UNITED IN PRACTICE

Slovenian Legal Conference
November 18–19 2021

#legislation #implementation #technology

CONFERENCE PROCEEDINGS

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Introduction

The Slovenian Legal Conference “United in Practice” was a great opportunity for an open dialogue on trends and challenges in the European legal environment.

Representatives of national governments, the EU institutions, academia, and legal practitioners were discussing the ups and downs of the ceaseless interplay between the national and the EU law. A debate covered the following topics:

- legislative and legal challenges at the intersection of the national and EU law,
- application of the EU law at the national level with focus on linguistic issues,
- the legislative process and challenges in the digital era.

We are proud that more than 250 participants from 29 countries attended the Slovenian Legal Conference, which, in cooperation with inspiring speakers, enriched the debate and further strengthened us in believing how important it is to be united in practice.

Office of the Government of the Republic of Slovenia for Legislation

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2 Speakers

Matjaž Gruden

Director of Democratic Participation at the Council of Europe

With his speeches and wordings, interwoven with many years of diplomatic experience, he radically cuts into the core of current political topics and sets up a mirror where it is needed.

The insight of his spirit is revealed in a collection of columns on the role and importance of human rights in an increasingly uncertain and turbulent world, which bears the significant title of the Slovenian anthem »Žive naj vsi narodi« (let all nations live).

He is a »living legend« for Slovenes, as with his central role in the legendary family movie »Sreča na vrvici« (luck on a string) he forever imprinted the memory of life in the late 1970s, which is, in many places, still the same, especially in terms of human relations and children's worldview.

> At historical turning points, certainly we are at one of them at the moment, it’s good to listen to people who know what they’re saying. In this sense, Gruden is a voice that should also be an alarm for us. We should hear him. (M. Stepišnik)

Nina Gregori

Executive Director of the European Asylum Support Office (EASO)

She's been an internationally recognized and well-established asylum and migration expert. Her duties as the Executive Director of EASO, following her immense national and international experience, are of an exceptional importance regarding challenging period of global asylum issues. Being sincerely overwhelmed with the power of cooperation, need for efficient and urgent action, she believes in combination of practice, professional excellence and understanding of political dynamics.

As enthusiastic as she is, she tries to seek the intertwinement of various abstract and concrete aspects and junctures of different decision-making standards of EU Member States. Not only following the words, but mainly results, she tries to spread the urge for understanding and active cooperation way across the EU borders when resolving the challenges of asylum politics and concerning inherent issues of fragile humanity.

> I firmly support the idea that every action counts, and that only by working together we will achieve a more inclusive and equal world.

Mag. Alojz Grabner

Director of Chemicals Office of the Republic of Slovenia

He actively participates in the formulation of a common EU chemical safety policy.

With his professionalism and in-depth knowledge of the subject at the national level, he significantly contributes to the formation of the rules that shape our everyday lives. Through him law gains dimensions of humanity, as he understands it as a field that should guide, discourage and inform people about the risks, benefits and the use of chemicals

> People are not aware that in the midst of the chemicals they are using intentionally and deliberately, they are screaming that the chemicals need to be disposed of.

Mag. Katja Božič

Head of Division at the Office for Legislation of the Government of the Republic of Slovenia

The letters and words in which they are intertwined, the sentences they draw, and the contents that are thus created are the canvas which she observes and on which her contributions to a more comprehensible (legal) world are created.

By intertwining national and EU law she strives to make sense to everyone. This is why she is the soul of the legislative drafting group at the Office for Legislation, which makes notes on drafting upheavals, resolves related dilemmas and offers solutions aimed at comprehensibility of law and legal security.

She loves the company of fountain pens, cameras, and people who instead of a hand offer a hug.

> Everything said or written demands responsibility, which increases with the potential consequences the words might cause. And when these words are the tissue from which we knead content that will be legally binding in a form of a legal norm, such responsibility is justified.

Karen Banks, LL.M.

Former Deputy Director-General of the Legal Service of the European Commission

In the period from 1983 until August 2021, when new life achievements await her, she worked in different legal fields and spent the majority of her career working for the institutions of the EU.

Her experience and the insight open doors into the world where politics and legal rules that dictate actions of the Member States and their citizens are created. Hence, one should not miss the opportunity to listen very carefully to what she has to say.

> I think we can say that although EU law does not in any way want to replace all national procedural rules or determine what courts should be competent for what kind of matter it is still the case that the nature of EU law and certain specific rules like the question of judicial independence have nevertheless considerable implications for national justice systems.

Dr. Katarina Vatovec

Assistant Professor at the Faculty of Government and European Studies and European Faculty of Law (Nova univerza)

She works in academia whilst at the same time, as an adviser at the Constitutional Court, she is in contact with the review of legislation, the constant attempt of the latter to reinterpret constitutional principles and find new ways.

In essence, a lawyer, but with a broader insight and view of the ingrained and often cumbersome mechanism, she seeks and explores attempts to expand the binding legal framework with a so-called soft law, which by its interpretive nature is becoming a category that not only helps with understanding but gives meaning to the rules. With its elusive legal nature, often non-existence in the languages of the Member States, and with the diversity of names given to it, it introduces elements into the already furrowed field of EU law that significantly co-shape the national legal landscape.

> It is characteristic of the EU that crises are the driving force behind its progress. They allow it to upgrade its political role and institutional structure.

Mira Radulović

Head of the Unit at the European Integration Office, Montenegro

She gives an impression that law is a game in which despite an unpromising starting point one always strives for victory.

In a small team of big enthusiasts, she revises the transposition of EU legislation into the national legislation and the compliance of the latter with the EU law. Years go by, hope remains and with it an immense will to seek solutions and help whenever a seemingly hopeless situation arises.

> The starting point of all achievement is DESIRE. Keep this constantly in mind. Weak desire brings weak results, just as a small fire makes a small amount of heat. (N. Hill)

Dr. Gordana Lalić

Head of Division at the Office for Legislation of the Government of the Republic of Slovenia

Anyone who thinks the law can't be refined hasn't met her yet. Her flow of thought always finds a wording that is relentlessly focused on a comprehensible, fair and comprehensive (legal) solution. She does not skimp on words, but chooses them carefully and distributes them subtly, which makes her views benevolently flexible, but far from submissive.

Her life, work, articles and lectures are variations on the theme of use of language. Nevertheless, scenes captured through a lens that her travelling soul never really puts down, and invisible to the eyes of most passers-by, need no explanation.

> Words are important, but I am afraid they are too weak a weapon in this war. One should grab for something else! And yet words, these little black bugs, are the only weapon we have.

Andrej Kmecl

Judge at the Supreme Court of the Republic of Slovenia

He is a judge with exceptional legal reach and a sense of people. In addition to his judicial function, which he initially performed in the field of criminal law, and since 2006 in the field of administrative law, he has been involved in numerous projects dealing with the IT support of courts and judicial education and formation. Prior to the accession of the Republic of Slovenia to the EU, he was responsible for the implementation of the training programme for judges on EU law and thus contributed to the readiness of the Slovenian judiciary for new challenges.

He is Vice-President of the Association of European Administrative Judges (AEAJ), Member of the Board of Trustees of the Academy of European Law (ERA), and co-author of the commentaries on Administrative Dispute Act and General Administrative Procedure Act.

> Justice has nothing to do with what goes on in a courtroom; Justice is what comes out of a courtroom. (Clarence Darrow)

Dr. Matej Accetto

Judge at the Constitutional Court of the Republic of Slovenia

He assesses questions of EU law, fundamental rights and freedoms, (constitutional) judicial protection and citizenship, from different aspects, engaging on a research, pedagogical and judicial level.

His research on and of law is limitless.

The knowledge and insights he acquired and shared at universities and institutes around the world are read as a travelogue: Tokyo, Kyoto, Beijing, Irkutsk, Kőszeg, Ljubljana, Lisbon, Cambridge, Copenhagen, Graz, Kaunas, Bihać, Lugano, Reykjavík … He sharpened his view of law in many domestic and international projects, in the company of eminent Slovenian and foreign judges, lawyers, professors, academics.

> Yes, that's how the law is − sometimes it seems limitless in its effects, but other times it turns that limitless is only the imagination of those who seek its help …

Živa Jakšić Ivačič

Author of "Easy-to-read Constitution of the Republic of Slovenia"

She is a person who makes you become aware of the fact that time and energy are something that defines and enriches us. The world can be beautiful if we strive for it, if we work actively in this direction and if we turn dreams into reality.

She is the main author and leader of an intergenerational and multidisciplinary group of volunteers who, in a multi-year project, adapted the Constitution of the Republic of Slovenia into an easy-to-read and understandable form for all who have difficulty reading or have difficulties with understanding the written texts. As a speaker, she presented her dreams of a world in which information is written in such a way that we can all understand them, and the book Easy-to-Read Constitution of the Republic of Slovenia at this year's event TEDxUniversityofLjubljana.

> We all have our own views on how our country's system could be regulated in a better way and we all can get angry on Twitter about it. The question is whether you actually actively participate towards making it better.

Ana Stanič, LL.M.

Lawyer and the founder of the law firm E&A Law in London

She is an internationally renowned expert in international law, EU law and energy law, with degrees in law and in banking. Since 2019, she has been a member of the Hague Arbitration Court.

Curiosity and a desire to understand the differences between nations and countries, as well as critical thinking and the ability to argue the near impossible, are her tickets to counselling, representation and lecturing in the name of world openness and the rule of law.

Her home has no address – her home is the people she meets on her travels. A vagabond and a cosmopolitan in one, who from an early age believes that rules should apply equally to all.

> Short-term personal interests of politicians are what lead us to long-term change.

Dr. Aleksandra Čavoški

Professor at Birmingham Law School

She grew up in an intellectually stimulating environment. Her academic path started in Belgrade and from 2012 continues in Birmingham. She works in the field of environmental law and EU law, including certain aspects of public international law.

She is interested in different aspects of the law and is especially keen on exploring its interconnection with other disciplines, amongst them language. She is actively following the preparation of the translations of the EU law into the languages of the Western Balkans, focusing on how the translation deals with different legal cultures.

> The interaction between law and language was always considered to be a part of the process of globalisation. [...] the EU represents an amalgam of different cultures and legal traditions which have a profound impact on translation. Hence, legal translation becomes an Achilles heel of this process.

Dr. Anamarija Patricija Masten

Head of Division at the Office for Legislation of the Government of the Republic of Slovenia

She is someone who lives the law and lives life alongside it. Her main characteristics are curiosity, insight and diversity. She upgrades law with what is right, as she stands for fundamental values of humanity and views people not only as a bunch of individuals, but as beings with rights, beings who regardless of their personal characteristics and circumstances deserve equal treatment.

Unlike the usually narrowly oriented lawyer, her basic feature is a holistic view of the creation and application of law, which she profoundly embraces from a substantive and technical aspect.

> EU […] needs innovative mechanisms. However, this innovation must also be accepted, above all, at Member States' level, as the creation of legal order and the design of value systems irrespective of and without the consent of the pillars, i. e. Member States and their citizens, lead to a democratic deficit and distance European citizens from any affection towards the EU itself and the implementation of its policies.

Fernando Nubla Durango

IT Project Manager at European Commission

He finished studies at the University of Deusto (Bilbao, Spain) and received a Master's degree in Informatics Engineering. He has a solid background on software design and development of IT solutions. As a connoisseur of different Information and communications technologies, he conscientiously and professionally transmits his knowledge and experience onto the younger generations. As from 2019, he is the leading force of the project LEOS an open source solution that is designed to make legislation drafting more efficient and to help those involved in this process by facilitating efficient online collaboration.

When not in the world of informatics, he enjoys photography.

> His commitment and positive attitude are two of his most valuable characteristics, and added to his tech skills, makes Fernando an important asset of any project team. (Asier Del Pozo Uriarte)

Dr. Aleš Završnik

Director of the Institute of Criminology at the Faculty of Law in Ljubljana

As full professor of criminology at the Faculty of Law of the University of Ljubljana, author of many scientific books and the leader of numerous research studies on the far-reaching effects of information technology on society, he uncovers the dangers, ethical and legal dilemmas of data surveillance and legal automation.

His interdisciplinary study of topics at the intersection of law, information technology, crime, and social control merges with ethical dilemmas, human rights, and universal social values.

> Democracy or algocracy: from the rule of law to the rule of algorithms?

Dr. Monica Palmirani

Full Professor of Computer Science and Law at Bologna University, School of Law

Her field of research is in Legal Informatics; in particular, she is an expert of XML techniques for modelling legal documents both in structure and legal knowledge aspects, including normative rules. She is proficient in Legal Drafting techniques supported by ICT. She participates in numerous international projects in which, by applying modern and innovative approaches, new models and applications for a digitalized use and understanding of law are developed in order to enable the legal profession to act accordingly in the world of ever changing and hardly tenable increasing number of data and information.

She is a member of the Centre for Research in the History, Philosophy, and Sociology of Law and in Computer Science and Law of the Alma Mater Research Institute for Human Centered Artificial Intelligence.

> In one of the most celebrated 2014 John Klossner's cartoons […] the husband resignedly says to his wife: 'We have to go out for dinner. The refrigerator isn't speaking to the stove.' This is not a joke anymore, and neither is the possibility of connecting thousands of billions of devices that can literally speak to each other.

Dr. Benjamin Lesjak

Assistant Professor at the Faculty of Management, University of Primorska

He is a lawyer and IT specialist and thus an indispensable interlocutor in the search for legal solutions to the information society. At different higher education institutions, he participates in subjects which link the law to advanced technologies and protection of personal data.

His mission encompasses awareness of the safe use of the internet and mobile devices, and the protection of privacy. For many years now, in cooperation with Safer Internet Centre, Safe.si, he has been conducting workshops and lectures for children, parents, teachers, professionals and the general public, where he very clearly and in a subtle manner takes us through the traps of excessive and unbridled digitalization.

> It's amazing what people can do online to fascinate and how boundless human stupidity is.

Dr. Maja Brkan, LL.M.

Judge at the General Court of the European Union

During her rich career, she has worked in various roles: as a judge, researcher, professor, member of projects and editorial boards, head of a study programme, lecturer, author of books, scientific publications and articles. Her research and practical work covers a wide range of legal aspects of European integration. She focuses on constitutional issues of the EU, in particular with respect to fundamental rights, which she addresses from a theoretical viewpoint as well as from the perspective of new technologies.

She can impress and persuade many – not only because of her exceptional knowledge of the content she tackles, but also because of the languages in which she can address you.

> Artificial Intelligence (AI) is expected to be the major trigger for the 'fourth industrial revolution' that is predicted to change the way our society functions and how humans relate to each other, to alter the job market and job demands as well as the relationships between companies that will take the path of digitalisation.

Peter Goldschmidt

Head of Institutional Relations, EIPA Luxembourg

His leadership of European Centre for Judges and Lawyers for 17 years has reinforced EIPA's reputation as a leading European-level provider of EU law and judicial training, advisory activities and projects for the administrations and legal professions mostly in the EU Member States and EU institutions.

Throughout his career, he has dealt extensively with EU matters at various levels, including articles, studies, papers and active involvement in workshops and practical guides related to implementation of EU policies and law.

Strong belief in knowledge and understanding is his focal point when linking EU and national legislation, aiming at improving the application of EU Law, considering as many dimensions and challenges as possible.

> It is beyond a doubt that all our knowledge begins with experience.
> (Immanuel Kant)

3 Contributions

Why united?

Matjaž Gruden

Director of Democratic Participation at the Council of Europe
Opening keynote

My article is a response – and a challenge – to the conference title "United in Practice". Why united? Why together? I will try to answer this from a historical, political and social point of view, but also from a personal point of view.

My first serious contact with the European Union was my diploma paper at the Faculty of Law in Ljubljana. This is so long ago that the EU was not even the European Community at the time. The title of my diploma paper was "Accession of the European Economic Community to the European Convention on Human Rights". More than thirty years after that, I sit today in my office, looking out of the window at the Strasbourg court building, and the EU has still not acceded to the Convention. This is important both because it confirms the EU's commitment to human rights and because it will bring an end to the exemption of decisions by EU bodies from the legal protection provided by the Convention to all citizens of the Member States, i.e. including all EU Member States.

Although my diploma paper did not contribute to the accession, it did help me apply for and receive a European Commission scholarship to study at the College of Europe in Bruges, Belgium. Those were different times. The EU was at the peak of its popularity. I returned to Slovenia with a postgraduate degree in European law in June 1991, just a few days before the declaration of independence and the Ten-Day War that followed. It was an experience that helped all of us to understand how thin the line between normality and chaos is. Between peace and war. Between past and future. Between the European orientation and its alternatives.

This experience – and the desire to continue my career in an international organisation – led to my decision to apply for a job in the Council of Europe. This was not a departure from the EU as my "first love", but a return to its roots.

A few years ago, I took part in a round table hosted by the European Movement in Strasbourg. My comment on the significance of the EU for peace in Europe triggered a brusque reply from a professor of the Strasbourg Faculty of Economics: "Let's stop yacking about war and peace, nobody in Europe cares about that any more. Let's look forward, not backward." Similar discussions, criticism and mockery were also triggered by the decision to award the 2012 Nobel Peace Prize to the EU. As I cooperated closely at the time with the then Secretary General of the Council of Europe, who also chaired the Norwegian Nobel Committee in his spare time, I know that it was not a mistake but a deliberate decision to remind Europe, and the EU itself, at a very important moment, of what its fundamental mission is.

That the issue of war and peace in Europe no longer interests anyone? Because it is enough to occasionally ritually say "never again"? Just look at how many conflicts there have been in Europe in recent decades, as well as today. All of them are directly or indirectly linked to the undermining of the values on which the European project was based.

The link between human rights and the historical experience, when these rights were most severely and tragically trampled on – is often mentioned in a ceremonial, ritual manner, almost like an empty cliché.

I personally am of the opinion that this link is direct and legal.

The story begins in October 1946, when convictions of ten Nazi officials were handed down and carried out in Nuremberg.

From today's point of view, it was a logical epilogue to this bloodiest episode in recent European history, but at that time, it was anything but that. There were no clear rules and standards in international law that would allow political and military leaders to be prosecuted for criminal acts committed against their own citizens, especially if these acts were committed on the basis of the applicable law.

Churchill wanted to approach this pragmatically. Stalin did not resist, and Roosevelt insisted on court proceedings, which was the only right thing to do. Where proceedings were conducted out of court, the consequences can still be felt today.

The judicial basis, and thus the trial in Nuremberg, was made possible by the London Charter, adopted in August 1945, which added another hitherto non-existent legal category to crimes against peace and war crimes – crimes against humanity. This was a complete breakthrough in international law. It brought an end to the doctrine of unlimited and absolute national sovereignty that had allowed states, and especially the people in power, to do whatever they wanted with their own citizens and other entities under their jurisdiction.

For the first time in international law, criminal liability was introduced to hold to account political and military leaders for acts committed in war or in peace against civilians, regardless of whether they were committed on the basis of national law in force at the time.

This limitation of absolute national sovereignty is important, especially at a time when this concept is gaining popularity again and is often mentioned as an alternative or antithesis to European integration.

Following the London Charter, the Universal Declaration of Human Rights was adopted in 1948 and the European Convention on Human Rights two years later.

The link between limited national sovereignty, human rights and the Council of Europe is clear to everyone. Each article of the Convention is a response to the historical experience of the gradual slide into inhumanity that was witnessed in the 1930s, which culminated horribly in the crematoria of concentration camps.

Some have more problems with the link between human rights and the EU – because it has its beginnings in economic cooperation and integration in the steel and coal industries.

I personally don't have these problems. The statutes of the first communities do not mention only steel and coal among the goals of integration.

The doctrine of limited or, to put it better, united sovereignty has been embedded in the EU from the very beginnings. Let me quote Jean Monnet, one of the fathers of European integration.

As early as 1943, when he was a member of General de Gaulle's government, he said: "There will be no peace in Europe if the States are reconstituted on the basis of national sovereignty, with all that that entails in terms of prestige politics and economic protectionism. The countries of Europe are too small to guarantee their peoples the

prosperity that modern conditions make possible and consequently necessary. Prosperity for the states of Europe and the social developments that must go with it will only be possible if they form a federation or a 'European entity'."

So why did Monnet, unlike the founders of the Council of Europe (although more or less the same people are connected with the beginnings of both the EU and the Council of Europe), insist on economic integration first? Because he was a pragmatist and a realist, not just a visionary. This is an important lesson for the present time. The EU was established and still exists primarily as a peace project, and for its success and survival it must prove that it is also successful in meeting the economic, social, democratic and other expectations of European citizens. Every time it stumbles in this respect, it paves the way for the "alternatives and antitheses" to European cooperation that I have already mentioned.

To be successful in this, it must be consistent, especially in respecting the principles and values on which it was based. First and foremost, regarding human rights. That is why it is important that the topic of my diploma paper is realised as soon as possible.

It must also be consistent in insisting on the democratic rule of law. This is becoming a key issue of the present time, a make-or-break for the future of the European project. A conflict between different concepts and understandings of sovereignty is also very present here.

Finally, respect for democracy and pluralism is also very important. It is not only about respecting regular elections at the national and European level, but also what I would call, if we talk so much about sovereignty, democratic sovereignty of citizens – providing institutional, legal and social conditions and safeguards that allow European citizens to exercise their democratic rights in circumstances and in a manner that gives them assurances and confidence that their vote counts and that they have an impact at all levels at which decisions about their present and their future are made.

This is a complex, but also a fatefully important EU challenge. The rise of populism was paved by the feeling of economic and political marginalisation of a significant proportion of European citizens. The feeling that one has lost influence, that one's voice is not considered by anyone. There are many economic, social, and political reasons for this that I will not be listing now. In such a situation, the EU and its institutions must, in all respects, including the manner in which they take their decisions and shape the rule of law – be a strong ally of the democratic sovereignty of citizens. This is the main condition and foundation of citizens' trust in the EU institutions and in the European integration project.

The issue of democratic legitimacy is a challenge to which the EU will have to find a convincing and effective answer. The growing role and importance of the European Parliament is a move in the right direction, and I hope that this will show in the turnout in the next European elections.

The Conference on the Future of Europe is also important, and it must not end with approximations and mimicry of democratic progress, but with convincing results that will strengthen European citizens' confidence and support for the European project.

The European project – and the doctrine of limited or, if you will, united sovereignty – also requires something else. Commitment – from the bottom up and from the top down – to the fundamental values of solidarity and humanity. The European project cannot exist without this. If we do not create while being connected, we run the risk of going back to where we have already been in Europe. Not together, but one against the other.

Common European Asylum System (CEAS) – Creation of a legal fiction or building a functional system?

Nina Gregori

Executive Director of the European Asylum Support Office (EASO)

For more than 20 years, European Union Institutions and Member States have been working to create, implement and improve the legislative framework on migration and asylum. Back in 1999, the European Council committed to establish a Common European Asylum System (CEAS) – a commitment made in the Tampere Programme, the goal of which was also set out in the Treaty on the Functioning of the European Union itself.

The first phase of CEAS saw several legislative instruments adopted between 1999 and 2005, which established minimum standards on asylum procedures, reception conditions and qualification. Since then, efforts have continued in order to develop this system – to achieve a greater level of convergence and uniformity among Member States.

The minimum standards established in that first phase were replaced by common asylum and reception standards, while the Dublin Regulation and Eurodac were also strengthened in the second phase of the CEAS legislation, which was completed in 2013. However, the national implementation of asylum procedures and reception conditions continued to vary from Member State to Member State. There are various reasons for this, but let's point out two broad ones:

- The directives are a form of EU legislative instrument that allowed, and still allow today, for differences in how Member States transpose them into their national law and/or practices.

- Legislation on its own is not sufficient to achieve convergence – it is also about implementation and how the legislation is actually applied in practice.

And this became painfully evident with the 2015-2016 migration crisis.

1. The legislative aspect of the CEAS

To go briefly into the legislative aspect first – because common legislation is of course one important aspect of a common system: in 2016 the European Commission issued several legislative proposals to reform the CEAS, and finally, one year ago, the New Pact on Migration and Asylum was presented, complementing and in some cases replacing, the 2016 Proposals.

While progress towards adoption of the Pact remains overall slow, it has to be remembered that important progress was also made on some proposals from 2016 that were not affected by the Pact, but which nevertheless remain pending (such as the Proposal for an EU Resettlement Framework, the recast Reception Conditions Directive, the draft Qualification Regulation). In fact, the only proposal which has been finalised is the Proposal transforming European Asylum Support Office (EASO) into the European Union Agency for Asylum (EUAA).

The New Pact aims to establish a comprehensive common framework – to achieve more coherence and convergence – and to make procedures more effective, while trying to strike the difficult balance between responsibility and solidarity.

This is shown, for example:

- in the proposal to establish a screening procedure: it covers a lot of what Member States already do, but it aims to achieve some uniformity in the checks on all those who arrive irregularly at the external borders;

- the amended Eurodac proposal, finally gives us a much clearer, accurate picture of the number of asylum-seekers in the EU, whether they received protection, whether they were returned, whether they engaged in secondary movements and so on. And it will become interoperable with other JHA large-scale IT systems which will enable us to use depersonalised data for more comprehensive analysis, supporting evidence-based policy making and legislation;

- The Asylum Procedures Directive and the Qualification Directive are proposed to be replaced by Regulations, which would obviously make them directly applicable without the need for transposing national law;

- The Asylum and Migration Management proposal (part of which replaces the Dublin Regulation) also aims for a more coherent and holistic approach to asylum and migration – with a better functioning system to identify the Member State responsible,

but also a solidarity mechanism, to allow for better sharing of the burden among Member States;

- Other elements, such as deeper cooperation with partner countries, as well as the proposed resettlement framework regulation will support Member States' efforts to offer protection to people in need and to address migration across routes as a whole.

Of course, this is not to say that all flexibility for Member States should be eliminated – on the contrary. But all of these proposals taken together should also contribute to a more common European asylum system.

2. Practical implementation of the legislation

And this brings us to the second point – the actual implementation of the legislative framework. This is crucial if we want to have a truly common application of the CEAS across the Union – a CEAS which is functional and not just legislation on paper. This is where EASO, soon to be transformed into the EU Agency for Asylum, plays a key role.

For the past decade, EASO has been supporting all EU Member States in implementing the CEAS – through practical cooperation, training and when required, also through operational support. At its core, EASO is a centre of expertise on asylum and reception. EASO develops guidance, common country of origin information, country guidance, data analysis, recommendations, practical tools, operational standards and indicators and so on. These help Member States and their officials to actually apply the legislation in their work, and to do so in a similar way across the EU. Many practical tools have been developed relating to access to the asylum procedure, guidance on the Dublin procedure, guides to examining asylum applications, guidance on reception, on applicants with special needs and so on. There are more than 40 thematic networks set up, which bring Member State experts together to exchange best practices and address common challenges.

EASO is also tasked with developing the European Asylum Curriculum to enhance the training and professional development of EU asylum officials from all Member States. There are already some 30 curriculum modules available, between introductory and advanced ones, catering for specialisations that Member State officials might need. There have been 50,000 participations in EASO training since 2012. And in recent years, EASO has worked together with Member States to develop a competence framework for asylum and reception officials – in line with the European Sectoral

Qualifications Framework. A train-the-trainer system has been used to make this sustainable – for every trainer EASO trains, that person normally trains around 12 other officers in the national administration, using EASO's training modules and materials. This common training provides a common baseline for officials across the EU Member States and fosters a common understanding of the legislation and common competencies for its application.

Since 2015 EASO has been providing very significant operational support, especially in cases of disproportionate migration pressure, while asylum-seeker flows and pressures are not the same in all Member States. And in some cases, operational support from the Agency is needed in order for those Member States to be able to continue applying the legislation correctly.

EASO currently provides operational support in 7 Member States (Greece, Italy, Malta, Cyprus, Spain, Lithuania and Latvia). This year's budget for operations stands at EUR 72 million. In 2020, still in COVID-19 conditions, the Agency delivered approximately 160,000 workdays in all, and this year, EASO had already delivered 145,000 workdays by the end of August. To give an example, between January and August this year, EASO carried out the registration of more than 16,600 applications – if EASO were a Member State, it would rank 7th in terms of registrations performed.

Soon [probably January 2022], EASO will be transformed into the EU Agency for Asylum (EUAA) – this Regulation is the only one of the Commission's 2016 proposals to be finalised to date. The reinforced mandate will put the Agency in a position to provide even stronger support in the implementation of the CEAS.

3. Conclusion

As we have learnt in recent years, asylum and migration are a shared EU responsibility. Building a functional EU common asylum system is possible and indeed it should start with an adequate legal framework. But any legal framework – as comprehensive and balanced as it might be – needs to be properly and consistently implemented. Here the Agency comes into play to help translate the legal framework into a common reality across the EU Member States.

Context is also important. A Member State which suddenly receives thousands of applications cannot be expected to process them all fairly within six months. National governments must also ensure security and have social obligations to citizens. Pragmatism is an important ingredient. Again, the current CEAS accounts for these

realities. It is perhaps what makes the CEAS so unique when we consider that it brings together over 27 countries and was originally formulated in a different time.

Europe needs to remain a place of protection for those in need. We can be proud of a unique common asylum system that has been built in a relatively short timeframe, but there is also very evident room for improvement. The challenges facing this ongoing ambitious project are certainly many and are further complicated by the politicised and divisive nature of migration. Upgrading the system to the extent that it will be resilient and crisis-proof, ultimately allowing for the better management of migration, will require a lot of flexibility and positive political will. Only this kind of solidarity will overcome the unilateral, populistic actions and rhetoric of certain actors.

