of EU Member State, Greece, through which territory illegal migrants, mostly without documents, come to the territory of the Republics of Albania, Macedonia, Serbia and Kosovo and further use the territory of Montenegro as a transit. According to sources of relevant international bodies, 2.000.000 illegal migrants are currently residing in Greece, which indicates that in 2013 there will be an increased trend of influx of migrants to the region countries, in order to reach Western Europe countries as soon as possible.
The forthcoming accession of the Republic of Croatia to EU will additionally aggravate the position of Montenegro, having in mind that illegal migrants will seek the shortest way to arrive to a Member State, so in the following period it is likely to expect an increase of illegal migrations in Montenegro with elements of organization.

Illegal migrations in Montenegro currently have a transit character over the territory of Montenegro to countries of EU, and it is mainly about economic immigrants.

The Sector of Border Police succeeded to return a certain number of persons caught illegally on the border with the Republic of Albania to the police of the Republic of Albania in the summary procedure of readmission. Illegal immigrants who are not admitted in the summary procedure are prosecuted for misdemeanor, are sentenced to a term of imprisonment, after which they usually sought asylum.

In order to create conditions for performing activities of control of movement and residence of aliens in accordance with standards and recommendations of EU, as well as more efficient fight against illegal migrations, The Police Administration has undertaken activities in the previous period on the establishment of the Alien Shelter in Montenegro, with capacity of 46 persons, which in the close future will not meet the needs because of the trend of growth of illegal immigrants.

FUTURE ACTIVITIES ON THE WAY TO THE EUROPEAN UNION

Respecting the significance of the asylum system in the Chapter 24 (Justice, Freedom and Security) in the process of negotiation with the European Union, it is necessary to adopt a new Law on Asylum, which will identify institutes of the European acquis on asylum which will be in compliance with the national legislation, as well as the best practices of EU Member States, especially in the following fields:
- Identification of the asylum seekers,
- Conditions of acceptance
- Procedures of giving and revoking international protection
- Standards for qualification of asylum seekers as beneficiaries of international protection,
- Rights of persons with approved protection.

Institutes which are completely in compliance with acquis such as acts of persecution, reasons for expulsion, executors of persecution, secure country of origin, first country of asylum, secure third country, unacceptable requests, procedure at the border, judicial protection etc. will be incorporated in the new law.

Harmonization of the national legislation with the relevant acts of the EU acquis (existing as well as updated texts) in the field of asylum will be done in accordance with commitments undertaken during the bilateral screening for the following documents:
- Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national;
- Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection,
for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

- Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted;
- Directive 2005/85/EC on minimal standards in Member States on procedures for granting and withdrawal of refugee status;
- Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof;

Pursuant to all above mentioned it is clear that the asylum is more than the mere procedure and system should be functional, effective and integrated. Close cooperation between state authorities competent for issues of asylum and border police is necessary so that the system could implement the European policy on asylum, and to build the common system of knowledge and the manner of raising awareness in this field in accordance with legislation of EU.

**STATISTICAL INDICATORS**

In the procedure of the implementation of the Law on asylum, statistical indicators for the field ASYLUM look like this:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NUMBER OF SUBMITTED APPLICATIONS</th>
<th>APPROVED PROTECTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>3</td>
<td>1 (REFUGEE STATUS)</td>
</tr>
<tr>
<td>2008</td>
<td>7</td>
<td>1 (APPROVED PROTECTION)</td>
</tr>
<tr>
<td>2009</td>
<td>20</td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>2011</td>
<td>239</td>
<td>3 (APPROVED PROTECTION)</td>
</tr>
<tr>
<td>2012</td>
<td>1529</td>
<td>1 (ADDITIONAL PROTECTION), 1 (REFUGEE STATUS)</td>
</tr>
<tr>
<td>2013</td>
<td>892</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>2699</td>
<td>7</td>
</tr>
</tbody>
</table>

Refugee status granted in 2007 was revoked in 2010. One additional protection approved in 2011 was revoked same year.

**Currently, 4 additional protections and 1 person with a refugee status are effective.**
CURRENT DEVELOPMENTS WITHIN EU ASYLUM ACQUIS (TRANSPOSITION INTO NATIONAL LEGISLATION AND PRACTICES)

JUDr. Nataša Hrnčárová, PhD.

I. INTRODUCTORY REMARKS

The status and legal definition of a refugee is set out in the *1951 Geneva Convention Relating to the Status of Refugees* (further referred to only as “1951 Geneva Convention”) that has been signed and ratified by all Member States of European Union (further referred to only as “EU Member States”). The provisions of the 1951 Geneva Convention are implemented through the national legislation of each country. All the EU Member States make a distinction between asylum seekers and refugees. An asylum seeker is a person submitting a request for refugee status. The asylum seeker is not granted refugee status unless the EU Member State decides they qualify, following a defined legal procedure. Article 18 of the EU Charter of Fundamental Rights states: “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union”.

Asylum is granted to people fleeing persecution or serious harm in their own country and therefore in need of international protection. Asylum is a fundamental right; granting it is an international obligation, first recognized in the 1951 Geneva Convention. In the European Union, an area of open borders and freedom of movement, countries share the same fundamental values and States need to have a joint approach to guarantee high standards of protection for refugees. Procedures must at the same time be fair and effective throughout the European Union and impervious to abuse. With this in mind, the EU Member States have committed to establishing a Common European Asylum System.

Asylum flows are not constant, nor are they evenly distributed across the European Union. Still, asylum must not be a lottery. EU Member States have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring they are treated fairly and that their case is examined to uniform standards so that, no matter where an applicant applies, the outcome will be similar.

Since 1999, the EU has been working to create a Common European Asylum System and improve the current legislative framework. Between 1999 and 2005, several legislative measures harmonizing common minimum standards for asylum were adopted. Also
important was the strengthening of financial solidarity with the creation of the European Refugee Fund. And in 2001, the Temporary Protection Directive allowed for a common response of European Union to a mass influx of displaced persons unable to return to their country of origin. The Family Reunification Directive also applies to refugees.

EU Member States retain a large degree of sovereignty over the way asylum seekers and refugees are treated. This means that the conditions and benefits asylum seekers and refugees receive in each EU Member State can vary significantly. The EU Member States have taken the first steps in trying to harmonize the treatment of asylum seekers and refugees living on their territory. The Common European Asylum System is the motor behind this harmonization and contains a number of legal instruments covering issues such as which Member State is responsible for hearing an asylum claim, the procedures to be used in reviewing the asylum claim and the living conditions pending a decision. The Common European Asylum System has not however, eliminated differences in the way Member States treat asylum seekers and refugees. The European Parliament and EU Member States therefore negotiated revisions to the existing legislation.

Hence, after the completion of the first phase, a period of reflection was necessary to determine the direction in which the Common European Asylum System should develop. A 2007 Green Paper was the basis for a large public consultation. The responses, together with the results of an evaluation of how existing instruments were implemented, were the basis for the European Commission’s Policy Plan on Asylum, presented in June 2008. As stated in the Policy Plan, three pillars underpin the development of the Common European Asylum System: bringing more harmonization to standards of protection by further aligning the EU Member States’ asylum legislation; effective and well-supported practical cooperation; increased solidarity and sense of responsibility among EU States, and between the EU and non-EU countries.

New European Union rules have now been agreed, setting out common high standards and stronger co-operation to ensure that asylum seekers are treated equally in an open and fair system – wherever they apply. In short:

- **The revised Asylum Procedures Directive** aims at fairer, quicker and better quality asylum decisions. Asylum seekers with special needs will receive the necessary support to explain their claim and in particular there will be greater protection of unaccompanied minors and victims of torture.

- **The revised Reception Conditions Directive** ensures that there are humane material reception conditions (such as housing) for asylum seekers across the EU and that the fundamental rights of the concerned persons are fully respected. It also ensures that detention is only applied as a measure of last resort.

- **The revised Qualification Directive** clarifies the grounds for granting international protection and therefore will make asylum decisions more robust. It will also improve the access to rights and integration measures for beneficiaries of international protection.
• The revised Dublin Regulation enhances the protection of asylum seekers during the process of establishing the State responsible for examining the application, and clarifies the rules governing the relations between states. It creates a system to detect early problems in national asylum or reception systems, and address their root causes before they develop into fully fledged crises.

• The revised Eurodac Regulation will allow law enforcement access to the EU database of the fingerprints of asylum seekers under strictly limited circumstances in order to prevent, detect or investigate the most serious crimes, such as murder, and terrorism.

II. IDENTIFICATION OF APPLICANTS (EURODAC)

The Eurodac Regulation\(^\text{14}\) establishes European Union asylum fingerprint database. When someone applies for asylum, no matter where they are in the European Union, their fingerprints are transmitted to the Eurodac central system. Eurodac has been operating since 2003 but some updates were required, in particular to reduce the delay of transmission by some EU Member States, to address data protection concerns and to help combat terrorism and serious crime. Hence, the new Regulation\(^\text{15}\) improves regular functioning of Eurodac. Specifically it sets new time limits for fingerprint data to be transmitted which aims for reducing of the time which elapses between the taking and sending of fingerprints to the Central Unit of Eurodac. Further, it also ensures full compatibility with the latest asylum legislation and better addresses data protection requirements. Until now, the Eurodac database could only be used for asylum purposes. The new Regulation now allows national police forces and Europol to compare fingerprints linked to criminal investigations with those contained in Eurodac. This will take place under strictly controlled circumstances and only for the purpose of the prevention, detection and investigation of serious crimes and terrorism. Specific safeguards include a requirement to check all available criminal records databases first and limiting searches only to the most serious crimes, such as murder and terrorism. In addition, prior to making a Eurodac check, law enforcement authorities must undertake a comparison of fingerprints against the Visa Information System (where permitted). Law enforcement checks may not be made in a systematic way, but only as a last resort when all the conditions for access are fulfilled. No data received from Eurodac may be shared with third countries.

\(^{14}\) Council Regulation No \(2725/2000\) of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention;

\(^{15}\) \url{http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0555:FIN:EN:PDF}
III. COUNTRY RESPONSIBLE FOR ASYLUM APPLICATION

The Dublin Regulation\textsuperscript{16} establishes a hierarchy of criteria for identifying the EU Member State responsible for the examination of an asylum claim in European Union. This is predominantly through the State, which the asylum seeker first entered, or the State responsible for their entry into the territory of the EU Member States, Norway, Iceland and Switzerland.

The aim of the Regulation is to ensure that one Member State is responsible for the examination of an asylum application, to deter multiple asylum claims and to determine as quickly as possible the responsible Member State to ensure effective access to an asylum procedure.


However in practice, the operation of the Dublin Regulation often acts to the detriment of refugees. Its application can cause serious delays in the examination of asylum claims, and can even result in asylum seekers’ claims never being heard. Areas of concern include the excessive use of detention to enforce transfers of asylum seekers, the separation of families, the denial of an effective opportunity to appeal against transfers and the limited use of the sovereignty clause (Article 3(2) of Dublin regulation) to alleviate these and other problems. It also impedes integration of refugees by forcing them to have their claims determined in Member States with which they may have no particular connection. Similarly the operation of the Dublin system also increases pressures on those EU Member States at the external borders of Europe, where States are often least able to offer asylum seekers support and protection.

Recent developments have highlighted the flaws in the Dublin system including the numerous Court challenges both at the European and national level against transfers to Greece and the proposal to recast the Dublin Regulation.

In 2008 the Commission published a recast proposal of the Dublin Regulation. The aim of this recast proposal is to increase the system’s efficiency and to ensure higher standards of protection for asylum seekers falling under the Dublin procedure. Over the past few years there also has been a significant amount of Court litigation whereby asylum seekers challenged transfers to other EU Member States under the Dublin

\textsuperscript{16} Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national
system, both for protection concerns and due to inadequate reception conditions, at the national level and at the European level. This culminated on January 2011 when the Grand Chamber of the European Court of Human Rights ruled in M.S.S. v Belgium & Greece amongst other findings that Belgium had violated Article 3 and 13 of the European Convention of Human Rights by sending asylum seekers back to Greece under the Dublin Regulation. The Court ruled that Belgium was in violation of Article 3 for exposing the applicant to risks arising from the deficiencies of the asylum procedure in Greece, as well as exposing the applicant to the detention and living conditions there. With regard to the national appeal procedure in Belgium, the Court held that Belgium was in violation of Article 13 in conjunction with Article 3 because of the lack of an effective remedy against the Dublin decision.

Similarly in December 2011 the Court of Justice of the European Union in the case of NS & ME that Member States have an obligation not to transfer asylum seekers to Member States where they would face inhuman or degrading treatment in violation of Article 4 of the Charter. It is clear from these Court rulings that the Dublin System cannot work on the basis of a conclusive presumption that asylum seeker’s fundamental rights in each EU Member State will be observed. Member States will have to ensure that they apply the Dublin Regulation in a manner which respects the fundamental rights of refugees.

The new Dublin regulation\(^{17}\) aims for sound procedures for the protection of asylum applicants and improves the system’s efficiency through:

- An early warning, preparedness and crisis management mechanism, geared to addressing the root dysfunctional causes of national asylum systems or problems stemming from particular pressures.
- A series of provisions on protection of applicants, such as compulsory personal interview, guarantees for minors (including a detailed description of the factors that should lay at the basis of assessing a child’s best interests) and extended possibilities of reunifying them with relatives.
- The possibility for appeals to suspend the execution of the transfer for the period when the appeal is judged, together with the guarantee of the right for a person to remain on the territory pending the decision of a court on the suspension of the transfer pending the appeal.
- An obligation to ensure legal assistance free of charge upon request.
- A single ground for detention in case of risk of absconding; strict limitation of the duration of detention.
- The possibility for asylum seekers that could in some cases be considered irregular migrants and returned under the Return Directive, to be treated under the Dublin procedure - thus giving these persons more protection than the Return Directive.
- An obligation to guarantee right to appeal against transfer decision.
- More legal clarity of procedures between Member States - e.g. exhaustive

and clearer deadlines. The entire Dublin procedure cannot last longer than 11 months to take charge of a person, or 9 months to take him/her back (except for absconding or where the person is imprisoned).

IV. RECEPTION CONDITIONS

Asylum seekers waiting for a decision on their application must be provided with certain necessities that guarantee them a dignified standard of living. The Reception Conditions Directive18 defines certain key terms, such as: Geneva Convention, applicant for asylum, family members, unaccompanied minor, reception conditions and detention. The Directive in principle, applies only to applicants for asylum. However, the competent authorities will presume that all applications for international protection are applications for asylum, unless the applicant explicitly requests another form of protection. This Directive does not relate to family reunification. Family members include spouses and unmarried partners if the provisions of the host State treat unmarried couples in the same way as married couples. Children of a married or unmarried couple or adopted children and other members of the family are considered part of the family if they are dependent on an asylum applicant or if they have undergone particularly traumatic experiences or require special medical treatment.

The Directive applies to all nationals of third countries as well as to stateless persons who have requested asylum at the border or on the territory of a EU Member State. In addition, the Directive applies to family members accompanying the applicant. The Directive does not apply to third country nationals or stateless persons who submit their requests for diplomatic or territorial asylum to the representations of Member States.

EU Member States can apply more favorable conditions of reception and they may apply the same conditions to applicants for forms of protection other than those provided for by the Geneva Convention.

With regards to provisions relating to reception conditions, Reception Conditions Directive states, that applicants must be informed of their rights and the benefits they may claim, as well as the obligations they have to comply with. They will receive a document certifying their status as applicants for asylum, which will be renewable until they are notified of the decision on their application for asylum. Moreover, the EU Member State may provide a travel document when serious humanitarian reasons arise that require their presence in another State.

As a rule, EU Member States must allow applicants freedom of movement within their territory. Detention will only be allowed in order to check the identity of the applicant for asylum. Movement can be limited to part of the national territory in many cases, but it will only be compulsory for specific reasons (for example, processing applications swiftly). In any case, provision will be made for a review of the above limits.

Further, EU Member States must guarantee to asylum seekers:

- Certain material reception conditions, in particular accommodation, food and clothing, in kind or in the form of a financial allowance. Allowances must be such that they prevent the applicant from becoming destitute.
- Family unity.
- Medical and psychological care.
- Access to the education system for minor children and language courses to enable them to attend ordinary school.

EU Member States cannot deny applicants for asylum access to the labor market and vocational training six months after they have lodged their application. EU Member States remain in full control of the internal labor market as they can decide the kind of work asylum applicants may apply for, the amount of time per month or per year they are allowed to work, the skills and qualifications they should have, etc.

Material reception conditions and medical and psychological care are guaranteed during all types of procedures (regular, admissibility, accelerated and appeal procedures), in order to ensure a standard of living adequate for the health and well-being of the applicants and their families. If his/her economic situation permits it, the EU Member State could decide that the applicant should contribute partially or totally to the cost of the material reception conditions and medical and psychological care.

Moreover, special medical and psychological care must be given to pregnant women, minors, the mentally ill, the disabled and victims of rape and other forms of violence.

In all cases, applicants must have the possibility of communicating with legal advisers, non-governmental organizations (NGOs) and the United Nations Refugee Agency (UNHCR).

EU Member States can reduce or withdraw reception conditions if the applicant disappears without reasonable cause, or does not comply with requests for information or fails to appear for personal interviews concerning the asylum procedure; has withdrawn his application; has unduly benefited from material reception conditions; presents a threat to national security or is suspected of having committed a war crime or a crime against humanity. Such decisions will be taken objectively and impartially, based exclusively on the individual behavior of the person in question who can lodge an appeal against the decision reducing or withdrawing reception conditions and, where necessary, be entitled to legal assistance. Still, in all cases, emergency medical care cannot be reduced or withdrawn.

EU Member States must pay special attention to the situation of minors, disabled people, elderly people and victims of discrimination or exploitation. In particular, they should take measures to protect children who have been victims of abuse, exploitation, torture or cruel, inhuman and degrading treatment. As soon as possible, a guardian will be appointed for each unaccompanied minor. In addition, the EU Member States has to endeavor to trace the members of his family. Victims of torture or violence shall have access to rehabilitation programs and post-traumatic counseling.
As in the past, diverging practices among EU Member States could however lead to an inadequate level of material reception conditions for asylum seekers, the new Reception Conditions Directive\textsuperscript{19} aims to ensure better as well as more harmonized standards of reception conditions throughout the European Union. Most importantly for the first time, detailed common rules have been adopted on the issue of detention of asylum seekers, ensuring that their fundamental rights are fully respected. In particular, it includes an exhaustive list of detention grounds that will help to avoid arbitrary detention practices and limits detention to as short a period of time as possible; restricts the detention of vulnerable persons in particular minors; includes important legal guarantees such as access to free legal assistance and information in writing when lodging an appeal against a detention order; introduces specific reception conditions for detention facilities, such as access to fresh air and communication with lawyers, NGOs and family members.

The new Directive also clarifies the obligation to conduct an individual assessment in order to identify the special reception needs of vulnerable persons. It provides particular attention to unaccompanied minors and victims of torture and ensures that vulnerable asylum seekers can also access psychological support. Finally, it includes rules on the qualifications of the representatives for unaccompanied minors. Access to employment for an asylum seeker must now be granted within a maximum period of 9 months.

V. ASYLUM PROCEDURES

A refugee’s chances of gaining protection depend greatly upon the procedures used to assess asylum cases. Even the most compelling claim for international protection can fail, if it is not fully and fairly considered. Border and immigration authorities must understand the obligation to receive asylum seekers, while legal aid and interpretation services must be available to asylum seekers.

Fair and thorough procedures benefit both refugees and host states by producing high quality asylum decisions at first instance. A right to appeal asylum decisions and the right to remain in the host country during the appeals process both provide safeguards to ensure that first instance decisions are legally correct. Accelerated procedures should generally not be applied, except to speed up the granting of protection to those in particular need of it.

Hence, common safeguards must be ensured for people fleeing persecution and seeking international protection and asylum seekers must have access to fair and efficient asylum procedures in all EU Member States.

The Asylum Procedures Directive\textsuperscript{20} established common standards of safeguards and

guarantees to access a fair and efficient asylum procedure. This was the lowest common denominator between EU Member States at the time. The rules were often too vague and derogations allowed EU Member States to keep their own rules, even if these went below basic agreed standards.

With regards to basic guarantees Asylum Procedures Directive states that an application for asylum may not be refused solely on the grounds that it was not made as soon as possible. Moreover, EU Member States must ensure that applications are examined individually, objectively and impartially and applicants shall be entitled to remain in the country while their application is pending.

Furthermore, EU Member States must ensure that applicants are informed of the procedure to be followed, their rights and obligations and the result of the decision taken by the responsible authority. All decisions must be communicated in writing and, if an application is rejected, the reasons must be stated and information on how to challenge the negative decision must be given. Applicants must receive the services of an interpreter for submitting their case to the competent authorities whenever necessary and be given an opportunity to communicate with the United Nations High Commissioner for Refugees (UNHCR). In more general terms, EU countries must authorize the UNHCR to have access to applicants for asylum, including those in detention centers, and to information on asylum applications and procedures, and enable the UNHCR to give his/her opinion to any competent authority. Similarly, applicants must have a genuine opportunity to consult a legal adviser. In the first instance, applicants may have to do so at their own expense. If the competent authority’s decision is negative, the EU country in question must ensure that free legal assistance is granted on request. It may attach certain conditions to this right (only applying it to one appeal and not to any onward proceedings, limiting the option of legal advice to advisors specifically designated by national law, restricting proceedings to those that have a chance of success or to applicants who do not have sufficient resources).

The following additional guarantees apply, subject to some conditions, in the case of unaccompanied minors:

- a person shall represent the minor and/or help him/her with the application,
- if the procedure involves a personal interview, the representative shall have an opportunity to explain the purpose of the interview to the minor,
- a person with knowledge of the special needs of minors shall prepare the decision of the determining authority and, if applicable, conduct the personal interview.

With regards to examination procedure in general - decisions on applications are taken by the determining authority designated by EU countries. The personnel of such an authority must have knowledge of the relevant standards of asylum and refugee law. Before the competent authority reaches its decision, applicants for asylum are usually entitled to a personal interview with a competent official. This normally takes place without the members of the family being present and in conditions that ensure appropriate confidentiality. A written report of the interview is drawn up, the contents
of which may be submitted for approval by the applicant. However, the applicant’s refusal to approve the report cannot prevent the competent authority from taking its decision.

As mentioned previously, Asylum Procedures Directive was the lowest common denominator between EU States at the time. The rules were often too vague and derogations allowed EU Member States to keep their own rules, even if these went below basic agreed standards.

Hence, the new Asylum Procedures Directive\(^{21}\) is much more precise. It creates a coherent system, which ensures that asylum decisions are made more efficiently and more fairly and that all Member States examine applications with a common high quality standard. In short:

- **It sets clearer rules on how to apply for asylum:** there have to be specific arrangements, for example at borders, to make sure that everyone who wishes to request asylum can do so quickly and effectively,

- **Procedures will be both faster and more efficient.** Normally, an asylum procedure will not be longer than six months. There will be better training for decision-makers and more early help for the applicant, so that the claim can be fully examined quickly. These investments will save money overall, because asylum seekers will spend less time in state-sponsored reception systems and there will be fewer wrong decisions, so fewer costly appeals,

- **Anyone in need of special help** - for example because of their age, disability, illness, sexual orientation, or traumatic experiences - will receive adequate support, including sufficient time, to explain their claim. Unaccompanied children will be appointed a qualified representative by the national authorities,

- **Cases that are unlikely to be well-founded can be dealt with in special procedures** (‘accelerated’ and ‘border’ procedures). There are clear rules on when these procedures can be applied, to avoid well-founded cases being covered. Unaccompanied children seeking asylum and victims of torture benefit from special treatment in this respect,

- **Rules on appeals in front of courts** are much clearer than previously. Currently, EU law is vague and national systems do not always guarantee enough access to courts. As a result, many cases end up in with the European Court of Human Rights in Strasbourg, which is costly and creates legal uncertainty. The new rules fully comply with fundamental rights and should reduce pressure on the Strasbourg court,

- **Member States will also become better equipped to deal with abusive claims,** in particular with repetitive applications by the same person. Someone who does not need protection will no longer be able to prevent removal indefinitely by continuously making new asylum applications.

VI. QUALIFICATION FOR INTERNATIONAL PROTECTION

In December 2011 the new text of the Qualification Directive \(^{22}\) was published in the Official Journal of the European Union. Member States must transpose the Directive into their national law by 21 December 2013. The UK, Ireland and Denmark have opted out of this Directive.

The new Directive aims at addressing deficiencies identified during the first phase of the Common European Asylum System and further harmonizing standards of protection. The text sets standards and criteria for the identification of people in need of international protection in the European Union and the content of rights granted to them either as refugees or as beneficiaries of subsidiary protection. It improves the current minimum standards laid out in the Qualification Directive in a number of key areas such as a greater acknowledgment of gender-specific forms of persecution and the inclusion of gender identity as a potential ground for protection.

The Directive also includes other areas of improvement such as the commitment to take the best interest of the child into account and it approximates the content of rights granted to beneficiaries of subsidiary protection and refugees in areas such as access to employment and to health care.

Hence, the new Qualification Directive aims to contribute to improve the quality of the decision-making and ensure that people fleeing persecution, wars and torture are treated fairly, in a uniform manner. It clarifies the grounds for granting international protection and leads to more robust determinations, thus improving the efficiency of the asylum process and prevention of fraud, and ensures coherence with the European court’s judgments. It approximates to a large extent the rights granted to all beneficiaries of international protection (recognized refugees and recipients of subsidiary protection) on access to employment and health care. It also extends the duration of validity of residence permits for beneficiaries of subsidiary protection and ensures a better taking into account of the best interests of the child and of gender-related aspects in the assessment of asylum applications, as well as in the implementation of the rules on the content of international protection.

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\(^{22}\) DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
EXTERNAL BORDERS AND SHCENGEN

Vukoman Žarković

Introduction

Due to its position, Montenegro, it being a crossroads of the Balkans, represents a fertile ground for transit of diverse types of merchandise and, as a result of that, also for diverse forms of crime.

Montenegro is bordering with the Republic of Albania, Republic of Kosovo, Republic of Serbia, Bosnia and Herzegovina, Croatia and the Adriatic Sea separates us from Italy.

The green border is characterized by quite impervious terrain, with a large number of trails and unobstructed side roads leading to the neighbouring countries. With the exclusion of the coastal area, the river Bojana and Skadar Lake, there are no electronic systems of surveillance of the other parts of the border.

Organized crime, international terrorism threats, higher quality of forged documents, different forms of smuggling goods, drugs, weapons and people across the border represent a serious threat to building of civil society in the region we belong to and demand adequate training and technical equipment, as a response to new challenges.

On the other hand, international trade, tourism and cultural exchange demand more open borders. Through its work, the Montenegrin border police is trying to strike a balance between adequate controls and the need for open borders. This, together with closer cooperation with different security agencies in the country and the region, enables the achievement of the common goal – “Open, but safe boarders”.

Improvement of the border security system, it being an integral part of the security system of Montenegro as a whole, represents one of strategic and constant tasks of the Border Police.

Border Police performs surveillance of the Montenegrin state boarder in the length of 840.4 km (based on the available data provided by the competent authorities), out of which 571.6 km on land and 268.8 km on water (137 km at the sea, 50.4 on lakes and 81.3 km on rivers).

Also, Border Police performs border controls at 28 border crossings, out of which 19 are land border crossings, 5 port border crossings, 2 airport border crossings and 2 railway transport border crossings.
Chief Activities of the Border Police

Border Police, in accordance with the Law on Border Control, is primarily focused on the implementation of the following tasks:
- State border surveillance,
- Border controls,
- Assessment of threats to safety of state borders,
- Prevention of exercise and discovery of criminal offences and misdemeanours and discovery and apprehension of perpetrators,
- Control of movement and residence of foreigners,
- Prevention of illegal migrations,
- Protection of life and health of humans and environmental protection,
- Prevention and discovery of other activities and actions which pose a safety threat to general public,
- Participation in drafting of normative documents in the area of border security,
- Participation in material and technical equipping and improvement of infrastructure used for the purpose of border control,
- Participation in raising the level of training of officers through realisation of regular and special forms of education,
- Undertaking of special measures and activities during winter and summer tourist season,
- Improvement of cooperation with Border Police authorities of neighbouring countries and international KFOR and UNMIK armed forces.

Besides the aforementioned chief activities, Border Police is also involved in provision of assistance to other police organisational units, Forrest Management Authority, National Park Skadar Lake, securing certain sports and cultural manifestations, seek and rescue activities for persons and vessels at sea and lakes, escorting deported persons, assisting to veterinary, phytosanitary, traffic and other inspection agencies, as well as numerous other activities.

Organisational structure

Regulation on the Organization and Operation of State Administration (Official Gazette of Montenegro, No 5/12, 25/12 and 61/13), among other things also prescribes the tasks from the scope of work of the Ministry of the Interior, safety of the state border and integrated border management.

Border control falls under the competency of the Ministry of the Interior and is being performed by the Police Authority – **Border Police Sector**.

**Border control** includes surveillance of the state border, border controls and assessment of threats to safety of the state border.
**Surveillance of the state border** includes the measures, activities and authorisations being used in the state border area and between the border crossings in order to suppress cross border crime, prevent illegal crossing of state border and safeguard its inviolability on land, sea and inland waterways.

**Border controls** include measures and activities being performed at a border crossing during intended crossing of a state border or immediately after crossing a state border, in order to control legal entry of people to Montenegro and also people leaving Montenegro and it involves border controls of persons, items and transport vehicles.

In order to perform the aforementioned tasks, the following **organisational units** were founded at the national level in the **Border Police Sector**:

- Department for State Border Surveillance, with the Group for Electronic Surveillance of State Border;
- Department for Border Controls;
- Department for Operations and Risk Analysis;
- Department for Foreigners, Visas and Combatting Illegal Migrations, with the asylum for foreigners.

Eight Border Security Departments were founded at the regional level:

- Berane, with Border Police stations in Rozaje and Plav;
- Pljevlja, with Border Police stations in Pljevlja and Boljanici;
- Bijelo Polje; Podgorica, with Border Police stations in Tuzi and at the Podgorica Airport
- Niksic, with Border Police stations in Vilusi, Banjani and Pluzine;
- Bar, with Border Police stations in Bar and Ulcinj;
- Herceg Novu, with Border Police stations in Sutorina and Tivat; and
- Department of Border Maritime Police, with Border Maritime Police stations in Podgorica, Bar and Herceg Novi.

Border Police stations represent a local organisational level within the Border Police. Organisational concept of the Border Police is harmonised with the operative needs and practice of European Union Member States.

**Legal framework**

National legislation governing **the field of border control** is for the most part in compliance with EU legislation in the area of the Regulation no. 32006R0562 (EurLex 19.10.10.00) on the European Community’s Code On the Rules of Cross-Border Movement of Persons - Schengen Borders Code.

National legislation governing **the field of international border cooperation**, which includes the founding of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) is partially in compliance with EU legislation.
Operative cross border cooperation is defined by protocols on regular organisation of meetings on all management levels and joint patrols with the neighbouring countries. These protocols, among other things, define the operative procedures for joint patrols. Protocols were signed with the Republic of Albania, Republic of Serbia, Bosnia and Herzegovina and Republic of Kosovo. The aforementioned protocols should be signed with the Republic of Croatia as well.

Furthermore, the Ministry of the Interior has signed the Protocol on Establishment of the Trilateral Joint Centre for Police Cooperation in Trebinje, where employees from Serbia and Bosnia and Herzegovina shall work alongside those from Montenegro.

In order to improve operative cooperation, combating illegal migrations and cross border crime, exchange information and risk analyses, cooperation in the area of training, technical cooperation and participation in joint operations and in accordance with the Article 14 of EU Regulation No 2007/2007, the Police Directorate of Montenegro has signed on 18 June 2009 the Working Arrangement on the Establishment of Operational Cooperation with the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).

National legislation governing the way of implementation of procedures for border controls on persons is for the most part in compliance with the Schengen Border Code, which defines the rules for performing border controls and border controls of persons at border crossings and for surveillance of state border between border crossings.

National legislation governing the area of international border cooperation, including the activities of foreign police services within the Montenegrin state’s territory and Montenegrin Police’s activities within the territory of foreign states and cooperation with foreign security services is for the most part in compliance with the Schengen acquis.

**Material and technical equipment**

Equipping the Border Police with modern technical means and equipment, although significant progress compared to the previous situation has been made, does not meet the required standards and conditions.

We are aware of the fact that the successful implementation of boarder control tasks is primarily conditioned with acquiring, exploitation and maintenance of contemporary material and technical equipment.

Although note-worthy results were achieved in the area of material and technical equipping and planned activities for the upcoming period, a number of Border Police organisational units are hit by significant problems due to inadequate facilities, poor infrastructure and non-existent or insufficient adequate equipment. Some are still operating in barely habitable containers or metal kiosks, with no canopies and sanitary facilities. Additional problem is the mobility of patrols due to inadequate number of terrain motor vehicles and vessels, their technical soundness and readiness. By making
an extra effort, for the time being we are managing to provide adequate presence at the border, in accordance with risk analysis and challenges of modern times.

In order to increase efficiency and rationalise the use of existing resources, we have realised many activities on establishing a system of electronic surveillance of the state border at the Adriatic Sea, river Bojana and Skadar Lake.

Police Directorate’s electronic surveillance system of the blue border is intended for electronic surveillance of the coastal sea and coast of the Adriatic Sea, territorial waters and coasts of Skadar Lake and river Bojana, including the surveillance of the green border with the Republic of Albania over the territory between the Skadar Lake and Shasko Lake.

Electronic surveillance is being performed by using multi-sensor surveillance of the aforementioned aquatoria and territories by using radar, thermal-vision, CCTV and other surveillance sensors.

The system of electronic surveillance of the blue border is being implemented in stages and it consists of a number of stationary and mobile centres and stations for electronic surveillance and operative centres, out of which constant and complete remote monitoring of all surveillance sensors is being performed by using purpose-built software, with automatic 90-day archiving of the data from all of the monitoring sensors. Maritime Security Authority’s Maritime Automatic Identification System (AIS) has also been integrated into the Electronic Surveillance System via software.

Up to the present moment, the 3rd stage of implementation of the Electronic Surveillance System of the Blue Border has been completed, consisting of:

- 3 (three) communication centres:
  - Command & control centre of the Border Police Sector in Podgorica;
  - National Communication & Operations Centre in Bar, and
  - Local Communication & Operations Centre in Bozaj, Skadar Lake.
- 2 (two) Stationary Centres for Electronic Surveillance (SCES): “Obostnik” and “Bozaj”;
- 6 (six) Stationary Stations for Electronic Surveillance (SSES): “Spas”, “Stari Grad”, “Bozaj”, “Bjelasica-Virpazar”, “Stegvas” and “Fraskanjel”, and
- 2 (two) Mobile Centres for Electronic Surveillance (MCES I and II).

All communication centres perform: complete remote monitoring over all of the existing monitoring sensors, joint overview of data from all of the monitoring sensors on the electronic map and automatic 90-day daily archiving of the data from all of the monitoring sensors.

Currently achieved level of surveillance of the blue border ensures:

- At the Adriatic Sea
  - Permanent radar surveillance with 2 high-range radars, installed at the
Stationary Centres for Electronic Surveillance (SCES) “Crni Rt” (Bar) and “Obostnik” (Herceg Novi),
- Permanent use of Maritime Security Directorate’s “AIS” sub-system (AIS is the system for identification of all ships over 300 gross tonnes and other vessels that must have AIS devices installed);
- Surveillance in daylight conditions with 4 CCTV mid-range surveillance sensors installed in SCES “Obostnik” and “Crni Rt” and Stationary Stations for Electronic Surveillance (SSES) “Spas (Budva) and “Stari grad” (Ulcinj).

- At Skadar Lake
  - Surveillance in daylight conditions with 3 CCTV mid-range surveillance sensors installed in (SSES) “Bozaj”, “Bjelasica-Virpazar” and “Stegvas”.

- At river Bojana
  - Surveillance in daylight conditions with 1 CCTV mid-range surveillance sensor installed in SSES “Fraskanjel”.

- Involvement of Mobile Centres for Electronic Surveillance I and II on
  - Local radar, thermal vision and CCTV mid-range surveillance, relevant aquatoria, coastal areas and territories, based on risk assessments.
1. Introduction

Establishing a space without internal borders between European countries began with the signing of the Agreement between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at common borders (hereinafter: the Schengen Agreement), and the adoption of the Convention on the Implementation of the Schengen Agreement. These agreements provided a security framework in the signatory countries after the abolition of border checks, which facilitated cooperation and security on both sides of the borders.

Although today, parts of the provisions of the Schengen Agreement and the Schengen Convention have been amended and defined in a more precise manner by various acts adopted by the European institutions, it is impossible to conceive the present situation and progress without a thorough analysis and understanding of the said agreements and the beginnings of a new form of cooperation between the police and other competent authorities that share a common goal – to strengthen the security of each country while facilitating the travel across national borders.

The external borders, coined in that specific terminology for the first time, can be crossed only at the border crossings, where national authorities implement standard verification in accordance with the national legislation of their country, while protecting the interests of the Schengen states. The cooperation resulting from the Schengen endorsement initially developed outside the then existing European Community. The creation of such an area in which there is free movement of goods and people is not possible without an agreement on legal assistance that would be provided in certain legal and security procedures, which are primarily related to legal assistance in criminal matters, the prohibition of double jeopardy, extradition and the transfer of enforcement of criminal decisions and the establishment of a common information system called the Schengen Information System (hereinafter: SIS). The SIS is constituted by each contractual party on a national level and a technical support unit set by signatories in Strasbourg, containing all the relevant information. The cooperation established by the Schengen Agreement represents a basis for today’s police, customs and consular cooperation in Europe, with the aim of protecting the internal security of the European Union.

The EU itself is constituted by the Treaty of Maastricht, which contained the first spe-
specific provisions within the scope of justice and home affairs. The next big step, namely the key one – without which creation of common policies and strategies in the field of justice and home affairs could not be initiated, was made in 1997 with the Treaty of Amsterdam, which covers the harmonization of the European Visa System, a uniform control of external borders, harmonization of asylum policies, with the provisions of the Schengen Agreement as well included in the legal system of the European Union. This made sure that a part of the policies which was initially in the third pillar, entered into the first pillar (borders, asylum, migration and visa), by which the Member States waived their exclusive responsibility for these areas and transferred jurisdiction (the right to initiate measures) to the bodies of the EU, notably the European Commission. The Amsterdam Treaty created a new and important concept – an area of Freedom, Security and Justice. Where the Maastricht Treaty calls or a “close co-operation in justice and home affairs”, the Amsterdam Treaty in Article 2 of the Treaty on European Union is determined “to maintain and develop the Union as an area of freedom, security and justice in which the free movement of persons with appropriate measures, with respect to external border controls, immigration, asylum and the prevention and combating of crime”, by which the control of persons is terminated at the borders regardless of whether they are EU citizens or not. Achieving this goal is possible through prevention and fight against organized and other crime, terrorism in particular, trafficking in human beings, criminal activities against children, illicit drug trafficking and arms trafficking, corruption and fraud, close cooperation of police, judicial and customs authorities and other competent authorities, as well as a unification of legal rules on criminal matters.

The Acquis of Schengen cooperation is thereby included in the Treaty on European Union and the Treaty on European Community in a way which ensured that the Schengen provisions related to visa, migration and asylum entered the first pillar, while the legislation which regulated the powers of police and other legal assistance in combating crime remained in the third pillar of the European Union. Final changes were made in the Treaty of Nice in 2001 and the Treaty of Lisbon in 2009 when the division by the so-called pillars was finally abolished.

2. Control of The European Union Borders

The regulation which established the Community Code on the Rules for the Movement of Persons across Borders (Shengen Borders Code) on 15 March 2006, is the first instrument in the area of justice, freedom and security in which the European Parliament acted as a co-legislator with the Council, and since it was adopted in the first reading, this illustrated the excellent cooperation among all the institutions, but also highlighted the importance of the issues at the European level. This Regulation can partly be seen as the end of a process that began in 1957 when the movement of persons was established as a fundamental right. The Regulation was created in order to abolish the control of persons crossing internal borders, but there is no doubt that by creating such areas further measures should be undertaken such as establishing a
common policy of crossing the external borders. This Regulation should, of course, be seen as a piece in the overall puzzle of the EU security, but it is also one of the most important ones which has established common rules for border control, changed the Schengen Convention for the implementation from the year 1990 and abolished and altered many regulations in this area.

The implementation of high-quality and efficient border control is certainly in the interest of the Member States at which external borders it is being implemented, but also of the Member States which have abolished internal border controls, because the effective control of the external borders alone can’t prevent illegal migration and human trafficking or any other threat to internal security. One of the major activities, apart from the border supervision which comprises of checking of persons at border crossings and ensuring the State border between those border crossings, has also been the assessment of risks to the internal security as well as the assessment of threats that could jeopardize the security of the external borders. The Regulation recognizes two groups of measures: the measures taken at internal borders and the measures taken at the external borders. Internal borders may be crossed at every turn without border checks of persons, regardless of their nationality, while the external borders can be crossed only at border crossing during the previously determined official working hours, unless they are permanently opened, which in turn needs to be clearly stated. During the carrying out of duties of border controls at the external borders, police officers perform either minimal or thorough control over the persons in question and are obliged to determine whether the conditions for border crossings have been met.

If there exists a serious threat to public order or internal security, a Member State may in exceptional cases reintroduce border control at its internal borders for a limited period, but no longer than 30 days or for the scheduled duration of the threat at hand, and needs to notify the Member States and the Commission as soon as possible. However, if the protection of public order and internal security requires urgent action, the reintroduction of border controls at the internal borders may be performed immediately while informing other Member States and the European Commission. The Regulation stipulates filing of reports on measures undertaken to the European Parliament, the Council and the Commission, as well as informing the public on the measures planned.

Faced with the growing need for coordination of activities in border control in the Mediterranean, in 2010 the Council issued a decision on the amendment of the Schengen Borders Code in relation to surveillance of the maritime external borders in the context of the operational cooperation coordinated by Frontex.

When the question of visas, border control, asylum and immigration was transferred to the first pillar by the Treaty of Amsterdam, through the Treaty on European Union, the Council of the European Union, at the proposal of the European Commission and the opinion of the European Parliament, issued a decree on the basis of Art. 62 TEU that lists the third countries whose nationals must be in possession of visas when crossing the external borders and whose nationals are exempt from that requirement. The
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decree is binding in its entirety and must be directly applicable in the Member States (except the UK and Ireland). The Regulation provides a “visa regime of the European Union” in a way that Annex I lists countries whose nationals must have a visa upon entering the territory of the EU and countries whose nationals are exempt from this requirement, as listed in Annex II. The Regulation also regards certain parts of the Schengen Acquis as inapplicable, replaces specific provisions of the Common Consular Guidelines and the Common Manual, which renders the crossing of external borders with regards to the possession of visa entirely defined by the European institutions.

