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Editorial

The editors are pleased to present to the reader issue 2016/II of the Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

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We encourage the reader, also on behalf of the editorial board, to consider the PJIEL as a venue for publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and European law issues. The next formal deadline for submission of articles is 15 March 2017, though submissions are welcomed at any time.

THE EDITORS

Brexit: What now for Study Mobility between the UK and the EU?

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In the referendum held on 23 June 2016 the UK voted to leave the EU. This momentous change is unlikely to come to pass for some time, but has significant implications for study mobility between the UK and the EU. The article considers the legal position of UK national degree mobile students studying in EU member states and EU national degree mobile students studying in the UK, and how EU law developed to encompass and facilitate such mobility. Different ways in which the current position may change are then considered, depending on whether the UK does or does not remain in the EEA or adopts a Swiss style relationship with the EU. The focus then turns to credit mobility and in particular, credit mobility under the aegis of the Erasmus Programme. The development and operation of the Erasmus Programme is explained and again the prospects for the UK's continued participation in the Erasmus Programme are considered on the basis of differing potential post-Brexit relationships between the UK and the EU.

Keywords: Brexit – study mobility – degree mobility – credit mobility – Erasmus Programme – EEA – EFTA – Swiss FMP Agreement

1. Introduction

The vote on 23 June 2016 by the United Kingdom to leave the European Union ('Brexit') was, to most people, a very considerable surprise and shock. The implications, for the UK, Europe, and probably the world, are profound and wide-ranging, and may resound for many years. At the time of writing (August-September 2016), they are still largely unclear, and are likely to be so for some while yet. The eventual new relationship between the UK and the EU will have many strands to it. Higher education, and in particular, the UK's participation in the Erasmus Programme, will be one of those strands, but inevitably will not be negotiated in a vacuum and will be influenced by other aspects of the overall package deal which emerges.

Universities in the UK are already very exercised about the future funding of research projects which involve collaboration between UK universities and those elsewhere in the EU. There is also anxiety about the labour mobility of academic staff between the UK and the EU. Significantly, there is considerable concern about the implications at what might be called the entry level into higher education: that is to say, the implications for students. There are two strands to this: first, potential changes to the rights of UK students wishing to study for their whole degrees in universities in EU countries, and the parallel rights of EU national students wishing to study for their whole degrees in the UK (so called 'degree mobile' students), who currently make up around 5.5% of students in UK

universities (about 125,000 students),[1] and second, potential changes to the UK's membership of the Erasmus Programme, often been referred to as the EU's 'flagship' study mobility programme,[2] whereby, broadly speaking, students studying for their degrees at universities in Europe (whether or not EU nationals) can study for one or two semesters at universities elsewhere in Europe, within an administrative framework which provides considerable assistance, convenience, and financial advantage. Students who move to a different university to study there for part of their degree are termed, in the literature on study mobility, 'credit mobile' students.

The consequences of Brexit for higher education are causing particular concern and distress because the voting pattern of those involved in UK higher education was so different from the overall result: it is thought that over 90% of those working in higher education in the UK who were eligible to vote (15% of UK higher education staff being EU nationals, who were not eligible to vote in the referendum)[3] voted for the UK to remain in the EU.[4] Furthermore, 81% of those still in full time education (the vast majority of whom will be in higher education) voted to remain as did 57% of those across all age groups with a university degree, and 64% of everyone with a higher degree (master's level or above).[5] University vice-chancellors and academics made their pro-EU views public.[6] A YouTube video by Professor Michael Dougan of Liverpool University in which he explained clearly and presciently the difficulties which the UK would face if they had to negotiate Brexit, received over seven million views.[7] The Minister for Universities and Science, Jo Johnson (brother of the most famous or notorious Leave campaigner of all) also encouraged a vote to remain as staunchly as he could,[8] as did 14 of his predecessors in the post.[9] Arguably most poignantly, given that the young are the people who expect to have longest to live with the decision to leave the EU, three quarters, 75%, of all those aged 18-24 voted to remain in the EU, a statistic which has left many younger UK voters feeling very bitter towards their elders, the proportion of whom voted to leave increased with age.[10] Much ink has already been spilt on this, many tears shed, and numerous families nurse deep intergenerational wounds: it is perhaps the issue concerning the referendum which has engendered the most lingering bitterness in the UK, apart only from the widely held view that the Leave campaign bolstered its support with the help of powerful and enticing untruths.

[1] M Boxall: *What will Universities Mean for Brexit?* available from http://www.paconsulting.com/newsroom/expert-opinion/he-what-will-universities-mean-for-brexit-26-june-2016/ (21 August 2016).

[2] For example, L Ritto: *The Erasmus Programme – An EU Success Story*, available from: http://ispdnetwork.org/2013/05/the-erasmus-programme-an-eu-success-story/ (22 August 2016). There are many other instances of the use of this phrase.

[3] A Corbett: *Brexit was a Huge Shock for Universities. Now We Must Regroup and Deepen our European Links*, available from: http://blogs.lse.ac.uk/impactofsocialsciences/2016/07/08/brexit-was-a-huge-shock-for-universities-now-we-must-regroup-and-deepen-our-european-links/ (18 August 2016).

[4] H Hotson: *The Stars Are Still Aligned*, Times Higher Education (London, 7 July 2016).

[5] M Ashcroft: *How the United Kingdom Voted on Thursday…and Why*, 24 June 2016, available from: http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/ (15 August 2016).

[6] University Vice-Chancellors: *EU Referendum: An Open Letter to UK Voters from the Leaders of 103 British Universities*, The Independent, 20 June 2016, available from: http://www.independent.co.uk/news/uk/politics/eu-referendum-an-open-letter-to-uk-voters-from-leaders-of-96-british-universities-a7092511.html (23 August 2016).

[7] P Yeung: *Brexit Campaign was 'Criminally Irresponsible', says legal academic*, The Independent, 2 July 2016, available from: http://www.independent.co.uk/news/uk/home-news/brexit-eu-referendum-michael-dougan-leave-campaign-latest-a7115316.html (20 August 2016). The YouTube video referred to can be viewed at: https://www.youtube.com/watch?v=USTypBKEd8Y.

[8] J Johnson: *Students, Remember: Your EU Vote Will Affect Your Life Chances for Years to Come*, The Guardian 20 June 2016, available from: https://www.theguardian.com/education/2016/jun/20/students-eu-vote-universities-funding-jo-johnson (17 August 2016).

[9] A Corbett (n3).

[10] H Goulard: *Britain's Youth Voted Remain*, available from: http://www.politico.eu/article/britains-youth-voted-remain-leave-eu-brexit-referendum-stats/ (24 August 2016).

Against this backdrop, this article will focus on the changes to the arrangements governing study mobility of UK students in the EU and EU students to the UK which may arise as a consequence of Brexit. The consequences for degree mobility and for credit mobility will be explored separately. It should be noted that Jo Johnson, the UK Minister for Universities and Science mentioned above, has confirmed that there will be no changes to the current position for UK students studying abroad on Erasmus, or for EU students studying in the UK, in the academic year 2016-7, and that all EU students eligible for UK student finance currently enrolled on a degree in England who start their degree in the academic year 2016-7 will remain entitled to such finance for the duration of their degree, even if the UK leaves the EU during that time.[11] Similar undertakings have been provided in respect of EU students studying in Scotland and Northern Ireland.[12] As will be well known, there is currently no projected date for the UK to leave the EU as there is expected to be a lengthy negotiation process about the 'divorce' between the UK and the EU which will commence once the UK triggers the process by invoking Article 50 of the Treaty on European Union, following which the UK is likely to leave the EU after two years. There will then be further discussions about the future relationship between the EU and the UK. The UK government has already stated that it will not be triggering Article 50 before the end of 2016 (and indeed has given assurances to the UK Supreme Court about this in the context of litigation concerning the appropriate procedure to trigger Article 50) and there has been some speculation in the UK press that Article 50 may well not be triggered until late 2017 or even later.[13]

2. Degree Mobile Students

2.1. Background and the Current Position

In many ways, universities have always been profoundly international institutions. Many of the best known are older than the nation states in which they are now situated (Bologna, Salamanca, Prague, Heidelburg, Uppsala, St Andrew's, and many others, were, when founded, in different countries from those in which they are today, the borders and identities of many nation states having come into existence, disappeared, or altered on numerous occasions over the centuries).[14] Student mobility has a long history: it is said that in the twelfth century, approximately 25,000 students at university in Timbuktu in Mali came from elsewhere in Africa.[15] Students and other academics often acquired special privileges which facilitated their travel and study away from home, for example those bestowed on academics by the Holy Roman Emperor Frederick I Barbarossa in the *Privilegium scholasticum* in or around 1155.[16] Hundreds of years later, as nationalism took root in European society, universities often

[11] Department for Business, Innovation and Skills and Jo Johnson MP, Statement on higher education and research following the EU referendum, 28 June 2016, available from: https://www.gov.uk/government/news/statement-on-higher-education-and-research-following-the-eu-referendum (23 August 2016).

[12] Student finance arrangements in England and Wales are different from those in Scotland and Northern Ireland (in Scotland, home and EU students do not pay fees) but similar assurances have been made in respect of EU students and their eligibility for financial support. Student Awards Agency Scotland, 'EU Nationals and Student Funding in Scotland: the UK EU referendum result,' available from: http://www.saas.gov.uk/_forms/eu_referendum_guidance.pdf (8 September 2016); Student Finance Northern Ireland, 'Students from other EU countries', available from: https://www.nidirect.gov.uk/information-and-services/student-finance/students-other-eu-countries (8 September 2016).

[13] D MacShane: *We Won't Trigger Article 50 Until After 2017 – and that Means Brexit May Never Happen at all*, The Independent, 19 August 2016, available from: http://www.independent.co.uk/voices/brexit-article-50-leaving-eu-wont-happen-after-2017-european-elections-france-germany-a7198736.html (24 August 2016).

[14] H Hotson (n4).

[15] O Olajide: *The Complete Concise History of the Slave Trade* (AuthorHouse 2013) 18.

[16] H Hotson (n4).

became cradles for the development of national citizenship, nurseries for the educating of national citizens in national languages, but even at the height of this period they retained their international outlook and welcomed scholars from abroad.[17]

Today, public universities in Europe are largely financed and administered according to national law, though the organisation of the education they offer has in recent years been considerably affected by the (intergovernmental) Bologna Process, closely intertwined with the EU but normatively outside it. This has encouraged greater compatibility between education systems, manifested by convergence between different countries on degree length, quality assurance systems, and comparability of standards. Freedom of movement as an EU principle has combined with cheap air travel to encourage some of those of student age to decide to undertake university study in a country other than their own. In making this choice, students may be encouraged by the opportunity to enhance their language skills in a more widely spoken language than their mother tongue (particularly English with its global appeal) or by perceptions of the varying levels of prestige which attach to different European universities. The CJEU has taken up the baton for them and over the years has, significantly for this generally impecunious sector of society, divined rights for them to financial support, both with fees where payable, and for living costs.

This is not the place for a full exposition of the development of the rights of students to enter and reside in a different EU country to attend university there, or in respect of their entitlement to financial support either from their own country or the country in which they chose to attend university. There is a considerable literature on this topic.[18] Suffice it to say that the starting point was free movement of workers, and that in the early days of the Community free movement of students, the not yet economically active, was not explicit: indeed, that the Community could act in the area of education at all was not established until 1974 and the case of *Casagrande*,[19] rights to reside in another EU Member State for the purposes of university study not being clarified until the *Gravier*[20] and *Blaizot*[21] cases in the mid 1980s. Relying on the non-discrimination principle, the CJEU fashioned the right for an EU national student wishing to study in a different EU country not to be charged higher fees than nationals of that country, equality of treatment in access to financial assistance, whether in the form of grants or loans, with such fees being the corollary. However, the introduction of EU citizenship in the Maastricht Treaty and the CJEU's imaginative weaving of that landmark concept with the longstanding non-discrimination principle to fashion equal rights to numerous benefits and entitlements proved a watershed. The essentially illogical and politically driven decision that enrolment fees to universities (and national provision for financial support to students to pay such fees) came within the scope of the non-discrimination principle, whereas financial support for maintenance did not, was overturned in the *Bidar* case:[22] this led to the considerable widening of the entitlement of EU citizen students to equality of treatment in respect of financial support for maintenance from the country in which they were studying, on condition only that the students concerned had a 'genuine link' with that country,

[17] R Anderson: *European Universities from the Enlightenment to 1914* (Oxford University Press 2004), Ch 1.

[18] See, for example, S Garben: *EU Higher Education Law: The Bologna Process and Harmonisation by Stealth* (Walters Kluwer, Alpen aan den Rijn 2011), Ch 4; M Dougan: *Fees, Grants, Loans and Dole Cheques: who covers the costs of migrant education within the EU?* (2005) 42 Common Market Law Review 943; M Dougan: *Cross border educational mobility and the exportation of student financial assistance* (2008) 33(5) European Law Review pp. 723-738, and many others.

[19] *Casagrande v Landeshauptstadt München* [1974] ECR 00773 (9/74).

[20] *Gravier v Ville de Liège* [1985] ECR 00593 (289/83).

[21] *Blaizot v University of Liège* [1988] ECR 389 (24/86).

[22] *Bidar v London Borough of Ealing* [2005] ECR I-02119 (C-209/03).

subsequently interpreted by the *Förster* case as able to be satisfied by no more than a period of residence in the host country.[23]

The position of the EU student now who wishes to study in another EU country is almost the same as that of a national of the country in which she wants to study ('the host country'), in that she pays the same fees (if any, the charging of fees or not being matter for national governments and outside EU competence) as a national of the host country would have to pay, is entitled to any financial support for those fees offered by the host country on the same basis as nationals of the host country (*ie.* is entitled to the same grants or loans on the same terms) and may well be entitled also to grants or loans for her maintenance, provided only that she has lived in that country for a few years. Further case law makes clear that some degree mobile EU students may in addition be entitled to financial support from their home country.[24] The EU has had a remarkable impact on the practical ability of EU students to study in other EU Member States given how limited its formal power is in the field of education, even after the limited competence to support and supplement the action of the Member States bestowed on it in the Maastricht Treaty (then Article 126 EEC, now 165 TFEU). In truth, this new Treaty article was a recognition and acceptance of the 'competence creep' whereby the CJEU used its magic in the cases mentioned above and others, to conjure up rights in the sphere of education where it could just as easily have decreed that the EU had no power to act.

The significance of the position of EU national students wishing to study for a degree in another EU country is therefore that it is highly advantageous when compared with the position of non-EU students wishing to study for a degree in an EU country. Not being within the scope of the EU non-discrimination principle, non-EU national degree mobile students may be, and often are, charged much higher fees than home or EU national students for the same course at the same university, and are not usually entitled to financial support, in the form of loans or grants, from the EU country in which they are studying, for those fees or for maintenance. Since EU law does not require that non-EU students be treated in this regard equally with EU students, the question of whether non-EU students are therefore entitled to such finance is a matter of policy for national governments to decide. Studying in an EU country for a non-EU national is therefore generally a considerably more expensive proposition than for an EU national. The UK's position is that non-EU students studying in the UK are not entitled to access the loans for fees and maintenance which are available to UK and EU nationals, UK universities are permitted to charge higher fees from non-EU national degree mobile students; many UK universities utilise this freedom enthusiastically to enhance their income.

So what will be the impact on this of Brexit? How will the position of EU students studying in other EU countries, so privileged compared with that of non-EU students studying in EU countries, and which currently benefits UK students studying in EU countries and EU students studying in the UK, be changed when the UK leaves the EU? The answer is that it depends. It depends largely on the relationship between the UK and the EU once it leaves the EU, something about which there has so far been considerable speculation and, at the time of writing, virtually no clarity. The following section therefore considers three possible relationships which might pertain between the EU and the UK after Brexit, and the likely position of UK and EU degree mobile students under each of them. Of course, it is possible that the relationship eventually negotiated between the EU and the UK will be entirely bespoke and not in line with any of the arrangements hypothesised here.

[23] *Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-08507 (C-108/07).

[24] See joined cases *Morgan v Bezirksregierung Köln* and *Bucher v Landrat des Kreises Düren* (C-11/06 and C-12/06).

2.2. Possible Relationships between the EU and the UK after Brexit

2.2.1. If the UK Remains in the Single Market after Brexit, as an EEA member

The UK might negotiate with the EU to remain a member of the EU Single Market, even though no longer an EU Member State. There are essentially two ways in which this could happen. First, the UK could remain inside the European Economic Area (EEA). The EEA brings together all[25] EU Member States and three of the states which belong to the European Free Trade Association (EFTA): Norway, Iceland and Liechtenstein (the EEA EFTA states). The EEA Agreement[26] is an international agreement which provides that the EEA EFTA states participate fully in the Single Market, integrating all EU legislation relevant to the Single Market, with the result that that there is uniform application of such law throughout the EEA and all EU Member States and EEA EFTA states can participate fully in the Single Market. The four freedoms, free movement of goods, capital, services and persons, are the cornerstones of the agreement, but the EEA Agreement also provides for co-operation in various policy areas, including education (Article 1(2)(f) and Article 78).[27]

The second way in which the UK could remain a member of the Single Market would be to follow the approach taken by Switzerland. Switzerland is also an EFTA state, but whilst part of the Single Market for most of its industries, is not part of the EEA, having chosen a different relationship with the EU. This is addressed below (2.2.3).

If the UK were to remain a member of the EU Single Market by virtue of entering into the EEA Agreement and thereby continuing its membership of the EEA, then along with the EEA EFTA states, UK nationals would enjoy essentially the same free movement rights throughout the EU as EU citizens. Significantly for degree mobile students, the right of residence in other EU Member States for EU citizen students granted by the Citizens' Directive 2004/38 (CD) Article 7(1)(c) is granted to EEA national students by virtue of the extension (with certain adaptations) of the CD to EEA EFTA states by EEA Joint Committee Decision 158/2007.[28] As explained above (2.1), CJEU case law provides that this combines with the right to equal treatment in Article 24 CD to entitle EEA nationals to parity of treatment with EU citizens as students, with the result that EEA EFTA state nationals have the same right to move to and reside in other EEA or EU countries for the purposes of study as do EU nationals, must only be charged the home/EU student fee rate and not any 'international' rates charged to non-EU students, and are entitled to access any financial support (whether grants or loans) for fees, and for students who satisfy the genuine link/residence requirements, for maintenance support, provided by the country in which they are studying in the same way as nationals of that country or EU nationals are entitled to financial support from their host country.

[25] Art. 28 of the EEA Agreement (see n26) provides that when a state becomes a member of the EU, it shall also apply to become party to the EEA Agreement.

[26] Agreement on the European Economic Area, OJ No L1, 3.1.94 and EFTA states' official gazettes, as amended.

[27] This enables the EEA EFTA states to participate in a number of EU programmes (Art 80), such participation being based on seven year commitments which include agreement on the contributions to be made by the EEA EFTA states to the EU's Multiannual Financial Framework, of which the current version covers 2014-2020. The EEA EFTA states do not all participate in all of the available EU programmes; for example, only Iceland and Norway participate in Horizon 2020 and Creative Europe, but all three of them participate in Erasmus+, prospects for the UK's future membership of which are considered later in this article.

[28] Directive 2004/38 of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, OJ L 158; EEA Joint Committee Decision 58/2007, 2008 OJ L124/20.

It follows that if after Brexit the UK were to continue to participate fully in the Single Market on the basis of joining first EFTA, and then the EEA, the position of UK students wishing to study for their degrees in universities in other EU member states or in any of the EEA EFTA states, and the position of EU and EEA EFTA state nationals wishing to study in the UK, would be unchanged.

However, after Brexit, the UK will no longer be an EU Member State. To remain a member of the EEA, the UK would need to become a member of EFTA. The UK was one of the original members of EFTA but left EFTA on joining the EEC in 1973. It is by no means a certainty that the current EFTA members (the three EEA EFTA states and Switzerland) would be prepared to allow this. Any one of them would have a veto, and might choose to exercise it, on account of the considerable shift in dynamics which UK membership would entail: Norway recently suggested that it might well veto an application for EFTA membership by the UK.[29]

If however this hurdle could be overcome, and the UK were to be permitted to become an EFTA member state once again, to participate fully in the Single Market it is to be expected that the UK would also have to join the EEA by signing the EEA Agreement. This would require the agreement of all of the EU Member States and of the EEA EFTA states. Finally, and perhaps most significantly, continued UK membership of the Single Market as an EEA member further presupposes that it would be acceptable to the 17 million members of the UK electorate who voted to leave the EU to be party to an arrangement which essentially entails paying into the EU budget and implementing much EU legislation with minimal input into it, these arrangements being at the heart of the EEA Agreement. This is hardly in line with one of the most popular 'Leave' campaign slogans, 'Take Back Control'. Furthermore, given that the EEA Agreement entails freedom of movement of workers and self-employed persons (Arts 28 and 30), membership of the EEA as it stands would fly in the face of 'Leave' voters, given that curtailing freedom of movement between the UK and the EU was, according to many analyses, a potent reason for their voting to leave the EU: over one third of Leave voters said that their main reason for voting Leave was so that the UK would regain control over immigration.[30] Whilst it is possible for EEA states to impose some restriction on free movement if 'serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising',[31] decisions to invoke this power are subject to review by the EEA Joint Committee,[32] and the indeterminate and limited control over immigration permitted by this Article would be unlikely to satisfy Leave voters; as such it is unlikely that the UK government would think it the appropriate means of controlling migration of EU nationals to the UK. It follows that it seems unlikely that the UK government will wish to sign up to the EEA Agreement.

Therefore, whilst full continued membership of the Single Market would be much the most acceptable Brexit option for Remain voters, at the time of writing, it seems unlikely that this outcome will come to pass.

2.2.2. If the UK does not Remain in the Single Market after Brexit

Let us suppose that after Brexit the UK does not remain in the Single Market. Under this scenario, UK students wishing to study for their degree in an EU Member State, and EU national students wishing to

[29] P Wintour: *Norway May Block UK Return to European Free Trade Association*, The Guardian, 9 August 2016, available from: https://www.theguardian.com/world/2016/aug/09/norway-may-block-uk-return-to-european-free-trade-association (3 September 2016).

[30] M Ashcroft (n5).

[31] EEA Agreement (n26) Art. 112.

[32] EEA Agreement (n26) Art. 113.

study in the UK, would probably be subject to the same regime as students from non-EU Member States. That is to say, they might have to obtain visas for study, depending on the national immigration law of the host state, and could be charged higher fees than EU national students, as they would no longer be protected by the EU non-discrimination principle. They would not have any right under EU law to entitlement to financial support for fees or maintenance from their host state.

Since EU law would not cover this situation, it would, in theory, be open to EU Member States to choose to treat UK students wishing to study at universities in their countries in the same way as they treat their own nationals and (by virtue of EU law) have to treat EU national students, and similarly possible for the UK to choose to treat EU national students as it does UK national students. In the absence either of a reciprocal agreement between the EU and the UK to this effect, or of bilateral agreements between the UK and individual EU Member States, this cannot be relied on.

2.2.3. If the UK's Relationship with the EU after Brexit is similar to the EU's relationship with Switzerland

Switzerland is an EFTA member, but it is not an EEA member. Instead, its relationship with the EU is governed by a series of over 120 sector specific bilateral agreements which give it access to the Single Market for most but not all of its industries. One of these agreements comprises a comprehensive regime for free movement of persons between the EU and Switzerland which is essentially similar to the arrangement between the EEA EFTA states and the EU (the EU Swiss FMP Agreement).[33] This Agreement extends to persons not exercising an economic activity, such as students.[34] Therefore, the position of EU national students wishing to study in Switzerland, and Swiss students wishing to study in EU Member States, is, at the time of writing, in broad terms fairly similar to the position regarding that applying throughout the EU. Since the EU Swiss FMP Agreement extends to nationals of EEA EFTA states, the position is similar throughout the EEA and Switzerland. It follows that if after Brexit the UK were to enter into a relationship with the EU similar to Switzerland's relationship with the EU, and included in this relationship was a sectoral agreement covering free movement of persons including students, the position of EU, EEA and Swiss students wishing to study for their degrees in the UK, and UK students wishing to study for their degrees in the EU, the EEA or Switzerland, would remain largely as it is at the current time.

However, it is well known that the EU Swiss FMP Agreement is currently under strain, following a Swiss referendum in 2014 on 'mass immigration', aiming to limit immigration by imposing quotas, which prevented the Swiss government from signing a protocol (the Croatia protocol) to the EU Swiss FMP Agreement to extend unrestricted free movement rights to Croatian nationals following the accession of Croatia to the EU on 1 July 2013. The Swiss government is constitutionally obliged to implement the referendum result by 9 February 2017. Significantly, the various agreements between Switzerland and the EU are co-dependent. The EU has reacted angrily, and made it clear that if Switzerland does indeed pass legislation to implement the referendum result, it will trigger the 'guillotine' mechanism in the EU Swiss FMP Agreement[35] which will terminate a package of agreements between the EU and Switzerland. In the meantime, the EU has suspended Switzerland's membership of Erasmus + and reduced Switzerland's participation in the EU's Horizon 2020 research

[33] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, [2002] OJ L 114.

[34] EU Swiss FMP Agreement Art 6 and Annex 1, Art. 24(4).

[35] *Ibid*. Art. 25.

programme to 'partially associated country status', with the prospect of complete ejection from that programme also if the Croatia protocol is not ratified.[36]

The lesson of the Swiss free movement referendum saga for the UK is that if, as seems likely, the UK wishes to make gaining control over immigration a very high priority after Brexit, the prospects for a relationship with the EU along similar lines to that enjoyed by Switzerland would seem to be remote as the EU would probably insist on compliance with the principle of free movement of persons between the EU and the UK.

3. Credit Mobile Students

3.1. Background

As stated above, there are two basic forms of study mobility. So far, consideration has been given to the position of 'degree mobile' students. 'Credit mobile' students are students who study for their degree in a university in but who study in a university in a different country for part of their degree, ideally earning credit towards their home degree when they do so: hence the term 'credit mobile'. The university in which they are registered for their degree and where they study for most of this time is generally their home country, but need not be: it follows that it is possible for degree mobile students to become, in addition, credit mobile students for a period of time. Many students do not want to go abroad for the whole of their studies, or indeed they may positively want to study for their degrees in their home country, but appreciate, or can be persuaded of, the advantages to them in studying for what may psychologically seem a more manageable period of time. For many students, it is just too big a step to go abroad for three or four years; they may still be quite young, they may have ties which make it hard for them to be abroad for that long. Going abroad for just a few months may be an easier prospect for them to cope with, and they may still enjoy many of the benefits of studying abroad – seeing a different way of life, experiencing a different style of study, improving foreign language skills, enhancing intercultural competences.[37]

Credit mobility comes in various forms: some universities will have interinstitutional agreements with universities in other countries whereby they each agree to accept a certain number of students from each other for a semester or a year, often with fee waivers, and sometimes supported by scholarships to assist with travel or living costs. Some organisations offer scholarships to enable such study mobility.[38] Sometimes students themselves organise semesters abroad: so called 'study abroad' students, whose liability to pay fees in countries where they are charged makes them an increasingly wooed group and whose mobility may be promoted by agents.[39] However, there is obvious convenience in an established programme which undertakes much of the organisation and offers a framework within which to operate.

[36] M Hengartner: *Horizon 2020: Not Without Switzerland?* International Innovation,7 June 2016, available from: http://www.internationalinnovation.com/horizon-2020-not-without-switzerland/ (4 September 2016).

[37] There is a huge literature on this topic: see, for example, E Murphy-Lejeune: *Student Mobility and Narrative in Europe*, Routledge, Abingdon 2002; M Byram & F Dervin (eds): *Students, Staff and Academic Mobility in Higher Education*, Cambridge Scholars Publishing, Newcastle 2008; B Feyen & E Krzaklewska (eds): *The Erasmus Phenomenon – Symbol of a New European Generation?* Peter Lang GmbH, Frankfurt 2013; though there are many other examples.

[38] See, for example, for UK students, *Funding Your Studies*, British Council 2016, available from: https://www.britishcouncil.org/study-work-create/practicalities/funding-studies (4 September 2016).

[39] See, for example, *The Use of Overseas Agents to Recruit Students*, European Association for International Education blog post, available from: http://www.eaie.org/blog/the-use-of-agents/ (4 September 2016).

3.2. Credit Mobility EU Style: The Erasmus Programme

3.2.1. The History of the Erasmus Programme

The genesis of the Erasmus Programme is well known and there is a large literature setting this out in detail.[40] The following is only a short summary of its early history. In the mid 1970s, the Community initiated 'Joint Study Programmes' which promoted short periods of university study in a different country. Also in the 1970s, Community politicians began to discuss the desirability of a 'European identity', partly to address what was seen as a deficit in the democratic accountability of the Community. Student mobility was seen as one of the potentially fruitful seedbeds of this project, and the Joint Study Programmes one of the initiatives intended to make these aspirations a reality.

The 1980s saw a period of what was termed 'Eurosclerosis'. The idea of a European identity seemed a distant mirage. European Parliamentary elections in 1984 had a truly dismal turn out and it was decided that since democracy in that form was apparently ineffective in galvanising people in Europe into perceiving themselves as a European People, there needed to be other means. The Committee on a People's Europe was therefore established, known as the Adonnino Committee, under the chairmanship of MEP Pietro Adonnino. This committee reported in 1985 with a raft of recommendations, one of which was to build on the Joint Study Programmes by encouraging students to pursue part of their studies in other countries.[41] The focus of this project shifted as the Community became over the next year or two much more directed towards the completion of the Single Market, and what was to become the Erasmus Programme was refocused as part of this project: 'helping young people, in whose hands the future of the Community's economy lies, to think in European terms'. The process: some sort of European identity or consciousness, the vessels for change: the educated youth, the outcome: economic advancement.

The programme was named Erasmus after Desiderius Erasmus, the fifteenth century Dutch philosopher and scholar who studied in many countries; 'Erasmus' is an acronym for EuRopean Community Action Scheme for the Mobility of University Students. A complex legal battle preceded the establishment of the Erasmus Programme in 1987, concerning the proper Treaty base for the Decision by which it was established.[42]

3.2.2. Operation of the Erasmus Programme

The beauty of the Erasmus Programme, as is well known, is that it provides a comprehensive framework within which credit mobile students can operate. Under the Erasmus Programme, students registered in a university in one of the Erasmus Programme countries, study abroad in another European university for one or two semesters, remaining entitled to any financial support they would be if at their home university, but also entitled to a non-means tested, non-repayable Erasmus grant to assist partially with

[40] See, for example, S Garben (n18); A Curaj and others (eds): *European Higher Education at the Crossroads. Part 1*, Springer, Dordrecht 2012; J Field: *European Dimensions. Education, Training and the European Union*, Jessica Kingsley Publishers, London 1998; F Maiworm & W Steube & U Teichler: *Learning in Europe: The ERASMUS Experience*, Jessica Kinglsey Publishers, London 1991; again, there are many other examples.

[41] Report to the European Council 29 and 30 March 1985 from the ad hoc Committee on a People's Europe, Offprint from the Bulletin of the EC 3-1985, available from: http://ec.europa.eu/dorie/fileDownload.do (4 September 2016).

[42] Council Decision 87/327/EEC of 15 June 1987 adopting the European Community Action Scheme for the Mobility of University Students (Erasmus), OJ L166 25 June 1987.

the costs of living abroad, with additional funds payable to disadvantaged students.[43] Erasmus students do not pay fees to their host university. Their host university commits in their Erasmus Charter to supporting them in finding accommodation.[44] Whilst abroad, students are meant to earn credits for their studies there which count towards their home university degree by virtue of the European Credit Transfer System (ECTS). This was set up in the context of Erasmus to facilitate the transfer of credit for modules studied abroad on the basis that Erasmus students study modules which their home university is happy to accept towards their degree, though in practice this is not always the case and the ECTS credits earned during an Erasmus study period are not always accepted by the returning student's home university.