(Non-)participation and effectiveness of the Republic of Slovenia in the process of drafting EU legal acts

Mag. Alojz Grabner

Director of Chemicals Office of the Republic of Slovenia

In this paper, I present some experience and reflections on the ways and byways taken and the (in)effectiveness of Slovenia and its institutions in adopting, transposing and implementing the EU law. These reflections are based on some of the specific and outstanding cases of the Chemical Office of the Republic of Slovenia as the competent authority for European and wider international chemicals legislation that we have encountered in recent years. However, I would like to point out that the area I am going to discuss is not comparable to other areas of legislation and that we do not necessarily have the same experience as other authorities and ministries.

In the historical perspective of Slovenia's accession to the EU law, chemicals were one of the first areas where the alignment of the national legislation to the EU law started – this was mainly due to the needs and requirements of the Slovenian chemical industry. After Slovenia gained independence, the chemical industry also needed a European legal framework for its activities due to its close connection with the European Economic Area. In the second half of the 1990s we started to transpose European regulations in this field and encountered all the diversity and complexity of the European legal order. At the same time we were breaking new ground in the national legal order navigating through the many obstacles and unknowns in the national legal system which was in force at that time and not (yet) adapted to this process.

The regulation of chemicals is one of the most demanding areas of legislation in the European Union in terms of its content, scope and complexity. Not only because of the number and properties of chemicals in themselves but also because of the various functions they have in all spheres of our lives. As a result, with its requirements and effects, EU legislation affects many areas of our lives: health and environmental protection, the functioning of the internal market, the free movement of goods and services and international trade; some provisions also refer to international safety and security.

As such, the regulation of chemicals is integrated in many policies and sectors, and through its solutions it presents a delicate balance between the economic, social and technical aspects on the one hand and a broader public interest of protecting health and the environment on the other. In practice, these aspects are regulated by various institutions. In Slovenia, they are dealt with (more or less coherently and in a coordinated way) by various ministries, but this is also the case in the European Union. In the European Union, these aspects are spread across various directorates and their organisational structures, which are not well connected and coordinated. We have often witnessed uncoordinated and unrelated action at the EU level, when in many cases new, already adopted solutions have been sought or the same problems solved in different ways.

What are the legislative procedures in the field of chemicals?

In practical terms, the development of legislation in the EU can be seen as a two-stage process. For the reasons mentioned above and the generally high level of "chemical caution" in the EU the process is very open and transparent allowing for a broad involvement of all interested stakeholders.

At the first ("soft") stage the first proposals and the concepts of a new measure start to be developed[1]. Discussions and considerations mainly take place at expert level and several formats and channels for discussion and consultation are established. This part of the legislative procedure actually still allows for the equal and broadest possible participation of all stakeholders and is the easiest way to ensure the development of future regulation. It is a process where the basic frameworks and elements of future regulation are established, i.e. the answers to the questions what, what for, why and how. This stage is intended for and open to the widest range of stakeholders who can participate, give opinions, contribute data etc. And at this stage the final version of the legislation can still be easily influenced. However, in practice, this also means that the debate can be very demanding, especially from the technical aspect, and full of details, data and arguments, which means that it can only be followed by experts who are extremely knowledgeable in economic and financial (as well as legal) expertise. In this process, you can very easily get the impression that legislation is written by "the big for the big" and that there is no room for small companies in it. This view is also quite common among Slovenian companies and therefore the first stage is very often

[1] This measure could mean, for example, restricting the use of a certain chemical for certain purposes or in certain products, banning it completely in the EU, placing it on the lists with special regimes, restricting international trade and so on

unjustifiably ignored. Slovenian companies have difficulties in coping with it or believe that this stage is not important for them. In this way, many an opportunity is lost which cannot be made up at a later stage.

This stage is followed by various "real" legislative procedures (depending on the nature of the proposal, there are several possible procedures) which are both very rigid and very unpredictable due to their procedural rules. At this stage the legislative procedures are conducted by the European Commission, Council and Parliament. These procedures take place through long and demanding negotiations which can sometimes turn certain concepts and proposals upside down "in the spirit of compromise" or even change them completely at the last minute. Another problem with this second stage is that it takes place at the very general (political) level, where there is no room for individual member states and their interests (which do not usually speak the same language anyway), let alone the consequences for regions and businesses. At the second stage, there is not much room for detailed technical discussions and arguments. However, it is not unusual for stakeholders to become aware and respond only at this stage and then propose important changes, even if it is already (too) late for them.

How do we manage this conglomerate?

At the first stage, the most important role is played by the national competent (expert) authorities that participate with their experts in technical and expert discussions in various committees; they are involved in the earliest discussions on proposals and may represent and give their own opinions on an equal footing with other stakeholders or present assessments and views (sometimes) provided to them by our external partners and stakeholders. Over the years, the Chemicals Office of the Republic of Slovenia has developed a good practice to keep its stakeholders regularly informed of all such procedures, to encourage them to engage in discussions or to provide relevant information for our members in working bodies at the EU level.

The legislative procedure continues to be conducted via the EU portal, an information system that collects thousands of documents related to new legislative proposals. For each dossier, a key ministry or body is appointed in the EU portal which becomes the coordinator and is in charge of the conduct of the further procedure. The procedure is supported by expert (working) groups in which not only the key ministry participates but also the ministries competent for specific issues related to the proposal. During the examination process they are involved where appropriate (and within their respective

tasks and competences) in the process of drafting national responses (positions, guidelines, etc.) represented by our representatives in the procedures in Brussels.

The process of drafting national responses is nothing special in itself and should, in all its elements, follow the objectives, starting points and principles for drafting legislation set out in the Resolution on Legislative Regulation adopted more than a decade ago. In this process the State (the ministries and other competent authorities) must analyse the proposed legislative act and assess its impacts: technical and substantive, economic and social (consequences for the economy, employment rate, competitiveness), environmental, health and regulatory (competences related to the implementation and supervision, staffing requirements) as well as financial (burden on the budget) impacts. On the basis of this assessment, the State decides on its own interests and prepares the starting points for the actions of its representatives in the EU institutions which are approved by the Government and/or the National Assembly before being submitted to Brussels. Without a doubt, it can be said that a decision by which a country takes a position on an EU legislative act is comparable in terms of importance and weight to legislative decisions in the National Assembly.

How does this look like in practice?

The basic challenge we have been faced with from the very beginning is the aforementioned slowness, lack of interest and unresponsiveness of our partners in the preparatory phase.

In the legislative procedure on the EU Portal we often find that dossiers are assigned in an unclear and non-transparent way to the key authorities (where, as a rule, the assignment already defines the subsequent responsibility for implementation). In this step, we have so far several times observed the rule that the key authority is determined by the subject matter to be regulated and not by the purpose which is intended to be achieved through the proposed legislation, and by the method introduced for doing so. In the case of chemicals, this approach is rather common: quite a few dossiers could have been assigned to the Chemical Office simply because they regulated chemicals, even though the Chemical Office had neither the competence, the knowledge nor the capacity for the purpose and way of implementation.

The next challenge is international cooperation and support, which is sometimes too weak or is non-existent. In this context we often rightly ask ourselves whether the analysis of a proposal, the preparation of national positions and the implementation of

the adopted proposal are team work in the national interest which requires a comprehensive approach and the cooperation of all ministries or merely the responsibility of a single body. Every new legislation brings certain consequences for the Slovenian industry, new tasks for the competent authorities and an inevitable need for people to implement and supervise it, which demands a serious and responsible consideration of the obligations of the State, its competent bodies, human and financial resources. In this context, we are often confronted with the absence and passivity of key decision-makers on these very issues. In preparing national responses, we, the "operational actors" usually do our best and look for appropriate solutions to effectively implement new tasks, while state-building ministries keep on the safe side and only tell us what we have done wrong and what we cannot do. At this point, we can ask ourselves the following (rhetorical) question: will (if ever) Slovenia reject a legislative proposal in Brussels on the basis of a reasoned and substantiated assessment by any of the ministries that capacities and financial resources will be required for its implementation which, however, cannot be provided?

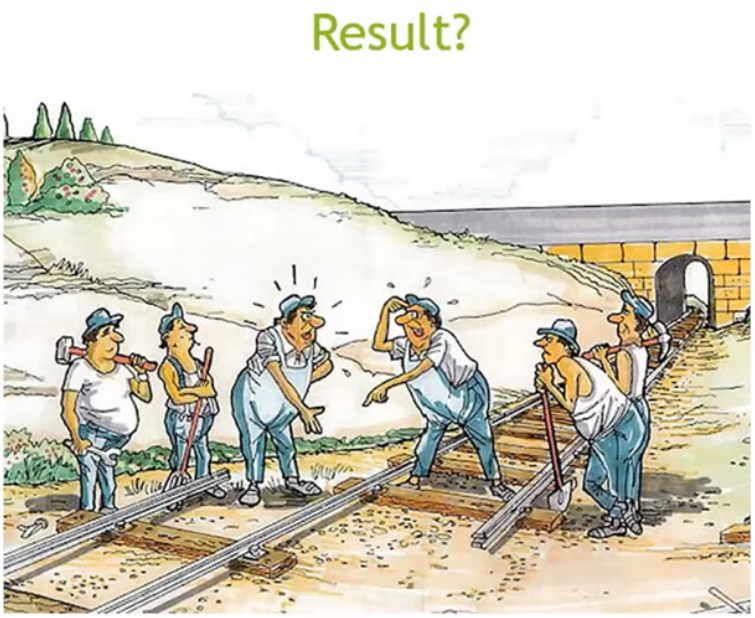
What are the consequences of such work and poor cooperation?

We spend a lot of time discussing who will take over, adopt and implement certain legislation. This shifting of responsibilities, in extreme cases, sooner or later results in missed deadlines and procedures before the European Commission, which are corrected at the last minute by quick, minimalistic and bad solutions, by way of which we appear to "fulfil" the assumed commitments at first glance, but we do not go into the depth and expertise of the subject matter itself.

We resort to vague and ineffective improvisations, which in reality are no solution at all. One of the most common forms of this improvisation is the constant imposition of new tasks and assignments given to the same authorities with the naive expectation that the authorities will reallocate their resources and "optimise" them forever, in the sense that "this will work out somehow". Underestimating the role of professional bodies and neglecting their needs and neglecting supervision ultimately leads to a justified impression of a virtual, "paper" state, where everything is written down but nothing works. Such legislative Potemkin villages bring no results and no effect; they only undermine citizens' confidence in its functioning of the State and, what is even worse, in the functioning and legal order of the EU in general.

And last but not least, in this way, we sometimes also lose opportunities for ourselves. This is because EU legislation is not (always) only a burden on staff and the budget,

but can also be a source of revenue. With a little less bureaucratic rigidity and pragmatic flexibility, we could build a solid professional infrastructure at national level for the implementation of tasks financed by the European industry and thus turn the initial apparent costs into a source of revenue very quickly.



Lost in transposition?

Mag. Katja Božič

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The legal framework of the European Union (hereinafter referred to as: EU) certainly affects some of the specifics of the drafting of regulations in the process of transposition and implementation of the EU legal acts into national regulations, although the basic starting points for the drafting of regulations are the same for all.

- Between the national and the European

A typical national regulation is the result of the creation of law in the national legal framework and the use of national nomotechnics. What regulations that transpose or implement the EU legal acts have in common is that they, in a way, have two phases: the first phase takes place at the EU level and is subjected exclusively to the legal framework and nomotechnics of the EU.

The transition from the EU to the national law is the neuralgic point of this article. That is the second phase, which enables the EU legal acts to come to life in a Member State through transposition and implementation, and it takes place at the level of each individual Member State. The context in terms of scope and manner of regulation for this phase is also dictated by EU law.

In the drafting of a standard national regulation and a legal act at the EU level, the rules are clearly set out, and the different legal systems do not overlap, as is the case with the transposition and implementation procedure.

- Between ideas and norms

The predominant rigidity and formalism is immanent in law. It strives for uniformity and stability and its legitimacy is based on the democratic principles of acceptance and general contextual consensus. Law should be proportionately equal for all similar situations, and above all it should be predictable and reliable in terms of legal certainty. It originates from relationships between people and it grows from this. This means that

not only clarity and transparency, but also a feeling for those to whom regulation is addressed and their interaction with the legislator must be built into legal acts.

The drafting of regulations must focus on the "story" and the many details that provide it with structure, foundation for a good dramatic arc, and support it in terms of content and keep it consistent. A good regulation, like any good story, requires a good knowledge of the background and several perspectives being taken into account.

When drafting a national (at least implementing) regulation, the majority of the procedure is usually concentrated in one or two competent bodies, the trail of activities is transparent, and the same experts usually participate in the entire procedure.

The involvement of a Member State in the procedure of drafting legislation at the EU level means the possibility of more or less active monitoring and responding, i.e. participation in the creation, and thus the possibility of influencing the quality of the regulation as early as the initial phase. An EU legal act is originally drafted in a different social environment, by predominantly different experts, taking into account several diverse policies, with different approaches than if the regulation was drafted entirely at a national level.

The manoeuvring space of a Member State in creating the EU law is relatively limited, and the normative outcome of transposition cannot be significantly tailored at a national level without risking breaches of EU law. The substantive starting point of a regulation is relatively clear, and the field of transposition and implementation at a national level is accordingly limited – the same content must be regulated in a very similar manner at the same time in the different social environments of the 27 Member States.

- Between trust and trust

A departure from the legislator can lead to a form of democratic deficit in the actual sense: a feeling of non-involvement in the process of drafting of a regulation and, consequently, poorer identification with such law, which is very important for the effect of law.

Trust in law, in legal security and in the rule of law is the essential foundation, a quality that is supposed to be immanent to the attitude to law that people perceive as legitimate, i.e. what is, to put it very simply, acceptable and justified. Trust in the law actually means trust in people, because people are the ones who write the regulations, and trust decreases as the distance from the "original" legislator grows.

By joining the EU, a Member State not only takes over a number of the EU acquis, but also nods to the fact that rights and obligations are also governed by EU law, some of them even directly or at least with the direct effect that national courts must rule not only in accordance with national law, but also significantly with regard to the EU acquis and the case law of the Court of Justice of the EU. If we do not perceive the EU law as "our" law, we do not indirectly count on all the rights and obligations that stem from it. On the one hand, we quickly accepted the erased borders and the common currency with the EU membership, while the adoption of the EU law as our own is a process that requires more commitment, reflection and, above all, an irrational sense of internalisation as a result of many factors. The story about trust in EU law is probably similar to the story about trust in national regulations, in which important additional factors certainly include at least the geographical factor of decision-making, poor general knowledge of the functioning of the EU, the complicated and relatively less transparent system of EU legal acts that may be incompatible with the national system and, last but not least, the huge EU bureaucratic apparatus.

- Between regulations and good regulations

Regulations are not created only by jurists, and even less so are they their predominant users, so they must be drafted in such a way that each individual can understand them.

The language of a good regulation is supposed to be precise for the purpose of being unambiguous (this does not necessarily mean intelligibility), without colours, emotions, ambiguities, so unfortunately also without much by way of juicy and beautiful words, without synonyms. As regards the accuracy and clarity of a regulation, a Member State can make a significant contribution to the quality of standardised content as part of the transposition of EU legal acts (i.e. in particular as regards directives). Sometimes, however, the inaccuracy and ambiguity of an EU legal act is not accidental, and the national regulation must also carefully take into account the context so that it is not unduly clearer.

Good regulations should be simple, although the possibilities for simplification in the transposition and implementation procedure are limited to the approach of the original EU legal act.

A good regulation must anticipate who it is addressed to and present the content to them in an understandable way. Thinking about how to find a detail in the flood of law, if they were looking for it as the addressee, should always be the starting point for the drafter of the regulation.

If Member States wish to draft regulations in the procedure of transposition and implementation of the EU legal acts in accordance with the basic principles of drafting of good regulations, they must therefore respect the original regulations and cooperate with each other as regards national specificities. It depends on the intertwining of rational and irrational factors, including good nomotechnical skills in a broader and narrower sense, whether a regulation is constitutional and lawful, understandable, clear, unambiguous and enforceable – that its actual reach is as intended by the legislator. A good approach to drafting regulations allows for the ideal of the rule of law to be approached more closely – ensuring the best possible legal certainty and thus trust in law. The predictability and reliability of law, of course, always reflect the quality of the work of the people who create it.

- Between theory and practice

The methods of transposition and implementation of EU legal acts by means of national regulations constantly fluctuate between theory and practice, so it is all the more inevitable to have a good understanding of the coexistence of two normative frameworks – the national and the EU frameworks. The desire for completeness and self-sufficiency of a national regulation (the "all in one place" principle) has long been unattainable in areas covered by EU law. The norm must in any case remain the norm with its prescriptive (or prohibitive) nature, and appropriate instructions, manuals and similar non-normative aids may be prepared to assist the addressees of the regulation.

The evolution of the institutional structure and "architecture" of the EU and, consequently, the nature of individual EU legal acts (the "unification" nature of directives, the "harmonisation" nature of regulations) has been constant, and the scope of fields and content and the accuracy of standardisation is growing, which means that nomotechnical approaches to standardisation at a national level in the transposition and implementation of EU legal acts must be adapted to this and improved. Nomotechnics still remains a living tool that, given the constant changing of various variables, repeatedly looks for overlapping sets and justifies stubborn specificities when two legal orders – national and EU – meet. Some nomotechnical differences between the two concepts, such as different structures of the regulation or specific ways of quoting, can certainly be operationally resolved. However, it is more difficult to overcome some of the conceptual dilemmas caused by the cacophony of regulations and the evolution of EU law.

When transposing directives, the national legislator can in principle regulate many things "in the spirit" of the directive, and the field of content lost (or gained) through

transposition is potentially so much wider. The content is subjected to the risk of so-called gold-plating or assessment from the aspect of the adequacy of transposition.

When implementing regulations, a Member State is usually more limited in terms of content and scope of standardisation, as they are in principle directly applicable, while some effects arise only with standardisation at the national level.

However, directives are not always just directives and regulations are not always just regulations. In any case, a Member State must assume active responsibility and ensure the clearest possible transposition and implementation, although this often goes beyond theoretical frameworks. Thus, some directives require transposition far from standardisation in the spirit of the directive, if there is very little manoeuvring space in transposing them into national law due to extreme precision (e.g. in annexes). When it comes to content that is regulated in such a careful manner, losses in transposition must be kept to a minimum, which is why the possibility of normative is lost and so is the connection between the national legislator and the participants in the national procedure of the drafting of regulations.

On the other hand, some EU regulations affect a large number of other EU legal acts, and a Member State sometimes has to take on a good chunk of standardisation despite theoretically having minimum powers. A Member State must be even more precise in the implementation than in the transposition, as these are areas of so-called unification, where the content is regulated at the EU level with a high common denominator for all Member States. In doing so, a Member State must take into account the challenge of inadmissible double standardisation, and in particular it must bear in mind the transparency of the system and the addressee, who should be able to apply a combination of such a "systemic" regulation, all related EU legal acts and national implementing regulations. The chances of such a cluster of regulations losing effectiveness are high, so in such cases Member States must cooperate and have the support of the European Commission to achieve the highest possible degree of uniformity.

- Between 27 transposition stories and implementation and 27 frameworks of creativity and innovation

Along the way from the drafting of an EU legal act to its implementation in practice, there can be as many different stories of transposition and implementation as there are Member States. These methods constantly fluctuate between theory and practice, while they should ensure the highest possible degree of "authenticity" of the final norm.

Member States themselves take care for the nomotechnical rules in question, which can lead to relatively diverse approaches.

At the EU level, however, a number of mechanisms are in place to contribute to the highest possible level of harmonisation, such as, for example, notification, declarations of conformity, correlation tables, support from the European Commission with, for example, field groups of experts and so-called soft law for individual fields.

So where, if at all, is "creativity"? Creativity always happens in the procedure, i.e. between the "cause" and the "consequence", which is where all possibilities for progress reside. These possibilities are greater at the national level, especially regarding regulations in which a Member State can actually standardise more loosely, i.e. in the transposition of directives, where a regulation is finally born only with its transposition, while in the implementation the regulation already causes most of its effects upon the adoption at the EU level.

Therefore, if the "loss in transposition" (or implementation) is literally content-related, it may violate the EU law and, in a broader sense, also contain either nuances that occur consciously or less consciously, or perhaps terminological noise or errors that may undermine the results of an exceptionally accomplished system for drafting different language versions at the EU level. Such losses in 27 different procedures concerning the same content may be justified or less justified, and sometimes they are about differences in the style of the Member States. However, in the event of insufficient activity of a Member State in procedures at the EU level, this may also lead to a loss of legitimacy in law that is created in this way. The rules for drafting of regulations are not a bureaucratic and unchangeable corpus, and creativity and new ideas are also possible if a broader and more active view is taken, of course, within the framework allowed by the context and objectives of the legislation.

- Between ideas and good regulations

And if big ideas seem impossible in these stories in reality, that does not mean we should give up small ones. Actual people are involved in the drafting of regulations, and actual people can also advocate for specific improvements. Sometimes we need a lot of useful uselessness and a lot of solutions (including bad ones) to find the right one. This way, we would not only lose and get lost in the transposition, each of us in our own way, but also find something good and create better solutions (while being connected). And draft even better regulations in the areas regulated by EU law, in particular with more agile and active cooperation – with the idea that there is someone on the other side of every norm who needs to understand and apply it.

Cooperation between the European Commission and the Member States in the transposition and application of EU law

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Former Deputy Director-General of the Legal Service of the European Commission

Why is this an important topic? Essentially because of the institutionally shared responsibility of ensuring compliance with EU law – the European Commission (hereinafter referred to as "the Commission") has a special responsibility of ensuring the correct implementation and application of that law, but Article 4(3) makes it clear that the Member States also have definite obligations in relation to "ensuring fulfilment of the obligations arising out of the Treaties" or from legislation adopted by EU institutions. In line with the principle of sincere cooperation set out in Article 4(3), the Commission and the Member States should, in full mutual respect, assist each other in carrying out the tasks which flow from the Treaties, including the correct implementation and application of EU law.

The Commission's task as Guardian of the Treaties is to ensure effective compliance with EU law. In that sense, infringement procedures are a remedy of last resort; the Commission recognises the importance of using methods of communication and persuasion at an early stage in order to achieve compliance without having to resort to infringement procedures. In its Communication "EU law: better results through better application", the Commission committed itself to strengthening its partnership with the Member States.

A number of tools are used in this context: guidance documents, implementation plans, expert groups, explanatory documents, providing training, organising workshops and holding package meetings. Some of these tools, such as guidance documents, aim to prevent infringements arising in the first place, while others are used in parallel with infringement proceedings in order to bring an infringement to an end more quickly and to avoid having to bring the matter before the Court of Justice.

As examples of guidance documents, the Commission has produced guidelines on most areas of the Common Agricultural Policy and on many aspects of environmental

law. For instance, it recently updated a booklet explaining the rulings of the Court of Justice on the Environmental Impact Assessment and Strategic Environmental Assessment Directives. This will help Member States apply the directives correctly as knowledge of EU case law is necessary for the understanding of the directives.

In the area of employment law, the Commission has produced an Interpretative Communication on the Working Time Directive, and it updates this communication on the Commission's website after each new Court judgment.

- Meeting-based cooperation mechanisms

Intensive use is made of committees, which provide an important forum to discuss and clarify rules established in EU legislation. In the agricultural sector alone, the Commission held 76 committee meetings and 66 meetings of expert groups with the Member States during 2020, mostly online. Other areas in which contact committees provide the Member States with an opportunity to exchange views and obtain advice on the correct transposition and application of EU law are those of audio-visual media services and copyright. In the very different area of the social security of migrant workers, there is both an Administrative Commission where the national authorities meet each other and the Commission to share information on the application of the EU rules on social security and to discuss difficulties of interpretation, and a network of experts in social security law from all the Member States, which is often consulted by the Commission on tricky questions of interpretation and development of the law, and which has a high level of authoritativeness due to its degree of expertise. I know from my own experience that these bodies often contribute to the solution of practical problems of misapplication of the rules through discussion in a cooperative atmosphere and as a result of the trust which has been built up over the years in the expertise provided, not only by the Commission but also by the members of the expert group.

- Transposition workshops – these are used where particular difficulties of transposition are anticipated

In the area of financial services, the Commission organises transposition workshops to help the Member States ensure that they had fully understood the intricacies of implementing the Capital Requirements Directive, the Bank Resolution and Recovery Directive, the Covered Bond Directive and the Investment Firms Directive. There were two workshops last year on the Bank Resolution and Recovery directive alone, and afterwards the Commission published two Notices with answers to questions

submitted by the Member States during the workshops to help them transpose the Directive in question consistently and accurately.

Workshops are also used where difficulties of application are experienced even though a directive has already been transposed for some years, e.g. in 2020 the Commission organised three expert workshops on the implementation of the Child Sexual Abuse directive. Topics explored during the workshops included technical solutions for the prevention of such abuse.

- Implementation plans

These are another tool to not only help the Member States transpose directives correctly, but also to apply provisions of a regulation in a satisfactory manner. A plan identifies the particular challenges the Member States will face in either case and provides a wide range of tools to help them implement the EU legal provisions in question, such as guidance documents, expert groups and dedicated websites.

- Package meetings

These are usually organised to discuss open infringement cases covering a whole sector, e.g. environmental emissions or water quality, but they can also be held independently of an existing infringement procedure, where problems of application are widely perceived and where it is thought that practical discussions, e.g. on how to better enforce the provisions of a directive, might help to avoid infringement proceedings being opened.

- Other methods of encouraging compliance

Audits of the Member States' control systems: this method is regularly used in the agricultural area. The idea is to check whether procedures are in place in the Member State which are capable of ensuring the correct application of EU rules, and notably that EU money is being channelled to the right beneficiaries and under the appropriate conditions. If weaknesses are found in the control systems, audits can result in recommendations and financial corrections. Where systemic deficiencies are found, the Commission requests that remedial action plans be developed and ensures their follow-up. A suspension or reduction in payments to the Member State may follow if an action plan is not implemented. Sixteen action plans on rural development were adopted in 2020. Audits of the Member State control systems are also carried out in the fisheries sector, and action plans for improvement are agreed upon and then closely monitored.

- Training

Training courses are organised for different actors within the Member States, according to the circumstances. During 2020, a pilot training scheme was organised covering all aspects of the Zoo directive. This training was directed at the Member State authorities, zoos and their associations. In the past, training courses were frequently organised for judges and practitioners of EU law. No doubt they will be resumed when the health conditions permit.

- EU Pilot

This is a procedure for cooperation between the Commission and the Member States on issues related to potential non-compliance with EU law. The objective is to help resolve possible infringements swiftly and effectively and, where possible, without having recourse to infringement proceedings. EU Pilot is not an automatic or compulsory stage before launching infringement proceedings. The Commission position is that it is only to be used where it seems useful in a given case. It should not add a lengthy step to the infringement process – it needs to lead to a solution quickly. The Commission submits its concerns to well identified contact points in the Member States which try to clarify the national legal position and find a solution to the problem raised. This procedure is very helpful for the Commission in cases when its factual information is incomplete or where the problem seems to be one which should be able to be resolved swiftly and informally. Problems may sometimes arise because of local actions of which the central government is unaware. Or the Commission may not know all the national authorities which may have a role in a given situation, and the central authorities can help clarify who is responsible for what. Or it may seem likely that a particular issue will be more easily addressed through an informal approach, e.g. reporting obligations or the quality of reports.

There is generally a ten week timeframe for the Member State to respond to the Commission's request, and a further ten weeks (plus translation time) for the Commission to assess the Member State's response. Shorter periods and extensions are sometimes provided for. Further exchanges may follow, but if a file is still open after nine months, the Commission assesses whether to close the file, proceed to a letter of formal notice or continue the dialogue for a limited time.

- Infringement procedures

This category may sound more like confrontation than cooperation, but in fact the lengthy process involved allows for multiple exchanges and opportunities for both sides to better understand the point of view of the other. It is quite often the case that either a Member State accepts that its legal situation is not satisfactory after an initial exchange of arguments or that the Commission realises, having studied the reasoning put forward by the Member State, that its initial impression of the Member State's legislation was not accurate and that it needs to revise its position. Or simply that the logic of its own arguments is not as strong as it had supposed. I recall a case against Spain in which the Commission initially maintained that the Member State in question did not carry out enough fisheries controls. This was certainly true, but the question was: how many controls would suffice? The Spanish authorities pointed out that no amount of resources invested in controls would ever suffice to eliminate infringements of the EU fisheries rules by fishermen. It followed that the mere existence of such infringements could not form the basis of a case against the Member State. The Commission services realised that this was a strong argument and decided not to proceed with the case but instead tried to work with the Member State to agree on a methodology for determining what types and quantities of controls would be appropriate in the given circumstances.

In any case, the passage of time gives a Member State an extra opportunity to put matters in order. As you all know, there is first a letter of formal notice, followed by a reply, a Reasoned Opinion, and a further reply. By far the majority of infringement cases are closed before reaching the Court of Justice, either because the Member State has brought its legislation in line with EU requirements or because the Commission has understood that it should not go further with the case. Sometimes this is because it finally accepts that there is no infringement, but more often it is because, while an infringement technically exists, it finally realised that the infringement is of little practical or economic significance.