In order to facilitate ways of crossing the external borders of the EU to the people living in border areas who are due to a number of objective or subjective circumstances forced to often cross the external borders, on 20 December 2006 a regulation was issued on the establishment of rules of border traffic at the external borders of the Member States and on the amendments of the Schengen Convention regulating the area in question. This confirms the view that the borders with neighbors oughtn’t to be barriers to trade, social and cultural exchanges and regional cooperation of border regions. A border region is defined by an area of up to 30 km away from the border determined by bilateral agreements of neighboring countries. This area can be extended if the administrative center of remote border areas is between 30 and 50 km from the border. The implementation of cross-border traffic regime necessarily means changing the conditions of governing border control of persons crossing the external borders of the EU. In fact, such a lowering of the conditions tuned out to actually achieve a balance: on one hand, people who live and work in the border areas can easily cross the border and on the other hand, high standards are achieved with regards to the protection of external borders and the fight against illegal migration and other forms of cross-border crime.

In order to achieve the requirements above and in order to meet the conditions above in a more efficient manner, procedures and requirements have been prescribed with regards to the crossing of the external borders of specific categories of persons. Residents may cross the border in a very liberal manner and obtain a special permit for a period of five years. In order to achieve cross-border traffic regime, the Member States will sign new or implement the existing bilateral agreements with third countries, in accordance with the Regulation. Bilateral agreements must provide:

- establishing special border crossing opened exclusively to certain residents
- introducing special traffic lanes at the existing border crossings that are to be used exclusively by certain residents
- In accordance with the local circumstances, certain residents will be allowed to cross the border outside the formal border crossings an outside of regular working hours.

Furthermore, mechanisms are placed which serve to provide prompt operational assistance for a limited time to the Member States in a need of assistance and facing an urgent or exceptional pressure. This mainly implies an influx of a large number of third country nationals who are trying to enter the territory of a Member State illegally.
The mechanism operates as a group of measures for a quick response at the borders (hereinafter referred to as the “Group”). It also defines the tasks to be performed and the powers of foreign border police officers participating in joint operations and pilot projects in other Member States, by which the Regulation on the Establishment of Frontex is amended in terms of authority and group activities. Member States shall make its border police available, unless faced with emergency situations which significantly affect the performance of their own national objectives. The host State shall issue instructions on the procedure regarding the visits of the Border Police, but Frontex can, through its coordinator, alter those instructions since Member States are obliged to provide all necessary assistance to Frontex, including full access to the groups at any time of the employment. Group members can carry out its tasks and duties only in accordance with the instructions of the host country and its presence. The group members need to wear their own uniform during the performance of tasks and duties as well as wear a blue ribbon on their sleeves with the logo of the EU and Frontex, indicating their participation in the deployment group. For the purpose of identification by the national authorities of the host Member State and its citizens, the group members may have to carry a certificate of accreditation at all times which are to be shown at request. While performing its tasks and duties, the group members can carry service weapons, ammunition and equipment in accordance with the authorization that are based on the national law of the host Member State. However, the host Member State may prohibit the wearing of a service weapon, ammunition or equipment if it shows that the same prohibition applies to its own border police.

In conclusion, it is evident that a single legal framework has been established on the territory of the European Union which, from a supranational level, determines the rules of procedures with regards to the national police forces at the common external borders, where the countries which control the external borders take responsibility for the security status of countries which do not have such control. The rules of getting visas and border crossings of people living in the border areas have also been established thereby creating a mechanism of assistance to countries which request help in performing the control of external borders. Border Police, in addition to responsibilities at the national level, enjoy a great responsibility at the European level as well (the failure to comply with those responsibilities may transfer the problem to the political arena between Member States).

Border security is one of the most comprehensive and most important parts of Chapter 24 – Justice, Freedom and Security where the Ministry of Interior found itself at the helm of the negotiation process. EU policies aim to maintain the existence of the Union and continue its development as an area of freedom, security and justice. On issues such as border control, visas, external migration, asylum, police cooperation, the fight against organized crime and terrorism, cooperation in the area of combating a misuse of drugs, customs cooperation and judicial cooperation in criminal and civil matters, Member States should be well equipped to adequately implement the growing framework of common rules. In almost all of these areas, Border police has its role and tasks. This requires, above all, building a strong and well-integrated administrative
capacities of bodies, law enforcement agencies and other relevant bodies which need to achieve the required standards. A professional, reliable, and efficient organization of border police is certainly of the utmost importance. At the same time, we can say that Chapter 24 is one of the most difficult to negotiate on, because of its sensitivity and interference in matters which are often seen as issues of national interest.

After the screening completion, the European Commission set benchmarks for the Republic of Croatia for the opening of negotiations on Chapter 24 – duty to adopt an updated action plan for integrated border management which should contain specific activities, both land and maritime borders with goals and realistic deadlines for responsible government bodies as well as budget estimates for each activity that requires investment. The first updated action plan for integrated border management has been accepted by the Government of the Republic of Croatia on 30 November 2006, and has since been issued annually. This ministry, as previously stated, was also the bearer of the Schengen Action Plan, which contains activities that Croatia should take into account after joining the EU in order to access the Schengen Area or take control of the external borders of the EU. On 9 April 2008 the European Commission approved the fulfillment of criteria/guidelines for the opening of Chapter 24 – Justice, Freedom and Security and recommended the opening of negotiations. The Government of the Republic of Croatia on 10 April 2008 adopted the Croatian negotiation position for Chapter 24, the next day the negotiation position was sent to the European Commission, while negotiations on Chapter 24 were formally opened on 2 October 2009 when Croatia received six closing benchmarks in this Chapter, one of which was again directly related to border surveillance:

- Republic of Croatia implements the Action Plan of integrated border management which is shown in the form of satisfactory records of monitoring and it will be fully prepared by the date of the accession to ensure the implementation and enforcement of EU requirements in terms of the external borders of the EU.

Due to the need of strengthening the border police and answering all of the said security challenges, but also due to the need of fulfilling its obligations and standards related to the accession of Croatia to the EU, the following strategic documents were devised:

a) Strategy for the Development of Border Police
b) Integrated Border Management Strategy with associated action plans
c) The Schengen Action Plan
d) The updated Action Plan on Integrated Border Management
e) Strategy for the Development of the State Police

**a) Strategy for the Development of Border Police** is the first document of this kind issued by the Government of the Republic of Croatia and adopted in 2005, and it has represented a revolution in strategic planning at the Ministry of Interior. Its main objective was to achieve the Schengen border management standards, define and develop a new concept of organizing human resource management of the border police, define minimum standards for procuring equipment of border police and
border police training programs. However, considering that when it was passed and considering the stage of negotiations along with significant changes which occurred in that time at the level of the EU, the Strategy soon pointed out deficiencies which were corrected in later documents and later became part of the Integrated Border Management Strategy.

b) **Integrated Border Management Strategy with associated action plans** defines the strategic guidelines for the integrated management of the country borders and contains instructions for the border police, customs, phytosanitary, veterinary and sanitary inspection and the State Inspectorate. It also contains provisions on asylum, migration and visa with the possibility of including other agencies in case of need. The Strategy includes an Action Plan for its implementation which the Government of the Republic of Croatia adopted in 2005.

Integrated Border Management Strategy with the associated Action Plan for its implementation is the result of the CARDS Program in 2001 called “Integrated Border Management”. The Strategy sets the basis for inter-agency cooperation in the management of the borders of the country, especially in the part relating to the performance of the control, establishment of procedures to facilitate border control and a faster flow of traffic, the implementation of a joint inter-agency cooperation, the use of shared equipment and others.

c) On 30 October 2006, the Government adopted the updated Action Plan on Integrated Border Management, which includes the implementation of the Strategy for the Development of Border Police, which is filled with a benchmark for the opening of negotiations on Chapter 24. In accordance with the obligation of a one-year update, the Plan was updated November 2007 and adopted by the Government in December 2007. The latest annual update was done in early 2012. The Government accepted it in April 2012. This updated version of the Action Plan for the implementation of the Integrated Border Management Strategy consists of three pillars of cooperation (inter-departmental, inter-agency and international cooperation). They are discussed in the following chapters:

- Legal and regulatory framework
- Management and organization
- Procedures
- Human resources and training
- Communication and information exchange
- Information technology systems
- Infrastructure and equipment

Each chapter contains specific actions with realistic deadlines and necessary human and financial resources. Financial resources for the implementation of the Action Plan are provided in the state budget and the pre-accession funds of the European Union. The activities contained in this document were jointly developed by the efforts of all agencies involved in the integrated border management in Croatia and will ensure effective implementation of all the necessary goals. Required regular annual analysis
of the implementation of the Action Plan, as well as an update, was placed in order to monitor its results. The Croatian Government established a task force to coordinate and monitor the implementation of the activities set out in the Action Plan, led by the Chief of the Border at the Ministry of Internal Affairs of the Republic of Croatia.

d) The Schengen Action Plan was adopted by the Government of the Republic of Croatia for the first time on 9 March 2007 and it includes activities that Croatia should take upon joining the European Union in order to access the Schengen Area, or to protect the external borders of the European Union. Areas covered are related to border control, visas, migration, asylum, the use of the Schengen Information System, customs, judicial cooperation in criminal matters and the protection of personal data. It is evident that the comprehensive plan and the measures implemented by the Border Police included are the responsibility of other bodies involved in Chapter 24 - Justice, Freedom and Security.

e) Development Strategy of the State Police and the Action Plan for its implementation from 2010 to 2013 was aimed at establishing an efficient system of border surveillance at sea in accordance with European standards. The Strategy defines the organization, operational measures and actions taken by the State Police, State Police training, development of risk analysis in the area of competence, IT structures and technical equipment, as well as cooperation with other governmental bodies and agencies, as well as cooperation with the Member States of the European Union, which will enable the achievement of the Schengen Border Management standards.
External Borders and Schengen – Slovak Experience

Miroslava Vozaryova

Conditions for Accession to the Schengen Area

In terms of the Protocol on Schengen acquis incorporated into the EU framework, the so-called Schengen Protocol, states which have declared their intention to join the EU have to adopt the Schengen acquis.

The Schengen acquis in its full extent is applied by the following member states of the European Union: Belgium, Germany, France, Luxembourg, Netherlands, Italy, Spain, Portugal, Greece, Austria, Denmark, Finland, Sweden, the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia and on the basis of a special treaty with the EU it is also applied by non-member states of Norway, Iceland, Switzerland and Liechtenstein.

Ireland, the Great Britain and Cyprus are Member States which cooperate with the Schengen states only in specific aspects and have not fully implemented the Schengen acquis up to now. Current candidate states for joining the Schengen Area are Bulgaria and Romania.

In terms of the wording of the Article 3 of the Act on Accession of 2003, new EU member states could not automatically abolish checks on their internal borders, join the Schengen Information System and issue common Schengen visas on the day they joined the EU. They started applying the Schengen acquis only in a limited extent, and for this purpose the Schengen acquis was divided into two categories for newly accessing countries.

In terms of the Article 3 (1) of the Act on Accession of 2003, new member states had to start applying the first category of the Schengen acquis on the day when they joined the European Union and it is stated in the Annex I of the Act on Accession of 2003 called the “List of provisions of the Schengen acquis as integrated into the framework of the European Union and the acts arising from it or otherwise related to it, to be binding on and applicable in the new Member States as from accession.”

New member states started to apply the Schengen acquis related to abolishing internal border checks and the common visa policy in line with the Article 3 (2) of the Act on Accession only after a decision of the Council of the European Union made, following positive Schengen evaluations related to a correct and full application of the Schengen acquis and in all areas concerned (land, air and sea borders, police cooperation, data protection, visa and the Schengen Information System/SIRENE). The Council of
the European Union made this decision only after a consultation with the European Parliament.

**External Borders – Travelling to the non-Schengen Area**

External borders are land borders of member states including river- and lake—borders, sea borders of member states and their airports, river-, sea- and lake-ports, provided that they are not internal borders. External borders may only be crossed at border crossing points and during the stated opening hours.

Crossing the external borders is laid down for all categories of travellers in the Schengen Borders Code. Crossing the external borders by the Slovak nationals is regulated, in addition to the Schengen Borders Code, also by the Act No. 647/2007 Coll. on Travel Documents and on the changes and amendment to some laws. When crossing an external border, third-country nationals must meet the conditions stated in the Article 5 of the Schengen Borders Code.

The basic rule for carrying out customs controls on the borders is that the EU nationals undergo only minimum checks – their identity is verified on the basis of the submitted travel documents, unlike third-country nationals who have to undergo systematic and thorough controls.

**Internal land border**

Internal land borders may be crossed at any point without undergoing personal customs control regardless of your nationality.

Nevertheless, the abolition of internal border checks has no impact on the execution of police powers by relevant member state bodies according to national law; unless the execution of these powers has the same effect as border checks; this is also applied for border areas.

**Schengen evaluation process of the Slovak Republic**

In order to assess a correct and full application of the Schengen acquis, in 1998 the Schengen Executive Committee established a Standing Committee on the evaluation and implementation of Schengen (currently “Schengen Evaluation Working Group of the EU Council”). The Working Group mainly assesses the level of implementation and application of the valid Schengen acquis and the Schengen standards by the states which are being evaluated. The evaluation is made for land, air and sea borders, police cooperation, data protection, visa and the Schengen Information System/SIRENE.
In the Declaration of the Minister of Interior of the Slovak Republic as of 20th December 2004, the Slovak Republic declared its readiness to start the evaluation process regarding the correct application of the Schengen acquis and of the Schengen standards with the intention to integrate the Slovak Republic into the Schengen Area.

The process of Schengen evaluation of the Slovak Republic started on 20th December 2005 by presenting individual institutions and respective bodies at the meeting of the Schengen Evaluation Working Group of the EU Council in Brussels.

The following picture represents the history of the Schengen evaluation process in the Slovak Republic:

**Security of the Schengen Area**

The Schengen Convention was the first and the main tool laying down cooperation in the area of law enforcement. It lays down a complete and legally binding abolition of checks on person at internal borders shared by signatory countries, enabling free movement of persons, goods and services, which are some of the fundamental rights of EU-citizens, while ensuring internal safety. In order to eliminate potential safety shortcomings which will arise as a result of abolition of checks at internal borders, the Convention also contains several compensatory measures. The most important one of them is an intensified police cooperation including mainly:

1. creating common cooperation structures by establishing a central body or a national point of contact for exchanging and providing information (in the Slovak Republic this task is carried out by the Presidium of the Police Force – International Police Cooperation Office), on the regional level then by creating police and customs cooperation centers (in the Slovak Republic this task is carried out by police cooperation centers);
2. cross-border surveillance;
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3. cross-border hot pursuit;

4. joint operations carried out in the form of:
   a) joint patrols;
   b) assistance in the events of natural disasters or serious events;
   c) cooperation in international football matches and special events;
   d) public officials protection;

5. creation of joint investigation teams;

6. secondment of liaison officers;

7. operation and usage of the Schengen Information System.

The Schengen Convention also enables all Member States to modify and extend their individual police cooperation institutes in bilateral or multilateral agreements beyond the Schengen Convention.

As it is necessary to intensify and generally develop close police cooperation, the Slovak Republic concluded the following bilateral agreements with its neighboring states of the Schengen Area:


Agreement between the Slovak Republic and the Republic of Austria on Police Cooperation (Notification of the Ministry of Foreign Affairs of the Slovak Republic No. 252/2005 Coll.).

**Schengen Police Cooperation**

In order to provide coordination and police cooperation within the Schengen Area with other Member States, a single point of contact for international police cooperation was established in the Slovak Republic – **International Police Cooperation Office of the Presidium of the Police Force** (hereinafter referred to as the “Office”).

The Office provides for police cooperation within the Schengen Area by means of the national SIRENE office, Europol National Unit and a department for international police cooperation. International police cooperation with non-Schengen states is provided
by the National Central Bureau of INTERPOL channel and the network of police attaches and police liaison officers. In addition to exchange of information through the Office’s single point of contact, requests for cross-border police cooperation may also be submitted to the police cooperation centers (PCC) established on the borders with neighbouring states except for Ukraine.

On the basis of bilateral agreements on police cooperation, the Slovak Republic, in cooperation with its neighboring states of the Schengen Area, has established seven police cooperation centers which main aim is to support cross-border police cooperation in order to prevent and deal with threats to public order safety. On the border with the Republic of Poland there is a PCC in Vyšný Komárnik and in Trstená, on the border with Austria there is such PCC on the highway crossing Jarovce – Kittsee, on the border with the Republic of Hungary such PCCs are located in Čunovo, in Slovenské Šarmoty and Slovenské Nové Mesto and on the border with the Czech Republic in Hodonín.

Other forms of Schengen police cooperation

Cross-border surveillance is laid down in the Article 40 of the Schengen Convention. Officers of one of the Contracting Parties who, as part of a criminal investigation, are keeping under surveillance in their country a person who is presumed to have participated in an extraditable criminal offence shall be authorised to continue their surveillance in the territory of another Contracting Party where the latter has authorised cross-border surveillance in response to a request for assistance made in advance. Where, for particularly urgent reasons, prior authorisation cannot be requested from the other Contracting Party, the officers carrying out the surveillance shall be authorised to continue beyond the border the surveillance of a person presumed to have committed criminal offences, provided that the authority of the Contracting Party, in whose territory the surveillance is to be continued, must be notified immediately, during the surveillance, that the border has been crossed.

The Article 41 of the Schengen Convention on hot pursuit enables police officers pursuing a person caught in the act of committing or of participating in a serious crime in their country to continue the pursuit on the territory of another state without the latter’s prior authorization where given the particular urgency of the situation, it is not possible to notify the competent authorities of the other Contracting Party prior to entry into that territory or where these authorities are unable to reach the scene in time to take over the pursuit. The same shall apply where the person being pursued has escaped from imprisonment, provisional custody or while serving a sentence involving deprivation of liberty. The pursuing officers shall be easily identifiable, either by their uniform, by means of an armband or by accessories fitted to their vehicles.

In order to intensify police cooperation when maintaining public order and safety and preventing crimes, relevant authorities may use joint patrols and other joint opera-
tions, i.e. nationals of one Member State participate in operations on the territory of another Member State.

The aim of the joint patrols is to facilitate the access to law enforcement by nationals from the different Member States concerned, to improve general cooperation among the authorities and officers involved, to provide practical and linguistic assistance to the officers of the host State, to facilitate communication with national authorities of the supporting State, etc.

Two kinds of joint patrols are usually carried out:
- joint patrols in the border areas between Member States – they are established depending on operational needs. Such patrolling may be performed on the territory of one of the Member States concerned, or patrols may repeatedly cross the borders
- joint patrols in the framework of particular events or periods.

A special kind of joint operation is assistance in mass gatherings and similar major events, disasters or serious accidents with the aim to prevent criminality, maintain public order and safety. In relation to football matches with an international dimension and adopting measures to prevent violence and riots, National Football Information Point has been established, providing for cooperation during international football matches exceeding the exchange of information.

Joint investigation teams are considered to be a suitable tool in the fight against cross-border criminal activities. Joint investigation teams will be set up in line with the provisions of the Convention on Mutual Legal Assistance and following an agreement between two or several Member States and other contracting parties for a specific purpose and limited duration.

**Schengen Information System**

Freedom of movement in the Schengen Area is not connected only to legal regulations but also to information systems which help to provide exchanging important information necessary for determined authorities and subjects responsible mainly for safety, protection of public order, persons and property. One of such information systems is the Schengen Information System (SIS). This information system is one of the main compensation measures to ensure safety and public order on the territory of the member states of the common Schengen Area and is one of the major pre-requisites for abolishing controls on internal borders.

The SIS enables members of safety units of the member states to acquire access to data entered in the SIS by any member state and related to the search for persons and objects, and in particular cases to provide appropriate response to such entries – e.g. to prevent a person, whose entrance in the Schengen Area has been prohibited in one country, from entering the Schengen Area in another one, or, on the contrary,
to arrest a wanted person trying to leave the Schengen Area, to search for missing person, lost or stolen objects. The SIS is not only used at border crossing points of the Schengen Area countries, but helps revealing criminal activities within the inland, too.

The Schengen Information System contains the following categories of entries for the purpose of: - arresting persons and handing them over to relevant authorities of the requesting state (Article 95 of the Schengen Convention); - expelling persons from the Schengen Area (Article 96 of the Schengen Convention); - discovering missing persons (Article 97 of the Schengen Convention); - identifying a place where a wanted person is staying for judicial authorities (Article 98 of the Schengen Convention); - discrete or specific control of persons or vehicles (Article 99 of the Schengen Convention); - seizing lost, stolen, invalidated or misappropriated objects (Article 100 of the Schengen Convention).

Data is entered to the SIS by each member state; then it is accessible on-line to each of the countries involved. SIS only contains those categories of data which is necessary for police and customs units in relation to checks of persons and objects, for judicial authorities and for authorities in charge of issuing residence permits or visas. These authorities use the information and data from the Schengen Information System to fulfil their tasks and subsequently they adopt relevant measures against persons or objects which are subjects of the searches.

In relation to this, each member state has established a SIRENE office responsible for the quality of national data processed by the SIS, and at the same time it represents a special unit providing the exchange of supplementary information to entries in the SIS among individual member states. The SIRENE office is also competent in the area of personal data protection and deals with the issues of rights of data subjects whose personal data is recorded in the SIS records.

A historical reason for establishing the SIS was the need to make all data on missing or wanted persons and objects, or persons whose entrance in the EU is to be denied, available directly and efficiently to all safety units of member states involved. The SIS started to be built in 1988 when first ideas appeared about the necessity of a common information system which would contain police information from each member state. The original technical concept was determined for 12 member states of the EU. Later it has changed into SIS 1+ which could include 18 countries at most.

In the course of 2000 first ideas about a further development and increase of efficiency of the SIS started to appear, as in that form it was not able to provide its services to more than 18 countries, so a concept to develop a second generation of this system (SIS II) has been approved. It involves broad technical and technological changes which will have impact on its data structure and provide several new functionalities. Due to objective facts and different obstacles the development of the system, it is constantly behind the original schedule of its construction. As a result of the delay, the Council of the European Union decided in December 2006 that a version of the so-called SISOne4all was to be made, a solution provided by Portugal, which in September 2007 enabled
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the accessing countries to join SIS 1+. It concerned 9 member states which joined the EU on 1st May 2004. The Slovak Republic is also one of the countries using the access to SIS by means of the SISone4all version. Cyprus is an exception, not planning to join until the SIS II. Currently the SIS database is used by 28 countries.

National Bureau of SIRENE

The national SIRENE office was established in the Slovak Republic on 1st January 2004 and has been included in the organisational structure of the Office for International Police Co-operation of the Police Corps Presidium. In terms of the Article 69 (9) of the Act No. 171/1993 Coll. on Police Force as amended, the national SIRENE office represents a separate unit providing an exchange of supplementary information and personal data to the entries processed in the Schengen Information System.

The name SIRENE is an acronym of the English phrase expressing the main scope of activity of this centre (Supplementary Information REquest at the National Entries). Each EU country using the Schengen Information System has its own SIRENE office established for this purpose.

The national SIRENE office plays the role of a point of the first contact within international police co-operation, both for partner SIRENE offices abroad and for national authorities and individual end-users of the Schengen Information System. SIRENE offices established in member states of the common Schengen Area communicate with each other 24/7 by means of a specific e-information network in a determined form. The communication among SIRENE offices is most intensive in situations when police forces of member states, fulfilling their tasks of checking persons and objects, identify these with one of the entries in the Schengen Information System. In such cases it is necessary to obtain the maximum amount of information available from the country which has created the entry in the system in order to pursue the given matter. Depending on single cases, a SIRENE office has to be able, as a part of fulfilling its tasks, to deal with single requests of the bodies involved, or to forward them to competent authorities.

Main areas of tasks fulfilled by the national SIRENE office:

- searching for persons and objects on the basis of entry in the Schengen Information System (entering, updating, deleting an entry);
- exchanging supplementary information and personal data to the entries (photos, biometric data, decisions of relevant bodies, etc.);
- executing the European arrest warrants (providing hand-over and take-over of person);
- international police co-operation in terms of the provisions of the Schengen Convention (Articles 39, 40, 41, 46);
- protection and quality of personal data processed in the Schengen Information System;
• rights of data subjects exercised in terms of the Articles 109 and 110 of the Schengen Convention;
• providing information in view of the Act No. 211/2000 Coll. on Free Access to Information;
• participation in meeting of working groups of the EU bodies;
• education in the area of Schengen police co-operation and the Schengen Information System;
• operation of the national part of the Schengen Information System;
• implementing the development of the Schengen Information System in national conditions.

**European Arrest Warrant**

European arrest warrant is an important tool of judicial bodies of the EU member states aiming at arresting the person on the territory of the member states and at subsequent take-over of the person to the requesting member state for prosecution, execution of the punishment imposed or a protective measure. The European arrest warrant issued in the Schengen Area countries also represents a legal basis for inserting a search (creating an entry) in the Schengen Information System in line with the Article 95 of the Schengen Convention, and herewith then creates a scope for international co-operation of judicial and police bodies of these states.

In the Slovak Republic this issue is regulated by the Act No. 154/2010 on European Arrest Warrant laying down the procedure of Slovak authorities when take-over persons among the EU member states on the basis of the European arrest warrant and the related proceedings.

SIRENE office plays an important role in the process of international search for a person as well as in the process of exchanging necessary information among the Schengen Area countries. In addition to the related administration, the SIRENE staff directly arranges physical hand-over of the person and in almost all cases they also take part in the hand-over process itself.

The procedure of the physical hand-over of the person between the state requesting the person to be taken-over and the state handing-over the person is a subject of co-operation of police authorities of these states. The escort and the subsequent hand-over of the person is always made with armed security units present, both on land borders of the co-operating countries – at former border crossings or at the common contact centers - as well as in identified airport areas, if the person has to be escorted by plane.
Data Subjects’ Rights

Since the moment when the Slovak Republic joined the Schengen Information System and also made available all the data kept herein which has been entered by relevant member states and also all the data entered subsequently by the Slovak Republic, and in line with the Article 109 of the Schengen Convention, natural persons have the right to enquire the data about him/her collected in the Schengen Information System. This entitlement is governed by the national law of the Slovak Republic. In its Article 19, the Constitution of the Slovak Republic lays down the right of each person to be protected against unlawful collecting, disclosing or other misuse of the data related to him/her.

The issue of rights of the data subjects is regulated by the Act No. 428/2002 Coll. on Personal Data Protection as amended, and also by the Act No. 171/1993 Coll. on Police Force as amended (hereinafter the “Act on the Police Force”), as processing personal data kept in the police information systems requires a specific legal regulation.

The data subjects is each natural person whose personal data is processed and, in terms of the Article 69c of the Act on Police Force, he/she has the right to enquire at the Ministry of Interior of the Slovak Republic in writing which personal data about him/her is processed. At the same time, the administrator of the Schengen Information System is obliged to provide a free-of-charge response to the data subject within 30 days from the day when the written request was delivered. In terms of the Article 69c of the Act on Police Force, the data subject has also the right to ask for correction or destruction of the personal data processed in the Schengen Information System, if he/she submits a written request for correction or destruction of the data.

If the data subject suspects that his/her personal data is being processed illegally, he/she can, in terms of the Article 20 (6) of the Act on Personal Data Protection, notify directly the Office for Protection of Personal Data of the Slovak Republic which shall verify if the rights of the data subject have been violated by processing the data in the Schengen Information System. The notification procedure is regulated by the Article 45 of the Act on Personal Data Protection.

State Bodies of the SR Implementing the Schengen Acquis

<table>
<thead>
<tr>
<th>Schengen acquis area</th>
<th>Content</th>
<th>Managing Entity and a co-managing entity</th>
</tr>
</thead>
</table>
| 1. Police co-operation (including the fight against terrorism, organised crime and drug criminality) | • exchanging information  
• cross-border co-operation  
• hot pursuit and cross-border surveillance  
• common contact centres  
• legal aid  
• legislation | MOI SR – managing entity  
MFA SR  
MF SR – CD  
MJ SR  
GPO SR |
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| 2. | N SIS and SIRENE office | • national interface of the SIS  
• exchanging information  
• legal aid  
• surrender of persons sought on the basis of the European arrest warrant | MOI SR – managing entity  
MFA SR  
MF SR – CD  
MJ SR  
GPO SR |
| 3. | Border management | • border control  
• border crossing points  
• internal controls – mobile units  
• veterinary and phytosanitary protection | MOI SR – managing entity  
MF SR – CD  
MJ SR  
MFA SR  
MTCRD SR |
| 4. | Migration | • legal and illegal migration flow control  
• people smuggling  
• illegal work | MOI SR – managing entity  
MLSAF SR  
MTCRD SR |
| 5. | Visa policy | • visa issuing  
• entrance in and transit across the SR territory  
• expulsion  
• readmissions | MOI SR – managing entity  
MFA SR |
| 6. | Customs co-operation | • customs co-operation  
• cross-border co-operation | MF SR – CD – managing entity  
MOI SR |
| 7. | Data protection | • registration and records of information systems  
• IS control | Data Protection Authority of the SR – manager all CBPAs |
| 8. | Education in the area of European affairs and the Schengen acquis | • education of state service officers executing tasks related to the Schengen acquis | MOI SR – managing entity  
the CBPAs involved |
| 9. | Justice co-operation | • criminal matters  
• civil matters | MJ SR – managing entity  
GPO SR  
MOI SR |

**Abbreviations used:**

- MOI SR: Ministry of the Interior of the Slovak Republic
- MFA SR: Ministry of Foreign Affairs of the Slovak Republic
- MF SR – CD: Ministry of Finance of the Slovak Republic – Customs Directorate
- MJ SR: Ministry of Justice of the Slovak Republic
Recommendations:

- identification of state bodies responsible for each part of Schengen acquis and one main responsible Ministry (recommended MoI) that should coordinate the agenda,
- to draft an action plan with framework tasks (short-term, long-term), e.g. technical, legislative, financial (including EU financial tools), organizational etc. and to submit it to the Government for its approval.
- regular check of development within responsible state authorities.
Montenegro is a candidate for membership in the European Union, which brings forth the commitment, *inter alia*, to harmonize its legal framework with the EU *acquis* during the accession process. Within the Chapter 24 – Justice, freedom and security, under the security sub-group, apart from the cooperation in fight against drug trafficking, the fight against terrorism, the fight against organized crime and the fight against trafficking in human beings, there is also the area of police and customs cooperation.

Session 3 of WG II – Justice, freedom and security, realized in the scope of the NCEI 2013-2014 project was dedicated precisely to the topic of “Customs Cooperation” with the aim of increasing the level of alignment with the *acquis* in this area and achieving the best possible negotiation position of Montenegro in its process of EU accession.

The legal framework for the cooperation between Montenegro and the EU Member States is the Stabilization and Association Agreement between Montenegro and the European Union (Official Gazette of Montenegro, No.7/07). Pursuant to Article 99 of the Agreement, the Customs Administration of Montenegro carries out cooperation with customs services of the EU Member States, on the basis of Protocol 6 of this Agreement, which regulates mutual administrative assistance in customs matters. In the national law, Article 14 of the Customs Act stipulates that in the exercise of customs supervision and control, and when it is necessary in order to reduce the risk, the customs authorities may exchange information with regard to entrance, export, transit, transfer and end-use of goods moving between the customs areas of Montenegro and other territories, as well as in relation to the presence of foreign goods, with international institutions and bodies of other countries. In addition to this, the legal support is represented by regulations set out in the Customs Administration Act governing the jurisdiction of the body responsible for customs duties, rights, obligations and responsibilities of customs officers.

There are several segments within which customs cooperation is performed. First of all, customs cooperation is achieved through the implementation of the agreements with international organizations where, besides the agreement with the EU, Montenegro participates in the work of numerous international and regional organizations such as:
- Membership in the World Customs Organization, making Montenegro a signatory of the Convention on establishing the Customs Cooperation Council, which confers certain rights and obligations
- Membership to the Initiative for Cooperation in South East Europe (SELEC)
- Participation in the work of the Regional Intelligence Liaison Office for Central and Eastern Europe (RILO ECE)
- Exchanges of intelligence information on cross-border smuggling, primarily with countries in the region, but also with other countries, international organizations and institutions engaged in the fight against cross-border crime such as OLAF, EUROPOL, Interpol etc.
- Participation in the SEED project which performs systematic electronic data exchange of goods and means of transport with all neighboring countries except Republic of Croatia
- Implementation of customs cooperation in accordance with Annex 5 of the Agreement on Amendments and Central European Free Trade Agreement – CEFTA 2006
- Participation in the projects of Venice Cooperation Initiative
- Participation in the implementation of the Regional Program of the United Nations Office on Drugs and Crime (UNODC) for better governance, justice and security in Southeast Europe, 2012-2015.

Aside from implementing the provisions of the said agreements with international organizations and memberships and participations in numerous international and regional organizations, customs cooperation is conducted on the basis of international agreements. Customs Administration of Montenegro has signed 27 bilateral agreements on cooperation and mutual assistance in customs matters with other countries, 12 of which are Member States. Also, the Customs Administration of Montenegro has signed a Memorandum of Understanding with certain airline and shipping companies and agencies, as well as the Memorandum of Understanding and exchange of information between Montenegro and Italy at the state and local levels between port customs. The purpose of this memorandum was signed to acquire so-called “pre-arrival” information on goods and passengers.

In addition to the cooperation with other countries in the field of customs and intelligence, the Customs Administration of Montenegro is actively involved in cooperation on the said matters with other Montenegrin institutions. It has signed agreements and memoranda with the following institutions in Montenegro: Tax Administration, Police Administration, Directorate for the Prevention of Money Laundering and Financing of Terrorism, the Supreme State Prosecutor’s Office – through the formation of a joint investigation team, the Ministry of Internal Affairs and Public Administration and the Ministry of Justice within ILECUS project (International Law Enforcement Coordination Units), Market Inspection, Directorate for Anti-Corruption Initiative, Environmental Protection Agency, Administration for Pharmaceutical and Medical Devices and Supplies and Montenegrin Employers Federation.
In the area of customs cooperation, legislation in Montenegro is partially aligned with the *acquis*. The *acquis* in this area consists of the Convention on mutual assistance and cooperation among customs administrations (Naples II), adopted on the basis of the decision of the Council of Europe of 18.12.1997. The objective of the said Convention is to prevent and detect violations of national customs legislation and to prosecute and punish infringements of the EU and national customs legislation. In order to meet the increasingly complex requirements, the Customs Administration of Montenegro introduces changes in the organizational structure and initiates the expansion of its jurisdiction. In this regard, during 2012 an initiative was addressed to the Ministry of Justice to amend the Code of Criminal Procedure with regards to the provisions that provide the necessary powers to customs officers to act in the stage of criminal proceedings in relation to a criminal offense. These activities were necessary to meet the specific forms of cooperation set by the Convention on mutual assistance and cooperation between customs administrations – Naples II, where the Customs Administration of Montenegro is an observer and will become a party to this Convention only upon its accession to the EU. Special forms of cooperation include cross-border actions for the prevention and investigation of certain violations of national legislation of Member States and customs regulations, control of supply, joint investigation teams, and undercover investigations, etc.

In addition to this Convention, the Council Decision 2009/917/JHA of 30.12.2009 regarding the use of information technology for customs purposes is also part of the *acquis*. A common automated information system for customs purposes, the so-called Customs Information System (CIS) is established by this Decision.

The objective of establishing CIS was to help in the prevention, investigation and prosecution of serious violations of national laws through the rapid spread of information, enabling better collaboration and control procedures of the customs services of the Member States.

In order to increase the level of alignment with the *acquis* in this area it is necessary to stay aware of the new role of customs services in terms of security, both at the EU and at the global level. Therefore, in order to achieve the best possible position of Montenegro in the process of EU membership, it is necessary to carry out the following activities:

1. Continuation of activities regarding the harmonization of the national legal framework with the EU *acquis* in the field of customs cooperation (the Convention on mutual assistance and cooperation between customs administrations (Naples II)) and Council Decision 2009/917/JHA on the use of information technology for customs purposes.)

2. Strengthening of the administrative capacities of the customs service through:
   - Realization of training programs of custom officials on the *acquis*, standards and practices of customs services in Member States;
   - Realization of specialized training programs for custom officials in smuggling and customs fraud;
This project has been financially supported by the European Union.

3. Providing modern and high-quality technical equipment required for customs control and combating smuggling at border crossings, inland customs offices as well as for mobile teams (static and mobile scanners, portal monitors, equipment for detection of radioactive materials, explosives and narcotic, vehicles etc)

4. The creation of preconditions for joining the Common Customs Information Systems of the Member States (CIS and other information systems) and continuous monitoring of the implementation of ICT strategy and ICT tactical plan.
Border cooperation within the Chapter: Justice, freedom and security

Vesna Kadić Komadina

Apart from the fight against illegal migration and Common Visa Policy, strengthening the security of external borders also implies the fight against organized crime with its key element being the efficient cooperation among police, judicial and customs authorities of Member States and the harmonization of criminal legislation. With the accession of Republic of Croatia to the European Union, its borders became, for the most part, an external border of the Union, which augmented the responsibility of all the institutions acting at the external border.

It is important to emphasize that the role of customs service in the world has significantly changed over the years. The ever advancing technology, increased international trade, global threats such as terrorism, organized crime, climate change and trade in hazardous substances have instigated substantial changes in the modus operandi of customs services, which now play a key part in the European Union. Their mission and general aim is to constantly make sure to establish a necessary balance between protecting the society on one hand and making trade easier on the other, at the EU external borders as well as inland.

Reaching such a balance is far from simple, but there are certain methods and mechanisms which make it easier. A continuous development of modern information technologies accelerates the operating process with the application of analysis methods and risk management, which enables fewer physical examinations of goods with the increase of targeted inspection of goods and controls over risky shipments.

Customs service has ample information regarding every movement of goods imported into or exported from the EU and applies sophisticated methods of control. The extent of movement of goods across external borders of the EU is huge, and therefore the customs service must be highly efficient in order to successfully cope with such a large scale of trade, without causing major delays and traffic jams while curbing fraudulent or illegal activities.

The creation of a single market meant the abolition of all customs formalities at the borders between EU Member States. Thus, the national customs bodies became responsible for the protection of the external borders in terms of goods, becoming the main protection between the illegal and dangerous international trade and the freedom of movement within the single market.

From all of the above, there are demanding obligations and expectations in relation
to the customs authority of Member States, as well as of those countries that are preparing for full membership. In any case, it is important to note that the process of negotiation itself is extremely complex and the candidate countries are expected to fulfill a number of prerequisites and implement a set of numerous legislative and administrative measures. The pre-accession period implies the preparation of the candidate country for a full-fledged membership and reaching full capacity for transposing and implementing the *acquis*.

As far as the customs cooperation is concerned, it represents one of the areas of the *acquis* under Chapter 24 – Justice, freedom and security. There are many regulations which prescribe the manner of cooperation both between the customs services of the Member States and with other law enforcement agencies. In this article, I will focus only on the key acts of the *acquis* in the field of customs cooperation. The legal conditions in this area stipulate creating a legal framework for the implementation of the *acquis*, with the emphasis on the preparation for the accession to the Convention on Mutual Assistance and Cooperation between Customs Administrations (Naples II), as well as preparing the implementation of Council Decision 2009/917/JHA on the use of information technology for customs purposes.

The aim of the Naples II Convention is to prevent and detect violations of national customs regulations and punish infringements of the Community and national customs legislation. This Convention provides for specific forms of cross-border cooperation in terms of action of the competent authorities of a Member State in the territory of another Member State. By being involved in cross-border cooperation, the customs service shall mutually provide all support necessary in terms of human resources and organizational support. This kind of cooperation requires a strictly prescribed set of rules and its implementation is somewhat difficult for those customs services which do not have the required authorization in their actions. Also, it is necessary to ensure a satisfactory level of protection of personal data during the exchange between different government bodies, as well as Member States.

Another key document is the Council Decision 2009/917/JHA regarding the use of information technology for customs purposes. This Decision established a common automated information system for customs purposes, the so-called Customs Information System (CIS). The objective of establishing CIS was to help prevent, investigate and prosecute serious violations of national laws through a rapid dissemination of information, which allows for greater efficiency of cooperation and control procedures of the Member States customs services.

Please note that in the *acquis* there are several other regulations governing the customs cooperation with other law enforcement bodies, joint monitoring measures as well as the strengthening of practical cooperation among the customs services of the Member States, primarily by organizing joint operational actions of customs control and data exchange, but it is also important to emphasize how a mere transposition of the *acquis* and the harmonization of national legislation with EU legislation is not enough. It is also important to apply and enforce those very same laws.
In terms of Chapter 24 and measures to be implemented in the area of issues related to customs cooperation, it is from the outset necessary be aware of the new role of customs service both at the EU and the global level.

New security roles of customs bodies require stronger powers delegated to customs officers, which should be defined by the Customs Service Act or other relevant legislation. Within the framework of the harmonization in the field of customs cooperation, in addition to the aforementioned legal prerequisites, it is also important to fulfill administrative and technical requirements, as well as to adapt the IT infrastructure.

Therefore, along with the legislative measures, it is necessary to implement a series of administrative measures which are supposed to strengthen the administrative capacity of the customs service. Customs Service, according to its new role, has to make strategic directions of development of services in the medium term, on the basis of which it could argue necessary reforms, reorganization and investment in human resources.

With regards to the safety aspect of the customs service, it is necessary to provide all the tools for the work of the customs service which needs to accentuate the strengthening of customs control and new methods of surveillance at the border as well as inland. The formation of mobile teams increases the flexibility of the Service as well as its mobility. It is these increased powers which contribute to their effectiveness. New and increased powers, of course, also imply a greater responsibility of the officers, which means that it isn’t enough to simply introduce new authorizations, but to prepare the civil servants for their implementation in a systemic way, in order to avoid illegal and irresponsible conduct as they certainly require high-quality theoretical and practical training of the civil servants in question.

This training is extremely important at the level of all officials, particularly in relation to the new practices introduced through EU legislation and Member States practices. A timely adoption of new rules and methods of operation will greatly facilitate the adaptation to EU standards.

With regards to the Customs Union and the single actions of the Member States in terms of implementing trade, agricultural and other measures against third countries, it is necessary to adopt a strategy for the development of information systems, with emphasis on establishing many systems of interconnectivity and interoperability that enable connection and data exchange between customs services of States, but also with the European Commission. This is one of the most challenging tasks that require many human and financial resources. Continuous development is occurring in the field of information technologies which require constant monitoring of the customs services and the constant investment in existing information systems and their upgrades.

It is therefore necessary to establish a flexible environment which has the capacity to promptly respond to the continuous development of IT technologies and new applications and be able to build upon the existing customs systems in accordance with the changes at the EU level.
As far as the Chapter 24 is concerned, it is certainly one of the most financially challenging chapters.

Efficient implementation of safety standards at the borders requires a new and modern methodology of action of the border police, customs and all other services involved in border control.

For this purpose, it is necessary to strengthen the existing administrative capacity, which means not only ensuring a sufficient number of personnel, but also their capacity in terms of powers and equipment necessary, as well as an adequate infrastructure at border crossings.

The implementation of safety standards at the border implies establishing an efficient system of state border, which is achievable with good cooperation of all agencies operating at the border. For this purpose, an integrated concept of border management is designed, which was introduced in Croatia in 2005 and forms the basis of interdepartmental cooperation. This concept contributes to better coordination and strengthening of cooperation between all agencies responsible at the state border, avoiding job duplication and accelerating procedures at the border and the flow of passengers and goods, while at the same time increasing security with the aim of combating cross-border crime.