All EU Member States are full members of the Erasmus Programme, known as Programme countries. However, whilst there are currently 28 EU Member States, there are in fact 33 countries which participate fully as Programme countries in the Erasmus Programme in its current manifestation, Erasmus+, which runs from 2014-2020: the 28 EU Member States; the EEA EFTA states, Norway, Iceland, Liechtenstein; and Turkey and the Former Yugoslav Republic of Macedonia. Switzerland's membership of the Erasmus Programme is currently suspended for the reasons explained in 2.2.3 above. Students registered at a university in any of these 33 countries can, with the agreement of their home university, study under the Erasmus Programme for one or two semesters at a university in another Erasmus Programme country, provided their home university has an interinstitutional Erasmus agreement with the university abroad. The student does not have to be a national of the country in which he/she is studying. By 2013, 3,000,000 university students had participated in the Erasmus Programme since its inception, and in 2014 alone over 300,000 students enjoyed an Erasmus study period.[45]

3.2.3. The UK's Participation in the Erasmus Programme

The UK, as an EU Member State, is currently a fully participating Erasmus Programme country, and universities in the UK send and receive Erasmus students. The UK is a net recipient of Erasmus students, being a popular destination owing to the global prestige of its universities and the fact that English, in which its courses are taught, is the most common second language in the world.[46] UK students have historically been reticent about studying abroad on Erasmus, partly because English bachelor's degrees generally only last three years so there is less time to incorporate a study mobility period, and partly because of the well-known weakness of UK nationals with foreign languages: the corollary of speaking a globally widespread language. British Erasmus students are overwhelmingly comprised of students studying modern languages at UK universities.[47] The reticence of UK students is ironic given that the genesis of Erasmus owes much to a British diplomat to the EEC in Brussels, Dr Hywel Ceri Jones, who

[43] Higher education study or work abroad grant rates 2016-7 rates, available from: https://www.erasmusplus.org.uk/higher-education-study-or-work-abroad-grant-rates-2016-17 (4 September 2016). This sets out the rates payable to Erasmus students registered at a UK university, such payments being administered by the UK Erasmus National Agency, the British Council, which receives funding for this purpose from the Commission. However, rates payable by different countries can vary considerably.

[44] Erasmus Charter for Higher Education 2014-2020, available from: https://ec.europa.eu/education/opportunities/higher-education/doc/he-charter_en.pdf (4 September 2016).

[45] European Commission: *Who is the 3,000,000th Erasmus Student?* available from: https://ec.europa.eu/education/tools/erasmus-3-million_en.htm> accessed 5/9/16; Erasmus statistics from 2013-4, available from: https://ec.europa.eu/education/tools/statistics_en.htm (5 September 2016).

[46] M Holloway: *Second Languages Around the World*, 8 September 2014, available from: http://www.movehub.com/blog/global-second-languages (5 September 2016).

[47] British Council, *Record Number of UK Students Go in Europe with Erasmus'* 16 November 2012, available from: https://www.britishcouncil.org/organisation/press/record-number-uk-students-go-europe-erasmus (5 September 2016).

went on to become Director-General for Education at the Commission. However, there has been an increase in British students studying abroad under Erasmus over recent years: between 2007 and 2013 the number of British Erasmus students doubled from 7500 to 15000.[48]

3.2.4. Participation of the EEA EFTA States and of EU Candidate Countries in the Erasmus Programme

Given that there are currently 33 Programme countries which participate fully in Erasmus, the inclusion of five countries which are not EU Member States raises the question as to whether the UK could after Brexit continue to participate in the Erasmus Programme. Universities in the UK are very keen it should.[49] The inclusion of the EEA EFTA states suggests that if the UK were to re-join the EFTA and thereby remain a member of the EEA, its position would probably be unchanged and it would continue to be a full Programme member of Erasmus. As already noted (2.2.1), the EEA Agreement provides for co-operation in various policies, including education. This enables the EEA EFTA states to participate in a number of EU programmes, such participation being based on seven year commitments which include agreement on the contributions to be made by the EEA EFTA states to the EU's Multiannual Financial Framework. For 2014-2020 these include Erasmus+. This means that if after Brexit the UK were to become an EEA EFTA state, it is to be expected that it would continue to participate in the Erasmus Programme as before. This would include having to contribute to it as set out in Article 82 of the EEA Agreement.

However, it is evident from the fact that the Erasmus+ Programme has 33 full Programme members, that full participation in the Erasmus Programme is not confined to EU Member States and EEA EFTA states. The 33 Programme members, which participate fully in Erasmus, include Turkey and the FYR of Macedonia. These countries are neither EU Member States nor members of the EEA, nor of EFTA. So how is it that they are participating in the Erasmus+ Programme? And might it provide a glimmer of hope that the UK might be able to continue to participate in Erasmus after Brexit, even if the UK does not become an EEA EFTA state?

To understand this, it needs to be noted that there are in fact two levels of participation in the Erasmus+ Programme. Those countries which participate fully in all parts of the programme are termed Programme countries. However, many countries in the world can participate in some parts of the programme or in more restricted ways, and these are termed Partner countries.[50] Partner countries participate to different extents with the Erasmus Programme, with those geographically closer to the EU and who are candidate countries for EU membership tending to have greater levels of participation. This is key. Turkey and the Former Yugoslav Republic of Macedonia are EU candidate countries and participation in Erasmus+ is expected to 'contribute towards upgrading of the institutional capacities as well as the personal and professional development of all actors in the field of education, training, youth and sport.'[51] In the run up to the commencement of the Erasmus+ Programme from 2014-2020, Turkey

[48] E Vulliamy: *Erasmus Scheme May Exclude British Students After Brexit,* The Guardian, 24 July 2016, available from: https://www.theguardian.com/education/2016/jul/23/erasmus-scheme-exclude-british-students-brexit (5 September 2016).

[49] See, for example, K Burnett: *Life After Brexit – What Next for British Universities?* Times Higher Education, 24 June 2016, available from: https://www.timeshighereducation.com/blog/life-after-brexit-what-next-british-universities (5 September 2016).

[50] Erasmus+ website, *Participating Countries*, available from: https://www.erasmusplus.org.uk/participating-countries (5 September 2016).

[51] Independent.mk, the Macedonian English language news agency: *Macedonia officially joined the Erasmus Plus Program*, 26 May 2014, available from: http://www.independent.mk/articles/5439/Macedonia+Officially+Joined+the+Erasmus+Plus+Program (25 August 2016).

and the Former Yugoslav Republic of Macedonia each had to confirm to the Commission that they had satisfied certain internal legal requirements for participation in the Erasmus+ Agreement, in accordance with Article 5 of the Agreement.[52] Their status as Erasmus+ Programme countries means that they enjoy all the associated rights and duties equally with the EU Member States. Notably, this includes the obligation to contribute to the Erasmus+ budget.[53] The other EU candidate countries (Serbia, Albania, Montenegro) are not blessed with full Programme country status in Erasmus+ Programme but participate as Partner countries.

It follows from this that full participation in the Erasmus+ Programme is not limited either to EU member states, or to EEA EFTA states, but extends to states which are neither. It is therefore possible that after Brexit the UK could continue as a full Erasmus Programme member, which would mean no change in the current position of Erasmus student mobility between the UK and other Erasmus+ Programme countries. Certainly 'no change' is the outcome fervently desired by UK universities, but whether it can be the eventual outcome it is too early to predict, as it will depend on the highly complex negotiations between the UK and the EU which have not even commenced yet.

The UK would, however, clearly not be an EU candidate country, and therefore if after Brexit it does not remain a member of the EEA, continued full membership of the Erasmus Programme would not fit the pattern of other fully participating countries, who if not EU member states, have a formal close relationship with the EU (such as the EEA EFTA states, and such as formerly, Switzerland, but see 3.2.5 below), or are aspiring to become EU member states. But it is not impossible that the UK could continue to be a fully participating Erasmus Programme country. It would have to be considered politically acceptable in the UK to accept the obligation to contribute to the Erasmus budget, but this would be one area where in view of the perceived benefits of membership of the Erasmus Programme, continued payment into the EU coffers by the UK might be regarded as worthwhile.

3.2.5. Switzerland and the Erasmus Programme

The particular position of Switzerland, a member of EFTA but not of the EEA, again requires noting. It will be recalled (2.2.3) that following a referendum against 'mass immigration' in February 2014, Switzerland has been suspended from the Erasmus Programme,[54] and that this situation is currently unresolved and likely to remain so unless a solution can be reached, acceptable to both the EU and Switzerland and operating within the framework of the EU Swiss FMP Agreement.[55] Since 2014, the Swiss government has itself financed ingoing and outgoing study mobility which would have been covered by Erasmus+ were it not for Switzerland's suspension.[56] The point of relevance to the possibility of the UK remaining a full Programme member of Erasmus after Brexit is that the EU has made

[52] Turkey signed the Erasmus+ Agreement on 19 May 2014, and the Former Yugoslav Republic of Macedonia on 26 May 2014. It was published in the Official Gazette of 17 June 2014 (ref 2014/6458) and came into force on 18 June 2014.

[53] European Stability Initiative Background Paper: *Turkish Students, Isolation and the Erasmus Challenge,* 24 July 2014, p. 17., available from: http://www.esiweb.org/pdf/ESI%20-%20Turkish%20Students,%20Isolation%20and%20the%20Erasmus%20Challenge%20(24%20July%202014).pdf (6 September 2016).

[54] Euronews: *EU Suspends Swiss Erasmus Participation for 2014,* 26 February 2014, available from: http://www.euronews.com/2014/02/26/eu-suspends-swiss-erasmus-participation-for-2014 (6 September 2016).

[55] S Carrera & E Guild & K Eisele: *No Move Without Free Movement: The EU-Swiss Controversy Over Quotas for Free Movement of Persons*, CEPS Policy Brief, 23 April 2015, available from: https://www.ceps.eu/publications/no-move-without-free-movement-eu-swiss-controversy-over-quotas-free-movement-persons (6 September 2016).

[56] PHZH website, *Incoming European Students*, available from: https://phzh.ch/en/Services/International-Office/Incoming-students/application/Incoming-Erasmus-students/ (6 September 2016).

Switzerland's membership of the Erasmus Programme conditional on its not unilaterally imposing restrictions on free movement of persons. Given that all the signs are the UK intends to restrict free movement of persons from the EU after Brexit, it must be doubtful whether it is realistic to hope that the UK can remain a full participating Erasmus Programme member.

4. Conclusion

The UK faces an uncertain future, and even after the terms of its new arrangements with the EU are clarified, it is likely to take some years before the new relationship settles down. In the short term, the UK government has given a commitment both that UK Erasmus students studying abroad in the academic year 2016-7 or 2017-8 will continue to be subject to current arrangements, and that degree mobile EU national students eligible for UK student finance will remain eligible at least for the 2016-7 academic year.[57] Indeed, as it is clear that the UK will not trigger Article 50 before 2017, and therefore that Brexit is unlikely to happen before 2019, EU law will continue to apply to UK/EU relations for at least the next two or three years and therefore the position for EU national degree mobile students wishing to study in the UK, governed as it is by EU law, should not change in that time, and the same goes for UK national students wishing to study in the EU. Thereafter, the landscape could change considerably, and it is far from impossible that degree mobile EU national students wishing to study in the UK might find themselves in the same position as non-EU national students, that is, subject to visa requirements, liable to be charged higher fees than UK national students, and ineligible to access loans to finance their studies. Furthermore, until the UK leaves the EU, it will continue to be a participant in the Erasmus Programme. Thereafter, it will depend on the arrangement forged between the EU and the UK. Given the wider remit of the Erasmus Programme, full participation of the UK in the Erasmus Programme after Brexit is within the bounds of possibility, perhaps even if, as currently seems likely, the UK does not remain a member of the EEA. But the lesson afforded by Switzerland is a salutary one, and if restricting free movement of persons remains one of the UK's most treasured post-Brexit prizes, it is hard to see how the UK could remain a full participant in Erasmus. It is hardly surprising that the man who has been called 'Erasmus's founding father', the UK's Dr Hywel Ceri Jones, has recently said that he feels 'bereaved by Brexit'.[58]

[57] Department for Business, Innovation and Skills and Jo Johnson MP (n11).
[58] E Vulliamy (n48).

Could Adult Education Become a Means of Active Participatory Citizenship for Young People in the EU?

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The research and policy reports show that adult education policies and practices are designed and carried out in ways and using means which are not always appropriate to groups of young citizens between the ages 16-30. In the Horizon 2020's EduMAP (Adult Education as a Means for Active Participatory Citizenship) Project the diversity of societal participation and the wide range of cultural contexts and practices among learners is examined. In particular, Hungarian, Romanian, Bulgarian, Croatian and Slovenian adult educations are in the focus of this article. Available statistical data were collected and analysed concerning young people with low educational level, who have dropped out of adult education or who are otherwise in a vulnerable position. We came to the conclusion that this region of five adjacent states can be divided into two models: Slovenia and Croatia have similar parameters while Hungary, Romania and Bulgaria are converging in education, literacy, skilled persons and budget efforts on education. The fundamental aim of the analysis is to help policymakers and educational agencies to ensure that vulnerable young generations are able to obtain the skills needed to fully participate in European and national societies, and the labour market.

Keywords: Citizenship, societal participation, low levels of education, vulnerable young adults, gender issues, evidence-based policies, Horizon 2020, EduMAP

1. Introduction

The article describes how adult learning would improve social inclusion and the acceptance of the Union citizenship status in Hungary, Romania, Bulgaria, Croatia, and Slovenia. The joint research of Adult Education as a Means to Active Participatory Citizenship (EduMAP) in the frame of Horizon 2020 assists to compare certain social statistics, institutional specificities in adult education and the most disadvantaged groups in accession to basic and special skills in order to become active citizens of the EU in the future.[1] The question is raised how active citizenship may be enhanced in a diverse region.

[1] The project is funded under the European Union's Horizon 2020 Research and Innovation Programme (No. 693388). The research consortium is led by the University of Tampere, who is coordinating the work of nine partner institutions. More

The European Union has a ten-year long jobs and growth strategy (2010–2020): the Europe 2020[2] strategy set up certain priorities and integrated guidelines on economic policies of the Member States for a smart, sustainable and inclusive growth. Among the priorities can be found the improvement of employment rate, the reducing of early school leavers, to increase the rate of the young population having completed tertiary education, and reduction of people at risk of poverty or social exclusion. From among the selected five countries, only Slovenia has a chance to meet the European average in four priorities and Croatia in three, while the others intend to fulfil two priority requirements each. It means that neighbours in the region are differing in the size of the social inequalities.

Four priorities in the Europe 2020	**EU average 2012**	**EU target 2020**	**National rate 2012**	**National target 2020**
Employment rate *(share of people employed 20-64 age group)*	68.4%	75%	Hungary: 62% Romania: 64% Bulgaria: 63% Croatia: 55% Slovenia: 68%	75% 70% 75.5% 63% 75%
Share of early school leavers	12.7%	Below 10%	Hungary: 12% Romania:18% Bulgaria: 12% Croatia: 4% Slovenia:4%	10% 11% 11% 4-5% 4-5%
Share of the population aged 30-34 having completed tertiary education *(ISCED 5 and 6)*	35.7%	At least 40%	Hungary: 30% Romania:24% Bulgaria: 28% Croatia: 26% Slovenia:40%	30.3% 26.7% 36% 36% 40%
Share of population at risk of poverty and social exclusion *(income poverty, material poverty and living in households with low work intensity)*	25% (124 million people)	20% (100 million people)	Hungary: 33% Romania:40% Bulgaria: 50% Croatia: 32% Slovenia:20%	24% 40% 38% 28% 18%

information about the project could be read on its website: http://www.uta.fi/edu/en/research/projects/edumap/index.html (14 November 2016).

[2] The priorities of the strategy to 2016–2020 was defined in the *COM (2014) 130 final, Taking Stock of the Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth* (3 May 2014) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. This communication contains the statistical data to the first table.

Also, the upgraded economic competitiveness and improvement of the labour force in the EU represents the leading principle in adult education policy. The European Agenda for Adult Education[3] endorses the increasing participation in all kinds of adult learning (formal, non-formal and informal) whether to acquire new work skills, for active citizenship, or for personal development and fulfilment through extended coordination by public administrators, NGOs or labour organisations. Despite the great diversity in participation rate of adults aged 25–64 (between 1.4 and 31.6 percent) from the average (9 percent in 2012) it would be extended to 15 percent in general to 2020. Overcoming the economic crisis, inequalities and keeping the aging workforce productive, it defines the following targets:

- Making lifelong learning and mobility a reality, which covers the accession to job-specific skills, adult education for disadvantaged groups, and second chance opportunities for early school leavers, young people neither in education nor in employment or training (NEETs);
- Improving the quality and efficiency of education and training; this includes a transparent system funding of adult learning and meeting the market needs;
- Promoting equity, social cohesion and active citizenship through adult learning; the Agenda aims to improve traditional and digital literacy, basic skills, accession to adult education for disabilities and migrants, and intergeneration learning;
- Enhancing the creativity and innovation of adults and their learning environment, for instance, using the ICT in education;
- Improving the knowledge base on the field of adult learning and monitoring the adult learning sector; this entails data collection from states, regions and local municipals, data exchange and analysis through the Adult Education Survey or Programme for the International Assessment of Adult Competitiveness.

Taking into account the high unemployment rate in youth and Roma communities, special programmes may guide also the implementation of the mentioned adult education agenda.[4]

The progressive management of adult education is required for the reduction of poverty of low-waged workers because their income level has been limited in the recent two decades in the developed world.[5] The growing inequalities – including its severe increase among minors – may hinder economic growth and competitiveness. The last UNICEF report[6] proves the high risk of poverty for children in the five analysed states as well. The children's well-being rank of the surveyed 41 countries also differs in these adjacent states in four aspects.

[3] *2011/C 372/1, Council Resolution on a Renewed European Agenda for Adult Learning* (20 December 2012) and its Annex explains the priorities of the policy to 2012–2014, and the recent *2009/C 119/02, Council Conclusions of 12 May 2009 on Strategic Framework for European Cooperation in Education and Training (ET 2020)* (28 May 2009) determines the work programme and the working groups and the *2012/C 70/05, 2012 Joint Report of the Council and the Commission on the Implementation of the Strategic Framework for European Cooperation in Education and Training (ET 2020) – 'Education and Training in a Smart, Sustainable and Inclusive Europe'* (8 March 2012) is giving more insights to this question.

[4] See for instance: *COM/2012/727 final, Moving Youth into Employment* (5 December 2012) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, and *COM/2011/173 final, An EU Framework for National Roma Integration Strategies up to 2020* (5 April 2011) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

[5] OECD, *OECD Employment Outlook 2012*, OECD Publishing, Paris 2012, pp. 109–161.

[6] J. Hudson & S. Kühner, *Innocenti Report Card 13: Fairness for Children*, UNICEF, Florence 2016.

Inequalities of children ranking in *(average)*	**Inequalities in income**	**Inequalities in education** *(e.g. shortages in PISA test, rate of acceptable results)*	**Inequalities in health** *(e.g. daily complains for health conditions, for disease)*	**Inequalities in life satisfaction**
Hungary (18)	21	17	18	15
Romania (26)	41	n.d.	32	5
Bulgaria (28)	40	32	26	16
Croatia (16.5)	26	5	12	23
Slovenia (14.5)	19	11	16	12

2. Inequalities and Adult Education

The *EduMAP* project aims to map the possibilities of young adults', aged 16–30, access adult education and how partly or totally excluded social groups can be involved into the adult learning in order to become active citizens in the EU. The disadvantaged, vulnerable groups need effective communication with the education environment and specific programmes to participate in lifelong learning. The researchers and IT experts in the frame of Horizon 2020 must propose direct (such as development of a decision making supporting system) and indirect measures (such as free accession to internet, second-chance training for low-educated persons or early schooling leavers) in adult education policy in the EU.

However, the target group in *EduMAP* differs from the existing data collection. For instance, the Adult Education Survey (*AES*) of the *Eurostat* (2007, 2011) covers the population aged 25 to 64.[7] The age division of sectoral statistics, or the mandatory school age, or the public funding of adult education supports the comparison of available data in a limited extent. The involvement of tertiary education is also problematic while the part-time education attracts mainly (young) adults. Numerical information on job-specific training and learning is hardly available. For these reasons an operative adult education policy based on data analysis at European level is almost impossible.

The definition of adult education determined by the *UNESCO* Recommendation[8] shall be implemented during the research as a common basis. Accordingly, adult education and learning

- is a core component of the lifelong learning;
- it comprises all forms of education and learning (formal, non-formal and informal);

[7] Eurostat, *Adult Education Survey (AES) 2007 and 2011*, available at: http://ec.europa.eu/eurostat/web/microdata/adult-education-survey (10 October 2016).

[8] Recommendation on Adult Learning and Education is passed by the General Conference of the United Nations Educational, Scientific and Cultural Organization (*UNESCO*) on its meeting in Paris from 3rd to18th November 2015, at its 38th session. It replaced the prior Recommendation adopted in 1976. The recommendation is available at: http://unesdoc.unesco.org/images/0024/002451/245119M.pdf#page=3 (29 September 2016).

- its aim to ensure that all adults (regardless the legal age of maturity) participate in their societies and the world of work, both in their own sake and their communities, organizations and societies interests;
- it involves sustained activities and processes of acquiring, recognizing, exchanging, and adapting capabilities using ICT as much as possible;
- it covers various types of learning and education for equipping adults with digital and other literacy and basic skills to continue training and professional development for active citizenship, including second chance programs to make up for lack of initial schooling, or for early school leavers and dropouts;
- it empowers people to actively engage in social issues, such as poverty, gender, intergenerational solidarity, social mobility, justice, equity, exclusion, violence, unemployment, environmental protection and climate change;
- its objectives are to develop the capacity of individuals to think critically and to act with autonomy and a sense of responsibility; to reinforce the capacity to deal with and shape the developments taking place in the economy and the world of work; to learn and fully participate in sustainable development, environment protection and human rights.

Two further components of the definition shall be underlined. First, states should mobilize and allocate sufficient resources to adult education in accordance with national needs, using the required resources in a sustainable, effective, efficient, democratic and accountable way. Second, the learning outcomes from participation should be recognized, validated and accredited as equivalent values to those granted by formal education (for instance, in accordance with National Qualification Frameworks) in order to allow continuous education and access to the labour market, without facing discrimination barriers.

Can tertiary education be separated from adult education? Part-time learning (evening coursers, distance and e-learning) is strongly connected to adult education as it is has been proved recently.[9] The involvement of the 'working class' into the tertiary education was the priority in many CEE states, setting up non-regular learning courses at universities and colleges in 1947–49. For instance, in Hungary the number of these students was ten times more up to 1952, because the forced industrialisation and agricultural modernisation as well as the administrative staff required more and more qualified (and politically reliable) workers. Up to the late '80s the quarter of all students in tertiary education belonged to the non-regular students. This type of learning has started to reduce since 2005 due to demographic and financial reasons (about half of these students have to cover their own tuition fees and learning expenditures which are growing). The law on tertiary education determines that 30–50 percent of frontal (contact) lectures of regular (full-time) education shall be ensured in non-regular education. According to the survey, part-time learning that is mainly self-financed, is accompanied with work (the state financed places are limited). This form of tertiary education means an alternative of non-applicable full-time learning for adults below 21 (in 16–22 percent) rather than for those over 30. The part-time students have jobs (at least 20 working hours per week), their own wage and household living with a partner. This chance for social equality is accompanied with more innovation in teaching methods (non-frontal lectures, e-books, practical trainings). For these reasons, at least part-time learning in tertiary education should be considered as an important part of lifelong learning and adult education of employees in this

[9] The Eurostudent V database gives more insights on the topic: http://database.eurostudent.eu (28 September 2016). The summaries of Hungarian results are also supporting the above mentioned statement: http://www.felvi.hu/pub_bin/dload/eurostudent/eurostudent_tanulmany_hu_VEGLEGES_web.pdf (10 October 2016).

region. The following table demonstrates that enrolled students in tertiary education in Hungary and Romania are below the proportion of the country's population of the EU, while students' rate in Slovenia is higher. This result is strongly determined by access to secondary education and the budget resources used on education.

Number of enrolled regular students in tertiary education[10]		**% from the total students**	**The country's population % from the EU population**
EU28 total	19 623 000	100.00	
Hungary	359 000	1.83	1.95
Romania	618 200	3.15	3.99
Bulgaria	284 000	1.44	1.43
Croatia	164 000	0.83	0.84
Slovenia	97 700	0.49	0.41

The absence of proper national statistics and public data on disadvantaged groups with regard to access to adult education (for instance, the size and number of disabled persons, Roma, migrants, persons facing cumulative discrimination and poverty) makes the analysis dubious. These uncertainties could be reduced with field research. Similarly, the data on (public and students') finance in adult education is fragmented, hindering the assessment of efficiency and democratic operation.

3. Specificities in Five Member States[11]

3.1. Hungary

Hungary has adopted several national strategies in 2014–15 to improve the equality of its education and training system: on early school leaving, public education development, vocational and training system, higher education and lifelong learning. The education and training system faces a number of issues: the proportion of underachievement in basic skills is increasing and the socio-economic gaps in performance

[10] Eurostat, *Number of tertiary education students, 2013*. Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Number_of_tertiary_education_students,_2013_(thousands)_ET15.png (10 October 2016).

[11] Data in this section is used from OECD, *Education at a Glance 2015: OECD Indicators*, OECD Publishing, Paris 2015, www.oecd.org/education/education-at-a-glance-19991487.htm (1 October 2016); European Commission/EACEA/Eurydice, *Adult Education and Training in Europe: Widening Access to Learning Opportunities, Eurydice Report*, Publications Office of the European Union, Luxembourg 2015; Eurostat, European Union Labour Force Survey (EU LFS). Available at: http://ec.europa.eu/eurostat/web/microdata/european-union-labour-force-survey (10 September 2016); Eurostat, *Number of tertiary education students, 2013*. Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Number_of_tertiary_education_students,_2013_(thousands)_ET15.png (10 October 2016); Eurostat, Adult Education Survey (AES) 2007 and 2011, available at: http://ec.europa.eu/eurostat/web/microdata/adult-education-survey (10 October 2016); European Commission, *Education and Training Monitor 2015*, Publications Office of the European Union, Luxembourg 2015. Available at: http://ec.europa.eu/education/library/publications/monitor15_en.pdf (15 September 2016). Other sources are indicated separately.

are still among the highest in the EU. Increasing the participation of disadvantaged students, in particular Roma, in mainstream inclusive education and improving support through targeted teacher training represents a challenge. Vocational schools are not attractive to young people, due to the high dropout rate and lack of flexible career opportunities. Many dropout students participation in higher and/or adult education remain low.

General government expenditure on education as a share of GDP is among the lowest in the EU: it was 5.6 per cent in 2010, 5.1 in 2011, 4.7 in 2012 and in 2013. While in the *OECD* member states spend on average 10 220 USD per year from primary through tertiary education (8,247 per primary student, 9,518 per secondary student and 15028 per tertiary student), Hungary has no data since 2006. Students receive an average of 7,570 hours of compulsory education at primary and lower secondary level in *OECD* states in 2015, but for students in Hungary it is less than 6,000 hours.

These measures in fact deny that education holds key potential for long-term growth and tackling the root causes of the social crisis. The reduction of public investment in education limits the availability of a properly skilled, competent labour force that is needed for economic entrepreneurship. The Hungarian society is not prepared for changes while the employment rate of people with below upper-secondary education is among the lowest in the *OECD*. The average rate in the EU is 52 percent, in the *OECD* is 55 percent, while in Hungary it is 45 percent. Inequalities still persist in education, causing serious consequences for labour markets and economies. In 2014, less than 60 percent of adults without an upper secondary education were employed, compared to over 80 percent of tertiary-educated adults.[12] Moreover, the rapid technological changes require flexible adaptation to new tasks and job specificities, but adult education (specific skills, ICT or basic skills) is neglected in the frame of the publicly financed community work for long-term unemployed persons. For this reason, only 14 percent of community workers can access jobs in the market economy.

The rate of graduated persons in tertiary education is low, although the number of enrolled students is growing. Rapid progress has been made in expanding education over the past 25 years, and around 41 percent of 25–34 year-olds now have a tertiary qualification in *OECD* countries. The budget contribution to tertiary education should be upgraded and in parallel, the cooperation between the universities and entrepreneurs shall be improved in order to offer more and proper jobs for newly graduated young workers and to avoid further emigration of qualified persons. Despite the structural and territorial unemployment, an absence of skilled labour force appears. As the *OECD* projects, this shortage could cause economic concerns. In Hungary, more than half of the companies indicate vacancies and labour shortages, while this rate is 20 percent in Poland and 10 percent in Slovakia. The data below proves the high shortages of skilled workers in Hungary, as they have the biggest chance to be employed there.

Employment rate of recent graduates *(within 3 years in ISCED 3-6)* in age 20–34[13]	**Hungary**	**Romania**	**Bulgaria**	**Croatia**	**Slovenia**	**EU 28 average**
	80.4%	68.1%	74.6%	62.6%	71.5%	76.9%

[12] OECD, *OECD Economic Surveys: Hungary*, OECD Publishing, Paris 2016. Available at: http://dx.doi.org/10.1787/eco_surveys-hun-2016-en (25 September 2016).

[13] Eurostat, *Employment rates of recent graduates (aged 20–34) not in education and training, 2015*. Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Employment_rates_of_recent_graduates_(aged_20%E2%80%9334)_not_in_education_and_training,_2015_(%C2%B9)_(%25).png (30 August 2016).

The *OECD* statistics reveal the difficulties that governments face in financing education. Between 2010 and 2012, GDP began to rise again in most countries, but public spending on primary to tertiary educational institutions fell in more than one in three *OECD* countries, including Hungary and Slovenia.

In Hungary, according to the EU Labour Force Survey (2013), 17.5 percent of adults (aged 25–64) have completed lower secondary education at most, while only 1.3 percent has a lower level of educational attainment. According to the Adult Education Survey (2011), 24.7 percent of low-qualified adults (i.e. those with lower secondary education at most) participate in lifelong learning, which is above the EU average (21.8 percent). Hungary did not participate in the Survey of Adult Skills. There is no specific policy framework for adult literacy and basic skills. However, there are publicly funded programmes that support adults acquiring or improving their basic skills.

Persons living in poverty or handicapped, disabled are the most vulnerable. 14% of Hungary's total population can be considered to be living in relative income poverty. Within the age group 18–24, the proportion is 19.8%, which is lower than those, who are under 18 years of age, but higher than those, who are over 24. The risk of poverty decreases with aging and is influenced primarily by economic activity and the number of children, while the primary influence on economic activity is educational attainment. The risk of poverty is especially high in households with a single parent. In 2011, Hungary had the fifth lowest poverty line within the European Union (227 EUR/month).[14] Young adults coming from child protection system form are also usual "candidates" of early school leaving, low education and living in poverty. We find it significant to consider individuals under child protection as disadvantaged regarding education. Those children and youth, who are under temporary or permanent child protection (living in an orphanage, foster care, or receiving aftercare), do not get enough support for their studies. The number of those, who are under child protection was 23,000 in 2014, 6,000 of which belonged to age group 15–17, while 3,000 were 18 years of age or older.