- Article 260(3)

Apart from the usual exchanges, evolutions of position and occasional meetings of minds that occur in the natural course of an infringement procedure, there have been particular developments in the specific context of Article 260(3) which governs infringement procedures concerning the failure of a Member State to communicate the measures necessary to transpose a directive. As you all know, Article 260(3) allows the Commission to propose to the Court of Justice, when it refers such a case to it, to

impose either a periodic penalty payment or a lump sum payment on a defaulting Member State. Unlike in the case of other infringements, the penalty can already be imposed by the first judgment by which the Court finds the Member State to be in default of its obligations. There is no need for the Commission to return to the Court and initiate a second case in order to obtain this result. The greater pressure which this system puts on the Member States to speed up their legislative procedures in order to fulfil their EU obligations has of course led them to formulate various ingenious arguments with a view to diminishing the perceived threat posed by Article 260(3). Notably, they argued that the sanction mechanism could only apply in the case of a total failure to transpose a directive. It would thus not apply where a Member State had transposed, say, half of a directive's provisions. The Court of Justice did not get an opportunity for some time to deal with this argument. The efficacy of Article 260(3) in galvanising the Member States into doing what was necessary in order to prevent a case proceeding to final judgment resulted in over 70 cases of this type being settled during the litigation procedure. It was only on 8 July 2019, in the famous case C-543/17, Commission v Belgium, that the Court of Justice finally managed to put its mark on this area of infringement law. This became possible because, by the time of judgment, Belgium had not managed to notify all of the measures necessary to transpose the directive in question. It had in fact notified most of them, but there were still some gaps concerning the region of Bruxelles-Capitale. The Commission therefore did not withdraw this case as it had done with all of the others until then, giving the Court the opportunity to issue a judgment and to settle the long-running dispute about the applicability of Article 260(3) in the case of partial non-transposition.

The Court confirmed the Commission's position that the provision applied also in such a situation. It stressed that the objective of Article 260(3) would not be met if the sanction scheme could be activated only where the Member State in question had failed to notify any transposition measure at all.

The Court's judgment also provides important clarifications on the respective roles of the Member States and the Commission in identifying the provisions of national law that correspond to those of a directive to be transposed. In two separate passages of the judgment, the Court emphasises that the terms "obligation to notify transposition measures of a directive" referred to in Article 260(3), which are the centrepiece of the provision, include the Member States' obligation to disclose sufficiently clear and precise information on the measures transposing a directive. This implies that a notification will not be complete if it does not include a clear indication of which national provision the Member State considers to transpose each obligation laid down by a

directive. Once that notification has taken place, if necessary accompanied by a table of equivalences, it is for the Commission to establish, if it intends to seek an order that the Member State concerned pay a financial penalty, that certain transposing measures are manifestly lacking or do not cover the whole national territory of the Member State concerned. However, it is not for the Court, in proceedings brought under Article 260(3), to examine whether the national measures notified to the Commission correctly transpose the directive. Hence, where the Commission has received sufficiently clear and precise information from a Member State concerning the manner in which it claims to have transposed a directive, it (the Commission) may bring an infringement action under Article 260(3) only if it can identify a manifest transposition gap. In other words, it can act only when it is quite clear that, in spite of the indications given by a Member State, no corresponding transposition measure exists for a given obligation laid down by a directive. Where, in contrast, a corresponding provision exists but is unsatisfactory, that issue has to be dealt with under a normal Article 258 infringement procedure.

This judgment not only put an end to a long-running dispute between the Commission and a number of the Member States, it also clearly explained a certain aspect of the cooperation which must take place between the Commission and a Member State in a situation of alleged non-transposition, whether complete or partial. This is very useful in terms of clarifying the respective roles of the Commission and the Member States and the dividing line between actions for non-communication of transposing measures and proceedings concerned with poor transposition. It remains to be seen whether correspondence tables will finally be accepted by the Member States as the most practical method of identifying national provisions corresponding to each obligation laid down by a directive. No doubt that this is the next frontier in the development of the necessary cooperation between the Commission and the Member States which is so necessary in order that EU law may be correctly applied throughout the territory of the European Union.

Enforcement of EU soft law: between virtues and flaws[1]

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In this article, I discuss the topic of soft instruments of European Union law. In a considerable part I rely on the work and findings of the European Network of Soft Law Research (SoLaR), an international research group in which I participated in studying soft instruments and their implementation in the European Union Member States.[2] I start the article with a few starting points on soft law of the European Union as a special concept within its normative regulation. I follow this up by noting its strengths and weaknesses and then I move on to the findings regarding the implementation of soft instruments of the European Union in the Slovenian legal system, which are the result of work on the mentioned research project.

Soft law has long been dividing researchers and practitioners. Its existence had even been challenged in the past. To put it differently, words that describe soft law and its nature can in fact be very hard. Klabbers, for example, noted its redundancy years ago[3] and – in particular in the context of the EU – its conceptual awkwardness and even undesirability.[4] A binary view outlines law as black-and-white or white-and-black, depending on the perspective, but it is crucial that it does not detect shades of colour. This view or approach does not follow the realistic situation and it is worth agreeing with those who claim that a more balanced, more moderate view is the one that "best explains the reality".[5] The reality is that soft law of the European Union has long been part of its normative regulation and is therefore worth studying, drawing attention to, trying to understand its dimensions, thinking about its role in the regulation of the

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[1] The views expressed in the article are not necessarily the views of the institution where the author is employed.

[2] For details, see Eliantonio, M., Korkea-aho, E., Ştefan, O. (eds.) EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence. Oxford: Hart, 2021.

[3] Klabbers, J. The Redundancy of Soft Law. Nordic Journal of International Law, 65 (2), 1996, pp. 167–182.

[4] Klabbers, J. The Undesirability of Soft Law. Nordic Journal of International Law, 67 (4), 1998, pp. 381–391.

[5] Peters, A. Soft Law as a New Mode of Governance. In: Diedrichs, Udo, Reiners, Wulf, Wessels, Wolfgang (eds.), The Dynamics of Change in EU Governance. Cheltenham, UK, Northampton, MA, USA: Edward Elgar, 2011, p. 23.

European Union and, consequently, understanding the processes of its enforcement at the level of a Member State within its legislative, judicial and executive branches of power.

Statistical representation is always welcome as an indicator of the existence of a phenomenon. For the needs of the research project, Hofmann listed 37,175 legal acts in force on the EUR-Lex website, including 614 recommendations and 417 opinions.[6] Soft instruments therefore do not represent the majority of acts adopted in the European Union, but they should not be overlooked due to the effects they create. Recommendation and opinion are two forms explicitly mentioned in Article 288 of the Treaty on the Functioning of the European Union. In addition to recommendations and opinions, there are many other forms of these instruments, such as communications, instructions, resolutions, rules of conduct, and action plans. This is why these instruments are elusive and difficult to find. In the range of manifestation forms, the difference between the interpretative and decisional soft instruments of the European Union is outlined in the doctrine, and both of them are closely linked to hard law of the Union, and the steering instruments, in which such a connection is lacking.[7]

Soft law of the European Union is therefore fairly firmly embedded in the functioning of the European Union, although the statistics shows that it does not displace the traditional "hard" law. It coexists in the normative regulation of the European Union, it is the crossroads of law and politics and the point of collision between legal certainty, trust in law, predictability, democratic legitimacy, including transparency, on the one hand, and flexibility and efficiency, on the other.

The flexibility of soft instruments already deviates from hard law at the level of definition, as hard law is characterised by appropriate integration in the hierarchical structure of the legal order. The definition of soft law is not completely uniform, either. Terpan says “that it is an abstraction that helps encapsulate the complexity of the European legal order while placing law in the wider social and political context".[8] Peters uses the terminology of astronomy; soft law is "in the penumbra of law" because it also has specific legal effects "not merely political or otherwise factual effects".[9] Legal

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[6] Hofmann, A. Types of EU Soft Law and Their National Impact. In: Eliantonio, M., Korkea-aho, E., Ştefan, O. (eds.) EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence. Oxford: Hart, 2021, pp. 41–42.

[7] Senden, L. Soft Law in European Community Law. Oxford: Hard Publishing, 2004, pp 118–119. This typology is summarised by Hofmann, *supra* op. 6, pp. 42–43.

[8] Terpan, F. Soft Law in the European Union – The Changing Nature of EU Law. European Law Journal, 2015, 21 (1), p. 72.

[9] Peters, A. Soft Law as a New Mode of Governance. In: Diedrichs, U., Reiners, W., Wessels, W. (eds.), The Dynamics of Change in EU Governance, Cheltenham, UK, Northampton, MA, USA: Edward Elgar, 2011, p. 23.

texts can be of harder or softer content. Snyder wrote as early as 1993 that soft law is made up of rules of conduct that have no legally binding force but may nevertheless produce legal and practical effects.[10] Although the legal and practical effects are often blurred, as Eliantonio, Korkea-aho and Ştefan point out, the legal effects usually mean a change in rights and obligations, while the practical ones can lead to changes in behaviour and practice and can consequently lead to policy change.[11] Theory emphasises a number of characteristics that can be attributed to soft law: virtues such as efficiency, fast adoption and the already mentioned flexibility, and weaknesses such as a lack of transparency, disputable democratic legitimacy, the presence of detrimental effect on institutional balance, and in certain places a lack of clarity and a questionable possibility of judicial review.[12] The European Union law has an extensive and intensive effect on national legal systems, including the Slovenian one, and with its weaknesses and strengths it is also gaining ground in the Slovenian legal order.[13]

The empirical part of the article refers, as mentioned, to the work of the international research group that included an interdisciplinary group of researchers from six universities in six Member States, which included in its three-and-a-half-year study the application of soft law of the European Union in ten Member States. Due to the large presence of soft instruments, it focused on four European Union policies: environmental law, social policy, competition and state aid and financial regulation. In the remainder, I limit myself to certain findings regarding the enforcement of soft law in these areas in Slovenia.[14]

With regard to the legislative branch of power, the research has shown that legislative acts usually do not mention soft instruments of the European Union. What should be noted is the possibility of tacit transposition of a soft instrument into legal act, with the consequences being obvious: at the national level, the "soft" content of the European Union becomes part of a legislative act, i.e. binding law. A well-known example that gained European proportions in the case *Kotnik and Others*,[15] derives from the field of

[10] Snyder, F. The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques. Modern Law Review, 56 (1), 1993, p. 32.

[11] Eliantonio, M., Korkea-aho E., Stefan, O. Introduction. In: Eliantonio, M., Korkea-aho, E., Ştefan, O. (eds.) EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence. Oxford: Hart, 2021, pp. 2–3.

[12] Eliantonio, Korkea-aho, Ştefan (ed.), *supra* op. 2.

[13] For more detail see Avbelj, M., Vatovec, K. The Uneasy Reception of EU Soft Law in the Slovenian Legal Order. In: Eliantonio, M., Korkea-aho, E., Ştefan, O. (eds.) EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence. Oxford: Hart, 2021, pp. 219–232.

[14] For more detail see *ibid*.

[15] See the Order of the Constitutional Court of the Republic of Slovenia in the case No. U-I-295/13 of 6 November 2014 (Official Gazette of the Republic of Slovenia, No. 82/14) and Decision in the same case of 19 October 2016 (Official Gazette of the Republic of Slovenia, No. 71/16), ECLI:SI:USRS:2016:U.I.295.13; and the judgement of the Court of Justice of the European Union in the case Kotnik and Others, C-526/14, of 19 July 2016, ECLI:EU:C:2016:570.

the Slovenian banking legislation. With the adoption of amendment to the Banking Act (ZBan-1L), certain content of the Banking Communication (related to the write-off or conversion of eligible bank liabilities).[16]

Regarding the reference to soft instruments of the European Union in the decisions of Slovenian courts, it is worth recalling the already mentioned case *Kotnik and Others*, in which the Constitutional Court first said: "It is impossible to deny the indirect legal effect of the Banking Communication on Member States, as the Communication represents important information for the states as to how the Commission will carry out its competences in the field of the assessment of the admissibility of state aid."[17] It continued by saying: "Therefore, for the Constitutional Court, the content of the Banking Communication is not irrelevant. In assessing the constitutionality of the ZBan-1, the Constitutional Court also interprets this Act; in this respect, the content of the Banking Communication, which is the actual substantive basis for the challenged provisions of the ZBan-1, must also be taken into account".[18] References to soft law of the European Union can also be found in the decisions of regular courts. The frequency of references to these instruments depends on the field of law. In some areas (e.g. competition law) there are more, and in some (such as environmental protection) there are fewer such references.[19] Sometimes, despite the reference to soft law of the European Union, the court's argument follows that these are instruments that are not legally binding, so national courts are not obliged to apply them in a specific case.[20] The role of these instruments in judicial reasoning varies. It ranges from the explicit denial that such an instrument is applied, through its interpretive value, to judges taking into account the content of a soft instrument of the European Union.[21] Sometimes such an instrument serves the judge as an additional argument that directs them to a particular decision that is otherwise based on hard law.[22]

Compared to the legislative and judicial branches of power, the country's administrative apparatus seems to be the most willing to accept soft law of the

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[16] Communication from the Commission on the application, from 1 August 2013, of state aid rules to support measures in favour of banks in the context of the financial crisis (hereinafter referred to as: Banking Communication). OJ C 216, 30 July 2013, pp. 1–15. Also see Avbelj, Vatovec, *supra* op. 13.

[17] Decision of the Constitutional Court of the Republic of Slovenia in the case No. U-I-295/13 of 19 October 2016, *supra*, op. 15 para. 75.

[18] *Ibid*., para. 76.

[19] For more detail see Avbelj, Vatovec, *supra* op. 13, pp. 224–225.

[20] *Ibid*., p. 227. See, for example, judgement of the Supreme Court of the Republic of Slovenia No. III Ips 101/2015 of 29 March 2016, ECLI:SI:VSRS:2016:III.IPS.101.2015, para. 35.

[21] Avbelj, Vatovec, *supra* op. 13, pp. 228–229.

[22] *Ibid*., p. 229.

European Union.[23] The conducted research shows – at least to a certain extent – the pragmatic approach of administrative bodies. With the awareness of the weaknesses of soft law, such as the already mentioned lack of transparency, accountability and democratic legitimacy, its contribution to interpreting and applying the European Union law has nevertheless been emphasised. These instruments often serve as an additional aid because, as it has already been explained, work is easier when guidelines are clear and precise, when they are received quickly in the spirit of flexibility and efficiency of soft law of the European Union, particularly in an extensively regulated area.

Soft instruments are thus being adopted as part of the European Union in the most diverse areas of its functioning and, consequently, gaining ground at the national level. The weaknesses of these instruments have been mentioned, although such weaknesses are not impossible to eliminate. They can be overcome by increasing the involvement of various stakeholders and bringing together different levels in the process of drafting of a soft law instrument, which would also strengthen trust between these stakeholders; through dialogue and argumentation that facilitate the understanding and meaning of these instruments. In this area, too, the basis should be understanding that creating content with the top-down approach is not the right way, as the flow of views and arguments should go in both directions, which strengthens the power of argument, establishes a collaborative, inclusive and trustworthy relationship and explains also these soft instruments of the European Union that – as can be seen – sometimes do not deviate significantly in their effects from the "hard" law of the European Union, while also being enforced at the national level.

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[23] *Ibid*.

Experience and procedures of bringing Montenegrin legal system closer to EU law

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The alignment of Montenegrin legislation with the *acquis* is a process that began with the signing of the Stabilisation and Association Agreement (15 October 2007), since Article 72 of the SAA stipulates that Montenegro will gradually align its national legislation with the *acquis*. The process was intensified by the opening of accession negotiations in 2012.

The Division for Alignment of National Legislation with the *acquis*, within Montenegro's European Integration Office coordinates the process of aligning Montenegrin legislation with the *acquis*, monitors the level of compliance of the Montenegrin legal system with the *acquis*; verifies the accuracy of statements in the Statement of Compatibility and the Table of Concordance of Montenegro with the *acquis*, which are submitted by legislation drafter, and confirms them. The Division is also involved in drafting the Programme of Accession of Montenegro to the EU as well as implementation monitoring. The Division consists of two Groups, one dealing with the alignment of national legal acts in the field of the political system and social services, and the other dealing with monitoring the compliance of proposed acts in the field of economic, financial matters and sectoral policies. The Division employs five law graduates including the Head of Division.

According to the Article 40 of the Rules of Procedure of the Government of Montenegro the drafter is required to submit, along with the proposal of an act, completed Statement of Compatibility forms with a Table of Concordance. Giving an opinion on an act proposal submitted by a drafter is a multi-stage process in coordination with the competent ministry, which depends on the quality of the completed Statement of Compatibility and the Table of Concordance.

Since the negotiation process began in June 2012, the alignment process has intensified. This means that since May 2012 the compatibility instruments (the Statement of Compatibility with Table of Concordance) have been updated to give a

more detailed overview of the transposed acquis in the national regulation. The Table of Concordance lists all the provisions of the relevant acquis that are transposed into the relevant regulation: directives, regulations, decisions, while recommendations and opinions are given in the absence of other EU law sources.

The Programme of Accession of Montenegro to the European Union 2021-2023 is a strategic document that contains a plan for transposing the acquis into 33 negotiation chapters, designed in tabular form. Given the constant development and changes in the *acquis*, which influences the dynamics of the negotiation process, the Accession Programme is adapted annually to changes in the development of EU law. The first Programme covered the period 2014-2018, and was revised annually. The revision aligns the strategic and legislative frameworks by revising deadlines and linking the new *acquis* to relevant acts in the Programme.

Montenegro's EU Accession Programme for 2021-2023 was adopted at the Government session of 30 March. The Programme contains an Introduction to each chapter, a Strategic Framework (plans) and a Legislative Framework (plans).

- The introduction includes a brief description of the chapters with the most important characteristics, as well as a review of the current state of the negotiation process for each chapter or to any possible challenges in the process ahead.
- The strategic framework includes planned measures and activities. Plans are related to the future (planned) measures/actions that Programme anticipates and which relate to Montenegro's ability to assume the obligations of membership in each of the 33 chapters, with appropriate time limits for implementation.
- The legislative framework also includes planned measures which are related to the planned legislation that Montenegro should adopt, taking into account the new acquis to be transposed into the national legal system, with the level of compliance of national acts with the relevant EU acts and deadlines for implementation.

In 2021 a total of 344 acts, 96 strategic documents and 248 legislative acts were planned for adoption.

The Commission for European Integration is the body responsible for approving the draft Programme and monitoring its realisation. The Commission is chaired by the Chief Negotiator and is represented by senior management from all ministries and other competent bodies.

Before drafting a piece of legislation, the legislation drafter has to consider the time framework required to adopt an act, as well as procedures which were established in 2014. As of January 2014, the obligation to submit proposals of the acts has been established in order to obtain EC comments/opinion. This obligation applies to all MNE acts that align with the *acquis* or represent benchmarks for specific negotiation chapters. Following the meeting of the Special Working Group on Public Administration Reform, this procedure was strengthened in 2017 since a completed Table of Concordance, RIA (Regulatory Impact Assessment) form and a public consultation report are now submitted together with the proposed act. The Table of Concordance is checked by the Division for Alignment of National Legislation with the Acquis prior to the submission of act to the EC, as well as before adoption of the act proposal at a Government session (the Division therefore gives its opinion twice). Depending on the complexity of the proposed regulation itself, as well as the *acquis* to be transposed, communication with the EC may take several months.

It is important to emphasise that act proposal is submitted twice to the Secretariat and the Division within the EI Office. A proposed act is sent to the EC after receiving the first opinion from the Secretariat and the correction of the Table by the Division. The second opinion of the Secretariat and the Division is obtained after the end of communication with the EC, taking into account any corrections to the text of the proposed acts that affect the level of alignment with the acquis. It is important to mention that the EC requires submission of final versions of laws with the accompanying Table, after adoption by parliament. The legislative procedure covers several phases:

Legislative procedure	
Phase I	The Ministry prepares Draft Act with rationale/explanations
Phase II	Draft Act proceeds to public debate
Phase III	The Ministry obtains opinion on the Draft Act from Secretariat for Legislation and relevant Ministries
Phase IV	Draft Act and ToC are submitted to the OEI for checking before it is sent to the European Commission
Phase V	Draft Act, verified ToC, Regulatory Impact Assessment and summary from a public debate is being sent to the EC
Phase VI	After completed consultations with the EC, the Draft Act is sent to inter-institutional alignment
Phase VII	The Act Proposal is sent to the Government for adoption
Phase VIII	The Government submits the Act Proposal to the Parliament for adoption

The IT Portal for European Affairs is a new database which simplifies coordination of EU affairs and alignment process as well. The modules it features are: Programme of Accession of Montenegro to the EU, Statements of Compatibility and ToC, Montenegrin version of the *acquis* and Strategic Module. This database is important because the Statement of Compatibility and ToC will be completed via the database and can be imported as Word documents. It has direct links to the EUR-Lex site which is important for drafting the Acccession Programme. Through the database new additions to the acquis are shared with colleagues in relevant ministries on a monthly basis, so they can analyse and determine its relevance while drafting the new Accession Programme. This database also provides important information on the *acquis* (celexes) and their transposition into national legislation with level of compliance.

Bearing in mind that the alignment process in Montenegro has been going on for more than a decade, legislation drafters in line ministries have made good progress. In this sense, cooperation with the European Commission, through the Mission of Montenegro to the EU, has further improved overall process.

Language as a constitutional category

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1. Language – a right?

The Constitution of the Republic of Slovenia is one of the few constitutions that address language. It stipulates that the official language of the Republic of Slovenia is Slovenian, and also Italian or Hungarian in the municipalities where Italian or Hungarian national communities reside. It also guarantees the right to use one's language and script, in accordance with which everyone has the right to use their own language and script in the exercise of their rights and duties and in proceedings before state and other bodies that perform public service in the manner determined by law. At the same time, the free use of the Slovenian sign language is ensured, and in the municipalities where Italian or Hungarian are also the official languages, the free use of the Italian and Hungarian sign languages is ensured.

The fundamental question in law, at least when it comes to language, is whether language is (substantively speaking) a right? We can talk about a right when it
− is about a certain entitlement to state power,
− enjoys legal protection and
− limits state power.

Linguistic rights are most often seen as collective rights, as they are associated with a "group of people" who have certain characteristics in common, including language. They belong to it and not only to its individual members (e.g. the right to self-determination). Here we come into conflict with the usual concept of fundamental human rights that belong to the individual - they are therefore individual rights. From the aspect of human rights protection, the individual is at the forefront, and the community is pushed into the background and deprived of the legal category of group entitlements. At the theoretical level, it could be argued that language rights cannot be collective because they belong to fundamental human rights and stem from the fact that language activity is a feature of the human species, and its implementation is

strictly an individual characteristic of each individual. Therefore, the right to use one's own language can also be understood as a distinct example of an individual right (which personal rights usually are). However, when we speak about the right to language, we always speak from the collective position. The right to language itself consists of several different rights: the right to name in one's language, the right to freely use one's language in community life, the right to education in one's language, the right to use one's language in court proceedings.

2. Principles of equality and protection against discrimination

Language is also protected by the principle of equality, one of the fundamental principles of constitutional arrangements that are binding on all state bodies in terms of regulation of human rights. What is linked to it is the explicit prohibition of discrimination, in accordance with which any discrimination based on personal circumstances, including language, is prohibited.

The principles of equality and non-discrimination based on language ensure the participation of individuals and groups in public communication; the latter, most often as linguistic minorities, enjoy the rights deriving directly from international treaties to which the countries of their residence are signatories. In the event of violations of certain language rights, an individual may turn not only to the competent national authorities but may also claim and expect the respect and exercise of these rights at the international level.

Despite the fact that a language in a country has the role of serving the undisrupted functioning of society, regional and minority languages, migrant languages, sign languages and non-territorial languages are often used in addition to the "official" language. Every country, as well as international organisations, must use at least one language for its functioning and communication with the people, while individuals and legal entities exercise their rights and obligations through it. By giving preference to the official, state or dominant language, the state gives priority to those people who speak the language chosen by the state. The question arises as to whether, in such cases, residents who do not speak the chosen language are at a disadvantage.

Language as the *spiritus movens* of cultural and political life in some way defines the state, but often the question is whether language is what characterises an individual nation. The sociological elements of the state – population, territory and authority – in the form of the right to language can also lead to the "nation is language" formulation and vice versa.

3. Territorial and personal principle

Language as a defining element of a state or nation can be talked about when the territorial or personal principle is used. The territorial principle, i.e. determination of the territory in which a language is the official language or where a particular language is used (most often in the constitution), requires that the judiciary, administration, education, social security, healthcare – - all areas of governance, operate in the same language. The purpose of such territoriality is, in addition to homogeneity, the uniformity of the functioning of the state (in the broadest sense).

Contrary to the territorial principle, the personal principle has a completely different logic. In accordance with this principle, an individual has a number of rights (political, economic, social, cultural). These rights can be exercised in relation to public authorities as well as to other persons. In this way, the individual has their linguistic status, which is implemented in all those countries where the official language/ languages are not regulated in the constitution or where this is not specifically emphasised in legislation.

4. Language policy

The state has the actual duty to strengthen the right to (the use of) language by setting a language policy. Wherever there are the "authorities" on the other side, someone who decides on our rights or imposes certain obligations on us, a language policy is in the function of the state, and through it also the "language" operation of (state) bodies (in the fields of employment in state services, acquisition of citizenship, education or healthcare). It is in these contexts, in these acts of governance, that language as a right comes to life and functions in its full meaning.

Most constitutions do not contain provisions on language, or provisions on the language in which the state is supposed to operate. There are various reasons for this. It seems that the most common reason is that such explicit exposure of language could disrupt the established traditions and conventions that are in force in a certain country and which stem from the principle of equality itself, where any exposure to certain characteristics of a particular part of the population could be grounds for discrimination based on language. On the other hand, in particular in European countries, such a lack of regulation of the status of language in the constitution can be explained by the fact that the majority of them are signatories to international treaties that explicitly protect minority languages, while it is self-evident that the majority language, as part of the identity of the state community, functions as the official language among and in the constituent parts of the population.

5. The European Union and linguistic diversity

Its legislative function and the direct involvement of its citizens explains why the European Union (hereinafter referred to as: EU) uses more languages than multinational bodies such as, for example, the United Nations, which operates only at the intergovernmental level and has no legislative function (the United Nations, with more than 190 members, uses only six languages).

The fundamental principle of the EU is that all citizens and their elected representatives have the equal right of access to the EU and can communicate with its institutions and bodies in their own language. For the same reason, all new legislation adopted by the EU is translated into all official languages, so that all interested citizens across the entire EU are immediately acquainted with its content and how it affects them. All language versions of EU law have the same legal validity. The EU thus ensures that there is no discrimination between citizens whose languages are spoken by a large number of people and citizens who speak less widely used languages.

For EU citizens, the basic principles underlying the EU language policy are intended to:
− enable them to take part in the building of the EU,
− inform them about what the EU is doing on their behalf,
− provide them with access to legislation in a language they understand.

Equality of languages should, in the view of the majority, be ensured if appropriate translation aids are provided. Simultaneous interpreting is often inconvenient for the speaker as well as for the listeners due to the time lags that necessarily occur (the expression or message is not synchronised with the response of the audience). Speakers who are aware of the complexity of the work of translators try to make it easier for them by simplifying their speech, while adapting their language, omitting metaphors and jokes, and using shorter sentences and direct language. Listeners often do not even want to listen to translations, so they eventually only listen to those speakers whose language they master actively or passively, which means that "minority" languages are the victims of this type of audience, because their message is not heard. It is a paradox of sorts. The original purpose of enabling everyone to speak in their own language is to listen to contributions from speakers of "minority" languages and not in a foreign language, and it seems that simultaneous interpreting leads to serious discrimination against "minority" languages.

It is also a problem between native and non-native speakers. Native speakers are often not even aware of the problems that non-native speakers face. Above all, they are not aware that non-native speakers, when using a language other than their mother tongue, often resort to a reduced vocabulary to say what they are able to say, and not what they *want* to say. Thus, many people, thinking that it would be easier to reach a larger number of listeners this way (and, consequently, receive understanding for their proposals), consciously give up the right to use their language, thus impoverishing not only their own message, as they do not possess sufficient knowledge of the language which they have chosen to fully communicate the content, but also the EU idea of multilingualism. The idea of multilingualism in the diverse society of the EU Member States does not mean that you can use your language in all areas of life in this organisation, but that you should not be at a disadvantage because of language.

6. Conclusion

The fact is that language, where enshrined in the constitution, mostly in the part of the constitutional matter (*materia constitutionis*) that contains general provisions on the institutional framework of the state, is most often part of the definition of the "official language" or "state language". If the role of the constitution is to ensure the fundamental rules in accordance with which the state operates, then it undoubtedly makes sense to place language within the framework of the rules it contains. It is also part of personal circumstances that ensure the protection of the individual in criminal proceedings and the equality of individuals. It seems that language, with such explicit regulation, strengthens the right to equality and protection against discrimination.

Such a placement also represents an expression of the sovereignty of the state which, with the language and the right to its use, to the use of the official language or other languages, also shows the degree of tolerance of the majority to all other groups in society. This is especially important when we talk about minorities, groups that are particularly identified by language and, at the same time, separated from majority groups on the basis of this specificity. It thus guarantees members of minorities the right to equality before law and equal legal protection, and in this regard prohibits any discrimination based on the affiliation to a minority. This right extends to the private and public, oral and written, thus enabling the effective participation of members of minorities in all matters, including in public affairs, in particular those that directly affect them.

On the other hand, one or more languages being formally designated as official (in the constitution) as such does not necessarily have significant legal consequences. The meaning and legal reach of the concept of an official language depends on the actual legal treatment of the language envisaged as such. What follows from this is that, in certain situations, one or more languages being the official language/languages is of a declaratory nature only, without any particular generally important effects. This means that the level of consciousness of the nation is translated into law by the normativist approach of the constitution. However, although the definition of language in the constitution undoubtedly has, among other things, legal consequences, these have no other than an ideological nature, as long as they are not specified by norms.

Judgments of the Court of Justice of the EU in the Slovenian case-law

Andrej Kmecl

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By way of introduction, I would like to emphasise that neither the scope nor the context of this paper enables an in-depth analysis of the complex and relatively lengthy process of the integration of the case-law of the Court of Justice of the European Union (the Court) into deliberations of Slovenian courts. This process, however, best illustrates the actual integration of EU law into the national legal system, which is far from complete with the mere formal adoption of legal norms, and thus the well-known truth that law is a living organism reaching far beyond its formal basis. For that reason alone, this process should not remain undocumented, albeit in the form of the present contribution of a few inevitably subjective and generalised observations.