In conclusion, I would like to emphasize that the pre-accession process is rather exhausting for every country, particularly for its government’s institutions, and requires huge resources. Therefore, it is crucial to begin with a good organization of the negotiation process and creation of high-quality teams of people who will handle most of tasks, both in the sense of coordination of the negotiation talks as well as in the professional sense with regards to the harmonization of legislation and adoption of the best practices of Member States.

Likewise, it is important to stress that the EU, through the European Commission, provides ample support to the countries which are applying for full membership, through the provision of technical assistance and pre-accession funds which are made available, given that it is difficult to deal with all the activities needed to be carried out at the national level.

It is therefore very important to have a clear strategy and objectives based on which projects for financing from EU funds are to be prepared, as well as personnel trained to prepare and manage those projects.
Producer organizations in the fruit and vegetable sector

Zoran Krsnik

For the last fifteen years I have been intensively involved in advertising agricultural and food products with a special focus on the market of fresh fruits and vegetables in Central and Eastern Europe (CEE). This region has many historically conditioned similarities, as certain countries of the region with varying degrees of success are undergoing the process of transition from a planned to a market economy. I would say that through the measures of the Common Agricultural Policy (CAP) an equal chance has been given to, more or less, all Member States and candidate countries to reach the EU standards in the agricultural sector, and it depends on individual countries to what extent will they take the offered opportunity.

By looking over the past fifteen years at only the fruit and vegetable sector (VIP sector) in the countries in transition, I noticed the following characteristics, as well as problems this sector faces in the CEE region:

1. **Economic characteristics:**
   - difficult transition from a planned to a market economy
   - high percentage of small, fragmented holdings
   - predominantly extensive production
   - poor implementation of agro-technical measures
   - absence of specialization
   - insufficient system of subsidies
   - undeveloped system of lending/finance sector
   - poor image of local products
   - high trade margins
   - standards mismatched with those in EU markets
   - poorly developed sales network and dominance of direct marketing
   - difficult access of modern retail channels and so on

2. **Social characteristics:**
   - weak revenue for the direct producers
   - insufficient education
   - aging of the population engaged in the production
   - lack of cooperation and producer organizations
   - unused arable land with great potential for growth and employment
   - abandonment of production and emigration to urban areas and so on

3. **International context:**
   - globalization (distances are reduced, international trade is growing faster than production and consumption, concentration, standardization, production tends to move towards the most competitive countries in the world, free markets etc.)
This project has been financially supported by the European Union.

- urbanization (more people live in cities than in rural areas)
- changes in the modern society (individualization, aging society, knowledge-based economy, etc.)
- agriculture (with a cultural dimension) as opposed to farming (as well as any other industrial activity)
- WTO – the free market
- EU Common Agricultural Policy (CAP)
- new rural development policy
- ecology and so on

These features significantly threaten the sustainability of the VIP sector in the CEE region in terms of global markets and therefore urgent, serious and radical reforms of the sector are needed. Fortunately, these problems have been recognized by the economic strategists of the Union, and the EU has predicted, through its decrees under the CAP, models of organization for producers in the VIP sector, organized in such a way through a system of subsidies which enables sector restructuring and achieving the necessary level of competitiveness which allows the survival of producers in the global market. However, in order for the mentioned organizational and financial models to be implemented in a timely manner, it is necessary to dedicate a certain amount of time to preparing the Sector for the transition, which, inter alia, includes:

- Drafting national development strategies in the VIP sector (what, where, how and for whom to produce)
- Modify the system of subsidies according to the EU standards
- Creating/updating the database of agricultural producers/associations in the VIP sector + revision
- Training of the Advisory Service employees to provide consulting services in the implementation of certain education models
- CEE regional cooperation – engagement of experts from the region + study tours
- Monitoring of the Ministry, etc.

If these necessary preparations were to be conducted on time, the conditions for the use of available funds would be created and thus the VIP sector would be modernized at three key levels, namely:

- in production – establishing producer groups and organizations, the concentration of production, specialization in several key products from the VIP sector, modernization of production, standardization, etc.
- logistics – building and equipping the necessary logistical capacity for the collection, storage, sorting, packing and distributing products with the financial support from the EU funds
- at the market – by adopting EU standards for individual products or groups of products the EU and third countries market would open for the producers along with equal opportunities.

Finally, there is a realistic chance for establishing a sustainable VIP sector and it’s only a matter of question to what extent are certain countries ready to take advantage of the opportunity given.
The Code of Good Agricultural Practice and Cross-Compliance (the Acquis and practice in Montenegro)

Jovan Nikolić

The Common Agricultural Policy (CAP) is composed of two pillars – the income and market policies financed by the European Fund for Guarantees in Agriculture and rural development financed by the European Fund for Rural Development.

To apply this policy in the years to come, Montenegro will have to adapt its national agricultural policy and bring it closer to the CAP, especially in terms of the agricultural policy measures which have to be implemented gradually.

When creating the necessary measures, apart from the harmonization, one should take into account the anticipation of future measures of the CAP for the programming period 2014-2020, because it is a dynamic policy which has been, for the given period, to some extent changed, compared to the previous one.

The publication of the Code of Good Agricultural Practice, published by the Ministry of Agriculture, was created out of necessity and as a measure of support for the gradual adaptation of our agricultural system to the CAP requirements and to the special conditions called cross-compliance (cross-conditionality) which manufacturers must meet in order to receive direct assistance (subsidies).

These conditions include: public health standards, animal health and animal welfare, plant health, environmental protection and the preservation of land in good, arable condition. If a manufacturer fails to meet any of these conditions, his payment may be reduced or even withdrawn.

The above conditions are classified into two groups:

- Statutory management requirements (SMR), which currently include the current EU regulations in the field of animal and plant health and animal welfare. This list is constantly updated with new regulations;
- The preservation of the land in good condition and the production environment (Good Agricultural and Environment Conditions – GEAC).

This area falls within the discretion of each Member State to further define these elements (prevention of soil erosion, etc.). The requirements and the system of cross-conditionality are legally regulated by the Council Directive (EC) No. 73/2009 and Commission Regulation (EC) No. 1122/2009.

Some of the necessary preconditions for effective implementation and enforcement of the provision of these Directives are met in Montenegro by forming the Department
for Payments within the Ministry of Agriculture and Rural Development in 2011 (the function of the Agency for Payments) and the existence of advisory service which can be regarded as an equivalent to the System Farm Advisory (FAS).

In the coming period, it is necessary to establish a system of identifying parcels (LPIS/Land Parcel Identification System) as a prerequisite for the operation of an integrated administrative system of control payments (IACS – Integrated Administration and Control System) as well as the adoption of a number of laws that regulate this area as a whole, in other words: creating a legal framework.

Since this process is demanding and complex, in order to complete its establishment it is important to successively carry out structural changes in the coming period, in order to strengthen the administrative capacity, create a legal framework and last, but not least, to provide education for producers and prepare them for the complex requirements of the EU agricultural policy. It is the Code of Good Agricultural Practices which is a good starting point, essential source of information and a synergy of guidelines that will help farmers adapt to the demands and exercise their rights in terms of getting direct support (subsidies).

The above stems from the fact that the concept of the Montenegrin Code of Good Practice is designed and structurally comprised of five mandatory standards that each member of the EU must define for GAEC, namely the following: protection of the agricultural land (erosion, organic matter, structure and minimal coverage), as well as the standard of water safety and management. Also, the Code includes sections of standards of animal breeding and a safe use of pesticides, by which the Code deals with certain statutory management requirements – SMR.

Although the document is recommendatory in character, similar to Codex Alimentarius - without binding legal force, the purpose of the Code of Good Agricultural Practice is practical and its implementation can contribute to gaining the necessary experience that will prove to be important once the national legislation governing these areas acquires its final form, according to the requirements of the European Union.
Agriculture in the European Union is much more than food production. For most farmers it is a way of life. The role of farmers in the European Union is substantial and multifaceted. A European farmer produces high quality and safe food and places it on the market at affordable prices. The rules governing this process are also complex and demanding. Area of agriculture in the EU is covered by a number of regulations that have to be implemented directly from EU legislation, and their correct administrative implementation is critical to the functioning of the Common Agricultural Policy.

The Common Agricultural Policy (CAP) is one of the most important operational areas addressed by the European Union. It was not created just for farmers but for all citizens of the European Union. The aim of this policy is to ensure reasonable prices and quality of the food-agricultural products to European consumers, and adequate income for farmers, as well as to preserve the rural heritage. Over the past 50 years this policy has been feeding Europe’s population, and fifteen million EU citizens involved in agriculture have been directly encompassed by it.

EU Member States are obliged to implement the Common Agricultural Policy, which includes a number of legal acts. One of the most important and largest areas i.e. elements of the Common Agricultural Policy of the EU are direct payments, which are linked to adherence to the requirements of cross compliance. These requirements are related to environment, human health, animal and plant health and animal welfare, as well as good agricultural and environmental practices. Failure to comply with requirements of cross compliance results in a reduction or complete discontinuance of the payment of direct payments and certain rural development measures.

Today, environmental issues are associated with all sectors of the economy, and therefore clearly with agriculture as a scope of activity in the most direct contact with the environment.

The Code of Good Agricultural Practice (GAP) was created at the initiative of the Food and Agriculture Organization and evolved over the recent several years, in the context of rapid changes and globalization of food production, as a result of the concerns and commitments of a wide range of stakeholders in food production, food quality and safety and environmental impact of agriculture. These stakeholders include the public sector, the food industry and retailers, farmers and consumers who are striving to meet
the specific objectives of food safety, food quality, production efficiency, livelihoods and environmental benefits in the medium and long term. Broadly defined, the Code of Good Agricultural Practice-GAP applies available knowledge to address the issues related to the environment, economic and social sustainability of farm production and processing industry, and the possible consequences for the health and safety of food and non-food agricultural products.

Many farmers in developed and developing countries already implement the Code of Good Agricultural Practices through sustainable agricultural methods, such as integrated protection, integrated feed management etc.

Follow-up and response to the initiative of the Food and Agriculture Organization (FAO) is cross-compliance as an element of the Common Agricultural Policy introduced as a compulsory one since 2009, with the aim of linking payment of support to farmers and care for the environment, animal welfare and food safety.

Namely, through its legal acts the European Union requires Member States to prescribe and ensure adherence to the basic principles of good agricultural practice. These principles impose on farmers some environmentally friendly and technologically not too demanding criteria of agricultural activities by the application of which the negative effects of agricultural production on the environment would be prevented to the greatest extent possible. Also, the European Union Member States have established a system of control of compliance with such standards, and for this purpose the right to support is linked with adherence to the cross-compliance standards.

Requirements of cross compliance are minimum management requirements on farms, to which farms must adhere in carrying out agricultural activities.

They consist of the good agricultural and environmental conditions (GAEC) - minimum management requirements related to the protection of soil from erosion, protection and management of water, maintenance of soil structure and levels of soil organic matter and ensuring a minimum level of maintenance in order to prevent destruction of habitats.

Another important element of cross compliance requirements are the Statutory Management Requirements (SMR) - minimum management requirements related to environmental protection, public health, animal and plant health and animal welfare.

Statutory Management requirements –SMR are a list of selected provisions of the 18 EU pieces of legislation in the fields of: environment; human health, animal and plant health; animal welfare. The requirements are divided into three parts for the purpose of gradual implementation in the Member States: Item A: Requirements relating to environmental protection, animal identification and registration; Item B: Requirements relating to human health, animal and plant health and reporting of a disease; Item C: Requirements relating to animal welfare.

Because of its comprehensiveness and scope, the application of the SMRs is introduced gradually, as a rule. For example, the Republic of Croatia began with the introduction of
GAEC in the first year of accession to the EU, while it started to introduce SMRs gradually, the first part as of 2014, the second part as of 2016 and the third part as of 2018.

The introduction of the application of cross compliance was preceded by harmonization of the national legislation with the EU acquis, establishing of the administrative capacity to implement them (competent professional services and inspectorates (in government agencies and ministries and agencies for payments in agriculture). These services, each in its domain, regulate specific issues of cross compliance and supervise their application (for example, agricultural inspectorate supervises the implementation of good agricultural and environmental conditions; nature protection inspectorate supervises the protection of wild birds habitats... etc.).

It is important to mention that the implementation of legislation in the domain of the above-mentioned large number of regulations is binding for all farmers on the effective date (in the process of harmonization with the EU), whereas violation of conditions of cross compliance and relation towards payment of incentives from the Common Agricultural Policy is applied gradually (as explained above). The reason for this approach is that it takes some time to train farmers, and adjust their way of management and production with the new requirements of cross compliance (e. g. introduction of registers of farm animals and marking them on the farm ... etc).

For this purpose it is necessary to invest a lot of effort and knowledge, and include experts in order to gradually educate the farmers regarding the Code of Good Agricultural Practice, and cross compliance. It is advisable to print brochures with explanations of the context and purpose of the cross-compliance requirements, containing practical examples if possible, and point out which conditions are controlled and how by the relevant control bodies (inspectorates). The so-called trainings/demonstrations for farm advisors on the subject matter proved to be very practical in many EU Member States.

For example, in Croatia, all regulations related to cross-compliance must be observed from the beginning of their applications (which typically entered into force before the accession to the EU). Failure to comply with the requirements prescribed by the Rules on the cross compliance requirements in the agricultural production results in reduction or complete discontinuance of payment of support in agriculture. Control of the implementation of cross compliance in the field is performed by the Paying Agency for Agriculture, Fisheries and Rural Development, according to a specific pattern of at least 1 % of farms each year.

It is recommended to gradually introduce legislation which regulates issues of cross-compliance, then simultaneously carry out the training for farmers, and link the requirements gradually with the payment of support in agriculture. In the early stages of implementation it is necessary to determine which professional bodies are responsible for certain standards and modes of communication, as well as the coordinating body for cross compliance (most commonly, it is the service for the control of Paying Agency or agricultural inspectorate) in order to ensure uniform treatment on one hand and avoid overlapping of powers and double controlling and sanctioning of farmers on the other hand.
Effectively ensuring traceability at all stages of production, processing and distribution of food and feed

Aleksandra Martinovic

Introduction

In the last few years the humanity has been facing several important global problems, food safety being among the most important ones. Unsafe and unhealthy food and/or water are one of the key causes of disease and mortality all around the world. Thus, in the undeveloped and developing countries, due to the illnesses caused by the contaminated water and food more than 3 million people die annually, most of them children.

Look, smell and taste of food can be good indicators whether the food we consume is safe or not. Nevertheless, the food that looks good and does not have a strange smell or look does not have to be necessarily safe to be consumed, because if it was not properly stored and processed, it can threaten one’s health. Presence of different diseases among animals that can be passed on to humans or presence of different chemicals in feed and food can threaten the quality and safety of food products.

Efficient monitoring of food according to the current approach “from farm to fork”, i.e. from the moment of production of ingredients in primary production stages, through processing stage, all the way to final distribution, when the farm reaches customers, is gaining more and more attention.

TRACEABILITY SYSTEM IN THE FOOD CHAIN

The system of monitoring of food during the whole production and distribution chain, in order to identify and eliminate the risk and protect the health of people, is known as “traceability”.

Previous practice has shown that in this area in Montenegro there is still no well-developed mechanisms, so that the customers could trust in the quality and health safety of food products. Establishing an efficient system for food traceability, through all stages of food production, processing and distribution would to a large extent influence the increase of competitiveness of domestic food producers.

Traceability is the possibility of tracing food, feed, animals that produce food or are used for production of food, ingredients or matters intended to be used in or are...
expected to be added to food or feed, through all stages of production, processing and distribution. Traceability system includes all types of food and similar products, including feed and other agricultural products needed for production of food, like materials that are in contact with food and packaging.

Unsafe food is food that is harmful to one’s health or inadequate for human consumption, as described in the Article 14 of EC Regulation No.178/2002 and the Law on Food Safety (Official Gazette of Montenegro, No. 14/07). Article 41 of the Montenegrin Law on Food Safety clearly states: “Entity dealing with food or feed shall provide traceability of food and feed, ingredients and substances that are added to food and feed for animals used for production of food, during all stages of production and placement on the market.

EU has provided guidebooks/manuals, which explain how food and feed producers should document the name and the address of the supplier and the user, as well as the nature of the product and the delivery date. Producer is also expected to keep records on the quantity of the product, lot number and to provide a detailed description of the product (raw/processed). Traceability system is not directly linked to food safety, quality management and protection of environment during the production process, but integrated systems are being more and more implemented, in order to ensure effectiveness and simplify management.

Entities in the food business have different objectives regarding the implementation of traceability systems, depending on their different role in the supply chain, product portfolio, enterprise’s market orientation, etc. Quite often stakeholders in food supply chain have a low degree of understanding the demands regarding traceability and hesitate to invest in establishing a traceability system.

Efficient traceability management includes simultaneous monitoring of the product flow and information flow. In order to achieve this, it is necessary that all the participants in the food supply chain implement systems of internal and external traceability.

Traceability system has the goal to provide all of the required information, thus enabling tracing the product back in order to determine what is the possible cause of the problem, as well as following of already distributed products in case their withdrawal or recall is required. Traceability system has unique identification of food/ingredients, which enables following of the physical food flow through the supply chain and keeping of available records.

Implementation of the system of traceability enables swift withdrawal or recall of products and swift protection of consumers, strengthening of consumer’s trust, improvement of efficiency of supply and distribution chain, etc. Besides the fact that it is necessary to have complete identification of the amounts of food containing dangerous substances or microorganism, it is also indispensable to react quickly and have a fast information flow, which is ensured through the application of traceability system.

Today there is a number of standards which facilitate implementation and maintenance
of the traceability system, and the standard most frequently applied is ISO 22005:2009 (Traceability in the feed and food chain -- General principles and basic requirements for system design and implementation). This standard defines the principles and general requirements for implementation of traceability system in food and feed production chain and can be applied by companies operating at any step in the feed and food chain – both by producers and distributors. The standard makes it possible for the companies to control food, feed and packaging flow, to do it in an easily understandable and documented way, to coordinate activities of multiple factors involved in production chain (farmers, freight forwarders, storage). Selection of traceability system depends on regulations, product characteristics, producer’s expectations, etc. Application of traceability system depends on technical limitations inherent to the producer and products and the profit made by using such a system. Having a traceability system is not enough by itself to ensure the safety of food.

What is important to highlight is the requirement that implementation mechanisms and ways of applying product traceability in practice has to be harmonised with legislation regulations, which is an indispensable and important step towards achieving the goal.

Bibliography

Efficient and consistent safety in all phases of production, processing and distributing food, including food for animals and fulfilment of special hygienic requirements for food traffic in domestic and international market and fulfilment of the requirements regarding food labeling

Bohuslav Harvilak

I. Introduction

Food safety represents the basic national strategic aim of the Slovak Republic. It’s importance is done by ensuring of high level of human health protection, animal health and animal welfare and plant health and consumer interests through deep and integrated control of whole food chain from stage of production to sale to final consumer in the spirit of the rule „from stable to table“ and is in connection with the aim to improve and streamline the system of official controls. Strategy of the Slovak Republic in food safety area covers food safety, animal health and animal welfare, plant health, allows to monitor an origin of food stuffs from food business operator to final consumer including cases, when foodstuffs are transported between Member States.

Official controls of foodstuffs are regulated by Law No. 39/2007 Coll. on veterinary care as amended and Law No. 152/1995 Coll. on foodstuffs. Official controls of foodstuffs are performed by competent authorities in all stages of production, processing and distributing of food, in import of foodstuffs from third country and export of foodstuffs including official controls of personal hygiene requirements and hygiene of persons participating in production, processing of foodstuffs and in its placing on the market. Competent authorities performing official controls of foodstuffs draw the attention of prohibition of misleading advertising.

II. Competent authorities

Ministry of Agriculture and Rural development of the Slovak Republic and Ministry of Health of the Slovak Republic are the central competent authorities of official controls of foodstuffs. The official controls regarding food of animal origin, food of plant origin including fresh vegetable and fruits, potatoes, drinks, mixed animal and plant origin food, confectionery, ice cream and water in consumer packaging and GMO are performed by State Veterinary and Food Administration of the Slovak Republic as a central
body and 40 District Veterinary and Food Administrations as local bodies. Public health authorities are responsible for official controls of food in catering including production of confectionery, epidemiologically risk activities, dietary supplements and materials in connection with food, baby food, novel food and additives.

III. New trends in official controls in the Slovak Republic

The legal bases are most important in performance of official controls by competent authorities. Based on the practical experience and newest scientific knowledge responding to current EU legislation in order to grant safety of whole food chain from stable to table by competent veterinary and food authorities the legislation needs to be dynamic and reflecting to new trends on the market. Taking into account practical experience Slovak Food Law introduced new provisions of on-line sale of foodstuffs with specific requirements to food business operators regarding registration of its businesses by District Veterinary and Food Administration and obligation of fulfillment of Food Law. The new provisions of measures ordering are also stipulate by Amendment of Slovak Food Law.

To avoid possible corruption and focused on upgrading of effectiveness and efficiency of official control of food, food inspector of District veterinary and Food Administration is allowed to perform official controls out of its responsibility, it means out its territorial district in territorial district of other District Veterinary and Food Administration on the request of Chief Veterinary Officer. Based on this rule special official controls are performed by special team of inspectors – auditors operating in whole territory of the Slovak Republic. The analyze of the results of new system of official controls shows very good results.

Based on the practical experience with food scandals in last years in the European Union and following the intention of its avoiding, the new obligation of food business operators was introduced by Slovak Food Law. Recipient of consignment of products of animal origin, raw vegetable and raw fruits in place of destination is obliged to notify it’s delivery 24 hours prior at the latest. Notification shall be done to District Veterinary and Food Administration. Notification consists on address of place of destination, place of origin, consignment species and consignment amount.

Official controls of food are based on Multi Annual National Control Plan prepared and adopted for 3 years with special parts of zoonosis and Quality politics including protected designation of origin, protected geographical indication and traditional speciality guaranteed and special part of Organic farming.

To ensure effectiveness of official controls to grant safety of food in all stages of production, processing and distributing of food, competent authorities in the Slovak Republic introduced system of internal audits in type of follow-up audits and vertical audits including audits of official control on the spot in food business operators and
controls of documentation of competent food authority, system of samples taking, documentation, consumer’s complains handling, system of sampling analysis reporting to RASFF. Internal audit includes audit of HACCP performance in food business operator producing food and audit of import controls.

Competent authorities in the Slovak Republic perform official controls during transport following Plan to improve official controls of foodstuffs and to avoid import and placing on the market of unsafe foodstuffs from third countries and other member States including domestic products. Special official controls during transport are performed in cooperation with Police and Customs authorities to fulfill the aims of Strategy of prevention of crimes in the Slovak Republic in 2012-2015.

IV. Portal of the official controls

Following the aim to integrate all information related to official controls of food safety and food quality in the SR on one website, to highline difficult and high level professional activities of competent authorities with the effort to inform consumers on results of official controls in establishments of FBO and during transport of food consignments to increase quality of foodstuffs intended to final consumer, State Veterinary and Food Administration of the Slovak Republic introduced on the official website http://www.svps.sk/puk new information Portal of official controls.

V. Current issues of food safety and food quality in Slovakia

Performing of the official control of competent food and veterinary authorities in the Slovak Republic represents effective system for ensuring the high level of food safety and consumer protections with direct influence to increase of quality and food safety on Slovak market and decrease of import and placing on the market of less quality food and unsafe food. Food and veterinary authorities in the Slovak Republic respecting the European and national legislation seek to increase effectiveness of official controls of food from stable to table (system in Slovakia is best prepared – findings of FVO audits, controls findings).
Building foundations for drafting river basin management plans and implementation of Montenegrin Water Framework Directive

Rita Barjaktarović

In late 2010, Montenegro was awarded a candidate status, and as of June 2010, negotiation process with EU started. Transposition of its legal norms, i.e. *acquis communautaire*, in the Montenegrin legal system is one of the preconditions which have to be fulfilled. However, harmonization of Montenegrin legislation concerning environmental protection with the European legislation is not only a precondition for the EU accession, but also proceeding along the road which Montenegro stepped on by adopting the *Declaration on Montenegro as an Ecological Country* (1991).

European Union environmental protection policy (EU) is aimed at establishing a sustainable development and environmental protection, for both present and future generations. It is based on preventive actions; *polluter pays* principle, suppression of damage from its source, shared responsibility and integration of the environmental protection into other EU policies. Acquis communautaire consists of over 200 legal acts including horizontal legislation, water and air quality, waste management, nature preservation, industrial pollution control and risk management, chemicals and genetically modified organisms (GMO), noise, forestry and climate changes.

Enforcement of acquis communautaire requires huge investments. Well established and equipped national and local administrations are necessary for enforcement and implementation of the acquis communautaire in the field of environmental protection.

**European water policy**

European water policy origin goes back to the seventies of the XX century and from then on it has evolved through three stages. The first stage was featured by user access to water management, eco systems developed during the second stage, while the third stage, representing a combination of those approaches, started with passing the *EU 2000 Water Framework Directive* (26 articles and 11 annexes specifying its provisions and their implementation). The Directive restructured previous relevant EU directives in the field of waters in a systematic way and included them in its provisions and annexes. Passing this directive was inspired by raised awareness on importance of water resources and their impact on humans and the society in general.

Unlike previous water policy, FWD introduces a *concept on integral water management* on the level of the river basin. The said concept is primarily based on respect
of natural borders, not on administrative or some other man made ones. Article 3 of the Framework Directive requires that member states should identify river basins on their own territories and join them to individual water bodies. Those water bodies embrace all surface waters of the given basin along with the appurtenant underground waters, coastal and mixed waters and they represent the major unit for river basin management. A basis for river basin management is a river basin management plan, the content of which is defined by the Annex VII FWD. The member states were given a 9 year deadline, from the day of passing the Directive, for passing the said plans. In addition to the river basin based management system, FWD introduces also a term a combined approach to pollution control through use of emission limit values and objective quality criteria, awareness of users concerning costs for ensuring supply with sufficient water quantities, being of a satisfactory quality, and public participation in the water policy design.

Plan drafting is preceded by a huge effort including identification of river basins and appointing competent authorities for the basin, a situation assessment in certain water bodies which is required by Art. 5 and Annex II (physical characteristics of the area, water flow types and their ecological, geographical, and morphological characteristics, analysis of human activity impact on water status and economic analysis of use of water, establishing environmental protection objectives pursuant to art. 4 and finally, a program of measures (Art. 11) to be applied so as to achieve the identified objectives. An important step forward is identification of considerable pressures on waters (concentrated and dispersed pollution resources, water intakes, etc.) resulting from human activities and assessment of sensitivity of surface water body to such pressures. Based on those data, risk assessment is performed in order to establish whether such body shall achieve the environmental objectives laid down in Art. 4.

The basic goal of the Framework Directive is to achieve a good status of all waters (surface, underground, coastal and mixed waters) within 15 years from the date it comes into effect. Surface waters are characterized by their ecological and chemical statuses and underground waters and by their quantitative and chemical statuses. When it comes to surface waters, a good status means a good ecological status, which is determined by biological elements and also by hydro morphological and physical and chemical parameters supporting the biological ones (Annex V). When a water body achieves all standards in terms of ecological quality, a good chemical status is registered. Thereby, the former water quality control system, which was based mainly on chemical parameters, has been replaced by a new one, ecologically oriented, by which water quality assessment is made by determining their status in five steps. When it comes to monitoring, the Framework Directive includes three basic types: supervision, operation and research, and additionally it requires monitoring of protected areas (Art. 8 and Annex V).
Montenegrin Water Policy

In the recent years, Montenegro passed two very important laws: the Law on waters and Law on water management funding and a great number of by-laws for enforcement of those laws \(\textit{Decree on surface and underground water classification and categorization, Decree on content and preparation of a water management plan for the water body of a river basin, Decree on content and management of water information system, Rulebook on quality and sanitary and technical conditions regarding waste water release as it was amended, Decision on identification of waters important for Montenegro...)}\).

\textit{Law on waters} of Montenegro was passed in 2007 and transposed key requirements of FWD. EC established that 64\% of FWD was transposed into Montenegrin law in 2012 (from 54\% in 2007 to 64\% in 2012). A full transposition is expected to be completed by 2016 when Plans for water basin area management is scheduled to be passed.

Speaking about Article 9 of FWD, imposing introduction of economic water price, it can be said that it has generally been transposed by \textit{Law on water management funding}, 2008, but it does not indicate a timeframe for the implementation of the above.

A ground for development of the plans is the Decree concerning content and the way for development of river basin management plans which has been fully harmonized with FWD.

Framework water directive implementation in Montenegro

1. Law on waters defines two river basins, \textit{The Black Sea and the Adriatic Sea}.
2. \textit{Institutional coordination mechanisms in case of transboundary water basins, lakes and coastal waters} have not been established, yet. A planned deadline is 2015.
3. The law laid down the \textit{competent authorities}: Ministry of Agriculture and Rural Development and Water Administration, \textit{however, the bodies to be strictly responsible for river basins have not been defined}.
4. When it comes to \textit{objectives} to be achieved, they should be scheduled for the end of the first cycle of the Management plans in Montenegro, and that is 2022. \textit{They have not been defined}.
5. Establishment of a \textit{protected area registry} is expected to be completed together with the preparation of the River basin management plans, meaning by 2016.
6. \textit{Characterization of the river basin areas} following Article 5, is expected to be completed together with the drafting of the River basin management plans, meaning by 2016.
7. \textit{Human activity impact assessment}, following Article 5, is expected to be completed together with preparation of River basin management plans, meaning by 2016.
8. **Economic analysis of water use**, following Article 5, is expected to be completed together with preparation of River basin management plans, meaning by 2016.

9. **Water quality monitoring program** has been established but not fully in compliance with FWD requirements. Water quality and their categorization and quality assessment, in relation to the prescribed level, have been defined by *Decree on classification and categorization of water in Montenegro*. A quantitative status of underground waters and a chemical status of surface and underground waters are monitored following the *Program for water qualitative and quantitative aspects*. However, a system for ecological status/potential monitoring has not been established. The Program envisages monitoring of a certain number of hydrological quality parameters, a larger number of physical and chemical quality parameters and a small number of biological quality parameters. The fact is that this program lacks biological quality elements required by FWD, as, according to it, only microbiological analysis and establishment of index are envisaged.

Speaking about sediments, no qualitative following Article 5, is expected to be completed together with preparation of River basin management plans, meaning by 2016. Qualitative/quantitative analysis have been made, and the said program lacks requirements regarding chemical sediment analysis. An absence of monitoring of priority pollutants and hazardous priority pollutants has been noted.

10. **Defining an economic water price** (Article 9, FWD) is envisaged by *Law on water management funding*, but the timeline for its implementation has not been defined, yet.

11. A **Program of measures** for every river basin area will be completed when the Plans come into force, meaning in 2016.

12. **Drafting plans for the management of every basin** is scheduled for 2015, in line with the very Directive (a year before the period to which the Plan refers).

13. **Management plans for every river basin** are planned to be published in 2016 in compliance with *Law on waters* of Montenegro (nine years after the law comes into effect).

14. **Penalty policy is expected to be established** once the Management plans come into effect, meaning in 2016.

**CRITICAL REVIEW OVER THE COMPLETED ACTIVITIES**

In 2012 EC report it is indicated that Montenegro has made a slight progress in the field of environmental protection and climate changes. However, more attention should be paid to water quality and waste management. Huge effort should be made in order to harmonize and implement acquis in the area of environmental protection and climate changes and to strengthen administrative capacities and inter-institutional cooperation. Considerations of environmental protection and climate changes have to
be made in a more systematic way in other areas covered by the program policy and plan documents. Lack of political priority and adequate funding, and a limited awareness on requirements in the environmental protection and climate, hinder a progress in this area. Preparations in this area are still in their early phase.

Although it is indicated in the introductory part that Law on waters has transposed key FWD requirements and based on the fact that the initial, in other words, the first call to the public by the Water Administration which in late 2011 issued a communication to the public on the start of drafting water management plans and a public call for an insight into Terms of Reference for the water management plans for the water territory of the Black Sea basin from the territory of Montenegro and for the water territory of the Adriatic Sea basin from the territory of Montenegro, one gets an impression that drafting of the plans has not been started, yet. That leads to a conclusion that the 2016 deadline, established by the law, for completing the plans will not be met.

Major reasons for the failure include lack of work force and technical capacities for drafting the plans, and also lack of funds for their creation (FWD is regarded to be one of the most demanding directives when it comes to its implementation costs). Many European reports reflect this conclusion indicating those two major issues and pointing out a doubt that Montenegro with its existing administrative and financial capacities will be able to draft management plans within the established timeframe. Four EU member states failed to accomplish the same task and their deadline was 2009. Croatia deals with a similar issue and it had to increase a number of employees in the competent authorities in order to be able to bring the negotiation process to its end.

Additionally, a huge problem lies in the fact that we do not have a good data base which could serve as a basis for establishing water flow types and their ecological, geographic and morphological aspects, human activity impact on the water status, etc. Negative financial situation in the recent years resulted in badly equipped laboratories, unable to carry out analysis of surface and underground water statuses and a subsequent monitoring.

Since the process of drafting river basin management plans is at its initial phase, it would be good to work simultaneously on implementation of the Flood Directive and Natura 2000 and using an integral approach protect areas surrounded by a basin.

It can be noticed that beside the above mentioned laws and a certain number of by-laws, Montenegro does not have a Water Management Strategy, which would create a basis in an integral way for implementation of current principles of the water policy. The Strategy should provide: assessment of the current water management situation, objectives and guidelines for water management, functions for achievement of the established goals and a projection of the water management development in Montenegro. Possibly, it could be resolved by establishment and keeping a water information system along with all necessary databases.

Despite the fact Montenegro has been a member of the International Committee
for the Danube Protection since 2008, it is evident that its cooperation with ICDP is poor and we do not participate actively in its task force activities. Also, we do not participate in work of various task forces in the EU and rarely use opportunities to participate even as observers.

CONCLUSION

The chapter on environmental protection may have been a complex one with a wide scope of activity but the advantages like better health protection, less damage imposed on natural resources, tourism promotion, creation of more jobs resulting in higher contributions, better economy efficiency and finally, social welfare generated through more active learning and inclusion, gained from transposing the acquis communitaire referring to this area into the national legislation can not be denied.

According to Croatian officials, the point of the integration process was not to check out things done, and create an illusion on the paper of a harmonization achieved with the EU, but to push the country forward towards a more efficient and better organized system.
The Establishment of the grounds for development of plans for water management and implementation of the Water Framework Directive.

JUDr. Michal Maslen, PhD.

Introductory remarks

The basic legislation in the field of water policy at the level of the European Union enshrines the Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy, establishing a framework for Community action in the field of water policy (hereinafter referred to as “the directive”). The Directive is therefore an essential instrument of secondary legislation in the field of water management and water policy. The basic thesis, which it is based on is the fact that water is not a commercial product like any other, but rather, a heritage which must be protected, defended and treated as such.

Directive within the meaning of art. 1 lays down the framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which: (i) prevents further deterioration and protects and enhances the status of aquatic resources (ii) promotes sustainable use of water, (iii) will focus on increased protection and improvement of the aquatic environment through specific measures for the progressive reduction of discharges, emissions and losses of priority substances; (iv) ensures the progressive reduction of pollution of groundwater and prevents its further pollution, and (v) contributes to mitigating the effects of floods and droughts.

Overall, the directive focuses its purpose on achieving good status directive “of all waters” by 2015. The directive requires Member States to carry out the assessment of ecological status of water bodies. Ecological quality status results from a biological, hydro-morphological and physico-chemical state of quality, where the biological elements contained in water are particularly important. In coastal and transitional waters biological elements are especially phytoplankton, fish, and plants and animals living on the seabed.24

The creators of the Directive have built it mainly on the principle of sustainable development. The Directive aims at maintaining and improving the aquatic environment within the Union. It should therefore ensure basic legal framework for water policy

in accordance with applicable principles of European environmental law, coordinate, integrate, and in longer perspective, further develop the overall principles and structures for protection and sustainable water use in the Community in accordance with the principle of subsidiarity. The essence of that principle is manifested primarily in the delegation of the competencies in the area of environmental protection, which are located at the lowest level of government (local, regional, national, union). Holders of those competencies are also required to use the most effective solutions.

Other principles on which the Union has built the directive include in particular the prevention principle. This principle permeates the entire environmental law. It is based on the idea that it is easier to prevent adverse consequences than to eliminate them. The fact that the prevention principle is in the environmental law “ubiquitous” can be documented not only by pointing to the existence of significant, already absolutely irreplaceable legal institutions in the protection of the environment (such as the Institute of Spatial Planning, the environmental impact assessment), but also pointing out that most of the legal provisions of environmental law establish specific obligations, and aim to prevent adverse effects on the environment or at least reduce them.\(^25\) Prevention is in the content of the Directive manifested in two ways. The first provides for Member States to prevent or reduce the impact of incidents in which water is accidentally polluted. Such measures should the states incorporate into the programs of measures. The second level creates the identification of priority hazardous substances, based in particular on the identification of any potentially adverse effects of the product and the scientific risk assessment.

Directive then follows the principle of bearable burden. Accordingly, the territory must not be encumbered by human activity over the carrying capacity. The manifestations of this principle may be in the legislation seen frequently. Prerequisite for its practical application in environmental protection is the knowledge of the environment in a given area (parts and components), including the interrelations between them and also “capacity” of the area, it is his ability to take still other human activities without the risk of (significant) deterioration of the environment. Size of the so far unfulfilled capacity of a particular area must always be considered in relation to certain specific activities (specific intent).\(^26\) In accordance with the regulation of the Directive the water policy should be with regard to the prevention and control of pollution based on a combined approach using control of pollution at source through the establishment of emission limit values and environmental quality standards. Union has, therefore, presented a requirement of providing generally applicable principles of regulation on abstraction and impoundment in order to ensure the environmental sustainability of the affected water systems. Community legislation should establish common minimum standards of environmental quality standards and emission limit values for certain groups or families of pollutants. Provisions for the adoption of such standards should ensure


Directive explicitly integrates into your content and the polluter pays principle. Manifestations of this principle can be found wherever legislation uses economic tools to encourage economic and legal entities at the same time to environmentally friendly behavior. In addition to economic instruments (charges, taxes, fees, grants, subsidies and price) some economic impact on persons obliged have always also sanctions imposed by the competent public authorities for infringement. But those are not economic instruments of environmental protection in the true sense of the word. The aim of this principle in practice misfires, if applicable legislation allows a polluter, who is also an entrepreneur, to include these payments in his costs. In this case, these the polluter carries an obligation under an economic tool for consumers.27 However, some legal obligations can also combine economic and penalty mechanisms. However the legal practice and also jurisprudence point to the need for accurate and adequate expression of economic instruments in order to fulfill their motivational functions.28 The Directive therefore considers the use of economic instruments by Member States as appropriate as part of the program of measures. According to the Union the principle of cost recovery should have been taken into account for water services, including environmental costs and resource costs associated with damage or negative impact on the aquatic environment, especially in accordance with the “polluter pays” principle. However, for this purpose, the Directive itself foresaw the need for an economic analysis of water services based on long-term forecasts of supply and demand for water in the river basin district.

Water as a component of the environment is also a public good. The regulation also considers the principle of the Directive of public participation in the establishment and updating of river basin management. The regulation within the European Union is therefore based on the postulate of wide arrangements for public participation in the planning processes in all its forms, that is, from individuals to institutionalized public in the form of legal entity. However the public is also subject to the rules laid down for procedures involving public participation, particularly entry to processes, implementation of the rights, objections, pleadings and arguments within by law laid down stages of the process.29 Even Directive therefore reflects the requirement for attendance by the general public, including users of water in the establishment and updating of river basin management plans. It also stresses the need for the provision of appropriate information on planned measures and reporting on progress with their implementation with a view to engage the public before final decisions on the necessary measures.

The subsequent principle that directive explicitly expresses is the principle of law enforcement. This rule is normally expressed in the legislation that establishes the procedures and proceedings in which the parties may obtain one of their fundamental rights - the right to a favorable environment. Given that environmental legislation delegates in particular to public authorities, there are in particular public means by which the individuals can claim the mentioned right within competent public authorities. This mechanism also introduced the directive. Therefore it stresses full implementation and enforcement of existing environmental legislation on water protection. The entire community is necessary to ensure the proper application of the provisions implementing this Directive by appropriate penalties which are allowed by the Member States’ legislation. Such penalties should be effective, proportionate and dissuasive.

The implementation of this Directive shall achieve the level of protection of waters at least equivalent to that provided in certain earlier acts, which should therefore be repealed once the full implementation of the relevant provisions of this Directive is done. At this point, the document creators expressed the requirement on the principle of legal continuity. Together the two previous rules also set requirements of the principle of lawfulness.

Directive is to contribute to the progressive reduction of emissions of hazardous substances to water. It provides therefore provision of generally applicable definitions of the status of water quality. Therefore It defines tools to achieve good status of surface and groundwater. Union through the Framework of the Directive established the requirements to achieve at least good status and obligations imposed on Member States to adopt measures and integrated programs to ensure and maintain good water status. The final objective of the Directive is therefore defined as the elimination of priority hazardous substances and condition of the substances in the marine environment, which is close to their natural occurrence.

Surface waters and groundwaters are in essence the renewable natural resources. Reinsurance of their welfare requires early action and stable long-term planning of protective measures due to the natural time lag in its formation and renewal. The running time in the improvement takes into account in timetables when establishing measures to achieve good status of groundwater and reversing any significant and sustained upward trend in the concentration of any pollutant in groundwater. Accordingly, the Directive allows the Member States to subdivide implementation of the program of measures to spread the costs of its implementation.

The basic tool of transposition and implementation of the directive are river basin management plans. Those documents must reflect all the procedures and steps in achieving the objectives of the Directive. In particular, they must be translated into timetables. Those documents should in particular reflect the actual state of water quality and water bodies, and on the basis of appropriate, evident and transparent criteria that are transparent. For example, if a body of water is so affected by human activity

or its natural condition is such that the achievement of good status may be impractical or excessively costly, they can establish less stringent environmental objectives on the basis of appropriate, evident and transparent criteria to. However, Member States shall also take all feasible measures to prevent any further deterioration of the water.

After defining the basic principles the Directive follows the individual definitions. In Art. 1 it defines its purpose, which is, in particular the protection of water types mentioned. Implementation of the Directive is to prevent further deterioration and to protect and enhance the status of aquatic ecosystems. The Directive is intended to promote sustainable water use based on the long-term protection of available water resources and lead to enhanced protection and improvement of the aquatic environment. Another objective is to achieve a progressive reduction of pollution of groundwater and prevent its further pollution and mitigate the effects of floods and droughts.