In summary, Hungary demonstrates controversial public education measures and a diluted adult learning policy that cannot diminish social inequalities, frictions in labour demands and supplies, the high rate of low educated persons and their unemployment.

3.2. Romania

In Romania, according to the EU Labour Force Survey (2013), 23.7 percent of adults (aged 25–64) have completed lower secondary education at most, while 3.7 percent have a lower level of educational attainment. In June 2015, the Government adopted a strategy for reducing early school leaving, because the early school leaving rate remained above the EU average. The availability and access to nursery and pre-schooling services is limited, especially in rural areas and for the Roma community.

Not only the high rate of early school leavers comparing with neighbour states, but the relatively weak results in secondary educational attainments in young and in the active aged population of Romania is observable.

Shortages in secondary education	**Hungary**	**Romania**	**Bulgaria**	**Croatia**	**Slovenia**	**EU average**

[14] KSH, *A relatív jövedelmi szegénység és a társadalmi kirekesztődés (Laeken-i indikátorok), 2012*, Statisztikai Tükör, Vol. 7, No. 66, September 2013, pp. 1–4.

At most lower secondary educational attainment *(ISCED 1-3)* by age 25-64 *(Eurostat, 2015)*	16.8%	25.0%	18.1%	17.7%	13.2%	23.5%
At least upper secondary educational attainment *(ISCED 4)* in age 20-24 *(2015)*	84.2%	79.7%	85.1%	95.7%	90.9%	82.7%
Early leavers from education and training, age 18-24 *(2015)*	11.6%	19.1%	13.4%	2.8%	5.0%	11%

Romania's tertiary education attainment rate has risen consistently in recent years, but remains the second lowest in the EU. The Government has adopted a strategy on tertiary education, which has two overarching aims: to make higher education more relevant by aligning it more closely with labour market needs; and to improve the accessibility of higher education for disadvantaged groups.

Romania has not participated in any international surveys on adult competences. There is no specific policy framework for adult literacy and basic skills. However, there are publicly funded programmes that support adults acquiring or improving their basic skills: mature learners, who have not completed primary or lower secondary education can follow 'second chance' programmes.[15] These were developed in 1999 within a PHARE project and revised in 2009. At present, the programme is part of the national education system and its curriculum, which is modular, falls under the responsibility of the Ministry of Education. The programme leading to the completion of primary education has a standard duration of two years. However, this is flexible and can be adapted to suit the individual needs of learners. Students who completed primary education can continue their studies at lower secondary level. This combines general and vocational elements (the vocational education and training component starts in the second year of the programme). The standard duration of the lower secondary level programme is four years. Yet, here again, it can be adapted to the learners' needs. At the end of the lower secondary 'second chance' programme, students are considered as having completed compulsory education and can continue their studies at upper secondary level. If graduates continue practical vocational education sessions for six months and succeed in their final exam, they receive a certificate. It is financed from national sources and is free for all participants. According to the Statistical Office, in 2011/12, 9,202 learners enrolled in this type of education (3,079 in primary education and 6,123 in lower-secondary education). Other types of learning also contribute to the development of basic skills in the adult population within the framework of active labour market policies using European funding.

Due to the mentioned weaknesses in attainment in primary and secondary education, the rate of young persons who are neither employed nor in education or vocational professional training (NEET) in ages 15–24 has been high in Romania. Between 2006 and 2015 the NEET rate in age 20–24 could decrease only in Bulgaria (5 percent) and in Hungary (2 percent), while it was growing in Slovenia (3 percent), Romania (5 percent) and Croatia (5.55 percent). Furthermore, in Romania it is over 24 percent and in

[15] The programme of 'A doua șansă' (Second Chance), more information at: https://www.edu.ro/a%20doua%20sansa (24 September 2016).

Hungary 16.5 percent.[16] Using the *Eurostat* data it can be said that the NEET rate in age 20–24 is higher than in ages 15–24 in whole Europe: for instance, in Poland (17 percent), in Slovakia (19 percent), and the EU 28 average was 17.3 percent in 2015. On the other hand, the rate of young persons in ages 20–24 that are working and studying on average in the EU28 is 17%.

Young people neither in employment nor in education or training *(NEET)* in ages 15-24 comparing to the total population in the same age group *(2015)*	**Hungary**	**Romania**	**Bulgaria**	**Croatia**	**Slovenia**	**EU28 average**
	13.6 %	18.1%	19.3%	18.5%	9.5%	11.6%

Adult participation in learning remains far below the EU average and general government expenditure on education as a share of GDP is the lowest in the EU. According to the Adult Education Survey (2011), 1.4 percent of low-qualified adults (i.e. those with lower secondary education at most) participate in lifelong learning, which is below the EU average (21.8 percent).

In Romania, the youth itself is a very vulnerable group, as in 2011, the poverty rate was 5 percent for the total population, 8.4 percent for young people aged 15–19, 7.6 percent for 20–24 year-olds, 6.0 percent for 25–29 year-olds, and 4.6 percent for 30–34 year-olds. The child poverty rate was 6.1 percent for the age group 0–5 and 7.7 percent for 6–14 year-olds.[17] Romania's employment rate among the population aged 20–64 (63.9 percent in 2013) is much lower than the EU average (68.5 percent in 2012), with a national target of 70% by 2020. The age group 30–34 registers an employment rate which is close to the European level (77.1 percent vs. 77.5 percent), while all other age groups (15–29) are well below the EU28 average. Major discrepancies can be seen at regional level. Therefore, the lowest employment rates for 15–24 year-olds are reported in the West (27.9 percent) and North-West (27.6 percent) Regions, while other regions like North-East (36.4 percent) and South-Muntenia (34.5 percent) perform much better. It has to be mentioned that in the West and North-West the 15–24 year-olds group is mainly still attending secondary or tertiary education on a full time basis. In these regions there are several university centres with 57,000[18] students, like Timisoara or with more than 80,000 students like Cluj-Napoca.[19] So this does not mean that in these regions have more NEET youth, it means that they are generally still studying. Based on the National Youth Policy Strategy 2015–2020 in Romania, edited by the Ministry of Youth and Sports and UNICEF, the Strategy tackles the situation of and policies for young people aged 14 to 35, including the most disadvantaged Roma youth, young people from pockets of poverty;

16 Eurostat, *Statistics on young people neither in employment nor in education or training*. Available: http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_young_people_neither_in_employment_nor_in_education_or_training (29 September 2016).

17 Data from the Ministry of Labour, Family, Social Protection and the Elderly of Romania: http://www.mmuncii.ro/j33/index.php/ro/ (9 September 2016).

18 See: Timpolis, *Pretul chiriilor, in aer din cauza aglomeratiei din campusul universitar*. Available at: http://timpolis.ro/print.php?id=11697 (9 September 2016).

19 Campus Cluj, *80 000 studenti aduc la Cluj anual 400 de milioane de euro*. Available at: http://www.campuscluj.ro/stiri/218-80-000-de-studenti-aduc-la-cluj-anual-400-de-milioane-de-euro.html (6 September 2016).

youth with special educational needs; young victims of exploitation; youth with HIV/AIDS; and young victims of discrimination.[20]

3.3. Bulgaria

Without repeating the details above, there are many shortages in education and adult learning system, including the financial resources.

Low reading literacy performed pupils in age 15 *(PISA Scale, 2012)*	**Hungary**	**Romania**	**Bulgaria**	**Croatia**	**Slovenia**
	19.7%	37.3%	39.4%	18.7%	21.1%

Bulgaria has recently improved its performance with regard to basic skills and tertiary education attainment. However, it still needs to improve the overall quality and efficiency of its school education system and the capacity of higher education to respond to the labour market needs. Access to education for disadvantaged children, in particular Roma, is an ongoing challenge. The quality of vocational training in Bulgaria is insufficient, including in terms of its integration in the general education system. Following table proves that Bulgaria provides vocational and upper secondary education at European size for youth at the age of 18. This rate is more limited in Croatia and Romania.

18 year-olds in education from the total population from the same age group *(2012)*	**Hungary**	**Romania**	**Bulgaria**	**Croatia**	**Slovenia**	**EU 28 average**
	86.0%	77.7%	80.6%	70.6%	92.1%	80.4%

The rate of adult participation in learning is among the lowest of the EU, although the rate of attainment of secondary education would be upgraded. In Bulgaria, according to the EU Labour Force Survey (2013), 18.2 percent of adults (aged 25–64) have completed lower secondary education at most, while 3.5 percent have a lower level of educational attainment. According to the Adult Education Survey (2011), 12.3 percent of low-qualified adults (i.e. those with lower secondary education at most) participate in lifelong learning, which is below the EU average (21.8 percent).

Bulgaria has not participated in any international surveys on adult competences, and there is no specific policy framework for adult literacy and basic skills. However, there are EU funded programmes that support adults acquiring or improving their basic skills. In the school year 2014/15, adult education in Bulgaria was provided by 294 general and professional secondary schools, professional colleges and 362 non-formal Centres for Professional Training. The number of adults who participate in LLL is 1.8% from the population of 25–64 year old which is quite below the national goal for 2020, which is 5%. Having in mind that according to the National Statistics the growth rate is about 0.1–0.15% annually there is a relatively small chance to realize the national goal of 5% participation by 2020.

From the most potential audience in adult education the vulnerable groups are present to a great extent in Bulgaria. Beyond the huge groups of low educated and unskilled people, among NEET predominated young people (19.3 percent in the age of 15–24) are from ethnic minorities, those who live in small

[20] C. Briciu & O. Marcovici & S. Mitulescu & A. Popa & I. Tomus, *National Youth Policy Strategy 2015–2020*, Alpha MDN Publishing House Bucharest 2015. Available at: http://www.unicef.org/romania/Strategia_pt_tineret_en.pdf (2 September 2016).

villages, who have low-education and who are economically non-active.[21] According to the data from the census of 2011, where people had to define their own ethnic affiliation, the second ethnic group includes people who define themselves as Turkish minority (10.9 percent). The third group represents Roma people (8 percent). All other ethnic groups are relatively small and altogether they represent about 1.3 percent from the total population in the age of 10–29. The population of Turkish and Roma minorities increases among the youth of 10–19 years old, slightly for Turkish with 1.4 percent and more rapidly for Roma with 3 percent.

According to the LLL Strategy adopted by the Bulgarian government in 2014 there are some special measures to be taken to increase the participation of adults in LLL like re-integration into formal education, additional classes of Bulgarian language for children of the ethnic minority groups, and ensuring the opportunity for formal learning for children and adults who are in correctional facilities.

3.4. Croatia

The main strengths of Croatia's education and training system are the low early school leaving rate and the high proportion of secondary vocational school graduates continuing into higher education. In Croatia, according to the EU Labour Force Survey (2013), 20.3 percent of adults (aged 25-64) have completed lower secondary education at most, while 3 percent have a lower level of educational attainment. However, the following table represents the outstanding position of Croatia with high percentage of attendance in upper secondary education, but mainly for males: its rate in Croatia is far above the EU average and other four states' ratio.

Pupils in upper secondary education *(ISCED 3)* enrolled in vocational system by gender *(males in 2012)*	**Hungary**	**Romania**	**Bulgaria**	**Croatia**	**Slovenia**	**EU 28 average**
	32.2%	69.9%	58.5%	78.2%	73.1%	55.7%

Positive developments in the country include the adoption of a comprehensive strategy for education, science and technology, which will be the main driver of reform in the coming years. On the other hand, the Croatian education and training system faces a significant number of challenges, including improving education outcomes in mathematics in primary and secondary schools, modernising initial vocational education and training curricula in line with the needs of the labour market, and increasing access and completion rates in higher education.

There are relatively low participation rates in adult learning partly due to the under-regulated and under-funded system. Croatia has not participated in any international surveys on adult competences. There is no specific policy framework for adult literacy and basic skills. However, there are publicly funded programmes that support adults acquiring or improving their basic skills.

The participation rate of persons in active age in lifelong learning of the five examined countries is far from the European average with the exception of Slovenia. Moreover, the number of participants is stable or diminished in three countries, while Hungary and Bulgaria extended the ratio of participation somewhat in the recent years. It means that job-specific or other professional training within four weeks

[21] UNICEF, Изгубено бъдеще? Изследване на феномените на необхващане в училище, UNICEF, Sofia 2013, p 16. Available at: http://www.unicef.bg/assets/PDFs/Izgubeno_budeshte_bg.pdf (28 August 2016).

from the questioning are covering a small circle. The absent data on LLL expenditures can be explained by certain derogations to Regulation 452/2008/EC up to 2013.[22]

LLL participation rate in active aged persons *(2012–2015)*	**Hungary**	**Romania**	**Bulgaria**	**Croatia**	**Slovenia**	**EU 28 average**
Lifelong learning participation rate in aged 25-64 *(Eurostat, 2012)*	2.9%	1.4%	1.7%	3.3%	13.8%	9.2%
(Eurostat, 2015)	7.1%	1.3%	2.0%	3.1%	11.9%	10.7%

From the context of vulnerable groups, the 7 percent of minority population is divers, including 2.51 percent Serbians, 0.72 percent Bosnians and 0,.6% Roma. Moreover, active measures for minors are usually implemented within the compulsory education system, when a certain pupil is considered a risk of dropping out of elementary school. In this case the school informs the Centre for Social Welfare, and subsequently the two institutions cooperate to find the best possible solution. For adults, implementation of these measures depends on the personal engagement of the individual. However, there is absence of data that would clearly show the needs of young adults in the target group (ages 16–30) and the research, which defines that whose goal would be to determine the specific needs of the young adults and the need for their involvement in the labour market.

3.5. Slovenia

Slovenia has the second lowest early school leaving rate in the EU. Average basic skills proficiency is satisfactory, especially in mathematics and science. The proportion of upper secondary students in vocational education and training remains above the EU average. In upper secondary education, reversing demographic trends and the drop in student numbers have caused schools across the country to function below their capacity. Around 85 percent of young people in 2015 completed upper secondary education over their lifetimes. In all *OECD* countries, young women are now more likely to do so than men. The largest gender gap is in Slovenia, where 95 percent of young women are expected to graduate from upper secondary level, compared to only 76 percent of young men.

Tertiary education attainment in ages 30–34 is above the EU average. However, the higher education system is marked by a disproportionately high number of study programmes, a high drop-out rate and problems with fictitious enrolment. Moreover, it is under-funded, and as a result, the quality of teaching and resources is unsustainable. Despite these criticisms the rate of GDP and annually financed expenditure per student from the budget is the highest among the investigated countries and over the average of the EU28. Finally, there are very marked regional differences in national examinations, indicating that socio-economic status has a strong effect on educational achievement.

[22] *Regulation (EC) No 452/2008 of the European Parliament and the Council concerning the production and development of statistics on education and lifelong learning* (23 April 2008).

Budget contribution to education and attainment in tertiary education	**Hungary**	**Romania**	**Bulgaria**	**Croatia**	**Slovenia**	**EU 28 average**
Tertiary educational attainment *(ISCED 5-6)* in ages 30-34 *(2015)*	34.3%	25.6%	32.1%	30.9%	43.4%	23.5%
Public expenditure in broad meaning on education from the GDP *(2011)*	4.71%	3.07%	3.82%	4.21%	5.68%	5.25%
Annual expenditure on public and private educational institutions per pupil/student *(by level of education in 2011)*	n.d. (last data in 2006: 3987)	2075	2713	3902	6782	6846 EUR

In Slovenia, according to the EU Labour Force Survey (2013), 14.5 percent of adults (aged 25-64) have completed lower secondary education at most, while only 1.1 percent has a lower level of educational attainment. According to the Adult Education Survey (2011), 13.2 percent of low qualified adults (i.e. those with lower secondary education at most) participate in lifelong learning, which is below the EU average (21.8 percent). Slovenia participated in the second round of the Survey of Adult Skills (2012), but these results are not yet available.

While there is no actual policy framework for adult literacy and basic skills,[23] this area is also referred to in the Strategic Plan for Adult Education in Slovenia 2013–2020, and there are publicly funded programmes that support adults acquiring or improving their basic skills.[24]

Mature learners, who have not completed single-structure education (i.e. education covering primary and lower secondary level), can follow a programme allowing them to finish this stage.[25] It is provided by various public education organisations, mainly those focusing specifically on adult learners. The programme includes around 2 000 teaching periods and is fully publicly funded (i.e. free for participants). During the school year 2013/14, 1,088 learners participated in the programme. In addition, there is a range of short programmes providing education in a range of basic skills. Central authorities have been involved in the development of the curriculum and some of the programmes have been adopted by the minister responsible for education based on the recommendations of the Council of Experts for Adult Education. The sources of funding include national and European sources as well. The provision is generally free for participants, except for ICT courses, for which fees may be charged.

The target groups identified by the Annual Adult Education Program (2015) are the unemployed persons as a priority group over the age of 50, who have no vocational or professional education or less professional ability. The other target group represents those employees, who are over the age of 45 and

[23] E. Možina & J. Mirčeva & P. Beltram & L. Knaflič & A. Ivančič & V. Mohorčič Špolar, *Strategija za dvigovanje ravni pismenosti v Sloveniji in strokovne podlage*, Ljubljana, 2003. Available at: http://arhiv.acs.si/programi/Strategija_razvoja_pismenosti_ODRASLI_2003.pdf (15 September 2016).

[24] *RS, 90/13, Resolucija o Nacionalnem programu izobraževanja odraslih v Republiki Sloveniji za obdobje 2013–2020 (ReNPIO13–20)* [30 October 2013] Republic of Slovenia.

[25] See: *Program osnovne šole za odrasle (2003).* Available at: http://www.mizs.gov.si/fileadmin/mizs.gov.si/pageuploads/podrocje/odrasli/Programi/Program_odrasli_OS_za_odrasle.pdf (4 September 2016).

having completed less than four years of secondary school or worse career prospects, and young people, who leave school at different stages. The less educated people and other vulnerable groups, such as early school leavers, socially disadvantaged, immigrants, Roma, older adults, migrants, people with disabilities and prisoners or other groups of adults, who have limited ability to access social, cultural and economic goods, such as farmers and the population of the less developed regions are also designated in the Program.

4. Conclusions

A recent Eurobarometer survey has focused on the public awareness and benefits of the EU citizenship in Member States. [26] Adult education can draw some conclusions from its results, because the share of answers reflects the social background of the respondents. Furthermore, the knowledge about Union citizenship is close or is over the level of the EU28 average in the analysed five countries. Regardless of the inconsistencies of the answers (for instance, one may be familiar with Union citizenship, but its acquisition, duality with national citizenship and main rights as Union citizen are not in harmony with one another), this region is rather homogeneous in this context.

Awareness level on Union citizenship *(2015)*	**Hungary**	**Romania**	**Bulgaria**	**Croatia**	**Slovenia**	**EU 28 average**
Are you familiar with the term of citizen of the Union? Yes *(% of the respondent)*	96%	93%	91%	86%	83%	87%
Do you have to ask to become a citizen of the European Union? No because it is false *(% of the respondent)*	88%	60%	50%	82%	75%	78%
Are you both a citizen of the EU and the national of your country? Yes *(% of the respondent)*	87%	94%	88%	94%	90%	91%
Are you informed about your rights as a citizen of the EU? Yes *(% of the respondent)*	47%	42%	43%	25%	36%	42%

The respondents being familiar with the Union citizenship including its term, substance and method of acquisition are people aged over 25 that completed full-time education in age over 20; they are employees or self-employed persons living in a large town. The majority of respondents lack relevant information on Union citizenship and are manual workers, who completed full-time education before the age 15 or 20 and living in rural villages.

[26] European Commission, *Flash Eurobarometer 430: Report on European Union Citizenship*, DG COMM, Brussels 2016, p. 96. Available at: http://ec.europa.eu/justice/citizen/document/files/2016-flash-eurobarometer-430-citizenship_en.pdf (14 September 2016).

Looking at the relevant statistics, this region of the five adjacent states can be divided into two models: Slovenia and Croatia have similar parameters, while Hungary, Romania and Bulgaria is converging in education, literacy, skilled persons and budget efforts on education. For all that, diversity is revealed in this area as follows:

- Till 2020 the improvement of the employment rate, cutting of the share of early school leavers, increasing the rate of the young population having completed tertiary education and the reduction of people at risk of poverty or social exclusion is planned to put into practice only in Slovenia meeting the European average in four priorities and Croatia in three, while Romania, Hungary and Bulgaria intend to fulfil two priority requirements each.
- The high risk of poverty for children can be expressed by certain aspects of inequalities. According to their average ranking in four types of inequalities Slovenia and Croatia provide much more results than Romania and Bulgaria do (Slovenia: 14.5; Croatia: 16.5; Hungary: 18; Romania: 26 and Bulgaria: 28). The gender inequality can be detected in upper secondary education. The high percentage of attendance in upper secondary education for males in Croatia is far over the EU average and the other four states' ratios.
- Not only the high rate of early school leavers comparing with neighbour states, but the relatively weak results in secondary educational attainments in young and also in the active aged population of Romania and Bulgaria can be observed. Bulgaria and Romania is facing high proportion of pupils in the age of 15 with limited competence in literacy.
- Due to these mentioned weaknesses in attainment in primary and secondary education the rate of non-active (NEET) young persons in the age of 15–24 has been high in Romania and Bulgaria, but also in Hungary and Croatia is over the EU28 average. Between 2006 and 2015 the NEET rate in the age of 20–24 decreased only in Bulgaria and in Hungary. Furthermore, in Romania it is over 24 percent and 16.5 percent in Hungary. The NEET rate in the age of 20–24 is higher than in 15–24. The EU28 average was 17.3 percent in 2015.
- On the other hand, the rate of young persons in the ages of 20–24, who are working and studying in average in EU28, is 17 percent, in Hungary this ratio grew from 4.5 percent in 2006 to 6.4 percent in 2015.
- The number of enrolled regular students in tertiary education in Hungary and Romania is below the proportion of the country's population of the EU, while this student rate in Slovenia is higher, which is strongly determined by access to secondary education and used budget resources on education. Tertiary education attainment in the ages of 30–34 is above the EU average in each analysed country and this rate in Slovenia is two times higher than the EU28 average. Furthermore, the rate of GDP and annually financed expenditure per student from the budget is the highest in Slovenia among the investigated countries and it is over the average of the EU28.
- The shortage in skilled workers could cause economic concerns. In Hungary, more than half of the companies indicate vacancies and labour shortages, while this rate in Poland shows 20 percent and 10 percent in Slovakia. On the other hand, strong absence of qualified workers improves the chances of employment for newly graduated youth (see the data from Hungary and Bulgaria).
- The participation rate of persons in active age in lifelong learning is far from the European average with the exception of Slovenia. Moreover, the number of participants is stable or diminished in three countries, while in Hungary and Bulgaria the ratio of participation grew somewhat in recent

years. This means that job-specific or other professional training within four weeks from the questioning cover a small circle.

- The youth living in rural areas, the social strata in poverty, early school leavers, Roma, minorities, persons completed full-time education below the age 18, youth in NEET, disabled young adults as well as minors and young adults, who are under temporary or permanent child protection shall be the target audience of adult education and second-chance education programmes.

A stagnant adult learning rate and the lack of policy commitment demand the reconsideration of adult learning policies. Among the set of policy levers likely to impact adults' disposition towards further learning, the provision of targeted guidance stands out as one of the most effective ones. Stronger still among the policy actions linked to employer investment in learning is the effect of the co-financing of employers' investment on the amount of work-related training. Among the more important policy tasks is the need to improve access to learning for disadvantaged groups, the most meaningful intervention being actual financing (or direct provision) of learning opportunities. Other effective measures, including targeted guidance, recognition of prior learning, embedding basic skills development in adult education programmes, and the assistance of intermediary organisations (e.g. NGOs and social services) engaging in socio-economic groups, are harder to reach.

The minimal enthusiasm in participation in adult education and a less respected LLL is common in these five countries, although new professions with challenging responsibilities, tasks and job-classifications (such as online marketing coordinator, drug-safety specialist, and technical-commercial advisor) are born in Europe. Such opportunities can only be fulfilled with stable basic or specific competences. Adult education must adjust to the changes of labour demand and technology. Adult education could be the second chance for many segregated, unskilled and poor people to reduce harsh inequalities and represents a key component to create a less manipulated, a bit autonomous and integrated Union citizens. Despite Brexit or governmentally fuelled Euro-scepticism, the recent representative public opinion survey conducted by Závecz Research proves that 68 percent of respondents in Hungary support membership in the EU.[27] Why? The answer is simple, because citizens can work and study lawfully in any member state (82 percent), the membership is better for the economy than being out of the Union (68 percent), the EU means guarantee for peaceful life (64 percent) and EU law and membership can frame the actions of the national governments (56 percent). These points should be important drivers for future adult learning programs in Europe.

[27] Á Kolozsi, *Tíz év múlva már nem biztos, hogy bent leszünk az EU-ban*, Index.hu, 16 August 2016. Available at: http://index.hu/belfold/2016/08/16/ok_akarnak_itthon_kilepni_az_eu-bol/ (30 August 2016).

Convergence, Compatibility or Decoration: The Luxembourg Court's References to Strasbourg Case Law in its Final Judgments[1]

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Although the EU is not a Contracting Party to the European Convention yet, the ECHR and its Strasbourg case-law do have an impact on the EU legal order. Before the Lisbon Treaty came into effect, the Court of Justice of the EU and the drafters of the Maastricht Treaty recognized that the ECHR and the ECtHR case law had a special significance for the EU legal order and regarded them as one part of the general principle of EU law. The Lisbon Treaty entitles the EU Charter on Fundamental Rights the primary legislation from which the Court could start in its deliberation. According to Art.53(3) and the relevant Official Explanation, the Court of Justice should take the Strasbourg jurisprudence into account when it needs to define the scope and meaning of fundamental rights borrowed from the ECHR and its case-law. Although the CJEU still lacks a set of uniform rules on references to Strasbourg case-law, and even the European judges' motivations for Strasbourg case-law references are varied, this method can be regarded as a kind of solution to the jurisprudential conflicts between the two European courts. From a functional perspective, the function of the Strasbourg case-law reference can be divided into four categories: authoritative guidance, legitimate guidance, reference "by analogy", and decorative reference. In particular, the function of legitimate guidance can even be re-divided into three sub-functions: guidance, conformation to legitimacy, and warning the member states against the undermining of the Strasbourg jurisprudence as well as a comparative analysis of similarity and difference between EU law and ECHR.

Keywords: case-law reference, Luxembourg judgments, fundamental rights, comparative law, Strasbourg case law.

1. Introduction

Many scholars have referred to the judicial and legislative interactions between the EU Charter on Fundamental Rights and the European Convention on Human Rights (ECHR). These two instruments, combined with the national constitutions, constitute the consolidated multilevel protection of fundamental rights in most European states. In this triangular structure, the formal intertwined mechanism for judicial dialogue has already been embedded in the hierarchical relationship between the

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EU and the national judiciaries, which is the preliminary reference mechanism. Apart from this, a new transnational judicial dialogue will be established by the advisory opinion mechanism in the Strasbourg legal order that will work to guarantee that the national courts correctly apply or interpret the ECHR.

However, these two mechanisms for dialogue show the different motivations of lawyers and judges. The first of them aims to guarantee the EU's authority in the process of European integration, through the Luxembourg Court's uniform interpretation, and examination of compliance, of national measures implementing EU law, whereas the Strasbourg Court's aim is to "ensure the observance of the commitments entered into by the Contracting Parties" under the European Convention, which is designed to "operate primarily as an interstate agreement which creates obligations between the Contracting Parties at the national level".[2] These formal mechanisms may have an impact on the evolution of the domestic legal order, given that the supranational opinions will probably be adopted by the national courts as the authoritative criteria for the assessment of the conventionality of domestic law. The consequences are easily perceived from the supranational legal orders:

(1) The domestic (constitutional) provision must be set aside if it conflicts with an EU ruling that has direct effect.[3] If the EU provision has indirect effect, the national court must reconcile the legal conflict through a consistent interpretation. Since the preliminary decision has a binding effect on the domestic court, the domestic court must apply domestic measures by relying on the Luxembourg opinion.

(2) The Strasbourg regime does not adopt the EU model of a preliminary ruling that grants binding effect to an advisory opinion, because this would be incompatible with the principle of subsidiarity in relation to the exhaustion of domestic judicial remedies, but the Strasbourg advisory opinion still has a potential impact on the interpretation of the domestic rules in the light of the Convention rights. By means of an advisory opinion, the Strasbourg judges do not have to follow a previous legal decision. The Grand Chamber in a leading case may deliver an opinion *erga omnes*; the effect of such an opinion is to block the admissibility of similar cases submitted by the courts of other states. Pursuant to Art.2, paragraph 1 of Protocol No.16 to the ECHR, the referring court must inform the Strasbourg Court of the Convention rights to be applied and the domestic law to be reviewed. Accordingly, the Court may, after a ruling that the domestic law is incompatible with the Convention rules, suggest that the legislators of the referring state revise the relevant legal provisions or may teach the domestic judicial organs a new measure or technique for balancing competing rights and interests. This might be sufficient to allow the Strasbourg advisory opinion to diffuse into the legal systems of all the Contracting States. The domestic court can determine the case at hand under the guidance of the Strasbourg decision, within the scope of the margin of appreciation. Despite the fact that the advisory opinion will not formally bind the domestic interpretation of the ECHR, it would be hard for an individual complaint, once the domestic remedies have been exhausted, to be admitted if the domestic court has properly taken the Strasbourg opinion into account. Instead of the vertical interaction between the national and the supranational courts, the present essay specifically focuses on the Luxembourg Court's references to Strasbourg case law in its final judgments. As is well-known, the Luxembourg judges have cited a number of Strasbourg decisions in their final judgments. However, very few of the Luxembourg judges have revealed the motivations for the Luxembourg Court's citations of Strasbourg case law or the function of such citations, and very few

[2] Opinion of Advocate General Maduro in the *Kadi* case. See *Case 402/05 P, Yassin Abdullah Kadi v. Council of European Union and Commission of European Community* [2008], para.37.

[3] The preliminary decision in the *Melloni* case forced the Spanish Constitutional Court to overrule its previous constitutional decision. Moreover, the Spanish Constitutional Court had to reformulate the meaning of the constitutional provision of Art.94 of the Spanish Constitution.

have comprehensively analysed the Strasbourg case law to which they have referred.[4] These deficiencies inevitably give rise to some general questions as to why and how the Luxembourg judges refer to Strasbourg case law in their judgments. Given the fact that the Luxembourg judges rarely invoke argumentation or use discursive methods when elaborating the comparative law,[5] we need to examine the references to Strasbourg case law in the Luxembourg judgments, in order to discern the functions of and motivations for such references, twenty years after the judgment in *P. v. S.*[6] in which the Luxembourg judges cited a Strasbourg decision for the first time in history.

Before a thorough analysis of the functions and motivations of Luxembourg's references to Strasbourg jurisprudence, it is necessary to rethink the legal status of the European Convention and the Strasbourg case law in the EU legal order. Art.6(3) of the Treaty of EU (TEU) requires that the EU institutions and Member States regard Convention rights as general principles of EU law. Theoretically, it is by no means the case that the European Convention should be regarded as primary law; nor did it have external binding power on the EU institutions before the EU's accession to the ECHR. Instead, the Luxembourg Court is likely to interpret the Convention rights autonomously if the appellants or domestic courts require them to start a judicial review of an EU statute that is being challenged, or to interpret a provision in compliance with the relevant fundamental rights. Although the EU Charter was endowed with a binding force after the entry into force of the Lisbon Treaty, the European Convention and Strasbourg case law are still regarded as special parameters in the areas of the protection of minor's rights and in the area of freedom, security and justice.