Much has been written about the typical features of the national legal environment after Slovenia gained independence, therefore I only wish to remind you that, on the one hand, it was founded on a markedly normative tradition, while, on the other, it was defined by the need for modernisation resulting in a lively process of norm drafting, for which the adaptation to EU law in some cases meant the second or even third radical change in fundamental norms in a short period of only a few years. To this, we must add the young country's confidence that it can implement all the necessary reforms on its own, without external "interference". In these circumstances, it was not surprising that judges were rather reserved – to put it mildly – to take on board the prospect of a new vast legal field in which they had no previous experience and which, at least in part, included radically different methods of interpretation and mutual relationships between legal acts. The role of the Court and its case-law, which could not compare with anything the Slovenian courts had had to deal with until then, undoubtedly formed an important part of what was new and unfamiliar.

Early enough, measures were adopted to formally integrate the Slovenian judiciary into the EU legal system, which included the systematic training of judges, publication of the relevant EU legal acts in the Slovenian language, and normative changes providing for the integration in terms of national law, e.g. the procedural regulation of

reference for a preliminary ruling of the Court. Nevertheless, even excellent theoretical knowledge and an adequate legal basis could not mitigate the uncertainty associated with integration into an already functioning legal system which is not defined solely by abstract legal acts. The delay in the translation of the Court's most important decisions adopted prior to Slovenia's accession to the EU certainly did not advance the cause. While there were no principled reservations, it still remained unclear how to apply in practice texts for which there is no authoritative translation into Slovenian or – on a much more elementary level – how to navigate these linguistically demanding texts even with a good command of a foreign language.

During that period, judges were anxious to learn what the parties to the proceedings or, more precisely, their lawyers would contribute to this end. In the experience of their colleagues from the "old" EU member states, it was the lawyers, especially the young generation of lawyers, who initially raised issues concerning EU law. In comparison with their predecessors, the young generation of Slovenian lawyers dealt more intensively with EU law during their studies. Furthermore, law firms were staffed with lawyers who had completed postgraduate studies abroad, including in the EU member states. Unfortunately, the expectations were not fulfilled and, to this day, claims of breaches of EU law have, with a few exceptions, remained a generalised "fallback" argument without any real connection to the actual arguments which rarely go beyond a mere citation of the allegedly breached legal act. A surprising exception in this respect has been made by some non-governmental organisations, particularly in the field of environmental protection.[1] However, in the majority of cases the parties still only point to the legal problem while its European dimension is only detected and more precisely defined by courts.

In the early years of Slovenia's EU membership, Slovenian courts were seemingly very reserved about their role in the European legal system since they did not refer a single case to the Court for a preliminary ruling for quite some time. This led to considerable speculation, including about their actual readiness to assume this role. However, the actual "internal" developments revealed a completely different picture. It became clear very soon that legal problems arising from norms implementing EU law could not be solved at the level of national law. This "conclusion" seems terribly naive in principle, especially from today's perspective, but it should be taken into consideration that, at that time, the courts were confronted with an entirely new concept of the application of supranational law which had to be applied in concrete cases to a specific national

[1] Judgment of the Administrative Court I U 162/2011, available at http://sodnapraksa.si

system. Therefore, relatively early in this period, initial experience was gained in a targeted study of the Court's case-law coupled with at least formal reference to it.

This is best illustrated by a later case filed with the Administrative Court[2] concerning the capacity of a landfill that warrants an environmental impact assessment. At first glance the case was straightforward, as the threshold capacity was clearly defined by an implementing act and the parties' arguments remained largely in the domain of national law. Since the relevant national norms were transposed European norms, the Slovenian court in its interpretation of these norms relied on the Court's extensive case-law and on its basis defined the scope of the directive in question and the criteria for setting quantitative thresholds requiring an environmental impact assessment and the right of a EU member state to determine these threshold values at its discretion. This ultimately enabled the Slovenian court to interpret national law in accordance with EU law and to decide on the legality of the implementing act defining the quantitative thresholds.

This case provides some further typical examples of the attitude towards the Court's case-law still present today (I emphasise again that these are not empirical data but rather subjective observations based on a number of concrete cases). Slovenian courts above all rely on this case-law without any principled reservations or practical problems; in this respect, the increasing number of the Court's decisions in Slovenian is of great help.[3] Furthermore, numerous lectures for Slovenian judges given by Dr Marko Ilešič, Judge of the Court, were an important contribution in this respect. The situation is essentially different with regard to the willingness to refer to the Court for a preliminary ruling as, contrary to the first years, the judiciary as a whole is anything but reluctant. However, the majority of requests for a preliminary ruling are lodged by the two courts of highest instance, i.e. the Constitutional Court and the Supreme Court. Lower instance courts try to compensate for this by interpreting legal norms in line with EU law but, where this is not possible, it seems that they still prefer the "domestic" path, i.e. a petition for the review of constitutionality. A distinct phenomen can been observed in administrative law where many EU legal norms were transposed through implementing acts. In specific cases, the legality of these acts may be subject to judicial review in an administrative dispute, which provides the Administrative Court with an additional tool – and with it a responsibility – to guarantee that the legal system

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[2] Judgment of the Administrative Court I U 1075/2013, available at http://sodnapraksa.si

[3] Between 2008 and 2011, around 800 key decisions of the Court dating from before 2004 were translated as part of the project managed by the Government Office for Legislation.

is functioning in accordance with EU law or the maxim that national judges are EU judges.

The first two requests for a preliminary ruling were not lodged until 2009 or five years after Slovenia joined the EU. One of them, which I consider to be especially typical of the period, involved a fairly technical issue of how to interpret the term 'prevention of inspection in relation to agricultural subsidies';[4] an extensive and very detailed request by the Administrative Court. The fact that the Court dealt with the request means that it was undoubtedly a relevant issue of the interpretation of EU law, but when reading the judgment of the Administrative Court in this case[5], one cannot escape the feeling that the Court's decision did not have any significant impact on the application of law in Slovenia, let alone in Europe. The early requests for a preliminary ruling included many similar cases to this one, namely complex and technically demanding cases, which did not resound or have a broader impact on the interpretation of the law. With all due respect to my colleagues who have shouldered this burden – or perhaps out of that very respect – I must add that the complexity and enormity of these early requests demonstrated equally the need for an authoritative interpretation of EU law and the desire to make a "breakthrough" or break with the established way of thinking presented at the beginning of the paper.

Statistics has shown that this "breakthrough" delivered excellent results over time. Since 2019, 35 requests for a preliminary ruling have been lodged, of which 29 by ordinary courts and the rest by the Constitutional Court and the National Commission for Reviewing Public Procurement Procedures recognised as a court by the Court within the meaning of Article 267(2) of the TFEU. In the first half of 2021 alone, six new requests were lodged[6] which demonstrate another Slovenian feature, i.e. that requests are most frequently lodged by the Supreme Court and hardly any by the courts of first instance. An assessment of the quality of these requests is, of course, subjective, but, judging from my good knowledge of the Court's case-law, I am convinced that the vast majority of them excel in clarity, thoroughness and relevance. What exactly a well-prepared request can cover became evident very early on when the following question was raised: whether a tractor kept in a barn, where it is used as a piece of machinery and not a vehicle in road transport, is still considered a vehicle in road transport for the purposes of insurance.[7] The Court's decision in this case was indeed decisive, and not

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[4] Request of the Administrative Court in case U 1170/2007, available at http://sodnapraksa.si

[5] Judgment in the same case, also available at http://sodnapraksa.si

[6] Country size must be taken into account when compring these figures with the Court's annual caseload.

[7] Request of the Supreme Court of the Republic of Slovenia in case II Ips 415/2011, available at http://sodnapraksa.si

only for the purposes of this specific case but also for the further development of the case-law in several European countries.

Today, one can claim that at least a look in the direction of the Court's case-law is an integral part of deliberations before Slovenian courts. In all (judicial) environments where I have worked in recent years, the presentation of the Court's case-law has been in all the relevant cases included in the case report in the same manner as the analysis of the national case-law, while being fully aware that this was the shortest route to solving many legal issues. The referral for a preliminary ruling has almost become a routine task, sometimes even an easier task than embarking on the "domestic" path or turning to the Constitutional Court, and sometimes, of course, the only option, if one prefers to avoid "walking on the edge" in terms of the reach of their own interpretation of EU law. All this is reflected in the last – and at the same time the most recent – request for a preliminary ruling discussed in this paper.[8] It refers to the compliance of the national system with the EU acquis in the part it prohibits, in specific proceedings, the presentation of new facts and evidence from a relatively early phase of the proceedings onwards. Although I have to reiterate that my view on this request is highly subjective, I am also convinced that it is obviously different from earlier requests: it is relatively short and clear, it refers to the Court's existing case-law and explains in very specific terms why, in the opinion of the Slovenian court, the case-law does not resolve the issue in question. At first glance, the question is formulated in such a manner that the answer to it should significantly contribute to the solution in this case.

In conclusion, I would like to reiterate my introductory thesis that the radical change of a legal system is never only a formal act, but rather a complex procedure. This has been clearly demonstrated by the attitude of Slovenian courts towards the application of the Court's case-law, which, however, was initially – despite its full formal integration – rejected as being foreign and incompatible with our legal system. As the Slovenian courts were placed in an entirely new legal landscape, signposts in the form of advice and experience shared by our colleagues from the "old" EU member states were helpful when we were taking our first steps, but in order for our steps to lead us to a meaningful destination we had to embark on our own path. However, this was only possible once EU law had been adopted over time by younger generations and through problems encountered in practice in not only the legal system but also in the

[8] Request of the Supreme Court of the Republic of Slovenia in case X Ips 51/2021, available at http://sodnapraksa.si

way courts think and decide. If one speculates further, the example set by the Court and its interpretation of the law have significantly helped Slovenian lawyers and judges to be able to move away from excessive normativism and towards an independent and creative interpretation of legal norms. Nevertheless, this is a topic that merits further research.

EU language and law in constitutional review[1]

Dr. Matej Accetto

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There is a close but also demanding link between law and language: close because language is a key tool of law and demanding because this tool is not in itself the most suitable for achieving the central goals of legal regulation. Law strives for the clearest possible framework of governance regulation, which should regulate the relevant legal relations as predictably and consistently as possible and ensure equal treatment of those to whom it is addressed; language, however, by its nature is often vague, indefinite, and semantically ambiguous. This is why the challenge of finding an appropriate or (from the aspect of constitutional review) constitutionally admissible review is often not concluded at the stage of the drafting of regulations, but only at the stage of their application, which necessarily demands their interpretation.[2]

The importance of interpretation of legal texts and established methods of interpretation (primarily perhaps linguistic, systematic, purposeful and historical interpretations) is well known and does not need to be summarised in detail here. The article is thus intended primarily to outline the importance of interpretation – and the relevance of comparison of legal institutes in different legal languages – regarding some of the narrative issues dealt with by the Constitutional Court in recent years.

Years ago, the Supreme Court addressed a request to the Constitutional Court to assess the constitutionality of paragraph two of Article 287 of the Criminal Code, which defines the publication of personal data of a minor in judicial, administrative or other proceedings as a criminal act.[3] The applicant considered that this provision was

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[1] This is a condensed version of a paper from the Slovenian Legal Conference on 18 November 2021, which in some places refers to my other discussions which dealt with individual issues in more detail.

[2] More about this in M. Accetto, "Field of law, language on it - pickaxe, shovel? Reflection on the importance and problem of language as a tool of law", in M. Jemec Tomazin, K. Škrubej and G. Strban. (ed.), *Legal terminology: in history, theory and practice*, GV Založba (Legal Horizons collection), Ljubljana 2019, page 407–434.

[3] The text of this provision reads in full: "Whoever publishes personal details of a child who is party to a judicial, administrative, or any other proceedings, or publishes other information which would be relevant to establishing the child's identity, shall be punished by a fine or sentenced to imprisonment for not more than three years."

inconsistent with the principle of certainty, as it allows for two very different interpretations as to whether criminality should relate solely to *unlawful* publication or to any publication of data of a minor: a linguistic and (in accordance with the principle of the best interests of the child) purposeful interpretation should indicate the latter possibility, while a systematic interpretation (taking into account the placement of this provision among criminal acts against justice) should point in the direction of the explanation that criminality relates only to "unjustified" publication. The Constitutional Court rejected the request,[4] thus reaffirming the importance and need for an interpretation of every – linguistically – clear provision or regulation. The request of the applicant showed that the provision allows for two interpretations, of which the applicant had already identified one as being the more appropriate or even the only constitutionally compliant choice. That this was an interpretation dictated by a systematic interpretation, and not the one to which a linguistic and purposeful interpretation pointed to, may have further emphasised that there is no a priori hierarchical relationship between the different methods of interpretation in which one would automatically dominate over others.

Case U-I-483/20 provides a similar illustration of a difficult search for meaning concerning which the Constitutional Court was also divided.[5] In this case, the key question was whether the provision of the first indent of paragraph two of Article 90 of the Constitution, in accordance to which a referendum may not be called "on laws on urgent measures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters", the phrase "urgent measures" refers to (merely) *unavoidably necessary* or (also) to *urgent measures*. In the light of the topic of the section, I would like to add that the interpretation of the relevant provision in this case was entirely focused on the Slovene wording in the Constitution – but that it is not negligible that the Slovenian term "urgent" actually corresponds to two different terms in foreign languages, one of which expresses the meaning of unavoidable necessity (English *necessary*, German *notwendig*, French *nécessaire*), and the other the meaning of urgency in the sense of time (English *urgent*, German *dringend*, French *urgente*).[6]

A case in which the importance of comparison of different legal languages was even

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[4] See the decision of the Constitutional Court, No. U-I-92/15 ("*Publication of information about a minor*") of 14 September 2017.

[5] Decision of the Constitutional Court No. U-I-483/20 ("*Financing of the Slovenian Army*") of 1 April 2021 (Official Gazette of the RS, No. 64/21), to which several separate opinions have been added.

[6] It may be added that the translation of the Slovenian Constitution into English, as available on the website of the Constitutional Court, uses the term "urgent measures" in the evaluated provision of the first indent of paragraph two of Article 90 of the Constitution – see the text available at <https://www.us-rs.si/media/constitution.pdf>.

more directly outlined was the case Up-371/19, which concerned the assessment of the content of a contract that was concluded in English and envisaged the buyer paying two amounts named *first deposit* and *second payment*. The buyer settled the first amount, and then there was a dispute (before the Slovenian courts) as to whether the payment of this amount, which was defined in English as the *first deposit*, meant the payment of *earnest money*. The regular courts ruled that this amount was not unambiguously marked as earnest money (*ara* in Slovenian), relying also on the translations by three court interpreters, two of whom translated the phrase as "*prvi depozit*" and one as "*prvi polog*". In its decision, the Constitutional Court emphasised that in such cases the linguistic, substantive meaning of the disputed contractual provision in the English language is decisive, because this is the language in which the contract was concluded, and thus is in the original legal terminology of this language as a means of legal agreement.[7]

The examples mentioned above can serve as a brief outline of the importance of language and certain types of challenges for law brought by the coexistence of different languages and legal terminologies. Such challenges are certainly known to the European Union, which in the linguistic sense is based on the principled and de facto equality of 24 official languages, including Slovenian. In the functioning of the EU, this poses an additional challenge in the drafting of European legislation, as well as in providing judicial protection directly before the Court of Justice of the EU or in cooperation with national courts.[8]

The Constitutional Court accepts the EU law as the relevant legal regulation, which must also have an effect in the Slovenian legal order in accordance with the legal regulation of this organisation or political formation. Due to the specific role of the Constitutional Court in the Slovenian constitutional system and the nature of cases, the EU law is generally not in the foreground of assessment in specific cases, but also – and in light of the topic of this section, even more important – does not cause particular problems from the aspect of co-existence of the EU law (and the Slovenian legal system) in different language versions. In procedures to decide on constitutional appeals, the EU law will thus often be particularly relevant in assessing whether the regular courts have ignored or failed to duly take into account a certain aspect of EU law, for example as regards the obligation to refer a matter for a preliminary ruling by

[7] See the decision of the Constitutional Court of the Republic of Slovenia, No. Up-371/19 of 18 June 2020 (OdlUS XXV, 39), in which the Constitutional Court also disagreed and to which several separate opinions were also added.

[8] For more about this, see, for example, M. Accetto, "Legal translation and multilingualism: Between the authenticity of the text and the authority of the translator", in N. Ledinek, M. Žagar Karer and M. Humar (ed.), *Terminology and modern terminography* (Založba ZRC, ZRC SAZU, 2009), page 281–290, in particular page 286–289.

the Court of Justice of the EU.[9] Limits to such control may also be set by limits of the jurisdiction of the Constitutional Court or procedural preconditions for access to the Constitutional Court.[10] In addition, EU law will also be present in the procedures of reviewing the provisions of Slovenian legislation, when and if it is relevant, and through the effect of the fundamental principles of EU law, which the Constitutional Court has already recognised in its review as internal constitutional principles that are binding on the Constitution.[11] Following its entry into force, the provisions of the EU Charter of Fundamental Rights have also been relevant in a number of cases over the last twelve years.[12]

In conclusion, it is precisely the Charter that can also serve to return us to the thoughts outlined in the introduction to this article. In addition to the important innovation of the "constitutional" catalogue of fundamental rights, the Charter also introduced some new terminological challenges at the EU level. On the one hand, these rights explicitly enshrined in the Charter now coexist with fundamental rights which were previously developed by the Court of Justice of the EU through its case law as part of unrecorded law. On the other hand, it has introduced a new – and not completely clarified – distinction between provisions that define rights and those defining principles, which means that today we can talk about legal principles in the EU law in as many as four different and partly overlapping contexts: as a means for filling legal gaps; on unwritten general principles of law as a measure of the validity of the secondary legislation of the EU (which have importantly also entered human rights in EU law); on the role of fundamental principles – today partly terminologically transformed into fundamental values – as building blocks of the constitutional image of the EU; and on principles as one of the two types of provisions of the EU Charter of Fundamental Rights.[13] This terminological overlap is unlikely to lead to new "translation" challenges for the functioning of the Constitutional Court; however, it is another illustration of the lasting obligation of (European and domestic) courts to constantly pay attention to the proper interpretation of their meaning when using legal institutes or legal concepts.

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[9] For one of the cases in which the Constitutional Court found a violation in light of this duty, see the decision of the Constitutional Court No. Up-561/15 (*Dodič*) of 16 November 2017 (OdlUS XXII, 32).

[10] See, for example, the decision of the Constitutional Court, No. U-I-157/16, Up-729/16, Up-55/17 of 19 April 2018 (Official Gazette of the RS, No. 32/18, and OdlUS XXIII, 5) on the inability of the European Central Bank to lodge a constitutional complaint when acting in the capacity of a governing institution.

[11] See the decision of the Constitutional Court, No. U-I-155/11 of 18 December 2013 (Official Gazette of the RS, No. 114/13, and OdlUS XX, 12), point 14 of the explanatory note.

[12] See M. Accetto, "Trials, Tributes and Tribulations: The EU Charter before the Slovenian Courts", in M. Bobek and J. Adams-Prassl (ed.), The EU Charter of Fundamental Rights in Member States (Hart, 2020), page 305–318.

[13] For more about this, see M. Accetto, "Importance of (general) legal principles in the European Union law", in M. Pavčnik and A. Novak (ed.), *Explanatory importance of legal principles* (ZRC SAZU, 2020), page 49–68.

Easy-to-read Constitution of the Republic of Slovenia

Živa Jakšić Ivačič

Author of "Easy-to-read Constitution of the Republic of Slovenia"

- Introduction

Article 14 of the Constitution of the Republic of Slovenia stipulates that in Slovenia, "everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance". On the other hand, the Committee on the Rights of Persons with Disabilities (2018, p. 2) is concerned about the inadequacy of policies and measures focusing on equality and the protection of persons with disabilities from all forms of discrimination. This is especially true in the case of citizens with intellectual disabilities, both members of the majority population and members of national minorities, as they are all too often deprived of information on matters concerning their lives and the communities in which they live. They are deprived because there is relatively little experience in converting demanding content into a readable and understandable form, and because of the prevailing opinion in the majority society that "they don't understand or know anything anyway".

The challenge posed by the mentioned circumstances or the mechanisms of discrimination against people with intellectual disabilities has been accepted by members of the Student Section of the Association of Special and Rehabilitation Educators of Slovenia, who have formed an interdisciplinary team of experts and representatives of target audiences or readers with intellectual disabilities. The team has successfully concluded its five-year volunteer work.

- The importance of access to legal documents: Why without me? Not without me, please![1]

The concern of the Committee on the Rights of Persons with Disabilities (2018, p. 1) due to Slovenia insisting on a paternalistic or patronising approach to persons with disabilities is especially justified when it comes to people with intellectual disabilities, as it is precisely because they are neglected in terms of access to information that they are deprived of self-advocacy in exercising their rights and inclusion in society.

Self-advocacy is the ability of an individual to speak for themselves or to communicate effectively, to advocate their interests, needs and rights (Hourston, 2011; Van Reusen et al., 2015). Self-advocacy empowers people for active citizenship, enabling them to become their own advocates in relation to holders of social power. Self-advocates note that self-advocacy skills are essential because "*other people make decisions for us, they don't talk to us, they often don't even ask us for our opinion*" (Pfeiffer, 2017). Understanding the rights and duties of an individual are important elements of self-advocacy, which can be achieved by understanding the relevant regulations. (Pfeiffer, 2017; Test et al., 2005). The manner in which regulations in Slovenia are written significantly reduces their accessibility not only for people with intellectual disabilities, but also for many legally lay readers. In this respect, Dougan (2019, p. 66), in his discussion on access to judicial protection for people with intellectual disabilities proposes "the possibility of the use of the concept of easy read, which aims to present texts and information in a clear and readable way that is intelligible and accessible to people with intellectual disabilities (for example, the use of short sentences, avoidance of foreign words, appropriate design adaptations, etc.)." By doing so, he echoes the warnings by legal experts abroad, who have for many years been emphasising the importance of the use of simple language to communicate legal content to the public, as it provides clarity and enables the government to communicate in a way that citizens can easily understand (Blank and Osofsky, 2017). The law professors Blank and Osofsky (2017) advocate the use of the "simplexity" concept in communicating legal information intended for the public. They explain simplexity as the art of simplifying information to its essence or as a selection of purely essential details. Simplexity in legal documents occurs when the government presents clear and simple interpretations of laws without emphasising their fundamental complexity or reducing the complexity of the content by using formal legal terms (ibid.).

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[1] The title was taken from a book with the same title - Lačen M. 2016. Why without me? Not without me, please!; attitudes towards people with intellectual disabilities (other special feature or difference may also be reflected in this). Ljubljana, the Sožitje Union - the union of associations for assistance to people with intellectual disabilities.

- What is the easy-to-read Constitution of the Republic of Slovenia?

The easy-to-read Constitution of the Republic of Slovenia contains absolutely all the information/articles of the original Constitution of the Republic of Slovenia, which are written in such a manner that readers with poor reading skills and experience can read and understand them. Many foreign and domestic authors of definitions of easy read (Freyhoff, 1998; Rot, 2016; Haramija and Knapp, 2019) agree that reading can be a *method* by which information is written in terms of *content* and *form* in a manner that the target audience can read and understand. The answer to whether a piece of information can be read and understood can be given only by readers or representatives of the target group for which the information is primarily intended. It is therefore important that they are actively involved in the process of adaptation. However, because readers have different reading skills, experience, knowledge and interests, it is impossible to design a piece of information in a manner that suits just about everyone. It is therefore important, when adapting information for easy read, to follow guidelines that contain advice on how to write a piece of information in terms of design, content and language so that it is understandable and easy to read. The first guidelines for the Slovenian, as well as for the Italian and Hungarian languages, were developed by the umbrella organisation of Europeans with intellectual disabilities and their families, Inclusion Europe.[2] Later on, the RISA Institute, together with partners in the READING IS EASY project, published a manual for the preparation of easy-to-read information (2019), which upgrades Information for All (2012) with, among other things, specific guidelines for adapting literary texts to easy read.

- Who is the easy-to-read Constitution of the Republic of Slovenia intended for?

It is a democratic right to have access to information in a form that is understandable to a person. Having the opportunity and ability to read greatly increase the self-confidence of a person, who broadens their world view through reading and it thus becomes easier for them to take control of their life, which also has a significant impact on their quality of life. It is therefore crucial to provide accessible information to people who have problems with a certain component of reading and comprehension by using an adapted form (that is easy to read and understand) (Jakšić Ivačič et al., 2018 and 2019).

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[2] Information for All: European standards for making information easy to read and understand
Informazioni per tutti: Linee guida europee per rendere l'informazione facile da leggere e da capire per tutti
Információ mindenkinek: A könnyen érthető kommunikáció európai alapelvei

The Constitution of the Republic of Slovenia is the country's umbrella legal document, regulating the most important rights and duties of its citizens. When reading and understanding the content of the Constitution of the Republic of Slovenia, many people who have difficulties in reading or understanding what they are reading encounter obstacles that they cannot overcome on their own.[3] Among these, readers with intellectual disabilities find it the most difficult to access information due to the complexity and frequency of associated disorders. People with intellectual disabilities have disorders that are characterised by a significant limitation of both intellectual functioning and adapted behaviour, which is reflected in the conceptual, social and practical skills of adaptation. Disorders appear before the age of eighteen (Jurišić, b.d.). The exact number of people with intellectual disabilities in Slovenia is not known, while the proportion of these in the global population, according to estimates by the World Health Organisation (2011), is between 1% and 3%. As a register of these people is not kept in Slovenia, it is estimated that their number is approximately 50,000, of whom the vast majority (80%) are people with light disorders, while approximately 8,000 have moderate, severe and combined intellectual (and physical) disabilities and have the status of a person with disability in accordance with the Social Inclusion of Disabled Persons Act (2018).

- Adoption of the Easy-to-read Constitution of the Republic of Slovenia by the Slovenian public

It has turned out that the need for accessible basic legal information is much greater than the authors of the Easy-to-read Constitution of the Republic of Slovenia were aware of. We are very pleased that "our" Easy-to-read Constitution of the Republic of Slovenia has not only come to life in groups of readers who have difficulty reading and/or understanding what they have read. It has been warmly received by a wider audience and legal professionals have been friendly to it. It has quickly found its place in many classrooms for students of all ages and reading skills, prisons, public administration, ministries, the Human Rights Ombudsman, the Advocate of the Principle of Equality, libraries, law schools, law firms, etc. An important confirmation also came from Igor Kavčič, a full professor of constitutional law at the Faculty of Law of the University of Ljubljana. Kavčič sees the easy-to-read adaptation of the Constitution of the Republic of Slovenia as a symbolic act, as "no citizen can avoid the

[3] These are, for example, people with dyslexia and other reading difficulties, people with autism spectrum disorder, people with attention deficit disorder, people who lose their hearing before developing speech. i.e. prelingually deaf people, people with intellectual disabilities, people who have limited language skills (e.g. foreign-language immigrants) and people with limited reading skills (e.g. poor reader) (International Federation of Library Association and Institutions, 2010).

Constitution because it is the highest legal guideline and social contract, in which we agree on what is crucial for us, what we will respect and what we will leave to the freedom of an individual. This is why the Constitution of the Republic of Slovenia is more important than it seems to many who are not jurists and do not deal with it." (Lipovšek, 2021). The Constitutional Court and the Supreme Court of the Republic of Slovenia have also recognised the easy-to-read and understandable Constitution of the Republic of Slovenia as an important document and published it on their websites (2021).

- Procedure of adaptation of the Constitution of the Republic of Slovenia into an easy read format

The adaptation of the Constitution took place in three phases: preparation, adaptation and review (Jakšić et al., 2021). In the preparatory phase, we determined the target group of readers for whom the information is prepared, assembled an interdisciplinary team and, with the help of all participants, outlined the structure of the book and the method of work. In this phase, we faced many challenges and dilemmas, because at that time there was no Slovenian legal document that would be fully adapted under the easy read method, i.e. having all the information contained in the original. It was therefore not possible to find examples and access the experience of adaptors and other experts on how to approach the adaptation of legal documents. In order for our work to be well documented and thus help other adaptors and help develop this field of expertise, we have carefully recorded the entire experience and knowledge gained during the process and published it in the professional press (Jakšić Ivačič et al., 2018).

This was followed by phases of adaptation of individual articles, all of which were structured in the same way. Each article was adapted by a member of the Student Section of the Association of Special and Rehabilitation Educators of Slovenia, i.e. a student of special and rehabilitation education at the Faculty of Education of the University of Ljubljana. The adapted articles were then reviewed and commented on by other members of the interdisciplinary team. In addition to the students, the team also comprised two long-time members of the Sožitje Union, whose task was to ensure the correctness of adaptation in accordance with the easy read rules and the legal correctness of the adapted text.

When the team members agreed on the adaptation of individual articles, explanations and lists of difficult words, these were sent for review to test readers with intellectual

disabilities - protégés of the Želva special social care and employment centre in Ljubljana. Every week, we met with a group of nine test readers and expert workers from the centre for two hours to check the comprehensibility of our adaptations and their accessibility in terms of design. As the solutions proposed by the experts were often not to the liking of the test readers, it took a lot of work, adjustments and compromise-seeking to make the text legally adequate, easy to read and, at the same time, comprehensible to readers.

- Added value for adaptations

It turned out that test readers truly came across topics such as human rights, fundamental freedoms, inviolability of life, equal protection of rights, the right to personal dignity and security, etc. for the first time. In the conversations intended for testing of individual articles, they had the opportunity to present their life experience, the experience of their loved ones and other public events that they heard about or read about in the media. These conversations thus enabled them to have a broader understanding of the world around them and, consequently, to become more actively involved in the functioning of society and to advocate their rights and understand their duties.