Those instruments should lead to the provision of adequate supplies of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use. Equally as important is under the Directive the substantial reduction of pollution of groundwater and protection of territorial and marine waters. Apart from the economic and environmental objectives had the document creators interest in achieving the objectives of relevant international conventions, including those which aim to prevent and eliminate pollution of the marine environment, by Community action to cease or phase out discharges, emissions and losses of priority hazardous substances, so that the concentration of these substances approached background values for naturally occurring substances and concentrations close to zero for man-made synthetic substances. Subsequently, in Art. 2 Directive provides definitions of basic terms, wherein it mainly focuses on individual types of water, water bodies, ecological and chemical quality of water and water management services. These provisions also define hazardous substances, priority substances and pollutants. In addition, the legislature in this part of the Directive the definition of processes set of water contamination, environmental quality standards and emission limit values in water. The directive also provides for Member States commitment to the delegation of the scope and powers of the competent authority respectively to public authorities.

**Coordination of administrative arrangements**

The first requirement for creating documents for river basin management plans is coordination of administrative arrangements within river basin districts. Article 3 of the Directive provides Member States with basic obligations in this regard. Member States shall identify the individual river basins lying within their national territory and, for the purposes of the Directive, shall assign them to individual river basin districts. Where appropriate, they can merge small basins with larger river basins or joined with neighboring small basins to form individual river basin. Where the ground waters do not fully follow a particular river basin, they must be assigned to the nearest or most
appropriate river basin district. The Member States must identify and incorporate Coastal waters to the nearest or most appropriate river basin territory or territories.

River basin district is according to the Directive the territory of land and sea made up of one or more neighboring river basins together with their associated groundwaters and coastal waters, which the Directive defines as the main unit for management of river basins in terms of the Directive. River basin means an area from which all surface water flow flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta. Sub-basin includes the area from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes to a particular point in a water course (normally a lake or into the confluence).

Slovak Act no. 364/2004 Coll. on waters and on the amendment of the Act of the Slovak National Council no. 372/1990 Coll. on Offences, as amended (Water Act) defines individual administrative areas in Art. 11. The territory of the Slovak Republic for the purposes of this Act, is a part of the the Danube River Basin and Wisła river basin, within which according to natural hydrological boundaries there are defined sub-basins and their associated hydrogeological zones. Hydrogeological zones are allocated areas with similar hydrogeological conditions, type of aquifer and groundwater circulation.

Basin is part of the earth’s surface defined by an orographic switchboard, from which the water flows through surface water bodies into the sea in one mouth, estuary or delta. Sub-basin is part of the territory of the river basin, from which all surface run-off flows through rivers into a profile of the watercourse.

River basin district is an area of land and sea, which constitutes one or more neighboring river basins together with their associated groundwaters and coastal waters. River basin is defined as the main unit for management of river basin (hereinafter referred to as “management of river basins”).

A river basin district in the international Danube River Basin (Black seadrainage basin) is the Danube river basin defined by

a) the sub-basin of the Danube,
b) the sub-basin of the Morava,
c) the sub-basin of the Váh,
d) the sub-basin of the Hron,
e) the sub-basin of the Ipeľ,
f) the sub-basin of the Slaná,
g) the sub-basin of the Bodrog,
h) the sub-basin of the Hornád,
i) the sub-basin of the Bodva.

A river basin district in international river basin Wisła (Baltic Sea drainage basin) is the Dunajec river basin and sub-basin of the Poprad defined by the Dunajec and the Poprad.

These provisions of the Water Act transpose obligation of Article. 3 par. 1 and 2 of the Directive. From the above, inter aliafollows that the Member States ensure the
appropriate administrative arrangements, including the appropriate competent authority, for the application of the rules of this Directive within each river basin district lying within their territory. Legitimate authority for the management of river basins, according to Slovak Water Act is the Ministry of Environment of the Slovak Republic (hereinafter the “Ministry”).

In addition to the instruments of national reports, Member States have the obligation to take into account the international dimension of care for water. These instruments divides the Directive according to whether the interstate dimension of water treatment involves several Member States of the European Union or the Member States of the Union on the one hand and non-member countries on the other. Member States shall ensure that a river basin covering the territory of more than one Member State is assigned to an international river basin district. At the request of the Member States, the Commission conveys assigning to such international river basin districts. Each member state will adopt appropriate administrative arrangements, including the identification of the competent authority, for the implementation of the rules of the Directive within the portion of any international river basin district lying within its territory.

On delineated administrative areas the Member States shall apply the requirements of the achievement of the environmental objectives established under Article 4. These requirements include in particular all programs of measures coordinated throughout the river basin. For international river basin districts the Member States shall ensure coordination together, for this purpose, they can use existing structures stemming from international conventions. The Commission may request the Member States to communicate the programs of measures.

The second situation presumed by the directive is legal relationship between the member state and a non-Member State. Where a river basin district extends beyond the territory of the Union, the Member State or Member States concerned shall seek to establish appropriate coordination with the relevant non-Member States to achieve the objectives of the Directive throughout the river basin. Member States shall ensure the implementation of the rules of the Directive in its territory. Similarly, Member States may identify an existing national or international body as competent authority for the purposes of this Directive. These obligations shall Member States incorporate into their legal orders in an implementation period of December 22nd 2003. No later than six months from that date then they shall send the Commission a list of their competent authorities of all the international bodies of which they are members. For each competent authority the information set out in Annex I to the Directive.

The Slovak Republic joined the European Union on May 1st 2004. Water Act adopted and approved by the National Council of the Slovak Republic became valid on June 24th 2004 and came into force on July 1st 2004. Since then it was about thirteen times revised. The last amendment to this Act adopted by the National Council of the Slovak Republic in 2012, by the Act no. 306/2012 Coll., which entered into force on October 15th 2012.
On all the river basin districts, the State must provide for an analysis of its features and characteristics, to examine the effects of human activity the status of surface and ground water and carry out an economic analysis of water use. The terms of these activities specify the Annex II. and III. of the Directive.

**Environmental objectives**

In addition to the definition of river basin apply the Member States tools of the Directive to achieve environmental objectives. These divides the Directive according to whether they relate to surface water, groundwater and protected areas. The principle applies that Member States implement in these bodies measures to prevent the deterioration of their condition and seek their improvement and renewal. Where in the body covers several tools the strictest protection in its nature shall apply.

For surface water the Directive establishes the following responsibilities. Member States shall take the necessary measures to prevent deterioration of the status of all bodies of surface water. They shall also protect, enhance and restore all bodies of surface water, with the aim of achieving good surface water status within 15 years after the entry into force of this of the Directive. Conditions of quality of those services provides the Annex V of the Directive. In addition to natural bodies the Member States are required to protect and improve all the artificial and heavily modified water bodies with the aim of achieving good ecological potential and good surface water chemical status within 15 years from the date of entry into force of the Directive. On these bodies, Member States are obliged to implement strategies against pollution of water according to Article 16 of the Directive. Under the conditions laid down by the Directive, Member States may declare a surface water body as artificial. The condition lays down the Directive demonstratively and they are tied to the ecological stability of areas, maritime activity, drinking water supply, regulation of water conditions, or the like. and flood protection. Such designation and the grounds shall be specified in the plans of river basin management required under Article 13 of the Directive and reviewed every six years.

For groundwaters the Member States shall implement the necessary measures to prevent or limit inputs of pollutants into groundwater and to prevent deterioration of the status of all bodies of groundwater. Similarly, also here shall the Member States undertake actions to protect, enhance and restore all bodies of groundwater. Another responsibility is obligation to ensure a balance between abstraction and recharge of groundwater, with the aim of achieving good groundwater status within 15 years from the date of entry into force of Directive no. 2000/60/EC. Measures in the groundwater include tools to reverse any significant and sustained upward trend in the concentration of each pollutant that is caused by human activity in order to progressively reduce pollution of groundwater.
For protected areas Member States are required to achieve compliance with any standards and objectives within 15 years from the date of entry into force of the Directive, unless otherwise specified in the Community legislation under which the individual protected areas have been established.

All of the above deadlines may the Member States extend as laid down by law. Prerequisite for this process is the need to improve the status of water bodies that can not be sufficiently achieved in time laid down by law. Conditions of prolongation can be technical barriers, lack of funds or the nature of natural conditions. However all of this, should the Member States document in their water management plans, and for a period of up to two additional periods upgrade plans. An exception to this is in cases where natural conditions do not allow fulfilling environmental objectives or plans at this time. Summary of all these measures, the state water and delays are recorded by Member States in their plans.

For certain water bodies may the Member States aim to achieve less stringent environmental objectives, if they are affected by human activity or their natural condition is such that the achievement of these objectives would be infeasible or disproportionately expensive. Determination of softer environmental objectives can be if all the following conditions, environmental and socioeconomic needs served by such human activity cannot be achieved by other means which are a significantly better environmental option not entailing disproportionate costs. Member States shall also ensure that the surface water reaches the highest ecological and chemical status with respect of the impact, which could not be avoided due to the nature of the human activity or pollution. At the same time the Member states shall ensure the least possible changes to good groundwater status, with regards to the impacts that could not have been avoided due to the nature of the human activity or pollution. Establishment of softer targets must the states record in the plans. This measure may not cause deterioration of the water body.

The directive also specifies the conditions under which the temporary deterioration of water bodies shall not be in breach of its requirements, if it is the result of exceptional or unforeseen natural cause or force majeure, in particular extreme floods and long-term droughts, or the result of unforeseen accidents. The state, is in this case bound, to take any steps to prevent further deterioration of water on the touched body and prevent worsening the status of the water on the other bodies. The conditions of abnormal situations must the states define in advance within the plans. Measures to be taken under such exceptional circumstances are included in program of measures and will not compromise the quality of the body of water when the circumstances are over. The effects of unforeseen exceptional circumstances shall be reviewed annually and all applicable measures for the recovery of such a condition of the water body, which it was before the incident, shall be taken. Summary of the effects of the circumstances and actions must be included in the plan in the next update.

Member States will not be in breach of this Directive when failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential
or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities and all the following conditions are met:

a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;
b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;
c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and
d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental

Tools of the water protection

Instruments for the protection of waters according to the Directive are register of protected areas, demarcation of bodies for drinking water and monitoring surface water status, groundwater and protected areas.

Member States shall establish a register or registers of all areas lying within each river basin district which have been designated as requiring special protection under the European Union legislation on the protection of surface and groundwater and the conservation of natural habitats and plant and animal species directly depending on water. They shall also ensure that the register is completed within four years from the date of entry into force of this Directive. Register or registers shall include all bodies of water identified for drinking water and all protected areas listed in Annex IV of the Directive. The state has an obligation to the areas to constantly review and update them.

Member States shall determine in each river basin district all bodies of water used for the abstraction of water intended for human consumption providing more than an average of 10 m³ per day or serving more than 50 persons. Similarly, the State must identify bodies in which it considers the abstraction of drinking water. In addition, it has the obligation to monitor those water bodies which provide an average of more than 100 m³ of water per day. The method used for water treatment in accordance with Union legislation must ensure the coming level of water quality, which is also is in accordance with the requirements of the Directive no. 80/778/EEC as amended by
Directive no. 98/83/EC. The territorial protection of water has to primarily to ensure the quality of drinking water supplies in order to govern human activity as possible. Instrument of territorial protection is mainly the protection zone.

Monitoring of water status has to lead to a coherent and comprehensive overview of water status within each river basin district. Within surface water the State shall monitor the volume and level or rate of flow, ecological and chemical status and ecological potential. Programs of monitoring of groundwater shall include chemical status monitoring and water quantity monitoring. Programs complement the requirements of Union legislation on the establishment of protected areas.

When using the water the State shall account the polluter pays principle. In doing so it shall divide the pricing policy for water use to groups - industry, households and agriculture. In determining the payments the State shall take into account the social, economic and environmental consequences of payments. Pricing policy should not prevent funding for preventive and corrective measures.

**Program of measures**

Member State has the obligation to establish a program of measures for each river basin district or part of an international river basin. The Directive divides the measures to basic and supplementary.

Basic measures are tools that relate to the implementation of European legislation and implementation of pricing policies. They include further measures to promote the sustainable development of water and drinking water. They govern the collection of surface water and groundwater refilling these waters into water bodies. In this respect, the Directive provides for the State the obligation to determine the conditions for authorization to supplement the mine water back to the mines, for the back filling of geothermal water source and groundwater conditions for the injection of natural gas into underground storage facilities and conditions for works that come into contact with groundwater. Basic measures just regulate water pollution, in particular the discharge of pollutants and prevention and avoidance of any other adverse effects.

Complementary measures are instruments designed and implemented in addition to the basic measures. They support the fulfillment of environmental objectives and make their legislative instruments, administrative tools, economic and fiscal instruments, environmental agreements, codes of good practice, recreation and restoration of wetlands and control of water consumption.
River basin management plans

Member States shall ensure a creation of river basin management plan for each river basin district lying entirely within their areas. The specific procedure establishes the Directive for the international river basin district which as a whole, falls within the territory of the Union. In this case, States shall ensure coordination of administration in order to prepare a single plan. However, if States fail to ensure coordination of river basin management, they shall develop separate plans for their part of the international river basin district.

Independent way regulates the Directive for the procedure where the international river basin district extends beyond the Union. In the case of an international river basin district extending beyond the boundaries of the Community, the Member States shall endeavor to produce a single river basin management plan, and if this is not possible, the plan will cover at least a portion of an international river basin district lying within the territory of the Member State.

The plan shall include the information set out in Annex VII of the Directive. It is composed primarily of a summary of the general characteristics of area, of a description of the impact of human activities, of a demarcation of protected areas, of a map of the monitoring networks, of a summary of the economic analysis of water use, of a summary of the environmental objectives, of measures for drinking water, basic and supplementary measures, or of a list of competent authorities and others.

River basin management plans can be supplemented by the production of more detailed programs and management plans for sub-basin, sector, issue, or water type, to deal with the individual aspects of water management. Implementation of these measures shall not exempt Member States from any obligations arising from other parts of the directive. The State shall publish river basin management plans no later than nine years from the date of entry into force of the Directive. The obligation to revise these documents shall arise the States within 15 years from the date of entry into force of the Directive and every six years thereafter.

Planning in river basins and river basin districts is according to Slovak Water Act systematic conceptual work undertaken primarily for the purpose of

a) all-round protection of waters and achieving environmental objectives,
b) creating conditions for sustainable use of water resources,
c) the provision of water services,
d) protection against harmful effects of water.

Within the water planning shall be made out the river basin management plans, which are the Danube River Basin Management Plan, which includes sub-basin management plans and Wisła river basin management plan, which includes sub-basin management plan of the Dunajec and of the Poprad. Another tool it is not Slovak Water Plan.

Part of the river basin management plans and Slovakia’s Water Plan are programs of
measures to achieve environmental objectives. Proposal for River Basin Management Plan, proposal for Water Plan of Slovakia and their updates, proposals for concepts and development programs in the water sector are subject to the environmental impacts assessment.

River Basin Management Plan is an essential tool for achieving the objectives of planning in water river basin areas, which on the basis of analysis of current status of surface water and groundwater and assessment of the impact of human activities on water conditions establishes environmental objectives and programs of measures to achieve them, including financial security. River Basin Management Plan is required to use in landscape planning or may be a landscape plan.

Proposal for River Basin Management Plan shall draw up the Ministry via the person in charge and the administrator of important water courses in cooperation with the State Water Authority, county authorities, other relevant state authorities and other persons concerned, in particular representatives of municipalities, industrial sector, agricultural sector, water companies and other institutions.

The Ministry shall make the following documents accessible for the submission of written comments, the active participation and consultation within six month to the public, water users, autonomous region, municipalities and concerned state administration bodies

a) timing and material schedule of drafting River Basin Management Plan,

b) identified significant water management issues,

c) proposal for river basin management plan.

The Ministry on a request shall provide the access to these entities to the the basis and to the information used for the development of the draft River Basin Management Plan. These obligations also apply to the updated river basin management plans.

Proposal for River Basin Management Plan, which includes a program of measures, approves the Ministry. Approved Basin Management Plans are the basis for the development of Slovakia’s Water Plan and its program of action. River Basin Management Plan is reviewed and updated every six years.

Slovak Water Plan is planning document for the water protection and improvement of surface water and groundwater and aquatic ecosystems, for the sustainable and efficient use of water to improve water conditions, to ensure the territorial system of ecological stability and protection against harmful effects of water.

Development of Slovakia’s Water Plan shall provide the Ministry in cooperation with the central government authorities. Slovak Water Plan is the basis for the development of the International Danube River Basin Management Plan and the International Wisła river basin management plan in accordance with the international commitments of the Slovak Republic.

Slovak Water Plan adopts the Government of the Slovak Republic (hereinafter the “Government”) and its binding part, which contains the program of measures, declares
by Regulation. Approved Slovak Water Plan is reviewed and updated at least every six years after its initial approval, which must be provided till December 22nd 2009.

**Summary - recommendations**

To sum up the paper, I would like to give following recommendations that are connected to the institutional basis, legislation and administration, environmental objectives, planning and administrative liability.

As for the institutional basis, the competence within the water management planning should be cleared. For example such competence is in Slovakia regulated by the Act no, 575/2001 Coll. the Great competence Act. The art. 16 of this act sets out the competence of the Ministry of environment. The Ministry of Environment of the Slovak Republic is a central government authority for the creation and protection of the environment, including water management, flood protection, protection of water quality and quantity and the rational use of fisheries and aquaculture. This competence is specified by the Water act, which in the art. 58 enumerates the bodies of state water administration. Those are the Ministry of environment, District authorities with regional seat, District authorities, the Inspection and the municipalities.

Important issue is also the coordination. It results from the competence. The central authority is the Ministry of environment. However there are also the cooperating authorities, which in Slovakia include the Ministry of Health (drinking water), the Ministry of Interior (floods) and the Ministry of Transport, Posts and Telecommunications (river navigation).

With the cooperation the organizational support is closely connected. Where the cooperation explains the institutional basis, the organizational support expresses the method of work. The “leader” within the establishment of the grounds for development of plans for water management is the Ministry. Then there are involved organizations of the Ministry that include state company, agency, research institute. Cooperation bodies help the Ministry as well. They include other ministries, state administration and the municipalities. Special entity is the report body, which is responsible only for reporting to the Commission.

Very important recommendation is to define the relations that fall within the scope of directive at national level. The scope is usually specified by the legislation through the legal terms, which in this case include

- inland surface waters, transitional waters, coastal waters and groundwater, protected areas
- Drinking water, floods, navigation, fisheries

Another point is to select the requests established by the directive. The principle shall apply that the statutory (which in Slovakia mainly the Water Act) expresses the requirements, which set out the objectives and obligation of the implementation (norms,
principles, rights and obligations). The substatutory level shall include the requirements of technical nature. This method or system shall provide the proper application of the principle of lawfulness, which requires the clear and understandable legislation.

The legal framework of water-management planning itself should express also:

- Determination of act of law
- Purpose, nature
- Binding part – relevant source of law
- Explanatory part
- Factual orientation
- Time orientation
- Public participation

All these requirements would not be efficient, if there was no system of control and liability. So the legal framework should also contain the Instruments of administrative control and administrative liability. The legislative grounds on the inspection and its competences shall be expressed explicitly. The legal grounds shall also include the procedural inspection, and the relation to police authorities.

Legislative grounds on the administrative liability shall set out the types of unlawful conduct. Especially the regulation of shall be clear, transparent and understandable. Such an unlawful conduct could easily fall within the scope of the term of criminal charge according to the Article 6 of the European convention on protection of human rights and fundamental freedoms. Therefore the legislation should express the ways of proving the liability. Those should include also the instruments of administration, inspection affairs, principle of “Onus of proof” and limits of sanctions. Finally the regulation should respect constitutionally protected rights.
Ecological network of the European Union (Natura 2000) is a network that includes areas important for conservation of European endangered species and habitats. The main objective of establishing the network is achievement of “Favourable Conservation Status” of species and types of habitats with annexes of the Habitats Directive and Birds Directive. Establishment of Natura 2000 represents a very challenging task, which can be divided in two phases: Planning and Management. Planning phase involves a series of steps: adequate transposition of the Habitats Directive and Birds Directive into national legislation, identification of areas and defining proposals of Natura 2000, education of interested parties on each relevant issue related to Natura 2000, development of financing plan for the future network and building adequate capacities for implementation of demanding protection mechanisms, management and monitoring of representativeness and achieving goals of Natura 2000 at the national level. Management phase involves establishment and implementation of a functioning system of protection mechanisms (acceptability ratings, compensatory measures, determining the public interest), defining protection measures and management and establishing of functional system of monitoring and reporting.

The process of establishing of Natura 2000 and phases of dialogue with the European Commission


Following the analysis of available data and collecting new relevant data, which includes field research and inventory space on the distribution of habitat types and species from the Annex of the Directive, on the basis of analysis, proposal of Natura 2000 at the national level has been defined, while taking into account the criteria laid down in the Annex III on Habitats. All available data should be presented in GIS and it should not be older than 15 years. Defined areas are proposed to the European Commission in a pre-defined form called Standard Data Form (SDF) with GIS maps. Thus, the suggested areas are Potential Sites for Community Interest (pSci) and Special Protection Areas
for birds (SPA). Candidate country is required to submit a proposal to the European Commission by the date of accession.

After receiving the proposal, the European Commission, namely the Directorate-General Enlargement via the Environment Directorate-General provides a proposal for evaluation and adjustment to European Topic Centre on Biological Diversity, concretely is in this case to the Museum of Natural History in Paris. The same institution is in charge of EMERALD process which is implemented in the framework of the Berne Convention, which was also ratified by Montenegro; Museum of Natural History in Paris is also the institution that coordinates reporting within the EIONET network for data exchange of the European Environment Agency (EEA). In this way, when it comes to reporting virtually all of the data at the European level obligations is submitted to the same institution which evaluates the proposals of Natura 2000 as well.

The possibility of negotiation with The European Commission related to Natura 2000 is focused on the possibility of technical adaptations of Directives. Technical adaptations of Directives represent possibility of adding species or habitats to the existing Annexes of Directives, which the country considers to be very important to be included in the Annex to the Directive. Furthermore, the negotiation process is carried out in the context of the derogations or exemptions from the rules of this Directive, for the future member state, for certain species for which it can be proven that the population of that particular specie is at a level that does not require protection measures, or their implementation may pose a real problem for the population of other species. The evaluation of these proposals, in addition to ETC Biodiversity, are conducted by professional authorities (Habitats Committee and Ornis Committee), which established in accordance with the Directives and composed of experts from the relevant EU Member States. In order to adopt a country’s proposal, whether it is a derogation or an amended proposal to the Annex to Directive, it is very important to have good science-based arguments and to consider the experience of other countries in the accession process relevant to this topic.

When formulating the proposals for the Natura 2000, it is very important to have in mind the criteria stipulated in the Annex III of the Habitats Directive. According to the experience of other countries, the most difficult part is fulfilment of the rule which defines that in defining of proposals, areas and their borders for EU Commission, economic interest is not an acceptable criterion. Therefore, that fact should be kept in mind when defining the proposal for Natura 2000, because such a criterion may cause controversy when the European Commission evaluates the proposals for Natura 2000. Percentage of territory under protection is not defined as well, and it exclusively depends on wealth of biodiversity, but there is a rule that the network has to cover from 20 to 60% of distribution of habitats and population species by biogeographic regions at the national level, and 80% for priority species and habitats. Experience has shown that 20% is usually not satisfactory and in most cases it tends to be around 50%.

The proposal for Natura 2000 is submitted by the date of accession and includes Po-
tential Sites for Community Interest according to the Habitats Directive and Special Protection Area for birds (SPA).

Then, after accession, followed by evaluation of the above proposal pSCI areas through the process of biogeographic seminars, where in relation to the proposed network of habitats and species defined by biogeographic regions the representativeness of the proposed network, is evaluated, bearing in mind the criteria provided in the Annex III of the Directive, as well as the rule on percentage coverage by network of habitats and species. Biogeographic seminars are organized by ETC for Biodiversity, and the invitations are sent to the representatives of the countries that submitted the proposals, the European Commission, independent experts, representatives of European Habitats Forum, forum Natura 2000, NGOs, and EU Member States. Everyone has an equal right to express arguments about representativeness of the network in relation to the species and habitats from the Annex to the Habitats Directive. The process of evaluation can last up to three years and within this process, based on expert and scientific assessments and information, it can be shown that certain areas must be added to the network or in some rare cases some of the proposed areas can be deleted. In this part of the negotiation process it is very important to have valid scientific data and compliance at the national level between experts, including NGO sector, so that the aforementioned process can be applied without difficulties.

When it comes to Special Protection Areas for birds (SPA), according to the Birds Directive, the evaluation is done in accordance with the criteria of Bird Life International. Therefore it is very important that the proposal is harmonized with identified Important Bird Areas (IBA) at the national level and take into account the migratory species during the drafting of proposals.

After the evaluation process, and harmonization of proposals of the candidate country and the European Commission via biogeographic seminars, starts the nomination procedure for the Natura 2000 network (SAC and SPA), during which the Member Countries have to declare those areas as Natura 2000 within 6 years, and within the same time frame they are obliged to establish systems for management of those areas through defined measures of protection and management, functional mechanism of evaluation of acceptability, compensatory measures and determining of the public interest, as well as monitoring and reporting.

Also, in parallel with the process of identifying areas and outlining the proposal for Natura 2000, it is necessary to implement education for all interested parties, from decision makers in all sectors related to Natura 2000, to land owners, the media and the general public about procedures related to process of Natura 2000 and about all other relevant issues. Communication must be open, primarily in terms of features and rules issued by the Natura 2000. In addition, it is necessary to design a financing plan of Natura 2000 after the identification of the area. It should include an analysis of the possibility of using available funds for establishing and implementation of management measures, as well as the possibility of financing the development of sustainable activities (tourism, agriculture, development of green infrastructure) that
will contribute to sustainable valorisation of Natura 2000 network, or outlining a plan to mobilize resources.

From everything stated above, it is already clear that country has to build and enforce administrative and expert capacities for the process of planning of Natura 2000, as well as for its managing. The job of Natura 2000 essentially begins in the true sense of the word after the EU accession, i.e. after defining for proposal for environmental network Natura 2000. Therefore, for adequate enforcement of protection mechanisms, definition and implementation of management measures, reporting and monitoring, it is necessary to provide and strengthen capacities in parallel with the planning process of Natura 2000 and with the identification of areas. The evaluation of acceptability represents one of the main protection mechanisms for an area, and often can be considered as a barrier to business. In order to avoid it becoming a barrier, it is necessary to have a certain level of expertise which can be specifically connected to objectives of management, or, to be more accurate, to certain species and habitats, so that in relation to the ecology of specific species and habitats one can make an assessment whether the planned activity has a significant impact or not, as well as to consider acceptable alternatives, thus making and adequate and proper decision. There is ample evidence that in Natura 2000 areas is possible to implement a number of activities with adequate scientific data and expertise, but of course it would not be right to say that all activities should be considered as acceptable. Therefore, if the country would like to avoid proceedings before the European Court of Justice, while at the same time facilitating its own development in a sustainable and affordable fashion, it is very important to build and invest heavily in building capacities which will be capable from expert and administrative aspect to adequately implement this mechanism, as well as other specific tasks like measures for enhancement of management, monitoring and reporting.

**Previous activities related to Natura 2000 and the current capacity of institutions**

In relation to the obligations listed in the accession process and after it, we can ascertain that, so far, the implemented activities were focused on the transposition of regulations of Directives in national legislation, primarily in the Law on Environmental Protection and relevant secondary legislation, as well as initial activities for collecting and gathering data implemented through different project activities and initiatives.

When it comes to transposition, although some significant increase of compliance was recorded in previous assessments provided in the Progress Report, there is still room for improving the compliance of national legislation with the Directives – first and foremost the List of Protected Species, Law on Wildlife and Hunting and the Hunting Season Rulebook. Articles of the Directives define what Member Countries should do, but not how they should do it. For a great number of Member States there are
guidebooks that give recommendations and guidelines, which often as such are not fully directly transposable into national legislation, because of the existing legislation system or terminology, or because of the administrative framework itself. But, in the context of further harmonization via the proposed amendments to the Law on Environmental Protection, which are currently being drafted, we shall try to achieve an even higher level of compliance.

Speaking about planning of Natura 2000 and steps for defining the proposals of areas, we are at an early stage in this sense. Some significant activities are realized through the project “Strengthening the Capacity of State Institutions and Civil Society in Serbia and Montenegro to Harmonize National Legislation with EU Regulations in the Field of Nature Protection”, financed by the Norwegian Government and implemented by WWF, in cooperation with the Ministry of Sustainable Development and Tourism and the former Institute for Nature Conservation. We analysed the available data through this project and consolidated it. A training for young experts was also organised and a small number of field studies was conducted. Natura Info Centre was established as NGO network for exchange of information and participation in the process of Natura 2000. As the final result of the project, the following documents were made on the basis of available information: draft Reference List of Species of Flora and Fauna, which is a list of species from Annex II of the Habitats Directive present in Montenegro, Draft Catalogue of Habitats and “desktop inventory” database of mapped habitats and species on the basis of literary data and small-scale field studies. The goal of that project was not the Birds Directive.

Before the aforementioned project, and in context of Natura 2000, the project called EMERALD was implemented, financed by the Council of Europe under the Convention on the Conservation of European Wildlife and Natural Habitats (The Berne Convention). It was decided during the EMERALD process that Montenegro should be divided in two biogeographic regions: Alpine and Mediterranean. This shall be applied also during the process of defining and evaluation of Natura 2000 more precisely from the aspect of assessment of the representativeness of networks at the national level and distribution of species and habitats and the percentage of their network coverage according to these biogeographic regions. As a result of the project, EMERALD network defined a proposal for Montenegro, consisting of 32 sites (Areas of Special Conservation Interest - ASCI, which should establish by the member states of the Berne Convention). For Member Countries of EU, EMERALD network is similar or the same as Natura 2000. The only difference is that the mode of defining of proposals in EMERALD is less strict, which means that all available literary data can be used and the base itself and geospatial positioning is not as demanding as it is for the proposal for Natura 2000. So practically Emerald is a prerequisite for Natura 2000, with the necessity to perform additional field research and checking and completion of data. Criteria for defining areas and evaluation as well are not as strict as in case of Natura 2000, which practically means that through the process of defining of Natura 2000 proposals, having in mind criteria defined by Directives and the relevant network resolutions, they can include a larger number of regions in relation to the EMERALD network.
Except the aforementioned projects, there have been others that were realized, like identification of “Important Plant Areas” (IPA), “Important Bird Areas” (IBA) in cooperation with NGO “CZIP” and Bird Life International, Supporting the Establishment of MPA “Katić” (through bilateral cooperation of the Italian Ministry of Land, Sea and Environment and the Ministry of Sustainable Development and Tourism) and research of marine and coastal ecosystems along the coast and MedMPAnet (RAC/SPA), that defined potential marine areas suitable for protection: Mamula bay up to Cape Macak, Cape Traste to Platamuni (where the area for protection stretches from Cape Zukovac to Cape Kostovica), ZPM Katić, Cape Vulujica up to the Dobre Vode settlement, area from Cape Komina to Cape Stari Ulcinj, from Valdanos Bay to Velika plaža, Seka Djeran and from the southern part of Velika Plaža to the delta of river Bojana. After analysing the areas from the initiatives listed above, one can notice a marked difference when compared to the current system of protected areas at the national level, as well as to the proposals of the EMERALD network. It is important to understand that among systems of protected areas at national level and other initiatives, as well as Natura 2000, there are differences in all countries and usually the environmental network and the system of protected areas operate in parallel. Primary difference is in the protection objectives and protection mechanisms. To put it simply, national protected areas are presented and defined in terms of the importance of species, habitats and areas at the national level, while Natura 2000 and other initiatives take into account the context of protection of important species and habitats at the level of the whole Europe or even broader. Most certainly, as much as some initiatives are voluntary, like the identification of IBA areas, they are a valid reference for the European Court of Justice in disputes with the Member States. Therefore, that should be kept in mind when defining the proposal for the area of the ecological network of Natura 2000. As a conclusion, we can state the assumption that in the case of Montenegro, if we take into account Emerald network, with 32 areas as a presupposition to Natura 2000 and also other aforementioned initiatives, which identify a number of areas outside these 32, the total area shall be somewhat larger.

Also, there are 2 ongoing GEF projects implemented by UNDP, concerning planning and management of the Protected Areas System. The projects are the following: (i) Catalysing financial sustainability of protected areas in Montenegro (PAF), with the goal to enable the legal framework for improvement of financial sustainability of protected areas and ensure their income, and (ii) Strengthening the sustainability of the protected area system of Montenegro (PAS), that has the goal of expanding and rationalising the protected areas system, in order to ensure better representation of habitats and their protection status, as well as strengthening the capacities of institutions concerning protected areas activities, so that they can efficiently manage a more representative protected areas system. The ongoing project “Conservation and Sustainable Use of Biodiversity at Lakes Prespa, Ohrid and Shkodra/Skadar (CSBL)”, which is being financed by the German Government and implemented by GIZ in cooperation with the relevant institutions, shall contribute to the future data base for Natura 2000 through the activity “Monitoring of Skadar Lake Flora and Fauna”. They
shall collect the data on flora and fauna species for the year 2013 in accordance to the Natura 2000 methodology. Additionally, an important source of data concerning representation and distribution of forest habitats is also the data base established through the “National Forest Inventory” project.

In the last two years, in order to perform data collection in accordance with Natura 2000 methodology, for the areas that, based on aforementioned projects, are believed that are on the path to become an integral part of the environmental network and the Biodiversity Monitoring Program was conceived more like a research and data collection program.

What awaits is the realisation of the project (IPA National Program 2012) “Strengthening the Environmental Protection System in Montenegro”, which is focused on further activities of concern to establishment of Natura 2000. All of the aforementioned data and databases shall be consolidated through this program, as well as planning and realisation of field research in order to ensure the lacking relevant data. Most definitely, the topic of this project shall also be other activities that are indispensable and already mentioned for the planning process for Natura 2000. What should be taken into account in order to avoid certain problems that were previously occurring is most certainly an appropriate way of organisation of this project’s realisation. In accordance with the IPA’s and European Commission’s procedures, realisation of the project shall be entrusted to a consultancy company by announcing a tender. Therefore, the quality of realisation of a project shall depend on the quality of the selected company and its understanding of biodiversity and circumstances in Montenegro. Therefore, we should think in the direction of establishing a national expert team that shall actively participate in the process of project realisation. Requirement of participation and establishment of a team of renowned experts on the national level raises the issue of possibility to finance it from the state budget, as was the practice in the neighbouring countries.

**Institutional framework for establishment and management of Natura 2000**

In accordance with the Draft Amendments to the Law on Environmental Protection, in order to establish Natura 2000, it was envisaged that a government body (Agency for Environmental Protection) in cooperation with other professional and scientific institutions from the area of nature protection collect the data and prepare documents for establishment of environmental network within the Montenegrin territory, in accordance with the criteria defined by the law, international laws and regulations and confirmed international treaties. Environmental network and environmental corridors are defined by the Government.

When speaking about managing the future environmental network, it was envisaged that entities that manage natural resources (Public Enterprise “Nacionalni parkovi”, local governances, etc) for the areas that are compatible with the environmental network
This project has been financially supported by the European Union.

should also be managing entities for the areas that shall become an integral part of
the environmental network, and are situated in the zone of Public Enterprise “Morsko
Dobro”, locations under forests in the environmental network – government body in
charge of forests and in all other cases a legal entity delegated by the government.

When speaking about implementation of protection mechanisms, like procedures
for acceptability assessment, determining the primary public interest, compensatory
measures, defining and establishing protection measures, chief competencies shall
be in the hands of the Environmental Protection Agency.

As was previously stated, in order to have an adequate implementation of the Direc-
tives, it is necessary to build appropriate administrative, as well as expert capacities.
It is important to understand that several different sectors in the Government have
direct or indirect influence or connections with the issue of establishment and man-
agement of the environmental network. Therefore it is necessary to unite capacities
and coordinate activities in relation to this issue.

Relevant institutions in the process of establishing an environmental network or in the
context of direct competencies, control functions or owning expert skills and capaci-
ties are provided in the Image 1.

**Image 1.** Diagram of institutions relevant for the issue of environmental network

Without a doubt, direct competence and the most demanding role lies in the hands of
the Ministry for Sustainable Development and Tourism and the Environment Protec-
tion Agency. Nevertheless, cooperation with other relevant institutions, which have
relevant expert capacities and deal with certain taxonomic groups, is very important
and indispensable in the field of compiling and exchange of data, like for example:
University (Faculty of Science - Department of Biology), Institute for Maritime Biology,
Natural History Museum, Forestry Administration, etc. Also, cooperation with the NGO
sector is very important.

Existing institutional capacities in the sense of the number of people dealing with the
topic of environmental protection are very limited and can be defined as inadequate
for everything that awaits us on the road of planning and establishment of Natura
Assessment of current institutional capacities, that are directly competent for the establishment, management or control process of the environmental network is provided in the Table 1, although it should be underlined that expert capacities of other institutions operating in the system in the sense of expert knowledge for taxonomic groups or habitats are also limited in lieu of the number of people. For certain taxonomic groups, like plants and birds, the situation is slightly better in comparison with, for example, the number of people dealing with other taxonomic categories.

Table 1. Institutional capacities

<table>
<thead>
<tr>
<th>Administration</th>
<th>Current human resources situation</th>
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<tbody>
<tr>
<td>Ministry of sustainable development</td>
<td>3</td>
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<tr>
<td>and tourism</td>
<td></td>
</tr>
<tr>
<td>Environmental Protection Agency</td>
<td>18 (experts and administration)</td>
</tr>
<tr>
<td>PE „National Parks“</td>
<td>39 (rangers) and 14 (experts)</td>
</tr>
<tr>
<td>Directorate for Inspection Affairs</td>
<td>Environmental Inspection – 7 (2 biologists)</td>
</tr>
<tr>
<td></td>
<td>Forestry and Hunting Inspection – 11</td>
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<tr>
<td></td>
<td>Inspectors for Waters of Montenegro – 2</td>
</tr>
</tbody>
</table>

Based on everything said, it should be clear that capacity building of institutions and increasing the number of human resources working in the area of environmental protection should be regarded as a necessity. Nevertheless, since these are highly specific and profession-oriented issues and topics, it should be necessary to harmonise the system of education and curricula at the universities, incorporating specific issues and needs relevant to Natura 2000. This would decrease the issues of unemployment and building adequate required professional resources and capacities, whether they might be administrative issues or highly specific ones, referring to the knowledge of ecology of certain species and habitats.

Financing of Natura 2000

Financing of Natura 2000 includes the following phases: network definition phase (administration and process of area identification, research, creating an inventory of the process, mapping, promotion and raising awareness on Natura 2000, education, land acquisition), planning of management and administration of management, current management activities (application of protective measures, control, monitoring and research), occasional capital investments (infrastructure in protected areas).

Previous activities in Montenegro, as was previously stated, were mostly focused on different project activities, therefore the financing was provided by different international donor mechanisms. Most definitely, the analysis of invested funds and implemented project activities prove that these investments were not significant,
having in mind that in Slovenia and Croatia several million Euros were spent during the process of establishment of Natura 2000, and the amounts spent up until now on realised project activities in Montenegro, directly connected with the environmental network, individually are not higher than tens of thousands of Euros. Of course, these projects have made those initial steps in the process of establishment of the network, whether this is in the area of data compiling and analysis or adoption of methodologies and equipment for scientific research.

Also, the experience of other countries has shown that substantial budgetary allocations are indispensable, in order to solve the issue of ownership of the data, involvement of relevant national experts and other similar issues. To use the case of Croatia as an example: they have allocated 5 million Euros from the state budget for the process of establishing Natura 2000, and EU Member States depending on the size of the network annually spend 7 million Euros on average for management activities.

While the possibilities for financing the process of establishing are very limited and boil down to IPA, LIFE and LIFE + Nature, obligation to finance Natura 2000 after the network has been defined is stipulated in the Article 8 of the Habitats Directive, stating that “States assess the funds needed for preservation of areas important to priority species and habitat types. European Commission is obliged to co-finance the necessary protection measures for the Natura 2000 areas.”

Most EU countries, besides the national budget also use the money from different available funds, primarily:

- LIFE Fund
- The Seventh Framework Programme for research (FP7)
- European Agricultural Fund for Rural Development (EAFRD)
- European Fishing Fund (EFF)
- Structural and Cohesion Fund – as well as others, through which owners or beneficiaries of protected areas can obtain incentives for implementation of prescribed measures.

The aforementioned funds support diverse activities, from drafting of management plans, implementation of management measures, management capacity strengthening, to research and agricultural projects and green infrastructure construction projects. These funds annually allocate between 550 and 1150 million euros for Natura 2000.

Public-private partnerships are also a model that was recognised as a success story in the context of valorisation of Natura 2000 and adequate management.

In the upcoming period, a significant source of financing of Natura 2000 process in Montenegro shall be the aforementioned (IPA National Programme 2012) “Strengthening of the Environmental Protection System in Montenegro”, through which 2,750,000 Euros were allocated for the establishment of Natura 2000.

In the end, it should be underlined that the environmental network Natura 2000 does not represent only an “expenditure”, but as numerous studies have proven that
through adequate planning of activities and valorisation of the area multiple benefits can be achieved. In the Institute for European Environmental Policy’s study, entitled “Costs and Socio-Economic Benefits associated with the Natura 2000 Network”, it was shown that the profit in the case of The Netherlands is 4000 Euros per acre, in France it is 7 times more than the amount invested and in Ireland 2 to 3 times more than invested. Profit mostly comes from the development of sustainable recreational tourist activities and agriculture.

It is important to have in mind that natural resources, biological diversity being one of its key components, can be completely put on the same level plane with natural capital. Nature is also observed as a storage of natural resources which can be used to provide a broad spectrum of goods and services of ecosystem, like sources of energy, food and materials; reservoirs for waste and pollution; climate, water and land regulation services, as well as the environment for life and relaxation. Thus it can be concluded that natural capital is society’s essential tissue. Nevertheless, what proved to be obvious most certainly is that the resources and services that nature provides are not indestructible and unlimited, and that we become aware of the nature’s capital only after large natural disasters and processes in the environment that influence our quality of life. Therefore the concept of protection of biodiversity as a resource that was developed through the establishment of Natura 2000 has the goal to raise the awareness on possibilities of sustainable valorisation of natural resources.
Responsibility for crimes within the field of environmental protection

*Maja Kostić-Mandić*

Abstracts

The development of the environmental protection law as a separate legal discipline, since the 1970s of the 20th century, influenced many countries to protect their most important values through national criminal legislation.

Environmental protection through criminal law was first foreseen, in the international framework, in the Convention on the Protection of Environment through Criminal Law, which was adopted in 1998. This international treaty established the basics of the unified environmental protection through criminal law, within the framework of European law, as well as the foundations of responsibility for natural and legal persons for criminal and other offenses (administrative offenses). However, the abovementioned Convention of the Council of Europe has not yet entered into force.

In a situation where there is a growing number of crimes against the environment, which increasingly move across the borders of countries within which these offenses were committed, Directive no. 2008/99/EC on the protection of the environment through criminal law, was adopted at the level of the European Union. The adoption of the Directive aims to make use of efficient methods of investigation and assistance between Member States.

