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Thematic Conference Proceedings

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CONTENT

Editor's note

The Thematic Conference Proceedings from the International scientific Conference "Legal system in the period of the new reality" was published in the year of the jubilee - 60 years since the founding of the Faculty of Law, University of Priština. At the same time, for the eleventh time in a row, in completely changed social circumstances, an International scientific conference is being held at the Faculty of Law.

Undoubtedly the year in which we mark the jubilee, as well as the previous one, was marked by the pandemic of the COVID-19 virus, the global threat to the population caused by the speed of the virus spread and the consequences it causes for human health. The pandemic potential of the virus has caused unimaginable changes in the functioning of states and affected all aspects of social life. The time in which we live is increasingly called the period of the "new reality". Having in mind the tectonic social changes of which we are contemporaries, as well as the challenges of states in establishing the "normal" functioning of legal systems, this year's International scientific conference was held under the name "Legal system in the time of the new reality". This gave the authors the opportunity to explore a wide range of topics, in the field of legal and other social sciences, which relate to the functioning of legal systems in this period and to present their views, proposals and conclusions to the professional and general public.

The International Scientific Conference "Legal System in the period of the new reality" gathered sixty-two authors, from the country and abroad, who presented forty-five scientific papers independently or as co-authors. Bearing in mind that almost half of the papers were written in English, the papers were published in two volumes of the thematic conference proceedings - one in Serbian and one in English language.

I would like to thank all the members of the Editorial Council, members of the Editorial Board from abroad and the country, as well as reviewers, for suggestions, comments and proposals that were crucial for the final shaping of Thematic Conference Proceedings.

Editor-In-Chief

Prof. dr Zdravko Grujić

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INTERNATIONAL LAW AND DIPLOMACY TRANSNATIONAL REGIME AS A SOFT LAW IN THE EU

Abstract

The traditional and most common instrument of polities to conduct public policy is legislation. Even policy-making by the use of norms (hard law) is increasingly being replaced by other instruments, such as the establishment of standards, good practices and guidelines, which rely on the ability of states and organizations to achieve by themselves certain goals and to maintain a level of performance that can be asserted from the use of objective indicators. The use of such instruments, commonly known as soft law, comes from the realization that 1) international interdependence demands coordination of policies, and 2) the complexity of the issues calls for cooperation and exchange of experiences among actors in order to better address them, rather than rely on the ability of a certain actor to impose a solution by judiciable norms.

The basis of this development is the soft law in Europe, his models, then soft law as policy – decision making instrument and design and dynamics of the open method of Coordination (OMC). Most important in this development is Monetary and Interdependence.

Key words: law, models, policy, transnational, coordination

1. INTRODUCTION

Rules and administrative law obligations are not only violated by nationals and legal entities based in the state where these rules and obligations apply, but also by foreigners and companies with their seats abroad. These infringements could be committed during a short visit which was ended before

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the procedure imposing or even executing an administrative sanction was completed. It is also possible that these infringements were committed from abroad.

In the single market of the European Union the free movement of goods, services, capital and persons is ensured. The resulting free movement of person has consequences for the affectivity of law enforcement. Normally national law enforcement authorities can only execute their powers on their own territory. From this legal point of view their freedom of movement is limited. National law enforcement authorities are confronted with the limits of their jurisdiction resulting from the traditionally strongly nationally organized law enforcement systems in the EU Member States. Without effective international or European legal instruments to cooperate in extraterritorial law enforcement, infringing mobile citizens and companies get away unscathed too easily. As we will see below, both private international and international or European criminal law instruments have developed into an advanced legal system, whereas international administrative law instruments have advanced much less.[1]

One of the basic rules of international law is that States enjoy full sovereign powers within their territories. The exercise of extraterritorial jurisdiction clashes with the prohibition of interference in another State's internal affairs or violate its sovereignty and its right to territorial integrity and political Independence. This is the principle of territoriality, apparently a Frisian invention. The general principles on territoriality are still derived from the 1927 judgment of the Permanent Court of International Justice (PCIJ) in the *Lotus Case.* The first uncontroversial principle is that whether a State may lawfully exercise extraterritorial jurisdiction is a matter of international law. The second principle is that as a general rule, law prohibits the exercise of extraterritorial enforcement jurisdiction unless this is specifically permitted. The PCIJ's decision was focused on '*enforcement jurisdiction*'.