My research, based on the *Curia* database, shows that around 50 Luxembourg judgments between 1997 and 2015 explicitly referred to Strasbourg case law. About 35 of these were delivered before the adoption of the Lisbon Treaty, while the other 15 judgments were given in the post-Lisbon Treaty era. The effects of the citation of Strasbourg case law are various and unsystematic. Peers divides them into three categories: relevant citations, irrelevant citations and questionable citations.[7] De Witte describes the Luxembourg references to Strasbourg case law as "eclectic and unsystematic".[8] Douglas-Scott also criticizes the Luxembourg judges for usually citing Strasbourg case law in a vague manner[9] and for not using consistent and articulate comparative methods.[10] The Luxembourg judges quite often publicly

[4] G. de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator*, Maastricht Journal of European and Comparative Law, Vol.20, No.2, 2013, pp.176-178. The author points out several reasons why the Luxembourg Court does not like referring to international or comparative legal sources in its judgments. The Luxembourg Court adopts the French continental judicial approach to drafting a final judgment. Unlike the Strasbourg Court, which models its judgments on the discursive and full style of reasoning, the Luxembourg judges have largely continued with their original approach. Moreover, in order to protect themselves from the disputes and challenges that might follow from providing more fully reasoned judgments, the Luxembourg judgments avoid showing any analyses of international or comparative law. Last but not least, a frequent response of the Luxembourg judges in defence of their style of reasoning and their practice of not citing international or comparative law is that these foreign legal sources are considered or read by the Luxembourg judges or the Advocates General.

[5] S. Douglas-Scott: *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights* Acquis, Common Market Law Review, Vol.43, No.3, 2006, pp.657-658.

[6] *Case 13/94, P v. S*, [1996] ECR 2143.

[7] S. Peers, *The European Court of Justice and the European Court of Human Rights: Comparative Approach*, in E. Örücü (ed.): *Judicial Comparativism in Human Rights Cases*, United Kingdom National Committee of Comparative Law, London, 2003, pp.113-127.

[8] B. de Witte: *The Use of the ECHR and Convention Case Law by the European Court of Justice*, in P. Popelier & C. Van de Heyning & P. Van Nuffel (eds.): Human Rights Protection in the EU Legal Order: The Interaction between European and National Courts, Intersentia, Antwerp, 2011, p. 24.

[9] Douglas-Scott 2006, p. 646.

[10] Douglas-Scott 2006, p. 656; see also K. Lenaerts: *Interlocking Legal Orders in the EU and Comparative Law*, The International and Comparative Law Quarterly, Vol.52, No.4, October 2003, p. 873. Lenaerts argues that the Court of Justice often bases its judgments on Strasbourg case decisions, but that this is rarely translated directly into its reasoning.

claim that they refer to Strasbourg cases "by analogy", rather than regarding them as a binding legal source.[11] In this sense, Strasbourg case law seems to be treated as no more than a source of which Luxembourg must take note but with no binding power in relation to the protection of fundamental rights in Europe, so that the Luxembourg Court can interpret the fundamental rights in any way that is compatible with the Strasbourg jurisprudence.[12]

Unfortunately, very few EU legal scholars take the systematic case law study approach when they analyse the various roles of the Strasbourg decisions in the Luxembourg judgments. Concrete case law studies can pave the way to revealing those judgments in which the Court substantively relies on Strasbourg case law, and those in which the Court refers to Strasbourg case law in passing. On the other hand, research founded on concrete case studies can effectively reveal the Luxembourg Court's motivation and the function of the Strasbourg citations. This approach allows us to examine effectively whether a reference to Strasbourg case law actually enhances the legitimacy of a Luxembourg judgment[13] and effectively promotes harmonization between the two Courts.[14]

Given that it is unnecessary and impossible to carry out a detailed analysis of all fifty of the Luxembourg judgments that I have collected, I will divide them into four types according to my functional categories, and then select typical examples to examine the function of the reference and revealing the motivations of the Luxembourg judges. The four types are as follows:

- **Substantive following of Strasbourg jurisprudence**: the Luxembourg judges decide the case by relying on Strasbourg jurisprudence. This usually occurs in circumstances in which the Luxembourg Court lacks the relevant precedents or there is an absence of EU legislation. Thus, Strasbourg jurisprudence becomes the source of legitimacy with regard to the interpretation of fundamental rights. At other times, it is likely that the Luxembourg judges will prefer to follow the Strasbourg jurisprudence when the official Explanation Relating to the Charter of Fundamental Rights (hereiafter: Official Explanation)[15] explicitly indicates that the standard of fundamental rights protection derives from the Strasbourg jurisprudence.
- **Decorative citations**: the Strasbourg case provides no help but only serve as a decoration. In examples in this category, the Luxembourg Court may find the Strasbourg case law irrelevant to the Luxembourg case at hand, or it might be that the Strasbourg case law referred to by the Court does not have an impact on the final decision.
- **Reference to Strasbourg case law "by analogy"**: the Luxembourg Court refers to Strasbourg jurisprudence under comparable but not identical circumstances. Not only do the Luxembourg judges generously follow the Strasbourg case law to which they refer, but they also may extend the applicability of the Strasbourg case law into new areas.

[11] L. Scheeck, *Solving Europe's Binary Human Rights Puzzle: The Interaction between Supranational Courts as a Parameter of the European Governance*, Questions de Recherche, No.15, 2005, p. 21.

[12] Joint Communication from Presidents Costa and Skouris, 24 January 2014, para.1.

[13] G. Harpaz, *The European Court of Justice and Its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy*, Common Market Law Review, Vol.46, No.1, 2009, p.121. The author argues that, "The ECJ should therefore ensure that its reliance on the Strasbourg Regime and on the verdicts of the Strasbourg Court are made explicit. Placing the EU's human rights regime under the external (and therefore more objective) normative supervision of the Strasbourg Regime may further advance the ECJ's legitimacy".

[14] S. Morano-Foadi: *Fundamental Rights in Europe: "Constitutional" Dialogue between the Court of Justice of the EU and the European Court of Human Rights*, Oñati Journal of Emergent Socio-Legal Studies, Vol.5, No.1, 2013, p.79; Harpaz 2009, p. 119.

[15] Explanation Relating to the Charter of Fundamental Rights, 2007/C 303/02, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF (4 November 2016).

- **Citation for legitimate guidance**: most Strasbourg case law is used as a parameter to provide legitimate guidance in the Luxembourg Court's deliberations. The Court usually ascertains the definition of a specific legal term or the scope of rights in line with the relevant Strasbourg case law. In addition, the Court usually confirms whether the domestic court's or the General Court's decision is justified on the basis of the Strasbourg jurisprudence. Sometimes it outlines the relevant case law, warning the domestic court not to undermine the fundamental rights established by the Strasbourg case law. In addition, the Court may rely on the comparative method to reveal the characteristics of the Convention system.

2. Strasbourg Case Law in the System for the Protection of Fundamental Rights in the EU

2.1. The European Convention as a General Principle of EU Law in the EU Legal Order

In its early days the Court of Justice did not regard itself as a legitimate tribunal with competence in relation to the protection of fundamental rights.[16] In the 1950s the Rome Treaty merely embodied some economic rights to promote internal economic integration among the member states of the ECSC and the EEC. Given the fact that the EEC's founders sought to build an innovative international economic identity by transferring sovereign power from the states to a supranational organization, the Court of Justice developed direct effect[17] and the doctrine of primacy[18] of Community law, so that the national judges were obliged to apply Community law even when their national law conflicted with it. Thus, the EC became a supranational entity that could autonomously fulfil its legitimate mandates without being subjected to any external supervision. This worried the national courts and some Luxembourg judges, because they felt that the absence of a mandate for the protection of fundamental rights in the EC might gradually encroach on the EC's legitimacy and deepen the distrust between Brussels and the Member States. Pierre Pescatore, an outstanding European judge, even questioned whether the Luxembourg case law could be adequate for the protection of fundamental rights in the EU legal order.[19]

The Luxembourg Court recognized, in the decision of *Stauder*[20], that the fundamental rights, as part of the general principles of EU law, were embedded in the common constitutional traditions to the member states. The judgment in *Nold*[21] explicitly linked EU legal order to the European Convention on Human Rights. The Luxembourg judges claimed that the international (human rights) treaties, particularly the ECHR, together with the identified common constitutional traditions, were two sources of inspiration of fundamental rights protection. The Court then specifically claimed, in the *Rutili* judgment, that the ECHR established "the guideline that the EC member states should observe in the Community legal order".[22] With their frequently automatic interpretation of the ECHR, the Luxembourg judges regarded

[16] J. H. H. Weiler: *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights within the Legal Order of the European Community*, Washington Law Review, Vol.61, No.3, July 1986, p.1110.

[17] *Case 26/62, en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 2, p.7.

[18] *Case 6/64, Flaminio Costa v E.N.E.L* [1964] ECR 585, p.594.

[19] P. Pescatore: *Les Droits de l'homme et I'intégration Européenne*, Cahiers de Droits Européenne, No.4, 1968, p. 657.

[20] *Case 29/69, Erich Stauder v City of Ulm*, [1969] ECR I-419.

[21] *Case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, [1974] ECR I-491.

[22] *Case 36/75, Roland Rutili v Ministre de l'intérieur*, [1975] ECR I-1219, p. 1232.

the European Convention as having "special significance" in the Community legal order.[23]

The drafters of the Maastricht Treaty reaffirmed that the European Convention constituted a part of the general principles of Community (Union) law.[24] Although it was by no means clear that the legal effect of other international human rights treaties would be denied before the Luxembourg Court, the Treaty authors emphasized the dominant status of the ECHR, in particular, in laying down general principles of Community law. Because the ECHR had been widely regarded as the "European minimum standard for fundamental rights", even before the Lisbon Treaty came into effect the domestic courts and appellants had always required the Luxembourg Court to interpret or examine secondary EU law on the grounds of the ECHR.

2.2. The Status of Strasbourg Case Law in Art. 52 (3) of the EU Charter on Fundamental Rights

Now that the Lisbon Treaty has come into effect, the Luxembourg judges can directly start from the Charter whenever they need to review the compliance (legality) of secondary EU legislation or whether concrete domestic measures correctly implement EU law with fundamental rights contained by the EU Charter or general principles of EU Law. In order to ensure that the EU Charter gives protection on fundamental rights that is equivalent to the ECHR standards, Art.52(3) provides that "*... rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention*".

In fact, the drafters of the EU Charter borrowed nearly all the Convention rights; Douglas-Scott argues that "more than half of the Charter rights are borrowed from the European Convention".[25] However, the drafters did not simply adopt a cut-and-paste method for transplanting these Convention rights into the EU Charter. Rather, they adopted four other approaches as well[26] in order to make the judicial protection

[23] A. Arnull, *The European Union and Its Court of Justice*, 2nd edn, Oxford University Press, Oxford, 2006, pp.339-340.

[24] Art.6(2) of the Maastricht Treaty provides that the Union shall respect the fundamental rights "as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ... as general principles of Community law". Art.6(3) of the Lisbon Treaty states that fundamental rights "as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms... shall constitute general principles of the Union's law".

[25] S. Douglas-Scott: *The Court of Justice of the European Union and the European Court of Human Rights after the Lisbon Treaty*, Legal Research Paper Series, Oxford University, 2012, p.8.

[26] P. Lemmens: *The Relation between the Charter of Fundamental Rights of the European Union and European Convention on Human Rights: Substantive Aspects*, Maastricht Journal of European and Comparative Law, Vol.8, No.1, 2001, p.50. Also see 范继增：《欧洲多层级框架下人权保障机制——欧盟法与"欧洲人权公约"的交互性影响》，载《中山大学法律评论》，第13卷第3期，2015, 第33-35页 (Jizeng Fan, The European Multilevel Protection of Fundamental Rights — The Interactive Relationship between the EU Law and the European Convention on Human Rights, *Sun Yat-sen University Law Review* (2015), vol.13, pp.33-35). In total, the drafters of the EU Charter adopted five different approaches to the transplantation of European fundamental rights from the ECHR to the EU Charter: (a) a cut-and-paste model: the drafters literally copied the words of the European Convention's provisions into the EU Charter without making any significant modification. For instance, Art.4 of the EU Charter, prohibiting torture and degrading treatment, copies Art.3 ECHR almost word for word. The wording of the first two paragraphs of Art.4 of the ECHR, concerning the prohibition of slavery, servitude and forced and compulsory labour, are transferred into the first two paragraphs of Art.5 of the EU Charter; (b) the transplantation of Convention rights into the EU Charter with general expressions: the drafters of the EU Charter have not given the detailed meaning and scope of the fundamental rights borrowed from the European Convention, but these fundamental rights are transferred to the EU Charter using brief and abstract words. For instance, the EU Charter has borrowed the right to life and the right to the abolition of the death penalty (Art.2), rights to liberty and security (Art.6) and the right of defence in a fair trial (Art.48(2)); (c) the borrowing of rights for the Charter from the corresponding Convention provisions, but with a higher standard of protection being granted than in the ECHR. For instance, the Charter's rights to marry and have a family correspond to the Convention rights embodied in Art.12 of the ECHR. The Charter's definition of

of fundamental rights visible and compatible with the EU context, and to ensure that the Charter standard of protection was not lower than the standard of their counterparts embodied in the European Convention.

A controversial question is whether the Court of Justice could be considered bound by Strasbourg case law in light of the fact that the European Convention is a "living instrument".[27] The Strasbourg judges dynamically define the meaning and scope of the fundamental rights through the "consensus" approach. The margin of appreciation is narrowed if the Strasbourg Court can find a consensus among the Contracting States concerning the protection of fundamental rights.[28] Otherwise, the Contracting States enjoy quite a large margin of discretion on restrictions of fundamental rights. The dynamic approach to the interpretation of fundamental rights converts the Convention into a document applicable to all the Contracting States that can never be out of date. Strasbourg case law, before Protocol No.16 to the ECHR[29] comes into effect, must be seen as one of the fundamental sources setting the European standard on fundamental rights. Even though the binding effect of a Strasbourg decision is mainly confined to *inter partes* disputes,[30] Strasbourg jurisprudence provides *de facto* orientation to the Luxembourg judges for their deliberations and interpretations of fundamental rights when the circumstances are similar or comparable to those of the relevant Strasbourg decisions.[31] Thus, it is reasonable to expect that the

family cuts the link to couples of opposite sexes. Moreover, the family foundation is no longer correlated to an officially registered marriage. In this sense, same-sex marriage is recognized by the EU Charter; (d) the transplantation of EU Charter rights from the Convention Protocols: for instance, the right to education, provided by Art.14 of the EU Charter, not only imposes on EU institutions and Member States the obligation to provide compulsory as well as other types of education to EU citizens, but also adds respect for parents' rights, providing in its third paragraph "to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions". The protection of the right to property in the EU Charter goes further than European Convention Protocol No.1 does. Protocol No.1 is silent on the right to compensation if the competent authorities expropriate private property, while the EU Charter explicitly prescribes that any expropriation is subject to "a fair compensation, being paid in a good time for loss"; and (e) the borrowing of EU fundamental rights from the Strasbourg case law. In line with the Strasbourg judgment in *Soering*, the drafters of the EU Charter incorporate the words "no one shall be removed, expelled and extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other degrading treatment or punishment" into Art.19(2) of the EU Charter.

[27] G. Letsas: *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, in A. Follesdal & B. Peters & G. Ulfstein (eds.): *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press, Cambridge, 2013, p.109. In the judgment in *Tyere*, the Strasbourg Court denied the legitimacy of corporal punishment and added that, "The Court must also recall that the Convention is a living standard which, as the Commission rightly stressed, must be interpreted in the light of the present-day conditions. In the case now before it the Court cannot be influenced by the development and commonly accepted standard in the penal policy of the member states of the Council of Europe in this field".

[28] F. Parras: *From Strasbourg to Luxembourg? Transposing the Margin of Appreciation Concept into EU Law*, Working Paper, Centre Perelman de Philosophie du Droit, No.7, 2015, p.4.

[29] N. Posenato: *Il Protocollo n.16 alla CEDU e il rafforzamento della giurisprudenza sui diritti umani in Europa*, Diritto Pubblico Comparato ed Europeo, No.3, 2014, p.1442. The author argues that the new mechanism may contribute to a decrease in the number of cases appealed to the Strasbourg Court. Moreover, the Court could provide different types of guidance or orientation to the referring national courts, which must take these Strasbourg opinions into account in their domestic judgments.

[30] The legal effect of Strasbourg case law in the domestic legal order is completely regulated by national law. Moreover, unlike the common law, where deliberations on later cases must follow precedents, the Strasbourg judges do not have to be bound by the Court's precedents.

[31] H. Keller & A. S. Sweet: *The Reception of the ECHR in National Legal Orders*, in H. Keller &A. S. Sweet (eds.:, A Europe of Rights: The Impact of the ECHR on National Legal Systems, Oxford University Press, Oxford, 2008, p.14. Using the Strasbourg precedents, the Court seeks to structure the arguments of the applicants and the defendant states, to ground its rulings, and to persuade states to comply when it finds violations. The Court also relies heavily on precedent-based rationales to develop Convention rights and to manage a complex environment protectively. The Court does this in the name of "legal certainty and the orderly development of its case law". Convention rights, like the rights provisions of national constitutions, have been judicially constructed, and precedent both enables and constrains the Court's creativity. The Court will abandon a line of case law in order to correct an earlier error, or "ensure that the interpretation of the Convention reflects societal change and remains in line with the present day conditions". The idea of the "living instrument" and the evolutionary approach to interpretation may, to some extent, set barriers to whether the Court is to be bound by the Strasbourg precedents.

Luxembourg Court may develop its interpretation of fundamental rights by referring to Strasbourg case law.

Koen Lenaerts, the current President of the CJEU, argues that the Luxembourg judges are obliged to follow Strasbourg case law because the Strasbourg decisions have evolved into a crucial part of the Convention with respect to the European standard of fundamental rights.[32] Francis Jacobs, a former Advocate General, even argued boldly, in the Opinion in the *Bosphorus* case, that "the Convention can be regarded as part of Community law and can be invoked as such both in this Court and in national courts".[33] The argument that Strasbourg case law has a binding effect seems to be solidified by the Official Explanation to Art.52 (3) of the EU Charter, which states that "*the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and of the Court of Justice of the European Union*".[34]

However, it cannot easily be accepted by the Luxembourg judges that subjection to the Strasbourg decision is compatible with the Luxembourg legal order, because it actually undermines the Luxembourg Court's autonomy if the interpretation of the EU Charter gives a binding effect in the EU legal order to a Strasbourg decision. This would imply that an international judicial decision automatically transfers into EU law, but EU law also constitutes a two-layer legal hierarchical structure in which the Luxembourg Court is definitely at the bottom.[35] In this sense, the authors of the EU Charter may have intentionally excluded "Strasbourg case law" from the wording of Art.52(3) of the EU Charter.[36] Pursuant to Art.52(7) of the EU Charter, the Official Explanation providing guidance on the interpretation of the EU fundamental rights shall be "given due regard by the courts of the Union and of the Member States". The phrase "due regard" sounds as if the Luxembourg judges do not need to follow the Strasbourg interpretation strictly. Therefore, the Official Explanation of Art.52(3) of the EU Charter becomes a confirmation of the fact that the Luxembourg judges can take Strasbourg case law into account in certain circumstances. The legislators intentionally leave it to the discretion of the Luxembourg judges as to whether or not they observe Strasbourg decisions.

3. The Methodology of the Luxembourg Using Strasbourg Jurisprudence

Since the CJEU has adopted the French style of writing judgments, its forms of legal reasoning and judicial deliberations seem simple and formalistic.[37] Unlike the Strasbourg judges, the Luxembourg

Thus Judge Nicolas warned his colleagues in his dissenting opinion on *Scoppola II* that "... we, as a minority, do not call into question the [precedence of Strasbourg], to which the majority refer, either on reversing previous decisions, where necessary, or of adapting to changing conditions and responding to some emerging consensus on new standards, since the Convention is a living instrument ... But no judicial interpretation, however creative, can be entirely free of constraint".

[32] Koen Lenaerts & Eddy de Smijter: *The Charter and Role of the European Courts*, Maastricht Journal of European and Comparative Law, Vol.8, No.1, 2001, p.99. The two authors argue that "since the Strasbourg case law has formed a constituent part of the protection standard of the European Convention, it is reasonable to hold that the Luxembourg decision should be subjected to the Strasbourg case law". Lord Goldsmith,

[33] Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, Advocate General's Opinion, para.53.

[34] Tobias Lock: *The ECJ and ECtHR: The Future Relationship between the Two European Courts*, The Law and Practice in the International Courts and Tribunals, Vol.8, No.3, June 2009, p.384.

[35] Lock 2009, p. 383.

[36] S. Douglas-Scott: *The European Union and Human Rights after the Lisbon Treaty*, Human Rights Law Review, Vol.11, No.4, December 2011, p.655.

[37] Christopher McCrudden: *Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared*, in C. Barnard & A. A. Llorens & M. Gehring & R. Schütze (eds.): *Cambridge Yearbook of European Studies*, Vol.15, 2012-2013, p.403.

judges seldom refer to foreign law or international treaties, and they never present their dissenting opinions, fearing that any minimal divergence may lead people to question the reasonableness of the judgment. The European Convention has a special significance for EU law because the ECHR and ECtHR case law have been repeatedly cited by the Court, as general principles of EU law, or as analogical inspiration for the Luxembourg judges, or as guidance (orientation) in the deliberations in Luxembourg. Some scholars have noted that the Luxembourg Court sometimes regards the Strasbourg jurisprudence as its own set of precedents.[38] The Luxembourg judges seem to be a little timid about explicitly giving accurate answers about the role of Strasbourg case law through Luxembourg's interpretation of Art.52(3) EU Charter. They are wise to avoid answering this general but sensitive question without giving it due consideration, because the Luxembourg Court must defend its autonomy. On the other hand, the Luxembourg Court cannot ignore the influence of the ECHR in the complicated question of the multilevel protection of fundamental rights in Europe. Recognized as the "constitutional instrument of the European public order"[39] in the field of human rights, the European Convention and ECtHR case law have become parameters for measuring the domestic protection of human rights. Thus, although the legal status of Strasbourg case law in the domestic legal order varies according to the national constitutional rules,[40] it should be regarded as a persuasive constitutional or *de facto* supra-legislative instrument.[41] Thus, the national courts of the EU Member States are accustomed to submitting their preliminary references to the Luxembourg Court to require the Court to examine the EU provisions, domestic provisions or measures on the implementation of EU law that have been challenged, to confirm whether they are in line with the ECHR and the relevant Strasbourg case law.[42] Even though the

[38] De Witte 2011, p. 23.

[39] *Loizidou vs. Turkey* (Appl. no. 15318/89) ECtHR (1996).

[40] G. Martinico: *Is the European Convention Going to Be 'Supreme'? A Comparative Constitutional Overview of ECHR and EU Law before National Courts*, The European Journal of International Law, Vol.23, No.2, 2012, p.404. The ECHR in the domestic legal order might be summarized as follows: (a) Some constitutions attribute constitutional standing to the ECHR; this is the case in Austria and the Netherlands (monist states); (b) In some states (e.g. France, Belgium, Spain and Portugal), the ECHR has a super-legislative standing; (c) Finally, in other states (such as the UK), the ECHR has a legislative standing. Countries such as Italy and Germany apparently belong in the third group (if one reads their constitutions), but the local constitutional courts have clarified that the ECHR has a special force that exceeds the normal constitutional discipline of international norms. See also Douglas-Scott 2011, p. 657. Section 2 of the UK Human Rights Act only requires the UK Court to "take into account" Strasbourg jurisprudence, denying it any binding status. In Germany, the Constitutional Court has not required the strict application of ECHR case law, even in cases brought against Germany directly; see also G. Martinico & O. Pollicino: *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws*, Edward Elgar, Cheltenham, 2012, p.92. The Italian Constitutional Court made two fundamental decisions (Nos.348 & 349/2007) in 2007 clarifying the position of the ECHR in the domestic legal system in Italy. These can be summarized as follows: (a) The ECHR has a super-primary value; (b) In some cases, the ECHR can stand as an 'interposed parameter' for assessing the validity of primary laws, since any conflict between them and the ECHR can result in an indirect violation of the Constitution; (c) This does not imply that the ECHR has a constitutional value; on the contrary, the ECHR has to respect the Constitution; (d) The constitutional status accorded to the ECHR implies that there is a need to interpret national law in the light of the provisions of the ECHR. Strasbourg case law has been perceived as a hermeneutical tool to interpret the Conventional provisions. Subsequently, it has been understood as a supra-legislative instrument to ensure closeness between the wording of its provisions and the language of the Constitution.

[41] Martinico 2012, p. 411. In May 2011, the German Constitutional Court held preventive detention to be unconstitutional, basing its expansive interpretation of the German Constitution on Strasbourg case law. Also see M. Amos: *Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act*, Human Rights Quarterly, Vol.35, No.2, May2013, pp.389-390 & 403-404. Although the 1998 UK Human Rights Act does not grant Strasbourg jurisprudence a binding effect, the UK courts have consistently held that a national court should not "without strong reason dilute or weaken the effect of the Strasbourg case law". Even though the House of Lords and the Supreme Court have held that the Strasbourg decisions are inconsistent with some fundamental substantive and procedural aspects of UK law and are not "directly binding as a matter of our law", the UK courts will eventually adopt the Strasbourg jurisprudence in a complete about-face on what was previously decided.

[42] Jasper Krommendijk: *The Use of ECtHR Case Law by the CJEU after Lisbon: The View of Luxembourg Insiders*, Maastricht Working Paper, No.6, 2015, p.20. One interviewee noted that 90 to 95% of the arguments (on Strasbourg case law) in a case are usually brought up by the parties or by the agents of the intervening Member States. Another interviewee had the supplementary view that if a certain ECtHR-inspired argument or ECtHR-specific judgment is not put forward, the

Luxembourg judges could directly use the Charter rights as their departure point, they sometimes have to take the Strasbourg jurisprudence seriously if there are no relevant Luxembourg precedents or if the Court wishes to modify the Luxembourg jurisprudence to match the development of Strasbourg case law. In the judgment in *Hoechst*, the Luxembourg Court even refused to treat the premises of an undertaking as part of the private sphere under Art. 8 ECHR because it noted that "there is no case-law of the European Court of Human Rights on the subject"[43] and argued that the European Convention did not explicitly protect this right to legal person privacy in the judgment in *Roquette*.[44] The Strasbourg Court then criticized this Luxembourg decision in the judgment in *Niemietz,*[45] taking the view that business premises having a strong relationship to private life should also be regarded as a "home" and be free from inappropriate interference. Thus, the Luxembourg Court had to modify its case law, stressing, in particular, that "[The Luxembourg Court] must regard the case law of the European Court of Human Rights subsequent to the judgment of Hoechst". The Court particularly stressed the point that "*the protection of home provided for in Art.8 of the European Convention may in certain circumstances be extended to cover such a premise*" as decided in the *Société Colas Est*[46] case, and recognized that the *Niemietz* decision "*might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case*".[47] Although the Luxembourg Court has consistently insisted that the relevant Strasbourg decisions are used "by analogy", when it wishes to circumvent their influence, it actually made this decision in line with the Strasbourg case law that is referred to. In this sense, the protection of fundamental rights may be the least autonomous field in the Luxembourg regime.

In contrast with the Luxembourg judges who show this great prudence, the Advocates General are usually bolder in expressing their personal views on the role of Strasbourg case law in the EU legal system. In the *Connolly* case, AG Colomer asserted that Strasbourg case law had "*cardinal importance as a source for defining fundamental rights recognized by the ECJ*". In the *Van der Wal* case, AG Cosmas stated that "*since the EU is not a signatory to the ECHR, while it may be logical and legitimate to refer by way of analogy to rulings of the European Court and Commission of Human Rights, it cannot be accepted that the ECJ and CFI are formally bound by the rulings*". In the *Roquette* case, AG Mischo stated that "*the ECJ attaches the greatest importance to the case-law of the Court of Human Rights*". In *Kaba*, AG Colomer said "the ECJ pays the greatest heed to the European Court of Human Rights" and in the *SGL Carbon* case, AG Geelhoed stated that "*the Court of Justice attaches great value to the case law of the European Court of Human Rights*". The attitudes of the AGs towards the status of Strasbourg jurisprudence still lack consensus after the Lisbon Treaty. In the Opinion in *Fransson*[48], AG Villalon argued that, because not all the Member States of the EU had ratified Protocol No.4 to the ECHR, the Luxembourg judges should not take into account Strasbourg case law concerning the principle of *ne bis in idem*. However, the final judgment was silent on this issue. Conversely, AG Kokott took the opposite position from her colleague in the Opinion in *Bonda*[49]. She argued that even though not all the Member States had ratified this Protocol, the Luxembourg Court should respect the principle of *ne bis in idem*

chances are high that this argument is wrong or irrelevant, especially when an ECtHR argument is repeated by the Court as a message that it must be closely studied.

[43] *Joined Cases 46/87 and 227/88, Hoechst AG v Commission of the European Communities* [1989] ECR 2859, p. 2924.

[44] *Case C-94/00 ,Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities*, [2002] ECR I-9011.

[45] *Niemietz vs. Germany* (Appl. no.13710/88) ECtHR (1992).

[46] *Société Colas Est vs. France* (Appl. No. 37971/97) ECtHR (2004).

[47] *Niemietz* 1992, para.31.

[48] *Case C-617/10, Åklagaren v Hans Åkerberg Fransson,* judgment 26 February 2013.

[49] *Case C-489/10, Lukasz Marcin Bonda,* judgment 5 June 2012.

enshrined in Protocol No. 4 to the ECHR.

The final judgments from Strasbourg reveal very few personal opinions of the judges on the role of Strasbourg case law. This is not only because dissenting opinions cannot be officially attached to the final Luxembourg judgment, but also because the procedure for drafting judgments probably prevents some Strasbourg citations being considered in the Luxembourg Court. The Luxembourg final judgments are based on consensus. The more foreign law that is discussed and cited in the final judgment, the greater the risk of dissent among the Luxembourg judges. Each sentence and word is examined by many eyes and can potentially lead to disagreement.[50] Thus, the Luxembourg judges favour concise decisions, and limit the legal reasoning to the subject matter that is absolutely essential.[51] This may imply that an original reference to Strasbourg case law used by the Luxembourg rapporteurs at the initial stage of deliberation may ultimately be removed if the ECtHR case law is not particularly necessary or the reference to Strasbourg case law may excessively lengthen the judgment.[52] For instance, the number of Strasbourg case law citations in the final judgment in *Pupino*[53] is smaller than the number in the initial draft.[54] Apart from that, many other factors may also influence the (number of) citations of Strasbourg case law in the stages of the initial drafts and the final judgment.[55] The writing style of the judges and the judges' professional backgrounds are regarded as the two fundamental factors here. Judges who have working experience in the European Court of Human Rights are likely to take Strasbourg case law into account in their deliberations in relation to fundamental rights. These judges know the Strasbourg jurisprudence very well, so they may individually rely on Strasbourg case law to define the scope and meaning of fundamental rights. The judges who are keen on academic research present their legal reasoning having considered Strasbourg case law. However, not all the judges are interested in the Strasbourg jurisprudence. Some of them are even reluctant to attend the annual meeting with the Strasbourg judges. Hence, this group of judges may just start from the Luxembourg instruments, without considering the Strasbourg jurisprudence in detail. However, these Luxembourg judges must take the Strasbourg jurisprudence seriously whenever the Luxembourg instruments are not self-evident with regard to concrete jurisprudential criteria for the protection of fundamental rights.[56] The Luxembourg Court cites a number of Strasbourg case law decisions in the judgment in *Kadi I*,[57] with the Court following the Strasbourg jurisprudence from *Jokela*[58] to demonstrate that a correct procedure must afford the person concerned a reasonable opportunity of accessing justice. In the judgment in *Kadi II*[59], the Court explicitly referred to the Strasbourg judgment in *Nada*[60] (where the Strasbourg judges, in turn,

[50] Konrad Schiemann: *A Response to the Judge as a Comparativist*, Tulane Law Review, Vol.80, No.2, 2005, p.290.