The Directive respects the fundamental rights and principles of the Charter of Fundamental Rights of the European Union, which provides that the right to a high level of environmental protection is one of the fundamental rights of citizens of the European Union and the improvement of environmental quality must be integrated into Union’s policies and implemented in accordance with the principle of sustainable development (Article 37). The Directive obligates Member States to provide sanctions in their national legislation related to serious violations of the provisions of EU law on environmental protection. Furthermore, the Directive provides the minimum set of rules, and Member States may adopt or maintain more stringent measures to protect the environment within the framework of their national law.

Events at the international level have also affected the law of Montenegro, whose Criminal Code provisions were recently fully harmonized with the solutions of the Directive.

31 Professor at the Faculty of Law of the University of Montenegro
33 Law on Amendments to the Criminal Code, Official Gazette of Montenegro no. 40/13.
Montenegrin law

Criminal offenses, as unlawful actions, aimed at environment as a whole or its individual segments, are contained primarily in criminal legislation, and sometimes, within laws governing other areas that may have impacts on the environment. Chapter XX of the Criminal Code of Montenegro (70/03, 13/04, 47/06, 40/08, 25/10, 32/11, 40/13)\(^{34}\) stipulates criminal offenses against environment and spatial planning, so that every organization and individual whose right to a healthy environment is violated may initiate proceedings to protect their rights, by filing criminal charges to a competent Prosecutor.

Specific criminal offenses include: pollution of the environment (article 303), pollution of the environment related to waste management (article 303a), ozone layer depletion (article 303b), failure to take measures for the protection of the environment (article 304), unlawful construction and putting into function buildings and plants which pollute the environment (article 305), damaging of buildings and plants for the protection of the environment (article 306), damaging the environment (article 307), abuse of genetically modified organisms (article 307a) destruction of plants (article 308), killing and torturing animal and the destruction of their habitat (article 309), destroying and damaging protected natural goods (article 310), stealing protected natural good (article 311), taking abroad and importing protected natural goods and specially protected plants and animals and trading in them (article 312), taking abroad and importing of dangerous substances (article 313), unlawful processing of dangerous substances (article 314), unlawful construction of nuclear plants (article 315), non executing the decision pertaining to environmental protection measures (article 316), violation of the right to be informed on the state of the environment (article 317), transmitting of contagious animal and plant diseases (article 318), unconscientious rendering veterinary services (article 319), quack veterinary assistance (article 320), producing harmful products for treating animals (article 321), pollution of livestock fodder and water (article 322), devastation of forests (article 323), forest theft (article 324), unlawful hunt (article 325), unlawful fishing (article 326), construction of building without a building permit (article 326a) and illegal connection of the construction site to technical infrastructure (article 326b).

Liability for environmentally based criminal offenses falls under the principle of subjective responsibility, and the stipulated sanctions includes a fine or imprisonment. In addition to the liability of natural persons, Montenegrin national legislation prescribes the liability of legal persons for a criminal offense, on the principle of objective responsibility. Thus, Law on Liability of Legal Entities for Criminal Offences (2/07, 13/07) provides that legal persons can be held accountable for criminal offenses stemming from the special part of the Criminal Code, as well as for other criminal offenses stipulated by a special law (article 3); that the legal entity is responsible for a
This project has been financially supported by the European Union.

criminal offense even if the responsible person that performed the criminal offense has not been convicted of that offense, as well as that the liability of the legal person shall not exclude the criminal responsibility of the person responsible for the criminal offense (article 6); and that a legal person can face sanctions such as a fine and the dissolution of a legal entity (article 13).

Chapter XXV of the Criminal Code of Montenegro, prior to the adoption of amendments to the Criminal Code in 2013, stipulated a legal standard in the case of eight offenses for a basic or qualified form of a criminal offense: pollution of air, water or land “to a greater extent, or in the wider area”, i.e. destruction or damage to animal or plant life “of a large-scale” or pollution of the environment to the extent that longer period of time is needed for removing harmful consequences.35

Characteristic example was Article 303 of the Criminal Code of Montenegro, which stipulated that the crime of environmental pollution comprises of the pollution of air, water or soil to a greater extent or over a wider area, by violating the regulations within this area. The qualified forms of this offense included the destruction or damage to animal or plant life of a large scale or environmental pollution to the extent that longer period of time and larger expenditures are needed for removing harmful consequences, whether the offense was committed intentionally or negligently. All forms of this criminal offense were punishable by imprisonment; however, the basic form of the offense provided the possibility of imposing fines instead of imprisonment.

This method of formulating criminal offenses against the environment, by using the blanket norm, which means that for a criminal offense to exist, in addition to the elements of the crime, the perpetrator of that offense must violate some other law or by-law, with the problems in the application of the legal standard “to a greater extent or in the wider region”, in practice turned out to be one of the causes for a small number of criminal complaints for those crimes, as well as the small number of convictions. Based on the data obtained from the relevant state authorities (Police Directorate, State Prosecution and judiciary) and in an effort to draw attention to the most significant characteristics, as well as problems, in the protection of the environment through criminal law, the following text is a brief analysis of the actions from their scope of work, relating to the period from 2004 to 2012.36

By analyzing the data obtained from the Police Directorate of Montenegro for the period from 2004 to 2009, one can easily observe certain trends. In the mentioned period, there were no criminal charges for a number of offenses under the Chapter XXV of the Criminal Code; the smallest number of criminal charges referred to those crimes that are of so called “blanket” character (for example, environmental pollution - 3, damage to the environment - 2), and the largest number of criminal charges referred to the criminal offense - forest theft (total of 943). In addition, a large number of

35 See article. 303 (1,3,4), art. 304 (3,4,5,6), čl. 305 (1,2), art. 306 (3,4,5,6), art. 307 (1,3,4), art. 308 (1), art. 309 (1), art. 314 (3) of the Criminal Code (70/03, 13/04, 47/06, 40/08, 25/10, 32/11).
36 Processed data was obtained for different purposes and at different times and it was impossible to “follow” the individual cases at all stages of the proceedings.
criminal charges existed for two, at the time, recent crimes: construction of building without a building permit, from article 326a, and illegal connection of the construction site to technical infrastructure, from article 326b (85 in total), which were introduced by the Law on Amendments of the Criminal Code of Montenegro from June 27th, 2008; therefore, for a significantly shorter observed period in comparison to other offenses under this chapter of the Criminal Code. Also, a slightly higher number of criminal charges relates to criminal offenses of illegal fishing (54) and illegal hunt (24).37

Based on the Report of the State Prosecution Office of Montenegro, Podgorica,38 the number of persons reported to all Basic Public Prosecution Offices in Montenegro, for the period from 2004 until October 1st 2011 (according to the number of reported persons, rather than established cases that may refer to more than one person), it is clear that the number of persons reported is in great disproportion to the number of verdicts. The given data shows that, during this period, there were 3008 persons reported for criminal offenses under Chapter XXV of the Criminal Code. There were no reported persons for eleven other offenses. The largest number of charges were filed for the criminal offense of forest theft (total of 1968), out of which 261 persons were given the punishment of imprisonment, 488 persons were given suspended sentence, and 255 persons were fined.

For criminal offenses of so-called “blanket” character (environmental pollution, environmental damage, etc.), the number of reported persons was 16 or 3 in the above mentioned period, and only five persons were given suspended sentence for the criminal offense of environmental pollution.

Dismissals of criminal charges are relatively frequent for offences such as destruction of plants (against 4 of 5 people reported) and killing and torturing of animals (against 11 of the 20 people reported). Suspended sentences are given considerably more often than prison sentences and fines, for criminal offenses of illegal hunt and illegal fishing.

Based on data obtained from the Ministry of Justice of Montenegro, on final court rulings regarding the criminal acts under Chapter XXV of the Criminal Code of Montenegro, for the period from 2011 until March 2013 (total of 783 court rulings), number of convictions for all criminal offenses from this field amounts to 661. However, the analysis on the number of final convictions per criminal offense shows the extent to which statistics can be misleading. It is interesting to note that except for 2011, when there were as many as 16 convictions for the criminal offense of environmental pollution (Article 303) and 2012 when they were two convictions for a crime which was then called the killing and torture of animals (Article 309), all other final court rulings relate to offenses under Article 323-326a. From the total number of ruling, convictions

37 Best results in reporting crimes have been achieved in cooperation with other authorities (Directorate for Inspection, Directorate for Water, Veterinary Administration, hunting and fishing societies, etc.), as well as in the framework of activities aimed at combating certain frequent offenses (criminal offenses related to forest theft and devastation of forests, as well as criminal offenses in the area of illegal construction). For more details see: Kostić-Mandić Maja, Challenges in exercising rights to a healthy environment in Montenegro - public participation and punitive procedures, OSCE, Podgorica, 2011.

38 Same.
included crimes for: forest devastation (4), forest theft (189), illegal hunt (33) illegal fishing (163), construction of a structure without a building permit (258) and illegal connection of the construction site to technical infrastructure (article 326b).

The amendments to the Criminal Code helped harmonize the provisions related to this field with the European Union acquis - Directive 2008/99/EC on the protection of the environment through criminal law. Most important novelties include the introduction of new offenses (environmental pollution through waste management and ozone depletion - Art. 303a and 303b), and for the purpose of this study it is especially important that the legal standard of “to a greater extent or to a greater i.e. wider area”39 was kept for only two offenses (Art. 307 and 308), while the corresponding standards are now clear and precise (using the legal standard “substantial damage”, and a number of norms suffered significant changes). In addition, qualified forms of the most serious criminal offenses will be sanctioned with longer legal punishments.40 An illustrative example is the new Article 303 which now, in paragraph 1, in a different manner regulates the basic form of criminal offence of environmental pollution specifying that there will be an imprisonment sentence up to three years for: “anyone who by violating the regulations on the protection, preservation and development of the environment omits, brings in or puts aside a certain amount of material or ionizing radiation into air, water or land which endangers the life, body or health of people, or causes the risk of occurrence of significant harm in relation to air quality, water or soil, or animal or plant life”. Qualified forms of criminal offence are foreseen as well, if serious bodily injury or serious damage to the health of one or more persons occurs, as well as if the death of one or more persons occurs, which is punishable by imprisonment for a term of two to ten, i.e. three to twelve years.41

It is expected that the standardization of criminal offenses under Chapter XXV, in a manner which is not abstract, with a precise definition of the nature of criminal offenses and more severe sanctions, will significantly contribute to the growing number of criminal charges, as well as a greater number of convictions for these crimes.

Hope remains that the mentioned amendments to the criminal legislation will, in the long run, reflect on the reduction of environmental crime through the application of the principle of prevention.

Conclusions and recommendations

To which extent the protection of basic goods, which are protected by criminal legislation, will be efficient and effective primarily depends on the actions of the competent authorities in the specific case, as well as on the number final court verdicts.

39 See footnote no. 5.
40 See, for example: art. 303, 313. and 314 i.e. article. 53, 61 and 62 of the Law on amendments to the Criminal Code.
41 See article 303 paragr. 5 and 6 i.e. article 53 of the Law on amendments to the Criminal Code.
Numerous problems were noted in practice, regarding the handling of criminal charges: inspections responsible for environmental protection, the Police, State Prosecution Office and courts. The situation is even more difficult regarding actions taken based on criminal charges by individuals or non-governmental organizations (based on the information received from NGO MANS and Ozon, there were no convictions on the criminal charges brought by them).

In order to improve the procedure of processing criminal charges in this field and their future success before the courts, the main recommendation relates to the improvement of cooperation and communication between the representatives of state administration bodies which deal with this issue (the ministries responsible for environmental protection and other subjects) and the State Prosecutor. Specifically, this means that the representatives of state administration bodies shall act in accordance with the Criminal Procedure Code, which regulates pre-trial proceedings and relations between the Police and the State Prosecutor. Joint pre-trial proceedings by the Police and the State Prosecution, including the role of the State Prosecutor as the head of the pre-trial proceedings and the authority that gives the mandatory instructions and guidance in the work of the Police.

Such manner of conduct of the Police and the State Prosecutor, in the pre-trial proceedings, which began in April 2004, has proven to be much more successful than the earlier solution in which the Police alone undertook actions in the pre-trial proceedings, and then decided, on their own initiative, whether enough evidence was collected to file criminal charges. For these reasons, in the period before 2004, there were many more dismissals of criminal charges, than after the application of the new law.

Cases to be avoided include the ones that can normally be encountered in practice, when a body, for example a Ministry, files criminal charges on their own initiative against a particular criminal offense, without prior consultations with the Police or the State Prosecutor, because such criminal charges usually result in a dismissal, or acquittal, mostly because of poor completion of the preliminary investigation, as one of the most important stages of the proceedings regarding the collection of evidence.

In addition, it is necessary to organize joint seminars and lectures for representatives of administrative authorities, State Prosecution Office and the Police, for the purpose of exchanging information and experiences from this field, as well as the training for state prosecutors (who do not go thorough specialization with regards to performing tasks, as is the case with police officers); to draft a manual in the field of environmental criminal law, which would include a comparative court practice, as well as the creation of a database of criminal proceedings in cases of environmental protection.
Liability for Criminal offenses in the Field of Environmental Protection

Marija Pujo Tadić

Criminal offenses against Environment in General

Criminal offenses against environment cause significant damage to environment in Europe and the world. It is often the case that consequences of these acts have cross border effect. Thus, criminal offenses against environment are serious and growing problem which needs to be solved at the European level.

These acts typically cause great damage or danger for environment and human health. The most common criminal offenses against nature are illegal emission of pollutants in the air, water and soil; smuggling of animals; illegal waste disposal, especially dangerous waste etc.

In order to secure high level of environmental protection it is necessary to solve increasing problem of growing number of criminal offenses against environment. Perpetrators of those criminal offenses gain high profit, but on the other hand, there are great difficulties in damage assessment of these acts.


In order to implement environmental law efficiently, EU adopted numerous legislation on the protection of the environment and member states are bound to transpose those acts into their national legislation and implement them. However, experience has shown that sanctions currently implemented by member states are not enough in order to respect for the rights of Community. Obeying the law could and should be strengthened through criminal sanctions reflecting societal condemnation of a different character in comparison with administrative sanctions or compensation mechanisms within civil law.

For this reason the Commission proposed Directive demanding member states to provide for criminal sanctions for the most severe criminal offenses against environment, because only this type of measured seems adequate in order to achieve appropriate implementation of environmental protection law.
After long institutional debates and two rulings of the European Court of Justice on the scope of competences of the Community in the area of criminal law, in order to solve this issue, the Council and the European Parliament agreed on the content of the Directive on the protection of the environment through criminal law.

Directive had been formally adopted on 19 November 2008 and it was supposed to be transposed into legislation of member states until 26 November 2010. This is Directive 2008/99/EC on the protection of the environment through criminal law.

Directive 2008/99/EC asks member states to declare certain acts as punishable in accordance the criminal law, and not administrative law (law of torts) which provides for lenient sentence. Article 3 provides that member states take necessary measures and list infringements of the EU law in the area of environmental protection which are considered criminal offenses according to the domestic law. This includes: polluting the air, soil or water; smuggling protected plant and animal species; illegal waste disposal. Sanctions have to be introduced in both dealing with illegal acts of individuals and legal persons. However, in last case, member states can choose between applying either criminal or administrative sanctions. Member states should have adopted laws, decisions and administrative regulations necessary for harmonization with the Directive until 26 December 2010.

Namely, Directive 2008/99/EC sets out measures for environmental protection through criminal law – list of acts against environment which ought to be prescribed as criminal offenses of by all member states, if committed with premeditation or as severe negligence, with serious consequences.

Directive does not create a new list of criminal offenses, it rather refers to the existing EU legislation on the environment, and a member state has to ensure that breaches of the law will succumb efficient, proportional and dissuasive criminal sanctions.

According to the Directive 2008/99/EC, member states will ensure that following acts will constitute for the criminal act, if committed illegally and intentionally or as severe negligence, at the least:

- If there is a serious damage of air, soil, water or animals or plants, or if it causes death or severe physical injury of any person;
- Introduction of ionizing material or emission of ionizing radiation;
- Illegal acts (disposal, transportation, storage etc) with waste (including dangerous waste);
- Illegal functioning of facilities where dangerous actions take place, or hazardous materials are being used;
- Illegal waste shipments;
- Illegal production, processing, storage, usage, transportation, import and export of nuclear materials or other dangerous radioactive substances;
- Illegal possession, usage, damaging, killing or smuggling of specimens of protected wild species of fauna or flora;
- Smuggling specimens of protected wild species of fauna or flora;
Criminal offenses against Environment in legislation of the republic of Croatia – short overview

Criminal offenses against environment in the Republic of Croatia are regulated in special Chapter XX of the Criminal law (NN 125/11 I 144/12) titles as Criminal offenses against environment.

Moreover, Directive 2008/99/EC was transposed into criminal legislation of the Republic of Croatia which resulted in widening of this Chapter of Criminal Law with number of new acts that were not recognized as such in the past.

Lately, majority of legislation regulates criminal offenses against environment as criminal offenses of contamination which do not require that legally protected entity is damaged (environment), a danger of contamination is enough (abstract damage), and precisely this type of regulation followed the harmonization of Croatian criminal legislation in Chapter XX which deals with criminal offenses against environment.

Further on, most of listed criminal offenses against environment are blanket norms – meaning that through this (“who against the rules”) accessoriness of such act is stipulated, thus for implementation of specific criminal offenses relevant laws are for example Law on protection of environment, Law on protection of air etc.

In the Republic of Croatia relevant legislation related to the topic of responsibility for criminal offenses in the area of environment is:

- (Old) Criminal Law until 1 January 2013 (NN 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11)
- (New) Criminal Law, entered into force on 1 January 2013 (NN 125/11)
- Law on liability of legal persons for criminal offenses (NN 151/03, 110/07, 45/11)
- Law on criminal procedure (NN 152/08, 76/09, 80/11, 121/11)
- Law on public prosecution (NN 76/09, 153/09, 116/10, 145/10, 57/11, 130/11 (hereinafter: LPP)
- Law on police affairs and authority (NN 76/09)
- Rulebook on conduct of police officers (NN 89/10)
- Law on Misdemeanor (NN 107/07), (hereinafter: LM)

As far as liability of legal persons for criminal offenses against environment, Law on liability of legal persons for criminal offenses (NN 151/03, 110/07 and 45/11) is applied on them, and this law stipulates that legal person shall be punished for criminal act of responsible person if this act violates responsibilities of legal person or it served for legal person to claim or try to claim material gain for itself or someone else, and under these conditions a legal person shall be punished for criminal offenses within
the scope of Criminal law and other law, as long as the liability of legal person is based on the fault of responsible person.

It is everyone’s duty in Republic of Croatia to report a criminal act against environment, and report of criminal offenses against environment can be submitted to State Prosecution, Police, Inspection of Ministry of protection of nature and environment protection.

All state bodies act within their jurisdiction, but the most important is the role of State Prosecutor who is in charge of all criminal offenses prosecuted ex officio in order to determine whether criminal offense was committed. State Prosecutor leads criminal investigation in matters of criminal offenses against environment, it directs and supervises work of other state bodies and it presses charges.

**Types of criminal offenses against environment and criminal offenses from Chapter XX of Criminal Law of the Republic of Croatia**

As far as criminal offenses against environment are concerned, there are:

- Criminal offenses related only to infringement of administrative provisions: there is no menace or real damage where punishment is necessary
- Criminal offenses of damages: it is abstract enough that protected entities are damaged, such as fauna, flora or habitat, water, soil or air, so that criminal act would be committed against environment, for example “it can endanger…”
- Criminal offenses causing damage: illegal acts sanctioned only in following cases. Damage is a precondition for criminal liability.

Criminal offenses against environment from new Criminal Law;

- Pollution of the environment, Art. 193
- Emission of pollutant from vessels, Art. 194
- Endangering the ozone layer, Art. 195
- Endangering environment with waste, Art. 196
- Endangering environment with a facility, Art. 197
- Endangering the environment with radioactive substances, Art. 198
- Endangering environment with noise, vibrations or non-ionizing radiation, Art. 199
- Destruction of protected natural values, Art. 200
- Destruction of habitat, Art. 201
- Smuggling of protected natural values, Art. 202
- Illegal introduction of wild varieties in habitat GMOs, Art. 203
- Illegal hunting and fishing, Art. 204
- Killing and torturing of animals, Art. 205
- Transmission of infectious diseases of animals and organisms harmful to plants, Art. 206
• Production and marketing of harmful means for the treatment of animals, Art. 207
• Veterinary Malpractice, Art. 208
• Devastation of forests, Art. 209
• Change the water regime, Art. 210
• Illegal exploitation of mineral resources, Art. 211
• Illegal construction, Art. 212

Since Republic of Croatia had introduced predominantly eco-centric model of criminal offenses (negligent endangerment is abstract enough to constitute criminal offense), a special principle which emphasizes – Effective repentance. Purpose of this principle is that a court can dismiss charges against perpetrator of the criminal offense: Pollution of the environment (Art. 193), Endangering environment with waste (Art. 196), Endangering environment with a facility (Art. 197) and Endangering the environment with radioactive substances (Art. 198), who, before severe consequences occurred, eliminates the danger or condition he or she caused. This principle is adequate in implementing a tenet that penalty ought to be ultima ratio and gives an incentive to perpetrators to eliminate pollution before severe consequences occur, such as: death, severe body injury, severe damage of health of one or more persons, changes caused by pollution which cannot be removed in a long time period, great accident.

Criminal offenses against nature, as well as other criminal offenses, because of specific circumstances can be qualified as serious crime offenses. Serious crime offenses against environment are acts that due to circumstances and previously listed severe consequences qualify as more serious, which requires more severe punishment.

Overview of statistical data on criminal offenses against environment of the biggest municipal court, Municipal Criminal Court of Zagreb in ten-year period up to 24/10/2013

<table>
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<th>Criminal offense</th>
<th>Received</th>
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<th>Unsolved</th>
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<tr>
<td>Endangering environment with waste (Art. 252)</td>
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<td>0</td>
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<tr>
<td>Illegal construction;</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Importing radioactive or other dangerous waste in RC ;( Art. 253)</td>
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<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Endangering environment with devices (Art. 254)</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Transmission of contagious diseases animals/plants (Art. 255)</td>
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<td></td>
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Production of harmful medications for animals (Art. 256)  

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Negligent veterinary treatment (Art. 257)  

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Illegal hunt (Art. 258)  

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Illegal fishing (Art. 259)  

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Torture of animals (Art. 260)  

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Devastation of forests (Art. 261)  

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Illegal exploitation of mineral capacities  

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Ukupno:  

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Source: Statistics of Municipal Criminal Court in Zagreb show that the biggest number of reported criminal offenses was for criminal offenses Endangering environment with waste (Art. 252 – old law) and Torture of animals (Art. 260 – old law).

Efficiency of work of Municipal Criminal Court in Zagreb is commendable, since it does not have a single unsolved case of criminal offense against environment.

**Conclusion and Recommendations**

Due to amending Criminal law and widening it with bigger number of criminal offenses against environment, and taking into account actuality of this topic, it is expected that the number of reported criminal offenses (charges) against perpetrators of these crimes significantly rises in the following period, which requires continuously developed judicial practice with the examples of good practice of the EU.

Further on, all state institutions ought to work more on educating their employees on this specific type of criminal offenses. It is necessary to draft guidelines in form of handbook for inspection services’ functioning in accordance with the procedural law in the area of protection of the environment.

In addition to this, cooperation of all institution is necessary in order to detect and punish perpetrators, as efficiently as possible, but also in order to mend consequences of these criminal offenses because, as I mentioned in introduction, consequences of most of such acts do not affect only individual, but whole community, all people and resources available to them (air, water, soil) which requires special efficiency and rapidity in dealing with these type of criminal offenses.
State Aid – harmonization with the EU acquis

Šefika Kurtagić

Awareness on importance of the just and controlled granting of state aid has been a trait of the EU from its very beginning, since the signing of the founding Treaties in 1957. At that time already, the EU had taken stance that state aids which affect negatively the trade between Member States and thus endanger creation of a single internal market of the Union shall be prohibited. Therefore, for this principle to be sustainable in practice, the European Union, through its bodies, mainly the European Commission, monitors any granting of money from the state budgets of Member States to the national economy, that is, controls Member States in their management and disposal with their “own” money.

In the same way, the EU demands from the countries with which it signed stabilization and association agreements, amongst which is our country, to align their systems for state aid control with rules and regulations of the EU legal system. In practice, that meant harmonization of state aid granting and control legislation with the EU legislation, as well as establishing a national body in charge of state aid control, with powers equal or similar to those of the European Commission.

Therefore, the state aid system that we have today in Montenegro is a result of fulfilling obligations arising from the Stabilization and Association Agreement, which was signed in October 2007 between Montenegro on one side and the European communities and their Member States on the other (SAA). Aforementioned agreement, article 73 (iii) and Protocol 5 of which regulate the area of state aid, entered into force on 1 January 2008 as an Interim agreement on trade and related matters between European Community and Montenegro.

Montenegro understood in time the exceptional importance of harmonizing the state aid rules for the strategy of Montenegro to become a Member State and widening it internal market, so the first Montenegrin Law on state aid (Law on Control of State Aid and Support) was adopted in the end of 2007, which was the first time in its history that Montenegro established a system for control of state aid, namely by setting up the basic rules and procedures of approving state aid.

Having in mind that any further steps towards membership would be impossible without complete harmonization of legislation on state aid approval and control with the EU legislation, as well as without establishing a national body in charge with state aid control which would, in terms of powers, be structured in regard to already existing European model, all necessary activities have been taken with the aim of fulfilling this strategic goal. Therefore, in the following period, full attention has been given to
transposition of European state aid rules into the national legal system, mainly through bylaws which regulated closer criteria, conditions and procedure for approving state aid, conditions and procedure for notifying state aid, as well as keeping state aid records.

However, in spite of willingness and decisiveness, the harmonization and alignment process has presented us with many difficulties, where most of all the difference between existence of “hard” and “soft” law comes forward, being non-existent in Montenegrin legal system.

On the path of achieving as complete as possible harmonization and fulfilment of obligations from SAA, as well as more efficient implementation of the Law on State Aid Control, it is necessary to further align bylaws in the area of state aid in Montenegro with the secondary legislation of EU _acquis_ in this area. Taking into account that all 68 pieces of secondary legislation which regulate state aid in the EU were summed up into one bylaw in Montenegro – _Decree on Closer Criteria, Conditions and Procedure for Granting State Aid_, it wasn’t possible to encompass a large number of detailed rules and guidelines for assessing legality of state aid, which has been having a negative impact on the implementation of Law on State Aid Control, and thus also on the fulfilment of obligations flowing from the Article 73 of SAA.

Having had in mind this fact, we came to conclusion that it would be the most useful to follow the Croatian model, meaning to publish integral texts of EU secondary pieces of legislation within the scope of secondary pieces legislation of national law.

One more reason for deciding on the model such as Croatian one lies in the fact that the drafting of a large number of individual bylaws, which would contain harmonized rules prescribed in the individual pieces of EU _acquis_ secondary legislation, would be expensive, complex and demand a long period of time. As another decisive factor we could list the wish to preserve the context and meaning of long preambles which are part of EU acts, with help of which their articles are easier to interpret, and which are not common in our legal system.

In order not to possibly jeopardize the fulfilment of obligations arising from the negotiation Chapter 8, due to shortcomings of the existing system in this area, we are leaning towards the idea to apply the new system of harmonization with the EU _acquis_, which had already been proved and assessed as successful, both by Croatia and the European Commission.

Furthermore, no less important is the fact that through the transposition of original EU rules, that is, through their translation and publishing within national bylaws, we could avoid the danger that some of the provisions might lose their true meaning, or be wrongly interpreted or transposed in the process of harmonization, and avoid legal gaps and possibilities for free interpretation. Application of this model would bring considerable benefits also for some national subjects, institutions, courts, legal and natural persons, as they would adjust and face the _acquis_ which will be directly applicable once Montenegro becomes an EU Member State.
Furthermore, having in mind that EU state aid rules are often subject to change and amendments, while our legal system is characterized by more complex procedure for amending legislation, this model could provide for more efficient and faster adjustments to changes in regulation.

As we are discussing implementation of solutions which were thus far uncommon in our legal system, adoption of this model and solving the issues of harmonization in the area of state aid will demand devoted inclusion of all institutions dealing with this topic, first and foremost the Secretariat for Legislation and the Ministry of Finance as a carrier of state aid policy in Montenegro, but also the state aid granting institutions (sector ministries) and all stakeholders to which these rules apply, and all with the aim of more efficient and better-quality negotiation process.
Harmonisation of the secondary legislation with the EU *acquis* in the field of state aid

- Croatian experience -

*Marijana Liszt*

The obligation to harmonise legislation of the Republic of Croatia in the matters of the competition law and state aids with *acquis* of the European Union started by entry into force of the Interim Agreement on the 1st of March 2002 and it may be said that it ended successfully by closing the accession negotiations in the Chapter VIII – Competition, on 30 June 2011.

Generally speaking about harmonisation, it should be mentioned that the fundamental obligation of the Republic of Croatia to harmonise its legislation with EU *acquis* primarily stemmed from the provision of the Article 69 of the Stabilisation and Association Agreement between European Communities and their Member States and the Republic of Croatia (Official Gazette – International treaties, No. 14/01, hereinafter: SAA).

Namely, Article 69 of SAA states the following: “Parties shall pay attention to the harmonisation of the existing Croatian legislation with the acquis of Community. Croatia shall aim at ensuring gradual harmonisation of the existing laws and the future legislation with acquis of the Community, and then in the Paragraph 2 continues: “Harmonisation shall start on the day of signing of the Agreement and it shall gradually expand on all elements of acquis of the Community from this Agreement by the end of the period determined in the Article 5 of the Agreement. The harmonisation shall, especially in the first stage, be focused on the fundamental parts of the *acquis* of the Community which refer to the internal market and other fields regarding trade, and on the basis of the program on which Croatia and the Commission should agree. Croatia will define means of monitoring implementation of harmonisation in agreement with the Community”

It is interesting that thereby the field of the competition and state aid is actually emphasised as a priority in harmonisation. In this respect, it is necessary to observe the following Article, Article 70 of SAA which refers to the harmonisation in the field of the competition law as a special provision, following the idea on the priority harmonisation.

The provision of the Article 70 of SAA is in the Chapter VI of SAA under the title Harmonisation of law, provisions of law and rules of the competition and the subtitle “Competition and other economic provisions” and it states that, with the proper implementation of the Agreement, to the extent in which it may affect the trade between the Community and Croatia, the following are, inter alia, incompatible: “... any
state aid which distorts or threatens to distort market competition by preferment of certain undertakings or certain products.” Therefore, the fundamental provision on state aids from the Article 70, Paragraph 1 of SAA, as well as the provision of the current Article 107 of the Treaty on the Functioning of the European Union, (and before the Article 87 of the Treaty Establishing the European Community) includes the principle according to which the state aids are incompatible with the proper implementation of the Agreement, or simply said: prohibited.

Thereby the Paragraph 2 of the Article 70 defined that “Any action contrary to this Article shall be assessed on the basis of criteria arising from the implementation of the rule on the competition in the Community, especially Articles 81, 82, 86 and 87 of the Treaty Establishing European Community and instruments for interpretation adopted by the institutions of the Community”, which are now Articles 101, 102, 106 and 107 of the Treaty on Functioning of the European Union. That provision of the Article 70 Paragraph 2 has played very important role in the context of harmonisation of the Croatian legislation in the matter of competition law, which will be presented hereinafter.

However, which fundamental obligations for the Republic of Croatia have arisen from SAA and have been important for harmonisation of legislation in this field?

Firstly, there was an obligation for Croatia to establish an operationally independent body which should be delegated powers necessary for the complete implementation of the Provision on the general prohibition of state aid within a year from the day when the Agreement entered into force, therefore 1 March 2003. That body had to be, inter alia, authorised to approve state aid schemes and individual aids in compliance with Paragraph 2 of the Article and order the recovery of the state aid which was illegally allocated. Croatia fulfilled this obligation by adoption of the first Law on the State Aids in 2003 and delegating the role of the independent operational body to then already existing Agency for Protection of Competition.

Furthermore, each party committed itself to ensure transparency in the field of state aids in a way that it, inter alia, bound itself to submit regular annual report or another similar document to other party, following the methodology and outline from the list of state aids of the Community. At the request of one of the parties, other party is bound to provide information on specific individual cases of public support.

In addition to this, Croatia had to draft a comprehensive inventory of state aid schemes approved before an independent body was set up and it had committed to align these schemes according to criteria set out in Article 70 paragraph 2 of SAA, for a period not exceeding four years from the date of entry into force of SAA, no later then 1 March 2006. This inventory was adopted by the Government and it has been revised later on during accession negotiations.

Also, within three years from the entry into force of the Agreement Croatia obliged itself to the Commission of the European Union to submit its amounts of GDP per capita in accordance with NUTS II, so that it would allow to operational independent
body and the Commission to jointly estimate suitability of Croatian regions, based on which it would estimate maximum amount of support, in order to create Croatian map of regional aid based on specific guidelines of the Community.

With regard to the harmonization of aid in the steel sector, the SAA was added Protocol 2 that regulates obligations of the Republic of Croatia relating to steel products and adoption of a national restructuring program for the steel sector, which was the main legal framework later in the context of restructuring and privatization of the steel sector.

Comparing obligations for Croatia arising from the provisions of the SAA and provisions of similar agreements from an earlier generation of association agreements (the so-called Europe Agreements) it is clear that the bar was already for Croatia higher than the one that needed to be “jumped over” by candidate states in previous rounds of enlargement of the European Union. It is expected that this bar would be even higher with every new member state. Novelty in the case of Croatia was obligation to set up an independent operational body that will, contrary to the practice up to that point, have the possibility to control state aid both ex ante, as well as ex post. Namely, this body was supposed to be allowed to not just previously evaluate, but also to order return of illegally granted state aid with compex interest rate, which is the ultimate resort and very painful consequence for every undertaking who had been receiving state aid.

Starting from obligations from Article 70 of SAA, Republic of Croatia adopted the first Law on State Aid in 2003, and this law regulated system of state aid in Croatia, determined competences of the body in charge for approval, control and order to return illegal state aid granted. In the end of 2005, this Law was replaced by the new Law on State Aid (NN 140/05) which was additionally harmonized with the EU legislation. After the Law entered into force, Croatian legal system gradually introduced implementing regulations, acts and directives of the Commission dealing with possibility, conditions and rules for granting state aid, which are, according to the Law and commitments, implemented when granting state aid in the Republic of Croatia.

Subsequently, Law on State Aid (NN 140/05) that had regulated general conditions and rules for approval, monitoring and return of state aid with the aim of implementing international obligations of the Republic of Croatia, stipulated that the state aid which is, irrespective of its form, infringing or could infringe competition by giving advantage to those who use it on the market, is not in accordance with this Law, to the extent to which it can influence implementation of international obligations of the Republic of Croatia.

In addition to this, Law defines the meaning of state aid in a way that it stipulates that state aid represents all real and potential expenditures or lowered income of state granted from donor of state aid which distorts or threaten to distort competition by favouring state aid beneficiary, regardless of the form of state aid, to the extent to which it affects the fulfilment of Croatian international obligations. Thus, we can say that the term state aid in Croatian law is completely transposed from the law of the European Union and, as such, it had been defined identically. Except for the term, ex-
Exceptions from general prohibition of state aid were defined in accordance with Article 107, paragraphs 2 and 3 of the Treaty on the Functioning of the EU. Concretely, Article 4 of the Law on state aid stipulates that in exceptional cases, with the prior approval of the Agency, state aid would be in compliance with the Law on State Aid in cases of mitigating damages caused by natural disasters, exceptional or war circumstances. If it does not affect fulfillment of international obligations of the Republic of Croatia, in accordance with the law shall be a state aid which promotes economic development of the areas with exceptionally low standard of living or high unemployment rate, also state aid aiming at cultural improvements and protection of tradition, state aid for implementation of important international projects or mitigating severe economic difficulties, state aid for promotion of specific economic activities or areas, state aid to legal and private persons who are performing activities of general interest or have exclusive right of performing specific duty, who will be unable to perform this duty without state aid, with the condition that state aid represents only compensation for performance of these activities.

Content, procedure and important elements for assessment of conformity of these state aids with the Law on State Aid from 2005 were set out by the Government of the Republic of Croatia.

Namely, beside the Law on State Aid (NN 140/05), legislative framework of state aid control in the Republic of Croatia comprises of secondary legislation, i.e. Decree on state aids (NN 50/06), which substituted Decree on state aids from 2003 (NN 121/03). Decree on state aids sets out content, procedure and important elements for determining compliance of state aids with provisions of the Law on State Aids and it states that the Government of the Republic of Croatia, at the proposal of Minister of Finance, decides on publishing a list of rules on state aids and decision proclaiming the content of the rules on state aids in different areas.

Content of compliance assessment of state aids is rooted in the rules derived from Article 70 of SAA, so from the rules of EU legislation. Decision on publishing a specific rule contained the text of act which set out specific rules form the EU acquis translated into Croatian, provision on ways of implementing rules in question, as well as the state body in charge of managing such state aid, or provider of state aids.

Government of the Republic of Croatia, based on Decree in question, adopted Decision on publishing list of rules on state aids on 8 November 2006, and this act was amended repeatedly, through both amending it or adopting completely new text of the Decision (NN 121/06, 45/07 13/08, 12/09, 31/10), based on the dynamic and activities of the European Commission in adopting new legislation or modifying or extending the validity of already existing legislation on state aids. Everyone who had ever found themselves in the situation having to apply a rule of the European Commission on state aids knows that this is a normative corpus undergoing constant amendments.

On 19 July 2012, last valid List of rules on state aids (NN 83/12) was published which meant that all relevant regulations of the European Commission on state aids up to
that point were transposed into Croatian legal system: Communications, Instructions, Guidelines, Frameworks and other instruments, and in the area of defining services of general economic interest, ruling of European Court in Altmark case had been transposed and published.\footnote{Following decisions were adopted in the area on publishing rules on state aids: Decision on publishing rules on state aids for recovery and restructuring (NN 20/07), Decision on publishing rules on aids on de minimis (NN 45/07), Decision on publishing rules on state aids for research and development and innovations (NN 84/07), Decision on publishing rules on state aids for SMEs (NN 39/08), Decision on publishing rules on state aid in the form of fees for public services (NN 39/08), Decision on publishing rules on state aid for insurance of short term export loans (NN 39/08), Decision on publishing rules on application of state aid regulations on measures dealing with direct taxation of entrepreneurs (NN 46/08), Decision on publishing rules on state aid in postal services (NN 46/08), Decision on publishing rules on aid for cinema and audio-visual actions (NN 46/08), Decision on publishing rules regional aids (NN 58/08), Decision on publishing rules on aids for specialization (NN 68/08), Decision on publishing rules on state aids for employment (NN 68/08), Decision on publishing rules on state aids for stimulation of investments of risk capital in SMEs (NN 91/08), Decision on publishing rules on share in selling land and buildings by public administration bodies (NN 106/08), Decision on publishing rules on determining reference and discount rate (NN 114/08), Decision on publishing rules on state aid to steel sector (NN 134/08), Decision on publishing rules on aid for turnover (NN 141/08), Decision on publishing rules on state aids for compensation of expenditure due to liberalization of electric energy market (NN 150/08), Decision on publishing rules on state aids in shipbuilding sector (NN 154/08), Decision on publishing rules on state aids for the protection of the environment (NN 154/08), Decision on publishing rules on collective exceptions in the field of state aids (NN 37/09), Decision on publishing rules on state aid in form of guarantees (NN 39/09), Decision on publishing rules of temporary framework for measures of state aids which support the access of finance and economic crisis (NN 56/09), Decision on publishing rules on state aids for shipbuilding sector (NN 03/2013), Decision on amending Decision on publishing rules on state aids for insuring short term export loans (NN 130/2012), Decision on amending Decision on publishing rules on state aids for stimulation of investments of risk capital in SMEs (NN 117/2012), Decision on amending Decision on publishing rules regional aids (NN 117/2012), Decision on amending Decision on publishing rules on state aid for employment (NN 31/2012), Decision on amending Decision on publishing rules on state aid for cinema and audio-visual actions (NN 144/2011), Decision on amending Decision on publishing rules on state aids for recovery and restructuring (NN 119/2011), Decision on amending Decision on publishing rules on aids for specialization (NN 68/2011), Decision on publishing rules on state aids related to rapid development of broadband networks (NN, No. 64/2011), Decision on publishing rules on implementing law on state aids by national courts (NN, No. 89/2010), Decision on amending Decision on publishing rules on support of turnover (NN, No. 31/2010), Decision on publishing rules on state aids for public broadcasting services (NN, 31/2010), Decision on publishing rules on state aid in form of guarantees (NN, No. 39/2009).} At the same time, it is important to stress out that in the Republic of Croatia criteria derived from implementation of rules on state aids from the EU legislation were implemented in the process of assessing schemes and individual aids directly on the basis of paragraph 2 Article 70 of SAA, as well as Article 6 paragraph 4 of the Law on State Aids, stipulating that the Agency shall, in implementation of supervision over granting state aids, adequately apply criteria stemming from correct implementation of rules on state aids from Article 70 of SAA. Rules and texts of the rules were being published with the purpose of full transparency and efficiency of the system of monitoring of state aids.
However, it is good to clarify what constitutes this legislation with which the Republic of Croatia needed to harmonize its laws, both primary and secondary, that is the topic of this article.

Primary sources of law or primary legislation of the EU in the field of competition are Articles 101, 102, 106 and 107 of the Treaty on the Functioning of the EU (earlier Articles 81, 82, 86, 87 Treaty on Founding of European Community) and they provide for the most important substantive provisions. They were transposed in Croatian legal system through laws, Law on protection of competition and Law on state aids. However, also Article 108 of the Treaty on the Functioning of the EU is important for the field of state aids, although it primarily concerns procedure before the European Commission which refers only to Member States, so Croatia in the pre-accession period focused primarily to substantive provisions, while procedural ones are a part of national legal order, meaning that in the cases in the area of competition and state aid domestic procedural rules were applied, especially administrative procedure.

Secondary sources of law on state aids are acts of European Union bodies, whether it is about „regular”, formal sources (regulations, directives, decisions, recommendations and opinions, last two of which are not binding\(^{43}\)), or about so-called “irregular” sources of law.\(^{44}\) Secondary sources are first several regulations of the Council and Commission. It is interesting that the first Regulation in the matter of state aid law dates only from 1998. Directives should be put in groups of the secondary sources of law. For the field of state aids only the so-called “Transparency” Directive adopted by the Commission is applicable and it imposes the obligation of informing the Commission regarding the financial relations between Member States and public undertakings.\(^{45}\)

Legal ground for the secondary sources of state aid law is in the Article 109 of the Treaty on the Functioning of the European Union (previously it was the Article 89 of the Treaty Establishing EC). It provides authority to the Council to adopt Regulations as acts of the general implementation which are completely binding and directly applicable in every Member State. The fact that the Treaty on the Functioning of the European Union mentions exactly regulations, not directives, which would leave space for Member States to select forms and manners of the achievement of the required objective, points out the importance which Founders of Community were giving to the circumstance that the EU institutions ensure for themselves the task of the state aid control.

