Public Goods & Governance

RECENT CHANGES IN GOVERNING PUBLIC GOODS & SERVICES

Volume 2 * Issue 2 *** December 2017**

Journal of the MTA-DE Public Service Research Group

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IMPRINT

PUBLISHER:

MTA-DE Public Service Research Group
Head of the research group and Editor-in-chief:
Tamás M. Horváth, DSc., full professor
26th Kassai str., Debrecen, H-4028 Hungary
http://publicgoods.eu

ISSN 2498-6453

JOURNAL DOI 10.21868/PGnG
ISSUE DOI 10.21868/PGnG.2017.2.

Aims and Scope

*Public Goods & Governance*is a semi-annual academic journal, aims to publish original material within the field of public policy, public management, governance and administration. This includes articles, shorter notes and comments based on theoretically and empirically grounded research on public goods, public service delivery and other public functions in a wide range of sectors, especially focused on recent challenges of governmental roles and new governance models in the market economies.

The journal welcomes submissions (articles, notes and comments) from anywhere in the world from both academics and practitioners. The maximum word limit for articles is 2500 words. Notes (not full academic papers presenting new phenomena, ideas or methods in a brief form) and comments providing additional thoughts and critical remarks to previously published articles should not exceed 1000 words.

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PPP: PAST, PRESENCE AND PROSPECTS*

Gábor Péteri[1]

PPPs deals highly divide politicians, economists and social scientists at large. It is not a simple public service and financial management issue any more, but a conspiracy theory of big business interests has evolved around it. However, similar to other modernization efforts and concepts, the success or failure of PPP very much depends on its institutional environment in a specific country. This brief note argues, that mostly this factor determines whether the governments or the private contractors benefit primarily from PPP.

What is the partnership about?

Public-private partnership in a narrow sense is a long term cooperation between governments and other non-public actors for providing public services. The client central or local government arranges the service provision by involving the resources of the contracted private sector organization. PPP deals might cover capital investments and service delivery, from design through financing to service management and organization. Presently PPP account for 15% of central government capital expenditures among the OECD countries, led by UK (648 projects) and Korea (567).[2]

PPPs started to emerge in the 1990s with other New Public Management techniques. By splitting the public service provider and producer functions the government's *client*, *regulator* and *financing* roles were separated. It helped to set clear priorities towards the *service organizations* and at the same time increased the *customers'* role, as well. Service beneficiaries not only pay user charges for the received public services, but they can directly influence service producers through complaints and other feedback mechanisms, as well.

Within this new framework the tasks and responsibilities of all parties were made clear. It supported policy making, because fiscal and social goals could be exposed and prioritized in an objective way. This aimed to make the entire system of public service provision more efficient and effective.

In a classical PPP scheme the various forms of private sector participation, the flow of funds and the client government's role are identifiable: the government orders the service, defines the service performance requirements and forms of compensation, the private partner brings in service technology and management expertise. PPP is usually a long term agreement, which makes the recovery of costly infrastructure services possible for the private contractor.

The key public and private actors of a PPP scheme are summarized in the Chart 1. below. The private partners can be involved in the project company, in the construction and the operation or even as a financier.

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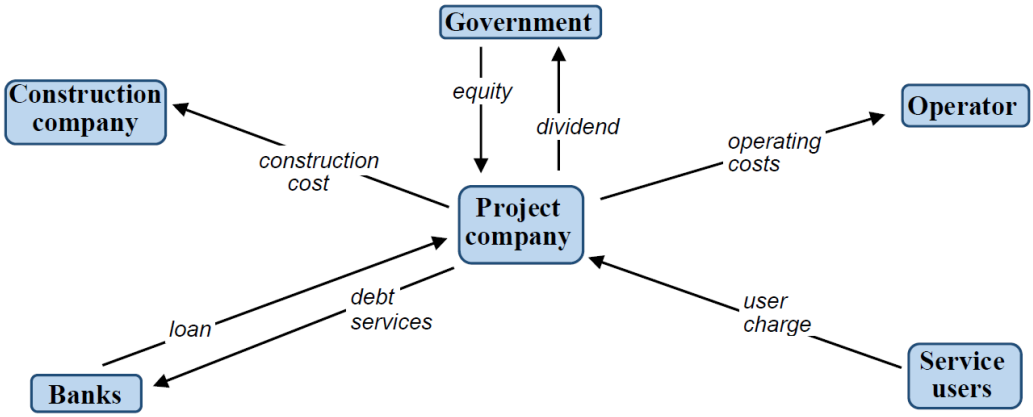
* DOI 10.21868/PGnG.2017.2.1.

[1]*Gábor Péteri,* PhD, Ecobomist,LGID Ltd.

[2]http://www.oecd-ilibrary.org/governance/government-at-a-glance-2013/public-private-partnerships_gov_glance-2013-30-en;jsessionid=750oktci601or.x-oecd-live-02[accessed October 9, 2016]

Chart 1.

PPP players[3]



Sources: Author compiled

Similarly to any other broad terms, such as privatization, the public-private partnership is also used in many different ways. So the international development and finance organizations made huge efforts to share information on PPP schemes and to disseminate techniques for capacity development purposes. There are various professional resources, for example the knowledge centre of the European Investment Bank[4] or the World Bank Group's database,[5] regulatory, information resources. The World Bank has also established a Public Private Infrastructure Advisory Facility[6] in 1999, which provides technical assistance to low and middle income countries. The OECD governance program has formulated recommendations[7] on managing PPP schemes and it was included in its governance monitoring survey,[8] as well. Donors themselves established a trust fund for promoting private sector involvement[9] in infrastructure development, which invests in PPPs in developing countries.

During this two-decade-long learning process the focus of PPP development has changed significantly. Based on the lessons learned in the rich and in the developing countries the main topics moved from the technical and financing issues towards the more sophisticated and softer conditions of successful PPP practices. Now the mentioned resource centres provide information on details of various contract types, assessment of non-monetary effects of PPPs, gender issues, etc. So there is a very clear shift in public-private partnership policies, which shows how the technical knowledge has evolved.

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[3] This is called the project finance „angel", developed by Princeton Pacific Group, see http://finance.wharton.upenn.edu/~bodnarg/ml/projfinance.pdf[accessed October 9, 2016]

[4] www.eib.org/epec/[accessed October 9, 2016]

[5] ppp.worldbank.org/public-private-partnership/ [accessed October 9, 2016]

[6] https://ppiaf.org/[accessed October 9, 2016]

[7] OECD (2012). Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships, https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf[accessed October 9, 2016]

[8] OECD (2013). Government at a Glance 2013. OECD Publishing. http://dx.doi.org/10.1787/gov_glance-2013-enp. 95

[9] www.pidg.org[accessed October 9, 2016]

Arguments for and against

Working with the private sector is always a dangerous business for the government. When the public meets the private sector – through construction contracts, purchase of goods, in local economic development or by setting tax preferences – the corruption risks increase. If governments really want to operate in a transparent and accountable way, these potential problems should be managed. So why PPP would be different? Just the rules of the game have to be learned and institutions should be developed for balancing the private and public interests. A PPP deal is perhaps more complicated and have long term implications, but if all its advantages and potential negative effects are known, then it can be kept under control.

Table 1.

PPP: beneficial or harmful?

Arguments for PPP	***Against PPP***
Capital investment financing	
Brings additional resources to public budgets for building infrastructure	Financing by government borrowing is less expensive than private funding
Lower capital investment costs, projects completed on time and within contracted budget	Private partner's profit make the investments more costly
Operation and management	
Market incentives make service management more efficient	Benefits of competition cannot be realized in the case of natural monopolies
Lower prices and regulated service performance result higher value for money	Limited regulatory, technical and monitoring capacity on the government side
Predictable costs and service performance improvements	Binding long term agreements
Fiscal impact	
Allocating costs among generations of infrastructure users (long termism)	PPP is a fiscal trick to overcome fiscal rules on balanced budget and debt limitations (short termism)
Known liabilities for the client government	It is contingent liability with unknown and non-accounted (e.g. related public investments) costs
Sharing (construction, demand, availability) risks between the parties, which are able to manage them the most efficiently	Cash based public sector accounting cannot manage long term fiscal commitments
Political and social consequences	
Positive impact of better public infrastructure on economic growth	Private sector benefits from the relatively stable and profitable public investment opportunities
Infrastructure built with PPPs helps to eliminate poverty	PPPs limit the budget discretion. No data on the impact on the poor
Public companies work under political influence	Low transparency, high corruption risk

Source: Author compiled

The usual arguments for and against public-private partnerships target four main areas of PPP schemes. (Table 1.) As a form of *financing capital investments* it can bring additional resources and as the investment projects partners are bound by contracts, the

usual cost increase and delays will be more limited. The counterarguments emphasize the advantages of public sector borrowing and take the contractors' profit as an extra cost.

At the *operation and management* stage the market based incentives are on the positive side of PPP. However, these projects can be rarely assessed in a quantifiable way and benchmarks seldom exist. But it was soon recognized, that competition in the case of natural monopolies is rather artificial. Developing the government's regulatory powers and service monitoring capacities need a lot of efforts and is a lengthy process.