The cooperation with test readers in the process of adaptation of the Constitution of the Republic of Slovenia has shown how important accessible and understandable information is for them and what a strong impact it can have on their self-confidence, self-image and self-advocacy skills. As an expert worker from the Želva special social care and employment centre said after one meeting: *"No one talks about adult topics with them. It is wonderful to see how they respond to conversations and how they apply the knowledge they gain in their private lives".* (Jakšić Ivačič et al., 2019).

- Easy-to-read Constitution of the Republic of Slovenia as a non-commercial commodity

During the process of finalisation of the Easy-to-read Constitution of the Republic of Slovenia, the adaptors sought financial support for the funding the design and printing of our product in book form from various ministries, offices and organisations, but were unsuccessful. The work done by the members of the interdisciplinary team, a total of 34 of them, was entirely voluntary work comprising 10,000 hours and valued at EUR 120,000 (measured using the student work rate), but this did not discourage the team, as they found moral support from easy read ambassadors and advisers to the President of the Republic, Vlasta Nussdorfer and academician Boštjan Žekš, who

received representatives of the authors of the book several times and offered advice and support in the editing process. Eventually, the Sožitje Union took on the costs of design and printing and also published the Easy-to-read Constitution of the Republic of Slovenia in book form with the support of the Foundation for Funding Disability and Humanitarian Organisations (FIHO). Because we have wanted from the very beginning to ensure that the Constitution is accessible to all, we have published it in two versions and two forms – in lower and upper case, and in hard copy and electronic format. However, in order to make the Easy-to-read Constitution of the Republic of Slovenia truly accessible to everyone, we have decided that it must not become a commercial commodity. Thus, its printed version is available in many libraries and schools and institutions for children with special needs. Anyone can also print it, as the electronic version is available free of charge on the Union's website in the EASY READ tab (https://www.zveza-sozitje.si/lahko-berljiva-ustava.html).

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Challenges of EU law in everyday life (examples from practice)

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Thank you to the organisers of the conference for inviting me to speak. In the fifteen minutes allocated to me I propose to discuss four concrete examples of the challenges facing individuals, companies and lawyers in everyday life which concern EU law.

1. Implementation of EU law by EU Member States

The first challenge I wish to discuss concerns the implementation of EU law by EU Member States. The concrete example I will discuss today concerns the implementation of EU environmental law into national law and, in particular, the implementation of *Directive 2014/52/EU of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment*[1] (the "Amending Directive"). This Directive was adopted in 2014 with the aim to, *inter alia, "stimulate decision-making and increase legal certainty"*.[2]

In particular: (i) an obligation was imposed pursuant to Article 4(6) thereof on relevant bodies of EU Member States to issue a preliminary screening decision on whether an environmental impact assessment ("EIA") is required to be undertaken in respect of certain types of projects within no more than 90 days of the developer submitting the information required; and (ii) an obligation was imposed on such bodies pursuant to Article 8a(5) to issue the final decision concerning development consent "*within a reasonable period of time*".

In Slovenia and some other countries of the EU the above-mentioned obligations have not been understood as mandatory. A formal review of Slovenian's compliance with its

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[1] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L 124, 25.4.2014, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0052&from=EN, last accessed on 12 January 2022.

[2] Para. 36 of Amending Directive.

obligation to transpose these provisions into Slovenian law confirmed their correct transposition. But this is far from the reality.

Having taken part in numerous reviews of EU Member States' transposition of EU energy and environmental law, it is my opinion that these are very cursory in nature and fail to assess whether EU law has been actually implemented in practice. Instead, such reviews are reviews of implementation on paper. The reality is, therefore, that over four years after Slovenia and other EU Member States were required to implement the Amending Directive, the average time for the Slovenian Environmental Agency (known as "ARSO") to issue a final development consent is over four years, despite the fact that Slovenian law implementing the Amending Directive provides that such decision must be issued in six months.

I have been engaged in Slovenia on numerous occasions to advise the government, energy companies and non-governmental organisations ("NGOs") on matters of EU environmental law. Despite the fact that environmental law is an area of the law where the majority, if not all, of the rules originate at the EU level, there is still a misconception of there being EU law on one hand and national environmental law on the other. This misconception is also shared by many Slovenian judges making it very hard to ensure that EU environmental law is correctly enforced.

The implications of mandatory provisions of EU law mentioned above not being given effect are significant for companies seeking to develop projects in Slovenia not only in terms of delay and lack of legal certainty but also in terms of finance. Rather than ensuring that ARSO/the Ministry of the Environment issues decisions in the EU mandated timeframes, the government of Slovenia continues, unnecessarily, to amend the law in ways which undermine the role of NGOs and breach EU environmental *acquis*.

2. Issue of standing to challenge decisions/actions/laws of EU institutions

The second challenge I would like to discuss with you today is the highly circumscribed grounds for standing to challenge decisions and laws adopted by EU institutions. I trust you will all agree that every developed legal system must have a mechanism for testing the legality of its laws and actions adopted by its executive. This is fundamental to democracy and the rule of law. And yet this is not the case at EU level. At least, not yet.

Over the years, we have seen an increase in the amount of legislation adopted at EU level as well as a proliferation of institutions and agencies set up at EU level. Yet, the

ability of companies and individuals to challenge laws, decisions and actions adopted by EU institutions is very circumscribed.

Pursuant to paragraph 4 of Article 263 TFEU "*any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*".

In other words, there are three standing scenarios: (i) an act addressed to the person, (ii) an act which is of direct and individual concern and (iii) an regulatory act which is of direct concern and does not entail an implementing measure.

These narrow rules on standing to challenge EU law are difficult to reconcile with national laws of EU Member States on standing. They are also increasingly difficult to reconcile with the CJEU's case law on the principle of effective judicial protection in national courts as per Article 19 TEU.

The Nord Stream 2 CJEU General Court's decision of May 2020 in Cases T-526/19[3] and T-530/19[4] in respect of *Directive 2019/692 of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas* (the "*Amended Gas Directive*")[5] is an example of an extremely narrow interpretation of standing as per Article 263 TFEU for judicial review of EU legislative acts. The General Court in that decision held that Nord Stream 2 was not directly concerned by the adoption of the Amended Gas Directive on the basis that (i) it is only through the intermediary of the national measures transposing the directive that Nord Stream 2 will be subject to it and (ii) Germany had a margin of discretion in implementing the directive which included the ability to grant exemptions or derogations.

As part of the Conference on the Future of Europe, calls have been made to amend Article 263 TFEU and align the requirements for standing under EU law to those of EU Member States. Failure to do so is likely to lead to further disenchantment with EU law

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[3] Case T-526/19, *Nord Stream 2 AG v European Parliament and Council of the European Union*, Order of the General Court (Eighth Chamber) of 20 May 2020, [2020] ECLI:EU:T:2020:210, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019TO0526(01), last accessed 12 January 2022.

[4] Case T-530/19, Nord Stream AG v European Parliament and Council of the European Union, Order of the General Court (Eighth Chamber) of 20 May 2020, [2020] ECLI:EU:T:2020:213, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019TO0530, last accessed 12 January 2022.

[5] Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, OJ L 117, 3.5.2019, available at http://data.europa.eu/eli/dir/2019/692/oj, last accessed 12 January 2022.

and EU institutions and give further wind in the sails of those calling for the disintegration of the EU.

3. Human rights, the relationship between the CJEU and constitutional courts

The third challenge in respect of EU law that is faced by companies, individuals and lawyers in everyday life concerns human rights and, in particular, the relationship between the CJEU and the constitutional courts of EU Member States in upholding human rights.

I share the concern of many that so far the CJEU has given priority to effectiveness, uniformity, mutual trust and, after the *Melloni case*[6] and Case Opinion 2/13[7], the supremacy of EU law over human rights.

Let me remind you what the CJEU said in para. 189 of the Case Opinion 2/13: "*In so far as Article 53 of the ECHR [European Convention on Human Rights] essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter [of Fundamental Rights of the EU], as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited (…) to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised*" (emphasis added). Let me also recall you that in this decision the CJEU held that despite the express provision of Article 6(2) Treaty of European Union that the EU "shall accede to the ECHR", the agreement on the accession of the EU to the ECHR was not compatible with EU law thereby slamming the door shut to the EU becoming a party to the ECHR.

It is telling that to date there seem to have been only two cases in which the CJEU annulled an EU directive on fundamental rights grounds. The first being the T*est-Achats case*[8] and the second the *Digital Rights Ireland Seitlinger case*.[9] In the Kadi

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[6] Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, Judgment of the Court (Grand Chamber), 26 February 2013 (the "*Melloni case*"), [2013] ECLI:EU:C:2013:107, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0399, last accessed 12 January 2022.

[7] Case Opinion 2/13, Opinion of the Court (Full Court) of 18 December 2014, [2014] ECLI:EU:C:2014:2454, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62013CV0002, last accessed 12 January 2022.

[8] Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, Judgment of the Court (Grand Chamber) of 1 March 2011 (the "Test-Achats case") [2011] ECR I-00773, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0236, last accessed 12 January 2022.

[9] Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Judgment of the Court (Grand Chamber) of 8 April 2014 (the "*Digital Rights Ireland Seitlinger case*"), [2014] ECLI:EU:C:2014:238, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62012CJ0293, last accessed 12 January 2022.

case[10] the principle of legal certainty was invoked to find that an unpublished regulation cannot be enforced against an individual.

I would suggest that it is at the core of any legal system based on the rule of law, and this includes the EU legal system, that (a) the decisions/actions of public institutions must be subject to effective review and give rise to liability and (b) the conferral of competence/separation of powers must be restrictively interpreted.

The recent decisions of constitutional courts of EU Member States, including that of the German Constitutional Court of May 2020[11], provide ample evidence that rather than being primarily preoccupied with preserving the sovereignty and identity of Member States, the central rationale and normative value of constitutions they seek to uphold is in fact to protect fundamental human rights, the rule of law, along with a system of separation of powers and checks and balances and judicial review.

4. Legitimate expectation, state aid and collision of EU law with international investment law

Finally, I would like to speak today about a challenge facing companies, individuals and lawyers about which I have written and spoken about extensively in the past.[12] The schism between EU law and international investment law regarding investment protection and the enforcement of arbitral awards continues to grow with every new decision of the CJEU. That the rights granted to investors under EU law are not the same and may be incompatible with the rights accorded to investors under bilateral investment treaties ("BITs"), the Energy Charter Treaty ("ECT") and customary international law has been clear for some time. The difference in the ruling of the CJEU in the Case C-17/03 *VEMW*[13] when compared to C-264/09 *Commission v Slovakia*[14] puts this beyond doubt. There has also been much discussion as to the difference in

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[10] Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Judgment of the Court (Grand Chamber) of 3 September 2008 (the "Kadi case"), [2008] ECR I-06351 available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0402, last accessed 12 January 2022.

[11] German Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15, available at http://www.bverfg.de/e/rs20200505_2bvr085915en.html, last accessed 12 January 2022.

[12] Ana Stanič, 'Enforcement of Awards and Other Implications of Achmea' in Crina Baltag and Ana Stanič (eds), *The Future of Investment Treaty Arbitration in the EU*, Routledge, 2021.

[13] Case C-17/03, *Vereniging voor Energie, Milieu en Water and Others v Directeur van de Dienst uitvoering en toezicht energie*, Judgment of the Court (Grand Chamber) of 7 June 2005 (the "*VEMW case*"), [2005] ECR I-04983, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62003CJ0017, last accessed 12 January 2022.

[14] Case C-264/09, *European Commission v Slovak Republic*, Judgment of the Court (First Chamber) of 15 September 2011 (the "*Commission v. Slovakia*" case), [2011] ECR I-08065, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62009CJ0264, last accessed 12 January 2022.

the concept of legitimate expectation under EU law and international law. The rulings of the CJEU in the *Achmea case*[15] in 2018 and the Komstroy v *Moldova case*[16] of 2021 that intra-EU BIT investor state dispute provisions and intra-EU ECT investor state dispute provisions are not valid under EU law have left investors from EU Member States without the investor Treaty protection they had prior to these judgments being rendered and arguably retrospectively. Many of them consider the current situation unduly favours investments and investors from third countries who continue to be able to rely on BITs with EU Member States. In response to these concerns, the European Commission held a public consultation on 26 May 2020 on the protection and facilitation of cross-border investment within the EU. Although investment arbitration remains a preferable option to resolving investment disputes, the possible creation of an EU Investment Court may address some of the current concerns raised by EU investors.

The readiness of the CJEU in the Komstroy v Moldova case (a case concerning a dispute between two non-EU parties and where no issue of substantive EU law came into play) to interpret and construe the provisions of the ECT, an international Treaty, whilst at the same time maintaining that it solely has the authority to interpret the TFEU, TEU and EU law is unlikely to be well received or understood by courts in other countries around the world or by their governments. This will pit the EU against other countries around the world at a time when steps should be taken strengthen international comity and cooperation.

As I see my time is up, I will stop here and invite the audience to ask any questions they may have.

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[15] Case C-284/16, Slowakische Republik v Achmea BV, Judgment of the Court (Grand Chamber) of 6 March 2018 (the "*Achmea*" case), [2018] ECLI:EU:C:2018:158, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62016CJ0284, last accessed 12 January 2022.

[16] Case C-741/19, *République de Moldavie v Komstroy LLC*, Judgment of the Court (Grand Chamber) of 2 September 2021 (the "Komstroy v Moldova case"), [2021] ECLI:EU:C:2021:655, available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0741, last accessed 12 January 2022.

Law and language as a path to integration[1]

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- Introduction

Legal translation through the means of legal language represents one of the key components of the European integration project. There is no doubt that implementation of the four freedoms coupled with other forms of political integration led to the success of the EU integration project. However, this whole process was facilitated and depended upon the successful translation of EU law in national jurisdictions. Moreover, further enlargement of the EU is equally reliant on successful acceptance of membership criteria in potential and candidate countries and the creation of a compliant legal environment through the means of legal translation and legal language.[2]

The EU's linguistic policy is underpinned by the principle of multilingualism which is enshrined in Article 3(4) TEU stating that the EU ensures respect of its "cultural and linguistic diversity" embodied in 24 official languages.[3] A similar provision respecting cultural, religious and linguistic diversity is guaranteed in the Charter of Fundamental Rights of the EU.[4] This principle is key as it enables member states not only to preserve their linguistic and cultural identity but also it gives them agency to interpret EU law in legal, metaphorical and literal senses and consequently preserve their legal culture by incorporating EU law within the national legal framework. It thus becomes interesting to examine the relationship between legal translation through the means of legal language and multilingualism. This summary outlines two different effects that

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[1] This paper is a summary of the presentation I gave on 18 November 2021 at 'United in Practice' conference. For fuller details of these findings see Aleksandra Čavoški, Interaction of Law and Language in the EU", *JoSTrans* 2017 27 and Aleksandra Čavoški, Legal Language and EU Integration — The Case of the Western Balkans*, International Journal of Language & Law* vol. 7 (2018).

[2] Presidency Conclusions 1993, 7.A.(iii)): "Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union".

[3] Official Journal of the European Union, C 202, 7 June 2016.

[4] Article 22 of the Charter, Official Journal of the European Union, C 202, 7 June 2016

legal translation can have on national legal texts – it can either lead to divergent national texts or have the opposite effect by creating greater convergence between translated legal texts in national languages. In both instances, as a result of EU multilingualism policy, national experts are incentivised to learn from each other by reviewing other countries' translations and practices.

- Legal Translation Creating Differences in National Legal Texts

Article 55(1) TEU endorses the principle of multilingualism by stipulating that this Treaty will be drawn up in 24 languages and that "texts in each of these languages shall be equally authentic". This latter statement about the authenticity of legal texts implies that textual equivalence is possible despite differences between legal languages and legal cultures in member states. Leung explains the effects of textual equivalence by stating that "if authentic language versions of a legal text are truly equal in meaning and status, then any single language version should carry the intended legal meaning, and multilingual legal interpretation should not differ significantly from monolingual legal interpretation."[5] However, the incorporation of EU law in member states over time exposed different experiences member states had had as a result of the inability of translation to achieve the symmetry of translation.[6] In practice, we can occasionally see the effects of lack of achieving textual equivalence resulting in differences between translations of the same EU legal texts in different EU official languages.

There a number of reasons behind this challenge in translation, including the following. It is not always an easy task to reconcile differences that result from different legal traditions and cultures among member states. This may especially be the case in areas of law where different legal traditions do not recognise or use the same legal concepts and institutions. Good examples of this are areas of private and administrative law where one would find differences between countries that fall broadly within the common law or the civil law systems. For example, the concept of a trust is an institution which is deeply engrained in common law systems and has significant implications on the foundations of property law. This legal form is not recognised or known in civil law systems.[7] Some of those examples can be found in EU Treaties. A

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[5] Janny Leung, *Shallow Equality and Symbolic Jurisprudence in Multilingual Legal Orders*, Oxford Studies in Language and Law, OUP (US), p. 190.

[6] PSee Ludmila Stern (2010), Book review of Translation Issues in Language and Law by Olsen, F., Lorz, A. and Stein, D. (eds) (2009). The International Journal of Speech, Language and the Law 17(1), 161–166.

[7] There were some attempts to introduce the concept of trust in French law.

good illustration is the area of administrative law which is not well developed in the English legal system and forms part of constitutional law.[8] Article 103 TFEU which prescribes rules for drafting legal acts that will regulate competition law in the EU offer a good illustration in this respect.[9] If we look closely at the provision in the English language, it stipulates that one of the requirements is to design rules which will "ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other hand".[10] If we compare this provision with its French language equivalent, its meaning becomes clearer and it indicates the type of administrative review well known in civil law systems (in French text it is translated as *contrôle administratif* and in German legal text as *Verwaltungskontrolle* 'administrative control').[11]

No less important is the use of the English language as a source language in EU legal drafting. Unlike English legal language that applies in countries based on common law, EU English is less precise and clear. It is often the case that EU legal texts drafted in English use words such as above, below, aforementioned and these are more common in civil law legal texts as part of the legal drafting technique. If we look at the TFEU it uses the terms *crimes* and *criminal offences* interchangeably in Articles 83 and 87 TFEU, although those two terms have the same meaning in the Treaty.[12] Finally, the development of EU law and the extension of EU powers in various policy areas lead to changes in the meaning of existing legal concepts or the emergence of new legal concepts such as enhanced cooperation, structured dialogue, joint action, or carbon footprint. These terms are not always easy to translate into another language. This was recognised by the Court of Justice of the European Union in CILFIT case when the Court explained that the "Community law uses terminology which is peculiar to it" and that "legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States".[13]

These differences between translations in national legal languages which stem from EU multilingualism policy have important implications on legal interpretation of EU law in national law. This is especially important for judges who are faced on a regular basis with national cases that involve application of EU law. In those situations, the Court of

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[8] Constitutional law is better known as public law in English legal system.

[9] Aleksandra Čavoški, „Interaction of Law and Language in the EU", *JoSTrans* 2017 27, p. 65.

[10] Ibid.

[11] Ibid. Please note that administrative review in English law forms parts of the judicial review which is regarded as a constitutional legal proceeding.

[12] Čavoški n. 9 at p. 64.

[13] Case C-283/81 ECLI:EU:C:1982:335: para 19.

Justice encourages an interpretation of a provision of Community Law which involves a comparison of the different language versions.[14] Thus, despite occasional divergences between texts in national languages, the EU multilinguistic policy facilitates the learning process among national experts by reaching out to different languages versions and understanding how the same legal provision is understood in different languages and cultures.

- Legal Translation of EU Law Creating Greater Convergence of National Legal Texts

In certain instances, where there is already an important degree of similarity between national languages among countries, the legal translation of EU law can lead to an opposite effect, thereby creating convergence and greater uniformity between national legal texts. Good examples of this include several countries in the Western Balkans which share common legal cultures and significant degree of similarity between national languages such as Croatia (EU member since 2013), Serbia, Montenegro and Bosnia and Herzegovina, who are EU accession countries. Those four countries were part of the former Yugoslavia and as a result all shared the language known at the time as Serbo-Croatian/Croatian-Serbian, while respecting different dialects and scripts. All federal laws and general acts of federal bodies were published in Serbo-Croatian/ Croatian-Serbian using two scripts (Latin and Cyrillic) and two dialects (ekavian and Ijekavian).[15]

Upon the break-up of former Yugoslavia, those four countries gained independence and four new standards languages were officially recognised including Croatian, Serbian, Bosnian and Montenegrin. Despite more prominent differences that began to emerge between those four standard languages, the effect of the break-up was less visible on legal languages. There are two main reasons. The first reason stems from the fact that those countries shared almost half a century of a common legal history and culture. Most of the federal framework laws that were adopted in former Yugoslavia such as the 1978 Law on Obligations and the 1980 Property Law Act continued to apply with no or very minor changes in four countries after the break up.[16] Moreover, those four countries shared the same understanding of legal principles, values and doctrines and there were no incentives or rationale to change these. Finally, stability and permanence of law partly explain the levels of inertia in making legal changes.

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[14] Case C-283/81 n. 13 at para 18.

[15] Article 131 of the 1963 Constitution; See more in Legal Language and EU Integration — The Case of the Western Balkans, International Journal of Language & Law vol. 7 (2018). Slovenian and Macedonian in Slovenia and Macedonia.

[16] Čavoški n.15 at pp. 82-85.

However, the second reason explains more profoundly the greater convergence between legal languages in four countries. The EU has acted as a cohesive force for years now in further unifying legal languages and cultures in those four countries via the accession process.[17] As a result of the EU enlargement process, all those countries had to embark on the road of incorporating EU law into national laws and three countries are still following this process. The European Commission has created an environment in which national bureaucracies are incentivised to cooperate and take full advantage of the identical processes and similarities between legal languages to facilitate their accession through the lens of legal translation. Thus, legal translation, though not a part of a deliberate EU enlargement strategy, became a vehicle of further EU integration.[18]

The European Commission fostered the same accession process with all candidate countries. This is best evidenced by the formulaic accession agreements which contain almost identical provisions and imposed the very similar, if not identical, legal obligations on the accession countries. In practice, national technocrats availed of this formulaic approach and use each other's translations in producing official translations of the agreement in their languages. As a result of this approach, we now have translations is four languages which are more than similar. The same approach was used in monitoring the progress of countries in their fulfilment of the membership criteria. The Commission not only uses the same processes for this purpose but uses the same legal and policy language, which is subsequently translated identically in all four countries. Moreover, as a part of the monitoring process the countries need to submit translations of national laws in the English language. In preparing those translations, countries very often borrow translations between themselves and final translations of legal acts in English that are sent to the Commission are again very similar. Thus, we see that this greater convergence among legal languages works in both directions of translation – from English to national legal languages and from national languages into English.

As a response to the Commission's approach to accession, the authorities in the four countries followed suit. They made a rational decision to learn from each other and follow the same processes in legal translation, as well as to use each other's translations in translating EU law into national legal languages. Croatia, which was the first to join the EU, devised different tools and processes which were followed by the

[17] Čavoški n.15.

[18] Ibid at p. 86.

other three countries and thus at the moment all share some translation processes and tools. A good illustration are methodology and guidelines for legal translation of the EU law. For example, Croatia introduced a “Statement on the compliance of the proposed act with EU law” which follows any new legal proposal submitted to the National Parliament.[19] This was accepted as practice in all three countries. Similarly, the countries all have almost identical manuals for translation of EU law with very similar legal terms.

Finally, as a part of the accession process, the countries all had to adopt new laws and policies to ensure compliance with EU rules. In doing so, they again took advantage of the similar legal languages and cultures in order to facilitate their own work. This is especially the case when national experts are faced with new legal terms that are not part of the existing legal language and culture. For example, the Third Money Laundering Directive (2005/60/EC), introduced the term 'beneficial owner' meaning the person who is regarded as the genuine owner of the assets though this may not necessarily be immediately visible.[20] As this term is new, countries in the region tended to borrow terms and concepts from their neighbours. Thus, what we have in practice is a series of national laws and policies which use not only the same legal terms and definitions but very often have similar or identical legal provisions. As a result of EU integration underpinned by similar legal languages and cultures, the national authorities in the region are therefore incentivised to cooperate and learn from each other in implementing the EU multilingual policy.

- Conclusion

This summary provided some examples on the effects of legal translation of EU law in national legal languages in the pursuit of the EU multilingualism policy. In certain instances, legal translation leads to divergent texts in national languages, while in very specific circumstances it has the opposite effect whereby legal translation through the means of legal language creates uniformity and greater convergence among languages which are similar and based on the same legal culture. However, in both situations, EU multilingual policy creates a positive policy outcome and encourages national authorities, such as civil servants and judges to consult legal texts in different languages and learn from each other.

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[19] See Ramljak, Snježana (2008). “Jezično” pristupanje Hrvatske Europskoj Uniji: prevođenje pravne stečevine i europsko nazivlje. *Politička misao*, *XLV*(1), 159–177.

[20] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, *OJ L 309, 25.11.2005, p. 15–36.*

This learning process sometimes involves reading different translations as the best way to ensure correct interpretation and application of EU law especially when a national official is faced with an imprecise or unclear provision or a provision which may be contrary to national rules. In reaching out to different national versions, national officials not only have a better understanding of EU law but are provided with the opportunity to see how EU rules are incorporated into different national jurisdictions. In cases when national languages are similar, legal translation offers an even more profound opportunity for cooperation and, in the case of the Western Balkans, facilitates regional cooperation among national authorities. This is especially important for this region as regional cooperation is one of the supplementary requirements, in addition to standard membership criteria. Thus, this provides an example of how the European Commission through its enlargement approach can incentivise cross-country cooperation through the means of legal translation and legal language.

eLegislation in the Republic of Slovenia: who, what, how, why

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Introduction

The slogan of the Slovenian Legal Conference "United in Practice" is followed by three hashtags: #legislation, #implementation, #technology – one for each section. The article in question, which launched the third section, is dedicated to the interaction of law with technology, which is why it leans in its introduction on this significant video clip[1].

What is the message of this advertisement? Leaving aside the marketing aspect, it is clear that there is something self-evident in it: technology brings benefits, brings progress, and is an important part of our lives. These days we are accustomed to talking about smartphones, smart cities, and virtual consultants. Digitalisation is no longer just a trend, it is a necessity that forces us to improve business models and allows us to achieve our goals in a more transparent, efficient, and easy way. This is true in both law and in normative activity.

eLegislation, which is the central topic of this article, is a set of projects aimed at a comprehensive and systematic digital transformation of the process of planning, preparation, adoption, and evaluation of legislation in the Republic of Slovenia.

Who and why?

In 2014, the Government Office for Legislation, which manages several legal registers and databases, made an analysis of the situation in the field of data and document management in the legislative procedure. We listed and reviewed all steps and procedures, requirements, and rules in the path from planning to publication of the legislative act, as well as the IT solutions in use. We found that quite a few applications

[1] Element E Filmproduktion. Available at: http://element-e.net/DE/werbefilme/mercedes-benz---sorry/mercedes-benz---sorry.html.

are available to legal drafters, although these are very different from each other and are not optimally connected. In addition, many do not use them at all or use them incorrectly because they are difficult to access, and their operation is complicated. In no case can we talk about a uniform and systematically regulated process of legislative drafting that could take place on a digital platform created for this purpose and which has a user-friendly interface, which would make the implementation of tasks that are essential in this process easier, faster, and more transparent. Although there is a certain level of IT support, we are therefore still prisoners of non-optimised methods of doing business, which require a lot of manual work and are time consuming.

The conclusion of the analysis was that more advanced IT support of the scope of work of those involved in the process of legislative drafting would achieve a significant shift in several areas:

- accessibility and responsiveness

By establishing a single (online) platform accessible from anywhere and with a one-stop shop service, we can significantly improve the accessibility of digital services and enable the greater responsiveness of those for whom these services are intended.

- optimising work processes and achieving better results

We can significantly improve the manner of work and achieve better results if we combine the functionalities of different systems into a single IT solution, if we enter data and texts only once and then reuse them, if we use validations and controls that remind us of the correct sequence of steps and mistakes made that can be corrected immediately, etc.

- technical progress

The use of open-source solutions and modules designed for a specific purpose (fit-to-purpose) makes it easier to adapt to technical progress and increase the possibilities for future upgrades, especially by integrating new dedicated modules and connecting to a variety of IT systems.

- job satisfaction

Last but not least, with good IT solutions we provide a safe, stable and human-oriented digital environment, and through regular training we improve the digital competencies of users and can thus significantly contribute to overall job satisfaction.

What?

Taking into account the above-mentioned findings, we have developed the eLegislation digital environment concept, which must meet three essential criteria: it must address the needs of legal drafters, take into account modern technological approaches to document management and be able to ensure quality legislation, as this is an important element of legal certainty.

The first step towards a complete solution was named the Modular Open Platform for Electronic Documents (MOPED-DOC). It is a platform for the drafting of digitalised material that is required in the process of adoption of a regulation. The basic purpose of the platform is to start drafting legislation and accompanying material in a multi-purpose, constantly accessible and controlled environment, in formats that are machine-readable and can be read and processed by a computer. According to ISO 15489 standard, data and documents that are not in this form are without context and lack four key characteristics of trustworthy business records: reliability, authenticity, integrity, and usability. The design of the MOPED system is modular, which means that specific content is edited within each module. Some of the most important modules can be seen in the diagram below.