However, Article 109 (89) has stayed only a on the paper for the whole 40 years of

\(^{43}\) According to the current Article 288 of the Treaty on Functioning of the European Union, previously Article 249 of the Treaty of Functioning of the European Union.

\(^{44}\) With regard to the specialty of the EU law and its development, and with regards to scantiness and quality of the law sources in the matter of state aid, which arises from the complexity of the matter in any sense, it is understandable that the Commission and Member States as the source of state aid law used sources which formally and legally could not be called thus.

the EU history. Such situation served for the development of the non-formal sources of law (soft law) and increasing significance of the judiciary practice in the matter of the state aids. A change came in the mid-‘90s, when the Commission announced and initiated the big reform and the project of modernisation of the state aid control aiming at increasing transparency and legal security in the field of state aid and making the whole system more efficient, especially by introducing so-called “block exemptions” and by codification of the procedural rules. Thus based on the Article 109 (89) two Council Regulations were adopted. The first one was adopted in 1998. It was the Regulation of the Council 994/98 on the application of Articles 87 (92) and 88 (94) of the Treaty on EC to some categories of the horizontal aid. 46 This Regulation gives authority to the Commission (this is why it is often called “Enabling Regulation”) to adopt other regulations by which specific categories of the horizontal aid will exempt from the obligation of reporting to Commission. The exemption may be used by those categories of aid which meet conditions provided for by the Regulation. Such group exemptions significantly simplify the procedure of allocation of horizontal aid and reduce the scope of work for both Member States and the Commission, which is allowed to focus on the more complex cases where the jeopardy of the distortion on the market is higher.

Acts adopted by the Commission as the EU institution represent also secondary source of law. The Commission, applying Articles 107 and 108, adopts decisions in the concrete cases of allocation of aid. Those decisions are primarily the source of law inter partes. Namely, each decision of the Commission is binding to its entirety to those to whom it is addressed, and thus the decision of the Commission which approves or rejects the allocation of the state aid. Although such decisions do not represent the formal source of law, their binding character and possibility to contain a new rule or principle, or to change the existing rule or principle to a certain extent by interpreting relevant provision of the Treaty on the Functioning of the European Union or a certain principle of soft law gives them a great influence. Namely, it is possible for parties in the procedure before Commission which is conducted in compliance with the Article 108 (previously 88) to find by induction some “general principle” in the relevant decision of Commission and comply it with their future actions and business activities.

However, the Commission has developed its own system of interpretation of rules from articles 107 and 108 of the Treaty on the Functioning of the European Union (hereinafter: the Treaty) which it recommends to other addressees of these articles, primarily to Member States. Thus the greatest part of acquis in the field of state aid, as a counterbalance of deficiencies of formal regulations and leaness of the Treaty itself was created by the so-called “quasi-legislative” activity of the Commission, or by non-binding acts of Commission (“soft law”). The Commission created acquis on state aid in a pragmatic manner; based on its decisions from case to case and based on other acts by which it explained its decisions additionally and respectively predicted situations in advance and announced its stance. It was in the interest of the Commission

to present to the Member States its stance on specific forms of aids as it consistently considered that the cooperation with Member States is essential in order to ensure efficient and stable implementation of competition law of the EU. Such reflection of the Commission contributed to the development of the “soft law”, as the specific source of EU state aid law, which successfully compensated for the lack of formal sources.

Soft law may be defined as “the rules of behaviour which principally do not have legally binding force, but which, in spite of that, may have the practical output”, however they hardly differentiate from those rules which actually have legal force because of this practical output. The results of such “quasi-legislative” activities of the Commission are numerous documents with different names47: guidelines, general frameworks, notices, communications, co-ordination principles, codes, etc. Sometimes even statements on policy of state aids of Community which are published in annual reports of the Commission (Annual Competition Reports) are a part of the soft law. Different names of these documents do not affect their real value.

However, those acts are not so non-binding de facto. They are instruments with the effects of legislative acts, although they were not adopted through formal legislative procedure. Although it is certain that rules of «soft law» cannot formally be considered to represent sources of law, they would nonetheless be treated equally as sources of law on state aids in the EU, because of their effects.

Rulings of European courts also cannot be considered as sources of law in formal sense. Nevertheless, they cannot be neglected when talking about sources of law on state aids. Through them Court provided interpretation and control of the implementation of the rules on state aids. State aid legislation of the Community through its history often had significant traits of casuistic law. Namely, often interpretations of European court content to poorly defined provisions of the Treaty on EC. Rulings of the Court of First instance and European Court based on articles 230 or 234 of the Treaty establishing the EC were crucial in interpreting competition law of the European Union. Because of the fact that in the legal system of the EU interpretations of European courts become the “law” of some kind, each case of inconsistent interpretation of specific terms or unequal implementation of specific provisions by courts causes “internal shock” of competition legislation of the EU.48

With this, provisionally called “secondary legislation”, Croatia harmonized its state aid legislation, as a result of obligations derived from SAA and a wish to become a member state of the EU. Thus, in the Law on State Aids (2005) itself it was stated that it regulates general conditions and rules for approval, supervision and return of state aids with the aim to implement international obligations of the Republic of Croatia,

47 Complete list of all documents issues by the Commission in the area of state aids can be found on: http://ec.europa.eu/competition/state_aid/legislation/legislation.html (15/09/2013). Thus, for example, there are frameworks or guidelines for sectoral aids, regional aids, horizontal aids such as environment, R&D, aid for entrepreneurs in public sector etc.

48 It is obvious that time plays a part in the reasoning of the Court, so it will not adopt a ruling that it adopted ten years earlier, if dealing with the same acts.
stemming from Stabilization and Association Agreement between the Republic of Croatia and European Communities and their Member States.

It had been stated that exceptions from general prohibition of state aids shall be issued by Government of RC in a Decree, but at this point domestic legislator faced a challenge on how to transpose secondary sources of law on state aids, as described above, to domestic legislation, or how to formulate this Decree to comprise all different rules from this legal corpus. In addition to this, problem was also the fact that this corpus was a “moving target” which is constantly being amended so the issue was how to overcome this obstacle and implement harmonization process at the same time.

Thus, a group for drafting new Decree determined by amending existing Decree from 2003 nothing would be achieved substantially: namely, old Decree could not be normatively changed significantly; it could have only been widened through larger number of provisions transposed from EU legislation. Proposal of the working group was that Article 1 of the decree provides for content, procedures and important element in determining compliance of state aids with provisions of the Law on state aids, and article 2 to stipulate that the content of assessment of compliance in Article 4 paragraph 3 of the Law on state aids shall be based on principles from Article 70 of SAA. It was also proposed that the Government of RC, on the proposal of Minister of Finance adopts decisions on publishing rules and procedures of Article 2 of the Decree in the “Official Gazette”. This Decision on publishing rules was supposed to have a following context: text of and act containing all individual rules from Article 2 of the Decree in Croatian language and provision on the method of implementation of these rules. This text of an act, i.e. “material rules” assessing the content of assessment of compliance are precisely above mentioned acts of secondary legislation of the EU, translated into Croatian. This is how rules started being adopted in their original form. Interestingly enough, in an Explanation of the Decree in 2006 it is stated: Here, it is important to mention that Article 70 of SAA introduced full application of these rules on state aids from legislation of the EU since 1 March 2002, so this concept does not introduce anything which already wasn’t binding for the Republic of Croatia! This is a reference to Article 70 (2) of SAA for which an explanation shall follow.

Article 70, Paragraph 2 of SAA states: “...any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions.”

Pursuant to that provision, a similar provision is contained in Article 6 (4) of the Law on State Aid (2005), Article 74 (3) of the Law on Protection of Competition (2009) or earlier Article 35 (3) of the Law on Protection of Competition (2003). Thus, Article 6(4) of the Law on State Aid (2005) indicated that: “In performing the duties referred to in paragraph 1 of this Article, the Agency shall apply the criteria arising from the proper provision...”

49 As an inspiration for the Working group for this innovative legislative move was former practise of publishing International Financial Reporting Standards, also in Official Gazette.
application of the rules on state aid arising from Article 70 of the SAA”. Article 35 (3) of the Law on Protection of Competition (2003) indicated that: “In assessing the forms of prevention, restriction or distortion of competition which may affect trade between Croatia and the European Union, the Council, in accordance with Art. 70 SAA, applies the criteria arising from the proper application of competition rules in the European Community”, and Article 74 (3) of the Law on Protection of Competition (2009): “in the application of this Act, and particularly in the case of legal gaps or doubts as to the interpretation of regulations, in accordance with Art. 70 SAA, appropriate criteria shall be applied arising from the application of competition rules in the European Communities.

The reference to “legal gaps or doubts as to the interpretation of regulations” is a small change compared to the two earlier formulations of the said laws, and it is inspired by the decision of the Croatian Constitutional Court in the case of MA AUTO. The Constitutional Court has repeatedly ruled on the possibility of applying the regulations of the European Union in the Croatian legal system, in relation to the provision of Article 70, paragraph 2 of the SAA, and the cases in which the legality of the decision of the Agency for the Protection of Competition have already been reviewed by the Administrative Court.

Therefore, in terms of the application of the SAA, a legal principle has been outlined for the first time by the Administrative Court, which in the ruling of 26 Us-5438/2003-7 October 2006 (“Official Gazette”, No. 16/07) in the case of PLIVA dd stated: “In terms of application of the law it must be said that the provisions of Article 140 of the Constitution of the Republic of Croatia (“Official Gazette”. No. 41/01 – consolidated text, 55/01 – corr.) provide that the international agreements concluded and ratified in accordance with the Constitution and the published ones, which are in force, are part of the internal legal order of the Republic of Croatia and they will have primacy over a law. Thus, the Stabilisation and Association Agreement between the Croatian and the European Community and its Member States and the Interim Agreement on Trade and related Matters between the Croatian and the European Community, could have been applied in this case, while criteria, standards and instruments of interpretation of the European Community referred to by the defendant body, and are not included in the text of these agreements, nor are published in any other Croatian law or regulation, cannot be a source of rights”.

In the case of VARTEKS dd Us-5632/2007-10/the Administrative Court of the Republic of Croatia repeats the same view: “In terms of the application of the law it must be said that the provisions of Article 140 of the Constitution of the Republic of Croatia (“Official Gazette” No. 41/01 – consolidated text, 55/01 – rectified), provide that the international agreements concluded and ratified in accordance with the Constitution and the published ones, which are in force, are part of the internal legal order of the Republic of Croatia, and will have primacy over the law. Thus, the Stabilisation and Association Agreement between the Croatian and the European Community and its Member States and the Interim Agreement on Trade and related Matters between the Croatian and the European Community, could have been applied in this case, while criteria, standards and instruments of interpretation of the European Community referred to by the defendant body, and are not included in the text of these agreements, nor are published in any other Croatian law or regulation, cannot be a source of rights”. 
Croatian and the European Community, could have been applied in this case, while criteria, standards and instruments of interpretation of the European Community referred to by the defendant body, and are not included in the text of these agreements, nor are published in any other Croatian law or regulation, cannot be a source of rights”.

However, in the case P.Z. AUTO Us-4832/2003-6 (NN 29/07), the Administrative Court in its response to the suit stated: “The body against whom the action was brought has not misused the substantive law by applying method, criteria and standards of comparative law of the European Union regarding the distribution of motor vehicles. This body, in the explanation of the challenged decision affirms that, in the absence of domestic by-laws of the Republic of Croatia to determine criteria, methods and standards for assessment of the agreements, it applies the methods, criteria and standards from the comparative European Union law regarding distribution of motor vehicles. In this way, in the interest of parties concerned it shows a uniform approach towards assessment and points to method and standard which are regarded as benchmarks, thereby eliminating the possibility for using discretion in assessing the lawfulness of proceedings, thus providing equality for the parties before it as a public authority. The Applicant did not apply the aforementioned international acts and criteria exclusively as legal rules, but is also authorised to apply them pursuant to provisions of the Articles 70 and 130 of the Stabilisation and Association Agreement between the Republic of Croatia and the European Community and its Member States (»Official Gazette – International treaties« No. 14/01). The Stabilisation and Association Agreement regulates competition in Articles 40, 69 and 70 and it is prescribed that any conduct contrary to rules of free competition shall be assesses on the basis of the criteria arising from the application of competition rules in the Community, especially Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretation instruments adopted by the institutions of the Community. Provisions of the Articles 40 and 70 of the Stabilisation and Association Agreement ... correspond to the provision of the Articles 27 and 35 of the Interim Agreement on trade and trade-related provisions between the Republic of Croatia and the European Community. The Agreement was signed on 29 October 2001, and it was temporarily applied from 1 January 2002, while it entered into force on 1 March 2002, and it will be applied until the entering into force of the Stabilisation and Association Agreement. The fact that the disputed contract, which is the matter of assessment in this case, was signed before entering into force of the abovementioned Agreement does not mean that the said Agreement cannot be applied to it. The reason for this is that such International agreements have the purpose to eliminate from the market all agreements or possible relations that restrict or distort free competition. Given all the above, it is conclusive that, in this very matter, the body against which the suit was brought, in a properly conducted procedure correctly and fully determined facts of the case, to which it correctly applied the provisions of the law.”

Against the judgment of the Administrative Court in the Case P.Z. AUTO of 9 November 2006 a Constitutional complaint was brought, and in its judgement U-III-1410/2007 (NN 25/08) the Constitutional Court states as follows: “In the procedure of constitu-
tional assessment the question is being raised in regards to application of “criteria, standards and instruments for interpretation of the European Communities”, application of is stipulated in SAA and the Interim Agreement. The Applicant, to the account that those criteria, standards and instruments for interpretation of the European Communities cannot in any way be applicable, points out the circumstance that those “were neither adopted nor published in any other Croatian law or legislative act” and therefore cannon be sources of law. To that end the Applicant cites the judgement of the Administrative Court No: Us-5438/2003-7 of 26 October 2006, which was given in a matter different from the one that was being decided in this case. Administrative Court in that judgement as well recognizes the possibility for general application of the SAA and the Interim Agreement, while it only disputed the possibility of application of criteria, standards and instruments for interpretation of the European Communities.

The Constitutional Court determined that such standing of the Applicant was not founded because criteria, standards and interpretative instruments of the European Communities were not applied as the primary source of law, but only as ancillary interpretation instrument. Provisions of the Article 70 paragraph 2 of the SAA and Article 35 paragraph 2 of the Interim Agreement must be observed in the context of commitments of the Republic of Croatia to align its legislation, among which the one regarding competition, with the European Union acquis. When applying legislation harmonized in this manner, it is the obligation of the public authorities of the Republic of Croatia to do so in a way it is done in the European Communities, therefore in the spirit and according to the meaning of the acts on the basis of which the harmonization was conducted.

Therefore, the provision of the Article 70 paragraph 2 of the SAA mainly determines that, for the assessment if a certain conduct of an undertaking is in accordance with the rules of competition, not only the Croatian law is relevant, but attention must be given to the whole European Communities’ legislation related to competition. In this manner the law of European Communities is not formally made a part of the Croatian legal system on the basis of provisions of the SAA as an international agreement, however it is prescribed that Croatian legislation on competition should be applied and interpreted having in mind the rules, conditions and principles of the competition law.

In this concrete case, the SAA and the Interim Agreement were not in force when the event which was determined as an abuse of dominance occurred. However, the Agency and the Administrative Court in their assessment whether such behaviour could have caused the abuse of dominant position on the market started from the relevant provisions of the Law on Protection of Competition (Articles 13 to 20), and only as an ancillary instrument they have applied the criteria, standards and instruments for interpretation of the European Communities. This was a case of filling legal gaps in a way which was suitable to the spirit of the national law and which was not contrary to explicit solutions from the aforementioned Law which was applied when deciding on this case.

Concerning the application of the case law of the European Union in cases carried
out for protection of competition, the Constitutional Court in the same decision No: U-III-1410/2007 of 13 February 2007, among other matters, decided the following: “Following the aforementioned, in cases where infringements of competition are being assessed, Croatian bodies for protection of competition are authorized and obliged to apply criteria derived from application of competition rules of the European Communities and from instruments for interpretation adopted by European Communities’ institutions. In that way, the Stabilisation and Association Agreement between the Republic of Croatia and European Communities and their Member States and the Interim Agreement oblige Croatian bodies for protection of competition to, when resolving individual cases, apply not only Croatian competition law, but to also take into consideration the corresponding legislation of the European Communities.”

It is therefore obvious that the possibility to apply SAA as an international agreement and the possibility to apply it Article 70 paragraph 2, which directs the user of the norm to apply criteria derived from application of the competition rules of the European Communities and interpretative instruments adopted by Communities’ institutions, made a lot of noise and caused disturbance in both the legal doctrine and the legal practice, however, it seems that the practical approach to look at the “big picture”, i.e. legal and political context of the provision, took the victory.

In that sense, Croatia succeeded to align its secondary legislation with the secondary sources of law in the EU in a short-term, and in that way in it achieved its goal: closed accession negotiations and become member of the EU. However, if this wasn’t the case, it is questionable what would be the next legal conclusions and consequences of the constitutional case-law, which in this article was only touched upon as an interesting legal topic suitable for further detailed analysis and assessment.
Economic Analysis in the Field of Competition

Boženka Nikolić

Economic analyses in the field of competition can be observed through several segments, as follows:

1. Overview of the most important legislation of the acquis in the area of competition

Legislation transposed by Montenegro in the field of competition and incorporated into the law and secondary legislation is related to assessing infringement of competition (antitrust) and the regulations governing the analysis of behaviour of the competition in the market.

1.1. Agreements restricting competition

Article 101 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) – refers to agreements that restrict competition, i.e. prohibited agreements. In addition to Article 101, the application of the rules envisaged by the Regulations, which mainly relate to vertical agreements, as well as guidelines for individual exemptions from the prohibition.

1.2. Abuse of dominant position

Prohibition of abuse of dominant position in the EU law is regulated in Article 102 of the TFEU, which stipulates that having a dominant position is not prohibited, but only its abuse.

In the field of abuse of dominant position jurisprudence of the Court of Justice of the European Union and the General Court of the EU is significant, as well as the decisions of the European Commission.

1.3. Control of concentrations of undertakings

The basic rule underlying the control of the concentration is the Council Regulation 139/2004 on the control of concentrations between undertakings and the Commission Regulation EC no. 802/2004 which implements the EC Commission Regulation no. 139/2004 on the control of concentrations of undertakings. A set of regulations govern specific issues such as the determination of the relevant market, procedural matters and sentencing.
1.4. Relevant Market

Enforcement of the EC competition rules in terms of determining the relevant market is provided for in the Notice OJ C no. 372/97.

1.5. Regulations governing the procedural matters in the application of Articles 101 and 102 of the TFEU

The basic regulation, specifying the general rules of competition protection (EC powers and bodies, cooperation, investigative powers ..) is the Council Regulation no. 1/2003 on the implementation of the competition rules laid down in Art. 81 and 82 of the EC Treaty (now Articles 101 and 102 of the TFEU).

1.6. Sanctioning and immunity from sanctioning

After the adoption of a decision, the EC proceeds with sentencing the undertaking which infringed competition, while in terms of cartels, a request for immunity and reduction of fines may be filed.

- Guidelines no. 201/2006 on the method of determining the fines in accordance with Article 23, paragraph 2 of the Regulation 1/2003
- Notice of the Commission no. 298/2006 on immunity and reduction of fines in cartel cases

Other important sources of the EU competition law are the jurisprudence of the European Commission through the decisions and case law of the Court of Justice the European Union and the General Court of the European Union.

2. Overview of legislation in Montenegro in the area of competition

2.1. International agreements

*The Stabilisation and Association Agreement between the European Communities and their Member States and the Republic of Montenegro* was signed on 15 October 2007 in Luxembourg and entered into force on 1 May 2010 (Official Gazette of Montenegro 02/08).

Under this Agreement, Montenegro undertook to apply the *criteria* of EU competition law and *adopted instruments* for interpretation directly in the legal system of Montenegro.

The provision of Article 73 *Competition and other economic provisions* relate to the prohibition of agreements between companies, decisions by associations and concerted practices which distort competition and abuse of dominant position, as well as the obligation to apply the criteria and to establish an operationally independent body.
2.1. Legislative framework in Montenegro

The adoption of the new Law on Protection of Competition (Official Gazette of MNE 44/12), which entered into force on 8/10/2012, improved the competition legislation in accordance with European practice, through a number of new legal solutions compared to the previous one, establishing of an independent body has been defined - the Agency for the Protection of Competition (hereinafter: the Agency) and the powers of this institution and persons in the Agency expanded. Also, this law defines fines differently in relation to the previous, and a possibility of release or sentence reduction is envisaged as a special incentive element for a more efficient detection of cartels for undertakings which are willing to cooperate with the Agency (Leniency program).

In addition, it is necessary to adopt all secondary legislation in order to fully ensure the conditions for full harmonization of rules and practices of the newly established Agency with the work of the competition protection authorities of the EU and the EC countries. To this end, from the planned ten pieces of secondary legislation, three new ones were adopted:

- Rulebook on the content and manner of filing application for individual exemption from the agreement (Official Gazette of MNE 18/13);
- Instruction on the content and manner of filing application for implementation of concentration (Official Gazette of MNE 18/13) and
- Rulebook on the method and criteria for establishment of the relevant market (Official Gazette of MNE 18/13).

Decree on detailed conditions for exemptions from the Agreement by types and determination of types of agreements which may be exempted from the prohibition (Official Gazette of Montenegro 10/07) will be replaced with five pieces of secondary legislation, which are under a procedure with the competent authorities, while two are in the draft form.

It should be particularly pointed out that the Law on Competition is largely harmonized with the EU acquis through the process of harmonization by adoption of by-laws and the process of negotiation, in terms of which Montenegro’s progress in the field of competition policy, with a commitment to strengthening administrative capacities and implementation of adopted legislation was evaluated as good, which has been confirmed in the EC reports50.

3. The role of economic analysis in the procedures for the protection of competition rights

The role of economic analyses is very important in the competition protection procedures. It can be monitored through three segments: the prohibited agreements restricting competition, abuse of dominant position and control over concentration of undertakings.

50 Screening Report and Progress report from 15/10/2013
3.1. Agreements restricting competition

In competition law, there are agreements that restrict competition and are prohibited by the Law, and can be horizontal and vertical agreements.

**Horizontal agreements** - agreements between undertakings operating at the same production or distribution level.
- *hard-core horizontal agreements* – cartels which determine the buying and selling prices, limit or control production, share the market, exchange confidential information. These agreements cannot be exempted from the prohibition. It takes a direct and/or indirect evidence of concerted or joint business activities of competitors. When it is proven that a cartel is concerned, no economic analysis has to be conducted.
- *concerted action* - (tacit agreements)- it is difficult to prove it.
- *horizontal cooperation agreements*

The priority is to identify the relevant market, as well as both the market share and market power of undertakings, as well as the effect of restricting competition. It is checked whether the agreements actually restrict the market, and some which have up to 30% market share and contribute to improving the production or distribution or promotion of technical or economic development, i.e. provide benefit for the consumers will be exempt from the ban, if their objectives are constrained and do not allow substantial exclusion of competition.

**Vertical agreements** - agreements between two or more undertakings operating at different levels of the production or distribution chain, which determine the conditions under which contracting parties may purchase, sell or resell the products/services which are the subject-matter of the agreement. They also define the relevant market, determine market shares and market power of undertakings in the market as well as the effect of restricting competition.

3.2. Abuse of dominant position

Defining the relevant market in terms of production and geographic terms is the first step in the procedure while proving the existence of a dominant position in the market and is a precondition for any further analysis.

In determining the abuse of dominant position, an economic analysis is required. Primarily, it is determined whether an undertaking has a dominant position, then the basic procedure is used in defining the relevant market, the hypothetical monopolist test (SSNIP test), so the interchangeability on the demand side is examined - determining types or groups of products that consumers consider interchangeable. Whether customers will accept an interchangeable product in response to a hypothetical slight (5-10 %) increase in the price of the relevant product for a period of one year. After that, the interchangeability on the supply side is examined, which entails the ability of the manufacturer or supplier to increase production in the short term without major costs and ensure supply in the long term in the event of an increase in the price of the relevant product.
The structure of the market is determined, which is necessary to establish how many of the undertakings there are, the market position, the market power of an individual. Based on the calculated market shares of the competitors, the Herfindahl-Hirschman Index (HHI) is used, which calculates the concentration of the market.

To determine the market power, various criteria for evaluating the existence of market power are used (barriers to entry into the market, economic and financial strength, capacity, closeness of competition, etc.).

On the basis of these criteria, it is determined whether there is dominance in the relevant market, which can be individual and collective.

After establishing a dominant position, the behavior of undertakings is analyzed; it is checked whether it is such as to be abusing the dominant position. The most important forms of abuse, which are primarily aimed at restricting competition, could be the following: predation, excessive lowering of margins (margin squeeze), refusal of business operation, refusal of access to infrastructure (essential facility), price discrimination, bounded trade etc.

Abuse of dominant position causes negative effects, i.e. damage not only to the undertakings due to ejection from the market, but it also harms the consumers (raising prices after predation).

3.2. Control of concentration of undertakings

Concentration is a form of merging of two or more undertakings, a contracted, joint venture, via the acquisition of property or property rights, provided that one or more undertakings acquire control of another undertaking. Since the merger may lead to an increase in market power of the newly established undertaking, and thus the weakening of competitive pressure, there is an obligation to control concentrations.

When assessing concentration, the Agency firstly checks the compliance with the requirements for reporting of concentration, according to the Law.

The same procedure for performing the analysis - determination of the relevant market is applied on concentrations; where the relevant market is considered to be the market which encompasses the relevant product market in the relevant geographic market. In other words, it is a market within which the undertakings feel the competitive pressure of another competitor.

In accordance with its competences, in every procedure instituted the Agency determines the relevant product market and the relevant geographic market, which can be defined as narrow and broad. In order to determine the relevant market, the following criteria are applied: demand interchangeability, supply interchangeability and depending on the assessment of conditions of competition, the level of development of potential competition and barriers to entry in the market.

For the implementation of the test, the econometric models are used - elasticity of
demand, cross elasticity, price correlation and others. For all of these tests, reliable data should be provided.

Assessment is based on: changes in business strategies, market dynamics, economic and financial power, the use of previous tests.

In addition, the Test of significant impediment of effective competition (the SIEC - test) is used, by which the existence of a dominant position and its determination are carried out solely on the basis of actual market indicators of the strength of an individual undertaking, rather than on the basis of market share at the time of assessment.

A detailed analysis of the relevant market is important only when it is probable that the concentration in those markets will lead to a significant restriction of competition. When conducting the assessment of the concentration, the effects caused thereby are assessed, which may include the following: negative (unilateral effects and coordination effects) and positive effects of concentration (technical and economic progress, rational business operation, benefits to consumers).

4. The most important instruments used in the past

4.1. SSNIP test (Small but Significant and Non-transitory Increase in Price)

SSNIP test is the basic instrument for the determination of the relevant market, i.e. a test of small but significant and non-transitory price increase by the hypothetical monopolist; however, this is a starting indicator but it is not sufficient to determine the possible effects of concentration without other criteria. As a rule, it is applied in all procedures where it is necessary to determine the relevant market on the basis of an analysis of all potential substitutes.

4.2. Herfindahl-Hirschman indeks (HHI)

HHI is used to calculate market concentration on the basis of data on participation. The analysis is performed in order to point out to the intensity of competition that exists in a particular relevant market and the changes therein over time.

Hence, when the market concentration increases, competition and efficiency are decreasing the possibility of abuse and monopoly is increasing.

4.3. SIEC test (Significant Impediment of Effective Competition)

SIEC test has replaced the previously applied “test of the dominant undertaking”, which prohibits those concentrations that significantly distort competition, regardless of whether they create or strengthen an existing dominant position.

51 „Relevant market and market share retail trade in Croatia and EU“ - Economic Institute, Zagreb
4.4. Sectoral analyses

The Agency is authorized by law and is responsible for monitoring the state of competition in the market or in a particular sector of economy. In order to implement the sectoral analysis, the Agency may require undertakings to submit all necessary data or documents.

5. Practice of the Agency for Protection of Competition

Analyses of the state in the market, in terms of free and effective competition are done for the needs of specific procedures. If the assessments are not reliable, the Agency itself conducts an analysis, in order to compare the submitted data, by collecting data from the sectoral regulators, Statistics Office, Tax Administration, Chamber of Commerce, as well as directly from undertakings.

In determining the abuse of dominant position, the following markets have been addressed so far: provision of service of storage of oil and oil derivatives, the market for the provision of funeral services, as well as the market for services of setting up billboards.

In assessing the concentration, the following was addressed, inter alia: the market of food products and consumer goods in retail, markets of pharmaceutical producers operating in the territory of Montenegro, as well as analysis of the milk and dairy products markets.

Agency /previously Administration/ has been following for four years the events in the retail market of food products and consumer goods, by collecting data from companies which own two or more facilities. The data refer to annual income by municipality, the size of facility, and refer to the local markets of: Podgorica, Nikšić and coastal municipalities of H.Novi and Kotor.

Given all the above, the Agency will especially focus on strengthening administrative capacity in the field of economic analysis through employment, training and internship opportunities at the European Commission. Particularly, bearing in mind that, through the activities of IPA projects, as of January 2014, employees at the Agency will be able to improve their knowledge and thereby contribute to the future development of free competition in the market of Montenegro through programs that are planned in this direction, in particular, study visits at the level of EU institutions.
Modern competition protection policy in Europe stems from the economic theory, and geographically speaking from the United States, where the first law regulating the matter of protection of competition was introduced in 1890, as a response to great consolidation of industry after the civil war.

Competition policy in the European Union has been present since the very beginning of the European Union, the policy being an integral part of the Treaty establishing the European coal and steel Community, and therefore it was included in the institutional framework for joining European countries since the beginning. The year 1950 is considered the beginning of European Integration, as a year when Schuman declaration was presented, in which the plan for uniting production of coal and steel of France and Germany was presented. The idea was realized in 1951, through creation of European community for coal and steel, with participation of Belgium, France, Italy, Luxembourg, Netherlands and Germany. Founders of Coal and steel community wanted to ensure that Germany after the World War II does not renew an important role on the coal and steel market, such as it has before the World War II. Aforementioned sector was controlled under unique conditions by the Community. Considering the goal of Community, the need was created for creating regulation concerning competition policy. In that way, founding countries accepted the possibility to limit freedoms of entrepreneurs in order to achieve control over certain sector of industry.

In relation to that, it is clear that the first goals of introducing competition law were prevention of war and control of business conduct.

As the idea about the closer integration of countries inside Europe developed, so the aims of competition policy adjusted to new situations, and soon the competition law was regarded as the policy which can facilitate economic integration of the member states’ markets.

Within the original Treaty establishing Community, i.e. Rome Treaty, it was highlighted that without the common market, uniting of peoples and countries of Europe could
not be achieved, and that the common market cannot survive without the central and independent body for protection of competition.

Main principles of European Union competition law are set in the Treaty on Functioning of the European Union. In general, only two articles of the Treaty on Functioning of the European Union regulate protection of competition, namely Article 101, which prohibits conclusion of and pronounces null and void those agreements which restrict competition, restrictive decisions of associations of undertakings and concerted practices which may affect trade among Member States and have for their aim or consequence restriction or distortion of competition on the common market, and Article 102, which prohibits abuse of dominant position by one or more undertakings, which may affect the trade between Member States. Furthermore, control of concentrations was not covered by the Treaty on Functioning of the European Union itself, however concentrations were first regulated on the European Union level by a Regulation 4064/89 on control of concentration between undertakings which prohibits concentrations which have as a consequence creation or strengthening of dominant position on the market.

Nowadays, goals of competition protection law are defined differently, but they all have an economic basis in common. According to Hildebrand, the ultimate goal of European competition rules is to preserve or to help to establish competitive market structures. Current Commissioner for competition in the European Commission Joaquin Almunia, states that the competition protection policy is about creating the best possible conditions for buyers, investors and innovative undertakings on the internal market.

Generally speaking, European Union competition law has two goals: to promote integration between Member States and to promote efficient and undistorted competition.

Creation of internal market and connecting national markets into one common market was not possible without creating a good foundation, i.e. certain fundamental rules. Competition law policy in the European Union serves also for achieving goals which are not necessarily related only to competition protection policy, unlike competition law in the United States, where economic theory is much more appreciated in the application of rules for protection of competition.

Economics in the function of competition law at the European Union level is led by goals from the Treaty on Functioning of the European Union, and as freedom of movement of people, goods, capital and services between Member States are a foundation of the single common market, competition law has a great role in achieving of these market freedoms.

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Effective competition brings benefits for consumers, such as low prices, higher quality of products, wider choice of goods and innovations. Through its control of concentrations, Commission prevents realization of concentrations which would probably deprive consumers of such benefits, and while enabling a considerable increase in strength of the undertaking. The „increased market strength” implies the ability of one or more undertakings to, in a profitable manner, increase its prices, lower production output, choice and/or quality of products and services, curtail innovation or influence competition parameters in some other way.\(^56\)

Competition protection regulations are within the framework of those rules which, having in mind protection of greater and general interest, limit freedom of contract and autonomy of will of contracting parties.\(^57\)

Competition policy represents a part of general economic policy of the European Community. It is the most developed law and economic theory of one segment of economic policy and welfare policy of free market economies.\(^58\) McGowan and Wilks point out that it was the first supranational policy in the European Union.\(^59\)

Competition law policy represents a unique area of strength of the European Union. There is no comparable policy from the first pillar in which the European Commission has similar powers.\(^60\) The first pillar encompasses the European Community, made of the Treaty establishing European Economic Community and European Treaty on Atomic Energy Community, economic and monetary union and European policies in which European Community has exclusive decision-making powers and it has supranational character.

Competition law has a central position in the European Union among other public policies, and it is the first true supranational public policy which regulates market competition. One of the goals of competition law in the European Union is to prevent the accumulation of too much market strength in the hands of the few.\(^61\)

Competition policy appeared as a main policy in the European Union in which competition law stands as an actuating force for economic efficiency and welfare of citizens.\(^62\) Competition policy represents a set of policies and regulations which serve to ensure

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56 Guidelines for assessment of horizontal concentrations pursuant to Council Regulation on Control of Concentrations between Undertakings (2004/C 31/03), para. 8
that market competition is not restricted in any way which would lower economic welfare.\textsuperscript{63}

Criteria which all candidate countries must fulfil in order to become full members were set on a meeting of the European Council in Copenhagen in 1993. Those are Copenhagen criteria, which encompass political, legal and economic criteria. Legal criteria comprise of adoption of the complete EU acquis communautaire, thus including the legislation on protection of competition. Economic criteria shall mean the functioning market economy and ability of undertakings to endure competitive pressures and market laws which are in force in the European Union.

In order to ensure efficient implementation and application of European Union acquis, it is necessary to provide an adequate administration system. Therefore, administrative criteria was introduced in 1995, with the aim to adjust the administrative structures to integration process.

When assessing the fulfilment of economic criteria, the level of functioning of market economy and competitiveness has to be taken into account, meaning the efficient legal system and liberalized market, as well as removing the entry barriers for Member States markets and effective rules and their application when it comes to protection of competition.

In order to ensure that candidate countries consent to demands to introduce the acquis in the area of protection of competition, accession to European Union is conditioned on transposition of competition rules from the acquis into the legal system of the candidate country even before formal accession in the European Union. It was considered necessary that candidate countries, before they become Member States, must grow accustomed to competitive discipline equal to that existing in the European Union. Lack of discipline carries certain risks, presented in a way that, on one hand, undertakings of those countries would not survive in the competitive environment of the European Union, and on the other, should the candidate countries gain access to the common market under conditions different from those applied to existing Member States, that might be contrary to the principle of level playing field for all undertakings on the relevant market, which exists in the European Union.

Mario Monti, former competition Commissioner, in his address from 2001 highlighted that without a strict policy for protection of competition which will prevent and behaviour of an undertaking which would distort competition, market economy cannot deliver on its promise and, furthermore, without the strict competition policy, economies which were previously state-owned would not be able to survive competitive pressures and market forces on the European Union’s Internal market.\textsuperscript{64}

Rules on protection of competition benefit from economic theory founded on different


\textsuperscript{64} Monti, M. Address on 7th Annual Competition Conference between Candidate countries and the European Commission „Enforcement of competition policy – case for the accession negotiations and for developing a real competition culture“, Ljubljana, Slovenija, 2001.
assumptions, which attempts to provide clear answers by relying on abstract concepts of perfect competition and monopolies. Economic theory on perfect competition is the foundation of competition policy.

Economic analysis provides support through theory and it is used also for identify concrete behaviours which are contrary to rules on protection of competition.

Over time, European Commission and national competition authorities developed a strong economic approach to competition matters, which is obvious both from the decisions of aforementioned bodies and the regulations. Regulations are aimed at defining the relevant market, vertical agreements, horizontal agreements, abuse of dominant position, assessment of concentrations, and they contain economic approach to each of these parts of competition policy. Economic criteria adopted in competition law are applicable also in different legal systems. Even though the rules and basic assumptions remain the same, competition law significantly evolved during the last decade with introduction of stronger economic approach, through inclusion of findings from industrial organization economic theory into the shaping of rules and assessment of undertakings’ behaviour on the market.

Intensive use of economic theory and methods for defining all relevant data, defining of the relevant market, defining anticompetitive effects today became rules in decisions of the European Commission. Large influence on use of economics and economic principles in the decisions was made by Court with its judgements in 2002, where it annulled 3 decisions regarding permissibility of concentrations of the European Commission for the reasons of economic insufficiency. Those were Airtours65, Tetra Laval66 and Schneider Electric67 Court judgements.

Stronger economic approach is without a doubt the most important challenge for EU competition law, so behind that concept there is no monolithic theory or a concept, but a conglomerate of recommendations on how to intensify use of economic knowledge in interpretation and application of competition law.68 Economic approach entails analysis of competition on each individual market in order to assess how certain undertakings’ strategies affect consumers’ welfare. Modern economic approach takes into account the fact how certain behaviours even though equal, may cause different effects under different conditions.

Having in mind that competition law has its roots in the economic theory economic analysis itself is an inseparable part of assessment of undertaking’s behaviour on the relevant market. The case which is often cited in the literature in different contexts is

Standar Oil\textsuperscript{69} from 1911, and it is important for the introduction of rule of reason, which assumes analysis of beneficial and adverse effects on the level of competition, taking into account economic consequences of certain behaviours. Regarding behaviours and contract provisions which are in itself prohibited in competition law, often \textit{per se} principle was applied, which allowed for assessment and final decision on infringement of competition rules without additional deeper analysis. However, today there is an increasing pressure to assess all types of market behaviours.

For example, the very existence of dominant position is not in itself against the rules on competition protection, but its abuse is prohibited. Article 102 of the Treaty on Functioning of the European Union prohibits also exploitative and exclusionary types of abuse. Types of abuse considered exploitative concern those types directly aimed at consumers, and they are manifested as application of too high prices and in cases when undertaking uses its great market power to seek extra rent from buyers. Exclusionary types encompass application of price-policy aimed against competitors on the market with regard to decreasing competitive powers of other undertakings on the market, and exclusion of competitors from the market. Since the European Commission adopted Guidelines on exclusionary abuse of dominance in 2009, but not those concerning exploitative types of abuse, there is an impression that detecting and punishing exclusionary abuses is a priority. However, protection of welfare of consumers takes up an important place in competition policy of the European Union, thus a significant attention is given also to exploitative types of abuse of dominance, because without it and relying only on exclusionary types of abuse in competition policy would lead to a situation where there is no mean to directly protect the consumer from inflated prices, but only indirectly through protection of competitive market processes.

Economic theory and existing practice of the European Commission and courts provide a framework for conducting analysis, in order to determine competition infringements. Thus in case of unfairly high prices it is firstly determined whether the difference between the price and the cost is too big, i.e. if the profit margin is too high, and then it is assessed whether the price charged by the undertaking is unfair in comparison to those costs or in comparison to competitive products on the relevant market.

Determining whether a concentration, certain behaviour or business practice have more negative or positive effects on competition and consumers is a difficult task for national competition authorities, because business processes, interactions of undertakings and market reality are very complex. Use of economics through economic principles and concepts and application of economic techniques and models is necessary because provision on protection of competition are implemented taking into account economic reality and market trends.

Efficient application of competition rules leads to competitiveness, higher economic efficiency and more consumer welfare.

From all said above, it can be clearly deduced that correct application of rules on

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protection of competition and strong and independent body for protection of competition are necessary both for candidate countries in the process of EU accession negotiations and for Member States, having in mind the extreme importance of the competition policy with regard to general European economic policy and goals from the Treaty on Functioning of the European Union. Conditions for membership in the European Union which are related to competition law concern the adoption of the acquis, establishment of an independent, professional and autonomous body and ensuring the consistent application of legislation, which is reflected in the number and complexity of adopted decisions and their economic foundation, and in accordance with existing national legislation, but also with full appreciation of European legislation and analytical framework adopted by the European Commission and courts. It is therefore necessary to continuously strengthen institutional capacities and efficiency of the competition protection authority and to increase awareness and knowledge of undertakings and institutions on competition law and its role in the modern economy.
Penalties and judicial process in cases of competition

Michaela Nosa

1. Fines in antitrust infringements

There are several types of penalties in competition law for abuse of dominant position and agreements restricting competition.

While in the American legal system criminal liability of individuals within undertaking together with effective private enforcement are dominant, European system stands on the administrative enforcement and administrative sanctions for antitrust infringements. Administrative sanctions are, however also in EU member states complemented by other types of sanctions on individuals, such as disqualifications of managers or possibility of criminal penalties, or sanction on undertakings in the form of exclusion from public procurement.

Across EU, in the jurisdictions where the competition law infringements are sanctioned as infringements of administrative nature, the National Competition Authorities (hereinafter referred to as “NCAs”) have powers to impose sanctions on the undertakings up to 10% of the relevant turnover. However, the systems of the method which is used to assess the fine in specific case, may vary.

Within ECA (European Competition Authorities) forum an exercise was made with regard to sanctions and the WG on sanctions was established. These WG prepared a document - Best practices (Pecuniary sanctions imposed on undertakings for infringements of antitrust law. Principles for convergence) which were published in May 2008).

Effect of fines

In the introductory part of the document the competition authorities have agreed that fines should effectively sanction and deter the offender from repeating an infringement, as well as deterring any other potential offenders (aim of fines). Deterrence - both specific and general - of anticompetitive behaviour is the crucial objective pursued through the imposition of fines. In the ECA jurisdictions, fines imposed on undertakings play a key role in ensuring deterrence, although other sanctions, such as imprisonment or pecuniary sanctions imposed upon individuals, may also contribute to ensuring that antitrust violations are effectively deterred. Sufficiently deterrent fines are also

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70 The author is the employee of the Antimonopoly Office of the Slovak Republic. The views in this article are those of the author and may not necessarily meet with the views of the authority.
a prerequisite for effective leniency programmes, which have proven to constitute a highly efficient tool for the detection of cartels. Absent such deterrent fines, offenders will not have the incentive to apply for immunity or a fine reduction under a leniency programme, which may seriously hamper cartel enforcement.

The competition authorities taking part in this exercise, also agreed that Transparency and a certain degree of predictability should be ensured, with a view to increasing the effectiveness of the fining policy pursued by competition authorities.