Opinions on the *fiscal impact* of PPP are also divided. If it is properly managed, PPP can highlight the long term consequences of infrastructure project financing and it can allocate risk among the parties. However, short term fiscal goals might dominate the budget decisions and they could disguise future fiscal burden on public budget. So again what really matters is, how these decisions are made.

Finally, in a developing country context, the *political and social consequences* of PPP matter a lot. Simply by building new infrastructure would promote economic growth and development, limit the poor public enterprise governance practices. The other side emphasizes that PPPs just create a steady revenue flow to the private sector, it limits the budget discretion beyond election cycles and it is often less transparent than the public enterprise management.

As the administrative-fiscal environment matters a lot, the balance in developed and poor countries will be different. Public pressure on governments might bring results in the rich countries: see for example the movement against PFI.[10] In developing countries, with weak public institutions, the high public investment is usually associated with elevated corruption level.[11]Deeper analysis of specific cases[12] also proved that PPP schemes might bring mutual benefits and if properly managed they can work much better than the widely shared public views suggest.

It should not be forgotten, that governments also learn a lot from the cooperation with the private sector. Advantages of New Public Management techniques was not only the better service performance, but their indirect impact on government operation. Working with PPP schemes, central and local governments were forced to better specify their own service requirements, develop new cost assessment methods, introduce contracting and monitoring practices, etc. Many of these methods were adapted from the private sector or they were developed under these partnership schemes.

The way out

[10]peoplevspfi.org.uk[accessed October 9, 2016]

[11]Brumby-Kaiser-Kim (2016). Public Investment Management and Public-Private Partnerships,In:Allen-Hemming- Potter (Eds.),*The International Handbook of Public Financial Management*. Palgrave Macmillan

[12]See Péteri (2013). Szeged Waterworks: successful privatization in a French way. Case study. In: Hegedüs-Péteri-Tönkő: Effects of Governance Models on Affordability, Sustainability and Efficiency of the Water Services in Three Transition Countries (Armenia, Hungary, Romania) GDN Working Paper Series. http://www.gdn.int/html/workingpapers.php[accessed Octoer 9, 2016]

The debate over public-private partnership is still going on. The great recession after 2008 decreased public capital investments of all types and had a negative impact on PPPs, as well. Funds for public and private investment have declined and the trust in private sector significantly declined, in general. But by now PPPs are back and the new infrastructure investments, such as in alternative energy supply and green technologies need private sector participation both in developing and rich countries.

The growing hostility towards the private sector can be reversed by introducing new fiscal, regulatory and procedural techniques. It is already widely known that PPP can be better built into public service provision by developing transparent budgeting and procurement practices, introducing value for money assessment, caps on PPP obligations, using accrual accounting in the public sector. However, these complex public financial management methods will work effectively only if the political and governance environment is able to absorb them.PPP is not a magic bullet and the institutional development process takes time. But it could improve public service performance, when its introduction is adjusted to the quality of the broader governance framework.

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- peoplevspfi.org.uk
- ppp.worldbank.org/public-private-partnership/
- www.eib.org/epec/

PPP PROJECTS IN BELARUS: DOES IT BREAKTHROUGH IN PUBLIC SERVICES?*

Yuri Krivorotko[1]

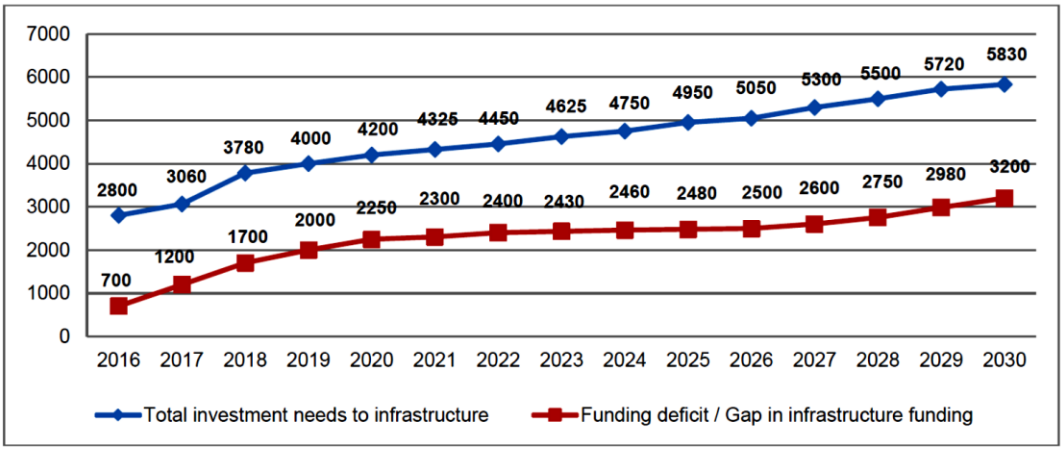
Nowadays a PPP concept is quite widespread among statesmen, legislators, representatives of business and experts in Belarus. What is it: fashionable name, craze or real need for a present economic life? The latest events in Belarusian economy and finance vividly show that the PPP role becomes even more demanded and urgent. It interests scientists, practitioners, experts to explore PPP's experience both in EU and Post-Soviet countries and to use all its positive in infrastructures' development and public services providing.

Why PPP is needed in Belarus?

In condition of recession Belarus is faced with challenges one of which is need of capital investments in modern infrastructure under the very limited opportunities of the budgetary funding. Moreover, the tendency to decrease of budget funding is traced in recent years. According to the governmental infrastructure plan the share of infrastructure investment to GDP is reducing every year. If in 2006 this indicator was 1.2 percent, then in 2014 – 0.8 percent. It indicates the need to search new funding mechanisms for infrastructure projects. It mechanism should improve the living standards of population and maintenance of social standards level in comparison of last years. In the long term till 2020 the funding needs for creation of infrastructure facilities are estimated at $17.9 bn., and from 2021 to 2030 – $50.5 bn.

Figure 1.

Infrastructure's investment needs and budget deficit for covering infrastructure investments frim 2016 to 2030 (in min. USD)



Source: Author complied, based on data of the Ministry of Economics of the Republic of Belarus

* DOI 10.21868/PGnG.2017.2.2.

[1]*Yuri Krivorotko,* Doctor of Economic Sciences, Professor, "Lev Sapieha" foundation, Minsk, Belarus

As the figure shows, an annual average gap between infrastructure investment needs and budgets' capacity to fund it has been planned as an amount of $1.57 bn. during 2016-2020 and $ 2.41 bn. during 2021-2030. It is expected that the gap of funding should be covered by means of PPP projects. Thus nothing remains how to go on the way of financing by means of PPP's.

PPP pilot projects in Belarus

Currently only seven from 63 submitted PPP projects started to be implemented: two for road infrastructure, two for thermal and electric energy and three for welfare sphere.

Table 1.

PPP projects in Belarus

DESCRIPTION	LOCATION	EXPECTED OUTCOMES	WORTH /INVESTMENTS	GOVERNMENT'S CONTRIBUTION	DURATION
Road infrastructure projects					
Reconstruction of the highway M10	Russian Federation border – Gomel – Kobrin	Highway extended from 109.9 to184.0 km	343.0 mln.USD*	Land	2017–2019
Construction of a through street in Gomel city, a bridge over the 'Sozh" river and five overpasses	Gomel city	n/d	199.3 mln.USD*	Land	2019–2020
Energy efficiency projects in the utilities and communal sector					
Construction of a waste incineration plant	Mogilev city	Municipal solid waste utilised, thermal and electric energy produced	130.0 mln.USD	Land, municipal waste objects	2014–2016
Construction of a hydro- electric power station on the "Dvina" river	Beshenkovichi (Vitebsk oblast)	Electric energy produced and supplied in the region (33Mwt - 130 mn. Kw/h).	186.0 mln.USD*	Land	2017–2020
Welfare projects					
Construction of two pre-school institutions	Minsk city and Minsk oblast	Number of places in pre-school institutions increased	25.7 mln.USD*	Land	2017–2019
Reconstruction of the block of buildings of Grodno hospital No.3	Grodno city	Number of beds in the institution increased, new technology procured	200.0 mln.USD*	Land, infrastructure	2016–2019
Reconstruction of the museum, tourist and recreation complex	Brest city	Tourism infrastructure improved	31.0 mln.USD*	Land , infrastructure	2017–2020

**) preliminary data*

Source: Author compiled, based on data of the Center for Public Private Partnership under the Ministry of Economics of the Republic of Belarus

The table above characterizes the pilot projects only which capture 27 percent of the national infrastructure plan of the Republic of Belarus for 2016–2030. These figures give an essential optimism in infrastructure development by means of PPPs. It should be noted, however, that since the PPP pilot projects started to run between 2014 and 2016, it is too early to provide any comment on them but some preliminary analysis of success factors and components may be done. However, there are risks of PPP projects to be failed due to deterioration of investment climate in Belarus where foreign investments for 9 months of 2016 has been decreased on 2.4 bn. USD[2] as compared to the same period of 2015.

Progress and shortcomings in PPPs

Some progress in developing the legal and regulatory framework of PPP is evident: the Law on public-private partnership[3] has been adopted by the Belarusian Parliament in the end of 2015. The Law on PPP includes forms and spheres of implementation of partnership, obligation of partners, sources of financing, a guarantee of the rights of partners, mechanism of replacement of the private partner in case of his inability to fulfill the obligations, without terminating agreements, settlement of disputes, etc.