2. SOFT LAW IN EUROPE

The traditional and most common instrument of polities to conduct public policy is legislation. By issuing norms, states can frame the way citizens and organizations behave and interact, providing for ways of securing that the common interest is protected. Norms can be enacted because they result from the imposition of a formal authority legitimized (usually) by the democratic choice

[1]R. Cecile, "L'impossible Modele Social Europeen," *Actes de la Rechercheen Sciences Sociales* (166–67), 2007, 94–109.

of the people, and infringements can be prosecuted in a court of law. However, issuing norms is only part of policy-making; one has to ensure that norms are enacted, which involves also the development of administrative action and governance.[2]

Even policy-making by the use of norms (hard law) is increasingly being replaced by other instruments, such as the establishment of standards, good practices and guidelines, which rely on the ability of states and organizations to achieve by themselves certain goals and to maintain a level of performance that can be asserted from the use of objective indicators.

The use of such instruments, commonly known as soft law, comes from the realization that 1) international interdependence demands coordination of policies, and 2) the complexity of the issues calls for cooperation and exchange of experiences among actors in order to better address them, rather than rely on the ability of a certain actor to impose a solution by judiciable norms.

This way, the outcome of policies is increasingly becoming framed by standards that are deemed to be good because they result from expertise and experimentation, rather than from the imposition of authority. Regulation, as well as policy-making, is becoming more concerned with the ability to convince than the ability to impose. The effectiveness of such methods relies essentially on reputation, which can be considered in two dimensions: the reputation that a certain practice holds, and the reputation that an organization can claim by following a certain practice because it is deemed to be a good one.[3]

The use of soft law instruments by states, international organizations and private actors, can prove efficient in addressing problems and inducing policy advancement, but it also raises issues of legitimacy and political significance. The aim of this paper is to provide an outlook of the use of soft law instruments and mechanisms in policy making by the European Union, and to address some of the issues that are at stake. The use of soft law will be approached both in terms of policy-making and of implementation of policies already established by law.[4]

[2] G. Sacriste, A. Vauchez, "The Force of International Law: Lawyers' Diplomacy on the International Scene in the 1920s", *Law and Social Inquiry,* 2007, 32, 83–107.
[3] J. H. H. Weiler, "The Reformation of European Constitutionalism," *Journal of Common Market Studies,* 35 (1), 1997, 97–131.
[4] W. Yondorf, "Monnet and the Action Committee: The Formative Period of the European Communities," *International Organization* 19 (4), 1965, 885–912.

3. MODELS OF SOFT LAW

The realization of the EU Lisbon Strategy relies on a particular soft-law implementation model -Open Method of Coordination (OMC). This model presents the most flexible approach in managing the EU. It relies on a set of mutually agreed indicators and metrics that allows the members to pursue the realization of the defined goals in different ways, the latter not being legally prescribed at the EU level. The model has been applied (differently) to various issue-areas, such as the employment, social inclusion and health protection. The differences in its application include a varying time table, types of the expected results, number of participants and role of the common institutions, as well as the level of already existing harmonization in the issue-area.[5]

It is possible to identify another model of supranational governance through soft law in the area of the EU fiscal coordination (EUFC), regarding the implementation of the Lisbon Treaty (which is itself considered a hard law). The EUFC system relies primarily on the soft-law instruments, such as general guidelines for the members' economic policy and the multilateral surveillance of their fiscal policy. However, certain regulatory elements in the fiscal area are of a binding-nature, for example the level of fiscal deficit (Lisbon Treaty: Excessive Deficit Procedure) and the EC's actions when this level is exceeded. In this way, the model is a specific combination of hard- and soft-law instruments, called the theory of hybridity.