Provided the level of fines is set at a deterrent level, the conduct of undertakings is expected to be influenced to a greater extent if they have a better understanding of the methodology employed to determine the fines. However, some level of uncertainty as to the actual amount of the fine flowing from the application of a given methodology may increase its deterrent effect, since such limited uncertainty prevents potential offenders to calculate exactly in advance the cost of the infringement. Competition authorities should not commit to any automatic and arithmetical calculation method, but retain a sufficient margin of discretion for setting the level of the fine. Guidelines or similar transparent information setting forth the methodology followed by competition authorities in order to calculate fines should be made publicly available. This would ensure a certain degree of predictability and transparency of the fining policy pursued by the authorities. It would also strengthen the impartiality of their decision making process and thus increase the acceptability of the fines. Finally, guidelines or similar transparent information would facilitate the judicial review of competition decisions.

The same considerations of transparency and legal certainty require that the undertakings concerned are adequately informed of the principal reasoning followed by the competition authorities to determine the level of fines imposed on them.

The Slovak competition authority (Antimonopoly Office of the Slovak Republic, herein-after referred to as the “AMO”) has power to impose fines up to 10% of the turnover of the undertaking for the preceding business year (Art 38 of the Act No. 136/2001 coll. on Protection of Competition as amended). Although the main provisions on setting fine are in the Act on Protection of Competition (Act on Protection of Competition No. 136/2011 Coll.)71, the AMO also decides like other NCAs to publish its guidelines,

71 The main provisions which empower to set the fine, main circumstances that should be considered by the AMO when setting the fine:

1) For the violation of the provisions of Article 4 (1), Article 8 (6), Article 10 (9), Article 25 (4) and Article 29 (5), the Office shall impose on an undertaking a fine of up to 10% of its turnover pursuant to Article 10 (3) for the preceding closed accounting period and a fine of up to EUR 330,000 on an undertaking that attained a turnover of up to EUR 330 or attained no turnover, or on an undertaking whose turnover is not able to be calculated.

2) The Office shall impose a fine pursuant to paragraph 1 on an undertaking that fails to fulfill a condition, an undertaking that violates an obligation or commitment imposed by a decision of the Office, an undertaking that fails to fulfill a decision of the Office, or an undertaking that has violated the prohibition to exercise the rights and obligations ensuing from a concentration, unless the Office has granted an exemption pursuant to Article 10 (17).
and it did so in the beginning of year 2008. These guidelines also introduced the new calculation method in line with the trends in competition law at that time which was the calculation of fines for antitrust infringements based on relevant turnover. The relevant turnover was defined as a turnover (excluding taxes) achieved by the undertaking by sales of goods and services related to the direct or indirect distortion or restriction of competition on the defined relevant geographic market. This method was chosen also for the reason (as it is explained under point 6 of the guidelines) his method of calculating fines best reflects the economic impact of the violation of the Act as well as the proportional share of each undertaking in the violation within given practice and best ensures correspondence of the fine to profit from anti-competitive practice due to the fact that profit gained by the violation is positively correlated with the turnover of the undertaking on relevant market during the violation period.

Also the European Commission’s guidelines of 2006 use the criterion of the relevant turnover as the basis for calculation of the basic amount. Guidelines of the Commission further explain the calculation of a fine. Sanctions are imposed for negligent or

(3) For the violation of the prohibition pursuant to Article 39, the Office shall impose a fine of up to EUR 66,000 on a state administration authority, territorial self-administration authority, or special interest body.

(4) The preceding accounting period pursuant to paragraph 1 shall be the year preceding the year in which the Office issues a decision or the year preceding that year if data for that year is not available. 5) An undertaking or legal person that fails to fulfill the obligation to submit the requested documents or information to the Office within the specified time limit, or submits false or incomplete documents or information, or does not allow their examination or entry according to Article 40 may be imposed a fine of up to 1% of its turnover pursuant to the Article 10 (3) for the preceding closed accounting period and a fine of up to EUR 330,000 on an undertaking or legal person that attained a turnover of up to EUR 330 or attained no turnover, or on an undertaking or legal person whose turnover is not able to be calculated.

(6) The Office may impose a fine of up to EUR 3,300 on an entrepreneur who fails to attend, without valid reasons, a hearing or otherwise interferes with the progress of the proceedings.

(7) The Office may repeatedly impose fines referred to in paragraphs 1 to 3 and 5.

(8) The Office may impose fines pursuant to paragraphs 1 to 3 and 5 within four years from the commencement of proceedings. However, the Office may impose these fines within eight years from the day of the violation of the provisions of this Act and/or the provisions of special legislation 5b), the failure to fulfill a condition or the violation of an obligation or commitment imposed by a decision of the Office; in the event of a continuing administrative offence or lasting administrative offence, the time limit shall begin on the date on which the violation last occurred. (9) When imposing a fine, the Office shall consider the gravity and duration of the violation of the provisions of this Act, violation of the provisions of special legislation 5b) or violation of a condition, obligation or commitment imposed by a decision of the Office. When assessing the gravity of the violation, the Office shall consider its character, actual impact on the market and, where appropriate, the size of the relevant market. In addition to these criteria, the Office shall also consider other facts with respect to imposing a fine, especially a repeated violation by the same undertaking, an undertaking's refusal to cooperate with the Office, an undertaking being in the position of a leader or instigator of a violation, gaining financial benefit as a result of a violation or failure to fulfill in practice an agreement restricting competition.


intentional infringements. When setting a fine, Commission uses two-step methodology. Firstly, Commission determines the basic amount for each undertaking or association of undertakings, then it may adjust it upwards or downwards (according to aggravating and mitigating circumstances). The basic amount is established on the basis of a relevant turnover. The basic amount of fine is related to a proportion of value and sales, depending on the degree of the gravity of the infringement, multiplied by the number of years of participation in the infringement. The degree of the gravity is expressed by a percentage of the relevant turnover on the scale up to 30%. The specific percentage will depend on the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and the fact whether or not the infringement has been implemented. Cartels (horizontal price-fixing, market sharing and output limitation agreements) are considered as the most serious infringements and therefore the percentage set for the gravity will be according to the Guidelines usually at the higher end of the scale.

The duration will be according to guidelines reflected by the multiplication of the amount of fine depending on the gravity, as indicated above, by number of years of the participation in the infringement. The amount of fine set as illustrated above is referred as the basic amount of fine. In case of cartels, the Commission automatically applies also additional amount of 15 to 25% (the AMO does not apply this criterion). The Commission may apply this additional amount also in cases of other infringements. Regarding aggravating circumstances, Commission may consider the repeating of the infringement (up to 100% for each infringement established), refusal to cooperate or obstruction in the investigation, role of leader in, or instigator of, the infringement.

As mitigating circumstances, Commission may consider termination of the infringement as soon as Commission intervenes (which will not apply in secret cartels), if the undertaking provides evidence that the infringement was committed as a result of negligence, or its involvement in the infringement was substantially limited and it avoided applying the infringement by adopting competitive conduct in the market. The Commission may also consider effective cooperation of undertaking outside the scope of the Leniency Notice and beyond its legal obligation to do so, or consider the fact that anticompetitive conduct of undertaking was authorised or encouraged by public authorities or legislation. Consideration of these circumstances is expressed as added or deducted percentage of basic amount of fine. This amount may be further increased for the purpose of effective deterrence, mainly in the cases of undertakings which have particularly large turnover beyond the sales of goods or services to which the infringement relates and it is apparent that the assessed fine would not have deterrent effect. The final amount of fine must not exceed the 10% of the total turnover of the undertaking. Leniency programme that provides for immunity or reduction of fine when the undertaking provides from its own initiative evidence about the cartel can be applied at this stage.

A mentioned above, sanctions should be sufficiently deterrent but should not force
the undertaking to exit the market. Therefore, it is possible to consider the undertaking’s ability to pay. Guidelines establish that this provision will be applied only in exceptional cases, upon request of undertaking in specific economic and social context. As Commission’s Guidelines stipulate, the Commission will not grant reduction on this reason on the mere finding of an adverse or loss-making financial situation but it is only possible on the basis of objective evidence that imposition of fine would irretrievably jeopardise the economic viability of the undertaking concerned and to cause its assets to lose all their value. This provision of the Guidelines was applied by the Commission in the cases of “bathroom fitting cartel” where ten companies requested the reduction of the fine and reduction was granted to three companies of 50%, and two of 25%. The Slovak AMO does not have so far experience with application of this criterion.

Despite the fact that the method of setting of administrative fines stems from economic studies, years of experience and jurisprudence, it is questionable whether these sanctions are really sufficient, sufficiently deterrent. Nevertheless, the criticism that fines imposed by the Commission are too heavy and disproportionate, repeated infringements and economic studies introduce certain doubts regarding the effectiveness of the system.

Consequently, it is inevitable to increase the probability of the detection in order to increase effectiveness of this system, via whistle blowing programmes like leniency which plays important role within investigation and deterrence.

The question of effectiveness of administrative sanctions and the need for additional sanctions for antitrust infringements is therefore in place. Already mentioned study of the OFT presents a company survey that highlighted the importance of sanctions which operate at the individual, as opposed to corporate, level. Specifically, companies’ average ranking of the factors which motivate compliance was:

1. criminal penalties,
2. disqualification of directors,
3. adverse publicity,

75 One of the studies for instance says that the additional revenue achieved worldwide by cartel prices above the competitive equilibrium has been estimated to exceed 25 billion euros per year. Some authors indicate that current sanctions are too low to deter undertakings. Study of the British Office of Fair Trading (“OFT”) (October, 2009) concludes that if cartel overcharges are in the region of 20% and the probability of detection is around 20 %, in order to deter potential infringers, fines would need to be set at a minimum of 100% of relevant turnover. In other study, Wils presents similar description: if the price increase of 10% would lead to increase to profits of 5% of turnover, cartel duration is 5 years and probability of detection is 16%, the floor below which fines would generally not deter price-fixing would be in the order of 150% of the annual turnover of products concerned by the violation. Therefore, it is evident that if legal maximum for setting the fine is 30% of relevant turnover in the case of Commission, Germany, Netherlands, Great Britain, Italy, Slovak Republic and other competition authorities within EU, and 20 to 40% in the U.S., sanctions imposed on undertakings by competition authorities are low.
4. fines and
5. private damages actions.

Although it depends on the competition culture and the traditional system which is specific and may be different from region to region and country to country, these results should be considered within the evaluation/reconsidering of the sanctioning system. I also, together with previous references to different studies, shows that administrative sanctioning system on individuals itself does not sufficiently deter from competition law infringements. Therefore, administrative or criminal sanctions for individuals, disqualification of directors, exclusion from public tenders and increase of effectiveness of system of private damages actions (compensation of damage cause by competition law infringements in civil proceedings) might be considered.

However, any of these should be carefully evaluated before its implementation with regard to existing law system and rules and any sanction (as well as exclusion from public tenders) should be also reflected with the leniency policy and include the immunity from sanctions for successful recipients under leniency programme.

For instance, in the Slovak Republic, the competition law infringement excludes the infringer from public tenders for period of three years after the final decision of the AMO, or review court, if the decision was reviewed by the relevant court. This however, does not include successful leniency applicants who benefited by the immunity or reduction of fine under leniency programme.

With regard to criminal liability of natural persons for violation of competition act, the Slovak Republic has almost no experience. Despite the existence of this criminal act for already a few years, no person has been convicted so far. Unlike some other European countries, such as UK, where for example, only a few years after the implementation of criminal liability first convictions were brought in the marine hoses cartel case. In the UK, for instance, also the disqualification of directors seem to play its role. Disqualification orders are basically sanctions for liable directors or managers within undertaking in the form of the disqualification from acting like a director for certain time period. In the UK, disqualification orders were implemented on the basis of which a ban to act like a director of company of up to 15 years. In Slovak republic, there is no experience with such an order. Within the criminal liability, there exists a possibility that a punishment of prohibition of the person’s activity – especially if the criminal act was committed with regard to this activity, or by it, etc.

With regard to the abovementioned, it should be recommended that the competition authority should publish its guidelines on setting fines. The method on calculation of fines should be based on basic amount which should reflect the gravity of the infringement and its duration, based on the relevant turnover, than aggravating and mitigating circumstances can be considered. Any additional sanctions are worth of

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77 This was implemented by the amendment to the Act on public procurement
78 Three managers were sentenced to two and half and three years of imprisonment and were also disqualified from acting as company directors for periods of between five and seven years.
implementation, however, should be carefully considered as well as their possible interrelation with existing systems and sanctions, mainly with leniency policy, which has to be effective and motivating therefore those undertakings applying and benefiting from leniency programme should be exempted also from others sanctions that follow competition law infringements and sanctions (criminal, or prohibition to participate in public tenders etc.). If individual sanctions are introduced, the individuals should have opportunity to apply for leniency as well.

2. Experience with judicial review system and cooperation with judges

The courts play an imminent role in the competition law enforcement. Therefore, when considering the application of competition law it is inevitable to take into account the involvement of the courts. Across the EU, there are different systems, and therefore the courts’ interventions might be of a different type. The most common system, seems to be the system, where the court reviews the decision that was adopted by the NCA. In some systems, such as Austria, for example, the NCA investigates the case, and the court decides on it. In others, such as Sweden, NCA investigates and decides, but the court is the one that imposes or decides on the fine.

In those systems, where the court reviews the decision of the NCA, such as in case of the European Commission, the court might have different powers.

In the Slovak Republic, administrative decisions passed by administrative authorities are subject to judicial review upon the filed action of the undertaking. AMO decides in two instances, first instance decision is passed by the relevant division, Council of the Office decides on the appeal as a second instance decision making body. The decision of the Council of the Office is the final enforceable decision provided the undertaking which is an addressee of the decision does not file an action to the Regional Court in Bratislava (hereinafter only the “Regional Court”) and does not successfully seek for the suspension of the enforceability of the decision. An appeal against the decision of the Regional Court can be filed to the Supreme Court of the Slovak Republic (hereinafter only the “Supreme Court”) as the court of the last instance. Both Regional Court and the Supreme Court are the courts of general jurisdiction. If the person in question feels that their rights were breached in course of judicial proceedings, they might file the complaint to the Constitutional Court of the Slovak Republic.

Competition decisions pursuant to the Act on Protection of Competition are reviewed

80 Please see DAF/COMP/WP3/WD(2010)42 further on the procedure and the decision-making process of the Office and the judicial review procedure
81 Act No. 136/2001 on Protection of Competition and on Amendments and Supplements to Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic as amended
by the panels of three judges from the administrative collegium of the relevant court. These judges are not specialised for competition matters only but are reviewing also other administrative decisions from tax law, social security law, environmental law, decisions on offences, traffic offences, building/planning permissions, healthcare administrative decisions, administrative decisions concerning the Industrial Property Office, etc. Thus, the judges have to deal with diverse legal matters.

The court may uphold the decision or annul it and return the case to new proceedings, or modify the sanction that was imposed by the AMO, i.e. the court has the full jurisdiction with regard to the modification of sanction.

In the past, the decisions of the AMO were reviewed by the Supreme Court only, and the prevailing majority of decisions were upheld. However, after the amendment to the Code of Civil Procedure, in October 2004, the Regional Court became the first instance court in competition (and other administrative) cases (competition agenda was new agenda for this court). In 2004 and 2005 the AMO also imposed a few heavier fines for the abuse of dominant position [37 mil SKK (app. 1228174 euros, 885 mil SKK (29376618 euros)]. The Regional Court annulled a few decisions of the AMO in line. Since the AMO did not have the right to appeal at that time, the cases were returned back to the AMO for further investigation. Most of the decisions of the AMO were annulled on the procedural grounds on the reasons that were not questioned before and on the application per analogiam of principles of criminal law. However, the AMO did not get the clear opinion from the court on merits of the case and thus, often lacked the instruction how to proceed in the case further.

Although, one has to admit that the decisions of the AMO are not always flawless, these are annulled on the reasons that were not subject to dispute before courts previously and the AMO also felt that some of the decisions were based also on the reasons that are diverting from the EU competition law and case law of the Court of Justice for instance. As a result, the AMO was not able to remedy the markets by a swift and effective intervention in the market.

The AMO tried to initiate open public discussion with courts/judges on specifics of competition law and to learn their views.

Speaking about relationship with courts, we are thus talking mainly about relationship with the body that guards fundamental rights of persons in administrative proceedings within the review process. As the competition law is rather complex legal discipline bound with economic assessment and legal provisions on anticompetitive infringements are not that clear as in tax law for instance, but rather allow some discretion for the competition authorities and further interpretation of courts, the employees of the competition authorities have to educate themselves and “keep with

82 Until the amendment in by the Act No. 384/2008 Coll. In force since October 15, 2008) the AMO did not have a general right to appeal and could appeal only in some cases (specific reasons for the annulment) which was in practice very rarely
trends”. However, the same applies for judges, as it is not possible for the successful application of competition rules for judges to isolate from these issues.

Therefore, the AMO also tried to support the possibilities for the judges to participate in different workshops, seminars, and also inform the Ministry of Justice or relevant courts about any opportunities for judges to exchange their views and experience with their “mates” from other member states.

We all try, especially within ECN to converge our procedures, assessment and discuss lot of issues so that we do not sanction conduct that would be allowed in other member state and undertaking do not meet with different rules across EU83. Although, we put our efforts together with the aim for coherent approach, the last say is on the court. Therefore, it is also important that judges have enough time to specialize for competition law issues, and have opportunities to exchange their views, otherwise, our efforts for convergence and common approaches, especially regarding our jurisdiction, remain only ineffectively applied.

It is also important to note, that being the member of the EU, the courts in the Slovak Republic have also a few measures to use in competition law cases.

One of them is the Art. 15 of the Regulation 1/200384, pursue which, the national court may ask the European Commission (EC) to transmit to them information in its possession or its opinion on questions concerning the application of the EU competition rules. Member States shall forward to the EC a copy of any written judgment of national courts deciding on the application of Article 101 or Article 102 of the TFEU85. Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 101 or Article 102 of the TFEU. With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 101 or Article 102 of the TFEU so requires, the EC, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

The national court has also possibility to submit the question on the interpretation

83 Moreover, within the EU, with the aim of coherent application of Art. 101 and 102 of the Treaty on the functioning of the European union (TFEU) pursuant to Art 11 (4) of COUNCIL REGULATION (EC) No 1/2003of 16 December 2002 (O.J. L 001, 04/01/2003 p. 0001 – 0025) on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty no later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the European Commission. However, if such decision passed by national competition authority is later subject to review by a national court, the coherent application relies on the measures such as amicus curiae interventions of the European Commission (Art 15(3) Regulation 1/2003), and/or activity of the national court to refer preliminary questions to the European Commission or the Court of Justice of the EU (pursuant to Regulation 1/2003 and the TFEU).

84 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance)

85 Treaty on the Functioning of the European Union
of the EU law (not only in competition cases) to the Court of Justice pursuant to the Art. 267 of the TFEU86. The Supreme Court of the Slovak Republic has done so in one cartel case so far (No. C-68/1287).

It is also important not to forget that also a system of actions on damages caused by antitrust infringements plays an important role in the effective competition law system. These are cases heard in civil proceedings. Therefore, also judges deciding such cases might be partners for discussions. It is also important to evaluate the effectiveness of the system and to remove any obstacles for harmed persons to claim their damage. In this regard it is important to remind that this topic is part of the discussions in the EU for over years, which ended up with the draft Directive which the European Commission submitted for the legislative process on June, 11, 201388.

86 Article 267
The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.
87 Judgment of the Court (Tenth Chamber) of 7 February 2013 (request for a preliminary ruling from the Najvyšší súd Slovenskej republiky (Slovakia), Protimopopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s. (Case C-68/12)
88 http://ec.europa.eu/competition/antitrust/actionsdamages/proposed_directive_en.html
UNFAIR BUSINESS PRACTICE AND CONSUMER PROTECTION EXPERIENCE OF MONTENEGRO

Mijat Šestović

Unfair business practice are those actions which are done by the traders to the detriment of the consumer interest, and which are used before, during and after conclusion of the legal affairs relating specific product. More precisely, it is the action opposite to requirements of the professional care and in respect to the specific product it significantly influences or it is likely to influence the economic behaviour of consumers.

The subjects of relation are traders as doers of detrimental action on one side, and consumers as an injured party, on the other side.

RELATION BETWEEN UNFAIR MARKET COMPETITION WITH UNFAIR BUSINESS PRACTICE

These two terms are often confused in everyday speech and even in professional discussions.

Namely, actions of unfair business completion which are undertaken by a trader harm the reputation and interest of another trader and thus, as a rule, they are detrimental to him/her. In this case subjects of relation are traders on the side of the damage as well as on the side of the consumer as an injured party.

Opposite to this, actions of the unfair business practice are those actions undertaken by the traders to the detriment of the consumer interest and which are used before, during and after conclusion of the legal affairs. Therefore, subjects of relation in this matter are the trader, on one side, and the consumer as an injured party, on the other side.

Unfair business competition or competition law is a group of legally defined norms which aim at protection and preservation of competition on the market.

ACTIONS OF UNFAIR BUSINESS PRACTICE

Current legal regulations define action of unfair business practice through provisions of the Article 67 of the Law on the consumer protection which refer to the forbidden behaviour of traders as well as provisions of the Article 84 – product advertisement which decoys or misleads the buyer.
Forbidden behaviour of traders (as a misleading business practice) implies:

1. Communication of incorrect, incomplete, unclear and ambiguous information on product or sale conditions which may mislead the consumer
2. Make condition upon the product sale by another product sale
3. Statement that the product is possible to get only in short period of time with an intention to cause hasty decision of the consumer
4. Ensuring the consumer that the illegal product turnover is legal
5. Ensuring the consumer that his/her own safety is endangered unless he/she buys the product
6. Establishment, activities and promotion of the pyramid network within which the consumer pays for the possibility of profit which primarily depends on the involvement of other consumers in network, not on the sale itself or the product consummation.
7. Use of term Liquidation sales or total sales or similar terms when the trader does not stop the business.

ACTIONS OF UNFAIR BUSINESS PRACTICE THROUGH THE MISLEADING PRODUCT ADVERTISTMENT

The current legal solution (The Law on the Consumer Protection, Official Gazette of Montenegro no 26/7), prohibits decoying or misleading advertisement or advertisement which is likely to mislead persons that it reaches and refers to and which is likely to influence their economic behaviour, due to its misleading character, or which for these reasons is detrimental to or is likely to be detrimental to the consumer even when it is about the advertisement which has not been published. The same regulation prohibits discriminatory advertisement (on account of race, sex, nationality etc), advertisement promoting violence, hidden advertisement and advertisement assigned to the juvenile persons.

IMPLEMENTATION OF THE LEGAL PROVISIONS REGARDING UNFAIR BUSINESS PRACTICE – EXAMPLES FROM THE PRACTICE (IMMEDIATE INSPECTION SUPERVISION)

Breaches of provisions of the unfair business practice are mostly present at traders dealing with retail and wholesale trade (furniture, textile and shoes, audio and video devices, mobile operators etc.)

Reasons for this should be sought in the smaller manual trade as well as in big supplies and in these cases in order to sell the goods there are bigger possibilities of misleading advertisement or actions relating to the unfair business practice.
The most frequent forms of product advertisement by the trader and which mislead the buyer are putting following notifications on the facilities: “big discounts”, “the cheapest”, “an offer you cannot refuse”, “guaranteed the most reasonable and the best”, “only 1 euro” etc.

Economic companies dealing with the retail and wholesale trade of goods partly emphasise misleading advertisements by means of illustrated hand-outs in the daily newspapers, most often with an emphasised slogan (incredible discount, guaranteed cheapest). However, the inspection supervision has found that it is about 5% discounts and that the slogan “incredible discount” is in no case appropriate, and in another case, at other traders it has been found that the prices of the advertised products are the same or lower than those at the traders advertising on this manner. It has also been found that there are cases of emphasising advertisements with the content “without guarantors and going to bank” and that controls in the retail companies find that the information is not true in any element, because the buyer must meet all bank conditions which, naturally, imply the guarantor and going to bank.

There are also found cases of putting notifications on the retail facilities with the slogan “buy at producer’s price”, and the inspection supervision and the insight into the business documentation found that the calculative margins reach to 200%.

There are also notifications on the shop-windows “whole sales” without closing the facility, since this slogan is legally approved only in cases when the facility ceases with performing activities.

There are also frequent cases that in facilities which perform sale of goods there are prices and rates emphasised (if the goods are bought on credit) and there are no manners or conditions of sale which would define the elements relating to discounts and credit arrangements.

In the sale facility of the mobile operator there is a notification that mobile phones may be bought for only one euro. At request of the consumer to buy the phone and acceptance of “implicit-tacit” conditions relating to the obligation of prepay, contracts, the trader set the condition and payment in advance so in that case the price of the phone was the same as the price in the free sale.

There are also cases of the aggressive behaviour of traders who offer the product over the phone (over ten employed operators)by calling and molesting the buyers offering them the product of the magnet necklace or bracelet. At the same time, they make the fraudulent sale communicating to the buyer that the product is for free or that it does not cost anything, and that only during delivery “they must pay the postal tariff in the amount of 10 euro”. The goods origin is from China and the purchasing price is 0.70 euro.

These are only some of determined cases of the unfair business practice which are the most frequent and which are very prominent but proved in the administrative proceedings by the repressive measures.
EFFECTS OF THE UNFAIR BUSINESS PRACTICE

In any case, the most frequent effect of the unfair business practice is the damaged and deceived buyer and for these reasons unfair business practice is prohibited.

The instruments of protection, in the first line, are cooperation, as well as the influence of the non-governmental sector in this part (CEZAP and ECOM), education of the economic entities – traders (directly or by means of media) and, in the end, inspection supervision, imposing administrative measures and sanctions.

NEW LEGAL SOLUTIONS FROM THIS FIELD

The Bill of the Law on the Consumer Protection made a huge step in harmonisation of the national legislation with EU acquis and the guidelines from the Directive 2005/29 of EC are completely implemented.

Unfair business practice in the new Law is separated as a single section with the regulations:
- The concept of unfair business practice
- Prohibitions of the unfair business practice
- Concept of misleading business practice
- Misleading permissions
- Misleading business practice
- Aggressive business practice
- Molesting, coercion and unapproved influence
- Aggressive business practice in all circumstances

The Bill of Law on the Prohibition of Misleading Advertisement at Providing services and Sale of Product defines the protection of economic interest of consumers from the misleading and forbidden comparative advertising or all forms of advertising for offering services and sale of products. Adoption of this Law will be the important segment in the harmonisation of the national legislation with EU acquis in part of implementation of Directive 2006/114 of EC, European Parliament and Council from 12 of December 2006.
Unfair Business Commercial Practice and Consumer Protection (acquis communitaire and practice in the European Union)

Marijana Lončar Velkova


EC 2005/29/ Unfair Commercial Practice Directive has been transposed into Montenegrin Law on consumer protection proposal (LCP) and hereby introduces a high level of consumer protection from unfair business practices of business operators referring to B2C\(^89\) relations.

The Directive is based on the principle of full and maximal conformity of the national legislation with European legislation, aimed at achieving a high level of consumer protection in all sectors and establishing a security network filling the gaps in the legislation in cases where unfair practices are not covered by special regulations. According to the said Directive, EU Member States may have additional and more restrictive rules which regulate unfair business practice in the fields of health protection, product safety and environmental protection. Also, the Directive does not in any way affect the right of each Member State to further regulate areas of financial services and immovable assets in order to protect economic interests of consumers (because financial services and immovable assets, due to their complexity, require a detailed regulation).

This Directive is paid a huge attention in terms of raising the level of the consumer protection out of the reason that by its nature, unfair commercial practice is prohibited, new mechanisms for prevention of consumer misleading by actions or omission are introduced and aggressive commercial practice is prevented. At the same time, the Directive sets out obligations for traders in regard to their claims which have to be clear, timely and comprehensive in order to allow consumers to make an informed and meaningful choice.

The Directive does not affect either the regulations by which economic interest of the competition are exclusively harmed, or the regulations referring to transactions made between traders. To that end, the Directive does not regulate relations between business operators, in other words it does not refer to B2B (business to business) practice.

Also, the Directive does not refer to conduct in regard to investors, nor on a campaign

\(^{89}\) B2C - business to consumer commercial practice
II. Code of conduct between businesses and consumers –
commercial practice

Code of conduct includes every action, omission, way of conduct and presentation, business communication, including advertising and product market placement, closely related to product promotion, sale or delivery to the consumer by the trader.

Significant distortion of the code of conduct (business practice) in order to prevent the consumer to make informed choice, affects the consumer to make a decision which he would not have made otherwise. According to the above mentioned, unfair commercial practice is adverse to professional diligence and at the same time, it affects or there is a possibility that it will considerably affect commercial conduct of an average consumer exposed to such a conduct or an average member of a consumer group (when a commercial practice is focused on a special group of consumers).

According to the Directive and the LCP, there is a general provision prohibiting unfair commercial practice, the so called „umbrella provision”, comprising all forms of commercial conduct which are regarded as unfair. Two basic categories of unfair commercial practices have been identified in compliance with the Directive:

- Misleading commercial practice
- Aggressive commercial practice.

1. Misleading commercial practice

A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way is likely to deceive the average consumer, or otherwise deceives and causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.

In terms of commercial practice which contains false information we can mention the following examples:

- Drink Montenegrin milk ....(the milk is produced in B&H )
- Free of charge loans..... (the truth is, consumers have to pay additional administrative fees, not mentioned)
- Does not contain additives.... the truth is, it does
- Hotel room with a sea view ....actually it has a mountain view
- GMO - FREE .... but it contains genetically modified soya
- Brand new models ... but it is about a last year model.

Examples of the cases of commercial practice by which an average consumer is misled in other ways are the following:
• IT equipment: you get the state-of-the–art technology for 8 EUR only (the truth is, you have to conclude a 24 month contract which is not clearly indicated in the offer)
• Cell phone tariffs (a net price, but plus some costs written in small letters)
• Presentation of a car model not worth of the price
• Statement concerning a price like “only” or “from”........ EUR
• Discount even up to 80%, the truth is, it applies to only a small number of products

a) Misleading practice
Misleading practice means provision of false information which is misleading or is likely to be misleading for an average consumer:
• Existence of a product: e.g. making an advance payment for an apartment while it is still under construction;
• Nature of a product: e.g. flowers sold for garden when it is about closed space flowers or a second-hand product sold as a new one;
• Availability, use of a product (e.g. unbelievable claims on weight loss or prevention of hair loss or improved sexual capacity or pain relief);
• Risks from use of a product, (e.g. claiming that the product is harmless, but you should strictly follow the instructions);
• Way a product is made, its content (claiming a product is “hand made", though it has not be made in that way, sugar free products, preservative free products etc......which is not true)
• Support provided to consumers after transaction (24 hour support which actually does not exist)
• Consumer complaints (free of charge repair but the consumer has to pay transportation)
• Way and date of production or purchase (hormone free, 100% natural, green, bio product, so called “Healthy ...Environment claims").
• Delivery, suitability for achieving a goal, way of use, quantity, specification, geographic or market origin, results expected from its use or results and important indicator of tests or controls performed on the product; and all such information is untruthful.

Misleading practice also includes any form of a product marketing including comparative advertising which does not make a clear distinction from other products, trade marks or other marks used for making a clear distinction among competitors. A misleading practice also includes disrespect of commitments by traders bound by conduct codex under presumption that the commitment does not only mean an intention but a firm commitment which can be checked and all that under condition that the trader has indicated within his business practice that he is bound by that codex.
b) Misleading omissions

A commercial practice shall be regarded as misleading if a trader omits material information that the average consumer needs to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. It shall also be regarded as a misleading omission when, a trader hides information or provides them in an unclear, unintelligible, ambiguous or untimely manner.

It is believed that a consumer should make a decision based on truthful information. The Directive defines information which is regarded important for consumers including:

- Basic features of the product
- Main office and identity of the traded
- Product price, the method of its calculation, additional mailing costs, transportation and delivery costs
- Terms of payment, other elements of fulfilment of conditions as a system for dealing with consumer complaints if those elements contrary to the requirements of professional diligence and
- Right to breach the contract.

2. Aggressive commercial practice

A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impair or is likely to significantly impair the average consumer’s freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise. An undue influence means use of position of the more powerful party opposed to the consumer by use of pressure, even without use of physical force, in way which significantly impairs considerably prevent the consumer to make a rational decision.

Some examples of taking advantage of the more powerful party can be compared with situation in which children are exhorted to purchase some advertised products or when children are exhorted by commercials to make pester their parents to buy them the advertised product; unplanned stops in front of stores or windows during an excursion organized for the elderly, with an intention to exhort them to make a purchase, which is contrary to the excursion agenda.

Aggressive commercial practice is recognized as such in the following cases:

- Advertisement directly aimed at exhorting children to buy products or persuade their parents or other adults to buy the advertised products for them;
- Requiring immediate payment of the product, payment in instalments, return or keeping the product not ordered by the consumer;
- Informing the consumer directly that the trader’s business or his existence will be endangered unless he purchase the product, and
This project has been financially supported by the European Union.

- Prize promotions where the consumer is falsely informed that he has won or will win a prize or some other kind of benefit, unconditionally or if fulfilling some condition, but consumers must make a payment or incur other costs in order to claim a prize.

The Directive defines and provides an explicit list of manners which are regarded as misleading commercial practice in all cases, known as “black list” of unfair practice and the same are listed in the draft CPL of Montenegro.

III. Problems expected to occur during transposition, implementation in EU and further strengthening of the Directive

While transposing and implementing the Directive by professional and expert public, problems that were expected to occur with interpretation of the provisions defining code of conduct (deferring form state to state) include transposition of the so called “black list” (Annex I Directive 2005/29/EC), transposition of the provisions referring to “professional diligence”, expected problems with interpretation of the term “an average consumer”, as well as, the correlation of this Directive with the contract legislation of the member states.

An efficient implementation of the Directive can be achieved through interpretations by the European Court of Justice -ECJ\(^{90}\)- which is a long process based on cooperation between national courts and that court. National courts refer to ECJ when deciding on certain cases, for so called preliminary ruling (that is a decision made by ECJ on interpretation of the Community law).

The role of ECJ is to ensure interpretation of the Community law and its uniform enforcement in all member states, which is of a special importance for this Directive. Judgements have proved to have a positive impact on qualification of general issues regarding the correlation between this Directive and national legislation and interpretation of some specific provisions. Besides, ECJ has competence for preliminary rulings in cases where a) contracts of EU; b) institutional acts, bodies, etc. are to be interpreted.

When a case comes in front of a court or a member state tribunal, the court or the tribunal can refer to ECJ and ask for an opinion concerning the case.

a) Giving opinion in view of implementation of this Directive – European Organization for Consumer Protection – EOCP

Regarding the anticipated problems in the implementation of the Directive, it can be said that European Organization for Consumer Protection – BEUC\(^{91}\), has recognized them claiming that:

\(^{90}\) European Court of Justice (ECJ)

\(^{91}\) BEUC draft position paper on the European commission’s communication on the application of the unfair commercial practices directive (com(2013) 138 final),
• Former unfair commercial practice which were banned on the national level were not included in the Annex of the Directive – „Black list“ (e.g. in promotional sale);

• There exists an issue when it comes to an average consumer. Pursuant to the Directive, “an average consumer” is a well informed person, sufficiently “careful and caring” which is not always in line with reality and behaviour of most of the consumers;

• There is an issue concerning consumers who are regarded as vulnerable consumers, and BEUC underlines a need to take into consideration social and economic reality and the way consumers make transactional choice, while defining the concept. The consumer’s choice is defined by his personal (emotional), economic (incomes, inheritance, etc.) and social (cultural, educational) background or it is qualified by a different level of vulnerability.

• There is still a problematic correlation between the Directive and the contract law, especially in relation to a possibility of compensation when a contract is concluded as a result of an unfair commercial practice.

In any case, specific rules for unfair commercial practice should be applied to financial services and they should be defined on the national level, and within the EU legislation (e.g. unfair advertising of loans for purchase of property, housing mortgage loans, etc.).

BEUC argues that in order to apply the Directive properly it is necessary to involve consumers’ organizations to promote and strengthen its implementation by use of various means but mostly through instituting court procedures, requiring timely measures or through cooperation with national state bodies. For example, consumer organizations can identify collective issues of the consumers laying behind individual complaint (when a consumer asks for an advice) and when negotiations with a company are about to start (through submission of a letter by a consumer).

Additionally, it is indicated that projects for better enforcement of the Law on consumer protection e.g. Consumer Law Enforcement Forum (2007 - 2009) or Consumer Justice Enforcement Forum (2011 - 2013) should be initiated, as they have been established as discussion platforms and a possibility for more efficient enforcement of the EU legislation regulating consumer protection.

In terms of the role of EU, use and coordination of CPC network, following the Decree on consumer protection cooperation (Regulation EC 2006/2004 on Consumer Protection Cooperation) between national bodies while taking over joint cross-sectoral control actions through “sweeps” – joint actions, were underlined.

In any case, it is necessary to apply an integrated access of public, state and private bodies through implementation of various measures aimed at reinforcing implementation of the Directive. In such cases, public and state bodies can also participate in a conflict resolution or the conflict can end up before an arbitrage, if out of court settlement is not reached.
This project has been financially supported by the European Union.

b) Two most recent documents drafted by European Commission are Communication\textsuperscript{92} and Report and the Report\textsuperscript{93} on implementation of the Directive from 14/03/2013.

- **The Communication on the Unfair Commercial Practice Directive** provides basis for major conclusions drawn based on the initial period and the experience with implementation of this Directive and recommends activities necessary to maximise benefits gained from the Directive in terms of strengthening Single Market and consumer protection.

Positive aspects of the implementation have been observed in building better trust in the Single Market and the most recent evidence reveals that more consumers in the EU are now more interested in cross-border purchases than in 2006 when the Directive had not yet been transposed in the EU Member States (Eurobarometer 332 *Consumers’ attitudes towards cross-border trade and consumer protection, May 2012*).

The Directive has been widely implemented on cross-border cases, in almost 50% of cases joint support has been provided through CPC network in the last 5 (information search, dangers and applications).

Those market surveillance actions, (“surveillance actions - sweeps”) which were undertaken by CPC network, referred to digital products; services of websites selling airline ticket; online services for mobile phones, websites selling electrical products for consumers etc. All the actions are coordinated by EC through national bodies competent for consumer protection member states, as well as, in Norway and Island, and are implemented in a coordination of the authorities responsible for market surveillance, which they control on hundreds of sites within a specific sector and at a specific time in order to detect any violation of consumer’s rights. After certain actions and identification of irregularities, they contact an operator and ask for compliance with the law. Those who fail to make corrections get punished or their web sites are closed down.

**The key priority according to this document refers to:** retail (including e-commerce), travel and transportation, financial sector, digital economy, energy sector and sustainability as a priority area. Also, harder enforcement of the national legislation and a more intensive control imposed on cross-border trade are necessary. An efficient cooperation and coordination between EC and national bodies, consumers’ organizations and business operators remain a priority. In cooperation with EC a full conformity of the national regulations with the Directive should be ensured including checking of the status of implementation of the rules in practice and defining corrective actions where needed, as the existing analysis proved that in a number of EU member states there is a huge discrepancy between national legislations and the Directive. It is needed to further develop guidelines for promoting and reinforcing enforcement of the Directive within national legislations including all stakeholders, to improve the existing date base.

\textsuperscript{92} Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the unfair commercial practices Directive

\textsuperscript{93} Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee
on implementation of this Directive and to improve cooperation between administrative and other bodies responsible for consumer protection in member states.

The Commission will take the following measures:
- establish regular thematic workshops between national enforcers and organise training for enforcers and the judiciary
- strengthen the efficiency of the CPC-Network and continue to promote coordinated enforcement actions (“sweeps”)
- assist Member States in ensuring an effective application of the Directive by further developing the Guidance document and sharing best practices with Member States
- develop enforcement indicators, in cooperation with the Member States, specific to the application of the Unfair Commercial Practices Directive, which will detect shortcomings and failures that require further investigative and/or corrective action.
- involve other key sectors: travel and transportation, digital / on-line trade; environmental protection; financial services; immovable assets.

Interests of vulnerable consumers (especially the elderly and children) will be taken into account in all those areas.
Collective actions for the protection of consumer rights (administrative and court injunctions) and Directive 2009/22/EC 94

Zvezdan Čadjenović

One of the areas of procedural protection of consumers envisaged by the new Law on Consumer Protection95 (hereinafter: LCP) is the protection of the collective interests of consumers, through the institute of action for the protection of these interests. By its adoption, the institute of action for the protection of the collective interests of consumers per se (hereinafter: collective actions) for the first time, is unequivocally and completely introduced into the system of Montenegro’s procedural law. The inspiration and basis for regulating collective actions were drawn by the Montenegrin legislator from European legislation, part of the acquis governing the relations between sellers and consumers. This reasonably causes the need for clarification of the particularity of collective actions and an overview of the solutions pertaining to the EU acquis.

Primarily, in order to prove the uniqueness of this institute of procedural and legal protection, it should be pointed out to the basis and inspiration for its regulation. The same is found in Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests, which was fully transposed by the new LCP in accordance with the international commitments assumed in the EU accession process, in terms of Articles 72 and 78 of the SAA. Like the Directive, in order to facilitate consideration of the subject-matter, it seems advisable to start from a negative determination, i.e. what the purpose of the procedure initiated by a collective action is not and what it is, and consequently, what are not, and what are the collective interests of consumers in terms of the provisions of Articles 118 to 130 of the new LCP.

According to the said Directive, the purpose of the procedure initiated by a collective action is not to determine the validity of the contracts that have already been concluded or that it decides for example on monetary compensation, discounts, return of what has been paid, a possible compensation claim, and the like. The purpose of the procedure is to allow the actions for termination of activities, hence, with effect in the future, since in these cases often there are no any specific requirements or infringement of rights of a particular customer in a particular contract. So we come up with an answer as to what the essence of “the collective interests of consumers” is. They

94 Zvezdan Čadjenović, MA in European Commercial Law
95 Law on Consumer Protection (Official Gazette of Montenegro 02/14), adopted by the Parliament of Montenegro on 23/12/2013. Provisions contained in this Article are taken from Part IV, Chapter I, Art. 118-130.
relate primarily to situations where an individual right of an individual consumer (in terms of civil law relations) has not been infringed yet, which actually poses the difference between individual and collective interests. Like the Directive, the LCP does not contain a definition of “collective interests”, but it seems necessary to point out the very Directive in items 3 of the Preamble nevertheless states that “Collective interests means interests which do not include the cumulation of interests of individuals who have been harmed by an infringement. This is without prejudice to individual actions brought by individuals who have been harmed by an infringement”. Therefore, it can be concluded that the interests of e.g. 1,000 consumers who suffered damage from some infringement still do not represent the infringement of “collective interests” in terms of the new LCP (or Directive), but only an infringement of the interests of the sum of these concrete (1,000) individual consumers.