Some changes on regulatory environment of PPP have been brought by the recent additions to the Budget Code of the Republic of Belarus.[4] Now from local budgets of different levels: oblasts, rayons, urban and rural budgets on infrastructure projects and programs concerning PPP can be funded. It gives a good reason for adoption of independent decisions for PPP's projects implementation at all local levels.

However, some shortcomings about Law should be highlighted. Firstly, the Law was submitted very generally and has many problematic issues and bottlenecks. There is, for instance, no legislative explanation of PPP's types, ways and models. Secondly, PPP formation procedures are insufficiently accurately registered, tariff regulations need to be enclosed in the normative documents. Thirdly, the legal regulation of a concession contract has not been changed and it is regulated now by the Investment Code through a specific concession agreement and not the Law on PPP. This issue is particularly important for private partners and needs to be complexly regulated by Law on PPP. It would be guarantee good relationships between government and private partner in terms of expenses and outcomes, for example, in sales, costs and profit sharing, taxes, other payments. Fourth, no progress in risk management has been noticed so far, hence it is difficult to talk about improvement of relationship between the partners. The rearrangement of the obligations and risks between the parties should not focus on the private partner only. Government should not limit itself to transfer land for construction or to supply of municipal waste, it should be involved in all cycles of production as an equal partner. *Table 2* summarizes all progress and shortcomings in PPP's development.

[2] https://charter97.org/ru/news/2016/11/12/230830/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+charter97+%28Charter%2797+-+News+from+Belarus+%28in+Russian%29%29 [accessed December 20, 2016]

[3] The Belarusian Law on PPP is available at pravo.by [accessed December 20, 2016]

[4] http://www.minfin.gov.by/upload/bp/act/zakon_301215_342z.pdf [accessed December 20, 2016]

Table 2.

Progress and shortcomings in Belarusian PPP's development

Progress	Shortcomings
In legal and regulatory environment area	
Law on PPP adopted	Law is submitted very generally
PPP added to the Budget Code	Absence of legislative explanation of PPP's types, ways and models
PPP projects based on long term governmental Infrastructure plan adopted by the Central government	PPP formation procedures are insufficiently accurately registered
Forms and spheres of partnership's implementation, partners' obligations, sources of financing, a guarantee of partners' rights are determined by the law	Tariff regulations need to be enclosed in the normative documents
There are mechanisms of replacement of the private partner in case of his inability to fulfill obligations	Legal regulation of a concession contract does not regulate by the Law on PPP. Absence of legal protection's interests of concessioners
In partner interaction area	
Organisational procedures and forms that provide a reliable platform for partner interaction are declared	Absence of effective governance structures and dispute resolution mechanisms
	Absence government preferential treatment of PPP-related tasks (procurement procedures and other)
	Absence of concession form in PPP projects
In risk management area	
	All obligations and risks are focused on the private partner

*Source:*author compiled

Obstacles to be overcome

In addition to the shortcomings it should be focused on obstacles to PPP's formation and management. They are:

1. Weakness of financial market in Belarus. Most of PPP projects faced funding difficulties by private investors, government, international financial institutions. PPP partners must be provided with financial instruments.

2. Belarus has not attained sovereign credit rating assigned by international rating agencies. That is a prerequisite seeking to obtain long-term debt financing instruments in international bond market. Funding by international financial institutions is a good instrument seeking to promote PPP.

3. Risk insurance is problematic. Lending risk assessment in Belarus, carried out by some authoritative insurance agencies, show that the country belongs to group seven, i.e. high lending risk countries.

4. Long-term budget planning is an important in long-term contracts therefore it is necessary to reconsider an approach to budget planning and allow drawing up plans for 3-5 years. The barrier for long term planning is a high

inflation rate. For example, an inflation rate in Belarus[5] for a last decade 19.58 percent makes long-term planning very complicated.

5. Absence of efficient spending techniques. Efficient spending (value for money) depends on several factors, such as the chosen funding model, the selected private partner, etc.

6. Deficit of competent local specialists and experts in PPP in Belarus who are able to control fulfillment of contractual obligations of the private partner regarding works, costs, quality, services, efficiency, etc. Such experts should be recruited by each ministry engaged with PPC projects.

7. Absence of concessional ways of PPP formation. In fact, there are no concession contracts in PPP practice. This is a serious obstacle in real partnership and PPP development as a whole. The main reason why there are no concession contracts in Belarus is that the governmental part does not wish to bear equal responsibility in fulfillment of its obligations by the concessional agreement. Another reason that the government is unwilling to lose control over state ownership assets. In addition, there are no regulations protecting the interests of the both parties. So, Belarusian government badly needs in scientifically grounded strategy for concession development.

8. PPP project formation and its administration should be decentralised and not bureaucratic. Nodaway PPP projects in Belarus are developed by the central government and controlled by the ministries. It is no secret that power and administration in Belarus are centralized and projects are considered and approved by the central government. The public as well as local authorities have no voice in PPP projects' decision-making although projects are implementing in their territories. Absence of the third party of PPP – civil society represented by public organizations. At decision making of PPP project implementation, the authority do not consult public, associations, non-governmental organisations. In other words, those people to whom public services are intended to provide and who have to be active actors in sustainable development situation. Civil participation in PPP has to be implemented through creation of local action groups (LAG). They have to connect the public and partners, observe balance of interest and represent the interests of all available local groups operating in the most various welfare branches. At decision making the share of private partners and associations has to make less than 50 percent of local representatives. *Table 3* characterizes main barriers and ways to overcome them.

[5] http://fin-plus.ru/ru/info/inflation_index/Belarus [accessed December 20, 2016]

Table 3

Barriers of PPP and ways to overcome them

Barriers	Ways to overcome (policy recommendations)
Financial market weakness, lack of financial tools	• *Security market development, real privatization process of State ownership development*
Absence of sovereign credit rating	• *Implementation of International Financial Institutions (IFI) recommendations*
Country's high lending risk	• *Policy trust of the IFI to Belarusian economy*
Short-term budget planning (planning for 1 year only)	• *Budget's planning horizons expansion; Budget planning on 3-5 years; Introducing measures for inflation rate decreasing*
Lack of advanced techniques of efficient spending	• *Using of value – for- money (VFM) method in PPP projecting*
Lack of national specialists and experts in PPP's	• *Permanent training of the national specialists and experts in PPP; Involvement of foreign experts and consultants into a PPP's project management*
Absence of concessionary models in PPP's practice	• *Creation of legal system protecting the interests of concessioners; Concession legislation should be included into the Law on PPP*
Centralised management of PPC projects	• *Decentralisation of PPP project administration; Transfer PPP project administration to the regions; Elimination of the central government's excessive control over the PPP projects*
Lack of civil society participation into PPP project implementation (absence of public control over the PPP projects)	• *Expansion of civil participation in PPP project decision-making; Creation of local action groups (LAG)as the third side in partnership*

*Source:*author compiled

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UKRAINE'S IMPLEMENTATION OF EU ENERGY ACQUIS*

Daniel Haitas[1]

The EU's Third Energy Package is composed of two Directives and three regulations. These include Directive 2009/72/EC[2] *concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC*[3] *and Directive 2009/73/EC*[4] *concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC*[5]*. The latter are Regulation (EC) No 714/2009*[6] *on conditions for access to the network of cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003*[7]*, Regulation (EC) No 715/2009*[8] *on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005*[9]*, and Regulation (EC) No 713/2009*[10] *establishing an Agency for the Cooperation of Energy Regulators.*

The self-professed aim and essence of the Third Energy Package is the improvement of the internal energy market's functioning and the resolution of unresolved structural problems.[11] This involves the unbundling of the energy sector, which refers to the separation of energy generation and supply from network

* DOI 10.21868/PGnG.2017.2.3.

[1]*Daniel Haitas*, PhD Student, Géza Marton Doctoral School of Legal Studies, University of Debrecen

[2] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, ELI: http://data.europa.eu/eli/dir/2009/72/oj

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[7]Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity, ELI: http://data.europa.eu/eli/reg/2003/1228/oj

[8] Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, ELI: http://data.europa.eu/eli/reg/2009/715/oj

[9] Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks, ELI: http://data.europa.eu/eli/reg/2005/1775/oj

[10] Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators,ELI: http://data.europa.eu/eli/reg/2009/713/oj

[11]European Commission, *Market Legislation*,https://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation.

operators.[12] The logic behind this is that without unbundling, single companies which both generate and sell energy, while also operating transmission networks, may have reason to obstruct competition, thus preventing fair competition, and thus being disadvantageous for consumers due to possibility of increased prices.[13] In addition, the Package seeks to strengthen and safeguard the independent status and nature of energy regulators.[14]

Behind the Commission's campaign is the belief that a fully interconnected and competitive energy market would help to ensure energy security through making emergency supplies more easily transferable throughout the EU, and would help to deal with the issue of climate change through the maximalization of effecient energy use and the minimalization of emissions.[15]

Beyond the Member States of the European Union, these norms and regulations have also become binding upon third party states, who have become signatories to the Energy Community Treaty. Thus, these countries are bound to implement the EU's energy *acquis*, among which is Ukraine.Ukraine's general approach to implementing the Third Energy Package has been described as „incredibly fragmented".[16] It has been characterised by real reform and success in part, most notably in the gas sector, whereas as other areas have come up for criticism. Below there shall be a survey and evaluation of Ukraine's attempt to conform its energy regime in line with its obligations as a signatory of the Energy Community. This shall focus on three major areas: gas, electricity and the creation of an independent regulatory authority.