Another example of soft law implementation is the 2003 EU's Forest Law Enforcement Governance and Trade Action Plan (FLEGT), aiming at improving forest sustainable management and reducing illegal logging. It includes numerous private and public actors, as well as actors outside the EU through Voluntary Partnership Agreements (VPAs). The initiative covers a number of interrelated issues, such as legal forest management, improved governance, trade in legally produced timber, promotion of public procurement policies and private sector's voluntary codes of conduct, appropriate finance to support such conduct and procedures, etc. This model of soft law implementation has been emphasized as an example of an effective supranational regulation of a complex issue-area. From the experimentalists' view, FLEGT is an example of a new governance model that might prove useful also for other transnational issue-areas, due to its particular nature. Such a governance architecture is highly flexible and a "learning" one: common, provisional goals are set and revised if

[5] K. Abbott, Duncan. Snidal, "Hard and Soft Law in International Governance", *International Organization*, Cambridge Journal, Vol. 54, 2000, 421-456.

necessary, based on the experience of the governance subjects in reaching the goals by alternative routes. In the case of FLEGT, common, broad goals have been set and progress metrics developed.[6] Local subjects (i.e. lower than-central, regulatory actors) from both public and private sector enjoy a high level of discretion to pursue the agreed goals. Monitoring and reviewing processes have been established to compare progress achieved through different routes taken by local actors. Finally, the goals, metrics and procedures are revised and new actors brought in, if necessary. Beyond the forest sector, the EU uses this model also for the regulation of energy, telecommunication, food safety, etc. The relation between such a soft-law model and the traditional hard-law governance is exemplified by the VPA component of the initiative: these legally binding international agreements are concluded with non-EU stakeholders.

From the presented models, one can conclude that soft law certainly provides a framework for new, transnational governance concepts to emerge. Although the examples may seem quite similar, there are significant differences among them. The OMC and FLEGT models do not feature explicit and concrete goals and the related rules, as the model of the EUFC does (Theory of Hybridity), but only overall goals (the OMC) and provisional, not precisely defined goals (FLEGT). The OMC and FLEGT also do not rely on formal binding documents, with defined standards and prescribed instructions to be deployed at the national level, as does the EUFC. The EUFC does not include various types of actors and stakeholders, as the other two models do (particularly FLEGT which heavily relies on private actors), but depends on states and their hard-law implementation force. The EUFC is a highly centralized and structured model that draws its efficiency from the state power and hard-law norms.

However, it does not always function with high effectiveness because it does not take into greater account national goals/contexts, and is only exceptionally open for revision. Contrary to that, the other two models seriously consider local conditions (to a different extent) and are open to revision of the goals and methods, but sometimes they are too slow to start and develop. So, each of the models has its positive and negative sides, but in comparing them one must bear in mind that they have been created for very different issue-areas and purposes.

[6] K. Dingwerth, P. Pattberg, “Global Governance as a Perspective on World Politics”,

3.1 Soft law as policy – making - the open method of coordination

As an international integration organization, the EU relies on binding, judiciable rules that emanate from institutions created by member states and to which they transfer the citizen’s power to conduct common policies and to issue legislation that affect not only the states, but their citizens, in an immediate way, as well. These institutions hold a high degree of autonomy or independence from the states and decision-making can be performed by way of a qualified majority, rather than by unanimity. Integration organizations differ from cooperation organizations in that, in the former, the scope of action is broader and member states must abide to rules made by the institutions by taking into account the interest of the majority of the states, and not necessarily of all of them, while in the latter, the participation of member states refers essentially to cooperation to achieve better ways of addressing their problems in a narrower, more specific scope, that does not involve relinquishing sovereignty.[7]