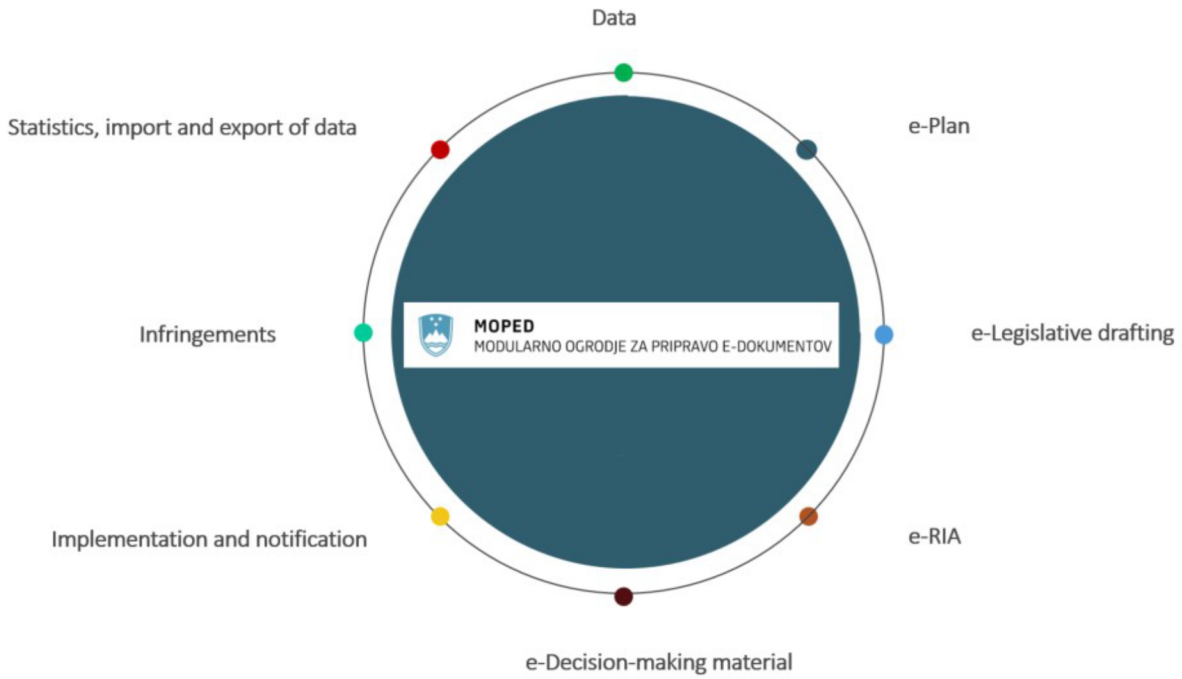

Figure 1: A diagram of some modules of the MOPED system

However, the MOPED system cannot address all the challenges of normative activity on its own. Therefore, several other projects intertwine under the umbrella project

eLegislation in which various authorities participate (e.g. the Ministry of Public Administration, the Ministry of Justice, the Ministry of the Environment and Spatial Planning). I will leave the details of these projects aside. It is important that the results of IT solutions that flow into the eLegislation concept are visible and accessible to the public through the Legal Information System of the Republic of Slovenia, which is a state legal portal available free of charge.

How?

Before I answer the question of how to achieve the goal that we have set, it should be pointed out that all such projects are very demanding to implement from several aspects (organisational, personnel, financial, substantive, and technical).

To illustrate, I provide a diagram of the building blocks used in the Legal Information System of the Republic of Slovenia. From the point of view of the eLegislation project, the latter is just the tip of the iceberg or, expressed more evocatively, a mirror in which is reflected the creation of law.

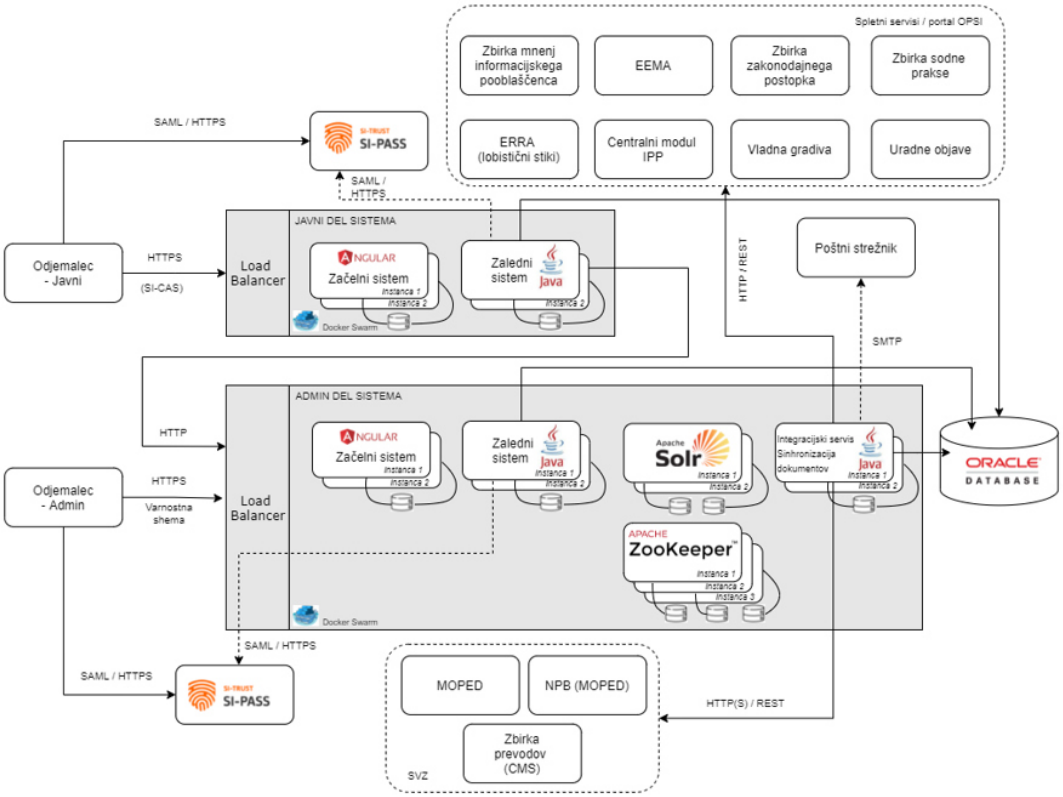

Figure 2: A diagram of the building blocks used in the Legal Information System of the Republic of Slovenia

Most of the frames in the diagram are, functionally speaking, independent IT solutions with their own logic, which were created as part of a project and are the result of teamwork. However, good teams don't fall from the sky. Forming a project team that must command many other skills in addition to programming skills, from project management, business analytics, design, content structuring to, of course, specific knowledge of the field to be digitalised, is a very special organisational and personnel challenge.

It is not disputed that the technical (programming) aspect is exceptionally important. We would not be able to develop anything without programmers. However, the client must be able to analyse the current situation in detail and describe what the situation should be in the future. No contractor can start developing with its programming team if the client is not able to articulate where the problems are and what they really want. This is an exceptionally arduous but necessary phase in the construction of any IT solution, as development can start only when its strategy is set in a sustainable manner. Therefore, the key to developing a final IT solution is not who actually creates the building blocks and connections between them, but how to strategically shape the content context and thus enable the coexistence of various applications so that the utility function for the broadest circle of end users eventually prevails.

The eLegislation project is difficult to implement because the law-making itself is exceptionally complex. It is a set of principles, rules and practices that have been shaped by many hands for decades. In addition, many people are involved in the process, including drafters, decision-makers and the expert and lay public. Everyone must work in conjunction with each other, regardless of interest dichotomies, differences in legal awareness, language dissonances or any other disharmony between them. If law is being created while there is a lack of pre-known rules and established practices, with no involvement of experts and the public, and confusing and imprecise norms are being written, we (can) quickly enter a state in which law commands, prohibits and penalises in a way that has nothing to do with the collective consciousness of society.

It is clear that we must always start a digital transformation where we are and with what we currently have. We can make progress from there. We can only make progress if we allow ourselves to speak openly about the weaknesses and obstacles in the manner of work; if we are prepared to shake off the need to utilise the existing framework that turns out to be no longer the best; if we free ourselves from thinking that it is impossible to do things differently to the way they are done now; if we are

willing to cooperate; if we take into account the risks that change brings; and if we allow the mechanisms that are an anchor of legal certainty, transparency and reliability to live on, while putting into practice the knowledge and ideas about how to make the existing regulation more flexible, creative and innovative.

I am afraid that we have not yet become fully aware of the importance of strong foundations for creating law, such as the implementation of the principle of necessity of normative activity, self-limitation, proportionality, responsibility, and professionalism. If these foundations are tested over and over again, it is much more difficult to move boundaries in normative activity. I would like to see us at a considerably more advanced stage today, both in terms of content and technology: e.g. implementing guidelines for the preparation of easy-to-read material in the legal drafting, pilot testing certain methods of artificial intelligence, such as detection of semantic connections in legislation and automated detection of compliance between laws, etc. Unfortunately, these are visions and missions that await us.

Conclusion

Finally, let me return to the introductory video clip. It is an 11-year-old advertisement that promotes a braking assistance system. This is a safety device that detects external events, calculates the risk of collision, and automatically increases the braking power and thus enabling the vehicle to stop more quickly. It is a system that significantly upgraded the well-known ABS or anti-lock braking system, which, by the way, was developed as far back as 1971.[2] What I want to say is that what stands behind a quality product that benefits many generations is years of development of ideas, analyses, studies, prototyping, a wealth of knowledge and experience from a variety of disciplines that often flow from industry to industry, and that this innovation cycle never really ends.

We know that when braking in an emergency, seconds can mean the difference between life and death. It is no different in law. Reckless moves and slips in the legislative procedure can have fatal consequences. The key to success is in a prudent and gradual shift to the digital and in building a system that allows professionals, with the participation of the expert and lay public, to (correctly) (co-)create law, while helping it in the process – helping by sensing (legal) dangers and, when necessary, increasing braking powers.

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[2] It was invented by Mario Palazzetti (known as Mister ABS) in the Fiat Research Centre.

Legislation drafting in the new era of digital transformation

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1. About LEOS

LEOS is an online drafting tool designed to help those involved in drafting legislation. LEOS ensures that the content drafted by the users follows drafting guidelines by offering features like enforcing predefined document structures, predefined layout and numbering rules. All of this serves to ensure that the author can first and foremost focus on drafting itself and much less on layout management (or checking). In order to facilitate efficient online collaboration LEOS also contains some others features like comments, suggestions, version control, co-edition, etc. Content is stored in an XML format, currently Akoma Ntoso V3, which facilitates document exchange, element retrieval, etc.

LEOS delivered its first results under the ISA Programme as ISA Action 1.13 LEOS and continued under ISA^2 Programme as part of LegIT-2016.38 Legislation Interoperability Tools from the second quarter of 2016 until the third quarter of 2021. LEOS will continue under the new Digital Europe Programme (DIGITAL) as of 2021.

2. Objective(s)

Even if there is a high diversity of legislative traditions encountered across the Union and different levels of modernisation, several common challenges have been identified:

- the process of drafting legislation is complex,
- there are a lot of stakeholders involved,
- the process has both digital and paper version,
- drafters have to deal with versioning of documents,
- time is spent on formatting and on overall quality of the document and
- there are limited tools for re-use of texts.

LEOS has been designed to address these challenges. This doesn't mean that LEOS is a universal single turnkey ICT solution, but it is a solution that can be configured and re-used in specific contexts to address the challenges identified above .

3. Features

The latest version of LEOS offers the following features:

• Structure: In order to help the drafters focus on the content and not on the structure, LEOS helps drafters follow the structural rules and avoid mistakes. If the structure is your challenge, our solution deals with the creation of acts from a template, and has all further editions subject to predefined structure rules. Additionally, there is no need to worry about internal references, they are automatically created and updated.

• Collaboration: Losing time exchanging and managing different versions with your drafting partners? LEOS is built as an online authoring tool, a single online workspace for all contributors, offering simultaneous collaboration on one draft.

• Versioning: All versions are centrally stored and protected using role-based access control rules. With this feature, the users can have instant comparisons between successive versions and the timeline is visually displayed and easy to manage.

• Review / comments: Features for review, comments or suggestions which can be approved (or rejected) and merged directly in the text are also available. The solution includes also the track changes option.

• Import: If you need to reuse some text from existing sources like the Official Journal of the European Union, you can use the import feature. You can import some or all recitals and articles of an act.

• Rich text: If the text needs to be enriched with images, tables and mathematical formula, this is also possible. The rich text can be added as-is and can be customised by adding plugins.

4. LEOS and digital transformation

Entering in the new era of the digital transformation, the LEOS project is exploring the potential of the use of innovative/advanced IT in order to improve the quality of the process and content, increase operational efficiency and harness digital change. The exploration took a pragmatic approach by focusing on the evaluation of the impact and

benefits observed in four use cases, with the longer-term goal to further explore other use cases and to consider more pilots at a larger scale.

5. LEOS community

LEOS is an open source software and therefore its community plays an important role. Under clear defined rules, the community is a key factor in the evolution of LEOS. The LEOS team is actively working to support the growth of the community, a community that already has active participation from members:

- User from Spain: LEOS will help us make the drafting of legal texts more efficient,
- LEOS as an educational tool for public administrators,
- Testing EdiT, the European Commission instance of LEOS.

For anyone interested in joining the community, go to LEOS project in on Joinup and become a member.

6. LEOS release package

Currently, all LEOS releases are available in Joinup as .zip packages and released under European Union Public Licence. For details on the EUPL version, please see each individual release. For more relevant information about LEOS, please check the latest information available:

- The user manual, called "Leos user guide.pdf" and can be found in the latest release package in the following folder \ LEOS-Pilot_3.1.0.zip\docs\

- An architecture document called "Leos architecture manual.pdf" located in the same place as the user manual.

- A document on the configuration called: "LEOS_Document_templates_and_elements_configuration_manual.pdf", located in the latest release package in the following folder \ LEOS-Pilot_3.1.0.zip\docs\ Document-templates-and-configuration.

- A demo of LEOS 3.1.0.: https://www.youtube.com/watch?v=SwQDVxtwmUs.

For any questions, do not hesitate to contact the LEOS team at: DIGIT-LEOS-FEEDBACK@ec.europa.eu.

Artificial intelligence and law: the pitfalls and limitations of automation

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1. New language and new knowledge

In this paper, the author discusses the use of artificial intelligence (AI) in law, with a particular emphasis on its use in criminal prosecution and criminal justice, as this application of AI provides a broader insight into how AI can and should (not) influence law and how it can be used in criminal law.

The shift in the understanding of data in terms of their new value, their added value at the aggregate level, their ability to present new insights and generate new knowledge, is important for the development of AI tools. Hence the emphasis on the importance of "data reuse" and the emergence of a "data economy" (data as the "new oil") in the EU since 2014 at least. Metadata (data about data) may not be of great significance on their own, but when combined with other data, they create new added value. They enable two things: 1) *predictions* based on existing data that transcend human perception. Deep learning methods and neural networks help us find correlations between data that a human could never detect (e.g. numerous scattered data enable us to forecast the weather or predict – as technological enthusiasts claim – criminal offences); 2) *interventions*; predictions are not an end in themselves. They lay ground for pre-emptive action (e.g. police predictive software is used to predict robberies with a certain probability based on past data and consequently to dispatch police patrols to the identified neighbourhoods). Big data is therefore used to make predictions, which are in turn used to plan interventions and pre-emptively respond. In the "fight against crime", this means taking action before criminal offences are committed.

AI is not about “intelligence” in the usual sense of the word but about correlations and connections between data that transcend human perception. Predictions based on past data are of course interesting for law, as law is also concerned with the future (e.g. parole is granted only if there is a high probability that the convicted person will not re-offend in the next two years). This allows for anticipatory interventions, changes to the

course of events or adaptation to the course of events (the purpose of predictive policing is to adequately prepare for or even – hopefully – prevent unwanted events, e.g. by dispatching a police patrol to the site where a robbery is predicted to take place).

Furthermore, new AI tools are important for law, since they generate a new vocabulary, a new language to describe our reality and new knowledge. Unfortunately, these new concepts may come into conflict with existing legal concepts, e.g. in the crime control domain, new concepts such as meaning extraction or sentiment analysis (an analysis of users' feelings by analysing posts on social networking sites) and opinion mining are of particular value, which may come into conflict with the existing regulation of the repressive apparatus. New concepts, at least in criminal law, clash with established criminal law concepts, e.g. the concept of a "sleeping terrorist" (from the standpoint of legal certainty) is not comparable with the concept of a suspect (the concept of a "sleeping terrorist" was included in German counter-terrorism legislation, which was later repealed by the German Constitutional Court). The notion of a “person of interest”, which can be technically created by mining large quantities of posts on social networking sites, is something that comes into conflict with the concept of a suspect. The notion of mathematically calculated “escalating behaviour”, which can be threatening, intrusive behaviour or just loud talking, denotes behaviour that has not yet crossed the threshold of criminality and should not legitimise the encroachment on fundamental human rights by agents of formal social control.

A new language generated by new AI tools transforms data into actionable data or information, which enables immediate action or can be acted upon in real time or “near real time”. The implicit idea is that data enable cutting budgets – “to achieve more with less” is a maxim which spread from online retailers also to law enforcement agencies, which should prevent crime with fewer resources.

These new concepts generated by AI tools may conflict with existing criminal law concepts and fundamental human rights, which are the regulator of state power and benefit the legal certainty of a person. When someone becomes a suspect, they are entitled to certain rights that have been shaped by the development of the liberal criminal procedure. However, is a "person of interest" a suspect or not? Is "escalating behaviour" enough for the criminal law apparatus to focus on the individual and take him or her under scrutiny?

These are only a few examples which show how computer-generated knowledge can come into conflict with existing legal concepts in criminal law. Nevertheless, examples could also be found elsewhere, as potentially all human rights could be affected by new AI tools. The implicit assumptions of the development and use of AI therefore must be unveiled and meticulously scrutinised. Mathematical models are not value neutral, but they contain specific values. It is not true that theory is no longer needed in the age of big data because new insights can be born without a prior hypothesis (as the AI apologists say "the data speaks for itself").

2. Algorithmic governance

The uptake of AI tools in many social subsystems is leading to a new form of algorithmic governance. Examples of AI uses having a direct impact on the chances and choices of a person can be found in banking (e.g. when an AI tool calculates the terms and conditions of banking services and customers' risk levels), in the insurance sector (e.g. when racial minorities pay higher premiums for the same insurance coverage), in education and employment. In these domains, AI has a direct effect on a person's rights and duties. Nevertheless, its reliability is questionable because (a) the data are incomplete (or complete in the sense that they reflect the weaknesses of our societies and mirror racial, gender and other inequalities remarkably well) or (b) the algorithms calculate prohibited circumstances for decision-making through proxies (for the US criminal law system, for example, B. E. Harcourt (2015) notes that criminal history is a proxy for race; as soon as criminal record of a person is included in decision-making, race is automatically taken into account, even though it is explicitly excluded from the decision-making process). The injustices in car insurance were demonstrated by ProPublica when it proved that black people in the US pay twice the insurance premium for the same coverage. A report by P. Alston (Digital Welfare Dystopia, 2019) cites figures on the use of AI in social welfare services and the ensuing harmful legal consequences. In the Netherlands, for example, the government resigned in January 2021 because the tax administration's automated identification of child benefit fraud had falsely accused more than 200,000 recipients of child benefits of fraud and among them a disproportionate number of people with dual nationality.

The use of AI can also lead to news manipulation, and the emotional and political "contagion" of users of social networking sites. In 2014, Facebook researchers demonstrated how specific manipulation in serving and recommending content on social networking sites can affect the mood of users (Kramer, Guillory, Hancock, 2014). The alleged neutral role of platforms as intermediaries is therefore in reality not value

neutral. The researchers altered news feeds in the profiles of nearly 700,000 users without their consent and demonstrated that their mood can be transmitted across digital networks – more “positive” news led to more “positive” posts and vice versa.

Similarly, in 2018, the general public realised that AI tools may lead to the “political contagion” of the users of online social networks, as reported by Cambridge Analytica whistle-blowers. This company claimed to have obtained 5,000 data points on every American voter and to have profiled each of them with the "Big 5" personality test and micro-targeted them according to their psychological profile. Such tailored advertising is said to have changed many election outcomes around the world (the US election in 2017, Brexit, Brazil, Indonesia, etc.). This power of AI has been referred to by some authors as the "Weaponized AI Propaganda Machine" (Anderson, Horvath, 2017). The supposedly neutral AI tools have an impact on human rights and even on the fundamental democratic processes and the rule of law. Can we therefore already claim that the rule of law is being replaced by the "rule of algorithms" or that democracy is being replaced by an "algocracy”?

Legal automation, of course, has many positive uses too. These include predicting the outcome of judicial decision-making, assisting legal research, helping to decide how to resolve legal disputes, reviewing case law, understanding biases of legal and political decision-makers etc. Better insight into past court cases and into legislation through AI tools, such as with the help of natural language processing (NLP) tools, may improve the quality of legal decision-making and provide insights into the potential biases of legal decision-makers and discrepancies between them. However, these tools can also cause many injustices and errors when used without comprehensive human rights impact assessments.

3. Automation of police work and criminal justice

There are several uses of AI in policing, such as crime predictive software, which identifies geographical hot spots and creates heat lists using specific software (e.g. PredPol and BlueCrush in the US and Precobs in Switzerland). Algorithmic preventive screening of Muslims living in Germany, police analysis of Twitter users in Slovenia or identification of violent gang members in the UK are well known practical examples in Europe.

In criminal justice, AI can be used to predict the future behaviour of defendants for the purposes of detention on remand, search for and analysis of evidence (digital forensics tools), to select and assess penal sanctions, to design penological treatments and in

parole procedures. Nevertheless, despite such tools being technically feasible, it does not automatically mean that these data should also be used in legal decision-making processes in practice. The best-known tool for predicting the future behaviour of convicted prisoners (recidivism rates) in the US, COMPAS, has been proven by ProPublica to disproportionately hit black prisoners, with predictions of recidivism of parole applicants being incorrect twice as often for black people (i.e. black people were twice as likely to be labelled as re-offenders compared to white people, even though in the end they did not re-offend). Hence it best illustrates the injustices and difficulties associated with the use of AI tools in legal decision-making. While the risk assessments produced for an individual parole applicant were "mere" recommendations to the parole board (see Loomis v. Wisconsin, 2016, and the State v. Wisconsin, 2017), the procedure by which these assessments were produced was not transparent (e.g. which data was fed into the algorithm and the properties of the algorithm remain unclear) and was not disclosed to the convicts to whom the risk assessments pertained (raising serious doubts about the due process of law). Another problem associated with the design of COMPAS was determining which forecasting errors needed to be minimised or what needed to be optimised. Whereas the critics at ProPublica focused on the false (positive and negative) hits, i.e. those convicts who were falsely identified as re-offenders (and in the end did not re-offend) and those who were falsely identified as not likely to re-offend (and then did re-offend), Northpoint, the company that developed COMPAS, focused on optimizing the correct hits (so called true positives and true negatives). To put it differently, COMPAS was equally successful at predicting recidivism rates of white and black offenders (true positives and true negatives), but when it failed, it failed differently for black defendants, i.e. black defendants were twice as likely flagged as a high risk, but did not re-commit (and vice versa, white defendants were more likely flagged as a low risk, but they did re-commit). Critics (ProPublica) and advocates (Northpoint) of COMPAS focused on different levels of the software: ProPublica on false hits and Northpoint on correct hits. But a simultaneous optimisation of both types of hits is mathematically impossible, as the two groups of defendants contribute disproportionately different to crime rates. i.e. black defendants are more often in the grip of the criminal justice system. It is therefore necessary to decide which level of the software to optimise and, moreover, this decision must not be left to the computer experts of a company which has no democratic mandate to make such decisions with implications for the right of defendants.

Another example revealing the lack of understanding of the law and the functioning of the criminal justice system by computer experts is the prediction of crime from the shape of a person's face using computer vision technologies. Chinese scientists conducted technologically sophisticated research on inferring criminality from a person's face, but they completely overlooked the nature of criminality (law) as a normative phenomenon, normalising implicit biases that machine learning merely perpetuates and hides in complex statistical models. Arcas et al. (2017) described the experiment of automated recognition of "criminal" faces as the "laundering of human bias through computer algorithms". The research is but one example of a comeback of the (forgotten and ridiculed) phrenology of the 19th and 21st centuries camouflaged in a new computer-inspired form.

Despite the pitfalls of AI use in legal and especially criminal law procedures, it is important to look at the reality of existing procedures (law in action): these often reflect the weaknesses of the people who run them and those who play preconceived roles in them. It is therefore not unusual that defendants would often – given the choice – choose a robot over a human as judge. At least that is what S. Turkle finds for black defendants in the US who are deeply distrustful of "old, white, male" judges. Is this an argument for replacing human judges with robots? Unfortunately, there is no world without biases – an imaginary biased-free bonanza, and humans just like computer systems make mistakes. The question is, where to invest societal resources – in decision-makers' education or/and in the development of AI decision-making systems? As specific legal procedures are often not transparent at all, improvement in one or the other would result in significant progress.

4. Conclusion

It is crucial to stress that there are also uses of AI that must be rejected a priori. Such considerations have appeared in theory in the recent years, for example A. Narayanan speaks of "AI snake-oil" in this respect. For him, the fundamentally questionable uses of AI include predicting recidivism (re-offending), predicting job performance, predictive policing, predicting terrorist risks and predicting at-risk children. What these cases have in common is that they predict social outcomes – which depend on too many circumstances to be predicted with sufficient certainty and would take away a person's dignity and autonomy to act differently (from a statistical prediction based on past similar cases). It would also mean the end of the Enlightenment conception of the subject, of what humans are and should be. These theoretical considerations on the problematic and dangerous uses of AI are also reflected in the European

Commission's proposal for an AI Act of 2021. It identifies the absolutely prohibited uses of AI, such as harmful subliminal manipulation, exploiting the vulnerability of certain groups (children, people with special needs), etc.

AI requires adjustments and re-interpretations in a wide range of legal disciplines, from constitutional, civil and criminal law to consumer, tax and personal data protection law. The paper has only presented examples from criminal law, which should serve as a starting point for more general reflections on the challenges and pitfalls of new technologies in law. Criminal law concepts, such as the notion of the suspect and the defendant, fair trial, reasons for a decision, etc., are anchors of legal certainty that modern technology is challenging with new language and new type of knowledge. It is therefore imperative to demand transparency and urgent dialogue with the computer community in the development, implementation and use of new technologies, or more specifically AI tools, in legal decision-making processes. A human rights-based approach should be the cornerstone of development of AI, not just the more loosely (self-)defined ethics of AI developers.

Artificial intelligence and LegalXML standards to support the transposition and implementation of the Acquis

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1. From LegalXML standards to AI for the legislative process

In the last two decades the legal informatics community, using multidisciplinary methodologies, elaborated relevant outcomes that provide solutions to modelling legal knowledge within the Semantic Web framework (Casanovas 2016), Open Government Data (Casanovas 2017, Francesconi 2018), Free Access to Law Movement[1] (Greenleaf 2011). Also, the official gazettes moved to digital format[2] with a deep transformation of the legal source paradigm. The LegalXML community developed different XML standards (e.g., Akoma Ntoso, AKN4UN, AKN4EU) for structuring legal texts, metadata legal models (e.g., RDF models for legal domain, like ELI), legal rule modelling languages (e.g., LegalRuleML), URI naming convention persistent over time (e.g., ELI/ECLI), and legal reasoning literature and AI in law. Machine learning and legal analytics extract legal knowledge from texts and predictive models, and legal design proposes new pattern for smart visualization. The LegalXML approach ranges from the legal official text approved by institutions (e.g., parliament, government) to the formal modelling using XML, logic programming and functional coding. The MIT Computational Law Development Goals is a July 2020 initiative that aims to research new methods for making the law human-centred, measurable, computable, and machine-readable in the Semantic Web approach, also interoperable thanks to international data-models and standards. Stanford CodeX lab[3] and the Australian and Canadian governments[4] are investigating this new direction also using programming languages (e.g., Java, Python, C++). The New Zealand Government started a project

[1] https://www.nyulawglobal.org/globalex/Legal_Information_Institutes1.html

[2] https://op.europa.eu/en/web/forum_official_gazettes/home

[3] See point 2 of paragraph one of Article 6 of the ZVOP-1, Personal Data Protection Act (Official Gazette of the Republic of Slovenia, No. 94/07 – official consolidated text and 177/20).

[4] https://ial-online.org/legislative-drafting-conference-making-laws-in-a-post-modern-world-are-you-ready-ottawa-september-2020/

in 2018 named “Rules as Code”[5] and in 2020 it proposed to OECD-OPSI (Cracking the code: Rulemaking for humans and machines) to codify a new approach: the idea is to use coding methodology (e.g., UML, flow chart, pseudo-coding) to create a macro-schema of law, legally binding, that produces as output a legal text in a natural language. This approach is very fascinating, but it leads to many research questions in the community of legal theory, philosophy of law, constitutional law, and untimely also in the legal informatics area that have dedicated the last 30 years to artificial intelligence and law analysis. The main issues are the following:

i) the Law is not only rules, but it includes parts that are hardly reducible in static formulas (e.g., principles and values, Hansson 2007);
ii) fixing the norms in a monolithic coding formula does not permit the flexible adaptation of the norms to the evolution of society (open-textured Hart 1961);
iii) artificial languages are a subset of natural language (Chomsky 2006), so we need take in consideration this limit and to investigate whether some other computational linguistics formal methods are more effective in the legal domain (Fillmore 2009, Marmor 2014);
iv) norms could be intentionally contradictory in order to balance different interests, institutions (legal pluralism for managing coexisting legal orders);
v) any prediction is based on the past, so it is limited in the detection of the new concepts or the autopoietic role of legal language;
vi) any prediction influences the decision-maker and future human behaviour (Hildebrandt 2020, Diver 2020);
vii) the autonomy of the addressee of the norms is a fundamental element of normativity and a lack of transparency of the code does not always make it possible to maintain this autonomy both in the creation of the norms (legislative process) and in the execution of the rule (Forst 2021).