Gas

Directive 2009/73/EC states that „The internal market in natural gas, ..., aims to deliver real choice for all consumers of the European Union, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices, and higher standards of service, and to contribute to security of supply and sustainability."[17]

Ukraine is considered to be effectively reforming its gas sector, through the implementation of its Gas Sector Reform Implementation Plan, having been hailed as the first Contracting Party of the Energy Community to have developed a significant natural gas market regulatory framework.[18]It is also argued that this reform of the gas sector has the potential to increase Central and Eastern Europe's energy security, and

[12]Ibid.
[13]Ibid.
[14]Ibid.
[15]David Buchan (2015), Energy Policy: Sharp Challenges and Rising Ambitions, In, Helen Wallace, Mark A. Pollack and Alasdair R. Young (Eds.), *Policy-Making in the European Union*, Seventh Edition, Oxford: Oxford University Press, 2015, pp. 349.
[16]Maksym Popovych, Energy regulator in Ukraine is another fight for independence, *Kyiv Post*, May 22 2016,http://www.kyivpost.com/article/opinion/op-ed/max-popovych-energy-regulator-in-ukraine-is-another-fight-for-independence-414294.html. [accessed Oktober 10, 2017]
[17]Preamble (1)
[18]Energy Community, „Energy Community Country Brief: Spotlight on Ukraine", Issue 3, 9 March 2016, 1.

thus Ukraine's domestic reforms in this area have an influence and importance beyond its own borders.[19]

In April 2015 the Ukrainian Rahda passed the Law of Ukraine on the Natural Gas Market.The law was drafted by the Ukrainian government in close consultation with the Energy Community Secretariat, and Naftogaz, the Ukrainian state gas and oil company.[20]The legislation states that „In pursuance of Ukraine's obligations under the Treaty establishing the Energy Community and the [*Ukraine-EU Association Agreement*] the present law is directed at implementation of the Energy Community *acquis* on energy, in particular: Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; Regulation (EC) 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) 1775/2005; as well as Directive 2004/67/EC on measures to safeguard security of natural gas supply."[21]

It begins with, „This Law defines legal fundamentals of the functioning of the natural gas market in Ukraine founded on principles of free competition, due protection of consumers and security of supply as well as capable of integration with natural gas markets of the states parties of the Energy Community, including by means of creation of regional natural gas markets."

According to Article 23 Ukraine's Gas Law, entitled „General requirements of unbundling and independence of a gas transmission system operator (unbundling mode OU), paragraph 1:

„The gas transmission system operator shall be a separate legal person which is not part of a vertically integrated undertaking and carries out its commercial activities independent from activities independent from activities of production, distribution, supply of natural gas, activities of wholesale sellers. The gas transmission system operator may not carry out activities of production, distribution or supply of natural gas."

This legislation was praised by the Director of the Energy Community Secretariat, who said that „Ukraine is well advanced in gas sector reform, having adopted the EU Third Energy Package compliant Law on Natural Gas Market which entered into force in October 2015".[22] In general, its adoption was seen as a success which can act a model and be emulated in other attempts at approximation to EU law.[23]

The adoption of this law was followed by the creation of secondary legislation, with the assistance of the Energy Community Secretariat.[24] However, all of the secondary legal regulations were not entirely adopted, and in the case of some of those that were, some of their provisions did not wholly comply with the Gas Market Law.[25]

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[19]Dixigroup, *Ukraine's Gas Sector Reform*, 1.
[20]McKenna, „Ukraine".
[21]Article 2.1
[22]Energy Community Secretariat hopes Ukraine's energy regulator will correct gas market regulations, 24 May 2016, Interfax-Ukraine Ukraine News Agency, http://en.interfax.com.ua/news/economic/345478.html.[accessed Oktober 10, 2017]
[23]Maksym Popovych, Ukraine's Gas Market: A thorny way to liberalisation, 9 April 2015, *New Eastern Europe*, http://www.neweasterneurope.eu/articles-and-commentary/1562-ukraine-s-gas-market-a-thorny-way-to-liberalisation.[accessed Oktober 10, 2017]
[24]Energy Community Country Brief Spotlight on Ukraine, Issue 3, 9 March 2016, 1.
[25]„Energy Community Secretariat hopes Ukraine's energy regulator will correct gas market regulations"

A bill was approved on July 1 2016 by the Cabinet of Ministers of Ukraine which will split Naftogaz of Ukraine according to the requirements of the EU's Third Energy Package,[26] as specified in the Ukrainian „On the Natural Gas Market" law.[27] The resolution, named „On unbundling of operations for transportation and storage (injection, withdrawal) of natural gas"[28] was drafted by the Ukrainian government in conjunction with the Energy Community Secretariat.[29] The plan includes provision for the creation of two new entities: JSC „Main Gas Pipelines of Ukraine" (MGU) and JSC „Underground Has Storage Facilities of Ukraine" (UGSF).[30] These will both take over the assets of the Ukrainian transmission system operator (TSO), Ukrtransgaz.[31]

At the time of writing, in Ukraine it is Naftogaz, along with its subsidiaries, which carries out such tasks as gas production, storage, supply and transmission.[32]

In September 2016 the Ukrainian government announced that the economy ministry would take over control over Ukrtransgaz, the subsidiary gas transportation operator of Naftogaz.[33]This decision would have placed both the generator/supplier and transmitter of gas under the control of the same ministry.The Secretariat of the Energy Community, in response statedthat"this unilateral move is not in line with the Resolution on Unbundling adopted by the government on July 1, nor was it consulted with the Secretariat."[34]Furthermore, it said that „control by the same public body – the ministry of economic development and trade – over both transmission system operator and Naftogaz' gas production and supply activities violates the unbundling provisions applicable under Energy Community law".[35] There was also a threat of a possible action to enforce Energy Community rules.[36]In addition, the country's creditors warned that the move could put in jeopardy the disbursement of money connected to the country's IMF bailout package.[37]

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[26] Brent Haight, Ukraine Government Authorizes Naftogaz Split, *Gas Compression*, July 5 2016, http://gascompressionmagazine.com/2016/07/05/ukraine-government-authorizes-naftogaz-split/.[accessed Oktober 10, 2017]

[27]Vitaliy Radchenko, Ukraine: Naftogaz Unbundling Plan Adopted,*Lexology*, July 7 2016, http://www.lexology.com/library/detail.aspx?g=230892a7-d324-4d08-89df-0055bef81b84. [accessed Oktober 10, 2017]

[28]Naftogaz of Ukraine, Ukraine's government approves Naftogaz unbundling plan, July 4 2016, http://www.naftogaz.com/www/3/nakweben.nsf/0/471E4A2222A20B92C2257FE6003174D0?OpenDocument&year=2016&month=07&nt=News&[accessed Oktober 10, 2017]

[29]Radchenko, *Ukraine.*

[30]Naftogaz, *Ukraine's government approves Naftogaz unbundling plan.*

[31]Ibid.

[32]Radchenko, *Ukraine.*

[33]Roman Olearchyk, Ukraine under fire over gas group revamp, *Financial Times*, September 18 2016, https://www.ft.com/content/89a349a4-7da2-11e6-8e50-8ec15fb462f4.[accessed Oktober 10, 2017]

[34]AlyonaZhuk, Economy Ministry puts seizing control over Ukrtransgaz on hold, *Kyiv Post*, September 19 2016, https://www.kyivpost.com/article/content/business/economy-ministry-puts-seizing-control-over-ukrtransgaz-on-hold-423225.html.[accessed Oktober 10, 2017]

[35]William Powell, Bank, EC Condemn Ukraine Economy Ministry,*Natural Gas World*, September 17 2016, http://www.naturalgaseurope.com/bank-ec-condemn-ukraine-economy-ministry-31655.[accessed Oktober 10, 2017]

[36]EurActiv.com, After striking murky gas deal, Ukraine bows to West, *EurActiv*,September 26 2016, https://www.euractiv.com/section/europe-s-east/news/after-striking-murky-gas-deal-ukraine-bows-to-west/.[accessed Oktober 10, 2017]

[37]Olearchyk, *Ukraine under fire*.

Electricity

Upon obtaining independence in 1991, Ukraine inherited a highly developed electricity sector as well as high energy consumption levels from the USSR.[38] In the mid-1990s Ukraine was the first country that had been part of the Soviet Union that underwent extensive reforms in the electricity sector.[39]

A key priority of the European Commission in relation to energy reform in Ukraine has been the introduction of a new model for the electricity market.[40]On 31 March 2016 the Ukrainian Parliament's energy committee recommended the approval of the Electricity Market Law draft.[41] The adoption of this law had been delayed for around one and a half years, even though by this time the secondary legislation necessary for the practical implementation of the law was already prepared.[42]

The vacilitating in the passing on the necessary legislation in order to reform the electricity market even provoked the intervention of the United States Ambassador to Ukraine, Geoffrey Pyatt, who stated that his government insisted that the electricity law should be adopted in the Autumn of 2016.[43]

Ukrainian Prime Minister Volodymir Groysman sought to reassure interested parties that passing of legislation in conformity with EU standards was a major aim of the government and that the process was moving forward, stating on June 30 2016 at the Ukrainian Energy Conference in Kyiv that the passing of the electricity law was a priority, and that work was underway with the various parties and factions of the Ukrainian parlaiment in order to bring about the passing of the legislation, and was confident of its approval, with the aim being to have the legislation passed in the autumn of this year.[44]

Independent Regulator

[38]Laslo Lovei, Electricity Reform in Ukraine: The impact of weak governance and budget crises, *Public Policy for the Private Sector*, December 1998, Note No. 168, 2.