Traditionally, the use of binding legislative acts in policy-making in the European Union is known as the Community Method: the Commission makes a proposal to the Council and Parliament who then debate it, propose amendments and eventually adopt it as EU law. The alternative to this common procedure is the establishment of common objectives and open-ended guidelines, based on the ability of states to cooperate with each other, by learning and experimenting, and essentially by putting in effect policy changes at the national and subnational level in order to achieve pre-established goals. This is due, mostly, to a growing concern on addressing certain subjects that the constituent treaties still regard as exclusively in the jurisdiction of the member states, but that are perceived as of needing to be addressed by the adoption of common policies, in order to promote a balanced outcome for all member states.

Aside from that, the use of soft law is also seen as a more effective way of involving both public and private actors in pursuing either shared objectives, or objectives that, despite being established unilaterally by public actors, are imposed to private actors in such a way that they will eventually prefer to comply and cooperate, rather than having to deal with legislation unilaterally imposed and in which they have little opportunity to influence the outcome (the shadow of hierarchy).

If policy-making cannot, or should not, be done by legislative acts produced by the European institutions, member states devise ways of policy-making that circumvent the formality of legislation and the necessity to abide

[7] S. Scott, ‘”Transnational Law” as Proto-Concept: Three Conceptions’, 876.

rigid rules. These rigid rules are then replaced by new modes of governance, which include target definitions, publications of performance, voluntary accords with and by private actors, and codes of conduct.[8]

3.2 The design and dynamics of the open method of coordination

Unlike the rigidity of the Community Method, the OMC involves:

a) Fixing guidelines for achieving the goals set by member states in a given timetable, instead of creating a set of rules to be uniformly observed by all;

b) Establishing quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;

c) Translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;

d) Periodic monitoring, evaluation and peer review organized as a mutual learning processes. No sanctions are established in case any of the objectives are not accomplished.

The preference for such forms of soft law instead of hard law may have been decisively influenced by the following factors:

a) The realization that changes were to be made in many areas of law and policy, ranging from rules governing welfare provisions to those structuring tax systems, being that the systems of employment and social protection that needed to be changed vary greatly among the member states. Therefore, even if the EU had legislative competence in the field of employment policy, it would be very difficult to craft uniform rules;

b) The fact that these are very sensitive policy areas in which reform have prompted the fall of more than one government

c) For many problems there was no ready-made set of solutions that could be legislated at any level of government, since no one was sure of the best way to deal with unemployment

As Dehousse points out, emphasis is placed on developing common interpretations of situations, common values and techniques, through an iterative learning process. Discussions about common objectives and the analysis of national policies are expected to lead to a mutual sharing of knowledge. There is

[8] G. de Burca, "The Constitutional Challenge of New Governance in the European Union" paper presented at workshop on New Governance and Law in EU, Minda de Gunzburg Center for European Studies, Harvard University, February 28, 2003.

a stressing of management by objectives instead of the harmonization by legislation resulting from the Community Method that echoes the influence of the New Public Management.

The OMC has a strong concern with the principle of subsidiarity, acknowledging the diversity of national traditions in the policy sectors in question and the desire to preserve member states' autonomy. The discussion of issues and the setting of strategic goals at a European level must later be enacted in some form by national, regional and local authorities, in partnership with the social partners and civil society.[9]

Due to the complexity of the issues at hand, the OMC calls for the intervention of expert public officials from national administrations, providing for network coordination and for the development of policy communities. The OMC relies on the work of these experts to formulate the actions to pursue in order to achieve the goals set, and to put in effect the guidelines drawn. This is in line with the work done in the traditional community policies, in which the formation of a cognitive convergence by these experts precedes the adoption of legislation in the Community Method. However, in the OMC the role of these experts is enhanced in that they assume a leading role in designing policy and in the implementation of the necessary reforms in their own countries, establishing with considerable autonomy which lines of action are to be pursued, as well as participating in the evaluation (and, accessorily, the definition) of the lines of action established by experts in other member states, assessing their success and failure, in a process of mutual learning. This makes the OMC essentially an horizontal (bottom-bottom), rather than a vertical (top-down) process of policy implementation, without a hegemonic player endowed with formal authority, such as the Commission or any given member state in the logic of the Community Method.