[51] K. Lenaerts: *How the ECJ Thinks: A Study on Judicial Legitimacy*, Fordham International Law Journal, vol.36, No.1, 2013, p.1351.

[52] Krommendijk 2015, p. 28.

[53] *Case 105/03, Maria Pupino*, [2005] ECR I-5285.

[54] L. Scheeck: *Competition, Conflict and Cooperation between the European Courts and the Diplomacy of Supranational Judicial Networks*, GARNET Working Paper, No.23, 2007, p.17. The author said that "although the initial draft of the judgments extensively quotes the Strasbourg jurisprudence in a very precise manner, the final judgment still relies heavily on the Convention and its Court's work to justify its groundbreaking decisions."

[55] Krommendijk 2015, pp. 24-35.

[56] S. I. Sanchez: *The Court and the Charter: The Impact of the Entry into the Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights*, Common Market Law Review, Vol.49, No.5, 2012, p.1604.

[57] *Joined Cases 402/05 and C-415/05, Kadi*, [2008] ECR 6351.

[58] *Jokela vs. Finland* (Appl. no.28856/95) ECtHR (2002).

[59] *Joined Cases 584/10 P, C-593/10 P and C-595/10 P, European Commission and Others v Yassin Abdullah Kadi*, judgment 18 July 2013.

[60] *Nada vs. Switzerland* (Appl. No.10593/08) ECtHR (2012).

had obtained inspiration from the Luxembourg decision in *Kadi I)*[61] and argued that since there were no effective measures provided to the applicant to enable him to remove his name from the UN blacklist, he should be given the opportunity to apply to the domestic court to request the removal of his name from the list through judicial review, which was the essence of the right to fair trial.[62] The mutual references to case law between the judgments in *Nada* and *Kadi* reflected an interesting phenomenon of "reciprocal cross-fertilization" in the field of fundamental rights protection, indicating that the two European courts each rely on the other's reasoning as a source of legitimate guidance.

The statistics collected by European scholars seem to indicate that the tendency of the Luxembourg Court to refer to Strasbourg case law became weaker after the Lisbon Treaty,[63] but that in certain cases the Strasbourg jurisprudence still exerts its influence on the Luxembourg judges. In the decision in *McB.*,[64] the Luxembourg Court explicitly held that "It is clear that the said Art. 7 contains rights corresponding to those guaranteed by Art. 8(1) of the ECHR. Art. 7 of the Charter must be therefor given the same meaning and the same scope as Art. 8(1) of the ECHR ". The Court also noticed that the circumstances in *Guichard*,[65] in which an unmarried mother removed her child to a third country, were similar to those in the *McB.* case. The national law of both states provided that an unmarried mother was the only parent responsible for the child. The Strasbourg Court determined that a national law granting parental responsibility to the child's mother did not violate the European Convention, provided that "it permits the child's father, not vested with parental responsibility, to ask the national court with jurisdiction to vary the award of that responsibility". The Court then found another Strasbourg decision – that in *Z v. Germany*[66] – in which it was determined that national legislation constituted an unjustified discrimination against the unmarried father because it actually deprived him of any chance to obtain a right to custody in the absence of the mother's agreement. The Court's interpretation of the Brussels II-bis Regulation substantively relied on the two Strasbourg decisions, stating that the right to request custody from a competent court before the removal of a child constituted "the very essence of the right of a natural father to a private and family life".[67] The Luxembourg reasoning in *DEB*[68] reflected the

[61] Nada 2012, para.122. The Strasbourg Court quoted the Luxembourg judgment (from Kadi I, para.86) to show that the UN was not capable of providing certain procedural remedies (a judicial review) to the applicant. The opinions of both the European courts seem to say that the domestic courts are obliged to enforce the domestic human rights guarantee even if this will lead to non-compliance with the resolution of the UN Security Council. Marko Milanovic, *European Court Decides Nada vs. Switzerland*, available at: http://www.ejiltalk.org/european-court-decides-nada-v-switzerland/., last visited 13-02-2016.

[62] ,*Joined Cases 584/10 P, C-593/10 P and C-595/10 P, Kadi II,* paras.133-134.

[63] De Búrca 2013, p.174. The Luxembourg Court has made reference to provisions of the EU Charter in at least 122 judgments. In 27 of these 122 judgments, the Court engaged with the matter in some detail and substance, with arguments based on one or more provisions of the Charter. Among the 27 cases in which the Luxembourg Court engaged substantively with a Charter provision, the case law of the Strasbourg Court was referred to in just ten. See also M. Safjan, *A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU*, Lecture at King's College London, 09-02-2014, p.9. Judge Safjan points out that "only in 16 of the roughly 60 cases relating to effective judicial protection since the Charter became binding, did the Court refer to the European Court of Human Rights' case law"; see also Krommendijk 2015, p.23. The author has interviewed present and former Luxembourg judges, *référendaire* and AGs to discuss the frequency of references to Strasbourg case law. Eight of nine interviewees noted the tendency, after the Lisbon Treaty, to refer less often to the ECHR and the case law of the ECtHR, while only one argued that there had been an increase in the number of references to ECtHR case law.

[64] *Case 400/10 PPU, J. McB v. L. E.*, judgment 4 December 2010.

[65] *Guichard vs. France*, (Appl. no.56838/00) ECtHR (2003).

[66] *Zaunegger vs. Germany*, (Appl. no.22028/04), ECtHR (2009).

[67] *Case 400/10, McB,* para.56.

[68] *Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, judgment 22 December 2010.

Court's immediate use of the relevant ECtHR case law as a point of departure when it found that the secondary EU law was not self-evident.[69] According to German domestic law, the appellant had to pay the preliminary costs before starting legal proceedings because legal aid was not available to the legal person. The Luxembourg Court relied on the Strasbourg decisions in *McVicar*[70] and *Steel & Morris*[71] in determining that the right of access to a court constitutes an element that is inherent in the right to a fair trial under Art.6(1) ECHR. In this regard, it is important for a litigant not to be denied the opportunity to present his or her case before a court. Moreover, the court of the respondent state must take the financial situation of litigants into account, in line with the Strasbourg decision in *Steel & Morris*. Using the substantive guidance of the Strasbourg case law, the Luxembourg Court warned the German court that the limitation of the right of access to a court undermines the very core of the right to a fair trial, on the basis that the domestic court would not examine all the circumstances or make a fair balance among the competing interests, and particularly taking into account the fact that funds approved by private associations and companies for the legal representation of undertaking came from funds accepted, approved and paid by the Member States, in accordance with the Strasbourg decision in *O'Limov.*[72] In addition, the Luxembourg Court suggested that the German court should adopt the Strasbourg decision in the *VP Diffusion Sari* case,[73] where the payment for the cost of proceedings could be deducted from taxable profits and carried over as a loss to subsequent tax years. In the Luxembourg judgment, in the case of *NS*,[74] the Luxembourg Court even interpreted the EU refugee law partially in compliance with the Strasbourg jurisprudence to the detriment of the EU doctrine of "mutual trust".

Within the framework of the multilevel protection of fundamental rights, the Luxembourg Court treats the preliminary questions referred to it by Constitutional Courts more prudently than those submitted by the ordinary courts.[75] Consequently, Strasbourg case law may be cited to demonstrate the fact that the Luxembourg Court has taken due regard of Strasbourg jurisprudence in the deliberation phase. In the case of *Jeremy F.*,[76] the French *Conseil Constitutionnel* asked the Luxembourg Court whether the absence of any possible recourse against the ruling of the investigating judges was a direct requirement of the author of the EU Framework Decision or was derived from the choice made by the domestic legislators.[77] The Court compared the Strasbourg decision in *Khodzhamberdiyev*[78] to reveal the relevant Strasbourg standard of the right to fair trial, concluding that "*when the decision depriving a person of his liberty is made by a court at the close of judicial proceedings, the supervision required by Article 5(4) of the Convention is incorporated in the decision*".[79] When the Luxembourg Court noted that both

[69] T. Ahmed: *The EU's Protection of ECHR Standards: More Protective than the Bosphorus Legacy?*, in J. A. Green & C.P.M. Waters (eds.), Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi, Martinus Nijhoff Publisher, The Hague, 2014, p.111. The German Court did not require the Luxembourg Court to make a decision under Art.47(3) of the EU Charter, but only asked whether in the context of EU law the legal person should enjoy the rights to legal aid (effective protection) enshrined in Arts.6 and 13 of the ECHR. However, the Court departed from the Explanation of Art.43 of the EU Charter when it assessed the case, and relied on the aforementioned Strasbourg case law in *Airey*.

[70] *McVicar vs. The UK* (Appl. no.46311/99) ECtHR (2002).

[71] *Steel & Morris vs. UK* (Appl. no.68416/01) ECtHR (2005).

[72] *CMVMC O'Limov vs. Spain*, ECtHR (2009).

[73] *VP Diffusion Sari vs. France* (Appl. no.14564/04) ECtHR (2008).

[74] *Case 411/10, N.S v. Secretary of State for the Home Department*, judgment 21 December 2011.

[75] B. J. Fan: *The Judicial Dialogue between the Luxembourg and National Courts in the European Framework of Multilevel Protection of Fundamental Rights*, International Journal of Human Rights and Constitutional Studies, Vol.4, No.2, July 2016, p.97.

[76] *Case 168/13 PPU, Jeremy F. v Premier ministre*, judgment 30 May 2013.

[77] F.-X. Millet & N. Perla: *The First Preliminary Reference of the French Constitutional Court to the CJEU:* Révolution de Palais *or Revolution in French Constitutional Law*, German Law Journal, Vol.16, No.6 (special issue), December 2015, p.1477.

[78] *Khodzhamberdiyev vs. Russia* (Appl. no.64809/10) ECtHR (2012).

[79] *Case C-168/13 PPU, Jeremy F.*, para.43.

the instruments had left a certain margin of appreciation to the Member States, it quoted the Strasbourg decision that "*[the Strasbourg Court did not] compel the Contracting Parties to set up a second level of jurisdiction for the examination of the lawfulness of detention and for hearing application of the suspension of the extradition*". In the case of *Melloni*,[80] the Spanish Constitutional Court asked the Luxembourg Court whether Arts.47 and 48(2) of the EU Charter could provide the surrendered person *in absentia* with an opportunity to be reheard in a Spanish court under the EAW Framework Decision.[81] The answer depended on the interpretation of the Charter rights. On the basis that the final Luxembourg interpretation might have potentially undermined the Spanish constitutional order with respect to the protection of fundamental rights, it might have triggered the counter-limits mechanism established by the Spanish Constitutional Declaration 1/2004.[82] Given this possibility, the Luxembourg Court had to persuade the Spanish Constitutional Court that its interpretation was compatible with the Strasbourg jurisprudence. Therefore, it referred to several Strasbourg decisions to demonstrate that the person concerned, who had been clearly informed of the time and place of the legal proceedings and was represented by an employed lawyer, actually waived his rights to defend himself when he intentionally did not present himself before the court.[83] The Spanish authorities was to execute the issued EAW warrant provided that the minimum standard of fundamental rights had been respected and that the execution was not in conflict with the public interest. When the preliminary decision returned to the Spanish Constitutional Court, the Spanish judges argued that international human rights treaties must be taken into account in the phase of the interpretation of fundamental rights. The Constitutional Court particularly mentioned the two European fundamental rights instruments and the relevant fundamental rights case law as among the most authoritative guides to the interpretation of constitutional rights. In this sense, the Spanish Constitutional Court explicitly affirmed that the circumstances of the Strasbourg case of *Sejdovic*,[84] which was also one of the Strasbourg cases cited in the Luxembourg preliminary rulings, were similar to those of the present case. As a result, the Spanish court overruled the previous constitutional precedent, a decision that proceedings related to a Romanian citizen, who had been charged by a Romanian Court *in absentia* under the EAW Framework Decision, and where this was held to having constituted an infringement of the Spanish Constitution. In the present case, the Strasbourg jurisprudence was substantially turned into a "hermeneutic criterion" under Art.94 of the Spanish Constitution, implying that the Spanish Constitutional Court regarded the international jurisprudence as a legitimate source that outweighed its constitutional precedents.[85]

The Luxembourg Court seldom repeats references to Strasbourg case law if the cases have been referred to in a Luxembourg judgment a short time earlier.[86] For instance, the Luxembourg Court only referred

[80] *Case C-399/11, Stefano Melloni v Ministerio Fiscal*, judgment 26 February 2013.

[81] M. R. Serrano, *The Spanish Constitutional Court and Fundamental Rights Adjudication after the First Preliminary Reference*, German Law Journal, Vol.16, No.6 (special issue), December 2015, p.1518.

[82] Declaración 1/2004. The Spanish Constitutional Declaration 1/2004 has raise some ultimate barriers against the penetration of EU law with the famous distinction between primacy and supremacy. The Constitutional Tribunal claims that "Supramacy and primacy are categories which are developed in differentiated orders. The former, in that of the application of valid regulations; the latter, in that of regulatory procedures. Supremacy is sustained in the higher hierarchical character of a regulation and, therefore, is a source of validity of the lower regulations, leading to consequent invalidity of the latter if they contravene the provision set forth imperatively in the former. Primacy, however, is not necessarily sustained on hierarchy, but rather on the distinction between the scopes of application of different regulations, principally valid, of which, however, one or more of them have the capacity for displacing others by virtue of their preferential or prevalent application due to various reasons".

[83] *Case 399/11, Melloni,* paras.49-50.

[84] *Sejdovic vs. Italy* (Appl. no.56581/00) ECtHR (2006).

[85] A. T. Pérez: *Melloni in Three Acts: From Dialogue to Monologue*, European Constitutional Law Review, Vol.10, No.2, September 2014, p.321.

[86] Krommendijk 2015, p.30. According to a series of empirical comparative studies, it is a common legal phenomenon that newly emerging states or international organizations cite fewer foreign provisions or instances of case law in their domestic

to its own case of *N.S*[87]. in the judgment in *Kaveh Puid*,[88] and did not mention the landmark Strasbourg decision in *M.S.S*[89]. In the judgment in *Trade Agency*, the Court relied on the Luxembourg precedent in *DEB* without citing any Strasbourg decisions. On the other hand, it may happen that the Strasbourg case law develops too fast for the Luxembourg judges to cite the most recent jurisprudence. Thus, the Luxembourg Court may cite outdated Strasbourg case judgments, which may allow a legitimate challenge to a Luxembourg decision. The aforementioned *Roquette* case provides us with a good example.

Given that the Luxembourg Court is not a specific regional human rights court, it is not necessary for the Luxembourg judges to refer to the Convention and the Strasbourg case law in cases in which fundamental rights are not the central issue. Even in the cases concerning fundamental rights, the Court does not need to cite Strasbourg case law if the EU secondary legislation is self-evident, or if the Court is able to strike a balance among the competing interests. The Strasbourg precedents may not be considered by the Luxembourg Court if they cannot provide relevant help in the Court's decisions. For instance, the Luxembourg Court did not cite a Strasbourg decision in the judgment in *Google Spain*[90] because the case did not concern the right to access to information in a political sense, nor did it relate to the activity of an ordinary news agency. Similarly, in the judgment in *Radu*,[91] the Court focused only on the interpretation of the Framework Decision under the principle of mutual trust, without needing to pay attention to Strasbourg case law.

Interviews with the Luxembourg judges reveal that Strasbourg decisions are considered and discussed in detail among the judges in the deliberation phase.[92] One judge expressed his (her) deliberative methods in relation to the fundamental rights as follows: "*overall, we may start with the Charter, provided that the right is recognized there, then the Convention becomes important, if the right is the same there as well. Then, to a certain extent, we can follow our earlier case law, general principles of law or other international conventions as sources of inspiration*"[93]. This interviewee seems to use the Strasbourg jurisprudence on each possible occasion to guarantee the compatibility of the jurisprudence of the two European courts. Another Luxembourg judge states that the coming into effect of the EU Charter will not change the judicial methodology in relation to the application of the European Convention.[94]

As mentioned above, the EU legal system lacks a consensus about the use of ECtHR case law. Some interviewees assert that ECtHR case law is not discussed at length in the deliberation stage. Occasionally,

judgments after a period of intensive citations of foreign law in their early years. Examples can easily be found among states with common law traditions. See the following chapters from T. Groppi & M-C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013: I. Spigno, *Namibia: The Supreme Court as a Foreign Law Importer*, p.171; C. Rautenbach, *South Africa: Teaching an "Old Dog" New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010)*, p.194; V. R. Scott, *India: A "Critical" Use of Foreign Precedents in Constitutional Adjudication*, p.86.

[87] *Case 411/10, N.S*, [2011] ECR 13905.

[88] *Case 4/11, Bundesrepublik Deutschland v Kaveh Puid*, judgment 14 November 2013.

[89] *M.S.S vs. Greece & Belgium* (Appl no. 30696/09) ECtHR (2011).

[90] *Case 131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, judgment 13 May 2014.

[91] *Case 369/11, European Commission v. Italian Republic*, judgment 29 January 2013.

[92] Krommendijk 2015, p.14.

[93] S. Morano-Foadi & S. Andreadakis: *Reflection on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights*, European Law Journal, Vol.17, No.5, September 2011, p.601.

[94] Morano-Foadi & Andreadakis 2011, p. 600. The interviewed judge said that, "it is a document set up by the people looking at the Convention and the ECtHR's jurisprudence, putting things in a slightly different language, but not with a view to changing the values which underline the provisions of the Charter. It does not aim at undermining the role of the Convention. It is a new reference point for the same overall substance".

Strasbourg case law may be examined if a Luxembourg judge warns that the final decision is likely to conflict with the ECHR. In the deliberation phase in *Akzo Nobel*,[95] the judges discussed Strasbourg case law under Art.6 ECHR extensively.[96] This process effectively guaranteed that the Strasbourg case law would be taken into account in the final decision.[97]

The motivations for the Luxembourg Court's references to Strasbourg case law are various, but they include looking for the "greatest coherence",[98] "searching for convergence"[99] and the Court being "extremely careful not to distance itself from the Strasbourg Court".[100] If the Luxembourg Court does not refer to Strasbourg case law, the courts of the Member States will be confused as to which supranational decision they should follow.[101] The citation of Strasbourg case law becomes a good way to prevent an open conflict between the two European courts.[102] However, it is difficult for this method to eliminate all possibility of jurisprudential conflicts between the two European courts. As is well-known, the Luxembourg decision in *Emesa Sugar*[103] actually conflicts with the Strasbourg interpretation of Art.6 ECHR in the judgment in *Mantovanelli*,[104] and the two courts recently showed a new divergence with regard to the interpretation of the right to association,[105] not to mention the sticky problem that is often complained about by the Luxembourg judges – that limited time and few channels have become the biggest obstacle for accessing the Strasbourg judgments. Consequently, the door is still open to the possibility of citing outdated Strasbourg case law.[106]

A common theme in these interviews is that the Luxembourg judges, to some extent, share a consensus on the role of Strasbourg case law in the deliberation phase for the CJEU. Usually, the Strasbourg case law is not extensively discussed by the Luxembourg judges, unless particular judges warn that the Luxembourg decision may conflict with Strasbourg jurisprudence. Although the motivations for the citation of Strasbourg case law are diverse, the Luxembourg judges regard this measure as an effective

[95] *Case C-550/07 P, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission,* judgment 14 September 2010.

[96] Krommendijk 2015, p.17.

[97] Krommendijk 2015, p.15.

[98] Joint Communication, idib n.11, para.1.

[99] S. Prechal & K. Cath: *The European Acquis of Civil Procedure: Constitutional Aspects*, Uniform Law Review, Vol.19, No.2, June 2014, p.191.

[100] Scheeck 2005, p.45.

[101] F. Jacobs, *The European Convention of Human Rights, The EU Charter of Fundamental Rights and The European Court of Justice*, available at: http://www.ecln.net/elements/conferences/book_berlin/jacobs.pdf (4 November 2016) at p. 293.

[102] Scheeck 2005, p.20.

[103] *Case 17/98, Emesa Sugar (Free Zone) NV v Aruba*, [2000] ECR I-668. The Luxembourg Court refuses to recognize the right to reply to the opinion of the Advocate General.

[104] F. Korenica: *The EU Accession to the ECHR. Between the Luxembourg Search for Autonomy and Strasbourg Credibility on Human Rights Protection*, Springer, 2015, p.369.

[105] N. Busby & R. Zahn: *The EU's Accession to the ECHR: Conflict or Convergence of Social Rights*, Paper presented at the Labor Law Research Network's Inaugural Conference, Barcelona, 13-15th June 2013. See also A. Ludlow, T*he Right to Strike: A Jurisprudential Gulf between the CJEU and ECtHR*, in K. Dzehtsiarou, T. Konstadinides, T. Lock & N. O'Meara (eds.): *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR*, Routledge, Abingdon, 2014, p.133. Under the EU legal order the right to strike is recognized as a fundamental right to collective action. The Luxembourg Court treats the right to strike as a limitation on the right to movement, but holds that the protection of some economic rights comes prior to the protection of non-economic rights. Relying on the proportionality test, the Court stresses that the essence of the right to movement cannot be undermined by being balanced with the right to strike. However, the Strasbourg Court seems to depart from the common consensus under the ILO Conventions. Thus, a strike, though not for the furtherance of collective bargaining, will be protected if it will enhance the workers' position in their negotiations with the employers. See also J. Callewaet: *The European Convention on Human Rights and European Union Law*, European Human Rights Law Review, No.6, 2009, pp.777-782. The author offers the reminder that the legislative standard for fundamental rights protection under the EU law is lower than the Convention rules.

[106] Krommendijk 2015, pp. 20-21.

way of minimizing conflicts between the two European courts. Besides, a reference to Strasbourg case law in a Luxembourg judgment can enhance the legitimacy of its legal reasoning in relation to fundamental rights and make it more convincing. This means that the domestic (constitutional) court is less likely to trigger the counter-limit mechanism even if the Court decision, to some extent, undermines the domestic constitutional order, as it probably will. Given that the Strasbourg case law has no external binding power on the EU legal order, the Luxembourg Court can refer to the Strasbourg Court for various reasons. To correspond with this, the Strasbourg case law may fulfil multiple functions in Luxembourg judgments.

4. The Categories of Functions Fulfilled by Strasbourg Case Law Citations in Luxembourg Judgments

Until now, very few scholars have systematically researched the functions served by the Strasbourg decisions in Luxembourg judgments.[107] In this part, I would like to use a functional perspective to divide the Luxembourg references to Strasbourg case law into four types: (1) references used for substantively following the Strasbourg jurisprudence; (2) references used for legitimate guidance; (3) references to Strasbourg case law "by analogy"; and (4) decorative references.

4.1. References Used for Substantively Following the Strasbourg Jurisprudence

It is not very common for the EU judges to refer to the Strasbourg jurisprudence in order to follow it substantively and determine the case in reliance on the Strasbourg case law. Around nine of the 50 Luxembourg judgments (fewer than 20%) belong to this category. The Luxembourg judges are normally reluctant to give the impression that they are subject to the Strasbourg jurisprudence. However, given that the Luxembourg Court lacks experience in deliberations on fundamental rights, it should take the Strasbourg case law into account substantively in some fields relating to the protection of fundamental rights. Moreover, the national courts, appellants and AGs usually refer to Strasbourg case law as evidence to support their arguments, or they require the Luxembourg court to interpret EU law in line with Strasbourg jurisprudence. Correspondingly, the Court may substantively observe Strasbourg jurisprudence in certain circumstances under Art.52(3) of the EU Charter.

Most of the nine Luxembourg decisions that substantively follow the Strasbourg jurisprudence concern the right to a fair trial (Art.6 ECHR) and the right to private life (Art.8 ECHR). The subjects of the others are scattered among the right not to be discriminated against, provided by Art.14 ECHR, the doctrine of *ne bis in idem* enshrined in Protocol No.4 to the ECHR, and the right to marriage enshrined in Art.12 of the ECHR.

[107] Very few scholars have systematically referred to this issue. Steve Peers has made a particular study of the role of Strasbourg jurisprudence in the Luxembourg judgments. He began his research from the perspective of the function of the reference to Strasbourg case law by the Luxembourg judges. He divided these functions into three categories: "relevant", "irrelevant" and "questionable". He then looked at the actual Strasbourg cases used by the Luxembourg Court under Arts.6, 8, and 11 of the ECHR. See Peers 2003, pp. 113-127. Professor Douglas-Scott is another scholar who has preferred to study the relationship between the two European courts through the perspective of the Luxembourg Court's references to Strasbourg decisions before and after the Lisbon Treaty. See Douglas-Scott 2006, pp. 644-652; Douglas-Scott 2011, pp. 655-658; Douglas-Scott, The Court of Justice of the European Union and the Court of Human Rights after Lisbon Treaty, at 5-9. Some Luxembourg judges have also focused their research on this field. G. Arestis: *Fundamental Rights in the EU: Three Years after Lisbon, the Luxembourg Perspective*, Cooperative Research Paper, College of Europe, No.3, 2013, pp.10-13.

4.1.1. The Right to Privacy

The first Luxembourg decision that substantively relied on Strasbourg jurisprudence occurred in the case of *Grant*[108] and concerned the equal treatment of men and women. The appellant was a woman who complained that the Commission's Directive had not provided for equal treatment as it only made reference to married couples of opposite sexes. In order to justify the Directive's compatibility with the European Convention, the Luxembourg Court cited several Strasbourg cases on the definition of marriage. Given that the Commission's Directive aimed to provide benefits to "family" members, including opposite-sex partners who were unmarried but in stable relationships, the Luxembourg Court cited Strasbourg case law to demonstrate that at that time homosexual partners were beyond the concept of "family members" under Art.8 ECHR.[109] Subsequently, the Luxembourg Court relied on the Strasbourg decisions in *Rees*[110] and *Cossey*[111] to affirm that the partners in a "marriage" had to be heterosexual persons. Given that the subject matter of the two cases adjudicated by the two European courts was the same, the Luxembourg citation of the Strasbourg case law as authoritative guidance can be seen as a persuasive indication that the Luxembourg judges substantively observed Strasbourg jurisprudence.

The aforementioned Luxembourg decision in *Roquette* is a landmark case decision because the Luxembourg judges not only cited Strasbourg case law but also substantively made their decision in line with Strasbourg jurisprudence. In its judgment in *Hoechst,* the Luxembourg Court determined that a legal person cannot be treated as being equal to a natural person in the sense of having the right to privacy enshrined by Art.8 ECHR, because the European judges noted that a legal person's right to privacy was not explicitly recognized by the European Convention or the Strasbourg case law, so that a legal person's rights could not be protected under the general principles of EU law. However, the *Cour de Cassation* reminded the Court of Justice to note the development of Strasbourg case law in this area. In particular, the judgment in *Niemietz* affirmed that the right to privacy might apply to certain professional and business activities or premises. Accordingly, the Luxembourg Court had to make a choice between following or denying the Strasbourg case law. It is sometimes hard for the dual functions of the Luxembourg Court to coexist, in the light of the fact that on the one hand it is obliged to defend its autonomy *vis-à-vis* the interpretation of EU law and, on the other hand, the ECtHR case law cited here dynamically set the minimum standard of fundamental rights in Europe that was quite often observed by the domestic authorities. Any decision taken without due consideration might lead the domestic court to question whether the Court was taking the protection of fundamental rights seriously. Thus, the Court strategically adopted legal reasoning following the model of a U-shaped curve in order to demonstrate that the general principles of EU law had granted the right to privacy to all legal persons; this circumvented the influence of the Strasbourg decisions. It is interesting to note that, although the Court consistently argued that the Strasbourg case law was only seen as a "by analogy" source, the Luxembourg judges in this case obviously overruled their previous interpretation on the substantive basis of the Strasbourg judgments in *Société Colas Est* and *Niemietz.* In the former case, the Strasbourg Court explicitly declared that the definition of "home" enshrined by Art.8 ECHR might extend to the premises of a business undertaking. Moreover, the judgment in *Niemietz* took a more important role in the interpretation of the term "home". The Strasbourg judges stated that the French term "*domicile*" had

[108] *Case C-249/96, Lisa Jacqueline Grant v South-West Trains Ltd*, [1998] ECR I-636.

[109] *X. and Y. vs. The UK* (Appl. no.9369/81); *S. vs. UK* (Appl. no.11716/85) para.2; *Kerkhoven and Hinke vs. Netherlands* (Appl. no.15666/89).

[110] *Rees vs. UK* (Appl. no.9532/81) ECtHR (1986).

[111] *Cossey vs. UK* (Appl. no.10843/84) ECtHR (1990).

broader connotations than the word "home" in the English context, and that it might extend to professional premises.[112] This is the reason why the Luxembourg Court described the latter Strasbourg decision as having a "far-reaching impact" on the Luxembourg deliberation.

The *McB.* judgment was another typical case where the Luxembourg Court's reasoning was substantively embedded in the ECtHR case law of *Guichard* and *Balbontin.* Since the decision in *McB.* was delivered after the EU Charter had come into effect, the Court directly started from the EU Charter in its interpretation of the Brussels Convention II. Given that the Official Explanation had recognized that the meaning and scope of the right provided by Art.7 EU Charter was derived from Art.8 ECHR, the Luxembourg judges cited Strasbourg case law to ascertain the definition and scope of the right to parental custody in the context of the Convention. Substantively keeping pace with the Strasbourg jurisprudence, the Court upheld that the father, even though he was not granted the right to responsibility by law, could ask for the custody of his child without the mother's agreement. It is worth mentioning that the Luxembourg judges did not cite even one Luxembourg case in their deliberations on the protection of fathers' rights, implying that the Court, until then, had not produced any relevant precedents relating to the right to parental responsibility.

4.1.2. The Right to Fair Trial

The Court usually defines the right to a fair trial substantively in line with the Strasbourg jurisprudence arising from some hard cases. In the *Köbler* judgment[113], the Luxembourg Court deliberated on whether a Member State had an obligation to pay reparations when the Supreme Court had wrongly interpreted EU law. In the deliberation phase, the Luxembourg Court explicitly referred to the judgment in *Dulaurans*[114] to support the notion that victims should be given a remedy when they were damaged as the result of a judgment made by a national court acting as the court of last resort. The litigation concerned the sensitive legal question of whether the principle of *res judicata* should be regarded as an autonomous question immune from judicial review by the Luxembourg Court's, even if the interpretation given by the court of last instance had actually violated EU law. Several national governments are opposed to liability for states arising from a wrong interpretation by the court of last resort, because this would lead to chaos in the case law system. The UK government delegates, in particular, expressed worries from the perspective of the UK's common law tradition, arguing that it was embedded in the doctrine of *stare decisis.* However, the maintenance of EU authority was the only issue of concern for the Luxembourg Court. The Court of Justice of the European Union therefore adopted a teleological interpretation to clarify that reparation because of a wrong interpretation of EU law would not substantively undermine the principle of *res judicata*, in the sense that the Luxembourg Court did not require the national courts to overturn their precedents. In addition, the state must be liable for the erroneous interpretations of EU law because it is obliged to follow EU rules. The Court's interpretation ignored the diverse legal preconditions to a finding of state liability, which definitely constitutes part of the national identity, among the legal systems of the Member States. On the other side, the Court's interpretation was deficient with respect to its teleological interpretation, because it failed to explain in detail how the doctrine of *res judicata* had been well respected. If the Supreme Court, as the highest judicially domestic competent authority on the application of EU law, was obliged to pay reparation to the individual concerned, which could not be denied, as demanded by the Luxembourg

[112] Nietmietz 1992, para.30-31.