[39]Russell Pittman, Restructuring Ukraine's Electricity Sector: What Are We Trying to Accomplish, February 7 2015,*voxukraine*, http://voxukraine.org/2015/02/07/restructuring-ukraines-electricity-sector-what-are-we-trying-to-accomplish/.[accessed Oktober 10, 2017]

[40]European Commission hopes Ukraine reforms energy market soon, 3 June 2016, *Interfax-Ukraine Ukraine News Agency*, http://en.interfax.com.ua/news/economic/347862.html.[accessed Oktober 10, 2017]

[41] Energy Community „Ukraine Electricity", https://www.energycommunity.org/portal/page/portal/ENC_HOME/AREAS_OF_WORK/Implementation/Ukraine/Electricity[accessed Oktober 10, 2017]

[42]Director of Energy Community: In the area of energy efficiency Ukraine did almost nothing, *Interfax-Ukraine Ukraine News Agency*,http://en.interfax.com.ua/news/interview/345602.html. [accessed Oktober 10, 2017]

[43]U.S expects Ukraine to adopt legislation on electricity market next fall – Ambassador Pyatt, *Ukrinform*, 30 June 2016, http://www.ukrinform.net/rubric-economics/2042404-us-expects-ukraine-to-adopt-legislation-on-electricity-market-next-fall-ambassador-pyatt.html.[accessed Oktober 10, 2017]

[44]Ukraine Energy Conference assures private investors ahead of planned privatization of energy companies,*Kyiv Post*, June 2 2016, http://www.kyivpost.com/article/content/ukraine-politics/ukraine-energy-conference-assures-private-investors-ahead-of-planned-privatization-of-energy-companies-417659.html.[accessed Oktober 10, 2017]

A major issue in the Ukraine's complying with the Energy Community standards is that legislation establishing an independent energy regulator.[45]After much delay and criticism, onSeptember 22 this year the Ukrainian parliament passed the law to create an independent energy market regulator.[46] The legislation is titled Draft Law No 2966-d "*On the National Commission for State Regulation of Energy and Public Utilities Sector"*[47]and was written with in consultation with the Energy Community Secretariat.[48]This was signed into law by President Petro Poroshenko on November 23 of this year.[49]This independent commission will have the responsibility of setting power tariffs,[50] and shall be composed of two members nominated by the president, two members nominated by the parliament, and one nominated by the Cabinet of Ministers.[51]It is hoped that the adoption of this legislation and it being successfully implemented will create a truly independent regulatory authority. The passing of this legislation was critical for Ukraine, as the European Union directly tied to receiving a 600-million-euro loan to the reforming of this area.[52]

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- https://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation
- http://en.interfax.com.ua/news/economic/347862.html.
- http://en.interfax.com.ua/news/interview/345602.html.
- http://gascompressionmagazine.com/2016/07/05/ukraine-government-authorizes-naftogaz-split/.
- http://voxukraine.org/2015/02/07/restructuring-ukraines-electricity-sector-what-are-we-trying-to-accomplish/.

[45]Director of Energy Community.

[46]Alyona Zhuk, Parliament passes long-awaited law on energy market regulator,*Kyiv Post*, September 22 2016, http://www.kyivpost.com/article/content/ukraine-politics/parliament-passes-long-awaited-law-on-energy-market-regulator-423486.html.[accessed Oktober 10, 2017]

[47]Vitaliy Radchenko, Law on Energy Regulator Finally Adopted, *Lexology*, October 7 2016, http://www.lexology.com/library/detail.aspx?g=d22ccbe5-3634-4d4c-94da-871a123ecdc4.

[48]Olena Kuchynska, New law in Ukraine establishes independent national energy regulator, *Kinstellar*, November 2016, http://www.kinstellar.com/insights/detail/425/new-law-in-ukraine-establishes-independent-national-energy-regulator.[accessed Oktober 10, 2017]

[49]Ibid.

[50]Natalia Zinets and Alexei Kalymkov, Passing energy bills, Ukrainian MPs clear path for new EU loan,*Reuters*, September 22, http://www.reuters.com/article/ukraine-energy-idUSL8N1BY2K3.[accessed Oktober 10, 2017]

[51]AlyonaZhuk, A Week in the Rada: What was done on Sept. 20-23,*Kyiv Post*, September 23 2016, https://www.kyivpost.com/article/content/ukraine-politics/a-week-in-the-rada-what-was-done-on-sept-20-23-423602.html. [accessed Oktober 10, 2017]

[52]Zinets and Kalymkov, *Passing energy bills.*

- http://www.kinstellar.com/insights/detail/425/new-law-in-ukraine-establishes-independent-national-energy-regulator.
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- http://www.naturalgaseurope.com/bank-ec-condemn-ukraine-economy-ministry-31655.
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- https://www.kyivpost.com/article/content/business/economy-ministry-puts-seizing-control-over-ukrtransgaz-on-hold-423225.html
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PRIVATE ENFORCEMENT OF EU COMPETITION LAW UNDER DIRECTIVE 2014/104/EU ON ANTITRUST DAMAGES ACTIONS*

Tamás Szendrei[1]

Competition law rules can be enforced in two principal ways – either through public enforcement, which in the EU is the task of national competition authorities and the European Commission or through private enforcement, which relies on private initiatives of private entities damaged by certain competition law infringements. While public enforcement works well, private enforcement (with a few notable exceptions) has been lacking in its efficiency due to the high initial investment required to pursue such damages, lack of court practice which would make the potential outcomes less uncertain, difficulties in the collection of information on the infringement, reluctance of many national courts to take on such cases, and difficulties in quantifying damages, to name a few.

The "European antitrust community" – as such defined by Giuseppe Tesauro – has long awaited the adoption of Directive 2014/104 EU on antitrust damages actions.[2] In a context of growing awareness by the antitrust community of the complementarity between public and private antitrust enforcement in order to reach an effective application of the competition rules – the expectations mainly regarded the cooperation mechanisms between the Commission and National Competition Authorities on the one hand, and The National Courts, on the other hand.

1. The link between public and private enforcement in antitrust cases

The public enforcement of EU antitrust rules[3] is carried out by the Commission and national competition authorities (NCAs) using the powers provided by Council Regulation (EC) No 1/2003.[4] Besides, the case-law of the Court of Justice of the European Union (hereinafter, CJEU) also confirmed that any citizen or business who suffers harm as a result of a breach of EC antitrust rules must be able to claim reparation from the party who caused the damage.

* DOI 10.21868/PGnG.2017.2.4.

[1]*Tamás Szendrei, LLM,* avocat stagiar, „Nagy Zsuzsa" Law Office, Cluj-Napoca.

[2]Gabriella Muscolo (2015), The impact of Directive 104/2014 on private actions. Competition law enforcement and open issues. The relationship between public and private antitrust enforcement, general and institutional aspects, *JUECON Project*, Genova, 20 November 2015.

[3]Article 101 TFEU on anticompetitive agreements between undertakings and Article 102 TFEU prohibiting abuse by undertakings of a dominant position.

[4] Directive 2014/104/EU, recitals 1and 2.

Case-law on the right to compensation

The first step was the *Courage judgment*[5] handed down by the CJEU. With that judgment, the CJEU first recognized the principle according to which a party who complains of harm arising from an infringement of competition law is entitled to compensation for the harm thus suffered, even if the injured and the infringing parties are linked by a contractual relationship within the sphere of which the alleged harm arose. The CJEU confirmed this right in a number of cases in recent years.[6]

The *Courage judgment* is significant for at least two reasons: first, it overcomes *the principle of nemo auditur propriam turpitudinem allegans*, since the claim for damages may be legitimate regardless of the preexistence of a contractual relationship between the infringing and the injured parties – a relationship considered irrelevant. In this regard, civil liability represents a tool of general scope, and is therefore suitable to meet a need for protection even in terms of correcting, from the outside, the rules created within the contractual environment. Second, resorting to a framework of tortious liability enhances the position of the judge, who is now called upon to perform a leading role in the application of the rules of fair competition.

However, this right of victims to compensation could not be exercised in an effective way in the practice. The European Commission concluded that this failure is largely due to various legal and procedural hurdles in the Member States' rules governing actions for antitrust damages before national courts.