3.3. The European employment strategy and the emergences of the “open method”

The EU has begun to respond to this challenge by crafting a new governance model that differs radically from the top-down, rule-based, centralized approach used in social policy heretofore. Zeitlin and Sabel (2003) have summarized the essential elements of this method as follows:

[9] European Commission, (2001) European Governance — A White Paper, COM (2001), 428 Final.

a) Joint definition by the member states of initial objectives (general and specific), indicators, and in some cases guidelines.
b) National reports or action plans which assess performance in light of the objectives and metrics, and propose reforms accordingly.
c) Peer review of these plans, including mutual criticism and exchange of good practices, backed up by recommendations in some cases.
d) Re-elaboration of the individual plans and, at less frequent intervals, of the broader objectives and metrics in light of the experience gained in their implementation.

The first and most developed example of this "open method of coordination" is the European Employment Strategy. The EES emerged in the 1990s when concern about unemployment was great and the EU was getting ready to launch the single currency. At that time, it was felt that for both political and economic reasons the EU had to tackle the growing problem of unemployment. This decision to Europeanize employment policy was a major change from the past. Theretofore, employment policy had been seen as the exclusive preserve of the Member States. But by the 1990s a consensus emerged that EU level action was needed.[10]

While the Member States saw they had common problems in the employment area, and agreed that this issue demanded attention at a European level, they also recognized that it would not be easy to craft common solutions or pass uniform rules . There were several reasons for this conclusion. First, it was understood that the employment problem would require changes in many areas of law and policy, ranging from the rules governing welfare provision to those structuring tax systems. In many of these areas the EU lacked legislative competence. Moreover, the systems that needed changing vary greatly among the Member States: there are at least three major types of welfare state structures in the EU and equally great variation in their industrial relations systems. So even if the EU had legislative competence, it would be hard to craft uniform rules for such diverse systems. Finally, no one was sure of the best way to deal with unemployment, so for many problems there was no ready-made set of solutions that could be legislated at any level of government. Faced with problems that were not well understood, whose solutions involved changes in many areas of law and policy and were sure to differ from country to country, and for which its legal competence was extremely limited, the EU could not rely exclusively on the Community Method. Instead, it had to craft another approach.

[10] M. Ferrera, A. Hemerijck, M. Rhodes, "TheFuture of Social Europe: Recasting Work and Welfare in the New Economy", *Oxford University Press*, Oxford, 2001.

4. MONETARY UNION AND INTERDEPENDENCE

Whatever may have been the way to deal with these issues in the past, the creation if of the single market and the single currency led to a new context for social policy, generating new constraints and creating new independencies. The constraints came from monetary integration. Because of the common currency, national governments no longer could use monetary policy as a tool for job creation. And because of the Stability and Growth Pact they were also constrained in their ability to use fiscal policy for the same ends. The increased interdependence derived both from the common currency and the single market. Each country in the euro has an interest in the fiscal stability of the others since major budget deficits anywhere would threaten the euro. And that gives them an interest in each other's social and employment policies.[11]

For most European countries, social costs represent a major part of state expenditures. These costs are already high as a result of generous income maintenance plans and state pensions combined with low levels of labor market participation and relatively early retirement ages. They will get higher as populations age unless policies are changed and labor market participation rates increased. So many countries face the need to change their policies on work and welfare to ensure fiscal sustainability in the face of these mounting costs.

While this is primarily a concern of the individual Member States, it has become a EU level issue because of the single market and common currency. The euro zone countries, at least, have an interest in ensuring that other countries in the common currency maintain fiscal sustainability. And all countries in the single market have an interest in ensuring that other countries do not achieve that sustainability by radically lowering standards and slashing social charges, thus setting off a race to the bottom.