2. Hybrid AI in the legal domain

With these important research questions in mind, we believe that it is possible to have a good balance between legal theory and the benefits produced by the introduction of ICT in the legislative process without affecting the democratic principles. We propose to use the so-called *Hybrid AI* where human-in-the-loop, human-on-the-loop, and human-in-command principles[6] are combined with different complementary disciplines

[5] https://joinup.ec.europa.eu/collection/better-legislation-smoother-implementation/discussion/better-rules-and-rules-code-references-australia-nz-mainly; https://www.digital.govt.nz/blog/what-is-better-rules/

[6] High-Level Expert Group on AI presented Ethics Guidelines for Trustworthy Artificial Intelligence, 2019.

(e.g., law, philosophy, ethics), using symbolic and sub-symbolic AI techniques integrated with Semantic Web findings in order to add context and meanings to the pure data-driven or code-driven methodology. The Hybrid AI is very promising approach especially in the legal domain where the context, values, concepts are fundamental for the correct application of the AI outcomes (AICOL 2021, Fratrič 2021). Often the different legal informatics techniques are fragmented and each of them in isolation could present limits: i) the data-driven approach is more oriented to the probabilistic approach based on data extracted by the documents, and the description logic could deduct some assertions not perfectly accurate, which is not recommendable in the domain of law; ii) the non-symbolic algorithmic-approach is based on probabilistic methods (e.g., machine learning) that often do not include the semantics. It is a good proxy but it should be integrated with symbolic representation (rule-based); iii) the document-oriented approach is oriented to model the structure of the legal text and to data mining; iv) the Semantic Web approach is focused on capturing the concepts and the relationships. The Hybrid AI intends to use all these aspects together: symbolic AI with logic formalism, non-symbolic AI for extracting hidden legal knowledge from the legal text, document analysis for creating a network of relationships inside of the legal order, the semantic annotation of the meaning of the knowledge extracted and annotated. Another important element that is fundamental for guaranteeing the legitimacy of the whole digital law-making process is the metadata concerning the workflow. The legislative process is regulated by constitutional law to preserve the democratic pillars and step by step process validation preserves the system from injections leading to distortions of the Rule of Law.

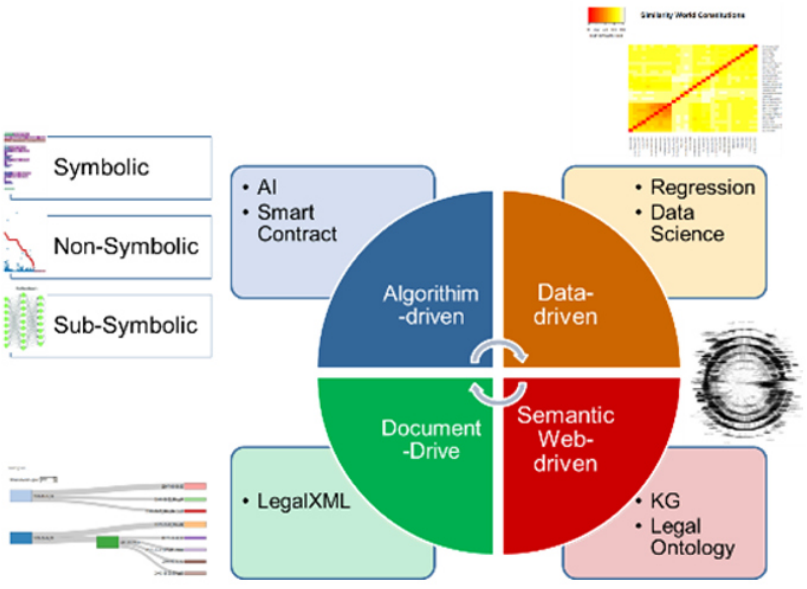

Figure 1: Hybrid AI

We also know of some specific critical technical issues in the legislative domain where the use of the non-symbolic AI alone could present problems. For this reason, we use the LegalXML Akoma Ntoso (AKN) standard as a background format of the legal document and on the top of this we add other AI solutions. Below are presented some examples of critical issues where AKN can help:

- *Granularity vs. Structure*: machine learning works at sentence level and this approach is not capable of linking different parts of legal speech that are semantically connected (e.g., obligation-exception, duty-penalty). For this reason, we also need a symbolic AI level (based on rules) to connect the part of the legal reasoning. AKN provides the document structure for the machine learning;

- *Content vs. Context*: machine learning often works without context (e.g., jurisdiction, temporal parameters) and can deduct something probabilistically correct but in fact irrelevant if we cannot collocate the information in the correct semantic way (e.g., the legal lexicon changes over time accordingly to the evolution of society, the concept of European citizen has changed in the last ten years and the machine learning tends to compare similar terms). AKN provides context to the machine learning;

- *Past vs. Future*: machine learning depends to the past data series (e.g., a brilliant new solution has no historical series), so new concepts introduced with law (e.g., smart working) are not known by the non-symbolic engine. AKN provides a quasi-ontology of concepts expressed in the text, and using this information we could create a light ontology for supporting the checking of new emerging legal concepts (e.g., starting from the analysis of definitions);

- *Internal vs. External Information*: machine learning does not consider the normative and juridical citations (normative references) or better it recognises the sequence of characters but not the topic that the citation intends to inject in the legal reasoning of the law. For this reason, AKN provides the correct link, based on a permanent unique identifier, to the destination text;

- *Static vs. Dynamic*: The normative references evolve over time (e.g., Art. 3 is not the same forever) and AKN provides a temporal model of the norms managing versioning and point-in-time. In this manner we are able to discover the norms abrogated, suspended, postponed or reactivated and to use the legal knowledge extracted by non-symbolic AI in an effective way.

3. Drafting legislation in the era of artificial intelligence and digitisation

The European Commission has recently provided a roadmap for the digital-ready legislation[7] with an interdisciplinary approach and it investigated the "Drafting legislation in the era of artificial intelligence and digitisation" (2019 workshop).[8] The EU Commission, Directorate-General for Informatics together with the University of Bologna is carrying out a study on "Drafting legislation in the era of artificial intelligence and digitisation" that includes three pilot cases using AI techniques applied to support the legal drafting units. In this study we propose a third way (e.g., *Hybrid AI for Law*) with a legal and technical model for developing computable informatics legal systems compliant by-design (or *Legal Protection by-design* as Hildebrandt defined) with theory of law, intended in the autopoietic role to create new framework never seen before. Legal formalism and logic-positivism (reductionism and textualism) that have been used for decades are not a sufficient approach to coding law resilient to the passage of time. There is a necessity to maintain flexibility to be applicable to different jurisdictions, contexts, historical periods and changes in society. Neither the opposite radical legal hermeneutic nor subjectivism used in the legal area are good approaches for the Web of Data (Filtz 2021). Therefore, this project is ground-breaking because nowadays the mentioned communities are silos, and nobody is interested in finding a new innovative structure that conciliates legal theory/philosophy of law disciplines with emerging technologies that are deeply modifying the current society.

The application of the AI in the legislative domain is relevant for the entire cycle of the legislative procedure:

- *Creation of Law*: AI for supporting legislative drafting and the law-making process in the generative phase of the law;

- *Application of Law*: AI for supporting the decision support process using the law. This field includes methods and tools for legal reasoning, checking compliance, trends prediction, and often these instruments are applicable to a specific domain (e.g., privacy, taxation, contract law);

- *Monitor the Law*: Legal data analytics for discovering hidden knowledge in the legal system and to monitor the quality of the legal order as complex system.

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[7] https://joinup.ec.europa.eu/collection/better-legislation-smoother-implementation/digital-ready-policymaking

[8] https://ial-online.org/wp-content/uploads/2019/07/Invitation-EN.pdf

4. Hybrid AI supports the transposition and implementation of the acquis

We have applied the Hybrid AI to several use-cases. One of these is to compare the transposition of some EU directives into Italian domestic legislation with the original directive to measure the relationships between the different articles and so identify where the two document diverge. The dataset examined several directives. We focused our attention on Directive 2014/89/EU establishing a framework for maritime spatial planning.[9] We took the FORMEX 4.0 file of this directive from CELLAR database. We converted it into Akoma Ntoso using the Formex2AKN service.[10] We did the same extracting from Normattiva,[11] the Italian legislative portal, using the corresponding implementing Legislative Decree 201/2016,[12] and we converted it into Akoma Ntoso. We then extracted all the articles of the two documents using Xpath queries.

We created an experiment using KNIME, producing a Cartesian product between each article of the directive and each article of the national law: 17 articles of the directive combined for each of the 12 articles in the national law, for a total of 204 rows. We created pairs that we fed to different similarity AI algorithms (e.g., Levenshtein, Jaro–Winkler, e-gram overlap distance) for measuring the distance between the articles. We then selected the pairs with the maximum value of similarity, creating a matrix. The matrix is visualized using different graphs connecting on one side the EU Member State's implementation article and on the other side the article of the directive that has the highest similarity index. In the middle we find the similarity index. We can notice that there is a connection between Art. 3 and Art. 6 with the lower similarity index.

[9] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0089

[10] bach.cirsfid.unibo.it/formex2akn-v2/

[11] https://www.normattiva.it/

[12] https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2016-10-17;201

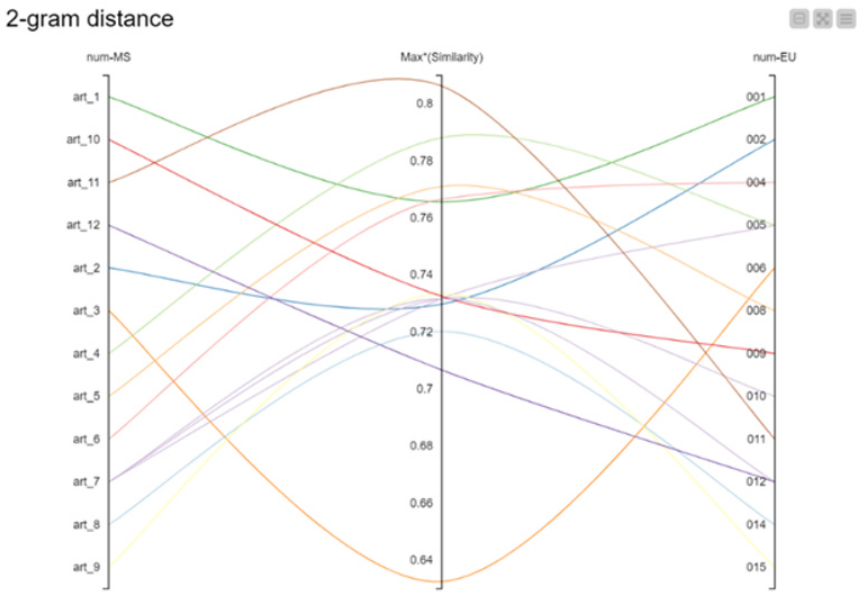

Figure 1: Matrix visualisation

5. Conclusion

The digital era is entering also in the legislative process by creating a deep digital transformation and new legal theory research questions are pushing the urgent need to define a new theoretical framework of the smart legal system. This framework designs the permitter where the emerging AI technologies could operate preserving the constitutional principles, the democratic values and the ethics issues. On the other hand, the Hybrid AI methodology could mitigate some risks and weaknesses produced adopting isolated AI non-symbolic techniques. In this light, LegalXML standards, in particular Akoma Ntoso, could guarantee a solid background for combining a rule-based approach, Semantic Web knowledge, document structure information and non-symbolic AI. AKN is also capable of managing the workflow of the legislative process and the temporal model of the diachronic evolution of the norms over time, for building a solid smart legal system. Additionally, the use of Akoma Ntoso representation, and in general the semantic and the LegalXML annotation, produces important inputs for implementing an explicable and transparent law-making system even if supported by AI, avoiding the black-box effect (Pasquale 2015).

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Legislative and practical aspects of performing the duties of a data protection officer in the digitalisation age

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Ever since the General Data Protection Regulation (hereinafter referred to as: General Regulation) entered into force,[1] that is on 25 May 2018 much attention has been paid to the protection of personal data. In the Republic of Slovenia, the protection of personal data is already ensured on the basis of the Constitution of the Republic of Slovenia (hereinafter referred to as: CRS),[2] which in Article 38 prohibits the use of personal data contrary to the purpose for which it was collected. The collection, processing, designated use, supervision, and protection of the confidentiality of personal data shall be provided by law. The CRS provides everyone with the right of access to the collected personal data that relates to them and the right to judicial protection in the event of any abuse of such data.

The Personal Data Protection Act (ZVOP-1) defined personal data as any data relating to an individual, regardless of the form in which it is expressed.[3] The definition has been slightly supplemented with the entry into force of the General Regulation. Personal data thus means any information relating to an identified or identifiable natural person; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.[4]

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[1] Regulation (EU) 2016/679 of the European parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Official Journal of the European Union L 119/1, 4 May 2016.

[2] Constitution of the Republic of Slovenia (Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a and 92/21 – UZ62a.

[3] See point 2 of paragraph one of Article 6 of the ZVOP-1, Personal Data Protection Act (Official Gazette of the Republic of Slovenia, No. 94/07 – official consolidated text and 177/20).

[4] See point 1 of Article 4 of the General Regulation.

One of the essential obligations introduced by the General Regulation is that for the purpose of regulating matters related to personal data, the controller must appoint a Data Protection Officer – DPO). The Data Protection Officer (hereinafter referred to as: DPO) is a kind of a "guardian angel" of personal data in the organisation. According to a survey from 2019, around 500,000 organisations in the EU have registered a DPO[5], and in Slovenia, around 2,500 organisations or companies registered a DPO, according to interviews with the Information Commissioner. In accordance with Article 37 of the General Regulation, the controller and the processor shall designate a DPO if the organisation is in the public sector, if the core activities require regular and systematic monitoring of data subjects on a large scale, and if the core activities consist of processing of special categories of data or data relating to criminal convictions and offences. The DPO must demonstrate professional qualifications, which depends mainly on the extent of the processing. It should be emphasised that a good DPO is not only a lawyer, but also an expert in the field of information security. The General Regulation states that a DPO may be a staff member or a person hired on the basis of a service contract.

Article 38 of the General Regulation determined in detail the position of the DPO, who must be involved in all matters of the controller and must be provided sufficient resources and access to data. For the DPO to be able to perform all their tasks normally, they need to be ensured their independence and the option of reporting to the highest management level in the organisation. Their contact information is made public, as they make contact with individuals, and they must observe the highest level of professional secrecy in their work. The issue of conflict of interest is often raised, as the DPO cannot be someone from the management structure of the organisation.

Tasks of the DPO are defined in detail in Article 39 of the General Regulation and are: providing information to the controller or the processor and the employees, providing advice as regards personal data, monitoring compliance with legislation or regulation in internal acts, awareness-raising and training of staff, which includes education of employees, regularly auditing the controller in the field of personal data, as well as cooperating with the Information Commissioner.

The controller that appoints the DPO must at all times monitor the adequacy and legality of the processing of personal data and adjust the measures if necessary. In doing so, they are regularly assisted by the DPO, who is not responsible for the

[5] More: https://iapp.org/news/a/study-an-estimated-500k-organizations-have-registered-dpos-across-europe/

processing, but only provides advice. In accordance with the General Regulation, the measures to be taken by the controller for the entire duration of processing and including the DPO on a regular basis are:

- implementation of appropriate policies under Article 24 (this may be the so-called Rules on the protection of personal data, or other act in which the controller describes the measures and procedures by which the protection of personal data is ensured in a particular organisation in a clear, concise and understandable way);[6]

- implementation of the procedure for ensuring integrated and default data protection or provision of an explanation for its absence under Article 25;[7]

- agreement with joint controllers and verification of the legality of processing under Article 26 (this is an agreement between at least two controllers that divides the tasks and obligations related to processing. The agreement must at least determine the obligations of each controller as regards the exercising of the rights of the individual and provision of the information referred to in Articles 13 and 14);[8]

- appointment of a representative of the controller or the processor not established in the European Union under Article 27 (a representative (exceptions apply) must be appointed when the controller or the processor that is not established in the European Union offers goods or services to individuals in the European Union, or whose behaviour is monitored, if this takes place in the European Union);[9]

- Preparation of the Records of processing activities and its updating under Article 30 (the Records of processing activities is intended primarily to demonstrate compliance and facilitate the monitoring of processing activities by supervisory authorities; at the same time, it is the most effective tool to ensure an appropriate level of transparency towards individuals);[10]

- compiling of a risk analysis and implementing measures for security of processing together with ongoing verification under Article 32;[11]

- regular training of employees in personal data protection;

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[6] Taken from Pirc Musar, N. et al., 2020, page 428.

[7] See section 3.2.

[8] Taken from Pirc Musar, N. et al., 2020, page 445.

[9] See paragraph two of Article 3 of the General Regulation.

[10] Taken from Pirc Musar, N. et al., 2020, page 490–491.

[11] See section 3.2.

- notification of a personal data breach to the Information Commissioner and possible communication to the individual under Articles 33 and 34;[12]

- data protection impact assessment, or an explanation of the reasons why this was not carried out under Articles 35 and 36 (risk assessment is intended to identify, analyse and reduce the risks of illegal processing of personal data; this is a basic preventive measure);[13]

- access to approved codes of conduct (where applicable) and their implementation under Article 40;

- drafting of a contract on (contractual) processing of personal data and supervision of the work of the processor under Article 28 (the contract on personal data processing is binding on the processor with regard to the controller and sets out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller).[14]

When digitalisation is carried out in an organisation, this process must also involve the DPO. New applications or new digital environments are usually introduced, remote work is performed from the aspect of new forms of work, video conferencing is used, the volume of storage of (personal) data is increased, new forms of cookies appear on websites, marketing activities and customer profiling is enhanced, (smart) video surveillance is being introduced, some companies have started activities related to artificial intelligence, and there is a huge quantity of data. The mentioned forms of digitalisation almost always involve the processing of personal data, so the controller must take appropriate technical and organisational measures to ensure, and be able to demonstrate, compliance. It must ensure continuous improvement in accordance with the PDCA principle and provide for integrated and default data protection, taking into account, of course, the latest technological developments. Above all, the DPO must participate in the drafting of a Data Protection Impact Assessment (DPIA). In accordance with Article 35 of the General Regulation, in which it is stipulated that when a type of processing, taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the

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[12] See section 3.6.3.

[13] Taken from Markovič, Z. et al., 2019, page 341.

[14] Taken from Pirc Musar, N. et al., 2020, page 427-428 and Markovič, Z. et al., 2019, page 341.

impact of the envisaged processing operations on the protection of personal data. The forms of digitalisation listed above can almost certainly pose risks. The purpose of the impact assessment in question is to verify all measures in order to assess the impact of the acts of processing on the protection of personal data. In the process of the drafting of a data protection impact assessment, the objectives, advantages, set of personal data, legality of the legal basis for processing, measures and data protection, required retention periods and methods of informing all groups of individuals should be examined.

In the event of violations related to the DPO, e.g. the controller fails to appoint a DPO or the tasks are not performed or they are performed poorly, the supervisory authority may impose a fine of up to EUR 10,000,000 or up to 2% of the company's total global annual turnover in the previous financial year.

Examples of the so-called poor or non-performance of DPO tasks are described on the Enforcement tracker website[15], where it is said that in one case: The supervisory authority imposed a fine on the company ... in the opinion of the controller, it did not initially involve the Data Protection Officer in all personal data protection matters. The controller did not have a data protection control plan in place to demonstrate that the Data Protection Officer was performing their duties properly. Fines in the amounts ranging from EUR 10,000 to 51,000 for violations of Articles 37, 38 and 39 of the General Regulation were found on the mentioned website on the day this article was finalised.

The problem that has been identified in Slovenia is that both controllers and processors must operate in accordance with the General Regulation regarding the fulfilment of the content and assigned tasks, while the supervisory body (i.e. the Information Commissioner) cannot impose penalties for non-appointment or poor performance or non-performance of the DPO tasks. Otherwise, in accordance with the applicable Personal Data Protection Act, it may impose fines in relation to the content that is directly regulated by this Act[16] or carry out inspection in the sense of the Inspection Act (ZIN).[17] However, it cannot impose a fine of up to EUR 20 million under the General Regulation. Only when amendments to the ZVOP-1 or the new ZVOP-2, which is currently published on the e-democracy web portal, is adopted, will it be possible to fully apply and implement the provisions from the General Regulation that are otherwise already directly binding.

[15] More: https://enforcementtracker.com/

[16] See Article 91 and following articles of the ZVOP-1.

[17] Inspection Act (Official Gazette of the Republic of Slovenia, No. 43/07 – official consolidated text and 40/14).

The challenges that we identify and that remain to be dealt with in the future are the following: organisations must realise that the regulation of personal data is not just an administrative barrier, but a competitive advantage; it is necessary to improve the relevant culture in employees - the decisions of the Information Commissioner mostly relate to unauthorised "sniffing out" of data; there is a need to greatly improve and strengthen information security awareness and knowledge, and to involve DPOs in all processes of the organisation, and not only when it is too late, when the Information Commissioner initiates an inspection procedure.

European fundamental rights in the digital age

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Judge at the General Court of the European Union

- Introduction

The central issue discussed by the contribution is the relationship between fundamental rights and new technologies in the digital age, especially those that use artificial intelligence. Although in general the issue of the impact of new technologies on fundamental rights is not entirely new, as questions on this topic also arise, for example, in the field of biotechnology, genetics and stem cell research, the main differences arise from the different degrees of autonomy of technologies that use artificial intelligence. A high degree of autonomy in the operation of such technologies can have major legal consequences. New technologies that mainly use machine learning algorithms can lead to results that cannot be precisely predicted. For example, autonomous vehicles that improve their autonomous driving capabilities by collecting and analysing data from the environment may incorrectly assess road conditions due to possible machine learning errors, which can lead to traffic accidents. In this case, the question arises as to who is responsible for the malfunction of the autonomous vehicle and who is responsible for the damage caused by the accident. The latter relates to the issue of liability for violations of fundamental rights of persons involved in the traffic accident.

At the same time, the contribution depicts certain challenges related to the use of the legal framework of the European Union (hereinafter: EU) to protect fundamental rights from violations caused by the use of new digital technologies. Hence, the contribution explores certain interpretative options for overcoming the challenge of the traditional applicability of the provisions on the EU fundamental rights in vertical relationships, while most interferences with fundamental rights related to these technologies stem from the actions of private entities, such as private data analytics companies or companies operating online.

The article further addresses several sets of fundamental rights from the perspective of new digital technologies: first, the right to privacy and protection of personal data, second, the freedom of expression, third, human dignity, and finally, free elections and European democracy.

- New technologies, the right to privacy and the protection of personal data

One of the objectives of the contribution is to examine the ways in which the use of new digital technologies may lead to encroachments on the fundamental rights to private life and protection of personal data referred to in Articles 7 and 8 of the Charter of the Fundamental Rights of the EU (OJ C 326, 26 November 2012, page 391; hereinafter: Charter). Those two rights are at risk particularly due to automated decision-making, the use of portable electronic devices based on artificial intelligence technology and so-called microtargeting on social networks. The contribution critically examines the rules on automated decision-making referred to in Article 22 of the General Data Protection Regulation (OJ L 119, 4 May 2016, page 1), which only provides for limited possibilities for automated decision-making without human intervention. At the same time, the contribution also presents safeguards available to individuals whose data are processed as a part of automated decision-making. The case law of some national courts regarding Article 22 of the General Data Protection Regulation is also presented.

- New technologies and freedom of expression

The use of digital technologies, in particular artificial intelligence, can also affect freedom of expression and particularly freedom of information, especially if automated systems decide completely autonomously on the online content to which individuals have access, and disproportionately restrict it. For example, freedom of expression and information may be violated by the use of machine learning to disseminate false information or by completely automated blocking of content. If such systems are used by private companies, the question arises as to whether Article 11 of the Charter is an appropriate instrument to address the frictions between the freedom of expression and digital technologies. The applicability of Article 11 of the Charter in practice is hampered by its traditional use in vertical relationships. Given that the wording of this provision only prevents encroachments by public authorities it is questionable whether the Charter can prevent such interferences at all. The contribution discusses possible solutions to this legal problem, particularly in light of the case law of the Court of Justice of the EU on the horizontal direct effect of the Charter (in particular cases

C-414/16 Egenberger, C-684/16 Max-Planck as well as joint cases C-569/16 and C-570/16 Bauer).

- New technologies and human dignity

The contribution further discusses possible undesirable consequences of digital technologies for human dignity and the issue of the adequacy of protection offered by Article 1 of the Charter, as well as by other provisions of the Charter related to human dignity, against such consequences. The issue of human dignity and new technologies, in particular artificial intelligence, is particularly important when it comes to vulnerable groups such as the elderly, sick and emotionally vulnerable, who need special protection from potential interferences with their dignity. Possible encroachments on human dignity due to the use of these technologies may therefore occur in many situations, for example in relation to humanoid robots that coexist with humans, in connection with the use of smart robots to help care for the elderly, especially in times of emotional distress, or in connection with the use of artificial intelligence in counselling. Consequently, a too wide use of artificial intelligence in the case of vulnerable individuals may prove itself to be problematic, especially if these technologies are used without human supervision or with minimal supervision only. Therefore, in order to prevent encroachments on human dignity, it is crucial that the final decision on how to use these technologies is made by a human.

- New technologies, free elections and European democracy

The contribution also discusses different impacts resulting from the use of digital technologies on free elections and European democracy, as well as the options for preventing their adverse effects. The use of these technologies can affect the outcome of elections in the EU and thus the right to free elections (Article 39(2) of the Charter) and, consequently, European democracy, in different ways. Such effects may arise, for example, from the use of so-called social bots to promote political candidates in elections, the use of artificial intelligence to disseminate false information and the use of voter targeting techniques by analysing the psychological characteristics of voters. A number of documents have been adopted at the EU level to raise awareness of these issues, such as the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Securing free and fair European elections of 12 September 2018 (COM(2018)637 final), and Regulation (EU, Euratom) 2019/439 of the European Parliament and of the Council of 25 March 2019 amending Regulation (EU, Euratom)

No 1141/2014, which regulates the verification procedure related to breaches of personal data protection rules in the context of elections to the European Parliament (new Article 10.a). In addition to the latter change in the rules on the financing of European political parties, the Commission issued on 25 November 2021 a proposal for the new Regulation on the transparency and targeting of political advertising (COM(2021) 731 final), which limits certain aspects of targeted political advertising, particularly if it is based on sensitive personal data (Article 12(1)).

- Conclusion

Digital technologies undoubtedly brought about many benefits, yet demand caution in their use. The key legal issues regarding their regulation, including more detailed regulatory framework to prevent undesirable interferences with fundamental rights, remain open for the time being. These issues are currently being discussed at the EU level from several aspects, with the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts of 21 April 2021 (COM(2021)206 final) being the most notable. As a legal framework at the EU level, this Regulation proposal provides for stricter obligations and measures for companies pertaining to the use of artificial intelligence (Articles 8-29 of the proposed Regulation) and a ban on certain high-risk artificial intelligence practices (Article 5 of the proposed Regulation) due to their harmful effects on the fundamental rights protected by the Charter (Recital 28). In addition to the fundamental rights discussed in this article, the proposed Regulation highlights the importance of protecting other rights, such as non-discrimination (Article 21 of the Charter), equality between women and men (Article 23 of the Charter), high level of consumer protection (Article 38 of the Charter) and some of the recently codified rights, such as the right to a high level of environmental protection and the improvement of the quality of the environment (Article 37 of the Charter). The author concludes with the thought that it is crucial for the legal regulation to encourage the development of digital technologies, while limiting the possibilities of abuse of these technologies in ways that could interfere with fundamental rights.

Closing keynote

Peter Goldschmidt

Head of Institutional Relations, EIPA Luxembourg

First of all, thank you to all of you in Ljubljana for organising this extremely interesting and exciting event that addressed even more than I had expected. I suppose I should also thank you for giving me the very unthankful task of trying to summarise 18 interventions by super qualified experts in 15 minutes. Let me just take the opportunity to thank all the speakers including the opening address for their very qualified, very informative and very inspiring contributions.

I have tried to divide all the different interventions into three groups under the following headlines:
− Implementation of EU law in the Member States,
− Advantages and challenges related to language,
− Digital support to EU law-making and EU law transposition.

I will try to summarise the interventions, not in the order they were delivered but rather seen from the perspective of the implementation of EU law at the national level, whether at central or subnational level. As we know, some of the EU Member States (and future EU Member States) have more or less autonomous regions that also have law implementation responsibilities.

The implementation consists of three elements:
− Transposition, i.e. the establishment of a national legal infrastructure that allows and enables the application and enforcement of EU law,
− Actual application of EU law at the national level,
− Enforcement.

My summary is based on these three aspects.

- Transposition

The lesson learned from this conference is that the starting point for correct implementation of EU law at the national level is the transposition of EU law into the national legal order. The obligation is to ensure that the objectives and the intentions of the EU law makers are fulfilled fully, correctly, timely, and as some speakers pointed out, also efficiently, thus avoiding additional and unnecessary red tape and making sure that we adopt appropriate implementing measures, whether they be by establishing institutions or allocating responsibility or adopting appropriate, proportionate and efficient sanctions.

Some new challenges to this process, which were highlighted during day one, are how do we make legislation readable and understandable not only to legal experts, but also to the general public and, I hope no one gets insulted by me saying, also to politicians; and all this without losing the precision of the text. Very interesting initiatives to tackle these challenges were presented during the second half of day one. Personally, I was attracted in particularly to the idea of peer review by the representatives of the general public. I think that is a very interesting approach to law making. Another challenge introduced during the conference was what to do with the EU soft law. We heard about the two sides of the coin: on the one hand, it should be transposed to the extent possible and on the other hand, we were reminded that soft law is generally binding on the institution that issues it and not necessarily the EU Member States.