The Directive 2014/104/EU aims to remove these practical obstacles to compensation for all victims of infringements of EU antitrust law. The Directive applies to all damages actions, whether individual or collective, which are available in the Member States. The new legal act is a sort of "microsystem" rules of law about civil liability that makes it easier for victims of antitrust violation to claim compensation, as a consequence of anticompetitive behaviors, in breach of antitrust rules.[7]

Recital 6 of the Directive provides that: "*To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules.*" For this reason the renewed system has been defined as a "two pillars" one. However, this option appears satisfactory only if limited to a transition phase, in which private enforcement lacks of a full implementation in all the Member States; but nevertheless it should avoided to create a system which is based on a mere parallelism between public and private enforcement and which operate independently and interact only in exceptional circumstances, with the consequence of reducing the effectiveness of both of them.[8] On the contrary, an optimal solution shall be grounded on the

[5] Case Courage Ltd v Crehan and Inntrepreneur Pub Company v Crehan C-453/99, [2001] ECR I-6297; [2006].

[6] See for example, Manfredi and Others, C-295/04, EU: C: 2012: 461:,Pfleiderer C-360/09, EU:C:2011:389, DonauChemie and Others, C-536/11, EU:C:2013:366; Kone and Ohers, C-557/12, EU: C: 2014: 1317.

[7]BeniaminoCaravita di Toritto (2016), Overview on the Directive 2014/104/EU, Private Enforcement: Where do we stand? – An update for the state of art, *Italian Antitrust Review* nr. 2, 2016, pp.45.

[8] Walter Frenz (2016), *Handbook of EU Competition Law*, Springer-Verlag Berlin Heidelberg, 2016, pp. 115.

principle of cooperation between courts and NCAs, as already stated by Regulation EC 1/2003, in a context of complementarity between public and private enforcement which may ultimately only reinforce the effectiveness of antitrust rules.[9]

2. Main changes brought by the Directive

Along with a wide palette of changes that the Damages Directive is bringing about, some examples include establishing individual responsibility of each infringement participant for the entire harm caused to victims, sets of detailed rules for discovery of information and quantification of damages, a rebuttable presumption stating that cartel infringements cause harm, special rules regarding the statute of limitation directed towards providing an adequate period for filing claims, as well as provisions stimulating settlements and alternative dispute resolution. Prospective claimants will also not have to wait for the competition authorities to establish an infringement (follow-on actions), but will be able to sue for damages independently of public enforcement proceedings.

The principal intended and likely effect of Directive 2014/104 on the practice of private enforcement is an increase in the number of (purely compensatory) follow-on actions for damages. Significant change as to the frequency of stand-alone actions for damages was not intended by the legislator and is most unlikely to result from the Directive.[10]

Directive 104/2014 is designed to establish certain common standards in national proceedings, although it is not comprehensive in its scope.[11]Parties will have easier access to evidence they need in actions for damages in the antitrust field. In particular, if a party needs documents that are in the hands of other parties or third parties to prove a claim or a defense, it may obtain a court order for the disclosure of those documents. Disclosure of categories of evidence, described as precisely and narrowly as possible, will also be possible. The judge will have to ensure that disclosure orders are proportionate and that confidential information is duly protected.

Similarly as a Commission infringement decision, a final infringement decision of a national competition authority will constitute full proof before civil courts in the same Member State that the infringement occurred. Before courts of other Member States, it will constitute at least prima facie evidence of the infringement.

Clear limitation period rules are established so that victims have sufficient time to bring an action. In particular, victims will have at least 5 years to bring damages claims, starting from the moment when they had the possibility to discover that they suffered harm from an infringement. This period will be suspended or interrupted if a competition authority starts infringement proceedings, so that victims can decide to

[9] Gabriella Muscolo (2015), „*The impact of Directive 104/2014 on private actions…*"*op. cit.*, pp. 9.

[10] P. Van Nuffel (2016), Institutional Report – Private enforcement of EU competition law, XXVII FIDE Congress, Budapest, 18-21 May 2016.

[11]BeniaminoCaravita di Toritto (2015), The Interplay between Public and Private Enforcement in the Light of Directive 2014/104/UE*Conference*, Rome, 28 May 2015.

wait until the public proceedings are over. Once a competition authority's infringement decision becomes final, victims will have at least 1 year to bring damages actions.[12]

The Directive clarifies the legal consequences of 'passing on'. Direct customers of an infringer sometimes offset the increased price they paid by raising the prices they charge to their own customers (indirect customers). When this occurs, the infringer can reduce compensation to direct customers by the amount they passed on to indirect customers. Compensation for that amount is in fact owed to indirect customers, who in the end suffered from the price increase. However, since it is difficult for indirect customers to prove that they suffered this pass-on, the Directive facilitates their claims by establishing a rebuttable presumption that they suffered some level of overcharge harm, to be estimated by the judge.

The Directive contains provisions to avoid that claims by both direct and indirect purchasers lead to overcompensation. Claims concerning harm resulting from loss of profit are not affected by the Directive's passing-on rules. It is clarified that victims are entitled to full compensation for the harm suffered, which covers compensation for actual loss and for loss of profit, plus payment of interest from the time the harm occurred until compensation is paid.

The Directive establishes a rebuttable presumption that cartels cause harm. This will facilitate compensation, given that victims often have difficulty in proving the harm they have suffered. The presumption is based on the finding that more than 90% of cartels cause a price increase (as found by a study). In the very rare cases where a cartel does not cause price increases, infringers can still prove that their cartel did not cause harm.

Any participant in an infringement will be responsible towards the victims for the whole harm caused by the infringement (joint and several liability), with the possibility of obtaining a contribution from other infringers for their share of responsibility. However, to safeguard the effectiveness of leniency programs, this will not apply to infringers which obtained immunity from fines in return for their voluntary cooperation with a competition authority during an investigation; these immunity recipients will normally be obliged to compensate only their (direct and indirect) customers. Furthermore, a narrow exception from joint and several liability is foreseen under restrictive conditions for SMEs that would go bankrupt as a consequence of the normal rules on joint and several liability.[13]

According to the information (last updated on 13 November 2017) available at the European Commission's website,[14] 25 Member States communicated so far that they have fully transposed the Directive (Austria, Belgium, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Malta, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom). The three remaining Member States are in

[12]Ioannis Lianos, Peter Davis, PaolisaNebbia (2015), *Damages Claims for the Infringement of EU Competition Law*, Oxford University Press, 2015, pp. 350.
[13]Frank Wijckmans, MaaikeVisser, Sarah Jaques, Evi Noel (2016), *The EU private damages directive practical insight*, Intersentia, Cambridge, 2016, pp. 5.
[14]http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html[accessed november 18, 2017]

the final stages of their national legislative process to adopt measures transposing the Directive. *Annex 1* shows the current state of play of transposition procedures.

3. Claims for Damages for the infringement of Competition Law – Antitrust enforcement in Romania

In Romanian legal system, the actions for damages have as legal basis the Civil Code, which is the general legislation for this matter. Hence, as a general rule, the Civil Code[15]provides that any person that caused harm to another is obligated to compensate the damages suffered, whether it was committed intentionally or with negligence. Correlatively, any person that suffered harm must be able to claim reparation from the person who caused that harm. These provisions are acknowledging the principle of the civil liability based on an illegal conduct.

Due to lack of specific provisions, these rules are also applicable to actions for damages as a result of breach of European or national antitrust rules.

According to the applicable rules, the general conditions of the civil liability that the court must assess, once an application for seeking damages was brought before it, are: the existence of harm, the existence of illegal conduct, the causal link between the illegal conduct and the harm suffered and the fault of the person whose conduct caused that harm, intentionally or with negligence. In competition private enforcement cases, the court must ascertain the causal link between the breach of the antitrust rules by the offender and the losses suffered by the claimant.[16]

According to the Competition Law, damages actions may be brought before courts either before or after a decision sanctioning an antitrust infringement was adopted by the Romanian Competition Council (hereinafter referred as RCC). The damages actions can be brought before the courts by harmed persons, by an attorney on behalf of a number of harmed persons, based on individual will expressed by each of them, or by the associations for the protection of the consumer's interests or trade associations.

The applicable procedural rules are those provided by general legislation, respectively the Civil Procedural Code.[17]

The competent courts, in a first instance, are the local courts and county courts, civil or commercial sections, depending on the level of the damages claimed. The burden of proof is on the plaintiff, as in public enforcement. The court may use, at the request of the parties or ex officio, any type of evidence, including witnesses and expertise.[18]

The burden of proof falling on the claimant in competition damages actions, especially if stand-alone type, is notoriously fraught with difficulty. As a consequence, if the national judge interprets the domestic procedural laws in a strict and formalistic manner, this may render the burden not just difficult but nearly close to impossible.[19]

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[15] The new Civil Code is in force as of 1 October 2011; it contains modern and efficient provisions in respect of the liability for torts.

[16]Paul Vasilescu (2012), *Drept Civil. Obligații*, EdituraHamangiu, Bucharest, 2012, pp. 527.

[17] Code of Civil Procedure, enacted by Law no. 134/2010; Law no. 134/2010 published in "Monitoruloficial al României", part I, no. 545 of August 3, 2012, as subsequently amended and modified.

[18] Gabriel Boroi (2015), *Dreptprocesual civil*. Editia a 2-a, EdituraHamangiu, București, 2015, pp. 465.

[19]Assimakis P. Komninos (2008), *EC private antitrust enforcement: decentralised application of EC Competition Law by national courts*, Oxford and Portland/Oregon, Hart Publishing, 2008, pp. 314.