These factors create significant functional interdependencies. At the same time, the emergence of a European context for discussion of social policy creates another, very different kind of "interdependence" – since there is great variation in the degree to which countries have solved these problems, Member States may see the possibility for mutual learning.[12]

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[11]C. Kilpatrick, "Hard and Soft Law in EU Employment Regulation",paper presented at the 8th Biennal International Conference of the EU StudiesAssociation, Nashville TN, March 2003.

[12]D. M. Trubek, J.Mosher, "New Governance, EmploymentPolicy, and the European Social Model", in J.Zeitlin and D.M.Trubek (eds), GoverningWork and Welfare in a New Economy: European and American Experiments, *Oxford University Press,*Oxford, 2003.

5. CONCLUSION

The main concerns about the use of the OMC and soft law in general seem to be the effectiveness of the method, the legitimacy of the actors entrusted with policy decision making that affect a larger number of subjects not involved, and the possibility of soft law being increasingly used to circumvent the lack of consensus in delicate policy issues, thus voiding the role of political debate in European integration. Criticism seems to appear essentially at the theoretical level.

Regarding effectiveness, one must keep in mind that even the "hardest" law is not always able to ensure abidance per se – it needs to be complemented with administrative and political action in the everyday life of an organization. Furthermore, hard laws can be enacted without any concern for how they are to convey meaningful change for those affected, or with a merely symbolic purpose. On the other hand, soft law mechanisms focus on results, not institutional framework or symbolism. Legitimacy deficit – if it is to occur – can thus be an affordable, or simply an unavoidable, trade-off. For instance, in the case of rating agencies (in which, however, no public actors are involved), one can question their methods and even their motivations in the assessment of financial soundness of an organization such as a nation, and raise the issue of them being entrusted too much power in setting the standards that will constrain the action of a given state or organization. However, the need to have access to expert information that can assess the risk of doing business with someone is crucial in any decision making process.

As for an eventual political deficit, it must be stressed that soft law is still basically a method of policy-making oriented primarily for issues that cannot be effectively addressed by law-making, due to the nature of the institutional framework or the constraints deriving for political reasons. The Lisbon Council Conclusions that devised the OMC highlight that the OMC had to be combined with other available methods, depending on the nature of the problems to be solved. As Dehousse notes, "the OMC allows for the establishment of flexible forms of common action in policy areas where centralized decision-making is not possible or even desirable". And Trubek and L. Trubek stress that "the institutional debate should be about the relative capacities of different modes to handle specific certain governance tasks, and discussion should focus on evidence relating to those capacities". The literature on soft law aims for searching for the best of two worlds, seeking the enhancement of hybrid forms

of policy-making methods, as suggested above, and that have already been tried in the areas of environmental law and employment.

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МЕЂУНАРОДНО ПРАВО И ДИПЛОМАТИЈА
ТРАНСНАЦИОНАЛНИ РЕЖИМИ SOFT LAW ПРАВА У ЕУ

Резиме

Традиционални и најчешћи инструмент спровођења политике је законодавство. Чак се и креирање политике употребом норми све више замењује другим инструментима, попут успостављања стандарда, добре праксе и смерница,које се ослањају на способност држава и организација да саме постигну одређене циљеве и да одржавају ниво учинка који се може утврдити употребом објективних показатеља. Употреба таквих инструмената, опште познатих као soft law, произилази из спознаје да: 1) међународна међузависност захтева координацију политика и 2) сложеност питања захтева сарадњу и размену искустава међу актерима у циљу њиховог бољег решавања, него да се ослањају на способност одређеног актера да наметне решење од стране судских норми.
Основа овог развоја је soft law у Европи, његови модели, затим soft law као инструмент доношења одлука и дизајн и динамика отвореног метода координације (ОМЦ).
Кључне речи: закон, модели, политика, транснационално, координација