We were then introduced to some recent trends in the area of transposition. Of particular interest to me was the practical support being offered by some parts of the European Commission and some EU agencies. I recall that when I at the beginning of my career worked as a civil servant in the Danish central administration and we reached out to the Commission with queries related to the implementation of EU legal acts, the answer was always: Our job is to oversee that you do it correctly, not to provide guidance how to do it. But that approach, in line with the better regulation initiatives, has clearly been changing. And that support is interesting – because it is not just theoretical support or support in understanding the individual provisions, but even implementation plans, guidance notes and expert groups organising meetings with national experts to share experiences and to learn from each other.

I also take the liberty of mentioning the EU Pilot, which was initially introduced in 2008, in this context. Although the European Commission sees the EU Pilot as part of the enforcement of EU law, from the EU Member States' perspective this could also be a

step forward in terms of support on how to ensure the full and correct implementation at national level.

And finally, we heard about all the various new digital and AI tools which have been or are being developed and which can help with all kinds of things: from translating EU legal acts, to planning the transposition process and from drafting national legislation to managing stakeholder consultations, etc.

All of these solutions contribute to help EU Member States to implement EU law in more efficient way.

- Application

The conference also looked at the application of EU law in the EU Member States.

A number of challenges on this point were raised. First and foremost, the capacity and resources needed in the EU Member States, in particularly small and medium sized EU Member States. They have a real challenge when transposing and applying EU law. If we disregard the issues related to human, financial, technological resources, there are also general issues related to the understanding of the EU legal acts. From my experience, I have to say that EU Member States still have a bit of work to do with respect to national coordination. While this was not mentioned expressly, I nevertheless take the liberty of bringing it up here. If EU Member States already coordinate during the EU legislative process, in particular by involving the implementers into the national EU decision-making process, this would facilitate the understanding – and thus accelerate and improve the application – of EU legal acts later on.

Other challenges mentioned were of a linguistic nature. “Lost in translation”, as one speaker described it. We heard that AI could help to solve linguistic issues. We know that terminology is important. You might have a technical term in one language which is simply untranslatable into another. Thus linguistic issues continue to be an issue and a challenge in the transposition and later in the application of EU law.

A special challenge, very diplomatically hinted at in a couple of presentations, is the challenge for national administrations to understand and accept the supremacy of (and the standing under) EU law in proceedings, for example before national courts as well as before the EU Court of Justice or vis-a-vis the Commission. Assuming there is a political will to overcome such challenges, there are different ways to do so. One of

them is including relevant rulings by the EU Court of Justice during the transposition phase. Another is raising awareness of these issues among administrators and their managers as well as providing appropriate training for them. This training, aimed at showing how to apply not only directly applicable EU legal acts (e.g. regulations) but also the national law derived from EU law in accordance with EU law and with the decisions of EU Court of Justice, would contribute appreciably to alleviate this challenge.

The last point, which again was not expressly mentioned, but derived from the interventions given, is the differences in constitutional and administrative cultures. The flexibility and preparedness to apply EU law at the national level is also a question of flexibility of the system to adapt to new rules.

We were presented with a number of tools that support the EU Member States in their application of EU law. The European Commission has developed a wide number of toolboxes which are very practical and really support national administrations in this task. We have online translation tools which help us to understand the meaning of a regulation or a directive in case we cannot understand what is written in the official translation. There are practice groups of national officials, through which they share experiences and knowledge and try to find common solutions to common problems. The Commission offers and provides training. Last but not least, as we heard it from the representative of EASO, there is the actual operational support to EU Member States who do not have sufficient resources at home to deal with a specific overload of challenges (for example: supporting the registration of emigrants in Malta).

- Enforcement

Finally, we also discussed issues relating to the enforcement of EU law in the EU Member States. Presentations on this point mainly focused on the challenges, namely:
− Interpretating national law which transposes or implements EU law into the national legal order,
− Understanding the underlying EU legal act or directly applicable EU legal act,
− Understanding and accepting the supremacy of EU law and respecting the rule of law,
− Awareness and the willingness, and even the skill, to benefit from the use of the preliminary ruling procedures. How to ask questions that can help to solve the national case?
− Uncertainty as to the application of EU soft law in national enforcement procedures,

− Awareness of the applicability of the infringement procedure not only due to errors or misapplication by national public administration bodies either at central or local level, but also to misunderstandings or misapplication by the national courts. As many of you know, the EU Court of Justice has in several cases brought to attention that the wrongful enforcement of EU law by national courts also constitutes an infringement of the EU Member States' obligation to loyally implement EU law.

The panellists brought up a number of factors which contribute to the strengthening of the enforcement of EU law in EU Member States:
− Increased emphasis on EU law in national education systems,
− Increased emphasis on EU law in the initial and continuous training of legal professionals such as members of the judiciary, notaries, private practicing lawyers, bailiffs, etc., and
− Growing understanding that EU law can actually contribute to the resolution of domestic conflicts and disagreements and litigations, and even to avoid the latter if the lawyers are properly trained.
At this point, I would also like to mention the European Area of Justice as a contributing factor, where the judiciary/national courts across Europe work together by recognising judgments from one EU Member State and enforcing them in another. The rules on mutual recognition of judgements as well as the numerous cross-border judicial cooperation instruments are becoming increasingly relevant in parallel with the ever increasing mobility of the people and cross border trade.

All of these elements contribute to strengthening the enforcement of EU law at the national level.

To conclude, I have also added a new contributing factor. A new challenge to enforcement is, of course, the use of AI and digital solutions. It was very interesting to hear, mostly in the last panel discussion, about finding the right balance between the advantages and benefits digital solutions can give, and the human element.

Thank you so much for this conference. I hope I have summarised the discussion properly. Thank you for giving me this opportunity not just to attend, but also to highlight some lessons learned.

4 Moderator

Mag. Matej Golob, MBA

partner in CorpoHub, experienced speaker, moderator and mentor

He is a pioneer of lean and agile innovation in Slovenia, entering the world of unpredictable and complex work environments on a daily basis, where with a mixture of innovative methodologies from design thinking, lean startup to scrum he leads teams to meaningful and effective solutions, mutual understanding and the use of team potential.

Sharp-tongued, he argues that experience doesn't come overnight and that every day is an opportunity to learn and push boundaries. With zeal, enthusiasm and pride, he reveals the events and circumstances from the times when he was the IBM executive or driving force of TEDx Ljubljana events or when he broke new ground of the company 30Lean startup, and especially the lessons of stories he wrote or co-created.

> If you can do better, you must.

5 We could not have done it without them

Some people prefer to keep out of the limelight and manage matters from behind the scenes, sure and steady, helping those in the forefront create magic. These are people with a spark in their eyes. They might not have the same mischievous look in their eyes as people in fairy tales, but they do have the same aura of mystery about them. Because of them, life is much safer.

Veronika Pušnik
interpreter

Živa Petkovšek
interpreter

Enej Gradišek
CorpoHub

Metka Resman
CorpoHub

6 I feel Slovenia

The downside of online events is that they rob us of everyday pleasures – a warm handshake, a sincere smile, the smell of coffee during an enjoyable conversation, the music of the background and of the wanderer's admiration of the venue's beautiful surroundings. We tried to recreate this atmosphere for the conference participants as best as we could – we snuck into speaker's announcements, filled the breaks with music, served Slovenian delicacies for lunch and waved good-bye from the valleys and hills of our beautiful country. We hope to soon meet HERE, if not for all of the above then perhaps because of the interesting facts we presented in a short quiz.

Slovenia. A place where I'm free to go my own way.

Slovenian Gastronomy: You can’t spell Slovenia without love.

Katalena

Photo: Ivian Kan Mujezinović

"We are Katalena, we come from Ljubljana and play Slovenian folk music," the group introduces itself at concerts. They have been active for 20 years. The group pays respectful homage to folklore and ancient music in an authentic way that creates a constant dialogue between the ancient and the contemporary and translates different reflections on the weight of the world into music, enriched by the variety of the experiences that the six musicians bring from other creative backgrounds. Their unique and imaginative contexts are a cradle of tales and creatures from the wider Slovenian area, shelters for nursery rhymes and war stories, of the darkest sorrows and the brightest hope. Through them, the world is reflected both in the deepest socially critical thought and the most intimate luxuries.

Silence

Photo: Nika Hölcl Praper

Silence was originally a band but has been active as a duo since 1995; however, their music seems much more than an interplay of two energies. On the contrary: it sounds intimate and sophisticated, while sumptuous and monumental at the same time. The duo's delicate musical sense works well in various artistic contexts. In particular, their music is a refined accompaniment to dance, film, music and theatre projects. With them we gently and hypnotically, yet firmly and boldly, touch upon the apocalypticism which they prophetically herald both in these strange times and otherwise. Contrary to what their name suggests, Silence are eloquent in their unique way and in no way stay silent.

Dan D

Photo: Marko Alpner

Dan D is a group that plays original rock, a group whose music has been maturing over a remarkably long time, in dialogue with their loyal audience and through numerous musical collaborations, from their beginnings in pure rock through acoustic intimacy and bold musical enrichments beyond the unambiguous definitions of the genetic code of rock music, to which they are otherwise faithful. They satisfy their musical curiosity and creative urge by exploring beyond familiar soundscapes and comfortable musical patterns. With them we walk on clouds, wonder about the colour of our day, let ourselves be carried by the water, we dance, think forbidden thoughts and hope that time will heal the world.

Q: Which keynote speaker of the conference is a lawyer with a film career?
A: Matjaž Gruden

For Slovenians, Matjaž Gruden is a living legend. By playing the main character in the legendary family movie Sreča na vrvici (luck on a string), he helped create a lasting memory of life in the late 1970s. As the main character, Matic, a boy who forms a deep attachment to his faithful companion, a dog called Jakob, he tells a simple story of friendship, love, trust and disappointment, especially in adults. Although the movie was filmed in 1977, it continues to be a staple in every generation's film repertoire due to its meaningful and empathetic narrative.

Q: Which animal species native to Slovenia is protected at the EU level?
A: The Carniolan honey bee

Bees are Slovenia's pride and joy. We Slovenians are very fond of our bees and are aware that there is no life without them, so we made sure that the Carniolan honey bee, which is native to Slovenia, is protected at the EU level. Moreover, thanks to our efforts within the United Nations Organization, the bees now have their own world day, World Bee Day, celebrated on 20 May, when spring is in full bloom and most bee swarms leave the hives.

Q: Do you know that Slovenian language is the only official EU language using a grammatical number that distinguishes two people or things from more? How is it called?
A: Dual

Dual is a unique linguistic feature of the Slovenian language. It is a grammatical number, along with singular and plural, used to denote two persons or two things. The Slovenian language is one of the very few languages that has preserved the dual and still uses it to its full extent, almost unchanged. Slovenian is not regarded as an easy language per se, but the use of dual certainly makes learning our language all the more challenging.

Q: Who was one of the first European women to travel solo around the world?
A: Alma Maksimiljana Karlin

She was an extraordinary woman. Alma Karlin was of Slovenian descent. In 1919 she set off on a journey around the world and only returned home in 1928. In her travelogues, articles and lectures, she painted an authentic picture of the world at the time.

"Alone and abandoned wander through life those who only think of themselves; but those who know how to lovingly adapt and turn things around, who always know when their help is needed and give themselves to others, for them life is a blooming meadow, and the traces of their work remain even after they are gone." (Under the Bony Eye)

Q: Which company is behind one of the major turning points in aviation development – the first type-certified electric aircraft for commercial use?
A: Pipistrel

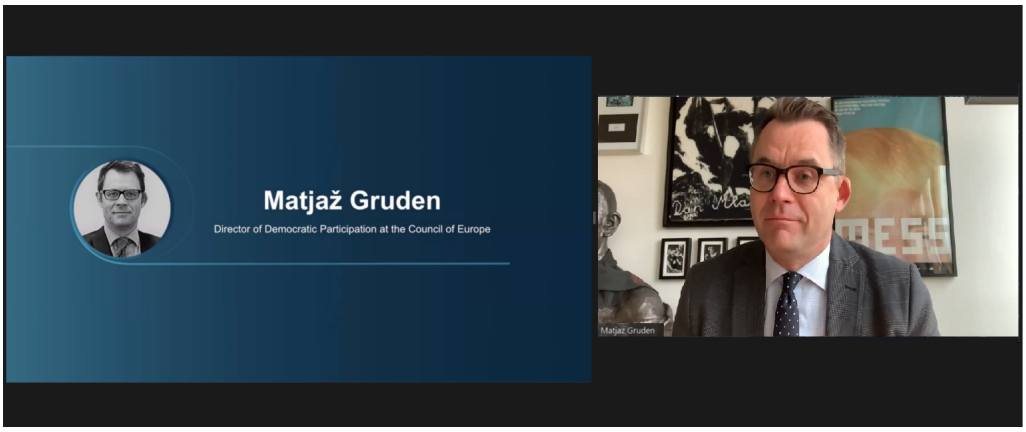
The Pipistrel company has been manufacturing state-of-the-art ultralight motor gliders and gliders with auxiliary engines for many years. It is a pioneer of alternative aviation technologies both in Slovenia and the world. The team's innovative approach won the NASA PAV Challenge – personal air vehicle of the future – proving that as a society we are one step closer to zero-emission flying. In 2020, their Pipistrel Velis Electro aircraft was the first electric aircraft to receive a type certificate for commercial aviation, which was a major turning point in aviation development.

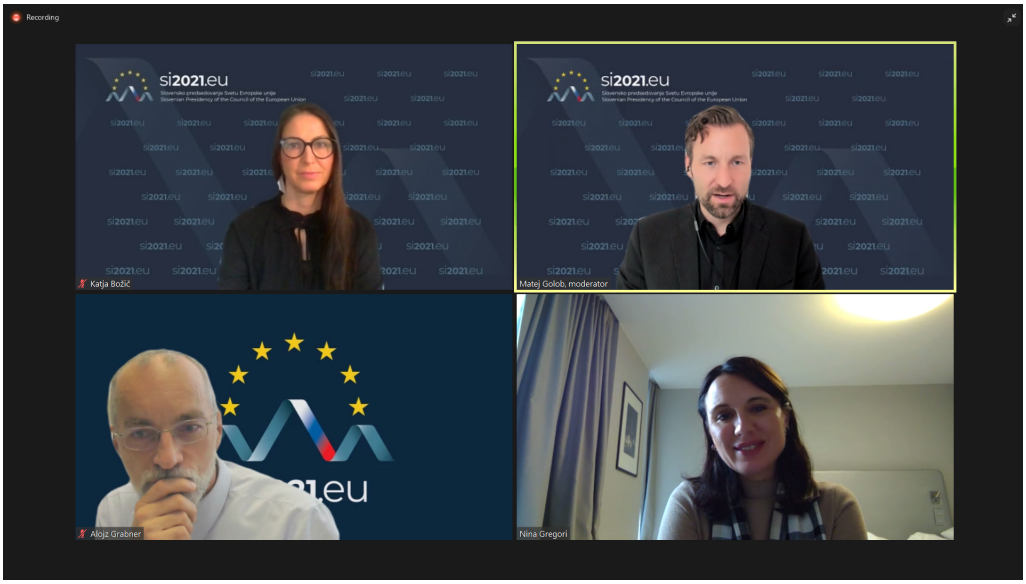
Q: Who is the author of logarithm tables that were used for calculations all over the world for nearly 200 years?
A: Jurij Vega

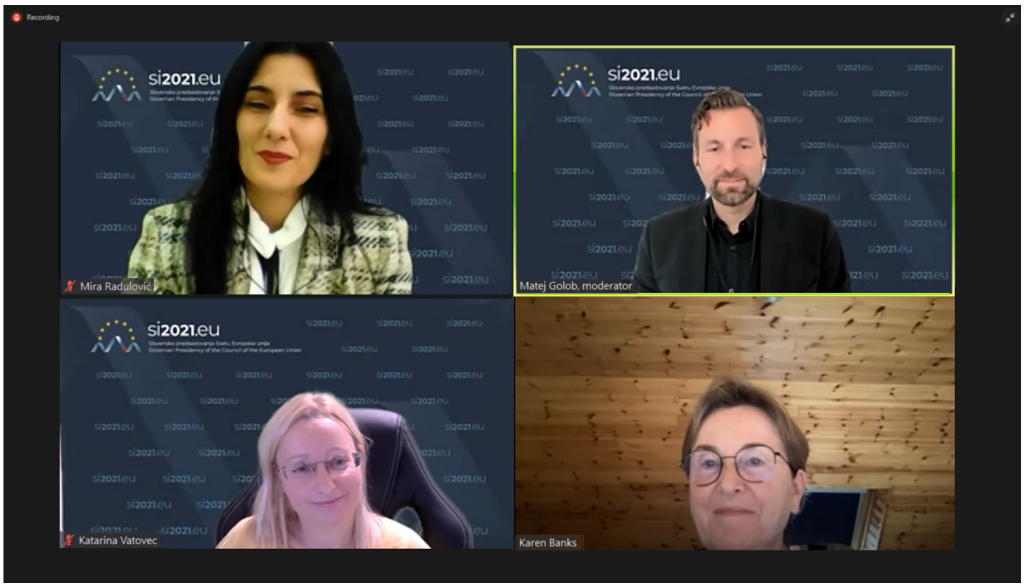
Jurij Vega is a well-known Slovenian mathematician, physicist, land surveyor and meteorologist. Although he is best known as a mathematician due to his logarithms, the bulk of his papers and textbooks were about physics. He is the only Slovenian to have a lunar crater named after him.

7 "In person"

The conference that focused on numerous important topics, provided various fresh insights and stirred thought-provoking questions has come to an end. Almost everything that made it turn out the way it did will soon be forgotten, but hopefully this adventure that we have created together has left a lasting impression. Sadly, we were unable to meet and get to know each other in person, and thus form even stronger alliances, see the sincere look in someone's eyes and hear people's opinions. However, messages from you who helped shape this conference in one way or another did pop up on our screens. May some of these kind and encouraging words stay on these pages, so that we may indeed meet again soon with even greater enthusiasm.



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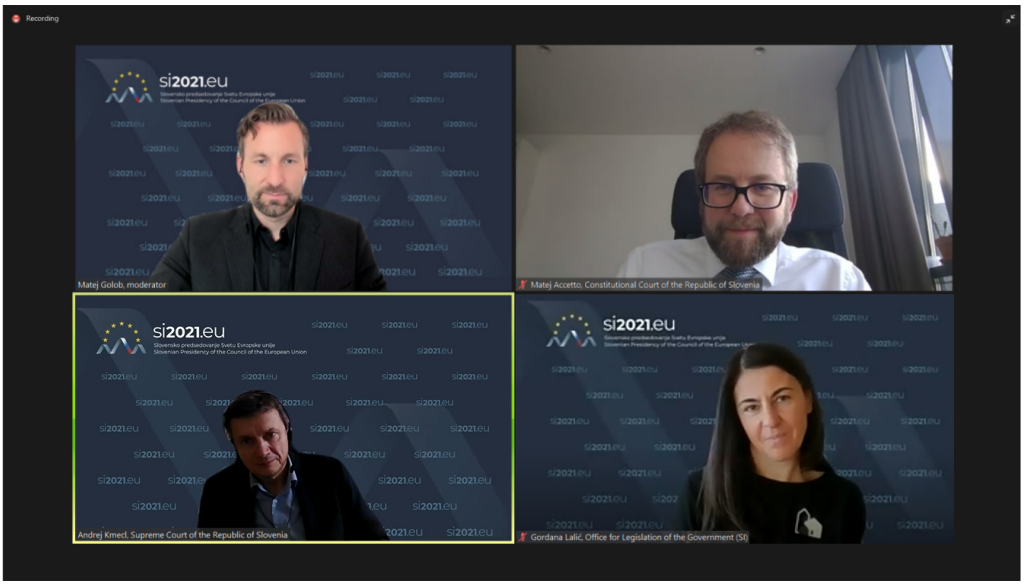
Karen Banks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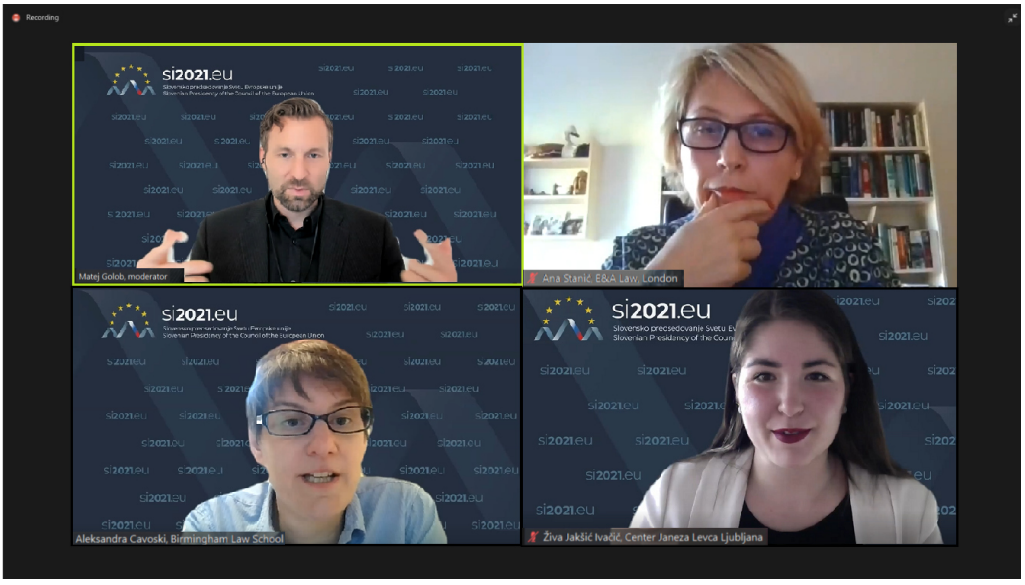
Andrej Kmecl, Supreme Court of the Republic of Slovenia
Gordana Lalić, Office for Legislation of the Government (SI)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Aleksandra Cavoski, Birmingham Law School
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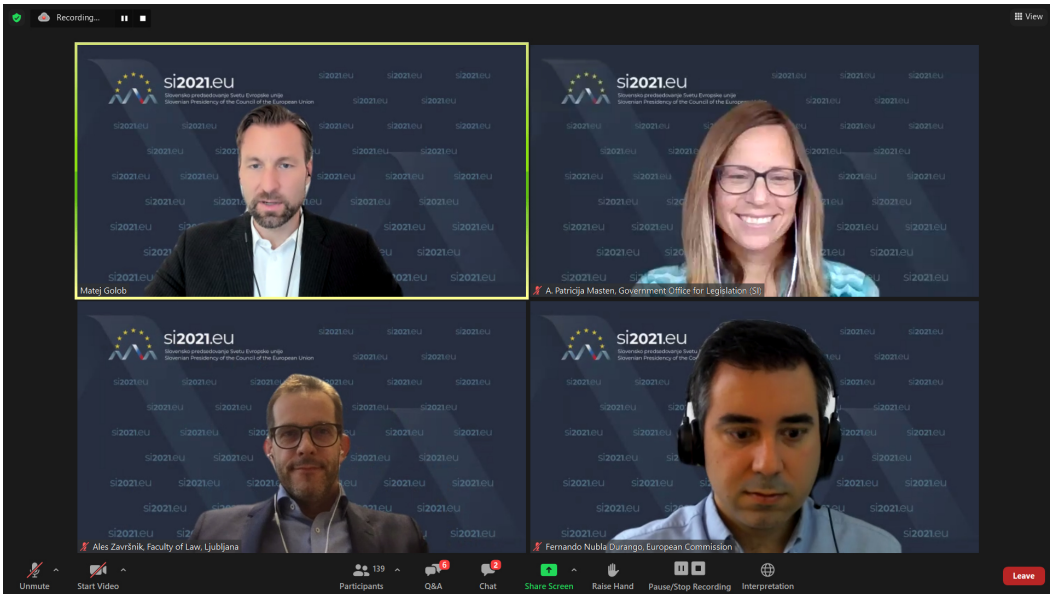
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A. Patricija Masten, Government Office for Legislation (SI)
Ales Završnik, Faculty of Law, Ljubljana
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Share Screen
Raise Hand
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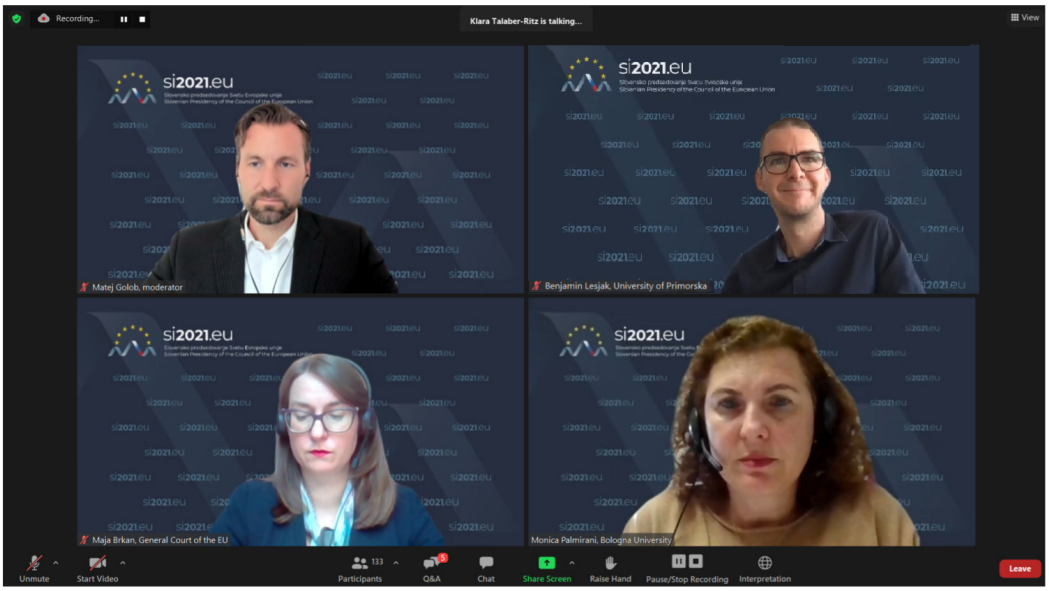
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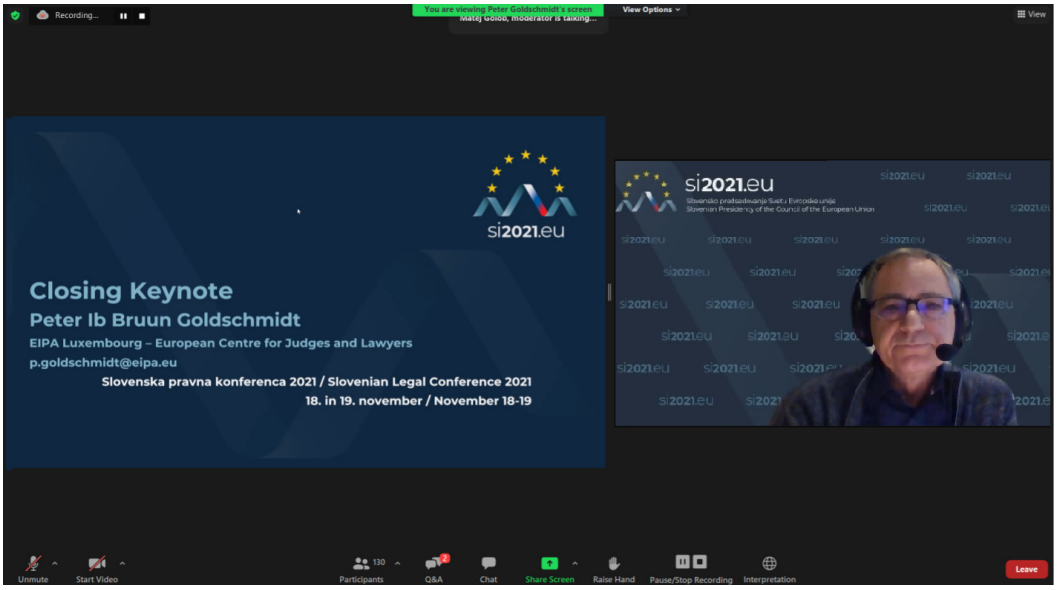
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Closing Keynote
Peter Ib Bruun Goldschmidt
EIPA Luxembourg – European Centre for Judges and Lawyers
p.goldschmidt@eipa.eu
Slovenska pravna konferenca 2021 / Slovenian Legal Conference 2021
18. in 19. november / November 18-19
Unmute
Start Video
Participants
Q&A
Chat
Share Screen
Raise Hand
Pause/Stop Recording
Interpretation
Leave

The conference was excellent.

…….

I could listen to the experts for hours, so much experience and sincerity. How do they keep a cool head when dealing with the complex issue of interlinking national law and EU law in daily practice?

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Thank you to all the speakers for their inspiring contributions.

…….

Congratulations to the organizers and the panellists for this excellent conference. It reaffirms trust in people who deal with rule of law in the EU.

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Thank you so much to all the organisers and panellists.

…….

The conference was really well-organised, very professional, great job. It was very interesting in all aspects (including theatre and film), the selection of speakers was good, the length of the presentations just right, the performances were great...

…….

The organization of the conference and its content were excellent, congratulations! I would like to thank you again for the invitation and hope we will keep in touch.

…….

Distinguished organisers,
It was a great pleasure and honour to participate in such a valuable conference. It is certainly a relevant topic, and the proceedings are a very useful tool for disseminating the state of the art from different, equally fundamental perspectives.

…….

The conference was very interesting and superbly organised. My sincere compliments for successfully holding such a high-quality event in these times!

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Thank you so much for the opportunity to participate in this conference. Sublime! It was also a pleasure to listen to the rest of the presentations.

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It was a great conference and I just wanted to send my feedback. It was so well organised and there was a great selection of speakers.
Looking forward to the edited publications!

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Technical issues are no big deal, everything is great. Félicitations. We are of course all hoping that these online meetings will soon become a thing of the past and we will be able to meet face-to-face again.

……

Thank you to each and every one, this was an adrenaline rush, but also an inspiring journey.

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Everything was really great. As someone wrote – See you in 2022?