In private judicial procedures, a decision issued by the competition authority, prior to a finaljudgment, may represent a strong presumption in relation to the illegal conduct and the responsible persons. If the appellate court has given a final judgment upholding the competition authority's decision, this decision is mandatory for the civil or commercial courts with regard to decided aspects, on the *res judicata* principle.

Also, the full compensation principle is applicable, meaning that the damaged persons are able to seek compensation not only for actual loss (damnumemergens) but also for loss of profit (lucrumcessans) plus interest. Thus, the Competition Law establishes this principle in Art 64 para. (1). The Civil Code contains also provisions regarding the full recovery of the harm (Art.1531-1537) and the Procedural Civil Code establishes the way of covering the legal expenses (Art. 451-455)

It should be emphasized also that in Romanian legal system the civil liability has a reparatory role and not a punitive role as the damages do not represent a punishment.[20] Competition Law provides also that the passing-on overcharges defence is not a legal basis for considering that the harm does not exist. The unjust enrichment principle is also applicable to all private litigations. It means that damages shall be granted for both direct and indirect buyers, for covering the harm they prove to have suffered. In order to ensure that the leniency program is attractive, the Competition Law provides that civil liability of successful immunity applicants is limited to the damages attributable to its conduct, in this case the general civil principle of the joint and several liability not being applicable.[21]

Another important modification brought to the Competition Law during 2010-2011 consists inthe introduction of the RCC's role as amicus curiae, giving it the power to issue observations to courts in particular cases when the national and European competition rules are applied. These observations may be issued ex officio or at the request of the courts.This role of RCC may be exercised in private enforcement cases as well, since the competition authority is not part of the trial as plaintiff or defendant.[22]

It must be emphasized that the amicus curiae role of public institutions in Romania is also provided by the new Civil Procedural Code that entered into force in 2014, these institutions being empowered to intervene in cases for the protection of public interest.

With regard to time limits for seeking compensation, Competition Law provides at Art. 64 para. (5) for a special limitation period of two years that will start once the infringement decision of the competition authority, on which a follow-on claimant relies, has been confirmed by a final court decision. The general time limit for seeking

[20]Liviu Pop, Ionuț Florin Popa, StelianIoanVidu (2012), *Tratatelementar de drept civil. Obligațiile*, EdituraUniversulJuridic, București, 2012, pp. 489.

[21] The importance of the leniency programs are recognized also by the ECJ: *C-536/11, DonauChemie, the Court of Justice stated that: "(42)The Court has recognised that leniency programmes are useful tools if efforts to uncover and bring an end to infringements of competition rules are to be effective and thus serve the objective of effective application of Articles 101 TFEU and 102 TFEU."*

[22]Ana Maria Toma Bianov (2016), *Aplicareaprivata a regulilorconcurentei in UniuneaEuropeana* – Actiunile in despagubire promovate in fata instantelor nationale si tribunalelor arbitrale, Editura Universitara, Bucharest, 2016, pp. 32.

compensation provided by the Civil Code is three years since the date the claimant had to know or he should have known about the appearance of this right.[23]

The quantification of harm suffered by the victims in the actions for damages based on infringements of European and national antitrust rules rests entirely with the judge. In practice it is very likely that the judge will ask for an expert opinion, on the expense of the plaintiff.

A major impact in the direction to facilitate further development of effective competition law enforcement will have the transposition of the provisions of the EU Directive into national legislation, however this implementation is late with half a year in Romania, while Member States shall had to transpose it in their national legislation by 27 December 2016.

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[23]IonelReghini, ȘerbanDiaconescu, Paul Vasilescu, Introducereîndreptul civil, EdituraColecțiauniversitaria. SferaJuridică., Cluj-Napoca, 2008, p. 649;

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Annex 1.

Antitrust damages directive: state of play of transposition procedures

Country	Stakeholder consultation	Government	Parliament	Adopted legislation	Full transposition communicated
Austria			Ministry Proposal of 26 August 2016 Government Proposal of 1 March 2017	Kartell- und Wettbewerbsrechts-Änderungsgesetz 2017	✓
Belgium	Nov. 2015 - May 2016	Proposal of 17 June 2016	Proposal of 12 April 2017	Law of 6 June 2017 amending the Code of Economic Law	✓
Bulgaria	02 - 16 Sept. 2016		Proposal of 25 October 2017		✗
Croatia	09 Nov. – 08 Dec. 2016		Proposal of 8 March 2017	Law on damages for the breach of competition law	✓

Czech Republic		Proposal of 18 August 2016	Proposal of 5 December 2016 Parliament file	Act 262/2017 Coll, on Damages in the Field of Competition and on the Amendment of Act 143/2001 Coll, on the Protection of Competition and on the Amendment of Certain Acts (Act on the Protection of Competition), as amended (Law on Damages in the Field of Competition)	✓
Cyprus			Ministry Proposal of 14 December 2016	Legislation N.113(I)/2017	✓
Denmark	29 June – 03 Aug. 2016 (2nd consultation)06 October – 13 November 2015 (1st consultation)		Proposal of 5 October 2016	Competition Damages Act Explanatory notes Parliament amendments	✓
Estonia	11 August - 1 September 2016			Act amending the Competition Act and the associated Acts	✓
Finland	15 June – 11 Sept. 2015		Proposal of 19 May 2016	Act on Competition Damages (1077/2016) Amendment to Competition Act 1078/2016) Entry into force: 26.12.2016 More info	✓
France				Decree of 9 March 2017 (n°2017-305) Ordonnance of 9 March 2017 (n°2017-303)	✓
Germany	01 - 15 July 2016		Proposal of 28 September 2016	Parliament file Neuntes Gesetz zur Änderung des GWB – Published text	✓
Greece	14 September 2017 – 29 September 2017				✗
Hungary	13 - 22 September 2016		Proposal of 28 October 2016	Amendment to the Competition Act (see pages 183 and seq.)	✓
Ireland				EU (Actions for Damages) Regulations 2017	✓
Italy			Proposal of 27 October 2016	Legislative Decree of 19 January 2017, n. 3	✓
Latvia	07 - 21 January 2016		Proposal of 9 May 2017 for Amendments in Competition Law	Amendments in Civil Procedure Law Amendments in Competition Law	✓

			Proposal of 9 May 2017 for Amendments in Civil procedure Law		
Lithuania	10 February - 02 March 2016	Proposal of 21 October 2016	Proposal of 22 November Proposal of 15 December	Amended Competition Act	✓
Luxembourg			Proposal of 5 July 2016	Competition Damages Act	✓
Malta	20 September - 18 October 2016			Competition Law Infringements (Actions for Damages) Regulations 2017 Competition (Amendment) Act, 2017 (Act XXV of 2017)	✓
Netherlands	08 October - 22 November 2015		Proposal of 7 June2016 Proposal of 24 November 2016	Law amending the Book 6 of the Civil Code and the Code of Civil Procedure in relation to the implementation of the Directive 2014/104/EU Entry into force: 10.02.2017	✓
Poland	17 March - 07 April 2016	Proposal of 1 February 2017 Proposal Progress File	Proposal for Damages Actions Act	Act adopted by the Parliament	✓
Portugal	26 April - 27 May 2016	Proposal of 19 October 2017			✗
Romania	04 - 15 September 2016			Government emergency ordinance of 31 May 2017	✓
Slovakia	08 - 26 August 2016	Discussion of revised draft	Proposal of 23 September 2016	Competition Damages Act	✓
Slovenia	15 June - 15 July 2016	Proposal of 13 February 2017(adopted on 2 March 2017)	Proposal of 3 March 2017 More info	Law amending the Law on Prevention of the Restriction of Competition Act (ZPOmK-1G)	✓
Spain	First draft			Royal Decree 9/2017 of 26 May 2017	✓
Sweden	06 Nov. 2015 - 05 Febr. 2016		Proposal of 15 September 2016	Competition Damages act Amendment to the Competition Act Amendment to the Group Actions Act Amendment to the Patent and Market Court Act	✓
United Kingdom	28 Jan.- 09 March 2016	Government response of 20 December	Draft Statutory Instruments	Gibraltar: Fair Trading (damages for infringement of competition) Rules	✓

		2016 to public consultation		2016 UK: The Claims in respect of Loss or Damage arising from Competition Infringements Regulations 2017	

Source: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html

THE RIGHT TO EDUCATION OF VULNERABLE SOCIAL GROUPS IN THE EUROPEAN UNION*

Dániel Szilágyi[1]

The first appearance of the concept of vulnerable social groups in a European legal context can be traced back to the case-law of the European Court of Human Rights. The expression was originally usedin relation to the Romani minority, however, in later decisions, the forum drew attention to the vulnerability of several different groups – among others, the mentally disabled, people living with HIV and asylum seekers. At the same time, the recognition of vulnerability requires special measures taken to protect the interests of those affected. In the Chapman v United Kingdom decision, marking the first appearance of the term, the Strasbourg court argued that "the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases."[2]

The concept of vulnerable social groups – alongside numerous other instruments developed via the ECHR's practice for the protection of human rights– has been adopted by both the legislation of the European Union and the case-law of its Court of Justice. The European Commission gives the following definition of the term: *"A number of groups within our societies face higher risk of poverty and social exclusion compared to the general population. These vulnerable and marginalised groups include but are not limited to: people with disabilities, migrants and ethnic minorities (including Roma), homeless people, ex-prisoners, drug addicts, people with alcohol problems, isolated older people and children."*[3] The Commission notes that the difficulties these groups experience translate into homelessness, unemployment, low education, and subsequently, their further exclusion from society. In view of this, the Commission considers the enhanced integration of these groups into society a priority and has developed the following threefold approach to meet this objective:

- increasing access to mainstream services and opportunities,
- enforcing legislation to overcome discrimination and, where necessary,
- developing targeted approaches to respond to the specific needs of each group.[4]

One policy area where the necessity of the integration of socially vulnerable groups clearly arises is the field of education. According to Article 6 of the Treaty on the Functioning of the European Union, the competence of the EU in this field is limited to

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* DOI 10.21868/PGnG.2017.2.5.