[113] Case 224/01, *Gerhard Köbler v Republik Österreich*, [2003] ECR I-10290.

[114] *Dulaurans vs. France* (Appl. no.34553/97) ECtHR (2001).

Court, by the doctrine of *res judicata*. The Court also did not explicitly answer the Austrian question of why reparations were not applicable in the case of Luxembourg's wrong application of EU law. The Court, moreover, refused to accept the European Commission's proposal that the domestic courts were liable only when they "seriously breached" EU law, since it held more generally that all wrong applications of EU law by domestic tribunals should result in state liability, no matter what the motivation. Thus, the Luxembourg judges selected the Strasbourg decision in *Dulaurans* as a substantive guidance.

In the case of *Stefenssen*,[115] which concerned the right to a second opinion provided by Art.7 of Directive 89/397/EEC, the Luxembourg Court held that as the European Community lacked rules on evidence, the national legislators had wide discretion on which procedure to adopt for taking evidence. In these circumstances, the German court was to examine whether the national rules governing the procedure for taking evidence complied with the principles of equivalence and effectiveness. Any national provision that made it impossible or extremely difficult to protect the right to a second opinion breached EU law. Finally, the Court substantively relied on the Strasbourg decision of *Mantovanelli*[116] to warn the German court that the evidence taken by the administration and the related comments from *Stefenssen* should be treated with care in such a highly technical case.

In the judgment in *KNK*,[117] the Luxembourg Court observed the Strasbourg jurisprudence absolutely with respect to the admissibility of the case. Regarding the fact that the appellant was not on the list linked to Common Position 2001/931, and would consequently be subject to impossibly restrictive measures, the Luxembourg Court relied substantively on the comparable Strasbourg decision in *Gestoras*[118] to argue that the appellant in that case could not easily be regarded as a victim under the Strasbourg regime, and that his appeal would not be admitted by the Court.

4.1.3. Other Convention Rights

The decision in *K.B.*[119] shows the Court of Justice of the European Union relying substantively on the Strasbourg judgment in *Goodwin*[120]. The claimant complained that the national pension scheme was restricted to widowers and widows of members of the scheme and that this constituted discrimination on the grounds of sex, contrary to Art.141 of the EC Treaty and the relevant Community Directive. The challenge was to the NHS Pension Regulation, which laid down that a pension would only be granted to an employee's survivor; a survivor, according to the National Matrimonial Act, could only be the registered opposite-sex married partner. Although the Luxembourg judgment in *P. v. S.*[121] had stated that treating a transsexual person differently from a person with their birth-assigned gender definitely constituted discrimination on the grounds of sex, the domestic authority argued that the national legislation on marriage registration would not apply to heterosexual partnerships where one of the partners was transsexual. This was the crucial reason preventing K.B. from officially registering a marriage with her transsexual partner.

[115] *Case C-276/01, Joachim Steffensen*, [2003] ECR 3756.

[116] *Mantovanelli vs. France* (Appl no.21497/93) ECtHR (1997).

[117] *Case 229/05, AEPI Elliniki Etaireia pros Prostasian tis Pnevmatikis Idioktisias AE v Commission of the European Communities*, [2007] ECR 470.

[118] *Segi and Others vs. 15 Member States of the EU* (Appl. nos.6422/02 and 9916/02) ECtHR (2002).

[119] *Case 117/01, K.B. v National Health Service Pensions Agency and Secretary of State for Health*, [2001] ECR 568.

[120] Goodwin vs. UK (Appl. no.28975/95) ECtHR (2002).

[121] *Case 13/94, P. v.S*, [1996] ECR I-2159.

The domestic court recognized that K.B. and her partner were a heterosexual couple, but it still needed to define whether or not a transsexual person's right to marriage should be respected by European Community law. Thus, the focus of the present case was no longer whether the partner could be paid the pension after K.B.'s death, but whether or not their marriage should be respected by Community law. In the absence of a consensus in the legislation of the Member States, the Court substantively observed the final decision given in the *Goodwin* case. This was that the domestic legislation constituted an infringement of the non-discrimination right if the applicant's new gender identity had not been recognized by law so that it had become impossible by law for the couple to register their marriage. In fact, the reference to the Strasbourg case law in the present case was very persuasive, in that the Community legal system lacked clear Directives provision specifically protecting the civil rights of transsexuals, and there was no consensus on the legal status of transsexuals among the legal systems of the Member States. The Court invoked the previous Strasbourg case law as a common European standard to persuade the British authorities to review their relevant domestic law. This preliminary ruling also indicated that the Court took ECtHR case law as a baseline in this sensitive conflict between conservative religious culture and biological innovation.

The Luxembourg Court also took the Strasbourg decision in *M.S.S.* as authoritative guidance in its judgment in *N.S.*. In the decision in *M.S.S.*, the Strasbourg Court determined that the Belgian government, in removing refugees to Greece under the Dublin II Regulation[122], had infringed the prohibition on torture enshrined by Art.3 ECHR, because Belgium knew, or should have known, as evidenced by numerous NGOs' human rights reports on the Greek situation, that the Greek authorities had consistently treated asylum seekers in an inhumane manner. Although the Belgian government rightly claimed that the EU's doctrine of mutual trust in the application of the Dublin Regulation prevented the Member States from examining the implementation by Greece of the Dublin Regulation, so that under EU law this state's activities were immune from a Strasbourg judicial review, the Strasbourg Court insisted on its jurisdictional competence. It argued that it had competence on the grounds that the state's obligation stemmed from international treaties and that it could not derogate from the duty it derived from the European Convention, which was established in the *Matthews* case.[123] Consequently, this allowed the Strasbourg Court to make a substantive review of whether Belgium's transfer of the refugee applicants was in compliance with the Convention's legal order, rather than granting the particular EU Directive a presumption of equivalent status to the ECHR as established by the Strasbourg judgment in *Bosphorus*.[124]

A UK court submitted nearly the same question concerning the implementation of the Dublin II Regulation to the Luxembourg Court in the *N.S.* case. Given that the deficiency in the execution of the Dublin Regulation was incompatible with the protection of fundamental rights provided by the European Convention, the Luxembourg Court had to reconcile the conflict through the interpretation of EU law in compliance with the fundamental rights. The focal point was whether a Member State had the obligation to examine whether fundamental rights were protected in the receiving state. The UK government claim before the Court of Appeal that the Dublin Regulation entitled the transferring state government to rely on the conclusive presumption that the receiving Member State would comply with its obligations under EU law. The Luxembourg Court disagreed with the British argument, because it did not want to trigger controversies with the European Convention and the EU judges perceived that there was a margin left for the interpretation of this EU Regulation in a way that was compatible with the Convention. The

[122] Council Regulation, No.343/2003.

[123] *Matthews vs. UK* (Appl. no.24833/94) ECtHR (1999).

[124] *Bosphorus vs. Ireland* (Appl. no.45036/98) ECtHR (2005).

Court thus stated that "*an application of the Dublin Regulation on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member States primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply the Regulation in a manner consistent with the fundamental rights*".

The conclusive presumption of the compatibility of the Dublin Regulation with fundamental rights was denied by the Luxembourg Court, so that the sending Member State had to check whether there were substantial grounds for believing that the receiving Member State had systematic flaws in the procedures it applied and the reception conditions in which asylum seekers were received. If there were, the sending state conduct would be imposing inhuman or degrading treatment of the asylum seekers, contrary to Art. 4 of the EU Charter, with respect to their transfer to the receiving state. This Luxembourg reasoning obviously borrowed from the judgment in *M.S.S.*, where the Strasbourg Court had noted that the Dublin II Regulation was deficient because the Member States were not given judicial competence to examine the refugee situation in the receiving states. To remedy this flaw, the Court fully agreed with the Strasbourg Court's approved methods for collecting evidence and assessing the situation for refugees in receiving states. The Member States needed to make relevant assessment by reliance on NGO reports and official documents published by the UN Human Rights Commission and the European Commission.

4.2. Legitimate Guidance to Luxembourg Judgments

The Luxembourg Court usually refers to Strasbourg case law as a legitimate source for demonstrating that a Luxembourg judgment is compatible or parallel with the Strasbourg jurisprudence. The motivations for the citations of Strasbourg case law in this category are various. On some occasions, the Court tends to explore a legal definition that is shared between the two courts through passing references. In some cases, the Court demonstrates that the domestic application of EU law is compatible with the protection of fundamental rights, or warns the domestic court not to go against the Convention rights established in particular Strasbourg cases. In some sensitive cases, the Luxembourg Court adds Strasbourg case law at the end of the judgment to enhance the legitimacy of the deliberative result. In other cases, Strasbourg case law is regarded as a general or concrete guide to Luxembourg judicial approaches that explore the boundaries of fundamental rights or balance competing rights. It is by no means true that the Court will take the Strasbourg jurisprudence seriously as an authoritative direction, but the Court often interprets a fundamental right or strikes a balance among competing interests in a parallel manner that is compatible with, but not identical to, Strasbourg case law. Apart from the above instances, some occasional references to Strasbourg case law aim to reveal the nature of the European Convention, or to present the similarities and differences between the Strasbourg and Luxembourg Courts' practice from a comparative point of view. Generally, there may be numerous motivitions behind references to the Strasbourg case law as part of "legitimate guidance" function, but all these references could fall into the sphere of one of three sub-functions: guidance, comparative analysis, and confirmation of a domestic decision.

4.2.1. Guidance

Guidance is the most common function of a reference to Strasbourg case law, particularly in cases concerning the protection of fundamental rights, where the reference demonstrates that the Court's decision is compatible with the Strasbourg jurisprudence. This type of citation can also be divided into two sub-categories: general guidance and concrete jurisprudential guidance.

The main function of a general reference to Strasbourg case law is to show the Luxembourg Court's preference in the deliberation phase for the general approach or method of the Strasbourg Court. This type of reference can often be found in judgments concerning the duration of judicial and administrative procedures. The judgment in *Baustahlgewebe*[125] is a typical example: the Court simply referred to some Strasbourg cases in order to justify the reasonableness of a period of time in the EU law context. By citing the Strasbourg case law, the Luxembourg Court argued that whether or not the duration of legal proceedings is reasonable must be appraised by considering the circumstances specific to the particular case and, in particular, the important factors of the case itself, such as its complexity and the conduct of the applicants and of the competent authority. Similarly, the Court cited almost the same Strasbourg decisions in the judgment in *Z.*,[126] for the same reasons.

On other occasions, the Luxembourg Court's reference to Strasbourg case law reflects its preference for Strasbourg's jurisprudential approaches or methods. Although this type of reference may not have any substantial impact on the final Luxembourg decision, it usually indicates that the Luxembourg Court found some inspiration in the Strasbourg case law. In the judgment in *Connolly*[127], concerning the restriction on the freedom of expression of a public servant, the Court cited many landmark Strasbourg decisions, such as those in *The Sunday Times*[128] and *Handyside*[129], arguing that the justification for the interference in the fundamental rights in that case could also be judged by the Strasbourg Court. In the Luxembourg judgment in *Tocai*[130], the Court cited the Strasbourg decision in *Jokela* to demonstrate that any restriction on the right to property must be in compliance with the principle of lawfulness and must be proportionate to the legitimate aim. This general Strasbourg guidance was of very limited impact in the final decision, because the Luxembourg Court did not follow the proportionality test established by the Strasbourg case law. In the judgment in *Österreichischer Rundfunk*[131], the Court substantively clarify the methods of proportionality test applied in the domestic court. In order to give the impression that the Luxembourg decision would not be incompatible with Strasbourg jurisprudence under Art.8, the European judges generally stated that the "necessary" measures employed must be "proportionate to the legitimate aim pursued", as established in the Strasbourg decision in *Gillow*. In addition, the Court affirmed that the state enjoyed a certain margin of appreciation, the scope of which "will depend not only on the particular nature of interference involved", following the guidance of the Strasbourg decision in *Leander*.[132]

On the other hand, it seems that most of the Strasbourg case law to which reference is made provides the Luxembourg Court with concrete jurisprudential guidance. The Court may look for the shared definition of legal terms, concrete Strasbourg methods or persuasive legitimacy. In the judgment in *Familiapress*,[133] the Austrian authority complained that a German-based newspaper had violated the domestic rules of fair competition because the total amount of prize value of a newspaper competition had exceeded the maximum limit laid down by Austrian law. The Court noted that the said Austrian law constituted an interference with the right to free movement of goods enshrined in Art. 36 TFEU (ex Art.

[125] *Case 185/95, Baustahlgewebe GmbH v Commission of the European Communities*, [1998] ECR 8485.

[126] *Case 270/99, Z v. European Parliament*, [2001] ECR I-9214.

[127] *Case 274/99 P, Bernard Connolly v Commission of the European Communities*, [2001] ECR I-1638.

[128] *The Sunday Times vs. UK* (Appl. no.6538/74) ECtHR (1979).

[129] *Handyside vs. UK* (Appl. no.5493/72) ECtHR (1976).

[130] *Case 347/03, Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v Ministero delle Politiche Agricole e Forestal*i, [2005] ECR I-3820.

[131] *Joined Case 465/00 & Case 138-139/00, Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm (C-138/01) and Joseph Lauermann v Österreichischer Rundfunk*, [2003] ECR I-5041.

[132] *Leander vs. Sweden* (Appl. no.9248/81) ECtHR (1987).

[133] *Case 368/95, Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, [1997] ECR 3709.

30 TEC). The interference with this economic right needed to be justified by a public interest recognized by the EC Treaty. The purpose of this restriction, claimed the Austrian government, was to protect press diversity under Art.10 ECHR. The Court referred in its judgment to the Strasbourg decision in *Informationsverein Lentia*[134], affirming that the maintenance of press diversity fell within the scope of the Convention's protection of freedom of expression. Moreover, the maintenance of press diversity was a legitimate aim of the law and was necessary in a democratic society. The Court drew inspiration from two Strasbourg decisions, *Wille*[135] and *Glasenapp*,[136] using them as concrete jurisprudential guidance to argue that civil servants assumed a special "duty and responsibility" in the exercise of the freedom of expression.

In the area of the protection of procedural rights, Strasbourg case law also provides Luxembourg judges with concrete jurisprudential guidance regarding procedural rules and legal definitions. In the judgment in *Aalborg Portland*,[137] the Luxembourg Court clarified the meaning of the "adversarial principle", drawing inspiration from the two Strasbourg judgments in *Kerojarvi*[138] and *Mantovanelli*, and concluded that the adversarial principle related "*only to the judicial proceeding before a 'tribunal' and there was no general or abstract principle that the parties in all instances had the opportunity to attend the interview carried out or to receive copies of all the documents taken into account in the case of another person*". In the judgment in *Weiss*,[139] the Strasbourg decisions were cited as a parameter for defining the scope of the right to a defence and the meaning of "indictment". The Luxembourg Court refused to recognize a right not to accept evidence written in a foreign language, following concrete jurisprudential guidance from the Strasbourg case *Kamasinski*.[140] In the judgment in *ASML*,[141] the Court took legitimate guidance from the Strasbourg decision in *Artico*,[142] recognizing that "the rights of the defence, which derive from the right to fair legal process enshrined in [Art.6 ECHR], require specific protection intended to guarantee the effective exercise of the defendant's rights". In the *Krombach* judgment[143], the Court referred to several Strasbourg decisions, arguing that the defendant's right to defence was not respected in the French criminal proceedings because even if the defendant could not himself be present at the hearing, his right to be represented before the Court was one of the inalienable fundamental rights under Art.6 ECHR.

After the Lisbon Treaty, concrete jurisprudential guidance has been regarded as the principal function of a reference to Strasbourg case law. This method is particularly necessary when the Court receives a preliminary reference from a national Constitutional Court. In the well-known Luxembourg judgment in *Melloni*, the Court referred to the Strasbourg case *Sejdovic*, which had similar facts and circumstances to the *Melloni* case, and in which it had been demonstrated that the right to a fair trial as stated by the ECHR would not be undermined if an absent defendant was well informed about the time and place of the legal proceedings and the consequence of his failure to attend court. In the *DEB* judgment, the Luxembourg Court warned the German court that the necessity for a legal hearing depends on particular

[134] *Informationsverein Lentia vs. Austria* (Appl no.37093/97) ECtHR (2002).
[135] *Wille vs. Liechtenstein* (Appl. no.28369/95) ECtHR (1999).
[136] *Glasenapp vs. Germany* (Appl. no.9228/80) ECtHR (1986).
[137] *Case 204/00, Aalborg Portland and Others v Commission*, [2004] ECR I-403.
[138] *Kerojarvi vs. Finland* (Appl. no.17506/90) ECtHR (1995).
[139] *Case 14/07, Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin*, judgment 8 May 2008.
[140] *Kamasinski vs. Austria* (Appl. no.9783/82) ECtHR (1989).
[141] *Case 283/05, ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)*, [2006] ECR I-12067.
[142] *Artico vs. Italy* (Appl. no.6694/74) ECtHR (1980).
[143] *Case 7/98, Dieter Krombach v André Bamberski*, [2000] ECR I-1956.

factors and circumstances, in line with Strasbourg case law.

In the field of the right to privacy, Strasbourg case law has become a hermeneutical tool for the Luxembourg judges' interpretation of legal definitions and examinations of the scope of fundamental rights. In the judgment in *Österreichischer Rundfunk*, the Court agreed with the claimant's opinion that the transmission of personal data to the government, even though the data would not be published, constituted an interference with his "private life". On the basis that the Convention rights were concretely defined by the Strasbourg case law, the Court particularly referred to the Strasbourg cases of *Amann* and *Rotaru*, in the second of which the Strasbourg Court had stated that "there is no reason of principle to justify excluding activities of a professional ... nature from the notion of 'private life'". This Strasbourg definition was repeated in the judgment in *Volker und Markus Schecke*[144] as a legitimate reason to prevent government activity in relation to the collection of personal data. In the judgment in *Schwartz*,[145] the Court deferred entirely to the Strasbourg view of the legal nature of fingerprints that had been established in its judgment in *S. and Marper*,[146] holding that "fingerprints constitute personal data, as they objectively contain unique information about individuals which allows those individuals to be identified with precision".

In the case of *European Parliament vs. Council*,[147] the European Parliament sought to annul certain legal provisions in EC Directive 2003/86 on the grounds that the limitation of the right to family reunification for minors over the age of 12 supposely were in breach of relevant international treaties. However, the Council argued that the European Community did not need to follow those international rules since it was not a contracting state to those international treaties. Against this argument, the Luxembourg Court found that the fundamental rights provided by the European Convention formed a general principle of EU law, so that the Court had to take international human rights treaties seriously. Despite the fact that a state government, according to the European Convention, had both positive and negative obligations to respect this right, pursuant to Art.8 ECHR, the state enjoyed a certain margin of appreciation in both types of obligations. The scope of the state obligation to admit to its territory relatives of settled immigrants would vary according to the particular circumstances of the people involved and to other general interests. In this sense, Art.8 ECHR did not impose a general obligation to authorize family reunion in the state's territory. The Court continued by noting that the Strasbourg decisions in *Sen*[148] and *Rodriguez da Silva*[149] provided the concrete jurisprudential guidance that respondent states could take into account the age of the children concerned, their circumstances in the country of origin and the extent to which they depended on their relatives. The Court's decision actually reflected the fact that the Luxembourg Court did not stand on either side of the argument. It cleverly transferred the final power to the domestic authority in line with the two ECtHR cases to which it referred.

Examples of references to Strasbourg case law functioning as concrete jurisprudential guidance can be found not only in the common cases concerning the right to fair trial, the right to privacy and the right to freedom of expression. In the judgment in *Advocaten voor de Wereld*[150], the Court interpreted the principle of the legality of a penalty for a criminal offence in line with the Strasbourg decision in *Coeme*,[151] which had stated that the domestic judges had to let the defendant know which act or omission

[144] *Case 92-93/09, Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen,* judgment 9 November 2010.
[145] *Case 291/12, Michael Schwarz v Stadt Bochum*, judgment 17 October 2013.
[146] *S. and Marper vs. UK* (Appl. nos.30562/04 and 30566/04) ECtHR (2008).
[147] *Case 540/03, European Parliament v Council of the European Union,* [2006] ECR I-5809.
[148] *Sen vs. Netherlands* (Appl. no.31465/96) ECtHR (2001).
[149] *Rodriguez da Silva vs. Netherlands* (Appl. no.50435/99) ECtHR (2006).
[150] *Case 303/05, Advocaten voor de Wereld VZW v Leden van de Ministerraad,* [2007] ECR I-3672.
[151] *Coeme and Others vs. Belgium* (Appl. no.32492/96) ECtHR (2000).

had resulted in his or her criminal liability, on the basis of the wording of the relevant provisions and their legal interpretation. In the judgment in *Kadi I*, the Court held that the property sanction resulting from the EU Regulation that implemented the UN resolution substantively infringed the defendant's right to property. According to the EU legal order, restrictions on fundamental rights must be subject to judicial review. Thus, the Court referred to the Strasbourg decision in *Jokela*, arguing that the domestic court must take a comprehensive view of the applicant's procedural rights that are inherently assumed by Art.1 of Protocol No.1 to the ECHR. In the case of *M.*,[152] an Italian suspect was charged with committing a sexual offence against a minor (his granddaughter) in both Belgium and Italy. The Belgian pre-trial chamber made the decision of "*non-lieu*". Mr M., however, might have faced a criminal conviction in Italy under the same facts. In these circumstances, he had claimed that the doctrine of *ne bis in idem*, which was stated in both European human rights instruments, would be infringed because the Belgian decision made the case *res judicata*. The Luxembourg Court outlined the elements of the *ne bis in idem* doctrine from the Strasbourg decision in *Zolotukhin*,[153] and held that a particular case could be reopened when new evidence or procedural errors were found. In this sense, *res judicata* doctrine was not a reason to block the continuation of the proceedings in the particular circumstances.

4.2.2. Confirmation of the Legitimacy of a Decision or Warning to the Domestic Court

On some occasions, Strasbourg case law is cited to confirm the legitimacy of the decision or to give a specific warning to the domestic court not to undermine the Convention rights established by concrete Strasbourg case law. In the judgment in *Schindler*[154], there was a dispute between the appellants and the Court as to which Strasbourg case law should be used for the parameters in the EU context. The appellants questioned the correctness of the General Court's reference to the Strasbourg decision in *Jussila*[155] which held that, for certain categories of infringement not forming the core part of the criminal law, the fine need not be determined by a tribunal so long as provision was made for a full review of the legality of the fine decision; this was applied in Cartel proceedings. Moreover, since the fine was large, the appellant opposed the General Court's reference to the Strasbourg decision in *Menarini*[156] where it was held that the amount of the penal fine determined by the administrative authority actually infringed the appellant's right to a fair trial. Arguing against this, the Court stated that the *Menarini* decision was rightly applied, not only because both Courts agreed that Art.6(1) ECHR did not preclude an administrative authority from imposing a "penalty", but also because the appellant still retained the right to a judicial remedy if the administrative authority did not satisfy the requirement of the right to a fair trial. When the appellant complained that a certain provision that left wide discretionary power to the judges might violate the principles of the rule of law and *nulla poena sine lege*, the Court referred to two Strasbourg decisions demonstrating that the provision under challenge would be consistent with fundamental rights. In the decision in *G. vs. France*,[157] the clarity of law was assessed by considering not only the wording of the relevant provision, but also the Court's understanding of the case law. Moreover, the Strasbourg Court also determined, in the case of *Margareta and Roger Andersson*,[158] that the fact that a law had conferred a new discretionary competence on the judiciary was consistent with

[152] *Case 398/12, Criminal proceedings against M*, judgment 5 June 2014.
[153] *Sergey Zolotukhin vs. Russia* (Appl. no. 14939/03) ECtHR (2009).
[154] *Case C-501/11P, Schindler Holding Ltd and Others v European Commission*, judgment 18 July 2013.
[155] *Jussila vs. Finland* (Appl. no.73053/01) ECtHR (2006).
[156] *Menarini vs. Italy* (Appl. no.43509/08) ECtHR (2011).
[157] *G. vs. France* (Appl. no.15312/89) ECtHR (1995).
[158] *Margareta and Roger Andersson vs. Sweden* (Appl. no.12963/87) ECtHR (1992).

the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise were indicated with sufficient clarity to give an individual adequate protection against arbitrary interference.

In the preliminary reference in *G.*,[159] the domestic court submitted a question as to whether EU law must be interpreted in such a way as to preclude the delivery of judgment by default against a defendant on whom, the document instituting proceedings was served by a public notice under the national law, as it was impossible to locate the individual in question. The Court noted that there was provision under the German regulations for proceedings to be brought against a person whose domicile was unknown. Thus, considering that the EU law lacked concrete rules on this issue, the domestic regulation seemed to be permissible, provided that it did not undermine the core of the rights to defend oneself enshrined by the EU Charter and the European Convention and provided that the potential restriction on the right to bring a defence did not constitute a disproportionate threat to the public interest. The Court, thus, referred to the Strasbourg decision in *Nunes Dias*[160] as a source of persuasive legitimacy, because the Strasbourg judges did not preclude the use of a "summons by public notice" provided that the rights of the person concerned were properly protected. This reference actually represented a crucial reminder to the domestic judges that they must observe the requirements established by the Strasbourg case law. In the judgment in *El Dridi*[161], the Luxembourg Court referred to the Strasbourg decision in *Saadi*[162] to warn the local Italian authority not to detain a person who would be removed from the state for an unreasonable time; that is, the length of time in detention should not exceed what was required to fulfil the aim of the detention. In the judgment in *Lanigan*[163], the Court referred to the Strasbourg decisions in *Quinn* and *Gallardo Sanchez*[164] that required the Member State to carry out a holding procedure with due care.

The Strasbourg judgment in *N. vs. UK*[165] provided concrete jurisprudential guidance in the Luxembourg decisions in *M'Bodj*[166] and *Abdida.*[167] In the latter judgment, the Court warned the domestic court that it must observe the ruling established by the Strasbourg case law, in particular that in some exceptional cases, the deportation of a non-national who was suffering from a serious illness and could not enjoy equivalent medical treatment in his or her state of origin, might constitute an infringement of the prohibition on inhuman and degrading treatment contained in Art. 3 ECHR. In the former , the Strasbourg Court's interpretation was referred to as a parameter in the argument that the non-national, who was neither a refugee nor on a low income, was not entitled to benefit from subsidized medical treatment under the EU Qualification Directive 2004/83/EC[168]. The national decision to remove him to his state of origin, where the quality of medical treatment was far lower than in his state of residence, was thus not in breach of the ECHR.

[159] *Case 292/10, G v Cornelius de Visser*, judgment 15 September 2012.

[160] *Nunes Dias vs. Portugal* (Appl. no.69829/01) ECtHR (2003).

[161] *Case 11/61 PPU, Hassen El Dridi,* judgment 28 April 2011.

[162] *Saadi vs. Italy* (Appl no. 37201/08) ECtHR (2008).

[163] *Case 237/15 PPU, Minister for Justice and Equality v Francis Lanigan,* judgment 16 July 2015.

[164] Gallardo Sanchez vs. Italy (Appl. no.11620.07) ECtHR (2015).

[165] *N. vs. UK* (Appl. no.26565/05) ECtHR (2008).

[166] *Case 542/13, Mohamed M'Bodj v État belge,* judgment 18 December 2014.

[167] *Case 562/13, Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida,* judgment 18 December 2014.

[168] European Council Directive 2004/83/EC, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML (4 November 2016).

4.2.3. Reference to the Strasbourg Decision by way of Comparison

The Luxembourg Court may make a comparison with Strasbourg case law, looking for similarities and differences between the two legal orders. In the judgment in *Jeremy F.*, the French *Conseil Constitutionnel* submitted a question to the Court, inquiring whether the EAW Framework Decision deprived the defendant of the opportunity to appeal against the decision made by the domestic investigating judges. The Luxembourg Court replied that the surrender procedures under the Framework Decision must respect the rights to a defence provided by Art. 47 of the Charter and Art. 13 of the ECHR.

The Court adopted a comparative approach to analyse Strasbourg's judicial remedy procedure for individuals subjected to extradition under Art.5(4) ECHR, which was regarded as a *lex specialis* in relation to the more general requirements of Art.13 ECHR. The Court noted that, according to the judgment in *Khodzhamberdiyev*, when the decision to deprive the individual of his personal liberty is made by a court at the close of the judicial proceedings, the supervision required by the Convention should be incorporated into the decision. Moreover, according to the Strasbourg decision in *Marturana*,[169] the Strasbourg regime did not compel the Contracting Parties to set up a second level of jurisdiction for examining the lawfulness of detentions and for hearing release applications. The comparative analysis of this Strasbourg case law revealed, as a parameter for the Luxembourg Court, the necessary characteristics of the EAW procedural system. As a result, the Luxembourg Court claimed that the Council Directive had the same relevant content as the Strasbourg regime, and that the EU institution required the Member States to respect an individual's right to access justice, but did not impose on the Member States the establishment of a number of levels of jurisdiction. The Court's preliminary ruling implied that the right to appeal against the decision of the investigating judges was an essential part of access to justice, but that the Member States enjoyed a margin of discretion in relation to determine the concrete judicial procedure when protecting the appellant's right to a fair trial within the period of execution of EAW.

Similarly, in the judgment *KNK*, the Court examined the Strasbourg criteria for admissibility as requested by appellants whose arguments to annul EC Decision 2002/334 were dismissed. The Court took the Strasbourg decisions in *Klass*[170] and *Tauira*[171] as guidance to determine the Strasbourg criteria of admissibility. By reference, the Court noted that applicants must be victims whose rights have actually been violated unless, in some highly exceptional circumstances, they could be treated as victims without having suffered any real injury.

4.3. Reference to Strasbourg Case Law "by Analogy"

The Luxembourg Court occasionally uses Strasbourg case law in its judgments to draw "analogies", because the Luxembourg context in which fundamental rights are invoked is somehow different from the Strasbourg one. In the judgments in *Carpenter*[172] and *Akrich*[173] concerning the removal of non-EU citizen family members from a state in which they resided, the Luxembourg Court generously protected the rights in relation to family members by citing Strasbourg case law under Art. 8 ECHR.

[169] *Marturana vs. Italy* (Appl. no.63154/00) ECtHR (2008).
[170] *Klass and Others vs. Germany* (Appl. no.5029/71) ECtHR (1978).
[171] *Tauira and 18 Others vs. France* (Appl. no.28204/95) ECtHR (1995).
[172] *Case 60/00, Mary Carpenter v Secretary of State for the Home Department,* [2002] ECR I-6305.
[173] *Case 109/01, Secretary of State for the Home Department v Hacene Akrich*, [2003] ECR I-9665.