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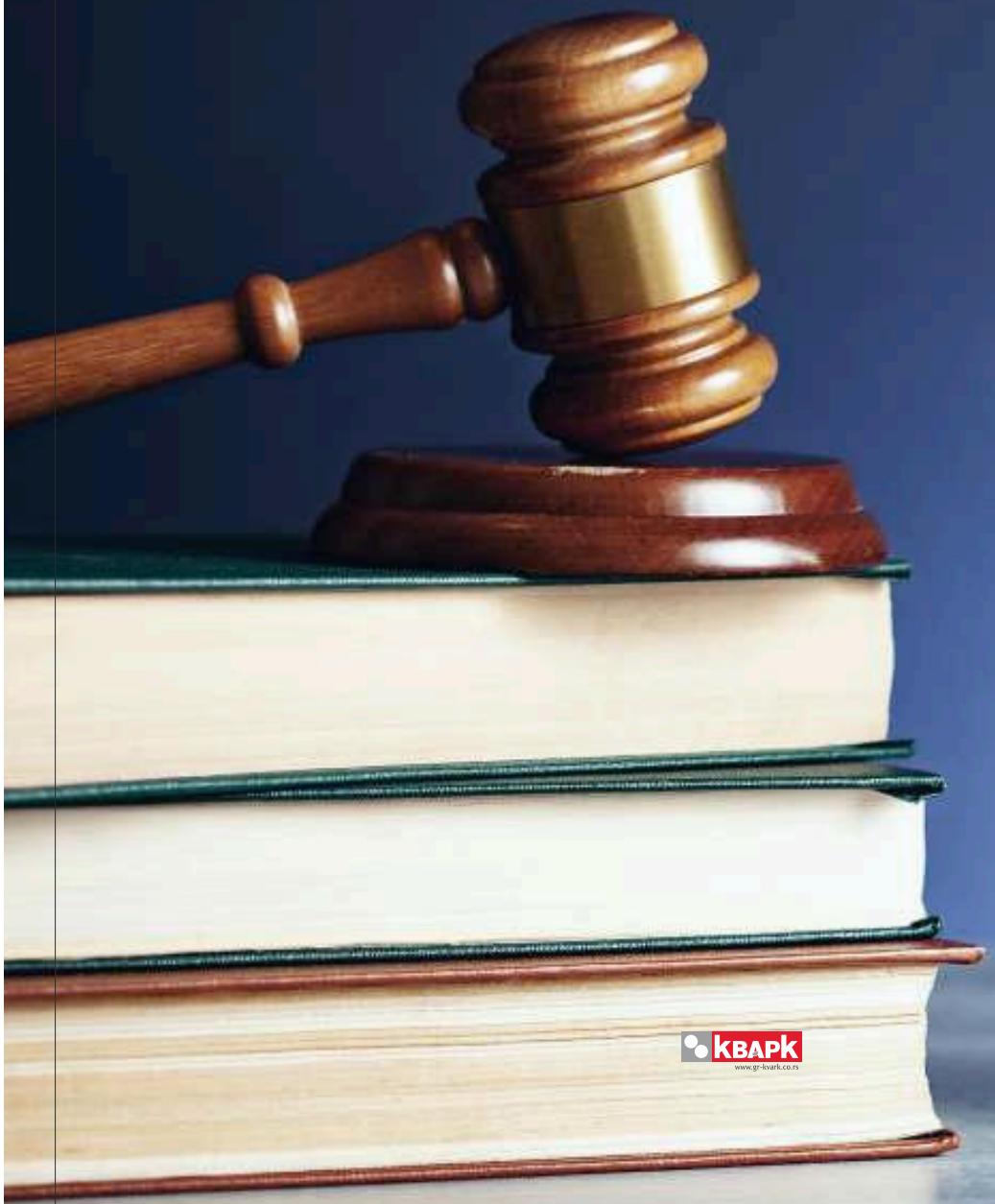

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