[1]*Dániel Szilágyi*, PhD Student, Géza Marton Doctoral School of Legal Studies, University of Debrecen

[2]Chapman v. The United Kingdom (Application no. 27238/95) ECHR

[3] European Commission (2010) Inclusion of vulnerable groups, http://ec.europa.eu/employment_social/2010againstpoverty/extranet/vulnerable_groups_en.pdf[accessed July 2, 2017]

[4]*Ibid.*

carrying out actions to support, coordinate or supplement the actions of the Member States. This, in turn, largely determines the nature of EU legislation and policy documents in this area, as the Union may not supersede the competences of the Member States, therefore its legally binding acts may not entail harmonisation of Member States' laws or regulations.

The EU's approach

Currently, the strategic framework titled "Education and training 2020",[5] developed by the European Commission, forms the basis of EU education policy. The current framework can be considered a continuation of the "Education and training 2010" work programme,[6] building on the results and following the methodology of its predecessor.

"Education and training 2010" was the European Union's first programme in the area of education policy, reflecting on the broader objectives of the ten-year action and development plan drawn up by the 2000 Lisbon European Council (known as the Lisbon Strategy), which had aimed to transform Europe into *"the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion"* by 2010.[7] This comprehensive economic, social and environmental strategy laid down three major objectives concerning the field of education: improving the quality of education and training systems, making access to learning easier and opening education and training to the world.

Taking into account these general objectives and in consultation with the configuration of the Council of the European Union composed of the ministers responsible for education, the Commission set forth to establish the "Education and training 2010" programme, laying down specific objectives for the 2000-2010 period in order to coordinate the education policies of the member states, and setting up thematic working groups tasked with the examination of education systems and the formulation of best practices for the achievement of the objectives set. The work programme utilizes the so-called Open Method of Coordination,[8] in which the policy goals and the approaches developed by the working groups (including statistics, indicators, guidelines and best practices based on the data collected from member states) are presented to the member states as recommendations, and the realisation of the objectives is constantly monitored (*benchmarking*). This "soft law" approach eschews the harmonisation of member states' regulations, focusing instead on the

[5]Council conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training (ET 2020) OJ C 119, 28.5.2009, p. 2–10

[6]Lisbon European Council 23 and 24 March 2000, Presidency conclusions, http://www.europarl.europa.eu/summits/lis1_en.htm[accessed July 2, 2017]

[7]*Ibid.*

[8] The openmethod of coordination and European integration: The Example of European Education Policy, http://www.polsoz.fu-berlin.de/polwiss/forschung/international/europa/arbeitspapiere/2008-8_Humburg_OpenMethodofCoordination.pdf[accessed July 2, 2017]

coordination of their distinct practices and thusly, does not require the issuing of legally binding acts or the use of sanctions.

Several of the specific objectives of the work programme directly addressed the situation of socially vulnerable groups in the area of education and training, with the programme also identifying the key issues necessary to tackle in order to achieve the objectives set. One such objective was titled "*Supporting active citizenship, equal opportunities and social cohesion",*its key issuesincluding the integration of the equal opportunities dimension into the objectives and functioning of education and training as well as ensuring fair access to the acquisition of skills– even for the least privileged. Of equal importance was the objective titled *"Increasing mobility and exchanges"*, addressing key issues such as the provision of the widest possible access to mobility for individuals and education and training organisations, including those serving a less privileged public, and reducing the remaining obstacles to mobility. Also worth mentioning is the objective of *"Developing the skills needed for a knowledge society"* which included making the attainment of basic skills available to everyone, including those who are less advantaged or have special needs, school drop-outs and adult learners among its key issues.

The "Education and Training 2020" strategic framework, adopted in May 2009 and developed by the Commission in close cooperation with the Council, set four new strategic goals for the 2010-2020 period, based on the objectives of the Lisbon Strategy and the preceding work programme:

- Making lifelong learning and mobility a reality,
- Improving the quality and efficiency of education and training,
- Promoting equity, social cohesion, and active citizenship,
- Enhancing creativity and innovation, including entrepreneurship, at all levels of education and training.

In connection with the objective of promoting equity, social cohesion, and active citizenship, the conclusions of the Council consider several key areas directly concerning the situation of vulnerable social groups. According to the conclusions : *"Education and training policy should enable all citizens, irrespective of their personal, social or economic circumstances, to acquire, update and develop over a lifetime both job-specific skills and the key competences needed for their employability and to foster further learning, active citizenship and intercultural dialogue. Educational disadvantage should be addressed by providing high quality early childhood education and targeted support, and by promoting inclusive education. Education and training systems should aim to ensure that all learners — including those from disadvantaged backgrounds, those with special needs and migrants — complete their education, including, where appropriate, through second-chance education and the provision of more personalised learning. Education should promote intercultural competences, democratic values and respect for fundamental rights and the environment, as well as combat all forms of discrimination, equipping all young people to interact positively with their peers from diverse backgrounds."*[9]

[9]ET 2020, op. cit.

In order to achieve its objectives, the strategic framework continues the use of the Open Method of Coordination. To enhance effectiveness and flexibility, the ten-year period was subdivided into shorter work cycles, with the current cycle running from February 2016 until June 2018.[10] For the duration of these work cycles, thematic working groups are established in the priority areas of cooperation between the Commission and the member states; these priorities are laid down by the Council before each work cycle. In the current cycle, six priority areas have working groups assigned to them; the *"Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education"*working group is primarily responsible for issues relating to the participation of socially vulnerable groups in education. The name and objectives of the working group were established by the so-called *Paris declaration* adopted by the informal meeting of EU education ministers on 17 March 2015. These objectives include the fostering of the education of disadvantaged children and young people and the promotion of intercultural dialogue through all forms of learning.[11]

The Paris declaration called for an increased cooperation between member states for the accomplishment of its objectives and emphasised the importance of the Education and Training 2020 strategy, the Erasmus+ programme supporting the mobility of students and educators and other EU-level policy and funding instruments in education-related areassuch as the Horizon 2020 innovation and research programme. The declaration also highlights the fact that in light of recent events – and particularly, the terror attacks shaking up European societies – EU-level cooperation in the field of education is instrumental in addressing the common challenges Europe is facing and in protecting the fundamental values lying at the heart of the Union: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, since the protection of these values common to all member states requiresan education that is able to help youth embrace these values and become active, responsible, open-minded members of society.[12]

It's necessary to elaborate on the importance of the Erasmus+ programme,[13] introduced as the Commission's programme for education, training, youth and sport for the 2014–2020period. This comprehensive programme combines several preceding EU schemes in the field of education and training, including the Lifelong Learning Programme, several international cooperation programmes and, most important to the topic at hand, the Youth in Action programme promoting active citizenship, solidarity, tolerance and intercultural dialogue among young people. For the continued achievement of these objectives, Erasmus+ introduced its Inclusion and Diversity Strategy, an agenda with the dual focus of including disadvantaged young people in

[10] Working Group Mandates for 2016-2018, http://ec.europa.eu/education/policy/strategic-framework/expert-groups/2016-2018/et-2020-group-mandates_en.pdf[accessed July 2, 2017]

[11]Declaration onPromoting citizenship and the common values of freedom, tolerance andnon-discrimination through education, https://eu2015.lv/images/notikumi/2015-3-10_Declaration_EN.pdf[accessed July 2, 2017]

[12]*Ibid.*

[13]European Commission (2014) Erasmus+ Inclusion and Diversity Strategy – in the field of Youth, http://ec.europa.eu/youth/library/reports/inclusion-diversity-strategy_en.pdf[accessed July 2, 2017]

education and training while also strengthening the knowledge, skills and behaviours needed to fully accept, support and promote their differences in society. This can be considered as a novel, increasingly socially responsible approach towards reducing the obstacles separating disenfranchised youth from participation in education and training, as well as the further benefits stemming from these opportunities, while also transforming mainstream societal attitudes.Another novelty of the strategy is its usage of innovative definitions: for example, the agenda introduces the umbrella concept of "young people with fewer opportunities", a decidedly non-exhaustive term developed to encompass the numerous factors that may manifest in social vulnerability.

Whether this new approach will prove successful in providing vulnerable youth with new opportunities in the field of education and training remains to be seen, however, with recent developments showing an increased focus on supporting refugees and other marginalised groups, the European Union seems more determined than ever to make a change.

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Reference to a newspaper article or blog article:

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