This state and distinguishing of collective interests from the interests of individuals, including their own in case of several individuals injured by an infringement was confirmed by the Court of Justice of the European Union in a number of judgments. In the preparation of the Draft LCP they were subject to careful consideration of the members of the Ministry of Economy being officially in charge of preparing the text of the Proposal for the LCP. One of them, which sheds additional light on and poses confirmation of the specificity of the collective interests of consumers and therefore the actions for their protection, is the judgment in case Heinz Henkel\textsuperscript{96} in which the EU CoJ confirmed the above specificities\textsuperscript{97}.

In this case, the question arose as to whether the special provisions in favour of the consumer, in determining the international jurisdiction for disputes arising from consumer contracts (with cross-border elements), can be invoked in cases where an action is not filed by the consumer alone but by a consumer organization. EU CoJ has taken a clear stand that the said provisions of the Brussels Regulation (then: the Brussels Convention) apply only when a consumer files an action himself. What is important for our consideration is the position of the CoJ that an injunction is not at all an action that arises out of “the contract”, but it protects the wider collective interest of consumers and the basis of this action is not in the “contractual “ obligations of the seller, but in its non-contractual obligations (tort or quasi-tort).

For these reasons, the EU CoJ has taken a stand that preventive action (collective action) of the consumer protection organizations with a request for a ban on the use of unfair contract provisions be considered as an action in relation to a tort or quasi-tort under Article 5 paragraph 3 of the Brussels Convention (now: Brussels Regulation I).

As a result of a brief consideration of the subject-matter, the new LCP envisages a substantial and comprehensive regulation of the subject-matter. Again, in the spirit of

\textsuperscript{96} Judgement of 1 October 2002. in case C-167/00 Verein für Konsumenteninformation vs. Karl Heinz Henkel [2002] Corpus of the judgments of the Court pg.. I-8111

\textsuperscript{97} The fact that the judgment was adopted at time of validity of the old Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumer interests is without prejudice to the subject-matter concerned.
international law, which was the inspiration for the legislator to regulate the subject relations. Thus, in accordance with the option given in the Directive, the new LCP provides for the possibility of collective protection (an action for termination and prohibition of further use or activity) of consumer rights for all activities that are in contravention with the applicable standards of consumer protection rights. So, not only contrary to the provisions that protect certain consumer rights contained in the new LCP, but in other (sectoral) legislation as well (e.g. tourism, consumer loans, domestic trade, electronic communication, electronic commerce, advertising, medicines, etc.). This is since the European legislator recognized that existing (individual) mechanisms\textsuperscript{98}, which are available at national and EU level (then Community) in order to guarantee their respect do not always provide for timely termination of activities which disturb the collective interests of consumers. Finally, as a result of the aforementioned, the new LPC carefully regulated the circle “persons” who are authorized to file the collective actions.

Alike in other countries with similar legal systems, Montenegro and the new LCP gives the authority to file collective complaints primarily to the Ministry of Economy (responsible for supervision of implementation of the LCP), other ministries and state administration bodies are responsible for consumer rights protection, and well as to consumer protection organizations; to these firstly mentioned, among other things, due to the fact that, as mentioned above, the collective action protects consumer rights guaranteed under other sectoral laws, not just by the LCP. Likewise, for the reason that consumer NGOs in Montenegro are underdeveloped, so it would be insufficient if responsibility for initiating procedures for the protection of collective interests would be handed over to them only. To the latter, namely consumer protection organizations, because the goal of their establishment is to protect consumers. Still, they are defined in a way that provides clarity and a certain seriousness of legitimate complainants, so these are only the consumer organizations that meet the criteria under Article 169 of the LCP. Finally, given that activities that violate the collective interest of consumers often violate the rules of the market and thereby endanger the positions of competitors, the LCP envisages the legitimacy of filing a collective action by trade chambers and associations.

Consequently, which is not a goal of detailed elaboration of this article, the LCP contains a number of other provisions that reflect the particularities of this new procedural institute, such as limiting the cost risk (so that collective action costs would not be too high, thereby dissuading for the bodies authorized to initiate procedures), the contents of the court’s decision on collective actions, and the prohibition of the same behaviour in the future (including similar behaviour), the sanction of decision publication (but not in the official gazette, since it does not adequately contribute to the elimination of the consequences, warning of the consumers and preventive effect), reasonable deviations from the principle that enforcement of court decisions can only be requested by the complainant (or a particular customer), a specific expansion

\textsuperscript{98} Individual directives listed in Annex I to Directive 2009/22/EC.
of the effect of the judgment in case of judgments on unfair contractual provisions, termination of certain (aggressive or misleading) business practices (and the burden of proof is on the seller to prove that the allegations are true), the possibility for the consumer to rely, in a separate lawsuit, on the judgment upon collective action on the existence of the infringement of the collective interests of consumers \(^99\) and the like.

\(^{99}\) This is without prejudice to the constitutional right to a hearing in a court proceeding that a judicial decision, adopted in a procedure in which a person was not able to participate cannot be adopted at the detriment of that person. Judgments in civil cases, in general, for that reason are effective only between the parties (inter partes). However, the specific trader who was already heard regarding the inadmissibility of certain actions, in a litigation upon collective action, for which reason it is not problematic that an adverse result of litigation against him is effective in the following cases (individual consumer complaints). The same is true for the case when the same or similar activities or contractual provisions are used another trader (meaning one who was not a defendant in a litigation upon collective action). Due to the above principles, the judgment has effect only between the parties and due to the constitutional right to a hearing, another trader in the legal sense of effectiveness cannot be linked to the outcome of the litigation upon collective claim between the consumer and the defendant trader. However, even then, one should bear in mind the effect of the judgment in terms of precedent, i. e. harmonization of case law.
1. Introduction

The core area of consumer protection law refers to substantive provisions on rights and safeguards. Several Community instruments do provide consumers with a set of basic rights. However, if such rights are to have practical value, mechanisms must exist to ensure their effective exercise. A formal approximation of laws and formal determination of rights and safeguards is not sufficient. What matters is an effective implementation and an effective guarantee for consumers that their formally recognized rights, will be protected in practice. In order to ensure effective protection of consumer rights, procedural aspects of consumer protection law should not remain neglected. These relate foremost to the following: (1) special favorable norms for consumer concerning international jurisdiction, (2) special rules on standing to sue for the protection of collective interests of consumers, (3) ADR for consumer disputes and (4) special regulation of small claims procedures in regular courts.

Concerning protection of collective interests of consumers it first needs to be defined what this exactly means. Originally the protection of collective interests was understood as aimed at deterrence and prevention (hence: injunctions), not compensation, it is thus “future oriented”. For the time being the EU law requires only such instruments (Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer interests). Member States should have a system of collective redress that allows private individuals and entities to seek court orders ceasing infringements of their rights granted by EU law (so called “injunctive relief”).

Perhaps the distinction between an individual interest and a collective interest (protected through injunction relief) can be most clearly explained on a practical example: Pursuant to the Door-step selling directive, the trader must inform the consumer in writing about his or her right to withdraw from the contract within 15 days (cooling-off period) without need to state any reasons thereof. In the given case the trader did not provide such an information for the consumer. Such is also his usual business practice. The trader probably counts on the fact that most consumers will – either most likely because they don’t even know that they were victims of an illegal practice - not to pursue their claim not pursue any claims against the trader. If the consumer already knows about his or her right, his individual interest is not endangered (and
neither has he an interest to request the trader to provide information about rights, which he already knows). If however the consumer did not initially know about his or her right of withdrawal, however he found out about the right at a later stage (after the 15-days time-limit has expired), it is no more essential for the consumer to get a proper information. Rather, he wishes to consider what consequences the trader’s omission has caused in his case and what remedies are available (is the contract void, can he claim damages, is the cooling-off period prolonged....) . But there exists no individual interest that the trader ceases with such illegal practice. However such an unfair trade practice endangers position of consumers as a group (“potential”, “future”, “not identified”). Besides, the market competition is distorted as well. For the protection of this interest it is essential that the trader stops with such a trade practice. For this reason it is of a crucial importance that there exist procedural instruments which enable qualified entities (either authorized state bodies or consumer organisations) to file actions for injunctions.

2. The EU Injunctions Directive and its (proposed) transposition in Montenegrin legislation

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer interests will be transposed by the Montenegrin Consumer Protection Law, which is at present in the parliamentary proceedings. The Directive requires that a competent body for decision making can be either court or an administrative authority, whereas standing to sue may be given to qualified entities (either independent public bodies (e.g. a consumer ombudsman in Scandinavian countries) or consumers’ organisations). Relief sought is restricted to the cessation or prohibition of any infringement (injunction – order not to do something) , whereas publication of the decision and, if the national law, permits, publication of the decision and if the national law permits: astreinte or penalty in case of non-performance, can also be imposed. In case of intra-Community infringements, a qualified body from one country may seek an injunction in another. Condition: prior consultation. Injunction relief has effect only for the future, prohibition of certain acts in the future. It does not conclusively mean that the court determined as res iudicata that meaning that contracts, already concluded or particular contract terms, included in these contracts are null and void. Effect to the benefit of consumers only indirect; a consumer cannot request enforcement if the injunction is not complied with; only the claimant (i.e. the consumer organisation) can request enforcement.

The draft chapter on collective redress in consumer disputes fully complies with requirements of the Injunction directive and it relies on best practices in numerous EU member states (e.g. Austria, Slovenia, Croatia, Germany). It only provides for an Injunction Action, not for recovery of Mass Monetary Claims. However, certain provisions extend the scope of protection, given to consumers in the Injunctions Directive.
In case of favourable judgment in a collective litigation, consumers shall be able to rely on findings of violation of consumer protection legislation in a subsequent action concerning their individual claims. Proper understanding is given to the role of consumer organisations. These must not be given standing to sue for protection of individual interests of consumers, however they should be able to address the ADR mechanism for the protection of collective interests. The regulation in the old Montenegrin Consumer Protection Act, which enables for actions filed by consumer organizations not only for injunctions but also for collective monetary relief, is entirely unacceptable. It negates the private nature of civil law since it enables such actions to be filed even without knowledge or consent of the consumer affected. In addition it does not provide for any necessary procedural safeguards (consent of the consumer to be bound by the future outcome of the litigation, which can be achieved either through opt in or opt out system) for the consumers, so the right to be heard can be seriously violated. The draft new law in this regard puts the system in line with general procedural requirements of European Human Rights Convention (ECHR). The new draft law also adequately, and in compliance with the EU law requirements contains provisions which relate to standing to sue for authorized bodies from other EU member states as well as provisions concerning reporting of qualified bodies from Montenegro to the European Commission should start to apply as of the accession of Montenegro to EU.

It needs to be stressed that state inspectorate services have played and will continue to play an important role in consumer protection in Montenegro also under the new (draft) Consumer Protection Law. Thus there shall be a “two tracks” system: on the one hand consumer organizations will be entitled to pursue injunctive relief for the protection of collective consumers’ interests in litigation in regular courts. On the other hand state (e.g. market) inspectors will continue to exercise their duties in administrative proceedings (subject to judicial review in state courts). This is not an unwelcome “duplication”, but rather a manner of strengthening consumer protection in Montenegro.

3. A long term project – mass recovery of monetary claims

The protection of collective interests of consumers, as required by the Injunctive Directive and as provided for in the new draft Montenegrin Consumer Protection Law is limited to injunctions only, as they only have effect for the future and do not immediately benefit a consumer, who has already been a victim of illegal trader’s acts and commercial practices. However the development in numerous countries, also those within EU, shows a trend towards a wider possibility of a collective recovery of mass monetary claims. This is not only a matter of an effective implementation of consumer rights. A traditional civil justice system cannot cope with possible mass claims, which could, if pursued individually cause huge backlogs in courts. As a result of more recent development and in broader sense, protection of collective interests covers also so called recovery of mass monetary claims (“collective redress mechanisms”). This covers
cases where multiple consumers suffer harm caused by the same or similar detrimental behavior of the trader. Proper understanding of what is collective interest, which is “not just a sum of individual interests” is – when it comes to collective redress mechanisms (mass monetary claims) not always easy. Number of infringement and persistence of a harmful practice is a relevant factor in that regard. If an individual claim is too small, bringing it individually to the court is not a realistic option. It is also important to determine, who the addressee of the illegal practice is – is it an individually targeted consumer or every consumer who might find himself in a certain situation (like in the case of general contract terms). Only in the latter situation is the collective interest involved. There are however still no binding instruments on the community level in this regard, merely recommendations (Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law). This is not only a matter of an effective implementation of consumer rights. A traditional civil justice system cannot cope with possible mass claims, which could, if pursued individually cause huge backlogs in courts. On the other hand, negative experience with certain aspects of class actions, especially those related to the danger of abuse, to promoting litigation industry and to additional financial burdens for traders, when they have to defend huge but unmeritorious claims.

In light of the aforementioned one can conclude that injunctions are insufficient, as they only have effect for the future and do not immediately benefit a consumer, who has already been a victim of illegal trader’s acts and commercial practices. Even a partial broadening of effects of a positive judgment, following an organization action, as provided for in the draft new Consumer Protection Act, is not entirely satisfactory. Nevertheless the new EU Legislative instrument relating to recovery of mass monetary claims is, as it is not binding, not of immediate relevance for the Montenegrin legislation – except to the extent that one needs to give proper consideration when referring to collective interests – is this understood narrowly in traditional sense (“pro future” injunctions) or also in sense of recovery of mass monetary claims. For the time being it is essential to correctly transpose the requirements of the Injunctions directive and to properly educate both consumer organisations as well as judiciary about the functioning of the new procedural instrument. While it is true that the Injunctions directive provides only for the “minimum harmonization” (meaning that the member states are free to provide for a more comprehensive protection) it would be much too ambitious and not realistic to introduce legislative instruments for the recovery of mass monetary claims already at this stage. But we certainly can expect a lively debate in Montenegro – just like in many EU member states – relating to this topic in the (not so distant future) already.
PATIENTS’ RIGHTS IN CROSS-BORDER COOPERATION

Slavojka Šuković

Cross-border health care should be viewed from three aspects: the provision of health care to the insured of other countries (foreigners) in health institutions in Montenegro; providing health care to the Montenegrin insured persons in health institutions in another country; the implementation of these rights in the European Union (EU) and in terms of the obligations of Montenegro towards European integration, in order to implement the EU acquis.

Obtaining the health care for foreigners in Montenegro

The health care that is provided to foreigners in Montenegro is regulated by the Law on Health Care (“Official Gazette of Montenegro”, No. 39/04 and “Official Gazette of Montenegro”, No. 14/10), the Law on Asylum (“Official Gazette of RM”, No. 45/06), Regulation on the healthcare implementation of an asylum seeker, of Persons who have been recognized as refugees, a person accorded subsidiary protection and a person accorded temporary protection (“Official Gazette of Montenegro”, no. 31/10), as well as by a number of international agreements. In accordance with the Law on Health Care, an asylum seeker, a person who has been recognized as a refugee, a person accorded subsidiary protection and the accorded temporary protection in Montenegro, has a right to health care, in accordance with this Law, and the Law on Asylum, unless an international agreement provides otherwise, since the bilateral agreements have the primacy. Medical institutions and health professionals are required to give a foreigner an emergency medical assistance. Foreigners shall bear the costs for the provided emergency medical assistance or other types of healthcare, except in cases where the treaty specifies otherwise.

Obtaining healthcare for Montenegrin insured persons in another state

Speaking about health care that Montenegrin insured persons obtain in another state, in addition to the Law on Health Care, the Regulation on the manner and procedure for referral of the insured persons to medical treatment abroad (“Official Gazette of Montenegro”, No. 74/06) should also be mentioned. In this case, the difference was found in relation to referral to treatment in the former republics of the SFRY and the referral to treatment in other countries. Referral to the former republics of the SFRY is carried out in medical institutions with which the Fund for Health Insurance has a contract, based on the findings and opinions of the First Degree Medical Care Fund Commission. Referral to treatment in other countries is carried out at the request of the insured person or health care institution in which the insured person has been
treated. In addition to the request, a proposal of the appropriate council of doctors is submitted to Fund. When deciding on the request for referral to medical treatment abroad, the findings and opinion are given by the Commission on Treatment Abroad, established by the Fund.

The insured persons referred for treatment abroad are reimbursed the costs of treatment and the costs of procurement of medicines prescribed by the doctor in charge of a health institution where the insured person has been treated. The compensation of the expenses is conducted upon the request, medical records, invoice of payment and other required documentation.

International health insurance is regulated by bilateral agreements. Montenegro has concluded agreements on social insurance (in the area of health insurance) with 23 countries, of which 18 are members of the EU. Most of these agreements were concluded at the time of the former SFRY, and a smaller number was concluded by Montenegro. Due to the way that international agreements regulated health care, the countries can be divided into three groups, in the following way:

The first group consists of the insured persons of: the Republic of Austria, the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of the Netherlands, the Grand Duchy of Luxembourg, the Republic of France, the Republic of Romania, the Republic of Italy, the Czech Republic, the Republic of Hungary and the Republic of Slovenia. These agreements are the most comprehensive in terms of the scale of persons covered by the health protection, as well as in terms of volume of health care.

Second group consists of the insured persons of: the United Kingdom of Great Britain and Northern Ireland, the Republic of Bulgaria, the Slovak Republic and the Republic of Poland. Health protection with these countries is regulated by the norm of reciprocity, which means that foreigners, who use health care on the basis of the agreement, do not pay a fee for the provision of health services in the Contracting country, but the costs of healthcare are borne by the country which provides the health services.

Third group consists of the insured persons of: the Swiss Confederation, the Kingdom of Sweden, the Kingdom of Denmark and the Kingdom of Norway. Policyholders of these countries are entitled to health care in the same manner and the under the same conditions as our insured persons, except that they directly pay the costs for the use of health services. Medical institutions are required to issue the invoices, according to which in their country they exercise the right to reimbursement under the national legislation.

Cross-border healthcare in the EU

In the European Union, this area is regulated by the Directive on the application of patients’ rights in cross-border provision of healthcare 2011/24/EU of 9 March 2011 and by Commission Implementing Directive 2012/52/EU of December 20, on the recognition of medical prescriptions issued in another EU Member State.

For the exercise of these rights, the Regulation 883/2004 of April 29, 2004 and 987/2009 of the European Parliament and the Council on the coordination of social security systems should also be mentioned, which will be directly implemented in Montenegro after joining the EU, implementation of which cannot be brought into question by the Directive 2011/24/EU.

The Directive 2011/24/EU specifies the rules that allow the access to a safe and high-quality cross-border healthcare and promotes cooperation between Member States in the field of health, while respecting national competences in terms of organizing and providing the health care. The goal of most of the provisions of this Directive, inter alia, is improvement of functioning of the internal market and the free movement of goods, people and services. All Member States are responsible for providing safe high quality, efficient and, according to the volume of rights, satisfying health care to citizens on its territory.

Patients’ rights in cross-border health insurance in the EU are based on principles which are common to the all health systems of the Member States and which are focused on setting the rules to facilitate the availability of safe and high-quality cross-border healthcare. These principles provide the mobility of patients and guarantee their confidence in cross-border healthcare. The practice of exercising these rights, although based on common principles, varies considerably between Member States, since every country has the right to decide on the type of health care that it deems appropriate for its policyholders, as well as to decide on a package of health care to which citizens in cross-border healthcare protection are entitled. Likewise, the mechanisms used to finance the provision of this form of health care must be considered in a national context, while respecting the Member States’ responsibilities for the organization and delivery of health care and medical treatment, as well as for the determination of the remuneration of health, or more broadly, social security.

Transposition of this directive into national law of the Member States allows restricting the cross-border health care, if that is in the public interest. Therefore, this directive applies to patients who choose to seek the health care in another Member State which is not a state of their insurance or their residence. However, the state of insurance or residence of the patient may limit the amount of the costs of that health care and the scope of health care provision. Such restrictions are possible if it is in the interests of quality and safety of the provided health care, maintenance of health and human resource capacities on the national territory or if it is justified by the reasons of general interest relating to public health or other reasons of public interest.
Also, the reimbursement of cross-border health care shall be limited to health care to which the beneficiary is entitled under the legislation of a Member State of insurance or residence. It is important to emphasize that in transposing this Directive, Member States have the right not to apply the provisions relating to services whose main purpose is to provide protection when performing routine, everyday tasks, as well as the long-term health care services, such as home care, life sustaining using devices, health care and treatment in nursing homes, etc.

Because of the specificity, access to the organs and allocation of organs for the purpose of transplantation are not subject to the application of this directive.

This directive applies to regulation, issue and procurement of drugs and medical devices that are procured in order to use health services, which are provided in another state. Cross-border health care includes also cases in which the patient buys medications and medical devices in a Member State other than the Member State of insurance or residence and the situation in which the patient is buying medicines and medical devices in another Member State.

The Directive does not restrict the right of temporary residence or permanent residence in a Member State in order to obtain health care. But when stay of an individual in the territory of a Member State, which refers to the right to enter or stay on its territory, is not in conformity with the legislation of that State, that person should not be considered a beneficiary of the right to health care, according to this directive. When a customer uses a cross-border health care, it is important to know in advance which regulations will be applied. These are the rules that are prescribed in the legislation of a Member State of treatment, due to the fact that the organization and provision of health services and medical care are the responsibility of Member States.

Therefore, the Member States of treatment provide that patients from other Member States are given adequate information about the quality and safety relating to health care. Health care providers inform the patients on specific conditions of health care use. However, this directive does not oblige healthcare providers to provide more extensive information to patients from another Member States. But member states ensure that all patients are treated equally, with compliance with the principle of free movement of persons. The Directive does not oblige healthcare providers to accept patients from other Member States in case of planned treatment or to give them an advantage to the detriment of other patients.

Mechanism of liability for damages arising from health care is needed in order to prevent mistrust in the use of cross-border healthcare. Therefore, Member States ensure that, in case of damage, mechanisms are established for the protection of patients and realization of damage compensation, when the health care is provided in their territory.

The right to protection of personal data is a fundamental right that is established by the Charter of fundamental human rights of the EU. Ensuring the continuity of cross-border healthcare depends on transfer of personal data on the health of patients.
Therefore, it is necessary to facilitate the flow of personal data from one Member State to another, but at the same time basic individual rights that relate to the processing of the data and the free movement of such data (diagnosis, examination results, evaluation of the doctor and all performed treatment procedures or interventions) must be protected.

The application of this Directive should not affect the rights of patients in terms of covering the costs of health care that become necessary on medical grounds during a temporary stay in another Member State and the right of the user to obtain the approval for treatment in another Member State. This approval can be obtained if the requirements are met under the EU regulations on coordination of social security schemes to employed persons, self-employed persons and members of their families moving within the EU. Patients are guaranteed the coverage of the cost of health care used in another Member State for at least the amount that is equal to health care in the Member State of insurance or in the patient’s country of residence.

This directive does not deny the patients more favourable rights guaranteed by Regulation (EC) No. 883/2004 and Regulation (EC) No. 987 / 2009. The patient asking for approval for treatment, appropriate to his condition in another Member State, is should receive it, according to the conditions stipulated in these Regulations, when that treatment is envisaged in the legislation of the Member State in which the patient resides and when the patient cannot receive such treatment within a period which is medically justifiable, taking into account his current medical condition and the expected course of such a condition. This Directive prescribes that Member States are free to organize their health care and health insurance systems in a way to determine the right to treatment at the regional or local level. The obligation to reimburse the costs of cross-border health care is limited to health care which is listed among the benefits to which the patient has a right in his own state. The Directive fully respects the differences in national health care systems and responsibilities of the Member States for the organization and provision of health services and health care. The Directive envisages the right of the patient to receive each medication that has been approved for circulation in the Member State of treatment, even if the medicine is not approved for circulation in the Member State of insurance or residence, as this is an essential part of obtaining an effective treatment in another Member State. For the purposes of this Directive, Member States can apply the general conditions, criteria for compliance with the conditions, and regulatory and administrative formalities for receiving healthcare and reimbursement of the healthcare costs. For the purposes of this Directive, Member States of insurance or residence, as a rule, should not set the conditions that the reimbursement of health care provided in another Member State requires prior authorization, if the costs of such a health care, if provided in its territory, would be covered by its health care system.

Movement of patients between Member States is limited and expected to remain as such, since the vast majority of patients in the EU receive health care in their country. Thus, Member States may condition the coverage of costs of hospital care provided
in another Member State with prior approval. Therefore, the Member States are to decide on the need for introduction of the system for prior approval and for which health care. The rules of such a health care should be available to the public in advance.

Criteria relating to the provision of prior authorization are justified by objective reasons of general interest, the financial sustainability of the balance of the health insurance system, balanced and accessible health care and health maintenance capacities. Also, in the course of adoption of regulations regarding the prior authorization, the general principle of patient safety shall be taken into consideration. If a patient has a right to health care, and that health care cannot be provided within the period that is medically justified, the Member State of insurance or residence should in principle, grant that prior authorization. However, in certain circumstances, if a cross-border health care may expose the patient or his family to risk that goes beyond the interest of the patient to obtain the required cross-border healthcare, Member States may refuse to grant prior approval. In principle, in the case of prior approval, the state of insurance should reimburse health care costs up to the amount that is equal to costs that would be payable in case that the health care is provided in that country.

In any case, patients have the right to obtain a decision in relation to cross-border health care in a reasonable time, taking into account the urgency of the case. It is necessary to provide the patients with all the necessary information about the cross-border healthcare, on how and under which conditions they can exercise their rights to cross-border healthcare. One of the mechanisms for the provision of such information is the establishment of national contact points. National contact points provide information to patients on conditions to obtain cross-border healthcare, information on healthcare providers, the rights of patients, the appeal proceedings, in accordance with the legislation of that Member State, as well as legal and administrative possibilities regarding the settlement of disputes, including those based on claims arising from the provision of cross-border healthcare.

Collaboration between health care providers, health care users and insurance regulators at national, regional or local basis from different Member States is important, and of particular importance in border areas where cross-border provision of services may be the most efficient way of organizing the health services for local population.

Montenegro on the path to European integration, for realization of cross-border healthcare

Prior to joining the EU, Montenegro is obliged to harmonize its legislation with the acquis of the European Union, which regulates the area of exercising the rights of patients to treatment in cross-border healthcare, that is, to transpose it to its legislation. It is obliged to transpose the directive on the application of patients’ rights in cross-border provision of healthcare 2011/24/EU of March 9, 2011 and an implementing Commission Directive 2012/52/EU of December 20, on the recognition of medical prescriptions issued in another EU member state. Transposition of these directives into Montenegrin legislation shall be conducted by law that governs the rights in the area of
health insurance and by regulations for its implementation, which will more precisely determine the conditions and manner of exercising the rights in cross-border health care. Transposition of these regulations will create a regulatory framework for the exercising of rights to cross-border healthcare in another Member State. In addition to the normative framework, the other requirements for the implementation and practical application of these regulations shall be provided. For creating these conditions, it is necessary to undertake a series of activities in the organizational, human resources and technical terms. Therefore, with accession of Montenegro in the European Union, normative, administrative and institutional conditions will be created to exercise the patients’ rights in cross-border provision of health care, which is compatible with the systems of the EU. However, it should be borne in mind that, in accordance with the Directive, each Member State, during its transposition and prescribing the scope of certain rights, the amount of reimbursement, the type of health services, etc, has the right and possibility of their limitations in the interest of public health, the financial sustainability of the system, personnel and technical needs of its policyholders.

Therefore, through transposition of the Directive 2011/24/EU, Montenegro is obliged to regulate, according to its specificities in the interest of public health, safety and quality of health care provision and sustainability of the health system, without encouraging the patients to treatment in other EU member states, the following areas:

1) reimbursement of expenses for health care services provided to Montenegrin policyholders abroad, with particular focus on the treatment that needs to be financially compensated; reimbursement levels; authorization procedures, applicable regulations for planned and unplanned health care; information for patients;

2) provision of health care for citizens of EU member states, with a special focus on: access to health care, paying taxes, access to medical records of patients, informing patients regarding standards for patient safety, all the differences in terms of the provision of planned and unplanned health care;

3) establishment of national contact points (persons) that would inform the patients (regarding the patients’ rights, the level of reimbursement, procedure for approval, the manner of the complaints and compensation referral, on standards of quality and safety, on the status of health care providers and similar;

4) recognition of prescriptions issued in another country, not in Montenegro, including the measures on their content (which items should those contain in order to get them recognized by the one who prescribes them, patient and prescribed product, etc.).

Instrument for the realization of cross-border health care is the European Health Insurance Card, which will replace the current paper forms needed for the treatment of the insured in any EU member state. The European Health Insurance Card is a card that enables its holder the use of health care services in the EU Member States, which are actually the services that are necessary from a medical standpoint, taking into account the nature of services and the expected length of stay. The European Health Insurance Card cannot be used when the purpose of the stay abroad is solely to obtain the health
The insured person from Montenegro, who during a temporary stay, regardless of the purpose of stay, in one of the EU member states suddenly becomes ill, injured or suffers an accident shall be entitled to health care benefits at the expense of the Health Insurance Fund of Montenegro, on the basis of this card. It is intended that the insured can receive necessary medical service in the country of temporary residence (EU), i.e. to enjoy the same rights from health insurance as the indigenous policyholders in order to facilitate the access to health care. Also, it is necessary to provide reimbursement of health care costs for all the necessary treatments of Montenegrin insured persons who are sick or have an accident during a temporary stay in another Member State and use the health care through these cards. The insured persons from the member states will be enabled to realize the health care in Montenegro on the basis of the European Health Insurance Card.

Until the time it joins the EU, Montenegro, respectively the Fund for health insurance, as well as health care providers, need to provide the conditions, both in organizational and in terms of the application of information technologies for the introduction and use of the European Health Insurance Card. Montenegro needs to begin with the release of these cards to their policyholders on the day of its accession in the EU, whereby the possibility will be created for its use and realization of cross-border healthcare in the EU member states. Also, the uniformity of appearance, content, recognition and the other issues which are of importance for the implementation of prescriptions and the provision of drugs and medical devices for the realization of cross-border healthcare shall be provided.
The right to cross-border health care according to the regulations of the European Union

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1. Introduction

By becoming the 28th Member State of the European Union (EU), on 1 July 2013, the Republic of Croatia has committed to implement European legislation relating to the coordination of social security systems.

The regulations are Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 about the coordination of social security systems (Regulation 883/04)\textsuperscript{100}, as the basic regulation and Regulation No 987/2009 of 16 September 2009, establishing the procedure of implementation of the Regulation No 883/2004 on the coordination of social security systems (Regulation 987/09)\textsuperscript{101}. Also, essential is Regulation (EC) No. 1231/2010 of 24 November 2010 on extending the application of Regulation 883/2004 to nationals of third countries. Regulations are directly applicable and binding in all its parts for all Member States, and do not require special measures to incorporate into national legislation. Also according to the legal power, they supersede national legislation.

In the area of health care are also important the Decisions of the Administrative Commission for the coordination of social security systems from the S series (Sickness), which also apply.

At the same time, for area of cross-border health protection Directive 2011/24/EU on the exercise of patients’ rights in cross-border healthcare is very important (Directive 2011/24/EU). Unlike regulations, the provisions of the directives shall be transposed into national legislation in order to be applicable. The provisions of the said Directive in Croatia were entered in the Law on Compulsory Health Insurance (“Official Gazette”, No 80/13. 137/13 - the Law), and entered into force on 25 October 2013.

In order to regulate the manner of exercise of rights in cross-border health care of its insured persons, the Croatian Health Institution Fund (hereinafter referred to as: “CHIF”) issued the Rulebook on rights, conditions and manner of use of cross-border healthcare (“Official Gazette”, No 160 / 13 - Rulebook).

\textsuperscript{100} The Regulation is available in the Official Journal of the European Union, and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=DD:05:03:32004R0883:HR:PDF

\textsuperscript{101} The Regulation is available in the Official Journal of the European Union, and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=DD:05:02:32009R0987:HR
2. Regulations on the coordination of social security systems and Directive 2011/24/EU

From 1 July 2013, persons insured by CHIF can use health care during their stay on the territory of another EU Member State in accordance with Regulation 883/04 and Regulation 987/09. The Regulations replaced all bilateral social security agreements that the Republic of Croatia had concluded with the EU Member States until 1 July 2013, as well as the forms they agreed, and the forms were replaced by new, E-forms.

The Regulation 883/04 shall apply to all nationals of EU Member States, stateless persons and refugees residing in a Member State, and to which it applies or applied the legislation of one or more Member States, as well as to members and survivors of their families. According to the above, a person can be insured only in one EU Member State, and during its stay on the territory of another Member State health care is exercised under the same terms as the private residence of the state, but at the expense of its insurer.

The Regulation 883/04 regulates the right to health care in the event of temporary residence, place of residence or work of the insured persons on the territory of another EU Member State, and the planned treatment.

However, health care, in accordance with the Regulations, of insured persons can be exercised exclusive at contractual providers of health care, i.e., in the framework of the so-called system of social health insurance, and not by the private provider.

On the other hand, the Directive 2011/24/EU has expanded the possibility of using cross-border health care in private service providers in one of the EU Member States.

3. Exercising the right to health care during a temporary stay on the territory of another EU Member State

One of the most important news relating to the use of health care during a temporary stay in the territory of another EU Member State is possibility to use a European Health Insurance Card (EHIC).

EHIC is used during a temporary stay on the territory of another EU Member State. The reason for the temporary stay of insured persons on the territory of another EU Member State is irrelevant, so the person can stay in the EU as a tourist, for the purpose of study or temporary work, and in all these cases is using EHIC for health care.

The basis for the use of EHIC is Article 19 of Regulation 883/04, according to which insured persons are entitled during a temporary stay on the territory of other EU Member State to use health care that is necessary from the medical point of view, taking into account the nature of health services and the expected length of stay, at the
contracting medical institutions and doctors, and at the expense of its insurer. Based on this provision CHIF adopted a Regulation on the European Health Insurance Card.\textsuperscript{102}

The necessary health care also includes health services that are necessary from a medical point of view so the insured person would not be forced to return to the home Member State before the end of the planned stay for submission to necessary medical treatment, and the doctor on the spot estimates which are those services. The insured person is obligated to pay only participation in health care costs (participation), if it is envisaged also for the insurers of the country of residence.

Furthermore, the necessary healthcare includes also healthcare services for chronic disease, that is for already existing diagnosis, as well as child birth and services related to pregnancy. However, childbirth and chronic diseases are not covered when the purpose of residence in another Member State is just childbirth or treatment of existing chronic diseases.

The necessary healthcare, which is used as a basis for EHIC, also includes health services that require prior agreement with the provider of healthcare services themselves such as e.g. dialysis, oxygen therapy, chemotherapy, special treatments for asthma, etc. In order for insurer to exercise those rights based on its EHIC, it is necessary before the arrival to apply for the required health services at the provider (hospital).

The requirement for the issuance of EHIC in Croatia is regular status in compulsory health insurance. Insured persons may submit a request in person at any location of CIHI, or via Internet application, on www.hzzo.hr, and pick up the card in person, in the final period of 8 days, at the CHIF location of their choice.

EHIC, as a rule, is issued for a one-year period and longer to expatriate workers and their families (two years) and to diplomatic representatives (four years).

If the insured person for some reason is not in possession of EHIC while located abroad, it may contact, in person or through the institution of the place of residence, directly CHIF for the issuance of the Certificate, which temporarily replaces EHIC. The Certificate shall be issued also in the event of theft, loss of EHIC or when the insured person of CHIF is without EHIC for some other reason.

EHIC does not cover the cost of the planned healthcare, healthcare costs used by private providers, and travel costs when returning to Croatia, after the occurrence of the insured event.

As already mentioned, the Directive 2011/24/EU expands the right to use necessary healthcare in other Member States and the private health service providers, but not on the basis of EHIC. If the care is used at private providers, after returning to Croatia a request for reimbursement may be submitted. If the following proceedings establish that health care used at a private provider was of essential nature, it is possible to

\textsuperscript{102} The Rulebook is published in “Narodne novine”, the Official Gazette of the Republic of Croatia, No. 153/11, and is also available on http://www.hzzo.hr/zdravstveni-sistem-rh/poveznice-na-nacionalno-i-eu-zakonodavstvo/pravilnici
refund incurred costs, but not more than the amount determined by CHIF general act for contracting entities CHIF, for the same health care.

4. Exercise of the right to health care during a residence on the territory of another EU Member State

The Regulation 883/04 prescribes the way how healthcare services is exercised by persons who, for example, work or are self-employed on the territory of one Member State, and having residence on the territory of another Member State, as well as for certain other categories of insured persons who are similarly related to two or more EU Member States. We will mention some of them.

4.1 Workers employed in the EU and their family members

Workers who are temporarily employed on the territory of another EU Member State (seconded workers), use urgent health care based on the EHIC, as well as their family members.

Unlike them, for a person who is employed or self-employed in one Member State, and is resident (permanent residence) in another Member State, the basic rule is that it is insured in the Member State of work (according to the principle of lex loci laboris). Therefore, such persons exercise full health care in the Member State where they work, but is entitled to full health care in the Member State of residence. For this purpose, the competent insurer from the state where they work issues a document S1 or certificate E106, which they declare to the insurer in the country of residence. However, the cost of health care in the country of residence is exercised at the expense of relevant bearer. The competent holder also issues EHIC. Family members are entitled to full medical care both in the state of residence and the state of insurance of the worker (insurance holder), based on the document S1 or certificate E109 issued to them by the competent holder of the worker.

4.2 Cross-border workers

A cross-border worker is a person who performs an activity as an employed or self-employed person in one of the EU Member States, and is domiciled in another Member State and which, as a rule, is returning to the country of residence daily or at least once a week. The cross-border worker is also entitled to health care in the country of employment and in the Member State of residence, at the expense of its insurer from the country of work. For this purpose, the insurer of the country of work issues document S1 or certificate E106 and EHIC. Family members of cross-border workers are also entitled to full health care in their state of residence, and for this purpose the country of insurance, which is the country of work of the insurance holder, issues document S1 or certificate E106.
4.3 Pensioners and their family members

A pensioner with residence in a Member State other than the Member State from which it is entitled to a pension, is entitled to full health care in the country of residence, and at the expense of the Member State from which it receives a pension. To this end, the relevant insurer of the Member State from which they receive pension shall issue document E 121 or certificate S1, which the pensioner will submit to the institution of residence, as well as EHIC. Family members of pensioners exercise their right to full healthcare services in the state in which they reside. For this purpose, the competent insurer of the pensioner issues them a document S1 or certificate 121 and EHIC.

5. Planned treatment

5.1 Planned treatment under Regulation 883/04 (in contractual health institutions in the EU)

Insured persons of a Member State which go to the planned treatment on the territory of another Member State, before leaving must seek permission from their relevant health insurance holder (Article 20, paragraph 1 of Regulation 883/04).

The authorization shall be granted if the treatment is included in the benefits provided for in the legislation of the Member State where the person resides and if it cannot be exercised within a medically justifiable time period, taking into account the current state of health of the person and the probable development of their illness (Article 20, paragraph 2 Regulation 883/04).

Along with the request the insured person is required to submit documentation proving medical indication for the requested treatment, proof of dates of scheduled treatment in one of the contracting healthcare institutions in Croatia, and available time and date in a contractual term health institution in one of the EU Member States (detailed documentation listed in Article 7 of the Rulebook).

Upon submitted request, medical assessment is made and a decision is issued in the administrative proceeding. In case of a positive decision, the insured person is issued a certificate E 112, which the person submits to the country where the treatment will be done, and pays only the costs of participation, if they are intended for insured persons of the country of treatment. The insured person is entitled to the reimbursement of transport and possible person accompanying the patient.

5.2 Planned treatment under the Directive 2011/24/EU (with private service providers in the EU)

In addition to Regulation 883/04, the approval of the planned treatment is regulated by the Directive 2011/24/EU, i.e., Article 28 of the Law, which transposes the provisions of the Directive into national legislation in Croatia. CHIF is always required to
check whether the applicant for prior approval satisfies the conditions for granting prior approval in accordance with the provisions of Article 20 of the Regulation 883/04 (with contracted providers), and if they met the conditions of the said Regulation, prior approval is given to these regulations, unless the insured person requires otherwise (Article 28, paragraph 4 of the Act).

In the case when the approval is issued in accordance with Article 28 of the Law, therefore, for treatment with private service providers, an insured person in another EU country shall always bear all costs, and upon return to Croatia, is entitled to compensation from the CHIF in accordance with Croatian tariffs for identical services. At the same time, the insured person is not entitled to reimbursement of transport costs, nor is entitled to additional costs (Article 31, paragraph 4 of the Law).

6. Coordination of maternal and parental assistance

Until the application of Regulations 883/04 and 987/09 on the system of maternity and paternity assistance in Croatia can be exercised in three cases. The first is when there is a cross-border element that includes at least two EU Member States, and one of which is Croatia, the other one is that the child to which the request relates is domiciled in one of the EU Member States, including Croatia, and the third one is that the child in question is a family member of the applicant.

The first issue that will appear is which state is competent for handling claims for maternity or parental support. The State Member in which the same person is employed, or where the activity is performed is competent to resolve the claims of employees or self-employed person. When a request for maternity or parental assistance is submitted by work inactive person (unemployed, outside the system of work), the legislation of the Member State where the person resides is applied.

In the case when it is established that Croatia is competent for processing an application for maternity or parental assistance, the request is handled according to the Croatian regulation that is the Law on maternity and parental assistance103. The only difference of the usual procedure is that when deciding it must be ensured that provisions of the Law do not discriminate in relation to regulations, i.e. that they are not contrary to the principles prescribed by regulations.

In the area of maternity and parental assistance the essential is principle of addition of periods of insurance and the principle of opportunity to export rights. The first principle allows the applicant when making decisions on entitlement to compensation taking into account the period of health insurance, employment, self-employment, or residence which is attained or achieved in another Member State, and to add it up with the same periods which are made in Croatia. The second principle states that cash

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103 The Law on maternity and parenting assistance is published in the “Official Gazette”, No 85/08, 110/08, 34/11 and 54/13.
payments will not be subject to any reduction, modifications, suspensions, withdrawals or seizure due to the fact that the beneficiary or family members reside in a Member State other that is different from the one whose legislation is applied on that person.

7. And at the end – recommendations

Preparations of Croatian institutions competent for the implementation of European legislation in the field of coordination of social security systems began in 2006.

Preparations included work in a series of working groups, drafting documents, change and harmonization of national legislation, and of the most important steps on the way we need to mention establishment of a working group to assist the negotiations in the chapter “2 - Freedom of Movement for Workers,” working groups that came out of it, multilateral negotiations and bilateral negotiations in the same area, the establishment of an interdepartmental working group, study tours, visits to foreign partners, seminars and various projects throughout the entire period of preparation, and, as an umbrella project, IPA and 2009 Twinning project (TP) “Strengthening the administrative capacity of competent authorities and institutions for implementation on the field of coordination of social security systems “, which was implemented by Croatia in cooperation with the Kingdom of Sweden.

What may be recommend to the competent social security institutions in Montenegro, during their preparations for the creation of a basis for the implementation of European legislation in the field of social security, is also the implementation of the twinning project and selection of partners that will be useful in the transfer of knowledge and experience, and timely involvement and training of regional units and the service of all the institutions involved, timely changes of regulations, reporting to citizens on their rights after joining the European Union and, of course, most importantly, close cooperation of all institutions involved in order to jointly overcome more easily all obstacles on the way to joining the European family.
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