In the former case, Mrs Carpenter, who was from the Philippines, continued to live in the UK after the expiration of her permit to stay. Unfortunately, her husband was working in the Netherlands and. Thus, Mrs Carpenter became the only member of the family who could take care of their children at home. The Luxembourg Court acknowledged that the EC's right to economic freedom could hardly be fulfilled if close family members could not be granted permission to live in other EU states. In the latter case, the Court determined that the deportation of a non-EU citizen, who had married an EU citizen and had been living in the EU Member State in question for a long time, might constitute an infringement to the right to the respect of family life, although, according to domestic law, he no longer was a legal resident. In both cases, the Court pointed out that Art. 8 ECHR did not provide specific right for aliens to enter or live in a particular country. However, the Court followed the Strasbourg jurisprudence that showed that deportation of an alien must be in accordance with Art. 8(2) of the European Convention, namely that any restriction of the right under Art.8(2) ECHR should be motivated by one or more legitimate aims and be necessary in a democratic society. In order to enhance the legitimacy of these two decisions, the Court referred to the Strasbourg decisions *Boultif*[174] and *Amrollahi*[175] for setting the criteria of "necessity". Actually, these Strasbourg cases concerned the deportation of criminals, who were not nationals, from their states of residence where they had been living with their family members for a long period. In contrast, the Luxembourg court was deliberating on two cases concerning the protection of the civil rights of third-country nationals who were spouses of EU nationals.

4.4. Decorative Reference to Strasbourg Case Law

On some occasions, the Luxembourg reference to the Strasbourg case law seems useless or unnecessary. At these times, decoration becomes the main function of the citation of a Strasbourg case. *P. v. S.* is the first judgment in which the Court referred to the Strasbourg decision in *Rees* in order to define the term "transsexual". The explanation of this word had no impact on the Luxembourg Court's final decision. The main function of this reference seems just to have been to record the fact that the Luxembourg Court agreed with the Strasbourg Court's explanation.

Similarly, the Court referred to three Strasbourg cases in the judgment in *Francophones*,[176] arguing that the concept of a fair trial defined by Art.6 ECHR entailed the presence of various elements including, *inter alia*, the right of defence, the principle of equality of arms, the right to access the courts, and the right to have access to a lawyer in both civil and criminal proceedings. However, these were only decorative citations in the final judgment, given that the references were used in the description of an abstract concept that could hardly be taken as legitimate guidance for the Luxembourg judges to follow.

Besides, the Court usually makes references to Strasbourg case law together with Luxembourg precedents. In the judgment in *Schmidberger*,[177] the Court referred to the Strasbourg decision in *Steel* & *Morris*, implying that the Strasbourg Court had adopted the same method as the Luxembourg judges to justify a restriction of fundamental rights that was proportionate to a legitimate aim. The Luxembourg citation of the Strasbourg case in this judgment seems unnecessary because the Luxembourg case law was fully able to provide an appropriate source.

[174] *Boultif vs. Switzerland* (Appl. no.54273/00) ECtHR (2001).
[175] *Amrollahi vs. Denmark* (Appl. no.56811/00) ECtHR (2002).
[176] *Case 305/05, Ordre des barreaux francophones et germanophone and Others v Conseil des ministres,* [2007] ECR I-5335.
[177] *Case 112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, [2003] ECR I-5694.

5. Conclusion

Within the framework of the European multilevel protection of fundamental rights, national and supranational legal orders are both intertwined and cooperative. The Luxembourg Court, on the one hand, guarantees the authority of the EU legal order. On the other hand, the protection of fundamental rights in the EU legal order could hardly be an autonomous area free from the influence of the Strasbourg Court. From the Maastricht Treaty to the Lisbon Treaty, the drafters of the Treaities have consistently granted the European Convention the legal status of a general principle of EU law. Before the Lisbon Treaty came into effect, the Court of Justice of the European Union usually mentioned that the European Convention had "special significance". After the Lisbon Treaty came into effect, the Court has often taken the ECHR as a parameter to interpret the EU provisions. Art.52(7) of the EU Charter and the Official Explanation leave a margin of discretion for the Court in relation to the extent to which it takes Strasbourg case law into account. Since more than half of the Charter rights are borrowed from the European Convention, the Court can hardly ignore the relevant Strasbourg interpretations, because the Convention has been widely regarded as a "living instrument" that dynamically reshapes the scope and meaning of the Convention rights.

Although the empirical statistics and the opinions of the majority of CJEU's judges interviewed by some scholars suggest that the frequency with which Strasbourg case law is cited is lower now than it was in the pre-Lisbon Treaty era, it is by no means clear that the Strasbourg jurisprudence is losing its influence over the Luxembourg judgments. Some final judgments published in the *Curia* database might be revised versions of the original drafts, and these drafts may have contained many more references to Strasbourg case law. Because the Luxembourg Court is very concerned about its legitimacy, the European judges tend to delete references to Strasbourg case law from the official judgments. Sometimes, Strasbourg case law will not be cited in Luxembourg judgments because the latter court interprets the fundamental rights in a parallel manner. However, the members in chambers or the Grand Chamber might possibly examine the compatibility of the judgment with the Strasbourg jurisprudence in the final phase if some judges are arguing that the Luxembourg decision may breach the European Convention.

The motivations for the Luxembourg Court's references to Strasbourg case law can be divided into four categories: substantive observance of the Strasbourg jurisprudence; reference to Strasbourg case law as legitimate guidance; reference "by analogy"; and decorative reference. The majority of the Strasbourg judgments that are referred to function as legitimate guidance through which the Luxembourg Court not only ascertains the meaning and scope of the fundamental rights in question, but also implicitly reminds the Member States not to undermine Strasbourg's standard of fundamental rights. Substantive observances of Strasbourg decisions are usually found in cases where the EU lacks concrete procedural rules or regulations on how EU law should be implemented, or cases where developments in Strasbourg case law have modified the Luxembourg Court's previous understanding of the meaning of Convention rights. In these circumstances, the Luxembourg Court prefers to follow the Strasbourg jurisprudence substantively. Apart from that, the Court may rely substantively on Strasbourg's decisions with respect to the protection of fundamental rights that are borrowed from the ECHR and ECtHR case law. Very few Strasbourg cases are cited as "by analogy" or as decoration. These two latter types of citation both make it clear that the Court has considered the Strasbourg jurisprudence. Using the Strasbourg case law "by analogy" indicates that the Court is generously extending the applicability of a Strasbourg decision into a new area, while a decorative reference is nothing but a superficial citation of Strasbourg case law in a Luxembourg judgment.

Situations Referred to the International Criminal Court by the United Nations Security Council – "ad hoc Tribunalisation" of the Court and its Dangers

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The study examines the possibility created by the Rome Statute, the founding and governing document of the International Criminal Court, according to which the United Nations Security Council has the option to refer situations to the court by a legally binding resolution acting under Chapter VII of the United Nations Charter. This is possible, regardless of the fact that the state concerned is a party to the Statue or not. According to the author's conclusion – although only limited number of such situations could yet be examined – this legal possibility is currently far from being a success story. It is still important to emphasize that while it can be a really useful tool from the perspective of international politics, it may poses a serious threat to the future of the court.

Keywords: International Criminal Court, ICC, United Nations, Security Council, referral, complementarity, ad hoc tribunal, Chapter VII, Sudan, Darfur, Bashir, Libya, Gaddafi, immunity.

Different types of international criminal judicial fora have appeared and become active during the last 25 years. The examination of those and their relationship to states – the classic subjects of international law – or state sovereignty can lead to interesting questions. How is international criminal justice (which is based on transferred competence by sovereign states to international level) relate to domestic criminal justice (exercised directly by state sovereignty) and in what direction is international criminal justice developing?

The possibility of the Security Council to refer specific situations to the court without any consent of the state concerned, regardless of the fact if that state had earlier ratified the Statute or not,[1] is a very interesting attempt to step up against impunity, with circumventing state sovereignty, if it is used to provide protection for somebody responsible for the gravest crimes, embodied in the Statute. Similarly, there is an additional option to suspend any ongoing case in front of the Court by the Security Council, using the same method.[2]

The first situation like that – connected to the conflict in Sudan and the Darfur region – have led only to disappointment and also had a role in the African disappointment in the Court. With only one situation at the table it was not possible yet to foresee the future of this legal solution in the Statute, or where the International Criminal Court is going to head in connection with that.

[1] *Rome Statute of the International Criminal Court.* Rome, 17/07/1998, UNTS vol. 2187. Art. 13 Para (b).
[2] *Ibid.* Art. 16.

The initial feelings have not been optimistic, rather quite critical and anxious. Of course, there are understandable political reasons for creating this option in the Statute, and in specific situations it may become politically useful. At the same time, there is also a clear danger arising. These tools in the hands of the Security Council do not necessarily serve the idea of international peace and justice, and especially not the dogmatic purity of international criminal justice. Those are rather bargaining tools for specific situations, in which some actors of international politics could be deterred from committing further violations and/or forced to the negotiation table with the threat of the referral or the promise of a future suspension. Although this may be understood and to some extent accepted as a sad fact and a reality of international politics, unfortunately the worries still persist, given that the events since the first situation have not helped to dispel any doubts.

1. Comments related to referrals by the Security Council

According to my opinion, one of the most important characteristics of the International Criminal Court is that its possible procedures represent a balance between state sovereignty and the international need for criminal justice, which may strengthen international rule of law. But the possibility of a referral by the Security Council can make the weight of politics heavily overweight, which otherwise had been a dominant characteristic of the ad hoc tribunals, which had been created by the Council on a case by case basis, had they been needed, and had the necessary political compromise been present. I believe that this was one of the weakest point in the ICC Statute system, which poses the danger of the court turning into an *ad hoc* judicial forum like the Yugoslavia or the Rwanda Tribunal, which will raise several questions.

The first such problem is hypothetical in its nature. A Security Council referral under Chapter VII of the UN Charter means the application of politically motivated legitimate coercion. I believe that this problem is also well reflected in the fact that the possibility of the Council to "move" the court persists not only in respect of referrals, but also of suspension of actual cases in front of the judges.

In a case like this, what happens is that UN Security Council agrees somehow in a political interests-forged compromise, which takes the form of coercion, being exceptional under the current system of international law, though legitimate under the UN Charter. Legally this may be possible, but it attracts all kind of political problems. Such as the disappearance of one of the most important advantages, which the International Criminal Court offers opposed to *ad hoc* tribunals: the capacity to act based on the enhanced amount of co-operation of member states as a permanent international organization established by an international treaty. In the latter cases, in spite of the international legal obligation of the state(s) concerned to cooperate, it is usually depending primarily on political considerations, as it can very clearly be seen with cases of the Yugoslavia Tribunal. With its referral, the Security Council turns the International Criminal Court practically into an *ad hoc* tribunal (hence the term "*ad hoc* tribunalisation"), as those gain competence and legitimacy of its procedures and their existence from the powers of the Security Council – similarly to the International Criminal Court in a situation like that. From this moment, the most important advantage arising from the characteristics of the court is lost, because of the absence of compromise, which functions as the fundamental connective element of international law that organises the relation of the sovereigns. The highest advantage of the court that is lost here, the exemption from politics.

The second concern is purely political-financial in nature, but in terms of international relations is far from irrelevant. When the Security Council decides to set up an *ad hoc* tribunal, it must also consider its potential costs. The various UN ad hoc tribunals' high balance sheet total budget has been accepted by the UN General Assembly biannually during the last decade, as they have been part of the UN general

budget.[3] This solution has sparked serious controversy within the organization, and the debate around the issue has constantly got a sharper tone as a growing number of member states has echoed significantly growing criticism regarding to terms of cost and the effectiveness of the various judicial fora maintained by those funds.[4] For example, relevant donors like Germany and Japan have expressed their dissatisfaction by sharply criticizing the ad hoc tribunals in the General Assembly[5] and at the same time increasing their contributions to the International Criminal Court, where the main decision-making body of the organization, the so-called Assembly of States Parties is in charge of finances, rather than the United Nations. In the case of a referral of the Security Council to the International Criminal Court, a weird situation arises: it charges the expense of "international justice" it deems necessary to apply instead of the UN budget to the states party to the ICC Statute. Among the five permanent Security Council members this means only two, France and Britain, and among the non-permanent ten members a varying number of member states, but not necessarily any majority. The question arises: to what extent is it acceptable that the funds provided by the community of the currently 124 member states are used for the commitments of a body in which these states do not all have an effective decision-making position, and how long will this be tolerated by them.

During the last years the Security Council luckily has not made referrals a widely used tool, as to the one such existing situation (Sudan) only one more (Libya) has been referred to the Court. But already these two situations have highlighted at least three types of problems with Security Council referrals. The continuous deterioration of the situation in Syria has constantly kept the possibility of a new referral on the agenda, and according to many NGOs and some states, the situation in Iraq may also require the application of this option, especially with regard to the activities of the Daesh terrorist organisation (Islamic State).[6] Before decision is made on these situations, it is useful to examine and evaluate the situations that are already in process.

2. Referral no. 1: Sudan and the Darfur Region – an Expected Failure

The first situation referred to the International Criminal Court by the Security Council was the situation in Sudan, in 2005.[7] After examining the situation, five actual cases have been initiated in front of the International Criminal Court, out of which the most well-known is the indictment against the president of Sudan, Omar Hassan Ahmad Al Bashir, and the following proceeding.[8] It had started with some difficulty, since two arrest warrants got accepted: first, the prosecution did not succeed in getting the warrant for the crime of genocide approved by the pre-trial chamber of the court, only for the second time. Additionally, the indictment included five counts of crimes against humanity, two counts of war crimes and three counts of genocide.

[3] For example, the budget for the International Tribunal for Yugoslavia has been around 180 million USD in the 2014-2015 period, with a steep fall from the 250 million USD in the 2012-2013 period, which has already been 36 million USD less than of the 2010-2011 biannual period. This is the result of the lowering of the costs with the completion of the activities of the tribunal itself. Source of data: *The Cost of Justice.* ICTY, available online: http://www.icty.org/sid/325 (30 August 2016).

[4] William A. Schabas: *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone.* Cambridge University Press, 2006. p. 622.

[5] For arguments against the criticism related to the high costs of the Yugoslavia Tribunal, see: David Wippman: *The Costs of International Justice.* The American Journal of International Law Vol. 100, No. 4 (Oct 2006), pp. 861-881.

[6] *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups.* 13 March 2015, Geneva. A/HRC/28/18.

[7] S/RES/1593, 31 March 2005.

[8] *The Prosecutor v. Omar Hassan Ahmad Al Bashir.* Case No. ICC-02/05-01/09.

Evaluating the result of the proceedings of the International Criminal Court and the activities of the international community with the Darfur referral, it is safe to say that we face a failure. More importantly, this is a somewhat expected failure: the series of events following were more or less in line with what could have been expected by everyone when during the drafting of the Statute, at the part, where the states provided the Security Council the option of referral. The substantial point of this situation is that there is a state, its high-ranking leaders or politicians against whom international legal has to be enforced by the tools of criminal law. In a case like this it is only natural to calculate with the possibility that this will not succeed immediately, but it is possible with time. The most well-known examples to this are Slobodan Milosevic and Charles Taylor, who, at the peak of their power did not seem to fear any international criminal forum. But the picture with Sudan unfortunately predicts a different outcome.

An important prerequisite for this solution to be successful is an effective political isolation, which could reduce the political playing field significantly for the actor wanted by the International Criminal Court, or his/her political supporters. But in the case of Sudan, it just seemingly does not work: President Al Bashir was placed on the main seat on the Arabic League Summit in Doha, right after the arrest warrant had been issued. Not much later, during the meeting of the African Union in Sirte, Libya, where the UN Secretary-General Ban Ki-Moon has also been invited, the organizers seated them at the same table at the gala dinner. It is hard to imagine a more obvious slap in the face for the international community and the International Criminal Court. Another well visible sign of failure was in 2011, during an official state visit by Al Bashir in Peking, where he could march in front of a decorative military line after arrival, where those soldiers were clearly not there to arrest the politician wanted by the International Criminal Court for genocide. One could argue, that the situation has improved a bit in 2012, when the Republic of Malawi, the state responsible for organizing the 19th African Union Summit, rather stepped back from the task when had to face the potential political difficulties caused by the visit of Al Bashir: as a state party the Statute of the International Criminal Court, he would have been under the obligation to make the arrest and extradite the Sudanese president, which would have been hard to imagine given the realities of contemporary African politics.

The serious nature of this problem is show by the fact that the court has started to declare non-compliance issues. The first one of these was with the same Republic of Malawi, who was found responsible for not arresting the Sudanese president during his visit on 14 October 2011, in a decision made on 12 December 2011 by the Pre-Trial chamber I.[9]

At the same time, the same chamber has also decided that the Republic of Chad (which is also party to the Rome Statute) also has failed to fulfil its obligation to arrest and surrender Al Bashir during his visit on 7 and 8 August 2011,[10] then later again on 23 March 2012.[11] Chad also been found in violation of the Statute on 26 March 2013, when Pre-Trial chamber II has issued a new decision related to its repeated

[9] *Ibid.* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir. ICC-02/05-01/09-139, 12 December 2011.

[10] *Ibid.* Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir. 13 December 2011.

[11] *Ibid.* Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir. ICC-02/05-01/09-140-tENG, 23 March 2012.

breach of obligation, this time when Omar Al Bashir has visited the country during 16-17 February 2013.[12]

Sometime later, on 9 April 2014, Pre-Trial Chamber II has found the same breach of obligation with the Democratic Republic of the Congo (also a party to the Rome Statute), when the Sudanese president had been visiting the country during 26-27 February 2014.[13]

Nearly one year later, on 9 March 2015, Pre-Trial Chamber II has also come to a conclusion finally with the Republic of Sudan as well: it has declared that the state has failed to cooperate with the Court by not arresting and surrendering the president, Omar Al Bashir to the International Criminal Court over all the years that have passed.[14]

All the decisions have been transmitted to the UN Security Council and to the Assembly of the States Parties to take the necessary measures as they deem appropriate, and other cases have followed them ever since. So we could argue: back to politics. The really disturbing element of the above experience is that all states (except for Sudan) that has been found in violation of the Rome Statute are parties to it, so their obligations have a simpler source: the fact that they had ratified the Statute. Their direct violation has had a complex political reason, and while I do not argue that these definitely would not have existed, had the International Criminal Court had a different base of examining the Darfur/Sudan situation, I am confident that it would have been harder to find excuses for these actions, so they could have had a better chance of being avoided. But now the situation is that more and more African countries are turning against the court, arguing that it is a "court against Africa", which is definitely a grave political problem for the court, losing credibility, with a growing resistance towards it.[15] You can argue, that the fact of African states now seem to develop their own "African international criminal court" in the form of modifying the African human rights judiciary system is an advancement, even if it is to some extent a sign of opposing the International Criminal Court, I believe that this will not be a successful attempt.[16]

In summary, the referral of the Sudan/Darfur region situation has proven to be a failure for the Security Council and the court so far from every angle, and not only related to the present African activities of the court, but also to its future and the whole concept of international criminal justice in the African region.

3. Referral no. 2: Libya – an Unexpected Failure

Compared to the situation in Sudan, the second referral of the Security Council resulted in a somewhat surprising failure, throwing light to more potential problems related to this option. In the case of Libya,

[12] *Ibid.* Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir. ICC-02/05-01/09-151, 26 March 2013.

[13] *Ibid.* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court. ICC-02/05-01/09-195, 9 April 2014.

[14] *Ibid.* Decision on the Prosecutor's Request for a Finding of Non-Compliance against the Republic of the Sudan. ICC-02/05-01/09-227, 9 March 2015.

[15] For an overview, see: Kenneth Roth: *Africa Attacks the International Criminal Court.* The New York Review of Books, 6 February, 2014. Online: http://www.nybooks.com/articles/2014/02/06/africa-attacks-international-criminal-court/ (30 August 2016); Max du Plessis - Tiyanjana Maluwa - Annie O'Reilly: *Africa and the International Criminal Court.* Chatham House, July 2013. Online: https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf (30 August 2016).

[16] Chacha Bhoke Murungu: *Towards a Criminal Chamber in the African Court of Justice and Human Rights.* Journal of International Criminal Justice (2011) 9 (5). p. 1067-1088.

the Security Council has referred the situation to the International Criminal Court with a unanimously adopted resolution made in 2011, which was needed, as Libya – similarly to Sudan – has never ratified the Rome Statute.[17] After examination of the situation, the Prosecutor of the court ended up initiating three cases. One of them has been cancelled since then, as the accused, the former head of state of Libya, Muammar al-Gaddafi, has been killed by a group of rebels. During the proceedings against his captured son, Saif Al-Islam Gaddafi and Abdullah Al Senussi (former head of the military, who was arrested later, in the March of 2012 in Mauritania, and extradited to Libya in September of the same year), both accused of crimes against humanity, no such obstacles have arisen.[18]

The process was stopped instead by the capturing rebel group, and later the state, stating that they do not intend to extradite the accused to the International Criminal Court, but they plan to bring them to justice within domestic jurisdiction.

4. The Principle of Complementarity in the Situation of Libya

While the Security Council has referred the situation of Libya to the International Criminal Court, the affected state also wants to punish the person in question, which results in a strange situation, which can be dubbed a "reversed Sudan situation".

The principle of complementarity, embodied in the Rome Statute,[19] as one of the operational principles of the court means that the Court may only entertain a case, if the given crime is not being tried by the state on the territory of which it had taken place or which has jurisdiction on any other base. The goal of this provision is not only the protection of state sovereignty, but also to strengthen the "ultimate" nature of the Court and the original obligation of states to step up against these crimes.[20] The practical applicability of the principle could allow the Libyan authorities to refuse extradition if they are willing and able to bring the accused to justice in Libya. Of course, to defend this legal position, the state has to conduct thorough and fair proceedings with employing serious guarantees, with international observation if needed. The twist is that, according to the relevant rules of Chapter VII of the UN Charter and the Rome Statute, this resolution is legally binding, but we have to interpret this binding force within the framework of the Rome Statute, which describes the principle of complementarity being primary in the functioning of the court in its totality. The referral by the Security Council gives effect to the applicability of the Statute also in relation to a non-party state, but still has to respect complementarity (being part of the Statute), and based on this, taking the criminal proceeding from a state that is willing and able to conduct it, hardly seems to be justifiable or being in conformity with the Statute. As we could see earlier, in the Sudan situation, the willingness of the state has obviously been missing all over the years, which is the big difference between the two situations.

With Libya, the criterion of "ability" can be dubious, as it is not certain, that apart from the obvious willingness and political intent, the state is also able to offer the prerequisites of appropriate proceedings. This can be decided based on the quality of the justice system of Libya in general and to some extent, on the accused individual's local reputation and the attitude towards him. It is not unreasonable to assume that there is a good chance that instead of a fair trial, the accused would face the courtroom

[17] S/RES/1970 (2011).

[18] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi.* Case No. ICC-01/11-01/11.

[19] *Rome Statute.* Arts. 1, 17, 18, 19.

[20] Antonio Cassese: *International Criminal Law.* Oxford University Press, 2003, pp 351-352; Robert Cryer & Hakan Friman & Darryl Robinson & Elizabeth Wilmhurst: *An Introduction to International Criminal Law and Procedure.* Cambridge University Press, 2010, pp. 153-154.

version of his father's murder on the street. According to the Rome Statute, and the uniform interpretation by scholarly literature, domestic judicial proceedings are only deemed to be appropriate if all the needed judicial and human rights guarantees are fulfilled. As the Prosecutor of the court has stated in 2003 in his general comment, competing with state authorities is not a goal of the court, quite the contrary, he has held that conducting as many domestic proceedings as possible is desirable.

What can the court's potential decisions be based on? So far we can evaluate this situation as another failure, since the court was unable to proceed with its prosecution, but this failure is very different from the one in the Sudan/Darfur situation. First of all, it is unexpected, because probably nobody has ever anticipated this, not just in this particular situation, but not even during the drafting of the Rome Statute. By comparing this situation with the one in Sudan, the difference becomes obvious. The latter one is a "simple" line-up, in which there is an antagonist, the leader of the state, whom the court wishes to prosecute, yet he is able to hide in the mantle of the sovereignty of the state – and according to the provisions of international law, it is not easy to strip him of his power. In the Libya situation, the situation is much more complex: state sovereignty did not protect the accused from the prosecution, right on the contrary, it is used to bring him to justice within the state.

I believe that here the logic of the system simply breaks down, I do not think that even the "founding fathers" of the Court were prepared to handle such a situation, while they were designing the system of the operation of the institution. The pre-planned, and every logically pre-imagined scenarios for UN referrals have involved heads of states or other influential political characters to be brought to justice were to hide, to flee, to protect themselves to some extent by the protection of their states, but it has never come up as a potential problem, what if the state itself becomes an obstacle for the prosecution by the court, and not because it wants to protect the accused, but because it wants to exercise its punitive power domestically.

In my opinion this situation brings up very serious questions that have to be decided carefully during the proceedings of this situation. Since this is the first time that the court faces such difficulties, the appropriate reactions have to be defined now. Cooperation with the International Criminal Court is the *sine qua non* of the function of the whole system, and this cannot be different under the current international legal system defined by sovereign states.[21] The interpretation of the principle of complementarity, a principle that defines the functioning of the International Criminal Court, is a problem worth serious consideration, since it is the main element that separates the International Criminal Court from *ad hoc* tribunals. The burning question: does it have to be applied even in situations referred by the Security Council, or can it be waived in such cases?

I see the latter answer possible only in one case: if the Security Council explicitly states this in its resolution about the referral. But in the case of Libya, the relevant Security Council resolution has only copied the appropriate text from the Statute, and have not mentioned anything about waiving the principle of complementarity. Of course, if such an obligation had been created, it would be contrary to the text of the Statute and contrary to the original concept of the functioning of the institution, which would lead us to another intriguing question: whether or not the Security Council can waive, even on a case by case basis, complementarity from the system of the Rome Statute. This paper will not address this question in details, but after examining the practice of the Security Council, its resolutions and their relationship with international treaties, we can conclude that this is legally possible. But still, it has not happened in the Libya referral, so this theoretical possibility is not relevant here. I would stress that in

[21] Cassese, p. 356.

my opinion, the Security Council would definitely have to explicitly prescribe it, if it wants to impose such obligations on a state.

The official position of the Court during the discussion of this particular question can be summarized as that the best would be if the court itself decided the question. For this, Libya should extradite the accused individuals, and then challenge the jurisdiction, the admissibility of the case in front of the court. After long discussions, the Libyan government has done the latter, filed in a petition on 1 May 2012 concerning Saif Al-Islam Gaddafi,[22] but at the same time they have not gone forth with the extradition. In my opinion, this was not a sign of serious intention, rather an attempt to win some time.

The Pre-Trial Chamber I has examined the challenge to the admissibility based on the principle of complementarity, which has been built on the arguments described above, stating that the International Criminal Court shall not replace domestic criminal justice, and it can operate only if the state concerned is not willing or able genuinely to do so. On 31 May 2013, the chamber rejected the challenge,[23] arguing that the state of Libya is unable genuinely to carry out the prosecution of the accused, and also expressed doubts about the domestic criminal procedure and the possible procedure of the International Criminal Court would cover the same case. This decision was reaffirmed by the Appeals Chamber on 21 May 2014, finally deciding that the case against Saif Al-Islam Gaddafi is admissible in front of the court.[24]

On the other hand, a different result was concluded in the other case, the one regarding Abdullah Al Senussi, challenging the admissibility of the case, based on the same arguments. It was initiated by Libya on 2 April 2013, and decided on 11 October 2013 by the Pre-Trial Chamber I, concluding that the case is inadmissible before the International Criminal Court as it was under domestic proceedings.[25] The chamber has declared that the authorities conducting the proceedings are competent and that Libya is "willing and able" to genuinely carry out the proceedings. The decision was reaffirmed unanimously by the Appeals Chamber on 24 July 2014, declaring the case against Al-Senussi inadmissible, bringing that case to an end.[26]

The settlement of this question by the court's interpretation was not an easy task. As it has had to face an issue that had not been accounted for drafting of the Rome Statute, while recognizing that the principle of complementarity was not designed for such a situation. In the end, as we can see from the decisions of the court, it has clearly accepted the applicability of the principle of complementarity in the Senussi case, but its decision in the Gaddafi case can also be interpreted similarly. The difference was not in the substantial interpretation of the role of complementarity but in the factual differences between the two cases, the court being able to argue that the circumstances in the Gaddafi case are different, and for that reason he does not see the ability of a genuine proceeding (e.g. he was not detained by the government, but by a local militia).

Unfortunately these decisions have not been able to settle the situation and give possibility to the International Criminal Court to proceed with the trial. At this moment it seems that politics will once again have to take a vital role, as the court's final decision about the extradition can only be enforced by political pressure, if at all, and once again, this will not help to future of the court. On 10 December

[22] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi.* Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute. 1 May 2012. ICC-01/11-01/11-130.

[23] *Ibid.* Decision on the admissibility of the case against Saif Al-Islam Gaddafi. ICC-01/11-01/11-344-Red, 31 May 2013.

[24] *Ibid.* Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi". ICC-01/11-01/11-547-Red, 21 May 2014.

[25] *Ibid.* Decision on the admissibility of the case against Abdullah Al-Senussi. ICC-01/11-01/11-466-Red, 11 October 2013.

[26] *Ibid.* Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi'". ICC-01/11-01/11-565, 24 July 2014.

2014, the Pre-Trial Chamber I has found the responsibility of Libya for the lack of compliance with respect to its earlier decisions about the extradition, and referred the situation to the Security Council for further measures it deems necessary.[27] And while the chamber underlined that it understands the situation of the government, it only takes note of the "objective failure" to cooperate, it is surely not considered to be a friendly gesture on the side of the state, and not help future cooperation.

5. The Legal Status of the Employees of the International Criminal Court in a Security Council Referral Situation

The situation of Libya has led to a particularly unique incident, which, given its nature, matches the absurdity of the situation and has brought up new questions about the legal status of the employees of the International Criminal Court in the case of a Security Council referral. An Australian employee of the court, working for the defence unit, has been taken into custody by the militia controlling Zintan after her meeting the confined Gaddafi on 7 June. The Libyan authorities have communicated strange accusations to the UN that included her handing over documents with national security relevance, and that she has kept devices of espionage with herself.[28] During the tense situation the Libyan authorities called the court to "cooperate to solve the situation" and to suggest "possible solutions to handle the situation",[29] while the court expressed their "deep regret," and assured Libya that they "do not wish to risk Libya's national security in any way".[30] After three weeks of captivity, the employees of the court could leave captivity and travel home. While the incident was clearly a mere demonstration of power by the new Libyan government, it has started a lively debate among the practitioners of international law about the diplomatic immunity of the staff of the court.[31]

The incident has led to the generally accepted point of view that the employees of the International Criminal Court enjoy immunity, while question requires some explanation in the case of states non-party to the Rome Statute, raising at least two points to examine.

The first one is, why should a non-party state that legally does not even acknowledge the existence of the court grant immunity to someone from an entity that is non-existent in its eye? The second, more theoretical thinking point is, if we can talk about immunity in case of employees of international organizations without it being based on an international treaty?

The Statute itself vests immunity to the Court's employees, but refers to "in accordance with the agreement on the privileges and immunities of the Court",[32] which separate treaty has been concluded in 2002.[33] While many states party to the Statute has still not ratified this treaty, I believe that they have to grant immunity even if not ratified the agreement. The latter only details the immunity, which is granted by the Statute itself. But this is only true with states party to the Statute.

[27] *The Prosecutor v. Saif Al-Islam Gaddafi.* Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council. ICC-01/11-01/11-577, 10 December 2014.

[28] *Libya accuses Australian ICC official of passing secret letter to Gaddafi's son.* The Guardian, 25 June 2012. Online: http://www.guardian.co.uk/world/2012/jun/25/melinda-taylor-libya-accuse-spying (30 August 2016).

[29] *Libya says it wants ICC's cooperation over detained staff.* Reuters, 16 Jun 2012. Online: http://www.reuters.com/article/2012/06/16/us-libya-icc-idUSBRE85F0IW20120616 (30 August 2016).

[30] *Statement on the detention of four ICC staff members.* Press Release 22/06/2012, ICC-CPI-20120622-PR815.

[31] For an example, see: Dapo Akande: *The Immunity of the ICC Lawyers and Staff Detained in Libya.* EJIL Talk!, 18 June 2012. Online: http://www.ejiltalk.org/the-immunity-of-the-icc-lawyers-and-staff-detained-in-libya/ (30 August 2016).

[32] *Rome Statute.* Art. 48.

[33] *Agreement on the Privileges and Immunities of the International Criminal Court.* 09/09/2002, UNTS vol. 2271.

I would argue that norms of customary law have not been established in this area, especially considering the fact of the existence of a separate international treaty about the immunity of the International Criminal Court that even many states party to the Statute have not ratified yet. But in the case of a non-party state, the existence of any such customary legal norm seems heavily problematic. Additionally it is important to add, that unfortunately, currently acknowledged customary law also has a problematic relationship with the establishment of international criminal fora. For example, even the study of customary international humanitarian law, published with the contribution of the International Committee of the Red Cross in 2005, does not show any norm of customary law that would refer to international criminal fora, its identified Rule 161 only acknowledges the obligation of the cooperation of states according to the 1949 Geneva Convention, it doesn't even mention any international judicial institutions.[34] This makes any argument based on customary law for the case of immunity of employees in front of states non-party to the Statute quite shaky.

In the case of a Security Council referral, once again we have to come back to the argument we have used previously, regarding to complementarity. That a legally binding resolution of the Security Council is able to bring an entire set of new obligations, and based on this, we may conclude that the obligation to grant immunity, based on Article 48 of the Statute is an inseparable element of these obligations. The fact that a separate agreement exists about the immunity is still bothering. This could lead to the disturbing question, that even if states party to the Statute do not acknowledge immunity automatically, why should non-party states do that? This question can be answered two ways. First, arguing, that the agreement only acts to detail out the immunity, but it is granted by the Statute. The second possible answer, or rather a solution to avoid similar incidents in the future is simpler: an explicit provision about this in any future Security Council resolution aimed to refer a situation to the Court will be an adequate solution.

6. Conclusions and the Possible Future

During the past years, the most serious international tensions have been evolved in Syria with the civil war and then the rise of the Daesh terrorist organization, which is active also on the territory of Iraq. From time to time, the suggestion surfaces that the Security Council shall employ the International Criminal Court to step up against the horrific crimes committed by the leaders of Syria or the members of Daesh, which would mean another referral related to the situation in Syria, and/or to the situation in Iraq. In any of those cases, however, all the above issues would come up again as potential problems.

How fortunate it is for the Security Council to impose a political task on the International Criminal Court, or to use it as political tool in its effort to handle a situation? Of course it is a possible political alternative for the Council, but so far it seems like the effectiveness is very doubtful. I believe that if the Security Council systematically refers situations to the International Criminal Court, the future of the court could get very difficult. It has already received serious critiques of political nature, for example because it only deals with African issues while the court is mostly financed by the so-called developed countries, and the political consequence of this could be quite clearly seen with the Sudan/Darfur situation. If the Security Council tries to delegate its own task to the court, it could give rise to other critiques of post-colonialist nature, which could have the consequence that the International Criminal

[34] Jean-Marie Henckaerts & Louise Doswald-Beck (eds.): *Customary International Humanitarian Law. Volume I: Rules.* ICRC-Cambridge University Press, 2005, p. 618.

Court would be unable to fulfill the role that the founding states, NGOs, human rights organizations and all other supporters intended for it.

The court needs to be very careful not to turn into a political tool in the hands of the Security Council, for which unfortunately all chances are given. At the same time, the Security Council also has to consider the opportunity of referral with a serious sense of responsibility, and what is even more important, it shall provide for a clear and doubtless legal environment, for example with drafting resolutions which do not leave space for legal uncertainties.

Exporting the Policy - International Data Transfer and the Role of Binding Corporate Rules for Ensuring Adequate Safeguards[1]

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Personal data plays a key role in our digital age. The legislator is working on making the data controller interested in protecting personal data by self-regulation, so Binding Corporate Rules were enacted as the latest legal institution for ensuring adequate safeguards in case of international data transfers. In this study after a brief description of the strategic value of personal data the author makes an attempt to introduce BCR and their legal background within the rules of international data transfer in order to give an introduction on how EU data protection policy can affect data controllers in third countries.

Keywords: Binding Corporate Rules, international data transfer, adequate level of protection, personal data protection, GDPR, adequate safeguards

1. Introduction

Personal data have economic and strategic value not only for the data controller, but also for the data subject, undoubtedly. In our digital age, applying data protection measures is not a prestige of the data controller, but an obligatory legal requirement and an essential interest of the data subject. This factor is of high importance mostly in cases of data transfers to third countries where the adequate level of protection of personal data must be ensured. As the addressees of the regulation of data protection requirements have been differentiated in the last decade and enterprises have carried (some of) the highest risks of data breaches, the tendency of both EU and domestic legislation is to give priority to self-regulation[2] to enable data controllers to create rules and processes themselves for compliance, for ensuring the rights for personal data protection and for efficient maintenance at the same time. In this tendency Binding Corporate Rules (hereinafter: BCR) have a high importance at first glance as the General Data Protection Regulation[3] (hereinafter: GDPR) considers this legal institution one of the most important legal ways for ensuring adequate safeguards in third countries. However, several concerns may be raised and the real advantages have not been experienced so far.

[1] This research was (partially) carried out in the framework of the Center of Excellence of Mechatronics and Logistics at the University of Miskolc.

[2] Szőke G. L. (2015): *Az európai adatvédelmi jog megújítása – Tendenciák és lehetőségek az önszabályozás területén*, HVG-ORAC Lap- és Könyvkiadó Kft, Budapest

[3] Regulation 2016/679 (General Data Protection Regulation) OJ 2016 L 119, 4.5.2016, pp. 1–88.

2. Personal Data from a Different Perspective

Personal data are natural intermediate goods having value for the data subject and the data controller as well. This perspective is determined by Posner[4] providing a pure but picturesque situation in order to prove the statement: at a job interview, people sell themselves as commercial goods. They can hide the disfavoured qualities to get the job and at the same time mislead the employer. In conclusion hiding personal data or with other words exercising the right to information self-determination results in distorting the market and the real competition by default of performance. However, Posner added, that we can only save ourselves from disadvantageous transactions if we are entitled to retain personal information and others are prohibited to seek sensitive data.

Most infringements and data breaches remain latent as the data subject does not raise a claim because of the unlawful activity as he does not even know or eventually does not care about it. This careless behaviour changes immediately when the data subject has suffered financial loss or disadvantage, e.g. price discrimination at a webshop, or if the level of disturbance has exceeded his own tolerance in case of receiving spam mails or phone calls. However, people are ready to provide as much data as they are asked for for the tiniest benefits like using the supermarkets' store loyalty cards providing a clear picture to the company about buying and eating habits. Due to this tendency we can note that conscious information-self determination requires actions and denials taken by the data subject.

Laudon suggested a digital market of personal data[5] where the data subject can earn money by selling his data. In his market, we can have our own account to sell pieces of personal data at a price negotiated with the buyer. We can even hire agents to achieve better price. The biggest benefits are on one hand that the data subject would be able to follow the way of his data and could keep control over its processing, on the other hand, one would get financial profit from transactions. If we think of direct marketing, we can recognize some similarity albeit with the difference that the data subject cannot claim profit earned by selling his data.

In conclusion, personal data as a layer of our privacy has emotional and social, furthermore economic value for the data subject.

For the data controller, personal data do not have any emotional value but rather possess strong and strategic economic value. In case of a life insurance contract, the more sensitive the personal data is, the more value it has, influencing the details of the further contract. Also, personal data have effects on marketing costs such as the effectiveness of targeted commercials. Applying data protection measures may attract new customers and improve good reputation. In addition, controlling and transferring personal data play significant role in the everyday basic operation of multinational companies like banks, airlines, software providers, internet-based services or any companies with consumer service departments even if operated in third countries.

In conclusion personal data as an economic good is the new gold for the data controller and the trust is the key to make profit out them.[6] To enhance trust data controllers must have transparent privacy policy, respect the principles like purpose limitation, inform the data subject and process data with his

[4] Posner A. R., *The Right of Privacy, Georgia Law Review*, Vol. 12, No. 3, Spring 1978, Georgia.

[5] Laudon, K. C., *Markets and Privacy, Association for Computing Machinery*, *Communications of the ACM*, Sep 1996, Vol 39, No 9, 92-104, ABI/INFORM Global.

[6] Woolley L.A., *In the digital age, data is gold and trust is the key* http://www.fiercecmo.com/special-report/digital-age-data-gold-and-trust-key (20 October 2016).

permission, in case of the likeliness of any infringement an urgent action is needed to take parallel with noticing the affected data subject.

Last but not least, continuous compliance is also a prior obligation which requires serious efforts mainly in third countries at the events data transfers in spite of the fact that the data controller in a third country may not be subject to EU legislation. In the following sections I aim to highlight why and how the EU's data protection policy can be exported outside the EU.

3. Rules of International Data Transfer

The answers for the questions of why and how the EU's data protection policy can be exported outside the EU are given by the rules of international data transfer.

3.1. Why do the Rules of International Data Transfer Export the Policy?

Noticeably the current regulation does not define the expression "transfer to a third country" and although uploading data to a website which constitutes the subsequent transmission of those data to anyone who connects to the internet and seeks access to it from all points of the world, it does not send that information automatically to people who did not intentionally seek access to those pages, this was thus not considered to be data transfer to a third country.[7]

However, the EU has reached harmonized legal background of personal data protection enhancing it to the level of *primary source of law* by the entry into force of the Treaty of Lisbon and by endowing the Charter of Fundamental Rights with legal binding force equivalent to that of the Treaties. As a secondary source Directive 96/45/EC (hereinafter: Directive) was adopted, a major reform of which began in 2012. Today, the GDPR is already at our doorstep and urges the member states for prepare for its application which will commence with 25 May 2018. In addition, this source of law has direct applicability and the member states are prohibited from implementing it by domestic legislation, so the rules will be directly applicable.

In order to *provide a high standard of personal data protection and ensure data subject's rights* in our virtual age in the digitized economy where the flow of personal data is unlimited – and I must admit that it is also essential and necessary for using certain services – irrespective of state borders and jurisdictions, the legislator must create rules which can safeguard rights outside the geographical borders of the EU.

This is of high importance[8] the well-known case of *C-362/14 Schrems v Ireland Data Protection Commissioner* has shown.[9] In this case it was clearly stated that in the USA, companies did not comply with the basic principles of data protection and personal data is processed by authorities in a way incompatible with the rule of purpose limitation. Finally, the so-called Safe Harbour Decision 2000/520, which was adopted by the Commission in relation to US companies providing adequate level of protection, was declared invalid.

[7] C-101/01 – Lindqvist [2003] ECR 2003 I-12971, p. 56, 59, 60, 70.

[8] Data subjects also feel this important. Check the survey: European Commission: Social Eurobarometer 359 Attitudes on Data Protection and Electronic Identity in the European Union, 2011, Bruxelles, available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_en.pdf (4 November 2016).

[9] C-362/14 – Schrems [2015] (not yet published in the ECR) ECLI:EU:C:2015:650 p. 14.

3.2. How do the rules of international data transfer export the policy?

Both the Directive Article 25 para. 1. and the GDPR Article 44 determine the default rule: transfer may take place only if *the third country ensures an adequate level of protection*.

The GDPR's preamble declares (103 and 105) that without the need to obtain any further authorisation, transfer to third country can only take place if an adequate level of data protection is offered. The GDPR applies a differentiation between a third country, a territory or specified sector within a third country, and an international organisation. Adequate level is *a level equivalent to* that ensured within the Union: effective independent data protection supervision is required and cooperation mechanisms with the Member States' data protection authorities is needed, also, the data subjects should be provided with effective and enforceable rights and effective administrative and judicial redress. These factors have not been determined in regulation until the above cited Schrems-case, but it is supportable to implement them into a legislative act instead of referring to it only in case-law. The GDPR's preamble also states (104) that for evaluating the adequacy of the Commission takes into account several objective criteria: how a particular third country respects the rule of law; access to justice; international human rights norms and standards; general and sectoral law; specific processing activities and the scope of applicable legal standards. This is a complex development as under the Directive the assessment dealt with circumstances surrounding a data transfer: the nature of the data; the purpose and duration of the proposed processing operation, the country of origin and country of final destination; the rules of law, both general and sectoral and security measures which are complied with in that country. So instead of the former operational perspective, the *GDPR rather puts emphasis on the legal guarantees* offered to the data subject.

According to the rules detailed above, a data controller in a third country shall ensure the same level of protection for personal data as the data controller in the territory of the EU. However, the data controller in the third country is not subject to the EU regulation, and not subject to any member state's or the EU's jurisdiction, yet it shall comply with EU standards of data protection. This phenomenon can be deemed the 'export' of the EU's policy into third countries.

Both the Directive and the GDPR have specified rules on data transfers to third countries and both can be characterized by their extraterritorial effect[10] on data controllers running in third countries. Compliance will be a crucial factor in the future, because the GDRP will raise the administrative fees in case of infringement up to 20000000 euros or 4% of the total worldwide annual turnover of the preceding financial year which also proves the sensitive value of personal data and privacy protection. Also, it must be noted that in many cases compliance is obligatory for the data controller itself as a natural person or legal person, and not for the third country as a whole, although many factors of adequacy, such as the independent supervisory authority or the respect of the rule of law, depend on the third country's constitutional system. In order to cope with this anomaly the GDPR seems to introduce a different perspective: it supports self-regulation which has the ultimate advantage of improving the willingness to comply. It introduces codes of conducts and certification intended to contribute to the proper application of GDPR. In relation to international data transfers GDPR inherited the essential structure of the Directive, but it is extended in the adequacy methods.

[10] Kuner, C. (2015), *Extraterritoriality and Regulation of International Data Transfers in EU Data Protection Law*, University of Cambridge Faculty of Law Research Paper No. 49/2015, Cambridge.

In the USA self-regulation started in the early 1990's, but has not earned successful appreciation. Only those self-regulatory actions were able to exist longer which enjoyed governmental involvement. Self-regulation was mostly supported and promoted but not applied. A well-detailed, transparent and adequate self-regulatory method with regular audits and certifications can easily become a burden for its subjects and the need for rephrasing the regulations in effect has already been eliminated.[11]

4. Thoughts on Binding Corporate Rules

4.1. BCR in the GDPR

A transfer of personal data to a third country or an international organisation may take place if the adequacy is ensured by one of the following measures:

- the *Commission has decided* that the third country ensures an adequate level of protection; This kind of legal basis was also applied in the above referred Schrems-case regarding Decision 2000/520 and many other countries have earned such a decision[12];

in the absence of such decision:

- based on *an international agreement* in force between the requesting third country and the Union or a Member State, without prejudice of the rules of GDPR;
- a controller or processor may transfer personal data only if the controller or processor has *provided appropriate safeguards*, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available.

The appropriate safeguards are the following pursuant to Article 46 of the GDPR:

- a legally binding and enforceable instrument between public authorities or bodies;
- *BCR*;
- standard contractural clauses adopted by the Commission;
- standard contractual clauses adopted by a supervisory authority and approved by the Commission;
- an approved code of conduct together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards;
- an approved certification mechanism together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards.

Standard contractual clauses were constructed by the Commission[13] and experience has shown that they are useful for companies transferring personal data on an occasional basis and transferring a limited amount of personal data. All other means are ways of self-regulation.

[11] Wright D. & De Hert P. (eds.), *Enforcing Privacy: Regulatory, Legal and Technological Approaches Law*, Governance and Technology Series, Volume 25, Springer International Publishing, Switzerland, 2016.

[12] See the full list of the countries: http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm (5 November 2016).

[13] Between data controllers and data processors: 2010/87/: Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (notified under document C(2010) 593) OJ L 39, 12.2.2010, pp. 5–18, Between data controllers: 2001/497/EC: Commission Decision of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC (notified under document number C(2001) 1539) OJ L 181, 4.7.2001, p. 19 and 2004/915/EC: Commission Decision of 27 December 2004 amending Decision 2001/497/EC as regards the introduction

The EU legislator supports self-regulation as BCR is enacted as a prior method for ensuring adequate safeguards among several other means. In order to enhance transparency and compliance with the GDPR, codes of conducts and certification are strongly encouraged. So it is not surprising that the above cited list of the appropriate safeguards includes the BCR as its second element ahead all other commonly applied methods.

4.2. BCR as a Legal Instrument

BCR mean "policies which are adhered to by a controller or processor established on the territory of a Member State for transfers or a set of transfers of personal data to a controller or processor in one or more third countries within a group of undertakings, or group of enterprises engaged in a joint economic activity" pursuant to Article 4 paragraph (20) of the GDPR.

BCR are designed for regular transfers of huge sums of personal data. By applying this code of conduct, companies can avoid further administrative procedures and data transfers can be conducted without any other requirement to fulfil.[14] By obeying its rules, compliance of the members of a multinational company is also ensured as the rules of the BCR were authorised by the supervisory authority or even other member states' authorities in advance before its first application. Furthermore, in case of any changes of the legal surrounding or the structure of the applying companies or the nature of the data transfers a revision is compulsory.[15]

Although BCR have binding force on the applicants and the data subjects as third party beneficiaries become entitled to enforcement before the data protection authority and/or the competent court,[16] there have been hot debates whether BCR as unilateral commitments can constitute a right for the data subject to claim for remedy before a court.[17] It has not been experienced either how the data controller in the EU can satisfy the burden of proof in case of infringement committed by the member of the group in a third county.

However, BCR are designed *to reduce administrative costs and burdens*, it seems that authorizing BCR is a long-lasting and costly procedure. According to the ICO, the UK's data protection authority, the procedure may last as long as a year.[18] I must note that in Hungary, following its introduction on 1

of an alternative set of standard contractual clauses for the transfer of personal data to third countries (notified under document number C(2004) 5271) OJ L 385, 29.12.2004, pp. 74–84.

[14] Before the enactment of BCR it was also assumed that it will eliminate further needs of administrative actions to take for international data transfers. STEPHENS, J. (2003): *International communications round table ASBL: ICTR comments on bindign corporate rules***.** Brussels 30 September 2003, an open letter of ICRT to the Article 29 Working Party http://ec.europa.eu/justice/data-protection/article-29/press-material/public-consultation/bcr/2003_bcr/icrt_en.pdf (15 November 2016).

[15] Article 29 Data Protection Working Party: *Working Document setting up a table with the elements and principles to be found in Binding Corporate Rules (WP 153*), Adopted on 24 June 2008, B-1049 Brussels, Belgium, Office No LX-46 06/80, point 5. http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2008/wp153_en.pdf (15 November 2016).

[16] Article 29 Data Protection Working Party: *Working Document Setting up a framework for the structure of Binding Corporate Rules (WP 154),* Adopted on 24 June 2008, Brussels, Belgium, Office No LX-46 06/80. point 18. http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2008/wp154_en.pdf (15 November 2016).

[17] Article 29 Data Protection Working Party: *Working Document: Transfers of personal data to third countries: Applying Article 26 (2) of the EU Data Protection Directive to Binding Corporate Rules for International Data Transfers (WP 74),* Adopted on 3 June 2003, Brussels, Belgium, Office No C100-6/136, point 1 and 3.3.2. http://www.naih.hu/files/D_bcr_wp074_en.pdf (15 November 2016).

[18] https://ico.org.uk/for-organisations/binding-corporate-rules/ (4 November 2016).

October 2015, over a period of a year more than twenty multinational companies[19] with several members have finished the process of their BCR. The highest costs are incurred regarding legal counsels who facilitate the administrative processes before the national data protection authorities. The costs deriving from the administrative nature of the process differ in each member state, but none can be deemed expensive.[20] As for the procedure it must be evaluated as being a complex one. The draft is required to be submitted and the applicant is obliged to modify it according to the notes and comments of the national data protection authorities as many times as it is needed, otherwise the BCR may not get authorization.

The cooperation of the involved national authorities is also a key factor. To avoid difficulties in this part of the process a so-called *mutual recognition procedure* has been established. According to this, once the lead authority considers that a BCR meets the requirements, the other involved authorities shall accept it as sufficient basis for their own national permission.[21]

The most serious drawback of BCR currently is that not all Member States of the EU have implemented this legal institution, although from 2018 onwards it will be *directly applicable* because of the entry into force of the GDPR.[22] So, there will be no need for legislative acts to get the BCR commonly accepted but the *best practises should be shared* among companies and authorities as well to create harmonized legal surrounding and practice.

Harmonization without its legal aspect also may be improved within the company's operational policies, as the member of the multinational company in the third country as a subject of the BCR have to keep rules which are based on the standards and legal obligations and rights enacted in the EU. However, these compulsory rules only ensure protection within the company. BCR generalize the data protection standards but they can *improve the level of obedience*. One of their compulsory contents is a complaint handling procedure which can result in a good way to solve problems within the company. BCR are designed to *be individualized to the applying group of companies*.[23] Its flexibility provides the opportunity to fit into the field and structure of the certain industrial sector of the company. A further disadvantage also comes with structural issues: the sub-processor in the third country who is not a member of the multinational company is not subject to BCR automatically, thus the adequate level cannot be deemed to be ensured in relation to the sub-process; meaning that the abovementioned contractual clauses should once again be used.

5. Conclusion

BCR can contribute to better reputation and serve as a good marketing tool, and can also help to establish better contacts with the national authority. Nevertheless there is not enough empirical evidence yet to declare it the best way of ensuring an adequate level of protection. Until the first examples of best practices will become open to the public or less complaints will be raised because of data breaches, the expectations of BCR are difficult to prove.

[19] http://naih.hu/a-bcr-t-magyarorszagon-alkalmazo-adatkezel-k.html (4 November 2016).

[20] For example, in Hungary the procedural fee is 266000 HUF while in Denmark it is free of charge.

[21] Recently 21 countries are taking part in the mutual recognition process. http://ec.europa.eu/justice/data-protection/international-transfers/binding-corporate-rules/mutual_recognition/index_en.htm (4 November 2016).

[22] See the details: Article 29 Data Protection Working Party: *National filing requirements for controller BCR ("BCR-C")*, Last update: February 2016, http://ec.europa.eu/justice/data-protection/international-transfers/files/table_nat_admin_req_en.pdf (15 November 2016).

[23] cit. WP 74. point 3.1.

In addition EU data protection policy has been partly already exported to create safe harbours again on the windy ocean. The European Commission on adopted 12 July 2016 the EU-USA Privacy Shield[24] in order to replace the invalidated Safe Harbour Decision to serve as legal basis for data transfers to the USA ensuring the requirement of adequate level of protection. 'Furthermore it brings legal clarity for businesses relying on transatlantic data transfers.'[25] US companies must first sign up to the framework with the US Department of Commerce and must apply a privacy policy which includes safeguards for the data subject to ensure the standard of the EU's protection level enforceable under US law. These safeguards are similar, but not the same guarantees as in the EU, such as rights for the data subjects, providing free and accessible dispute resolution before authorities and arbitration at the request of the individual, maintaining data integrity and purpose limitation, obligatory rules for sub-processors and finally having transparent data protection measures and actions.[26]

Undoubtedly it is high time for establishing an efficient method of personal data protection in third countries also as more and more modern challenges like Web2 solutions, drones and world-wide economic relations creates challenges to face. And data controllers have a rushing and growing need for personal data, as it is the gold of the new age.

[24] European Commission - Directorate-General for Justice and Consumers: *Guide to the EU-U.S. Privacy Schield*, European Union, Beglium, 2016.

[25] http://ec.europa.eu/justice/data-protection/international-transfers/eu-us-privacy-shield/index_en.htm (5 November 2016).

[26] https://www.privacyshield.gov/Key-New-Requirements (5 November 2016).

Review

Avery Plaw – Matthew S. Fricker – Carlos R. Colon: The Drone Debate – A primer on the U. S. use of unmanned aircraft outside conventional battlefields.[27]

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The government of the United States of America uses armed drones to hunt and kill suspected terrorists outside of conventional battlefields. *The Drone Debate*,[28] with a well-organized structure, aims to inform American citizens about the U.S. covert drone program, and to get them acquainted with the debates that have emerged around it in laymen's terms. The book makes it possible for the reader to come to conclusions of their own, and make independent judgments about the drone issue.

In the past one and a half decades, targeted killing by remotely controlled aircrafts, commonly known as drones acquired significant importance. The drone campaigns differ in one key aspect. On the one hand, there are drone strikes which take place on the conventional battlefields *i.e. Afghanistan*, while on the other hand there are targeted killings which occur outside the scope of conventional battlefields, *i.e. Pakistan, Yemen and Somalia*.[29] According to the book – which clearly states that there is not enough reliable information available about the drone programs, due to their covert nature – around 4.000 persons were killed in these targeted killing processes outside conventional battlefields. This makes it easy to understand why the program attracts enormous attention among various scholars, in different field of studies, such as military sciences, law, philosophy, politics and international studies. The authors' goal is to present all the ongoing and resolved debates of the abovementioned fields of studies, without advancing the opinion of their own, which makes this book valuable for those who have already formed an opinion about the topic, and those who are neutral as well. Each chapter of the book culminates in a case study.

The Drone Debate is divided into six chapters with a brief introduction of the topic, and the goals of the book. The first chapter[30] begins with a historical overview of unmanned aerial vehicles (UAVs) or drones. In this part one can find out about the evolution of drones, from target practices before World War II through the first surveillance drones in Vietnam, to the early Predators in the Kosovo conflict. Lastly it deals with the MQ-9 Reaper, the 'big deadly cousin' of the Predator. The chapter also reviews U. S. drone campaigns outside of conventional battlefields, and provides fatality statistics. The authors also explain the difficulties posed by the absence of reliable data and the importance of the open source

[27] Supported by the New National Excellence Program of the Ministry of Human Capacities.

[28] Avery Plaw & Matthew S. Fricker & Carlos R. Colon: *The Drone Debate – A primer on the U. S. use of unmanned aircraft outside conventional battlefields*. Roman & Littlefield, Lanham-Boulder-New York-London, 2016. ISBN: 978-1-4422-3059.

[29] There was one drone strike outside of these countries as well. It took place in the Philippines. *Ibid.* p. 42.

[30] *Ibid*. pp. 13-64. – A Brief Overview of Aerial Drones and Their Military Use by the United States. Case Study: The U.S. Drone Campaign in Pakistan.

databases they use, to determine the quantity of the strikes. The chapter ends with a detailed case study about Pakistan, where a covert U.S. drone program takes place.

The second chapter[31] deals with the debate over whether targeted killing operations are strategically wise decisions, or if there is any other possible choice or tool against terrorist organizations. The chapter provides opinions on the positive effect and strategic dimensions of the drone campaigns, including decapitation of the terrorist organization, neutralization of threats which are only in operations phase, and even creating fear among the lines of foot-soldiers, making it harder to recruit new members. On the other hand, it also discusses the negative consequences of targeted killings by UAVs, such as increased sympathy for the terrorist organizations' struggle, the negative attitude towards the USA because of possibly illegal and/or disproportionate strikes. The chapter concludes with a case study about the drone program in Yemen, and the Yemeni consent to such operations.

The third chapter[32] explores the debate over the legality of the drone program under international, and U.S. domestic law. The overview begins with the national law aspects of the topic, and deals for example with the constitutional issues of drone strikes against U.S. citizens like Anwar al-Awlaki. The chapter also includes findings about the Congressional Authorization to Use Military Force (AUMF) against the perpetrators of the 9/11 attacks. The international law aspects of the drone campaign are far more complex. The chapter deals with the *jus ad bellum* question, i.e. whether the U.S. drone strikes have generally taken place in a context of an armed conflict, which will determine the applicability of international humanitarian law, or human rights law. Theauthors consequently turn to the *jus in bello* aspect of the topic, namely, are the drone attacks compatible with the applicable rulings of humanitarian law, such as humanity, proportionality, distinction and necessity. The chapter ends with a case study of signature strikes, where the attacks occur based on 'patterns of behavior' not hit lists or personality strikes.

In the fourth chapter[33] the authors examine the ethical debate surrounding the U.S. use of armed drones outside conventional battlefields. The authors review the criteria of the *just war theory*, such as just cause, last resort and probability of success. This part also engages in the ongoing debate over whether the use of armed drones makes it easier to wage war against other countries, or non-state organizations, like terrorist groups, and the interesting question of the use of UAVs in humanitarian interventions. Finally, the chapter briefly examines the theory of using autonomous unmanned systems for tracking and killing persons. The case study at the end of this chapter focuses on the accountability and the oversight of the U.S. drone strikes.

The fifth chapter[34] provides the reader with an overview of how political factors, such as surveys of U.S. attitude towards drone strikes seem to shape the use of UAVs nowadays, and how they have changed over time. The authors also examine the global reception of the use of drones for killing terrorists in the Middle-East, *inter alia* based on UN reports, and the resolution adopted by the European Parliament. The case study deals with the question of additional polling on the future of drone campaigns.

[31] *Ibid.* pp. 65-110. – The Debate over Strategy: Are Drones Helping to Defeat al-Qaeda and Associated Forces? Case study: The Drone War Reaches Yemen.

[32] *Ibid.* pp. 111-165. – The Debate over Legality: Are Drone Strikes Permissible under U.S. and International Law? Case Study: Signature Strikes.

[33] *Ibid.* pp. 166-224. – The Ethical Debate: Are Drone Strikes Consistent with the Ideals of Just War? Case Study: Oversight and Accountability.

[34] *Ibid.* pp. 225-280. – The Politics of Drone Strikes: What Political Considerations Shape the U.S. Drone Policy? Case Study: Additional Polls on Attitudes to Drones.

The last chapter[35] focuses on the proliferation of armed drones, and the possible use of these UAVs in more and more armed conflicts worldwide by other countries citing the U.S. precedent. The authors examine the question whether the existing international law framework and agreements will suffice to control the use of armed drones or not. They then turn to the debates over the future of warfare. Are drones truly revolutionizing the conduct of war? The question remains unresolved. The last case study deals with drone strikes related to China and Israel.

Last but not least, the book culminates in a brief conclusion[36] that explores the possible common points of different sides of the argument that are often obscured in the give and take of the drone debate.

The authors are evidently at the top of their respective fields. Avery Plaw is an associate professor of political sciences and director of the university honors program at the University of Massachusetts Dartmouth. Matthew S. Fricker and Carlos R. Colon are co-founders and analysts of the Center for the Study of Targeted Killings – which is one of the open source databases scholars tend to use to get a clear picture of the drone strikes – also at the University of Massachusetts, Dartmouth.[37]

To give a comprehensive conclusion and evaluation of the book reviewed above one should not forget about the goal of the book, which is to inform the public about the ongoing debate concerning the U.S. drone campaign and to reveal its serious issues. As a consequence, there is no room for more detailed and deeper analysis of serious issues, like whether there is or could at all be an armed conflict between a state and a non-state organization like a terrorist organization, or the Hydra-effect concerning the decapitation of the terrorist groups' leaderships. In overview one can conclude that despite these 'intentional deficiencies' of the book, it clearly reaches its goal by giving each and every one of us a chance to make up our own minds, and reach a conclusion on our own about the serious challenges of tracking and killing persons by remotely controlled aircrafts.

[35] *Ibid.* pp. 281-326. – Emerging Issues: Will Armed Drones Proliferate Rapidly, and What Impact Will They Have on International Security? Case Study: Non-U.S. Drone Strikes.

[36] *Ibid.* pp. 327-337. – Conclusion: The Age of Drones?

[37] *Ibid.* p. 345.